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## Forgetting *Lochner* in the Journey from Plan to Market: The Framing Effect of the Market Rhetoric in Market-Oriented Reforms

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### INTRODUCTION

In 1998, Professor Julie Cohen warned that *Lochnerism* had resurrected in stunning fashion in the digital frontier.<sup>1</sup> Professor Cohen was referring not to a string of Supreme Court decisions citing *Lochner v. New York*<sup>2</sup> favorably, but to a pattern of thinking about the relationship between economic rights and their limits in the political economy on the one hand, and the relative institutional competence of the branches of government to define the extent of those rights.<sup>3</sup> As she puts it, “*Lochner* represented a particular

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1. Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of “Rights Management,”* 97 MICH. L. REV. 462, 464 (1998).

2. 198 U.S. 45 (1905). In this case, the U.S. Supreme Court shot down, as unconstitutional, maximum employment hours legislation on the grounds that the legislation impermissibly interfered with the ability of individuals to enter into an employment contract freely. *Id.*

3. *Lochner* became an epithet used to characterize a narrow and rigid way of interpreting the powers of the state to regulate the market for social welfare purposes vis-à-vis the rights of individuals to contract freely. By the time the “reign” of *Lochner* was ended by *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), the U.S. Supreme Court had struck down almost two hundred legislations aimed at regulating the market and protecting the social welfare. *West Coast Hotel*, therefore, effectively held that individuals were not entitled to an unregulated market—a supposition that *Lochner* stood for given its expansive interpretation of freedom of contract. In U.S. constitutional

ideal of social ordering, premised on a seamless convergence of the private-law institutions of property and contract to provide a zone of legal insulation for market outcomes.”<sup>4</sup> While this vision of the political economy and the market has given way due to evidence of pervasive market failures in the “real world,” Professor Cohen warned that “cyber-economists” and government technocrats were using this same vision in making recommendations about the (de)regulation of the digital world.<sup>5</sup> As Professor James Boyle similarly argued, it became possible to make these *Lochnerian* arguments in cyberspace because participants in the digital (de)regulation discourse sought to label their discourse as “technical”—offering a neutral basis for devising “technocratic” rules for facilitating private choices.<sup>6</sup> Hence, the move to characterize the issues arising from cyberspace ownership and regulation as technocratic (rather than political) served the important discursive function of “forgetting” or obscuring the lessons of *Lochner* in determining the appropriate regime for regulating cyberspace.

In this Article, I sound a warning that this same *Lochnerism* is alive, well, and kicking in the “Development Frontier.”<sup>7</sup> I argue that a discursive move quite similar to that described by Professors Cohen and Boyle respecting the digital frontier is at play in the field of Law and Development. In this move, I argue, settled “lessons” about the role of and interaction between the state and the market are obscured and “forgotten” in the service of a doctrinaire form of a “Market approach” to economic development. Such an approach, I argue, simply reenacts abroad, in the developing world, a *Lochnerian* economic vision. As in the digital frontier, this discursive move is obfuscated by labeling the discourse producing it as

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jurisprudence, *Lochnerism* is derided almost unanimously. It is generally accepted that its interpretation of state powers vis-à-vis individuals’ rights to contract freely was narrow and lopsided.

4. Cohen, *supra* note 1, at 465.

5. *Id.* at 464-65.

6. James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177, 205 (1997).

7. “Development Frontier” can be loosely understood as the multi-disciplinary field that targets economies generally described as “under-developed,” “least-developed,” or “less-developed” with the objective of making them “more developed” through economic growth. For the origins of the field, see *infra* notes 60-67 and accompanying text.

“technocratic” rather than “political” or even “legal” regime to which many valid but differing perspectives and interests can appropriately clash. Constructing the “Market” discourse as “technocratic” presents it as neutral and objective—one which merely shapes or even actively facilitates individual’s choices—rather than coerce them into any particular legal relations.<sup>8</sup> Thus, while the content and meaning of the “Market” as a concept is primarily contested in many disciplines, it is particularly interesting that it seems to evoke an implicit consensus as to its meaning and content in Law and Development discourses.<sup>9</sup> Hence, international legal scholars, economists, political economists, and development technocrats often take for granted what they mean by “Market” when they talk of “Market-oriented” reforms in developing countries.<sup>10</sup>

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8. See Boyle, *supra* note 6, at 177.

9. By “Law and Development discourses” I am referring to the debates, scholarly writings, and interventions among international legal scholars, development technocrats, international development agencies, development economists, and other professionals interested in economic development about the role of law in facilitating economic development. As a distinct discourse, Trubek and Galanter trace its origins in the 1960s. David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflection on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062. After a brief hiatus, the “Law and Development Movement” (LDM) powerfully reemerged in the late 1980s, spurred by the fall of communism and the concomitant discourses extolling the virtues of the Market and capitalist development. Carol Rose and Thomas Carothers have two interesting, if competing versions of this “revival” of the LDM. Carol V. Rose, *The “New” Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study*, 32 LAW & SOC’Y REV. 93 (1998); Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95 (1998). The World Bank states that it has funded more than 600 legal reform projects in developing countries in the 1990s. These projects range from US\$190,000 to US\$252.5 million. WORLD BANK, INITIATIVES IN LEGAL AND JUDICIAL REFORM (2004), available at <http://go.worldbank.org/DVHH5FFLP0>.

10. See, e.g., Jeswald W. Salacuse, *From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World*, 33 INT’L LAW. 875, 883-84 (1999) (arguing that many developing nations have embraced evolving models to reach developmental goals since the 1980s).

[By the mid-1980s] powerful external forces were insisting upon fundamental changes in Third World economic policies, often as a condition to financial and developmental assistance. The World Bank, the International Monetary Fund, western bilateral aid agencies, and international commercial banks advocated a set of new policies, known as the “Washington Consensus,” which required the elimination of budget deficits, strict control of the money supply, privatization of state-owned enterprises, and an openness to international trade and

This Article considers the impact that the Market, as a concept, has played in organizing reality, and facilitating different policy prescriptions in Market-oriented legal reforms in developing countries. The argument is not that the concept of the Market has in fact commanded a consensus as to its meaning in Law and Development discourses. Rather, despite lack of such consensus, the Market as a conceptual tool, has nonetheless inspired legal reforms and economic policies and has been used to shape and influence available policy prescriptions in developing countries in ways that simultaneously presuppose such a consensus as to its meaning and content, yet espouse wildly varying prescriptions at the same time.

This Article will trace how the construction of the “Market” organizes ways of thinking about international relations, the role of the government in economic life, and the role of law and legal institutions in economic development and economic thought. Thus, I propose an understanding of the Market as a legal and social construct. As we will see, this understanding allows us to see the Market as a category that justifies and legitimates a wide array of policy prescriptions and interventions. These interventions are, at times, at odds with each other. However, the construction of the Market comprehends them all to produce profoundly stable, albeit incoherent, *mélange* of policy preferences.

I will develop a theoretical framework that attempts to explain the idea of the Market in this mode, and its practical consequences and manifestations in international development discourse, especially in Market-oriented legal, political and economic reforms.<sup>11</sup> I will explore how this mode of understanding the idea of the Market operates as a stable construct with the power to both prescribe a desired society and simultaneously legitimate that society. I will also use this mode of understanding to explain how this construction of the Market creates, manages (and polices) the binary provinces of the Market and the state, in

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investment. Together, these policies represented a new model of development.

*Id.* at 883.

11. In this Article I use the terms “Law and Development discourse,” and “International Development discourse” as synonymous and interchangeable. *See supra* note 9 (describing “Law and Development discourses”).

different places, and at different times prescribing different roles for each in opposition to the other.

I will then use this mode of understanding of the Market to explain one way to interpret the apparent solidification of the Market approach to development (read: neo-liberalism) in the “long decade of the 1980s”<sup>12</sup> and the flurry of Market-oriented reforms it unleashed in non-Western countries.<sup>13</sup> This mode of understanding reads the Market-oriented reforms as an institutional response to the changing character of international investment and the political economy of international trade and international relations. I will argue, however, that this deployment of the Market, and the accompanying reemergence of the Market approach to development that occurred in the post-1980 period simply reenacts, at the global level, a *Lochnerian* approach to market regulation that was shot down in the United States in 1937.<sup>14</sup>

The aim is threefold. First, I aim to show that though the “Market” does not have a definite meaning it is a useful fiction that is used to manage various interventions and policy and programmatic proposals. Conceptually, it has become an important tool for International Financial Institutions (IFIs) to use for expanding or constricting policy outcomes as preferred.<sup>15</sup> In this mode, the deployment

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12. I have borrowed this phrase from James Carrier. It refers to the period that begun in the late 1970s with the victory of the Conservatives in Britain, and ended in the early 1990s with the defeat of the Communists in Eastern Europe. James G. Carrier, *Introduction* to MEANINGS OF THE MARKET: THE FREE MARKET IN WESTERN CULTURE 1 (James G. Carrier ed., 1997).

13. For a brief but excellent description of these reforms, see Salacuse, *supra* note 10, at 875.

14. See, e.g., Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874-75 (1987). Professor Sunstein explains that the principal criticism of *Lochner* is not that the court engaged in illegitimate judicial activism in substituting its wisdom for that of the legislature. Rather, the primary fault of *Lochner* was that the court treated the market ordering under the extant rules of common law as “natural” rather than as a legal construct. As such, the court treated any governmental action departing from the common law baseline as “unnatural” and therefore illegitimate.

15. For a description (and critique) of the role of International Financial Institutions in determining economic policies of developing countries, see, for example, SUSAN STRANGE, *THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY* (1996); Joel M. Ngugi, *The World Bank and the Ideology of Reform and Development in International Economic Development Discourse*, 14 CARDOZO J. INT'L & COMP. L. 313 (2006).

of the Market by IFIs can be analogized to how the lack of a neat separation between public and private law creates a dichotomy that is usefully and fruitfully exploited in ideologically determining the propriety of legal intervention in different areas of the law.<sup>16</sup>

Second, the Article aims to explain how the Market as such a construct is deployed in Law and Development discourse as a rhetorical device, metaphor, or strategy that is used to institute or superintend the institution of a *Lochnerian* approach to law and policy making. The concept of the Market in Law and Development is used as a strategy to “forget” the lessons of *Lochner*. The Article, therefore, demonstrates how (and why) the framing of the economic development discourse as a movement from “Plan” to “Market”<sup>17</sup> has had a powerful impact in shaping and influencing available policy prescriptions, some of which simply “naturalize” problematic and contested aspects of reforms taking place in developing countries.

Third, I aim to reconfirm a truism about the workings of the Market in the society that increasingly appears to be clouded in the Law and Development discourses in the post-1980 period. This truism is that the Market is about regulation and political choices rather than about deregulation and “innate” laws of economics.<sup>18</sup> The Market

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16. See *infra* notes 48-50 and accompanying text.

17. See WORLD BANK, WORLD DEVELOPMENT REPORT 1996: FROM PLAN TO MARKET (1996) [hereinafter WORLD BANK, FROM PLAN TO MARKET].

18. The idea that markets are primarily about competition and deregulation is very strong in the literature. One could summarize the idea in the words of Professor Paul Brietzke:

We can summarize the Chicago approach as a drawing of three conclusions from three assumptions: *If* we assume almost everyone to be economically rational, *if* almost all of their relations are like exchanges in markets, and *if* markets almost never fail (are the most nearly perfect social institutions), *then* (by definition) these rational relations are efficient—involve the least waste of scarce resources. It *then* follows that these efficient relations should be enforced as cheaply as possible, under the common law, and *then* (by definition) statutory and regulatory interventions in these efficient relations will be inefficient and serve to reduce society’s wealth. In other words, society is so simple and monolithic that it can be coordinated by isolated and fragmented contracts and markets, provided that the common law fully and clearly specifies the parties’ rights.

Paul H. Brietzke, *New Wrinkles in Law . . . and Economics*, 32 VAL. U. L. REV.

is as much the product of state action and regulation as a product of the interaction of rights such as property rights or freedom of contract rights that some might be tempted to regard as “natural” or pre-political.<sup>19</sup> The aim of Law and Development, as a discipline, therefore, should be to formulate ways in which the state can fruitfully regulate the Market so as to enhance general social welfare, and to make political choices that are also socially rational. Hence, the Market is a product of not only individual choices and actions devoid of state action but, the result of a dynamic interaction of governmental choices with individual choices; regulatory schemes interacting with deregulatory schemes; politics interacting with economics; and so forth.

#### I. FROM PLAN TO MARKET AS A PARALLEL MOVEMENT FROM STATUS TO CONTRACT

We wanted democracy, but we ended up with the bond market.<sup>20</sup>

Writing in 1861, Sir Henry Maine characterized the ascent of Western civilization as a definitive shift from status to contract:

The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place . . . . [It is not] difficult to see what is the tie between man and man which replaced by degrees those forms of reciprocity in rights and duties which have their origin in the family. It is contract . . . . [W]e may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*.<sup>21</sup>

Maine saw a clean break in the historical shift—one

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105, 110 (1997). Professor Duncan Kennedy has also traced the intellectual lineology of the intellectual tradition of “naturalizing” the “market” by classical and neo-classical economists, and has refuted the idea that market outcomes are “efficient” and “just.” Instead, he argues, market outcomes are “decidedly artificial and manipulable” and inherently inseparable from distributive policies. Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939, 959 (1985).

19. See Kennedy, *supra* note 18, at 939.

20. HANS-PETER MARTIN & HERALD SCHUMANN, THE GLOBAL TRAP: GLOBALIZATION AND THE ASSAULT ON PROSPERITY AND DEMOCRACY 40 (Patrick Camiller trans., 1997) (citing Polish graffiti).

21. SIR HENRY MAINE, ANCIENT LAW 99-100 (1977).

that he considered most telling in the ascendancy of Western civilization as compared to other cultures that continued to organize their law in terms of status.<sup>22</sup> Maine argued that ancient law regarded the basic unit of society as the collective, so much so that the individual was subsumed by a series of status distinctions, each of which was transmitted between generations.<sup>23</sup> He argued that the progression of legal culture realized a shift from status as the basis of rights to an individual capability to transmit property on a personal, contractual basis.<sup>24</sup> The clean, historical shift postulated by Maine can be represented in tabular form as follows:

<b>Status</b>	<b>Contract</b>
Collective, multilateral traditions and customs	Bilateral negotiations
Imposed norms	Freedom of contract
Primacy of community/family	Primacy of individual
Social relations defined through kinship networks and ties	Social relations defined through individual will
Mechanical solidarity: society founded on likeness	Organic solidarity: society founded on integration of differences into a collaborative, harmonious whole
Collective property	Private property
Family obligations	Private autonomy

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22. Maine found support in the work of Max Weber. MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 671 (Guenther Roth & Claus Wittich eds., 1978) (1956) (“[T]he farther we go back in legal history, the less significant becomes contract as a device of economic acquisition in fields other than the law of the family and inheritance.”). However, deep into the twentieth century this definitive characterization became less sure. *See, e.g.*, GRANT GILMORE, *THE DEATH OF CONTRACT* 1 (1974) (“Contract, like God, is dead.”); Roscoe Pound, *The End of Law as Developed in Juristic Thought*, 30 *HARV. L. REV.* 201, 219 (1917) (“[T]he whole course of English and American law today is belying it unless, indeed, we are progressing backward.”).

23. MAINE, *supra* note 21, at 73-74.

24. *Id.* at 179.

Maine's dichotomy, whether implicit or explicit, lasted many years in legal thought ultimately shaping doctrines of *laissez faire* and free markets and justified the rise of the doctrine of untrammelled freedom of contract in the nineteenth century.<sup>25</sup> However, it turned out to be a misleading one: many aspects of the law, including the law of contract, continued to organize legal rights and entitlements according to status-like concepts as relational contract theorists have demonstrated.<sup>26</sup> At the same time, the perception that the pre-nineteenth century Western world and the present Third World are governed by collective, multilateral norms imposed on the members of the society only rather than voluntary bilateral negotiations that govern the twenty-first century Anglo-Saxon has been

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25. In legal theory, the rise of contract reached its high point between the mid- to late nineteenth century especially in the United States where the *Lochner*-era court elevated liberty (constituting of freedom of contract and private property) to constitutional status. See, e.g., P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 405-19 (1979); Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917 (1974). But for a trenchant critique of Horwitz's work, see A.W.B. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979). However, the *Lochner*-era was followed by a period of serious decline in the idea of freedom of contract. First, *Lochner* and its progeny was overruled—beginning with *Nebbia v. New York*, 291 U.S. 502, 510 (1934) (“But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract.”). By the mid-1960s, Kahn-Freund remarked that a reversion of the movement described by Maine was taking place: the new movement was from contract to status. O. Kahn-Freund, *A Note on Status and Contract in British Labour Law*, 30 MOD. L. REV. 635 (1967).

26. See, e.g., IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980); Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483; Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974). Many recent works on the Market model also challenge the notion that market actors are autonomous individuals dealing with each other contractually at arm's length. These research projects demonstrate that firms and individuals often use ties other than impersonal contractual relationships in transacting (i.e., kinship ties to recruit in the fishing industry in New England). See, e.g., Peter B. Doeringer et al., *Capitalism and Kinship: Do Institutions Matter in the Labor Market?*, 40 INDUS. & LAB. REL. REV. 48 (1986). Mutually understood criteria of fairness is used in transactions for many firms in the United States, Marc Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOC. 481 (1985), and Japan, Ronald Dore, *Goodwill and the Spirit of Market Capitalism*, 34 BRIT. J. SOC. 459 (1983).

challenged as inaccurate.<sup>27</sup> However, the construction of this historical break—and the misleading dichotomy it created—generated a powerful explanatory, analytical, rhetorical, and justificatory tool for various political and legal projects from the mid-nineteenth century to the present.

Legal scholars, economists, political economists, and development technocrats have similarly characterized a shift that occurred in the last two decades in the development discourse and model of development as a definitive shift from Plan to Market.<sup>28</sup> They perceive a clean break from “plan”—the pre-1980 development model with its emphasis on four basic elements: public ordering and state planning of the economy and society, reliance on state enterprises as economic actors, restriction and regulation of private enterprise, and limitation and control of the

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27. See, e.g., SALLY FALK MOORE, *LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH* 54-81 (1978). Moore pointed to the “semi-autonomous social field” as a site in which rulemaking and rule-enforcement occur, often independent of official laws and legal institutions, yet subject at times to their control. The “semi-autonomous social field” existed in eighteenth century Britain, nineteenth and twentieth century United States, as well as across the Third World then and now. Sylvia Kang’ara has developed this critique to make some generalizations about particular conceptions of property that are deemed to be “African” and therefore associated with “status” and those that are deemed to be “Western” and therefore associated with “contract.” She identifies six characteristics often attributed to African conception of property: it is governed by custom, norms, negotiations, spiritism, traditions, and communalism. On the other hand, “Western” conception of property is governed by the opposite of each of these “African” attributes: it is governed by contract, law, adjudication, commodity, modernity, and individualism. Maine would easily have associated the first list with “status” relationships and extol the second as unshackled from the vise of status to contract. Sylvia Kang’ara, *Is There an African Conception of Property?* (2002) (unpublished S.J.D. dissertation, Harvard Law School) (on file with author).

28. Initially, the phrase “From Plan to Market” was supplied by the World Bank. WORLD BANK, *FROM PLAN TO MARKET*, *supra* note 17. This is a phrase that has subsequently gained currency to explain the development policies in vogue in the post-1980 period. The periodization of when this shift actually started differs with each writer with many identifying the fall of communism in 1989 as the defining moment. However, in this study, I take the year 1980 as the moment that the shift occurred. This is because, in the development discourse, the shift predated the fall of communism. It was triggered by the right-ward move in politics in the United States and Britain and the pressures this put on multilateral donors to developing countries, and the debt-crisis that started in earnest in 1981.

country's economic relations with the outside world.<sup>29</sup> This has given way to the “market”—the post-1980 consensus on economic development with an emphasis on the opposite attributes of those associated with the earlier era: reliance on private ordering and markets, privatization, deregulation, and opening of economies.<sup>30</sup> In short, the “developmental state” of the pre-1980 era has given way to the “market-friendly minimalist state” in the post-1980 period. As the World Bank observed:

It is a hard fact of transition that the features of a market economy that many of these countries need most are the very ones that will take the longest to build . . . . [M]oving from plan to market requires a new way of thinking about the entire legal system.<sup>31</sup>

The image and role of the law in development in each of the two eras is similarly contrasted. Of the first era, it is said that:

First, [this model], with its emphasis on state planning, public ordering, and heavy regulation, relied heavily on public law to achieve its objectives and accorded private law only a limited role in the development process. More fundamentally, it led governments to see law's basic purpose as bringing about desired social and economic change, rather than merely setting down the rules within which persons and organizations would conduct their economic and social activities in accordance with their individual interests. Implicitly or explicitly, governments and scholars seemed to believe that law was a tool for social engineering; therefore they embarked on programs of legal reform whose goal was to abolish certain social and economic practices and institute new ones in their place.<sup>32</sup>

The image of the law in the post-1980 market model is described differently—as a move from “public ordering to private ordering of economic activity. Organizations and individuals have gained increased legal freedom to arrange transactions through contract. Conversely, the form and substance of economic transactions are less and less

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29. Salacuse, *supra* note 10, at 877.

30. *See id.* at 882-86.

31. WORLD BANK, FROM PLAN TO MARKET, *supra* note 17, at 97.

32. Salacuse, *supra* note 10, at 880.

mandated by governmental regulations and directives.”<sup>33</sup>  
As Julio Faundez writes:

In a market-friendly state, law is not an all purpose tool at the service of an interventionist state . . . . Instead, law, [sic] provides rules to facilitate market transactions mainly by defining property rights, guaranteeing the enforcement of contracts and maintaining law and order. Law is no longer a protagonist of social and economic change. Its role, though indispensable, is largely passive.<sup>34</sup>

The prevailing understanding in development discourse at present, therefore, is that there is a “consensus” about the market model.<sup>35</sup> This consensus is often constructed by way of contrasting the two models—one, a pre-1980 model, with an obvious emphasis on public law and the state as the engine of economic policies, the other, a post-1980 model, placing its emphasis on private law and the market as the engine of economic policies. It is also often expressed in terms of the role of the government in economic functioning. In this conception, the shift is conceived as a reduction of the economic role of the government—with the government relinquishing these roles to the private markets. In short, the pre-1980 development era is characterized and remembered with its association with the “state.” The post-1980 era, on the other hand, is described in terms of its association with the “market.”<sup>36</sup> This postulated shift from Plan to Market can be represented as follows:

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33. *Id.* at 887.

34. Julio Faundez, *Legal Technical Assistance*, in *GOOD GOVERNMENT AND LAW: LEGAL AND INSTITUTIONAL REFORM IN DEVELOPING COUNTRIES* 1, 13 (Julio Faundez ed., 1997).

35. This consensus is now widely known as the “Washington Consensus.” John Williamson originally coined the phrase. John Williamson, *What Washington Means by Policy Reform*, in *LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED* 5 (John Williamson ed., 1990).

36. See generally WORLD BANK, *WORLD DEVELOPMENT REPORT 1991: THE CHALLENGE OF DEVELOPMENT* (1991) [hereinafter *WORLD BANK, THE CHALLENGE OF DEVELOPMENT*].

<b>Plan</b>	<b>Market</b>
Public ordering using public laws	Private ordering using private laws
State enterprises	Privatization and private enterprises
Economic regulation	Deregulation
Managed trade	Free trade
Command economy	Price economy
Role of law's role: distributive; social engineering	Role of law: passive; neutral rules of the game
Collective property	Private property
Government intervention	<i>Laissez faire</i>
State planning and design	Markets and anti-design
State as engine of economic policies	Markets as engine of economic policies

From a cursory glance of these two tabular representations, it seems fairly obvious that today's dichotomization between "Plan" and "Market" closely parallels Maine's dichotomization between "status" and "contract." Maine's dichotomization, notwithstanding its veracity or falsity, became an important tool that was used to justify, specific legal, social, and political projects in the late nineteenth and early twentieth centuries' Western world.<sup>37</sup> Maine's dichotomization was a construction of

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37. Many reforms in modern law were justified as the progressive movement from status to contract. Some of these reforms could be thought of as politically progressive—for example, the prohibition of slavery and other race-based legal classifications. Some of these reforms could be thought of as politically conservative—for example, the rise of *laissez faire* economics which led, ultimately, to *Lochnerism*. As Roscoe Pound wrote, *Lochnerism* was ultimately a result not of economic bias but a blinding belief in the progressive narrative of status to contract. Pound wrote:

This opposition [social legislation such as minimum wage laws] was not due to class bias or economic associations or social relations of the judges nor to sinister influences brought to bear upon them, as was assumed so freely in the American presidential campaign of 1912, when such decisions were in issue. The judges were imbued with a genuine faith in the tenets of the historical school, especially the political interpretation and the doctrine of progress from status to contract. Hence it seemed to them that the constitutional requirement of due process of law was violated by legislative attempts to restore status and restrict the contractual powers of free men by enacting that men of full age and sound mind in particular callings should not be

ideal-type representations of the two periods he was studying—one constructed by generalization, intensification, homogenization, and dramatization of specific aspects of the two periods. However, its explanatory power lay, not in its veracity or falsity, but by the fact that at the point of application and deployment for legal or political projects, the ideal type representations were used as though they are in fact, the reality.<sup>38</sup> In the same way the dichotomization between “Plan” and “Market” becomes an important analytical tool that generates a discourse that comprehends, justifies and legitimizes specific legal, social and political projects in development. Again, the telling aspect is not so much the veracity or falsity of the dichotomization, but the way its construction unleashes a series of further theoretical maneuvers that serve as justification or legitimization of specific political, legal, or social projects.

