

The Legal Turn in Late Development Theory:  
The Rule of Law and the World Bank's  
Development Model

---

Tor Krever

TABLE OF CONTENTS

INTRODUCTION.....	288
I. THE WORLD BANK AS AN INTELLECTUAL ACTOR.....	291
II. FROM MODERNIZATION THEORY TO STRUCTURAL ADJUSTMENT: ORIGINS OF THE WORLD BANK'S USE OF THE RULE OF LAW .....	294
A. <i>The Law and Development movement</i> .....	294
B. <i>Structural adjustment and neoliberalism</i> .....	296
C. <i>Challenges to the neoliberal model</i> .....	299
III. RESPONDING TO CHALLENGE: THE NEW INSTITUTIONAL ECONOMICS AND "GOOD GOVERNANCE" .....	302
A. <i>The New Institutional Economics</i> .....	302
B. <i>The emergence of "governance"</i> .....	304
IV. RULE OF LAW OR RULE OF MARKET: THE WORLD BANK'S INSTRUMENTALIZATION OF THE RULE OF LAW .....	307
A. <i>A cherished creed</i> .....	307
B. <i>The rule of law and economic development</i> .....	311
V. IMPLICATIONS .....	315
VI. CONCLUSION.....	319

# The Legal Turn in Late Development Theory: The Rule of Law and the World Bank's Development Model

Tor Krevier\*

*Long cherished by liberal political philosophers, today the rule of law is increasingly viewed as a necessary requirement, or even silver bullet, for economic development. The past decade has seen the rise of a veritable industry—multilateral development banks, government development agencies, and nongovernmental aid organizations—committed to promoting the rule of law through legal and judicial reform in developing countries. This Article considers the emergence of a new rule of law orthodoxy within contemporary development theory and, in particular, the World Bank's development model. It asks how and why the Bank has embraced the rule of law discourse, and offers a brief genealogy of the rule of law within the Bank's theorizing. It argues that the Bank's interest in law was primarily a response to the critique and failure of its neoliberal policies and identifies the new discourse's affinities with the rise of New Institutional Economics and "good governance" in the 1990s. Under the Bank's view, the law's value for economic development lies in its ability to provide a stable investment environment and the predictability necessary for markets to operate. The role of law is reduced to the facilitation of utility maximizing exchange and optimal market allocation, a view that informs many of the Bank's specific law reform projects. More a rhetorical shift than a fundamental break in development theorizing, the Bank's turn to law actually undergirds many continued neoliberal assumptions and masks a continuation of neoliberalism's core tenets. The new discourse is attractive precisely because it provides strong ideological support for the neoliberal agenda.*

## INTRODUCTION

Long valued as a safeguard against arbitrary governance, the rule of law, embodying impersonal application of principles and laws by judicial and political decisionmakers, has become a central focus of contemporary political discourse. In recent years, the rule of law has increasingly been invoked to justify everything from military invasion<sup>1</sup> to coups d'état.<sup>2</sup> Of signal im-

\* J.D. Candidate, Harvard Law School; LL.M. Candidate, University of Cambridge Faculty of Law. I am grateful to Teresa Cravo, Christine Desan, Rick Krevier, Sven Beckert, Paul Dumaine, Alan Cliff, Charline Yim, and Michael Gibaldi, who provided careful comments on earlier drafts, not all of which I have been able to incorporate. I have also benefited from conversations with David Kennedy, Bill Alford, Duncan Kennedy, Roberto Vidal López, Juan Felipe García Arboleda, Adriana Medina Carrillo, Was Yaqoob, and members of the Workshop on the Political Economy of Modern Capitalism at Harvard University. All errors remain my own.

1. In Iraq, the rule of law provided an *ex post facto* legitimation of the U.S. and British military occupation. For instance, in a speech on January 10, 2007, almost four years after first declaring victory, George W. Bush opined that "victory in Iraq will bring something new in the Arab world—a functioning democracy that polices its territory, upholds the rule of law, respects fundamental human liberties, and answers to its people." George W. Bush, 43d President of the U.S., President's Address to the Nation (Jan. 10, 2007, 9:01 PM), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2007/01/20070110-7.html>.

portance is its emergence as a priority for the international development community. The past decade has seen the rise of a veritable industry—multilateral development banks, government development agencies, and non-governmental aid organizations—committed to promoting the rule of law through legal and judicial reform in developing countries. A rule of law department is de rigueur at any self-respecting NGO or development agency; the International Bar Association's International Rule of Law Directory lists 1317 organizations providing rule of law reform assistance.<sup>3</sup>

The blossoming of rule of law reform initiatives—and the concomitant flow of resources to support them—rests on a parallel transformation of mainstream development theory, for it is this new theoretical discourse that ultimately provides the rationale and legitimation for the praxis of the development community. On the intellectual plane, a new orthodoxy has taken shape under the banner of “institutional development” or “good governance.” Mainstream economists and policymakers alike now proclaim a “post-Washington Consensus,” or what Dani Rodrik has called an “Augmented Washington Consensus.”<sup>4</sup> The rule of law and the collection of legal institutions gathered under this epithet are central to the new discourse. While the old development model held that the path to growth and prosperity lay in the construction of efficient markets, the new orthodoxy stresses that such markets are themselves dependent on the rule of law.

Under the view of mainstream commentators, the new attention awarded to the rule of law is an organic result of intellectual inquiry and marks a

2. Following the military ouster of Honduran president Manuel Zelaya on June 28, 2009, a vocal coterie of right-wing publicists in the United States quickly set about explaining that this was, in fact, not a coup. The deposition of the country's democratically elected president, one Honduran lawyer informed U.S. readers, was “nothing short of the triumph of the rule of law.” Octavio Sánchez, *A ‘Coup’ in Honduras? Nonsense*, CHRISTIAN SCI. MONITOR, July 2, 2009, at 9, available at <http://www.csmonitor.com/Commentary/Opinion/2009/0702/p09s03-coop.html>; see also Miguel A. Estrada, *Honduras’ Non-coup*, L.A. TIMES, July 10, 2009, at A29, available at <http://articles.latimes.com/2009/jul/10/opinion/oe-est-rada10>. The military's own legal adviser, Colonel Herbeth Bayardo Inestroza, has acknowledged that, in authorizing the kidnapping and forced transport of Zelaya to Costa Rica, the military had acted illegally and circumvented laws. Frances Robles, *Top Honduran Military Lawyer: We Broke the Law*, HONDURAS FORUM MESSAGE BOARD (July 3, 2009, 9:57 AM), <http://honduras.com/catracho-forum/viewtopic.php?t=29847&sid=5215203e7a67f0c303cd29588755d05d>. For a discussion of the Honduran coup and its historical context—bloody and bearing the stamp of repeated U.S. machinations—see John Perry, *In Tegucigalpa*, 31 LONDON REV. BOOKS, Aug. 6, 2009, at 35, 35–36.

3. INT'L RULE OF LAW DIRECTORY, <http://www.roldirectory.org> (last visited Nov. 6, 2010).

4. Dani Rodrik, *Goodbye Washington Consensus, Hello Washington Confusion? A Review of the World Bank's Economic Growth in the 1990s: Learning from a Decade of Reform*, 44 J. ECON. LITERATURE 973, 978 (2006) (suggesting the original Washington consensus has been “augmented” by additional reforms that are “heavily institutional in nature”). Rodrik identifies ten elements in the original Washington consensus: fiscal discipline, reorientation of public expenditures, tax reform, financial liberalization, unified and competitive exchange rates, trade liberalization, openness to direct foreign investment, privatization, deregulation, and secure property rights. To these tenets, he suggests, the “augmented” Washington consensus adds: corporate governance; anti-corruption; flexible labor markets; World Trade Organization agreements; financial codes and standards; “prudent” capital-account opening; non-intermediate exchange rate regimes; independent central banks; social safety nets; and targeted poverty reduction. *Id.*

break from Washington consensus neoliberalism.<sup>5</sup> For instance, University of Chicago professor Kenneth Dam explains that “[t]he search for new solutions led to an increasing focus on how poorly many developing country governments functioned and especially on widespread inadequacies, even corruption, of public regulatory bodies and of the legal system.”<sup>6</sup> Even Alvaro Santos, while subjecting the World Bank’s ubiquitous invocation of the rule of law to trenchant critique, nonetheless notes a distinct break in Bank policy and suggests that a new, post-Washington consensus development model marks the “fall of neoliberal thinking.”<sup>7</sup> But have acolytes of the new rule of law orthodoxy really transcended neoliberal policy prescriptions?

This Article questions whether any such transcendence has really occurred, focusing specifically on the rule of law discourse as articulated by the World Bank, one of its main institutional proponents. It considers, specifically, how and why the Bank has embraced the rule of law discourse, and offers a genealogy, albeit abbreviated and modest, of the rule of law within the Bank’s development model. I argue that the rule of law orthodoxy is not the product of an “innocent scholastic awakening,”<sup>8</sup> but instead represents developments of an altogether different stamp: the Bank’s interest in law was primarily a response to the critique and failure of its neoliberal policies. I further argue that the rhetorical invocation of the rule of law, rather than marking the advent of a new paradigm, in fact sustains and reinforces the

---

5. Neoliberalism refers to a political economic program, and supporting ideology, that holds that the liberation of individual entrepreneurial activity is necessary, or at the very least is the best means, to promote economic welfare and human well-being. To this end, its adherents advocate free markets, the liberalization of trade and finance, and a limited role for the state in the economic and social organization of society. See DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2–4 (2005). In practice, neoliberal policies have included widespread “[d]eregulation, privatization, and the withdrawal of the state” from the provision of social services. *Id.* For the intellectual origins of neoliberalism, see HA-JOON CHANG, *An Institutionalist Perspective on the Role of the State*, in GLOBALIZATION, ECONOMIC DEVELOPMENT AND THE ROLE OF THE STATE 75, 77–79 (2003). Chang argues that neoliberalism was “born out of a marriage of convenience between neoclassical economics as the source of intellectual legitimacy . . . and what may be broadly called the Austrian-Libertarian tradition as the source of political rhetoric.” *Id.* at 77; see also HA-JOON CHANG, *State, Institutions and Structural Change*, in GLOBALIZATION, ECONOMIC DEVELOPMENT AND THE ROLE OF THE STATE 45, 47–50 (2003). The origins and growth of neoliberalism as an economic and political movement are also explored in two volumes on the Mont Pèlerin society, a “thought collective” particularly influential in the spread of neoliberal ideas. See generally THE ROAD FROM MONT PÉLERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE (Philip Mirowski & Dieter Plehwe eds., 2009). For a trenchant analysis of neoliberalism’s prospects as an economic and political program in the aftermath of the 2008 financial crisis, see Robert Wade, *Financial Regime Change?*, 53 NEW LEFT REV. 5, 5–21 (2008); Susan Watkins, *Shifting Sands*, 61 NEW LEFT REV. 5, 5–27 (2010).

6. KENNETH W. DAM, THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT 5 (2006).

7. Alvaro Santos, *The World Bank’s Uses of the “Rule of Law” Promise in Economic Development*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 253, 267 (David M. Trubek & Alvaro Santos eds., 2006).

8. Ha-Joon Chang, *Understanding the Relationship between Institutions and Economic Development: Some Key Theoretical Issues* 1 (U.N. World Institute for Development Economics Research, Discussion Paper No. 2006/05, 2006), available at [http://www.wider.unu.edu/publications/working-papers/discussion-papers/2006/en\\_GB/dp2006-05/](http://www.wider.unu.edu/publications/working-papers/discussion-papers/2006/en_GB/dp2006-05/) (expressing similar skepticism about other post-Washington consensus policy innovations).

neoliberal model, while masking what is fundamentally a continuation of its core tenets. The rule of law doctrine is essentially a piece with neoliberalism. Indeed, the new discourse is attractive precisely because it provides strong ideological support for the neoliberal agenda.

In considering how the Bank has contributed to the construction and dissemination of a new rule of law discourse, I am interested not so much in the specific legal reform projects behind which the Bank places its financial clout, but rather the theory informing this work. I consider the development of this theory from a historical perspective. First, I briefly explain my focus on the World Bank. I then look at the Bank's post-war development models, in which the rule of law played little rhetorical role, and the growing challenge to neoliberal hegemony from the late 1980s. I locate the deployment of the rule of law discourse as a response to this challenge and analyze its affinities with the rise of the New Institutional Economics and "good governance." Finally, I consider the contours and consequences of the Bank's instrumentalization of the rule of law.

