





Commodification and EU law: a genealogy

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Abstract

This symposium analyses European Union (EU) law as a means for both perpetuating commodification processes and potentially mitigating their consequences. This issue framing essay traces the evolutionary trajectory of commodification as a conceptual framework in contemporary intellectual debates, zeroing in on the most prominent theoretical frameworks underpinning its usage. It then relates the evolution of these debates more concretely to the context of the EU as a major institutional forum for the concept's actualisation. Lastly, it connects these narratives to current conversations on the law's role in constituting capitalism and consolidating its attendant structural inequalities. In so doing, it also canvasses the contributions that make up this symposium, showing how each enhances the discussion of commodification in the EU context.

Keywords: European Union law; commodification; law and capitalism; social inequality

1. Toward a federation of ends: morals, markets, and the roots of commodification in EU law

Should people be able to sell their own kidneys? What about their own babies? What if decades of ideological incursions against the welfare state have left these people with no reasonable economic alternatives? Should students be allowed to sell sexual services to pay tuition fees? What if such fees soar due to speculation on secondary markets in securities backed by student loan receivables, rather than actual demand for educational opportunities? Are these things morally wrong? Is a society based on these kinds of commercial exchanges socially just? These dilemmas touch upon different domains, but they implicate the same set of issues, dealing with the disputed boundaries of markets. A term frequently utilised to describe tendencies towards market expansion is 'commodification'. Commodification has been trending for decades now. In broad brushstrokes, it conjures up the mechanisms that make previously unsaleable things – not just goods, but also rights, liberties, interests, privileges, personal traits, and more – marketable.

Starting with the rise of critical studies in the 1970s, commodification has garnered popularity in academic discussions as a conceptual framework that evokes a variety of critiques of market ordering. According to some, individual instances of commodification ought to be tackled within their specific contexts. For others, commodification elicits sweeping critiques of the role of market forces in society, necessitating more or less radical alternatives.¹ Storytelling about commodification can be more or less tragic.² The degree of pessimism depends upon the philosophy one subscribes to and the values one endorses in dealing with the set of social dilemmas that

¹C Hermann, *The Critique of Commodification: Contours of a Post-Capitalist Society* (Oxford University Press 2021) ch 1.

²On the 'tragedies of commodification', see P Drahos, 'Regulating Capitalism's Processes of Destruction' in P Drahos (ed), *Regulatory Theory: Foundations and Application* (ANU Press 2017) 761–85.

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commodification brings into play. However, common ground may exist between competing theorisations. There is plenty of room in the discourse for descriptive accounts that employ evaluative criteria to gauge the practical effects of commodification on society while remaining noncommittal on its normative implications.³ Moreover, there is space for consensus on the factors that promote the spread of the commodity form, again, regardless of whether and why this may be undesirable.

This symposium relies on the shared assertion that law is at the heart of commodification processes. Today's capitalism, as John Braithwaite drives home, is far from being a site of unbridled action by market forces. Rather, it gains a foothold in a complex set of interactions among competing sources of public and private governance.⁴ It is hard to disentangle the iterative process by which law and markets come together to create new commodities. The contributions to the symposium accept this challenge, seeking to unveil the part that European Union (EU) law has played in commodification processes across a wide spectrum of disciplines, from consumer and data protection to technological and financial innovation. By thus embracing a conceptually broad, yet geographically limited focus, we hope to illustrate the pervasive influence of the commodity form in contemporary Western society, while simultaneously pinpointing precise ways in which politico-legal institutions can shape these evolving realities.

How do these interactions affect the EU as a political project? For one thing, they actualise tensions that were arguably already present in the writings of Immanuel Kant, which can be interpreted as offering divergent insights for contemporary Europe. In *Toward Perpetual Peace: A Philosophical Sketch*, Kant called for the creation of 'a special sort of federation' to accomplish what no mere treaty ever could: 'to end *all* wars forever'.⁵ In his vision, this '*pacific federation (foedus pacificum)*' would start with one republic constituted by 'a powerful and enlightened people'.⁶ This initial institutional arrangement would serve as a 'focus point for other states, so that they might join this federative union' until, by such piecemeal accession, it would 'gradually encompass all states and thereby lead to perpetual peace'.⁷ This is the Kantian construction most often invoked in the context of European integration – and with good reason. As John McCormick has asserted, 'Europe's post-war evolution has pushed it closer than any other part of the world to achieving the condition of perpetual peace outlined by Kant'.⁸ Today's EU, with its 27 Member States, looks a lot like what Habermas called Kant's 'ever-expanding federation of republics'⁹ (well, mostly republics).¹⁰ Even the Brexit setback can be recast as reaffirming the Member States' unfettered right of withdrawal.¹¹ This prerogative, Habermas argues, was essential for the Kantian endeavour to avoid the violence inherent in more universalising forms of republicanism.¹²

Elsewhere, however, in his *Groundwork on the Metaphysics of Morals*, Kant spoke of a different theoretical polity. This one was neither a republic nor a federation of republics. It was a kingdom: the kingdom of ends. It is an 'ideal' realm that connects those beings who qualify as 'rational' because they treat themselves and others 'never merely as a means, but always at the same time as

³See M Hesselink, 'Alienation Commodification – A Critique of the Role of EU Consumer Law', in this issue, 405.

⁴J Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making It Work Better* (Edward Elgar 2008) ch 1.

⁵I Kant, 'Toward Perpetual Peace: A Philosophical Sketch' in P Kleingeld (ed), DL Colclasure (trs), *Toward Perpetual Peace and Other Writings on Politics, Peace, and History* (first published 1795, Yale University Press 2006) 82.

⁶*Ibid.*

⁷*Ibid.*

⁸J McCormick, *Europeanism* (Oxford University Press 2010) 194.

⁹J Habermas, *The Divided West* (Polity 2006) 125.

¹⁰But see McCormick (n 8) 194, admitting 'Europe does not yet have all the qualities [Kant] considered necessary' for his pacific federation because, among other things, 'not every European state has a republican constitution'.

