



2020

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Emily Ann Donlevy

Roanoke College, edonlevy@mail.roanoke.edu

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Recommended Citation

Donlevy, Emily Ann (2020) "Undoing the Leges: Neoliberal Rationality and the United States Supreme Court," *The Macksey Journal*: Vol. 1 , Article 133.

Available at: <https://www.mackseyjournal.org/publications/vol1/iss1/133>

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Undoing the Leges: Neoliberal Rationality and the United States

Supreme Court

Emily Donlevy

Roanoke College

Abstract

The Supreme Court's 2010 decision in *Citizens United vs. Federal Election Commission* was hailed by some as a victory for free speech and economic freedom, but others decried the outcome as a prioritization of corporate interests over the individual. What both groups failed to notice was that a shift had occurred in law itself: the content was no longer legal or political. Using the work of Wendy Brown and David Harvey, I will track the cause and implications of this shift. Brown describes the process of marketization, in which the content of the political is hollowed out and replaced with the economic, turning every interaction into a transaction. The process of the marketization of the legal is clearly illustrated by the outcome of *Citizens United*, in which the right of free speech, typically reserved for individuals, was afforded to corporations. According to Brown's analysis, the process by which the political, and thus the legal, is undermined by the economic is caused by what she calls Neoliberal Rationality, which is reinforced by the judicial as a multiplier of economic power.

Keywords: Market Expansion, Economization, *Citizens United*, Neoliberalism, Liberalism

What is Neoliberalism?

The definition of neoliberalism is subject to much academic debate. The prefix “neo” would indicate that neoliberalism is a new configuration of liberalism. Liberalism itself varies between thinkers but can be loosely characterized as a western school of thought that is closely associated with constitutional democracy and emphasizes individuality, limited government intervention, popular sovereignty, and religious tolerance. Political theorists such as John Locke, Thomas Jefferson, and Adam Smith are associated with classical liberalism. These thinkers do not embody the entirety of classical liberalism, nor do they perfectly mirror each other’s beliefs. Liberalism acts as a loose umbrella term to group individuals together based upon the shared key tenets of their political philosophy. Liberalism values the protection of the rights of the individual, viewing limited government involvement and a democratic structure as the way to accomplish this. This extends both to the social rights of the individual, such as religious tolerance, and the economic rights of the individual, exemplified by a belief in self-regulating markets (Thorsen and Amund 3-6).

In the United States, the modern association with liberalism appears to be far more willing to tolerate state intervention to secure the rights of the individual. One common talking point of the modern liberal involves advocating for legislation that increases the oversight necessary to own a firearm and places restrictions on the type of firearms that an individual can possess. Modern liberals tend to object to government involvement in social issues such as restrictions placed on an individual’s reproductive rights or ability to marry someone of the same sex. In contrast, classical liberalism and neoliberalism, both assert that the rights of the individual are best protected by limiting government involvement in economic issues. Neoliberalism is a purely economic form of liberalism, differentiating it from classical liberalism

and the modern liberalism of the United States. This new “liberalism” is entirely distinct from what is frequently misidentified as its direct predecessor.

Neoliberalism holds that the well-being of the individual is preserved through the protection of private property, free trade, and free markets. This entails utilizing police and military force, as well as legal action, to ensure that the economy functions in an unrestrained fashion. Within neoliberalism, the only acceptable state interference is for the purpose of protecting the freedom of economic. Whereas classical liberalism involves the minimal intervention of the state, neoliberalism calls for an economic state. Neoliberalism, like classical liberalism, is difficult to define due to the myriad of thinkers that are subsumed under one broad term. An additional cause for conflict and confusion stems from the interpretation of both of these concepts in a purely philosophical sense. While both included ideological components, both are political theories, meaning they directly pertain to individual political projects. The political project of classical liberalism is commonly interpreted as securing liberty for the individual, the political project of neoliberalism is to secure liberty for the market (Thorsen and Amund 11-15).

A Brief History of Neoliberalism

David Harvey, author of *A Brief History of Neoliberalism*, defines neoliberalism as “a theory of political and economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property networks, free markets, and free trade” (Harvey 2).

