theory.[1] The following year, ClassCrits began as a scholarly community with two workshops held at the University at Buffalo Law School.[2] According to Mutua, she and Martha McCluskey, the principal workshop organizers, chose the name ClassCrits in order to signal two commitments.[3] First, Mutua and McCluskey wished to signal their fidelity to the tradition of critical legal thought. "ClassCrits" thus deliberately echoed the monikers of the "race-crits," "fem-crits," "queer-crits" and just plain "crits" who had come before.[4] Second, Mutua and McCluskey were committed to exploring economic analysis as an interdisciplinary inquiry,[5] seeking "to develop an alternative to the predominant discussions of 'law and economics' grounded in neoclassical economic theory and its denial of 'class.'"[6] As Mutua, writing

sexuality, but is thoroughly entangled with them. Finally, the statement asserts that a legal perspective is essential for understanding class and market relations. I will explore each claim in turn.

A. The Myth of the Free Market

ClassCrits scholars call for a critical conversation about the whole range of institutions, beliefs, practices, and actors that together are conventionally called "the market" or "the economy." As the ClassCrits account has it, conventional economic and policy analyses tend to treat the market as a set of natural dynamics, governed by abstract laws of supply and demand that can be mathematically modeled.[10] Further, popular discourse imagines "the market" and its institutions as free, nonpolitical, and conducive to creativity and innovation, whereas "government" and its institutions are widely perceived as coercive, political (in a bad way), inept (if not outright corrupt), and destructive of innovation.[11] Building on the American Legal Realists, who made a similar critique,[12] ClassCrits scholars argue that the dichotomy between market freedom and state coercion misrepresents both forms of governance and their mutual entanglement with legal rules – a point explored further in subsection C, below.[13] Moreover, they argue, the dichotomy, which strongly favors "private," market-based governance over "public"

10. *See* BERNARD HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER (2011). In recent years, however, so-called "neoclassical" economics has been up-ended by scholars who have brought insights from cognitive psychology, sociology, and anthropology into economic analysis. *See, e.g.*, ROBIN PAUL MALLOY, LAW IN A MARKET CONTEXT: AN INTRODUCTION TO MARKET CONCEPTS IN LEGAL REASONING (2004); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051 (2000); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476 (1998); Robert Ashford, *What Is Socioeconomics?*, 41 SAN DIEGO L. REV. 5 (2004); Lynne L. Dallas, *Teaching Law and Socioeconomics*, 41 SAN DIEGO L. REV. 11, 11-12 (2004).

11. *See* HARCOURT, *supra* note 10; *see also* Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783 (2003).

12. *See, e.g.*, Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923). For a careful and detailed history of critique of the market-state distinction, see generally Justin Desautels-Stein, *The Market as a Legal Concept*, 60 BUFF. L. REV. 387 (2012).

13. As Justin Desautels-Stein puts it:

> Among the most powerful obstacles in the way of imagining alternative institutional variations of market society is the false distinction between free competition and the regulatory state. This distinction stifles our imaginative powers because the very notion that naturally free markets actually exist blinds us from the market's socially and politically contingent legal structure.

Desautels-Stein, *supra* note 12, at 392.

governance, in practice promotes oligarchy, facilitating programs of "upward distribution" of wealth and power to the already-advantaged.[14]

B. Class as Status and Relation

In addition to calling for a more complex and realistic understanding of political economy and practices of governance, ClassCrits scholars call for a renewed public conversation about class, by which they include both the Weberian and Marxian senses of the word.[15] The Weberian view – in which society is divided into several economic tiers ranging from the very poor "underclass" up to the super-rich, each with distinctive access to wealth,

represented.[20] The economic boom following World War II (which allowed President Lyndon Johnson to declare a "war on poverty"), and the Cold War with its virulent anti-Communism, further buried the memory of American labor radicalism. As American Communists, socialists, and radical unionists suffered public persecution and vanished from the intellectual mainstream, along with them went a popular understanding of relational class – at least until the Occupy movement. The ClassCrits movement calls for an end to the silence that red-baiting and chastened unions brought about, and a return to the homegrown American language of class struggle.

In addition to enriching our understanding of political economy, the relational understanding of class enriches our accounts of identity and difference. The popular concept of "diversity" tends to implicitly adopt the Weberian view of class, seeking, for example, the inclusion of low-income and working-class people in affirmative action programs for the sake of embracing different perspectives and experiences.[21] Understanding the role of capitalist exploitation in creating and maintaining class identity, however, suggests that the goal of economic justice should not simply be "recognition" of different class identities, but rather an egalitarian program of redistribution of wealth, power, and property.[22]

At the same time, ClassCrits scholars break with the Marx-inspired tradition under which dimensions of identity and subordination such as gender, race, and sexuality are considered secondary to the primary, "real" social division of class. Building on the critical race theory concept of "intersectionality," ClassCrits scholars take the position that arguments about the primacy of class, race, or gender have been counterproductive; these dynamics are so enmeshed that they should be considered mutually constitutive. More generally, ClassCrit scholars reject a bright line between "redistribution" and "recognition," between material relations and identity. Although it is true that social movements organized around redistribution