Hence, in this Article, I reject as too crude and simplistic the two models that are often offered to understand and explain the shift in development discourse and the larger process of integration of economies and models of social order worldwide that accompanies it. This larger process is called “globalization.”<sup>39</sup> These two models are as follows.

One model would understand the shift as a logical response to the radial diffusion of institutions produced by

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able to make agreements which other men might make freely.

ROSCOE POUND, *INTERPRETATIONS OF LEGAL HISTORY* 62-63 (1923).

38. As Jerome Frank wrote, some legal fictions are useful but legal myths are never useful because they maintain a false perception of the law among laymen and professionals alike. JEROME FRANK, *LAW AND THE MODERN MIND* 40-41 (1930).

39. Although with legal consequences, and although law facilitates it, globalization is not primarily a legal concept. Its definition is hotly contested across and within disciplines. Many sociologists would define globalization as “the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa.” ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* 64 (1990). Many economists and political scientists would agree with Joseph Stiglitz’s definition of globalization as an integration of, and thus a cost savings in, transport and communications, and marked reductions in artificial barriers to the transnational movement of goods and services, capital, technology, various forms of knowledge, and (to a lesser extent) people. JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 21 (2002). Increasingly, this process is overseen by the International Financial Institutions and the World Trade Organization (WTO).

interactions between social actors in an increasingly stateless world.<sup>40</sup> These institutions are legitimated in rationalistic and universalistic terms and are globalized through instrumental culture. Typifying this approach, sociologist Martin Albrow writes that there is “no axial principle underlying global institutions.”<sup>41</sup> Rather, there is a pluralism reflecting “no theory of the greater good, simply the historic accumulation and interplay of national experiences and expertise coming to terms with each other.”<sup>42</sup>

The second approach understands the shift and the larger “globalization” project linked to it as a translation of material interests by powerful sectors at the global stage to strengthen their hand in international relations for material gains in terms of power or wealth.<sup>43</sup> Typifying this approach, Caroline Thomas writes that:

Globalization . . . refers broadly to the process whereby power is located in global social formations and expressed through global networks rather than through territorially-based states . . . . Transnational capitalist institutions are speeding up and deepening the realignment of social and class relations within what is already a single world-system. They are setting the global economic, social and political agenda.<sup>44</sup>

Both these approaches would understand the shift in development discourse in the 1980s solely in teleological or instrumental fashion. In other words, employed by development scholars, these two approaches would seek to explain the shift in development discourse in the 1980s in

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40. This is the most common explanation for “globalization” in sociology and international relations. *See, e.g.*, CONSTRUCTING WORLD CULTURE (John Boli & George M. Thomas eds., 1999); GEORGE M. THOMAS, JOHN W. MEYER, FRANCISCO O. RAMIREZ & JOHN BOLI, INSTITUTIONAL STRUCTURE: CONSTITUTING STATE, SOCIETY, AND THE INDIVIDUAL (1987); John W. Meyer et al., *World Society and the Nation-State*, 103 AM. J. SOC. 144 (1997).

41. MARTIN ALBROW, *THE GLOBAL AGE* 125 (1996).

42. *Id.*

43. Most critics of globalization and most Third World scholars would fall into this category. *See, e.g.*, WALDEN BELLO, *THE DARK VICTORY* (1994); SUSAN GEORGE & FABRIZIO SABELI, *FAITH AND CREDIT: THE WORLD BANK'S SECULAR EMPIRE* (1994); Caroline Thomas, *Globalization and the South*, in *GLOBALIZATION AND THE SOUTH* 1 (Caroline Thomas & Peter Wilkin eds., 1997).

44. Thomas, *supra* note 43, at 6.

terms of globalized instrumental models: one in terms of its diffusion, the other in terms of an instrumental imposition. In both approaches, “globalization,” as an explanation of the shift, involves a universalistic logic that subsumes hitherto culturally distinctive societies within the one emerging global order thereby corroding the preexisting cultural, political, social, and even legal logic of these societies and replacing it with its own.

In the remainder of this Article, however, I seek to understand the shift in a different way. Rather than take the shift for granted, and then search for its causes, I begin by problematizing the shift itself. By questioning how the shift is constructed, characterized, and ultimately deployed, it becomes possible to change the focus from the fact of the shift itself, to the mechanisms for its production, construction, and deployment. By focusing on the mechanisms that produce, enable, characterize, construct, constrain, and deploy the shift, I put my sight on how the discourse generates the vocabulary, politics, and available policy tools whose interaction with each other reinforce (and are reinforced by), enable (and are enabled by), and constrain (and are constrained by) the discourse itself. This complex interaction ultimately produces the discourse that drives the process of development.

## II. THE MEANING AND CONSTRUCTION OF THE MARKET IN DEVELOPMENT DISCOURSE

Consider the following definition of the market by James Carrier: “The [M]arket is not what people do and think, and how they interact when they buy and sell, give and take. Instead, it is a conception people have about an idealized form of buying and selling.”<sup>45</sup>

This conception of the Market is remarkable because it reminds us at once that though the Market is merely idealized, it is ordinarily used—or more accurately, invoked—implicitly and explicitly in academic argumentation in debating the wisdom of policy prescriptions and in supporting particular interventions and programmatic proposals as the reason or argument for establishing a given sort of “buying or

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45. James G. Carrier, *Preface* to MEANINGS OF THE MARKET: THE FREE MARKET IN WESTERN CULTURE, *supra* note 12, at vii, vii.

selling.”<sup>46</sup> As I will show shortly, this element of the market demonstrates how this conception of the Market can comprehend particular dualisms and how it has shaped particular debates about economic development, the role of government in economic development, and international relations generally.

What this definition flags from the outset is the fact that the Market is not a clear conceptual or analytical concept that rigorously, logically, or definitionally determines the relations between economic actors. It should be fairly obvious that this conception of the “Market” is *not* the “Market Model” that is studied in academic economics.<sup>47</sup> Indeed, for reasons discussed in this Article, to concentrate on the academic model of the Market would be to miss the forest for the trees. This is because, often, the Market Model and the conception of the Market that is operationalized in the politics of reform and development is an idealized one that is different from what economists and politicians work with. While the Market Model intersects with this “real life” notion of the Market at many points, what is more significant in the context of reform and international development is not what real economists do or believe. Rather, what is more significant is the representation of the idealized Market in the development discourse. It is this representation that is deployed in support or opposition to particular interventions or policies.

In this mode, the Market, rather than being a clear analytical concept, is a way of thinking about the relations between the economic actors that are constantly changing and being redefined. As such, though the Market is presented as a technocratic and predictable tool, it functions more as a political rhetoric that justifies and legitimates a particular economic system. Thus, it oscillates between a definition as an analytical tool that prescribes a desired society and a definition as a legitimating tool that merely justifies a particular instantiation of economic relations in a particular society.

In this way, the functioning of the Market in economic and legal analysis is more like the public/private distinction in social theory and socio-legal inquiry. Karl Klare has, for

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46. *Id.*

47. *Id.*

example, shown that the public/private dichotomy, though pervasive in labor relations, lacks conceptual clarity. Rather, the dichotomy provides “a series of ways of thinking about public and private that are constantly undergoing revision, reformulation, and refinement . . . . The public/private distinction poses as an analytical tool . . . but it functions more as a form of political rhetoric used to justify particular results.”<sup>48</sup>

This analogue is particularly fitting. Karl Klare argues that the public/private distinction creates and shapes the terrain over which labor disputes are fought.<sup>49</sup> The dichotomy helps limit the powers of some, while simultaneously expanding those of others,<sup>50</sup> as does the market function in the reform and development discourse. It creates and shapes the terrain and repertoire of reform. Its lack of precise analytical content makes it a powerful political rhetoric for justifying particular results.

The end results entail changing economic and social positions of some people—at once positively and negatively. They also entail widely varying economic and political interventions at different times. However, since the Market provides ways of thinking and the vocabulary for thinking about the different issues, it glosses over the apparent political choices that are and must be made. Hence, the terrain constituted by the dualistic nature of the Market concept has the ability to mediate its own conceptual incoherence yet make prescriptions and draw policy implications of a concrete kind even whilst remaining at a very general level of analysis.<sup>51</sup>

The upshot of this is three-fold. First, as Robert Hale long ago wrote, the state is unavoidably constitutive of the economy.<sup>52</sup> Second, the Market as a category justifies and

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48. Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1361 (1982).

49. *Id.*

50. *See id.* at 1362, 1394.

51. Christopher Colclough, *Structuralism Versus Neo-Liberalism: An Introduction*, in STATES OR MARKETS?: NEO-LIBERALISM AND THE DEVELOPMENT POLICY DEBATE 1, 17 (Christopher Colclough & James Manor eds., 1990).

52. *See, e.g.*, Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943) (arguing that government and law play a more significant role in a market economy than neo-classical economists let on);

legitimizes a wide array of policy prescriptions and interventions. Again, this is simply a restatement of the insight first made by Robert Hale that the institutions that underpin the Market are heterogeneous in nature.<sup>53</sup> These interventions are, at times, at odds with each other. However, the construction of the Market comprehends them all to produce profoundly stable, albeit incoherent, mélange of policy preferences. Third, the application of “market reforms” is not an inherently progressive or conservative move politically. It may be one or the other at different times. In technocratic terms, it does not necessarily lead to more or less state intervention in economic functioning. It may do either thing at different times.<sup>54</sup>

The principal point to make here, therefore, is that the creation of a “market society” through appeals to the state to cede more economic function to the private economic actors may lead to more or less state intervention in economic functioning.<sup>55</sup> Therefore, it begs the question to justify particular reforms merely on grounds that they are “Market-oriented” hence more efficient. The perception of whether the process of constituting, shaping and creating the private actors and the terrain in which they will operate is state intervention or market reform; right wing project or left wing project, efficient distribution or inefficient redistribution is not determined by the analytical ability of

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Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923) (arguing that even in a *laissez-faire* system, the government and laws inevitably restrict individual choices, and that laws are, by definition, coercive); Robert L. Hale, *Force and the State: A Comparison of “Political” and “Economic” Compulsion*, 35 COLUM. L. REV. 149 (1935) (arguing that the political power of the state is qualitatively no different than the kind of power that some private individuals can exercise against other private individuals).

53. See *supra* note 52.

54. Again, I follow in the footsteps of Robert Hale who demonstrated that while coercion originates from both private and public action, it should be judged not by its source, but by its consequences. See, e.g., BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* 18 (1998). See generally Warren J. Samuels, *The Economy as a System of Power and its Legal Bases: The Legal Economics of Robert Lee Hale*, 27 U. MIAMI L. REV. 261 (1973).

55. Market-oriented legal reforms in developing countries are justified in terms of reducing the role of the state in economic functioning. See *infra* Part IV.

the “market” to render such judgment.<sup>56</sup> Rather, it is determined by the political rhetoric that bears the particular action being described or justified. In order to demonstrate this aspect and construction of the market, I will trace below, two dualist ways in which the concept has been used in the discourse.

First, I will show how the concept of the market in the antecedents of international development discourse was constructed as the opposite of communism.<sup>57</sup> In this mode, various state interventions were permitted whilst still viewing the operating paradigm as “Market-oriented” as opposed to “central planning” that was associated with communism.<sup>58</sup>

Second, I will demonstrate how since the mid-1980s the meaning of the market has shifted remarkably in the development discourse. In this period, the market has increasingly been defined as the opposite of the state.<sup>59</sup> In the first mode, a particular brand of the state, preferred for its “non-communist” tendencies, is seen as a necessary corollary to the market and is given a prominent role in the discourse in shaping economic goals and development. In this first mode, therefore, this brand of the state is a “good thing”—a collective good to be nurtured and encouraged. In the second mode, the state is a necessary evil—an intrusive predator to be minimized and kept away from the Market and the economic functioning of the society. Both modes of understanding the Market define it in polar opposition to something else: first to “communism” and central-planning and then to the government. As is perhaps obvious to many, both modes of dichotomies between the Market and the state reveal contradictions. The strength of the dualism is that the dichotomization still acts as the idealized starting point in tailoring, and therefore constraining and limiting, the set of policy instruments that are available.

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56. As Robert Hale argued, coercion should be judged by its target not source. See FRIED, *supra* note 54, at 18.

57. See *infra* Part III.

58. See *infra* Part III.

59. See *Infra* Part IV.

### III. THE STATE AND THE MARKET IN DEVELOPMENT DISCOURSE BETWEEN 1950 AND 1980

On January 20, 1949, Harry Truman was inaugurated the thirty-third President of the United States. He titled his inaugural speech, "The Faith of the American People."<sup>60</sup> In it, he outlined the Truman doctrine of democratic fair-dealing.<sup>61</sup> The fourth principle of the Truman doctrine is now considered the origin of the development movement in international relations and international economic law.<sup>62</sup> He said:

[W]e must embark on a bold new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of underdeveloped areas.

More than half the people of the world are living in conditions approaching misery. Their food is inadequate. They are victims of disease. Their economic life is primitive and stagnant. Their poverty is a handicap and a threat both to them and to more prosperous areas.<sup>63</sup>

President Truman then went on to outline his vision for helping these underdeveloped areas:

For the first time in history, humanity possesses the knowledge and the skill to relieve the suffering of these people.

. . . The material resources which we can afford to use for the assistance of other peoples are limited. But our imponderable resources in technical knowledge are constantly growing and inexhaustible.

I believe we should make available to peace-loving peoples of the benefits of our store of technical knowledge in order to help them realize their aspirations for a better life. And, in cooperation with other nations, we should foster capital investment in areas needing development.

. . . This should be a cooperative enterprise in which all nations work together through the United Nations and its specialized

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60. HARRY TRUMAN, *The Faith of the American People*, in HARRY TRUMAN, *A NEW ERA IN WORLD AFFAIRS: SELECTED SPEECHES AND STATEMENTS OF PRESIDENT TRUMAN* 1, 6 (1949).

61. *Id.* at 8.

62. See ARTURO ESCOBAR, *ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD* 1 (Sherry B. Ortner et al. eds., 1996).

63. TRUMAN, *supra* note 60, at 6.

agencies wherever possible.<sup>64</sup>

But, the new proposals for spurring economic development in the Third World that President Truman had in mind were different from “old imperialism” that was devised and controlled to benefit areas other than those in which they were established:

The old imperialism—exploitation for foreign profit—has no place in our plans. What we envisage is a program of development based on the concepts of democratic fair-dealing.

[Since a]ll countries . . . will greatly benefit from a constructive program for the better use of the world’s human and natural resources.<sup>65</sup>

In enunciating this vision President Truman saw as an “occasion to proclaim to the world the essential principles of the faith by which [the United States] live[s], and to declare [the United States] aims to all peoples.”<sup>66</sup> President Truman clearly saw it as a product of liberal democracy as opposed to communism. Declaring communism a “false philosophy,” he proceeded to declare that communism actually inhibits the constructive program to realize economic development and the material well-being of human beings worldwide.<sup>67</sup>

This speech on the vision of development is important for the reason that it set out the provinces of the “constructive program” that became the development endeavor.<sup>68</sup> Two important axes are particularly germane. First, what was to be shared with the underdeveloped areas was not “material resources,” but the “imponderable resources in technical knowledge.”<sup>69</sup> Second, the preferred form of political governance was liberal democracy, and not communism; and the channel of development would be the market.<sup>70</sup> Both of these axes proved to be the most

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64. *Id.* at 6-7.

65. *Id.* at 8.

66. *Id.* at 2.

67. *Id.* at 3.

68. See ESCOBAR, *supra* note 62, at 3.

69. TRUMAN, *supra* note 60, at 6-7.

70. *Id.* at 7.

important markers of the development discourse in the pre-1980 period.

This way of thinking—economic development as the opposite of communism, and the market system as the opposite of central planning—created the first dualism that pervades the development discourse. This is the construction of the market by using the binary opposites of “rational” and “irrational.”<sup>71</sup> The first step in this process is to construct the ideal market. By “equat[ing] technical efficiency with value-loaded optimality, declaring that the best market is the ideal of ‘perfect competition’ functioning invisibly without government intervention and [with] perfect competition,” the mainstream theory proceeded to formulate policies “as if such ideal markets existed or could possibly exist.”<sup>72</sup> At the same time, these assumptions which make up this idealized version of the Market are seen through the rational-irrational axis. The Market is constructed upon axioms of individualism and utility maximization that are projected as rational.<sup>73</sup> At the same time, other modes of human behavior—for example, those derived from sharing and cooperation—are deemed irrational.<sup>74</sup> For example, mainstream theorists share a

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71. See OZAY MEHMET, WESTERNIZING THE THIRD WORLD: THE EUROCENTRICITY OF ECONOMIC DEVELOPMENT THEORIES 5 (1995).

72. *Id.* at 5.

73. The standard “Market hypothesis” is that all human beings are rational, and act on the basis of a stable set of preferences to maximize their utility. See GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 14 (1976). To this extent, law and economics theorists argue that the proper role of law and legal institutions is to determine which legal regimes would have the effect of ensuring the goal of utility maximization is met. See, e.g., A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 9-10 (2d ed. 1989); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3-4 (5th ed. 1998). This vision of the individual and the workings of the Market has been criticized by, among others, scholars writing in the tradition of Behavioral Approach to Law and Economics as well as Institutional Economists who challenge, and argue for the relaxation of, the three key assumptions of the economic approach: rationality, utility maximization, and stable preferences. See, e.g., Christine Jolls et al., *A Behavioral Approach to Law and Economics*, in BEHAVIORAL LAW AND ECONOMICS 13, 14-15 (Cass R. Sunstein ed., 2000) (explaining the notion of bounded rationality as a key constraint on the microeconomic assumptions of law and economics).

74. This form of dualism parallels the deep-rooted Western intellectual tradition of differentiating the “Other.” It has its roots in ancient Greek dualism of the cosmos that differentiates rational-irrational along the same axis as citizen-barbarian. This mindset was functional in the colonial project. See, e.g.,

strong presumption that “imperfect” markets such as monopolies and cartels, can be reformed and ultimately converted into ideal perfect competition in the undefined long-run.<sup>75</sup>

The Market concept as used in economic development discourse, however, is dualist in yet another sense. It is both a method of analysis and a formula for prescribing concrete policy positions at the same time, as opposed to being one or the other. The Market is not just an analytical mode that is used to evaluate economies and their systems of allocating resources vis-à-vis growth rates, productive capacities, redistributive goals, and so forth. Nor is the Market just used to prescribe a set of policy interventions that must be implemented. It is, and it serves, both functions. I return to this characteristic of the Market and its implications for policy intervention below.

Applying the idealized rationalist Market solution to the design of economic policy to promote economic development involved overlooking an inherent contradiction—between this mainstream Market theory and the state intervention that was promoted in the first quarter of the post-war period.<sup>76</sup> The construction of the Market as the polar opposite of communism was important in glossing over this

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Anthony Anghie, *Fransisco de Vitoria and the Colonial Origins of International Law*, 5 SOC. & LEGAL STUD. 321 (1996). Anghie illustrates how constructing the Indians as the “other” rationalized Spanish conquest to international law’s different treatment of the Indians. Similarly, Anghie argues that the goal of “universalizing” international law, itself principally a consequence of the imperial expansion that took place in the nineteenth century, was achieved through the granting or withholding “sovereignty” to the non-European states. This way, the universalization of international law becomes the extension and universalization of the European experience. This, in turn, is achieved by “transmuting [the European experience] into the major theoretical problem of the discipline, [and] has the effect of suppressing and subordinating other histories of international law and the people to whom it has applied.” Anthony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT’L L.J. 1, 7 (1999).

75. See, e.g., Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548-49 (1969) (arguing that even in the case of natural monopolies, it is more efficient to let the market determine prices and conduct of the supplier rather than government regulation).

76. Between 1945 and 1980, the development theory promoted a view of the “Market” that admitted that there was pervasive market failure, at least in the Third World, and hence intrusive state regulation was needed for markets to work well and spur economic development. See *infra* notes 91-111 and accompanying text.

contradiction. It also glossed over another aspect of the market. It is that the market is a byproduct of legal rules and property rights that are sponsored and supported by the state.<sup>77</sup> As I will explain below, this second tension within the Market concept became a big theoretical gap to be filled and explained in the “long decade” of the 1980s when the second wave of “Market-oriented” reforms hit the development discourse.<sup>78</sup> However, it did not pose a big problem in this first phase of “Market-oriented” reforms (in the 1950s and 1960s) as applied to the developing world. The reason for this is that, as already mentioned, the state in the developing world had already been acknowledged in the literature as a major factor in development.<sup>79</sup> This was due to the polar definition of the “market way” as the opposite of communism.<sup>80</sup> It was taken for granted that a government that facilitated development policies and embraced liberal political institutions and norms as “universal reference” was “Market-oriented.”<sup>81</sup>

As a result, in the first quarter of the international development history, economic development was based on idealized and stylized characteristics of a “typical under-

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77. As Professor Warren Samuels argues:

[T]he perceived spheres of polity and economy, of law and market, are not self-subsistent, and . . . it is helpful to understand what transpires by identifying the existence of a legal-economic nexus in which both seemingly distinct spheres commonly originate . . . . [T]he legal-economic nexus—the sphere of what is really going on at the deepest level of social existence—is the level at which both polity and economy are continuously and simultaneously (re)formed in a manner that negates any conception of their independent self-subsistence. Although not denying the possibility, if not the good sense, of contemplating the legal-economic nexus only as an alternative mode of discourse or analysis, the argument affirms both the actual existence of the legal-economic nexus and the paramount importance of understanding it relative to analyses that postulate separate, self-subsistent, political and economic spheres.

Warren J. Samuels, *The Legal-Economic Nexus*, 57 GEO. WASH. L. REV. 1556, 1557-58 (1989).

78. See *infra* notes 91-111 and accompanying text.

79. See *supra* note 12 and accompanying text.

80. See *supra* notes 64-67 and accompanying text.

81. See François Bourricaud, *Modernity, 'Universal Reference' and the Process of Modernization*, in 1 PATTERNS OF MODERNITY, at 1, 13-14 (S.N. Eisenstadt ed., 1987).

developed country.”<sup>82</sup> The task of mapping out the development agenda was explicitly seen as one of choosing policy instruments for causing specific directed changes in the economy.<sup>83</sup> The intervention by the state was not only seen as legitimate, it was seen as necessary. A large part of this thinking can be attributed to two factors. First, as I have already pointed out, once a state embraced the “development agenda,” it was deemed to be a “market society.” This was, again, because the market was defined to exclude the “false philosophy” of communism.<sup>84</sup>

Second, a large part of the widespread acceptance of the fundamental role of the state in directing development in developing countries was based on the implicit assumption that the states in the developing countries had to overcome the fundamental obstacle of transforming their polities from pre-modern traditional societies to modernity.<sup>85</sup> The reasoning was that the market can only work where the actors are “rational” since the Market model is based on the utility maximizing behavior of a rational actor.<sup>86</sup> Yet, a powerful and popular literature in the political science and anthropology discourses suggested that most of the rural denizens of the developing countries (constituting more than eighty percent of the populations there), were not “rational.”<sup>87</sup> The dominant paradigm in these discourses is represented by the following quote from Daniel Lerner’s book, considered in many respects a classic:

A mobile society has to encourage rationality, for the calculus of choice shapes individual behavior and conditions its rewards. People come to see the social future as manipulable rather than ordained and their personal prospects in terms of achievement rather than heritage. Rationality is purposive: ways of thinking and acting are instruments of intention (not articles of faith); men

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82. See ALBERT HIRSCHMAN, *THE STRATEGY OF ECONOMIC DEVELOPMENT* 3 (1958).

