

The New Law and Economic Development

A CRITICAL APPRAISAL

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4 THE "RULE OF LAW," POLITICAL CHOICES, AND DEVELOPMENT COMMON SENSE

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Although we easily intuit that development policy making is saturated with political significance, political choices are often presented in vocabularies of economic and legal expertise that obscure the political stakes of development policy making. This chapter retells the postwar history of economic and legal expertise in the development field to highlight the possibility – and also the difficulty – of reclaiming its political significance.

I use the term political in two senses. Experts act politically when they *distribute resources among groups and individuals* – we can decode the politics of this work by associating expert choices with the interests of groups that contest one another's claims on resources in the arenas we think of as political: men and women, rich and poor, rural and urban, North and South, agricultural and industrial. Experts also act politically when they *affect the distribution of power among ideological positions* that we associate with political contestation: left, center, and right.

I tell the history of development common sense in four phases: a postwar modest interventionist consensus (1945–1970); followed by a period of crisis and retrenchment (1970–1980); a new consensus on transition from socialism, first in the third world, and then in the second (1980–1995); followed by a period of doubt, reexamination, and eclecticism (1995–the present) during which the neoliberal "Washington Consensus" has been chastened in numerous ways.

Although my goal is to decode the politics of expertise in each phase, like my coauthors, I say very little about how thinking in these phases was linked to

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broader social and political events. We all suggest that the postwar consensus had something to do with broader ideas about the welfare state, embedded liberalism, the larger postwar international legal, institutional and economic order, and the possibilities opened by the Cold War. We link thinking in the 1970s intuitively to 1968, to the oil crisis, to the debt crisis, or to Vietnam. We treat it as part of a broader loss of faith in government, in the first world as in the third, and to interpretations (often wrong) about why so many countries had not developed while others – the Asian tigers in particular – had. The Washington Consensus of the 1980s and early 1990s seems inexplicable without mention of Thatcher and Reagan, and the broad discrediting of left and center-left welfare state policies in the first world. Its hold on the field seems linked to the new personnel and new terrain opened up for law and development by the shift from third world development to transition policies in ex-socialist states after 1989. The current moment of chastening seems to arise from perceptions of the failures of early transition policies. It is conventionally associated with Blair and Clinton, and often with the Asian and Latin American currency crises of the early nineties, or the new visibility for political resistance to globalization across the third world. It is often linked to criticism in intellectual circles, particularly among leading economists, of the neoliberal *idea* as a strategy for development or for transition. But these are loose suggestions, reminders of the context within which, or in relation to which, development expertise unfolded.

Nevertheless, these associations are helpful reminders that the difference between historical periods can seem to be replete with political significance. Indeed, it is now common to think of the postwar period of import substitution industrialization as “left,” the crisis period of the seventies as a failed experiment in more “radical left” thinking, the neoliberalism of the 1980s as a “right” reaction, and the current period of retrenchment as one of “centrist” balance and eclecticism. There is certainly something to this.

It is also true that development professionals in every period drew from only part of the available political spectrum. It would not be overgeneralizing to say that development experts in the postwar period were political centrists – anticommunist, social democrats of one or another variety. Few were part of any political vanguard. With very few exceptions, the same could be said of the seventies, as the range of political positions in the larger global intelligentsia became broader and more volatile. Although some leading development thinkers of the neoliberal period were in the vanguard of a new, energetic – even revolutionary – right, for the most part, development policy experts were modest reformers and status quo defenders of the remnants of postwar policy making. In the current period, the spectrum among development experts runs from center left to center right, with but a few outliers on either end.

In all periods, development professionals sometimes experienced themselves, at least indirectly, to be engaged in a “political” project. If we think

of politics as “distribution,” there is no question that postwar development policy experts thought themselves to be engaged directly in the distribution of resources – they saw their own role in political terms. Ideologically, they understood themselves to be promoting social democracy, opposing communism. Developmentalists in the 1970s were also conscious of their political role – whether as first world defenders of a market democracy attuned to “basic needs” or as exponents of broad third-worldist and nonalignment ideologies associated with the heritage of Bandung. Some neoliberal reformers of the 1980s – and many in the post-1989 period – experienced their development policy making as part of a political vanguard, reversing what they saw as a global trend to socialism begun after the First World War, and associated as much with the name Keynes as that of Marx or Stalin. Many contemporary developmentalists understand themselves to be correcting for the excesses of the neoliberal “right” in the name of a softer, more humane and center or center-left political line.

At the same time, development professionals have also thought of their work in each period in nonpolitical terms – as the work of experts. They advised politicians, on the basis of “knowledge” about how to develop. In the postwar period, expertise advised distributional rearrangements of a society’s resources – taking from agriculture and giving to industry, say. But these recommendations were less political choices or exercises of discretion than imperatives of their expertise. In the neoliberal period, the distinction was drawn more sharply still – the point was to maximize growth by enabling private allocation of resources to their most productive use – after growth was achieved, the politicians could “redistribute” the gains as they thought fit. Development was a matter of efficiency, not distribution or allocation. In the contemporary period, the vocabulary of needs and rights has brought distributional issues back to the fore, cast not as political choices but as the interpretation of preexisting entitlements and human needs. Both the neoliberals of the 1980s and their contemporary successors see it as a virtue to avoid making distributive choices, leaving them to the “market,” while confining their work to correcting for “market failures,” implementing consensus “human rights,” eliminating “corruption,” or reinforcing purely “formal” legal norms. In the same way, development professionals tend not to interpret their expert work in ideological terms – far more, they are the purveyors of something more like science, understood to pose more nuanced choices and more neutral and objective criteria for making them than “left,” or “right,” or “center.”

This doubled self-conception makes it difficult to interpret the “politics” of development expertise with confidence. The problem is made still more difficult by the fact that in each period, right, left, and center regimes have shared the dominant mode of development thinking. At the same time, regimes in each period sharing a broadly similar approach to development were self-consciously distributed along a left-center-right axis. There were right wing import substitution regimes and left wing neoliberal regimes. We should be

wary, of course, in taking the ideological labels leaders use to describe their own regimes at face value. The same is true for development experts. When they argue with one another, they often make assertions about the political implications of one or another position for the distribution of resources among groups or for the ideological authority of left, center, or right. But experts are notorious for overstating – and misunderstanding – the significance of differences between and within projects enunciated in their common expertise. In this chapter, I track the changing relationship between economic and legal ideas in development expertise to make a first stab at unraveling the mystery of their possible political associations.

PHASE ONE: POSTWAR CONSENSUS 1945–1970

The priority of economic ideas

Postwar common sense development economics emerged from dominant strands of economic thinking more broadly. At the time, mainstream economics was neoclassical in orientation. The marginal revolution had been won, the first wave of institutionalist economics (Commons) had been largely discarded, the second wave (Arrow, North, Williamson) remained in the future. The Coaseian revolution was only just beginning. Keynes remained a lodestar for thinking about macroeconomic policy, and macroeconomics continued to dominate microeconomics in thinking about what government and law should be about.

As a result, economists came to “development” sharing ideas about what an economy is – and about what economic development is. They assumed that economies were *national*, and that preindustrial economies differed fundamentally from industrialized economies. Since Adam Smith, they had seen specialization and the division of labor as the keys to increases in productivity. They saw an economy as an enormous cycle of inputs and outputs in which labor is deployed with a given technology and capital stock to produce income. When income is saved and made available for investment, the capital stock increases, permitting higher productivity in successive cycles.

They interpreted the productivity increases of the industrial revolution as a model of and definition for development. Development meant “modernization” – repeating the transformations that had occurred in the North during the industrial revolution. Only through industrialization did it seem possible to reproduce the North’s productivity gains. Modernization required a sudden acceleration of the input-output cycle – the goal for economic theory was to figure out how this happens and how it could be made to happen in premodern societies.

Ricardo had taught them to focus on capital accumulation – savings and investment. Social organization and technology matter, but like the labor

supply, they thought, are relatively fixed. Other things being equal, they were convinced that a given savings rate would correspond to a specific and generally stable equilibrium level of national income. The key to the rapid growth associated with industrialization was an increase in savings. Societies remained underdeveloped because their savings rate trapped them in a low-level equilibrium – they had insufficient capital to break out, to industrialize, and to begin an upward cycle of productivity gains. The key, therefore, was to identify a source of capital – a surplus in the economy – that could be harnessed to industrialization. At first, they focused on encouraging – or forcing – local savings, and on foreign aid. Later, they added the exploitation of natural resources, where possible, and the mobilization for industrial production of currently underemployed – “surplus” – rural labor.

They tended to downplay the export of primary products or inward foreign investment as sources of capital for development. There were capital shortages throughout the developed world, and capital mobility was restricted both by national law and by relatively primitive global banking and payment systems. In any event, it seemed unlikely that the gains from foreign investment could reliably be captured and redeployed for development without undermining the incentive to invest. They were also pessimistic about Less Developing Country (LDC) exports – the tropical product market seemed saturated, industrial exports seemed unlikely to be competitive. Less developed economies were likely, they thought, to be price takers while experiencing unstable prices for their exports.

They understood that mobilizing the surplus, and capturing gains for reinvestment, would mean taking resources from some groups, individuals, or economic sectors, and allocating them elsewhere. Getting distribution right was central. They were acutely aware that entire sectors could face diminishing returns if, say, landlords were to hoard or squander rather than reinvest rents. It was the task of policy to ensure that the surplus, once identified, was properly deployed, and that the gains were indeed captured for reinvestment.

Postwar development professionals had innumerable debates, both about the details of this broad economic model, and about its consequences for policy, both generally and in particular contexts. At the level of economic theory, they debated whether a single “big push” was necessary and sufficient to move a national economy to “take off” toward industrialization. Are there specific points in the economic cycle – bottlenecks – that when opened or closed will have exponential effects up- or downstream? When is it sensible to force disequilibrium to release these effects? Where are we likely to find useful forward or backward “linkages” in the economic cycle? Overall, is “balanced growth” more or less effective than prioritizing particular sectors? How significant are “tipping points” and how can they be identified? How precise do we need to be to generate a virtuous cycle? How sensitive is the economic cycle to overly rapid expansion or contraction – how precisely must macroeconomic

policy be calibrated? Is the equilibrium a "knife edge" we might well ride up or down? How significant are positive cross-sector externalities in multiplying productivity gains at the moment of takeoff? Will industrialization follow the same stages in LDCs as it did in the North in the industrial revolution? What were those stages? Are there latecomer advantages to exploit or disadvantages to avoid?

Sometimes, these questions of economic theory translated rather directly into debates about policy. Which sectors should be subsidized, which taxed? Control of which prices offers the best chance to stimulate positive forward and backward linkages? Should we focus on forced savings, labor mobilization, or natural resource exploitation? How should scarce hard currency be allocated? Should we aim to balance industrial and agricultural growth, or divert resources from one to the other?

And of course, there were also debates about innumerable practical questions of method – how should returns be captured for reinvestment? – Through taxation? Where, and of what? How should this best be accomplished – price controls? Subsidies? Credit allocations? Licenses? Taxation? How should the traditional and agricultural sector be mobilized to subsidize the emerging industrial sector? Wage rates? Price controls? Government purchasing monopolies? How important was land reform – and how should it be structured? Land taken how, from whom, compensated how, distributed to whom, with what forms of tenure?

Although these economic ideas formed a background common sense among development policy professionals, these were not the only ideas on the table. This is a winner's map. At the time, these ideas were contested within economics. Keynesian macroeconomics was contested by Marxist economists, by neoclassical economists who focused on microeconomics, and by institutionalists. Had these alternative ideas been taken up, development policymakers might have focused more on the international economy, less on national government policy, or more on small scale and local cultural, legal, or informal arrangements.

Moreover, there were those who did not think about development in economic terms in the first place. Dissent came from the fields of political economy, sociology, and anthropology. Throughout the postwar period, noneconomic ideas about development faced an uphill struggle to be heard. Only in the 1960s and 1970s do we see them struggling to get in – in debates about "basic needs" or "social rights," or about ways to measure development, or about maintaining data on income distributions, levels of education and health alongside, or factored into, measures of development.

Today, the easy target in the postwar consensus seems the large role proposed for national state administrations – a recipe for corruption, rent seeking, and all manner of inefficient price distortions. At the time, however,

the most salient targets were different. Critics focused on the presumption that the *national economy* was sufficiently autonomous to be the primary site for development policy, and that *industrialization* was necessary and desirable.

Some dissidents emphasized the significance of the larger world and what they saw as relations of structural dependency between the "core and periphery." For these "dependency" economists, the keys to the "development of underdevelopment" were declining terms of trade for third world economies and the relative price inelasticity and instability of primary product markets. For "world systems" political theorists, third world poverty was produced and maintained by bargaining power inequalities and a tacit alliance of world capital, first world governments, and multinational corporations to maintain an exploitative regime of "neocolonialism" throughout the newly decolonized third world.

For other dissidents, the problem was an insensitivity to local cultural endowments. For institutionalist economists, the mainstream was wrong to focus on savings rather than technology, on the management of prices rather than the reframing and harnessing of cultural attitudes and practices. They urged attention to the effects of cultural changes on economic processes – particularly the effect of changing differences between the traditional and modern sector. They urged study of the ways in which institutions and cultural commitments could hinder or stimulate cycles of cumulative causation necessary for development. Simultaneously, a range of local socialist or cooperativist experiments were initiated across the third world.

Similar institutionalist and localist themes were echoed by analysts from other fields – particularly sociology and anthropology – but with a less optimistic twist. Industrialization posed a threat to local culture, accentuated gender inequality, solidified apartheid-like divisions in the plural societies of the third world, and prevented the emergence of a national social will and ethic of collective responsibility and solidarity.

