Neoliberalism and the Law: How Historical Materialism Can Illuminate Recent Governmental and Judicial Decision Making

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The Marxist Moment

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To understand how neoliberalism has affected the law, we have to see the extent to which the law has constituted neoliberalism. The neoliberal project that has metastasized with the advent of globalization and the fall of communism can be defined, labor writer Kim Moody suggests, as “the policy of dismantling the national regulation of economic life . . . in favor of market governance.” This is what, today, is called “reform.” Neoliberalism also implicates enhanced private, particularly corporate, political and economic power. The interpenetration of neoliberalism and the law raises questions about the power of historical materialism, widely thought to be discredited, not least by the dubious triumph of neoliberalism itself, to account for the development and enforcement of law in a neoliberal era. The explanatory power of historical materialism, however, is strikingly vindicated by the neoliberal project. I illustrate this with two examples, legislative and administrative (in)action in the recent financial crisis and judicial enablement of corporate power in interpreting the First Amendment in campaign finance law.

The financial crisis of 2008 unveiled the operations and consequences of neoliberal deregulation with unusual clarity. Glass–Steagall was a crucial part of the regulatory apparatus developed in the New Deal and since. This administrative state was created by Congress to avoid or limit disasters of unregulated markets such as the Great Depression. The courts had opposed these regulatory initiatives as violating the Fourteenth Amendment, as they had, similarly, opposed state regulations that protected workers in the Progressive Era, until the crisis of the 1930s risked delegitimizing the judiciary. In the New Deal and since, Congress used its constitutional powers to delegate oversight of social and economic welfare to administrative agencies, many of whose regulations were also law. The New Deal Court, in a switch from prior practice, gave Congress a largely free hand to enact such laws and regulations under its power to regulate initiative, of the Glass–Steagall Act of 1933. That law barred commercial banks from issuing securities, which was thought to have helped trigger the Great Depression as banks made risky, and in many cases fraudulent, investments with other people’s money.

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interstate commerce while scrutinizing infringements of basic rights more carefully. Part of neoliberalism’s genius is that deregulation is largely free from judicial oversight. The courts can only require government action in rare circumstances, so legislative or executive inaction or withdrawal from regulation, such as the repeal of Glass–Steagall, generally escapes judicial review. Legally, it occurs largely in the world occupied almost solely by lawmakers and their campaign contributors, regulators and their corporate constituencies. Decisions by policymakers not to act, not to regulate, and whether—as well as how—to enforce are key to neoliberalism as a project of freeing the market from legal constraints.

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The repeal of Glass–Steagall, long chafed at by banks, was justified by the perceived need to keep the U.S. financial sector “competitive” in the world market. This was so seen, or claimed, even though financial machinations add little, if any, productive value to the economy, while adding considerably to the wealth of speculators. The repeal was a central act of deregulation and a major victory for neoliberalism. It allowed the development of giant investment banks like J.P. Morgan Chase, Citigroup, Goldman Sachs, Wells Fargo, and Lehman Brothers. Along with giant insurers like A.I.G. and mortgage lenders like Countrywide, these megabanks created, traded, and initially profited hugely from exotic, risky, and often unregulated novel financial instruments. These were largely based on home mortgage loans made to people often known to be unable to repay them. Nonetheless, these securities were sold to investors as safe investments graded AAA by rating agencies competing for bank business and fees. The megabanks insured each other, offloading risk of loss to other megabanks, and securitized those risks, creating a house of cards in the tens of trillions. They could choose their own regulators from among several agencies, creating a market in regulation to see which agency would offer the least real oversight. The players raked in the chips—income for the top 1 percent increased 275 percent from 1979 to 2007 and an average of 40 percent for everyone else—on the premise that housing prices would always go up. Until 2007-2008, when they did not go up any more.

The government’s response to the crisis shows the priorities of neoliberalism: its first duty is to maintain a minimally regulated market, and its last is to the public and those most affected by the results of neoliberal policies. The taxpayers, via emergency legislation pushed through under Bush and continued under Obama, bailed out Wall Street firms deemed “too big to fail,” with up to $700 billion in funds under the Troubled Asset Relief Program (TARP), while letting some other banks fail or be acquired by others. Having saved the big banks’ bacon, the government might, in theory, have nationalized them or, as they did in the current crisis, put the quasi-governmental Fannie Mae and Freddie Mac federal mortgage institutions into receivership under strict supervision, but it did neither. The first alternative was, of course, politically unthinkable for private entities like Chase or Goldman Sachs under neoliberalism. Indeed, the immediate response to the crisis was developed by government officials working in close cooperation with the CEOs of the biggest banks. That, itself, effectively foreclosed any possibility of a public takeover. It would be hard to find a more literal example of Marx’s idea in the *Manifesto* that “[t]he executive of the state is but a committee for managing the affairs of whole bourgeoisie.”

