

Law and the neoliberal vision: financial property, pension privatisation and the ownership society

PADDY IRELAND

Kent University

1 Introduction

When the financial crisis first broke, there was much speculation about whether it would prove a historic watershed which marked the end of the neoliberal era. It is, of course, still early days but there are, as yet, few signs that it will. On the contrary, the great majority of policymakers clearly hope that by supplementing the unprecedented fiscal and monetary stimuli which have already been administered with a dose of spending cuts, mandated austerity and “regulatory reform”, things will return (more or less) to normal, enabling a more sober and sustainable version of the old regime to emerge.¹ The result is that at the moment the remnants of social democracy seem more likely to fall victim to the crisis than neoliberalism. Even within the business community, however, there are doubts about how far it will be possible to resume business as usual. Richard Lambert, outgoing Director General of the Confederation of British Industry, for example, recently suggested that “the public and political response to what’s happened will . . . have troubling consequences”, criticising everything from short-termism, executive pay and business culture to shareholder value, hostile takeovers and foreign shareholders. Endorsing Lambert’s comments, John Plender of the *Financial Times* argued that “something radical ha[d] to be done” if business was “not to suffer from a permanent legitimacy deficit”, while Roger Bootle of Capital Economics thought there was “a real crisis of capitalism about all this”.² These hints that serious problems might be imminent have been echoed on the left. With the “conventional mantras” about the ability of “free markets and free trade, private property and personal responsibility, and low taxes and minimalist state intervention in

1 The remarkable degree of establishment consensus about this has been reflected in the quiet but growing convergence around a regime of what Susan Watkins has called “regulatory liberalism” in which the main components of the old regime – unfettered capital movements, free trade, “small” states, and private ownership (not least of banks) – remain firmly intact: S Watkins, “Shifting sands” (Jan–Feb 2010) 61 *New Left Review* 5, p. 13. She describes the crisis as having been “eerily non-agonistic”, p. 20.

2 R Lambert, “Does business have a role as a ‘force for good’ in creating a more sustainable economic, social and environmental future?”, RSA/Sky Sustainable Business Lecture Series, 30 March 2010; J Plender, “To avoid a backlash, executives must act on pay”, *Financial Times*, 2 April 2010; R Bootle, “Executive pay: what the experts say”, *The Guardian*, 31 March 2010, www.guardian.co.uk/business/2010/mar31/executive-pay-what-the-experts-say. This nervousness perhaps explains the rather hysterical and paranoid business reaction to Vince Cable’s party conference speech in 2010.

social provision” to create a world of plenty “sound[ing] increasingly hollow”, David Harvey has argued, “a crisis of legitimacy looms”.³

Certainly, social unrest is growing, both in the UK and elsewhere, and the public mood is likely to darken further as public spending cuts and the “age of austerity” begin to bite.⁴ Equally importantly, perhaps, it is already clear that the neoliberal vision of a world of inclusive “ownership societies” – populated by self-reliant “worker capitalists” who own their own homes and, through pension funds, modest amounts of financial property – is unravelling. This is potentially very significant for, in places like the UK, this vision has not only animated and influenced much recent policy-making, including (as we shall see) the growing focus on investor protection, but provided an important source of meaning, motivation and hope in people’s lives and helped to legitimate many of the changes which have occurred in recent decades. If John Prescott’s claim that “we’re all middle class now” seemed a tad premature in 1997, in the decade following, more and more people undoubtedly became “petty bourgeois . . . by imaginative orientation if not by economic fact”.⁵ Will these imaginings survive the economic facts which are likely to emerge in the coming years and, if they don’t, what will the consequences be?

Using pension privatisation as a vehicle, this article examines the impact of the financial crisis on the neoliberal vision. It argues that the vision is underlain by an economically determinist account of economic and social development which has had a major impact not only on economic and social policy but on legal policy and thinking about law. This economic determinism, it suggests, is rooted in mistaken ideas about the nature of markets and property, and financial property in particular; ideas which underpin equally misguided conceptions of self-reliance which deny our growing interdependence. The article moves on to explore the nature of neoliberalism and the gulf between neoliberal ideology and neoliberal practice, before concluding by arguing that the crisis represents an opportunity to re-enrich legal scholarship by cleansing it of the debilitating economic determinism with which so much of it has become infected and engaging in a radical rethink of what regulatory reform should entail.

2 The rise of pension privatisation

Since the 1980s there has been a concerted move away from traditional, pay-as-you-go (PAYG), state-administered pension systems in which tax revenues are used to pay pension benefits, towards privatised systems in which privately managed pension funds invest savings made by individuals during their working lives in financial property – in intangible rights to receive future revenues, such as government stock, corporate shares and corporate bonds. The idea is that by the time of their retirement, the old will directly or indirectly own (or have temporary, time-limited, beneficial claims over) sufficient revenue rights to live off or to fund the purchase of an annuity. They will, in other words, be able to become pensioner *rentiers*.

There are important differences between the two systems. Firstly, whereas in traditional public, state-administered systems benefits are defined in advance, in privatised systems, as “defined contribution” schemes replace “defined benefit” schemes, benefits increasingly depend on the returns accruing to the financial property held in individual accounts. Secondly, in traditional PAYG systems, risk is pooled and collectivised, with the result that

3 D Harvey, *The Enigma of Capital* (London: Verso 2010), p. 217.

4 At the time of writing, there have already been outbursts of public anger in places such as Greece, Ireland, Spain and France, as well as in the UK, where university tuition fees have generated furious protests.

5 R Unger, *The Left Alternative* (London: Verso 2002), p. 47. Shortly before the 1997 election, John Prescott famously announced that “we’re all middle class now”.

PAYG systems tend to be redistributive between both classes and genders, and within and between generations. By contrast, in privatised systems, where pension benefits are tied to individual contributions, there is little or no redistribution within or between classes or genders; risk and reward are individualised. Unlike the financing of traditional PAYG systems, however, the financing of private pensions is said to be “fully funded”, meaning that the fund from which the pensions are drawn is on hand when retirement commences, derived as it is from earlier saving. It is therefore suggested that in privatised systems pensioners do not impose a burden on the younger generation but provide *for themselves* in retirement using the returns accruing to (and/or capital value of) their financial property.⁶

The move towards pension privatisation began in Chile under Pinochet in the late 1970s, led by the then Minister of Labour and Social Security, Jose Pinera.⁷ The existing public PAYG system was replaced by a fully funded privatised system in which the savings of workers are invested in financial property held in personal retirement accounts administered by private, profit-oriented enterprises. Under the scheme, existing employees are compelled to invest 10 per cent of their wages, with the option of investing up to another 10 per cent voluntarily. They are allowed to choose between a range of investment institutions offering different mixes of bonds, equities, home and foreign investments, giving them some say in how (risky) their funds are invested. Retirement age is a matter for the worker, the size of whose accumulated fund determines his or her benefits. There is a state top-up to the individual savings accounts of those who have worked for at least 20 years but failed to accumulate sufficient capital to buy a minimum annuity; a low-level welfare pension, unrelated to years worked, is available to those in extreme poverty.⁸

The reforms implemented in Chile paved the way for pension privatisation elsewhere. In the UK, for example, the Thatcher government began to promote pension privatisation in the 1980s, increasing the state pension in line with prices rather than gross earnings, causing its relative value to fall significantly.⁹ At the same time, as previously state-owned industries were privatised, the government began to encourage people to engage in direct or indirect ownership of financial property, introducing a variety of tax-favoured forms of saving and investment, a process continued by New Labour.¹⁰ Crucially, the 1980s also saw various international agencies start to advocate shifting the management of social risk away from the state towards the individual. The International Monetary Fund (IMF) announced that it was no longer realistic to assume that the real value of state pensions could be maintained,¹¹ while the Organisation for Economic Co-operation and Development (OECD) began to dispense advice on how pension provision might be incrementally

6 See M Orenstein, *Privatizing Pensions* (Princeton: Princeton University Press 2008), pp. 179–93.

7 Pinera, a Chicago-trained economist is the brother of the current Chilean President (and dollar billionaire), Sebastian Pinera.

8 See A F Yazigi (ed.), *The Chilean Pension System* (Santiago: SAFP 2003). The contributions made by workers are tax deductible and the returns on the investments untaxed until withdrawal on retirement. On retirement, workers can choose to draw on their accumulated fund each month or use it to purchase an annuity from a life insurance company.

9 The state pension fell in value from 20% to less than 15% of average earnings between the late 1970s and 2001: O Atansio and S Rohwedder, “Pension wealth and household saving: evidence from pension reforms in the UK”, *IFS Working Paper* WP01/21 (2001), p. 5. The coalition government recently announced that it intends to restore the earnings link for the basic state pension from April 2011, but also intends to raise the retirement age.

10 See J Banks and S Tanner, *Household Saving in the UK* (London: IFS 1999), pp. 89–90; P Saunders and C Harris, *Privatization and Popular Capitalism* (Buckingham: Open University Press 1994); P Ireland, “Shareholder primacy and the distribution of wealth” (2005) 68 *Modern Law Review* 49.

11 See D Henwood (December 1994) *Left Business Observer*, issue 67. The IMF was, by then, using loan conditionality to impose “structural reforms” on indebted countries.

privatised.¹² The seminal moment came in 1994 with the publication by the World Bank of *Averting the Old Age Crisis: Policies to protect the old and promote growth*, a policy report which proposed a multi-pillar approach to pension provision. Mandatory, defined contribution savings schemes in which workers' savings are invested by privately managed financial institutions provide the main pillar. Existing defined benefit, public pensions provide the second pillar, though offering only a safety net. Voluntary savings and annuity schemes provide a third pillar for those with the means and inclination to save more.¹³ Promoted by the World Bank and other international agencies, particularly in South America and post-Communist Eastern Europe, these ideas steadily spread among policymakers and academics during the course of the 1990s.¹⁴ Although the campaign met with opposition (led by Joseph Stiglitz) from within the World Bank and this had some impact on the advice offered, it was "mostly rebuffed by the pension reform community within the Bank".¹⁵

3 The economic case for pension privatisation

NEOLIBERALISM AND THE RATIONALITY OF THE MARKET

Why has the idea of privatising pensions attracted so much support? As the title of the World Bank report suggests, many believe that pension privatisation is the only way to defuse the "demographic time bomb" confronting state systems. Indeed, by the time it appeared, greater longevity was already being portrayed as a threat rather than as a cause for celebration. The report also, however, put a positive case for pension privatisation rooted in a specifically neoliberal vision of economic, social and individual development.

This case was composed of two strands, one economic and one ethical. The economic strand, which was highlighted by the emphasis on the "and" in the title of the World Bank report, centres on the claim that traditional PAYG pension systems have deleterious macro-economic effects, acting as a drag on growth, demanding higher rates of tax, inhibiting savings and investment, adding to labour costs and encouraging capital flight. By contrast, privatised systems are said to foster growth by encouraging saving and investment, reducing the cost of capital to business, stimulating the development of capital markets and promoting the efficient allocation of resources. If invested in the private sector, argues Estelle James, leader of the research team that produced the report, mandatory pension funds are likely eventually "to dominate the ownership of financial assets that represent claims on the economy's real assets" and this, she suggests, will tighten the stock market disciplines to which corporate managers are subject. Worker-investors, interested only in

12 See R Holzmann, *Reforming Public Pensions* (Washington: OECD 1988), arguing that "what was only a couple of decades ago considered as a central achievement of the welfare state is now being evaluated differently".

13 World Bank, *Averting the Old Age Crisis: Policies to protect the old and promote growth* (Oxford: World Bank/OUP 1994). It is not insignificant that it was only after the collapse of Eastern European Communism that the assault on public pensions began in earnest. Just as the rise of public pension provision was prompted in part by the desire to reduce support for radical working-class social movements, the growing weakness of organised labour and elimination of the communist threat smoothed the way for its erosion.

14 See R Holzmann, "Reforming old-age pension systems in central and eastern European countries in transition" (December 1993) 7 *Journal of Economics*, Supplement 1, 191–218; and Orenstein, *Privatizing Pensions*, n. 6 above, ch. 4. When New Labour came to power in 1997, Jose Pinera, by now one of pension privatisation's leading international advocates, was invited to meet the Select Committee on Social Security by Frank Field, an admirer of the emphasis private pensions put on personal responsibility: See B Jamieson, "UK's Frank Field invites Jose Pinera", *Sunday Telegraph*, 11 May 1997.

15 Orenstein, *Privatizing Pensions*, n. 6 above, p. 81. For a discussion of the internal World Bank debates, see *ibid.* pp. 80–4. See also P Orszag and J Stiglitz, "Rethinking pension reform: ten myths about social security systems" in R Holzmann and J Stiglitz (eds), *New Ideas about Old Age Security: Towards sustainable pension systems in the 21st century* (Washington DC: World Bank 2001).

maximising returns and minimising risk, will, through their institutional representatives, be able to monitor corporate performance and insist that efficiency and “shareholder value” are maximised.¹⁶

This economic case is rooted in the neoliberal theories of economic and social development that rose to prominence in the 1980s and which have exerted enormous influence not only on policy-making but on the trajectory of legal thought and scholarship. The key supposition of these theories is that free markets know best; that private, contractual economic ordering and the “unregulated” forces of supply and demand serve to maximise not only individual freedom but efficiency, growth, wealth and welfare.¹⁷ Particular and specific emphasis is laid on the creation of open financial markets which enable capital to move freely around the world – the so-called “efficient capital markets hypothesis”. These theories are strident in their assertion of the existence of naturally functioning and naturally efficient markets.¹⁸ Indeed, it is belief in the existence of a transhistorical, beneficent, market-based, economic rationality – a rationality which tends to be depicted as not merely politically neutral but apolitical – that underlies the concept of “the market” as an abstract, singular phenomenon. If the technical, legal, political and cultural barriers inhibiting the operation of this rationality were removed, the argument runs, it would operate for the benefit of all.