## I. THE WORLD BANK AS AN INTELLECTUAL ACTOR

The World Bank has been central to the emergence of the rule of law orthodoxy. More than any other development actor, the Bank can provide the theoretical legitimacy and financial clout to shape mainstream development discourse. Over the past two decades, the Bank's research departments have devoted ever greater resources, and space in publications, to explain the role of law in the process of economic development. The Bank's operations and lending departments, too, have increasingly focused on rule of law and justice sector reform, channeling more and more funds to these activities. Three decades ago, fifty-eight percent of lending went to infrastructure projects. In 2007, by way of contrast, only twenty-two percent went to infrastructure; human development and law and institutional reform now attract fifty-two percent.<sup>9</sup> As of 2009, the Bank has been involved in almost 2500 justice reform activities in developing or transition countries, many with the explicit rationale of promoting economic development.<sup>10</sup>

---

9. Roberto Dañino, *The Legal Aspects of the World Bank's Work on Human Rights*, in *LAW, CULTURE, AND ECONOMIC DEVELOPMENT* 3, 6 (Joseph J. Norton & C. Paul Rogers III eds., 2007). Financial and technical assistance for rule of law and justice reform to developing countries is provided through two of the Bank's five primary institutions: the "International Bank for Reconstruction and Development (IBRD) focuses on middle-income countries," while the International Development Association ("IDA") works with their low-income counterparts. *WORLD BANK LEGAL VICE PRESIDENCY, INITIATIVES IN JUSTICE REFORM* 3 (2009).

10. *WORLD BANK LEGAL VICE PRESIDENCY, supra* note 9, at 1. The Legal Vice Presidency's *Initiatives in Justice Reform 2009* provides a listing of Bank-financed activities in justice reform since 2000. These range from projects to change countries' legal frameworks "in order to improve the business environment," *id.* at 4, to efforts to build the capacity, management, and performance of judiciaries, *id.* at 4-5. Reform also focuses on improving access to justice, namely through facilitating access of citizens and communities to the courts, and improving legal education. *Id.* at 5-6. Many reform projects, although

The World Bank's central role in the emergence of the rule of law orthodoxy is not mere coincidence. Among the international financial institutions created in the post-war period, the Bank has claimed a specialization in promoting development.<sup>11</sup> Its size, above all, places it in a unique position within the constellation of development actors and allows it to exert both significant intellectual and financial clout to shape mainstream development discourse. The Bank is the largest center for development research in the world, employing hundreds of professional economists with a research budget in the tens of millions of dollars.<sup>12</sup> The Development Economics Vice-Presidency alone, in which approximately three-quarters of the Bank's research occurs, has program costs between thirty to fifty million dollars per year.<sup>13</sup> Moreover, the size of the Bank's lending program—billions of dollars each year—allows it to exert significant influence on the terms upon which borrowing countries gain access to capital and the policies within those countries.<sup>14</sup> As Nicholas Stern, former World Bank Chief Economist and

---

not all, seek to promote economic development. As the Legal Vice Presidency observes, "the Bank has promoted adherence to the rule of law as a fundamental element of economic development." *Id.* at 2. The traditional focus by the Bank and other international financial institutions on economic measures of development (GDP or GNP growth, for instance) has been criticized. See, e.g., UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 9 (1990) (warning that such economism has "supplant[ed] a focus on ends by an obsession with merely the means"). Development is a multifaceted process involving not only economic growth, but also improved health, expanded education, increased life expectancy and a general improvement of individuals' well-being. The United Nations General Assembly Declaration on the Right to Development, for example, defines development as "a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom." Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc. A/RES/41/128 (Dec. 4, 1986). Amartya Sen has proposed a now influential conceptual framework for approaching development in which the goal of development is understood to be the expansion of individuals' capabilities—that is, individuals' substantive freedom to choose lifestyles they have reason to value. See generally AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999). Drawing, in part, on Sen's work, the United Nations Development Programme has, since 1990, published its Human Development Index ("HDI") in its annual *Human Development Report*. This index incorporates measures of life expectancy, adult literacy rate, school enrolment, and PPP GDP per capita. Nonetheless, *economic* measures remain dominant in the mainstream development literature.

11. The Bank's charter lists five purposes: "(1) to assist in development and reconstruction, (2) to promote private foreign investment, (3) to promote long term balanced international trade, (4) to lend for project development, (5) to conduct its operations with due regard for business conditions . . . ." GRAHAM HARRISON, THE WORLD BANK AND AFRICA: THE CONSTRUCTION OF GOVERNANCE STATES 8 (2004) (focusing primarily on the World Bank in Africa but capturing many of the salient features of, and shifts in, the Bank's approach to development in general), adapted from IBRAHIM F.I. SHIHATA, THE WORLD BANK IN A CHANGING WORLD: SELECTED ESSAYS 62 (1991).

12. Published in 1997, Nicholas Stern and Francisco Ferreira's study cites eight hundred professional economists employed by the Bank. Nicholas Stern & Francisco Ferreira, *The World Bank as "Intellectual Actor"*, in 2 THE WORLD BANK: ITS FIRST HALF CENTURY 523, 524 (Devesh Kapur, John P. Lewis & Richard Webb eds., 1997).

13. Robin Broad, *Research, Knowledge, and the Art of 'Paradigm Maintenance': The World Bank's Development Economics Vice-Presidency (DEC)*, 13 REV. INT'L POL. ECON. 387, 395 (2006). Writing in the 1990s, Stern and Ferreira provide the figure of twenty-five million dollars each year for the Bank's entire research budget. Stern & Ferreira, *supra* note 12, at 524.

14. Stern & Ferreira, *supra* note 12, at 524; Robert Wade, *Japan, the World Bank, and the Art of Paradigm Maintenance: The East Asian Miracle in Political Perspective*, 1/217 NEW LEFT REV. 3, 5 (1996) ("The Bank's ability to frame the debate rests on . . . its ability to influence the terms on which low-

Senior Vice President, and Francisco Ferreira conclude, “The weight of the number of development economists, the research budget, and the leverage from lending means that the Bank’s potential influence is profound, and that the Bank cannot be seen as just one of a number of fairly equal actors in the world of development economics.”<sup>15</sup>

In addition to its financial leverage, the Bank is able to influence development thinking through its perceived legitimacy as a fount of development wisdom reflecting leading technical research. Political elites frequently cite Bank research in support of policy choices; as one Brazilian government official explained, “The Bank is *the* institution which we address when we need some kind of information or advice.”<sup>16</sup> In the academy, too, Bank research is privileged—development syllabi are dominated by Bank authors<sup>17</sup>—and few development publications attract as much media attention as major World Bank reports. The Bank’s flagship annual publication, the *World Development Report*, is illustrative.<sup>18</sup> First published under Robert McNamara’s presidency,<sup>19</sup> the reports draw on a budget of several million dollars and enjoy a print run of at least 50,000 in English, as well as translations into Chinese, French, German, Japanese, Russian, Spanish, and Vietnamese.<sup>20</sup> These are “probably the most widely read of all World Bank documents,” Stern and Ferreira observe, and are “important intellectual contributions . . . [that] provide a crucial bridge between the Bank and the outside world.”<sup>21</sup>

Given its influence, it is unsurprising that the Bank should be at the forefront of the recent embrace of law in development thinking, and that its

---

income countries gain access to international capital markets . . .”); see also Lyn Squire, *Why the World Bank Should Be Involved in Development Research*, in *THE WORLD BANK: STRUCTURES AND POLICIES* 108, 125 (Christopher L. Gilbert & David Vines eds., 2000) (noting the influence of Bank research on operational staff).

15. Stern & Ferreira, *supra* note 12, at 524; see also Wade, *supra* note 14, at 5 (“The World Bank enjoys a unique position as a generator of ideas about economic development. Around the world, debates on development issues tend to be framed in terms of ‘pro or anti’ World Bank positions.”).

16. Broad, *supra* note 13, at 396 (quoting WORLD BANK, OPERATIONS EVALUATION DEPARTMENT, SHARING KNOWLEDGE: INNOVATIONS AND REMAINING CHALLENGES 62 (2003)); see also Béatrice Hibou, *The Political Economy of the World Bank’s Discourse: From Economic Catechism to Missionary Deeds (and Misdeeds)*, LES ÉTUDES DU CERI 3 (Janet Roitman trans., Jan. 2000), available at <http://www.ceri-sciencespo.com/publica/etude/etude39a.pdf> (“[T]he Bank has acquired a quasi-monopoly on institutional knowledge in the field of economic development.”).

17. Stern and Ferreira cite one Bank study finding that in a “1990 compendium of development economics reading lists . . . one-sixth of the reading assignments were drawn from World Bank research publications and journal articles.” Stern & Ferreira, *supra* note 12, at 590. They also observe that, based on the Social Sciences Citation Index, “[b]ank-authored publications are cited 20 to 40 percent more often than the average article.” *Id.*; see also Squire, *supra* note 14, at 126–27 (observing the high prevalence of Bank authors on development course reading lists).

18. World Development Reports are cited below by both their year and thematic title.

19. Stern & Ferreira, *supra* note 12, at 571.

20. Robert Wade, *US Hegemony and the World Bank: The Fight Over People and Ideas*, 9 REV. INT’L POL. ECON. 206, 224 n.15 (2002).

21. Stern & Ferreira, *supra* note 12, at 571. Typically concise and intelligible to the non-expert, the reports nonetheless achieve accessibility at a cost. “In particular, documentation has fallen far short of that which would be acceptable in a scholarly publication; given that the reports are widely quoted in support of particular positions, this is a serious drawback.” *Id.*

new emphasis on the rule of law should have gained a widespread following in the academic and policy communities. The Bank, of course, is not monolithic; many of its divisions contain legal components, and they engage in many different areas of legal reform. The World Bank Legal Vice Presidency, for instance, houses around 120 lawyers from around the world, divided into fourteen separate legal practice groups.<sup>22</sup> Different groups within the World Bank organization use the rule of law to invoke different institutional arrangements or goals. The rule of law is said to consolidate democracy, promote human rights, reduce corruption, and, not least, secure economic growth.<sup>23</sup> Such a plurality of meanings mirrors the historical indeterminacy of the concept.<sup>24</sup> Nonetheless, while the rule of law “has always consisted more of a bundle of ideals than a specific or necessary set of institutional arrangements,”<sup>25</sup> in practice the Bank insists that tangible legal institutions may be reformed to promote the rule of law and, in turn, economic development.<sup>26</sup> In the following sections, I trace the curve of the Bank’s legal turn, identifying its origins and antecedents.

## II. FROM MODERNIZATION THEORY TO STRUCTURAL ADJUSTMENT: ORIGINS OF THE WORLD BANK’S USE OF THE RULE OF LAW

### A. *The Law and Development Movement*

During the 1960s and early 1970s, a Law and Development movement briefly flourished in the United States.<sup>27</sup> The Ford Foundation and the

---

22. Roberto Dañino, Senior Vice President & Gen. Counsel, The World Bank, Speech to the American Foreign Law Association: The World Bank Legal Vice Presidency (June 9, 2004), available at <http://siteresources.worldbank.org/INTLAWJUSTICE/214576-1139604306966/20818477/TheWBLegalVicePresidencyAmericanForeignLawAssociation060904.pdf>.

23. See Santos, *supra* note 7, at 276. Discussing the Bank’s work on “good governance,” David Williams and Tom Young similarly observe: “The Bank’s position is a rather confused one. This is only to be expected perhaps for such a new area of concern, but it makes for certain analytical difficulties. The Bank is a large and diverse organization, so much so that even to talk of the ‘Bank’s position’ at all is to oversimplify.” David Williams & Tom Young, *Governance, the World Bank and Liberal Theory*, 42 POL. STUD. 84, 86 (1994).

24. See BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (2004) (discussing the meaning attached to the rule of law at various historical junctures); Danilo Zolo, *The Rule of Law: A Critical Reappraisal*, in *THE RULE OF LAW: HISTORY, THEORY AND CRITICISM* 3 (Pietro Costa & Danilo Zolo eds., 2007) (discussing the various historical meanings attached to the epithet, as well as common themes among geographical traditions); see also *infra* Part IV.

25. Brian Z. Tamanaha, *The Lessons of Law-and-Development Studies*, 89 AM. J. INT’L L. 470, 476 (1995).

26. See, e.g., WORLD BANK LEGAL VICE PRESIDENCY, *INITIATIVES IN LEGAL AND JUDICIAL REFORM* 3 (2004) (“Legal and judicial reform is a means to promote the rule of law.”); WORLD BANK LEGAL VICE PRESIDENCY, *supra* note 9, at 2 (“[T]he Bank has promoted adherence to the rule of law as a fundamental element of economic development and poverty reduction, given that the absence of well-functioning law and justice institutions and the presence of corruption are oft-cited constraints to economic growth and to the sustainability of development efforts.”); see also *infra* Part IV.B.

27. A now famous critique of the Law and Development movement was published in 1974 by two of its former leading figures. See David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062 (1974).