83. See, e.g., Wilfred Malenbaum, *Transforming Traditional Agriculture*, in *INTERNATIONAL DEVELOPMENT 1965*, at 22, 22-24 (Stefan H. Robock & Leo M. Solomon eds., 1966).

84. See *supra* notes 64-67 and accompanying text.

85. See MEHMET, *supra* note 71, at 56.

86. *Id.* at 5.

87. DANIEL LERNER, *THE PASSING OF TRADITIONAL SOCIETY: MODERNIZING THE MIDDLE EAST* 48-50 (1958).

succeed or fail by the test of what they accomplish (not what they worship). So whereas traditional man tended to reject innovation by saying '[i]t has never been thus,' the contemporary Westerner is more likely to ask "Does it work?" and try the new way without further ado.

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[Such Westerners] have a high empathic capacity [which is] the predominant personal style only in modern society, which is distinctively industrial, urban, literate and *participant*. Traditional society is nonparticipant—it deploys people by kinship into communities isolated from each other and from a center; without an urban-rural division of labor, it develops few needs requiring economic interdependence; lacking the bonds of interdependence, people's horizons are limited by locale and their decisions involve only other *known* people in *known* situations. Hence, there is no need for a transpersonal common doctrine formulated in terms of shared secondary symbols—a national 'ideology' which enables persons unknown to each other to engage in political controversy or achieve 'consensus' by comparing their opinions.<sup>88</sup>

The dominant approaches to pre-capitalist (agrarian) societies, therefore, posited that these societies existed in a world of subsistence production in which there are no markets, no buying, and no trading.<sup>89</sup> Orthodox economists accepted that it was necessary for the state to take the lead

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88. *Id.*

89. Robert Bates, *Some Conventional Orthodoxies in the Study of Agrarian Change* 19 (Div. of the Humanities and Soc. Scis., Cal. Inst. of Tech., Working Paper No. 458, 1982). According to Bates, actually, there are two dominant orthodoxies. *Id.* The "natural economy" model of "primitive societies" finds its eloquent explanation in the works of MAINE, *supra* note 21; TRIBAL AND PEASANT ECONOMIES (George Dalton ed., 1967); KARL MARX, *Pre-Capitalist Economic Formations*, in KARL MARX & FREDERICK ENGELS, PRE-CAPITALIST SOCIO-ECONOMIC FORMATIONS 84, 97-98 (1979). The "peasant economy" model, on the other hand has its most influential support in the works of PEASANTS AND PEASANT SOCIETY (Teodor Shanin ed., 1971); A. V. CHAYANOV, THE THEORY OF PEASANT ECONOMY (Daniel Thorner et al. eds., 1966). As Bates points out, both models have as their starting points historical conditions that have rarely existed. Bates, *supra*, at 19. The first model posits that the "primitive society" produces not for exchange but for use. *Id.* at 4. "[A]s a consequence[,] 'market exchanges are usually peripheral' . . . [and] labor and land do not enter the market." *Id.* The second model posits that most societies in developing countries represent peasant societies. In these societies labor is not separated from the means of production. Nonetheless, such societies are more "advanced" from those represented in the first model. *Id.* at 13. The societies here "reside within state systems and within economies which contain cities, industry and manufacturing." *Id.*

role in unleashing the exogenous shock that would transform these pre-capitalist societies into market societies. In this regard, Gerald Meier and R. E. Baldwin wrote:

The psychological and sociological requirements for development are as important as the economic requirement. They deserve full consideration in their own right . . . . It is obvious that some institutional changes which are not merely economic must accompany successful development efforts. Economic development of sufficient rapidity has not taken place within the present cultural framework. New wants, new motivations, new ways of production, new institutions need to be created if national income is to rise more rapidly. Where there are religious obstacles to modern economic progress, the religion may have to be taken less seriously or its character altered. Fundamentally the backward peoples must recognize that men can master nature; they must be motivated towards economic achievement; they must acquire the means of accomplishing these objectives; and these objectives must become part of the society's value structure.<sup>90</sup>

Therefore, development technocrats of this era accepted the state as the primary agency for the expansion of the market.<sup>91</sup> As juxtaposed against the dominant Market paradigm, state-led capitalism in the developing world could be justified in one of two ways. First, it could be justified as a means of administering the exogenous shock to facilitate the transformation of the peasants into rational actors within the capitalist system.<sup>92</sup> This was because “the

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90. GERALD M. MEIER & ROBERT E. BALDWIN, *ECONOMIC DEVELOPMENT: THEORY, HISTORY, POLICY* 355-57 (1957).

91. See, e.g., Henry C. Wallich, *Some Notes Towards a Theory of Derived Development*, in *THE ECONOMICS OF UNDERDEVELOPMENT* 189, 200-02 (A. N. Agarwala & S. P. Singh eds., 1963). Wallich writes: “In the less developed countries, where private enterprise is weak, development is not likely to go forward rapidly if the government . . . remains passive [as in the Schumpeterian theory]. Thus, derived development calls for some measure of government intervention.” *Id.* at 201.

92. See, e.g., BENJAMIN HIGGINS, *ECONOMIC DEVELOPMENT: PRINCIPLES, PROBLEMS AND POLICIES* 312 (1959). Higgins writes:

Hagen himself refers to one dramatic case of rapid cultural change—the revolutionary development of Manus society as a consequence of occupation of the island by American troops during World War II. This experience suggests that an almost complete transformation of a society can take place within a few years if the external ‘shock’ to the society is powerful enough.

*Id.* (internal citations omitted).

existence of a pre-capitalist agrarian society [was] characterized by a preference for subsistence which . . . frustrated the growth of [the capitalist system],” and the Market.<sup>93</sup> Goran Hyden, epitomizing this school of thought wrote that:

The argument is . . . that . . . where the peasant mode is very much alive, there is an economy other than the market economy. Moreover, this economy of affection is being maintained and defended against the intrusions of the market economy.

. . . .  
So common is this situation . . . that it is not an exaggeration to claim that the principal structural constraint to development are the barriers raised . . . by the peasant mode of production . . . . [Policy makers must] get the peasant [to be] involved in the cash nexus . . . . [T]here is no other way available but to raise peasant productivity and make him produce more than for his own domestic needs.<sup>94</sup>

The argument made was that in order for the peasants to play a meaningful role in capitalist development, two things were necessary. First, it was imperative that the peasants were forced to generate sufficient surplus for development purposes. This meant that the peasants had to produce more than they required for subsistence.<sup>95</sup> Second, it was imperative to drive the development policy such that there was a mechanism for appropriating the surplus generated by the peasant and transferring it into other areas of the economy such as industrialization or technology development.<sup>96</sup> Wilfred Malenbaum stated this position in 1965 in the following words:

First the task of transforming the traditional sector is the key task of overall development in today's poor countries. Without this transformation, self-sustaining growth will not be achieved. Second, the task is primarily one of overcoming non-economic deterrents to change.

. . . . In traditional sectors, the social, institutional, and motivational milieu prevents optimum resource use. Only with

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93. Bates, *supra* note 89, at 48.

94. GORAN HYDEN, BEYOND UJAMAA IN TANZANIA: UNDERDEVELOPMENT AND AN UNCAPTURED PEASANTRY 19, 31 (1980).

95. *Id.* at 31.

96. *Id.*

programs which reach for change in these non-economic deterrents can there be economic adjustments toward . . . large-scale programs of education and training, as well as of equipment, supplies and techniques, and of institutional reform.<sup>97</sup>

As is clear, both these steps would require direct government intervention. However, though here the state was expected to take a lead role as an agent of capitalism and the Market generally, the kind of economy that such a state superintended was deemed to be “Market-oriented” rather than “communist.” Though the state was expected and encouraged to create and shape the “market” by policy intervention it was considered a “Market-oriented” regime in the development discourse.

This begs the question: what kind of orientation toward the peasants and policy interventions could be labeled “communist” during this pre-1980 period? It seems that states that saw themselves as opposed to the “Market Model” too, ended up suggesting similar solutions and policy interventions.<sup>98</sup> This was because such states also basically accepted the same thesis of the “peasant society” or “natural economy.”<sup>99</sup> It would seem, therefore, that what distinguished between states that were considered “market oriented” and those that were not at this time, was not whether a state intervened in the economy by use of policy instruments or not. This was because it was widely accepted that such intervention was necessary. Historically, this is the path that the development discourse took—and the construction of the “Market” in this discourse is not affected by veracity or otherwise of the “peasant economy” or “natural economy” thesis. Indeed, as I will argue in Part IV, the very contestation of this that occurred in the discourse itself provided a necessary turn that facilitated a

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97. Malenbaum, *supra* note 83, at 22, 24.

98. See, e.g., HYDEN, *supra* note 94, at 31. Although Tanzania’s first President, Julius K. Nyerere, explicitly rejected “capitalism” as the method of development and instead embraced “Ujamaa” (African Socialism), the approach to the role of the state in capturing the surplus produced by the peasants was the same. See LOUISE FORTMANN, PEASANTS, OFFICIALS AND PARTICIPATION IN RURAL TANZANIA: EXPERIENCE WITH VILLAGIZATION AND DECENTRALIZATION 107 (1980).

99. See FORTMANN, *supra* note 98, at 94.

change in the meaning of the market in the 1980s.<sup>100</sup> Robert Bates argues, for example, that both the peasant and moral economy models seriously undervalued the role of the state in shaping the so-called pre-capitalist societies.<sup>101</sup> He contests the view that pre-capitalist societies have a preference for subsistence and therefore frustrate the growth of markets and capitalism through state agency.<sup>102</sup> Rather, he argues, the correct argument runs in the opposite direction. It is the operation of Market forces as shaped by the state that induces the peasants to produce in the subsistence economy as their means of evading the predator state.<sup>103</sup>

The argument on the construction of the Market does not depend on what side one takes in this debate.<sup>104</sup> The fundamental point here is that one's own view of the issue does not influence the main argument here which is that it was the construction of the Market as the opposite of communism during this era that was the important axis for differentiation between "Market-oriented" and "non-Market-oriented" regimes. In this period, therefore, the Market existed more as a political icon.<sup>105</sup> After all the attraction of the Market as a model was significantly dampened by Keynesian consensus that held that markets were best *not* left alone.<sup>106</sup>

Hence, the second justification for an expanded role of the government in spurring economic development in developing countries was based on economic theories that called attention to the "hidden potential" of economic development in less-developed regions, and the necessity of a concerted and substantial "push" from the government to

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100. See Bates, *supra* note 89, at 19; see also *infra* Part IV.

101. Bates, *supra* note 89, at 3.

102. *Id.* at 48.

103. *Id.*

104. I would express initial agreement with Robert Bates's position, but with the proviso that not all so called peasant characteristics are based on the evasion of the predator state. Additionally, the construction of peasant characteristics as "rational" or "market-compatible" may, at times, involve both stereotyping and exaggeration of "market characteristics" and "peasant characteristics."

105. Carrier, *supra* note 12, at 1.

106. *Id.*

create an entire industrial structure.<sup>107</sup> As Paul Rosenstein-Rodan, a prominent development economist, argued:

Social overhead capital is the most important instance of indivisibility and hence of external economies on the supply side. Its services are indirectly productive and become available only after long gestation periods. Its most important products are investment opportunities created in other industries. Social overhead capital comprises all those basic industries like power, transport, or communications which must precede the more quickly yielding, directly productive investments and which constitute the framework or infrastructure and the overhead costs of the economy as a whole. Its installations are characterized by a sizeable initial lump and low variable costs. Since the minimum size in these basic industries is large, excess capacity will be unavoidable over the initial period in underdeveloped countries . . . Since overall vision is required as well as a correct appraisal of future development, programming is undoubtedly required in this lumpy field. Normal market mechanisms will not provide an optimum supply.<sup>108</sup>

Such a “push,” it was argued, would “launch a chain reaction of virtuous circles and complementary investments that would then ripple in many directions through the economic system.”<sup>109</sup>

In any event, both the New Deal in the United States and the Marshall Plan in Europe were based on strong interventions by the state in the market place.<sup>110</sup> Furthermore, the now celebrated uses of various policy instruments in helping Europe and the United States recover from the slump in the 1930s and in the post-war

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107. See P.N. Rosenstein-Rodan, *Problems of Industrialization of Eastern and South-Eastern Europe*, 53 *ECON. J.* 202, 204-07 (1943).

108. *Id.*

109. JAMES M. CYPHER & JAMES L. DIETZ, *THE PROCESS OF ECONOMIC DEVELOPMENT* 137 (1997).

110. See *id.* at 135-36. As H. Kwasi Prempeh has written:

From the West, the impressive post war reconstruction of Europe under the Marshall Plan and the success of New Deal interventionism in rescuing the United States from the Depression went to reinforce the belief, widespread in postcolonial society, that the state had the superior capacity—and a duty—to organize and lead economic development.

H. Kwasi Prempeh, *Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa*, 80 *TUL. L. REV.* 1239, 1262 (2006).

periods respectively were both understood to be “Market-driven.”<sup>111</sup> As elaborated in Part IV, it was a strong counter-movement in the 1980s that changed the discourse and changed the way people think about the Market at least with respect to economic development. The Market would no longer be only a political label or icon—but would also be a prescriptive model.

The most important thing to remember about the state interventions of the pre-1980 era is that they were aimed at complementing the Market—not replacing it. The policy instruments selected for intervention were therefore aimed at promoting the extension of the Market.<sup>112</sup> As Colin Leys writes: “The goal of development was growth; the agent of development was the state and the means of development were . . . macroeconomic policy instruments.”<sup>113</sup> The effect of this was the highlighting of the role of state intervention in extending the Market during this period. The global political economy, and the prevailing Market discourse, however, made it possible, even necessary, to frame the debate in terms of Market capitalism in contra-distinction with socialism or central planning. As we have noted, however, the framing of this discourse stifled the fact that both state interventionism and market individualism were present at both extremes representing these two models of development. I end with the following quotation that illustrates that this realization—that state interventionism is not necessarily in opposition to Market individualism,

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111. See, e.g., Alan Brinkley, *The New Deal and the Idea of the State*, in *THE RISE AND FALL OF THE NEW DEAL ORDER 1930-1980*, at 85, 96-100 (Steve Fraser & Gary Gerstle eds., 1989) (arguing that President Roosevelt justified new government economic protections for workers as beneficial to business, reflecting a shift toward what would become known as Keynesian economic ideas). See generally JASON SCOTT SMITH, *BUILDING NEW DEAL LIBERALISM: THE POLITICAL ECONOMY OF PUBLIC WORKS 1933-1956* (2006) (providing a historical study of the role of the federal government in the New Deal economic development and New Deal liberalism); ELIZABETH BORGWARDT, *A NEW DEAL FOR THE WORLD: AMERICA'S VISION FOR HUMAN RIGHTS 286-87* (2005) (arguing that President Roosevelt's diplomacy after the Second World War was based on an expansive notion of expanding the American New Deal to the whole world). Borgwardt writes that in the 1940s and 1950s, the United States promoted a global Keynesianism as “part of Roosevelt's vision of a New Deal for the World.” *Id.* at 286.

112. See Gerald Berthoud, *Market*, in *THE DEVELOPMENT DICTIONARY: A GUIDE TO KNOWLEDGE AS POWER 70, 73* (Wolfgang Sachs ed., 1992).

113. COLIN LEYS, *THE RISE & FALL OF DEVELOPMENT THEORY 7* (1996).

and may indeed be in aid of it—had been noted as early as 1965:

[A]ll existing economic systems have some degree of planning by central authorities and some degree of latitude for decisions by the individual[s] [in the market].

For example, even in communist China—probably the most intensively planned and rigidly controlled economy on the planet—workers and farmers have some scope of choice in determining what, when and how they will produce and consume. Conversely, even in the United States—*certainly* the world's freest, most competitive and most dynamic market economy—planning decisions by government agencies in the fields of defense, education, health, transportation, resource development, etc., account for 20 percent of gross national product, with an additional unknown percentage produced by the private sector under the deliberate stimulus of fiscal, monetary, social welfare, agricultural and other government policies. Every country—developed and less developed, private enterprise and state socialist—can be located somewhere along a continuum which ranges from comprehensive and detailed planning by the national authorities of all significant aspects of economic activity to major reliance upon decentralized nongovernmental decision making in accordance with market conditions as influenced by government policies.<sup>114</sup>

In other words, the difference between state interventionism and market capitalism is only one of the degrees of relative planning. As William Kapp wrote in 1973:

If economic planning plays such an important role in contemporary society, the question may well be asked: What is the difference between planning under 'capitalism' and planning under 'socialism'? The most noticeable difference between planning under capitalism and socialist planning seems to lie in the degree to which the functions of decision-making in the field of production and investment are actually exercised by public authorities instead of by private producers.

.....  
Nor can the difference between government planning under capitalism and socialism be found in the nature of the objectives of the planning decision . . . . In short, whether national economic planning is directed toward economic development and

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114. Theodore Geiger, *Economic Decision Making by Planners and by the Market*, in INTERNATIONAL DEVELOPMENT 1965, *supra* note 83, at 67, 67-68.

industrialization, the preparation of adequate means of defense, the maintenance of full employment or the provision of a maximum of present consumers' goods will depend upon historical circumstances which have nothing to do with the nature of planning. It is misleading to identify economic planning with any of these possible objectives.<sup>115</sup>

#### IV. THE MARKET IN DEVELOPMENT DISCOURSE AFTER 1980

In the early 1980s, three significant events took place that helped influence a change in the meaning of the Market in the development discourse. First, in the early 1980s there was a shift to the right in Western political regimes.<sup>116</sup> This began with the election of Prime Minister Margaret Thatcher in Britain in 1979 and that of President Ronald Reagan in the United States in 1980. Both Thatcher and Reagan began what is commonly referred to as the "Conservative Revolution": an economic program that relied on monetarist policies, tax reductions, privatization, deregulation, and the operation of market forces. It was not long before this "Conservative Revolution" started informing the foreign policies of both the United States and Britain. Second, this "Conservative Revolution" was followed by the victory of the anti-communist forces in Eastern Europe toward the end of that decade.<sup>117</sup> Third, the debt crisis in the "Third World" exploded. This started with Mexico's sudden inability to meet its obligations in August 1982.<sup>118</sup> Soon thereafter, Argentina, Brazil, and then a host

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115. K. William Kapp, *Economic Planning and Freedom*, in DEVELOPMENT: PERSPECTIVES AND PROBLEMS 17, 19-20 (M. A. Oommen ed., 1973).

116. See generally A CONSERVATIVE REVOLUTION?: THE THATCHER-REAGAN DECADE IN PERSPECTIVE (Andrew Adonis & Tim Hames eds., 1994).

117. The fall of communism in east and central Europe brought to the fore questions about the role of the state and markets in fostering economic development and the relationship between democracy and market capitalism. See ADAM PRZEWORSKI, DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORMS IN EASTERN EUROPE AND LATIN AMERICA (1991); Claus Offe, *Capitalism by Democratic Design?: Democratic Theory Facing the Triple Transition in East Central Europe*, 58 SOC. RES. 865 (1991).

118. See Lee C. Buchheit, *A Quarter Century of Sovereign Debt Management: An Overview*, 35 GEO. J. INT'L L. 637, 637 (2004) ("The global debt crisis of the 1980s is generally thought to have begun on August 22, 1982, when Mexico formally requested its commercial bank lenders to begin rolling over the maturing principal of their loans to Mexican public sector borrowers.").

of other developing countries followed suit.<sup>119</sup>

As many analysts recognized, the sovereign debt problem was not just a problem of liquidity for developing countries: the situation threatened the solvency of major financial institutions in the United States and Europe.<sup>120</sup> “In the early 1970s, the sharp increases in the price of oil created a demand for credit in oil-importing countries that the commercial banks, flush with deposits from oil-surplus nations, were able and willing to fulfill.”<sup>121</sup> The second oil shock of 1979-80 unleashed a series of reactions in the capital markets that had a dire impact on the developing countries that were net oil importers and had commercial loans to repay.<sup>122</sup> A sudden, sharp tightening of monetary policies by industrial states pushed interest rates for the Third World sovereign loans to sky rocketing proportions. With most of the Third World commercial credits carrying floating interest rates, the real debt burden of these countries quickly reflected these onerous conditions.<sup>123</sup> The consequence was that the ratios of debt service to exports and to General National Product (GNP) of most Third World countries rose sharply at a time when the commercial loans were no longer willing or able to provide further credit to facilitate gradual adjustment.<sup>124</sup> However, this problem would not only affect Third World countries. As already intimated, the banking sectors in the industrial countries were threatened with bankruptcy. The loans extended to the Third World had far exceeded the resources of the major “money center” banks. A mere disruption, let alone mere inability to pay by the Third World countries, threatened very substantial losses for these banks.<sup>125</sup>

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119. See RICHARD PEET ET AL., *UNHOLY TRINITY: THE IMF, WORLD BANK AND WTO 74-75* (2003).

120. See, e.g., SUSAN GEORGE, *A FATE WORSE THAN DEBT 29-31* (1990); PEET ET AL., *supra* note 119, at 76-77; Peter H. Lindert, *Response to Debt Crisis: What is Different About the '80s?*, in *THE INTERNATIONAL DEBT CRISIS IN HISTORICAL PERSPECTIVE 227* (Barry Eichengreen & Peter H. Lindert eds., 1989).

121. Richard E. Feinberg, *The Adjustment Imperative and U.S. Policy*, in *ADJUSTMENT CRISIS IN THE THIRD WORLD 3, 6-7* (Richard E. Feinberg & Valeriana Kallab eds., 1984).

122. See *id.* at 7.

123. See *id.*

124. See *id.*

125. See Albert Fishlow, *The Debt Crisis: Round Two Ahead?*, in *ADJUSTMENT*

Outside the banking sector, demands for goods produced by the United States and other industrial countries were declining as a result of the declining foreign exchange for most Third World countries. Countries had used their borrowed money to buy imports from the United States and other industrial countries. After the oil shock of 1973, “this demand had helped to stabilize the world economy and to limit recession in the North.”<sup>126</sup>

These three events coupled with the disintegration of the Keynesian consensus, generated two separate discourses that eventually facilitated a shift in the meaning of the Market as applied in the development discourse.<sup>127</sup> Both discourses aimed to curtail the role of government in economic development as had been advocated for in the pre-1980 period.<sup>128</sup> First, there was the “rent-seeking discourse”

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CRISIS IN THE THIRD WORLD, *supra* note 121, at 32.

126. *Id.*

127. The Keynesian “consensus faded in the 1970s for a number of reasons, arguably including the very success of that older consensus in generating economic security.” Carrier, *supra* note 12, at 1. The second Oil Crisis had also given the Bretton Woods Institutions unprecedented powers and influence over developing countries’ economies. These institutions, in turn, used their influence to champion the definition and approach to the market that they preferred. The stranglehold that the Bretton Woods institutions got over developing countries’ economies happened as follows. After the first oil shock, the International Monetary Fund (IMF) set up the “oil facility” in 1974 to help oil-importing countries to adjust to the higher oil prices. The oil facility, however, also served two other important roles. First, it offered member countries policy advice on how to adjust to their payment positions. Later on, it started stipulating policy conditions for disbursement of loans. Second, governments, banks and other creditors started treating the IMF and World Bank endorsement of a country’s adjustment policies as a “seal of approval.” For example, in August 2000, the IMF approved a three-year Poverty Reduction and Growth Facility (PRGF) credit to Kenya totaling SDR150 million (about US\$198 million) to “support the nation’s economic and structural reform program.” Press Release, International Monetary Fund, IMF Approves Poverty Reduction and Growth Facility (1) Loan for Kenya (July 28, 2000), *available at* <http://www.africanation.org/docs00/ken008i.htm>. This was the first loan to Kenya since 1997 when the IMF and other donors stopped dealing with the Kenya government until key economic and political reforms were instituted. This news encouraged donor flows to the country. The Paris Club approved a debt rescheduling in November 2000. In sum, the IMF loan was expected to unlock about US\$300 million (Ksh23.4 billion) from the fund and other lenders, including the World Bank, the European Union, and Britain that had tied their budgetary support to the IMF. *See Dancing in Kenya to the Donors’ Tune*, *ECONOMIST*, Aug. 5, 2000, at 43.