Unlike mainstream development economics, these alternative ideas did not translate well into policy options. There were exceptions, of course. David Trubek reports, for example, that the economic institutionalism of John Commons and others was influential in the USAID funded land reform institute established at the University of Wisconsin in the 1960s. By and large, however, these more alternative strands of thought seemed too pessimistic to be helpful. If the problem was "global," or the whole idea of "development" was a cultural disaster, it is harder to figure out what to do. These dissident ideas seemed to require policy at another level – global efforts to stabilize commodity markets, or strengthen the bargaining power of third world labor, capital, and government authorities in their relations with multinational corporations and first world governments.

TABLE 1. Postwar Consensus 1945–1970

Left counterpoint	Center and mainstream	Right
"Left-wing" modest interventionism	Modest interventionism	"Right-wing" modest interventionism
Plus:		
Dependency/world systems and institutionalism/culturalism/localism	Host to its own left-right-center debate	

We might redraw the postwar common sense as shown in Table 1.

Implicit legal theory: The demand for law

We need to reverse engineer the legal theory of mainstream development professionals from their economic and political projects, and from the attitudes toward law they manifested in managing development policies within national administrations. A great deal of law was required to translate the leading economic theories of development into policy. "Import substitution" industrialization demanded the creation of numerous public law institutions, established by statute and implemented by public law bureaucracies: exchange controls, credit licensing schemes, tariffs, subsidy programs, tax incentives, price controls, national commodity monopolies, and so forth. Legislation was necessary to establish tariffs, subsidies, exchange controls, marketing boards, and all the other elements of the system. A vastly expanded administrative apparatus, with rule making, licensing, and other legal authority would need to be set up.

In most newly independent developing societies, this expanding legal regime was new, and brought with it new legal ideas – replacing colonial law, overturning customary law, and offering a largely public law framework for economic exchange. In the Latin American societies that had embarked on this path already before the war, this program had also come with a new set of legal ideas.

The implicit "legal theory" combined a number of ideas. In broad terms, law was understood to be *instrumental* and *purposive*. The purposes came from elsewhere – from the society, government, and the legislature. Law was subordinate to social purposes – implementing, fulfilling, and accomplishing the objectives of the society, rather than expressing a priori limits or historic commitments to be respected or purposes of its own to be achieved.

The purpose of the legal order itself was the consolidation of national economic and political authority – often associated with national self-determination and decolonization – rather than, say, the integration of local economic life into a global economy, or the facilitation of private exchange

and private ordering through supplemental regulatory interventions. To the extent legal arrangements were understood to have a social purpose, the purpose was something like national "development" – law was to be interpreted to achieve the developmental purposes of the state. Where these were not express, they could be derived from analysis of the social and economic needs of the society, given its stage of economic development. Distribution was understood to be central to the work of law – allocating resources among social and economic groups – from agriculture to industry, from foreign to local financial institutions – to implement national economic policy objectives.

Within the legal order, public law was far more salient than private law. When people thought of "law," they thought about *legislation* and the pronouncements of the legislature or executive, rather than customary law, contract or property law and the pronouncements of judges. Postwar development professionals were quite optimistic about public law and about the capacity of complex administrative systems to translate policy objectives into action – to control borders, implement tariff schedules, suppress black markets, control prices, or collect taxes.

To use the vocabulary Duncan Kennedy introduces in his contribution to this volume, these are the legal ideas of the "second globalization" – the "antiformalist social" legal theory Kennedy claims entered legal consciousness first in Europe and then in the United States during the prewar period. This set of legal ideas characterized the consciousness of development economists influenced by New Deal style welfare states in the United States and Europe. In many parts of the developing world, they seemed a workable substitute for the classical legal thought associated with the colonial legacy of the Commonwealth. They had been adopted enthusiastically by the international institutions most associated with development in the prewar period – the International Labor Organization and the League of the Mandates Commission or the Bruce Report. In Latin America, they had entered legal consciousness from France, often through the emerging fields of both labor law and international law, and were often understood to reflect a particularly "American" or national revolutionary identity.

We might think of development policy asking two sorts of questions of law and legal theory: instrumentally, how can I translate my policy objectives into action, and what limits must I observe in doing so? In this period, the answer to the first we might call *legal pragmatism*, associated with "social" conceptions of law developed in the interwar period. This legal pragmatism stressed the importance of purposive reasoning to link legal arrangements with social needs and objectives, and focused attention on legislatures and administrative bureaucracies as the creators, consumers, and interpreters of law. A wide range of previously settled fields of law were opened to new legislation and interpretation in furtherance of "social" objectives of national "solidarity" required for economic development.

The law was understood to place few limits on development policy. Of course, all these new legal arrangements were unsettling to existing legal entitlements – think of land reform and the property rights of large landowners. The legal vocabulary of “rights” has often been used to slow the emergence of new economic policies. During this period, however, this was infrequent. The main legal idea that prevented acquired “rights” from seeming to present much of an obstacle to development policy was legislative and administrative positivism – the idea that the state could regulate as it pleased, altering private rights, without judicial review.

In the United States, New Deal social regulation had, of course, been systematically opposed, and for some time limited, through judicial review. Judges struck down administrative and legislative initiatives in the name of “rights” to freedom of contract and property that were understood in terms Kennedy associates with the “classical” period of the late nineteenth century. In the United States, elements of classical legal thought developed in the context of private law and had been imported into public law thinking, and were used to define the limits of various public authorities vis à vis one another. As a result, they were readily available to constrain public law expressions of national economic policy.

To counter this resistance, American legal realists developed a range of critical analytic tools to demonstrate in particular cases – before courts – that “rights” were neither clear nor compelling enough to require limits on regulatory initiatives by judicial deduction. Some of these analytic tools were present in the “social” ideas about law that underlay postwar import substitution policies in the developing world – regimes of private right were understood to have numerous conflicts, gaps, and ambiguities, which could be interpreted by reference to social needs and purposes. But the absence of judicial review and the presence of strong assumptions of legislative and administrative positivism made American legal realism an unnecessary import. The judicial assertion of rights against postwar development policies was by and large a nonproblem.

Although these basic “social” or “pragmatic” ideas about law were central to the policy imaginations of mainstream development professionals, the more detailed disputes among legal theorists *within* this common set of ideas were far less important. Legal theorists differed on numerous elements of this broad legal framework – precisely what does legislative supremacy entail, how should it be translated into administrative rule making, how and where should discretion be lodged? How should purposive interpretation be reconciled with more traditional methods of professional legal reasoning? Where in the legal fabric should one insert “social” concerns? How might social needs and purposes be reflected in legal rules – what exceptions would be necessary, what new legal forms and institutions would be required? What did Kelsen mean here – what should we take Pound to have meant there? But these legal theory debates were generally far removed from debates about development

policy, and were rarely linked directly to them. Development policy was made by politicians and development experts, in the vocabulary of economics. Their legal ideas remained implicit, and debates within the legal academy largely passed them by.

At the same time, these were certainly not the only ideas about law in the air. But alternative legal ideas were rarely mobilized to contest mainstream development policy. Some jurists focused on judges and on private rather than public law. But they generally simply kept their distance from the expansion of administrative bureaucracy and legislation. Although their ideas – ideas from “classical legal thought” to use Kennedy’s terminology – might have been mobilized for dissent from mainstream development policies, this seems to have been quite rare during the postwar period. Such jurists were more likely to confine themselves to their private law subject matter, perhaps focusing on comparative or historical research, or stressing their legal culture’s ties to European and Roman law traditions. The tendency was to leave “national development policy” with its messy economic and political choices to others. Private law ideas and elements of the consciousness of classical legal thought would only later be mobilized to resist mainstream development policy.

There were also legal theorists, often associated with one or another strand of Marxism, who focused more on the political and social role of law. For them, the name Polanyi was more significant than Kelsen or Pound. In this period, however, their legal thinking did not differ from mainstream legal ideas in its support for import substitution development policies. It would only be later that Polanyi’s account of law during the industrial revolution as a useful brake permitting the wrenching changes brought by industrialization to be politically metabolized, would seem promising to development professionals – often influenced by economic institutionalism – who sought to challenge mainstream development policies.

Having excavated the implicit “legal theory” of development professionals in the postwar period, we face an uncertain and complex undertaking identifying its politics. If we think in ideological terms, “antiformalist social” ideas about law now seem everywhere associated with the political left. Like the development policies associated with them, however, at the time they were common to left, center, and right regimes. This can be difficult for United Statesan legal scholars, unused to comparative analysis of legal method, to grasp. In the United States, the historic association of antiformalism with the New Deal defeat of Lockner-style restrictions on public law and economic regulation has given these ideas a leftist feel for generations. Of course, even in the U.S. context, we have seen antiformalist ideas harnessed to ideological projects across the political spectrum.

The impact of implicit legal ideas is extremely difficult to identify – let alone analyze in political terms. The implicit legal theory of postwar development professionals *may* have encouraged policymakers to overestimate

TABLE 2. Mainstream: 1945-1970

Basic ideas: economics	Development policy set	Legal theory "Antiformalist social"	
		<i>Instrumental thinking</i>	<i>Rights thinking</i>
Modest interventionism	Large regulatory state	Legal pragmatism law = policy	Legislative positivism
Homogeneity among LDCs	Import substitution industrialization (ISI)	Social law, social purposes, and social needs	No judicial review
Heterogeneity vis à vis developed world	Various export promotion strategies	Administrative law bureaucracy	Legislative and administration supremacy Legal realism critique of deduction from rights

the ease with which social purposes could, in fact, be realized through law – how easily public law initiatives could be implemented, how effective state bureaucracies were. These implicit legal ideas may have made it more difficult to imagine alternative development strategies – the dominance of “antiformalist social” legal ideas may well have made it more difficult to think up neoliberal economic policies that would have relied more heavily on private law and private ordering. They may have made it easy to underestimate the difficulty of ensuring that “law in action” reflected the increasingly complex regulatory and administrative regimes “on the books.” Or to miss the potential for what has become known as “government failure,” widespread corruption, and rent seeking. These legal blindspots and biases may well, in particular contexts, have had effects we could associate with the interests of particular groups or ideological positions. Identifying them would, however, be a difficult and context-specific undertaking, requiring a set of ideas of its own about the nature of law and its links to policy and outcome. As with development economics common sense, the search for the politics of legal expertise takes us back to professional questions of legal and economic theory.

We might relate mainstream economic ideas, development policies, and legal theories as shown in Table 2.

The politics of postwar common sense

How might we assess the “politics” of this postwar common sense? At the time, the broad collection of “import substitution” policies encouraged by mainstream postwar development economics were adopted by all manner

of third world regimes. Governments everywhere strengthened the national management of their economies through tariffs, currency controls, price controls, credit rationing, and so on. It is difficult to say too much about the ideological color of ideas and policies common to regimes that were themselves understood at the time to exemplify the right, left, and center.

When development experts look back on the postwar period, they tend to associate its successes and failures with what they interpret as a broadly “left” ideology. Neoliberals invoke the disappointing development records of many postwar regimes to illustrate the grave wages of left thought. As disappointment with neoliberalism grew, others remembered the successes of the postwar era to illustrate the promises of a more progressive, social democratic developmentalism. At the time, it was more difficult to characterize the ideas. To participants, they seemed sharply distinct from state socialism – looking back, the differences are less pronounced. There was no well-developed “right” alternative to these ideas at the time – there were right wing, even national socialist, versions of them.

One way to think about the politics of large bodies of ideas like this is to focus on their form. For some development experts, postwar developmentalism was a loose collection of tools, hints, observations, and possibilities – for others it was a far more formal, even scientific recipe for social transformation. One could think of “stages of growth” as an iron law of history, or as a helpful sociological observation. One could imagine “declining terms of trade” as something to watch out for, or as an unfolding global logic, necessarily reproducing the “development of underdevelopment” at the periphery. The words “formalism” and “structuralism” capture something of this set of differences. Modest interventionism could seem a rulelike and objective science, autonomous from social context – or a set of broad generalizations that could inform an expert’s discretion in particular contexts. The forces promoting and impeding development might be mixed and contradictory – or part of a more systematic world “structure” of power.

In the postwar period, it would be fair to say that the more formalist and structuralist one tended to be when interpreting the economic and legal ideas about development, the less mainstream, the more extreme, one’s politics were likely to be. At the time, large ideological debates between, say, first world and third world experts, or American and European experts, often took on a “who is more left” quality. These also often contrasted a more theoretically modest and eclectic mode of reasoning with a more formal and structuralist mode – the first seemed more centrist, the latter more radical and leftist. In later periods, similar issues of theoretical form differentiated centrist eclecticism from more radical right-wing formalism and necessitarianism about the developmental consequences of a “free market.” In both cases, the broad vocabulary was shared across the ideological divide – but the vocabulary hardened as one moved to the edge.

It is difficult to link these formal dimensions of developmental expertise to the consequences of policy making. Often, rigid structuralists and modest pragmatists defended quite similar policies – where the policies of left and center developmentalists did differ, it is hard to associate the policy differences with these differences in reasoning style.

Of course, there were real differences in outcomes among import substitution/modest interventionist regimes. The enormous economic growth achieved in the South during the postwar period was by no means evenly distributed, either between or within national economies. Many national economies developed, some sustained growth and industrialized, others fell back. Some sectors and some groups prospered, others did not. It is extremely difficult to correlate these differences with more or less formal or structuralist conceptions of the dominant economic or legal ideas. Retrospective studies have sometimes attributed successes and failures to factors largely exogenous to import substitution policy altogether – pre-War manufacturing experience, cultural industriousness, the degree of income inequality at the outset, the nature of the colonial legacy, the details of factor endowments, or the quality of government control mechanisms and the civil service. Others have attributed the failures to policy sets common to the successes and vice versa.

It is difficult to link such different results to the broad mainstream consensus about what development is and how it might be achieved. Did modest interventionism have it in for some social groups? Was it fated to steer some national economies to growth and others to bankruptcy? It is even more difficult to link these different outcomes to more and less formal or structuralist conceptions of the dominant economic or legal theories. Certainly much depended on implementation, and on the choices made *within* the modest interventionist vocabulary. There were all sorts of import substitution regimes, after all, and something must have been at stake in the differences.