Neoliberalism is not merely an ideology, but a political project with material effects upon the modern United States. To say that neoliberalism is a political project raises further questions:

Who began this project? Why was this project created? What does it seek to accomplish? What had it accomplished? Now that neoliberalism has been defined, it is essential to examine its history.

After the second World War, Keynesian economics rose in popularity. Keynesian economics are characterized by state prioritization of the full-time employment of its citizens, their general economic welfare, and state authority to intervene on the citizen's behalf in order to ensure these needs are met. With states able to regulate markets, an economy based around the welfare of its citizens temporarily flourished. This was not to last. In the late 1960s, income gaps began to increase, Britain was in a financial crisis, and inflation became a major problem. One strategy was to support further state control, and another was to decrease government intervention and "liberate" the market. Those advocating for a free market asserted that deregulation would jump start the economy. The more radical interventionist position was wildly popular amongst left-leaning groups, meaning that those benefitting from market deregulation felt as though their wealth and position in society was being threatened. To these wealthy individuals, living in a similar fashion to most United States citizens was synonymous with the loss of their individual freedom.

A small group of affluent male advocates for neoliberalism, self-titled the *Mont Pelerin Society*, would displace pre-existing economic theory in favor of what we have come to define as neoliberalism. Their founding statement reads as followed:

Even the most precious possession of Western Man, freedom of thought and expression, is threatened by the spread of creeds which, claiming the privilege of tolerance... seek only to establish a position of power in which they can suppress

and obliterate all views but their own. This group holds that these developments have been fostered by the growth of a view of history which denies all absolute moral standards and by the growth of theories which question the desirability of the rule of law. It holds further that they have been fostered by a decline of belief in private property and the competitive market; for without the diffused power...associated with these institutions it is difficult to imagine a society in which freedom is preserved. (Harvey 1-21)

The *Mont Pelerin Society* labelled themselves liberals, associating themselves with economically liberal theory. The classical liberal theory of thinkers such as Adam Smith was obscured by this new political project that asserted that all freedom was subservient to that of the economic. The social component of classical liberal theory ceased to pertain to this new neoliberalism, as it co-opted the language of previous thinkers to serve its own ends. The best way to protect the rights of the individual, the individual being the economically elite, was to remove any restraints from the flow of capital that benefited him, allowing the market to grow ad infinitum in tandem with the elite's wealth. Liberation was no longer about the social and economic freedoms of the individual, but the liberation of the market from its restraints.

State intervention to protect the rights of an individual person was personified as an infringement upon the very rights it was trying to protect. The only function of the state, and thus the law, was to protect profit. If the state did not do so, or tried to intervene in social issues, it was infringing upon the rights of the individual. Through the co-optation of this classical liberal language neoliberals were able to portray any threat to their immediate profit as an authoritarian threat to democracy.

Those in possession of more wealth were disproportionately in positions of power and thus sought to maintain possession of their wealth. Neoliberal theory was readily adopted in the United States and United Kingdom, and as the old interventionist government failed neoliberal theory was adopted in its stead. Members of the *Mont Pelerin Society* won the noble prize, a symbol of their economic theory's mainstream acceptance in the United States. In the U.K., Margret Thatcher stated that "economics were the method, the mission was to change the soul." The election of Ronald Regan shifted the conversation from deregulating the economic to doing so with everything from environmental policies to the health industry (Harvey 17-30).

Regan, Thatcher, and the *Mont Pelerin Socceity* benefit from neoliberalism in that the wealth that they possessed was protected by the shadow of this belief system predicated upon hard work for little reward. They did not advocate for those working hardest to be paid more or for meaningful social betterment, rather they responded to a counter movement by protecting the threatened status quo. They asserted that the goal was freedom, but this freedom was only for themselves. *The Mont Pelerin Society* was established in 1947. In 1971 the U.S dollar flooded the market as a result of free trade policy, causing the fixed exchange rate to be abandon, allowing for interest rates to skyrocket and wages to be deflated. In 1979 Paul Volcker, chairman of the U.S. Federal Reserve drastically shifted monetary policy to combat inflation despite mass unemployment as a result. In 1990 the federal minimum wage fell 30% below the poverty line. With a deflated minimum wage and an increased rate of unemployment, the hours it was necessary to work drastically increased. Rent prices continued to rise, as did the cost of living, forcing individuals to accept poor working conditions, little pay, and long hours, as the norm. Infrastructure that could have aided unemployed individuals was cut in the name of personal freedom, as it placed a restriction upon the market. The gap between the rich and the poor

