Oñati Socio-Legal Series (ISSN: 2079-5971)
Oñati International Institute for the Sociology of Law
Avenida Universidad, 8 – Apdo. 28
20560 Oñati – Gipuzkoa – Spain
Tel. (+34) 943 783064 / opo@iisj.net / https://opo.iisj.net

Remaking Law & Economics: What is new about the Law and Political Economy Movement?

OÑATI SOCIO-LEGAL SERIES VOLUME 16, ISSUE 1 (2026), 10-34: DERECHO Y ECONOMÍA POLÍTICA EN AMÉRICA LATINA: PROBLEMAS Y PERSPECTIVAS PARA UNA AGENDA TRANSNACIONAL
DOI LINK: HTTPS://DOI.ORG/10.35295/OSLS.IISL.2295
RECEIVED 12 MARCH 2025, ACCEPTED 5 SEPTEMBER 2025, FIRST-ONLINE PUBLISHED 7 NOVEMBER 2025, VERSION OF RECORD PUBLISHED 2 FEBRUARY 2026

FELIPE MANUEL FIGUEROA ZIMMERMANN*

Abstract

The Law and Political Economy (LPE) movement aims to challenge the dominance of the "Chicago approach" in Law and Economics and offer a political alternative to neoliberalism. To evaluate its prospects, we must clarify neoliberalism's relationship to LPE's intellectual lineage—Legal Realism and American Institutionalism—whose decline in U.S. academia coincided with the rise of the Chicago School and Public Choice Theory. These movements assimilated and redirected core insights of those earlier traditions. I argue that LPE must more fully reclaim its intellectual history to resist similar subversion. This is illustrated through the trajectory of a key idea shared by all of these traditions: that economic power is tantamount to political power. I conclude by proposing that this idea compels closer attention to what I call "modalities of power"—the mechanisms through which economic and political domination are intertwined.

Keywords

Law and Political Economy; neoliberalism; legal realism; American institutionalism; 20th century synthesis; intellectual history

Resumen

El movimiento "Law and Political Economy" (LPE) busca desafiar la hegemonía de la escuela de Chicago en el campo de derecho y economía y proponer una alternativa política al neoliberalismo. Para evaluar sus posibilidades, debemos clarificar la relación entre el neoliberalismo y los orígenes intelectuales del LPE—el Realismo Jurídico y el

Funding institution: ANID postdoctoral scholarship 2022 N°74220052. I wish to thank the anonymous reviewers for their thoughtful, detailed and insightful comments to an earlier draft of this article. All remaining errors and shortcomings are my own.
* Felipe Figueroa Zimmermann. Independent researcher. Email: felipe.figueroaz@gmail.com ORCID: https://orcid.org/0000-0002-4944-306X

Institucionalismo Americano—cuyo declive coincidió con el ascenso de la Escuela de Chicago y la Public Choice Theory. Estos movimientos asimilaron y redirigieron ideas centrales de los antecesores del LPE. Sostengo que LPE debe recuperar críticamente su historia intelectual para evitar una subversión similar. Esto se ilustra a través de la trayectoria de una idea clave compartida por estas corrientes: que el poder económico equivale al poder político. Concluyo proponiendo que esta idea exige una atención renovada a lo que denomino "modalidades de poder".

Palabras clave

Law and Political Economy; neoliberalismo; realismo jurídico; institucionalismo estadounidense; síntesis del siglo XX; historia intelectual

Table of contents

1. Introduction

This paper seeks to contribute to the question of how we should understand the Law and Political Economy (LPE) movement's core insight—namely, that economic and political power are interchangeable.

I will investigate this question by tracing how the idea of the interchangeability of economic and political power was first recognized by progressive traditions like Legal Realism and Institutionalism, only to be appropriated and repurposed by early neoliberals to argue for the insulation of markets from democratic control (a point that LPE scholarship has correctly identified as a key goal of neoliberalism). The insight relating to the interchangeability of economic and political power was eventually repressed in mainstream economic and legal theory, forming the basis of what LPE scholars call the "20th century synthesis". The logic and causes for this repression need to be explained, and this paper is an attempt to provide such an explanation.

The outline of the paper is the following: First, I will briefly outline what LPE stands for, summarizing its key theoretical contributions. Second, I will explore the context in which awareness of the interchangeability between economic and political power in legal and economic theory arose. I will show that this awareness was shared by early institutionalists and American realists, as well as by a handful of early neoliberals such as Henry Simons, Walter Lipmann, Friedrich Hayek and Frank Knight and by reactionaries like Carl Schmitt. What distinguishes their positions is whether their awareness of the interchangeability between economic and political power is mobilized towards a critique of liberal democracy or not.

Next, I argue that this shared awareness of the interchangeability between economic and political power allowed early Neoliberals to appropriate and subvert the arguments put forward by Legal Realists and Institutionalists. I make the case by a close reading of (a) Frank Knight's review (1953) of Robert Hale's *Freedom Through Law* (1952), (b) the reception of the so-called "Coase Theorem" and (c) the debate between Warren J. Samuels and James Buchanan that took place almost two decades later in the early 1970s.

As will become clear, Knight's and Buchanan's take on the interchangeability of economic and political power are exemplary of the neoliberal critique of democracy, whose origins lie in Carl Schmitt's critique of Kelsenian legal positivism.

The upshot of this exercise in intellectual history is that at the core of the 20th century Synthesis there is a deep political reflection about the nature of power. Thus, it is incorrect to assume that the issue of power has been undertheorized in mainstream legal theory and economics. This paper shows that power was a key concern of early neoliberals – as LPE scholars correctly note – , albeit this concern has a more complex lineage than is usually recognized in LPE scholarship.

Finally, examining the progressive–neoliberal exchange, this paper seeks to contribute to LPE scholarship, by uncovering how the 20th-century synthesis both contains and conceals a theory of power. This concealment is the result of the implicit assumption that defines market transactions as non-coercive by definition. This is why it is not enough to recognize the existence of a relationship between economic and political power to provide an alternative to the 20th century synthesis and neoliberal orthodoxy, to do so, it

will be necessary to rethink the relationship between economic and political power facing up Knight's challenge to the Legal Realists/early Institutionalists.

In the concluding remarks, I offer some guidelines on how to further theorize the relationship between economic and political power through the notion of "modalities of power". I hope these will be helpful in the effort to overcome the challenge that Knight put forward against Legal Realism and American Institutionalism, which also remains a challenge to LPE's political aspirations. In sum, LPE must continue to further its efforts to theorize the modalities of economic and political power and how they interrelate under present and future conditions, especially within the Anthropocene.

By "modalities of power," I refer to the various ways in which power is actualized—as a dynamic process rather than a fixed structure. Liberally drawing on Deleuze for inspiration, I treat economic, political, and other forms of power as distinct "modes of being," much like ontological modalities (necessary, contingent, actual, potential). Although this usage departs from modality as a technical term in logic and epistemology, it remains inspired by ontology's focus on modes of existence. The concluding remarks further develop this definition and show how the Anthropocene's interlocking crises demand new conceptual tools for legal and economic theory.

2. What is LPE?

Law and Political Economy [LPE] approaches have proliferated in the last few years. In this sense, LPE is better understood as a plurality of overlapping heterodox approaches.

Here, among the many venues where LPE approaches are being fleshed out, I will focus on the Journal of Law and Political Economy (JLPE) and the LPE Project, mainly because they are focal nodes in which the LPE approach is being fleshed out.

JLPE editors' have traced multiple genealogies of the LPE movement (Harris and Varellas 2020). They recognize American Institutionalism and Legal Realism as two distinct roots to LPE approaches. They explain that, as the insights gained by both schools were obfuscated and relegated to the margins, these were again taken up by Critical Legal Studies (CLS) in the late 1970s and early 1980s. In turn, as CLS was sidelined, these insights are once again taken up and revamped for the "neoliberal age" by the LPE movement and APPEAL, along with fellow travelers such as Feminist Legal Theory, Critical Race Theory (CRT), LatCrit theory. To these they also add contributions to critical international law and development studies. From these overlapping genealogies, they put two central claims at the intellectual foundations of the LPE movement.