128. *See supra* Part III.

that generally focused on the costliness of government intervention in the economy.<sup>129</sup> The common thread in this discourse is the belief that the slow progress made by developing countries in development is caused by excessive economic interventions by their governments.<sup>130</sup> This discourse argues that the costs of these interventions have been typically higher than their benefits in terms of both production and distribution.<sup>131</sup> According to this discourse, market failure is a result of, rather than a justification for intervention by governments in the market.<sup>132</sup> An analysis of the costs of intervention—both direct and indirect—leads to the conclusion that markets are best left alone.<sup>133</sup> For solutions to the development crisis, this discourse overwhelmingly favors “Market-oriented” principles, meaning those that in the short-run would achieve allocative efficiency and long-run growth and development will emerge eventually.<sup>134</sup> Since this discourse identified itself as being strongly pro-free trade and pro-market, it followed that its analysis of the costs of intervention seriously undercut the earlier discourse, also associated with being

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129. Among the key texts in this discourse, I would include: BELA BALASSA, *THE STRUCTURE OF PROTECTION IN DEVELOPING COUNTRIES* (1971); BELA BALASSA, *DEVELOPMENT STRATEGIES IN SEMI-INDUSTRIAL ECONOMIES* (1982); P.T. BAUER, *EQUALITY, THE THIRD WORLD AND ECONOMIC DELUSION* (1981); JAGDISH BHAGWATI, *FOREIGN TRADE REGIMES AND ECONOMIC DEVELOPMENT: ANATOMY AND CONSEQUENCES OF EXCHANGE CONTROL REGIMES* (1978); ANNE O. KRUEGER, *FOREIGN TRADE REGIMES AND ECONOMIC DEVELOPMENT: LIBERALIZATION ATTEMPTS AND CONSEQUENCES* (1978); DEEPAK LAL, *THE POVERTY OF 'DEVELOPMENT ECONOMICS'* (1983); Anne Krueger, *The Political Economy of the Rent-Seeking Society*, 64 *AM. ECON. REV.* 291 (1974).

130. See Krueger, *supra* note 129, at 291.

131. See Colclough, *supra* note 51, at 6.

132. See *id.* at 7-8.

133. There are three costs of government intervention that are discussed in the literature. First is the direct cost of the intervention in terms of wages and salaries of the employees of the intervening bureaucratic agency. Second is the indirect cost brought about by the distortion of the relative prices elsewhere in the economy consequent upon, for example, the revenue raising measures to finance the intervention. Third is the distortion caused by the “scarcity rent” created by the intervention. Scarcity rent is the income which a holder of a license in a regulated economy can extract because of the difference between the value of an imported good at world prices and its costs in terms of the overvalued domestic currency. See Joel M. Ngugi, *Policing Neo-Liberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse*, 26 *U. PA. J. INT'L ECON. L.* 513, 523-24 (2005).

134. See *id.*

pro-market, but that supported interventions in the market by the government for a variety of reasons.

Second, there was a parallel discourse that attacked the role of the state but not based on the efficiency costs of the acts of intervention themselves. This discourse can itself be divided into two. The common theme of the two strands is their analysis of the argument that states are capable or willing, politically, to intervene in the market in order to benefit general development goals.<sup>135</sup> One strand used a Marxist framework to show that it was naïve to imagine that some reformist states would institute reforms or laws aimed at capturing surpluses for the general welfare of the country.<sup>136</sup> Such reformism, this strand argued, would be impossible since it would eventually mean that it was against more income gains for the owners of capital.<sup>137</sup> This view argued that the state is not a neutral arbiter that would automatically enforce a socially efficient development plan based on a transfer of resources from the rural areas to the industrial sector and then back to the rest of the economy. In short, the neo-Marxists argued that the state could not form an alliance with the rural peasants to the detriment of the owners of capital that maintained it in power.

The second strand used a non-Marxist framework to argue that governments perpetually aim to reward those alliances that keep them in power.<sup>138</sup> The pattern of state interventions represented the terms of a political pact among organized political interests, the costs of which are transferred to unorganized interests who are excluded from the price-setting coalition. Members of the political pact are organized labor, industry, and government. Small-scale farmers constitute its victims and large-scale farmers stand as passive allies politically neutralized through subsidy

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135. See ROBERT BATES, *MARKETS AND STATES IN TROPICAL AFRICA* (1981) (making the argument that the political elites pursued the development policies they did, not because they believed that they would produce superior results for the state as a whole, but because these policies enabled them to survive politically).

136. See, e.g., COLIN LEYS, *UNDERDEVELOPMENT IN KENYA: THE POLITICAL ECONOMY OF NEO-COLONIALISM 1964-1971* (1975); Colin Leys, *The Politics of Redistribution with Growth*, *IDS BULL.*, Aug. 1975, at 4.

137. See LEYS, *supra* note 136.

138. See generally BATES, *supra* note 135.

programs in agriculture.<sup>139</sup> It was therefore unrealistic to imagine that developing countries' governments would undercut the income gains of its industrial classes that were initially supported by over-taxing the rural areas by capturing their surplus and redistributing it for investment purposes.<sup>140</sup> In short, the neo-institutionalists argued that the state was consumed by the special interests that kept it in power such that it had no incentive to use generated surpluses for development.

It would seem that neither of these two strands of critique is fatal to the pre-1980 development prescriptions which privileged state intervention as discussed in Part III above. Both of these post-1980 critiques point out important practical limitations or obstacles but without revealing fatal analytic "errors" of state interventionism.<sup>141</sup> There is no evidence that these practical obstacles to the operationalization of the pre-1980 development paradigm cannot be overcome. Indeed, Ashutosh Varshney has shown that it is possible to intervene in the market in ways that are consistent with both making the rural majority better off and being in conformity with the special interests that maintain a government in power.<sup>142</sup> The questions here would be, for example, whether it is impossible to promote a less doctrinaire form of import substitution spiced by moderate, Market-oriented pricing policies as a successful mode of development for developing countries. In other words, is it possible to make agriculture more productive (via technological investment) and [Theodore] Shultz-induced productivity but transfer the surplus from agriculture to finance general welfare-increasing industrialization through taxation or terms of trade?<sup>143</sup> Alice Amsden, for

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139. *See id.*

140. *See id.*; *see also* ROBERT BATES, *ESSAYS IN THE POLITICAL ECONOMY OF RURAL AFRICA* (1983).

141. *See* Colclough, *supra* note 51, at 4; *see also* JEAN-FRANÇOIS BAYART, *THE STATE IN AFRICA: THE POLITICS OF THE BELLY* (1993).

142. Ashutosh Varshney, *Urban Bias in Perspective*, in *BEYOND URBAN BIAS* 3 (Ashutosh Varshney ed., 1993); *see also* Richard Jolly, *Redistribution with Growth – A Reply*, *IDS BULL.*, Aug. 1975, at 9.

143. Theodore Shultz, who won the Economics Nobel prize in 1979, studied the development potential of agriculture based on a disequilibrium approach. His analytical interest was on the imbalance between relative poverty and underdevelopment in agriculture compared with higher productivity and the

example, asks if there is any way developing countries can craft an import-substituting regime in a way that leads to industrialization. She confirms in the case of the South East Asian tigers, this happened.<sup>144</sup> Empirical studies like that done by Amsden seem to confirm that the critiques of government intervention in import substitution industrialization (ISI) are only based on empirical analysis of what has happened rather than principled or theoretical rejection of government intervention and ISI based on its analytical flaws or deficiency.<sup>145</sup>

However, despite the possible responses to these critiques as suggested above, the effect of these two sets of arguments on the role of government intervention in economic development, and consequently, the meaning of the Market was substantial. The effect was to seriously undercut the consensus that had emerged in the pre-1980 period about the need for governments to intervene in the economy and the set of instruments that could be utilized in

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higher income levels in industry and other urban economic activities. Schultz's analysis of the development potential of agriculture is based on a disequilibrium approach. He argued that the gap between, on the one hand, traditional production methods, and on the other, the more effective methods now available which create the conditions necessary for a dynamic development. Using this approach, Schultz presented a detailed critique of the developing countries' industrialization policies and their neglect of agriculture. He developed a model that showed that investments in education can affect productivity in agriculture as well as in the economy as a whole. THEODORE W. SHULTZ, *AGRICULTURE IN AN UNSTABLE ECONOMY* (1945); THEODORE W. SHULTZ, *PRODUCTION AND WELFARE OF AGRICULTURE* (1949). His most important book was THEODORE W. SHULTZ, *TRANSFORMING TRADITIONAL AGRICULTURE* (1964).

144. ALICE H. AMSDEN, *THE RISE OF "THE REST": CHALLENGES TO THE WEST FROM LATE-INDUSTRIALIZING ECONOMIES* (2001). Alice Amsden argues that the "late-comers" in industrialization—for example, Brazil, China, Taiwan, Singapore, Korea, Malaysia, etc.—used a series of intermediate assets to build mid-technology industries, which, in turn produced enough stimulus to self-sustain the industrialization through export. The intermediate assets are subsidies, performance standards, result-oriented, and redistributive measures for industries. All these "institutions" started as import substitution but were crafted to circumvent, rather than obey the invisible hand of the market. The use of these reciprocal "control" institutions, with an unlimited supply of labor coupled with a number of regulatory policies akin to those used in import substitution (e.g., tax breaks, industrial licensing, import licensing, etc.) had a disciplining effect on the market. In other words, these countries developed precisely by choosing winners, and not letting the invisible hand evolve "naturally." *Id.*

145. This would apply alike to critiques by neo-institutionalists like Robert Bates, neo-Marxists like Colin Leys, and neo-liberals like Deepak Lal.

that intervention. Without such a consensus, the meaning of what constituted “pro-Market” policies or “Market-oriented” policies changed. In this atmosphere, another aspect of the Market that had always remained beneath the surface and in the background started gaining currency. This is the association of the market with limited government libertarianism and freedom.<sup>146</sup>

The foregrounding of this aspect of the market was, to a large extent, inspired and shaped by the ideas of Friedrich Hayek.<sup>147</sup> Hayek’s main idea is that the Market is a spontaneously ordered institution that culturally evolves in the same way that the institutions of language and morality evolve.<sup>148</sup> Like their counterparts in the physical world like crystals, snowflakes, or galaxies, the market is not the product of intelligent design. Hayek therefore characterizes the market as the result of human actions over many generations, and not the result of human design. He therefore emphasizes price mechanism in “free markets” as the only mechanism that conveys accurate information about supply and demand.<sup>149</sup> As a result, Hayek’s liberalism emphasizes methodological individualism—*Homo economicus*, based on assumptions of individuality, rationality, self-interest—and the doctrine of spontaneous order. During the decade of the 1980s, Ronald Reagan and Margaret Thatcher adopted Hayek’s brand of liberalism to legitimate wide-ranging attacks on “big government” and the welfare state.<sup>150</sup> As I will point out below,

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146. This was a radical but marginal view in economics and philosophy since the early 1930s. It started acquiring influence and repute from the late 1970s with the rise of the New Right in England. See FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* (1944) [hereinafter *THE ROAD TO SERFDOM*]; FRIEDRICH A. HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER* (1949) [hereinafter *INDIVIDUALISM AND ECONOMIC ORDER*]; FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960). Other key writings that are considered antecedents of this view of the market, now associated with neo-liberalism include JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962) and MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

147. Friedrich Hayek is considered one of the most important thinkers of the twentieth century. He won the Nobel Prize in Economics in 1974.

148. *INDIVIDUALISM AND ECONOMIC ORDER*, *supra* note 146; *THE ROAD TO SERFDOM*, *supra* note 146.

149. *THE ROAD TO SERFDOM*, *supra* note 146.

150. See, e.g., Kenneth R. Hoover, *The Rise of Conservative Capitalism*:

internationally, the philosophy was adopted by the World Bank and the International Monetary Fund, in what has come to be known as the “Washington Consensus,” and used to justify structural adjustment programs in developing countries.<sup>151</sup>

The basic philosophy is “anti-design”: all decisions on the economy ought to be left to the individual units of the economy—enterprises, workers, farmers, investors, or consumers.<sup>152</sup> Since this form of liberalism rejects interference with process, it is hostile to the idea of a design or plan for a society. To this extent, it is anti-utopian.<sup>153</sup> Society should not have any fixed goals—process should determine outcome. This is exemplified by opposition to Communist centrally-planned economies, and support for deregulation.<sup>154</sup> There is no distinction, for example,

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*Ideological Tensions within the Reagan and Thatcher Governments*, 29 COMP. STUD. SOC'Y & HIST. 245 (1987). As Orlan Lee writes:

Hayek's views in economic theory had been influential in the early 1930s, but lost ground to Keynes's, as the latter's theories for recovering from the great depression and financing World War II became dominant. The current widespread interest in Hayek's work in economic theory and his latter contributions is a very recent phenomenon. In the 1980s, the Reagan administration in the United States and the Thatcher government in Britain openly avowed the free-market economic ideas of Hayek and of Milton Friedman for combating the results of the inflationary policies of the 1970s, and the mismanagement that often followed nationalization of industry—because national or social interests are not identical with the economic interests of sound enterprise.

Orlan Lee, *The Law of a Free Society Emerges Like the Laws of Economics: F.A. Hayek from The Road to Serfdom to Law, Religion & Liberty*, 1 N.Y.U. J. L. & LIBERTY 17, 33 (2005). Margaret Thatcher herself wrote: “Our inspiration [for her economic policies] was . . . Hayek's powerful *Road to Serfdom* [among others]. . . . Such books . . . provided crisp, clear analytical arguments against socialism . . .” MARGARET THATCHER, *THE DOWNING STREET YEARS 12-13* (1993).

151. See Williamson, *supra* note 35.

152. See F. A. HAYEK, *STUDIES IN PHILOSOPHY, POLITICS AND ECONOMICS* 96 (1967); Lee, *supra* note 150, at 23-24.

153. See HAYEK, *supra* note 152; Lee, *supra* note 150, at 23-24.

154. Therefore, a necessary corollary to the Hayekian liberalism is the social-Darwinist beliefs about the necessity of intense competition, and arguments about the moral necessity of market forces in the economy. However, despite the claims of this form of liberalism that the form of society should strictly be the outcome of processes, and that it rejects the idea of design for the market, other liberals, using similar logic claim that eventually, the form of human organization and interaction that is the “best human form of

between health or education services and other market products; they all can be traded in the marketplace. Similarly, there is no distinction between the operating of an industrialized economy and a developing or Third World one. Therefore, there are no structural reasons to suppose that the size and role of government should be different in the developing and industrialized societies.<sup>155</sup>

As a result of this shift, the Market in the development discourse was now being defined in terms of absence of certain regulatory regimes by states—and not by the extent of intervention as was the case in the earlier era. At the same time, the state was no longer considered able to channel development in an efficient way. The Market, made up of private individual actors, was extolled as the best arbiter of economic resources. As Jacques Donzelot remarked, the role of the state shifted from “a guarantor of progress to a manager of destiny.”<sup>156</sup> As Alice Amsden wrote about the Market-oriented reforms that swept Eastern Europe in the 1980s:

In the East European case [as opposed to the late-industrial capitalism of East Asia], the role of institutions has been minimal;

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government” is the political democracy of the industrial countries. The contradiction is that as this is the form of the “best organization” that man could ever have, liberalism would consider it “just” to impose itself on the society. In fact, since it is considered “freedom,” it is not considered an imposition in the first place. For the claim that liberalism is the best social organization that man would ever achieve or conceive (and would therefore, be the best design for the society). See Francis Fukuyama, *The End of History?*, NAT'L INT., Summer 1989, at 3. Fukuyama wrote:

What we may be witnessing is not just the end of the Cold War, or the passing of a particular period of postwar history, but the end of history as such: that is, the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government. . . . The ideal that will govern the material world *in the long run*.

*Id.* at 4; see also FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992). For a powerful critique of Fukuyama's thesis, see Susan Marks, *The End of History?: Reflections on Some International Legal Theses*, 8 EUR. J. INT'L L. 449 (1997). Susan Marks suggests that, though Fukuyama's views are easily dismissed as “extremist,” they are very similar to those of more moderate liberal renewal narratives.

155. Colclough, *supra* note 51, at 18.

156. Jacques Donzelot, *The Mobilization of Society*, in *THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY* 169, 176 (Graham Burchell et al. eds., 1991).

resource allocation has been left almost entirely to the market mechanism. When advocates of this 'market fundamentalism' refer to 'institutions' and the necessity of 'institution building' in order to foster capitalism, they have in mind a strictly limited agenda: the specification of property rights, contract law enforcement, and the removal of impediments to private enterprise.<sup>157</sup>

Preoccupation with regulatory regimes to capture surplus for productive reinvestment turned to preoccupation with freedom of contract and private property laws. The design of welfare legislation and policy was replaced by designs of "free markets." The desire to meet social goals of development through government intervention was replaced by the desire to get prices "right" as the overriding concern of development policy. In other words, the definition of the market changed:

The [market] is characterized by contract and property laws, and tort and criminal laws to protect and secure the interests of personality and of property. Under this scenario, law becomes an arbiter over households and firms which, in an open market, act and react to price signals and thus determine the mobilization and allocation of resources through the market mechanism.<sup>158</sup>

Hence, in the post-1980 era, the Market now was being defined more in opposition to the state rather than as a method of allocating investment resources that is enabled by the government. And, whereas in the earlier (pre-1980) era the state was thought of as the best institution or bureaucratic form for channeling the surplus in the society for development and growth purposes, in this new meaning, it is the private/bureaucratic decisionmakers/forms that are relied on for the mobilization and allocation of resources for growth and development purposes.

#### V. EXPLAINING THE SHIFTS IN THE MEANING OF MARKET

The argument I made in Part IV is that a change in the development discourse that occurred in the 1980s had the effect of highlighting a particular meaning of the Market. A change in the discourse can have the effect of drawing into

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157. ALICE H. AMSDEN ET AL., *THE MARKET MEETS ITS MATCH: RESTRUCTURING THE ECONOMIES OF EASTERN EUROPE* 4 (1989).

158. *LAW MAKING AND DEVELOPMENT* 27 (Seymour Haregot ed., 1987).

question, debate, or contestation (“foregrounding”), an issue that was hitherto in the “uncontested” background by the application of the “Market.” At the same time, a change in the discourse may have the effect of “backgrounding” a different issue that may have been in the foreground contested (or uncontested) arena in a different period.<sup>159</sup> It is what is backgrounded or foregrounded in the Market and economic development discourse that highlights a particular aspect of the meaning of the Market. For example, as I pointed out in Part IV, the two sets of arguments—one highlighting the costliness of government intervention by neo-liberals, and the other highlighting the apparent incapability of government action to reinvest surplus for development by neo-Institutionalists and neo-Marxists—both had the effect of foregrounding aspects of government’s role in the economy that were hitherto in the contested background. Similarly, the highlighting of the association of the Market with notions of individualism, liberty, and freedom was foregrounding aspects of the Market that had always been contested in the background. The three discourses, however, in their effect resulted in a shift in the development discourse and the way the meaning of the Market was constructed in the new discourse.

#### A. *The Analogy of U.S. Constitutional Jurisprudence*

These shifts in the meaning of the Market can be analogized to the philosophical shift that occurred in the New Deal line of cases in the U.S. Supreme Court’s interpretation of the Due Process Clause of the U.S. Constitution.<sup>160</sup> According to Lessig’s “fidelity theory,”

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159. My understanding in this regard is indebted to Professor Lawrence Lessig’s “fidelity theory” in American Constitutional law. Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995); see also *infra*, Part V.A.

160. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, passed in 1868, reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

constitutional interpretation by the U.S. Supreme Court cycles between two modes of interpretation—one textualist and the other “translation.”<sup>161</sup> The shifts in the cycles are in response to the constraints of contestability of the underlying discourse.<sup>162</sup> Hence, as to which technique is applicable or usable in a given context, will be determined by the social reality *vide* the constraint of contestability.<sup>163</sup>

Descriptively, the textualist technique simply reads a text according to the relatively simple rules of interpretation and simply applies its understanding of the text to the context.<sup>164</sup> It aims at finding a reading that coheres best with what is now understood to be the case. However, many changes occur that render the original structure differently. This necessitates a reading, an attempt by the Court to re-craft the theory/methodology to preserve the original design as envisaged by the framers. This is the second mode called “translation.”<sup>165</sup> But this cannot explain the very radical shifts that sometimes occur in constitutional law and which are not necessarily explained by these first two variables. This brings in the third factor—the constraining factor—

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U.S. CONST. amend. XIV, § 1 (emphasis added).

The literal meaning of this clause suggests that a state has to use sufficiently fair and just legal procedures whenever it lawfully takes away a persons life, freedom or possessions. It would therefore appear that, on its face, this clause only guarantees procedural or “process” rights. However, under “Substantive Due Process,” the Supreme Court has developed a broader interpretation of the Clause, one that protects basic substantive rights, as well as the right to process. The doctrine of Substantive Due Process holds that the Due Process Clause not only requires “due process,” that is, basic procedural rights, but that it also protects basic substantive rights. “Substantive” rights are those general rights that reserve to the individual the power to possess or to do certain things, despite the government’s desire to the contrary. These are rights like freedom of speech and religion. “Procedural” rights are special rights that, instead, dictate how the government can lawfully go about taking away a person’s freedom or property or life, when the law otherwise gives them the power to do so.

161. Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 127-28 [hereinafter Lessig, *Translating Federalism*]; see also Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

162. See Lessig, *Translating Federalism*, *supra* note 161, at 127-28.

163. *Id.* at 176-80.

164. *Id.* at 130-31.

165. *Id.* at 134-35.

contestability.<sup>166</sup> Even when the Court believes that it has done the above two, it will be constrained by a certain social reality and the shifting of what is contestable or not will determine how the court reacts.<sup>167</sup>

Normatively, while the textualist technique is constrained by both the text and the context, the translation technique is constrained by a conception of interpretive fidelity—ordinarily expressed in the mnemonic device “facts, not values, change.”<sup>168</sup> However, the third variable offers a more interesting exposé. It constrains the second technique by a fundamental requirement that the Court must avoid actions that appear, in context, political.<sup>169</sup> This explains the institutional limitations of the Court in taking various issues “for granted,” deciding the “off-the-tableness” of some, and the “up-for-grabness” of some.<sup>170</sup>

As Professor Lessig urges, using this theory, it is possible to read the shift in interpretation of the U.S. Constitution that occurred in 1937 as a result of a change in the “uncontested” background. I am referring here to the apparently radical shift in constitutional interpretation that occurred in interpreting the New Deal legislation around 1937.<sup>171</sup> The radical change occurred around 1937

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166. *Id.* at 176-80.

167. *Id.*

168. See Lawrence Lessig, *Understanding Federalism's Text*, 66 GEO. WASH. L. REV. 1218 (1998).

169. *Id.* at 1221. Professor Lessig calls this the “Frankfurter Constraint.”

170. See Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1393 (1997); Lawrence Lessig, *The Puzzling Persistence of Bellbottom Theory: What a Constitutional Theory Should Be*, 85 GEO. L.J. 1837, 1846-47 (1997).

171. The New Deal line of cases should really be seen in the general context of the Court's jurisprudence on the Commerce Clause and federalism. The legacy of the Marshall trilogy (*Marbury v. Madison*, 5 U.S. 137 (1803); *Gibbons v. Ogden*, 22 U.S. 1 (1824); *McCulloch v. Maryland*, 17 U.S. 316 (1819)) was that Congress had power over objects either in, or affecting interstate commerce. The “Necessary and Proper” clause was interpreted (in my view wrongly, but that is irrelevant here) as meaning that Congress was permitted to use whatever means are sufficient to achieve an end. (The Court could easily have interpreted the clause to mean Congress was restricted to using “necessary means” only to achieve legitimate ends.) However, the effect was to deliver to Congress the power to do whatever it wants to effect its legitimate constitutional purposes—a *carte blanche* for the federal government to encroach on the States' domain in exercise of powers unanticipated by the framers.

with a series of three cases that overturned earlier Supreme Court thinking on the Commerce Clause and substantive due process provisions. The three cases are as follows: First, *NLRB v. Jones & Laughlin* held that Congress can regulate a manufacturer if the manufacturer's activity significantly affects interstate commerce.<sup>172</sup> Second, *Wickard v. Filburn* held that Congress can regulate individual home production of wheat and use of a major interstate commodity based on the substantial effect of the aggregate of such activity.<sup>173</sup> Third, *United States v. Darby* held that Congress can establish and enforce wage and hour standards for the manufacture of goods for interstate commerce.<sup>174</sup> These cases directly overturned the earlier cases that sought to trammel Congress' powers under the Commerce Clause using formal distinctions such as manufacturing versus commerce and indirect versus direct control.<sup>175</sup>

The last few cases in this line included the following: *Hammer v. Dagenhart* had held that Congress cannot prohibit the transportation in interstate commerce of goods manufactured by child labor on the grounds that Congress does not have general police power and therefore cannot use the Commerce Clause to prohibit trade in goods that are themselves harmless.<sup>176</sup> *Schechter Poultry* had held that Congress cannot regulate intrastate commerce that has

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Ultimately, however, this expansion of the Necessary and Proper Clause and the evisceration of any restraint it may have otherwise placed on federal government went too far. The "Old Court" adorned with the armor of constitutional fidelity and framers' vision took upon themselves the task of restoring the "original" balance. Since a textualist reading of the Constitution would yield an unwelcome result, the "Old Court" simply translated the constitution text to render a reading they preferred. As expected, this could go on only for so long. It soon became untenable and with the New Deal pressures flat on the Court's face, it beat a hasty retreat back to textualist rendering of the Constitutional text. One may argue that there is another attempt at "translating" with the Rehnquist Court (witness decisions such as *United States v. Lopez*, 514 U.S. 549 (1995) and *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976)). It is an attempt to imply certain limitations on the federal government even when these are not found in the constitutional text.

172. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

173. *Wickard v. Filburn*, 317 U.S. 111, 133 (1942).

174. *United States v. Darby*, 312 U.S. 100, 123 (1941).

175. See Lessig, *Translating Federalism*, *supra* note 161, at 144-54.

176. *Hammer v. Dagenhart*, 247 U.S. 251, 281 (1918); see U.S. CONST. art. I, § 8, cl. 3 (giving Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

only an indirect effect on interstate commerce.<sup>177</sup> Finally, *Carter Coal* had held that Congress cannot regulate the hours, wages, and other employment conditions of a national industry.<sup>178</sup>

Most constitutional commentators characterize this shift as an unconstitutional, and a possibly cowardly response by the Supreme Court to Roosevelt's "court packing scheme."<sup>179</sup> Others see it as a non-textual but popularly legitimate constitutional amendment.<sup>180</sup> However, Professor Lessig argues, in line with the "fidelity theory," that the New Deal shift represents translation, both of fact—"uncontested" economic discourse—and of structure—understandings of the political basis of law.<sup>181</sup> In other words, a shift in the economic discourse rendered certain issues canvassed in the New Deal line of cases "uncontested." It is "[t]his uncontested context [that] has a critical effect on interpretation . . . [as it provides] the range of readings of fealty in an unchanged text."<sup>182</sup>

#### B. *The Market and the Changing Discourses that Determine Its Meaning in the Development Discourse*

In the nineteenth century, the major discourse constructing the Market privileged unregulated economic activities.<sup>183</sup> This discourse constructed the meaning of the Market in terms of absence of regulations—but did not reveal the fact that the Market itself was the outcome of a

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177. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546 (1935).

178. *Carter v. Carter Coal Co.*, 298 U.S. 238, 309 (1936).

179. See, e.g., Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1443 (1987); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 308-15 (2d. 1988).

180. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 119-21 (1991).

181. Lessig, *supra* note 159, at 453 (arguing that the "switch in time" that occurred in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), was a valid constitutional "translation" that recognized changes in the economic, social, and intellectual realities and trends necessitating a reconsideration of the continued viability of the constitutional doctrines based on facts as they existed in an earlier period).

182. *Id.* at 472.

183. See KARL POLANYI, *THE GREAT TRANSFORMATION* 33-34 (1957).

“conscious and often violent intervention on the part of government which imposed the market organization on society for noneconomic ends.”<sup>184</sup> A change in the Market discourse took place, however, in the industrialized North as a result of the rise of the “social” consciousness and sociological jurisprudence towards the end of the nineteenth century and during the first few decades of the twentieth century.<sup>185</sup> This was the mass social reaction against Market rationality across Europe and in the United States which, among other things, led to a reconceptualization of the legitimate social purposes of state power and its exercise to alter market relations for the sake of stabilizing the capitalist system. This was fueled by the idea of social embeddedness that evolved during this era.<sup>186</sup> This is the idea that social relations are based not primarily on principles of autonomy and individualism as full-blown market capitalism would hold, but on the notion of solidarity.<sup>187</sup> The consequence of this rise of the “social ethos” in the midst of capitalist legal regimes is what Karl Polanyi refers to as the “double movement”: the institution and spread of markets coupled with a corresponding “network of measures and policies . . . integrated into powerful institutions designed to check the action of the market relative to labor, land, and money.”<sup>188</sup>

The industrial revolution had spawned great wealth, but had also produced countless number of people who were poor and destitute. The millions of people who had flocked to overcrowded and disordered cities were a recipe for chaos that threatened to disrupt the industrial revolution and the unregulated market that had been its base.<sup>189</sup> It thus became important to “manage” poverty in order to save the

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184. *Id.* at 250; see also Duncan Kennedy, *Two Globalizations of Law & Legal Thought: 1850-1968*, 36 SUFFOLK U. L. REV. 631, 648-51 (2003) [hereinafter Kennedy, *Two Globalizations*]; Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 HASTINGS L.J. 1031, 1033-35 (2004) [hereinafter Kennedy, *Disenchantment*].

185. See POLANYI, *supra* note 183.

186. See *id.* at 57; see also Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOC. 481, 491 (1985).

187. See generally LEON DUGUIT, *LAW IN THE MODERN STATE* (1919).

188. POLANYI, *supra* note 183, at 76.

189. See *id.* at 74-76, 280.

economic liberalism that had produced it. As Duncan Kennedy writes:

But the social people were anti-Marxist, just as much as they were anti-laissez faire. Their goal was to save Liberalism from itself. Their basic idea was that the conditions of late nineteenth-century life represented a social transformation, consisting of urbanization, industrialization, organizational society, globalization of markets, all summarized in the idea of 'interdependence.' Because the will theory was individualist, it ignored interdependence and endorsed particular legal rules that permitted anti-social behavior of many kinds. The crises of the modern factory (industrial accidents) and the urban slum (pauperization), and later the crisis of the financial markets, all derived from the failure of coherently individualist law to respond to the coherently social needs of modern conditions of interdependence. From this 'is' analysis, they derived the 'ought' of a reform program, one that was astonishingly successful and globalized even more effectively than classical legal thought, through many of the same mechanisms, but also because the social became the ideology of many third-world nationalist elites. There was labor legislation, the regulation of urban areas through landlord/tenant, sanitary, and zoning regimes, the regulation of financial markets, and the development of new institutions of international law.<sup>190</sup>

The turmoil created by the unregulated Market presented an opportunity to both prevent rampant chaos in the cities but also presented an opportunity for the government to intervene in the everyday lives of people as a welfare agency.<sup>191</sup> This whole realm of intervention could be manipulated by the state for different purposes—one of which could be to ensure that the capitalist or Market system remained undisrupted.<sup>192</sup>

Eventually, this idea of the "social" in the Market influenced conceptions of what the state needed to do in developing countries to bring about the "Great

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190. Kennedy, *Disenchantment*, *supra* note 184, at 1034-35.

191. See POLANYI, *supra* note 183, at 280.

192. See Arturo Escobar, *Planning*, in THE DEVELOPMENT DICTIONARY 132 (Wolfgang Sachs ed., 1992). Karl Polanyi has also argued that the "Poor Laws" in England was a systematic aid-in-wages, reputed to be pandering to the whims of the poor while actually depressing their wages under the subsistence level. The legal regime for "Poor Laws" was, for example, coupled with a special anti-trade union law and elaborate subsidies for the industrialists. See POLANYI, *supra* note 183, at 280.

Transformation”<sup>193</sup> in these societies.<sup>194</sup> As we saw in Part III, the overall aim remained one of extending the Market as the primary allocator of investment resources—but it was realized that the state had to play a role in enabling the Market. As indicated in the writings of modernizers (like Wilfred Malenbaum quoted above), the concept of the “social” was broadened in the development discourse to include the task of “transforming the traditional sector” as part of the government’s role in managing poverty and underdevelopment.<sup>195</sup> M.A.G. van Meerhaeghe, writing in 1966 about the challenge facing international economic institutions, remarked that in many states, “further economic growth calls for a change in mentality. The conservatism and illiteracy of the agricultural population often prove an obstacle to any progress in that sector.”<sup>196</sup>

Similarly, a group of experts convened by the United Nations had, earlier, in 1951, put it thus:

There is a sense in which rapid economic progress is impossible without painful readjustments. Ancient philosophies have to be scrapped; old social institutions have to disintegrate; bonds of cast, creed and race have to be burst; and large numbers of persons who cannot keep up with the progress have to have their expectations of a comfortable life frustrated.<sup>197</sup>

The meaning of the Market in development discourse was therefore profoundly shaped by this realization of the need to transform the traditional societies into modern, rational, individual actors. For this project to be in line with capitalism, it was justified in terms of the “the social.”<sup>198</sup> Just like the state played a significant role in managing the “social” in industrialized societies, the Third World governments could intervene to change the “conservatism”

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193. The term is, of course, Karl Polanyi’s. POLANYI, *supra* note 183.

194. See Balakrishnan Rajagopal, *From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions*, 41 HARV. INT’L L.J. 529, 549-55 (2000).

195. See Malenbaum, *supra* note 83, at 22-24.

196. M.A.G. VAN MEERHAEGHE, INTERNATIONAL ECONOMIC INSTITUTIONS 153 (1966).

197. U.N. DEP’T OF ECON. AFFAIRS, MEASURES FOR THE DEVELOPMENT OF UNDER-DEVELOPED COUNTRIES 15 (1951).

198. See Rajagopal, *supra* note 194, at 549-55.

of the peasants using the notion of the “social.”<sup>199</sup> Just like the welfare state was an important instrument in sustaining capitalism in the industrial societies, so was this kind of intervention important in extending the Market in the Third World. Put in terms of supporting the view of development through state-led mobilization and allocation of investment resources, the reasoning went thus:

Developing countries are characterized by accumulated cultural, social and institutional rigidities, which inhibit or prevent change; that resources tend to be ‘stuck’ (or, in economic terms, that the supply of most goods and services is inelastic); and that only determined government action to change the structures of production, and trade and to reallocate resources within the economy can bring about modernization and development.<sup>200</sup>

The point that emerges here is that in the pre-1980 period the image of what constituted a Market economy in the development discourse is a radically different one than that of the post-1980 period in that same discourse. The Market economy in the pre-1980 period was characterized by laws intended to promote or regulate certain socio-economic activities, by welfare legislation designed to transfer certain incomes to certain households and firms. At the same time, such an economy relied on laws to regulate markets and, at times, prices in such a way as to influence substantially the mobilization and allocation of resources. At the same time, the state itself acted as a reservoir of savings for reinvestment in certain critical sectors—either as a response to a natural monopoly situation or where such state production of goods and services is warranted by social concerns.<sup>201</sup> George Powell, writing in 1961, stated thus:

First, it is assumed that the governments of the underdeveloped countries will have to, and will play an active role in the economy both to initiate productive enterprises on its own, especially of the social-overhead-capital nature, and to stimulate private enterprise directly and indirectly by creating favorable climate in which individual initiative can become much more effective than it has

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199. See VAN MEERHAEGHE, *supra* note 196, at 153.

200. Warren Baum & Tolbert Stocks, *Development Planning, in LAW MAKING AND DEVELOPMENT* 62-63 (Seymour Haregot ed., 1987).

201. *Id.*

been in the past.<sup>202</sup>

This dominant view was also held by international development agencies that financed most of the development “projects” in the developing countries whether by loans, grants, or foreign aid. This included the World Bank. Hence, an economic mission organized by the World Bank with the task of formulating a general development program for Colombia reported thus:

One cannot escape the conclusion that reliance on natural forces has not produced the most happy results. Equally inescapable is the conclusion that with knowledge of the underlying facts and economic processes, good planning in setting objectives and allocating resources, and determination in carrying out a program for improvements and reforms, a great deal can be done to improve the economic environment by shaping economic policies to meet scientifically ascertained social requirements.<sup>203</sup>

Similarly, Warren Baum and Tolbert Stocks, both development economists at the World Bank, wrote as follows:

But in much of the developing world in the 1940s and 1950s, the neo-classical view seemed so remote from the realities of those economies that it appeared irrelevant or even as a point of departure for analysis. The wide acceptance of the structuralist view was understandable. Most developing countries felt mired in a condition of underdevelopment, and government activism appeared to be the only available tool for achieving rapid economic and social progress. Government, it was felt, must not only employ various inducements and restrictions to control the private sector, but must also take decisive steps to remove structural disequilibria in the economy and bring about massive re-allocation of resources. It should invest, promote, often act as an entrepreneur, and through its own actions spur and guide development.<sup>204</sup>

The position espoused by these two reports is no less

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202. George Powell, *Use of Commercial Policies for Purposes of Economic Development with Respect to Selected Underdeveloped Countries* (1961) (unpublished Ph.D. thesis, University of Illinois) (on file with the Economics Department, University of Illinois).

203. INT'L BANK FOR RECONSTRUCTION AND DEV., *THE BASIS OF A DEVELOPMENT PROGRAM FOR COLOMBIA* 615 (1950).

204. Baum & Stocks, *supra* note 200, at 63.

true today than it was in the 1960s. Yet, the meaning of the Market has changed radically from what it was then. Between 1950 and 1980, the Market principle in development discourse was used to justify massive state interventions in directing investment as a way of dealing with what were understood as the rigidities and irrationality of the traditional society. After 1980, this argument for state intervention did not suddenly become less true. What changed was the meaning of Market in the economic development discourse. These types of arguments that foregrounded the “social” simply faded from the discourse as a result of the highlighting of different aspects of the Market. The impact of this was to reorient the meaning of the Market in the development discourse to a new set of issues, ultimately rendering the different emphasis and meaning of the Market as outlined above.

To reiterate this point, the aspects of the Market that are emphasized in the development discourse today were always present in the development discourse. These elements are a central focus on the individual as a rational actor and a preference for private-oriented bureaucratic form for harnessing surplus for reinvestment. They occupied a background stage between 1950 and 1980 while the opposite aspects were foregrounded. The aspects that were foregrounded in this earlier period were a focus on state intervention and a preference for public-oriented bureaucratic form for harnessing surplus for reinvestment. In the post-1980 era, however, the discourses discussed above concentrated their criticisms on these very aspects in highlighting the costliness of state intervention. These discourses latched on to the aspects of the Market discourse that link rational human behavior with freedom and liberty. This is the Hayekian idea that the free market is a spontaneous order, and as such, is the natural outcome of a long evolutionary process based on self-interested human nature.<sup>205</sup> However, despite the cycling from one understanding of the Market to the other, the bottom line is that all countries must, and do, rely on a combination of government intervention and Market forces to achieve legitimate economic and non-economic objectives.

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205. See generally 1 F. A. HAYEK, *LAW, LEGISLATION AND LIBERTY: RULES AND ORDER* (1973); 2 F. A. HAYEK, *LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE* (1976).

## VI. THE DUALIST ELEMENTS IN THE MARKET DISCOURSE AND THE SHIFT IN MEANING

In Part V, I suggested how a shift in the meaning of the Market occurred as facilitated by a shift in the Market discourse by foregrounding and backgrounding different aspects of the role of the state in economic functioning. In this Part, I want, very briefly, to suggest a theory for understanding how this apparently radical shift in the meaning occurred “smoothly” and without seeming to disrupt the economic development discourse irreparably. I had earlier in this Article suggested that both before and after 1980, the construction of the Market was in polar opposition to something else: first to “communism” and central-planning and then to the state.<sup>206</sup> I pointed out that both modes of dichotomies between the Market and the state reveal contradictions.<sup>207</sup> However, I indicated that this dualism that characterizes the understanding of the Market in development discourse acts as the idealized starting point in tailoring, and therefore constraining and limiting, the set of policy instruments that are available.

The dualism of the Market as both a method of analysis and a formula for prescribing economic policy positions at the same time reflects, is parallel to, and connected with the interventions against communism.<sup>208</sup> This was the importance of defining the “free world” distinguished by its adherence to Market democracy as the opposite of “communism.”<sup>209</sup> This dualism worked as follows. During the cold war, communism was represented as an all encompassing “evil” force that had to be fought everywhere.<sup>210</sup> However “[o]n the other hand, U.S. [intervention against communism] was concentrated in practice in key areas, according to a ‘strongpoint idea,’ of (in George Kennan’s words) ‘adroit and vigilant application of counter-force at a series of constantly shifting geographical and political points.’”<sup>211</sup>

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206. See *supra* Parts III, IV.

207. See *supra* Part III.

208. See ROBERT BIEL, *THE NEW IMPERIALISM* 63 (2000).

209. See *supra* Part III.

210. See BIEL, *supra* note 208, at 63.

211. *Id.*

This dualist policy was analytically functional. The broader concept that viewed communism as an all-embracing “evil” allowed justifiable intervention anywhere in the guise of the cold war, while the “concentrated” intervention permitted attention to key strategic locations over a prolonged period of time.<sup>212</sup> Since the capitalist development and the “free world” were defined as opposites of “communism,” the two elements of the policy were sufficient to justify various interventions in the Third World. As such, it was unnecessary, at least at the beginning, to invoke the Market as a political rhetoric justifying intervention. In the entire speech of President Truman, there was no invocation of the word “Market.”<sup>213</sup> Neither did the World Bank nor the IMF see themselves as championing the “Market” course in their formative years. They clearly saw themselves as advancing capitalist development, and perhaps free markets—but only as contra-distinguished to communism and central planning.

It is important to emphasize that what the IFIs opposed in the pre-1980 period was “central planning”—defined as synonymous with communism. Yet communism was defined not in terms of its relation to intervention in the Market, but in terms of other pernicious political tendencies “[s]ubject[ing] the individual to arrest without lawful cause, punishment without trial, and forced labor as the chattel of the state . . . decree[ing] what information he shall receive, what art he shall produce, what leaders he shall follow, and what thoughts he shall think.”<sup>214</sup>

The point is, at this time, what was considered the defining characteristic of communism was not state intervention in the economy—but other alleged political manifestations of communism: arbitrary arrests of dissenters; cruel and inhuman punishment; lack of freedom of speech, assembly and thought.<sup>215</sup> Communism was not “bad” because the governments that practiced it intervened in the “Market”; communism was bad because it bred unacceptable political control by the state. Indeed, Keynesian consensus was based on a socially-oriented,

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212. *See id.*

213. *See* TRUMAN, *supra* note 60.

214. *See id.* at 3.

215. *See id.*

interventionist, and benevolent state.<sup>216</sup> Such a state engages policies aimed at stimulating demand and ensuring full employment by intervening in the Market.<sup>217</sup> However, by defining communism in terms of its political correlates, and not by its relation to the Market, this discourse masked the fact that the difference between the “free world” of “Market societies” and the “unfree world” of “central-planning societies” was not one of nature, but degree of planning. For example, Arthur Lewis, a prominent development economist, wrote in 1955:

[T]he case against detailed central planning is that it is undemocratic, bureaucratic, inflexible, and subject to great error and confusion. It is also unnecessary. There is a much better case for piece-meal planning; that is to say, for concentrating on a few matters which it is particularly desired to influence, such as the level of exports, or of capital formation, or of industrial production, or of food production . . . . Some planning is necessary, since the results of demand and supply are not socially acceptable in their entirety . . . .<sup>218</sup>

Therefore, in the early years of developing economics, projects were not conceived in terms of ceding more powers to the Market actors as opposed to the state. Though communism was explicitly identified with “central planning,” the goal of ceding the “fundamental economic role” to Market actors was not an articulated goal of legal or economic reforms in the context of development. In fact the language of “reducing” the role of the state in the economy did not appear in World Bank literature until after 1980.<sup>219</sup>

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216. See Mark Kelman, *Could Lawyers Stop Recessions? Speculations on Law and Macroeconomics*, 45 STAN. L. REV. 1215, 1235-37 (1993) (arguing that the Keynesians consensus was that it was appropriate for the government to actively intervene in the economy even though there was disagreement about the appropriate instruments for such intervention); see also Maxwell O. Chibundu, *Law and the Political Economy of Privatization in Sub-Saharan Africa*, 21 MD. J. INT'L L. & TRADE 1, 17-24 (1997) (arguing that most African countries adopted Keynesian “liberal internationalism” after independence).

217. Economists disagreed on the legitimate goals for government intervention—whether to reduce inflation or achieve full employment—as well as the policy instruments for such intervention—whether fiscal or monetary. See, e.g., Kelman, *supra* note 216.

218. W. ARTHUR LEWIS, *THE THEORY OF ECONOMIC GROWTH* 384 (1955).

219. See Ngugi, *supra* note 133, at 523-33 (tracing the “Rule of Law” and “Good Governance” projects in developing countries in the context of Market-

The reason was that such rhetoric was simply unnecessary if counter-productive to the interventions in the pre-1980 period. The typical development project in the 1950s, 1960s, and 1970s was a public project: the state reorienting economic priorities.<sup>220</sup> The Market rhetoric was made unnecessary by the fact that the dualist elements in the war against communism could also be marshaled to justify and legitimate specific interventions.

The dualistic elements in the Market discourse neatly facilitated the radical shifts in the meaning of the Market in development discourse. Intervention on grounds of capitalist development based on relatively coherent, self-reproducing dynamics could be legitimated in the 1960s and 1970s as being “capitalist” and therefore “free” and “democratic” as opposed to “totalitarian” and “communist.”<sup>221</sup> Of course the overarching anti-Communist vision meant that any intervention could be justified as being anti-Communist since communism was defined as all-embracing. However, development theory that legitimated this self-reproducing dynamic that capitalist development both promised and invoked as reason for intervention was premised on three key elements each of which had to be refuted or modified in the 1980s during the launching of the neo-liberal economic reforms. These were (i) Stages Theory; (ii) The Rural-Urban Dualism; and (iii) Import Substitution Industrialization (ISI). I will discuss each of these briefly below.

A. *The Stages Theory and the Linked Concept of Trickle-Down*<sup>222</sup>

The stages theory and the associated concept of trickle-down effect were mainly propagated by the American economic historian Walt Rostow.<sup>223</sup> The theory is based on nineteenth century theories of evolution. It stipulates “that development proceeds through a linear succession of stages

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oriented legal reforms, and tracing the origins of the imagery of reducing the economic role of the state in economic functioning as the chief mantra of the development discourse after 1980).

220. See Salacuse, *supra* note 10, at 877-78.

221. See BIEL, *supra* note 208, at 73.

222. *Id.* at 74.

223. W.W. ROSTOW, *THE STATES OF ECONOMIC GROWTH* (2d ed. 1971).

copied from the historical experience of existing industrial countries.”<sup>224</sup> According to this theory, development could be sub-divided into five distinct time segments each characterized by different sources and patterns of economic changes.<sup>225</sup> According to Rostow, the five distinct stages of economic growth are: the traditional society, the preconditions for take-off, the take-off, the drive to maturity, and the age of high mass consumption.<sup>226</sup> Rostow wrote that while the developing countries were in the first two stages of unidirectional growth, it was possible to deliberately accelerate the “take off stage.”<sup>227</sup> Rostow defined the “take-off” period as the period when self-sustaining growth can be achieved because the degree of “productive economic activity reaches a critical level and produces changes which lead to a massive and progressive structural transformation [of the] econom[y] and the societ[y].”<sup>228</sup> According to Rostow, the take-off stage can only be reached if three important preconditions are met. First, there has to be an increase in the rate of saving from five percent to ten percent of the national income (i.e., capital accumulation).<sup>229</sup> Second, there has to be productive investment of surplus savings in new industries (i.e. development of at least one substantial industrial sector).<sup>230</sup> Third, the development of a political, social, and institutional framework that is capable of exploiting the impulses to expand in the modern sector.<sup>231</sup>

According to Rostow’s theory, it was especially important to reach the take-off stage because growth was a discontinuous and dialectical process until the take-off stage of self-sustained advancement was reached.<sup>232</sup> To reach the take-off stage, developing countries had to make strategic decisions affecting resource allocation designed to

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224. BIEL, *supra* note 208, at 74.

225. See ROSTOW, *supra* note 223, at 4-16.

226. *Id.* at 4-11.

227. *Id.* at 39-40.

228. *Id.* at 40.

229. *Id.* at 39.