These theories are underlain by a belief in the (potential) autonomy of “the market” and “the economic” from the legal and political, a belief reflected in the idea that states (spatially separate political powers) “intervene in” and/or “regulate” markets (spatially separate economic spheres).¹⁹ As such they are premised on a naturalisation of markets and property rights; on an assumption that they somehow pre-exist law and regulation. Lawyers, of course, are, or should be, aware that this is not the case; that property and markets are legal, political and social constructs – the products as well as the objects of regulation; and that, as a result, not only is the goal of “deregulation” absurd,²⁰ the dynamics and rationalities of particular markets are themselves inevitably political and legal products which vary according to the legal rights–obligations–regulatory structures that constitute them.²¹ This is especially true of international financial markets which exist under the authority and by permission of the state, and are conducted on whatever terms states choose to allow.²² Unaware of – or choosing to ignore – this, neoliberals purport to seek a

16 E James (1998) “New systems for old age security” (August 1998) 13(2) *World Bank Research Observer* 5–8, reprinted in S Ringen and P de Jong, *Fighting Poverty: Caring for parents, children, the elderly and health* (Farnham: Ashgate 1999); and World Bank, *Averting*, n. 13 above, pp. 208–16. Pension privatisation is thus seen as desirable in the developing as well as the developed world. Indeed, until recently, Chile was regularly held out as a role model whose privatisation programme had “deepened the nation’s capital market . . . stimulated economic growth” and helped to generate the high growth rates achieved from the mid-1980s to mid-1990s: M Skousen, *EconoPower: How a generation of economists is changing the world* (Hoboken: Wiley & Sons 2008), ch. 5. The slowdown which followed was portrayed by the system’s supporters as an aberration, a product of the government’s “erroneous response” to the Asian crisis of 1997: J Pinera, “Retiring in Chile”, *New York Times*, 1 December 2004.

17 See D Harvey, *A Brief History of Neoliberalism* (Oxford: OUP 2005). The Chicago wing of neoliberalism emphasises the efficiency benefits of markets; the Austrian wing their freedom-enhancing capacities.

18 They are said to be rooted in human nature and the natural propensity of self-interested human beings “to truck, barter and exchange” identified by Adam Smith: *Wealth of Nations* vol. 1, R H Campbell, A S Skinner and W B Todd (eds) (Oxford: OUP [1776] 1976), p. 25.

19 See E Meiksins Wood, *Democracy against Capitalism* (Cambridge: CUP 1995).

20 See D Campbell, “The end of Posnerian law and economics” (2010) 73 *Modern Law Review* 305, p. 326.

21 See P Ireland, “Property, private government and the myth of deregulation” in S Worthington (ed.), *Commercial Law and Commercial Practice* (Oxford: Hart 2003).

22 See S Strange, *Casino Capitalism* (Oxford: Blackwell 1986), p. 29.

“depoliticisation of economic life” and the establishment of market mechanisms in as many spheres of social activity as possible.²³

This hostility towards (certain sorts of) political intervention in the market elides into a more general hostility towards the state and collectivism,²⁴ with states commonly being depicted as ineffective, predatory collections of self-seeking politicians and bureaucrats and as vehicles for special-interest groups. Indeed, as doubts grow about their powers and capacities in a “globalised” world, many now see states as “at best as an anachronism and at worst as an obstacle to human progress”.²⁵ While this scepticism was conveniently forgotten when the crisis broke,²⁶ it is rapidly re-surfacing as governments seek to implement and justify spending cuts. Neoliberal hostility towards the state also finds expression in its uncomfortable and ambivalent relationship with democracy. Notwithstanding the emphasis they place on the importance of individual choice and consent, for neoliberals there are few more serious threats than democracy. Feeling unable openly to oppose it in the same way as their nineteenth-century counterparts,²⁷ however, contemporary neoliberals have tried instead to immunise the economy and the market from democratic control. Hence the growing use (associated with the shift from “government” to “governance”) of “experts” and independent agencies,²⁸ and the emergence of a “new constitutionalism” which limits the power of states by granting quasi-constitutional protection to property interests.²⁹ It is not insignificant, perhaps, that the first country to engage in thoroughgoing pension privatisation, Chile, was a US-backed dictatorship, nor that one World Bank study concluded that one of the “most important . . . negative lessons” of pension reform (in Argentina) was that “the democratic process” tended to “dilute” reform programmes.³⁰

DICTATORSHIP OF NO ALTERNATIVES

These ideas are illustrative of the neoliberal tendency to naturalise not only the market but a very particular model of capitalism. If the collapse of communism “seemed to confirm . . . that capitalism is the natural condition of humanity”,³¹ for many neoliberals the relative success of Anglo-Saxon models of capitalism in the 1990s confirmed that the socially democratic capitalisms of continental Europe were also being overtaken by history. With their market-inhibiting economic and social arrangements, the argument runs, these capitalisms are economically inferior. Many on the left drew a similar conclusion, “differ[ing] from conservative and neo-conservative critics only in deriving no pleasure

23 See M Boyco, A Shleifer and R Vishny, *Privatising Russia* (Cambridge MA: MIT Press 1997), pp. vii, 10–11. This underlies the neoliberal desire to turn as many “things” as possible into objects of private property (privatisation) capable of being transacted in markets.

24 Non-market mechanisms and institutions, like state bureaucracies, tend to be depicted as artificial, man-made, freedom-inhibiting, tendentially inefficient, market-substitutes to be deployed only in situations of “market failure”.

25 H-J Chang, *Globalisation, Economic Development and the Role of the State* (London: Zed Books 2003), p. 1.

26 See, for example, Richard Posner’s sudden and extraordinary conversion to the merits of state intervention: *A Failure of Capitalism* (Cambridge MA: Harvard University Press 2009); and Campbell, “The end”, n. 20 above.

27 On nineteenth-century liberal attitudes to democracy, see A Arblaster, *The Rise and Decline of Western Liberalism* (Oxford: Blackwell 1984), pp. 75–9, 264–83.

28 On this, see B Jessop, *The Future of the Capitalist State* (Cambridge: Polity 2002).

29 The term the “new constitutionalism” was first coined by Stephen Gill. It is discussed later in this paper.

30 D Vittas, “The Argentine pension reform and its relevance for Eastern Europe”, *World Bank Policy Research Working Paper* 1819 (Washington DC: World Bank 1997), pp. 8–9.

31 E Meiksins Wood, *The Origin of Capitalism: A longer view* (London: Verso 2002), p. 1.

from it”.³² From this perspective, the gradual evisceration of European social democracy and triumph of a neoliberal, stock- and free-market-based capitalism is more or less inevitable, a product of inexorable, transhistorical, economic laws. As Roberto Unger says, in this seeming “dictatorship of no alternatives”, progressives have been reduced to trying to preserve the compensatory redistributions of the welfare state and to “humanise the inevitable”.³³ After the deluge, of course, even this modest project is collapsing.

As this suggests, for neoliberals there is at work a process of functional evolution in which “the market” acts as the mechanism of selection – a process which is thought to have accelerated with the growth of increasingly open, global markets.³⁴ This idea is, of course, most easily applied to productive enterprises and, sure enough, in the 1990s, when the capitalisms of the US and the UK were out-performing their rivals, it came widely to be believed that this was in part because their shareholder-oriented, stock-market-centred corporations were economically superior to their more stakeholder-friendly rivals in places like Germany and Japan, leading some to suggest that we had reached “the end of history for corporate law”.³⁵ For neoliberals, however, globalisation has also increased the competition between the legal arrangements of different societies, amplifying the “evolutionary trend towards economically more efficient legal rules”. From this perspective, states are engaged in regulatory competition to produce “efficient law” and law as a whole can be “understood as the outcome of free competition among alternative, largely heterogeneous suppliers of legal authority”, hence claims that law not only “determines [but] is determined by economic efficiency”.³⁶ The concept of efficiency has thus come to be used not only to provide “an economic commentary on the law [but] . . . an explanation of [it]”.³⁷ Here too “old Europe”, hindered by its “legal origins” and insufficiently market- and investor-friendly civil law systems, is thought to fall short.³⁸

LAW AND POLICY IN AN ECONOMICALLY DETERMINED WORLD

In recent decades, this economically determinist, Darwinian paradigm of development – with its curious resemblance to vulgar, base-superstructure versions of Marxism³⁹ – has greatly influenced policymaking. Armed with tools which, they believe, make it possible to not only plot how far different bodies of “real world law” deviate from “the efficient model” but to offer “practical directions for making laws best”,⁴⁰ and firm in the belief that they are working with the grain of history, neoliberal policymakers in international agencies have displayed boundless self-confidence in dispensing policy advice to transitional

32 T Judt, “Europe vs America” (February 2005) 52(2) *London Review of Books* 37.

33 Unger, *The Left Alternative*, n. 5 above, pp. 1–11.

34 See M Roe, “Chaos and evolution in law and economics” (1996) 109 *Harvard Law Review* 641.

35 H Hansmann and R Kraakman, “The end of history for corporate law” (2001) 89 *Georgetown Law Journal* 439. In one of his (many) moments of irrational exuberance, Alan Greenspan went even further in 1998, arguing that American economic performance was so impressive, it was “possible we have moved *beyond* history”: remarks before the Joint Economic Committee of Congress, 10 June 1998.

36 See U Mattei and F Pulletti, “A competitive model of legal rules” in A Breton, G Galeotti, P Salmon and R Wintrobe, *The Competitive State* (New York: Springer 1991); and U Mattei and F Calfagi, *New Palgrave Dictionary of Economics and Law* vol. I (Basingstoke: Palgrave Macmillan 1998), p. 346, at p. 351; see also Roe, “Chaos”, n. 34 above, p. 642.

37 U Mattei, *Comparative Law and Economics* (Ann Arbor: University of Michigan Press 1997), p. xiii; see also R Coooter and T Ulen, *Law and Economics* 2nd edn (Reading: Addison-Wesley 1996), preface.

38 See E Glaeser and A Shleifer, “Legal origins” (2002) 107 *Quarterly Journal of Economics* 1193–229.

39 See P Ireland, “History, critical legal studies and the mysterious disappearance of capitalism” (2002) 65 *Modern Law Review* 120.

40 See Mattei and Calfagi, *New Palgrave*, n. 36 above, p. 346.

countries.⁴¹ Neoliberal economic determinism has also greatly influenced legal scholarship, not least in fuelling a tendency to treat certain areas of law as essentially superstructural, as mere reflections or facilitators of the economic logic of “the market”. This tendency has found its most vivid expression in the work of the law-and-economics movement, particularly the Posnerian variety, much of which is underlain by a belief in the transhistorical, purely economic, efficiency-maximising rationality of the “deregulated” market and in a “classical evolutionary paradigm” of legal development.⁴² It is also visible in claims about “legal convergence” and the benefits of importing and imitating rules, especially in areas of law designed to facilitate trade: “legal transplants” have come to be seen as a way of accelerating evolution towards better (“more efficient”) legal rules.⁴³ Indeed, even those who do not share the intellectual presuppositions and political preferences of neoliberalism often find themselves operating *within* rather than *against* the economically determinist analytical framework it provides. As Unger says, erstwhile progressives have become the “chastened votaries of their neoliberal opponents”.⁴⁴ Many of those who favour stakeholder models of the corporation, for example, attempt to defend them on orthodox “efficiency” grounds rather than on the varied and complex grounds of individual and social well-being, justice, human dignity and fulfilment, and productive efficiency more broadly defined. Indeed, as Ronald Dore observes, there is now a tendency to view models of the corporation which do not conform to neoliberal precepts as not merely different but “abnormal”, hence the emergence of a “US/UK normative–Japan/Germany deviant” mindset.⁴⁵ Within this framework, arrangements which are deemed to conform to neoliberal norms are in no need of explanation: they are assumed to be the products of natural (market) selection and the evolutionary trend towards efficiency. It is the survival of arrangements and institutions which are deemed “abnormal” and “inefficient” that needs explaining. In this context, concepts such as “path dependence” have been deployed to explain the survival of “sub-optimal” arrangements. Sustained deviations from the hallowed path of efficiency, the argument runs, are attributable to historical quirks and accidents, to entrenched cultural, political and institutional differences. Moreover, the resulting less-than-efficient arrangements can sometimes become “locked in”.⁴⁶ It is also when accounting for the less-than-efficient that *power*, which is otherwise strangely absent from neoliberal explanatory frameworks, makes a belated appearance, albeit in a marginal role at the side of the stage. Thus, we have to acknowledge the possibility that “powerful interest groups” – ranging from firms, to practising lawyers, to politicians and regulators, to academics – will try to “impede the

41 This advice is, of course, associated with the so-called “Washington Consensus”.

42 See Roe, “Chaos”, n. 34 above.

43 See A Ogus, “Competition between national legal systems: a contribution of economic analysis to comparative law” (1999) 48 *International and Comparative Law Quarterly* 405, p. 411.