continued to grow, as neoliberalism succeeded in its project of liberating market from its restraints in the name of freedom. This mode of governance becoming so hegemonic that it impacted the way that individual's living within it interacted with the world. The democracy associated with classical liberalism eroded into an entirely economic political project, not only in theory, but in practice (Harvey 21-52).

Neoliberal Rationality

In her book, *Undoing the Demos: Neoliberalism's Sneak Revolution*, Wendy Brown illustrates the process by which neoliberalism hollows out democracy, not only undermining its more radical manifestations, but redefining the ways in which humankind interacts with the political. This particular lens is not limited to the political, rather neoliberalism characterizes every human interaction through its particular conception of the economic. Brown defines neoliberalism as "a normative order of reason developed over three decades into a widely and deeply disseminated governing rationality," this is to say that within neoliberalism, humans only participate in the economic, as it is the normative order of reason. Human beings are shaped by the normative order of reason, redefining even what it is to be human through the economic (Brown 1-13).

The neoliberal subject is human capital, seeking the best way to enhance its monetary and social gain through competitive marketization of the self. The rights of the individual are completely eroded, as the person relinquishes their freedom, tolerating long work hours, poor working conditions, and low pay in lieu of living in poverty. The individual itself becomes a product to be bought or sold on the market, losing the autonomy coveted by the classical liberal. Individuals no longer strive for liberation, but vie for servitude. This is demonstrated through the competitiveness of the neoliberal subject and can be observed societally in the inflated

qualification expectations within the job market. A college degree has become a baseline expectation for gainful employment, and the student is expected to shape their education around what appears the most employable (Brown 175-181).

To say that the neoliberal subject is human capital is to say that within a society ordered around the economic, they themselves are both a consumer and a product for consumption. This assertion can be demonstrated by the modern turn towards the gig economy, with “side-hustles” becoming the norm. These side-hustles are frequently non-traditional and revolve more around selling content that is produced rather than physical goods. A neoliberal society is ordered by the economic and value in relation to it. This is a far cry from the popular sovereignty, it is impossible for the people of a state to rule if they are subservient to the economy. Brown asks the questions: What happens when the political is made subservient in the name of profit? What organizations serve a normative function under this regime and why? (Brown 47-57).

The transition from the political to the economic is an active one. Neoliberalism is constantly undermining what Brown calls “basic elements of democracy,” such as practices or rules, political culture, and principles of justice. This can be demonstrated in the criminalization of homelessness. For example, in 2015 Houston made it illegal to block sidewalks, stand on the roadway median, sleep on public property or in a makeshift shelter, or have a heating device in public. When judged as human capital, homeless people have little value in relation to the market. Homelessness exists as a visual reminder that the order of the state is not protecting the people, and thus threatens positive attitudes towards the market. It is not enough for the state to not intervene, rather homelessness must be legislated against. The judicial serves a normative function in criminalizing the undesirable behavior. Neoliberalism utilizes the hope that hard work will result in financial stability to encourage competition between citizens, resulting in the

belief that the homeless people must have done something wrong or simply not tried hard enough. Neoliberalism goes beyond the existing governmental structure to influence the ways in which human beings perceive themselves and others, this mode of thinking exhibited by the neoliberal subject is referred to by Brown as neoliberal reason (Brown 152-165).