It is no less complex to sort out the politics of postwar development common sense by looking to their distributional effects. In general terms, we can say that everywhere resources flowed from the countryside to the city, and from agriculture to industry. Everywhere the ideas of mainstream development economics influenced the structure of the elites – strengthening the hands of those with national policy-making responsibility, and encouraging the emergence of a bourgeois class dependent on regulatory gaps and accustomed to public subsidies and oversight. Everywhere, foreign direct investment was less favored than domestic savings, export industries were less favored than import substitution, industrialization was favored over services and agriculture. Capital movements were restricted, credit allocated, the banking sector subject to government ownership or intervention, and foreign banking restricted.

If we try to become more concrete, however, the situation is far less clear. It remains extremely difficult to link particular policy choices with particular

distributional outcomes even in one place and time, let alone across an entire period. For one thing, effects varied widely. Sometimes the allocation of resources to local investors encouraged an entrepreneurial break-out, at other times comprador dependency. Transformations in agricultural patterns and new modes of work and living, did change the distribution of resources between men and women – but in all sorts of different directions. The expectation that secular interests would be strengthened over religious interests was sometimes born out – and also sometimes confounded. The same for traditional cultural institutions and beliefs – sometimes wiped out, sometimes left intact, strengthened, or given new shape. In some places, the monied elites developed a “franchise” rather than an “entrepreneurial” sensibility – in others we find a consolidation of national oligopolies.

Differences within this mainstream vision often did mark ideological differences. The ideological right and left signaled their differences from the mainstream center by preferences among policy alternatives within the mainstream vernacular – to whom would the surplus be allocated, what fate for rural landholders, industrial wages, foreign investment, and traditional economic sectors – what prices stabilized, at what levels, whom to tax, whom to allocate credit, and so forth. Industrial labor could be supported or taxed in different ways, just as quite different industrial sectors could be favored. At a broader level, a “big push” might imply greater levels of state intervention, more concentrated foreign aid, less scrutiny of the details of local development projects, and more short-term tolerance for overvalued local currency. The debate between “balanced” and “unbalanced” growth often carried a political association – “unbalanced” growth would require more administrative fine tuning, more oversight, and promised to be able to be accomplished on the cheap, through precisely targeted foreign aid or investment.

Yet, despite a self-conscious focus on distribution among groups, and the widespread use of this development vocabulary to mark ideological differences within various national political cultures, the politics of these ideas remains frustratingly difficult to pin down. Associating these choices with ideological positions turns out to be more difficult than it would seem – much depends on the way specific political forces define themselves ideologically in a particular country. The apparent ideological significance of such a choice often results from the ideological predilections of whatever social groups are thought to benefit from it – industrial workers, urban commercial interests, large land owners, and so forth. Of course, where political struggle in the capital was primarily a battle between, say industrial workers (left) and urban commercial, industrial, and financial interests (right), the left/right character of policy choices might well simply ignore consequences for other players – perhaps agricultural interests, peasant labor, or traditional landholders. Other interests – foreign capital, say, or agricultural workers – might

only be present by proxy, as one or another group participating in national political struggles *associated itself* with their supposed interests.

Undoubtedly, there were politics to what was *missing* from this postwar consensus – groups and interests unlikely to be candidates for surplus generation or deployment, strategies that relied less on government than on private initiative, on foreign capital rather than domestic savings, and so forth. In ideological terms, what would become the *right* of neoliberalism was missing – with the consequence that no one stood cleanly for the moral virtues and economic benefits of market-oriented freedom. At the same time, the marginalization of institutionalism and dependency meant that options requiring international coordination or distribution, or which aimed to affect the distribution of gains from trade, were off the table. Factors that have since come to be thought central to development success – the need for prior industrial experience, relative income equality, the development of national firms (rather than subsidiaries), the importance of administrative targeting, feedback, and technology transfer – were given short shrift. And these omissions undoubtedly favored some, at a cost to others.

PHASE TWO: CRISIS 1970–1980

The lead slips from economics to politics

The decade of global economic stagnation that followed the Vietnam War, the 1972 oil shock, and American abandonment of the gold standard shifted the attention of development professionals from economics to politics. In an era of simultaneous inflation and recession, Keynesian ideas about macroeconomic management seemed less robust. In the developing world, a generation had passed since the first postwar “development plans” – and the results were extremely mixed. Some economies had developed, but many remained poor and were slipping further behind. Most seemed caught in an unpredictable middle zone, unable to advance further. Rising oil prices, export stagnation and a global climate of shifting exchange rates dramatically complicated macroeconomic management throughout the developing world, leading to spiraling and unsustainable debt burdens. Efforts at macroeconomic management in the first world – primarily raising interest rates to curb inflation – dramatically increased the burden of third world debt incurred at flexible interest rates and denominated in dollars, discrediting third world capacity for macroeconomic management.

Despite rapidly changing economic conditions, this was not, by and large, a period of imaginative new thinking in development economics itself. At the national level, when crisis hit, development policy managers reached for their most familiar tools. Borrowing increased, currencies were allowed to appreciate, government spending increased, and budget deficits rose. Import

substitution had always relied to some extent on export promotion to fund capital imports – many national regimes sought to expand exports, making the transition to “second stage” import substitution, or switching to a strategy of export-led growth. The policy tools remained familiar – credit was reallocated to the export sector, tariff schedules were realigned to facilitate import of the inputs for exports. Many governments established free-trade islands within their import substitution regime, cut off from the domestic economy. In dozens of small ways, import substitution regimes were adjusted and modified.

In the economic academy, talent left the development field. As developing economies became increasingly diverse – in their reliance on primary products, levels of industrialization, penetration of foreign investment, diversification of exports, openness to imports, and, most significantly, in economic performance – the opportunities for new general theories seemed few. Meanwhile, novel struggles in developed economies of the North with both stagnation and inflation presented opportunities to rethink macroeconomic orthodoxy, often on the basis of far more complex statistical and empirical analyses than had previously been possible. Those who remained in the field of development economics turned their attention to empirical analysis of the disappointing results of earlier prescriptions, in the hopes that policy prescriptions could be fine tuned, rather than to new theorizing. Some dissident ideas – dependency theory – found their way into the mainstream. Only later would it be apparent that during this period a new generation of development economists were laying the theoretical groundwork for what would become the “Chicago School,” then “neoliberalism” and “the Washington Consensus” by criticizing postwar modest interventionism wholesale. Only when their ideas ripened into an alternative vision of the way forward would economics again come to drive global development policy.

In this atmosphere of retrenchment, policy elites no longer felt they could look confidently to economic theory for guidance. Political ideas and, to a lesser extent, legal ideas became more significant to development policy expertise than economic theories. At the same time, the routinization of economic policy choices gave national policy debates a more explicitly ideological, and less expert, flavor. The loss of optimism about “take off” and lower expectations about what development policy expertise could achieve made distributional decisions seem less temporary matters of technical alignment than political choices about how to share an unstable and potentially shrinking pie. At the same time, the emergence of entrenched interests committed to each element in the overall import substitution scheme made change difficult – and more a matter of winners and losers than technical policy management. In national political debates, elites focused less on how to generate development than on how to empower their constituents and ensure their access to existing national resources.

On the law side, a small group of development professionals from the North proposed a new approach to national policy making in the developing world based not on new economic thinking, but on legal reform. The efforts of these "law and development" scholars have been well chronicled by David Trubek, both in his contribution to this book and in his earlier work. They began with an intuition about why postwar development efforts had shown such mixed results. The problem lay not with the prevailing economic common sense – after all, sometimes there had been growth. The problem was imperfect implementation of modest interventionist programs. After 1980, the implementation problem at the level of national development regimes would be understood in the language of "corruption," "rent seeking," "self dealing," and "governmental failure." The law and development professionals of the 1960s and 1970s saw the problem rather as one of *resistance* – cultural, institutional, and habitual resistance by officials (often lawyers) throughout the national economic and political structure who were insufficiently *pragmatic and antiformalist* in their attitudes about law itself. Blind rule following and unimaginative bureaucratic habits were preventing law in the books from realizing its potential in action. The solution was to build a more pragmatic and antiformalist local legal culture, to facilitate the emergence of a national administrative apparatus attuned to the social needs and development purposes of the regime.

In the larger story of global development policy, this effort by North American legal elites was quite modest and short lived. Funding dried up, leading participants to lose confidence in the project and move on to other projects. It turned out to be difficult to transplant a new legal culture, even with good access to a nation's law schools. Even were they to succeed, it was not clear that a more flexible national administrative elite would, in fact, improve implementation of the national development plan – or that this would in turn generate development. The correlation between legal pragmatism and economic development was weak – while the possible correlation with authoritarianism and human rights abuses could not be ignored. Nevertheless, their story remains significant, for our purposes, because they directed attention from economic policy making to legal reform, and theorized explicitly about the relationship between law and economic development.

More significant than the turn to law were the more overtly political ideas. Indeed, an explicitly political vocabulary increasingly came to replace economics, changing thinking about what development is and how it should be achieved. The move from economics to politics had at least two quite different manifestations – loosely associated with thinking in the first world and the third. In the first world, discussions of development focused far less on "industrialization" or "modernization," and far more on improvement in specific quality of life indicators: health, housing, nutrition, education, literacy rates, infant mortality rates, and life expectancy. The World Bank's focus on

"basic needs" during Robert MacNamara's tenure as president epitomized the trend. Progress on these indicators could be measured and compared globally. They could be the focus of direct and specific government programs, both nationally and internationally.

This shift represented both an expansion and a contraction of ambition. On the one hand, industrialization might not be sufficient, or might be but the first step – development now set a higher standard, national wealth *and* equitable distribution. On the other hand, development no longer required the transformation of an entire society, in a repetition of the industrial revolution. Indeed, industrialization might make things worse. The whole disappointing project of national development planning could be sidestepped – international development practitioners could intervene directly at the local level with programs designed to address these specific issues. At the same time, this approach gave the development project a more humane face – shifting the felt responsibility for the unpleasant costs of industrialization to other actors. These shifts altered the relationship between "development" and basic distributional choices in the society. On the one hand, development no longer required – and might even preclude – the sorts of massive reallocations required to harness the surplus for industrialization: from rural to urban, from agriculture to industry. In this sense, development policy could be *relatively indifferent* to national economic policy. On the other hand, development *did* require redistribution of a society's wealth to provide for the basic needs of its citizens. This brought a new range of humanitarian and antipoverity initiatives to the forefront of "development" policy making.

Second, and more significant in the third world, was a broader shift from the *national* to the *international* arena for development policy making. The popularization of world systems theory in political science and dependency theory in economics reinforced the notion that development would require fundamental changes in the world economic and political system. These changes would require political mobilization, rather than economic planning. The technical details of national economic policy might well be simply beside the point – swamped by the continuing effects of neocolonial exploitation. There is no question that for many third world elites, this shift was attractive precisely because it took the heat off local policy management.

There were, of course, global forces at work – debt burdens rose in response to the global oil shock and first world interest rate increases, for example. These were not the issues on which attention was focused, however, for these difficulties were only becoming apparent, and there was little appetite for shutting off the pipeline of new credit. Instead, development experts focused on what seemed two structural imbalances in the world trading system – the instability of primary product prices, and the unequal bargaining power of third world exporters. It is true, of course, that there is nothing in the economic theory of comparative advantage to ensure that the gains from

trade will be equally shared among the nations participating in trade flows – all the gains might well flow to one or the other party, depending upon their relative bargaining power.

Dependency theory had begun as a series of economic hypotheses about the potential for price takers to face declining terms of trade in international commerce. LDC exports faced competitive and unstable markets, so the story went, while LDC imports came from markets dominated by monopolistic or oligopolistic practices, ensuring a long-term decline in LDC terms of trade. As it turned out, proving these hypotheses empirically in any general way had been very difficult. LDC economies differed a great deal – and competition from Asian manufacturing was beginning to undermine assumptions about the first world's natural oligopolies in manufacturing. A broader inquiry into bargaining power inequality might have uncovered a range of other institutional issues – but these were sufficient, if largely unproven, to support a broader political effort to revise the global division of labor.

This shifted attention sharply from national to international policy making. The intergovernmental institutions of the United Nations seemed the appropriate locus for international regulations aimed at compensating for the unequal bargaining power of the third world. In the 1950s, mainstream development practitioners had been largely indifferent to the United Nations, other than as a provider of technical advice to those responsible for national economic policy in the newly independent states. The financial institutions were significant, but far less than they would become in later decades. The regional development banks and the World Bank largely shared the policy priorities of the national governments – the era of “conditionality” and aggressive efforts to discipline national policy lay in the future. Private banks were not significant lenders in the third world until the 1970s, the IMF was largely supportive of national import substitution regimes, and was a less significant player before the debt crises and economic liberalization expanded the vulnerability of third world currencies. The GATT focused on tariff reduction for manufactured products and was primarily focused on trade among the industrialized world. Many developing nations were not members (including almost all of the state socialist world), and those that were benefited from a special regime of “preferences” that exempted them from participating in the discipline of multilateral tariff reduction negotiations.

Still, the United Nations *had* been involved in development policy making throughout the 1960s. It financed research and data collection and was often a source for comparative statistical information about economic performance. Often, the United Nations was a leading source for discretionary foreign capital and technical expertise. The various Specialized Agencies were all over the third world, promoting various specific health, education, illiteracy, sanitation, and other humanitarian initiatives. These international programs were

sometimes more able to resist capture by local political interests and often stood somewhat outside national political debates. As the focus of development shifted from industrialization to ‘basic needs’ they seemed ever more at the center of things. U.N.-financed think tanks promoted development-related research by economists, lawyers, sociologists, and political scientists. The “dependency” school of development economics, in fact, was largely a product of U.N. funding in Latin America. The coordination of various U.N. humanitarian efforts in one country would often present questions of priority that could only be resolved with a view to the national development plan. The establishment of a single “U.N. Resident Representative” in many developing nations to coordinate U.N. activities often provided a locus for coordinating national development planning activities.