44 Unger, *The Left Alternative*, n. 5 above, p. 7.

45 R Dore, “Deviant or different? Corporate governance in Japan and Germany” (2005) 13 *Corporate Governance* 437.

46 Concepts such as path dependence – the idea that “history matters” – ostensibly soften the economic determinism and reductionism of neoliberal theories. In many ways, however, they simply reinforce them by offering an explanation for the contrary evidence that seems to be thrown up by empirical reality. In this context, so-called comparative law and economists have developed a notion of “comparative efficiency”, drawing on the work of institutional economists like Oliver Williamson to argue that what is legally efficient may vary according to the institutional context in which rules operate. A particular legal arrangement may not be the most efficient one in a theoretical world, but it may well be the best that can be achieved in light of the existing formal and informal constraints. See U Mattei and A Monti, “Comparative law and economics: borrowing and resistance” (2001) 1 *Global Jurist Frontiers* 5, p. 7; and U Mattei, *Comparative Law and Economics* (Ann Arbor: University of Michigan Press 1997).

convergence of legal principles relating to homogeneous products” for personal gain. They will try to maintain barriers to competition (like restrictive choice of law rules), to “imped[e] evolution towards economically justifiable common principles” and to “resist cost-reducing reforms to the law” in “rent-seeking” attempts to secure income and wealth beyond that they would receive in a competitive market.⁴⁷

Many elements of this analytical framework have figured in the debates surrounding pension reform. Thus pension privatisation is regularly presented as the economically rational, most “efficient” way forward, and regimes that cling to old PAYG systems warned that they are putting themselves at a competitive disadvantage. Thus, the progress made by the multi-pillar system proposed by the World Bank, Estelle James tells us, is in large part attributable to “economic forces”:

with economic growth slowing down in many countries and financial markets opening up globally, it has become increasingly important to raise productivity through improved incentives in the labor market and through the accumulation of capital which is then allocated to its most efficient uses . . .

Ideas about rent-seeking and path dependence have also been deployed, with the advocates of privatisation frequently lamenting the self-interested and economically irrational, “political” opposition to privatised systems. Thus, the extent to which individual countries have maximised the privatised pillar is said to have been significantly shaped by “political” factors such as the “strength of their social security bureaucrats, pensioner organisations and labor unions”.⁴⁸

4 The ethical case for pension privatisation: towards a world of neoliberal individuals

The case for pension privatisation rests not only on claims about its economic benefits, however, but on claims about its ethical virtues. By fostering the development of a financial property-owning “equity culture”,⁴⁹ its advocates argue, pension privatisation discourages dependence and encourages individual self-reliance and responsibility, expanding the realm of freedom and choice and linking benefits to contributions and work to reward. In doing so, it helps to build ownership societies composed of autonomous, hard-working, self-sufficient, intensively possessive, property-owning, neoliberal individuals.⁵⁰ Thus, Pinera describes his ideas for social security reform as “part of an overall vision of a free market and a free society” whose goal is to enable “the whole working population [to] accumulate wealth and become shareholder-capitalists”. The intention, argues Estelle James, is to “inculcat[e] the ethos of personal responsibility and [to] mak[e] each worker a little capitalist . . .”⁵¹ From this perspective, pension privatisation is a development of potentially historic importance, part of a transformative “worker–capitalist revolution” which has to

47 Ogus, “Competition”, n. 43 above, p. 411.

48 James, “New systems”, n. 16 above, pp. 9, 29–30.

49 See J Poterba, “The rise of the ‘equity culture’: US stockownership patterns, 1989–1998” (2001), <http://econ-www.mit.edu/faculty/poterba/files/aca2001.pdf>.

50 Drawing on C B MacPherson, David Harvey argues that the 1990s saw a “huge shift in mental conceptions of the world such that an even more intensive possessive individualism arose . . .”: Harvey, *The Enigma*, n. 3 above, p. 132.

51 J Pinera, “The bull by the horns: the battle for Chile’s social security reform” (2009), www.hacer.org/pdf/Pinera04.pdf; James, “New systems”, n. 16 above, p. 9. “It would be naïve”, James writes, “to ignore the fact that the partial replacement of a publicly managed program by privately managed funds . . . has political and ideological implications”, for “it changes the balance of power in society, taking influence and jobs away from bureaucrats and others who control the public programs and shifting them to private entrepreneurs.”

overcome “philosophical” obstacles to engineer a “paradigm shift” in which collectivist ideas are abandoned and replaced by ideas of individual responsibility.⁵²

FROM “SHARE-OWNING DEMOCRACIES” TO “OWNERSHIP SOCIETIES”

In the UK, the idea that pension privatisation would help to create a new world of ownership societies and neoliberal individuals first surfaced in the rhetoric of Margaret Thatcher’s government. The right-to-buy scheme introduced in 1980 contributed to a rise in home ownership, and, following the privatisation of previously state-owned industries and demutualisation of building societies, there was a significant increase in direct share ownership.⁵³ By 1990 more than one in five households owned shares directly, compared to less than one in ten a decade earlier. Indirect financial property ownership also increased, encouraged by the running down of the state pension and the introduction of various inducements to private investment, leading the Conservative government to boast that it was “taking capitalism to the people”.⁵⁴ The goal, claimed Nigel Lawson, was to encourage the creation of “an ever-widening share-owning democracy”. This was reiterated by John Moore, Financial Secretary to the Treasury from 1983–86, when he argued that privatisation not only brought productive benefits but was capable of “transforming public attitudes towards economic responsibility and the concept of private property”. It was “an educational process” through which people could grasp “the fundamental beliefs and values of free enterprise”.⁵⁵ With its “unrivalled power to teach the responsibilities and rewards of a free society”, privatisation was depicted in terms of moral regeneration.⁵⁶

With others following the British vanguard, by the turn of the century there had been significant increases in stock market participation and financial property ownership in many parts of the world.⁵⁷ In the US, where public assets were sold off and private retirement saving encouraged, 30 million Americans became stockholders for the first time between 1989–99 and the number owning corporate stock, directly or indirectly, increased by nearly 60 per cent.⁵⁸ In similar vein, by the turn of the millennium, 17.3 per cent of households in France, Germany, Italy, the Netherlands and the UK were holding stocks directly. When indirect ownership was taken into account, the overall stock market participation rate of households rose to nearly 50 per cent in the UK, 33 per cent in the Netherlands, 23 per cent in France and 20 per cent in Germany.⁵⁹ By the time Pinera met George W Bush in 1997, he was portraying pension privatisation as a “crucial element of an ownership society”. Embracing this idea, in his second inaugural speech Bush argued that to enable “citizens [to] find the dignity and security of economic independence” and to become “agents of [their] own destiny”, he would “widen the ownership of homes and businesses, retirement savings

52 Skousen, *EconoPower*, n. 16 above, ch. 5; Pinera, “The bull”, n. 51 above.

53 See T Clarke, “The political economy of the UK privatization programme” in T Clarke and C Pitelis (eds), *The Political Economy of Privatization* (London: Routledge 1993), p. 205.

54 J Moore, “British privatization – taking capitalism to the people” (February 1992) *Harvard Business Review* 115; See Ireland, “Shareholder primacy”, n. 10 above.

55 Moore, “British privatization”, n. 54 above, p. 115.

56 “Economics are the method”, Thatcher argued, but “the object is to change the soul”: quoted in J Gray, “Thatcher, Thatcher, Thatcher” (April 2010) 32 *London Review of Books* 19–21.

57 See L Guiso, M Haliassos and T Japelli, “Stockholding: a European comparison” in L Guiso, M Haliassos and T Jappelli (eds), *Stockholding in Europe* (Basingstoke: Palgrave Macmillan 2003), p. 201.

58 The development of defined contribution Individual Retirement Accounts (IRAs) and 401k plans were central to this development: see Investment Company Institute, *Equity and Bond Ownership in America* (Washington: ICI 2008); J M Poterba, “Stock market wealth and consumption” (2000) 14 *Journal of Economic Perspectives* 99.

59 See Guiso et al., “Stockholding”, n. 57 above. British households showed the highest rate of direct ownership at 27.9%.

and health insurance”.⁶⁰ It was also around this time that the ideas of “financial literacy” and “financial education” began to rise to prominence. In 2003, the OECD established an International Gateway for Financial Education, while the Financial Services Authority (FSA) launched its national strategy on financial capability. In a world in which governments are “scal[ing] back the benefits of state-supported social security programmes” and “an increasing number of workers” are having to “rely on defined contribution pension plans and their personal savings to finance their retirement”, the argument runs, people need to understand finance so they can manage life’s financial risks and “take ownership” of their futures. In other words, they need to start thinking like investors and recognise that achieving economic well-being in old age involves taking and managing risks.⁶¹

THE BONDHOLDING CLASS AND THE MYTH OF DEMOCRATISED WEALTH

The number owning, or possessing a beneficial interest in, financial property has undoubtedly grown substantially in recent decades. In the US, increasing participation in defined contribution pension plans has seen the percentage of households owning stock directly or indirectly rise from about 19 per cent in the early 1980s to nearly 50 per cent.⁶² The story is similar elsewhere.⁶³ The distribution of financial property ownership remains, however, very heavily concentrated. Indeed, in recent decades such redistributions as have occurred have tended to be upwards rather than downwards. In the US, for example, over one-third of total financial wealth is held by the wealthiest 1 per cent, with the next wealthiest 9 per cent holding another third; the bottom 50 per cent hold only 3 per cent.⁶⁴ The concentration of share ownership is even greater, with the wealthiest 10 per cent of Americans holding (directly and indirectly) over three-quarters of corporate equity and the least wealthy half of the population holding less than 2 per cent.⁶⁵ In the UK the picture is very similar: the base of the financial pyramid has widened, but financial property ownership remains very heavily concentrated among the very wealthy, with “extreme concentrations” among “the wealthiest 5 to 10 per cent of households”.⁶⁶ The economist Ray Canterbury has dubbed this financial property-owning elite “the bondholding class”.⁶⁷

Pension privatisation and the spread of financial property ownership cannot, therefore, be said to have democratised wealth or generated the emergence of genuine ownership societies, even in the developed world. There is, however, clear evidence that they have prompted a shift in attitudes along the lines hoped for by John Moore. It is not insignificant

60 See Orenstein, *Privatizing Pensions*, n. 6 above, p. 1; and S Soederberg, *Corporate Power and Ownership in Contemporary Capitalism* (Routledge: Abingdon 2010), p. 27. According to Bush, “self government relies, in the end, on the governing of the self”. The creation of such an “ownership society”, the Cato Institute observed, required that more Americans be given “an opportunity to invest in stocks, bonds and mutual funds so that they too [ould] become capitalists”: see D Boaz, “Defining an ownership society”, http://www.cato.org/special/ownership_society/boaz/html.

61 See “Round-table discussion on financial literacy”, *New Statesman*, 9 January 2006.

62 It reached 49.5% in 2002, before falling back slightly to 47% in 2008: Investment Company Institute and Securities Industry Association, *Equity Ownership in America* (Washington DC: ICI/SIA 2002); Investment Company Institute, *Equity*, n. 58 above.

63 See Guiso et al, “Stockholding”, n. 57 above.

64 See A Kennickell, “A rolling tide: changes in the distribution of wealth in the US, 1989–2001” (2003) *SCF Web* www.federalreserve.gov/pubs/oss/oss2/scfindex.html; J Poterba, “Stock market wealth and consumption” (2000) 14 *Journal of Economic Perspectives* 99.

65 See Ireland, “Shareholder primacy”, n. 10 above.

66 See J Banks, Z Smith and M Wakefield, “The distribution of financial wealth in the UK”, *Working Paper* 02/21 (London: IFS 2002); Ireland, “Shareholder primacy”, n. 10 above.

67 E R Canterbury, *Wall Street Capitalism: The theory of the bondholding class* (London: World Scientific Publishing 2000). His “bondholding class” encompasses bondholders and stockholders, p. 7.

that when Lawrence Mitchell, a leading academic critic of existing American corporate governance practices, asks “who is the stockholder?”, he answers “you and me”.⁶⁸ The spread of financial property ownership, part of the more general “financialisation of the masses”, has fostered a belief that “we’re all (more or less) shareholders now”, or soon will or could be. This has proved to be of considerable ideological and psychological significance, encouraging more and more people to think of themselves as middle class and as having a vested interest, albeit a modest one, in the performance of the corporate sector, financial markets and fictitious capital. This is reflected in the increasing media prominence given to financial news as indicator of the health and well-being of society as a whole.⁶⁹ Equally importantly, perhaps, with the growth in what Richard Minns has called “social security capital”, there has emerged a new culture of dependency, as a growing number of workers look to, and rely on, the performance of financial markets and publicly listed corporations for security in old age.⁷⁰ These developments have played an important role in garnering support for, and legitimating, shareholder value-oriented corporations and the prioritisation of investor protection as a policy goal.

THE RISE OF THE SHAREHOLDER VALUE CORPORATION

There is general agreement that in the post-war period, when organised labour was relatively strong and a mixture of shareholder dispersal and capital controls undermined the power and influence of financial interests, corporations became less single-mindedly shareholder-oriented. By the 1950s, even in the US and the UK, where the principle of shareholder primacy was well established, it was widely believed that corporate managers were using the discretion they had acquired over the determination of corporate goals to balance a range of different interests, rendering corporations more “socially responsible”.⁷¹ Certainly, workers *qua* workers did relatively well during this period, as reflected in falls in the levels of income and wealth inequality. From the 1970s, however, as the power of organised labour waned, financial property owners began to re-unite in institutions (including pension funds) and were liberated from the constraints imposed by Bretton Woods. Acting through their institutional representatives, they started to become more active, both within corporations and in financial markets. With the rise of the hostile takeover, emergence of an active market for corporate control and growing use of executive share options and other performance-related forms of remuneration, share price became a central focus of management. If in the 1960s and 1970s firms had, by their own accounts, been relatively insulated from investor preferences, by the 1990s they had become intensely sensitive to them. With corporate strategies increasingly tied to a narrowly financial view of how firms should be run, the maximisation of “shareholder value” emerged as the overriding corporate goal. Shareholder primacy had been reasserted with a vengeance.

The rise of the shareholder value corporation has brought significant benefits to a few. With managers under pressure to raise the market value of their corporations and to

68 L Mitchell, *Corporate Irresponsibility* (New Haven: Yale University Press 2001), pp. 147–8.

69 The bondholding class, Canterbury argues, has “revamped the indicators of economic well-being” and “redefined progress to benefit mostly themselves”: *Wall Street*, n. 67 above, p. 8.