> (…) two central claims lie at the heart of Law and Political Economy. (…)The first claim is that law is central to the creation and maintenance of structural inequalities in the state and the market. The second is that 'class' power is inextricably connected to the development of racial and gender hierarchies, as well as to other systems of unequal power and privilege. The first claim, the centrality of law to structural inequalities in the state and the market, entails in turn at least two scholarly commitments. First is the refusal of the idea that markets, or any other form of economic activity, is somehow prior to or outside of state power. (…) The second claim that we think central to the LPE initiative—the interrelation of 'recognition' and 'redistribution' injustices—deepens the

> first, and distinguishes LPE from its forebears in American Legal Realism and Critical Legal Studies. (Harris and Varellas 2020, 10–11)

As for the LPE project, since its inception at the Yale Law School, it has rapidly expanded and generated interesting debates fleshing out different theoretical and methodological debates ("Symposia: Does LPE Need Theory?" 2023), as well as showcasing novel applications of what an LPE approach might entail (e.g. Agrawal *et al.* 2025). Indeed, the LPE Project site speaks of "LPE approaches" in plural rather than in singular.

In a similar fashion to how Harris and Varellas characterize LPE, Britton-Purdy, Grewal and Kapczynski define LPE as based on the insight that politics and the economy cannot be separated and that both are constructed in essential respects by law (Britton-Purdy *et al.* 2017).

Parallel (albeit slightly different) LPE approaches have also developed in Europe. Kampourakis (2021) defines European LPE as mainly concerned with how the project of European economic integration entails "insulating the economy from political contestation" (2021, 305).

In short, the transatlantic LPE movement is a big-tent phenomenon, as illustrated by the contributions that one can find at the LPE blog, in articles submitted to the Journal of Law and Political Economy, as well as an edited volume which incorporates many contributions from the European strand of LPE, seeking to broaden the LPE scope beyond the US (Kjaer 2020).

Following Britton-Purdy, Grewal and Kapczynski, I use the label "20th century synthesis" to refer to a partially coherent portrait of contemporary scholarship in Law and Economics, against which different LPE approaches stand in opposition. The core features of the 20th century synthesis, according to these authors (Britton-Purdy *et al.* 2020), are the following:

- Its goal is to encase or insulate the rules constituting markets from democratic politics.
- To this end, there is a division of labor between the disciplines of law and economics geared towards eluding the relationship between political and economic power.

Hence, one might summarize the aspiration of the different LPE approaches in the following way: to replace this pattern of scholarship with one that would be (a) instrumental in articulating a more egalitarian and democratic political and economic order and (b) reveal the relationship between political and economic power. To this end, as members of the LPE movement have quickly realized, the question regarding the relationship between political and economic power is of the utmost importance. This is a salutary feature of the LPE movement. However, it is important not to forget that the awareness of the interchangeability of political and economic power also lies at the center of the so-called 20th century synthesis. I bring attention to this point by showing how early neoliberals associated with the Chicago School of Economics reversed Legal Realists' and American Institutionalists key insight: that economic power is tantamount to political power. Then, they used this insight to argue for the insulation of economic order from democratic politics. This latter goal has been correctly stressed by LPE scholars. Indeed, in the last few years, the LPE blog has featured a series of symposia on

recent scholarship on neoliberalism, such as Quinn Slobodian's "Globalists" [REF]; Vouchez, France and Morley's "The Neoliberal Republic" [REF] and Callison and Manfredi's "Mutant Neoliberalism" [REF], enriching LPE's understanding of neoliberalism as a political project. Out of these engagements, some common threads emerge: neoliberalism is an institution-building project focused on creating a legal and institutional framework to protect transnational markets and capital from democratic pressures, particularly demands for redistribution. Thus, neoliberal governance involves a process of profound reconfiguration of the state and the relationship between the public and the private.

However, it is not a fixed ideology or a singular set of policies, but rather an ever-evolving cultural and political formation. Due to this fact, the complexity and contradictions observed in "actually existing" neoliberal regimes are symptoms of neoliberalism's capacity to combine and adapt into different forms.

Despite the richness of the scholarship on the history and politics of neoliberalism with which LPE scholars have so fruitfully engaged, the fact that early neoliberals in fact reversed the claims made by Legal Realists and American Institutionalists has not been explored in sufficient depth. In this sense, the paper seeks to contribute to ongoing LPE scholarship aimed at achieving a better understanding of the logic behind the use of the interchangeability between economic and political power as a theoretical tool to argue for the encasement of the market.

3. The slippage between economic and political power

From the late 19th century onwards, a complex set of interlocking challenges emerged out of the new conditions of corporate capitalism. There was a widespread sensation that capitalism stumbled from crisis to crisis, in an increasingly unsustainable trend of boom and bust, with dire economic and social consequences. Likewise, the growing power of massive corporations over the national economy made increasingly clear the need to rethink the government's power to intervene in the economic sphere (Sklar 1989). The economics profession struggled to provide a theoretical framework to explain these interlocking crises.

So-called "ruinous competition", also known as "cutthroat" or "wasteful" competition, was one of the key economic challenges of the 1870s – 1930s period, as well as a key trend forcing economic concentration. Cutthroat competition fostered economic concentration by generating incentives for economic integration. The idea was that under the conditions of industrial capitalism, competition could have a deleterious effect on the economy by driving the prices down below the threshold in which firms could produce the goods, effectively driving them out of business.

Firms adopted two main strategies to overcome this trend: horizontal consolidation or vertical integration. In either case, altering the boundaries of the firm (i.e., bringing more operations under the same management structure) was deemed as the key mechanism for managing economic risk. By increasing their size, firms could keep costs low and prices high. This produced a "great merger movement", as Lamoreaux (1985) has called it.

During the 1930s, the link between political instability and economic concentration became increasingly conspicuous for the general population. A telling example of this is that in 1938 Roosevelt sent a letter to the US Congress linking the emergence of Nazism with economic concentration and unemployment. He urged that unless strong antitrust policies were put into place, the system of competition that had allegedly prevailed in the US would be replaced by a concealed cartel system, as it had happened in Europe, with dire consequences (Freyer 2006).

In this context, the critical concern of academics, politicians and the broader citizenry was that firms would abuse their increased economic power. Even those who were willing to allow some economic concentration to avoid the effects of cutthroat competition had doubts about the excessive growth of corporations.

Two themes recurred in the debate regarding the concentration of economic power. On the one hand, there was skepticism about the notion that increased size of business firms would bring more efficiency. On the other hand, there was the concern that size transformed firms into political actors capable of circumventing democratic politics. Both themes were voiced by early neoliberals both in the US and abroad. For example, Henry Simons (one of the founding members of the Chicago School of Economics) argued that once firms achieved a certain growth, they became "essentially political bodies".[1] Likewise, Walter Lippmann (another key figure to the intellectual history of neoliberalism) even claimed that the very nature of private property had changed due to the fact of economic concentration.[2]

Hayek, during the first meeting of the Mont Pelerin Society[3] (MPS) in 1947, repeated Lippmann's diagnosis, stating that economic concentration and the pervasive presence of monopolies in industrial capitalist economies was due to the unduly extension of the concept of property.[4]

---

[1] The full quote is as follows: "The efficiency of gigantic corporations is usually a vestigial reputation earned during early, rapid growth – a memory of youth rather than an attribute of maturity. Grown large, they become essentially political bodies, run by lawyers, bankers, and specialized politicians, and persisting mainly to preserve the power of control groups and to reward unnaturally an admittedly rare talent for holding together enterprise aggregations which ought to collapse from excessive size" (Simons 1943, 246). -

[2] "The trust movement is doing what not conspirator or revolutionist could ever do: it is sucking the life out of private property. For the purposes of modern industry the traditional notions have become meaningless: the name continues, but the fact is disappearing. You cannot conduct the great industries and preserve intact the principles of private property. And so the trusts are organizing private property out of existence, are altering its nature so radically that very little remains but the title and the ancient theory" (Lippmann 1985[1914], 45).