United States Agency for International Development (“USAID”) funded law reform projects, especially in Latin America and Africa.<sup>28</sup> The Law and Development practitioners were strongly influenced by modernization theory, which posited a deterministic model of development in which poor countries could pass through progressive stages of growth to converge with industrial, capitalist countries.<sup>29</sup> Under the Law and Development view, the law could be used as a tool—namely, by transplanting U.S. institutions—to empower the state and facilitate its exercise of macroeconomic control, thus accelerating convergence.<sup>30</sup> As one of the movement’s central protagonists recalls:

The state had to undertake many key economic roles, from banking to manufacture and state corporations were a dominant form of activity . . . . [The] private sector in some countries was not oriented toward effective economic action so the state had to try to transform key private actors through regulatory law. This orientation on the role of law led to an emphasis on public law and regulation as well as to sweeping legal reforms of traditional economic sectors.<sup>31</sup>

At this time, however, the Bank showed little interest in legal reform or the role of law in development. Many developing countries were pursuing trade and industrial policies based on import substitution and high tariff barriers, in line with the view, then prominent, that the state could play a constructive role in determining allocations of resources and, in particular, investment.<sup>32</sup> The Bank was not averse to this view, and primarily took a

---

28. Elliot M. Burg, *Law and Development: A Review of the Literature & a Critique of ‘Scholars in Self-Estrangement’*, 25 AM. J. COMP. L. 492, 496–97 (1977) (“[T]he chief sponsors of projects, research and writing in law and development have been the U.S. Agency for International Development (AID) and the Ford Foundation (Ford).”); John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457, 458 (1977) (suggesting that projects focused in particular on Latin America and Africa).

29. See, e.g., W.W. ROSTOW, *THE STAGES OF GROWTH: A NON-COMMUNIST MANIFESTO* 3, 12 (1960) (arguing that a society in the process of modernization passes from traditional society through a “transitional period” when preconditions for take-off are created, a “take-off” period, a “sweep into maturity,” and finally, an “age of high mass-consumption” marked by a fully mature economy); DAVID LERNER, *THE PASSING OF TRADITIONAL SOCIETY* (1958). The Law and Development theorists were also influenced by the work of Max Weber and, in particular, his observations on the role of “rational” legal systems in the emergence of modern capitalism. See David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720, 720 (1972) (discussing Weber’s contribution to Law and Development theory). See generally MAX WEBER, *ECONOMY AND SOCIETY* (1968) (suggesting European law contributed to the emergence of capitalism).

30. Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. COMP. L. 163, 163 (2003) (“The first law and development movement . . . brought new legal codes to countries in Latin America, Africa, and—to a lesser extent—in Asia.”).

31. David M. Trubek, *The Political Economy of the Rule of Law: The Challenge of the New Developmental State*, 1 HAGUE J. RULE L. 28, 29 (2009).

32. Import-substitution industrialization was also widely prescribed and followed. See generally RAÚL PREBISCH, *THE ECONOMIC DEVELOPMENT OF LATIN AMERICA AND ITS PRINCIPAL PROBLEMS* (1950).

“growth-oriented capital-intensive approach in which the ‘problem’ for development was understood primarily in terms of capital scarcity.”<sup>33</sup>

If U.S. lawyers were rushing to Latin America and other parts of the developing world with ideas for “modernizing” judiciaries and law schools,<sup>34</sup> they were notably absent from Bank “missions,” which at this time focused primarily on developing infrastructure, especially power, transport, and telecommunications.<sup>35</sup> In a response to an inquiry about the role of lawyers in Bank projects, the Bank Information Office observed in 1962 that:

We have never had a lawyer included on a mission because of his legal knowledge . . . . [T]he effort of a mission is generally directed towards broad economic planning and programming and . . . consequently its depth is extremely limited in the more specialized and highly technical areas such as the development of the legal system of the country or the legal problems incident to economic development.

This is not to say that men with legal backgrounds are never mission members, but rather that, if they have such background, it is only incidental to their other abilities.<sup>36</sup>

### B. *Structural adjustment and neoliberalism*

By the mid-1970s, the Law and Development movement’s leading figures had become disillusioned. Many had discovered that societies and institutions in developing countries were resistant to formal legal transplantation, while the transplants themselves often had unpredictable or even counterproductive effects.<sup>37</sup> At the same time, Bank policy shifted decisively to the neoliberal, macroeconomic reforms that would soon become synonymous with structural adjustment lending.<sup>38</sup>

---

33. HARRISON, *supra* note 11, at 11. However, even in this early post-war period, the Bank was adamant that in certain areas the private market was superior to the state. In 1949, for instance, the United Nations Economic and Employment Commission released a report advocating heavy industrial projects in the public sector. The Bank was highly critical and, as Stern and Ferreira describe, “suggested that governments of less developed countries had enough to do in trying to provide adequate infrastructure, and that domestic and foreign savings, channeled through the private sector, should take care of these other areas.” Stern & Ferreira, *supra* note 12, at 533.

34. See JAMES A. GARDNER, LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA 11 (1980) (describing the work of “American legal missionaries”); Trubek & Galanter, *supra* note 27, at 1075.

35. Devesh Kapur, John P. Lewis & Richard Webb, *The Bank of the 1950s*, in 1 THE WORLD BANK: ITS FIRST HALF CENTURY 85, 109–10 (Devesh Kapur, John P. Lewis & Richard Webb eds., 1997).

36. Alexander L. Wiener, Jr., *Law and Economic Development*, 40 U. DET. L.J. 510, 512 (1963) (quoting Letter from Doris R. Eliason, Office of Information, Int’l Bank for Reconstruction and Dev., to Alexander L. Wiener, Jr. (Mar. 15, 1962)).

37. Trubek & Galanter, *supra* note 27, at 1063–64, 1076.

38. For critiques of structural adjustment, see Howard Stein, *Rethinking African Development*, in RE-THINKING DEVELOPMENT ECONOMICS 153 (Ha-Joon Chang ed., 2003); Howard Stein & Machiko Nisanke, *Structural Adjustment and the African Crisis: A Theoretical Appraisal*, 25 E. ECON. J. 153 (1999).

In 1981, the Bank published a now famous study of Sub-Saharan Africa. Titled *Accelerated Development in Sub-Saharan Africa*, it is better known simply as the “Berg Report,” after its principal author.<sup>39</sup> The report located the cause of African countries’ poor economic performance in bad government policies that distorted prices and resource allocation. The key to generating growth, Berg argued, was three-pronged: “(1) more suitable trade and exchange rate policies; (2) increased efficiency or resource use in the public sector; and (3) improvement in agricultural policies.”<sup>40</sup>

The market-oriented policies and reductions in government expenditures advocated by Berg were soon reflected in the Bank’s lending practices. Bank (and International Monetary Fund) loans were granted in exchange for commitments to neoliberal, market-stimulating reforms.<sup>41</sup> To an initial emphasis on macroeconomic reform—opening domestic economies to imports, freeing prices from controls, and macroeconomic stabilization—were quickly added microeconomic reforms including privatization of state-owned enterprises and financial and labor market liberalization.<sup>42</sup>

The neoliberal agenda that emerged was to become a familiar set of policies labeled the “Washington consensus” by economist John Williamson.<sup>43</sup> Deployed by the Bank and other mainstream development agencies throughout the 1980s, this agenda had, by the time Williamson coined his term in 1989,<sup>44</sup> gained widespread acceptance as the necessary route to economic growth.<sup>45</sup> The policies Williamson identified included maintaining small budget deficits, broadening the tax base, ending state subsidies, allowing the market to set interest rates, liberalizing trade and foreign investment, privatizing state-owned enterprises, abolishing impediments to foreign direct investment, and guaranteeing secure property rights.<sup>46</sup> These reforms “disavowed the former emphasis on state-led national developmentalism.”<sup>47</sup> The role of the state was to be limited to one of supporting

39. John Loxley, *The Berg Report and the Model of Accumulation in Sub-Saharan Africa*, 27/28 *REV. AFR. POL. ECON.* 197, 197 (1983) (book review).

40. WORLD BANK, *ACCELERATED DEVELOPMENT IN SUB-SAHARAN AFRICA: AN AGENDA FOR ACTION* 5 (1981).

41. See William Easterly, *What Did Structural Adjustment Adjust? The Association of Policies and Growth with Repeated IMF and World Bank Adjustment Loans*, 76 *J. DEV. ECON.* 1, 2–3 (2005).

42. See Anne O. Krueger, *Introduction to ECONOMIC POLICY REFORM: THE SECOND STAGE* 3, 3–4 (Anne O. Krueger ed., 2000).

43. See John Williamson, *What Washington Means by Policy Reform*, in *LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED* 7, 7 (John Williamson ed., 1990).

44. Williamson’s edited 1990 volume collects papers and proceedings from a conference held by the Institute for International Economics in November 1989.

45. John Weeks & Howard Stein, *Washington Consensus*, in *THE ELGAR COMPANION TO DEVELOPMENT STUDIES* 676, 676 (David Alexander Clark ed., 2006) (“The Consensus reigned hegemonic in international development policy from the early 1980s to the mid-1990s, when it came under sustained attack.”).

46. Williamson, *supra* note 43, at 8–17.

47. Marcus Taylor, *Responding to Neoliberalism in Crisis: Discipline and Empowerment in the World Bank’s New Development Agenda*, in *NEOLIBERALISM IN CRISIS, ACCUMULATION, AND ROSA LUXEMBURG’S LEGACY* 3, 9 (Paul Zarembka & Susanne Soederberg eds., 2004).

private economic activity—in short, Bank policy from the late 1970s held that development would follow from “rolling back the state and placing faith in the market.”<sup>48</sup>

If the law was no longer understood as a tool to empower the state, as in the Law and Development movement, it was also not entirely absent from the neoliberal conception of development. The neoliberal view conceived of the economy as a market where individuals would use resources efficiently in reaction to price signals: markets in developing countries were considered no different from those found in developed countries, and both would require the same “universal” legal foundations.<sup>49</sup> Law was thus reduced to an instrument that facilitated private transactions (for example, by creating incentives for market actors) and limited state intervention. Trubek explains the neoliberal position as follows: “[T]he role of the state in the economy should be strictly curtailed and . . . to the extent state action affected private decision-making, it should be confined to the application of precise rules so its operations are predictable in advance. In that way, private actors would be fully empowered.”<sup>50</sup>

With the use of structural adjustment programs (“SAPs”), the Bank made an initial foray into legal reform projects. Legal reform, however, was not a goal in itself, but merely a necessary concomitant to economic policy.<sup>51</sup> Under an SAP, disbursement of loan funds depended upon implementation of various policies, which, in turn, often required amendment of the legal framework. For example, a reduction of trade tariffs commonly required amendment of laws or regulations, and increased labor market flexibility similarly required amendment of labor codes.<sup>52</sup> Bank-supported legal reform also focused on private sector development and, accordingly, privatization, which was itself a typical goal of SAPs. In Uganda, for instance, the Bank assisted “in defining a program of divestiture and liquidation of public en-

48. HARRISON, *supra* note 11, at 18; *see also* WORLD BANK, WORLD DEVELOPMENT REPORT 1987: BARRIERS TO ADJUSTMENT AND GROWTH IN THE WORLD ECONOMY, INDUSTRIALIZATION AND FOREIGN TRADE, WORLD DEVELOPMENT INDICATORS 38 (1987) (expressing a strong free market stance). Bateman and Chang argue that “the core doctrines of neo-liberalism” consist of “the need to vector all economic activity through private individual initiative; the need to avoid any aspect of planning or conscious guidance of the market mechanism; the need for all institutions to attempt to ‘earn their keep on the market’; and, the need to ensure that all economic organizations are also as much as possible owned and controlled by the private sector.” Milford Bateman & Ha-Joon Chang, *The Microfinance Illusion* 23 (March 2009) (unpublished manuscript), available at <http://www.econ.cam.ac.uk/faculty/chang/pubs/Microfinance.pdf>.

49. David Kennedy, *The “Rule of Law,” Political Choices, and Development Common Sense*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 7, at 95, 129.

50. Trubek, *supra* note 31, at 29–30.

51. It is indicative that Stern and Ferreira, in a history of the Bank’s intellectual role from its inception until the early 1990s, make no mention of legal reforms or the Bank’s theorizing on law and legal institutions in development. Although their focus is on the Bank’s contributions to economics, they observe that the Bank has also been influential in the fields of “political science, demography, statistics, and sociology.” Law does not rate a mention. *See* Stern & Ferreira, *supra* note 12, at 524.

52. *See* W. Paatii Ofosu-Amaah, *Legal and Judicial Reform in Developing Countries: Reflections on World Bank Experience*, 8 *LAW & BUS. REV. AM.* 551, 558–59 (2002).

terprises” which required “an appropriate legal and regulatory framework.”<sup>53</sup> Sri Lanka similarly received assistance “in the promulgation of appropriate debt recovery laws” and “appropriate legislation for the restructuring of its telecommunications sector,”<sup>54</sup> while Mozambique received assistance in preparing “the legal framework for privatization,”<sup>55</sup> in order to reverse its post-independence nationalization program.

### C. *Challenges to the neoliberal model*

By the 1990s, especially after the Cold War, neoliberalism’s hegemony was quickly approaching universality: almost all governments, regardless of political orientation, adhered to its tenets.<sup>56</sup> However, its application to development policy and prescription by the Bank and other international financial institutions did not go unchallenged. Dissent stemmed in the first place from the apparent failure of neoliberal policies to achieve promised growth. From the 1970s to the 1990s, growth actually slowed in many countries. For instance, between 1950 and 1973, real GDP grew 2.52% in Latin America and 2.07% in Africa.<sup>57</sup> By way of contrast, in the almost three decades that followed, real GDP per person grew only 0.99% a year in Latin American and a mere 0.01% a year in Africa.<sup>58</sup>

Neoliberal policies not only failed to meet their stated goals of economic development but also exacerbated inequality in much of the developing world: neoliberalism has tended to concentrate wealth in an increasingly small and privileged stratum in core and periphery alike.<sup>59</sup> The concomitant growth of “socioeconomic inequalities and of human misery” could be observed “in nearly every country and region of the world,” both internally

---

53. *Id.* at 560.

