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Market vs. contract? The implications of contractual theories of corporate governance to the analysis of neoliberalism

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abstract

Defining neoliberalism is a tricky thing to do. Whereas most critics of neoliberalism characterize it as an analytical category denoting an epistemology and set of practices based on a market ethic, market mechanism, or market principles, my aim in this paper is to theorize neoliberalism as a contract-based concept and social order. To do this I examine the co-production of neoliberalism's epistemic order and social order as they relate to corporate governance and corporate form. Neoliberal theories of the firm, characterizing it as a *nexus of contracts*, provide a useful insight into the importance of law, especially contract law, to our understandings of neoliberalism.

Introduction

How is it that neoliberalism – as an analytical category, political-economic project, or epistemic community – sits very comfortably with the expansion and dominance of large, monopolistic corporations? One would expect, considering the emphasis of neoliberals and their critics that neoliberalism entails the expansion and dominance of the market and market principles, that corporate monopoly would be anathema to neoliberalism. It certainly was anathema at one point in time, although this changed during the 1950s and 1960s – primarily in the United States – as the result of a concerted intellectual effort to reconcile markets and monopoly (see van Horn, 2009; 2011; van Horn and Mirowski, 2009). Nowadays, it is worth noting that most economic activity is undertaken *within* private economic organizations, especially large, multinational enterprises

(Hodgson, 2005). There are sectoral and national differences of course, but in countries like the UK, USA and Canada large business enterprises (i.e. over 500 employees) represent a significant proportion (i.e. 40-50%) of employment and value-added (Deakins and Freel, 2012: 36-7).

This contradiction provides the starting point, but not finishing line, for this paper. My aims are twofold. First, and primarily, my aim is to contribute a new angle to critical understandings of neoliberalism as an analytical category, especially by questioning the notion that neoliberalism is best thought of as a market-based order. This aim is really about questioning neoliberals and the tenets that underlie their epistemic and moral claims about the world (e.g. the market is efficient, the market is good, etc.) and, in so doing, questioning the analytical term 'neoliberalism' as it is currently deployed. Second, to undertake this first analytical goal, I address what I see as the central contradiction in understanding neoliberalism as a market-based social order, which I briefly highlighted above (re. monopoly). Neoliberal epistemic claims are underpinned by paeans to the market and its wondrous capacity to resolve *all* social problems, yet neoliberalism as a social order has entailed the legitimation of corporate monopoly and concentrations of market power, whether or not this produces significant distortion in the market.

In this paper, the first aim builds on the second. To do this I adopt a theoretical approach from science and technology studies (STS) called 'co-production' to examine the evolution of corporate governance and corporate form during the so-called neoliberal era (i.e. from 1980 onwards). Co-production is particularly useful for this task because it emphasizes the need to understand the relationship between the epistemic order – how we understand and represent the world – and the social order – how those claims are realized and enacted (or not). It is my contention that the co-production of neoliberal corporate governance and form provides a way to then unpack and rethink neoliberalism as an analytical category, which will hopefully provide a new way to critique the epistemic *and* moral claims of neoliberals (and other free market advocates).

I first outline the theoretical framework of co-production in more depth and explain how it can be usefully extended to political economic analyzes. I then discuss neoliberalism as an analytical category in the critical literature. I then focus on the evolution of corporate governance and corporate form in order to illustrate the usefulness of the co-production framework and to show how current understandings of neoliberalism are too focused on conceptualizing neoliberalism as a market-based order. In this section I provide a short historical overview before focusing more explicitly on the neoliberal era. In the final section I return to neoliberalism as an analytical category in order to illustrate how neoliberalism can be considered as a contractual-based concept. I then conclude with some implications of this argument.

Co-production as a theoretical framework

Co-production is a conceptual perspective in science and technology studies (STS) and is associated with the work of Sheila Jasanoff and her collaborators. It is based on the idea that 'natural and social orders are produced together' based on the claim 'that the ways in which we know and represent the world (both nature and society) are inseparable from the ways in which we live in it' (Jasanoff, 2004a: 2). Consequently, it is focused on understanding the articulation of scientific knowledge and socio-political order; especially how science and the nation-state evolve together. In this way co-production highlights how scientific knowledge entails certain 'social dimensions' and, on the other hand, that these social dimensions are informed by scientific knowledge. According to Jasanoff (2004b: 38), it is the 'constant interplay of the cognitive, the material, the social and the normative' that generates and maintains socio-political order. In this sense, culture, social meaning, political discourse, and so on are embedded in our scientific knowledge as much as scientific knowledge is embedded in our culture, politics, etc.

What this means, theoretically and methodologically, is that to explain something like scientific knowledge necessitates an examination of social and political institutions – both formal (e.g. the state, law) and informal (e.g. ethics, discourses, narratives) – since these institutions are implicated in the formation and stabilization of scientific knowledge (and vice versa) (*ibid.*). In their work on science and technology, for example, Jasanoff and Kim (2009: 120) argue that co-production allows them to analyze how different national states 'describe attainable futures and prescribe futures that states believe ought to be attained'. They contrast nuclear policies in the USA and South Korea to show how particular national narratives have driven specific scientific pathways: one aggressive (nuclear weapons) and the other passive (nuclear power).

More generally, this perspective can be applied to other forms of epistemic order and social order. Any specific social order necessarily entails the co-production of an epistemic order; that is, the world and our claims about it are entangled with one another, making it difficult to identify how either ideas or institutions cause one another. The explanatory strength of co-production rests on this approach. First, it has the capacity to explain how new epistemic claims (and artefacts) are created, understood and integrated in prevailing institutions and infrastructures at the same time that it can explain how those same institutions and infrastructures are challenged, changed and legitimated by new epistemic claims (and artefacts). Second, perhaps its greatest explanatory power rests in the fact that co-production does not lead to either techno-scientific or social deterministic claims.