Legally, the banks might have been allowed to go under, with the government taking over in bankruptcy. A few of them, like Lehman or Bear Stearns, were left to fail, although they were absorbed by other banks. But “too big to fail,” under neoliberalism, means the government in effect insured the private entities whose reckless greed and probably (at least in part) fraudulent conduct nearly brought down the world economy because if it did not, that would have brought down the world economy. “In all ideology, men and their circumstances appear upside down as in a camera obscura,” Marx and Engels say in *The German Ideology*.

In a radical change from the way the private savings and loans were handled twenty years
before, few strings were attached to the TARP funds that were provided to the biggest banks. Many recipients awarded their executives millions in bonuses—others used the funds for speculative investment, eventually paying the free money back.\textsuperscript{11} Damning the TARP with faint praise, the New York Times compared it with efforts of the Hoover administration in 1932.\textsuperscript{12} In 2010, the government extracted from the banks $25 billion to aid homeowners or foreclosed buyers—the latter received $2,000 apiece. Regulation was expanded and consolidated. Enforcement was not, either in power or action. President Obama promised, in his 2012 State of the Union address, the formation of a new prosecutorial task force to investigate crime in the crisis, but no indictments have been forthcoming, or are likely to be.\textsuperscript{13} Congress offered some tax cuts that Judge Richard Posner, a maverick conservative analyst of the crisis, called a “damp squib” as far as a stimulus goes, instead of a preferable sustained Keynesian program of deficit spending on public works.\textsuperscript{14}

The crisis and the bailout reveal neoliberalism red in tooth and claw in the legislature and the executive, but do not exhibit the role of courts under a neoliberal regime. As I have explained, the deregulatory laws and administrative inaction characteristic of neoliberalism can rarely if ever be challenged in court.

\textbf{The courts have demonstrated a strong pull toward treating General Electric or Goldman Sachs as essentially the same as you or me for purposes of the First Amendment.}

Of the many areas where the courts can be held up for scrutiny, however, few are more revealing than the way the judiciary treats the private power of its corporate citizens and the individual rights of actual human beings in the fundamental area of freedom of speech under the First Amendment. In the sphere of law, just as in what Marx calls in \textit{Capital}, vol. 1, the sphere of exchange, “the exclusive realm of Freedom, Equality, Property, and Bentham [egoism],”\textsuperscript{15} the courts have, over recent decades, tended to reflect the imperatives of neoliberalism. In interpreting the First Amendment, they have increasingly treated giant corporations like General Electric or Goldman Sachs as essentially the same as or equal to you or me for purposes of freedom of speech.

This is the sort of false equivalence Marx mocks in the quoted passage, both in ignoring, for legal purposes, the difference in resources and power between a multinational corporation and a human being, and in equating, as the same kind of entity and entitled therefore to rights equal with a human being, what Chief Justice John Marshall called in 1819 “an artificial being, invisible, intangible, and existing only in contemplation of law.”\textsuperscript{16} Under subsequent (1886) U.S. Supreme Court precedent, corporations are persons entitled to First Amendment protections.\textsuperscript{17} This specious equivalence is a classic example of ideology, a distorted belief driven by class interest.\textsuperscript{18} The law is full of fictions, but this one is particularly egregious, although deeply entrenched in U.S. constitutional jurisprudence. A more recent and perhaps more blatant piece of ideological jurisprudence in this area comes under the First Amendment. The Supreme Court held in \textit{Buckley v. Valeo} (1976) that money \textit{is} speech constitutionally protected.\textsuperscript{19} As the conservative constitutional scholar Robert Rotunda puts it in a standard treatise, money “talks, and more money talks louder, more effectively.”\textsuperscript{20}

First Amendment issues concerning the legal equivalence of corporate and human speech are highly salient because they link law and policy made by elected officials to class power as represented by corporations. These issues are also among the ones the courts have most thoroughly discussed in this area. This linkage is as much as anything else the mechanism by which the state acts, when it does, as the executive committee of the bourgeoisie. The development of the jurisprudence in this area tracks the rise of neoliberalism while illustrating the independence from any crude mechanical Marxist reflection of class interests in “superstructural” institutions like the courts.\textsuperscript{21}

\textit{Buckley v. Valeo}, the same case in which the Court held that money is speech—and so statutory limits on political \textit{expenditures} on behalf of particular candidates infringed the First Amendment rights of persons, including corporations, to engage in political expression—also
upheld limits on corporate and other campaign contributions to limit the risk of corruption.\textsuperscript{22} The Court acknowledged the reality that private financing makes raising large sums necessary, and that “to the extent that large contributions are given to secure a political quid pro quo, the integrity of our . . . democracy is undermined.” The court pointed to “deeply disturbing examples surfacing after the 1972 election.”\textsuperscript{23} It is probable that the post-Watergate timing of this case, as well as the recent history of public protest, affected the Court’s finding that restrictions on political contributions to avoid corruption were a justified limitation of speech even under the heightened review applied to governmental regulation of individual rights.

