Contents

List of figures x
List of contributors xi
Introduction: reshaping markets and the question of agency 1

Part I Crisis and normality in transnational market regulation 7

1 The central problems of Marx's economics and the nature of market regulation 9
DAVID CAMPBELL
1.1 Introduction 9
1.2 The meaning of 'regulation' 10
1.3 Left-wing criticism of the free market 13
1.4 Early British left-wing criticism of the labour theory of value 16
   1.4.1 Shaw and Keynes on Marx 16
   1.4.2 Wicksteed on Marx 21
1.5 The critique of capitalism in light of the labour theory 23
   1.5.1 Supply and demand 23
   1.5.2 Competition 31
   1.5.3 Planning 33
1.6 Conclusion: the form of value 36

2 Contract law, securitization and the pre-crisis transformation of banking 45
JAMES 'JAY' VARELLAS III
2.1 Introduction 45
2.2 Liberal contract law and the development of the securitization market 47
   2.2.1 The historical development of securitization 47
   2.2.2 The laissez-faire institution of contract law 49
   2.2.3 Contract law and the pre-crisis speed-up of securitization markets 50
2.3 Securitization and the rise of market-based banking 52
   2.3.1 Securitization and the eclipse of the post–World War II banking regime 52
   2.3.2 The rise of market-based banking and its consequences 53
Contents

2.3.3 Market-based banking and the problem of the "coordinated market economy" 54
2.4 Conclusion 56

3 'Inside' and 'outside' the firm: corporate law and contract governance as regulatory theories 60

PEER ZUMBANSEN
3.1 Introduction 60
3.2 Studying the corporation 63
3.3 The lawyer's mindset and the new twist in law and economics 66
3.4 The promises (and pitfalls) of contract governance 70
3.5 Coming full circle? The corporation and contract governance 72
  3.5.1 The conundrum of agency in contemporary contract and corporate theory 73
  3.5.2 Beyond public versus private: the promise of relational contract theory for a new theory of the firm 75
  3.5.3 The many bases of contracts 78
3.6 Conclusion 81

Part II Austerity woes: trials and tribulations of debt 95

4 The Greek crisis: a critical narrative 97

IANNIS MICHOS
4.1 Prologue: the biggest sovereign insolvency in history 97
4.2 Foucault's 'tool box' 99
  4.2.1 Crisis and reform 100
  4.2.2 An event and the quest for a single cause 101
  4.2.3 The use of data 101
4.3 What did really happen? 102
  4.3.1 The years 1990–2005: availability of cheap labour and profit margins 102
  4.3.2 Greece in the Eurozone: living with a strong currency 105
  4.3.3 Governance issues within Greece and the Eurozone 107
  4.3.4 The 'inefficient' markets: eurozone or euro country? 110
4.4 Epilogue: The shaping of a new paradigm 112

5 The biopolitics of debt-economy: market order, ascetic and hedonistic morality 115

ALESSANDRO SOMMA
5.1 Accumulation regimes, hedonism and asceticism 115
5.2 The emerging of a debt-economy 117
5.3 The morality of debt relations as power relations 119
5.4 Sovereign debt restructuring and morality: citizens' asceticism 121
5.5 The German experience: Hartz-reforms and invisible poverty 124
5.6 Cooperation and workers' asceticism 126
5.7 From consumers' hedonism to communitarianism 128
Contents

6 Credit contracts and the political economy of debt 133
MORITZ RENNER AND ANDREAS LEIDINGER
6.1 Introduction 133
6.2 Three stages of a decline? A historical political economy of debt 134
6.2.1 The social embeddedness of debt 134
6.2.2 The Great Transformation Part I: credit contracts and the regulatory state 135
6.2.3 The Great Transformation Part II: trading risks 137
6.2.3.1 Making risk 'disappear': the example of CDS trading 138
6.2.3.2 Making the law more risk-sensitive: the example of close-out netting 139
6.3 Reembedding debt? The Constitution of a political economy beyond the State 142
6.3.1 ISDA's development and functioning 142
6.3.2 ISDA's part in the cognitivation of financial markets 143
6.3.3 The evolution of ISDA's position in the derivatives market 144
6.3.3.1 Internal centralisation – The 2009 Supplement to the Master Agreement 144
6.3.3.2 External lobbying – the example of close-out netting 145
6.3.4 Reembedding debt? 147
6.3.4.1 Is there a reembedding of debt at all? 147
6.3.4.2 Are ISDA's standards democratically legitimate? 148
6.3.4.3 Societal regulatory authorities and the nation-state – a complementary relationship 153
6.4 Conclusion 154