¹¹Habermas (n 9).

¹²*Ibid.*, 143–4.

an end in itself.¹³ In this kingdom, Kant argues, ‘everything has either a price, or a dignity’.¹⁴ The distinction is simple: ‘[w]hat has a price can be replaced with something else, as its equivalent; whereas what is elevated above any price, and hence allows of no equivalent, has a dignity’.¹⁵ For Kant, this latter category is synonymous with morality.¹⁶ Morality has ‘inner worth’, a value that is non-fungible because, if ‘fidelity in promising and benevolence from principles (not from instinct) . . . are lacking, neither nature nor art contains anything that could be put in their place’.¹⁷ Nick Smith has called this claim ‘one of the most categorical condemnations of commodification’,¹⁸ for it follows that the ultimate achievement of universal commodification¹⁹ entails nothing less than the death of dignity. There can be no room for morality in a market society.

Has the pacific federation conquered the kingdom of ends? Again, we may come up with more or less pessimistic responses according to the philosophical or evaluative benchmark we employ to begin with. One view would emphasise that the European Union is more than a peacekeeping mission – it is a single market. The ‘four freedoms’ it protects are market-oriented concepts: the free movement of capital, goods (provided they have economic value),²⁰ services, and persons (and the TFEU still only says ‘workers’²¹). Then again, more social policy is made in Brussels than ever before. Dismissing the EU as a purely *laissez-faire*, neoliberal project would be a trivialisation. European citizens have directly benefited from safeguarding the four freedoms, the EU Charter²² has promoted fundamental rights protection across the Union, and the EU has legislative competence to protect citizens in key contexts of commodification such as data protection.²³ Nonetheless, it sometimes still seems the EU prefers its subjects to have a price, a poignant illustration being the failure of the Lisbon Treaty to change key features of the EU economy, specifically the market-instrumentalism of EU private law.²⁴ With its narrow, functionalist constitution, the EU as an organisational public power seems to prioritise what Agustín José Menéndez called ‘“sound” money, economic freedom(s), and “free” competition’ over its other foundational values.²⁵

This symposium analyses EU law, not as a driver of perpetual peace, but as a means for perpetuating commodification processes and, as a corollary, mitigating their consequences. This opening essay sets out to accomplish three things. First, it traces the evolutionary trajectory of commodification as a conceptual framework in contemporary intellectual debates, zeroing in on the most prominent theoretical frameworks underpinning its usage (Section 2). It then relates

¹³I Kant, *Groundwork on the Metaphysics of Morals* (first published 1785, M Gregor and J Timmerman (trs), Cambridge University Press, 2nd edn 2012) 45 (emphasis omitted). On rational life planning as the foundational tenet of justice, see J Rawls, *A Theory of Justice* (Belknap Press 1971) ch 2.

¹⁴Kant, *Groundwork on the Metaphysics of Morals* (n 13) 46.

¹⁵*Ibid.*

¹⁶*Ibid.*

¹⁷*Ibid.*

¹⁸N Smith, ‘Commodification in Law: Ideologies, Intractabilities, and Hyperboles’ 42 (2009) *Continental Philosophical Review* 101, 105.

¹⁹According to Margaret Jane Radin, ‘universal commodification’ is the situation in which ‘anything some people are willing to sell and others are willing to buy in principle can and should be the subject of free market exchange’, and where ‘everything people need or desire, individually or in groups, is conceived of as a commodity’. MJ Radin, ‘Market-Inalienability’ 100 (1987) *Harvard Law Review* 1849, 1860.

²⁰Commission, ‘Guide on Articles 34–36 of the Treaty on the Functioning of the European Union (TFEU)’ (2021) OJ C100/03, s 3.1.2.

²¹Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU), art 45(1).

²²Charter of Fundamental Rights of the European Union [2012] OJ C326/391 (EU Charter).

²³TFEU, art 16(2).

²⁴HW Micklitz, *The Politics of Justice in European Private Law: Social Justice, Access Justice, Societal Justice* (Cambridge University Press 2018) 28–9.

²⁵AJ Menéndez, ‘The “Terrible” Functional Constitution of the European Union: “Sound” Money, Economic Freedom(s) and “Free” Competition’ in M Goldoni and MA Wilkinson (eds), *The Cambridge Handbook on the Material Constitution* (Cambridge University Press 2023) 351.

these debates more concretely to the context of the EU as a major institutional forum for the concept's actualisation (Section 3). Lastly, it connects these narratives to current conversations on the law's role in constituting capitalism and consolidating its attendant structural inequalities (Section 4). In so doing, it also canvasses the contributions that make up this symposium, showing how each enhances the discussion of commodification in the EU context.

2. Competing concepts of commodification

Critiques of capitalism have frequently returned to a common touchstone: the fundamental role of the commodity form in structuring capitalist society. The term 'commodification', as alluded to above, rose to prominence in critical and Marxist cultural theory during the 1970s. Its originators owe an intellectual debt to György Lukács, who in his 1923 book *History and Class Consciousness* theorised about the 'reification' of labour, essentially arguing that the purchase and sale of labour power results in the objectification of the proletariat.²⁶ Inspired by Max Weber's work on the bourgeois affinity for calculation,²⁷ he argues that the reified proletariat loses its very humanity in the eyes of capitalist society.²⁸ This idea of dehumanisation and alienation through objectification was introduced into the realm of cultural theory in the 1960s by the work of Guy Debord, who fused Lukács' ideas with those of Frankfurt School theorists Max Horkheimer and Theodor W. Adorno²⁹ to tell a story about how consumer society and mass media replace reality with an illusory pseudo-life dominated by commodities.³⁰ In the 1970s, Debord's work inspired Anglo-American cultural theorists like Frederic Jameson to brand this class of phenomena as processes of commodification, tying them to postmodern critiques of the instrumentalism of capitalist society.³¹

A. Exchange value: Marx and the commodity fetish

Though Karl Marx never used the word 'commodification', his theory has a totemic status for the later thinkers who developed the concept. The commodity form is central to Marx's *Capital*, which took aim at bourgeois economics as contemporaneously articulated; that is, in terms of Adam Smith's labour theory of value. Building off John Locke's philosophy of property,³² Adam Smith asserted that the defining feature of the commodity is that it is the product of labour. Simply put, it is labour that determines the exchange value of commodities in the market.³³ Since bourgeois political economists were, in Marx's estimation, blinded by the historically exceptional

²⁶G Lukács, *History and Class Consciousness* (first published 1923, R Livingstone (tr), Merlin Press 1971) 83–109.