54. *Id.*

55. *Id.*

56. See HARVEY, *supra* note 5, at 2–3; Charles A.S. Hall & John Gowdy, *Does the Emperor Have Any Clothes? An Overview of Scientific Critiques of Neoclassical Economics*, in MAKING WORLD DEVELOPMENT WORK: SCIENTIFIC ALTERNATIVES TO NEOCLASSICAL ECONOMIC THEORY 3, 3 (Grégoire Leclerc & Charles A.S. Hall eds., 2007) (describing neoliberalism as a secular religion that “is based more on faith than on empiricism”); Perry Anderson, *Renewals*, 1 NEW LEFT REV. 1, 6 (2000) (noting “the virtually uncontested consolidation, and universal diffusion, of neo-liberalism”); Bateman & Chang, *supra* note 48, at 23 (describing neoliberalism as “the reigning ideology of our time”).

57. ANGUS MADDISON, *THE WORLD ECONOMY: A MILLENNIAL PERSPECTIVE* 126 (2001).

58. See *id.*; see also Branko Milanovic, *The Two Faces of Globalization: Against Globalization as We Know It*, 31 WORLD DEV. 667, 676 (2003) (concluding that the economic record of the two decades between 1978 and 1998 were “vastly less successful than the preceding two decades”). The pattern holds at the global level: Chang reports that “[t]he world economy, which was growing at about 3% in per capita terms in the ‘bad old days’ of widespread regulation and punitive taxation for the rich in the 1960s and 70s, has grown at about half that rate in the last three decades.” Ha-Joon Chang, *We Lost Sight of Fairness in the False Promise of Wealth*, THE GUARDIAN (London), Aug. 31, 2010, at 28. This trend includes developed countries; in Britain, income growth has fallen from 2.4% in the 1960s and 1970s to 1.7% in the past two decades. *Id.*

59. WILLIAM I. ROBINSON, *PROMOTING POLYARCHY: GLOBALIZATION, US INTERVENTION, AND HEGEMONY* 339 (1996).

and, simultaneously, between countries.<sup>60</sup> In 1960, the richest twenty percent of the world was about thirty times wealthier than the poorest quintile.<sup>61</sup> By 1989, the ratio had doubled: the top quintile was sixty times richer than the bottom quintile.<sup>62</sup> By the middle of the 1990s, the United Nations Development Program (“UNDP”) could report an even more sobering statistic: the net worth of the 358 richest people in the world “exceed[ed] the combined annual incomes of the countries with 45% of the world’s people,”<sup>63</sup> that is, 2.6 billion people.

That increasing inequality and the advance of neoliberal policies were coeval was not mere coincidence.<sup>64</sup> The opening of developing countries’ political economies to the free movement of products and financial flows from the North was combined with a transformation of states’ domestic social relations.<sup>65</sup> As economies were opened to transnational capital and state controls swept away, Susan Marks observes, “asymmetries in the distribution of material and cultural resources bec[a]me magnified. The hardships of [neoliberal] restructuring . . . precluded the implementation of social and economic policies—agrarian reform, industrial planning, expanded programmes of education and training, etc.—which might [have] help[ed] to correct this.”<sup>66</sup> The result, Robert Wade argues, was not only slower

60. *Id.*

61. UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1992, 34 (1992).

62. *Id.*

63. UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1996, 2 (1996).

64. Milanovic attributes “the disastrous results brought to most of Africa, Latin America, and Eastern Europe” directly to “two decades of unabashedly free market policies.” Milanovic, *supra* note 58, at 679. And Taylor observes that “neoliberal restructuring” is “widely recognised as being characterized by profoundly uneven development, including increased poverty and inequality at the global level.” Taylor, *supra* note 47, at 13. He points to “the stagnation of Latin America and regression of sub-Saharan Africa, the two regions that most dramatically implemented neoliberal reforms of restructuring.” *Id.* These arguments recall the position of dependency theorists writing in the 1960s and 1970s who held that the “underdevelopment” of the South was not due primarily to local failure or poor countries’ insufficient integration into the global economy, but rather was precisely a structural consequence of that integration and the resulting relation of dependency between metropole and satellite. See generally SAMIR AMIN, ACCUMULATION ON A WORLD SCALE (1974); FERNANDO HENRIQUE CARDOSO & ENZO FALETTO, DEPENDENCY AND DEVELOPMENT IN LATIN AMERICA (1979); ANDRE GUNDER FRANK, CAPITALISM AND UNDERDEVELOPMENT IN LATIN AMERICA (1967). For recent work which takes up these themes in a historical context, see MIKE DAVIS, LATE VICTORIAN HOLOCAUSTS: EL NIÑO FAMINES AND THE MAKING OF THE THIRD WORLD (2001). Davis explores the connection between the famines that swept the South from 1876 to 1899 and the global expansion of capitalism, arguing, “[m]illions died, not outside the ‘modern world system,’ but in the very process of being forcibly incorporated into its economic and political structures. They died in the golden age of Liberal Capitalism; indeed, many were murdered, as we shall see, by the theological application of the sacred principles of Smith, Bentham and Mill.” *Id.* at 9.

65. See PETER GOWAN, THE GLOBAL GAMBLE 13–15, 126–30 (1999); HARVEY, *supra* note 5, at 5–38. Leo Panitch and Sam Gindin argue that “neoliberalism was essentially a political strategy to shift the balance of class forces.” Leo Panitch & Sam Gindin, *Superintending Global Capital*, 35 NEW LEFT REV. 101, 110 (2005); see also Taylor, *supra* note 47, at 10 (“[N]eoliberal structural adjustment professed a fundamental re-articulation of social relations . . . . This was to be achieved through a process of social engineering by which the abstract disciplines inherent to capitalist social relations could be imposed in an increasingly direct fashion upon both state and society.”).

66. SUSAN MARKS, THE RIDDLE OF ALL CONSTITUTIONS 58 (2000).

growth, but an assortment of social ills: poverty, unemployment, and crime.<sup>67</sup>

By the late 1980s, the Bank's core ideas about the role of the state in economic development were increasingly under fire. A growing number of studies by heterodox economists suggested that the post-war developmental success of the so-called "East Asia tigers," in particular, was not the result of neoliberal fundamentals, but rather owed much to an active state intervening in, and working with, the market.<sup>68</sup> However, the Bank's response, published as a report on *The East Asian Miracle*, was brought about not by a challenge from the academy but by the growing influence of Japan on the international financial institutions. The Japanese government had long been skeptical of the Bank's emphasis on liberalization and privatization and, throughout the 1980s and 1990s, was vocal in prescribing policies to its East Asian neighbors that awarded a central, "market-guiding role" to the state.<sup>69</sup> If the Bank was critical of Japanese advice, which appeared to undermine its own policies in the region, Japan, in turn, sought to "induc[e] the Bank to pay more attention to East Asian development experience"—where the state had played a central role—and thus "enhance Japan's role as a leader in development thinking."<sup>70</sup> The Bank was ultimately persuaded to make a study of East and Southeast Asia, which was published in 1993.<sup>71</sup>

---

67. Robert Wade, *The Ringmaster of Doha*, 25 *NEW LEFT REV.* 146, 152 (2004) (arguing that neoliberal reforms "prohibit the use of protection or subsidies as part of any industrial strategy to stimulate new activities beyond those that might occur in free-market conditions" and "[t]his is a recipe for slower growth, higher poverty, higher unemployment and higher crime"); see also Jeff Faux & Larry Mishel, *Inequality and the Global Economy*, in *ON THE EDGE: LIVING WITH GLOBAL CAPITALISM* 93 (Will Hutton & Anthony Giddens eds., 2000) (describing the growing global population of unemployed, marginalized, and insecure attendant on neoliberal globalization).

68. See, e.g., ALICE H. AMSDEN, *ASIA'S NEXT GIANT: SOUTH KOREA AND LATE INDUSTRIALIZATION* (1989) (describing the role of the state in promoting industrialization in South Korea); CHALMERS JOHNSON, *MITI AND THE JAPANESE MIRACLE* (1982) (describing Japanese post-war industrial policy); ROBERT WADE, *GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION* (1990) (describing the role of the state, in particular in Taiwan, in steering the direction of industrial growth); Alice H. Amsden, *The State and Taiwan's Economic Development*, in *BRINGING THE STATE BACK IN* 78 (Peter B. Evans et al. eds., 1985) (describing the role of the state in Taiwan's development); Ha-Joon Chang, *The Political Economy of Industrial Policy in Korea*, 17 *CAMBRIDGE J. ECON.* 131 (1993) (describing the role of the state in South Korea's development); Peter Nolan, *Assessing Economic Growth in the Asian NICs*, 20 *J. CONTEMP. ASIA* 41, 60 (1990) (arguing that the experience of several East Asian economies "serves as a powerful reminder that a pure free market, laissez-faire capitalism . . . is not the way in which developing countries can best achieve rapid growth" and that "only in quite exceptional circumstances do free markets provide the best environment for rapid growth").

69. Wade, *supra* note 14, at 4.

70. *Id.*

71. WORLD BANK, *THE EAST ASIAN MIRACLE: ECONOMIC GROWTH AND PUBLIC POLICY* (1993). For discussions and critiques of *The East Asian Miracle*, see Ha-Joon Chang, *Explaining 'Flexible Rigidities' in East Asia*, in *THE FLEXIBLE ECONOMY: CAUSES AND CONSEQUENCES OF THE ADAPTABILITY OF NATIONAL ECONOMIES* 197 (Tony Killick ed., 1995); Ha-Joon Chang, *The East Asian Development Experience*, in *RETHINKING DEVELOPMENT ECONOMICS*, *supra* note 38, at 107; Stephan Haggard, *Politics and Institutions in the World Bank's East Asia*, in *MIRACLE OR DESIGN? LESSONS FROM THE EAST ASIAN EXPERIENCE* 81 (Albert Fishlow et al. eds., 1994) [hereinafter *MIRACLE OR DESIGN?*]; Dani Rodrik, *King Kong Meets Godzilla: The World Bank and The East Asian Miracle*, in *MIRACLE OR DESIGN?*, *supra* at 13; Robert Wade, *Selective Industrial Policies in East Asia: Is The East Asian Miracle Right?*, in *MIRACLE OR DESIGN?*, *supra* at

As Wade writes, the report “reflect[ed] an attempt at compromise between the well-established World Bank view and the newly-powerful Japanese view.”<sup>72</sup> It acknowledged that many East Asian states had used industrial policy but argued that such interventions had been largely unsuccessful and were not causally related to these states’ economic success. Even where such policy was successful, as in Japan, it was not replicable outside East Asia:

In large measure the HPAEs achieved high growth by getting the basics right . . . . Fundamentally sound development policy was a major ingredient in achieving rapid growth. Macroeconomic management was unusually good and macroeconomic performance unusually stable, providing the essential framework for private investment.<sup>73</sup>

Developing countries were ill-advised to copy interventionist Japanese or Korean trade and industrial policies, as they were likely to lack “the competence, insulation, and relative lack of corruptibility of the public administrations in Japan and Korea.”<sup>74</sup> The report’s conclusions were “heavily weighted towards the Bank’s established position, and legitimize[d] the Bank’s continuing advice to low-income countries to follow the ‘market-friendly’ policies apparently vindicated by East Asia’s success.”<sup>75</sup> The *Miracle* study thus left the Bank’s neoliberal model slightly chastened but “largely unscathed.”<sup>76</sup>

### III. RESPONDING TO CHALLENGE: THE NEW INSTITUTIONAL ECONOMICS AND “GOOD GOVERNANCE”

#### A. *The New Institutional Economics*

The Bank’s model came under further attack with the patent failure of neoliberal policies in the transitional countries of Eastern Europe. With the collapse of the Soviet Bloc, the intellectual heirs of Friedrich von Hayek and Milton Friedman had rushed to apply their “shock therapy” or “Big Bang”

---

55; Yilmaz Akyüz, Ha-Joon Chang & Richard Kozul-Wright, *New Perspectives on East Asian Development*, 34 J. DEV. STUD. 4 (1998); Alice H. Amsden, *Why Isn't the Whole World Experimenting with the East Asian Model to Develop?: Review of The East Asian Miracle*, 22 WORLD DEV. 627 (1994); Sanjaya Lall, *The East Asian Miracle: Does the Bell Toll for Industrial Strategy?*, 22 WORLD DEV. 645 (1994); Joseph E. Stiglitz, *Some Lessons from the East Asian Miracle*, 11 WORLD BANK RES. OBSERVER 151 (1996); Wade, *supra* note 14.

72. Wade, *supra* note 14, at 5.

73. WORLD BANK, *supra* note 71, at 5; see also Chang, *The East Asian Development Experience*, *supra* note 71, at 112–13 (discussing the *East Asian Miracle* report’s conclusions).