70 See R Minns, *The Cold War in Welfare* (London: Verso 2001); Soederberg, *Corporate Power*, n. 60 above, p. 36.

71 The emphasis that some still placed on “the profit-making element in corporate activity”, the leading post-war British company lawyer L C B Gower argued in 1955, had “a slightly old-fashioned ring”: L C B Gower, “Book review of Emerson and Latham, *Shareholder Democracy*” (1955) 68 *Harvard Law Review* 922. On the socially responsible corporation, see C Kaysen, “The social significance of the modern corporation” (1957) 47 *American Economic Review* 311; and T Nichols, *Ownership, Control and Ideology: An inquiry into certain aspects of modern business ideology* (London: George Allen & Unwin 1969). The resulting dilution of the principle of shareholder primacy was widely thought defensible as corporations resembled social or quasi-social institutions rather than purely private enterprises, while shareholders looked less and less like proper owners.

distribute a larger proportion of profits as dividends, the share of national income accruing to financial property owners rose across the OECD.⁷² In the US, as the policy of “retain and invest” was replaced by one of “downsize and distribute”, the proportion of post-tax income distributed to shareholders significantly increased.⁷³ In the UK, there was an even more marked upward shift in pay-outs from 13 to 20 per cent in the 1980s to 20 to 35 per cent in the 1990s and early 2000s.⁷⁴ Further shareholder gains followed the rises in the stock-market value of shares, though many of these proved transient. These benefits not only came at the expense of labour, which suffered as corporations downsized, outsourced and “re-engineered”, but were concentrated among the bondholding class and a coterie of corporate executives and financial intermediaries. The losses suffered by workers *qua* workers significantly outweighed the gains they made as worker-capitalists.

Shareholder value corporations have nevertheless been vigorously defended, though not so much on the problematic basis of shareholder corporate ownership as on the basis of their superior efficiency.⁷⁵ In this regard, the arguments made for shareholder value corporations echo those for made for pension privatisation. Claims that they operate for the benefit of society as a whole have, of course, been given further credence by the growth in private pensions and emergence of workers as small-scale investors. Thus, in seeking to account for the growing support for shareholder-oriented corporations, Hansmann and Kraakman, in their neoliberal tour-de-force announcing the “end of corporate history”, point not only to the “important economic forces” operating in their favour but to the rapid expansion of equity ownership and emergence of a “public shareholder class”. Echoing Pinera, they argue that with “even blue-collar workers now often hav[ing] sufficient personal savings to justify investment in equity securities . . . labor and capital no longer constitute clearly distinct interest groups in society”.⁷⁶

THE PRIORITISATION OF INVESTOR PROTECTION

The claim that shareholder value corporations and open financial markets operate to maximise efficiency, wealth and welfare, coupled with the feeling that “we’re all (more or less) shareholders (or potential shareholders) now”, has also helped to legitimate the growing prioritisation by policymakers of property protection and particularly the protection of vulnerable intangible property forms like intellectual and financial property. In recent decades, ensuring the integrity of financial property – investor protection – has become one of the principal policy goals of governments, routinely trumping other economic and social objectives. Nowhere has this been clearer than in the policy responses to both the initial financial crisis and the subsequent crises in sovereign debt, where the overriding concern has been to try to ensure that financial property owners continue to

72 G Epstein, “Introduction”, and G Epstein and A Jayadev, “The rise of rentier incomes in OECD countries”, both in G Epstein (ed.), *Financialization and the World Economy* (Cheltenham: Edward Elgar 2005).

73 W Lazonick and M O’Sullivan, “Maximising shareholder value: a new ideology for corporate governance” (2000) 29 *Economy and Society* 13.

74 J Froud, S Johal, A Leaver and K Williams, *Financialization and Strategy: Narrative and numbers* (London: Routledge 2006), pp. 68, 87–8.

75 Legally speaking, it is very difficult to sustain the “ownership” claims of the shareholders of large publicly quoted corporations: see P Ireland. “Defending the rentier: corporate theory and the reprivatization of the public company”, in J Parkinson et al. (eds), *The Political Economy of the Company* (Oxford: Hart 2001), p. 141.

76 Hansmann and Kraakman, “The end of history”, n. 35 above. This class, they argue, operates as a coherent, “broad and powerful interest group in both corporate and political affairs across jurisdictions”. The new Chilean pension system was inaugurated on Labour Day, 1 May 1980, to highlight that in a free-market economy the interests of capital and labour are “convergent”: see Skousen, *EconoPower*, n. 16 above, ch. 5.

receive their revenues whatever the cost. As we have seen equally clearly, however, protecting financial property is not easy.

This is because the value of intangible financial property is derived not from its physical properties but from its anticipated future earning power.⁷⁷ As such, its value is inherently speculative,⁷⁸ rendering it unusually vulnerable not only to fraud, bubbles and the manipulation of expectations, but to changes in trade and labour regimes, in financial and taxation policies, as well as in general economic conditions and the balance of political and class power. It is a high maintenance property form, the preservation of whose integrity and value demands an extraordinarily wide range of legal and other interventions aimed at ensuring that the revenues continue to flow.⁷⁹ Indeed, it was the desire to hedge and spread the risks associated with financial property that prompted some of the financial innovations – securitisation, credit default swaps and the like – which Alan Greenspan thought had made “individual financial institutions . . . less vulnerable to shocks [and] the financial system as a whole . . . more resilient”, but which we now know exacerbated the scale of the collapse.⁸⁰

The growing importance attached to investor and financial property protection is evident in the macro-economic focus on low inflation,⁸¹ in the growing willingness of both states and international organisations to act as financial firefighters, as well as in the rise of regulatory bodies, such as the FSA, and rapid growth in laws regulating securities and capital markets.⁸² It is also evident in the emergence of a complex transnational framework aimed at securing the interests of investors and of foreign investors in particular. In recent years, for example, international institutions have prioritised the creation of “good climates for investment”, identifying 12 areas where “standards are important for the institutional underpinning of macroeconomic and financial stability” and developing universal standards of “good governance” in each.⁸³ The OECD’s Principles of Corporate Governance, for instance, seek to embed the Anglo-American shareholder-oriented model of the corporation around the world and to protect the interests of *rentier* shareholders. Although compliance with these standards is formally voluntary, in reality it is more or less compulsory if capital flight and investment strikes are to be avoided.⁸⁴

At the same time a new transnational “investment rules regime” has been constructed. Embodied in a variety of legally binding agreements, ranging from bilateral investment treaties to regional trade agreements to multilateral instruments, this regime provides various legal protections to foreign investors. In addition to insisting on non-discrimination and fair and equitable treatment, it inhibits certain sorts of state interventions, prohibiting

77 More specifically, from a capitalisation of the returns which are expected to accrue to it in the future.

78 This is most obviously true of corporate shares, the rate of return on which is not usually fixed in advance but varies according to the profitability of the company. More recently, however, the uncertainties have encompassed the sovereign debt of a growing number of countries.

79 See P Ireland, “Property and contract in contemporary corporate theory” (2003) 23 *Legal Studies* 453. As Gillian Tett observes, it is not for nothing that the root of the word credit comes from the Latin *credere*, meaning to believe: see “Lost through creative destruction”, *Financial Times*, 10 March 2009.

80 A Greenspan, speech to American Bankers Association Annual Convention, New York, 5 October 2004.

81 See Canterbury, *Wall Street*, n. 67 above: “Because of the bondholders’ primal fear of inflation, monetary policy has had a strong anti-inflationary, anti-growth, and anti-employment bias”, p. 7.

82 Exemplified by things such as the EU’s Markets and Financial Instruments Directive of 2004: see N Moloney, *How to Protect Investors: Lessons from the EC and the UK* (Cambridge: CUP 2010).

83 See the Financial Stability Board, *Compendium of Standards*, available at www.financialstabilityboard.org/index.html.

84 On this see S Soederberg, *The Politics of the New Financial Architecture* (London: Zed Books 2004).

not only measures that “directly or indirectly” expropriate investment interests (such as nationalisation) but so-called “creeping expropriations” or “regulatory takings” – state interventions, like corporate or environmental regulations, that adversely impact on the value of investments. With investors increasingly being given standing to sue if their investments are damaged, states are becoming more constrained not only by fears of capital flight but by the threat of litigation.⁸⁵ This “interlocking network of rules and rule-making structures” thus offers investors quasi-constitutional protections, insulating them from “the vicissitudes of democratic politics”.⁸⁶ This “new constitutionalism”⁸⁷ locks countries into a new “rule of (investment) law” which not only protects foreign investors from legislative and administrative actions that damage their investment interests but confers on international organisations powers which, when exercised by states themselves, are usually referred to as “sovereign powers”.⁸⁸

In this context, as in others, the gulf between neoliberal rhetoric and neoliberal practice is palpable. As many have observed, you simply cannot understand the changes in the global financial markets since the early 1970s in terms of deregulation. On the contrary, financial markets have become increasingly heavily regulated. Indeed, modern American financial markets are probably “the most highly regulated markets in history if regulation is measured by volume (number of pages) of rules . . . and by extent of surveillance”, and “possibly even by vigour of enforcement”.⁸⁹ In pursuit of investor protection, states have endorsed extensive (regulatory) interventions in some areas, while at the same time reducing, discouraging and prohibiting them in others.

5 The neoliberal vision unravels

PENSION PRIVATISATION, CORPORATE GOVERNANCE AND FINANCIALISATION

Has pension privatisation delivered on its promises? Despite the claims made in its favour, there is little evidence that pension privatisation has fostered economic growth. This is not, perhaps, surprising, for, as John Eatwell observes, “exhaustive studies have identified no impact of increased personal savings on the rate of investment”.⁹⁰ The growth in pension saving has, however, undoubtedly fuelled both increased investment in the claims on productive activity (in financial property) and the growth in financial transactions and financial markets. In doing this, it has contributed less to economic growth than to the processes whereby, to use Keynes’ phrase, “speculation has come to dominate

85 In both domestic courts and international tribunals: See D Schneiderman, *Constitutionalizing Economic Globalization: Investment rules and democracy’s promise* (Cambridge: CUP 2008); D Schneiderman, “Investment rules and the new constitutionalism” (2000) 25 *Law and Social Inquiry* 757; D Schneiderman, “Constitutional approaches to privatization: an inquiry into the magnitude of neo-liberal constitutionalism” (2001) 63 *Law and Contemporary Problems* 83; D Schneiderman, “Investment rules and the rule of law” (2001) 8 *Constellations* 521.

86 See Schneiderman, “Investment rules and the rule of law”, n. 85 above, pp. 3–4; see also R Hirschl, “The political origins of the new constitutionalism” (2004) 11 *Indiana Journal of Global Legal Studies* 71–3. See also D Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (Oxford: OUP 2005).

87 A term coined by Stephen Gill: see his “Globalisation, market civilisation, and disciplinary neoliberalism” (1995) 24 *Millennium: Journal of International Studies* 399–423; and “The constitution of global capitalism” (paper presented at the ISA Annual Convention, Los Angeles, 2000).

88 See Schneiderman, “Investment rules”, n. 85 above (2001); and also Sarooshi, *International Organizations*, n. 86 above.

89 D MacKenzie, “Opening the black boxes of global finance” (2005) 12 *Review of International Political Economy* 569. See also Campbell, “The end”, n. 20 above, p. 324.

90 This leads him to conclude that “all those arguments about the need for society to save more are quite simply poppycock”: J Eatwell, “Three fallacies on pensions” (2003), www.cerf.cam.ac.uk/publications/files/Eatwell-%20pensions%20crisis.pdf.

enterprise”.⁹¹ There is equally little evidence that the growing power of pension funds and other institutional investors has generated significant productive benefits at the level of the individual corporation. On the contrary, while it has helped to ratchet up the financial and capital market pressures on managers, this has merely served to reinforce their obsession with share price and other financial indicators of performance. With more and more securities analysts providing institutions (including pension funds) with information on which to base their decisions, corporations have become increasingly concerned with keeping the expectations of analysts in line with their own forecasts, constructing plausible narratives about their strategy and performance and delivering numbers which corroborate their stories, even if this entails using accounting and revenue manipulations of various sorts.⁹²

In similar vein, while the takeovers associated with the market for corporate control have brought quick and plentiful gains for their organisers and target company shareholders, the overall verdict of studies of their long-term impact on corporate performance is generally negative. A significant proportion of the profits generated by hostile takeovers, including those associated with the private equity inspired boom of recent years, have been derived from asset stripping aimed at boosting short-term yields and at creating the illusion of improved productivity, rather than genuine improvements in output and productivity.⁹³ As Froud et al. observe, “for all its prestige” the business model of private equity firms “is almost exactly like used-car trading”, where capital is borrowed, cars purchased and cosmetically fixed up, before being resold for a quick profit.⁹⁴ Endorsing this view, Robert Peston emphasises the need to distinguish private equity firms from “real venture capitalists” and “genuine entrepreneurs”. The former, he argues, tend to view firms “in a very impersonal and blinkered fashion”, as “property and chattels, and statistics about cash flows and market shares” rather than as productive enterprises. They are, he concludes, better at financial engineering than successfully running businesses in the long-term, showing “little empathetic understanding of a business as a social institution wholly dependent on its people”. Indeed, for workers, their activities are often disastrous, as they ruthlessly sweat all assets, human as well as capital.⁹⁵

As this suggests, the effects of the growing capital market pressures on corporate culture have been considerable. Many non-financial corporations have become quasi-financial corporations and more and more corporate managers have begun to behave like financial market participants who see their enterprises as little more than financial flows and bundles of assets capable of being bought and sold at will. Production is often increasingly incidental to the much more lucrative business of “balance-sheet restructuring”.⁹⁶ It is hardly surprising that many think the growing focus on “shareholder value” has had a corrosive effect on productive performance and on innovation. Nor that many believe the

91 J M Keynes, *The General Theory of Employment, Interest and Money* (London: Macmillan 1936): “Speculators may do no harm as bubbles on a steady stream of enterprise. But the position is serious when enterprise becomes the bubble on a whirlpool of speculation.” More generally, see J B Foster, “The financialization of accumulation” (October 2010) 62(5) *Monthly Review*.

