Structure and Legitimation in Capitalism: Law, Power, and Justice in Market Society

Yochai Benkler

Professor of law at Harvard University. Email: benkler@law.harvard.edu

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ABSTRACT

Law structures social relations of production by allocating control over labor, knowledge, natural resources, and technology, as used for purposes of both subsistence and market-oriented production, as well coordination and cooperation in labor and investment processes, access to means of payment and credit, and the allocation of risk and uncertainty attendant to production. It also differentially constrains access to labor roles, training, and credit along lines of gender and race, leveraging gendered and racialized class relations for profit and reinforcing atavistic status subordination under a veil of juridical equality. Law in capitalism legitimates these relations through the social role of the legal profession as a distinct social formation within the professional and managerial class, one that is produced through training and practice-based habituation and asserts specialized knowledge acquired through this socialization process. The legal profession produces internal profession-wide acceptance of legal decisions by adhering to internal professional modes of reasoning that have recurred since the 17th century as the primary modes of legal argument and legitimation. It produces broad elite and public acceptance by communicating that acceptance as its members operate transversely in profit-seeking, political-military, and meaning-making social formations. The article ends with implications of this new institutional political economy and its relation to law in capitalism for the design and justification of a post-neoliberal regime.

Keywords: LEGITIMATION, JUSTICE, CAPITALISM, SOCIETY, capitalism

1.Introduction

By the beginning of the twenty-first century, the American professional and managerial class had adopted a certain view of markets and law. In this frame, markets are more-or-less natural outcomes of choices individuals make when left free to pursue their own plans armed with a set of basic rights of property and contract, enforced under a rule of law system of reliable procedural justice. Law, in turn, is or should be an autonomous field, operating on its own internal logic and methods as a check on politics. It protects individual and minority rights in the liberal version, maximizes efficiency in the neoliberal version, or imposes strict formalist methods in the reactionary-conservative version.

After the Great Recession and Occupy, some in the legal academy began to build a movement that focused on the role of law in structuring the economy. Diverse in methods and perspectives, the Law and Political Economy (LPE) movement appears to share two assumptions. The first is that "the economy is always already political in both its origins and its consequences" and 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 assumption, about the constitutive role of law in markets, revives the insights of 1920s Realists, particularly Robert Lee Hale and Morris Cohen. Much of the contemporary ferment in LPE theory focuses on the relation between LPE as a new movement and its predecessor movements, Legal Realism and CLS. The second assumption reflects a normative commitment to keep race and gender subordination firmly in focus in studying the role of law in structuring economic power and inequality.

This article builds on Yochai Benkler's work to provide a conception of capitalism and law in capitalism that does not suffer the limitations of unstated implicit models. The aim is to provide an explanatory framework that can explain how a range of different legal changes interacted with the basic dynamics of society to shape inequality, or distribute power, at a given historical conjuncture. Such a framework would allow us to see how different efforts of diverse scholars in the LPE network fit, or did not fit, together as part of a comprehensive programmatic agenda.

2. Capitalism: A New Institutional Political Economy

2.1. Defining Market Society

Capitalism, or market society, is a system in which: (a) most people live in households that depend on commodity exchange in markets to satisfy their basic needs and wants; (b) most organizers of production depend on commodity exchange in markets for access to labor, material and knowledge resources, and credit or finance to deal with time and uncertainty; and (c) the political military formations depend primarily on selling public debt or taxing market activity as commodity exchange in markets to satisfy their fiscal needs.

By "commodity exchange" we mean paying a price in a market transaction to someone whose relation to the buyer is defined as exchange among juridical equals bearing legal entitlements—property, contract—rather than through relations of kinship, religion, custom, or violence. What defines a society as "market society" (as opposed to a society with markets) is the conjunction of market dependence for subsistence, production, and protection as the dominant form of each. Market reach rather than market power is what makes a society a market society.

2.2. The Dynamics of Capitalism

Generalized markets are the combined effect of market dependence for subsistence and production: more-or-less everyone must acquire more-or-less everything through commodity exchange. This forces all workers to instrumentalize their own work, education, and daily efforts, and all organizers of production to increase their productivity continuously to stay abreast of competitors, or to increase their power to become price makers rather than takers.

Generalized markets therefore produce the historically unprecedented dynamics of capitalism, which combine:

Continuous intensification of productivity: The imperative to compete drives relentless innovation, efficiency improvements, and technological development.

Hidden exploitation, behind a veil of free exchange among juridical equals: The formal equality of market exchange masks the asymmetrical power relations and unequal access to resources that structure who gets what.