²⁷See eg M Weber, *Economy and Society*, vol 2 (first published 1922, G Roth and C Wittich (eds), E Fischhoff et al (trs), University of California Press 2013) 86, 847–55.

²⁸'[W]hen the proletariat is fully developed, its humanity and even the appearance of its humanity has become totally abstract'. Lukács (n 26) 20.

²⁹See eg TW Adorno and M Horkheimer, *Dialectic of Enlightenment: Philosophical Fragments* (first published 1947, E Jephcott (tr), Stanford University Press 2002) 120–67, criticising the 'culture industry' that manufactures standardised pop culture to neutralise the subversive potential of high art.

³⁰G Debord, *The Society of the Spectacle* (first published 1967, Donald Nicholson Smith (trs), 1st paperback edn, Zone Books 1994) 11–34.

³¹F Jameson, 'Reification and Utopia in Mass Culture' 1 (1) (1979) *Social Text* 130. See also Foucault and Deleuze's critiques, which can be viewed as illustrations of postmodern accounts of commodification theory. F Vandenberghe, 'Deleuzian Capitalism' 34 (2008) *Philosophy & Social Criticism* 843.

³²In the late 17th century, Locke had posited that, since 'every man has a property in his own person', he therefore should also enjoy a property in '[w]hatsoever . . . he removes out of the state that nature hath provided' and 'hath mixed his labour with, and joined to it something that is his own'. J Locke, *Two Treatises on Government* (first published 1688, TI Cook (ed), Hafner Publishing 1947) 134.

³³A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, vol 1 (first published 1776, RH Campbell and AS Skinner (eds), Glasgow Edition 1975) 45–81.

predominance of the mechanism of exchange characteristic of the period of manufacture,³⁴ Marx identifies the commodity as ‘the economic cell-form’ of ‘bourgeois society’.³⁵ He also sees in the commodity the secret to capitalism’s peculiar means of concealing the true nature of social relations.³⁶ The value of human activity and ingenuity is measured in purely quantitative terms, as the amount of ‘[s]ocially necessary labour-time’ that is ‘congealed’ in a given commodity during the production process.³⁷ Through the market mechanism, ‘the definite social relation between men themselves’ thus takes on ‘the fantastic form of a relation between things’.³⁸ Marx calls this phenomenon the ‘fetishism’ of the commodity.³⁹ Commodities function as ‘social hieroglyphs’,⁴⁰ standing in for the concrete realities of labour relations in the market transactions that mediate our social ordering operations.

Commodities do not tell the whole story though. Rather, they obscure the true nature of social relations behind a veil of commensurability.⁴¹ In his commentaries on Marx’s work, David Harvey aptly illustrates this through the example of purchasing lettuce at a supermarket.⁴² The transaction that occurs at the checkout facilitates a social relation between you as the consumer of lettuce (and as the labourer whose value-creating efforts are embodied in the money you use to buy it) and the labourers who contributed to the production of the lettuce. Setting aside any advertising puffery and industry group certifications on the packaging,⁴³ however, ‘[t]he lettuces are mute, as it were, as to how they were produced and who produced them’.⁴⁴ In other words, your purchase teaches you nothing about the actual real-life labour relations that it structures and propagates. Therefore, the more commodity exchange comes to dominate economic activity, the more we make collective decisions about how we produce things through the distributed decision-making of private individuals who have almost none of the relevant information for doing so at their disposal.

B. Production for sale: Polanyi and fictitious commodities

Another influential figure of the early commodification discourse – who likewise never used the term himself⁴⁵ – is Karl Polanyi. Polanyi’s work departs from Marx’s framework because, by 1944, a different strain of mainstream economic thought had emerged. During the decade after the publication of *Capital*, the field of political economy embarked upon a process of transition from a primary focus on productive labour to one of utilitarian satisfaction through consumption. This change of orientation accounts for how Polanyi’s ‘empirically defines’ the commodity: ‘objects produced for sale on the market’.⁴⁶ Key to this definition is that it allows for the possibility that

³⁴K Marx, *Capital: A Critique of Political Economy*, vol 1 (first published 1867, B Fowkes (tr), Penguin Books 1990) 486.

³⁵*Ibid.*, 90.

³⁶*Ibid.*, 168.

³⁷*Ibid.*, 129–30.

³⁸*Ibid.*, 165.

³⁹*Ibid.*

⁴⁰*Ibid.*, 167.

⁴¹*Ibid.*, 169.

⁴²See D Harvey, *A Companion to Marx’s Capital: The Complete Edition* (Verso 2018) 42. Of course, lettuce is just an illustration, for which nowadays we could substitute virtually anything thanks to the pervasive character of market structures in modern society. See eg N Smith (n 18) 119 (‘Like most of the goods I consume, I do not know the faces or names of the people who produce most of the clothes I wear’).

⁴³The recent proliferation of private certification initiatives in consumer capitalism is the subject of a ‘burgeoning literature’ that includes attempts to evaluate them through the commodification lens. See eg A Kalfagianni, L Partzsch, and M Beulting, ‘Governance for Global Stewardship: Can Private Certification Move Beyond Commodification in Fostering Sustainability Transformations?’ 37 (2020) *Agriculture and Human Values* 65.

⁴⁴Harvey (n 42) 42.

⁴⁵He speaks rather of ‘the idea of commodifying labor and land – the precondition of market economy’. K Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (first published 1944, 2nd paperback ed, Beacon Press 2001) 73.