92 See Froud et al., *Financialization*, n. 74 above.

93 S Konzelmann, F Wilkinson and M Fovargue-Davies, “Governance, regulation and financial market instability: the implications for policy” (paper delivered to Re-engineering the Corporation Seminar, Birkbeck College, 26 March 10), pp. 15, 19.

94 Froud et al., *Financialization*, n. 74 above, p. 122.

95 R Peston, *Who Runs Britain?* (London: Hodder 2008), pp. 13–14, 22, 44–5, 59–61, 96. Paradoxically, corporate raiders of this sort have often found willing allies in pension fund managers seeking to maximise returns for their (worker) investors.

96 J Toporowski, “The wisdom of property and the politics of the middle classes”, (2010) 62(4) *Monthly Review*.

growing bias towards quick short-term gain rather than new, long-term productive investment has seen resources poorly allocated from a productive and social perspective. In recent years, more and more businesspeople, journalists and academic commentators have expressed concern about the largely negative effects of an increasingly financialised governance culture.⁹⁷

PENSION PRIVATISATION AND THE FINANCIAL CRISIS

Pension privatisation has also failed to deliver a world of “ownership societies”. Even before the recent financial crisis, pensioner poverty around the world was rising, especially amongst women, and private pension schemes were facing serious financial difficulties. In the UK between 1992 and 2004, the coverage of workers by final salary, defined benefit schemes – theoretically less vulnerable to stock market volatility than their defined contribution counterparts – fell from 21 per cent to 9 per cent. Since then, many such schemes have reported massive funding shortfalls; by 2008 only one in five were still open to new members.⁹⁸ As a result, British workers are increasingly relying on defined contribution schemes, many of which are themselves in difficulty. In March 2009, an analysis of market returns by PwC suggested that people who had been paying into such schemes for 20 years were no better off than they would have been had they left their money in cash savings accounts.⁹⁹ It is a similar story elsewhere. In Chile, for example, dissatisfaction with the privatised system emerged as a key election issue in 2006 and in Argentina in 2008, in a measure which commanded widespread popular support, the government nationalised its private pension funds, prompting the OECD to fret that others might follow Argentina’s lead.¹⁰⁰

The financial crisis has greatly exacerbated these problems, “wreak[ing] havoc on retirement plans of all varieties”, particularly employer-based and private retirement savings schemes.¹⁰¹ The market value of and returns accruing to many forms of financial property have fallen, slashing the value of pension pots and generating (or amplifying) pension fund shortfalls. Many who thought they had provided for comfortable retirements are having to think again. Many of the companies sponsoring defined benefit plans have become insolvent; many others have closed their schemes and are now cutting their contributions to the defined contribution schemes which replaced them. In recent months, UK public sector pensions, many of which offer only very modest retirement incomes, have come under

97 See, for example, J Crotty, “The neoliberal paradox: the impact of destructive product market competition and ‘modern’ financial markets on nonfinancial corporation performance in the neoliberal era”, in Epstein, *Financialization*, n. 72, p. 77. By 2007, even Martin Wolf, erstwhile champion of free markets and globalisation, was worrying about the effects of “unfettered finance” and arguing that the new “global financial capitalism” had brought “the triumph of the global over the local, of the speculator over the manager and of the financier over the producer”: M Wolf, “The new capitalism”, *Financial Times*, 19 June 2007; “Risks and rewards of today’s unshackled global finance”, *Financial Times*, 27 June 2007.

98 See R Minns, “Missing the point” (paper delivered to Financial Institutions and Economic Security Conference, May 2009).

99 Worse still, people who had been paying in for only 10 years would now be holding less in their retirement accounts than the total value of their contributions, see *Financial Times*, 3 March 2009.

100 Since their creation in 1994, the privately owned funds had saved 96,000 million pesos for retirement accounts while pocketing 36,000 million pesos in fees. See P Antolin and F Stewart (2009), “Private pensions and policy responses to the financial and economic crisis”, *OECD Working Paper on Insurance and Private Pensions* No 36 (France: OECD), p. 5, regretfully reporting that “there are policy discussions about reverting back towards PAYG public pensions in some central and Eastern European countries”.

101 C O’Murchu et al., “The pensions crisis”, 27 May 2009, FT.com, video and audio interactive graphics. Matters have been made worse by the fact that in many countries government debt has mushroomed and both future pension savings and future government revenues are being adversely affected by falling profits and rising unemployment.

fierce attack from both politicians and the press for being too generous (“gold-plated”), prompting the government to inflation-link them not to the retail prices index but to the historically lower consumer prices index; a similar change to the inflation indexing of private pensions has been announced. Even die-hard supporters of pension privatisation, usually noted for their sublime optimism, have conceded that “the financial turmoil and the ensuing financial crisis have had a major impact on private pension assets”. The OECD estimates that there were declines of between 20 and 25 per cent (over \$5 trillion) in global pension assets during the course of 2008 alone.¹⁰²

FETISHISED MONEY: THE PENSIONS ILLUSION

In short, the financial crisis has highlighted the fundamental flaws in a pensions policy which relies on mass ownership of *rentier* financial property, making it painfully clear that private pensions are incapable of providing security in old age for more than a privileged minority. It has exposed the neoliberal vision of a world of classless ownership societies populated by autonomous, self-reliant, financial property-owning worker–capitalists as a chimera based on a series of misconceptions about the nature of financial property and money.

These misconceptions loom large in the work of those advocating pension privatisation. The World Bank, for example, regularly equates increased pension saving with increased productive investment, and stock market growth with economic growth. “Real” investment in productive enterprise is muddled up with investment in the claims on the product of such enterprise. Growth in the volume and value of interest- and dividend-bearing financial property and in the size of financial markets is treated as synonymous with growth in real productive assets and capacity. This reflects the deeply rooted tendency, endemic to modern capitalism, to treat money and financial property as somehow autonomously productive, as if financial property were capable of making more money by itself. This tendency surfaces when advocates of “ownership societies” suggest that pension privatisation will prevent the old from becoming a burden on the state and future generations. If everyone saved more and there was a move from PAYG towards fully funded pensions, they suggest, the younger generation would be relieved of the burden of supporting the old, for the latter would be able to live off the revenues accruing to their financial property. Even those critical of pension privatisation tend to make this assumption. Thus, Orenstein argues that, while privatised pension systems face certain risks social security systems do not, under privatised systems the demographic risks to which social security systems are vulnerable are “substantially reduced, because pension benefits do not rely on the earnings of another generation”.¹⁰³

There have been few better expressions of the fetishised view of financial property underlying these ideas than an advertisement which appeared in the UK in the 1980s. Depicting a man lying on a sofa, it declared that, contrary to appearances, he was working because he had been wise enough to invest in a particular financial institution. As a result his money was not only working for him but doing so incessantly because it “never slept”; it was always earning interest and dividends. On the face of it, the man was self-reliant and a burden on no one. In reality, of course, money is not autonomously productive and even if the sofa-bound man was *not* working, someone, somewhere was and it was these unknown others who were generating the wealth to which the man was entitled to lay (partial) claim by virtue of his financial property ownership.

¹⁰² See Antolin and Stewart, “Private pensions”, n. 100 above. The falls have been especially large in countries, such as the US, where portfolios contain a higher proportion of equities.

¹⁰³ Orenstein, *Privatizing Pensions*, n. 6 above, p. 184.

The reality is that no matter how much financial property (money) they own, the old are always ultimately drawing, one way or another, on the labour of those who work. As John Eatwell observes, people's standards of living are sustained by a flow of goods and services, which during their working lives is usually sustained by paid work. After retirement the flow can be sustained by either squirreling away goods and services and then gradually consuming them – a method with serious drawbacks, not least because many services, such as health care, simply can't be stored – or by acquiring monetary claims – revenue rights derived from either financial property and/or public pensions – which can be used as and when needed to purchase the goods and services being produced by the current workforce. Either way, the provision of goods and services for the old always involves an intergenerational transfer.¹⁰⁴ No matter how pensions are financed, the old are always drawing on the productive activities of the young, always making claims on the product of the labour of others. Even private pensions involve intergenerational transfers.

The unavoidable dependence of the non-working old on goods and services produced by current workers prompts Eatwell to argue that “in overall macro-economic terms” there is no difference between PAYG and so-called fully funded, privatised pension schemes so far as overall intergenerational transfers are concerned. “The burden on the current workforce, defined as the goods and services that are ‘extracted’ from them, is exactly the same” under both systems. Privatised schemes simply extract the resources in a different way, though in doing so they alter the distribution of goods and services between pensioners, favouring those who have invested in financial property. Comparisons between the two schemes must, therefore, be made on other grounds and in this regard, Eatwell suggests, fully funded, privatised schemes suffer from “rather weighty disadvantages”, most notably their regressive impact on the distribution of pensioner income¹⁰⁵ and high administration costs. Public PAYG pension schemes are simple, transparent and have administration costs of only 3 to 4 per cent, compared to 20 per cent or more for the typical private scheme.¹⁰⁶ This leads Antonio Tricarico to conclude that the “single-mindedness of the World Bank in promoting privatised systems has been peculiar, since the evidence – including that documented in World Bank publications – has indicated that well-run public sector systems, like the social security system in the US, are far more efficient than privatised systems”.¹⁰⁷

Eatwell is similarly sceptical of claims that by encouraging investment and capital market development privatised pensions foster good corporate governance and the efficient allocation of resources. “Whilst it may be possible to argue that the existence of fully funded schemes promotes the development of financial markets”, he argues, “there is no clear relationship between the growth of financial markets and aggregate savings growth or economic efficiency”.¹⁰⁸ On the contrary, as we have seen, the growing power of finance has fostered the development of highly financialised and dysfunctional forms of corporate governance. As many commentators have pointed out, world growth rates have fallen during the neoliberal era, from an average of 4.8 per cent between 1960 and 1980 to

104 J Eatwell, “The anatomy of the pensions crisis” in UN Economic Commission for Europe, *Economic Survey of Europe* No 3 (Geneva: UNECE 1999). As Morris Cohen observed: “The owners of revenue-producing property are in fact granted by the law certain powers to tax the future social product.”: “Property and sovereignty” (1927-28) 13 *Cornell Law Quarterly* 8, p. 13.

105 Between classes and between men and women.

106 Eatwell, “The anatomy”, n. 104 above.

107 See A Tricarico, in *Social Watch Report 2007* (Montevideo: Instituto del Tercer Mundo 2007). The fees and commissions associated with privatised systems come directly out of the money that retirees would otherwise receive, “lowering their retirement benefits by as much as one third compared to a well-run public social security system”.

108 Eatwell, “Three fallacies”, n. 90 above, and “The anatomy”, n. 104 above.

2.9 per cent between 1980 and 2000; growth in labour productivity fell from 2.5 per cent to 0.8 per cent during the same period.¹⁰⁹ “Perhaps the greatest advantage of fully-funded schemes”, Eatwell concludes, is that they generate “an automatic adjustment of the level of pensions to the available resources” without any need for an “overt political decision”. Pensioners may be disappointed with their pensions, but “they do not perceive any deliberate political decision in the reduction of their pensions by inflation or by the failure to attain a suitable return in the financial markets”. In other words, private pensions depoliticise the level of provision.¹¹⁰

THE CLASS DIMENSIONS OF FINANCIAL PROPERTY AND INVESTOR PROTECTION

As Eatwell’s comments suggest, the advocates of pension privatisation tend to overlook not only the intergenerational dimensions of all forms of pension provision, but the *class* dimensions of all forms of financial property. The latter were implicitly recognised by Aristotle, Aquinas and other early critics of usury when they argued that money is inherently sterile and unproductive and that all interest payments therefore inevitably entail transfers, in money form, of part of the product of one person’s labour to another. The usurer, like the man on the sofa, makes money by taking, in the form of interest, part of the product of someone else’s labour. When the rise of capitalism generated the development of an increasingly sophisticated and complex credit system and a huge expansion in the forms and volume of interest-bearing revenue rights, Marx saw in the modern owner of financial property, the money capitalist, a contemporary and class-based version of the usurer. For Marx, the only significant difference between the usurer’s capital and the interest-bearing capital of the money capitalist lay not in their form (both entail a movement from M-M1) but in the social and class relations within which the money moved. Crucially, he argued, although the revenues accruing to money capital are all ultimately derived from the exploitation of labour and the appropriation of surplus value in the process of production, under capitalism money appears to be autonomously productive, “a mysterious and self-creating source of interest”. It was because the revenues accruing to money capital seemingly presupposed no production at all (M-M1) that Marx considered it to be the most fetishistic form of capital of all.¹¹¹

Marx did not, however, anticipate the growing integration of the working classes into financial relations. Recent decades have seen the rise of working-class ownership of financial property as well as a massive growth in working-class consumer and household (including mortgage) debt and the consequent re-emergence of new, highly developed forms of usurer’s capital.¹¹² With the rise of “equal opportunities financialisation”, mainstream financial institutions have “moved into areas they had previously redlined” and adopted a similar position “vis-à-vis the poor [as] the loan sharks and illegal lenders whose role reformers had sought to undercut”.¹¹³ In an increasingly insecure world of stagnating real wages and diminishing public provision, the desire of people to participate in the ownership society and to find security through asset ownership has been ruthlessly

109 World Bank, *World Development Indicators* (Washington DC: World Bank 2005).

110 Eatwell, “Three fallacies”, n. 90 above.

111 Karl Marx, *Capital*, vol. 3, chs 25 and 29. See also Rudolf Hilferding, *Finance Capital* (1909)

112 “It was the usurious and exploitative character of lending to wage-earning households, as it developed in the concrete setting of rising inequality and privatization of the past three decades, that made it highly profitable.”: see P dos Santos, “At the heart of the matter: household debt in contemporary banking and the international crisis”, *Research on Money and Finance Discussion Paper* 11 (London: SOAS May 2009), p. 28.