Part III Reforming finance: systemic risk and accountability 159
7 Why manager liability fails at controlling systemic risk 161
ANDREAS ENGERT
7.1 Introduction 161
7.2 Manager liability: not strict but fault-based 162
7.2.1 Strict liability is inconsistent with managers' role as agents 163
7.2.2 Incentive distortions from strict liability 164
7.3 Defining the standard of care 166
7.3.1 Objective: limiting the probability of bank insolvency 167
7.3.2 Defining the standard ex ante 169
7.3.3 Defining the standard ex post 174
7.4 The consequences of uncertain care standards 176
7.4.1 The case for restricting manager liability 177
7.4.2 Objections 179
7.5 Conclusion 180
8 How special are they? Targeting systemic risk by regulating shadow banking

TOBIAS TRÖGER

8.1 Introduction
8.2 The rationale underpinning current regulatory initiatives to cover non-bank credit intermediation
  8.2.1 In search of an operative definition
  8.2.2 Goals of banking regulation revisited: substance
    8.2.2.1 Safeguarding the supply of liquidity as the paramount end in prudential bank regulation
    8.2.2.2 Risk-insensitive funding as the core problem
  8.2.3 Synthesising the debates

8.3 Legislators' and supervisors' 'formalist' implementation of the policy prescriptions
  8.3.1 Securitisation and off-balance sheet conduits
  8.3.2 Mutual money market funds and repo

8.4 Enhancing prudential regulation's assertiveness in a normative approach
  8.4.1 The idea of an internal solution without permanent law reform
  8.4.2 Actual and alleged limits of a normative approach

8.5 Conclusion

9 Fixing Finance 2.0

JOHN M. CONLEY AND CYNTHIA A. WILLIAMS

9.1 Introduction
9.2 Too big to fail banks are still a concern
  9.2.1 Why is "too big to fail" a problem?
  9.2.2 Relevant provisions of Dodd-Frank

9.3 Executive compensation
9.4 Why the gaps?

9.5 Culture, organizational psychology and regulation
  9.5.1 Project finance as a model of public/private co-regulation
  9.5.2 Dutch Central Bank psychological interventions

9.6 A co-regulation model

9.7 Conclusion

10 Regulating financial markets: what we might learn from sovereign wealth funds

LARRY CATÁ BACKER

10.1 Introduction
10.2 The operation of the Norwegian Sovereign Wealth Fund: private actor, international actor, and sovereign
  10.2.1 Organization of the NSWF
  10.2.2 Responsible investing and active ownership

10.3 Juridification of investment: the emerging jurisprudence of the ethics council
  10.3.1 The NSWF ethical guidelines
  10.3.2 Operationalizing the Ethics Guidelines – the structure and functions of the NSWF Council on Ethics
10.4 Cooperative and inter-systemic governance: its strength and fragility 243
10.5 Conclusion 247

Part IV Transforming contract 255

11 Sustainable contracting: how standard terms could govern markets 257
BERTRAM LOMFELD
11.1 Two problems: limits to growth and limits to law 257
11.2 One answer: sustainable contracts by standard terms 260
11.3 Why global sustainability terms could help 262
11.3.1 Economic mechanism design 262
11.3.2 Systemic structural coupling 264
11.3.3 Deliberative passage 265
11.3.4 Cultural corporate myth 265
11.3.5 Constitutional fragment 266
11.4 What adequate terms of sustainability could be 267
11.4.1 Natural (ecological) sustainability standards 269
11.4.2 Social (cultural) sustainability standards 270
11.4.3 Economic sustainability standards 271
11.4.4 Procedural (political sustainability) standards 272
11.5 How sustainable contracting could (really) work 273
11.5.1 Myth production by classification, labelling and certification 274
11.5.2 Structural couplings to domestic and international law 274
11.5.3 Deliberative hubs for local and global stakeholders 275
11.5.4 Economic incentives through graded interest rates and prices 276
11.5.5 Constitutionalising sustainability by judicial control 276
11.6 The vision: sustainable private self-governance 277

12 Anti-discrimination law and social policy-making 283
SONJA HABERL
12.1 Old and new questions in modern anti-discrimination law 283
12.2 Equal treatment in the construction of a common market 286
12.3 Towards a new approach in EU anti-discrimination law? 289
12.4 The limits and shortcomings of anti-discrimination law as an instrument of social policy-making 293

13 European or American style? Cultures of contract regulation 298
DANIELA CARUSO
13.1 Introduction 298
13.2 The American commentary in context 301
13.2.1 The neo-classical critique of the CESL 302
13.2.2 The CESL and behavioural law and economics 303
13.3 The burden of proof: origins and questions 307
13.4 Private law, redistribution and behavioural inquiry 309
Part V Conceptual Utopia: the market after the market

14 The Truth of the market

MARIA ROSARIA FERRARESE

14.1 Presentation and main ideas
14.2 The “truth” of the market and some of its implications
14.3 How do markets tell the truth? Between competition and efficiency
14.4 Finance and mathematical economics
14.5 Which “free market” after the crisis? Truths and untruths
14.6 Free markets and state capitalism
14.7 Global markets, governance and new institutional trends

Epilogue: the power of law to reshape markets

BERTRAM LOMFELD

Index