⁴⁶*Ibid.*, 75.

something can be available for purchase without being, for that sole reason, considered a commodity. Such items he refers to as ‘fictitious commodities’, and he posits that there are three with enormous consequences on social ordering: land; labour, and money.⁴⁷ What unites these is that there are very significant impediments to any production process calibrating their supply in accordance with the price mechanism. Beyond a certain point, it becomes extremely difficult to produce more of these properties to satisfy the ultimately insatiable demand for them. Efforts to do so would: in the case of land, deplete exhaustible natural resources⁴⁸; in the case of labour, degrade the dignity of human life⁴⁹; and in the case of money, cause financial crises.⁵⁰

Polanyi’s theorisation of fictitious commodities is part of his broader point about the self-defeating ‘endeavor of economic liberalism to set up a self-regulating market system’.⁵¹ Universal commodification means that the economy is no longer ‘embedded in social relations’.⁵² However, disembedding markets simply does not work. It tends towards such calamitous catastrophe that the capitalists themselves begin calling for various forms of regulation to contain the system’s volatility. This leads the development of capitalism to take the form of a ‘double movement’, in which the constant drive to expand market society stands in dialectic relation with the constant need to safeguard humanity from being destroyed in the process.

C. Liberty, utility, and human flourishing: Beyond materialist and critical theory

As emphasised at the outset of this piece, views on commodification are inextricably linked to their moral and political philosophical underpinnings.⁵³ Three of the main theoretical strands contending for dominance in the contemporary discourse are liberalism, communitarianism, and utilitarianism.⁵⁴ All of these share the goal of keeping only *certain categories of goods* away from markets. The rest of this section builds upon each of these accounts.

One of the most influential illustrations of liberal commodification theory is John Rawls’ notion of (social) primary goods. The key social primary goods are rights, liberties, powers, opportunities, income and wealth. These are to be distributed across society according to two principles of justice. The first principle applies to basic rights and liberties (such as freedom of conscience, the right to vote, and freedom of speech): ‘Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all’.⁵⁵ The second principle governs distribution of opportunities, income and wealth: ‘Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity’.⁵⁶ The first and the second

⁴⁷*Ibid.*

⁴⁸*Ibid.*, 76, warning that ‘[n]ature would be reduced to its elements, neighborhoods and landscapes defiled, rivers polluted, military safety jeopardized, the power to produce food and raw materials destroyed’.

⁴⁹*Ibid.*, admonishing that ‘human beings would perish from the effects of social exposure; they would die as the victims of acute social dislocation through vice, perversion, crime, and starvation’.

⁵⁰*Ibid.*, cautioning that ‘the market administration of purchasing power would periodically liquidate business enterprise, for shortages and surfeits of money would prove as disastrous to business as floods and droughts in primitive society’.

⁵¹*Ibid.*, 29.

⁵²*Ibid.*, 57. As Fred Block explains, Polanyi got the idea for the metaphor of embeddedness from his in-depth research on mining techniques in England, many of which were aimed at ‘extracting coal that was embedded in the rock walls of the mine’. F Block, ‘Introduction’ in *Ibid.*, xxiv n 10.

⁵³In this sense, Hermann distinguishes between materialist, moral, and pragmatist critiques of commodification: Hermann (n 1) 5–16. See similarly Hesselink, ‘Alienation Commodification’ (n 3).

⁵⁴Other contemporary political philosophical accounts that warrant additional study include (neo-)republicanism, multiculturalism and feminism. See W Kymlicka, *Contemporary Political Philosophy: An Introduction* (2nd edn, Oxford University Press 2002).

⁵⁵Rawls (n 13) at 302.

⁵⁶*Ibid.*

principles are to be taken in lexicographical order.⁵⁷ Individuals cannot improve their economic position by relinquishing their rights to equal citizenship and opportunities.⁵⁸ It follows that commodification processes should not affect the basic rights and liberties.

Resisting the marketisation of specific categories of goods is not solely a concern of liberal theorists. Elizabeth Anderson argues, along communitarian and pragmatist lines, that non-economic goods, such as personal relationships, as well as political goods should be placed outside the bounds of markets.⁵⁹ By the same token, Michael Walzer asserts that there are distinct ‘spheres of justice’ that correspond to specific types of social goods (eg political power, commodities, security), and each responds to its own set of distributive principles. When a good (or its distributional principles) pertaining to one sphere impinges on another, socially unjust outcomes ensue. The most striking illustration is the expansion of the sphere of money and commodities into other domains of justice. It is therefore crucial to preserve the integrity of spheres by ‘blocking exchanges’ between them and setting ‘no-goes’ for commodification.⁶⁰ It is imperative to curb the power of wealth and ban the use of money with respect to certain subjects, such as human beings, political power, criminal justice, and freedom of conscience.⁶¹

Margaret Jane Radin also falls into the communitarian camp.⁶² In her 1996 classic *Contested Commodities*, she advances a ‘broad understanding of commodification’ – one that explicitly includes ‘market rhetoric’, which she defines as ‘the practice of thinking about interactions as if they were sale transactions’.⁶³ Starting with her 1987 Article *Market-Inalienability*, she has espoused a critique of commodification that rejects both liberalism and economic analysis.⁶⁴ Her main preoccupation is rather to preserve the inviolability of personhood from encroachment by market forces. Accordingly, her critique of commodification targets those ‘particulars’ that she deems ‘integral to the self’ – things like ‘one’s politics, work, religion, family, love, sexuality, friendships, altruism, experiences, wisdom, moral commitments, character, and personal attributes’.⁶⁵ Commodifying these particulars impedes her thick conception of ‘human flourishing’, which goes beyond the demands of liberal views.⁶⁶ Though she acknowledges that the precise scope of what must be shielded from market forces in order for a given individual to flourish is somewhat subjective, she denies that it is entirely so, which means that crusaders of decommodification must engage in some degree of ‘moral judgement’ to determine which elements of identity are socially ‘justifiable’.⁶⁷

Other non-materialist critiques of commodification draw from economic theory. A prominent voice in this discourse is Guido Calabresi, whose welfarist pedigree makes him loath to challenge market ordering arrangements.⁶⁸ Key to his account is the special institutional treatment of what he calls ‘merit goods’. These come in two types. The first consists of goods that people frequently do not desire to have subjected to pricing mechanisms, those things ‘whose pricing . . . causes a

⁵⁷*Ibid.*

⁵⁸P Drahos, *A Philosophy of Intellectual Property* (2nd edn, ANU Press 2016) 206.