113 L Panitch, M Konings, S Gindin and S Aquanno, “The political economy of the subprime crisis” in L Panitch and M Konings (eds), *American Empire and the Political Economy of Global Finance* (Basingstoke: Palgrave Macmillan 2008), p. 253, at pp. 264, 268, 285.

encouraged and exploited. Indeed, the whole sub-prime superstructure rested on predatory lending and regular payments of interest by the poor. Through processes of this sort, much profit-making and surplus labour extraction in the developed world has come to centre on debt rather than exploitation in production itself. Thus, one of the most significant aspects of recent changes in banking activities has been the shift in focus from productive enterprise towards the individual wage income of ordinary people as sources of profit.¹¹⁴ The result of these processes has been the emergence of a growing number of worker-capitalists, of people who straddle the class divide in that they are simultaneously both workers, part of the product of whose labour is appropriated either in production or through debt, and the owners of (small amounts of) financial property which entitles them to receive interest payments on retirement. There is thus more than a little truth in the claims that what we have seen in recent years is not only the financialisation of society but the financialisation of class power.¹¹⁵

These developments have blurred class divisions but done little to eradicate them. As we have seen, while privatisation and pension privatisation in particular have undoubtedly widened financial property ownership, they have done little to change its distribution. Indeed, the alleged democratisation of financial property ownership and widening of the “community of money” has been accompanied by growing income and wealth inequalities. The significance of this was highlighted by the German economist Margrit Kennedy when she calculated the interest paid and interest received by the 10 income deciles of the German population. The bottom eight deciles all paid more in interest than they received; the ninth received slightly more than it paid and the tenth (and richest) received about twice as much as it paid. Much of the interest gain was concentrated in the top 1 per cent. This, she suggested, “explains graphically, in a very simple and straightforward way, why the rich get richer and the poor get poorer”.¹¹⁶

As a result of the sharply skewed distribution of financial property ownership, the rise of the shareholder value corporation and growing policy focus on investor protection have brought substantial benefits to the bondholding class but few benefits to anyone else. As we have seen, even for those privileged members of the working class with private pensions, financial property ownership does not guarantee a financially secure retirement. For the much more numerous, less privileged, non-financial-property-owning members of the global working class the benefits have been even harder to discern. Indeed, as we have seen, the impact of the growing financial power on the lives of workers *qua* workers has been extremely damaging. Wage bills have been cut, real wages have stagnated, job insecurity has increased, long-hours cultures have emerged, and working practices and labour markets have been made more “flexible”.¹¹⁷ As Doug Henwood says, workers have been asked “to trade a few extra percentage points return on their pension fund, on which they may draw some decades in the future, for 30 or 40 years of falling wages and rising employment insecurity”.¹¹⁸

114 dos Santos, “At the heart”, n. 112 above, pp. 5–7. Costas Lapavistas calls the extraction of financial profit directly out of the personal income of workers “financial expropriation”: see his “Financialised capitalism: crisis and financial expropriation” (2009) 17 *Historical Materialism* 114.

115 Panitch et al., “Political economy”, n. 113 above, at p. 257.

116 M Kennedy, *Interest and Inflation Free Money* (Philadelphia: New Society Publishers 2005).

117 In the words of one commentator, the “serial restructuring” which has accompanied the worship of shareholder value has “elevate[d] breach of implicit stakeholder contract into a guiding principle of management”: Froud et al, *Financialization*, n. 74 above, pp. 109–36.

118 D Henwood, *Wall Street* (London: Verso 1997), p. 293.

As noted earlier, however, other elite groups have also benefited from financialisation. Pension privatisation, for example, has been very good for financial institutions, generating all manner of fees and commissions. At the time of the 2006 Chilean election, the privately run pension funds had over a five-year period recorded average annual profitability of more than 50 per cent. A World Bank study concluded that they were retaining between a quarter and a third of workers' contributions in commissions and fees.¹¹⁹ In similar vein, lending in the US sub-prime debacle was driven less by the realistic ambitions of poor people to become homeowners and more by predatory money-making by banks. Mortgage lenders began to do everything they could to sign up borrowers at above average, sub-prime interest rates, intending to pool, securitise and sell the debt on as tranches of various grades of collateralised debt obligation.¹²⁰ In the corporate context, the most visible beneficiaries of financialisation have been corporate executives, whose remuneration has skyrocketed, often without any meaningful connection to performance. There have been unprecedented increases in executive–worker compensation ratios, especially in places such as the US and the UK.¹²¹ Many other less visible groups have also benefited from these developments – a diverse bunch of corporate advisors and service providers, securities analysts, hedge-fund operators, private equity firms, city lawyers, and investment banks. Some of them are largely reactive, responding to corporate demands; others are proactive deal-makers, actively initiating mergers, acquisitions and financial innovations.¹²² These groups have a stake in an “economy of permanent restructuring”, making money from advising, trading, dealing and investing, from acquisitions and de-mergers, new issues, buybacks, securitisation and the re-bundling of risks. Indeed, they have been largely responsible for the hyper-innovation that has produced billion-dollar turnovers in capital market dealings.¹²³ They also, some argue, helped to develop the idea of “shareholder value” to justify their self-serving activities.¹²⁴ In short, financialisation has generated the emergence of “new layers of *rentiers*” who profit from financial expropriation, drawing substantial incomes from their positions within the financial system rather than from direct ownership of financial property.¹²⁵

Crucially, these various elite groups, whose interests are by no means entirely co-extensive or harmonious, now wield, as various commentators have observed, considerable political power and have come in many places to dominate the state itself. In the UK, for example, the City has been given more or less everything it wants by successive governments. “Guiltlessly rapacious and mentally pugnacious”, writes Hywel Williams:

Britain's financial and business elites at least display the virtue of candour about their ultimate goals: the making of money for themselves . . . The City has won all the necessary battles for command and control. It now absorbs and directs the aims of all other power elites and thereby makes those elites subordinate to its own interests.¹²⁶

119 “Chile's candidates agree to agree on pension woes”, *New York Times*, 10 January 2006.

120 J Lanchester, *Whoops* (London: Allen Lane 2010), p. 103.

121 The 1990s, with its bull-market, is often portrayed as a decade in which managers armed with stock options heroically created value for shareholders, but in reality they were for the most part simply enriching themselves: Froud et al, *Financialization*, n. 74 above, pp. 54–64, 94

122 I Erturk, S Johal, A Leaver and K Williams, *Financialization at Work* (London: Routledge 2008), pp. 26–9.

123 P Folkman, J Froud, S Johal and K Williams, “Working for themselves?: capital market intermediaries and present day capitalism” (2007) 49 *Business History* 552; see also F Dobbin and D Zorn, “Corporate malfeasance and the myth of shareholder value” (2005) 17 *Political Power and Social Theory* 179.

124 D Zorn, F Dobbin, J Dierkes and M S Kwok, “The new new firm: power and sense-making in the construction of shareholder value” (2006) *Nordiske Organisationsstudier* 3.

125 See Lapavistas, “Financialised capitalism”, n. 114 above, p. 114.

126 H Williams, *Britain's Power Elites* (London: Constable 2006), p. 215; See also Peston, *Who Runs Britain?*, n. 95 above.

In innumerable ways and innumerable areas, from education to health to welfare, “bottom-line City imperatives have been transplanted wholesale into British society”.¹²⁷ Indeed, it is difficult to imagine a more powerful testament to the growing power (and prioritisation of the interests) of the bondholding class and these financial elites than the recent bail-outs and enforced austerity. States have, in effect, decided that, as far as possible, ordinary people, rather than the bondholding class, should suffer the consequences.¹²⁸

6 Neoliberalism in the age of austerity

NEOLIBERALISM AS A CLASS PROJECT

Neoliberalism presents itself as committed to “rolling back the state”, as wanting to allow free rein to the market. This has led many commentators to depict the current crisis as a crisis of deregulation and a very particular Anglo-American model of capitalism and to seek a solution in more and better regulation, in regulatory reform and a redrawing of the boundaries between state and market. While there is some truth in this view, it takes neoliberalism’s ideological self-representation too seriously. Neoliberalism has indeed entailed some deregulation, not least in the financial sphere, but, in general, what we have seen in recent decades is not so much a retreat as a major change in the nature and forms of state activity.¹²⁹ In many spheres, there has been a marked increase in interventionism, not only by states but by international agencies, much of it, as we have seen, directed at creating “good climates for investment”. The financial crisis occurred in a heavily regulated world and those who seek to understand the neoliberal era only at the ideological level, in terms of its self-professed determination to free markets from states, will struggle to make sense of actual neoliberal practice.

To understand the gulf between neoliberal practice and rhetoric, it is to the class dimensions of neoliberalism and financial property that one needs to turn. This is not to say that all the policy changes associated with the neoliberal revolution can directly or adequately be grasped through a simple class prism. As the intellectual grip of neoliberal ideas has tightened, they have taken on a life of their own. However, as a number of commentators have argued, many aspects of the neoliberal revolution are best understood as parts of a class project which emerged out of “the long downturn”, the decline in growth rates and rate of return on capital investment which began in the 1960s and saw a significant fall in the share of the social product accruing to financial property owners.¹³⁰ From this perspective, its deregulatory dimension, such as it is, has entailed not so much a withdrawal of the state from economic affairs as a state-led restructuring of economic life. Many neoliberal policies have sought to reshape, in favour of capital, what Robert Hale called the “structures of mutual coercion” which characterise all markets. Law has been central to this project, for, as Hale observed, the legal rights possessed by market actors are key

127 D Kynaston, *City of London: A club no more* vol. 4 (London: Chatto & Windas 2002), p. 791.

128 See E Moya, “How the bond vigilantes punished the sick men of Europe”, *The Guardian*, 18 November 2010. As Moya points out, the bond vigilantes who are exerting the market pressures which are prompting governments to slash spending and jobs are (paradoxically) primarily pension funds. She concludes that “the vigilantes are now arguably more powerful than governments”, inevitably bringing to mind Bill Clinton’s rhetorical question: “You mean to tell me that the success of the economic program and my re-election hinges on the Federal Reserve and a bunch of fucking bond traders?”

129 B Jessop, *The Future of the Capitalist State* (Cambridge: Polity 2002).

130 See Harvey, *A Brief History*, n. 17 above; R Brenner, *The Economics of Global Turbulence* (London: Verso 2005); R Brenner, “Interview” (March–April 2009) *Against the Current*, issue 139; R Brenner, “What is good for Goldman Sachs is good for America” (Los Angeles: UCLA, Institute for Social Science Research, April 2009); G Dumenil and D Levy, *Capital Resurgent* (Cambridge MA: Harvard University Press 2004).

determinants of the coercive power they can exercise.¹³¹ Put simply, in recent decades the coercive power of capital has been greatly enhanced by (amongst other things) multiple extensions to its legal rights, while the coercive power of labour has been undermined and curtailed by (amongst other things) a steady erosion of its legal rights at both the individual and collective levels. These changes in the “structures of mutual coercion” have generated major shifts in the balance of class forces, in the distribution of the social product and in the economic dynamics of contemporary capitalism.¹³² While they have been depicted as the natural products of economic evolution (or market forces), in reality many of them have been rooted in fundamentally *political* decisions to alter the prevailing structures of rights and power.¹³³ Hidden behind the free-market rhetoric of irresistible economic imperatives has lurked a ruthless political project designed to restore wealth and power to a few.

THE RISE OF BUBBLENOMICS

In certain respects this project has been successful. The emergence of a neoliberal order under the aegis of finance has destroyed the old social compromises and greatly weakened the power of labour. Huge new, amorphous, unorganised, increasingly feminised, easily exploited proletariats have been created, job security reduced and social protection systems weakened. The result of these and the other changes to the “structures of mutual coercion”, including those effected through law, has been downward pressure on wages, a marked redistribution of the proceeds of industry from labour to the bondholding class and to small elites in industry and finance,¹³⁴ and a sharp reversal of the trend towards greater equality.¹³⁵

In other ways, however, the strategy has failed, doing little to eradicate the structural problems facing contemporary capitalism. The interconnected problems of over-accumulation, overcapacity and underconsumption – what David Harvey calls “the capital surplus absorption problem”¹³⁶ – remain unresolved. There remains a serious shortage of outlets for profitable investment in real productive activity. Since the 1980s, stagnation has been gripping the capitalisms of the developed world, with economic performance in the US, Western Europe and Japan steadily deteriorating in terms of standard economic indicators such as gross domestic product (GDP), investment and real wages. Despite the “greatest government sponsored economic stimulus in US peacetime history”, the business cycle that began in 2001 and ended in 2007 was the weakest of the post-war period: GDP growth was slow and private sector employment barely shifted.¹³⁷ Paradoxically, this was in part because by holding down wages demand was depressed, exacerbating the chronic, systemic tendency towards overcapacity which has been dogging manufacturing industry

131 R L Hale, “Coercion and distribution in a supposedly non-coercive state” (1923) 38 *Political Science Quarterly* 470.

132 See Ireland, “Property”, n. 21, above.

133 See R Helleiner, *States and the Re-emergence of Global Finance* (New York: Cornell University Press 1994), arguing that most accounts of the globalisation of financial markets and demise of Bretton Woods downplay the role played by states.

