

## *Original Paper*

# Pistor and Milanovic: The Codes of Capital and Inequality A Commentary on Law, Economics and A New Design for 21 stc. Capitalism

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### **Abstract**

*Almost in tandem, two scholars Katharina Pistor and Blanko Milanovic released related work on economics, law and inequality to discuss how the legal rights of capital have become so deeply entrenched in the operational treatises of the international legal and financial system that an unbundling of those privileges is recommended in this century to prevent the further unweaving of the very foundations of democratic institutions. The perspectives of both authors offer a unique understanding of the growing dynamics of the “politics of resentment” and the challenging options as “hyper-globalization” and the demise of its neoliberal paradigm continues to come under closer scrutiny—the policy choices and rule of law options outlined support the call for a new legal constitution for capitalism in this century.*

### **Keywords**

*legal constitution for capitalism, types of capitalism, rule of law and choices about inequality, coders of capital, global inequality trends, changing neoliberal paradigm*

### **1. Introduction and Review Method (Note 2)**

The commentary summarizes and presents a focus review on the intricacy of how law works to produce and protect the importance for modern capital as legal patterns and centuries of economic development are analyzed and decoded. Pistor offers a new legal code where capital is ruled by law in order to stabilize democracy and begin to redress soaring global inequality. Milanovic's analysis of capitalism outlines the future system that rules the world in two broad categories: “liberal capitalism” of the Western variety and “political capitalism” of the Chinese variety. This remarkably well documented research allows the master narrator of global equality to trace the contrast between the ideological foundations of communism and capitalism provoking new insights on the critical role of functional

democratic institutions.

For the first time in human history, the globe is dominated by one economic system. While capitalism is a risky system, it also a human system capable of change in order to support human dignity. The pairing of Milanovic's statistical and historical analysis is well positioned to support the new legal code for capital that Pistor is proposing. These two scholars join others who care about democracy including Piketty, Rodrik, Grewal, and others whose ideas move beyond the neoliberal paradigm for economic globalization towards the possibility of a new legal constitution for capitalism in this century. Pistor's analysis of the "master coders" of capital and of coding capital itself is juxtaposed with Milanovic's analysis of capitalism as the future system that rules the world in two broad categories: "*liberal capitalism*" of the Western variety and "*political capitalism*" of the Chinese variety. Milanovic's remarkably well documented research allows the master narrator of global equality to trace the contrast between the ideological foundations of communism and capitalism provoking new insights on the critical role of functional democratic institutions. The most significant aspect of the *liberal capitalism model* is democracy and the rule of law. These two components are credited with faster economic development, broader innovation, and social mobility despite the growing tension of class polarization across Europe and the United States [discussed as the "politics of resentment" later in this review] that threatens both democracy, its foundational institutions and liberal capitalism.

Both of these scholars rely on Piketty's analysis of capitalism, democracy and inequality for people of *equal juridical standing* as Piketty describes the three negative impacts of inequality on democracy. Milanovic outlines three predictions of democracy and capitalism offering three different options and six suggestions for the reader to consider. Pistor attempts to detangle the regulations, capital assets and jurisdictional issues as rules of law traverse various jurisdictions. She too has eight suggestions that might be best incorporated into the design of a new legal constitution for capitalism in this century.

## 2. Discussion

### 2.1 Basic Building Blocks of Global Capitalism: How "Asset Enclosures" Are Coded

Pistor labels lawyers "*the masters of the code*" and outlines how they have spun the mechanisms of globalization into overdrive as the process now threatens democratic citizenship. She offers a new legal code where capital is ruled by law in order to stabilize democracy and begin to redress soaring global inequality. The basic Pistor premise is that capital is coded into the law and that these predominant private legal codes—namely contracts, property rights, collateral trust, corporate, and bankruptcy laws—are used to give the private holders of some assets a comparative advantage over others. She touches on these core components of our financial system at the critical junctures where decisions over survival or death in economic life are made. Debates over market economics often diminish the fact that capital is directly linked to and dependent upon State power. In her research, Pistor strives brings law to the core of her discussions noting that law is the very cloth from which capital is cut. For Pistor, the social relations that underpin capitalism and the outward "appearance" of capital has changed so

significantly, she wonders if the time has come to unbundle mismatched concepts of capitalism and re-bundle the making and defining of capital to include human dignity.

Pistor points to the basic building blocks of her structural analysis from within the highly integrated global financial systems but does not ignore their unparalleled legal complexity. Her motivation reflects a deep look into the 2007-2010 global financial crisis when Pistor first began to categorize assets at the core capital institutions of private law: contract, property rights, collateral trust, corporate, and bankruptcy law. These core institutions have not only powered the expansion of markets in financial assets, but they are also key determinants in the undoing of those very assets. When returns on private assets fell behind expected returns, private sector asset holders enforced their legal entitlements. In doing so, these private actors deepened the underlying financial crisis. Her research is no small feat as she touches on these core components of our financial system at the critical junctures where decisions over survival or death in economic life are made. Debates over market economics often diminish the fact that capital is directly linked to and dependent upon State power. Pistor intentionally brings law to the core of her discussions noting that law is the very cloth from which capital is cut.

The basic Pistor premise is that capital is coded into the law—this is not an extraordinary statement. Ordinary assets such as a plot of land, a promise to be paid in the future, pooled resources from friends to set up a new business, and even individual skills and knowledge can all be translated into capital in the same way that legal codes are used to code asset-backed securities and their derivatives. These legal private codes—namely contracts, property rights, collateral trust, corporate, and bankruptcy laws—are used to give the holders of some assets a comparative advantage over others. For centuries private attorneys have adapted these legal codes to enhance the wealth of their clients while States have supported the coding of private capital offering the State’s coercive power to enforce the legal rights that have been bestowed on capital. (Note 3)

Pistor’s carefully outlines the legal coding of capital by analyzing four major areas: coding land, cloning legal persons, minting debt, and enclosing nature’s code. Each section of her theory is interwoven with the historical perspective and multiple examples of how the work of the “master coders” [lawyers] and their coding of private capital has moved to create broader and broader systems of inequality. Pistor provides no shortages of examples. Her summary illustrates how different asset classes have been coded as “capital” starting with land; corporate firms; financial debt and know-how intellectual property. Pistor systematically unpacks the legal order that sustains global capitalism in the absence of a global State or global legal system and offers a stinging historical review and rebuke of the rise and power of a global legal profession as the “master coders” of capital.