[3] On this very important institution to the history of Neoliberalism, see Mirowski and Plehwe 2009, especially the introduction.

[4] "The problem of the prevention of monopoly and the preservation of competition is raised much more acutely in certain other fields to which the concept of property has been extended only in recent times. I am thinking here of the extension of the concept of property to such rights and privileges as patents for inventions, copyright, trade-marks, and the like. It seems to me beyond doubt that in these fields a slavish application of the concept of property as it has been developed for material things has done a great deal to foster the growth of monopoly and that here drastic reforms may be required if competition is to be made to work. In the field of industrial patents in particular we shall have seriously to examine whether the award of a monopoly privilege is really the most appropriate and effective form of reward for the kind of risk-bearing which investment in scientific research involves" (Hayek 1947, 113–14).

In short, under radically different economic conditions, the 19th-century legal language of property rights was deemed inappropriate by early Neoliberals. Old concepts had to be revised to address the challenges of the 20th-century economic order. In particular, the concept of private property seemed to require a new perspective.

Given the context of increasing economic concentration, the coercive aspect of economic power and its interchangeability with political power became an increasingly urgent problem. This was also the case for progressive or leftwing liberals such as Adolf Berle and Gardiner Means, Robert Lee Hale, J.R. Commons and John Maurice Clark.[5]

Following Hohfeld, these scholars argued that property rights expressed a relation between persons (as opposed to a between a person and a thing) and that this relationship was, by its very nature, coercive and thus entailed a transfer of power (Fried 1998, Fiorito and Vatiero 2011). For them, it was clear that "no existing legal entitlement had any formal meaning except in relation to reciprocal legal infirmities placed on others." (Fried 1998, 53) This shift in perspective involved dissolving the distinction between public and private forms of coercion. As Morris Cohen succinctly put it, "dominion over things is also imperium over our fellow human beings" (1927, 13).

Likewise, Hale argued that market transactions depended on bargaining power, which required State coercion to be operative. Thus, by regulating economic transactions, the State is in fact redistributing the capacity to exert coercion over others.[6]

Hale and the Realists' concept of coercion did not exclude a choice by the contracting individuals. However, it was akin to a form of social control, capable of directing the behavior of market agents, thus limiting their freedom to act. As Barbara Fried puts it, they redefined coercion as "a constraint on the background universe of available choices" (Fried 1998, 71).

In this sense, Legal Realists and early Institutionalists reconceptualized the case for State intervention not as a conflict between liberty and equality, but as government action directed at maximizing individual liberty through the distribution of economic power. Under this approach, State action aimed at redistributing property entitlements and

[5] See the closing paragraph in *The Modern Corporation and Private Property*: "The rise of the modern corporation has brought a concentration of economic power which can compete on equal terms with the modern state – economic power versus political power, each strong in its own field. The state seeks in some aspects to regulate the corporation, while the corporation, steadily becoming more powerful, makes every effort to avoid such regulation. Where its own interests are concerned, it even attempts to dominate the state. The future may see the economic organism, now typified by the corporation, not only on an equal plane with the state, but possibly even superseding it as the dominant form of social organization. The law of corporations, accordingly, might well be considered as a potential constitutional law for the new economic state, while business practice is increasingly assuming the aspect of economic statemanship (Berle and Means 1932, 537).

[6] (…) in a sense each party to the contract, by the threat to call on the government to enforce his power over the liberty of the other, imposes the terms of the contract on the other. When the rights and privileges which one party possesses are vastly superior in strategic importance to those possessed by the other (when the restraints on his liberty, in other words, are vastly less burdensome than those on the liberty of the other), the other party may in effect be compelled to submit by contract to almost any terms imposed by the stronger party. That is, the weaker party, whose previous legal restrictions are intolerable, may incur new restrictions as the price of scape from the old (Hale 1920, 452).

securing access to goods is justified in terms of its freedom-maximizing objective.[7] As Hale put it "[i]n curbing economic power, government is faced with choosing between different policies as to how wealth should be distributed, and (…) it is making a choice even when it does nothing (Hale, cited in Fried 1998, 89). Likewise, Felix Cohen underscored the same point by noting that courts, when distributing entitlements among economic agents, were actively distributing wealth (and power) without acknowledging that they were doing so.[8]

This insight had enormous political consequences: if an unequal distribution of property entails an unequal distribution of power, significant concentrations of property are a menace to democracy. More importantly, economic concentration generates a parallel, albeit unrecognized or "unofficial", form of sovereignty. As Robert Hale wrote "we live (…) under two governments, 'economic' and 'political,' the second public and hence visible, the first private and hence invisible." (Hale, cited in Fried 1998, 36). This "invisibility" of economic power, stemming from its private character, is precisely what the early institutionalists and legal realists sought to understand and uncover.

That early neoliberals and New Deal progressives shared this diagnosis is no coincidence. The equation between economic and political power has its origins in earlier theoretical discussions imported from the German-speaking world, which affected the way in which both early neoliberals as well as Legal Realists/early Institutionalists theorized economic and political power. Particularly, we will see how the equation between economic and political power can be traced back to Carl Schmitt's critique of liberal legal positivism.

4. Neoliberalism as a theory of power:

Legal positivists in the late 19th and early 20th century had posited the state as the embodiment of a rational, general and impersonal legal framework. Carl Schmitt opposed legal positivism on the basis that the bureaucratization of the state had brought with it a crisis in legitimacy, while the notion of the *Rechstaat* as the institutional precondition for self-determination collided with the character of the modern State. Schmitt argued that after the Great War, the possibility of returning to the 19th-century liberal order had been foreclosed. The war had generated a new kind of political entity, the Total State, capable of controlling all spheres of life, subsuming civil society under its wing. The modern state had become a "total" entity in the sense that there were no longer limits to what it could do. But the Total State was far from being all-powerful. Schmitt argued that the modern State was dissolved by the centrifugal forces of modern mass democracy. This trend was accentuated by legal positivism's view of state, law and

[7] For example, they argued for the redistribution of economic power through the doctrine of "police powers". As Barbara Fried notes: "(…) progressives commonly defended prounion legislation as simply a straightforward exercise of police powers, arguing that the state had determined that what was good for the unions was also good for America, or, alternatively, that protecting workers from economic injury resulting from their unequal bargaining position was itself a legitimate object of the police powers" (Fried 1998, 44).

[8] "What Courts are actually doing, of course, in unfair competition cases, is to create and distribute a new source of economic wealth or power. Language is socially useful apart from law, as air is socially useful, but neither language nor air is a source of economic wealth unless some people are prevented from using these resources in ways that are permitted to other people. That is to say, property is a function of inequality" (Cohen 1935, 816).

sovereignty. Schmitt argued that legal positivism fostered the fragmentation of State authority among competing interest groups, and he regarded Weimar Germany as a living example of this. Schmitt saw that legal positivism, by forsaking legal theory's traditional view of legal norms as general statements applicable to all citizens equally in favor of a procedural-formal view of norms, legitimized subjecting political life to individual, case-specific legislation which could only be understood as partisan. (Scheuerman 1999, 213–14).

To account for these two interrelated developments, Schmitt distinguished between the "qualitative" and the "quantitative" Total State. According to Schmitt, what was required was a transition from the former (which was the result of legal positivism, mass democracy and parliamentary politics) to the latter, which corresponded to a State directed by a decisionist dictator that would concentrate all power and thus would put an end to the chaos and the nihilism generated by the dissolution of the State brought about by liberal parliamentary democracy (Balakrishnan 2000).