Expectations of governance and management overlap within neoliberal reason. A government is expected to increase profit whenever possible and attract new business. Individuals within the state are expected to follow this model. Modern U.S presidents such as George W. Bush, Barack Obama, and Donald Trump have centered the neoliberal economic model in their vision for the United States. Attracting investors, creating jobs, and educating future employees seem like reasonable policy, but the reason behind this stance is what is truly telling. Attracting investors is not for increased multiculturalism in the United states, nor is creating jobs to help the homeless, nor education for its sake alone, rather it is for the purpose of future employment. All of these generate a profit and speak of the political in terms of the market, displaying the economization of this and the neoliberal propensity for replacing the very vocabulary used to speak about policy. Language itself is given new value referential to the market. Citizens are employees, foreign interest groups are investors, and poverty is to be remedied with compulsory participation within the economy. Barack Obama's inauguration speech in 2013 is a robust snapshot of neoliberal reason- full of gems such as investing in education to reduce teen pregnancy to "put kids on the path to a good job" and allow them to "work their way into the middle class." Freedom from poverty is only attainable through becoming more competitive human capital, a woman cannot work if she must look after a child and thus does not contribute to the visible market. Sacrifice is only permitted for the sake of the market; any other kind is demonized as blasphemous. A mother prioritizing her child over the

market is blasphemous behavior that must be legislated against through reallocating capital towards education. What is prioritized is the health of the economy, not the health of the American people. The general welfare of citizens is no longer sufficient for government intervention, rather there must be an economic end for an action to be deemed necessary, meaning that the value of the action is solely determined by the economic. Even Obama's decision to frame his speech this way reflects neoliberal reason, as he has made himself a more valuable and competitive candidate through appealing to what he doubtlessly knew was the normative order (Brown 115-123).

The phrase, "the freer the market the freer the people," is particularly sinister in that it is not only false, but reflects the understanding of humans only as capital, sinners in the hands of an angry market. Market deregulation allows for endless commercialization, as neoliberalism seeks to construe everything as a market, with no escape from the eyes of God. Recalling that neoliberalism is not simply a set of policies, but a way of viewing the world, it is important to note how both Brown and Michel Foucault define neoliberalism:

Conceiving Neoliberalism as an order of normative reason that, when it becomes ascendant, takes shape as a governing rationality extending a specific formulation of economic, values, practices, and metrics to every dimension of human life. (Brown 30)

Neoliberal rationality always produces the model of the market, meaning that humans are always economic actors and that the form, content, and conduct appropriate to public spheres is hollowed out and replaced with the neoliberal definition of said structure, as demonstrated in Obama's inauguration speech. Everything is a market; all parts of human life are economic experiences. Individuals are reduced to capital; things are only considered good if they are good for the market. This includes the expectation that the individual be willing to do this without any

economic compensation, an example of which being unpaid internships. The expectation of sacrifice illustrates the elevation of neoliberalism beyond a hegemonic mode of governance into a mode of thought, a rationality (Brown 35).

For one person to accumulate capital and be noticeably wealthier, another must be poor, the suffering is essential to the continued existence of neoliberalism. With decreased social infrastructure provided due to the deregulation of markets, those within neoliberalism are expected to provide for themselves as individual economic actors, while working as parts of the whole economic structure, without expecting the security of social benefits won by the public sector. This is the same logic employed in the criminalization of homelessness. If you cannot provide something for yourself then it is simply a failure of your entrepreneurial spirit, not crumbling infrastructure or burst economic bubbles created by those very persons demanding workers be grateful for the opportunity to work without security. Neoliberal morality succeeds in making humanity entirely responsible for all external factors.

The person is lost, fully economized, relational to nothing other than profit necessary to survive. What remains is the presumption that the market is the natural state of human activity and that, free of interference, it will regulate itself, thus shaping the neoliberal subject's reality into whatever is the most profitable. Despite what its architects would claim, the role of the government is not the Keynesian objective of protecting its citizens or their interests, but the neoliberal objective of protecting the market. Within neoliberal rationality, the market itself is truth, with all morality arranged in accordance to it. With neoliberalism as a hegemonic mode of reason, and all morality referential in value to it the mechanisms that service to protect the normative order of the state protect the economy. Justice becomes referential to the market, the legal no longer protects the individual or the political, rather the economic (Brown 22).