\textbf{Marx and Engels overstated their case when they said, “the law has as little independent existence as religion.”}

In \textit{Austin v. Michigan Chamber of Commerce} (1990), the Court extended this result, allowing prohibitions on corporate electioneering to prevent the “corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form.”\textsuperscript{24} This case is notable because, first, it specifically acknowledges the asymmetry between individuals and corporations, and the distorting power on democracy, even if not technically bribery or extortion, of “immense aggregations of wealth” that corporations can accumulate far more easily than individual humans. Second, the Court reaches this conclusion well along in the development of the U.S. legal and political system from a welfare state of sorts to a neoliberal regime, and with a far more conservative composition than it had in 1976.

This suggests that Marx and Engels overstated their case when they said, “The law has as little independent existence as religion.”\textsuperscript{25} The law has its own internal logic, and judges often feel constrained by precedent, fit with their understanding of the purpose of the law and its context, and bound to come to decisions that may not match their policy views.\textsuperscript{26}

But in \textit{Citizens United v. Federal Election Commission} (2010),\textsuperscript{27} the Court reversed course, rejected twenty-five years of precedent, and overturned limits on political expenditures and corporate speech. Unrestricted “speech,” including spending money, was “indispensable to decision making in a democracy,” and this is “no less true because the speech [money] comes from a corporation.” “The First Amendment’s protections do not depend on the speaker’s ‘financial ability to engage in public discussion.’”\textsuperscript{28} “\textit{Austin} interferes with the ‘open marketplace’ of ideas protected by the First Amendment.”\textsuperscript{29} This determination returns to the fantastic doctrine, naïve or cynical, but ideological to the core, that all “speakers,” including spenders qua speakers, stand on equal ground regardless of their resources, whether the speaker is an actual human individual with a blog or a multinational corporation, “an artificial being invisible, intangible, and existing only in contemplation of the law,”\textsuperscript{16} with hundreds of billions of dollars. It reiterates without justification the doctrine of corporate personhood. And in doing so, it fits nicely with the demands of neoliberal politics, friendly toward private initiatives, solicitous of profit, hostile and suspicious of public action, and largely indifferent toward the results of privatization unless they affect the interests of campaign contributors.

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The Court’s bland assessment that allowing vast influxes of corporate dollars will not risk corruption of public officials in a political system where legislators, executives, and many state judges must compete in increasingly expensive elections ignores the inconvenient facts about quid pro quo discussed in \textit{Buckley v. Valeo}. Or, as the Court put it in \textit{McCormick v. United States} (1991),\textsuperscript{30} a statutory extortion (bribery) case decided around the same time as \textit{Austin},

Campaigns must be . . . financed. Money is constantly being solicited on behalf of candidates who . . . claim support on the
basis [of] ... what they intend to do or have done. ... [This conduct is] in a very real sense unavoidable so long as election campaigns are financed by private contributions and expenditures. 31

Likewise, the idea that it is not corrosive and distorting of democracy to allow the greatest influence to the biggest spenders because corporations, like individuals, are all equally “persons,” is disingenuous at best.

Candidates who disappoint their largest contributors are likely to come up short at campaign time, and even elected judiciaries (existing in thirty-seven states), which are not supposed to do the bidding of their paymasters, predictably do so. To cite just one representative study, in the six states that have seen the most judicial campaign cash in the period 1992 to 2010—Alabama, Texas, Ohio, Pennsylvania, Illinois, and Michigan—the courts ruled in favor of corporations 71 percent of the time in a sample of 403 cases. 32 To assert that corruption is not an issue, that democracy requires that corporations be treated as persons, that money is speech, and that vast disparities in speakers’ “financial ability to engage in public discussion” is irrelevant to whether they should be treated the same for purposes of freedom of speech—and that to allow the “person” with virtually unilateral ability, because of those resources, to dominate the debate promotes an “open marketplace of ideas”—only illustrates vividly the neoliberal captivity of the judiciary.