Her focus on *The Empire of Law* essentially outlines the rest of the text and Pistor’s basic principles of review. The social relations that underpin capitalism and the outward “appearance” of capital has changed so significantly, that she ponders if the time has come to unbundle mismatched concepts of capitalism and re-bundle the making and defining of capital to include human dignity. Pistor provides an excellent discussion about capitals’ legal attributes—priority, durability, universality, and

convertibility. And then links these characteristics to the analysis the power of State where law creates and sustains the powerful social ordering technology, invoking both Max Weber and the need to focus on collective expectations. Of course, the State is not omnipresent. The current problem is that for the capitalist system in place today, not all assets are equal and some asset holders have better rights than others. Finally, even though capital has become global, it does not refute the argument that State power is central and still absolutely necessary to the structuring and success of capitalism. Two examples are briefly outlines here.

The analysis on debt and capital coding is a particularly fine compendium providing a detailed post-mortem on the history of debt finance—the story about how private claims to future pay are coded to ensure their convertibility into State public money “on demand” all completed without suffering serious loss. The trend she outlines the move from private owners of property rights to creditors now as the asset holders who have the strongest legal protection. Only after the end of the 19<sup>th</sup> century did financial assets become the leading source of private wealth. In Pistor’s theory, by mitigating all risk associated with debt these types of legal models have expanded from one unprecedented height to yet another only followed by steep downturns, safe only for the successful interventions of States and their central or regional bank operations. (Note 4)

Likewise, capturing “nature’s code” as outlined by Pistor, she details how after fifty years of work on the double helix, the Human Genome Project can map gene sequences but according to Pistor, the demand for conversion of this knowledge into wealth continues. (Note 5) Pistor discusses in depth the U.S. National Institutes of Health mandate to keep the human genome project in the public realm and not in the possession of private monopolies. She cites U.S. Supreme Court Justice Brandeis (1918) (Note 6) in his dissent that “knowledge, truths ascertained, conceptions, and ideas become, after voluntary communication to others, free as the air to common use”. Pistor goes on to follow case law into 2013, more than ninety years after the discovery of the structure of DNA and the completion of the human genome project, where the Supreme Court determined whether nature’s “raw code” could now be legally enclosed with the effect of granting a patient holder priority rights over the rest of humanity. (Note 7) The Court answer unanimously rejected this notion about nature’s “raw code” but noted that the synthetic creation of cDNA which does not occur exactly in the same form in nature, could be patentable.

Pistor provides a wonderful analysis of how this *asset enclosure struggle* [a process of activity she continually references in her work] was not over land, or human “know-how and skills”, but, over nature’s code itself. Pistor seeks to discuss capital not as a “thing” but as a *quality* as she references a recent book called *Capitalism Without Capital*. (Note 8) Capital is always about legal coding and the ability to capture and monetize expected returns. Pistor is careful but thorough in her analysis of how the *enclosure of assets* for the promotion of private investment *has not* been an overall success for economic development. (Note 9) This coding of capital is an ingenious process that has been largely hidden from public view because it happens exclusively behind closed doors of the “master coders”

operating exclusively in the realm of private law.

## 2.2 How Four Legal Devices Create Economic Inequality and Severe Adam Smith's "Invisible Hand"

Pistor's goal in releasing her research is to shed light on how we create wealth and inequality by tracing the roots of inequality as it threatens the social fabric of our democratic systems. Lawyers as the master coders are paid extraordinary fees to place assets beyond the reach of creditors including public taxing authorities based on any given State's law. And according to Pistor's rationale, public taxing authorities become more irrelevant in relation to conventional forms of redistribution. How assets are selected to be legally coded as capital, by whom, and for whose benefit are the questions cutting to the foundation of capital, the rule of law and the political economy of capitalism.

The legal methodology set forth by Pistor incorporates standard legal devices—contract law, property rights, collateral trust, corporate, and bankruptcy law. She structurally provides the review based on four legal modules which capital is coded and these categories bestow important assets and privileges on its holder. [3] These four areas are: [1] *priority* which ranks completing claims to the same asset; [2] *durability* which can extend priority claims across time; [3] *universality* which extends claims into space; and [4] *convertibility* permitting the conversion of private claims into State money on demand. While this review will cross reference these concepts for the reader later in this review, the full explanation by Pistor is in Chapter Four.

The full reading of her theory shows a metamorphosis of capital that not only goes hand in hand with grafting [or *asset enclosing*] of more new code onto new assets but also, as Pistor notes, from time to time stripping assets of key legal models. Pistor's review looks at rural land, capital coding and its asset losses of the 19<sup>th</sup> century. She looks at corporations not just as legal models organizing for industry but also huge incubators of wealth and how the corporate form together with trust law was a legal device to change shares of financial assets to derivatives. Finally, Pistor offers up an integrated analysis in the last few decades of the rise in intellectual property rights and how that dynamic actually accounts for huge portions of market valuation in many global corporations today. Even decoding capital and uncovering its legal code in the private sector continues to demonstrate that all capital assets are not created equal.

Interwoven into Pistor's review, references abound to historical and modern economic theory and legal perspectives including the "invisible hand" of Adam Smith despite the fact the "invisible hand" may not really be functional in any marketplace dominated by the private sector coding of capital. The empire of law from the time of Adam Smith was domestic in nature and tied to a specific State and their citizens. States now recognize foreign law not only for contracts but also for the other legal models which Pistor clearly articulates—financial, collateral trust, corporations and the assets they issue, domestic parties that opt into foreign law without losing the protection of local court—all of these modulations are created in the private sector by the "master coders" [transactional lawyers] of capital.

By dislodging capital from the public legal systems that begot them, there has been a creation of wealth

by *holders of capital*. It shifts attention to who has control of capital and its coding and how it remains perfectly adaptable to the ever-changing roster of assets and the wealth—creating benefits of capital. One of Pistor’s well reasoned conclusions is that States have been all too willing to vindicate and publicly enforce innovative legal coding strategies in the private sector. She references calls this empire of law a *patchwork*. There is no single global law. Selected domestic laws are stitches together sometimes in haphazard fashion including conflict-of-law rules that recognize these domestic laws elsewhere as well as selected international treaty laws.

For Pistor’s analysis, two legal systems appear to dominate—English common law and the laws of New York State. (Note 10) This decentralized nature of law favors private sector coding of capital as well. The “master coders” of capital select their own private sector rules that best suit their client’s needs and thus, the “invisible hand” touted as the essential part of Smith’s political economy and the grand marketplace idea is severed. Whatever historical ties in fact existed between individual self-interest and a broader imbedded social concern is non-existent.