74. WORLD BANK, *supra* note 71, at 102.

75. Wade, *supra* note 14, at 5.

76. *Id.*



reforms.<sup>77</sup> In the wake of rapid liberalization and privatization, neoliberal economists believed a market economy would develop quite naturally.<sup>78</sup> When no such development occurred, neoliberalism's champions, inside both the Bank and the academy, sought to explain the dismal failure without undermining the neoliberal model itself.<sup>79</sup> In the New Institutional Economics ("NIE"), rooted in the work of Ronald Coase and identified most closely with that of Douglass North, they found an answer.

North had been developing his brand of "new" institutional economics<sup>80</sup> since the 1970s, in which he located the institutional foundations of the neoclassical model of economics and presented a theory of economic change in which institutions took center stage.<sup>81</sup> Institutions, North explained, "are the humanly devised constraints that structure political, economic and social interaction. They consist of both informal constraints (sanctions, taboos, customs, traditions, and codes of conduct), and formal rules (constitutions, laws, property rights)."<sup>82</sup>

---

77. See GOWAN, *supra* note 65, at 187–242 (discussing and evaluating the theory and application of shock therapy in Eastern Europe). In Russia, for instance, "Big Bang reforms . . . deregulated most prices and launched a mass privatization program." Karla Hoff & Joseph E. Stiglitz, *After the Big Bang? Obstacles to the Emergence of the Rule of Law in Post-Communist Societies* 7 (Nat'l Bureau of Econ. Research, Working Paper No. 9282, 2002), available at <http://www.nber.org/papers/w9282>. Between the dissolution of the Soviet Union in December 1991 and July 1994, 14,000 medium and large state enterprises amounting to seventy percent of Russian industry were privatized. Further privatizations followed between 1995 and 1997. *Id.* at 7–8.

78. See, e.g., JEFFREY SACHS, *POLAND'S JUMP TO THE MARKET ECONOMY* xiii (1993) ("[M]arkets spring up as soon as central planning bureaucrats vacate the field.")

79. See Joseph E. Stiglitz, Senior Vice President & Chief Economist, World Bank, Whither Reform? Ten Years of the Transition, Keynote Address at the World Bank Annual Bank Conference on Development Economics 3 (Apr. 28–30, 1999). ("[T]hose who advocated shock therapy and rapid privatization argue that the problem was not too much shock and too little therapy, but that there was too little shock . . . . Other defenders of the recommended reform programs argue that the failures were not in the design of the reforms, but in their implementation.")

80. The prefix distinguishes this school from an earlier current of economic thought associated with thinkers such as Thorstein Veblen. Other prominent institutional economists included Gunnar Myrdal and John R. Commons. The work of Friedrich List, a German writing in the nineteenth century, was also influential. See generally, e.g., JOHN R. COMMONS, *INSTITUTIONAL ECONOMICS: ITS PLACE IN POLITICAL ECONOMY* (Transaction Publishers 1990) (1934); FRIEDRICH LIST, *THE NATIONAL SYSTEM OF POLITICAL ECONOMY* (J. Shield Nicholson ed., Sampson S. Lloyd trans., Longmans, Green, and Co. 1909) (1885); GUNNAR MYRDAL ET AL., *THE ESSENTIAL GUNNAR MYRDAL* (Orjan Appelqvist & Stellan Andersson eds., 2005); THORSTEIN VEBLÉN, *THE THEORY OF THE LEISURE CLASS: AN ECONOMIC STUDY OF INSTITUTIONS* (2d ed. 1912); Gunnar Myrdal, *Institutional Economics*, 12 J. ECON. ISSUES 771 (1978).

81. See generally, e.g., DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1990) [hereinafter *INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE*]; DOUGLASS C. NORTH & ROBERT P. THOMAS, *THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY* (1973) [hereinafter *RISE OF THE WEST*]; DOUGLASS C. NORTH, *STRUCTURE AND CHANGE IN ECONOMIC HISTORY* (1981) [hereinafter *STRUCTURE AND CHANGE*].

82. Douglass C. North, *Institutions*, 5 J. ECON. PERSP. 97, 97 (1991); see also *INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE*, *supra* note 81, at 3 (defining institutions as "the rules of the game in a society or, more formally . . . the humanly devised constraints that shape human interaction. In consequence they structure incentives in human exchange, whether political, social, or economic. Institutional change shapes the way societies evolve through time and hence is the key to understanding historical change.").

While a complex interaction between law, the economy, and development emerges from North's work, the central focus is a theory of property rights. Property rights, above all institutions, establish individual and group incentives of economic behavior and exchange, the NIE theorists explained. An absence of clearly defined and consistently enforced property rights leads to high transaction costs and, under North's analysis of economic history, is a key contributing factor to poor economic performance and growth.<sup>83</sup>

In sharp contrast with the neoclassical model of individuals engaged in free exchange under a system of *laissez-faire* markets, the NIE invoked an explicit, if still minimal, role for the state. While the primacy of markets remained, such markets were in reality underpinned by a collection of institutions, many of which were maintained by the state. On the NIE view, it is the state that specifies and enforces the "rules of the game." That is, the state provides the necessary institutions and legal infrastructure to ensure the protection of property rights.<sup>84</sup>

### B. *The emergence of "governance"*

The NIE was championed by the Bank precisely when its neoliberal model of development was under its strongest challenge. Starting in the early 1990s, the Bank was quick to point to the importance of institutions—and, foremost, stable property rights—in explaining the failures of SAPs and shock therapy. If the latter had not led to a functioning market economy as predicted in post-Cold War Russia, for example, it was due not to any failing in the policies of privatization and liberalization, but rather to the absence of a secure institutional environment.

The turn to the NIE was incorporated into a broader discursive shift in Bank policy in the early 1990s. The Bank ceased to talk only about macroeconomic fundamentals and instead spoke of "governance" and the importance of "good governance" for development. This new conceptual apparatus was first broached in the Bank's 1989 *Sub-Saharan Africa: From Crisis to Sustainable Growth*, which traced the "litany of Africa's development problems" to a "crisis of governance."<sup>85</sup>

The Bank's 1992 report, *Governance and Development*, defined governance as "the manner in which power is exercised in the management of a country's economic and social resources for development."<sup>86</sup> For sustainable development, the Bank explained in a later report:

[A] predictable and transparent framework of rules and institutions for the conduct of private and public business must exist.

---

83. See INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE, *supra* note 81, at 33; see generally RISE OF THE WEST, *supra* note 81.

84. See generally STRUCTURE AND CHANGE, *supra* note 81.

85. WORLD BANK, SUB-SAHARAN AFRICA: FROM CRISIS TO SUSTAINABLE GROWTH 60 (1989).

86. WORLD BANK, GOVERNANCE AND DEVELOPMENT 1 (1992).

Good governance is epitomized by predictable, open, and enlightened policymaking (that is, transparent processes); a bureaucracy imbued with a professional ethos; an executive arm of government accountable for its actions; and a strong civil society participating in public affairs; and *all behaving under the rule of law*.<sup>87</sup>

On its face, the shift to a discourse of governance suggested a dramatic transformation in the Bank's approach to the role of the state in development. In the 1981 Berg Report, the state was depicted as the source of all economic problems.<sup>88</sup> By the mid-1990s, however, the state was "brought back in," no longer predatory and venal, but "the key institution to ensure that the market functions properly."<sup>89</sup> The Bank's focus thus shifted from the *scope* of state action to the *nature* of such action.<sup>90</sup>

By 1997, James Wolfensohn, President of the Bank, could write that "development requires an effective state, one that plays a catalytic, facilitating role."<sup>91</sup> Importantly, though, the "facilitating role" of the state was not to be interventionist, for "state-dominated development" had, Wolfensohn insisted, unquestionably failed.<sup>92</sup> Rather, the state's contribution was to support and facilitate markets by "encouraging and complementing the activities of private businesses and individuals."<sup>93</sup> Wolfensohn's debt to the NIE was evident. "History and recent experience," he wrote, "have . . . taught us that development is not *just* about getting the right economic and technical inputs. It is also about the underlying, institutional environment: the rules and customs that determine how these inputs are used."<sup>94</sup> Thus, the successful developmental state will "set rules underpinning private transactions" and "enforce the rule of law to underpin market transactions."<sup>95</sup>

As Wolfensohn's comments illustrate, the shift to a governance paradigm also focused new attention on the rule of law as a necessary institution for economic development. As one Bank report observed, "[d]evelopment experience . . . showed that the rule of law promotes effective and sustainable economic development and good governance. Lack of the rule of law significantly hinders economic growth."<sup>96</sup> Wolfensohn himself wrote in a memorandum to the Bank's board, management, and staff in 1999:

---

87. WORLD BANK, *GOVERNANCE: THE WORLD BANK'S EXPERIENCE* vii (1994) (emphasis added).

88. See generally WORLD BANK, *supra* note 41 (criticizing state intervention in African economies and, in particular, the heavy protection of manufacturing industries and governments' trade and exchange-rate policies, which undermined agricultural producers' incentives).

89. HARRISON, *supra* note 11, at 19–20.

90. *Id.* at 18.

91. James D. Wolfensohn, *Foreword* to WORLD BANK, *WORLD DEVELOPMENT REPORT 1997: THE STATE IN A CHANGING WORLD* iii (1997).

92. *Id.*

93. *Id.*

94. *Id.* (emphasis added).

95. *Id.*

96. WORLD BANK LEGAL VICE PRESIDENCY, *supra* note 26, at 2.

Without the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible. A government must ensure that it has an effective system of property, contract, labor, bankruptcy, commercial codes, personal rights laws and other elements of a comprehensive legal system that is effectively, impartially and clearly administered by a well-functioning, impartial and honest judicial and legal system.<sup>97</sup>

Just as the lack of a suitable institutional environment purportedly explained the failure of SAPs and shock therapy, the Bank increasingly invoked the rule of law, and legal institutions more generally, in the 1990s to further deflect criticism of neoliberal policies. This was particularly apparent in the aftermath of the Asian financial crisis of 1997. Critical observers identified the rapid and unrestrained financial liberalization and deregulation of economies under Bank guidance as an important antecedent to the crisis.<sup>98</sup> When the crisis hit, however, the Bank quickly denied any connection; if a lesson was to be drawn from the crisis, it was of the importance of a strong rule of law. In its 2002 report, the Bank's Legal Vice Presidency noted: "One of the critical lessons from the East Asian financial crisis and the collapse of some of the Eastern European transition economies in the 1990s was that, *without the rule of law, economic growth and poverty reduction can be neither sustainable nor equitable.*"<sup>99</sup> Similarly, in its 2004 report, the Vice Presidency insisted that "[t]he Asian financial crisis . . . vividly illustrated that economic growth without the firm foundation of effective laws and legal institutions was vulnerable and unsustainable."<sup>100</sup>

---

97. Ofosu-Amaah, *supra* note 52, at 556 (quoting Memorandum from James D. Wolfensohn to the Board, Management, and Staff of the World Bank, *A Proposal for a Comprehensive Development Framework: A Discussion Draft* (Jan. 21, 1999)).

98. See, e.g., Ha-Joon Chang, *The Hazard of Moral Hazard: Untangling the Asian Crisis*, 28 *WORLD DEV.* 775, 776 (2000); Ha-Joon Chang et al., *Interpreting the Korean Crisis: Financial Liberalisation, Industrial Policy and Corporate Governance*, 22 *CAMBRIDGE J. ECON.* 735 (1998) (arguing that the roots of the Korean crisis lie in rapid financial liberalization and dismantling of industrial policy); Jason Furman & Joseph E. Stiglitz, *Economic Crises: Evidence and Insights from East Asia*, 2 *BROOKINGS PAPERS ON ECON. ACTIVITY* 1, 15–18 (1998); Chalmers Johnson, *Economic Crisis in East Asia: The Clash of Capitalisms*, 22 *CAMBRIDGE J. ECON.* 653 (1998); K.S. Jomo, *Malaysian D eb acle: Whose Fault?*, 22 *CAMBRIDGE J. ECON.* 707 (1998) (emphasizing financial liberalization prior to the crisis in Malaysia); Jonathan Pincus & Rizal Ramli, *Indonesia: From Showcase to Basket Case*, 22 *CAMBRIDGE J. ECON.* 723 (1998) (tracing the roots of the crisis in Indonesia to a 1980s program of economic liberalization).

99. *WORLD BANK, LEGAL AND JUDICIAL REFORM: OBSERVATIONS, EXPERIENCES AND APPROACH OF THE LEGAL VICE PRESIDENCY 1* (2002) (emphasis added).

100. *WORLD BANK LEGAL VICE PRESIDENCY, supra* note 26, at 2.