The reorientation from national to international came first to thinking about multilateral development aid. In the modest interventionist world of the 1950s, foreign aid did not seem particularly significant. The amounts of foreign aid were too modest, and too unreliable, to replace the mobilization of national savings, the employment of labor surpluses or the exploitation of natural resources as the trigger for takeoff. By the late 1960s and 1970s, however, foreign aid did seem significant. In some very poor countries, the amounts were significant as a percentage of GDP. It provided a source of government revenue at least partially exempt from national political vested interests. Multilateral aid also offered the opportunity to bring about development *directly*, eliminating the national government and the vagaries of national economic planning by “putting real food in the mouths of real people,” as the saying went. In political terms, multilateral aid was also of great symbolic importance, both as a sign of “nonalignment” and as an example of pure *redistribution* from North to South. Less a source of capital for local industrialization than compensation, one might think, for generations of exploitation. The turn to the United Nations in the 1970s coincided, however, with a shift among donors from broad support for multilateral aid, to far more targeted support for particular international programs, or to bilateral aid schemes.

In the 1970s, third world politicians tasked the United Nations with a different approach to development – not supporting national development planning, or even an expansion in aid, but rather legislating the revision of the global economic and political order. As development professionals became convinced that changes in global political and institutional arrangements would be necessary, the United Nations offered the only global political arena in which developing nations were all represented. To enable the United Nations to take on this new function, third world scholars and diplomats focused on the structure of the United Nations itself – shifting authority from the Security Council to the General Assembly, strengthening the organs and offices associated with development, promoting the legislative capability of

the General Assembly, and insisting on participation at all levels of the international institutional regime.

By the early 1970s, the U.N. system became the center for a series of proposals for changes in the global economic system, brought together as the call for a "New International Economic Order" or NIEO. Like any legislative program, it combined heterogeneous elements. Various schemes (buffer stocks, international marketing boards) were proposed to stabilize the prices of primary commodities exported by developing nations. There were calls for increased multilateral aid, for global regulation of multinational corporations, for south-south cooperation and information sharing, and for the compulsory transfer of technology. To overcome the South's role as a price taker in world trade, some promoted producer cartels on the model of OPEC. Private international dispute resolution mechanisms of commercial arbitration were to be reformed to eliminate bias against third world government interests. International regulation of multinational enterprises operating in the third world, support for national efforts to regulate foreign direct investment, technical assistance in negotiating more favorable concession contracts for extractive industries – all were part of the broad NIEO agenda. Bargaining power differences between the first and third world were to be offset by placing commercial negotiations in multilateral and intergovernmental settings where sovereigns' participation was ensured and where south-south cooperation – as in the "Group of 77" – could be promoted. As the Law of the Sea negotiations got started, third world nations insisted on the equitable sharing of seabed resources as part of the "common heritage of mankind." Declarations were adopted reinforcing the legal entitlement of nation states to regulate foreign commerce, limit repatriation of profits, control – and nationalize – foreign investment, and in general determine their own economic future.

Despite the attention focused on the New International Economic Order initiatives, it was not successful, either politically or economically. Cartels proved difficult to organize and sustain. Proposals to regulate global corporate behavior were watered down, or translated into voluntary codes of conduct. It proved difficult to shift private economic negotiations to public forums, or to remake the global economic system within which national governments made economic policy. As a global legislative project, the NIEO drew resistance from across the developed world. Its most significant legacy may have been to strengthen the hands of national development planners, giving modest interventionism and import substitution a further lease on life.

In the end, the most significant innovation in the global economic order in the 1970s had nothing to do with the NIEO. The global economic order was being remade in quite a different way by the oil shock, the move to floating exchange rates, and the expansion of lending, primarily by first world private banks, to third world governments. The system for recycling petrodollars as private government guaranteed debt across the developing world required

significant institutional imagination and innovation. As interest rates rose, indebtedness accelerated – the new international system that was actually built facilitated unprecedented and unsustainable levels of national indebtedness across the developing world. The explosion of debt – offered to subsidize imports made more costly by the oil shock and as a source of capital for development – would be the final undoing of modest interventionism. Debt swamped efforts to "mobilize" domestic savings. Flexible exchange rates, mounting interest payments, and balance of trade deficits swamped domestic macroeconomic policy. Expansion in government-guaranteed credit eliminated market and regulatory discipline on its use. The sums required to stabilize currencies dwarfed anything in the aid or project development field. The institutions providing such sums were in a position to demand all manner of changes in national macroeconomic policy, and felt no compulsion to respect national economic policy making.

Across the developing world, fiscal policy replaced development policy, and national governments progressively lost their margin of maneuver to foreign private banks, foreign financial experts and monetary authorities, and to the International Monetary Fund. Meanwhile, the intellectual groundwork was being laid for a new development vision, understood by its proponents as a refutation both of the economic ideas of the postwar period – import substitution, modest interventionism – and of the political ideas of the 1970s, with their focus on redistribution and public ordering at the national and international levels. These ideas would find their proponents precisely in the institutions first empowered by the debt crisis – the IMF, the U.S. Treasury, and the private banks of the North.

We might summarize the 1970 period as shown in Table 3.

The legal theory of 1970s development thinking

The legal consciousness of development professionals in the 1970s was largely continuous with that of their postwar predecessors. Law was the instrument of social purpose, the agent for implementing an economic – and political – development agenda through legislative and administrative action. Public law continued to predominate. At the national level, a pragmatic, antiformalist, "social" law continued to be the vehicle for modest interventionist development policy making. At the international level, the United Nations was seen as a centralized legislative vehicle for global policy making. International law was to provide the tools to support a nascent global welfare-state – top-down regulation to restructure relative bargaining powers of developing nations and the private market actors of the North, administrative arrangements to stabilize prices, implement social programs, and distribute resources to achieve development objectives. The New International Economic Order was promulgated in numerous legal resolutions,

TABLE 3. Crisis 1970-1980

Left	Center	Right
Falling counterpoint	Mainstream	Rising counterpoint
Problem: Exploitation, neocolonialism	National: Problem: bad national implementation Chastened modest interventionism Export-led growth /second stage ISI Borrowing	Problem: Bad national policy Criticism of Development Economics
International: Redistribution and reparations Technology transfer Tax and revenue sharing	Law: Antiformalism and strengthen institutions for modest interventionism "Law and Development"	National: Shift from macro to microeconomics
National: Nationalization Socialization Self-Reliance Solidarity Redistribution	International: Problem: global unfairness Global modest interventionism	International: Free trade
	Politics: NIEO Market stabilization, cartels, buffer stocks Price controls Strengthen national sovereignty Improve LDC participation in global institutions Promote aid / facilitate debt	

declarations, and doctrinal restatements: guaranteeing national sovereignty over natural resources and national economic management, demanding participation in established institutions, building new public sites for what had been commercial negotiations, establishing new schemes for commodity price stabilization, and technology sharing or sharing of the world's resources.

The generation of diplomats and international lawyers – often from the third world – who designed and promoted the NIEO looked to antiformalist and sociologically inspired legal thinkers like Wolfgang Friedmann for inspiration. Indeed, it would be hard to overstate the influence of his 1964 book *"The Changing Structure of International Law."* Friedmann's ideas informed countless projects at the United Nations – expansion of U.N. administrative law, strengthening of the General Assembly's legislative capacity, a flexible interpretation of international institutional mandates to seize opportunities

for "cooperation" in the fields of health, education, and poverty alleviation, and an expansion of international law to promote participation, ensure fairness, and provide space for equity. The most notable legal manifesto for the New International Economic Order was written by Mohamed Bedjaoui, a French-trained Algerian jurist who became a member, and then president of the International Court of Justice. Published by UNESCO, Bedjaoui's 1979 essay "Towards A New International Economic Order" denounced the "legal paganism" of an earlier, more "formal" and "positivist" era and called for an international law appropriate to the social and developmental needs of the age. Global interdependence required solidarity – and corresponding efforts both to reinforce the sovereignty and self-determination of the newly independent states and adjust the rules of the game to strengthen their bargaining power and ensure their representation in international institutional life.

For readers in the United States, it will be clear that the legal theories of international development experts differed in subtle ways from the dominant ideas about law in the American academy at the time. The antiformalism of international development experts owed more to the European sociological tradition than to American legal realism. At the same time, this antiformalism was coupled to a positivist and formal defense of sovereignty and normative validity that sounded, to American ears, like a throwback to classical legal thinking of the nineteenth century. Although Marxist conceptions of law were not influential among development experts, the international legal ideas advanced by jurists from the Soviet bloc, which emphasized sovereignty and national autonomy, were picked up by third world jurists. The result was often a rather unstable blend of social ideas about international cooperation and solidarity and a more conventional positivist emphasis on formal autonomy and national sovereignty.

We might say that the sociological tradition had not had the critical impact on positivist and formalist legal thought that American legal realism had had in the United States. As a result, the wide variety of postrealist reactions that emerged in American legal thought after the Second World War – most notably, the emphasis on legal process and procedures – was not particularly significant in the legal consciousness of international development experts. Other than in discussion of U.N. administrative law reform, it is hard to locate the influence of American legal process ideas. Similarly, the normative reconstructions that followed realism and pragmatism in American legal thought, with their emphasis on procedural stability, ethnical principle, and the interpretation of rights, were largely absent. In the United States, private law and private ordering continued to be a focal point for legal theory – but far less so in the thinking of international development experts. In the United States, the global regulatory framework had been reconceptualized as a horizontal – "transnational" – pastiche of often inconsistent national and local regulations and private ordering already in the 1950s. For development experts, national and global regulation remained distinct and hierarchical – the New

International Economic Order was to be not simply another transnational project, but a top-down global public law initiative parallel to the vertical public law through which development objectives were pursued nationally.

For all this continuity with the legal thinking of the postwar period, the legal ideas of developmental experts did begin to shift in the late 1960s and early 1970s. Two changes stand out – a new style of pragmatic legal thinking, and a new appreciation for the significance of formal rights and adjudication.

The “law and development” movement in the United States had exported styles of legal pragmatism and antiformalism more common in the postrealist thought of the American legal academy. At the same time, the international law thinking of those supporting the NIEO program was undergoing a series of subtle shifts, in part as a consequence of its encounter with American legal thought, and in part the result of efforts to bring the potentially contradictory antiformalist social and more formal and positivist elements in the NIEO legal program into harmony with one another. Friedmann had called these the laws of “cooperation” and “coexistence,” and consigned them to different spheres – coexistence between the first and second worlds, cooperation in the third, coexistence for peace and security, cooperation for development and economic cooperation. But this solution was not sufficient – the NIEO program for development itself combined a commitment to national autonomy and formal sovereignty with a call for more social solidarity and resource sharing.

The challenge for international law in the period was to accommodate these conflicting tendencies in a way that remained purposive, pragmatic, and attuned to developmental needs. Duncan Kennedy attributes the rise of what he terms “conflicting considerations” analysis in the postwar period to the encounter between European social traditions and American postrealist legal thought. Something parallel seems to have gone on in international law – the formulation *within* legal thought of a continuum of competing policies pulling on each rule or doctrine, and the interpretation of each doctrine as a *compromise* between competing, and legitimate, purposes. Here is Wolfgang Friedmann’s close friend and collaborator Oscar Schachter, also at Columbia, lauding what he takes as Dag Hammarskjöld’s exemplary attitude toward law in 1962.

Hammarskjöld made no sharp distinction between law and policy; in this he departed clearly from the prevailing positivist approach. He viewed the body of law not merely as a technical set of rules and procedures, but as the authoritative expression of principles that determine the goals and directions of collective action. . . . It is also of significance in evaluating Hammarskjöld’s flexibility that he characteristically expressed basic principles in terms of opposing tendencies (applying, one might say, the philosophic concept of polarity or dialectical opposition). He never lost sight of the fact that a principle, such as that of observance of human rights, was balanced by the concept of non-intervention, or that the notion of equality of states had to be considered in a context which included the special responsibilities of the great Powers. The fact that such precepts had

contradictory implications meant that they could not provide automatic answers to particular problems, but rather that they served as criteria which had to be weighed and balanced in order to achieve a rational solution of the particular problem. . . . He did not, therefore, attempt to set law against power. He sought rather to find within the limits of power the elements of common interest on the basis of which joint action and agreed standards could be established.¹

This is a different style of antiformalism – the law expresses competing social needs and purposes, which the jurist, no less than the administrator or political leader, must weigh and balance. For this interpretive task, he must cultivate a wise and open discretion. This international law less guides statesmen to new developmental or equitable purposes, than it enables them to craft novel solutions to social conflicts, to weigh and balance competing social interests and developmental objectives. In a more modest way, the same encounter with North American legal pragmatism occurred at the national level – at a minimum wherever the law and development movement had influence. The law and development scholars – largely from North America – sought less to install new social purposes in the legal fabric of developing societies than to encourage the emergence of a new more creative and discretionary sensibility among third world governmental elites – administrative and executive elites as much as judges. Their emphasis on legal education was designed less to change the law than to change the profession – to promote the practice of weighing and balancing, and the potential for discretionary innovation.

At the same time, and somewhat paradoxically, the legal pragmatism of the 1970s differed from its postwar predecessor in the new life it offered to *formalism*. Jurists influential at the United Nations – Wolfgang Friedmann, Oscar Schachter, Thomas Franck – all sought to strengthen the rulelike character of international law against the “policy”-oriented analytic style of the New Haven school associated with Myres McDougal and his collaborators. Only a law of rules, they felt, could restrain the foreign policy of the great powers. They interpreted the U.N. legal system as a liberal constitutional order, with the Charter as its constitution, rather than as a regime for public order, policy making, or collective politics. Each of the U.N. organs was thought to perform a *juridical function* – rule making, implementing, and adjudicating.