### *2.3 The Domination and Coordination of Capitalism’s Economic Principles*

Milanovic in *Capitalism Alone* also begins his theory development with a historical perspective coupled with the contours of the post-cold war world by noting that the entire globe now operates according to a single set of economic principles—production organizing for profit using legally free wage labor with mostly private capital in a decentralized system of coordination. Milanovic notes that the uncontested domination of capitalism based on the ideological view that money-making is not only respectable, but it might be the most objective in people’s lives, an incentive understood from all parts of the world. (Note 11) The book presents two types of capitalism :First, the liberal form of meritocratic capitalism that has developed incrementally in the West over 200 years [Chapter 2]. Second, the State led political and authoritarian capitalism exemplified by China [but does exist in part also in Asia, Africa and Europe, Russia, and Singapore]. [Chapter 3]. These two systems differ in the political, legal and economic as well as social spheres of their State, regional, and global operations.

The rise of Asia in the last century cannot be solely due to political capitalism as Milanovic points out. Liberal capitalist countries such as India and Indonesia also adopted the western model of capitalism to certain degrees. The focus here points to one important statistic—These two parts of the world, western Europe and its North American offshoots and Asia are together home to 70% of the world current population and 80% of the world’s output. These regions are in constant contact for trade, investment, movement of people, transfer of technology, and exchange of ideas.

The statistical information outlined by Milanovic for global income inequality 1820-2013 supports the notion that the geographical rebalancing of the world is putting a decisive end to the political, military and economic superiority claimed by the West. (Note 12) In fact, in a short forty year time period, Milanovic shows comparative data between China and the US and between Germany and India and rising support for globalization despite the malaise in the West. The author posits this malaise is caused by the growing gap between the elites who have done very well in globalization and the significant

number of people who have not benefited from the neoliberal “trickle down” aspects of globalization—Milanovic goes so far as to compare this growing trend to Third World countries where the elite are plugged into the global economic system and leave everyone else behind.

The most significant aspects of the *liberal capitalism model* is democracy and the rule of law. For Milanovic, these two components are credited with faster economic development, broader innovation, and social mobility despite the growing tension of class polarization across Europe and the United States [discussed as the “politics of resentment” later in this review] that threatens both democracy, its foundational institutions and liberal capitalism. Key to the theory outlined in *Capitalism Alone* are the detailed differences between *liberal capitalism* in the United States as a model different from *political capitalism* in China. Milanovic sets aside a complete review for each model of capitalism outlining characteristics of each their internal variants. The focus on each descriptive model is on the social and economic structures that each of the two types of capital reproduce and how those structures come to affect income inequality and class. Each of these model summaries are heavily supported with statistical research and relevant analysis of global trends.

#### *2.4 Future Ideas on the Construction of Capitalism, Market Hierarchy, and Morality*

The future of global capitalism is constructed by Milanovic when Milanovic notes that capitalism has two discernable sides: a side of lightness and a side of darkness. Citing Max Weber, Milanovic also echoes the economic and legal theory of Adam Smith, Joseph Schumpeter, Friedrich Hayek and John Rawls. In today’s world, Milanovic notes that Adam Smith’s baker cannot sell his loaf of bread unless he also markets it on *preferences and tastes* convincing his customers that his bread is better. Hierarchy in the marketplace based on rational pursuit of wealth is defined by Weber as one of the key sociological characteristics of capitalism which is highlighted throughout Milanovic’s text. According to Milanovic, the morality that has kept differentiated pursuits in balance in the past has been outsourced in global capitalism. (Note 13) Even the constraints of social contract no longer appear relevant. Where Adam Smith’s baker’s immoral business actions would have been observed by her neighbors, people who work in one place and live in a totally different place in the global market offer different challenges in this century.

Breaking the law in today’s commercialized society is not unique to this global economy. Milanovic notes that there are no internal moral codes that check the behavior in the area of financial regulation and tax evasion. The behavior of top banks, hedge funds, companies like Apple, Amazon, Starbucks, on tax evasion or hiding their assets from public tax authorities is a game intentionally played on the border of the rule of law knowing if they get caught, they have a cadre of lawyers to provide special explanation for corporate behavior. If that fails, corporate entities can settle.

Competitiveness and the acquisitive spirit are hard wired into capitalism but we have no alternative at this time to the *hyper-commercialized capitalism* that Milanovic outlines. (Note 14) For example, citing Maynard Keynes [1930] Milanovic asks what if a European country decided that in its current level of welfare that each citizen enjoyed was exactly sufficient and could be maintained thanks to

technological progress with a much smaller labor input?? This model contrasts the fact that almost all societies *glorify success and power* in a commercialized society, expressed in money, ownership of assets, and corruption—and that is why as Milanovic points out, corruption is an integral component of global capitalism.

Universal Basic Income [UBI] is detailed by Milanovic as a new philosophy of the 21<sup>st</sup> century welfare State. He reports his past research on UBI published in the 2019 World Bank's Development Report which was largely dedicated to the ideas of UBI as a means of dealing with widespread global inequality due to the current neoliberal paradigm of globalization. (Note 15) Although a complex analysis, Milanovic notes there would have to be some structural changes or built-in mechanisms to deal with inflation and GDP growth. Citing extensive sociological research by Soderberg and Offer (2016), Milanovic notes that UBI has routinely been tied to broad concepts of social insurance as a necessary safety nets. But, as Milanovic points out, the UBI system does not insure against risks, it completely ignores them.

Against the advantages of the form of *liberal capitalism* in the West, the form of *political capitalism* [China] promises more efficient management of the economy and higher growth rates. The ultimate objective is high income and wealth ideologically rooted in the very premise of global capitalism. Rawls [as quoted by Milanovic] speaks to primary goods [basic liberties and income] where people give priority to basic liberties over wealth. (Note 16) Everyday experience may suggest that people are willing to actually give away *democratic decision making* for economic wealth and greater income. The challenge for political capitalism as currently modeled in China as a global form is to constantly deliver high rates of growth despite the fact that this Chinese model has an inherent tendency toward corruption. This is so because *political capitalism* as a form of political economy operates outside a rule of law.

Reflecting on 1986 predictions of democracy and capitalism [Bowles and Gintis], Milanovic notes there are three options: (Note 17) [1] a model dictated by the West centered around neoliberal paradigm for a liberal capitalism model; [2] a neo-Hobbes an model defined as an expansion of law where property rights reign and personal rights recede, social engineering dominates, and State institutions are no longer accountable; and [3] a model based on a society of rentiers who lease or lend their capital to democratically organized companies [the author notes the third model might work if there was a greater abundance of capital, there was a halt in population increase, and labor would have the collateral to hire capital not vice versa]. Of course, in any of these options, the working definitions of *capital* and *capitalism* would need to change significantly.