⁵⁹‘The realization of some forms of freedom, autonomy, and welfare demands that certain goods be produced, exchanged, and enjoyed outside of market relations or in accordance with non-market norms’. E Anderson, *Value in Ethics and Economics* (Harvard University Press 1993) 166.

⁶⁰On the social limits of commodification, see further Hermann (n 1) 100.

⁶¹M Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books 1983) 100–3.

⁶²M Hesselink, *Justifying Contract in Europe: Political Philosophies of European Contract Law* (Oxford University Press 2021) 377–8.

⁶³MJ Radin, *Contested Commodities* (Harvard University Press 1996).

⁶⁴Radin, ‘Market-Inalienability’ (n 19).

⁶⁵*Ibid.*, 1905–6.

⁶⁶*Ibid.*, 1908.

⁶⁷*Ibid.*, 1908–9.

⁶⁸For his narrow view on ‘market inalienability’, see the classic G Calabresi and D Melamed, ‘Property Rules, Liability Rules, and Inalienability: One View of the Cathedral’ 85 (1972) Harvard Law Review 1089.

diminution in utility for a significant group of people'.⁶⁹ These are 'pearls beyond price . . . whose commodification is *in itself* costly'.⁷⁰ The paradigmatic example is human life.⁷¹ The second category, by contrast, is not categorically unsuited for commodification. Assigning a market value to these goods is not inherently costly, but most people consider their (unequal) distribution based on economic conditions highly unwelcome.⁷² The rights to have children, obtain various body parts, or access some level of education or healthcare are some examples.⁷³ Along institutionalist lines, Brett Frischmann's understanding of infrastructure can also be recast as an economic critique of commodification.⁷⁴ Drawing on commons-based governance theories, he understands (traditional) infrastructures (such as railway systems and motorways) as 'shared means to many ends' that generate positive externalities across society and are managed in an openly accessible fashion.⁷⁵ Thus, state actors, instead of private players, are frequently the most suitable candidates for governing these infrastructures.⁷⁶

D. Towards a unified theory of commodification

Each of these theoretical frameworks has their respective strengths and weaknesses. Of course, this assessment ultimately depends on the normative preferences to which one adheres. Marxist commodification theory has the advantage of centering the dehumanising tendencies of commodity exchange, connecting the concept to important modern ills such as alienation and the disregard of subaltern groups. Then again, it provides little scope for advancing decommodification within capitalism, with remedies tending towards the revolutionary rather than the incremental. Polanyi provides more optionality in this respect by pinpointing a subset of particularly problematic commodities, as well supplying some faith in society's capacity to guard itself against capitalism's most extreme excesses – though the precise balance to be struck remains tortuously elusive. Liberal theorists have also struggled with this balance, advancing a variety of proposals whose persuasiveness depends entirely on the degree to which one shares their underlying philosophical perspective. Perhaps, however, this is entirely the point. The proper scope of commodity exchange in society cannot be determined without reference to the shared values of the community in question. From this perspective, primary concern shifts away from the precise contours of market structures and onto the legal processes by which these boundaries are determined. How does our society decide whose philosophies shape our markets?

3. Commodification and the European Union

The various conceptualisations of commodification described above have influenced debates regarding the evolution of the EU project in numerous respects. Marxist, Polanyian, and liberal and welfarist commodification theories have all sparked discussions around the role of EU institutions in navigating the intricate interplay between fundamental rights and internal market integration. This section takes these perspectives in turn, seeking to uncover what the commodification lens reveals about the promises and pitfalls of European integration.

⁶⁹G Calabresi, *The Future of Law & Economics: Essays in Reform and Recollection* (Yale University Press 2016) 26.

⁷⁰*Ibid.*

⁷¹*Ibid.*, 31.

⁷²*Ibid.*, 26.

⁷³*Ibid.*, 43.

⁷⁴BM Frischmann, *Infrastructure: The Social Value of Shared Resources* (Oxford University Press 2012). Frischmann largely draws on Elinor Ostrom's institutional economic theory. See E Ostrom, 'Doing Institutional Analysis: Digging Deeper than Markets and Hierarchies' in C Ménard and MM Shirley (eds), *Handbook of New Institutional Economics* (Springer 2005) 819ff.

⁷⁵Frischmann (n 74) ch 1. Note that Frischmann's account is not necessarily normative, but more descriptive and evaluative.

⁷⁶*Ibid.*, 4.

A. Commodity rights: Marxist critiques of the EU

To be sure, it would be misguided to speak of a ‘Marxist critique’ of the EU, for multiple competing Marxist frameworks have been put forward.⁷⁷ Still, if anything unites these varying accounts, argues Eva Nanopoulos, it is the perspective ‘that Europe’s peace project was fundamentally a class project and that EU law was from the outset tied inextricably to the production of capitalist social relations’.⁷⁸ In a few cases, this critique has been expressly couched in the terms of commodification. For instance, as a graduate student in the late 1990s, Gustav Peebles advanced the view that EU law ‘revolve[s] around the rights of things (commodities) and not people’, because rights protection ‘only extends to people who can show their relationship to the circulation or production of commodities’.⁷⁹ Through this lens, EU law emerges as a source of deepening inequality, as legal status is not equal for all Europeans, with some enjoying greater privileges than others by virtue of their superior ‘market worth’ (or ‘exchange value’).⁸⁰

Nanopoulos, for her part, picks up on Evgeny Pashukanis’s ‘commodity-form theory of law’, emphasising the EU’s significance in establishing individuals alongside sovereign states as subjects of international law.⁸¹ Pashukanis likens the law to commodity exchange in that it is the product of contractual relations between ‘abstract and formally equal legal subjects’.⁸² He argues that the law, like commodities, has a fetishistic quality, concealing the ‘unseen abstract client’ behind an ‘endless chain of arguments’.⁸³ More than anything, however, Pashukanis’s perspective might help explain why there is perhaps less Marxist criticism of EU law than one might expect. Adopting Marx’s view of law as a ‘superstructure’,⁸⁴ he views the legal system as the product of ‘the individualization and opposition of interests’ that emerges from commodity exchange.⁸⁵ For Nanopoulos, the EU itself stands in stark contradiction to this conception, illustrating how the economic base and the legal and political superstructure are in fact ‘indissociable elements of a complex and mutually constitutive totality’.⁸⁶ Her perspective is in keeping with increasing scholarly attention to the significance of law in capitalist processes like commodification, which open up new pathways to critical reappraisal of legal institutions like the EU in this context.