IV. RULE OF LAW OR RULE OF MARKET: THE WORLD BANK'S  
INSTRUMENTALIZATION OF THE RULE OF LAW

A. *A cherished creed*

If the rule of law is necessary for economic development, of what exactly does it consist? The term has been long been characterized by a pervasive polysemy. As early as the 1930s, Carl Schmitt observed that the *Rechtsstaat* “can stand for as many different things as the word *Recht* [law] itself and for as many different concepts as the many institutional arrangements implied by the words *Staat* [state].”<sup>101</sup> Italian jurist Danilo Zolo remarks simply that “it would be naïve to seek a semantically univocal and ideologically neutral definition of the ‘rule of law.’”<sup>102</sup>

Against the view of the rule of law as a plastic concept without depth may be traced a deep-rooted tradition associating the rule of law with fairness and equality. In classical Athens, Pericles expressed pride that his political influence was limited by the Assembly and celebrated “the rule of law and the juridical equality which it prescribes for the citizen body as an index of the achievement of Athens.”<sup>103</sup> Liberals in the mold of Locke grasped this reasoning and celebrated the law as a check on arbitrary government. They argued that governmental action—by monarch or legislature—must be based upon clear and formal, publicly declared rules, thus restraining government action and rendering it calculable.<sup>104</sup> Hayek, too, famously invoked these ends in his defense of the rule of law, under which “government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge.”<sup>105</sup>

---

101. Zolo, *supra* note 24, at 5 (quoting Carl Schmitt, *Legalität und Legitimität* in CARL SCHMITT, VERFASSUNGSRECHTLICHE AUFSÄTZE AUS DEM JAHREN 1924–1954 274 (1932) (alteration in original); see also TAMANAHA, *supra* note 24, at 3 (quoting Olufemi Taiwo, *The Rule of Law: The New Leviathan?*, 12 CANADIAN J. L. & JURISPRUDENCE 151, 152 (1999)) (“[T]here are almost as many conceptions of the rule of law as there are people defending it.”).

102. Zolo, *supra* note 24, at 5. For surveys of the how the rule of law is understood in historical and contemporary scholarship, see generally TAMANAHA, *supra* note 24; MICHAEL J. TREBILCOCK & RONALD J. DANIELS, *RULE OF LAW REFORM AND DEVELOPMENT: CHARTING THE FRAGILE PATH OF PROGRESS* 12–29 (2008); *THE RULE OF LAW: HISTORY, THEORY AND CRITICISM* (Pietro Costa & Danilo Zolo eds., 2007).

103. JUSTIN ROSENBERG, *THE EMPIRE OF CIVIL SOCIETY: A CRITIQUE OF THE REALIST THEORY OF INTERNATIONAL RELATIONS* 78 (1994) (citing THUCYDIDES, *HISTORY OF THE PELOPONNESIAN WAR* 145 (M. Finley ed., 1972)); see also Edward M. Harris, *Pericles' Praise of Athenian Democracy Thucydides 2.37.1*, 94 HARV. STUD. CLASS. PHILOLOGY 157, 161 (1992) (“Pericles points to the principle of equality before the law for all citizens which the Athenian judiciary follows when resolving private legal disputes.”).

104. See WILLIAM E. SCHEUERMAN, *BETWEEN THE NORM AND THE EXCEPTION: THE FRANKFURT SCHOOL AND THE RULE OF LAW* 68–70 (1994) (discussing Locke’s political theory and its contribution to early liberal formulations of the rule of law).

105. FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 72 (1944).

In contemporary liberal legal thought, the rule of law takes center stage in the liberal conception of the state; it is an equal and uniform rule of law to which all individuals are subject and which is enforced through independent, impartial, reason-based adjudication.<sup>106</sup> To realize this idea, legal rules should be clear, consistent, public, prospective, and stable.<sup>107</sup> If the particular features of the rule of law have varied across time or space, Zolo suggests that this common theme runs through numerous Western traditions: the English rule of law, the North American version, the German *Rechtsstaat* and the French *État de droit*.<sup>108</sup> He argues that “the theoretical elements drawn from these four historical experiences may be consistently united within a general model.”<sup>109</sup> On this view, the rule of law is “meant as the normative and institutional structure of a modern state within which the legal system—and not other functional subsystems—is entrusted with the task of guaranteeing individual rights, curbing the natural tendency of political power to expand and act arbitrarily.”<sup>110</sup> Similarly, Randall Peerenboom insists that there exists a “broad consensus” as to the rule of law’s core meaning: “At its most basic, rule of law refers to a system in which law is able to impose meaningful restraints on the state and individual members of the ruling elite.”<sup>111</sup>

Many on the left, of course, have criticized this attachment to the rule of law.<sup>112</sup> They argue that in focusing on curtailing arbitrary government through the juridical equality of individuals before the law, the rule of law obscures the social conditions and inequalities that restrict formal freedoms.<sup>113</sup> For those writing in the Marxist tradition, law is a source of ideological mystification which serves to legitimate inequalities of capitalist social relations. Whereas exploitation and the appropriation of surplus labor in feudal social formations was compelled through formal relations of domination, under the capitalist rule of law poor and rich, laborer and capitalist, are all *formally* free and equal; economic need, and not juridical compulsion,

---

106. See, e.g., JOSEPH RAZ, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW* 210, 212–19 (1979).

107. See *id.* at 214–16.

108. Zolo, *supra* note 24, at 7.

109. *Id.*

110. *Id.*

111. RANDALL PEERENBOOM, *CHINA’S LONG MARCH TOWARD RULE OF LAW* 2 (2002).

112. Many, but not all such critiques, are from writers working in the Marxist tradition. The most sophisticated Marxist theory of law was developed by the Bolshevik jurist Evgeny Pashukanis, who argued that the very form of law itself is distinctive to capitalist relations. See generally EVGENY B. PASHUKANIS, *THE GENERAL THEORY OF LAW & MARXISM* (Chris Arthur ed., B. Einhorn trans., Transaction Publishers 2002) (1929). Hostility to bourgeois law can be traced through the work of Marx, although law *per se* was never the specific object of Marx’s inquiry. See generally KARL MARX & FRIEDRICH ENGELS, *THE GERMAN IDEOLOGY* (C.J. Arthur ed., 1970); KARL MARX, *On the Jewish Question*, in *EARLY POLITICAL WRITINGS* (Joseph O’Malley ed., 1994) (1844).

113. CHRISTINE SYNOWICH, *THE CONCEPT OF SOCIALIST LAW* 67 (1990) (outlining a socialist position on the rule of law).

forces the wage earner to sell her labor.<sup>114</sup> Following this position, Christine Sypnowich observes that the rule of law obfuscates the unequal property relations protected by the law, and the “fundamental question” of whether individuals have access to “the resources which determine [their] capacity to set goals and realize them” is thus lost from sight.<sup>115</sup> One consequence, she suggests, is that the rule of law becomes little more than “an effective rationale for curtailing the ability of the legal system to bring about redistributions of wealth.”<sup>116</sup>

Is the rule of law, then, necessarily a chimera? While critiquing the law’s role in mystification, many progressive critics nonetheless maintain the idea that the rule of law may achieve its promise of substantive equality and justice. The socialist historian E.P. Thompson, writing about eighteenth-century England, describes how “the actuality of the law’s operation in class-divided societies has, again and again, fallen short of its own rhetoric of equity,” yet he nonetheless applauds the rule of law as an “unqualified human good.”<sup>117</sup> Under Thompson’s study of English history, the rule of law often provided important checks on official discretion and could be used not only as a cloak for exploitation but also deployed by the subaltern.<sup>118</sup> As Alan Hunt argues, nothing *necessarily* ties the rule of law to the protection of individual property interests. Rather, “the substantive content delivered by legal process is an outcome of concrete political struggle.”<sup>119</sup> And Sypnowich, in developing a sophisticated socialist concept of law, proposes that the rule of law is not only compatible with progressive concerns of freedom and equality, but that it is in fact a necessary *condition* for socialist society; even where class divisions have been eliminated, law will be required to mediate conflict.<sup>120</sup>

A full exploration of the content and progressive potential of the rule of law is clearly beyond the scope of this Article. What is more important, here, is to note the existence of rich traditions on both the right and left, in disciplines ranging from social theory to political and legal philosophy, celebrating and criticizing the concept. Today, the rule of law is increasingly invoked to stand not only for juridical equality and a government bound by

114. See, e.g., JÜRGEN HABERMAS, *TOWARD A RATIONAL SOCIETY* 97 (Jeremy J. Shapiro trans., Beacon Press 1971) (1968) (“[T]he property order . . . legitimates itself through the rationality of the market, the ideology of exchange society, and no longer through a legitimate power structure.”); Ellen Meiksins Wood, *The Separation of the Economic and the Political in Capitalism*, I/127 *NEW LEFT REV.* 66, 80–81 (1981).

115. SYPNOWICH, *supra* note 113, at 67.

116. *Id.*; see also SCHEUERMAN, *supra* note 104, at 97 (“The rule of law is too often a sham in a society with vast social and economic inequalities. Fancy lawyers make sure that the well-to-do criminal remains unpunished, whereas the poor lack the social and economic resources to take advantage of their formal rights.”).

117. E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 267 (1975).

118. *Id.*

119. Alan Hunt, *A Socialist Interest in Law*, I/192 *NEW LEFT REV.* 105, 117 (1992).

120. SYPNOWICH, *supra* note 113, at 61.

law, but for a longer list of institutions and goals<sup>121</sup> including political liberties, protection of human rights, democracy, constitutionalism, and political morality concepts of justice, fairness, and liberty.<sup>122</sup> For instance, at the start of a detailed study of the rule of law and economic development, Dam observes that the field of legal institutions is broad and that a catholic approach to the rule of law might invoke the protection of political liberties and human rights, democracy, and constitutionalism—all institutions that “may indeed play a role in economic development.”<sup>123</sup> Many of these aspects are captured in the U.N. Secretary General’s definition of the rule of law as:

[A] principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in

---

121. A distinction is often drawn between “thin” and “thick” conceptions of the rule of law. See, e.g., PEERENBOOM, *supra* note 111, at 2–3, 65 (2002) (distinguishing between a thin, procedural rule of law and a thick, substantive theory); TREBILCOCK & DANIELS, *supra* note 102, at 14–23 (identifying and critiquing “‘thick’ and ‘thin’ approaches to theorizing the rule of law”). Joseph Raz has criticized thick theories of the rule of law, insisting on a formal, instrumental conception. RAZ, *supra* note 106, at 211. On his view, the rule of law should not be “confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man.” *Id.* Indeed, Raz insists that a non-democratic legal system, “based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies.” *Id.*

122. See DAM, *supra* note 6, at 14; TREBILCOCK & DANIELS, *supra* note 102, at 13 (quoting Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in *PROMOTING THE RULE OF LAW ABROAD* 31, 31–32 (Thomas Carothers ed., 2006)). Competing definitions are not necessarily consistent with one another. For instance, in the realm of human rights, some writers argue that respect for human rights is a component of the rule of law, while others insist that without the rule of law, human rights cannot possibly be respected or protected. Compare DAM, *supra* note 6, at 14 (suggesting respect for human rights may be a component of the rule of law), with OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *GOOD GOVERNANCE PRACTICES FOR THE PROTECTION OF HUMAN RIGHTS* 1 (2007) (arguing that without the rule of law and good governance generally, “human rights cannot be respected and protected in a sustainable manner”).

123. DAM, *supra* note 6, at 14. Dam, for his part, dismisses such an approach in his own analysis of links between law and development with an appeal to unspecified “ambiguities.” *Id.* The exclusion of human rights protection from the rule of law alone receives cursory explanation: “Any attempt to deal with the indisputably important issue of human rights would have to confront the absence of empirical information on the relation of human rights to economic development. Most discussions of human rights are either aspirational or devoted to the recounting of horror stories about abuses.” *Id.* at 14. The absence of a literature justifies elision of analysis. Dam instead focuses on a narrower, but familiar, institutional recipe: the protection of property rights, the enforcement of contracts, and a judiciary capable of achieving these goals. *Id.* at 7–14. Why, in an analysis of how the rule of law is linked to development, should we consider only these institutions? In a question-begging explanation, he states that these can be said with certainty to contribute to economic development. *Id.* at 14.



decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.<sup>124</sup>

The International Bar Association also takes an expansive, if more procedural, view. Resolutions of the Association's Council in 2005 and 2009 expound on the principles upheld by the rule of law, which include "[a]n independent, impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment; a strong and independent legal profession; strict protection of confidential communications between lawyer and client; [and] equality of all before the law . . . ."<sup>125</sup>

### B. *The rule of law and economic development*

The Bank's own use of the term is somewhat narrower. Its 2002 World Development Report, *Building Institutions for Markets*, explained that the rule of law "encompass[es] the collective importance of property rights, respect for legal institution, and the judiciary."<sup>126</sup> Two years later, the Legal Vice Presidency provided a more expansive definition; the rule of law was understood to exist where:

(1) the government itself is bound by the law; (2) every person in society is treated equally under the law; (3) the human dignity of each individual is recognized and protected by law; and (4) justice is accessible to all. The rule of law requires transparent legislation, fair laws, predictable enforcement, and accountable governments to maintain order, promote private sector growth, fight poverty, and have legitimacy.<sup>127</sup>

How, then, does the rule of law promote economic growth? Despite its purported recognition of a role for the state in development, the Bank's theoretical expositions of the link between law and development reveal an ongoing faith in the market and individual entrepreneurial activity as the drivers of economic growth. Strongly influenced by the NIE, the Bank is fundamentally concerned by the rule of law with "the inviolability of private property and the entrenchment of universally-accepted contractarian

---

124. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General*, UNSC, 4, S/2004/616\* (Aug. 23, 2004).