As this legal order opened to the participation of excolonial states, these jurists emphasized the sovereign *rights* of the newly independent states. Developing nations and their nationals were also said to have *rights* – to membership in international organizations, to participation in international fora, to staff positions at the United Nations, to the determination of their own economic policy, and to a share of the “common heritage of mankind.” Bedjaoui had linked his denunciation of formal “legal paganism” with a

¹ Oscar Schachter, *Dag Hammarskjöld and the Relation of Law to Politics*, 56 *Amer. J. Int’l L.* 1, 2-7 (1962).

strident assertion of the sovereign rights of the newly independent states and of the rights of all peoples to self-determination. New rights for U.N. officials would guarantee their autonomy – but also facilitate opening intergovernmental bureaucracies to participation by third world elites. At the same time, international lawyers working on restatements of the basic “rights and duties of states” articulated the sovereign rights of newly independent states, as well as the duties of solidarity for mankind’s “common heritage.”

The international human rights movement emerged during this period, offering a critique of the empowering instrumentalism of the law and development movement. There were *limits*, internationally agreed legal limits, to national governmental discretion. At the same time, the humanitarian focus on basic needs began to be articulated as a call for international social and economic *rights*. It was during this period, moreover, that international legal elites sought to transform development itself into a *right*, and development policy making into advocacy for the respect of human rights.

The focus on formal rights was often accompanied by a turn to the judiciary. International judiciaries were not yet the focal point they would become in the 1990s. Still, the International Court of Justice seemed a significant ally for third world international lawyers in the struggle for decolonization, for an expanded United Nations authority over development issues, and for resolution of disputes – primarily over territory – among third world nations. Bedjaoui would become its president. The International Court of Justice was repeatedly called upon to play a role in decolonization, affirming the right to self-determination – in Southwest Africa, in Western Sahara. Repeatedly – in territorial cases, in Nauru and East Timor, and elsewhere – the Court was asked to adjudicate the legal consequences of colonialism, the duties of ex-colonial powers and the rights of newly independent developing states vis à vis one another and the ex-colonial powers. Within the United Nations system, administrative tribunals increasingly found themselves presented with challenges to staffing and budgetary decisions that implicated rights to participation by developing nation and administrative discretion in the implementation of various development programs. The Law of the Sea negotiations provided a decade-long opportunity for third world conceptions of law and development to find expression. They did so not only in demands for codification, or for equitable sharing of seabed resources, but also in the articulation of a complex smorgasbord of dispute resolution mechanisms, simultaneously fragmenting and legalizing the resolution of competing claims.

Perhaps most significantly, international obligations were increasingly understood to be enforced not by the administrative action of states or international institutions, but by courts – including, most centrally, the “court” of world public opinion. International lawyers focusing on economic, social, and solidarity rights saw them implemented by the emergence of a global judicial *point of view* among the elites of the “international community,” which would become the decentralized enforcement arm for the

international regime. United Nations institutions were urged to adopt a “judicial” posture – detached, principled, and neutral, if also committed to justice and the long-run integration of the community. In the commercial field, moreover, development-oriented scholars promoted the emergence of a more judiciary-like commercial arbitration regime, able to weigh and balance appropriate “public policy” objectives alongside private rights in adjudication of contractual disputes between developing countries and multinational enterprises.

The emergence of a vital postcolonial formalist legal tradition was, if anything, more pronounced at the national level. The humanitarian objectives of development policy were asserted as rights – human rights – by local and multinational human rights advocates against administrative action across the developing world. At the same time, property rights began to be asserted in courts and arbitration proceedings – in the developed and developing world – against various elements of development policy. The formalism encountered by law and development scholars was not only a holdover of an earlier, more conservative, legal consciousness. It was also something new – empowering new interests in new forums. A generation of import substitution policy had created a range of new economic interests, which were increasingly understood as entitlements – to titles, licences, quotas, credit arrangements, long-standing administrative decisions, and existing contracts with the state. During this period, national judges in the third world remained largely passive in the face of such claims – their moment would come. The same could not be said for international arbitration and national courts in the North, which became increasingly important sites for the judicial review of policy decisions taken in the developing world.

These new elements – the balancing of conflicting interests, and neoformalist enthusiasm for rights and adjudication – track the legal consciousness that Duncan Kennedy associates with a “third globalization” in his contribution to this volume. The NIEO was articulated far more in this vocabulary of rights and policies, weighing and balancing, than in the postwar of an instrumental and purposive social law. Law would no longer be the instrumental expression of social needs, as understood through economic theory, but a vocabulary for balancing and selecting among diverse claims. Ever more questions seemed to present alternative, often contradictory solutions that could only be resolved by institutional deference or careful balancing on a case by case basis. This new pragmatism would take place within a “liberal constitutional” order, both internationally and nationally, in which the state’s internal procedures and substantive policy choices would be limited by legal rights and procedures enforced by adjudication. In such a universe, legislative or administrative authority to make new development policy would need to be weighed carefully against an array of vested interests.

These were subtle shifts from the legal consciousness of the postwar era – it remains extremely difficult to speculate about their political significance.

There is no doubt that within the elites, the new consciousness reflected the influence of American legal thought. Needless to say, that does not make it the instrument of American hegemony. Still, the new more flexible approach to international legal obligation was often decried as indistinguishable from the "policy" consciousness of the New Haven school, widely understood to have been deployed in defense of American Cold War policies. In the 1970s, it was often asserted that more flexible styles of international legal thought favored the powerful, who could manipulate them, while more formal, rights-based styles and positivist defenses of sovereignty favored the weak and the newly independent. The opposite was also asserted, however with equal vigor – the formal, positivist approaches of the past enshrined the authority of the powerful, and only a more flexible, cooperative style could advance global social objectives. In the 1970s, rather than clear links between legal consciousness and political or ideological positions, we find that legal consciousness has become a site for ideological and political contestation.

The broad package of legal theory commitments – antiformalism, legal pragmatism, social law, human rights, liberal constitutionalism, rights-policies-adjudication – informed left, right, and center regimes at the national level, and underlay a range of left and left-center positions internationally. Nevertheless, many participants remember the move from antiformalism/social conceptions to the liberal constitutionalism of rights/policies/adjudication as a deradicalization, a move from left to center. There may have been some truth to this – attention to rights did seem both to limit the discretion of national development policymakers and moderate the goals of international development professionals. At the same time, to the extent structuralist or necessitarian styles of thinking can be associated with political extremes, the more modest, case by case legal analytic style typical of the 1970s development expert does seem amenable to interpretation as more "centrist." The transition from "development professional" to "human rights advocate" seemed to reduce attention to economics and distribution issues, even as advocates struggled for "recognition" of "economic and social rights." At the global level, ideas to the left of the NIEO package were largely discarded in the move to a liberal constitutionalism of rights. At the same time, many authoritarian regimes and stagnant national "development plans" had become entrenched in the name of legislative positivism and administrative pragmatism. The new vocabulary of liberal constitutionalism did sometimes offer an effective mode of resistance and innovation.

That said, it may well have been that this set of ideas about law constrained the range of plausible political positions in various ways. The focus on public law and institutions may have made it harder to think about use of private law as a distributive tool for development. At the global level, a liberal constitutional vision of international law and the United Nations may have focused attention on participation in the internal structure of international organizations, and on the fairness of bargaining between the first and third

TABLE 4. Mainstream: 1970–1980

Basic ideas: Politics	Development policy set	Legal Theory	
		Transition from "antiformalist social" to liberal constitutionalism and a merger of rights and policies focused on adjudication	
		<i>Instrumental thinking</i>	<i>Rights thinking</i>
Dependency	National:	Public law	Human rights
World systems	Modest	pragmatism	universalism
Neocolonialism	interventionism	Law = policy	Political rights
Global New Deal	Retrenched	Social law and	Entrenched rights
Antiformal and pragmatic law	export-led growth	"basic needs"	Economic and social rights
Human rights	Law and development reform	Sovereignty, self-determination, and national autonomy	World court, judicial viewpoint, and administrative law
	Legal education	U.N. legislation and bureaucracy	
	Pluralism, democracy	Balancing social objectives	Balancing rights and interests
	Decentralization		
	International:		
	NIEO		
	Sovereign rights		
	International participation		
	Global economic management		
	Commodity price stabilization		
	Generalized System of Preferences		
	Common markets		
	Petro-dollar recycling		
	Debt		

worlds, rather than on questions of global distribution. The growing attention to rights, including sovereign rights, may have gridlocked efforts to think more aggressively about reparations and sharing. The reigning legal theories may have made it more difficult to challenge the legitimacy of kleptocratic national development regimes, or to identify the costs of maladjusted administrative action.

We might summarize the legal theoretical developments of the 1970s as shown in Table 4.

The politics of these political ideas

Looking back, both the international proposals of the NIEO and the national modest interventionist programs it sought to support and supplement are now easily identifiable as "left." At the time, they appeared more centrist. The leading proponents of the NIEO were moderate "nonaligned" left regimes, in an implicit alliance with social democrats in the North, and the cosmopolitan civil servants in the U.N. system. Many development professionals—including those in the law and development movement—were moderates or centrists, American "liberals," rather than leftists. Their anticommunism was as salient as their progressivism. Their ideological strategy was flexible: coexistence where necessary, cooperation where possible. Global communism was to be contained—but not rolled back.

Although the 1970s was a period of overt ideological contestation on the global stage, policy differences over development issues were more modest. Although the "nonaligned" and the "Group of 77" were ideologically diverse, their development thinking tended to the same cluster of modest interventionist and international redistributive ideas. Elements of the NIEO project were supported by regimes of all political stripes, by communist and right-wing authoritarian regimes as well as the social democratic regimes of the first world. OPEC, the model for efforts to establish commodity cartels, embraced regimes across a wide ideological range.

In broad terms, the NIEO program was a compromise between moderate and radical visions—and it was interpreted in both ways by proponents and opponents alike. Dependency theory—and the rise of left wing ideologies across the globe—had drawn attention to global inequalities. Should the response emphasize *fairness* or *redistribution*? Was the problem a set of unfair bargains, an inequality of bargaining power—or a more profound structural bias? Were procedural solutions adequate—or would substantive redistribution of resources be necessary? Were calls for more aid, technology transfer, regulation of multinational investment efforts to preserve the global market by softening its effects—or assaults on the institution of private property worldwide? Should cartels or price stabilization schemes aim to reset the balance in bargaining—or to empower the third world for confiscatory redistributions? Were the NIEO proposals intended to supplement, smooth, and stabilize global markets—or transform them? Was its goal humanitarian relief for the poorest of the poor—or a fundamental redistribution of wealth? Should U.N. officials demonstrate professional neutrality—or an ideological commitment to nonalignment?

How one answered these questions depended, of course, on one's ideological preconceptions—and upon one's interests. When it is your money, a great deal more will look confiscatory. And the NIEO was interpreted very differently in different places. To the American financial and corporate

establishment, it looked confiscatory—although liberal intellectuals were likely to interpret it more modestly, as a global version of policies that had become politically acceptable in the United States during the New Deal. For them, the goal was a level playing field. For many moderates, the more significant proposals stressed participation and procedural efforts to equalize bargaining power through information sharing, while more radical calls for redistribution or nationalization were moderated by insistence on "prompt, adequate and effective compensation." In the third world, the NIEO was often seen as the absolute minimum demanded by elemental standards of fairness.

Although these debates were carried on in quite overtly ideological terms, their effect on the ideological balance of power, either globally or within particular national political cultures, is far less clear. Often these debates had quite different resonances nationally. A pro-LDC position that seemed left wing and cosmopolitan in New York might translate into a nationalist and authoritarian position in the capital of a right-wing third world regime. Elements of the NIEO that seemed quite moderate in the United Nations context played as left wing in the United States. Looking back, the plasticity of national ideological associations for NIEO ideas that seemed center-left or left on the global stage is striking. Even on issues like the treatment of foreign investment, there were "right wing" regimes determined to tax, limit profit repatriation, even nationalize, and there were "left-wing" regimes that offered concessions for the exploitation of natural resources on extremely favorable terms.

If we think in distributional, rather than ideological terms, the politics of development thinking in the 1970s is even more difficult to assess. At the national level, right and left regimes continued to pursue versions of modest interventionist import substitution. "Right-wing" regimes were sometimes more, sometimes less, authoritarian than left-wing development regimes. In a given national context, they would typically bring a different constellation of social and economic interests to power—but which interests differed. There were right-wing regimes that favored the military, traditional landowners, the urban bourgeoisie, foreign investors—but there were also right-wing regimes that favored urban workers and rural interests, just as there were left-wing regimes that set up their import substitution regimes to favor the military—even foreign investment.

We can say that everywhere, national economic policies rooted in import substitution continued as debt burdens rose. Everywhere, national regimes seemed paralyzed in the face of new economic conditions. It would be difficult not to conclude that mainstream development thinking contributed to this paralysis. For all the rhetoric, the initiatives that emerged from the NIEO program were extremely modest—global sharing of seabed resources whose economic viability for recovery has not yet set in, modest buffer stock arrangements for a few primary commodities, and a series of nonbinding exhortations and legal pronouncements on aid and national sovereignty.

The global focus on humanitarian aid and basic needs took the pressure off national economic performance. The politicization of development policy everywhere disempowered technical experts to the advantage of entrenched interests. Across the developing world, national policymakers lost the initiative – on public and symbolic issues to the international arena of the NIEO or the United Nations, on private economic issues, to foreign banks and international financial institutions. This may have made it more difficult for national development policy to make the shift from first stage import substitution to a more targeted, diversified, and export-oriented second stage. With increased debt levels and shrinking public resources, private capital became more significant, and calls for nationalization or limits on the repatriation of profits diminished.

The politics of development thinking in the 1970s was also a consequence of what was missing. There were few challenges to modest interventionism, and national regimes stagnated in the face of rapidly changing international economic conditions. As a result of that stagnation, few of the more innovative and progressive ideas in the modest interventionist program were tried – land reforms were nominal or nonexistent, where national firms had not emerged in the earlier period, they were not created. Few national regimes eased the transition from import substitution to export promotion and diversification. The turn to humanitarianism accompanied an abandonment of social transformation as a goal for development policy. A focus on basic needs contributed to the deradicalization of development thinking, taking broader distribution issues off the table as legitimate objects of policymaking attention – shifting attention from distribution for economic development toward redistribution to meet minimum humanitarian objectives. Technical fine-tuning and targeted administrative action were broadly delegitimated in favor of more overtly political allocations of increasingly scarce resources.