Alienation of social powers and relations: The ceaseless expansion of exchange-value for its own sake subjects human needs and capabilities, human relations, and the Earth to ever more extensive and intensive instrumental quantification.

The third element—market dependence for protection—binds the interests of the military and political formations in a society to those of the profit-reaping classes. Societies whose political military formations were able to expand their fiscal power beyond the extraction of geographically localized coercive forms and to expand them to transaction taxes and later income taxes, and on public debt obligations secured by those faster-growing income streams, were able to punch above their demographic weight in struggles over global hegemonic power.

2.3. The Role of Power and Rent-Seeking

Power seeking—pursuing the capacity to impose transactions and prices one wants on counterparties to produce a steady flow of rents—is the animating spirit of capitalism. It manifests as organized struggle over institutions, ideology, and technology. Among institutions, law has played a large role as a terrain of struggle over the institutionalization of market dependence for subsistence, production, and protection, and over the structure of patterns and terms of coordinated collective action.

This Schumpeterian-Veblenian insight about rent-seeking must be complemented by what W.E.B. Du Bois and the Trinidadian school understood: that racialization, racialized colonization and enslavement, and in contemporary terms, racialized class relations and racialized global unequal trade, have always been a critical pathway for power-seeking. In parallel work, historians of women in the industrial revolution showed that gendered work and hyper-exploitation were foundational to power seeking in capitalism from its earliest days.

3. Law as an Institutional Dimension of Capitalism

3.1. Law as a Structuring Force

Law plays a central role in structuring and representing social relations not as relations of coercion, religion, custom, or status obligation, but as relations of free exchange among juridical equals, distinguishing capitalism from all prior systems. Law structures social relations of production by allocating control over:

Labor, knowledge, natural resources, and technology, as used for purposes of both subsistence and market-oriented production

Coordination and cooperation in labor and investment processes

Access to means of payment and credit

The allocation of risk and uncertainty attendant to production

Law also differentially constrains access to labor roles, training, and credit along lines of gender and race, leveraging gendered and racialized class relations for profit and reinforcing atavistic status subordination under a veil of juridical equality.

3.2. The Legal Profession as a Social Formation

Law in capitalism legitimates these relations through the social role of the legal profession as a distinct social formation within the professional and managerial class, one that is produced through training and practice-based habituation and asserts specialized knowledge acquired through this socialization process.

The legal profession produces internal profession-wide acceptance of legal decisions by adhering to internal professional modes of reasoning that have recurred since the 17th century as the primary modes of legal argument and legitimation. It produces broad elite and public acceptance by communicating that acceptance as its members operate transversely in profit-seeking, political-military, and meaning-making social formations.

In market society, law and the legal profession continue to provide a balancing mechanism, structuring the asymmetries of power in social relations of production, usually in favor of the profit-reaping classes, while preventing meaningful democratization of governance of the economy.

4. Law and the Structure of Social Relations of Production

4.1. Historical Overview

Throughout the past three centuries, law developed the structures of capitalism through a series of power struggles, combining political and street struggles with struggles within the profession among competing conceptions. Through these it sought not only to structure asymmetric power in social relations of production along dimensions of class, gender, and race, but also to legitimate its institutional resolution: to cause the majority of the population to acquiesce in these resolutions.

4.2. Early Industrialization and the Gilded Age

For early industrialization, I provide a brief overview of how capitalists and firms leveraged asymmetric roles, alternatives, and socialized expectations in market and reproduction work to harness women workers as a latent reserve army of labor to fill newly exploitative roles that men, with better alternatives and different expectations, refused to enter.

For the Gilded Age, the analysis covers the role of property, contract, criminal, and credit law in forcing formerly enslaved workers in the south into the system of debt-peonage; and examines how a range of other laws produced the particularly exploitative structure of American industrial capitalism in the Midwest and northeast.

4.3. Neoliberalism

With respect to neoliberalism, the analysis describes how the interactions among racialized criminal enforcement and suppression of social welfare, minimum wages, employment law, immigration law, and financial deregulation squeezed the bottom of the income distribution and reproduced a racialized underclass after the Second Reconstruction. It then shows how labor law, trade law, deregulation, antitrust, and retirement and health insurance law combined to force the stagnation of wages for the middle classes. Finally, it explains how financial deregulation, corporate law, and other areas of law interacted to underwrite the escape of the 1%.