While co-production has explanatory power in some areas, there is a significant gap in its analytical arsenal: it focuses on certain epistemic claims (e.g. scientific) and certain social formations (e.g. the state) meaning that it ignores a swathe of societal agents and formations (e.g. business) and epistemic claims (e.g. political economy) (Tyfield, 2012). This gap is made clear in Jasanoff's (2004a: 3) comment that 'States, we may say, are made of knowledge, just as knowledge is constituted by states'. In order to extend co-production as a theoretical perspective it is important to think about how it might be used to analyze the development of political economy as both epistemic and social orders. Doing so necessitates an examination of epistemic understandings of political economy (e.g. economics, law, corporate governance) and of social formations and forms of political economy (e.g. business enterprise, corporation, etc.). Incorporating such an analysis will complement the state-centric focus of Jasanoff (2004a, 2004b), Jasanoff and Kim (2009) and others, with a more economic- or market-focus of people like Jessop (2005; see also Ponte and Birch, 2014).

My intent in this paper is to apply co-production as a theoretical approach to the evolution of corporate governance (i.e. epistemic order) and corporate form (i.e. social order) in order to tease apart the contradiction between market-based claims underpinning neoliberalism and monopoly-based forms underpinning modern business. Before doing this, however, it is necessary to first highlight how neoliberalism and monopoly are contradictory.

Neoliberalism as a market-based concept and the contradiction of corporate monopoly

For a topic much discussed, neoliberalism is still a fuzzy term and concept. It has been used to mean anything from corporate power and malfeasance through to the systemic instability and collapse of the financial markets in 2007-8 – and much in between. It is a term that is difficult to pin down or come to agreement about. This is despite the fact (or perhaps because of it) that the term is largely used in a pejorative sense by critics of (free) market systems and institutions rather than by proponents of a market-based order itself. Few people identifiable as 'neoliberals' – e.g. Friedrich Hayek, Milton Friedman, etc. – actually ever used (or use) the term to describe themselves, and when they did (like Friedman) they subsequently recanted (Peck, 2010). Moreover, and to add to the confusion, it was a term originally used to characterize only one strand of 'new' liberalism – that of the Freiburg School or *ordoliberalism* (Friedrich, 1955) – rather than all schools (e.g. Austrian, British, Chicago, etc.) (Birch, 2015).

There are at least two reasons why it is difficult to either identify or agree on one version of neoliberalism. First, neoliberalism has a complex, shifting and often contradictory intellectual history stretching back to the 1930s (if not before). Neoliberalism emerges from a range of disparate strands of (new) liberalism – most of which had rejected the discredited *laissez-faire* version dominant in nineteenth-century Britain. Early work on neoliberalism by Michel Foucault (2008), for example, identified two schools of neoliberalism: the Freiburg (or ordoliberal) School and the Chicago School. The key difference between the two is their position on the role of the state in ordering (Freiburg) or interfering (Chicago) with markets (Siems and Schnyder, 2014). There is a long history to these differences that belies this simple characterization – those interested in these details should read Friedrich (1955), Foucault (2008), Gerber (1994), and Siems and Schnyder (2014), amongst others. The evolution of these distinct schools of neoliberalism could not be more different; on the one hand, the Freiburg School was pivotal in the founding of the German *social market economy* – the epitome of coordinated capitalism – while, on the other hand, the Chicago School is implicated in the emergence of Anglo-Saxon *free market capitalism* (Gerber, 1994; Siems and Schnyder, 2014). It is possible to argue that while both schools emerged from a similar critique of *laissez-faire*, they eventually diverged as their epistemic arguments evolved. For example, the Freiburg school maintained its conception of markets as social constructs, while later Chicago School thinkers shifted more towards the view that markets are *natural*, emerging from a liberal notion of the freedom to contract rather than from government fiat (see Bowman, 1996).

Second, critics do not adopt the same analytical meaning or concept when writing about neoliberalism. The main critical perspectives include the following:

- Foucault (2008) and later Foucauldian analyzes emphasize that neoliberalism is a form of *governmentality* – or art of governing – in which a specific market-based rationality and set of technologies of power help to mould people into suitable members of society.
- Neoliberalism has been defined as a *political project to restore class power* by Marxists like David Harvey (2005) and others (e.g. Dumenil and Lévy, 2004); this project entails the installation of a 'market ethic' across society.
- Economic sociologists have argued that neoliberalism is a form of *institutional restructuring* involving the introduction of markets and

market values into formal institutions, normative assumptions and cognitive principles (e.g. Campbell and Pedersen, 2001; Prasad, 2006; Mudge, 2008).

- Political scientists have argued that neoliberalism is a set of *powerful ideas* involving new forms of problem definition and solution based on neoclassical theories of the market (e.g. Blyth, 2013; Swarts, 2013).
- A number of human geographers have characterized neoliberalism as a process – or *neoliberalization* – in which 'market-like rule' is layered on existing spatialities, places and scales (e.g. Tickell and Peck, 2003; Brenner et al., 2010).
- Several philosophers and historians of economics argue that neoliberalism is an all-pervasive and constantly evolving epistemology and epistemic community, or *thought collective*, centred on promoting and constructing markets (e.g. Mirowski and Plehwe, 2009; van Horn, 2009; Davies, 2010; Mirowski, 2013).

Despite these different schools of neoliberal thought and different critical analyzes of neoliberalism, it is still possible to identify certain common characteristics across these definitions. The most obvious is the emphasis placed on markets – or, one kind of market (i.e. 'the market'). Within neoliberal thought the (competitive) market is positioned as economically efficient and politically liberating, and therefore the best and most ethical means to ensure social order (e.g. Hayek, 1944/2001; Friedman, 1962). Critics of neoliberalism also highlight the notion of a market-based order as the central premise of neoliberalism. For example, Bourdieu (1998) argued that neoliberalism is a political project to eradicate social collectives (e.g. state) and replace them with a (utopian) market. Similarly, Harvey (2005: 3) argues that neoliberalism 'holds that the social good will be maximized by maximizing the reach and frequency of market transactions, and it seeks to bring all human action into the domain of the market'.