If anything, the political imagination of development professionals seemed more limited in the 1970s. The image of what might be achieved at the international level was quite limited and the objectives for national development policy became ever narrower. Indeed, for all the changes in rhetoric at the global level, for all the disappointments and outright failures of modest interventionism, the policy vernacular remained relatively settled throughout the 1970s. It is difficult to conclude that the thinking of development professionals did not contribute to this stagnation.

PHASE THREE: WASHINGTON CONSENSUS 1980–1995

Economics strikes back

For all the diversity of initiatives promoted at the international and national level in the 1970s, it was not a period of optimism or confidence among theorists of development. Attention focused overwhelmingly on the disappointing

results of a generation of efforts to “take off” to industrialization. Looking back, the drift from economics to politics seems to have been symptomatic of a loss of faith in the postwar development paradigm.

Over a short period between the mid-1970s and the mid-1980s, the postwar consensus was swept away by a new set of economic ideas about development, which came to be termed “neoliberalism” or “The Washington Consensus,” because they came to prominence as the in-house development dogma of the U.S. Treasury, State Department, aid agencies, the International Monetary Fund, and the World Bank, all headquartered in Washington.

The basic outlines of neoliberal development policy are now well known. Within economics, the lead passed from macroeconomics to microeconomics. An economy was no longer imagined primarily as an input-output production cycle open to macroeconomic strategies to manage the relationship among economic aggregates such as “savings” or “investment,” “consumption,” “income,” and “labor” or “technology.” An economy was now imagined as a “market” in which individual economic actors transact with one another, responding to price signals and thereby allocating resources to their most productive use. Government is there less to manage the economy than to support the market. Moreover, there is no reason to think of economies in *national* terms. If things have more productive uses abroad, they will be bought, or traded for things more valued at home. In theory, the larger the market, the more opportunities there are for productive exchanges – trades from which both parties gain.

Developed and underdeveloped economies are not, in this view, fundamentally different from one another – there is no need for a special “development” economics. All societies seek to maximize economic performance and growth given their endowments. There is no path to development, there are no set stages, there is no “take-off,” there is nothing magic about industrialization. There are simply people who own things, who transact, and who thereby move things from less to more productive uses. Even the term “development” fell from favor during this period, replaced by the more technical term “efficiency” used both in a technical sense, and as a loose synonym for maximizing economic performance.

The shift from macro- to microeconomic analysis, from emphasis on input-output analysis as a tool for promoting industrial growth to relative prices as the dominant method to align supply and demand, completely changed the focal point for policy. “Getting distribution right” – capturing and targeting savings to promote industrialization – was displaced by “getting prices right.” The focus on prices arose from the work of economists Arrow and Debreu in the 1950s. They had demonstrated that in a perfectly competitive market, the equilibrium reached in the absence of regulation – where all prices are set by supply and demand, undistorted by government action – would be “efficient” in the specific sense that with given technology and resources, no one could be made better off without someone else being made worse off.

This theoretical insight was understood to have quite direct implications for policymakers. The basic idea was that economic policy should enable, rather than impede, market transactions. Governments should do what is necessary to support a market pricing mechanism and avoid doing anything that would distort market prices. The entire array of policy tools developed for import substitution industrialization were exactly wrong—subsidies, price controls, tariffs, licensing arrangements, exchange controls, preferential credit arrangements, tax incentives, or marketing boards were all price distorting rather than market supporting. They also cut the national economy off from world markets—both reducing the potential for gains from trade and eliminating the discipline of world prices that could serve as a proxy for undistorted market prices.

At the national level, the neoliberal policy agenda therefore began by dismantling the modest interventionist regimes that had been developed to pursue import substitution industrialization. Governments were encouraged to build down price distorting policies left over from their modest interventionist (and, in the case of ex-Soviet states, socialist) past and remove impediments to the penetration of national markets by global economic forces. Exchange controls, quotas, tariffs, import and export controls and licensing, restrictions on foreign investment were to be eliminated—they distort prices and limit participation in global markets. At the same time, governments should encourage the emergence of private actors through privatization of state-owned enterprises, promoting corporate law reform, strengthening the private banking sector, establishing more open and efficient financial markets, facilitating foreign investment, supporting new local enterprises, and strengthening local entrepreneurial skills and spirit. The goal was to eliminate discretionary public administration and management of economic assets. Market prices should replace administrative prices.

At the international level, the policy agenda was similar—eliminate the effort to regulate the global marketplace. Of course, efforts to regulate the global market had never been as robust as national modest interventionist regimes. Indeed, the horizontal global market, free of collectivist regulatory impulses, served as a loose model for neoliberal national markets. The New International Economic Order, with its call for global economic management by the United Nations illustrated precisely the danger to be avoided. Attention shifted away from the United Nations and public international law, with their programs to redress bargaining inequalities, regulate global markets or encourage sharing of the world's resources, to the IMF, GATT, and, to a lesser extent, the World Bank. The United Nations should stick to what it could do—humanitarian aid, disaster relief, and global security.

The neoliberal frame also led to a rethinking of foreign aid as either a necessary but temporary crutch to facilitate the move from modest interventionism to neoliberalism—in the case of “conditionality” arrangements with the IMF or

the World Bank—or a humanitarian charity for addressing basic needs, rather than generating development. Although foreign aid might be useful as a short-term source of capital, it was no longer seen as capital for development planning, or as compensation for prior exploitation. Where capital could enhance productivity, we could expect it to be forthcoming from private investors.

International policymakers should focus on building institutions supportive of the global market—on private ordering, the world of international private law, commercial arbitration, and international finance, and to the global institutions supporting that world by stabilizing currency markets and promoting trade. The most important action was in the field of private finance—ensuring the free movement of capital and the smooth operation of global currency markets through cooperation among global banks, both public and private, and the improvement of a reliable international payment system. At the same time, a transnational regime of private commercial law was built to support increased global commerce.

Many national regimes in the third world implemented neoliberal reforms with enthusiasm—starting with Chile in the 1970s. As countries emerged from state socialism in the late 1980s and 1990s, the initial desire to “do everything differently” fit smoothly into the neoliberal prescription to reverse the interventionist policies of the postwar developmental states. But the adoption of neoliberal reform was also, and probably more importantly, the result of pressure and encouragement from international institutions. National development policy was increasingly set in negotiations with international financial institutions over debt restructuring and aid, or in bilateral commercial, financial, and aid negotiations with developed nations.

As expanding hard currency debt, increasing interest rates, and economic contraction threw one national budget after another into crisis, governments turned to the IMF, to their private and public bank creditors and to the central banks of the developed world for rescheduling of debt and for temporary funding to avoid massive devaluation and inflation. Increasingly, strict fiscal discipline and implementation of the broader neoliberal policy set, was imposed as a condition for internationally sanctioned debt restructuring and receipt of IMF funding to stabilize currencies. As developing nations sought to participate more fully in international trade, membership in GATT seemed ever more significant. Accession negotiations often provided the opportunity for neoliberal dismantling of postwar interventionist regimes. The GATT was itself moving beyond its initial preoccupation with the reduction of industrial tariffs to negotiation over the elimination of a much broader range of administrative and regulatory practices that could be interpreted as price distorting “nontariff barriers” to trade.

At the same time, the transnational commercial order restricted the jurisdiction of national courts and private law systems in the third world—by developing rules for the enforcement of foreign judgments and choice of law

provisions permitting first world commercial law to govern transactions in the third, by establishing an enforceable commercial arbitration regime to resolve disputes cut off from national and global considerations of "public policy," and by harmonizing private law rules to eliminate social exceptions that might offer opportunities for national judicial discretion.

In one sense, taken together, the national neoliberal program was simple – the private law regimes necessary to support market transactions should be strengthened, while the public law regulations and bureaucratic procedures that impeded private exchange were dismantled. But it was clear from the start that *some* public regulation was necessary to support the market – criminal law, antitrust law, financial and monetary regulations of various sorts, and more. The difficult question for neoliberal policy at the national level was to determine which government actions supported and which impeded market activity, and to prioritize and order market supporting initiatives in the most effective way. For this we need a more precise analytic.

The neoliberal policy analytic was a blend of three somewhat different vocabularies for analyzing government policy developed in the academic literatures of political science, economics, and political economy: public choice theory, rent-seeking, and second-best welfare economics. That the first two should have raised skepticism about modest interventionist government policy is clear – the story for the last is more complicated. Public choice theory rejected the image of the state as the institutional embodiment of a general social will, and proposed analyzing it as a site for a struggle among individual bureaucrats and legislators, administrative entities and legislative bodies, all pursuing their own interests. The boundary, moreover, between public and private entities was blurry – agencies were subject to capture, and individual bureaucrats as often pursued personal as social objectives. Needless to say, looking at third world states in this light made it more difficult to imagine them as wise managers of national economic life pursuing the national development objectives. Government "failure" was everywhere – the welfare states could not be trusted with the kind of discretion envisioned by modest interventionist policy makers of the preceding generation.

The "rent-seeking" idea linked these government failures to the problem of distorted prices. Those given discretion to manage economic resources that they do not own "for the public good" have a constant incentive to rip the public off, collecting rents by restricting use of the asset, rather than profits from its sale. In such a world, assets will be withheld from productive use, or offered for use only at prices reflecting the dead weight of rents due those with administrative discretion over their utilization. In modest interventionist regimes, the incentive for rent seeking is everywhere. As a result, tariffs, subsidies, licenses, and the rest will be administered not to bring about development – not to ensure the most productive use of the asset – but to

generate the maximum rents for those within or near the state apparatus administering them.

In the field of development policy, as elsewhere, the rent-seeking and public choice ideas were deployed side by side to delegitimize the welfare state, and to promote more *laissez-faire*. They were often linked with ideas from economics well illustrated by Deepak Lal's 1983 paper "The Poverty of 'Development Economics.'" Indeed, Lal's paper became something of a bible for critics of what he termed the "dirigiste dogma" of postwar modest interventionism and import substitution. It is not clear, however, that the second-best welfare economic analytic that Lal develops leads inexorably to *laissez-faire* policy prescriptions. Lal acknowledges as much. It is worth looking at his argument in some detail, as it opens the door to appreciating the uncertain link between public choice or rent-seeking analysis and *laissez-faire*.

Lal argued that import substitution development policy had become a dogma. Its proponents repeatedly underestimated the significance of the price mechanism, microeconomics, and participation in global trade for developing economies, while overestimating the potential for macroeconomic management. These dogmatic beliefs, he argued, led them to *assume*, rather than demonstrate the gains to be expected from particular regulatory initiatives. Lal proposed the rigorous use of modern welfare economics to analyze the effects of particular proposals for new government regulation in the context of the existing array of regulation. Perhaps they would facilitate productive use of resources, perhaps they would not.

Modern welfare economics, he argued, begins with the crucial observation that all existing economies depart dramatically from the perfectly competitive environments for which Arrow and Debreu had demonstrated the efficiency of *laissez-faire*. Markets are not universal, competition is not perfect – there are all manner of transactions costs and market failures – information problems, collective action problems, goods for which it is difficult to create a market, and so on. As a result, it is extremely difficult to predict the results of any regulatory change taken on its own. Everything depends on the dynamic relationship between the existing array of imperfections and the proposed initiative. Adding – or eliminating – a given regulation might move the economy closer to the imaginable, but unattainable world of perfect competition, or it might not.

What is needed is analysis, not dogma. Lal proposes a careful comparative analysis of differing government policies against the *hypothetical* benchmark of economic activity under the "shadow prices" that would prevail under perfect competition – "reflecting the relative social (rather than private) costs and benefits of using and producing different goods and services."² In many cases, world prices can indeed be used as a proxy set of shadow prices for

² Deepak Lal (2002), at 78.

purposes of comparing differing baskets of regulatory interventions. But this is quite different from insisting that any given economy or sector move directly to trade at world prices. That might be a good idea and it might not.

This attack on economic dogma applied, as Lal repeatedly insisted, as much to devotees of deregulation as regulation. There is simply no reason to assume a priori that the elimination of a "distorting" price regulation will lead to a more efficient allocation of resources. Whether adding or subtracting a regulation would increase or decrease price distortion could only be determined in context. It might turn out that the optimal "second-best" arrangement requires a new regulation or the preservation of an existing price distortion.

Lal repeatedly castigates modest interventionists for failing to conduct the "subtle exercise" in welfare economics required to justify the regulations they propose. The debate between modest interventionists and neoliberals, he argues, is one between dogma and analysis. Lal criticizes Amartya Sen for opposing neoliberal arguments for an open economy by asserting that Korea was "interventionist" and nevertheless developed rapidly. Sen misunderstands the neoliberal project. Neoliberalism, Lal insists, is not about laissez-faire. It does not insist that one should never be interventionist or that markets always be open. Neoliberalism simply demands an *analysis* of particular interventionist practices to assess their welfare effects. Similarly, in discussing modest interventionist policy experience promoting heavy industry, Lal writes:

There is no reason to doubt that, for large countries such as India with varied natural resources, some heavy-industry products, such as steel, would pass a social-cost benefit test of economic desirability. What is irrational is the *dirigiste* claim that there are *general* grounds for preferring one branch or type of industry over another which the government can readily discern by intuition.³

Lal speculates about why modest interventionists have not made more use of welfare economics to substantiate their claims for regulatory initiatives. He speculates that they are biased – suspicious of "any form of intervention which attempts to supplement rather than supplant the price mechanism."⁴ He concludes, however, that the main block, other than *dirigiste* bias, is simply that "second-best welfare economics is a complex and delicate intellectual pursuit" beyond the "expertise" of developing country governments.