A comprehensive survey of the way that economic divisions and asymmetries infect the law, even if confined to neoliberal political and economic systems, would be a vast undertaking beyond my scope here. The instances I have briefly discussed nonetheless illustrate the effect of neoliberalism on the law in all three branches of the U.S. government. They further suggest that historical materialist critique remains relevant and powerful, although certain classic formulations of that sort of critique require refinement and revision. Nonetheless, the legal basis of and the sort of legal response to the financial crisis of 2007-2008—and the Court’s increasingly through-the-looking-glass treatment of corporate money as speech of persons, no less necessary to democracy and free debate as the speech by natural human beings—could not be fully and accurately explained without use of these theoretical tools, even if others are also required for a more complete account.

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Notes
2. The high estimates are by Mark Adelson, former Chief Credit Officer for the securities rating agency Standard & Poor’s; the lower is from the IMF. The S&L losses given are as estimated by the Resolution Trust Corporation, created to clean up the mess. Financial Audit: [RTC's] 1995 and 1994 Financial Statements (Washington, D.C.: U.S. Government Accountability Office, July 1996), 8, 13.
3. See, for example, G. Edward White, The Constitution and the New Deal (Cambridge: Harvard University Press, 2000). Early on in the era of the Lochner Court, named for Lochner v. New York, 195 U.S. 45 (1905) (invalidating the state hours limitation for bakery workers as violating their due process rights to freedom of contract), the Supreme Court’s judicial activism prompted a famous dissent from Justice Holmes, in which he said, “The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.” Ibid. at 75. Spencer was an advocate of extreme laissez-faire capitalism.
4. United States v. Carolene Products, 303 U.S. 144 & n. 4 (1938) (upholding federal regulation of milk content under Congress’s (now) very broad power to regulate commerce, while noting that with laws affecting specific individual rights, governmental regulatory powers are more limited).
5. See generally, Bethany McLean and Joe Nocera, All the Devils Are Here: The Hidden History of the Financial Crisis (New York: Portfolio, 2010).


7. See 12 U.S.C. § 5211 et seq. The amount authorized to be spent was reduced to $475 billion under the Dodd–Frank Act, 12 U.S.C. § 5301 et seq., but this does not include other bailout programs, such as secret loans, unknown to lawmakers or the public, of $7.7 trillion, made by the Federal Reserve. In the end the taxpayers lost nothing on these, although the banks made $13 billion on the bailout (Bloomberg, Nov. 27, 2011, available at http://www.bloomberg.com/news/2011-11-28/secret-fed-loans-undisclosed-to-congress-gave-banks-13-billion-in-income.html). Neither does it include the $83 billion annual subsidy the taxpayers give the ten largest banks, independent of any bailout, in the form of lower interest rates (Bloomberg View, Feb. 20, 3013 [editorial], available at http://www.bloomberg.com/news/2013-02-20/why-should-taxpayers-give-big-banks-83-billion-a-year.html).


11. Mike McIntire, “Bailout Is a Windfall to Banks if Not to Borrowers,” New York Times, January 17, 2009. (“[F]ew banks cited lending as a priority. An overwhelming majority saw the bailout program as a no-strings-attached windfall that could be used to pay down debt, acquire other businesses, or invest for the future.”)


18. See Marx and Engels, The German Ideology; Marx, Manifesto, The Marx-Engels Reader, 487 (“Your [the bourgeoisie’s] jurisprudence is but the will of your class made into a law for all”).


21. Marx distinguishes, in a widely discussed passage, between the “economic structure” or “base,” consisting of “relations of production,” and a “legal and political superstructure” arising on this base “to which correspond definite forms of social consciousness.” In the preface to A Contribution to the Critique of Political Economy (1859), “Marx on the History of his Opinions,” in The Marx-Engels Reader, 4-5. In The German Ideology, Marx and Engels state that ideology is only a “reflex[] of the[] real life process,” ibid. at 154. It is hard to know to what extent they maintained these propositions literally, but I do not think they are defensible if taken to an extreme.


23. Ibid. at 26-27 and n. 28 (citing the Court of Appeals for such examples). Such quid pro quo is criminal bribery or extortion.


25. Marx and Engels, The German Ideology, The Marx-Engels Reader, 188. It is doubtful that they meant that religion had a fair amount of independence.

not here endorse Dworkin’s overall view of judicial decision, but commend his elaboration of these factors.


28. Ibid. at 906 (citation omitted).

29. Ibid.


**Author Biography**

Justin Schwartz has practiced law for several large law firms and taught law at several Chicago area law schools. He is, among other things, a member of the National Lawyers Guild.