230. *See id.*

231. *See id.*

232. *Id.* at 40.

stimulate investment in leading sectors.<sup>233</sup> The bottom line was that “[l]arge growth-rates, which are seen as qualitatively different from small ones, are required for take-off.”<sup>234</sup> To achieve these large growth-rates, very big increases in savings were needed. These savings could only be made by withdrawing resources from consumption, and concentrating them in the hands of entrepreneurs. To this extent, therefore, Rostow relied on state intervention to help the entrepreneurial class to accumulate sufficient surplus for reinvestment in the take-off stage.

### B. *The Rural -Urban Dualism Model*

The Rural-Urban dualism model is also known as the Lewis “two sector model” or “the surplus labor model.”<sup>235</sup> Arthur Lewis was the most influential propagator of this dualistic theory of economic development.<sup>236</sup> Lewis’s model is built on “the empirical fact that developing countries are labour-surplus economies, especially in the large agricultural sectors dominated by low-productivity traditional farming which relies on unpaid family labour for subsistence production.”<sup>237</sup> According to Lewis, the typical underdeveloped economy consists of two sectors: the traditional, overpopulated, rural subsistence sector, and a modern, urban industrial sector.<sup>238</sup>

Lewis argued that that traditional sector was characterized by “surplus” labor because the marginal productivity of labor in this sector was zero.<sup>239</sup> This meant that this “surplus” labor could be withdrawn from this

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233. See *id.* at 39-40 (discussing the importance of developing substantial manufacturing sectors to reaching the take-off stage).

234. BIEL, *supra* note 208, at 75.

235. See generally LEWIS, *supra* note 218; see also BIEL, *supra* note 208, at 75; MEHMET, *supra* note 71, at 71-76.

236. For examples of Lewis’s work, see LEWIS, *supra* note 218; W. Arthur Lewis, *Economic Development with Unlimited Supplies of Labour*, in *THE ECONOMICS OF UNDERDEVELOPMENT* 400 (A. N. Aggarwala & S. P. Singh eds., 1958). Lewis’s model had a great intellectual impact, and eventually won him a Nobel Prize in Economics.

237. MEHMET, *supra* note 71, at 72.

238. LEWIS, *supra* note 218.

239. Lewis, *supra* note 236, at 402-03.

sector without any loss in productivity.<sup>240</sup> On the other hand, the industrial sector was characterized by high productivity.<sup>241</sup> For economic development to occur, Lewis argued, there had to be structural change in the economy whereby the surplus labor in the traditional agricultural sector with zero marginal labor productivity is withdrawn and directed to the modern industrial sector.<sup>242</sup> The focus of the model, therefore, was the simultaneous transfer of labor from the traditional sector, and the development of output and employment opportunities in the industrial sector where this labor would be absorbed.<sup>243</sup>

In accordance with this theory, Lewis suggested that the government should craft policies that would enable the entrepreneurial class to tap into this pool of surplus labor. The capital available at one time would be reinvested into productive activity that would attract labor from the rural sectors. If they are paid just sufficiently to make it attractive for them to migrate while reinvesting the rest in productive activity again in the next cycle, this would continue until the surplus labor has been absorbed completely. By this time, the economy would have been transformed as well. Hence, the basic idea in this model is two-fold: first, to make use of the surplus labor; and, second, to remove resources from the non-capitalist classes and to concentrate them on the capitalist industrialists who are profit maximizers. The underlying assumption, like in Rostow's model, is that the entrepreneurial class would reinvest the surplus. However, if an economy concentrates resources on non-capitalist classes such as the working classes or the political elite, they will consume rather than save for reinvestment.

### C. *Import Substituting Industrialization (ISI)*

Import Substituting Industrialization (ISI) was first inspired by the findings of Raul Prebisch and Hans Singer.<sup>244</sup> Prebisch and Singer used trade data to show

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240. *Id.*

241. *See id.* at 407-08.

242. *Id.* at 412.

243. *See id.*

244. Prebisch's theoretical formulations were mainly contained in U.N.

that, contrary to neo-classical trade theories, international trade could not act as an engine of growth for developing countries.<sup>245</sup> This was because the terms of trade in international trade are biased against primary producers, and that these terms had been deteriorating for these producers. The argument was that international trade did not diffuse gains of trade to all trading countries as neo-classical theories claimed. Trade had actually impoverished primary producers.<sup>246</sup>

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DEPT OF ECON. AFFAIRS, ECON. COMM'N. FOR LATIN AMERICA, THE ECONOMIC DEVELOPMENT OF LATIN AMERICA AND ITS PRINCIPAL PROBLEMS, U.N. Doc. E/CN.12/89/Rev.1, U.N. Sales No. 1950.II.G.2 (1950); U.N. DEPT OF ECON. & SOC. AFFAIRS, ECONOMIC SURVEY OF LATIN AMERICA 1956, U.N. Doc. E/CN.12/427/Rev.1, U.N. Sales No. 1957.II.G.1 (1957); *see also* Hans Singer, *The Distribution of Gains Between Investing and Borrowing Countries*, 40 AM. ECON. REV. 473 (1950).

245. *See* ECONOMIC SURVEY OF LATIN AMERICA, *supra* note 244; THE ECONOMIC DEVELOPMENT OF LATIN AMERICA AND ITS PRINCIPAL PROBLEMS, *supra* note 244; Singer, *supra* note 244.

246. Dependency Theorists started with the Prebisch-Singer thesis to advance the argument that no autonomous economic development could occur within the developing countries unless these countries de-linked from their dependence on the capital, technology, and markets of the developed countries. Historically, the Dependency Theorists argued that the relationship between metropolises (advanced economic centers) and peripheries (backward and underdeveloped centers) is a reflection of mercantilist and capitalist expansion since the sixteenth century. They therefore argued that underdevelopment was a negative impact of capitalism and the unequal exchange that it has constructed in international trade. Unequal international exchange is a result of distortions in export activities. Integration into the world capitalist market only makes the developing countries unable to challenge the dominance of the metropolises. This is because the kind of capitalism practiced in the developing countries is a "dependent" one: one integrated into the needs of the Metropolitan powers, and preserved their competitive dominance. It therefore functions to stunt and constrain rather than generate development in the developing countries. The extractive and manufacturing industries that dominate the industrial horizon of developing countries are run in strictly functional terms that generate surpluses that are realized within the metropolitan economies. In order to develop, therefore, the dependency school argued that the developing countries must seek to do so autonomously. For good exposition of the dependency theories, see SAMIR AMIN, ACCUMULATION ON A WORLD SCALE: A CRITIQUE OF THE THEORY OF UNDERDEVELOPMENT (1974); SAMIR AMIN, UNEQUAL DEVELOPMENT: AN ESSAY ON THE SOCIAL FORMATIONS OF PERIPHERAL CAPITALISM (1976); ARGHIRI EMMANUEL, UNEQUAL EXCHANGE: A STUDY OF THE IMPERIALISM OF TRADE (Brian Pearce trans., Monthly Review Press 1972) (1969); ANDRE GUNDER FRANK, CAPITALISM AND UNDERDEVELOPMENT IN LATIN AMERICA (1967); 1 IMMANUEL WALLERSTEIN, THE MODERN WORLD SYSTEM (1974); 2 IMMANUEL WALLERSTEIN, THE MODERN WORLD SYSTEM (1980); Fernando Henrique Cardoso, *Dependent Capitalist Development in Latin*

The development strategy to emerge from this thesis was that capitalist national development could eventually be brought about by import substitution—placing limitations on imports and establishing an industrial base for the assembly or manufacture of corresponding goods within the nation.<sup>247</sup> Such a strategy would both encourage domestic industrialization and stem the tide of declining terms of trade. Hence, ISI involved the creation of enclave manufacturing sectors by active government intervention that included the creation of a regime tailored to transfer resources from the rural sectors to the infant industrializing sector through taxation, over-valued currency, and exchange controls.

All three dominant economic development theories (i.e., Rostow's "Stages Theory," Lewis's "Two Sector Model," and Prebisch-Singer's ISI) were notable in their anti-rural and pro-capital characteristics coupled with a strong interventionist stance. However, what distinguished all of them as "Market-oriented" was the fact that they could somewhat be constructed as being against communism or "that false philosophy."<sup>248</sup> Since all the theories contemplated by the state orienting the economy in a way that ensured the accumulation of an economic surplus that could then be used in a specific way, they were decidedly against mass or grass-root organization that would have challenged the channeling of the economic surplus in any way other than the one preferred by the government. These theories envisaged a system where legal institutions, formal laws, and government policies would rearrange and redistribute assets and resources in such a way that the surplus will end up in the hands of the entrepreneurial class.<sup>249</sup>

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*America*, 74 NEW LEFT REV. 83 (1972); Immanuel Wallerstein, *The Rise and Future Demise of the World Capitalist System: Concepts for Comparative Analysis*, 16 COMP. STUD. IN SOC'Y & HIST. 387 (1974).

247. BIEL, *supra* note 208, at 79-86; MEHMET, *supra* note 71, at 76-80.

248. TRUMAN, *supra* note 60, at 8.

249. Among the most forceful criticisms of these theories are those that point out the underlying assumption that distribution of resources only occurs at the surplus stage. These criticisms point out that distribution occurs at every stage in the production cycle. See generally Duncan Kennedy, *Law-and-Economics from the Perspective of Critical Legal Studies*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 465 (Peter Newman ed., 1998). Other critiques have questioned the assumption that there can be an

On the other hand, alternate policies that were objected to by mainstream development theorists as “communist” or “Marxist” were not any different in their application of neo-classical analysis. For example, Samir Amin and Immanuel Wallerstein, the foremost dependency theorists, almost invariably rely on neo-classical tools coupled with a strong set of policy instruments in trade policy that discourages importation while advantaging self-sufficiency.<sup>250</sup> Yet their theories are considered Marxist. However, it turns out that what made them “Communist” or “Marxist” is *not* the fact of intervention by the state or policy-driven use of capitalism or investment, since the liberal, “Market-oriented” policies did that as well. What made them different was only their self-identification as pro-Marxist or anti-Capitalist, and their call for de-linking with the industrial capitalist markets of the North and not their reliance on a set of policy tools any qualitatively different from that relied on by the mainstream theories summarized above.

In the 1980s, as a result of the change in the discourse, which was a consequence of the events described and analyzed in Part III of this Article, the main elements in

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economic surplus that is utilized in a specific way. They point out that when certain sectors in an economy accumulate a surplus, in truth what is happening is the transformation of human interactions in a destructive way through hatred, competition, etc. What is termed the “surplus” is really what is taxed on the traditional society by breaking up the traditional system, and extracting from the solidarities of the rural families. See Harry W. Pearson, *The Economy Has No Surplus*, in *TRADE AND MARKET IN THE EARLY EMPIRES* 320 (Karl Polanyi et al. eds., 1957) (expressing the view that “surplus,” like “scarcity” is a socially instituted phenomenon not a natural one). Feminist economists also point out that these theories do not value some kinds of work, especially reproductive work, that is done by females. Feminist economists criticize the omission of the reproductive sphere in conventional macro-economics. They also draw attention to the interdependencies between the unpaid and the paid economy and women’s social positioning as intermediaries between the two spheres. Aside from the problem of under- or non-valuation of reproductive work, feminist critical economists also point to the gendered nature of markets. In such markets, the asymmetrical gender situation is likely to generate a surplus in the economy that is based on disadvantaging women. See, e.g., *FEMINIST APPROACHES TO DEVELOPMENT ECONOMICS* (Diane Elson ed., 1996); Diane Elson, *People, Development and International Financial Institutions: An Interpretation of the Bretton Woods System*, 62 *REV. AFRICAN POL. ECON.* 511 (1994); see also Kerry Rittich, *Recharacterizing Restructuring: Gender and Distribution in the Legal Structures of Market Reform* (1998) (unpublished S.J.D. dissertation, Harvard Law School) (on file with Harvard Law Library).

250. See *supra* note 246 and accompanying text (discussing further Amin and Wallerstein’s dependency theories).

the three theories of development discussed above had to be refuted. Most importantly, the idea that the state needed to explicitly organize the accumulation of surplus and productive investment through the use of law was targeted in the economic development discourse. The new meaning of the Market in the discourse emphasized the idea that Markets and the attendant accumulation that follows capitalist development is the product, not of explicit planning by the state, but of a spontaneous natural order resulting from the market.<sup>251</sup>

The idea of the Market as the rhetoric and metaphor that hosted the campaign for the refutation of these elements is doubly significant. First, the idea resonated generally with historical roots of capitalist development from the time of the abolition of the Corn Laws and Cobden's "Free market" in England.<sup>252</sup> The return of the Market in the 1980s could therefore be justified as either a return to normalcy or a correction of earlier distortions of the Market through state intervention.<sup>253</sup> Second, and significantly, however, the Market also forms a telling parallel in terms of functional utility of its idea as a construct with anti-Communist intervention. This enabled the radical shift from supporting some of the elements in these three pro-capitalist, anti-rural theories to refuting them completely without causing a rupture in the economic development discourse. The dualistic component of the Market could neatly take over the dualistic component of anti-Communist intervention because it has an exact similar component itself that can functionally be operationalized to both form an overarching vision while

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251. See 3 F. A. HAYEK, *LAW, LEGISLATION AND LIBERTY: THE POLITICAL ORDER OF A FREE PEOPLE* (1979),

252. See generally Albert O. Hirshman, *How the Keynesian Revolution Was Exported from the United States, and Other Comments*, in *THE POLITICAL POWER OF ECONOMIC IDEAS: KEYNESIANISM ACROSS NATIONS* 347, 347-59 (Peter A. Hall ed., 1989) (noting that Free Trade won its first major domestic victory in England with the abolition of the Corn Laws in 1846. Afterwards, the doctrine acquired considerable hegemony worldwide and was buttressed by the Cobden-Chevalier Treaty of 1860).

253. See, e.g., DEEPAK LAL, *THE POVERTY OF 'DEVELOPMENT ECONOMICS'* (2000) (arguing that the theories of development that began by suggesting that the typical Third World country was structurally different than a developed country (like the three theories discussed above) were based on "dirigiste dogma" rather than rigorous economics).

prescribing specific programmatic actions.

So the Market concept is dualist in the two senses already mentioned earlier. First, through the assumptions that make up its idealized version, it is seen through the axis of rational-irrational. The Market is constructed upon axioms of individualism and utility maximization that are projected as rational. At the same time, other modes of behavior—derived from sharing and co-operation, for example—are deemed irrational or non-rational. The second dualism is that the Market, as it emerges from the economic development discourse in the post-1980 period, is both a method of analysis and a formula for prescribing policy positions at the same time. The Market is neither just an analytical mode that is used to evaluate economies along particular structural or institutional correlates. Nor does it just prescribe a set of policy interventions that must be implemented. Instead, by emphasizing one aspect of the dualism of the Market over the other, it becomes possible to reorient the debate or discourse that shapes or frames the meaning of the Market in a given direction. Similarly, since the boundaries in the dichotomies/dualisms are porous and plastic, it becomes possible to “hang” together very different principles/ideas without making them seem inconsistent with each other.

In the pre-1980 period, state intervention in the Market was justified using the first dualist dichotomy in the schema. As we showed in Part III, it was argued that given the cultural rigidities that existed in most developing countries, the rational thing to do was for the state to intervene in the Market.<sup>254</sup> This argument could support all three dominant theories as I described them above: stages of growth theory, excess labor theory, and import substitution industrialization.<sup>255</sup> In the post-1980 period, when the shift in the meaning of the Market that I have been describing occurred, it was not so much because new knowledge or a shift in the discourse that showed it was irrational to intervene in the markets. Rather, it was the fact that the shift in the discourse elaborated a new criterion for markets that shifted the focus from the structural issues highlighted by the paradigm, to what a

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254. *See supra* Part III.

255. *See supra* notes 223-48 and accompanying text.

real Market model should be. This meant defining the Market, and “Market-oriented” reforms, using a completely new schema: the second set of dualism. Hence, by shifting focus from the first set of dualism to the new one, the framing of the meaning of the Market radically changed.

To conclude this Part, consider the following quote by Irving Friedman, the Economic Advisor to the President of the World Bank:

This demand for certainty requires answers to difficult questions. Many of these questions—free v. protected markets; non-discrimination v. discrimination; private v. government control of industry, to name only a few—are not new . . . . At the same time, the traditional answers are being challenged all over the world, probably the majority of those attending this discussion would agree with the belief that organized trade is preferable to free trade under the present circumstances.<sup>256</sup>

This quote is from a speech given in 1965. It illustrates that all the elements of the Market touched upon above were always present in the discourse but the meaning of the Market that prevailed in the pre-1980 period depended on what issues were foregrounded and highlighted.

#### VII. ANALYSIS AND CRITIQUE OF THE SHIFT IN MEANING OF THE MARKET IN THE POST-1980 PERIOD

In this Part, I will analyze and critique the new meaning of the Market that emerged in the 1980s. As in the previous Parts, the aim is two-fold. First, I hope to reveal the underlying contradictions in the mode of the Market that is now in vogue as defined by an emphasis on the self-interested individual as an independent economic actor only relating to others through primarily the medium of the unregulated Market. Second, I will aim to demonstrate how and why the “new” meaning of the Market shares similar characteristics with the “old” meaning except that each highlights different aspects of the same general concept. I will do this in a series of general critiques aimed at analyzing the shift in the meaning of the Market in the post-1980 period.

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256. Irving Friedman, *Foreword* in LAW MAKING AND DEVELOPMENT, *supra* note 200, at 27.

It will emerge from the list below that some, if not all, of the critiques I raise have been known in the discourse for a while. Most of these critiques occupied a contested but fore-grounded arena in the development discourse in the pre-1980 period. However, with the shifts in the discourse in the post-1980 period, these critiques were taken for granted—they were pushed into the background uncontested arena. The difference in this positioning of the doubts about the clarity of the laws of the Market, the extent to which one could extrapolate their consequences, and so forth has profound effects on our perceptions of what the Market means. The presence of these doubts or critiques in the contested foreground arena in the pre-1980 period disabled the highlighting of the “individual/private” axis of the meaning of the Market in the economic development discourse and dampened the effects of the overestimation of economics to predict the behavior of rational human beings as private actors. However, with the shift in the meaning of the Market in the post-1980 period, most of these critiques were slowly pushed into the background contested or uncontested arena.<sup>257</sup> With the change in situating these doubts/critiques, the approach to the meaning and role of markets in the economy that is in vogue ends up vastly overestimating the rationality of the human being as a utility-maximizing economic actor. It also exaggerates the role of legal categories, and the determinacy of the legal-economic nexus that goes with it.

A. *The Market is Enabled by the State and cannot be Defined in its Absence*

Despite the claims of the new Market discourse that emerged after 1980, the Market is not only “the supreme medium for the expression of individual choice”;<sup>258</sup> it is also a social construction of particular legal rules, ideology, and social arrangements.<sup>259</sup> The Market is not just the perfectly competitive, “atomistic realm of impersonal economic

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257. See *supra* Part IV.

258. GEOFFREY HODGSON, *ECONOMICS AND INSTITUTIONS: A MANIFESTO FOR A MODERN INSTITUTIONAL ECONOMICS* 178 (1988).

259. See Gary Minda, *Globalization, Decline of the Nation-State, and Foucault*, in *THE FUNDAMENTAL INTERRELATIONSHIPS BETWEEN GOVERNMENT AND PROPERTY* 151, 159 (Nicholas Mercuro & Warren J. Samuels eds., 1999).

exchange of homogenous goods by means of voluntary transactions on an equal basis between large numbers of autonomous, fully informed entities with profit-maximizing behavioral motivations, and able to enter and leave freely";<sup>260</sup> it is also a social institution that structures, organizes, and legitimates contractual agreements and the exchange of property rights in the society.<sup>261</sup>

As such, the self-regulating Market is created by the state.<sup>262</sup> It, therefore, is not instituted by the absence of regulations, but by the presence of certain regulations. As Bernard Edelman would argue, it is the state through legal institutions that "puts the marks of property, freedom, and equality on the face of exchange value"—whereas in the relations of production these could easily be read as "exploitation, slavery, inequality, and sacred egoism."<sup>263</sup>

However, in persuading developing countries to reform and pursue capitalism and the Market system, it has been customary to extol the advantages of the Market as opposed to the government.<sup>264</sup> Most proponents of Market-oriented reforms also create the myth of the self-adjusting Market.

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260. Barbara Harriss-White, *Maps and Landscapes of Grain Markets in South Asia*, in *THE NEW INSTITUTIONAL ECONOMICS AND THIRD WORLD DEVELOPMENT* 87, 87 (John Harriss et al. eds., 1995).

261. HODGSON, *supra* note 258, at 174.

262. See generally POLANYI, *supra* note 183; KARL POLANYI, *THE LIVELIHOOD OF MAN* (Harry W. Pearson ed., 1977). I see my study as aimed at showing how a selective construct of the "Market" is used to prescribe to the Third World states a version of the Market that, at least in rhetoric, verges on creation of the self-regulating Market as part of the neo-liberal Market-oriented reforms. The process of creating such a Market involves mischaracterizing the Market as it exists in the industrial North, as well as misdescribing the processes through which such a Market is to be established. However, the view that the self-regulating Market is created by the state which I adopt, is seriously challenged by the rival view of the Austrian school, that the free Market is a spontaneous, natural outcome of an evolutionary process based on human rationality and self-interest. For this latter view, see *THE ROAD TO SERFDOM*, *supra* note 146, at 17. See generally RICHARD MCKENZIE, *COMPETING VISIONS: THE POLITICAL CONFLICT OVER AMERICA'S ECONOMIC FUTURE* (1985); LUDWIG VON MISES, *HUMAN ACTION: A TREATISE ON ECONOMICS* (1949); Friedrich A. Hayek, *Reflections on Constitutional Economics*, in *CONSTITUTIONAL ECONOMICS: CONTAINING THE ECONOMIC POWERS OF GOVERNMENT* 235 (Richard McKenzie ed., 1984).

263. BERNARD EDELMAN, *OWNERSHIP OF THE IMAGE: ELEMENTS FOR A MARXIST THEORY OF LAW* 94 (Elizabeth Kingdom trans., Routledge & Kegan Paul 1979) (1973).

264. See generally WORLD BANK, *FROM PLAN TO MARKET*, *supra* note 17.

However, the contradiction in all these is rather apparent. It stems from the fact that a self-adjusting Market system is not a natural consequence, but is dependent on certain stimulants.<sup>265</sup> The first imposition that the self-adjusting Market demands is the institutional separation of society into an economic and political sphere.<sup>266</sup> It rests on the ability to remove all non-economic institutional regulations from the organization of buying and selling and vice-versa.<sup>267</sup> Yet, neo-liberalism reforms are foisted on the need to reduce the fundamental role of the state in economic organization.<sup>268</sup> The irony is that it would take the coercive power of the state to both institutionalize the regulations and stimulants required to create the Market as well as the ideology supporting it.<sup>269</sup> The state therefore is important and plays a significant role both in supplying the formal institutions allowing a shift to the Market economy, and the background rules which also play a causal role in constraining the particular mode of Market that is created.<sup>270</sup> States are expected to supply these background rules supporting the transition to a Market economy.<sup>271</sup> The particular kind of Market economy that is created is dependent on the kind of background norms that the state supplies, as well as the particular kind of formal, foreground norms that the state enacts. However the “Market-oriented” reforms that are

265. See POLANYI, *supra* note 183, at 56.

266. See *id.*

267. See *id.*

268. See, e.g., WORLD BANK, THE CHALLENGE OF DEVELOPMENT, *supra* note 36, at 9. The World Bank writes:

The approach to development that seems to have worked most reliably, and which seems to offer most promise, suggests a reappraisal of the respective roles for the market and the state. Put simply, governments need to do less in those areas where markets work, or can be made to work . . . .

*Id.*

269. See POLANYI, *supra* note 183, at 56, 250.

270. DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 248 (1996) (recognizing the causal role of background rules in constraining outcomes).

271. See Warren J. Samuels, *Interrelations Between Legal and Economic Processes*, 14 J.L. & ECON. 435, 450 (1971) (“The economy must be seen as an object of legal control and the law as a means of seeking private economic gain or advantage. Legal impact upon the private economic sphere and the economic use of government have not been the exception; rather they have been the fundamental and regular, perhaps daily pattern.”).

suggested in the post-1980 period ignore this background role of the state, and imagine that a Market can be defined in the absence of the state.