125. INT'L BAR ASS'N, RESOLUTION OF THE COUNCIL OF THE INTERNATIONAL BAR ASSOCIATION OF OCTOBER 8, 2009, ON THE COMMENTARY ON RULE OF LAW RESOLUTION 2 (2005), available at <http://www.ibanet.org/Document/Default.aspx?DocumentUId=9925C6FD-5804-407F-9D39-ECB9D6A8B9D4>.

126. WORLD BANK, WORLD DEVELOPMENT REPORT 2002: BUILDING INSTITUTIONS FOR MARKETS 7 (2002).

127. WORLD BANK LEGAL VICE PRESIDENCY, *supra* note 26, at 2-3.

market regulations.”<sup>128</sup> The Bank claims that where private property rights are not protected, where contracts are not enforced predictably, or where judicial enforcement is unreliable, “the private sector does not believe that the state will enforce the rules of the game” and “[i]nvestment suffers because entrepreneurs choose not to commit resources in highly uncertain and volatile environments.”<sup>129</sup> “[G]rowth and investment suffer as a consequence,” the Bank concludes.<sup>130</sup> The rule of law is essential insofar as it creates “the incentive structure to which economic agents respond” and facilitates “[t]he private sector’s ability to function.”<sup>131</sup>

The Legal Vice Presidency similarly explains that laws and legal institutions “engender investment and jobs” by providing an “environment conducive to economic activities.”<sup>132</sup> Secure property rights and enforceable contracts, for instance, enable individuals to “take opportunities in business, commerce and other activities.”<sup>133</sup> In providing the rule of law, the state may thus “empower private individuals to contribute to economic development by confidently engaging in business, investments and other transactions.”<sup>134</sup> An independent and credible judiciary is similarly important for its market-enhancing role and ability to ensure enforcement of private contracts and restrain government arbitrariness.<sup>135</sup> As Ibrahim Shihata, Vice President and General Counsel, observed in the mid-1990s:

[E]xperience has clearly demonstrated the quintessential role of law in development and, especially, the need for the rule of law and for well-functioning judicial institutions. This is particularly evident in the private sector, where the rule of law is a precondition for sectoral development. It creates certainty and predictability; it leads to lower transaction costs, greater access to capital, and the establishment of level playing fields. In fact, worldwide experience confirms the importance to rapid and sustainable development of the clarification and protection of property rights, the enforcement of contractual obligations, and the enactment and application of rigorous regulatory regimes.<sup>136</sup>

---

128. HARRISON, *supra* note 11, at 122; *see also* ALAIN SUPIOT, HOMO JURIDICUS: ON THE ANTHROPOLOGICAL FUNCTION OF THE LAW 78–109 (2007) (critiquing the general extension of the contract form as the organizing principle of social relations in contemporary society).

129. Wolfensohn, *supra* note 91, at 36.

130. *Id.* at 5.

131. *Id.* at 32.

132. WORLD BANK, *supra* note 99, at 3.

133. *Id.* at 2.

134. *Id.*

135. The law’s market-facilitating role was foreshadowed in Bank reports in the 1990s. *See, e.g.*, WORLD BANK, *supra* note 86, at 37 (arguing, *inter alia*, the importance of contract enforcement “for conducting efficient private economic activities”).

136. Ibrahim F.I. Shihata, *Judicial Reform in Developing Countries and the Role of the World Bank*, in JUDICIAL REFORM IN LATIN AMERICA AND THE CARIBBEAN 13, 13 (Malcolm Rowat, Waleed H. Malik & Maria Dakolias eds., 1995).

Under the Bank's view, the law's value for economic development lies in its ability to provide a stable investment environment and the predictability necessary for markets to operate. The purpose of law is reduced to the facilitation of utility maximizing exchange and optimal market allocation.<sup>137</sup>

This view also informs the Bank's specific law reform projects.<sup>138</sup> Many projects focus specifically on the ability of legal systems to facilitate market transactions: one study reports that "of a total of 555 Bank-supported rule of law projects, 240 are focused on the development of legal institutions for a market economy. Only 40 projects have 'access to justice' components which include goals such as, raising public awareness of legal institutions and laws, educational programmes and institutional transparency."<sup>139</sup> Similar conclusions were reached in a 2002 study by the World Bank's Operations Evaluation Department. The study's authors analyzed Bank projects in twenty-one European and Central Asian countries between 1990 and 2001 and found that the primary focus of legal reform was commercial and financial sector legal reform with an emphasis on, inter alia, privatization law, bankruptcy law, and property rights law.<sup>140</sup>

A market-facilitating view of law is also apparent in the Bank's various attempts at constructing empirical indices to quantify and measure the rule of law in different countries. One of the earliest attempts—and now the largest such project—is the World Bank Institute's Worldwide Governance Indicators ("WGI"), updated annually under the title *Governance Matters*.<sup>141</sup> Originally published in 1999, the WGI aggregate data on various subjective measures of institutional quality, including the rule of law, for 212 coun-

---

137. This view has clear affinities with the law and economics movement, which is prominent on law school campuses and now exerting a growing influence on the judiciaries of many countries. For a trenchant critique of this approach to the law, see SUPLOT, *supra* note 128, at 83–86 (arguing that the view of law prized by the law and economics movement undermines the anthropological function of the law as a dogmatic, socially constitutive force); Tor Krever, *Calling Power To Reason?*, 65 *NEW LEFT REV.* 141 (2010) (my discussion of Suplot's book).

138. I do not mean to suggest that all Bank law reform projects have this goal. Certainly the Bank funds projects on law reform which are justified not by increased growth but other normative goals. Cf. Gordon Barron, *The World Bank & Rule of Law Reforms* (Dev. Studies Inst. Working Paper No. 05-70, 2005) (concluding that there is an "absence of a guiding theory in the Bank's work"). The Bank's work on legal and judicial reform is undertaken by several different internal divisions. See Santos, *supra* note 7 at 253 (describing in some detail how conceptual confusion and differing normative visions often result in disagreement or even competing goals). However, a distinction must be drawn between rationales for individual law reform projects, on the one hand, and the role of law and the rule of law in a *theory* of economic development, on the other.

139. Victoria Harris, *Consolidating ideology in law? Legal and judicial reform programmes at the World Bank*, BRETTON WOODS PROJECT (July 25, 2007), <http://www.brettonwoodsproject.org/art-554671>.

140. Poonam Gupta et al., *Legal and Judicial Reform in Europe and Central Asia* v (World Bank Operations Evaluation Dep't Working Paper, 2002).

141. See generally Daniel Kaufmann et al., *Governance Matters* (World Bank Policy Research Working Paper No. 2196, 1999); Daniel Kaufmann et al., *Governance Matters IV: Governance Indicators for 1996–2004* (World Bank Policy Research Working Paper No. 3630, 2005); Daniel Kaufmann et al., *Governance Matters VIII: Aggregate and Individual Governance Indicators 1996–2008* (World Bank Policy Research Working Paper No. 4978, 2009).

tries.<sup>142</sup> The WGI's rule of law measure seeks to capture "perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence."<sup>143</sup> The indicator is based on a large number of individual variables collected from surveys, primarily of business leaders, "country experts," and commercial risk rating agencies.<sup>144</sup> However, an analysis of the survey-level sources used to compile the indicator suggests an overwhelming emphasis on a limited number of variables: protection of property rights (including intellectual property); enforcement of contracts; and the independence of the judiciary are the most important components of the rule of law as measured by the WGI.

Other projects under the Bank's auspices have gone further in awarding primacy to the market function of law. The Bank's *Doing Business* reports, for example, assess whether jurisdictions' laws and regulations "enhance or hinder business activity."<sup>145</sup> The project seeks "to provide an objective basis for understanding and improving the regulatory environment for business"<sup>146</sup> and, to this end, evaluates the laws and regulations of some 175 countries.<sup>147</sup> National laws and legal institutions are categorized on the basis of their role in private entrepreneurial activity—starting a business, dealing with permits and licenses, employing workers, registering property, obtaining credit, protecting investors, paying taxes, trading across borders, enforcing contracts, and closing a business—and their quality, measured by the extent to which they facilitate such activity.<sup>148</sup> Indicators score a jurisdiction, for instance, on the costliness of starting a business: more steps or time required to establish the business results in a lower score.<sup>149</sup> Under the rubric of

142. Kaufmann, *Governance Matters VIII*, *supra* note 141, at 1.

143. *Id.* at 6.

144. See Daniel Kaufmann et al., *Governance Matters V: Governance Indicators for 1996–2005* (World Bank Policy Research Working Papers No. 3630, 2006) (discussing the methodology used to produce the WGI composite indicators); see also CHRISTIANE ARNDT AND CHARLES OMAN, *USES AND ABUSES OF GOVERNANCE INDICATORS* 50–64 (2006). The WGI also incorporate several household surveys, although these are a distinct minority, suggesting a sample bias in favor of business-oriented perceptions of the rule of law. *Id.*

145. WORLD BANK, *DOING BUSINESS 2004: UNDERSTANDING REGULATION 1* (2004). Elsewhere, the project's creators note that they seek to establish "the scope and manner of regulations that enhance business activity and those that constrain it." *Id.* at viii.

146. WORLD BANK, *DOING BUSINESS 2010: REFORMING THROUGH DIFFICULT TIMES v* (2009).

147. *Id.* The original 2004 report included data on only five areas of law in 133 countries. See WORLD BANK, *supra* note 145, at 1.

148. See, e.g., WORLD BANK, *supra* note 146; WORLD BANK, *DOING BUSINESS 2009* (2008); WORLD BANK, *DOING BUSINESS 2008* (2007); WORLD BANK, *DOING BUSINESS 2007: HOW TO REFORM* (2006) [hereinafter *DOING BUSINESS 2007*]; WORLD BANK, *DOING BUSINESS 2006: CREATING JOBS* (2005); WORLD BANK, *DOING BUSINESS 2005: REMOVING OBSTACLES TO GROWTH* (2004); WORLD BANK, *supra* note 146; see also Kevin E. Davis & Michael B. Kruse, *Taking the Measure of Law: The Case of the Doing Business Project*, 32 L. & SOC. INQUIRY 1095, 1098–1102 (2007) (describing the *Doing Business* methodology); Alvaro Santos, *Labor Flexibility, Legal Reform, and Economic Development*, 50 VA. J. INT'L L. 43, 61–65 (2009) (discussing the *Doing Business* methodology).

149. WORLD BANK, *supra* note 146, at 78–80.

Employing Workers (called “Hiring and Firing Workers” in reports prior to 2007), a system of labor law is reduced to a numerical measure of the protections afforded labor. A “rigidity of employment” index rewards jurisdictions with, for example, a low minimum wage and relaxed rules for termination (no requirement of advanced notice, say, for redundancy termination or mass dismissals), and penalizes those with limits on work time or extended mandated paid annual vacation.<sup>150</sup> Perhaps unsurprisingly, the first report in 2004 found that “in most countries government intervention is excessive and that it hurts business.”<sup>151</sup>

The *Doing Business* reports have application beyond the private business sector: measures of business-friendliness are increasingly used as proxies for the quality of legal systems more broadly, and have influenced legal reform in a number of developing countries.<sup>152</sup> Economic efficiency and market facilitation have secured a near monopoly as the sole metrics for evaluating legal institutions, and jurisdictions now compete in a crude legal boosterism for both foreign capital and development aid, for which *Doing Business* and the WGI conveniently provide benchmarks.<sup>153</sup>

## V. IMPLICATIONS

Viewed in its historical context, what, then, are the salient features of the Bank’s rule of law discourse? First, its origins: the discourse is a response not to scholastic advancement but to the critique of the neoliberal development paradigm. What one finds in reviewing the Bank’s reports of the 1990s and into the new millennium is not so much a sea-change in development think-

---

150. *Id.* at 82–83.

151. WORLD BANK, *supra* note 145, at 93.

152. The 2007 report announces that “[s]ince its start in October 2003, the *Doing Business* project has inspired or informed 48 reforms around the world,” including reform in Mozambique, Burkina Faso, Mali, Niger and Georgia. DOING BUSINESS 2007, *supra* note 148, at 3–4.