Seemingly, there is now a general agreement amongst (academic) critics that neoliberalism does not entail the erosion or hollowing out of the state, primarily because the state is necessary to institute, maintain and enforce the market. Consequently, neoliberalism is distinct from *laissez-faire* in that it is based on an acknowledgement of the social construction of markets rather than their natural emergence (Mirowski, 2013). What neoliberalism naturalizes, however, are the origin of markets in liberal notions of freedom to contract (cf. government enactment) and the role of the market in the construction of social order. It is not simply a positive epistemic programme in this sense, it also seeks to legitimate the introduction or extension of the market as an efficient mechanism for organizing society; thus it is both a positive (i.e. descriptive) and normative (i.e. prescriptive) programme.

There are two contradictions to this notion of neoliberalism as a market-based concept pertinent to the rest of the paper. First, the concept of a market-based order, as imagined by neoliberals, entails the extension of the market and market thinking into all areas of life. The reason for this is outlined by Colin Crouch (2011: 31), who argues that the (neoliberal) market necessitates that everything be priced so that we can calculate the best allocation and distribution of resources across society, especially in our individual choices; however, without a 'common unit of measurement' it is impossible to coordinate information through market prices. Consequently, the (neoliberal) market provides no room *to not* participate in the market; everyone and everything must be priced – which has obvious implications for individual freedom. Second, with a market-based conception of order everyone must be a price taker and not price maker since market power distorts the workings of the market, meaning that monopoly is deeply problematic because it distorts market signals (i.e. prices) and, therefore, the efficiency of the market (*ibid.*: 29). While the former contradiction is important for understanding neoliberalism analytically, the latter raises questions about conceptualizing neoliberalism as *only* – or *primarily* – a market-based order and concept.

Neoliberalism has an interesting history when it comes to perceptions of business monopoly. Almost all neoliberals, from whatever school of thought, were opposed to any form of monopoly – private or public – up until the 1950s and 1960s. This is evident across the board in the writings of ordoliberals like Alexander Rustow and Wilhelm Ropke (Burgin, 2012); early Chicagoans like Jacob Viner and Henry Simons (*ibid.*); later Chicagoans like Friedman (1962; see Peck, 2010); and Austrians like Hayek (1944/2001; 1960/2011). These early neoliberals had a negative view of private monopoly as distorting market competition, on which their epistemology and normative claims rested. However, the attitude of later Chicago School neoliberals changed quite dramatically from the 1950s. According to van Horn (2009; 2011) and van Horn and Mirowski (2009) this change in attitude resulted from two major projects undertaken at the University of Chicago in this period: the *Free Market Study* (1946-1952) and the *Anti-Trust Project* (1953-1957). These projects went beyond the economics department, and were led by or involved academics from the law (e.g. Aaron Director) and business (e.g. George Stigler) schools. They de-problematized private monopoly in the eyes of Chicago School neoliberals, although not those of other neoliberals; for example, ordoliberals never reversed their position on monopoly (Gerber, 1994). According to Siems and Schnyder (2014: 383), private monopoly was 'accepted as a legitimate form of economic organization' because

Chicago thinkers argued that monopoly was, by definition, always 'a transitory phenomenon, which will ultimately be eroded by market forces'. Evidence for this expectation, however, is not supported by subsequent events, as outlined below.

What this change in attitude illustrates is a broader shift in representations of the market during the later twentieth century, especially in terms of what the market is, how it functions, and how we should understand it. Put simply, it distinguishes neoliberalism from both *laissez-faire* notions of the market as a creator of prices and price competition (Means, 1983) *and* from embedded liberal notions of the market as an outcome of cost-based transactions and cost accounting (Miller, 1998). It is broader than this, however, since it involved a complex evolution of epistemic claims about markets, business and society and the social order bound up with those claims.

The co-production of corporate governance and corporate form

In order to understand the contradiction inherent in neoliberalism highlighted above – that is, between the market and monopoly – it is necessary to examine the co-production of neoliberal epistemic claims and neoliberal social order. This section focuses on the co-production of corporate governance and corporate form as proxies for epistemic order and social order respectively. My starting point is that both corporate governance and corporate form have changed over time, but not necessarily towards greater efficiency. What I mean by corporate governance and form are the organizational and legal characteristics and abstract understandings of the dominant form of business enterprise (e.g. partnership, limited company, corporation, etc.) at a particular point in time. This means examining how certain social formations are represented as viable and/or achievable, while others are not. All of this will then allow me to unpack neoliberalism as an analytical category in the final section.

Corporate governance and form in historical perspective

The starting point for this brief historical sketch is the argument that global capitalism is dominated by one hegemonic power during each epoch; in the nineteenth century it was Britain and in the twentieth century it was – and still is? – the USA (Arrighi, 1994/2010). Each period was dominated by the co-production of a specific epistemic order and social order; that is, specific economic, legal and management claims about the role of business in society (epistemic order) and the emergence and dominance of specific business formations (social order).

Karl Polanyi (1944/2001) claimed that nineteenth-century British *laissez-faire* was underpinned by the concept of a 'self-regulating market' – although this was more fiction than reality. *Laissez-faire* emerged as a social order from new understandings of the market and economy, and new forms of economic organization. Going back to Adam Smith, it was centred on epistemic claims that individual, self-interested action would create social benefits through market interaction (Barkan, 2013: 44, 58); these new ideas promoted the view that large-scale economic organizations – whether the state or quasi-state entities like joint-stock companies – disrupt markets through collusion and monopoly (see Arrighi, 1994/2010: 21, 252; Hessen, 1983). Market competition and prices were naturalized as objective forces, according to Bratton (1989: 1471), while large-scale organizations were characterized as disrupting this *natural* order. Certain forms of business enterprise dominated the British economy during this period, namely small- and medium-sized owner-managed firms and partnerships or unincorporated joint stock trusts which acted like partnerships (Gillman and Eade, 1995; Guinnane et al., 2007; Cheffins, 2008; Schrauwers, 2008). These business enterprises did not entail a separation of ownership and control, and were part of a highly competitive, mainly familial business tradition; for example, they formed what Arrighi and Silver (1999: 127) call 'an ensemble of highly specialized medium-sized firms held together by a complex web of commercial transactions'. Their success and failure depended on price competition since success was supposedly rewarded and failure punished on the basis of market decisions (Ireland, 2010).