Milanovic wraps up his discussion about the future of global capitalism with an analysis of the closing income gap globally suggesting that it is conceivable income levels in China and in other Asian countries might come close to those of Western countries. (Note 18) If this begins to shift, the author predicts the first sustained drop in global income inequality since 1820 might occur. Milanovic shows how this convergence has already started by analyzing 2017 GDP data. Africa and global inequality



remain key to sustainability according to Milanovic especially as China continues to export its model of capitalism into Africa in a broad continental partnership for economic development and sweeping infrastructure programs. This analysis is not simply tracking a set of numbers on the Gini coefficient of inequality, it is the convergence of “real income” across vast groups of very different cultural groups of people. But, as Milanovic notes, larger middle classes across the globe also means changes in the rule of law especially related to securing property rights and demanding political stability.

The statistical analysis and the future vision of global capitalism offered by Milanovic to support his two models for 21<sup>st</sup> century capitalism [*liberal capitalism* or *political capitalism*] is a parallel component for Pistor’s methodology for how capital is legally coded and utilized in global capitalism. The outlier is that Milanovic’s model of *political capitalism* [China] operates outside a defined rule of law. The *Code of Capital* sets out a very detailed analysis of how the coding of capital occurs outside the public law purview in the model of *liberal capitalism* and causes endless distortion in the marketplace that impacts inequality long term. In fact, Pistor offers up very detailed structural analysis of how lawyers as a “master coders” of private capital *deliberately work to bend the rule of law* sometimes beyond recognition on behalf of their clients and their outrageous structuring of legal fees. (Note 19) These attorneys are transaction cost engineers who navigate complex regulations, structure transactions to avoid all costs, and negotiate with State regulators to obtain full clearance—all private sector law done with little or no public legislation, public regulatory hearings or notice, and no public oversight to protect tax payers.

These lawyers [the master coders of capital] who design new assets or intermediaries are deeply familiar with laws, rules and regulations, sometimes across various jurisdictions, as well as all the exceptions and limitations, and of course, of tax law. In addition, as Pistor points out, capital master coders avoid liability through asset-shielding devices, shifting risk and loss to others, and by disclosing enough so that project investors are put on notice and cannot claim later they were misled. These tool kits cloak assets in the attributes of capital, to arbitrage around legal constraints and to hand their client a very powerful defense—“but it is legal”. Pistor breaks out this façade in a detail. Her analysis of how these very groups of lawyers and their clients in 2008 participated in the litigation frenzy when big market players sued each other even though they all had engaged in the misconduct themselves.

### *2.5 The Intersection of Capital, Rule of Law, and a New Legal Constitution for Capitalism*

Pistor and Milanovic are not the only two scholars in the field researching how the rule of law intersects capitalism and how the current neoliberal paradigm [c.1980-2010] for global capitalism negatively impacts democracy and equality. (Note 20) There is a growing “politic of resentment” around the inequality linked to the neoliberal paradigm [c1980-2010] of capitalist globalization that is causing a widespread erosion in constitutional based rule of law. (Note 21) This growing “politic of resentment” is the foundation to support the design of a new legal constitution for capitalism. Both Pistor and Milanovic reference Thomas Piketty in his transformative study on 21<sup>st</sup> century capitalism speaks directly to the negative impact of inequality and the erosion of democracy.

Piketty's study of "modern" inequality documents where there is a widening difference in income and wealth among people of *equal juridical standing*. (Note 22) This disparity among people of *equal juridical standing* will be a primary legal challenge in re-defining democracy in this century and, particularly for designing a new legal constitution for capitalism. Piketty clearly has set out three negative implications of economic inequality on the function of democracy, implications that are clearly reflected in the *politics of resentment* and need to be addressed: First, inequality violates the basic *principle of equity* on voice and representation so that when citizens do not have equal voice and influence, the skewed nature of control over economic resources "poisons the promise" of equal representation. After all, according to Tomasi, individual *economic liberty* is just as important to freedom as all other liberties embraced by classical liberal thinkers. For Hurst, the corporate charter and what a State Constitution chooses to protect may be two different legal applications of the rule of law in terms of human rights and economic relations. (Note 23)

Second, as Picketty notes, if inequality means that due to neoliberal mandates for public austerity programs, a democratically elected government is less able to provide public goods, respond to a public problem, or have the capacity to promote broadly shared prosperity, then, there is a deeply negative impact on political processes and democracy. (Note 24) Third, excessive inequality promotes violence, high levels of vitriol and angry sentiments in the public square of democracy, that in turn, ultimately undermines the ability to define emerging legally shared democratic principles and to secure the process of balancing the nation State at its core. (Note 25) Akin to the work of Pistor and Milanovic, Piketty and other scholars who care about democracy, outline the basic principles of justice and equity that align and point to imbalances in the current global socio-economic order as evidenced by the growing wealth inequality and distorted income distribution. Furthermore, these scholars also offer several responsive options for a new *legal constitution for capitalism* that could be coupled with global and regional tracking mechanisms on wealth and thus, work in tandem with the rule of law to build a responsive State focused –democratic institutional reintegration for this century. (Note 26) Piketty's work and his definition of capitalism has forever changed the nature of economic modeling, statistical analysis, and its implication for State level economic capital management and wealth distribution. (Note 27) Piketty's new definition of capitalism as a *dynamic legal system* supports the continual transformation of society, its social relations and its socio-economic order.

In contrast to the neoliberal paradigm [c1980-2010] for capitalist globalization (Note 28), the new *legal constitution for capitalism* as proposed by Grewal and others would first define the legal parameters [ new rule of law ] for economic capital development and utilization—and then, using those parameters, establish a new sustainable global market paradigm or global compact for this century. (Note 29) These parameters would be the new paradigm for a *liberal capitalism* as presented by Milanovic and be based on democratic institutions and self-governance in the 21<sup>st</sup> century—not those parameters necessarily reflecting the long gone post World War era.

That international private sector as well as the international public sector trade and capital investment

should be a *means to an end*, not an end in itself, is not a radically new idea. (Note 30) As Rodrik and others have noted, capitalist globalization should be a legal instrument for achieving the goals that each State's civil society seeks: prosperity, stability, freedom and quality of life. (Note 31) Furthermore, Rodrik distinguishes a dominant role for the nation State in relation to the principles of democratic decision-making which is the foundation for the international economic architecture and notes that when States are not democratic, the entire scaffolding collapses and one can no longer presume a country's institutional arrangements reflect the preference of its citizens. (Note 32)

### 3. Conclusion

Both Pistor and Milanovic add to the stream of ongoing conversation around forms of capitalism for the 21<sup>st</sup> century and how democracy can be regenerated in tandem with the rule of law in political economy for a new global compact. For Milanovic the importance of reducing global inequality does not reside in the single numbers of the Gini coefficient of inequality but rather in the convergence of real income across vast groups of people.