153. According to one study, “[o]ne standard deviation higher on the [index] of rule of law . . . correspond[s] to 28% more overall aid and 50% more finance from the World Bank IDA facility . . .” Craig Burnside & David Dollar, *Aid, Policies, and Growth: Revisiting the Evidence* 7 (World Bank Policy Research Working Paper No. 3251, 2004); see also ARNDT & OMAN, *supra* note 144, at 39 (“[D]onors now pay considerable attention to the quality of political governance in recipient countries when making their aid-allocation decisions.”). Aid dispersed under the United States’ Millennium Challenge Account (MCA), for example, is determined on the basis of, inter alia, WGI and *Doing Business* scores. See MILLENNIUM CHALLENGE CORPORATION, REPORT ON THE CRITERIA AND METHODOLOGY FOR DETERMINING THE ELIGIBILITY OF CANDIDATE COUNTRIES FOR MILLENNIUM CHALLENGE ACCOUNT ASSISTANCE IN FISCAL YEAR 2010 3–4 (2009) (explaining eligibility for MCA assistance); *About the Indicators for Fiscal Year 2010*, MILLENNIUM CHALLENGE CORPORATION (Sept. 11, 2009), <http://www.mcc.gov/documents/press/factsheet-091109-indicators-for-fy10.pdf> (explaining eligibility for MCA assistance); see also WALDEN BELLO, DILEMMAS OF DOMINATION: THE UNMAKING OF THE AMERICAN EMPIRE 184–85 (2005) (arguing that the MCA represents a “rightwing transformation of aid policy” which aims “not just to accelerate market reform but, equally, to push political reform along narrow Western lines”); MARY M. SHIRLEY, INSTITUTIONS AND DEVELOPMENT: ADVANCES IN NEW INSTITUTIONAL ANALYSIS 91 (2008). USAID also supports the *Doing Business* project; Andrew S. Natsios, administrator of USAID, stated of the project in 2005, “[C]ountries that are willing to embark on serious reforms in these areas will find ready and willing support from the donors . . .” Santos, *supra* note 148, at 60.

ing as a subtle discursive shift. The neoliberal prescriptions of the 1980s and the anti-state view underpinning them have not been discarded. Rather, a new generation of institutional reforms has been added to these earlier policies and, indeed, posited as preconditions for their success. The failure of specific policies lay not in the neoliberal development model itself, which remains resilient, but in the lack of a permissive institutional environment. Under this view, the story of the Bank's changing theory of development appears to be an unfolding process of what Robert Wade has termed "paradigm maintenance."<sup>154</sup> From its initial concern with macroeconomic fundamentals ("get the prices right"), the Bank has progressively added new features—"new commandments" to use Erik Reinert's expression<sup>155</sup>—as each preceding formulation came under challenge and failed to deliver growth. Importantly, each addition never detracts from or amends the central premises of the original neoliberal paradigm.<sup>156</sup>

This, then, is the second salient feature: the continued embrace of the free market and individual entrepreneurialism as the privileged agents of growth. The new rule of law orthodoxy adopts the vernacular of the NIE in lieu of the explicit binary state-market dichotomy of neoclassical theory, but policy prescriptions such as liberalization and privatization remain unchanged, and indeed, bolstered. Even while opining about the importance of the law in supporting markets, the Legal Vice Presidency celebrates the era of SAP-led policies: "The first generation of 'neo-liberal' programs . . . helped move the global economy to the much more open and dynamic stage we see today."<sup>157</sup> Some such programs were admittedly unsuccessful due to the failure to establish the requisite legal support: "Privatization without having in place a legal and regulatory framework beforehand resulted in the opaque transfer of ownership, corruption, and dissipation of assets."<sup>158</sup> But the program itself—privatization or otherwise—remains unquestioned. The core policy proposals of the Washington consensus—trade liberalization, privatization, financial liberalization, strict inflation control, etc.—remain central to the World Bank's agenda. And, as the neoliberal and former World Bank economist Deepak Lal observes, the overriding concern of mainstream development policy remains "to remove the state from areas where it has no role."<sup>159</sup> Below the surface of rhetorical flourishes, neoliber-

---

154. Wade, *supra* note 14, at 3–4. Wade uses the term to describe the Bank's response to a growing challenge, championed by Japan in the late 1980s, to the Bank's "core ideas about the role of the state" in economic development. *Id.*

155. ERIK S. REINERT, *HOW RICH COUNTRIES GOT RICH . . . AND WHY POOR COUNTRIES STAY POOR 204–05* (2007) ("[I]f we just 'get the prices right' plus this or that factor, poor countries will achieve growth . . .").

156. *Id.* at 205 ("When it comes to practical policy recommendations . . . the original commandments are still applied.")

157. WORLD BANK, *supra* note 99, at 17.

158. *Id.* at 4.

159. DEEPAK LAL, *THE POVERTY OF 'DEVELOPMENT ECONOMICS'* 226 (3d ed. 2002). This concern is also apparent in the Bank's increased focus on good governance and in its rhetoric concerning civil

alism remains hostile toward government: the integration of world markets is necessarily tied to the atrophying of the state; an unfettered global market will lead to economic growth; and government or state interference in that market will be inherently counterproductive and inhibit the workings of the market.

To the student of twentieth-century intellectual history, there is something familiar about economic liberalism using its very failure to bolster its continued and reinvigorated extension. Writing of the “spectacular failure” of the *laissez-faire* principle in the 1930s and early 1940s, Karl Polanyi observes that economic liberalism’s “partial eclipse” actually “strengthened its hold.”<sup>160</sup> Its defenders, Polanyi observes, could now argue that the incomplete application of *laissez-faire* principles was “the reason for every and any difficulty laid to its charge.”<sup>161</sup> From mid-century defenders of economic liberalism we find the very same arguments deployed by neoliberalism’s partisans today:

[Economic liberalism’s] apologists are repeating in endless variations that but for the policies advocated by its critics, liberalism would have delivered the goods; that not the competitive system and the self-regulating market but interference with that system and interventions with that market are responsible for our ills.<sup>162</sup>

The rule of law orthodoxy provides a new ideological buttress to the neoliberal agenda, while in fact extending the mantras of economic efficiency and entrepreneurial activity as a *raison d’être* for law itself.<sup>163</sup> The promotion of the rule of law as a central component of development policy is attractive to neoliberals precisely because it helps embed social relations of the free market and a belief that development is predicated on individual entrepreneurial activity—and not on involving state intervention.<sup>164</sup>

---

society. See, e.g., WORLD BANK, *supra* note 86, at 13–26, 49; WORLD BANK, *supra* note 85, at 61; Williams & Young, *supra* note 23, at 87 (“The Bank’s promotion of civil society is linked to its promotion of accountability, legitimacy, transparency and participation as it is these factors which empower civil society and reduce the power of the state.”).

160. KARL POLANYI, *THE GREAT TRANSFORMATION* 143 (Beacon Press 1957) (1944).

161. *Id.*

162. *Id.*

163. Alain Supiot has characterized this approach to law as the rise, over the past three decades, of an “anarcho-capitalism that sees the market as the *Grundnorm* of every national regulatory order; a meta-judicial principle that must be imposed on every aspect of social life in every country, leading eventually to the withering-away of the state.” Alain Supiot, *Law and Labour*, 39 *NEW LEFT REV.* 109, 115 (2006). The ultimate horizon of this approach, he argues, is to view law as “just another product competing in a world market where natural selection will single out systems best adapted to commercial needs. Instead of free competition being founded on the law, law is to be founded upon free competition.” *Id.*

164. Bateman and Chang suggest that the recent popularity of microfinance may be similarly explained with reference to its “political/ideological serviceability” to the prevailing neoliberal model, particularly its emphasis on “individual entrepreneurship over all other forms (state, cooperative, etc.)” Bateman & Chang, *supra* note 48, at 6.

The rule of law doctrine as evinced by the Bank not only undergirds continued neoliberal assumptions about development, but also risks obfuscating the role that law has played in historical development experiences. By uncritically rehearsing a functionalist, market-facilitating view of law, its champions naturalize those legal institutions and forms distinctive to modern Western society, hiding their contingent character and mystifying the social relations from which they arise. In today's orthodoxy, law is not the product of political and ideological contest, as in the conflict between customary norms and the extension of capitalist property relations in pre-industrial Britain<sup>165</sup> or the struggle between capital and labor in the emergence of classical labor law and the social democratic welfare state. Rather, the Bank's theorizing reveals a process-driven deployment of law as an objective, non-controversial technique—the disinterested application of technical principles to facilitate an efficient outcome with law as a neutral platform for individual productivity. After all, Bank officials are eager to stress that the neoliberal rule of law is merely “a basic requirement . . . for a modern state.”<sup>166</sup> This ahistorical approach deflects attention from the political character of the law and its significant distributional consequences, and forecloses the law as a site of political contestation, thus narrowing political horizons.

But if the rule of law orthodoxy disassembles rather than illuminates, what are its implications for developing societies? Blithe praise for the rule of law may actually undermine prospects of development in the global South. Close historical analysis of those countries that achieved early developmental success in the nineteenth and early twentieth centuries—namely in North America and Western Europe—as well as those more recent economic “miracles”—principally Japan, South Korea, and Taiwan, but also China, India, Thailand, Malaysia, and most recently Vietnam—suggests that few, if any, followed neoliberal or neoclassical prescriptions. Both the early industrializing capitalist core and its East Asian counterparts developed on a diet of state-coordinated policy interventions anathema to the pieties found in contemporary economics textbooks.<sup>167</sup> Theoretical work, too, supports the view

---

165. See generally PETER LINEBAUGH, *THE LONDON HANGED: CRIME AND CIVIL SOCIETY IN THE EIGHTEENTH CENTURY* (1991); E.P. THOMPSON, *CUSTOMS IN COMMON* (1992).

166. SHIHATA, *supra* note 11, at 85.

167. See, e.g., HA-JOON CHANG, *KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE 2* (2002) (“[T]he developed countries did not get where they are now through the policies and the institutions that they recommend to developing countries today. Most of them actively used ‘bad’ trade and industrial policies . . . practices that these days are frowned upon, if not actively banned, by the WTO.”); PETER EVANS, *EMBEDDED AUTONOMY: STATES AND INDUSTRIAL TRANSFORMATION* 51–60 (1995) (discussing the role of the state in facilitating industrial transformation in Korea and Taiwan); REINERT, *supra* note 155, at 71–100 (arguing that developmental success has relied on “emulation” rather than comparative advantage or free trade); Richard Kozul-Wright, *The myth of Anglo-Saxon capitalism: reconstructing the history of the American state*, in *THE ROLE OF THE STATE IN ECONOMIC CHANGE* (Ha-Joon Chang & Robert Rowthorn eds., 1995) (discussing the history of U.S. industrial development strategy); see also sources cited *supra* note 68. See generally PAUL BAIROCH, *ECONOMICS AND WORLD HISTORY: MYTHS AND PARADOXES* (1993) (arguing, in particular, against orthodox assessments of the



that the state can play an important role in development, particularly in coordinating investments, ensuring that increasingly large flows of capital go to productive and efficient ends,<sup>168</sup> and promoting technological and industrial upgrading.<sup>169</sup>

## VI. CONCLUSION

In this Article, I have described the emergence of a new rule of law orthodoxy within contemporary development theory and, in particular, the World Bank's development model. I have argued that the Bank is a particularly influential actor in shaping development thinking and policy. Accordingly, I have traced the emergence and contours of the Bank's interest in and deployment of the rule of law, identifying its influences and antecedents in the era of neoliberal structural adjustment and the New Institutional Economics. I have argued, contrary to those commentators who herald the attention awarded to law as a break with the Washington consensus era, that the rule of law discourse in fact represents a continuation of neoliberalism and, indeed, emerged as a response to neoliberalism's apparent failures. The doctrinaire pursuit of the free market or a myopic focus on property and contract rights is unlikely to lift economies to a higher growth path or promote sustainable development. Nor, as the past three decades bear out, is it likely to advance social cohesion or a tolerable structure of wealth ownership or distributive outcomes. Less a broadening of intellectual horizons than a consolidation of neoliberalism, the legal turn in late development theory is, at best, misleading and, at worst, a further narrowing of the political and policy agenda.

---

trade policies pursued by the developed world and their effects on those countries' economic development).

168. See, e.g., HA-JOON CHANG, *THE POLITICAL ECONOMY OF INDUSTRIAL POLICY* (1994) (providing a comprehensive discussion of industrial policy, including the role of the state in coordinating investment, and its application in South Korea); HA-JOON CHANG, *The Political Economy of Industrial Policy*, in *GLOBALIZATION, ECONOMIC DEVELOPMENT AND THE ROLE OF THE STATE* 105, 118–20 (2003) [hereinafter CHANG, *Political Economy of Industrial Policy*] (discussing the role of the state in coordinating investment); Ricardo Hausmann & Dani Rodrik, *Doomed to Choose: Industrial Policy as Predicament* 37–38 (Sept. 2, 2006) (unpublished manuscript), available at [http://www.hks.harvard.edu/var/ezp\\_site/storage/fckeditor/file/pdfs/centers-programs/centers/cid/growth/events/20060909/hausmann\\_doomed\\_0609.pdf](http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/centers/cid/growth/events/20060909/hausmann_doomed_0609.pdf) (discussing how governments may be important actors in overcoming and correcting coordination failures).

169. See, e.g., Justin Lin & Ha-Joon Chang, *Should Industrial Policy in Developing Countries Conform to Comparative Advantage or Defy It? A Debate Between Justin Lin and Ha-Joon Chang*, 27 *DEV. POLICY REV.* 483, 484, 489 (2009); CHANG, *Political Economy of Industrial Policy*, *supra* note 168, at 130–35; CHANG, *State, Institutions and Structural Change*, *supra* note 5, at 45; Sanjaya Lall, *Technological Capabilities and Industrialization*, 20 *WORLD DEV.* 165, 165 (1992).