B. Double movement or double-edged sword? Polanyian perspectives on social protection

There has been no shortage of Polanyian perspectives on the EU political project. However, perhaps in keeping with the dialectical nature of the ‘double movement’ dynamic, these analyses have yielded diametrically opposing findings. As Maja Savevska observed in 2014, some depict the EU as a disembedding force for ‘intensified marketisation’, while others see it as a re-embedding

⁷⁷For the proposition that ‘there is no single Marxist theory of European integration’, see E Nanopoulos, ‘From Class-Based Project to Imperial Formation: European Union Law and the Reconstruction of Europe’ in P O’Connell and U Özsü (eds), *Research Handbook on Law and Marxism* (Edward Elgar 2021) 377.

⁷⁸*Ibid.*, 380.

⁷⁹G Peebles, ‘“A Very Eden of the Innate Rights of Man”? A Marxist Look at the European Union Treaties and Case Law’ 22 (1998) *Law and Social Inquiry* 581–7.

⁸⁰*Ibid.*, 615–16.

⁸¹Nanopoulos (n 77) 380.

⁸²*Ibid.*, citing E Pashukanis, ‘General Theory of Law and Marxism’ in P Beirne and R Sharlet (eds), *Pashukanis: Selected Writings on Marxism and Law* (first published 1924, Academic Press 1980) 37.

⁸³Pashukanis (n 82) 59.

⁸⁴Marx famously ascribes precious little agency to lawyers and legislators, consigning them to a ‘legal and political superstructure’ that is the product – not the producer – of the ‘the economic structure of society’. K Marx, ‘Preface’ to *A Contribution to the Critique of Political Economy* in T Carver (ed), *Later Political Writings* (first published 1859, Cambridge University Press 1996) 158–60.

⁸⁵*Ibid.*, 60.

⁸⁶Nanopoulos (n 77) 377.

influence through its increasing orientation towards ‘social and environmental protection’.⁸⁷ Christian Joerges observes a similar dialectic in a recent Article published in this journal,⁸⁸ where he specifically contrasts the viewpoints of American political scientists James A. Caposaro and Sidney Tarrow, on the one hand, with the work of Fritz W. Scharpf and his colleagues at the Max Planck Institute in Cologne, on the other. The former camp heralds the jurisprudence of the Court of Justice of the EU as an example of ‘embedded liberalism’, ensuring that social considerations are woven inextricably into economic processes.⁸⁹ The latter argues instead that a ‘political decoupling of economic integration and social-protection issues’ has ‘allowed economic-policy discourses to frame the European agenda exclusively in terms of market integration and liberalization’ and ‘ensured the privileged access of economic interests to European policy processes’.⁹⁰

Savevska aligns herself with the latter camp, criticising ‘the creation of the Single Market’ as having ‘reified the neoliberal creed’.⁹¹ Rather than focus on its influence on the scale of markets in Polanyi’s three fictitious commodities, she expands his framework by arguing that the EU has helped establish a market for a new fictitious commodity – ‘social protection’, which is increasingly evaluated through the lens of ‘its monetary utility’.⁹² Thus, even in those areas where other scholars have seen the EU as a re-embedding influence, Savevska sees the further proliferation of the commodity form in so-called ‘market-inhibiting policies’ like emissions trading that, ironically, ‘increasingly rely on the use of market solutions’.⁹³

Joerges, for his part, proceeds more diplomatically. His main point is simply that ‘European legal scholarship should become aware of Karl Polanyi’,⁹⁴ a cause taken up by at least some of the contributors to this symposium. For Joerges, European integration presents a ‘challenging example’ from the Polanyian perspective.⁹⁵ While he rejects the ‘Caporaso/Tarrow thesis’ as ‘not plausible’, he nonetheless acknowledges that it contains ‘more than a kernel of truth’.⁹⁶ By the same token, he shies away also from the polemics of Scharpf and company, who he argues underestimate the complexity and mixed character of true Polanyian countermovements.⁹⁷ Forging a middle way, Joerges effectively argues that both sides can be right (and wrong) at the same time; that European social regulation does ensure that non-economic issues are considered the policy-making process, but that this is achieved by shifting debates about social protections to a policy-making setting where they are subsumed within processes geared towards achieving economic efficiency.⁹⁸

While Joerges’s analysis relies explicitly on the theories of Giandomenico Majone,⁹⁹ it also echoes more recent ideas advanced by commentators such as Marija Bartl, who has criticised how the narrowly focused range of legislative actions has relegated the EU law-making to an essentially

⁸⁷M Savevska, ‘Polanyian Reading of the Socio-Economic Transformations of the European Union’ 22 (2014) *Journal of Contemporary European Studies* 395, 396.

⁸⁸C Joerges, ‘Why European Legal Scholarship Should Become Aware of Karl Polanyi: The Great Transformation and the Integration Project’ 1 (2022) *European Law Open* 1067.

⁸⁹JA Caposaro and S Tarrow, ‘Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets’ 63 (2009) *International Organization* 593, 614.

⁹⁰FW Scharpf, ‘The European Social Model: Coping with the Challenges of Diversity’ 40 (2002) *Journal of Common Market Studies* 645, 646–7.