Milanovic speaks specifically to the emergence for the first time in history of a global middle class but remains unclear in his conclusions about the political consequences. He references specific concerns about Africa and its slow process of convergence in any kind of sustained way related to per capita income growth. Milanovic's prediction of an actual reversal in Africa around per capita income growth is a real possibility. From the perspective outlined in *Capitalism Alone*, Milanovic concludes that the next few decades will present a convergence across Eurasia and North America.

In a broad conclusion Milanovic outlines the future of global capitalisms with a variety of options for structuring capitalism: Ricardo-Marx capitalism, Social-Democratic Capitalism, Liberal Meritocratic capitalism, People's capitalism and Egalitarian capitalism. Milanovic concludes that how capitalism will evolve in this century depends on liberal meritocratic capitalism and its ability to move into a more advanced stage with less concentration of capital incomes, lowering income inequality, and supporting intergenerational income mobility. (Note 33) For his analysis, the trend is not about incremental policy design, it is about having specific measurable outcomes in mind.

Milanovic further endorses new policies leading to progress in this century which include: [1] tax advantages for the middle class and corresponding increase in tax on the wealthy; [2] significant increases in financing and quality improvement for public schools so even the very poor have consistent access; [3] what he calls "citizenship light" to end the binary debacle of divisions between citizens and noncitizens; and [4] strict limits and exclusive public financing of political campaigns. He essentially dismantles the technocratic tool kits of political capitalism.

Pistor's summary discussion focuses on private capital coding and public power. She outlines this trajectory as capital "Rules by Law", promoting a more active role for the State and its agents, courts and regulators so that public exemptions, tax waivers and other "favors" granted to holders of capital are consistently reviewed. Legislation is recommended to create labor rights and bestow "new property

rights” for social protection and entitlements. Pistor notes with in the *changing fabric of capitalism*, there is a conflict and perhaps continual crisis that exists between a liberal legal order that single mindedly focuses on protecting private property rights on one hand and the use of law to advance social rights on the other. This pressure may be making the neoliberal paradigm of capitalism as we know it today start to implode—this shift will require a new social contract between capital and society. This stress is reflected in democratic settings where the *politics of resentment* abound and voters turn against their own leaders.

Suggesting the need for democracy to prevail in capitalist systems, Pistor points to politics regarding control over the rule of law which is the only tool they have to govern civil society including how capital is coded. The fact that capital is totally dependent on State law and its public enforcement of private contracts and deeds, should give agency to lawmakers, legislatures, courts and regulators to free themselves from the financial grip of capital and advance the project of democratic self-governance.

Similar to Milanovic, Pistor offers a list of eight ideas that could be incorporated into any 21<sup>st</sup> century design for new legal constitution for capitalism (Note 34): [1] refrain from offering capital legal privileges over and above the basic modules of the code; [2] the conflict of law rules that facilitate the legal mobility of capital are really part of domestic legal orders and not enshrined in international treaty law and, thus, can be rolled back one State at a time; [3] Limit arbitration or private settlement of disputes from presiding over issues of social policy like investor-State disputes, major policy issues like anti-trust policy or State domestic regulatory domains, and strictly prohibit these mechanisms between parties of highly unequal bargaining power; [4] Planning pre-emptively to prevent State tax bailouts of private capital gone wrong can be built into how capital is legally coded so that achieving State stability is not forced to be in a “reactionary” mode; [5] New mechanisms are needed for those who loose in an economic crisis such as seeking compensation for *damages ex post* in amounts that effectively engender deterrence; [6] Resurrect old limitations on capital so that for example, purely speculative contracts or wagers are not enforceable in court; [7] avoid acts of legal harmonization for the coding of capital which is ridden with the influence of special interests, but rather, move in favor of capital roving especially through the United States, New York State and the United Kingdom that better balanced with other social goals—citing Polanyi’s warning against the subversion of society to the market principle against which society will revolt; and [8] liberate lawyers as the master coders of capital to become independent from capital which will also require a *deep rethink* how to fund legal education and how to structure payat leading law firms.

Overall, each scholar standing alone offers a fascinating and relevant theory of economics and law in relation to the changing challenges and dynamics of the current neoliberal paradigm [1980-2010] for capitalism globalization. Yet the combination of Milanovic’s work in global inequality and systems of capitalism offers a choice set that is possible for this generation. Pistor highlights the technical parameters of the coding of capital and system and regulatory changes needed to rebalance the inequality that is festering all over the globe which will demand a changing legal code for capitalism

that redefines and secures the democratic social contract and liberal capitalism in this century.

### Notes

Note 1. Dr. K.A.C. O'Rourke, JD, M.Div., LL.M; holds a Doctorate of Juridical Science with dual Masters of Law [LL.M; International Law and Business; Government Law & Regulation] from Washington College of Law/ American University, Washington, DC./USA; O'Rourke has taught as adjunct faculty at Washington College of Law and holds a Juris Doctorate from Drake University Law School; O'Rourke is a private consultant, educator and serves in the core executive leadership circle at The Bridging Institute in Maryland USA; ORourke publishes in the area of State sovereignty, globalization and economics, participatory democracy and individual liberty. See O'ROURKE, K.A.C. Sovereignty Post-Brexit, The State's Core Function and EU Reintegration. *European Studies: The Review of European Law, Economics and Politics, CAES*, 2017, Vol 4 [Wolter-Kluwer, March 2018], 140-164 [discussing in depth the demise of the neoliberal paradigm (c.1980-2010) of capitalist globalization; meta-research provided; presents a framework of liberty for 21st century to support State core function based on balancing economic capital, social capital and human capital]; See also O'ROURKE, K.A.C., Post-Brexit: The Politics of Resentment and EU Reintegration-Creating a New Legal Constitution for Capitalism. *International and Comparative Law Review*, Vol.19. No.1, 2019, pages 38-73 [analysis of the politics of resentment and application of the GeoNOMOS model for State sovereignty in the 21st century relying on the cornerstones of justice, equity, and human dignity]. The GeoNOMOS© model is a copyrighted series of schematics designed by ORourke, depicting 21st century transitions in the role of the nation State and its legitimate expression of sovereignty. Interdisciplinary comments are welcomed and encouraged at EMAIL: GeoNOMOS777@gmail.com.