20. *See generally* Ahmed White, *The Wagner Act on Trial: The 1937 Little Steel Strike and the Limits of New Deal Reform* (2014);14ho(e)-3(t TJE(()-4(2)7(0)-6(1)7(4)-60)- -3(t)6(i)6(t)-45 267..- Tm[S9(m)1T ELP

might cheer the disappearance of social classes in a way that social movements organized around recognition might not cheer the disappearance,

groups themselves.[26]

As Karl Polanyi noted, legal adherence to the anti-political economy fosters complacency about injustices that are facilitated through market relations and institutions – both the persistence of race and gender subordination through "market forces," and flaws in market institutions themselves.[33] For example, economist Joseph Stiglitz argues that a structural flaw in our capitalist democracy is the tendency toward "rent-seeking" – the attempt by economically powerful agents to use their economic power in the political system to bend substantive rules and institutional processes in their favor.[34] The belief in an anti-political economy obscures recognition of this structural flaw and hinders the development of, for example, stronger antitrust rules to counter the tendency for economic inequality to produce political inequality.[35]

Finally, the belief in an anti-political economy helps stifle any move toward establishing substantive economic rights on a constitutional level. As Julie Nice and others have argued, existing constitutional law leaves poor people as a class unprotected; the possibility that the poor are at a systematic political disadvantage similar to the plight of "discrete and insular" identity groups has never gained a majority in the Supreme Court.[36] Rather, when the

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Karl Polyani described the anti-political economy in the late 1940s:

> Vision was limited by the market which "fragmentated" life into the producers sector that ended when his product reached the market, and the sector of the consumer for whom all goods sprang from the market. The one derived his income "freely"

Supreme Court has considered the problem of poor people's ability to exercise constitutionally-protected rights, it commonly finds no constitutional problem in distributing the exercise of rights based on ability to pay.[37]

III. PRECARITY AND THE LAW

A keyword in ClassCrits scholarship is "neoliberalism," which Mahmud, Mutua, and Valdes define as "a reorganization of capitalism where hegemony of finance capital displaces Keynesian welfare."

These legal and political initiatives now appear, in retrospect, as high-water

middle-class stability created by the post-World War II detente between labor and capital was an historical aberration.[43] Nevertheless, Mahmud then concedes that something is different today. In his view, capital's reliance on undocumented labor has produced a "hyper-precarity."[44] Unprotected by the state and subject to ever-improving methods of surveillance and discipline, undocumented workers experience "the absence of any time/life outside circuits of control and value-appropriation."[45]

David Waggoner makes a similarly sweeping argument, exploring law's alliance with white supremacy in the New World. Waggoner notes that white supremacy has been a feature of jurisprudence in the territory now called the United States before it was even the United States.[46] Waggoner begins with the series of papal decrees that became entrenched in the law of nations as the Doctrine of Discovery.[47] Memorialized by Chief Justice Marshall in and by other Anglo-European colonizing nations as well, the Doctrine of Discovery functioned to restrict indigenous people from obtaining full title to real property, directing wealth to white settlers.[48] Shifting forward to the twentieth century, Waggoner argues that the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez* represents the apotheosis of white supremacy: "Whereas concerned the rights of Indians to land, *Rodriguez* concerned the rights of the descendants of Indians to education, the quality of which turned precisely on the value of land, land which had been appropriated from the ancestors of the *Rodriguez* plaintiffs."[49]

The papers by Athena Mutua and Leo Martinez focus on the present day,

tellingly, does not depend on convincing elites to care about the precariat; she accepts the fact that the political and economic conditions of fifty years ago that made projects like the War on Poverty and robust neighborhood Legal Services possible are gone. Instead, Carter urges poor communities to seize hold of existing (and rapidly evolving) legal tools to construct alternative economies for and with themselves.[61] Demonstrating that poor people are largely shut out of the benefits of our money-driven political economy, she argues that "low-income communities can become productive through non-monetary means, such as bartering, service-exchange, gift-

Although a public economic justice agenda requires the cooperation of elite state actors, a private economic justice agenda does not. The tools of "private" law can be used to create innovative relationships and institutions that further the ends of democracy, equality, and liberty. Other scholars and advocates have also begun these explorations.[67] As the great public accomplishments of the civil rights movement and the Great Society continue to dwindle in the rear view mirror, the availability of private law to build new economic relationships in the cracks of the old may be an increasingly important resource for ClassCrits advocacy.

IV. CONCLUSION

ClassCrits scholars hope to get students, and ultimately the next generation of American lawyers, to see that the political and the economic are not two different realms subject to wholly different rules of governance. Rather, they are intimately intertwined with one another, and both are created and maintained by law. Several of the papers in this Symposium pursue this pedagogical agenda, continuing to point out that the emperor has no clothes.