At the end of the nineteenth century, British hegemony was gradually eclipsed as a result of the so-called *corporate revolution* in American (e.g. Chandler, 1977; Fligstein, 1990; Roy, 1997). This involved the rise and expansion of large, corporate enterprises and a gradual rapprochement between organized labour and business after World War II, ultimately leading to an 'embedded liberal order' (Ruggie, 1982). New understandings of markets and corporate governance were entangled with the emergence of these new corporate enterprises. These ideas promoted responsible corporate management and the societal benefits of large corporations (Konzelmann et al., 2010) as a way to reconcile the concentration of corporate power with the demands of liberal democracy (Bowman, 1996). There was an emphasis on understanding and promoting the positive role of large corporate entities in the wider US economy, especially in terms of promoting rising standards of living through mass production (Locke and Spender, 2011), as opposed to promoting (*laissez-faire*) markets. Examples of this new understanding was most evident in the work of people like Berle and Means (1932) when it came to corporate governance, but was also evident in the emergence of things like dedicated business schools (Khurana, 2007) and cost accounting (Miller, 1998). Corporations were classified as 'real entities', in contrast to the aggregate / contract view at the end of the nineteenth-century (Bratton, 1989; Harris, 2006; Gindis, 2009),[1] while corporate governance was shifted from corporate law to securities law as stock markets were turned into a mechanism for interaction between shareholders (*owners*) and managers (Hessen, 1983). These changes accompanied the rise of large, oligopolistic corporations, legitimating the activities of corporate *entities* as opposed to individual business owners; in turn, these entities became the centre of cost-based planning and production according to Bratton (1989: 1471), in contrast to previous focus on price-based market interactions between individuals.

Corporate governance and form in the neoliberal era

Neoliberalism is characterized by a distinct epistemic and social order when it comes to corporate governance and corporate form. This is most evident in the development of a 'contractual theory' of the firm alongside the dominance of corporations – and big business generally – over the state and society (Weinstein, 2012). In contrast to nineteenth-century laissez-faire, neoliberalism is not based on the assumption that the market emerges naturally, but rather on the idea that the market is based on the 'presumption of freedom to contract' (Bowman, 1996: 171), which must then be protected by the law and/or state regulation. However, what really distinguishes neoliberalism from laissez-faire is the emphasis on contract and contractual relations over and above (fictive) natural market ones; that is, the market is conceived as a series of contracts and not price interactions or cost calculations. This enables anything to be remade as part of the market in neoliberalism since everything can be turned into a contract (e.g. municipal rubbish collection, saving the planet from climate change, etc.).

When it comes to corporate governance, neoliberalism is based on the re-conceptualization of the market as a series of contracts, exemplified by the firm as a 'nexus of contracts' (Butler, 1989; Eisenberg, 1999; Olssen and Peters, 2005; O'Kelley, 2012; Weinstein, 2012). This is evident in the importance placed on the work of Coase (1937) on the theory of the firm and concept of transaction costs

1 This evolution is too complex to really discuss here, so I can only point out a few aspects of this process as outlined by Harris (2006). First, the aggregate/contract view was specific to the US because of the emphasis on *contractual* relations (*ibid.*: 1468); this is something I discuss later in relation to neoliberalism. Second, the aggregate/contract view 'could not be squared with the limited liability attribute of business corporations' because if corporations are mere aggregates of their shareholders then there is no reason why those same shareholders should receive liability protection (*ibid.*: 1470). This meant it did not survive very long before being replaced by real entity theory. Finally, real entity theory, which was partially derived from German legal concepts, enabled managers to claim control over corporate activities to the exclusion of shareholders (*ibid.*: 1474).

(O'Kelley, 2012). Transaction costs are described as the costs of contracting (e.g. negotiating, writing, enforcing, etc.) and are used to explain the decision to internalize certain market activities (e.g. hiring employees over temporary contractors) in an economic organization (e.g. corporation) (Eisenberg, 1999). Neoliberal scholars developed this contractual perspective through their direct engagement with the theory of the firm; for example, the likes of Jensen and Meckling (1976) and Fama (1980) have very explicitly identified corporations as a nexus of contracts between contracting parties (e.g. investors, managers, workers, etc.). In so doing, they assume a number of things:

- 'Contractual relations are the essence of firms' (Jensen and Meckling, 1976: 310).
- The separation of ownership and control entails an 'agency problem' in that managers need incentives (i.e. well-designed contracts) to run firms for the benefit of shareholders (or investors), who are characterized as both contractual owners and allocators of 'residual control rights' to managers (Shleifer and Vishny, 1997: 741).
- Markets are efficient (Fama, 1980).
- Stock markets are a suitable 'market for control' in that they enable shareholders to punish management (Jensen and Meckling, 1976).

This contractual perspective seeks to reframe *internal* transaction costs (e.g. employment contracts) as *external* and, therefore, market-based contracts (Hodgson, 2005). There are significant problems with this reframing, notably the difference between economics and law in definition of contract; that is, 'reciprocal arrangement' in economics and 'legally enforceable promise' in law (Eisenberg, 1999: 822-3).