Note 2. PISTOR Katharina. *The Code of Capital: How Law Creates Wealth and Inequality*. Princeton, NJ: Princeton University Press, 2019 [297pg] [Pistor is the Edwin B. Parker Professor of Comparative Law and Director of the Center for Global Legal Transformation at Columbia Law School; written extensively in the areas of law and capitalism, legal system and economic development and growing access needs to essential resources]; see also Milanovic, Branko. *Capitalism Alone: The Future of the System That Rules the World*. Cambridge, MA: Harvard University Press, 2019 [287pg] [Milanovic is the Visiting Professor and Core Faculty at the Stone Center on Socio-Economic Inequality at the Graduate Center, City University of New York; former Lead Economist in the World Bank's research department and has written extensively in the area of global inequality, law and development and its history]

Note 3. PISTOR, Katharina. *The Code of Capital: How Law Create Wealth and Inequality*. Princeton, NJ: Princeton University Press, 2019 [Pistor's methodology looks at what she calls "modules" of law in contract, property rights, collateral, corporate law, trust, and bankruptcy across four characteristics: [a]priority which ranks completing claims to same asset; [b] durability which can extend priority claims across time, [c] universality which extends claims into space, and [d] convertibility permitting the

conversion of private claims into State money on demand]

Note 4. The post-mortem by Pistor on NC2 complex debt instruments points to the “shadow” banking that emerged over the last few decades. Pistor unravels the creation and operation of CMLTI 2006-NC2 also known as the Citigroup Mortgage Loan Trust 2006-New Century 2 established under New York laws and a NC-2 California bankruptcy case in 2007 long before Lehman’s downswing triggered the 2008 crisis and great recession. The analysis of modern securitization business and the legal codes that were written contractually—all designed by private practice transactional lawyers.

Note 5. *Supra*, Note 2, Chapter 5 at pages 108-131.

Note 6. *Int’l News Serv. v. Associated Press*, 248 U.S.215,250 [1918] [Brandeis, J., dissenting, p 248ff]

Note 7. *Association for Molecular Pathology v Myriad Genetics, Inc*, 509 U.S. 576 ;590-596[2013 ]

Note 8. *Haskel and Westlake, Capitalism Without Capital*. Princeton, NJ: Princeton University Press, 2018. [book argues that the market value of leading corporations is not determined by physical assets they might own and use for production but their market value is based on intangibles such as patents, copyrights, trademarks, and the branding of business operations that flow from those intangibles; Haskel and Westlake align mapping of the law and national accounts concluding that half of in tangible investments are not even recognized on national accounts; Pistor cross references Haskel and Westlake at Table 3.1, page 44]

Note 9. *Supra*, Note 2, Chapter 5, page 117-131. [suggesting that the capture of knowledge has led to an “investment famine” ; noting that it was that U.S. based private industry took the lead in elevating and expanding U.S intellectual property rights to global legal standards; and how TRIPS agreements does not full harmonize IP rights.]

Note 10. *Supra*, Note 2, Pistorat Pages 7-12

Note 11. MILANOVIC, Branko. *Capitalism Alone: The Future System That Rules the World*. Cambridge, MA: Harvard University Press, 2019.

Note 12. *Ibid*, Note 10, Milanovic, Page 8-11

Note 13. *Ibid*, Note 10 at 180-182

Note 14. *Ibid*, Note 10 at 186-87

Note 15. *Supra*, Note10, at 203-205, citing World Bank, *The Changing Nature of Work*. World Development Report 2019; available at <https://pubdocx.worldbank.org/en/816281518818814423/2019-WDR-Concepts-Note/pdf> [This report was primary devoted to discussed the scope and range of proposals for Universal Basic Income]

Note 16. *Ibid*, Milanovic at 209-2011

Note 17. *Ibid*, Milanovic at 211

Note 18. *Ibid*, Milanovic, at 211, 2012-2014 [see graphic depictions of trend lines; analysis of China trend lines on spreading forms of political capitalism that operate outside the rule of law]

Note 19. The role of lawyers as master coders of capital is outlined in Pistor’s Chapter 7 of *The Code of Capital*. While lawyers are commonly described as legal service providers, according to Pistor this

description understates their role in the coding of capital and the distribution of wealth in society. The author has few positive things to say about how these lawyers function and how law schools produce them. The true masters of the code use their legal expertise in exchange with their clients and professional colleagues to craft new capital and in this process make new law from existing legal materials – all in the private sector. Asset holders according to Pistor greatly value the master coders of capital and even go along with suggestions by these lawyers that their payment per hour of three or four digits is not enough – these global transactional lawyers need to be paid on par with investment bankers.

Note 20. SCHAFFER, A and STREETER, W. [eds]. *Politics in the Age of Austerity*. Cambridge: Polity Press, 2013. [notes that democratic polity comes under significant pressure in the age of austerity promoted by the neoliberal paradigm of globalization. Domestic budgets are squeezed to accommodate financial markets as government responsiveness to voters severely declines. Democracy itself becomes incapacitated when citizen voters cannot influence the course of governments. For three decades now OECD countries have run huge deficit and accumulated debt which in turn reduces national budgets for discretionary spending and social capital investment]. For context discussions of the last century on neoliberalism]; See STREECK, Wolfgang, “The Politics of Public Debt: Neoliberalism, Capitalist Development and the Restructuring of the State”, in *German Economic Review* [August 2013]; available at <https://doi.org/10.1111/geer.12032> [Rising public debt has been widespread in democratic-capitalist political economies since the 1970s, generally accompanied among other things by weak economic growth, rising unemployment, increasing inequality, growing tax resistance, and declining political participation. Following an initial period of fiscal consolidation in the 1990s, public debt took an unprecedented leap in response to the Great Recession [2008-2010]. Renewed consolidation efforts, under the pressure of “financial markets”, point to a general decline in state expenditure, particularly discretionary and investment expenditure, and of extensive retrenchment and privatization of state functions]; see also CERNY, Phillip. “Globalization and the Erosion of Democracy” in *European Journal of Political Research* [vol 36; Issue 1; pg 30-47] [1999], available at <https://doi.org/10.1111/1475-6765.00461> [concluding that despite the apparent development and spread of liberal democratic state forms in the 1980s and 1990s, possibilities for genuine democratic governance overall declined. First, the emergence and consolidation of modern liberal democracy was inextricably intertwined with the development of the nation–state and was profoundly socially embedded in that structural context. Secondly, in today's globalizing world, cross–cutting and overlapping governance structures and processes increasingly took the form of private, oligarchic (and mixed public/private) forms; hegemonic neoliberal norms delegitimized state–based governance in general; and democratic states lost the policy capacity necessary for transforming democratically generated inputs into authoritative outputs. Consequently, robust constraints continue to limit the potential for (a) re-institutionalizing the ‘democratic chain’ between accountability and effectiveness, (b) rearticulating and diminishing the multi-tasking the essential public character of authoritative

institutions and (c) renewing the capacity of current authoritative State agents to make the side-payments and to undertake the monitoring necessary to control free-riding and assimilate alienated groups. Rather than a new pluralistic global civil society, globalization led to a growth in inequalities, a fragmentation of effective public governance structures and the multiplication of quasi-fiefdoms reminiscent of the Middle Ages]; See AIDAN, S Regan. Political Tensions in Euro Varieties of Capitalism-The Crisis of the Democratic State in Europe , Working Paper EUI MWP, 2013/14 at European University Institute, available at <https://hdl.handle.net/181428177> [ outlining The EU response to the financial sovereign debt crisis in the Eurozone led to the democratic crisis of the nation State as it exposed a tension between national and supranational power in multi-level polity and opened a conflict between the EU core and the periphery nations of the EU. Shifts by EU member States in internal devaluation also impacted the burden of adjustments to fiscal and labor market policy at the State level resulting in national government cutting public spending and imposition of structural reforms on labor markets. Imposing one-size-fits-all adjustments to a wide variety of economic problems across a variety of national capitalism really is the source of the EU crisis leading to electoral volatility and a crisis in legitimacy for the democratic state in Europe];