134 As Robert Reich says, the “restructuring” which has gone on within corporations has often entailed “nothing more than redistributing income from employees to shareholders”: R Reich, *Harper's Magazine*, May 1996.

135 This trend began in the 1930s and continued to the end of the 1970s. By the turn of the millennium, however, inequality was returning to the levels of the pre-1914 period.

136 Harvey, *The Enigma*, n. 3 above, p. 45

137 Brenner, “What is good”, n. 130 above.

worldwide.¹³⁸ It is in the attempts to overcome these problems that we can locate some of the roots of financialisation and of the financial crises which have afflicted capitalism with increasing regularity.

Since the beginning of the long downturn, governments have regularly responded to these problems by fostering debt-financed demand. Initially, traditional Keynesianism and public borrowing were deployed, but from the 1990s, beginning in the US but spreading elsewhere, governments moved towards more balanced budgets and began to use private borrowing by households and corporations as alternative sources of economic stimuli. At the same time, asset bubbles were nurtured to suck up surplus capital by creating new investment and profit-making opportunities in financial activity. The “wealth effect” of these bubbles made possible still further borrowing by corporations and households benefiting from increased paper wealth. In the late 1990s, this “asset-price Keynesianism” centred on the explosion in equity prices associated with the dot.com bubble and the alleged rise of a “New Economy”. When this particular bubble burst, a new one was nurtured, centred on housing and leveraged lending. Interest rates were kept low to encourage borrowing, and in the US in particular the authorities pressed credit card companies to develop colour- and gender-blind risk models which created equal opportunities to become indebted, turning a blind eye to increasingly lax lending practices and mortgage lending standards. This pseudo-democratisation of credit, debt and (share and house) ownership, which emerged as a sort of alternative social welfare programme, was portrayed by governments as a positive step in the direction of ownership societies.

In many places, of course, the result was rapid rises in the price of residential property, accelerated in the US by the sub-prime super-booster. With annual house price increases coming to be seen as normal, households were prompted to engage in yet more borrowing on the back of the bubble-inflated value of their homes. From the mid-1990s private debt relative to national income rose rapidly.¹³⁹ This not only helped to keep many economies afloat but, coupled with the intensification of labour and increase in two-earner households, enabled workers to maintain or even raise their living standards despite increasingly stagnant real wages. It also created a false sense of prosperity and helped to build positive political support for the ruling neoliberal ideas of the age. Financial markets and increasing debt thus acted as both mechanisms for disciplining workers and mechanisms for social integration.¹⁴⁰ In addition to contributing to the titanic growth of multi-layered debt, the residential property bubble also underpinned new financial bubbles, for the transformation of the prospective income streams created by debt – whether from mortgages or credit cards or student loans – into financial property (“securitisation”) acted as a basis for further extensions of credit. Sub-prime mortgages could be issued (originated), bundled together (securitised) and sold on (distributed). Moreover, the risks associated with them could, it seemed, not only be spread but engineered away through the use of financial innovations such as credit default swaps (CDSs). For the financial institutions concerned, it was

138 It is because of the conflict between the need for lower real wages to restore profitability and the need for higher wages to restore demand (coupled with the problem of over-indebted households) that some are pessimistic about the prospects of a rapid, market-based recovery: see dos Santos, “At the heart”, n. 112 above.

139 J B Foster and F Magdoff, “Financial implosion and stagnation” (November 2008) *Monthly Review* 6–7; see also dos Santos, “At the heart”, n. 112 above.

140 “Constrained in what they could get from their labour”, Panitch et al. observe, “US workers were drawn into the logic of asset inflation . . . not only via the institutional investment of their pensions, but also via the one major asset they held (or could aspire to hold) . . . their family home”. In the US, “high levels of consumption were sustained by the accumulation of household debt and the intensification of family labour (more family members working longer hours under more severe conditions subject to the growing discipline of having to meet debt payments”): Panitch et al., “Political economy”, n. 113 above, p. 264.

extraordinarily lucrative business and from the late 1990s their profits headed off into the stratosphere.¹⁴¹ At the same time more and more hitherto non-financial corporations became quasi-financial entities. In recent decades, in the absence of sufficient outlets for profitable investment in real productive activity, “profit-making [has come to] occur increasingly through financial channels rather than through trade and commodity production”.¹⁴² Pension privatisation, by adding to the growing volume of capital seeking outlets, played a part in fuelling these processes.

For institutional investors, operating in an increasingly competitive environment, these new forms of financial property were manna from heaven. Faced by modest rates of return on relatively low-risk financial property forms and desperately searching for higher yields, institutions began to stretch the boundaries of risk and speculation ever further, pouring money into exotic financial instruments and securities like those backed by American sub-prime mortgages. Indeed, in his testimony before the Angelides Commission, Alan Greenspan suggested that the crisis was as much a product of greedy investors (especially in Europe) searching for high-yielding bonds as it was of the misguided policies of the Fed, greedy bankers or fraudulent American mortgage lenders.¹⁴³ Even allowing for the blame-shifting here, there is no doubt that the near-insatiable appetite of investors for these securities made it possible for banks to lend to ever-poorer borrowers. We now know, of course, that the banks held on to a large number of them themselves, often via the rapidly rising “shadow banking system”, so that when the crash came they were on the books of institutions across the world. As dos Santos observes, “the very idea that defaults on home mortgages would have wiped out leading international financial institutions, and triggered a worldwide recession, would [previously] have been unthinkable”,¹⁴⁴ but not only had everyday life been increasingly “financialised”, Wall Street had become “more and more dependent on the mundane world of US mortgage and consumer debt”: the worlds of high and low finance, of finance and poverty had become entwined.¹⁴⁵ The supporters of pension privatisation were thus quite right when they argued that it would “spur financial market development by creating demand for new financial instruments and institutions”,¹⁴⁶ but quite wrong to think that this financial innovation would promote “market completion” and a superior, more perfect form of free-market capitalism. As Lord Turner recently observed, much of the financial innovation was “of little value” and “socially useless”.¹⁴⁷

THE END OF NEOLIBERAL HEGEMONY?

The US housing bubble deflated when mortgage interest rates increased and marginal borrowers, “pressed against the limits of continually increasing working hours”,¹⁴⁸ found themselves unable to meet their debt repayments. As foreclosures rose, the income streams which gave value to these mortgage-backed securities evaporated, as did the balance sheets of many financial institutions. It was no longer possible to conceal the fact that the ballooning and increasingly speculative financial superstructure had seriously outgrown the

141 See Foster and Magdoff, “Financial implosion”, n. 139 above, p. 7.

142 G Krippner, “The financialization of the American economy” (2005) 3 *Socio-Economic Review* 173.

143 “Blame Europe, former Federal Reserve boss tells US enquiry into financial crisis”, *The Guardian*, 7 April 2010. Europe means here primarily Germany. The commission, which was otherwise known as the Financial Crisis Inquiry Commission, was set up by the US government to investigate the causes of the financial crisis.

144 dos Santos, “At the heart”, n. 112 above, p. 4.

145 See Panitch et al., “Political economy”, n. 113 above, p. 253.

146 James, “New systems”, n. 16 above, p. 7.

147 Lord Turner, interview with *Prospect* magazine, 27 August 2009; see also P T Larsen, “Bank regulation needs straightening out”, *Financial Times*, 30 March 2009.

148 Panitch et al., “Political economy”, n. 113 above, p. 270.

productive base. The crisis was, however, only the latest in a series, from the third-world debt crisis of the 1970s and 1980s, to the US savings and loans scandal, to the “historic mis-allocation of capital” of the dot.com bubble.¹⁴⁹ The new financialised, neoliberal capitalism has since its inception been characterised by unpredictable currency fluctuations, reckless capital movements, asset bubbles, growing financial instability and regular financial crises. It is the sheer scale of the current crisis that is unprecedented and it was this that prompted some to herald it as marking the beginning of the end for neoliberalism.

It is worth remembering, however, that the East Asian crisis of 1997–98 also prompted talk about the end of neoliberal hegemony and need to build a “new international financial architecture”. In the event, however, it was contained in the periphery and attributed to faults in the countries affected, in particular their “crony capitalisms”. Instead of fundamental change, we saw the development of global standards of “good governance” aimed principally at creating a sounder platform for further financialisation, holding out to compliant developing countries the promise of foreign capital and to Western investors the promise of new, secure investment outlets. By contrast, the current crisis struck at the heartlands of global capitalism, initially propelling everyone from finance ministers to central bankers to investors into a state of dazed confusion.¹⁵⁰ Since then, however, the ruling elites have regained their bearings and set purposively about patching the system up. Indeed, the responses of governments have laid bare not only the sheer economic and political power of finance but the degree to which neoliberal ideas, policies and practices have become institutionally and culturally embedded.

In the corporate governance context, for example, while there have been mutterings about executive pay and the “dumb” idea of shareholder value,¹⁵¹ there are a few signs that the financialised, Anglo-American, shareholder-oriented model of the corporation is going to be abandoned. The OECD, for example, concedes that the crisis has highlighted various corporate governance weaknesses, but argues that there is “no urgent need” to revise its Principles, merely a need to ensure their better implementation.¹⁵² The OECD has also made it clear that, although the stock market bounce of 2009 recouped less than half of the investment losses suffered in 2008,¹⁵³ it does not intend to abandon pension privatisation. The crisis may have “severely dented the confidence of investors in many countries in DC [defined contribution] schemes” and caused some to “retreat from pension privatisation”, but the OECD’s firm recommendation is that governments “stay the course”.¹⁵⁴ Indeed, the organisation’s great fear is that some countries, especially in Central and Eastern Europe, might follow the Argentinian example and turn back towards PAYG public pension schemes when the need is for *more* not less to be invested in private pensions to close the

149 Brenner, “What is good”, n. 130 above, p. 29.

150 “Our world is broken – and I honestly don’t know what is going to replace it”, declared Bernie Sucher, head of Merrill Lynch’s operations in Moscow. “The compass by which we steered as Americans has gone.”: G Tett, “Lost through creative destruction”, *Financial Times*, 10 March 2009.

151 In an interview with the *Financial Times*, reported on 12 March 2009, Jack Welch, the celebrated former head of General Electric stated that “on the face of it, shareholder value is the dumbest idea in the world”. This view was endorsed by Lambert, “Does business have a role?”, n. 2 above.

152 OECD, Steering Group on Corporate Governance, “Corporate governance and the financial crisis”, 24 February 2010.

153 OECD (July 2010) *Pension Markets in Focus*, issue 7. Pension fund assets, it reports, were “struggling” to return to pre-crisis levels. Moreover, “new challenges” were appearing: the onset of retirement of the baby-boom generation, uncertainty over the strength of the economic recovery, the weakness of public bond markets and possible regulatory changes.

154 Antolin and Stewart, “Private pensions”, n. 100 above, pp. 2, 5.

“retirement savings gap”.¹⁵⁵ Governments need to “expand coverage among middle income workers and low earners” and to ensure that “the general public . . . [is] better informed on the virtues and challenges of their pension system”. Investors need to “become more conscious of the risks they face” and to adopt more “suitable” strategies.¹⁵⁶ Quite what this means is unclear. On the one hand, some are admonished for incurring large losses by putting too many eggs into the equity basket (presumably in an attempt to close the retirement savings gap), while others are admonished for being “excessively conservative” and engaging in “too little equity and foreign investment”.¹⁵⁷ The OECD, it seems, thinks people need to learn to gamble more skilfully. The UK is also sticking with pensions privatisation and is currently trying to reinvigorate pension saving by compelling employers to automatically enrol employees into workplace pension schemes or the new National Employment Savings Trust (NEST) and to make 3 per cent contributions. Introducing private pensions to low and middle income earners, argues Pensions Minister, Steve Webb, constitutes a “social revolution”.^{157a} The crisis does not, then, appear as yet to have significantly eroded belief in the key tenets of neoliberal ideology, at least amongst policymakers in the advanced capitalist economies of North America and Europe.¹⁵⁸ Is there nevertheless, as some have suggested, a legitimisation crisis looming?

Support for, or acquiescence in, the changes associated with the neoliberal revolution has been garnered in many ways. The idea that it is pointless trying to resist the irresistible economic logic of the market has been relentlessly promoted. Rather than futilely standing in the path of the juggernaut of history both individuals and countries have been urged to accept the imperatives of the market, to adapt, and to make themselves more competitive. The idea that the economic logic of the market is beneficent, encouraging individual self-reliance and responsibility, creating new opportunities for the exercise of individual freedom, and operating to ensure that resources are efficiently allocated and aggregate wealth and welfare maximised, has also been endlessly promoted. As we have seen, the popular attraction of this curious mix of choice and no choice – of compulsion combined with freedom and aspiration – has been strengthened by the propagation of a vision of increasingly inclusive, free, wealthy, market-based ownership societies in which everyone either is, or can reasonably aspire to be, a financial property- and home-owning member of the middle class. Widening home- and share-ownership have been presented as democratising initiatives which create bonds between divergent interests; as homogenising and harmonising measures which eradicate class difference.¹⁵⁹ In this context, investor protection has been presented as something which is both necessary and of benefit to the social whole and not merely the bondholding class.

This vision has unravelled. The financial crisis has not only exposed the chimerical nature of the attempt to create ownership societies populated by worker capitalists, it has

155 Prior to the onset of the crisis, they argue, some countries were already failing to accumulate a sufficiently large asset pool to cover the retirement savings “gap” caused by falling public pension benefits.