What this contractual perspective helps explain is the contradiction in neoliberalism highlighted above – that is, between an emphasis on the market and the legitimation of monopoly. Here I outline three ways that the co-production of corporate governance and corporate form in the neoliberal era has come to legitimate corporate monopoly:

It has involved a new view of corporate identity and personality. There has been a resurgence of the aggregate or contractual view of the corporation, which had briefly flared up at the end of the nineteenth-century (Harris, 2006; Gindis, 2009; Veldman, 2013). This resurgent conception of the corporation is based on the idea of the firm as a nexus of contracts, outlined above, as well as a legal fiction (Bratton, 1989). Unlike the nineteenth-century version, however, it treats contract as the basis of market interactions (cf. price). The aggregate/contract view legitimates specific forms of ownership, notably those based on shareholding since corporations are represented as the aggregate interest of shareholders who are represented as residual claimants (Butler, 1989). It thereby legitimates the market-distorting power of corporations by imagining the corporation as a collection of disparate and different market actors who are contracting with one another. From this perspective, a large, monopolistic corporation is no longer a problem for the functioning of the market because it is *actually* and *merely* a group of individuals contracting with one another, not a massive and powerful entity in its own right. Thus the corporation or firm is theorized away, according to Bratton (1989).

It has involved new forms of governance and control. Aggregate/contract theory became popular alongside emerging social trends in corporate governance, especially the demands of new types of shareholders like institutional investors (e.g. pensions, mutual and insurance funds). According to Lazonick and O'Sullivan (2000), the rise of institutional investors and changing financial climate during the 1970s led to greater demands for shareholder control. These trends were accompanied by the growth in the economic *and* market power of institutional investors themselves (see Deakin, 2005; Davis, 2008; Dobbin and Jung, 2010; Soederberg, 2010). This eventually fed into the adoption of specific governance mechanisms. Some were *internal* (e.g. executive share options), creating incentives for management to pursue shareholder value at all costs; others were *external* (e.g. stock analysis), creating information for investors to pursue portfolio diversification and liquidity through ease of exit (Dobbin and Jung, 2010). Aligning these two interests mirrored and incorporated some of the assumptions of efficient markets (*à la* Fama) and agency problems (*à la* Jensen and Meckling) (*ibid.*). This transformation reflected a broader shift from managerial capitalism – associated with the embedded liberalism – to shareholder capitalism and was tied into wider trends in the reconfiguration of (predominantly) American business schools; this involved a reorientation around fields like finance and objectives like shareholder value as curricula increasingly incorporated principles from financial economics (Khurana, 2007; Fourcade and Khurana, 2011; Locke and Spender, 2011).

It has involved a new view and implementation of antitrust regulation. Aggregate/contractual theory also fed into and reflected changes in competition law, helping to legitimate corporate monopoly by reframing notions of competition itself. This has been detailed by Will Davies (2010) in a discussion of the 'antitrust revolution' during the 1970s and 1980s, and can been seen in other issues in competition law (Christophers, 2015). What Davies (2010) highlights is the way that economic theory – especially notions of transaction costs derived from Coase (see above) – informed a shift in antitrust laws in the USA that contrasted with earlier critiques of corporate monopoly (see Barkan, 2013: 41-64;

also Bowman, 1996; van Horn, 2011). The focus on (nexus of) contracts meant that business organization – and hence corporate monopoly – could be cast as more efficient than the market where economies of scale led to reduced consumer prices (Davies, 2010: 75).[2] Ultimately, competition could be framed as a concern with 'consumer welfare', defined in a limited fashion as lower consumer prices, since prices were no longer seen as subject to arbitrary market power and were replaced by contract as the underpinning of corporate governance. Whether this transformation of antitrust was driven by epistemic claims or corporate power is difficult to untangle.

	Laissez-faire	Embedded liberalism	Neoliberalism
CORPORATE GOVERNANCE (epistemic order)	Economics: self-regulating market	Economics: transaction costs	Economics: nexus of contracts
	Theory: fiction, concession	Theory: real entity	Theory: aggregation
	Transactions: market price	Transactions: historic cost accounting	Transactions: contractual
CORPORATE FORM (social order)	Form: small, family	Form: large, oligopolies	Form: large, monopolies
	Law: private property	Law: securities	Law: contract
	Governance: ownership	Governance: separate ownership and control	Governance: shareholder primacy

Table 1: The evolution of corporate governance and form.

This discussion implies that the co-production of neoliberal epistemic and social orders is based, in part if not whole, on the conceptualization of contractual relations as equivalent to market price interactions, such that neoliberalism – as a supposedly market-based order – is made compatible with monopolistic business formations, which are treated as markets in themselves. As Hessen (1983: 283) puts it, from this perspective any 'organizational form is a contract with a particular mix of features... but the underlying core in *every* form [of organization] is contract'. The key point to emphasize is that contract actually trumps price or cost as the epistemic basis for thinking about the market within neoliberalism, at least when it comes to corporate governance. Moreover, Letza et al. (2004: 248) argue that 'The concept of contract is the most favoured metaphor used in agency theory. It believes that all social relations in economic interaction are reducible to a set of contracts between principals and agents'. Now, my point is that the implications of this contractual-based epistemic and social order are important, not only when it comes to analyzing the evolution of

2 Another interesting point Davies (2010: 68) makes is that neoliberals – of the second Chicago school – 'ceased to privilege markets' because they sought to erase any difference between economy and society.

corporate governance and corporate form (see Table 1), but also when it comes to understanding neoliberalism as an analytical category used to criticize certain forms of political-economic decision-making. It is to these analytical issues that I turn to next.