Undoing the Leges

Citizens United vs. Federal Election Commission is the legal reflection of these aims, demonstrating the economization the legal. Law is employed as a tool to enforce and reinforce neoliberal rationality. Michel Foucault states that “the juridical brings form to the economic,” but Brown takes this a step further stating that “law economize(s) new spheres and practices” (Brown 151). If neoliberalism is constantly seeking to expand through economization and marketization, then law is not only seeking to protect neoliberal interests but expand them. Just as the *Mont Pelerin Society* and leaders such as Thatcher and Reagan intentionally contributed to the rise of neoliberalism, the juridical advances that agenda, becoming the means by which the content of the pre-existing governmental structure is hollowed. Through strengthening the influence of capital, neoliberal legal reform weakens the already small influence and protections that human capital has within the legal system. In 2010, the U.S Supreme Court ruled in *Citizens United* against government bans on corporate contributions to Super PACS, organizations that are formed to support candidates outside of their campaign (Citizens). The Supreme Court awarded corporations unrestricted rights to free speech. Corporations possess more economic power than an individual, the recognition of their free speech right is a direct negation of the rights of the individual. Corporations gained the ability to influence the electoral process, erasing the line between state and economy and subsuming democracy into neoliberalism.

Citizens United serves as an example of the neoliberal co-optation of the law, with the majority opinion illustrating neoliberal rationality.

Citizens United v. Federal Election Commission

Citizens United sought an injunction to stop the Bipartisan Campaign Reform Act from interfering with its film, *Hilary: The Movie*, which expressed opinions regarding Hilary Clinton’s

presidential potential (No. 08–205). The BCRA was applied to regulate the extent to which capital could interfere within the electoral process, preventing corporations from funding political messages such as this from their general treasury, requiring the disclosure of donors to the message projected, and including a disclaimer when the message is not authorized by the candidate it is supporting.

The argument Citizens United poses is that of Section 203 of the BCRA, in which corporations are prevented from funding messages from their general treasuries, is unconstitutional when applied to advertisements and as a result of this the other stated stipulations of the act did not apply (No. 08–205). The initial injunction was declined by the United States District Court, on the account that *Hilary: The Movie* was advocacy as it attempted to sway voters away from Clinton. As for the disclosure of donors, the court reasoned that this had potential to become unconstitutional if it interfered with the freedom to associate with a particular organization, but that this was not the case in Citizens United. Once appealed, the Supreme Court of the United States overturned this decision, ruling instead in favor of Citizens United.

Justice Kennedy, author of the majority opinion, begins by upping the stakes even more, stating that the decision issued by the District Court is predicated upon two previous cases: *McConnell v. Federal Election Committee* and *Austin v. Michigan Chamber of Commerce*. Kennedy states that Austin “had held that political speech may be banned based on the speaker’s corporate identity” (No. 08–205). It is important to note the language which Kennedy employs, alluding to discrimination based upon the identity of the persons, framing intervention as discriminatory rather than a necessary precaution to rampant corporate greed. He then states that *McConnell v. FEC* was largely predicated upon *Austin* and that the question here is not simply

that of *Citizen's United* but two previous court decisions, thus utilizing *Citizens United* as a springboard to further the neoliberal project and deregulate corporate influence in elections through the justification of free speech.

Kennedy justifies this rejection of precedent by placing *Austin* in conflict with free speech, again utilizing language applying to the protection of human individuals from rights violations, to a corporation, painting it as sympathetic: the same tactic utilized by the *Mont Pelerin Society*. Kennedy allows for the most meager of regulation stating that the government may be allowed to require disclaimers, but more than this is considered an infringement political speech and thus an infringement upon the individual freedom of corporations. There is no political speech, because the political has become the economic. Speech itself becomes capital, as the endless marketization of neoliberalism continues.

Kennedy states that “courts too, are bound by the First Amendment” (No. 08–205), meaning that in this case the law is not subservient to the court, but the court to the law which serves to reinforce the normative order of neoliberalism. He then goes on to speak about what members of the court “ought” to do, which is to prevent the stifling of speech, or in the case of the speech of corporations, the deregulation of the flow of capital, which Harvey uses to characterize the Neoliberal regime (Harvey 2).

The natural state of speech (and thus profit) is perceived as the uninhibited flow of ideas, but within neoliberalism, ideas themselves are marketized or economized. Kennedy speaks of free speech constraints as “attacking all levels of the production and the dissemination of ideas” (No. 08–205).

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