In evaluating the shortcomings of classical liberalism and modern democracy, early Neoliberals took seriously and even adopted some of Schmitt's arguments (Cornelissen 2017, Irving 2018). Notably, like Carl Schmitt, they were deeply sceptic about legal positivism as a theoretical framework to understand law. As Keith Tribe (1995), Werner Bonefeld (2017a) and Renato Cristi (1991) have pointed out, Hayek and the Ordoliberal wing of the MPS drew key insights from Carl Schmitt's conception of Law and the State. For example, Hayek opposed Kelsen's legal positivism for it entailed a form of "constructivist rationalism", that replaced the spontaneous order of implicit law (nomos), with a model of law based on explicit commands or rules (thesis) (F. Hayek 1973). Just like Schmitt had argued before him, Hayek claimed that Kelsen's approach to law would lead to a "total State" (total Staat).[9]

Austrian Neoliberals and German Ordoliberals had experienced first-hand the failure of international and constitutional law in preventing chaos and violence and shared Schmitt's claim that legal positivism was to blame for this. The solution they reached was to advocate for the implementation of some ground-rules or principles that would allow for the evolution of a supranational order that would foster the conditions necessary for sustaining what they called alternatively, a competitive order or a social-market economy (Röpke 1960). The most essential condition of such an order was its

[9] In Hayek's own rendition of the Schmittean critique of legal positivism: "[Carl Schmitt's] central belief (…)is that from the 'normative' thinking of the liberal tradition law has gradually advanced through a 'decisionist' phase in which the will of the legislative authorities decided on particular matters, to the conception of a 'concrete order formation', a development which involves 'a re- interpretation of the ideal of the nomos as a total conception of law importing a concrete order and community'" (1973, 71 (vol. I)).

isolation from democratic politics, as Hayek,[10] and fellow Ordoliberals Walter Eucken, Wilhelm Röpke and Alexander Rüstow argued.[11]

Schmitt's critique of liberal legal positivism and democracy underlies the core of neoliberal legal theory. Neoliberals — even if unwilling to concede it — shared some of the former key insights, aligning their own outlook more closely with Schmitt's than they admitted.

Thus, at the core of the 20th century synthesis lies a deep reflection regarding the nature of both economic and political power: early neoliberals appropriated Schmitt's and the Legal Realists' reflection on the nature of political and economic power and used it to fashion a new foundation for the market economy.

During the early 20th century, thinkers from across the political spectrum agreed that property rights linked economic and political power—state-backed control over resources itself constituted a form of coercion. Although Marxists had long emphasized this interchangeability, their direct influence on mainstream economics and legal scholarship was limited, and most left-leaning authors steered clear of the Marxist label.[12]

Legal Realists, Institutionalists, early neoliberals (e.g. Simons, Knight, Hayek) and critics of the liberal order like Carl Schmitt all acknowledged this dynamic. While familiar to LPE scholars, the shift from the overtly political critique of economic–political power relations in early neoliberalism to the ostensibly neutral stance of the 20th-century synthesis demands explanation—a task I take up in the next section.

5. Reframing coercion and power: The road to the 20th-century synthesis

Legal realists and early Institutionalists' conception of power stemmed from their redefinition of coercion as a constraint on the background of an individual's universe of available choices. Thus, power amounts to the capacity available to some agents to use the State to define the universe of available choices for everyone else. When reviewing Robert Hale's *Freedom Through Law*, Frank Knight agreed with Legal Realists and early Institutionalists in noting the interchangeability between economic power and political

[10] Hayek, in a 1978 interview, gave this assessment of democracy in relation to Carl Schmitt: "(…) the original occasion [for the assessment that liberty was under threat in Western democracies] was my analysis of the causes of the intellectual appeal of the Nazi theories, which were very clearly – I mean, take a man like Carl Schmitt, one of the most intelligent of the German lawyers, who saw all the problems, then always came down on what to me was intellectually and morally the wrong side. But he did really see these problems almost more clearly than anybody else at the time – that an omnipotent democracy, just because it is omnipotent, must buy its support by granting privileges to a number of different groups. Even, in a sense, the rise of Hitler was due to an appeal to the great numbers. You can have a situation where the support, the searching for support, from a majority may lead to the ultimate destruction of a democracy" (Hayek *et al.* 1983).

[11] As Bonefeld argues: "Schmitt's stance was by and large shared by the founding ordoliberal thinkers (…).In a nutshell, like Schmitt, the ordoliberals identified mass democracy as a danger to free economy because it emasculates the independence of the state and makes government accountable to the interests of the governed" (Bonefeld 2017b, 47).

[12] Although this exceeds our aim here, I would argue that this was the especially the case with JR Commons, whose critical engagement with Marx crosses all his scholarship. See, for example Commons (1936, 2009).

power.[13] He argued that "the natural tendency under freedom (…) is for power to be used to acquire more power and constantly to increase inequality. This holds conspicuously for economic power (…) but holds also for political power and other forms" (Knight 1953, 875).

However, unlike Legal Realists and early Institutionalists, Knight redeployed this argument to make a case against regulation (and democratic politics). He argued that any sensible solution to problems of social organization must start from an empirical comparison between the available alternatives.[14] In short, Knight's point is that all the evils that could be ascribed to the invisible rule of economic power could also be ascribed (and often with more reason) to the visible rule of political power.[15]

Knight took the Legal Realists' argument about the interchangeability of political and economic power and turned it on its head. If economic power is tantamount to political power, that also means political power is a form of economic power. Crucially, this implies that political power is susceptible of being analyzed through the theoretical lenses of neoclassical economics, further expanding the field of expertise of economics.

Knight's reassessment of "coercion" and "power," was later developed in two complementary directions. First, by Ronald Coase's analysis of the role the allocation of rights plays in bargaining between economic agents. Second, by Buchanan's views on "political economy". Let's start with Coase.

In 1960, Ronald Coase's article "The Problem of Social Cost" began from the same Realist/Institutionalist insight: external "harms" are reciprocal — meaning that if one person's right to perform an activity that imposes a cost on other party is enforced, the other party loses. In other words, this is the legal realist-institutionalist insight that legal entitlements distribute power, shaping bargaining outcomes. However, under the stringent conditions proposed by Coase, the same wealth-maximizing outcome would be obtained, regardless of the initial allocation of rights.

Due to the persistent presence of positive transaction costs in the real world, private bargaining will not always occur even when both parties would, in principle, benefit. Hence, the "efficient" outcome (as in the zero-cost world) may not arise in practice. Once transaction costs are recognized, Coase argues, there is no a priori optimal remedy for "externalities" (a term that Coase himself did not use).

---

[13] Interestingly, he refers to New Deal Progressives (i.e. Legal Realists and early Institutionalists) as "Neoliberals" in the review, which was written in 1953, that is, after the Colloque Walter Lippman (CWL) and the first meeting of the Mont Pelerin Society (MPS), where the use of the term "neoliberal" was discussed as an alternative to characterize the project of revamping classical liberalism to cope with the novel socio-economic conditions. This usage suggests then that Knight regarded New Deal Progressives not as enemies, but rather as defenders of a parallel, albeit inferior effort of saving capitalism from itself (one that could potentially lead to totalitarian consequences). Alternatively, it may indicate that by then at least some of the Neoliberals had adopted the practice of attaching the label "classical liberals" to themselves, rejecting the previous "neoliberal" moniker.

[14] An argumentative move that lies at the heart of Harold Demsetz's approach to Institutional Economics and that will feature again the in the Buchanan – Samuels exchange.

[15] "(…) most of the "faults" so readily found with the market organization are at least as visible in the system that it is urged as its regulator or substitute. Politics too is a struggle for power, and pelf; politics offers at least equal opportunity for chicanery and it "naturally" involves as much tendency to cumulative concentration of power, with its perquisites thereof" (Knight 1953, 880–81).

The key element to consider is that Coase's analysis entails that, just as markets incur transaction costs, so do governments. Therefore, as Knight also argued, the question regarding government intervention must start by comparing available alternatives. Similarly, just as Knight took the insight regarding the interchangeability between economic power and political power to argue that government regulation might worsen the problem of the concentration of power, government regulation might also end up generating a less efficient outcome that the one that would result from letting the parties autonomously reach an agreement. Since both markets and governments incur transaction costs, Coase argues, one cannot presume that legal or regulatory solutions will reduce social cost.