Neoliberalism as a contract-based analytical concept and category

Neoliberalism, contract and contract law

As Crouch (2011) outlines, competitive and free markets are theoretically incompatible with the organization of any economic activity, in whatever form. On the one hand, a strong version of this claim would problematize any form of contractual regulation and management of economic activity within an organization since this entails forms of hierarchical rather than market coordination – that is, according to the work of people like Coase (1937) and others on transaction costs. Obviously this strong version is incompatible with twentieth and twenty-first century capitalism in which over half of all economic activity takes place within organizations and not markets (Hodgson, 2005). On the other hand, a weak version would stress the market distorting power of large, monopolistic organizations (e.g. multinational corporations), which is what early neoliberal thinkers (e.g. Hayek, Friedman, Ropke, etc.) argued at one point or another (see above). This would imply that a neoliberal, market-based order would be incompatible with business monopoly; yet this is far from the case, both empirically and conceptually. While this paper has not addressed the former, it is not due to a lack of evidence to support the idea that economic and market power has become increasingly concentrated.[3] As noted above, however, the objective of this section is not to present the evidence of economic and market concentration, but rather to develop a new analytical understanding of neoliberalism as a contract-based concept and order.

To start, it is important to note that contract and contractual relations are central planks of neoliberal thought – many early neoliberals, for example, were lawyers

3 Empirical work on business monopoly can be hard to dig up, and has seemingly been sidelined since the 1960s. However, it is still possible to illustrate, empirically, the concentration of economic power in the hands of large business organizations, especially corporations. For example, recent work by several physicists shows that 737 multinational corporations (MNCs) control 80% of the value of all MNCs and only 147 control 40% (Vitali et al., 2011); the journalist Barry C. Lynn (2010) outlines how a range of product and sectoral markets are dominated by a small number of firms as well as the concentration of supply chains behind these markets; and finally, Bellamy Foster et al. (2011) provide evidence of the increasing concentration of revenues, profits and sectors in the USA since the 1950s.

or interested in law – and, hence, it underpins their conceptions of social order. One example of the discussion of contract in neoliberal thought is Hayek (1960/2011) in his major treatment of law, *The Constitution of Liberty*. He claimed that the reason 'other people's property can be serviceable in the achievement of our aims is due mainly to the enforceability of contracts' meaning that 'the whole network of rights created by contracts is as important a part of our own protected sphere, as much the basis of our plans, as any property of our own' (1960/2011: 208). What he means is that *free* social interaction (i.e. market exchange) is only feasible where there is both property rights and, as important if not more so, rules of contract to enable exchange between property holders. In his words, 'competition [is] made possible by the dispersion of property' and this dispersion is dependent on contract.

What contract enables is individual decision-making in the arrangement of (contractual) relations with one another, although it is necessary that this only occurs within 'the reign of general and equal laws' (1960/2011: 222). Hayek had a preference for common law in this regard (1960/2011: 329) since it does not entail the *arbitrary* interference of government. However, according to Hayek certain minimum legal requirements are needed for a market order and have to be enforced by the state, including 'the protection of property and the enforcement of contract' (1960/2011: 338). To summarize Hayek's position: he argued that markets and market competition are underpinned by contract and individual contracting (e.g. buying and selling products and services); and, in turn, contract is underpinned by a general set of laws enforced by a state.[4]

Neoliberalism as a contract-based order

By mentioning Hayek's arguments, I want to highlight the importance of contract and law in theorizing neoliberalism. Not many critical scholars have engaged rigorously with this 'legal side' of neoliberalism – with a few exceptions. For example, several critics of neoliberalism have sought to show how neoclassical economic ideas have infiltrated legal scholarship, with the clear example being the law and economics movement developed at the University of Chicago (e.g. Davies, 2010; Nik-Khah and van Horn, 2012; Aksikas and Andrews, 2014). These critics show how economic analysis has come to influence concepts and principles in the law itself. While this is important work, it is not my focus

4 Neoliberals of one school or another have been interested in the law since the early days of the movement. A clear example of this is the emphasis placed by ordoliberals on the notion of an 'economic constitution' to underpin society and ensure the proper functioning of markets. This vision was enacted in West Germany after WW2 and, to a lesser extent, it has been embedded in the European Union (Gerber, 1994).

here. Rather I want to consider neoliberalism as a contractual theory – not simply a market-based one – by examining the relation between neoliberalism and contract law (Zamir, 2014).

First, it is possible to conceive of neoliberalism as a contract-based order in light of the contractual theories of the firm, corporation and corporate governance outlined in the previous section (e.g. Butler, 1989; Eisenberg, 1999; O'Kelley, 2012). In particular, Weinstein (2012) argues that the new contractual theory of market relations developed by the likes of Jensen and Meckling was meant to frame the firm as the market; this is evident in subsequent positive and normative claims about (proper) corporate governance and corporate forms. In Weinstein's (2012: 28 fn. 69) words:

> Let us say that there was a shift from a representation of the market order as a multilateral system of simultaneous, anonymous relations to a representation in terms of bilateral relations that are necessarily personal, and from coordination through prices (and equilibrium) to coordination through negotiation and contracts. This made it possible to reduce the opposition between market and firm, or even reduce the firm to a particular market.

Famously, Jensen and Meckling (1976: 310, emphasis in original) claim that firms are '*legal fictions which serve as a nexus for a set of contracting relationships among individuals*' and that 'Contractual relations are the essence of the firm, not only with employees but with suppliers, customers, creditors, etc.'. According to Weinstein (2012), this view enabled Jensen and Meckling to align their contractual theory with an organizational structure, namely the firm (or corporation – sometimes the distinction is not well made in this corporate governance literature); however, they did not argue – merely assume – that the contracts constituting the firm represent a market structure.

Second, the idea that all business transactions are only or mainly discrete, one-time interactions seems incongruous. Ongoing, relational contracts – highlighted in the literature on trust in business – are (more) common in business; however, this is ignored in most neoliberal conceptions or deployment of contract and contract language (Trakman, 2010). Importantly, when the market is conceived as one-time contractual relations, any extension of the market necessarily increases transaction costs – because it increases contracting – and thereby reduces the efficiency of the market.[5] This creates a major paradox in neoliberalism and our analytical understandings of it.