Note 21. KONCEWICZ, Tomasz. Understanding the Politics of Resentment. [online] Verfblog, 2017/9/28. Available at <<https://verfassungblog.de/understanding-the-politics-of-resentment/>> 28 September 2017. [Accessed 22 December 2019]; See also at DOI <https://dx.doi.org/10.17176/20170929-135630> [last viewed February 18,2019][ noting that the resentment that is sweeping across Europe cannot simply be equated with protest, revolt, and public contestation because unlike the rising politic of resentment, these episodes reflect part and parcel of democratic process that supports an open public square;. Koncewicz concludes that the rationale of resentment is distrust with varying degrees of intensity and disdain for the liberal status quo. The politics of resentment sets up a competing constitutional doctrine (‘constitutional capture’) that attacks liberal democratic values with its current stigma (e.g., support only for status quo) and offers an alternative to the promise of populist narratives.]

Note 22. PIKETTY, Thomas. Capital in the Twenty-First Century, trans Arthur Goldhammer [Cambridge, MA: Belknap Press of Harvard University, 2014]

Note 23. TOMASI, John. Free Market Fairness. New Jersey: Princeton University Press, [2012] [ defending individual economic liberty from legal or historical perspective of political philosophy; trying to find common ground between John Rawls and Friedrich Hayek the concept of ‘ free market fairness’ aka market democracy]; See ; HURST, James Willard. The Legitimacy of the Business Corporation in the Law of the United States 1790-1970 . New York: The Law book Exchange,2004 [noting at page 16 that what the corporate charter gave and what a Constitution protects is not just an official license but also a pattern for organizing certain human relations.]; See CORRE, Jacob I. “The Arguments and Reports of Darcy v Allen”, 45 Emery L.J. 1261,1325[1996] [ speaking to Darcy v Allen,11Co.Rep.84b,77 Rep.1260[K.B.1603][ pointing out that the original English Cokes’ Report of



an enduring nature on the questions of individual liberty arising out of the Darcy case in 1603; also noted the privileged nature of monopoly and its distortion on the common good, ultimately hurting the public square of civil society]; see also NACHBAR, Thomas B. Monopoly, Merchantilism, and the Politics of Regulation. 91 Va L. R. 1313,2005; 1324-1345, n.148; see also SANDEFUR, Thomas The Right to Earn a Living: Economic Freedom and the Law. Washington DC, CATO Institute, [2010] 20; see also SEIGAN, Bernie H. "Protecting Economic Liberties", 6 Chap L. R.43,2003; 50[ relying on notions of substantive due process]; as general reference see JONES, Franklin D. Historical Development of the Law of Business Competition, 36 Yale L.J. 42, 1926,29[1926]

Note 24. Supra, Note 21, Piketty

Note 25. GREWAL, David. The Legal Constitution of Capital. In BOUSHEY, Heather, DELONG, J. Bradford, and STEINBAUM, Marshall [eds], After Piketty: The Agenda for Economics and Inequality. Cambridge, MA: Harvard University Press, 2017., 481-483] AUTHORS NOTE : Terminology and definition of constitutional terminology as noted by Grewal sets the foundation for a new legal constitution for capitalism in this century but what of the public square of democracy at the core of the State where the four cornerstones of the framework of liberty ( justice, equity, individual choice and capabilities) simultaneously will matter in the daily function of civil society?][See See also O'ROURKE, K.A.C., Post-Brexit: The Politics of Resentment and EU Reintegration-Creating a New Legal Constitution for Capitalism. International and Comparative Law Review, Vol. 19. No. 1, 2019, pages 38-73 [analysis of the politics of resentment and application of the GeoNOMOS model for State sovereignty in the 21st century relying on the cornerstones of justice, equity, and human dignity]

Note 26. Supra, Note 21, Piketty [see specifically other tools Piketty discusses such as the World Wealth Income Database and the Global Wealth Register as supportive E.U. mechanisms in designing a peer review monitoring and enforcement system for member State partners. These ideas will be contested and rightly so—it is one way to begin to address the well documented and ongoing economic capital demands, unemployment, sluggish growth, and wealth disparity]; see also DAVIS, M and MONK, D.B.[eds]. Evil Paradises: Dream worlds of Neoliberalism. New York: New Press, 2007 ; see OXFAM, Working for the Few: Political Capture and Economic Inequality [Oxford: Oxfam International] [2014]; see SOSKICE, D. Capital in the Twenty First Century: A Critique, British Journal of Sociology, Vol. 65; No. 4, 2014, pg 650-666; see STIGLITZ, J. Free Markets and the Sinking of the Global Economy. London: Allen Lane, 2010; see HARVEY, D. The Enigma of Capital: And the Crisis of Capitalism. London: Profile Books, 2011.

Note 27. Ibid, Piketty.