The observation that third world governments lack the capacity for careful analysis opens the door for Lal to depart from economic subtlety in favor of default policy initiatives. Lal ends his 1983 paper by noting that in the absence of technocrats willing and able to do the difficult work of analyzing policy alternatives, it might be useful for economists to offer some broad rules

³ *Id.* at 82.

⁴ *Id.* at 78–79.

of thumb. They might well rely on recent ex-post empirical studies correlating economic performance with differing levels of government intervention. These studies, he reports, seem to suggest that governments pursuing laissez-faire did better than those that intervened. As a result, in the absence of careful analysis, laissez-faire might be the best idea to propose.

In such circumstances, (of governments with limited expertise) the *laissez-faire* outcomes of an imperfect market economy may turn out to be better than the irrational governmental interventions which alone are feasible.⁵

In 1997, Lal republished the paper with a postscript strengthening his call for a default policy of laissez-faire. Historical studies correlating more open economies with growth had mounted, and distrust of third world governments had become more insistent. Rampant corruption, incompetence, self-dealing, and rent seeking by third world elites made it unthinkable that one could expect the type of subtle analysis required to justify regulations. Public choice and rent-seeking ideas supported a move from careful analytics to neoliberal dogma. As Lal put it in 1997, "the most important change in thinking on economic policy in the Third World has been the recognition that the assumptions about the nature of the state that underpinned planning are unrealistic."⁶

It has often been observed that the laissez-faire discipline recommended for exsocialist countries or imposed upon third world nations through structural adjustment programs was far stricter than anything existing in the first world, where market interventions and regulations remained commonplace. Rent-seeking and public choice analysis could certainly help identify weaknesses in first world regulatory regimes – the political pressure to "universalize" welfare benefits that should be targeted and the political ease of adopting and difficulty of eliminating government benefits should lead one to be wary. But the developing and exsocialist states had such severe "governance" shortfalls that they could not contemplate the emergence of the sophisticated welfare state arrangements common in more developed settings. As many have pointed out, there is much room for racism and cultural prejudice in assessments like this.

Lal's transition from analysis to dogma is troubling in other ways as well. The historical studies correlating "laissez-faire" policies with economic performance require that societies be differentiated by their degree of divergence from the perfect competition – requiring precisely the analytic exercise a default policy is designed to avoid having to make. More importantly, the application of public-choice thinking and rent-seeking ideas to the activities of *public* entities seems a function of a similar dogma that Lal criticizes. There

⁵ *Id.* at 79.

⁶ *Id.* at 148.

seems little reason to believe that the entrepreneurial class in third world societies is any less prone to rent seeking than the public administration. To distinguish "rents" from productive uses would require a development strategy—a way of identifying and assessing the uses made of surpluses generated in various sectors. The focus on government failures may be well advised, but also distracts attention from dangers of private monopoly, anticompetitive behavior, and administered pricing. Once laissez-faire dogma replaced welfare economic analytics, there was little room for analysis of the relative gains from trade under conditions of capital mobility and free trade. With intense foreign investor penetration, for example, there was little reason to expect the gains to accrue in the third world. There was, moreover, little reason to expect that one-time efficiency gains from movement to laissez-faire would lead to development, if by that one means either industrialization or providing for basic human needs.

Resolving these issues in particular contexts would require complex welfare economics analysis. Should this particular regulation be abandoned? How quickly should we move? How sharp should the shock to market be? How should we sequence our moves—should we focus on privatization before or after banking and credit reform? What public enterprises should remain—for defense, garbage collection, electricity, telecoms, airlines? How should privatization be conducted—how quickly, on what terms, through what scheme? Is an antitrust regime appropriate—what role for "industrial policy" within it? Is it more important to promote small-scale entrepreneurship or large-scale financial markets? As an economy opened, should one focus on inward capital mobility, tariff reduction, exchange rate stabilization? When can we usefully strategize about our comparative advantage or work to alter our factor endowments over time?

The most significant contribution of neoliberalism was not a set of answers to these questions, but a new vocabulary for debating them—part economics, part politics, part sociology. Second best welfare economics provided a starting point—default ideas about the relative significance of public and private rent-seeking, public and private governance failure, played a role as well. Government policy would be appropriate where it compensated for or eliminated a market failure. Where this was difficult to assess accurately—where the distinction between "supporting" and "distorting" the market turns out to be too complex to assess with confidence—default presumptions and policy options could step in. The broad policy vocabulary that resulted was a mix of economic ideas, historical observations, sociological preconceptions, and political biases.

The focus on microeconomics and prices, the new optimism about foreign investment and trade, the pessimism about government policy capacity, and the relative confidence in private decision making, made it difficult to justify robust public development strategies—for strategic thinking about long-term national comparative advantage, or for government action to strengthen the

TABLE 5. Washington Consensus 1980–1995

Left Largely absent	Center Counterpoint	Right Mainstream
Delinking	Further chastened modest interventionism	Neoliberalism Markets
Antidevelopment	Export-led growth	Microeconomics Get prices right
	Human rights	Reverse state socialism and import substitution industrialization
	Economic and social rights	Free trade / foreign investment
	Right to development	Public choice theory Governance failure Rent-seeking
	Microlending	Second best welfare economics Efficiency and growth
	Empowerment	No need for a special economics of "development"
	Indigenous peoples rights	
	Sustainable development	

bargaining power of national economic actors in their international commercial transactions. It was difficult to think dynamically about what happens after the one-time efficiency gain, should it emerge, generated by the move to market.

Those seeking to preserve the policy tools of modest interventionism for these purposes were thrown back on their feet by criticism of *dirigiste* dogma, rent seeking, and government failure. When they recovered, and began to subject what had become neoliberal dogma to the same analytic scrutiny, they continued to find it difficult to remember the potentials for macroeconomic thinking, of attention to productivity in a dynamic input-output cycle, of distribution as a tool of development policy, for targeting bottlenecks, for harnessing the surplus to new modes of economic activity—all that had been swept away, and they found themselves arguing for interventions only where they could be said to compensate for one market failure without causing another.

We might summarize the 1980–1990 period as shown in Table 5.

Demand for law explicit in neoliberal economic theory

At the national and international level, law was the instrument for neoliberal policy. Law remained a pragmatic and purposive instrument of policy. Building down import substitution regimes required legislative and

administrative changes. Structural adjustment, conditionality, and the GATT are legal regimes. Completely new legal regimes were necessary, domestically and internationally, to support markets – financial regimes, intellectual property regimes, regimes of commercial law. New statutes and administrative rules were required – to structure the privatization of state-owned enterprises, establish financial institutions, and support new capital markets. Banking and payment systems, insurance schemes – all required a new legal framework. Investment laws, and corporate laws, insurance and securities laws were needed, and were promoted across the developing world through legal reform programs

In this sense, the neoliberal program was as *instrumentalist* and *positivist* about law as modest interventionism. National import substitution regimes were to be unbuilt by treaty, statute, and administrative decree. Particularly in the first phase, the statutes proposed to accomplish these goals were quite standardized – offered to one country after another as a kind of global “best practice.” The foreign experts bringing new statutes for securities regulation, corporate law, insurance, banking or commercial law, and more, were every bit as dependent upon legislative positivism and as unconcerned about the relationship between law in the books and law in action as their modest interventionist predecessors in the immediate postwar years. Like these “social” predecessors, neoliberals understood their normative regimes to be compelled by the facts of global social organization – this time the requirements of markets, and the priority of individuals, rather than the requirements of interdependence, and the priority of groups. Neoliberals were adept at turning social antiformalist ideas to new ends.

At the same time, the legal theory implicit in neoliberal development policy was quite different from that implicit in the development thinking of the previous periods. The focus shifted from public to private law. Law emerged as a *limit* on the state – on the discretion of administrators and the mandate of legislators. Private rights, constitutional procedures, judicial review, and international obligations – all constrained the neoliberal state. The focus was less legislative positivism and sovereignty than private rights and a neoformalism about the limits of public law. Focus shifted from administrative rule making or legislation to private ordering, both nationally and transnationally. Horizontal law replaced vertical law, just as a law of rights limited the law of sovereignty.

Where the law and development reformers of the 1960s had focused on reforming the legal profession to improve the implementation of administrative and legislative law, neoliberals paid very little attention to the structure or thinking of the legal profession, or to the gap between law in the books and law in action. They were not aiming to improve the effective exercise of state power, but to more effective restraint of government rent seeking. They tended to assume that potential market actors were waiting for the right

rules – once in place, they would be made use of. If that didn't happen, they were not the right rules. One didn't need to worry too much about the gap. The result was a kind of *literalism* about law and legal reform.

Courts grew in significance – central to the enforcement of market transactions and limitation of public discretion. By enforcing contracts and property rights courts both support market transactions and resist encroachment by the state. If administrative failure suggested deregulation, adjudicative failure called for judicial reform. Court enforcement of private law was thought necessary to enable market actors to make use of the new rule systems being put in place.

This is not an obvious idea – administrative agencies might as well have taken responsibility for enforcing commercial arrangements or implementing neoliberal reforms. Private actors might have been willing to make their own way, enforcing their reciprocal rights extralegally, through reputation or informal private sanctions – or, they might have been willing to lump their losses as they occurred rather than seek court enforcement. Nevertheless, neoliberal policymakers seem to have assumed that private market actors needed to see reliable courts to transact. Although potential foreign investors often *said* they wanted better courts during this period, it would take more study to understand whether this was accompanied by actual use of courts by these actors, either abroad or at home in the industrialized north. It would take still more to discover if this was a significant factor for other market actors, or was rather a collective prejudice of potential foreign investors of the day.

The focus on courts also accompanied a retreat from the legislative and administrative positivism of the modest interventionist period. With powers of *judicial review*, courts could enforce property rights against the executive, restraining its ability to mobilize resources for development and encouraging a retreat from interventionism. Of course, judicial review could be a double-edged sword. The modest interventionist regime had also generated a wide range of entitlements that were to be undone by neoliberal reforms. For judicial review to support the neoliberal reform process, courts would need to be able to distinguish inappropriate price distorting entitlement claims from “real” property rights.

The international legal regime soon found itself needing similar expertise. The United Nations of the NIEO had relied upon international public law – treaties, General Assembly resolutions, ICJ judgments, new administrative arrangements – to address political concerns about the global distribution of wealth and the fairness of international bargaining. Neoliberalism shifted attention from the United Nations to the General Agreement on Tariffs and Trade. The GATT would harness the politics of complex global bargaining sessions toward a different objective – the progressive elimination of national regulatory barriers to trade and the liberation of the global market.

This project required both formal tariff "bindings" and an apparatus – at the national and international level – for interpreting the GATT's central legal obligations ("national treatment" and "most-favored nation"), a range of vague exceptions (such as "national security") and for determining which national regulatory arrangements were *equivalent* to tariff barriers or subsidies. Interpreting these standards – to determine what counted as a "nontariff barrier" – required more than a formal application of treaty definition. National trade law regimes were always tempted to think any foreign impediment to their imports was an unfair barrier to trade – they would need a vocabulary of self-restraint. As the WTO's own interpretive machinery became increasingly juridical in nature, it would also require interpretive facility with the distinction between an unfair barrier to trade and a normal national background regulation.

A "free trade" regime requires more than the elimination of tariffs. As tariffs came down, industrial nations began to challenge all sorts of diverse pieces of one another's regulatory environment as "nontariff barriers to trade." In doing so, they were contesting elements of one another's background regime. It is an old legal realist insight that the reciprocal nature of a comparison between two legal rules – or legal regimes – makes it impossible to say which *causes* the harm – or which is "discriminatory." Is it the railroad's right of way that damages the farmer's wheat – or the farmer's property right that imposes cost on rail transport? In the trade context, we might ask whether Mexico's low minimum wage – or failure to implement its own minimum wage scheme – is an unfair "subsidy," or whether Mexican manufacturers who benefit from nonenforcement of local law are "dumping" when they export to American markets. But one might equally well ask whether it is a "nontariff barrier," an unfair or unreasonable extraterritorial reach of U.S. law, for the United States to demand higher labor standards for production of goods to be imported to its market.

Legal analysts might, at least in the first instance, draw the distinction in formal terms – if the foreign rule takes the form of a tariff or subsidy, it is an unfair barrier to trade, if not, not. But early on it was recognized that national regulators could use "nontariff barriers" to equally market restrictive effect. One might be tempted to preclude all *public* regulatory price distortions, while using antitrust to attack parallel private market distorting arrangements – but too many neoliberal regulatory initiatives might also fall under this ax. What is required is a mode of distinction that analyzes regulations for their actual market restricting or enabling potential. In the early stages, background ideas about what is "normal" served the purpose – if farmers *normally* grow wheat, a new railroad may appear to impose the cost, if the difference between American and Mexican wages is "normal," American efforts to raise Mexican standards will seem an abnormal nontariff barrier. As ever more national regulations were contested for their compatibility with national

and global trade standards progressed, such default ideas seemed ever less plausible.

Managing the neoliberal regime in all these dimensions would require enormous skill and precision in rule making and interpretation. National trade regimes would need to identify and sanction foreign unfair or corrupt practices, by private and public entities alike, without descending into protectionism or rent seeking, or becoming captive to the interests of local exporters. Throughout the third world, government agencies responsible for industrial development would need to support commerce and trade, while avoiding price-distorting interventions and rent seeking. National and international agencies would need to offer technical assistance to explain privatization, as they had once explained marketing boards. Buffer stocks were out – but commodity futures markets were in, and programs were implemented to train farmers across India in the use of the Internet to check prices on the Chicago exchanges. Private arbitrators would need to distinguish contractually intended obligations from fraudulent, self-dealing, coercive arrangements of disguised rent seeking. Judges would need to rework private law to eliminate the effects of distortive "social" objectives, shrink opportunities for discretion that could be used by national officials to discriminate, and in general orient private law to encourage or mimic the pareto-optimal arrangements private parties would arrive at were they able to transact without costs. All this would require a new style of legal reasoning.