156 OECD, *Private Pensions Outlook 2008* (Paris: OECD 2008) pp. 1–4.

157 Thus, “pension fund risk management needs to be strengthened to reduce exposure to unduly risky investments”, while the conservative post-crisis “shift in asset-allocation patterns” is identified as a particular problem, for risking “locking in portfolio losses and could reduce the potential of funds to generate retirement incomes in future”: Antolin and Stewart, “Private pensions”, n. 100 above, pp. 2–4.

157a See S Webb, “Pensions revolution is a social landmark”, *The Independent*, Raconteur section, 28 February 2011.

158 The story is rather different in other parts of the world such as South America.

159 Soederberg, *Corporate Power*, n. 60 above, pp. 27, 90–110.

brought the “golden age of home ownership” to an end.¹⁶⁰ If, as Fiona Haines suggests, the promise of future prosperity is, ideologically, often more important than its fulfilment, not least by rendering present deprivations palatable, this unravelling might prove significant.¹⁶¹ Much will turn, of course, on how people experience and interpret the age of austerity. Will they simply accept it and adapt to falling living standards, economic stagnation, uncertain futures, and poorer and later retirements, particularly if financial institutions, corporate executives and other financial intermediaries continue to reap large and disproportionate rewards? Will it be possible to convince people that (neoliberal) capitalism is good for them and not just a small, wealthy elite, no matter how stark the contrast between the socialisation of risks and losses and the continuing privatisation of profits? Is it going to be possible to construct a new, positive vision of future prosperity?¹⁶²

RETHINKING REGULATORY REFORM

At the moment, all that seems to be on offer is a vision of unevenly shared sacrifice driven by the irresistible imperatives of “the markets”.¹⁶³ The coalition government does not deny that policy mistakes were made – on the contrary, the profligacy of the previous administration have been emphasised, as has the need for regulatory reform – but argues that there is now little or no room for manoeuvre. The path of future policy is to a significant extent dictated by economic imperatives – and in particular, of course, by the demands of financial markets and bondholders.

This economically determinist view urgently needs to be challenged, for it is stifling consideration of the enormous range of policy options and institutional arrangements which are available. We need to dispel the idea that there exists a universal, apolitical, purely economic rationality (that of the market) which cannot be resisted and the idea that the goal of policy should be regulatory reforms aimed at correcting “market failures” and at creating perfectly functioning markets. We need instead to recognise that the allegedly inexorable economic forces before which we are being asked to bow are themselves in significant part legal and political constructs. Legal scholars are unusually well placed to do this, for, as noted earlier, they are, or should be, aware that “there is really no such thing as a free market”,¹⁶⁴ that “a market cannot be defined except with reference to the specific rights/obligations structure that underpins it, and that since these rights and obligations are determined through a political process . . . all markets have a fundamentally political origin”.¹⁶⁵ Markets are legal, political (and, therefore, regulatory) *products*, not spontaneously arising, pre-regulatory, pre-legal and pre-political phenomena which are merely *subjected to* regulation. They are or should also be aware that the property rights underpinning market

160 In commenting on their report, “Widening the rental housing market” (August 2010), Sarah Webb, Chief Executive of the Chartered Institute of Housing said that “a golden age of home ownership” was “coming to an end”.

161 F Haines, “Socializing economic relationships in the context of the financial and climate crises: what can regulation offer?” (paper delivered to Socializing Economic Relationships: New perspectives and methods for analysing transnational risk regulation, workshop held in Oñati, Spain, June 2010).

162 The political importance of such a vision was implicitly recognised by Ed Miliband when he sought to depict the Labour Party as the party of “optimism” in his conference speech in September 2010.

163 An important distinction is to be drawn, Haines argues, between aspirational sacrifices and imposed sacrifices, “Socializing”, n. 161 above.

164 H-J Chang, *23 Things They Don't Tell You about Capitalism* (London: Allen Lane 2010), p. xvi.

165 H-J Chang, “An institutionalist perspective on the role of the state: towards an institutionalist political economy” in Chang, *Globalisation*, n. 25 above, pp. 98–9.

exchange are themselves regulatory products, contingent bundles of rights which can, have been, and are legally constituted in many different ways.¹⁶⁶

It also means recognising that all property rights, including financial property rights, are sources of power and that the precise content of these rights bundles – their political/legal/regulatory constitution – is, therefore, vitally important, a key determinant of the power their holders can exercise. Markets are not neutral spaces for social interaction, but sites in which often very unevenly distributed power is exercised.¹⁶⁷ Even in a so-called free-market society, what appear to be (and are presented as) the objective outcomes of impersonal markets are, in fact, significantly shaped by certain (explicit and implicit) political and legal decisions about property rights and other legal entitlements.¹⁶⁸ These decisions shape the different rationalities by which different markets operate and are crucial determinants of the distribution of the social product. From this perspective, the growing power of financial interests which underlies the neoliberal revolution is in significant part a product of enhancements to the bundles of rights possessed by financial property owners, not least their right to move freely around the world (financial liberalisation) and to claim protection from state interventions that diminish their value, even if democratically mandated (the new constitutionalism). In an extreme example of “regulatory capture”, the bondholding class and various financial elites have established favourable new rights–obligations structures and then sought to create level playing fields (“free” markets) in which those rights can be coercively exercised. They have “shaped the environment for [their] own convenience”, and in doing so laid claim to a growing share of the social product.¹⁶⁹ Aided by the notion that money makes more money by itself, at no cost to anyone, policies which benefit a few have been passed off as both inevitable and as socially beneficial. In seeking to account for many of the legal and other developments associated with the neoliberal revolution (including the pre-occupation with investor protection), therefore, we need to *move* power from the margins to the centre of the stage. These developments and, indeed, the bail-outs are much better understood when viewed through a prism of (class) power than through a neoliberal prism of “deregulation”, “efficiency” and “market imperatives”. In reality, far from marking a hallowed path to growth and development, financial liberalisation has simply paved the way for new forms of exploitation, imperialism and socio-economic inequality.

While the current thirst for regulatory reform should, therefore, be welcomed, we need radically to rethink what it entails. At present the term “regulation” tends to be used in a way which assumes that both property rights and markets are spontaneously arising, natural products which somehow pre-exist regulatory intervention. Regulation is portrayed as

166 See, for example, A M Honore “Ownership” in A G Guest (ed.), *Oxford Essays in Jurisprudence* (Oxford: Clarendon 1961); see also Ireland, “Property”, n. 21 above. This is unusually clear in respect of the intangible rights to receive future revenues (the financial property forms) that lie at the heart of contemporary capitalism and the current crisis. With financial property, there is no concrete object of property independent of law to which the rights relate; the very “thing” that is owned is a legal construct, even if once constituted it tends to take on a reified life of its own. These property forms are regulation all the way down.

167 Soederberg, *Corporate Power*, n. 60 above, p. 28.

168 See Chang, “An institutionalist perspective”, n. 165, pp. 94–5: “The establishment and distribution of property rights and other entitlements that define the endowments that neoclassical economics take as given”, Chang observes, “is a highly political exercise”, from which he concludes that “all prices are political”.

169 Canterbury, *Wall Street*, n. 67 above, p. 5. Indeed, in constructing these new forms of financial power Western law has performed the miracle of enabling the “rich, developed, and often ex-colonial states . . . to . . . continue extracting wealth from the poorest countries” in an era of apparent de-colonialisation. Gun-boat diplomacy and costly imperial administrations have largely (though not entirely) been replaced by other, less militaristic, less politically overt, purely “economic” modes of extraction: see W Mansell, “Legal aspects of international debt” (1991) 18 *Journal of Law & Society* 381.

something which is imposed on them from the outside, rather than as something intrinsic to them, something which actually constitutes them. As a result, many regulations are not seen or acknowledged as such, but treated as natural, as having a pre-regulatory existence, and removed from the arena of regulatory reform.¹⁷⁰ If we are to tackle the problems we now face, these invisible regulations need to be identified and opened up for debate. It should be recognised that states determine the bundles of rights held by financial property owners and the terms on which international financial markets operate, and the idea of regulatory reform should be widened to encompass consideration of them. Rather than being treated as unchangeable and unchallengeable natural givens, these bundles of rights need openly to be recognised as social artefacts, subjected to critical analysis and, if necessary, to reform. Regulatory reform should not concern itself only with investor protection and creating a more secure environment for financialisation, but with consideration of the proper ambit and scope of investors' rights and, indeed, obligations. The present (socially constructed) rights–obligations structures systematically favour the interests of the bondholding class to the disadvantage of everyone else.¹⁷¹

There is a precedent, for this is, in effect, what happened at Bretton Woods. Both John Maynard Keynes and Harry Dexter White, the principal architects of the system, wanted to secure for governments the right to control their domestic capital markets and to prevent international capital from “operat[ing] against what the government deemed to be the interests of any country”. They wanted, in particular, to protect newly emerging welfare states from capital flights induced by a desire to evade the “burdens of social legislation”, and to promote “genuine new investments for developing the world’s resources”.¹⁷² Bretton Woods thus promoted the free trade of goods within a restrictive and decidedly *à*/liberal set of international financial arrangements characterised by fixed exchange rates and extensive capital controls. In restricting and regulating the international movement of capital, both Keynes and White acknowledged that they were limiting the bundles of rights possessed by financial property owners and thus significantly diminishing their market power.¹⁷³ As White observed, the new system would mean “less freedom for owners of liquid capital” and place “restriction[s] on the property rights of the 5 or 10 percent of persons in foreign countries who have enough wealth or income to keep or invest some of it abroad”.¹⁷⁴ In similar vein, Keynes recognised that the implementation of the accord would precipitate “keen political discussions [about] the position of the wealthier classes

170 See Chang, *23 Things*, n. 164 above, pp. 1–10.

171 As dos Santos observes, amongst other things they permit lenders to realise “high effective interests rates”, underpinning the sustained high profitability enjoyed by financial intermediaries lending to ordinary consumers, “At the heart”, n. 112 above, p. 6.

172 E Johnson and D Moggridge (eds), *The Collected Writings of John Maynard Keynes* vol. 25 (London: Macmillan 1980), p. 17. Keynes favoured “legitimate capital movements”. According to Helleiner, Bertil Ohlin summarised the views of many international economists in 1936: “There is a decisive difference between the role of such transfers [capital movements] and the functions of an exchange of commodities. The latter is a prerequisite of prosperity and economic growth, the former is not.”: Helleiner, *States*, n. 133 above, pp. 33–8.

173 The goal, in the words of Henry Morgenthau, American Treasury Department Secretary, was to “drive the moneylenders from the temple of international finance”: Helleiner, *States*, n. 133 above, p. 4.

174 H D White, “Preliminary draft proposal for a UN stabilization fund (April 1942)”, in J Keith Horsfield, *The International Monetary Fund 1945–65* vol. 3: Documents (Washington: IMF 1969), pp. 66–7.

and the treatment of private property”.¹⁷⁵ Both believed that the control of capital movements was a prerequisite of effective domestic economic and social management.

The desire to make finance servant rather than master¹⁷⁶ lies behind not only the calls for the establishment of a Bretton Woods II, but many of the other reform proposals which have surfaced in recent months – for the paring down of shareholder rights (introducing minimum ownership periods before shares accrue voting rights, for example),¹⁷⁷ for the imposition of greater restrictions on takeovers, for the introduction of maximum executive–worker remuneration ratios, for Tobin-style taxes, and so on. Any proposals which diminish the rights and privileges of the bondholding class will, of course, be highly controversial and fiercely contested. As J A Hobson observed during the depression of the 1930s, any political changes which entail changes to property rights tend to be portrayed by property owners as outrageous, wicked and wrong, infringements of natural rights and freedoms. It is, he suggested, for this reason that academics and policymakers are reluctant to subject property and property rights to the rational scrutiny to which they subject other social institutions. The “refusal to apply clear reasoning to unveil the defects of political and economic institutions, and the . . . class distinctions associated with them”, Hobson argued, “is in some measure due to the stubborn objection of rationalists to apply to property, income, profit, and other economic concepts the same relentless logic they apply to [other] concepts”.¹⁷⁸ Given the seriousness of the situation in which we currently find ourselves, it is precisely clear reasoning of this sort that we need.

Even before the current debacle, belief in the virtues of neoliberalism (and pension privatisation) persisted not because of the results it had delivered but because of the pressure exerted in its favour by financial elites, their representatives in powerful national and international agencies, and academics and policymakers seduced by simplistic theories about the benefits of so-called free markets and free financial markets in particular.¹⁷⁹ The crisis presents an opportunity to challenge not only the intellectual hegemony of these ideas and their false claims about the nature of markets, but the debilitating economic determinism and distorted and obfuscatory efficiency-based explanatory and normative frameworks which have underlain so much recent legal scholarship. It presents us, in other words, with an opportunity to re-orient and re-enrich that scholarship, to reconnect it with the vital and complex issues of productive efficiency, justice, ethics and human well-being with which law and regulation should be concerned, and to recognise that the range of institutional possibility is far greater than we have been led to believe.

175 Letter to Roy Harrod, 19 April 1942, Johnson and Moggridge (eds), *Collected Writings*, n. 172 above, pp. 35, 149. Keynes was not opposed to finance per se, differentiating the active financier who sensed opportunities for investment in particular productive sectors from the parasitic coupon-clipper (whom he described as an investor without a function) living off interest payments and dividends. For the latter he advocated euthanasia, slow death through declining interest rates.

176 In Lawrence Kraus’ words, Bretton Woods assigned to finance a kind of “second class status”, see Helleiner, *States*, n. 133 above, p. 5.

177 In the speech cited earlier (“Does business have a role?”, n. 2 above), Richard Lambert cited with approval Dave Packard’s suggestion that shareholders should settle for an “adequate profit”.

178 J A Hobson, *Confessions of an Economic Heretic* (London: Allen & Unwin 1938).

179 On this, see Charles Ferguson’s revealing film, *Inside Job* (2010).