Note 28. SCHAFER, A and STREETER, W. [eds]. Politics in the Age of Austerity. Cambridge: Polity Press, 2013. [notes that democratic polity comes under significant pressure in the age of austerity promoted by the neoliberal paradigm of globalization. Domestic budgets are squeezed to accommodate financial markets as government responsiveness to voters severely declines. Democracy itself becomes incapacitated when citizen voters cannot influence the course of governments. For three decades now

OECD countries have run huge deficit and accumulated debt which in turn reduces national budgets for discretionary spending and social capital investment]. For context discussions of the last century on neoliberalism]; See STREECK, Wolfgang. The Politics of Public Debt: Neoliberalism, Capitalist Development and the Restructuring of the State, German Economic Review, 2013 [August] [ONLINE]; available at <https://doi.org/10.1111/geer.12032> [Rising public debt has been widespread in democratic-capitalist political economies since the 1970s, generally accompanied among other things by weak economic growth, rising unemployment, increasing inequality, growing tax resistance, and declining political participation. Following an initial period of fiscal consolidation in the 1990s, public debt took an unprecedented leap in response to the Great Recession [2008-2010]. Renewed consolidation efforts, under the pressure of “financial markets”, point to a general decline in state expenditure, particularly discretionary and investment expenditure, and of extensive retrenchment and privatization of state functions]; see also CERNY, Phillip. Globalization and the Erosion of Democracy. European Journal of Political Research [vol 36; Issue 1, 1999; pg 30-47] [ONLINE], available at <https://doi.org/10.1111/1475-6765.00461> [concluding that despite the apparent development and spread of liberal democratic state forms in the 1980s and 1990s, possibilities for genuine democratic governance overall declined. First, the emergence and consolidation of modern liberal democracy was inextricably intertwined with the development of the nation-state and was profoundly socially embedded in that structural context. Secondly, in today’s globalizing world, cross-cutting and overlapping governance structures and processes increasingly took the form of private, oligarchic (and mixed public/private) forms; hegemonic neoliberal norms delegitimized state-based governance in general; and democratic states lost the policy capacity necessary for transforming democratically generated inputs into authoritative outputs. Consequently, robust constraints continue to limit the potential for (a) re-institutionalizing the “democratic chain” between accountability and effectiveness, (b) rearticulating and diminishing the multi-tasking the essential public character of authoritative institutions and (c) renewing the capacity of current authoritative State agents to make the side-payments and to undertake the monitoring necessary to control free-riding and assimilate alienated groups. Rather than a new pluralistic global civil society, globalization led to a growth in inequalities, a fragmentation of effective public governance structures and the multiplication of quasi-fiefdoms reminiscent of the Middle Ages]; See AIDAN, S Regan. Political Tensions in Euro Varieties of Capitalism-The Crisis of the Democratic State in Europe, Working Paper EUI MWP, 2013/14 at European University Institute, [ONLINE]; Available at <https://hdl.handle.net/181428177> [outlining The EU response to the financial sovereign debt crisis in the Eurozone led to the democratic crisis of the nation State as it exposed a tension between national and supranational power in multi-level polity and opened a conflict between the EU core and the periphery nations of the EU. Shifts by EU member States in internal devaluation also impacted the burden of adjustments to fiscal and labor market policy at the State level resulting in national government cutting public spending and imposition of structural reforms on labor markets. Imposing one-size-fits-all adjustments to a wide

variety of economic problems across a variety of national capitalism really is the source of the EU crisis leading to electoral volatility and a crisis in legitimacy for the democratic state in Europe]; See also O'ROURKE, K.A.C. Sovereignty Post-Brexit, The State's Core Function and EU Reintegration; *European Studies: The Review of European Law, Economics and Politics*, CAES, 2017, Vol 4 ,140-164 [Wolter-Kluwer, March 2018] [discussing the scope and application of the GeoNOMOS model for State sovereignty]]

Note 29 GREWAL, David. The Legal Constitution of Capital. In BOUSHEY, Heather, DELONG, J. Bradford, and STEINBAUM, Marshall [eds], *After Piketty: The Agenda for Economics and Inequality*. Cambridge, MA: Harvard University Press, 2017, pages 470-491. [Grewal suggests that this "constitution of capitalism" has a double meaning. First, it reflects the constitutional order that has been adopted by most capitalist societies. The question is whether citizens have a constitutional right to live in a society free of monopolies or what is referenced often as "crony capitalism". This is not the first century where "trade monopolies" have caused revolutions. Perhaps it is time to rethink economic liberty in relation to the legal analysis, e.g., rational basis review of times past and to incorporate new 21st century standards for economic liberty and definitions of "monopoly" that reflect the tremendous private accumulation of economic power across the globe so as to prevent legislation that create global or State economic castes or economic classes of citizens.]

Note 30. RODRIK, Dani. *The Globalization Paradox: Democracy and the Future of the World Economy*. New York: W.W. Norton & Co., 2011; pp. 231-242, 245 [noting that it is time to move beyond the neoliberal paradigm; setting out a series of statements in support of a State's right to protect their own social arrangements, regulations and institutions; and suggesting that trade is a means to an end, not an end in itself so that globalization should be an instrument for achieving the goals that a society seeks: prosperity, stability, freedom and quality of life ]; see generally MILGATE, M., STIMSON, S.C. *After Adam Smith: A Century of Transformation in Politics and Political Ideology*. New Jersey: Princeton University Press, 2009

Note 31. Ibid., RODRIK at 237-239; See also TIROLE, Jean. *Economics for The Common Good*. New Jersey: Princeton University Press, 2017; [ outlining the moral limits of the market at pp 33-50; creating a modern State at pp 155-169]

Note 32. At the same time, with a focus on economic capital development and utilization, the author begins to outline the struggles at the level of the nation State as it begins to adjust to a more integrated model of capitalism that balances economic capital at its core function with equal measures of financial, policy priority and broad political support for the development and utilization of human and social capital. See also, RODRIK, Dani. *The Globalization Paradox: Democracy and the Future of the World Economy*. New York: W.W. Norton & Co., 2011; pp 231-242, 245 [discussing a dominant role for the nation State in relation to the principles of democratic decision-making which is the foundation for the international economic architecture; noting that when States are not democratic and this scaffolding collapses, one cannot presume a country's institutional arrangements reflect the preference of its

citizens]; See also RODRIK, DANI, The Fatal Flaw of Neo-liberalism [Online]. Available at <https://www.theguardian.com/news/2017/nov/14/the-fatal-flaw-of-neoliberalism-its-bad-economics>. [November 14, 2017] [Noting Neoliberalism and its usual prescriptions-always more markets, always less government-are in fact a perversion of mainstream economics. Rodrik suggests that there is nothing wrong with markets, private entrepreneurship or incentives-when deployed appropriately. Their creative use lies behind the most significant economic achievements of our time. He notes as “we heap scorn on neoliberalism, we risk throwing out some of neoliberalism’s useful ideas. The real trouble is that mainstream economics shades too easily into ideology, constraining the choices available and providing cookie-cutter solutions. A proper understanding of the economics that lie behind neoliberalism would allow us to identify-and to reject-ideology when it masquerades as economic science. Most importantly, it would help to develop the institutional imagination badly need to redesign capitalism for the 21st century”]; see generally MILGATE, M.,STIMSON, S.C. *After Adam Smith: A Century of Transformation in Politics and Political Ideology*. New Jersey: Princeton University Press, 2009

Note 33. *Supra*, Note 10, Milanovic, Chapter 5, *The Future of Global Capitalism*, pages 207-218.

Note 34. *Supra*, Note 2, Pistor, pages 224-234