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5 As Thorsten Veblen argues: 'The greater the parcelment in point of ownership, the greater the amount of business work that has to be done in connection with a given

Third, according to Paul Treanor (2005: n.p.) neoliberalism is characterized by the 'desire to intensify and expand the market, by increasing the number, frequency, repeatability, and formalisation of transaction'. In this sense, neoliberals conceptualize the market as a contractual structure, as opposed to property- or price-based one – both of which are naturalized as givens. Treanor (2005) goes on to argue that neoliberalism promotes an extension of (market) contracts to everything, an increase in the frequency of (market) contract negotiation, a decrease in their duration, and intensified forms of contractual audit; in this sense, neoliberalism is conceptually based on the number, frequency, duration and intensity of *contractual* transactions. With neoliberalism, everything should be turned into a (market) contract, and these contracts should be (re-)negotiated constantly, reduced to the shortest possible timeframe to enable constant (re-)negotiation, and watched constantly – a starker utopia than the market-based order critical scholars generally present. This implies that as more activity – economic, social, political, etc. – (supposedly) becomes more market-based, it will significantly increase the aggregate cost of (market) transacting as every social action – now covered by the market – will necessitate contractual negotiation, coordination, monitoring and enforcement. The increase in contracts (or transaction costs) would be phenomenal if everything was swept up into the market, and it would likely lead to the market grinding to a halt. In fact, it would seem that the only way to resolve this dilemma is to standardize contractual arrangements; that is, to construct a range of *standard form contracts* to cover different social activities.

Finally, understanding neoliberalism as an analytical category requires an examination of the conceptual and practical importance of these standard form contracts (from now on 'standard contract'). Although Hayek (1960/2011: 339) noted that each individual should be able to construct their own contractual relations with each other, he also noted that the standard contract 'often greatly facilitates [such] private dealings' (1960/2011: 339). Standard contracts, however, raise yet more contradictory issues for neoliberalism in concept and practice. Recently, Aksikas and Andrews (2014: 745) argued that 'This artifice – the contract between equals – is central to the neoliberal ideology of our present age'. Their point is that even though neoliberalism may be a contract-based order, this does not mean that it is based on *free* and *voluntary* contract. More apt, perhaps, is the notion that neoliberalism is underpinned by standard contracts with all the inherent problems this entails.

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output of goods or services, and the slower, less facile, and less accurate, on the whole, is the work' (quoted in O'Kelley, 2012: 1256 fn. 44).

Standard form contracts and neoliberalism

A standard contract – or boilerplate contract – is a contractual arrangement in which one party – usually buyer or consumer – has no input in determining the terms of the contractual agreement (e.g. Slawson, 1971; Bebchuk and Posner, 2006; Gilo and Porat, 2006; Trakman, 2010; Zamir, 2014). An everyday example would be an end user license agreement (EULA) between software provider (or similar) and customer – this is a generic contract we enter into on an almost daily basis. Standard contracts are, in this sense, no longer negotiated or even negotiable. It is hard, therefore, to consider them to be free and voluntary arrangements since one party has no power to enact their demands; yet, as Hayek claimed, they are necessary for modern capitalism since without them every transaction would need to be individually negotiated, monitored and enforced – an enormous cost for any society to bear. Consequently, it is hardly surprising that standard contracts now represent 'more than 99% of the contracts currently entered, whether consumer or commercial' (Zamir, 2014: 15). They are everywhere, and they are not limited to individual consumers – business, the state and consumers use them on a daily basis. According to Zamir (*ibid.*) it is not 'coincidental' that US law has failed to address problems with standard contracts (e.g. asymmetric power) since such contracts reflect:

> ...the fundamentally individualistic ethos of American society, the entrenched suspiciousness of – and even hostility to – government regulation, and the great influence of right-wing, Chicago-style economic analysis of private and commercial law in the past decades.

Standard contracts highlight at least three significant contradictions here with current analytical conceptions of neoliberalism:

Anti-competitive practices: according to Gilo and Porat (2006: 1006-1007), standard contracts are problematic because they enable and legitimate various forms of anticompetitive practice as a result of their complexity; for example, cellphone operators can tacitly collude through complex and incommensurate cellphone contracts. As standard contracts become increasingly complex and differentiated from one another it becomes almost impossible to compare suppliers and prices. This has meant that it is the 'transaction costs [i.e. negotiating, monitoring, enforcing] imposed upon consumers, from which the supplier expects to gain' (*ibid.*: 986). It becomes difficult to see how market price competition is promoted, enabled or facilitated as a result, suggesting that characterizing neoliberalism, in analytical terms, as only or mainly a market-based order misses a key issue; most markets are 'administered' in one way or another (see Means, 1983).[6]

Markets vs. contract: Butler (1989: 119) notes that the standard form contract 'reduces the transaction and negotiating costs of reaching and adhering to optimal contracts'. Contract law is, in this sense, central to neoliberalism because it enables the extension of *market-like* relations – or, more accurately, contractual ones – to all areas of society; without standard contracts, transaction costs would militate against the extension of market-like arrangements. This conflicts, however, with the idea that the market is the best or should be the central mechanism for coordinating either society or the firm. If the market was the best or only mechanism needed, then there would be no need for contract law. However, the latter is crucial for ensuring transactions can and do happen without too high a cost. More critically, the more that our social relations are converted into *market-like* interactions, the less efficient the market will be unless those interactions are reduced to standard and non-negotiable contracts; this is hardly the basis for liberty or choice.