During the second half of the 1960s, Coase's insights began to crystallize into the so-called "Coase Theorem" (a term coined by George Stigler in 1966) and expand beyond the confines of economics into legal analysis.[16] Indeed, the "theorem" became a core section of the curriculum of Henry Manne's economics training program for federal judges, which ran for over twenty years (Butler 1999),was attended by almost half of federal judges between 1976 and 1999 and is regarded as highly influential in shaping judges' outlook (Ash, Chen, and Naidu 2022). During that period, through Richard Posner's exposition of Coase's work, the so-called "invariance" dimension of Coase's theorem (i.e. the initial assignment of legal liability will not affect resource use when transaction costs approach zero) came to prominence, but with a relaxed standard: rather than being strictly zero, transaction costs must not be "prohibitively costly" (Richard Posner, cited in Medema 2023, 8). This generated a bias towards agent transactions rather than government regulation.

While legal realists and early institutionalists stressed that the initial distribution of rights inevitably conditions exchanges (as Coase also claimed), the simplified reading of his theorem that became popularized argues that, if agents can negotiate freely and transaction costs do not represent a significant obstacle, the initial assigned right does not alter the efficient allocation of resources. In other words, it is sufficient for costs to be low enough for the parties to be able to arrange a transaction, without requiring that they approach zero. Thus, the combination of the symmetry between economic and political power and the purported irrelevance of the initial allocation of rights strengthens generate a bias against regulatory practices.

Likewise, James Buchanan developed and systematized Knight's argument against giving politicians the power to meddle with market transactions, inaugurating public choice theory (Buchanan 1954, Buchanan and Boba 1960). As Knight had argued before him, he claimed that politicians and public officials will use their political power to acquire more power (both economic and political) and consolidate their privileged position. At the same time, giving power to officials made that office attractive as an object of capture, i.e., of using economic power to buy political power. Hence, Buchanan reasoned, what is needed is to reduce this possibility to the minimum by reducing the scope of Governments' space for action.

[16] According to Daniel Farber, by 1989 the paper had over 1100 citations in the Social Science Index, about half of them from law journals, becoming one of the most frequently cited papers in law review articles (Farber 1997, 399).

Buchanan's development of Knight's views on the interchangeability of economic and political power can be further appreciated by examining the exchange between him and a heir of the earlier generation of Legal Realists/American Institutionalists: Warren J. Samuels (Buchanan and Samuels 1975).

Their exchange began apropos Buchanan's paper criticizing Warren's analysis of the economic effects of governmental decision-making in the *Miller v. Schoene* (1928) case (Samuels 1971). Samuels wrote a defense of his position, which he sent by mail to Buchanan. The epistolary exchange spanned 1972 and 1973 and was later to be published in the journal edited by Samuels. For our purposes, their disagreement can be summarized thus: Samuels insisted that resource allocation, even if on the surface is determined by demand and supply, at bottom is a function of the multi-directional interrelation between the power structure, rights and the use of government: "The power structure is a function of law *and* the use of government is a function of the power structure, and income and wealth distribution are a function of law *and* law is a function of income and wealth distribution." [italics in the original] (Buchanan and Samuels 1975, 17).

Buchanan does not disagree with Samuels on this. However, he insists in the necessity of "starting from here", i.e. the status quo, to determine which transactions count as voluntary and hence as non-coercive and legitimate. That is, given an initial allocation of rights over resources, Buchanan wants to know which rules would be accepted by all as non-coercive. Based on this line of reasoning, he arrived at a highly stringent standard for legitimate institutional change, based on Pareto efficient changes[17] capable of marshalling unanimous or quasi-unanimous consent: "in my vision, the status quo does have a unique place, for the simple reason that it exists, and hence offers the starting point for any peaceful (contractual) change" ((Buchanan and Samuels 1975, 25). Buchanan calls this "the consent paradigm". He defends his approach on the basis that it avoids imposing an "external" criterion to evaluate the status-quo, while positing non-coercive contractual transactions as the only legitimate vehicles for institutional change. Buchanan's point is that Samuels was imposing its own normative assessment of societal arrangements as an implicit background to its supposed positive analysis.

In turn, Samuels criticized Buchanan position on the basis that his approach neglects the difficult decision-making society faces regarding the power structure, particularly the balance between freedom and control. According to Samuels, Buchanan's approach allows those already privileged by the status quo to perpetuate themselves in that position simply by withholding consent. By granting them veto power, the unanimity rule concentrates too much power in the hands of the already privileged and powerful, allowing them to make non-Pareto optimal changes without external controls (Samuels 1975, 30).

In a nutshell, beyond the many methodological issues, they discussed, the disagreement between Samuels and Buchanan can be boiled down to the following: who can, and under which conditions, revise the rules granting some the power to (i) define the

[17] An allocation of resources is Pareto efficient when every possible reallocation would harm at least one person while benefiting another.

universe of available choices for everyone else and (ii) mobilize the State to enforce such definition.

For Buchanan, the interchangeability between economic and political power was a reason to limit government powers as much as possible, in an attempt to foreclose the interchangeability of economic and political power (i.e., avoiding rent-seeking and institutional capture). Hence, once the rules settling (i) and (ii) are in place, these should be kept outside the purview of politicians, to avoid the "chicanery" Knight noted. From this stems the drive to encase or insulate the economy from democratic politics.

By contrast, for Samuels, the interchangeability between economic and political power means that coercion and power are ineliminable elements of all imaginable societal arrangements. Implicit in the background conditions enabling exchanges are questions that will always be susceptible to revision: how is power distributed; whose interests are regarded as normatively relevant; who can revise these background conditions and how are they revisable. Samuels's point is that Buchanan, by refusing to (publicly) evaluate the status quo, and by conflating unanimously sanctioned social change with absence of coercion, avoids dealing with any of these questions. In ultimate instance, this only benefits those who already hold economic and political power. Of course, this is not a bug, but a feature of Buchanan's position: it must be read with the writings of Carl Schmitt (Wagner 2017) and Vilfredo Pareto (Marciano and Mosca 2018) in mind, as well as with the MPS decades-long engagement with "the problem of democracy" (Cornelissen 2017, especially section 3.2.) as background.

In sum, looking at the interchangeability between economic and political power from the perspective of the Samuels-Buchanan exchange highlights how this interchangeability (which Samuels calls the legal-economic nexus) is constantly being actualized through the choices made by state and non-state actors on whether to act and exchange or not.

Thus, the arguments of Legal Realists and Early Institutionalists were carried forward into the post-war consensus under a new political valence, which later crystallized in the 20th century synthesis against which (at least part of) the LPE movement is defining itself.

Such an argumentative move was possible because, despite apparently being at opposite sides of the political spectrum, Legal Realists and early Institutionalists shared a political project with early Neoliberals: both groups were trying to actualize liberalism to cope with the new economic and political conditions of corporate capitalism. In the words of Walter Lippmann, they sought "the reformation of the economic order through the reconstruction of the legal" (Lippmann, cited in Goodwin 2014, 243). Or, alternatively, as Hale's book aptly puts it, they were trying to achieve "freedom through law". Indeed, this is a point which Knight explicitly acknowledges while reviewing Hale's book, stating that "we all believe in 'Freedom through law' or in law in some sense 'maximizing' freedom (…)" (Knight 1953, 874).

Hopefully, I have succeeded in showing that the 20th century synthesis rests on a sophisticated theory of power. However, this is not the whole story. This fact has been repressed in legal consciousness, blinding current orthodoxy from criticism, thus representing the current state of affairs as the natural order of things and masking its most political (and polemical) aspects. This resulted in the (almost complete)

disappearance of power as an analytical category within contemporary mainstream legal scholarship and economic theory, as correctly denounced by LPE scholars.

In the Samuels–Buchanan exchange, Buchanan insists that only those arrangements arising from voluntary transactions are non-coercive. Once this premise is accepted, it takes a short conceptual step to define every market interaction as non-coercive by fiat: one simply needs to construe coercion as everything that occurs before or outside the moment of explicit consent—and then define the market as the realm in which consent has been unequivocally given—to render every market transaction, by definition, free of coercion.

In practice this entails stipulating that only overt force or its immediate threat counts as coercion, while any interaction in which parties formally agree on terms is treated as purely voluntary. Once these analytic boundaries are drawn, the categories become self-enforcing: an interaction cannot simultaneously qualify as a market exchange and as coercive, because its very status as a "market" transaction presupposes prior consent. Background conditions—such as the legal rules that establish property rights, the distribution of initial endowments, or the relative bargaining power of participants—are thus excised from the definition of both "market" and "coercion".