In each period, judges and scholars produced legitimating rationales and narratives for the new, mostly more extractive social relations of production, usually in conflict with opponents who produced counter-analyses.

5. The Modes of Legal Legitimation

5.1. The Professional Mode of Reasoning

The legal profession produces internal acceptance of legal decisions by adhering to internal professional modes of reasoning that have recurred since the 17th century as the primary modes of legal argument and legitimation. This mode of reasoning is characterized by:

A focus on procedural regularity and formal equality

The assertion of specialized knowledge acquired through socialization

The use of precedent and analogical reasoning

The construction of legal doctrine as autonomous from politics

5.2. The Social Role of Legitimation

The legal profession produces broad elite and public acceptance by communicating that acceptance as its members operate transversely in profit-seeking, political-military, and meaning-making social formations. This transversal operation means that lawyers, judges, and legal scholars serve as intermediaries between different social formations, translating legal reasoning into terms that are acceptable and persuasive across different domains.

Throughout the past three centuries, academics and judges have harnessed legal theory and transposed the broader emerging ideological trends of the professional and managerial class to legitimate and contest the newly emerging, often more exploitative relations.

6. Implications for a Post-Neoliberal Political Economy

6.1. Programmatic Pillars

The explanatory framework outlined above has important implications for current political practice. It allows us to see how diverse commitments and proposals offered by scholars and activists in and around LPE form a programmatic whole that responds to the dynamics outlined here. These include:

Active opposition to subordination along dimensions of race, gender, and immigration as a precondition to any effective transformation of market society.

Partial decommodification of basic needs and goods to escape the imperative of the market.

Strengthening labor and the role of workers in governance.

Expanding and deepening public provisioning and management of the economy, counteracted by means of broader popular accountability.

Bolstering cooperative production and other non-market production in at least parts of the economy.

Scholarship in the LPE network has provided programmatic implementation of each of these pillars of transformative law and politics.

6.2. Law and the Transformation of Capitalism

If we think that platforms and robots, ubiquitous sensors and algorithms do exert a real influence on the pattern of social relations that make up the economy, but we doubt that technology causes inequality by a "natural" process driven by its own intrinsic affordances and constraints interacting with markets, then we owe ourselves a clearer story than we have given to this point.

What this broad theoretical framework and history implies for current political practice is that law must be understood as a site of struggle over the pattern of social relations, rather than either a distraction or a source of legitimation. The question is not whether law structures capitalism, but how it structures it, in whose interests, and with what consequences for democracy, equality, and human flourishing.

7. Conclusion

This article has presented a new institutional political economy of capitalism that explains the distinctive dynamics that drive sustained productivity growth, recurring social dislocation, and persistent patterns of exploitation in modern market societies. It has analyzed the role of law in structuring social relations of production in capitalism and legitimating those structures so as to stabilize the asymmetric social relations they create.

Law structures social relations of production by allocating control over the key resources of production and by differentially constraining access to roles and opportunities along lines of race, gender, and class. Law in capitalism legitimates these relations through the social role of the legal profession as a distinct social formation within the professional and managerial class.

The implications of this framework for the design and justification of a post-neoliberal regime are profound. If law is central to the creation and maintenance of structural inequalities, then law can also be central to their transformation. The LPE movement's commitment to bringing political economy to the center of legal debates, and to working reparatively to democratize the political economy, provides a foundation for building a more just, equitable, and democratic market society.

References

1. Benkler, Y. (2025). Structure and legitimation in capitalism: Law, power, and justice in market society. Law and Contemporary Problems, *88*(1), 1-47.

2. Benkler, Y. (2023). The role of law in capitalism. LPE Project Blog. https://lpeproject.org/blog/the-role-of-law-in-capitalism/
3. Benkler, Y. (2020). The role of technology in political economy: Parts 1-3. LPE Project Blog. https://lpeproject.org/blog/
4. Benkler, Y. (2006). The wealth of networks: How social production transforms markets and freedom. Yale University Press.
5. Britton-Purdy, J., & Deystone, J. (2025). Foreword. Law and Contemporary Problems, *88*(1), i-iii.
6. Hale, R. L. (1923). Coercion and distribution in a supposedly non-coercive state. Political Science Quarterly, *38*(3), 470-494.
7. Cohen, M. R. (1927). Property and sovereignty. Cornell Law Quarterly, *13*(1), 8-30.
8. LPE Project. (2026). What is LPE? An ALPE lightning round. https://lpeproject.org/blog/what-is-lpe-an-alpe-lightning-round/