⁹¹Savevska (n 87) 398–406.

⁹²*Ibid.*, 405.

⁹³*Ibid.*, 405–7.

⁹⁴Joerges (n 88) 1067.

⁹⁵*Ibid.*, 1072.

⁹⁶*Ibid.*

⁹⁷*Ibid.*

⁹⁸*Ibid.*, 1073.

⁹⁹*Ibid.* (citing G Majone, *Regulating Europe* (Routledge 1996)).

technocratic, apolitical process, leaving little room for democratic deliberation.¹⁰⁰ The prevailing neoliberal ideology reduces the objective of internal market integration to the sole pursuit of economic growth and market building across the vast spectrum of the EU competences. Article 114 of the Treaty of the Functioning of the European Union (TFEU), the legal basis that enables the EU to legislate to harmonise and facilitate the internal market, has played a prominent role in shaping not only all economic aspects, but also ‘welfare states, culture and legal systems’.¹⁰¹ All of this points to a gradual disembedding of the EU market economy from the socio-political sphere, even as social protections become more a part of the EU legislative agenda.

C. Deficit and demoralisation: fragments from the liberal and the welfarist discourses

A few liberal commodification theorists have also opined on the EU project. Perhaps more surprisingly, they also offer divergent perspectives on these issues. Radin, for her part, has highlighted the benefits of the EU’s consumer protection regime in her work on standard form contracts, pointing out that ‘[t]he clauses that concern [her] most . . . cannot be used against consumers in the European Union’.¹⁰² Rawls, by contrast, warned as early as 1998 that the establishment of the European Single Market was rapidly leading to a society flooded with a meaningless form of consumerism.¹⁰³ His main prescription was that the distribution of basic liberties and rights should take precedence over economic advantages.¹⁰⁴ From his perspective, by the late 1990s the internal market narrative had begun to overshadow the other core foundational elements of the EU. Today, his theory of justice continues to influence conversations around the ‘EU’s justice deficit’. As Dimitry Kochenov and others have argued, although Article 3 of the TFEU mentions ‘social justice’ (merely) as an aspiration, the legal and political developments of the European Union have failed to advance any substantial vision of justice that goes beyond the economic objectives of the market integration project.¹⁰⁵

For Calabresi, it seems, the problem for contemporary Europe is precisely the opposite: economic considerations need to be insulated even further from their attendant socio-cultural implications. In 2016, he co-authored an Article on federalism and moral disagreement which, after noting the rise of North-South tensions over the Eurozone crisis, argued that the EU’s survival may depend on whether Europe’s ‘economic differences’ can be ‘demoralized’.¹⁰⁶ A Kantian might be tempted to interpret this as a synonym for ‘re-commodified’.

D. Commodification and European integration: a rough synthesis

Calabresi appears to be an outlier in the discourse on commodification and European integration. He is certainly not the only commentator that sees the EU as a potential force for good in calibrating the scope of commodity markets. However, he cuts decidedly against the grain in believing this is so on account of its capacity for prioritising economic priorities over other

¹⁰⁰M Bartl, ‘Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political’ 21 (2015) *European Law Journal* 572.

¹⁰¹G Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’ 21 (2015) *European Law Journal* 2, 8.

¹⁰²MJ Radin, ‘Boilerplate: A Threat to the Rule of Law’ in LM Austin and D Klimchuk (eds), *Private Law and the Rule of Law* (Oxford University Press 2014) 288 n 2. In keeping with the theme of her Article, we found this quotation in a footnote, the academic equivalent of contractual fine print.

¹⁰³J Rawls and PV Parijs, ‘Three Letters on The Law of Peoples and the European Union’ 7 (2003) *Revue de philosophie économique* <<https://cdn.uclouvain.be/public/Exports%20reddot/etes/documents/RawlsVanParijs1.Rev.phil.Econ.pdf>> accessed 15 March 2023, 9.

¹⁰⁴Rawls expressly states that his two principles of justice are to be intended in lexicographical order. On the ‘priority of liberty’, see Rawls (n 13) 243–51.

¹⁰⁵D Kochenov, ‘The Ought of Justice’ in D Kochenov, G de Búrca and A Williams (eds), *Europe’s Justice Deficit?* (Hart 2015) 30.

¹⁰⁶G Calabresi and ES Fish, ‘Federalism and Moral Disagreement’ 101 (2016) *Minnesota Law Review* 1, 17.

competing social concerns. Again, he is not the only one who believes the EU may harbour biases in this direction; he is merely the only one who seems to think this is largely a good thing. Generally speaking, bringing the commodification lens to bear on the institutions of the EU tends to encourage an awareness of the ways in which the market-orientation of its fundamental freedoms and the technocratic nature of its policy process tend to privilege economic interests, including expanding commodity markets. This can easily lead to a degree of scepticism with respect to the European project, but it does not necessarily mean that the EU is some great catastrophe of commodification. There are other impulses at play, awareness of which is particularly keen among those of a Polanyian persuasion, who evaluate every new EU social protection initiative as potential evidence of a double movement (but are not always impressed). In this way, perhaps contrary to what one might expect, the commodification lens by and large brings balance and nuance, not mere demagoguery, to the EU law debate.

4. Building a framework for commodification and the law

This symposium illustrates the diversity of theoretical approaches brought to bear on the commodification question. Along the way, its contributors draw from each and every one of the competing frameworks introduced in the preceding section. Yet, a consistent message still emerges from these diverse contributions that the law and legal institutions play an important role in shaping the course of commodification processes. The EU exercises an important influence over the degree to which the commodity form permeates the lives of Europeans. One can even go so far as to argue that the EU bears a moral responsibility for the injustices it may cause or facilitate through its lawmaking in this context.¹⁰⁷ Reasonable minds can, and within these pages do, disagree about the proper scope of markets in structuring social relations. They can nevertheless agree on the forces that dictate this delicate balance, and the kinds of measures that might be effective in recalibrating it to better match emergent preferences.