Mainstream legal theory, as it crystallized in the 20th-century synthesis, came to implicitly adopt this assumption. However, the logic of this implicit premise can be gauged by examining the writings of libertarian economist Murray Rothbard (also a member of the MPS) (1962/2009).[18] He argued that the terms "market" and "power" cannot co-exist, since the presence of one excludes the other. It is important to highlight that this is a stipulative definition: Rothbard is not making a statement subject to empirical testing. Rather, he defines coercion to exclude market transactions and vice versa. By defining market transactions as essentially non-coercive and coercion as excluding consent, the issue of power is left out from legal and economic reasoning. It entails a complete reversal from the position taken by Legal Realists and early Institutionalists, as well as early Neoliberals. But, as has been explored in this paper, it is not the whole story: regarding all market transactions as non-coercive is not to be confused nor conflated with the expressly political endeavor of using the market to constrain power, both in its economic and political modalities, as early Neoliberals aspired to do.

Consequently, it is not enough to identify and criticize the premise that divides the universe of possible interactions between agents into coercive and non-coercive (assigning all market transactions to the second category). Legal Realists and American Institutionalists did that a century ago. Nor is it sufficient to show empirically that there are market transactions based on coercion, for these can always be explained away as

[18] Although he is not the only one to hold this view, I chose him because he is unusually candid and transparent when stating its theoretical commitments, which makes him ideal for illustrative and pedagogical purposes. Of course, many would object that Rothbard's radical stances disqualify him as unrepresentative. That might be so in general, but I would argue that he is aligned with the mainstream in defining market transactions as non-coercive. At the very least, it is a view that was also held by Buchanan (although not by Knight) and that can be safely be imputed to the 20th century synthesis and neoliberal orthodoxy.

anomalies or as a regrettable, albeit necessary, side-effect of avoiding even worse forms of coercion.

If LPE scholars want to provide a real alternative to the 20th century synthesis, they need to go beyond the conceptual and empirical issues just outlined by going back to its intellectual heritage. This raises the question of whether "achieving freedom through law" should also be the aspiration of the LPE movement and if so, in what sense. My intuition is that even posing this question will have destabilizing effects on the big-tent character of the movement. Samuel Moyn's recent contribution to the LPE Project's Blog (Moyn 2023) and the responses to his piece ("In Defense of Theoretical Pluralism" 2023; "Legal Theory in the Lowercase" 2023; "In Defense of Theoretical Quietism" 2023; "Is Capitalism 'a Thing'?" 2023) can be seen as evidence of this destabilizing trend.

Thus, to summarize the claims made so far:

1. What distinguished Legal Realists and American Institutionalists from their Neoliberal counterparts was their divergent valuation of democratic politics.
2. Buchanan's and Knight's claims echo Schmitt's critique of Weimar's centrifugal politics. Indeed, just as Schmitt had noted before, groups compete to capture the State to foster their own interests and further secure their hold on the State apparatus.
3. The 20th century synthesis rests on a deeply political theoretical construct. Hence, it is wrong to assert that the theoretical and ideological underpinnings of the 20th century synthesis ignore questions of power. Rather, the opposite is true: its political goal was precisely to design institutional arrangements that would guarantee the impersonal rule of the market, as a way of both constraining economic and political power, which are seen by the early ideologues of neoliberalism as fully equivalent.

6. Conclusion: How we move forward

In the 20th century, Neoliberals were able to theorize the relationship between economic power and political power, implementing a solution to what they regarded as the troubling consequences of this interchangeability at a worldwide scale. Nothing less should be expected from those who pretend to have an alternative to the neoliberal order and the 20th century synthesis into which it has crystallized. In what follows, I suggest some guidelines on how long-term, interdisciplinary LPE research on power should look like.

The goal of contesting and superseding the 20th century synthesis will require a sharpened theoretical perspective. Figuring out how different modalities of power become interchangeable requires rethinking the conceptual categories of both legal theory and economics to adapt them to the institutional, political and economic conditions of the 21st century. As has been argued here, the theoretical and ideological elements of the 20th century synthesis arose out of the concern regarding the inadequacy of the conceptual frameworks of law and economics to explain the economy under the conditions of corporate capitalism during the late 19th century. Thus, the goal of the LPE movement should be to rethink the inherited categories of law and economics so it can theorize the relationship between the economic and political power in our current context.

Furthermore, we cannot assume that our conceptual schemes, which were developed and evolved in the relatively stable conditions of the Holocene are to be taken forward into the unprecedented conditions of the Anthropocene (Steffen *et al.* 2015). Just as the structural transition from industrial to corporate capitalism required a rethinking of the conceptual categories with which lawyers, social theorists, political thinkers and economists worked, the novel conditions of the Anthropocene and its interlocking, accelerating crises, will require a re-working of the conceptual tools of legal and economic theory (as well as the tools of the social sciences and the humanities more generally) (Ghosh 2016). This is so because the conditions under which economic and political power interact as two modalities of the same underlying phenomenon will likely change in unpredictable ways.

Thus, it is not casual that approaches to LPE have proliferated at a moment in which a series of overlapping political, economic, social and ecological crises have put under question the ideological consensus that achieved global hegemony in the last decades of the 20th century.

It is my contention that rethinking the conditions of interchangeability between economic and political power is essential, for these conditions are (i) changing rapidly and will continue to do so in the future and (ii) because the interchangeability between economic and political power determines what is and will be possible in the future with respect to facing these crises.

Please note that I am not suggesting that this would have in and of itself a transformative effect on our social and economic arrangements. Rather, my point is that our social and economic arrangements are already under severe stress and will endure more of it as Earth continues to warm.

Consider the historical timespan covered in this piece: it begins with the series of economic crises that followed each other after 1870, through the Great Depression, the Two World Wars, the Cold War to the crystallization of the 20th century synthesis during the 1970s. That is a timespan of roughly 100 years. Most models of climate change typically project to the year 2100. The IPCC reports cover up to the end of the 21st century. In other words, in a similar timespan, we are facing a much higher degree of uncertainty. This is especially true since our policy responses are the single most important variable in the warming path the earth takes (Shue 2021). In short, this means that we must theorize the relationship between economic and political power as part of the effort to understand the events that are rapidly unfolding today and will continue to do so in the foreseeable future.

This requires us to study economic and political power as alternative modalities of a single phenomenon. This means that "power" does not appear in the abstract, rather it can only be actualized in the context of social reality in different modalities. This is what I mean by the term "modalities of power": the way in which power appears under different guises. Power is not a unitary phenomenon – an abstract substance, if you will – that manifests itself in different spheres. Instead, the relation of causality should be reversed: agents mobilize a series of entities to further their goals. As these entities interact with each other, they constitute different spheres through this interaction. Borrowing from Deleuze's philosophy (merely as an inspiration, I do not claim to be making a "correct" interpretation of Deleuze's philosophy), one might say that

modalities of power are the ways in which "virtual" power is actualized into different modes. It is a processual rather than ontological understanding of power. As I interpret it, in Deleuze's ontology, the "virtual" is that dimension of reality which is fully "real" yet not yet "actual". Actualization is the process by which particular aspects of that virtual field "come to pass" as determinate modes. Deleuze calls this process the "modalization" or "modalizing" of the virtual. The actual consists of the modes of the virtual that have been "folded out" and endowed with spatio-temporal extension and specific properties.[19]

For example, in the economic modality of power, the entities which interact forming a network would include those that allocate rights to distribute costs and benefits. In this regard, Katharina Pistor has usefully suggested the notion of "legal modules". In Pistor's account, the "legal code" of capital is composed of a small set of modular instruments — contract, property, collateral, trust, corporate and bankruptcy law— which together confer on any asset the attributes of priority, durability, convertibility, and universality (Pistor 2019). Seen through the lens of modalities of power, each of these legal modules is a processual mechanism by which agents actualize the "virtual" potential of power into concrete networks of economic interaction. In short, Pistor's legal modules are the means through which "virtual" power is actualized into economic power.