B. *The Post-1980 Model of the Market Imagines that the Economic Actors are Pre-Political Agents*

The Market and the economic actors acting in it are not pre-political agents. Rather, they are products of state intervention in economic policy up until the present.<sup>272</sup> As such, whether the state acts or fails to act in a given sphere, it either maintains or modifies the utilization of resources available to society. This is a political decision that affects different actors differently. The assumption that the state can only enact neutral laws to facilitate economic actors to deal with each other in the market is an illusion. As Neva Makgetla and Robert Seidman stated this point:

Neither economic policy nor law can be neutral. The state uses its power, translated into new legal measures to solve social problems. But social problems affect different groups and strata differentially. Every exercise of state power inevitably favors one or the other of them. In economic terms, given scarcity, any allocation of resources will benefit some people, harm others. In enacting laws to implement economic policy, the state effectively reacts to the demands of a particular group.<sup>273</sup>

C. *The Post-1980 Image of the Market Conceives Legal Categories as Simple and Unproblematic*

In the post-1980 model of the Market, legal and technocratic institutions are constructed as neutral.<sup>274</sup> Legal rules about allocation of economic resources in the society are deemed to be merely technical and pragmatic devices that neutrally structure the relationship between the state and the Market, and between the different economic actors in the Market.<sup>275</sup> However, it turns out that

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272. See POLANYI, *supra* note 183, at 56; see also *supra* note 52.

273. Neva Makgetla & Robert Seidman, *Ownership of Capital and Its Implications for Development in a Liberated South Africa*, in LAW MAKING AND DEVELOPMENT (Seymour Haregot ed., 1987).

274. See generally Rittich, *supra* note 249.

275. See *id.*

the institutions are not neutral at all. As legal realists long demonstrated, even when legal categories seem neutral, they can often affect the various economic actors differentially.<sup>276</sup> This is because often, the rules and institutions are themselves ambiguous and capable of more than one plausible interpretation. “Clear contract and property rights,”<sup>277</sup> for example, could mean an awful lot of things. As Duncan Kennedy explains:

The legal realists have taught us that ‘property’ is an *extraordinarily* vague term. The concept itself gives no clue as to what kinds of things can be ‘objects’ of ownership, nor as to the particular rights, powers, privileges, and immunities that go along with ownership. ‘Property’ is a catch all for an infinitely varied set of ‘bundles of rights.’ What can be done in one of those bundles is a legal decision. Such a decision can be intelligibly justified only by reference to the legislative policy of the community. ‘Contract’ is no more clear-cut. The enforcement of a contract against the will of one of the parties is, like any other lawsuit, an instance of unfreedom or coercion. The exact kind and extent of state coercion that should occur in connection with private agreements cannot be deduced from the idea of the contract itself.<sup>278</sup>

In other words, the “neutral” and pragmatic institutions that this model of the Market prescribes can, in reality, be made concrete in many different ways.<sup>279</sup> The way we answer some foundational questions about the content of the legal institutions undergirding the Market model determines the nature of property and contract rights that one realizes in the end. Some of the foundational questions include what exact bundle of rights an owner gets, whether that bundle can or should be permanently redistributed, in what ways the interests can be transferred, and what counts as a “voluntary” transfer as opposed to a “coerced”

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276. See generally Kennedy, *supra* note 18.

277. The World Bank characteristically prescribes the establishment of “clear contract and property rights” as a *sine qua non* to development. See, e.g., WORLD BANK, FROM PLAN TO MARKET, *supra* note 17.

278. Kennedy, *supra* note 18, at 951.

279. See, e.g., Michael Robertson, *Reconceiving Private Property*, 24 J.L. & SOC. 465 (1997). Professor Robertson demonstrates that it is possible to reconceive the *content* of private property in a way that produces more socialist end-states or societies.

transaction.<sup>280</sup>

Alternatively, freedom of contract, property, and other legal institutions are institutionally and culturally embedded.<sup>281</sup> Therefore, it is difficult, nay, impossible to determine the economic impacts of legal institutions unless one is “ideological” about their meaning in the sense of *choosing* a given interpretation and “naturalizing” it.<sup>282</sup> An additional difficulty with the model’s characterization of the law and legal institutions is that law is a complex and often contradictory instrument, not simple and unproblematic.<sup>283</sup> As such, there is no single model of a legal system that would render a Market-friendly system. Therefore, the suggestion that all one needs to take into account to usher in a Market system is to consider the five “attributes of market-friendly legal systems” is deceptive.<sup>284</sup> The five “attributes” are named as rules known in advance; rules actually in force; availability of mechanisms for the application of the rules; independent bodies to resolve conflicts over the interpretation of rules; and, procedures

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280. See, e.g., Michael Robertson, *Property and Ideology*, 8 CAN. J.L. JURIS. 275 (1995).

281. See, e.g., KATHARINA PISTOR & PHILLIP A. WELLONS, *THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT: 1960-1985* (1998).

282. I use the term “ideological” here to mean the more ordinary, value-neutral sense of a system of political ideas. Stuart Hall defines an ideology as a “system of representation . . . Ideologies are the frameworks of thinking and calculation about the world—the “ideas” which people use to figure out how the social world works, what their place is in it, and what they ought to do.” Stuart Hall, *Signification, Representation, Ideology: Althusser and the Post-Structuralist Debates*, 2 CRITICAL MASS COMM. 91, 97 (1985). See generally Joel Ngugi, *Re-Examining the Role of Private Property in Market Democracies: Problematic Ideological Issues Raised by Land Registration*, 25 MICH. J. INT’L L. 467, 512-13 (2004) (demonstrating that even “technical” categories such as land registration do not have fixed meanings but are contingent on the context and the degree to which economic actors organize, invent, and mobilize competing norms to frustrate the complete operation of the formal institutions).

283. See Julio Faundez, *Legal Reform in Developing and Transition Countries: Making Haste Slowly*, in COMPREHENSIVE LEGAL AND JUDICIAL DEVELOPMENT: TOWARD AN AGENDA FOR A JUST AND EQUITABLE SOCIETY IN THE 21ST CENTURY 369, 369 (Rudolf V. Van Puymbroeck ed., 2001).

284. See Robert D. Cooter, *The Rule of State Law and the Rule-of-Law State: Economic Analysis of the Legal Foundations of Development*, in WORLD BANK, ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS 1996, at 191 (Michael Bruno & Boris Pleskovic eds., 1997).

for amending the.<sup>285</sup>

At the same time, the kind of foreground and background norms that the state supplies are mediated and negotiated by informal norms supplied by other economic actors.<sup>286</sup> The upshot is that, unless every state supplies some exactly specified foreground and background norms, the resultant Market society would differ from state to state. Since there is no agreed content or benchmarks on what the “Market” does or does not consist of, each state would likely have its own brand of the Market. This, in turn, means that it is not possible to aggregate what a “Market” society means and then prescribe that formula to transition economies.

Additionally, this post-1980 reliance on categories of the law that it treats as unproblematic creates another conceptual difficulty. Since legal categories and institutions are deemed to be neutral and objective, they therefore define the endowment set as infeasible. However, it turns out, as demonstrated above, that neither property nor contract is a natural given. So it turns out that this conception of the market suspends inquiry into the role of the state at the point at which contract and property are defined. Asking the prior question, however, reopens the whole issue of how we should define property and contract. Asking these prior questions ineluctably destabilizes the conception that property and contract are secure and stable. Besides, even assuming a general agreement on the definition of property and rules of contract, this conception of the Market ignores the fact that both in adjudication and in social operationalization, property and rules of contract are constantly redefined.<sup>287</sup> If this is true, then it seriously challenges the notion of the fixed infeasible endowment.

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285. *See id.*

286. *See, e.g.,* Ngugi, *supra* note 282 (demonstrating that, at times, economic actors organize, invent, and mobilize competing norms to frustrate the complete operation of the formal institutions).

287. *See* Kennedy, *supra* note 18, at 951-52; Robert Gordon, *The Elusive Transformation*, 6 *YALE J.L. & HUMAN.* 137, 141 (1994). *See also* chapter three of Joel Ngugi, *Searching for the Market Criterion* (2002) (S.J.D. dissertation, Harvard Law School) (on file with author), for a case study of Kenya land registration regimes and how property in land is redefined in application of the formal laws.

D. *The Post-1980 Model Assumes that the “Market” as a Concept Has an Agreed Content*

The argument here is that, in the guise of enunciating the new global “Market consensus,” a political agenda is enacted “for managing, maintaining and coordinating the functions of governments and their national interests at the international level.”<sup>288</sup> In this agenda, economics, through a highly idiosyncratic list of what “Market consensus” entails, becomes an instrument for attainment of politically chosen goals—but by displacing politics not by recognizing that it (economics) is the “indispensable servant of the sociopolitical order to which it ministers.”<sup>289</sup> It displaces politics by comprehending the “Market consensus,” a significantly social and political phenomenon, in strictly economic terms that only calls for political governance through legal innovation.

As I argue elsewhere, this “displacement” of politics is both contradictory and dangerous.<sup>290</sup> It is dangerous because, on analysis, it turns out that politics is not actually “displaced” by economic (read efficiency) concerns, but is only “managed” or “contained” in a way that renders only specific, desired political outcomes.<sup>291</sup> It is contradictory because this “displacement” takes an entirely different mode and function in developing countries than in the developed West.<sup>292</sup> The apparent contradiction is resolved through an ambiguous usage of the legal institution of rule of law.

The lack of an agreed definition or content of “Markets” and the “Market consensus” is not just semantic inelegance. It enables a theoretically innocuous move from the description of the “key aspects” of the “Market consensus” to a set of institutions that mark the direction of the movement of developing or transition economies to the Market economy.

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288. Minda, *supra* note 259, at 154.

289. ROBERT HEILBRONER & WILLIAMS MILBURG, *THE CRISIS OF VISION IN MODERN ECONOMIC THOUGHT* 127 (1995).

290. Ngugi, *supra* note 133, at 543-47 (arguing that IFIs use the Rule of Law Projects to foreclose the possibility of multiple, participatory, and competitive politics in the name of economic efficiency).

291. *See id.*

292. *See id.*

It is usually stated, for example, in terms of “reducing the economic roles of government in providing social welfare, in managing economic activity at the aggregate and sectoral levels, and in regulating international commerce.”<sup>293</sup> However, it is not clear to what extent the “reduction” must be done to meet the “Market consensus” standards. At the same time, these institutions are themselves fluid in two senses. First, the way in which they are defined or applied in a particular setting structures the political economy of the reform depending on the specific context. Second, their lack of clear, specific content means that they can be applied in differing measures to different situations.

The criticism here, therefore, is that the Market is heterogeneous in character.<sup>294</sup> It can be instantiated in a great variety of ways. At the same time, however, advocates for a particular approach to the Market can claim that a “consensus” exists about the different characteristics of the Market by inventing or developing a vocabulary that shapes the meaning of the different aspects of the market to suit the “consensus.” Such a vocabulary both backgrounds and foregrounds certain issues in a particular way that results in the highlighting or erasing; contesting or un-contesting; putting on the table or removing off the table particular ideas, doubts, critiques, or aspects of the Market. This way of framing the meaning of the Market, therefore, institutionalizes and naturalizes the particular meaning as a “consensus.” It also has the effect of removing the concrete problems dealt with (e.g., the role and size of the government, what specific interventions to make, what exact form of property rights, etc.) from the contested political (or cultural) realms and recasting them in the “objective,” uncontested world of legal institutions.<sup>295</sup>

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293. ARTHUR MACÉWAN, *NEO-LIBERALISM OR DEMOCRACY? ECONOMIC STRATEGY, MARKETS, AND ALTERNATIVES FOR THE 21ST CENTURY* 4 (1999).

294. *See, e.g.*, Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943).

295. Arturo Escobar argued that the professionalization of development (i.e., the creation of a discipline called “development” and a profession called “development experts”) played this exact same role in the earlier period of development discourse. Arturo Escobar writes that:

The concept of professionalization refers mainly to the process that brings the Third World into the politics of expert knowledge and Western science in general. This is accomplished through a set of techniques, strategies, and disciplinary practices that organize the

E. *The Model Assumes a Determinate Link Between Legal Institutions and Economic Performance*

Even assuming that it were possible to contrive a formula that would correlate most efficiently legal institutions and economic performance, it would not be possible to determine which institutions or norms would both institute it and, at the same time, deliver the economic benefits espoused in such transitions. The reason for this can be stated in terms of the “legal-economic nexus.”<sup>296</sup> Economic actors, whenever it suits them, supply informal, parallel norms that negotiate and mediate the norms supplied by the government, whether formally or informally.<sup>297</sup> Since the economic benefits of the neo-liberal Market reforms are based on the ability to predict the economic consequences of the application of knowable rules, the provision of socially-generated, informal but effective norms thwarts this process.<sup>298</sup> They also put in doubt the determinacy of the legal consequences on economic performance. Economic actors use both the government and the Market system; both the formal and informal norms to modify the rule of law for personal gain. This means that property rights structures, and other economic rewarding systems in the society are in a “constant state of redefinition, expansion and contraction.”<sup>299</sup> It then follows that the determinacy on which neo-liberal reforms are based is highly problematic.

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generation, validation, and diffusion of development knowledge, including the academic disciplines, methods of research and teaching, criteria of expertise, and manifold professional practices; in other words, those mechanisms through which a politics of truth is created and maintained, through which certain forms of knowledge are given the status of truth.

ESCOBAR, *supra* note 62, at 45.

296. See Samuels, *supra* note 77, at 1557-58.

297. See, e.g., Ngugi, *supra* note 282 (demonstrating that arguments that posit a determinate set of consequences as flowing from a change in legal structure or legal institutions overestimate the determinacy of the economic consequences that flow from the legal institutions and that even when the posited economic consequences follow from enactment of specific legal rules or institutions, it is often not because of the natural implications of the legal regime or laws, but because of a particular, ideological interpretation assigned to the laws and rules).

298. See Ngugi, *supra* note 15, at 315-20.

299. Laurence S. Moss, *Government, Civil Society, and Property: Restraining the Legal-Economic Nexus*, in THE FUNDAMENTAL INTERRELATIONSHIPS BETWEEN GOVERNMENT AND POVERTY, *supra* note 259, at 177, 178.

Neo-liberalism is significantly based on the notion that there is a singular relationship between appropriate institutions and economic performance. Market prices, achieved by “getting prices right” through the removal of Market “distortions” are the mechanism for efficient exchange, and are the *ex post* outcome of the interaction between appropriate institutions and economic conditions.

However, the relationship between Market forces and formal (and informal) institutions are much more complex, indeterminate, and capable of unleashing unintended consequences than this Model accepts.<sup>300</sup> Jean Ensminger poignantly writes:

The underlying assumption is that institutions directly affect economic outcomes (distribution and growth), that individuals realize this, and that they attempt to change institutions to serve their ends more effectively, whether these ends be ideological or materialistic. The relative success of different actors in getting the institutions they want derives in part from their bargaining power in the pre-existing institutional structure. The outcomes of this process often have unintended consequences, and by no means need result in institutional arrangements that better serve the interests of society as a whole.<sup>301</sup>

Institutions are made up of formal rules, informal norms, and the enforcement characteristics of both, and it is the admixture of rules, norms, and enforcement characteristics that determines economic performance.<sup>302</sup> This points to the critique that a model that relies on a determinate link between legal institutions and the economy and social reality to produce economic development fails to account for the complex interrelationships between formal and informal institutions; economic and legal categories. As Warren

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300. See, e.g., Ngugi, *supra* note 15, at 315-20 (arguing that there is no necessary and determinate relationship between formal legal institutions and economic development and stating that, “[r]ather than a determinate socio-cultural sphere interacting with determinate formal legal institutions to produce determinate economic results, messy and contested socio-cultural practices interact with ideological and manipulative legal institutions to produce an indeterminate economic reality at the end of the process”).

301. JEAN ENSMINGER, MAKING A MARKET: THE INSTITUTIONAL TRANSFORMATION OF AN AFRICAN SOCIETY, at xiii (1991).

302. See Douglass C. North, *The New Institutional Economics and Third World Development*, in THE NEW INSTITUTIONAL ECONOMICS AND THIRD WORLD DEVELOPMENT, *supra* note 260, at 17.

Samuels reminds us, “both the market mechanism and the legal system, as well as the system of moral rules, are modes of social control and social change.”<sup>303</sup> To be realistic, the model of economic development must take account of both.

F. *The Post-1980 Conception of the Market Acts as Both an Analytical Tool and Justification for Policy Preferences*

The conception of the Market that came in vogue in the post-1980 period acts as both a justification and a prescription of policy preferences at the same time. This enables the concept to, at different times, empty itself of content and, at other times, fill itself with particular content. It can be at the same time a very general and rhetorical justification for a particular general economic policy and a detailed concrete proposal for a given programmatic endeavor. This means that it can be used to justify a wide variety of proposals at the same place in different times, or at the same time in different places.

The recent attack by Paul Krugman on U.S. orthodox economists presents a good example.<sup>304</sup> In his attack, Krugman accuses Washington policy makers and New York bankers of double-sidedness in prescribing economic solutions to the economic slowdown in the United States as compared to the developing world:

When it comes to the U.S. economy, everyone—including people who imagine that they have rejected Keynesianism in favor of some doctrine more congenial to the free market faithful—practice views the current slowdown in terms of the intellectual framework John Maynard Keynes created 65 years ago. In particular, everyone thinks that during a slump what we need is more spending.<sup>305</sup>

There is no doubt that the economic recovery plans advocated for the United States are based on the “Market model.” Government intervention is, however, urged to encourage more spending by cutting interest rates, lowering

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303. Samuels, *supra* note 271, at 450.

304. Paul Krugman, Op-Ed., *Other People’s Money*, N.Y. TIMES, July 18, 2001, at A23.

305. *Id.*

taxes, increase government spending, and so forth.<sup>306</sup> All these government actions in the Market are seen in the United States as correcting market imperfections.<sup>307</sup> The post-1980 conception of the Market does not seem to prohibit such an argument. This is despite the fact that this argument seems strikingly similar to arguments that the Third World countries raised in the early 1980s during the debt crisis in support of more regulation.<sup>308</sup> The Third World governments' arguments, however, were shot down by the Bretton Woods institutions—which forced them, instead to undertake severe austerity measures, cut down government spending especially in social spending and exchange rate reforms.<sup>309</sup>

Even more interesting is the fact that even now, using the same Market model and conception, orthodox economists who call for more spending to help the United States recover from the slowdown can, at the same time, call for the opposite strategy in Argentina and Japan:

But we—by which I mean both policy makers in Washington and bankers in New York—often seem to prescribe for other countries the kind of root-canal economics that we would never tolerate here in the U.S.A.

. . . [This includes] telling the Japanese that they cannot do what we do routinely, that is, print however much money it takes to get the economy moving again.

And then, of course, there is Argentina[,] . . . forced into drastic spending cuts that will further worsen that slump. It wouldn't be tolerated here—but bankers in New York tell the Argentines that they have no alternative.<sup>310</sup>

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306. *See id.*

307. *See id.*

308. *See supra* Part II.

309. For a discussion of the programming and effects of Structural Adjustment Programs, see U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *Economic, Social and Cultural Rights: Effects of Structural Adjustment Policies on the Full Enjoyment of Human Rights*, U.N. Doc. E/CN.4/1999/50 (Feb. 24, 1999) (prepared by Fantu Cheru). For effects of Structural Adjustment Programs in Africa, see generally BETWEEN LIBERALISATION AND OPPRESSION: THE POLITICS OF STRUCTURAL ADJUSTMENT IN AFRICA (Thandika Mkandawire & Adebayo Olukoshi eds., 1995).

310. Krugman, *supra* note 304, at A23.

G. *The Model of the Market is a Self-Validating Logic*

The model is hinged on social Darwinist beliefs about the necessity of intense competition.<sup>311</sup> It views the Market as the outcome of processes that, therefore, legitimizes its outcomes.<sup>312</sup> However, it becomes a self-validating logic in which the theory trumps evidence because the concept of the Market is, at the same time, used to identify and explain the losers and the winners in the process. Hence, the Market as a concept, aside from its analytical, descriptive, and prescriptive uses I pointed to above, is also used to “make sense of social entities by identifying and explaining differences between them.”<sup>313</sup>

Since the concept of the Market equates and explains the losing and the winning in terms of whether the loser or the winner conformed to the Market characteristics, or not—or put differently, whether she was adequately competitive, or not—it equates “winning” with “Market characteristics,” and “losing” with “un-market characteristics.”<sup>314</sup> The implication is four-fold. First, this equation enables all “winners” to be identified with “Market characteristics,” no matter how “un-market-like” they actually are. For example, large profits by large corporations raked through mergers, buy-outs, and other techniques aimed at creating monopolies, and therefore monopoly rents would be identified in this no-fault system as “winning.”<sup>315</sup> In this way, the “naturalism” of the Market is assured since it is inevitably identified with those who turn out on top.

Second, since those who lose are identified as being unable to conform to the Market or to compete adequately, it becomes possible to blame them for their “un-market-like” characteristics. The effect of this strand of argument is to erase the many inequalities that exist in the Market-place.<sup>316</sup> It also detracts from focusing on the socio-economic

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311. See Carrier, *supra* note 12, at 28.

312. See, e.g., INDIVIDUALISM AND ECONOMIC ORDER, *supra* note 146, at 19.

313. Carrier, *supra* note 12, at 28.

314. See *id.*

315. See *id.*

316. See generally James Thuo Gathii, *Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law*, 5 BUFF. HUM. RTS. L. REV. 107 (1999).

conditions (as reflected in existing legal arrangements) creating the unequal positions. Instead, it focuses on the end-result situation, using it to justify the socio-economic situation that produced it.

Third, such a view that identifies losers with “weak,” “unfit,” “deviant,” or “undesirable” characteristics that cannot survive market competition, also legitimates the existing social relations, and militates attempts to change them through progressive actions. James Carrier captures this pernicious use of the market:

For individuals, winners are autonomous, rational and calculating; losers are dependent, muddled and cannot defer gratification . . . . [As a result,] members of the dominated classes [the losers] are driven by necessity precisely because they lack the resources that enable members of the dominant classes, the winners, to distance themselves from their immediate situation . . . . Such a view not only justifies the success of the winners, it also motivates (or at least legitimates) policies that weaken the position of the individuals who are losers. Such policies include attacks on welfare, which is said to decrease the market fitness of the unemployed, those who have failed to find a buyer for their labour, by encouraging dependency and discouraging initiative, calculation and self-reliance . . . .<sup>317</sup>

Fourth, aside from blaming the “losers,” and justifying and legitimating the existing socio-economic relations, this view actually has an effect of validating itself. This is because, by identifying those who “lose” as “unfit” and “undesirable,” it seeks to put pressure on them to alter their behavior to conform more to the “Market.” As such, it acts as a disciplining tool as well. To the extent that it actually succeeds in effecting these behavioral changes in the individuals, firms, or groups, it actually becomes a self-validating logic—a self-fulfilling model.<sup>318</sup> It is actually self-fulfilling in two senses. First, by equating the “winners” with Market characteristics, it ensures that the “moral superiority” of the Market as a postulate always trumps over any evidence to the contrary. Second, by disciplining the society to adhere to the “Market” by pressuring “losers”

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317. Carrier, *supra* note 12, at 28-29 (citation omitted).

318. See James Thuo Gathii, *Retelling Good Governance Narratives on Africa's Economic and Political Predicaments: Continuities and Discontinuities in Legal Outcomes Between Markets and States*, 45 VILL. L. REV. 971 (2000).

to adhere to the Market forces rather than seek to challenge its oppressive results, it helps to actually reconfigure power relations, and redistribute wealth in ways that correspond to its image of the world.

A good example of this phenomenon in practice is in the good governance projects of international development agencies in sub-Saharan Africa. As James Gathii argues, “[a]n important premise of the good governance agenda seems to be that economic regulation in favor of social justice is a perverse incentive that encourages lazy citizenry and rundown economies.”<sup>319</sup> Since the regulatory controls targeted are those aimed at achieving social justice and more egalitarian distribution of resources, the good governance projects associate these egalitarian aspects of regulation with “pervasion.” This is because such programs are aimed at assisting those who “lose” out in the market. Therefore, “[g]ood governance accounts spin out narratives of individual responsibility to replace what they argue to be the dependent mentality of Sub-Saharan African citizens.”<sup>320</sup>

In an earlier era, what is now known as “The Gilded Age,” a similar style of reasoning—also known as Social Darwinism interpreted using a conservative lens—was used to justify the extremes of poverty and wealth in the United States and attack social welfare legislation, and contract interpretation that took the concept of freedom of contract to the extreme.<sup>321</sup> The argument was formulated along Herbert Spencer’s famous aphorism: survival for the fittest.<sup>322</sup> It was an attempt to apply Darwin’s theories of natural selection to the social sphere.<sup>323</sup> The economic elites

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319. *Id.* at 972.