This shared perspective echoes a broader trend in legal scholarship that, in recent years, has paid increased attention to how shifts in the making and practice of law have shaped transformations in capitalism, casting a critical eye on lawyers' and lawmakers' role in consolidating historically contingent market configurations that contribute to acute social ills such as wealth inequality, racial and gender discrimination, and global climate change. One example is the legal institutionalist movement, which seeks to demonstrate how law 'is constitutive of social relations' and 'accounts for many of the results and structures of modern capitalist society'.¹⁰⁸ Another is the Law and Political Economy (LPE) project, which has seized on the New History of Capitalism initiative's revival of the 'political economy' lens¹⁰⁹ to argue that 'law is central to the creation and maintenance of structural inequalities in the state and the market'.¹¹⁰ How precisely does commodification interact with the law? This is a vital issue for anyone concerned with the law's potential to achieve distributional justice and reduce social inequalities. It forms the central concern of most of this symposium's contributions, which tackle it through a combination of theoretical analysis and concrete case studies from different domains of EU law.

¹⁰⁷See MW Hesselink, 'EU Private Law Injustices' 41 (2022) *Yearbook of European Law* 83.

¹⁰⁸S Deakin et al, 'Legal Institutionalism: Capitalism and the Constitutive Role of Law' 45 (2017) *Journal of Comparative Economics* 188, 189. In this lineage, see also K Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2019) 2.

¹⁰⁹See S Beckert and C Desan, 'Introduction' in S Beckert and C Desan (eds), *American Capitalism: New Histories* (Columbia University Press 2018) 10, which asserts that the New History of Capitalism movement strives '[f]irst—and most basically' to 'reinstall[] political economy as a category for analysis'.

¹¹⁰AP Harris and JJ Varellas III, 'Introduction: Law and Political Economy in a Time of Accelerating Crises' 1 (2020) *Journal of Law and Political Economy* 1, 10. See also J Britton-Purdy et al, 'Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis' 129 (2020) *Yale Law Journal* 1784.

The symposium begins in an intellectual historical vein with a paper by Bob Roth¹¹¹ that digs into the transformation of European juridical culture in the decades leading up to the Maastricht Treaty, unearthing the building blocks of contemporary European commodification processes. Focusing on neo-Marxist literature, Roth acknowledges the important contribution of Frankfurt School thinkers to critiquing the role of capital and law in European market society. However, he also observes their unexpected agreement with both neo-conservative and neo-liberal theorists on the limits of democratic control over the economy, a shared cynicism that contributed to the decline of welfare state policies. The symposium continues with a paper by Martijn Hesselink¹¹² proposing a Kantian–Marxist framework for understanding commodification impulses in European private law. At the core of this perspective is the pervasive influence of what he calls ‘alienation commodification’ in a significant number of domains of consumer law, including the conceptualisation of personal data as consideration in contracts, the promotion of consumer resilience, and the privatisation of social justice through ‘ethical consumption’ initiatives.

In the following contribution, Linus Hoffman¹¹³ draws inspiration from Margaret Radin to rethink what exactly is commodified in informational capitalism. He argues that much of the value that big tech has to offer comes from its power to filter through the otherwise overwhelming amount of data and information now available in the digital sphere. This capacity, he argues, has become a contested commodity, prompting the EU to intervene through legislation designed to preserve threatened democratic and social values. Remaining in Digital Europe, Maurizio Borghi¹¹⁴ then sets out to preserve the commons in the face of ‘lawless’ technologies, demonstrating how today’s commodification of intangibles (such as data) rests on corporations’ de facto control over them, rather than on formal intellectual property (IP) rights. Conceptualising IP as a fictitious commodity under Polanyi’s framework, he asserts that lawless technologies weaken the double movement with respect to IP expansionism, as they frustrate the public domain strategies forming the core of anti-market resistance.

Shifting focus from technological to financial innovation, Ian J. Murray¹¹⁵ then appraises the interplay between EU financial regulation and commodification in a financialised Europe. His contribution seeks to reanimate the Marxian and Polanyian categories of ‘fictitious’ capital and commodities to diagnose the apparent contemporary disconnect between finance and reality. Though his analysis is rooted in these earlier traditions, Murray seeks to reconcile them with Katharina Pistor’s ‘legal theory of finance’, probing the EU’s capacity to define the contours of commodity markets through regulatory interventions. Candida Leone¹¹⁶ likewise invokes Pistor, concluding the symposium by considering the potential for European private law to combat commodification by taking contractual equality seriously. In her view, this would entail coding for the 99 per cent, which more concretely translates to a decrease in the forms of flexibilisation that frequently offer unilateral prerogatives to stronger contractual parties. Her proposal emphasises the role that the European judiciary might play in promoting social equality by curbing the most flagrant excesses of commodification.

There are only so many questions that can be answered in the pages of a single journal symposium. Our goal here is not to put forward a comprehensive framework intended to cover the field of the legal aspects of commodification. On the contrary, it is to stimulate the imaginations of a diverse community of scholars whose collective action can carry this initiative further than we can imagine. We look forward to reading the future scholarship that will consider whether

¹¹¹See B Roth, ‘The Welfare State between Commodification and Juridification: How the Frankfurt School Gave Up on Economic Democracy’, in this issue, 386.

¹¹²See Hesselink, ‘Alienation Commodification’ (n 3).

¹¹³See L Hoffman, ‘Commodification Beyond Data: Regulating the Separation of Information from Noise’, in this issue, 424.

¹¹⁴See M Borghi, ‘Commodification of Intangibles in Post-IP Capitalism: Rethinking the Counter-hegemonic Discourse’, in this issue, 434.

¹¹⁵See IJ Murray, ‘Facing the Fiction: Can the European Union Regulate Fictitious Commodities and Capital?’, in this issue, 448.

¹¹⁶See C Leone, ‘Flexibility as Commodification and Contracts as Local Resistance’, in this issue, 467.

commodification is best deployed as a descriptive or normative category, refine the evaluative criteria by which it is most appropriately measured, generate empirical insights into law's influence on commodification and its distributional implications, and, more generally, begin to answer the many questions this symposium leaves unsettled.

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