So far, the parallel study of the conceptual frameworks underpinning economic and political power has allowed us to see how political and economic power are defined as polar opposites, interrelated to each other. However, we must push further down this road and examine how these two modalities interact with other possible modalities of power in contemporary societies.

In other words, the focus should be on the patterns of convergence and divergence that we can historically observe between different modalities of power. Just as it is possible to study how different structural patterns of governance have historically arisen from different ways of conceptualizing the relationship between economic and political power,[20] LPE could be understood as an enquiry on how these different modalities of power are related to each other and help form the relatively stable structures that constitute modern forms of government. This task could be pursued at different levels of abstraction. By the same token, it should also be possible to ask how new patterns of

[19] See Todd May (2005, 52): "Actualization is the 'modalizing' of the virtual, the folding, unfolding, and refolding of the virtual into modes. This actualization, this 'modalization,' is not a making of one thing into another. It is not a creation or an emanation. It is a process in which substance expresses itself in the course of its folding, unfolding, and refolding."

[20] Some argue that during the transition from feudalism to the early modern period there was a splitting of the concept of "dominium" into its current political and economic modalities, generating a series of related conceptual oppositions (e.g. sovereignty and property, State and Society) On this, see Anderson 2013; for a critique of Anderson, see Wood 1992. Another approach is taken by Michel Foucault: he characterizes the transition from the 16th and 17th centuries to the 18th century onwards in terms of a transition between "sovereign" and "disciplinary" power. The former refers to the relationship between sovereign and subject, whereas the latter, which is incompatible with the relations of sovereignty, is a mechanism of discipline which operates through continuous surveillance. It permits "time and labour, rather than wealth and commodities, to be extracted from bodies. It is a type of power which is constantly exercised by means of surveillance rather than in a discontinuous manner by means of a system of levies or obligations distributed over time. It presupposes a tightly knit grid of material coercions rather than the physical existence of a sovereign" (Foucault 1981, 104).

governance might be imagined (or even brought about) by rethinking the relationship between different modalities of power.

To do so, it is necessary to turn our attention simultaneously to historical investigations into the genesis and evolution of the theoretical concepts underpinning the different modalities of power: How did they form, what were the contextual challenges that they were meant to solve?

This in turn means reimagining the boundaries between law and other disciplines. For it is not an issue of redefining the intellectual division of labor between law and economics so that economists can now study "economic power" as a legitimate conceptual category, while legal scholars and political scientists take care of "political power" and sociologists take care of "social" power and so on. Instead, the goal should be to constitute porous disciplinary boundaries, so multiple disciplines can contribute to a better understanding of how modalities of power appear in modern society and how they interact with each other and in interacting constitute the structural pattern underlying dominant forms of government. At this juncture, it is worth noting that interdisciplinary research involves its own epistemological challenges, which in turn further exacerbate the need for theorizing (Figueroa Zimmermann 2020). In sum, the point is to avoid the illusion that (a) one modality is reducible to the other or that there is a primary form of power which then gets translated or converted into the other and (b) each discipline is to be concerned with a specific modality of power.

To this end, I propose a variation on Samuel's concept of the "legal-economic nexus": just as Samuels coined this concept to capture the notion that economic and political power are not two separate entities, but two surface appearances of a single underlying phenomenon, I propose that LPE scholars should focus on what we might call channels or networks of power. By this I mean the study of the concrete ways in which different modalities of power are transformed or translated into another. It also entails analyzing how some modalities of power require other modalities to be ignored, translated or abstracted out, i.e. left out of the network. For example, consider how the theoretical framework underpinning the 20th century synthesis handles the power that arises from collective action: in mainstream law and economics, collective action is (at best) reduced to its effects in rights allocation and the resulting price scheme, or (more usually) seen as a pernicious form of elite capture (e.g. union leaders are seen as rent-seeking elites that capture unions to foster their own interests rather than those of the unionized workers). This might be so in many cases. However, we also know that this is certainly not the whole story. LPE could be organized under the banner of theorizing not only how to take economic and political power from the elites and back to workers, citizens and migrants, but also to make visible and theorize the networks or channels of power available to these groups, as well as those that remain hidden or blocked.

This paper has shown how the Law and Political Economy insight—that economic and political power are two facets of the same force—emerges from early twentieth-century Realists and Institutionalists who saw property and markets as inherently coercive, only to be appropriated by mid-century neoliberals as a justification for insulating markets from democratic control. It has traced how, in the dominant law-and-economics synthesis, power was repressed through a series of theoretical constructs behind an ostensible non-coerciveness of transactions. By unmasking this hidden theory of power

and restoring focus on the processes by which the "virtual" potential of power is actualized, the paper calls for a new interdisciplinary agenda: mapping and analysing these modalities of power so that, in an era of accelerating social and ecological crises, scholars and citizens alike can expose, challenge, and ultimately reconfigure the structures that shape our collective lives.

At bottom, this brief foray into the intellectual history of LPE reminds us that by studying how economic power can be converted into political influence—and vice versa—we gain tools for imagining new forms of collective action.

References

Agrawal, S., *et al*., 2025. *Drug Dealing: Making Public Pharma Work* [online]. Yale Law School, Public Law Research Paper. Available at: https://doi.org/10.2139/ssrn.5110781

Anderson, P., 2013. *Lineages of the Absolutist State.* London: Verso Books.

Ash, E., Chen, D.L., and Naidu, S., 2022. *Ideas Have Consequences The Impact of Law and Economics on American Justice* [online]. NBER Working Paper Series, No. 29788. Available at: https://doi.org/10.3386/w29788

Balakrishnan, G., 2000. *The Enemy: An Intellectual Portrait of Carl Schmitt.* London: Verso.

Berle, A., and Means, G.C., 1932. *The Modern Corporation and Private Property*. 3rd ed. New Brunswick/London: Transaction.

Bonefeld, W., 2017a. Ordoliberalism and Political Theology: On the Government of Stateless Money. *In:* J. Hien and C. Joerges, eds., *Ordoliberalism, Law and the Rule of Economics.* Oxford: Hart.

Bonefeld, W., 2017b. *The Strong State and the Free Economy*. London/New York: Rowman & Littlefield International.

Britton-Purdy, J., *et al*., 2020. Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis. *The Yale Law Journal* [online], 129. Available at: https://www.yalelawjournal.org/pdf/Britton-Purdyetal.Feature_iwo42jj4.pdf

Britton-Purdy, J., Kapczynski, A., and Grewal, D.S., 2017. *Toward a Manifesto* [online]. Blog post. LPE Project, 6 November. Available at: https://lpeproject.org/lpe-manifesto/ Buchanan, J.M., 1954. Social Choice, Democracy, and Free Markets. *Journal of Political Economy* [online], 62(2), 114–23. Available at: https://doi.org/10.1086/257496

Buchanan, J.M, and Samuels, W.J., 1975. On Some Fundamental Issues in Political Economy: An Exchange of Correspondence. *Journal of Economic Issues* [online], 9(1), 15–38. Available at: https://doi.org/10.1080/00213624.1975.11503251

Buchanan, J.M., and Boba, S., 1960. Economic Policy, Free Institutions and Democratic Process. *Il Politico*, 25(2), 265–93.

Butler, H.N., 1999. The Manne Programs in Economics for Federal Judges. *Case Western Reserve Law Review* [online], 50(2), 351–420. Available at: https://scholarlycommons.law.case.edu/caselrev/vol50/iss2/19/

Cohen, F.S., 1927. Property and Sovereignty. *Cornell Law Review* [online], 13(1), 8-30. Available at: http://scholarship.law.cornell.edu/clr/vol13/iss1/3

Cohen, F.S., 1935. Transcendental Nonsense and the Functional Approach. *Columbia Law Review* [online], 35(6), 809. Available at: https://doi.org/10.2307/1116300

Commons, J.R., 1936. Institutional Economics. *The American Economic Review*, 26(1), 237–49.