320. *Id.*

321. See generally HERBERT SPENCER, *THE MAN VERSUS THE STATE* (Caxton Printers 1954) (1892); HERBERT SPENCER, *THE PROPER SPHERE OF GOVERNMENT* (1843). For a good historical account of this period, see ATIYAH, *supra* note 25; 2 GEORGE BROWN TINDALL, *AMERICA: A NARRATIVE HISTORY* 780-836 (1984).

322. 1 HERBERT SPENCER, *THE PRINCIPLES OF SOCIOLOGY* 50 (1906).

323. Troy Duster, *Lessons From History: Why Race and Ethnicity Have Played a Major Role in Biomedical Research*, 34 J.L. MED. & ETHICS 487, 490 (2006) (“Herbert Spencer was not focusing his ideas on the animal kingdom, but on social life, human behavior, and evolutionary differences among humans.”); see also Chantal Thomas, *Globalization and the Reproduction of Hierarchy*, 33 U.C. DAVIS L. REV. 1451, 1452-53 (2000) (discussing the policy implications of laissez-fairism on the governmental response to the casualties of globalization).

of the time, mainly industrialists, used Spencer's argument about survival for the fittest to provide justification for the argument that their accumulation of wealth was in fact the result of an inviolable natural law leading (eventually) to greater good for all.<sup>324</sup> Any attempt to interfere with or mitigate its results, using social welfare legislation, they warned, could only prevent society from advancing. Thus, they were hostile toward the expansion of the welfare state since this would only create conditions in which the "unfit" would be artificially maintained longer than they would survive naturally:

Those who were fittest, that is, toughest, most able, most enterprising, would survive; the weak would, if not physically perish, assuredly fail. This was an inexorable scientific process. Nothing the government or anyone else could do would arrest it in the long run; but for the government to interfere with the process would be disastrous in the short run for it would ensure a longer period of survival of the unfit.<sup>325</sup>

Kenneth Galbraith wrote of this argument:

Such was the service of economics to early capitalism. And such service has continued. Toward the end of the last century, in what has now come down to us as the Gilded Age, Herbert Spencer avowed the economic and social doctrine of the survival of the fittest—it is to him and not to Darwin that we owe those words. Though British, Spencer was a figure of heroic proportions in the United States, as were his disciples. His most distinguished acolyte, William Graham Sumner of Yale, served the gilded constituency in remarkable explicit language: "The millionaires are a product of natural selection . . . They may fairly be regarded as the naturally selected agents of society for certain work. They get high wages and live in luxury, but the bargain is a good one for

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324. See Owen D. Jones & Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 COLUM. L. REV. 405, 493 (2005) ("In Spencer's hands, Darwin's biology was warped and twisted to serve as justification for Gilded Age capitalism and individualism. It was for this reason that Spencer's ideas became immensely popular among United States industrialists, such as John D. Rockefeller and Andrew Carnegie. Darwin was invoked to buttress an already existing conservative outlook—that nature would ensure that the best competitors would win competitive situations—and to give the supposed force of natural law to an already rampant class struggle.") (footnotes omitted).

325. SPENCER, THE PROPER SPHERE OF GOVERNMENT, *supra* note 321, at 285.

society.”<sup>326</sup>

#### VIII. SHIFTS IN THE MEANING OF THE MARKET AND THE RETURN OF *LOCHNERISM* IN DEVELOPMENT DISCOURSE

So far, this Article has demonstrated how the pre-1980 notions of the role of the state and the meaning of the Market were constructed in the development discourse. The Article traced the antecedents of the notions of the “developmental state” in the Third World that supported strategic regimes such as import substitution industrialization.<sup>327</sup> The notion of the “developmental state” registered the claim or assumption that the predominant objective of governments in the Third World was development, “involving particularly a change in the quality and quantity of resources such that the productivity of human effort is raised.”<sup>328</sup> Since this change required the orientation of allocation of resources around structural change, a more pervasive role for the state in the economy than that traditionally assumed by neo-classical economists was envisaged.<sup>329</sup>

However, in the post-1980 period, the importance of structural orientation of allocation of resources as the justification of departure from traditional neo-classical theorization about the workings of the Market, was overshadowed by the more “purist” form of free trade.<sup>330</sup> This “purist” version emphasizes the neo-classical assumption that the most beneficial international exchange of commodities occurs between private individuals or firms of different countries operating in an atmosphere of free private competitive enterprise. This implies no government interference, economically rational behavior, a perfectly, or near-perfectly, competitive market for each market and

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326. JOHN KENNETH GALBRAITH, *THE CULTURE OF CONTENTMENT* 80–81 (1992) (footnote omitted).

327. *See supra* Part II.

328. George Powell, *Use of Commercial Policies for Purposes of Economic Development with Respect to Selected Underdeveloped Countries* 8 (1961) (unpublished Ph.D. thesis, University of Illinois) (on file with author).

329. *See id.*

330. *See supra* Part III.

factor of production, and so forth.<sup>331</sup> However, these assumptions and/or requirements of “free trade” in this “purist” version are no more satisfied today in the Third World as they were in the pre-1980 period. However, by using key aspects in the debate like privatization, the development discourse was able to change its focus from those aspects that made necessary the notion of the “developmental state.”

We could rethink the shift that took place around 1980 in terms of drawing and redrawing an axis between the Market and the state. The Article demonstrated that the meaning of the Market, and the construction of the role of the state vis-à-vis that of the Market in the economy are facilitated by shifting this axis.

In a way, students of legal ideas and globalization would be quick to associate the two meanings of the Market (in the pre- and post-1980 periods) with two dominant ideas that dominated legal theory in the period from 1850 to 1900 and 1900-1950 respectively.<sup>332</sup> If one thinks of the meanings of the Market as supported by particular legal ideals, theories, concepts, techniques, legal instruments, and global images, the pre- and post-1980 meanings of the Market as sketched out in this Article roughly correspond with the two dominant ideas in these two periods. These two ideas are the Classical Legal Thought (CLT) in the former period and the anti-formal and social ideas about law in the latter period.

Classical legal thought was characterized by a rhetoric that viewed the law as coming from a transcendent source, as if it existed apart from the courts and legislatures that formulate its rules. This rhetoric described private legal rights and obligations as self-defining and self-executing: courts had only to apply a body of determinate rules to a private legal dispute.<sup>333</sup>

In this conception, therefore, “the job of the state was to define rights (expansively), allow contracts of adhesion, and

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331. *See supra* Part III.

332. This periodization is Duncan Kennedy's. Kennedy, *Two Globalizations*, *supra* note 184.

333. Herbert Hovenkamp, University of Iowa Ben V. and Dorothy Willie Distinguished Professor of Law, A Presidential Lecture: The Mind and Heart of Progressive Legal Thought (1995), available at <http://sdrclib.uiowa.edu/preslectures/hovenkamp95/hovenkamp1.html>.

then get out of the picture, secure in the knowledge that it was not regulating.”<sup>334</sup> The outcome of this conception of the law was the exaltation of private ordering—private bargaining in unregulated markets. In the resolution of a private legal dispute, such as a contract case or a disagreement about ownership of property, the state was regarded not as “policy maker” but only as arbitrator of preexisting rights.<sup>335</sup>

Since CLT assumed that the law was apolitical, determinate, objective, and neutral, it retained a conception of law as static, or permanent.<sup>336</sup> Rules had to be applied to new situations, but they seldom needed to be rewritten. This was despite the fact that the nineteenth century was a period of rapid economic and social change. In this way, CLT provided rationale that ensured legitimacy of the extant distribution of society’s resources.<sup>337</sup>

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334. James Boyle, *A Non-Delegation Doctrine for the Digital Age*, 50 DUKE L.J. 5, 16 (2000).

335. CLT did, of course, concede that at times law was obviously tied to state policy making. The response to this was for CLT to conceptually distinguish between “private” law and “public” law. In this enterprise, CLT borrowed from William Blackstone, the important eighteenth-century writer on the common law, a sharp distinction between private law and public law. In private law the state administered independently established rules, but in public law it made the rules. *See generally* DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT 1850-1940* (1998); Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 BUFF. L. REV. 205 (1979). Prof. Kennedy’s central argument is that CLT divided the world into contrasting power-pairs, such as public/private and federal/state, with highly determinate interrelationships, and that a court’s decision to locate a litigant within one half of a power-pair or the other determines the outcome of cases.

336. *See, e.g.*, Jay M. Feinman, *Un-Making Law: The Classical Revival In The Common Law*, 28 SEATTLE U. L. REV. 1, 2 (2004) (“At the end of the Nineteenth Century, classical legal thought envisioned a highly systematic body of law through which courts could mechanically apply abstract legal concepts to reach determinate results, producing limited liability in contract and tort law and expansive property rights.”); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 5 (1984) (“Those of us associated with Critical Legal Studies believe that law is not apolitical and objective: Lawyers, judges, and scholars make highly controversial political choices, but use the ideology of legal reasoning to make our institutions appear natural and our rules appear neutral.”).

337. The most illustrative example given in this regard is Langdell’s first case book on contract. In it, Langdell presented legal rules as absolutely ahistorical. He presented contract law as an essentially timeless enterprise. There is no explicit acknowledgement that the law tracked economic or political policy or doctrine; indeed, there was little acknowledgement that the law

“Both judges and legal scholars formulated the taxonomic categories based on previous legal precedents and then applied these categories, without much explanation or interpretation, to resolve new disputes. Classical legal thinkers did not explore the ways in which human nature influenced the construction of the taxonomies they drew.”<sup>338</sup> Thus, the political orientation that CLT shared

was libertarian, committed to a rather minimal state that left as much scope as possible for citizens to exercise their individual liberty in the marketplace, where they could bargain, contract, and exchange. Libertarianism, like other political philosophies, has at least an implicit conception of human nature, as evidenced by its commitments to ownership and exchange, the activities it takes to be distinctively human and centrally important to human welfare.<sup>339</sup>

This is what heralded the rise of *Lochnerism* in the United States. Under CLT, therefore, a social legislation enacting maximum-hours law for bakers could be invalidated on the grounds that it unconstitutionally interfered with the freedom of contract.<sup>340</sup> The CLT was heavily influenced by German ideas about law, and the desire by legal jurists to elevate the law to the status of a natural science.<sup>341</sup>

However, as Morton Horwitz argues, the centralization of the American economy—with the accompanying problems of urbanization, immigration, industrialism, and polarization of economic classes—led to a gradual reexamination of

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changed at all over time. C. C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1871).

338. Heidi Li Feldman, *Foreword: Law, Psychology, and the Emotions*, 74 CHI.-KENT L. REV. 1423, 1424 (2000).

339. *Id.* at 1425.

340. *Lochner v. New York*, 198 U.S. 45 (1905). Steinfeld wrote that the right of men to contract for labor superseded land ownership as a defining element of political citizenship. By the end of the nineteenth century a linguistic turn-about had occurred. Many men and the businesses they owned not only claimed that the right to contract for labor was a sine qua non of political citizenship, but that the right to contract was also central to the meaning of property itself. Interference with the right to contract became a vehicle for arguing that the Constitution's provision barring governments from depriving persons of property without due process of law was violated. In short, the right to contract for labor itself came to be thought of as property. Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335 (1989).

341. See Kennedy, *Two Globalizations*, *supra* note 184, at 638-41.

Classical Legal Thought, particularly the bias in legal orthodoxy against redistribution of wealth.<sup>342</sup> Horwitz describes how economic and, ultimately, social changes brought about by the First World War put irresistible pressure on courts and legal scholars to bring jurisprudential thought into closer touch with America's rapidly changing society.<sup>343</sup>

According to Duncan Kennedy, the legal thought that staged the eventually fatal attack on the CLT, derived its inspiration from French legal writers like Saleilles, Duguit, Geny, and Lambert.<sup>344</sup> This school of thought was "anti-formalist" in opposition to the formal, taxonomic deductive logic of CLT, and "social" in opposition to the highly individualistic focus of CLT.<sup>345</sup> As opposed to the singular, hierarchical formalist ideal of the law in the CLT, the anti-formalist ideas were that in every legal system there is a plurality of normative orders—and that the law ought to evolve to reflect the increasing and inevitable interdependencies between much less individualistic, much more social and altruistic elements. The conclusion is then that the law ought to reflect the social functions of the legal order.<sup>346</sup>

Since this vision of the legal system questioned the "exaltation of the private ordering" it became emblematic with its distrust of the Market, and its faith that the government agency, whose salaried officials did not profit from their decisions, could regulate the economy better.<sup>347</sup> In the United States, for example, supporters of this school of thought supported the New Deal, which, by definition, was erecting the modern administrative state in order to remove great parts of the economy from free market control.<sup>348</sup> By privileging the "social," the anti-formalists also hoped to subordinate concerns for the efficient use of resources to other "social" values such as egalitarianism and redistribution. In the United States and other Northern

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342. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1977).

343. *Id.*

344. Kennedy, *Two Globalizations*, *supra* note 184, at 648-49.

345. *See id.* at 648-51.

346. *See id.* at 651-52.

347. *See id.* at 637-40.

348. *See id.*

countries, one may plausibly say that this mode of thinking remained in vogue effectively until the early 1980s.<sup>349</sup>

As would probably be clear by now, the meaning of the Market associated with the post-1980 “Market-oriented” reforms in the development discourse tallies closely with the conception of the economic image of CLT in many material respects. At the same time, the idea of the Market which prevailed in the development discourse in the pre-1980 period involved the legal ideal of solidarity, plural legal systems that take account of plural legal orders, and the privileging the social functions of the Market as a measure to avoid socially irrational markets.<sup>350</sup>

It would therefore appear that the idea of the Market in the pre-1980 development discourse roughly corresponds with ideas about the “social” that are associated with the French anti-formalist school.<sup>351</sup> The dominant mode of legal thought that this method uses is a combination of a critique of deduction and a severe critique of the excessive individualism of CLT coupled with an anti-formalist ideal of the “social” in regulating the marketplace.<sup>352</sup> What we can argue from this striking correspondence of ideas is that whereas these ideas of the anti-formalist “social” conception of law lost its dominance in legal theory in the 1950s—and was replaced by the American “pragmatic” ideal<sup>353</sup>—its influence continued to be important to the development discourse and the construction of the Market in development discourse until around 1980.<sup>354</sup> Hence, as legal theorists would notice here, the influence of the French anti-formalists and their notion of the “social” conception of law,

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349. However, Duncan Kennedy argues that a “third” wave of globalization started in the 1950s and is still under way. It is marked by pragmatism as opposed to anti-formalism. *Id.* at 675-78.

350. Witness, for example, the arguments about “cultural rigidities” that justified more pervasive state role in the economy in developing countries. *See supra* Part VI. The argument here was that due to “cultural rigidities” markets, if left alone, are likely to produce socially irrational outcomes.

351. *See generally* Kennedy, *Two Globalizations*, *supra* note 184.

352. *See id.*

353. *See id.* at 671-78 (describing the critiques of the “social” conceptions of law, and its ultimate replacement circa 1950 by a new wave of globalization that defined itself less by legal consciousness, and more by pragmatic legal reforms).

354. *See supra* Part III.

legal institutions, and Market regulation dominated thinking in development discourse well beyond the “sell-by” date that it is given by most legal theorists.<sup>355</sup> Most legal theorists put the date 1950 as the year marking the end of the dominance of the French anti-formalist ideas.<sup>356</sup>

In the post-1980 period, however, what took over the discourse framing the meaning of the Market in the development discourse, was not the “pragmatic” ideal that in the legal field took over from the French anti-formalist “social” ideal in the 1950s.<sup>357</sup> Instead, in the development discourse, at least the discourse framing the definition of the Market, there was a stunning reemergence of CLT that dominated the legal field in the period between 1850 and 1950. So, like in the CLT period, once again, in the post-1980 period, the ideas that became important in the definition of the Market and the framing of the Market discourse were (i) the legal ideal of freedom; (ii) the reemergence of the individual and autonomy as the central concept in economic relations; and (iii) the “Free market” as the economic ideal-image.

As noted above, in legal thought generally, the anti-formalist “social” ideal was replaced by the essentially American “pragmatic” ideal that comprehended the pragmatically regulated market as its economic image.<sup>358</sup> However, in the post-1980 Market discourse in development studies, the debates very much returned to the more classical view emphasizing the efficiency and robustness of private markets, and the many imperfections of public processes.<sup>359</sup> At the same time, however, these “core” ideas of CLT are supplemented by highly sophisticated ideas that are borrowed from the successor of the anti-formalist “social” ideal namely, the “pragmatic” ideas that have been ascendant in legal theory in the period after 1950. As Duncan Kennedy has shown, the three “core” ideas of CLT that have reemerged in the framing discourse that defines the meaning of the Market in the development discourse,

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355. See Kennedy, *Two Globalizations*, *supra* note 184, at 671-78 (putting the decline of the influence of the “social” as starting around 1950).

356. See, e.g., *id.*

357. See *id.*

358. See *supra* note 350 and accompanying text.

359. See *supra* Part IV.

are supplemented by the following ideas that are dominant in the present “pragmatic” mode of theorization: (i) the idea of rights-bearing individual (as opposed to the diadic private relationship of the CLT);<sup>360</sup> (ii) the legal technique of balancing of conflicting considerations;<sup>361</sup> and (iii) the legal agency of the judge and activist civil society.<sup>362</sup>

This combination of the “core” elements of CLT with these aspects of the “pragmatic” ideal are extremely crucial for the success of the particular construction of the Market that emerged in the post-1980 period as chronicled in this Article. This is because in retaining the “core” elements of CLT, this conflation successfully creates the “foundational” image that the absence of government interference in the private sector can succeed in being neutral between competing conceptions of the public good. The effect is that it destabilizes arguments that are routinely staged as either on the left (redistributive) side or the right (status quo). This is because it retains the basic elements of the ideal CLT conceptions of the economy and legal institutions. This post-1980 Market discourse then combines these retained CLT core with sophisticated, pragmatic “realistic” and, at times seeming progressive ideas about the individual and the society and the idea of rights that at once gives the emancipatory illusion and the social promise of collective prosperity. In this scenario, it became difficult for those in the left who had held on to the ideas of the French anti-formalists galvanized around the idea of the “social” to respond to the arguments centered on the definition of the Market churned out by the right and their framing of the discourse that now defines the Market and directs the policies of international financial institutions.

The CLT is more wedded to the idea of “free market” as the unregulated sphere—masking the fact that the state plays a crucial role in establishing the Market.<sup>363</sup> On the other hand, the pragmatic mode relies on the notion that one needs to “draw[ ] on a range of different disciplines and methods in an intuitive effort to solve problems and

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360. Kennedy, *Two Globalizations*, *supra* note 184, at 632.

361. *Id.*

362. *Id.*

363. *See supra* Part VIII.

exercise good judgment.”<sup>364</sup> The difficulty is that the retention (or resurrection) of the ideal-representation of the Free Market economic ideal in the meaning of the Market is combined with the major pragmatic intuition that “doing law” is a “practical matter of balancing, negotiating and managing competing political visions, ideals and outcomes.”<sup>365</sup> Since the “core” of CLT as outlined above in the form of retention of ideal-representation of the Market continues to direct the definition of the Market and the prescriptions for its establishment and operationalization, the exercise of balancing, negotiating and managing competing political visions, ideals and outcomes come as one that is already seriously circumscribed. This is because, as aforesaid, the basic “core” of the CLT ideal of the Free Market as the economic image is retained and directs the balancing act in the “pragmatic” ideal of the current era.

There are two things that we can carry away from this pre-1980 Market conception/anti-formalist “social” and post-1980 Market conception/CLT discussion. First, the practical and sobering message is the realization that from the ideas and strategies of the “free marketers” in the post-1980 period in organizing their support for the idea if the “market” in the development discourse involves a combination of the “core” ideals and ideas of CLT with the more sophisticated, pragmatic ideas of the present “pragmatic” moment. By combining ideal-type representations and evaluative descriptions of the Market (derived from CLT) with evaluative prescriptions of its operationalization (based on the dominant “pragmatic” ideal), it becomes difficult to contest their major points effectively. Hence, most critiques either focus merely on de-centering the ideal-type representation of the market or displacing the evaluative policy prescriptions of the model, leaving an altogether unconvincing critique of the definition of the market. The tendency is then to dismiss such critiques of the Market conception as either naïve, utopian or mistaken.

The second message we can take away from this discussion is the theoretical point that the “pragmatic” moment has never quite arrived in the development

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364. David Kennedy, *The Methods and the Politics*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 345, 347 (Pierre Legrand & Roderick Munday eds., 2003).

365. *Id.* at 348.

discourse. The discourse is dominated by a mode of thought that combines CLT ideas with the “pragmatic” ideal strategically in mobilizing the meaning of the Market that is preferred. It is not clear what the exact impact this theoretical insight would have—but it is easy to imagine that it would influence critics of the ideas of “free markets” in the ways that they organize their materials and arguments about the definition and operationalization of the Market in the development discourse.

### CONCLUSION

Market economies exist in a state of perpetual tension between the freedoms conferred by the private ownership of productive property and the need to impose communal limits on the exercise of those freedoms. This Article has demonstrated that regulation and intervention is a feature of all economies whether they rely on market capitalism or central planning to allocate resources. Therefore, contrary to the popular representation in the development discourse, regulation is not antithetical to capitalism; it is the hallmark of capitalism:

The impulse to acquisition has in itself nothing to do with capitalism . . . . Capitalism may even be identical with the restraint, or at least a rational tempering, of this irrational impulse . . . . The universal reign of absolute unscrupulousness in the pursuit of selfish interests has been a specific characteristic of precisely those countries whose bourgeois-capitalistic development . . . has remained backward.<sup>366</sup>

Yet regulation is, by definition, a power struggle. Various economic actors either lose or gain constantly according to the shifts in market conditions and competitive pressures. The role of the government in regulating—in choosing the framework and instruments of regulation—determines the winners and losers. It also determines the particular responses that individual firms take. But, to describe the general framework chosen or the specific regulation elected as “Market-oriented” or “central-

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366. Michael Moran, *Investor Protection and the Culture of Capitalism*, in *CAPITALISM, CULTURE, AND ECONOMIC REGULATION* 49, 50 (Leigh Hancker & Michael Moran eds., 1989) (citing MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 17, 57 (Talcott Parsons trans., Routledge 1985) (1930) (footnote omitted)).

planning” is a function, not of the governmental activity *per se*, but of the framing discourse in sway at a given time. As the discourse changes, the content of a given paradigm changes and the meaning shifts. This makes such paradigms not just on-going descriptions of concrete goings-on in the society, but a normative intellectual exercise aimed at devising prescriptions as well. As a concept, thus, the Market represents a great variety of specific approaches about the relationship between various participants in the market place—even whether some are legitimate actors or not.<sup>367</sup>

The fact that the concept of the “Market” can be both descriptive and evaluative makes the concept “user-friendly.” It can mean different things to different people at different times. Yet, it turns out that this plasticity of the Market has been extremely useful for the neo-liberal logic. The bridge between the meaning and content of the market and the concrete proposals of how to effectuate it under neo-liberalism, is filled by legal institutions.<sup>368</sup> These legal institutions, imbued by “objective” and “neutral” standards, eventually become both the means and the end of the reform.<sup>369</sup>

Hence, while the market has no agreed definition or content, it reproduces the dilemma in development discourse generally. The open-endedness of the market makes it inescapably normative—with different possible meanings, each with even more ramifications at different times. The real danger in all these is that the difference between means and ends can be obfuscated or obliterated—making the discourse self-referential. In this way, both neo-liberalism and developmentalism merely reproduce the strategy and results of Cartesian rationality. The same rationality lies at the heart of modernization. The rationality reveals the *telos* of development—a logic that simultaneously lures everyone “forward” (by the confidence of its ability to deliver superior results universally)—while transmuting all alternative visions rooted in local knowledge as going “backwards.”<sup>370</sup>

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367. See generally DAVID E. APTER, *RETHINKING DEVELOPMENT: MODERNIZATION, DEPENDENCY, AND POSTMODERN POLITICS* (1987).

368. See Ngugi, *supra* note 133.

369. See *id.*

370. Frédérique Apffel-Marglin, *Introduction: Rationality and the World*, in *DECOLONIZING KNOWLEDGE: FROM DEVELOPMENT TO DIALOGUE* 1, 2 (Frédérique Apffel-Marglin & Stephen A. Marglin eds., 1999).