Privately-made law vs. private law: following on from the last point, a standard contract is a way for private organizations to establish their own private system of law and governance, which explains why neoliberalism can sit comfortably with the rise and dominance of large, monopolistic businesses (Braithewaite, 2005). This point goes back to the 1970s when Slawson (1971: 530) argued that standard contracts, which he argued had 'engulfed the law of contract' and 'become a considerable portion of all the law to which we are subject', are a form of 'privately made law'.[7] The lack of negotiations – or even capacity to negotiate on the part of some parties – in standard contracts reflect the *delegation* (or arrogation) of law to private business, especially in the areas of incorporation, employment and association (*ibid.*: 536). What this implies, and as Miller (1972: 63) pointed out long ago, is that government and the law are 'used to permit economic power (the corporations) to prescribe the terms and conditions of most of those transactions called contracts'. The stipulation of non-negotiable terms

6 There is a neoliberal response to these criticisms of standard, one-sided contracts: to paraphrase, perhaps crudely, Bebchuk and Posner (2006), these contracts are clearer and therefore more efficient (i.e. low transaction costs) because courts will rarely need to get involved to adjudicate cases. Moreover, sellers with one-sided contracts simply have discretion as to how they treat their customers and will be lenient because they want to maintain their reputations, while customers with more equal contracts simply seek to exploit sellers.

7 This 'privately created law' goes along with the private law *within* the corporation between management and employees (see Ciepley, 2013).

and conditions in standard contracts, based on asymmetries in power between business and customer, severely limits any sense of freedom of contract.[8]

Conclusion

The rationale behind this paper is my desire to understand neoliberalism better, especially the tensions and ambiguities in our current conceptualization of it. The main issue that concerns me is the contradiction between the conceptualization of neoliberalism as a market-based epistemology and social order and the neoliberal accommodation with the rise and dominance of large, monopolistic corporations. This central problematic, as I call it here, is based on the view that corporate monopoly should be anathema to neoliberalism (Crouch, 2011); however, neoliberals have become very comfortable with corporate monopoly and market power (see van Horn, 2009; 2011; van Horn and Mirowski, 2009; Nik-Khah, 2011). My solution to this contradiction is to attempt to find some way analytically to reconcile neoliberalism as a concept and a social order. My suggestion it that we need to go beyond thinking of neoliberalism as market-based and, instead, consider how it is also a contract-based epistemology and order in which market price, competition and interaction are complicated by neoliberalism's dependence on the capacity to create, monitor and enforce contracts, most of which are by necessity standard form contracts.

Overall then, and despite the rhetoric about the market as the arbiter of value, my analysis in this paper is meant to illustrate – in some small way – that neoliberalism is not only or mainly underpinned by a market-based epistemic and social order, at least when it comes to corporate governance. Here there is less concern with market price or cost interactions, as opposed to the framing of markets interactions as (voluntary) contractual relations between private individuals, in an attempt to obscure the role of the state as creator, facilitator and/or enforcer of those relations (Butler, 1989; Bowman, 1996). What this reframing hides, however, is the difference between market interactions and contractual relations. These can be summarized as follows:

- Contracts are different from market price interactions in that they have to be instituted, by which I mean they need laws, regulation and enforcement to ensure that they are honoured.

8 In a discussion of the usefulness of neoliberalism as an analytical category, Carolyn Hardin (2014: 203) highlights an interesting point: 'Foucault (2003) suggests that the liberal thinkers in the eighteenth century conceived of power as a commodity, a right, which could be transferred or surrendered through contract'.

- Contracts are different because market prices need not be reflected in the agreed price in a contract at its signing, nor is the contractual price necessarily the same as the market price on the date the contract is realized; hence, the (current) market price is never necessarily realized in the contract price.
- Third, the future price (or goods) realized from a contract will be more or less than the market equivalent at the time the contract is realized (in the future), while one party is likely better off than the other as a consequence; there is not necessary reason that both parties will benefit from their exchange.[9]

All of this has several implications for how we understand neoliberalism, how we criticize it and how we engage politically with it. First, it is important to stress that what neoliberals write about their faith in freedom and liberty does not always tally with the implications of the implementation of market-based policies. What is clear is that neoliberal ideals are not reflected in neoliberal practice; the main example here is the contradiction between the market as the best mechanism for coordinating society and the resurgence of corporate power in the last three to four decades. Most economic activity, social relations, political decision-making, ecological conservation, and so on is now managed – in some way or another – by and on behalf of private economic organizations, especially multinational corporations. It is difficult, to say the least, to reconcile this state of affairs with neoliberal claims about individual liberty, freedom and choice.

Second, the increasing reliance on contract, especially standard contracts, necessitates an increase in both quasi-state and state oversight, enforcement and regulation of individual decisions, which are themselves increasingly dominated by contractual forms of social interaction. Individuals, social groups, communities, etc. are increasingly constrained by these contractual relations; this is not just a result of business activities either, it also involves the state as it has supported the neoliberal order. This is why a number of scholars argue that neoliberalism is not an analytically useful term because it ignores the expansion of regulation and governance in both private and public forms and at many national and global scales. Braithewaite (2005) – a key proponent of this perspective – argues that this form of 'regulatory capitalism' actually supports and reinforces the expansion of large, powerful businesses because they can afford to adhere to regulatory demands, while smaller businesses end up in the orbit of these powerful enterprises. None of this involves the market *per se*; all of it is about power and the constraints on politics and political decision-making.

9 Contracts are far more concerned with assets (i.e. resources that produce an income over time) than commodities (i.e. goods that are sold in the market) (Birch, 2015).

Third, analytically it is important to rethink the idea that neoliberalism – in theory or practice – is only about the market. Critics of neoliberalism can fall into the trap of accepting neoliberals at their own words by representing neoliberalism as a market-based theory and order. Consequently, neoliberals have had a free pass for decades because they are able to draw rhetorically on notions of free markets, free exchange, individual choice, individual responsibility, and so on. In reality, freedom, individualism, liberty and all those good things neither underpin neoliberalism conceptually nor in reality; neoliberalism is a wholly regressive philosophy and order based on the limiting capacity of contractual relations, especially asymmetrical, standard form contracts. Politically, critics of neoliberalism can turn the rhetorical tables on neoliberals by re-appropriating the language of freedom and democracy.

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