Commons, J.R., 2009. Marx To-Day: Capitalism and Socialism (1925). *Journal of Institutional Economics* [online], 5(1), 117. Available at: https://doi.org/10.1017/S1744137408001240

Cornelissen, L., 2017. "How Can the People Be Restricted?": The Mont Pèlerin Society and the Problem of Democracy, 1947–1998. *History of European Ideas* [online], 43(5), 507–24. Available at: https://doi.org/10.1080/01916599.2017.1365745

Cristi, R., 1991. Hayek, Schmitt y el estado de derecho. *Revista Chilena de Derecho*, 18(2), 189–202.

Farber, D.A., 1997. Parody Lost/Pragmatism Regained: The Ironic History of the Coase Theorem. *Virginia Law Review* [online], 83(2), 397. Available at: https://doi.org/10.2307/1073781

Figueroa Zimmermann, F., 2020. Fostering the Autonomy of Legal Reasoning Through Legal Realism. *In:* P. Cserne and F. Esposito, eds., *Economics in Legal Reasoning* [online]. Cham: Springer International, 121–37. Available at: https://doi.org/10.1007/978-3-030-40168-9_8

Fiorito, L., and Vatiero, M., 2011. Beyond Legal Relations: Wesley Newcomb Hohfeld's Influence on American Institutionalism. *Journal of Economic Issues* [online], 45(1), 199-222. Available at: https://doi.org/10.2753/JEI0021-3624450111

Foucault, M. (with C. Gordon, ed.,), 1981. *Power / Knowledge: Selected Interviews and Other Writings 1972-1977.* New York: Pantheon Books.

Freyer, T.A., 2006. *Antitrust and Global Capitalism, 1930-2004.* Cambridge/New York: Cambridge University Press.

Fried, B., 1998. *The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement* [online]. Cambridge, MA: Harvard University Press. Available at: https://doi.org/10.4159/9780674037304

Ghosh, A., 2016. *The Great Derangement: Climate Change and the Unthinkable.* Haryana: Allen Lane.

Goodwin, C.D., 2014. *Walter Lippmann: Public Economist* [online]. Cambridge, MA: Harvard University Press. Available at: https://doi.org/10.4159/harvard.9780674735750

Hale, R.L., 1920. Law Making by Unofficial Minorities. *Columbia Law Review* [online], 20(4), 451. Available at: https://doi.org/10.2307/1111985

Hale, R.L., 1952. *Freedom Through Law: Public Control of Private Governing Power.* New York: Columbia University Press.

Harris, A., and Varellas, J.V., 2020. Law and Political Economy in a Time of Accelerating Crises. *Journal of Law and Political Economy* [online], 1(1). Available at: https://doi.org/10.5070/LP61150254

Hayek, F., 1947. *Free Enterprise and Competitive Order.* University of Chicago Press.

Hayek, F., 1973. *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justics and Political Economy.* London: Routledge.

Hayek, F.A. (with R. Hamowy, ed.), 2011. *The Constitution of Liberty: The Definitive Edition. The Collected Works of Friedrich August Hayek* [online]. University of Chicago Press. Available at: https://doi.org/10.7208/chicago/9780226320519.001.0001

Hayek, F.A., 1983. *[Nobel Prize-Winning Economist Oral History Transcript. Interviewer: Earlene Craver]* [online]. Los Angeles: Oral History Program, University of California. Available at: http://archive.org/details/nobelprizewinnin00haye

Irving, S., 2018. Limiting Democracy and Framing the Economy: Hayek, Schmitt and Ordoliberalism. *History of European Ideas* [online], 44(1), 113–27. Available at: https://doi.org/10.1080/01916599.2017.1381856

Jessop, B., 2019. Ordoliberalism and Neoliberalization: Governing through Order or Disorder. *Critical Sociology* [online], 45(7–8), 967–81. Available at: https://doi.org/10.1177/0896920519834068

Kampourakis, I., 2021. Bound by the Economic Constitution: Notes for "Law and Political Economy" in Europe. *Journal of Law and Political Economy* [online], 1(2). Available at: https://doi.org/10.5070/LP61251589

Kjaer, P.F., ed., 2020. *The Law of Political Economy: Transformation in the Function of Law* [online]. 1st ed. Cambridge University Press. Available at: https://doi.org/10.1017/9781108675635

Knight, F.H., 1953. Reviewed Work: Freedom Through Law by Robert L. Hale. *Virginia Law Review* [online], 39(6), 871–82. Available at: https://doi.org/10.2307/1070404

Lamoreaux, N.R., 1985. *The Great Merger Movement in American Business, 1895-1904* [online]. New York: Cambridge University Press. Available at: https://doi.org/10.1017/CBO9780511665042

Lippmann, W., 1985. *Drift and Mastery: An Attempt to Diagnose the Current Unrest.* Madison: The University of Wisconsin Press. (Originally published in 1914).

Marciano, A., and Mosca, M., 2018. Italian Influences on Buchanan's Research Program. *In:* R.E. Wagner, ed., *James M. Buchanan* [online]. Cham: Springer International, 1053–78. Available at: https://doi.org/10.1007/978-3-030-03080-3_46

May, T., 2005. *Gilles Deleuze: An Introduction* [online]. Cambridge/New York: Cambridge University Press. Available at: https://doi.org/10.1017/CBO9781139165419

Medema, S.G., 2023. *Posnerian Rhapsody: The Role of the Coase Theorem in Economic Analysis of Law*. CHOPE Working Paper N° 2023-08.

Mirowski, P., and Plehwe, D., eds., 2009. *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective* [online]. Cambridge, MA: Harvard University Press. Available at: https://doi.org/10.4159/9780674054264

Moyn, S., 2023. *Symposia: Does LPE Need Theory?* [online]. Blog post. LPE Project, 9 April. Available at: https://lpeproject.org/blog/does-lpe-need-theory/

Pistor, K., 2019. *The Code of Capital: How the Law Creates Wealth and Inequality*. Princeton University Press.

Ptak, R., 2009. Neoliberalism in Germany. *In:* P. Mirowski and D. Plehwe, eds., *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective* [online]. Cambridge, MA: Harvard University Press, 98–138. Available at: https://doi.org/10.4159/9780674054264-004

Röpke, W., 1960. *A Humane Economy: The Social Framework of the Free Market. Vol. 1.* Chicago: Henry Regnery Co.

Rothbard, M., 2009. *Man, Economy, and State: A Treatise on Economic Principles.* Auburn: Ludwig von Mises Institute. (Originally published in 1962).

Samuels, W.J., 1971. Interrelations Between Legal and Economic Processes. *The Journal of Law and Economics* [online], 14(2), 435–50. Available at: https://doi.org/10.1086/466717

Scheuerman, W.E., 1999. *Carl Schmitt: The End of Law. Twentieth Century Political Thinkers.* Lanham, MD: Rowman & Littlefield.

Shue, H., 2021. *The Pivotal Generation: Why We Have a Moral Responsibility to Slow Climate Change Right Now* [online]. Princeton University Press. Available at: https://doi.org/10.1515/9780691226255

Simons, H., 1943. Postwar Economic Policy: Some Traditional Liberal Proposals. *The American Economic Review* [online], 33(1). Available at: https://www.jstor.org/stable/1819029

Sklar, M.J., 1989. *The Corporate Reconstruction of American Capitalism, 1890-1916: The Market, the Law, and Politics*. Reprint. Cambridge University Press.

Steffen, W., *et al.*, 2015. The Trajectory of the Anthropocene: The Great Acceleration. *The Anthropocene Review* [online], 2(1), 81–98. Available at: https://doi.org/10.1177/2053019614564785

Tribe, K., 1995. *Strategies of Economic Order: German Economic Discourse, 1750-1950. Ideas in Context* [online]. Cambridge University Press. Available at: https://doi.org/10.1017/CBO9780511551529

Wagner, R.E., 2017. *James M. Buchanan and Liberal Political Economy: A Rational Reconstruction* [online]. Lanham, MD: Lexington Books. Available at: https://doi.org/10.5040/9781666999013

Wood, E.M., 1992. *The Pristine Culture of Capitalism: A Historical Essay on Old Regimes and Modern States.* London: Verso Books.