With the focus on courts, private law enforcement, and judicial review to protect property entitlements from interventionist rent-seeking, the pragmatic and flexible antiformalism that "law and development" professionals had sought to inculcate during the law and development movement, was replaced by a kind of formalism. But this was not the formalism of judicial passivity – the spread of judicial review placed courts in a far more central role. More importantly, to distinguish property entitlements whose enforcement supported the market from entitlements whose enforcement would extend the distorting effects of modest interventionism required a mode of reasoning that reached beyond formalism. A sharp and formal distinction between private rights and publicly created entitlements seemed a good place to start. But this would not be the end of the story. Judges would need to determine *which* property rights to enforce in cases of conflict, and how extensive to interpret exceptions. *Some* administratively created rights – concessions to foreign investors exploiting natural resources, tax incentives, exemptions from zoning or local regulation, and eminent domain powers – were also part of the neoliberal order. Judges would need to be able to distinguish rights that must be enforced for the market to succeed, and rent-seeking or corrupt entitlement claims that needed to be rejected. In making these distinctions, judges would need to align their interpretation of property rights with good policy sense – participating in the new discourse about the existence, extent,

and prognosis for market failures and the justifications for regulation and intervention.

In this sense, neoliberalism's implicit theory of legal reasoning combined neoformalism with a policy analytics borrowed from neoliberal economics. It was not the subtle analytics of second-best welfare economics proposed by Lal, but the curious amalgam of welfare economics, more informal ideas about the type and extent of possible market failures, default ideas about likely governance failures, sporadic empiricism correlating national legal institutions and legal rules – or the reputations of these institutions – with economic performance to identify “best practices,” informal deference to the attitudes of the foreign investor community, a literalism about law's instrumental potential, and professional conventions of interpretive restraint. The image of a perfectly competitive Kaldor-Hicks efficient end state provided a kind of loose reference point and target, against which to compare various judicial approaches. So whether the market failure is big or small, whether the new policy corresponds to and will correct for a transaction cost, is a matter of degree, on a continuum, in particular cases. Will the enforcement of this right, given our hunches, economic theories, and empirical awareness, put us on the track to Kaldor-Hicks efficiency or not? The legal discourse produced as answers were sought for such questions sometimes presented itself as a technical machine of formal deduction or economic analytics, but it was usually a puzzling blend of the two, interspersed with loose empirical or sociological hunches.

As neoliberalism advanced, moreover, two large default ideas about law became more salient – useful to guide interpretation in this new juridical policy vocabulary – *formalization* and *anticorruption*. During the neoliberal period, the conviction grew among development professionals that economic performance in the third world required a formalization of law and the elimination of corruption. As the evolving neoliberal policy vocabulary became ever more hazy and multifaceted, these two ideas provided a reassuring stability. Each has a long history in literature about economics and law, and each suggests a set of tactics for policy making. Each heightens the sense that the rule of law can be enhanced – and policy choices necessary for interpretation made – without making the sort of overtly political choices about distribution of resources that characterized both modest interventionism and the international proposals of the NIEO.

Although the policy vocabulary of neoliberal interpretation was extremely flexible – and became more so in the last decade – there is no question that the focus on formalization and anticorruption narrowed the range for interpretive maneuver from the more open-ended, socially oriented discourse of the preceding periods. The implicit – and sometimes explicit – legal theory of neoliberalism seemed to forget much of what had been commonplace within the domain of legal theory for more than a century about both the limits of

law as an instrument of social change, and the plasticity of legal rules and standards. To observers who remained committed to the legal theories of prior periods, it could often seem that neoliberalism asked the legal order to perform feats it was unlikely to accomplish, and to remain neutral in making distinctions in ways it seemed unlikely to sustain.

One might say that neoliberals promoting formalization and anticorruption seemed to deny the necessity for interpretation, and for the difficulty of making precisely the sorts of distinctions between market ordering and market distorting made salient by their economic ideas. Indeed, the focus on formalization and anticorruption as *legal* strategies for development seemed to substitute both for the subtle exercises of welfare economic analytics initially called for by Lal, and for the more open-ended juridical policy analysis that emerged from efforts to link identification of market failures with broader empirical hunches and default assumptions.

Since at least Weber, people have asserted that “formalization” of legal entitlements, in one or another sense, is necessary for development. Necessary for transparency, for information and price signaling, to facilitate alienation of property, to reduce transaction costs, to assure security of title and economic return, or to inspire the confidence and trust needed for investment. From the start, legal formalization has meant a wide variety of things – a scheme of clear and registered titles, of contractual simplicity and reliable enforcement, a legal system of clear rules rather than vague standards, a scheme of legal doctrine whose internal structure was logical and whose interpretation could be mechanical, a system of institutions and courts whose internal hierarchy was mechanically enforced, in which the discretion of judges and administrators was reduced to a minimum, a public order of passive rule following, a priority for private over public law, and more. These ideas are all associated with the reduction of discretion and political choice in the legal system, and are defended as instantiations of the old maxim “not under the rule of man but of god and the law.”

The association of legal formalization with development, however, has always seemed more problematic than this, also since at least Weber. For starters, it has also been easy to imagine, from the point of view of *other* economic actors, that formalization in each of these ways might well eliminate the chance for productive economic activity. A clear title may help me to sell or defend my claims to land – but it may impede the productive opportunities for squatters now living there or neighbors whose uses would interfere with my quiet enjoyment. A great deal will depend on what we *mean* by clear title – which of the numerous possible entitlements might go with “title to property” we choose to enforce. Clear rules about investment may make it easy for foreign investors – but by reducing the wealth now in the hands of those with local knowledge about how credit is allocated or how the government will behave. An enforceable contract will be great for the person who

wants the promise enforced, but not so for the person who has to pay up. As every first year contracts student learns, it is one thing to say stable expectations need to be respected, and quite another to say whose expectations need to be respected and what those expectations should legitimately or reasonably be. To say anything about the relationship between legal formalization and *development* we would need a theory about how assets in the hands of the title holder *rather than* the squatter, the foreign *rather than* the local investor will lead to growth, and then to the sort of growth we associate with "development."

The story of development-through-formalization downplays the range of possible legal formalizations, each with its own winners and losers. Disinterest in the distributional choices one must make in designing a rule of law suitable for a policy of legal "formalization" is common in literature promoting the rule of law as a development strategy. Hernando de Soto's famous discussion of the benefits of legal formalization in his 2000 book, *The Mystery of Capital*, provides a good illustration. In discussing land reform, he is adamant that squatters be given formal title to the land on which they have settled. Doing so, he claims, will create useful capital by permitting them to eject trespassers, have the confidence to improve the land, or offer it for sale to more productive users. Of course, it will also destroy the capital of the current land owners – and, if the squatter's new rights are enforced, reduce economic opportunities for trespassers and future squatters. Formalization of title will also distribute authority *among* squatters – where families squat together, for example, formalization may well move economic discretion from women to men. The implicit assumption that squatters will make more productive use of the land than the current nominal owners may well often be correct. But de Soto provides no reason for supposing that the squatters will be more productive than the trespassers, nor for concluding that exclusive use by one or the other group is preferable to some customary arrangement of mixed use by squatters and trespassers in the shadow of an ambiguous law.

None of these observations is new. Development planners and practitioners have long struggled with precisely these problems. The puzzle is how easily one loses sight of these traditional issues of political and economic theory when the words "rule of law" come into play. There is something mesmerizing about the idea that a formal rule of law could somehow substitute for struggle over these issues and choices – or could replace contestable arguments about the consequences of different distributions with the apparent neutrality of legal best practice.

A second theme running through neoliberal ideas about the potential for using law as a development strategy focuses on eliminating corruption. Many of the advantages of eliminating corruption run parallel to those of legal formalization – eliminating corruption can seem much like eliminating judicial and administrative discretion. Indeed, sometimes "corruption" is simply a

code word for public discretion – the state acts corruptly when it acts by discretion rather than mechanically, by rule. Enthusiasm for eliminating corruption as a development strategy arises from the broader idea that corruption somehow drains resources from the system as a whole – its costs are costs of transactions, not costs of the product or service purchased. Elimination of such costs lifts all boats. And such costs might as easily be quite formal and predictable as variable and discretionary. Here the desire to eliminate corruption goes beyond the desire for legal form – embracing the desire to eliminate all costs *imposed* on transactions that are not properly costs *of* the transaction. There are at least two difficulties here. First, the connection between eliminating corruption and "development" remains obscure. Even if the move from a "corrupt" legal regime to a "not corrupt" regime produces a one-time efficiency gain, there is no good economic theory predicting that this will lead to growth or development, rather than simply another stable low-level equilibrium. More troubling is the difficulty of distinguishing clearly between the "normal" or "undistorted" price of a commodity and the "costs" associated with a "corrupt" or distortive process for purchasing the commodity or service. These were precisely the sorts of distinctions first addressed by the analytics of welfare economics, then by the looser policy vocabulary of neoliberalism, for which anticorruption and formalization emerged as default substitutes.

Hernando de Soto again provides a good illustration. He repeatedly asserts that the numerous bureaucratic steps now involved in formalizing legal entitlements are mud in the gears of capital formation and commerce, retarding development. He has been a central voice urging simplification of bureaucratic procedures as a development strategy – every minute and every dollar spent going to the state to pay a fee or get a stamp is a resource lost to development. This seems intuitively plausible. But there is a difficulty – when is the state supporting a transaction by formalizing it and when is the state burdening the transaction by adding unnecessary steps or costs? The aspiration seems to be an economic life without friction, each economic act mechanically supported without costs. But legal forms, like acts of discretion, are not simply friction – they are choices, defenses of some entitlements against others. Each bureaucratic step necessary to enforce a formal title is a subsidy for the economic activity of informal users. Indeed, everything that seems friction to one economic actor will seem like an entitlement, an advantage, an opportunity to another. The point is to develop a theory for choosing among them.

In fact, it is probably more sensible to think of both the formalism and the anticorruption campaigns as political, rather than as economic projects. They were oriented far more explicitly to the perception of governance failure than to economic performance per se. They responded to the widely shared sense among development professionals that third world governments

simply could not be trusted with policy making, regardless of the approach taken. If neoliberalism's energy had come, in part, from its enthusiasm for a *small* state, campaigns for formalism and against corruption were also driven by the desire for a *strong* state, capable of enforcing public order and private rights – without messing in the economy. If we think in distributional terms, there is no question that neoliberal legal theory accepted ideas about law more common in the foreign investor community than in most developing nations themselves. Many ideas about the law needed for development turned out to be about the law foreign investors wanted to see. In exsocialist countries, as elsewhere, there is no doubt that some local players were better situated to play in this new legal world and to deploy this new legal vocabulary than others.

In ideological terms, these ideas about law are quite difficult to characterize politically. Instrumentalism, positivism, and literalism about the economic consequences of legal initiatives have characterized all manner of ideological projects. Although a commitment to “formalism” was long associated in the United States with *laissez-faire* recollections of the nineteenth-century period of classical legal thought, it has certainly also served other masters. So also, of course, for judicial review. Projects to formalize small-scale rights to “empower” those in the informal sector to participate in the formal economy were extremely popular across the ideological spectrum, at least in the North. Formalization and anticorruption campaigns likewise. Moreover, the mode of legal reasoning about policy that developed – welfare economics, empirical observations, sociological hunches – to determine which state rules were market supporting and which were not, was used during this period by left, center, and right development professionals.

It did seem, however, that at least broadly speaking, the more market failures you thought there were, the more often you thought government initiatives might well correct them, the less certain you were about defaulting to *laissez-faire*, the more faith you had in third world government initiatives, the less significant a problem you felt corruption was, the slower you felt the transition to market should proceed, the more skeptical you were about the large-scale benefits of small-scale formalization, the more likely you were to be a center left of left-wing analyst. What was fascinating, however, was the relatively swift loss of a voice for “social” legal ideas as a vocabulary for the left – as well, of course, for the center and right.

The legal vocabulary of neoliberalism, however capacious ideologically, had its blind spots as well. As a policy analytic, it had little room for distributional concerns, particularly efforts to see first-order distribution as a tool for development planning. It pushed issues of redistribution, of fairness in allocation and in bargaining, off the table, and focused attention on the nature of the local public and private legal order, rather than on the international legal, political, or economic system. It does seem that the formalization and anticorruption campaigns had the effect of pushing even neoliberal policy

TABLE 6. Mainstream: 1980–1995

Basic ideas Economics	Development policy set	Legal theory	
		<i>Classical legal thought</i> <i>Law and economics</i> <i>Rights formalism</i>	
		<i>Instrumental thinking</i>	<i>Rights thinking</i>
Neoliberalism	Politically and economically small state	Legal pragmatism	Public and private law neoformalism
Efficiency and human rights	Get prices right	Law = policy	Property and contract rights
The “transition” from socialism to the market	Strengthen private law	Efficiency and Kaldor-Hicks for judges	Formalization of entrenched rights
From totalitarianism to democracy	Weaken public law	Eliminate rent seeking and corruption	Enforce private transactions
Hayek liberalism	Facilitate participation in global market	Public law literalism and neoformalism	Limit the state
	Open markets/world prices	WTO as world constitution	Judges
	“Best practice” property law, corporate law, tax reform		Judicial review
	International financial management		Human rights
	Structural adjustment IMF/WTO/IBRD		
	Transnational private ordering		

analytics to one side, let alone the legal policy vocabularies of the “social,” or of “modest interventionism.” Development policies rooted in distributional analysis were more difficult to imagine and propose. The legal projects necessary to create a small economic state while strengthening the public order state, reemphasized distinctions between public and private legal orders and institutions that had everywhere been eroded during the same period in the North in favor of more flexible “soft law” styles of governance or public-private partnerships. This certainly responded to the stigma associated with third world governance, but it also undoubtedly reinforced it.

We might summarize the mainstream of the 1980s as shown in Table 6.

The politics of neoliberalism: From opposition to mainstream

In ideological terms, this new vocabulary was everywhere associated, at least initially, with the right. Neoliberal ideas were developed by intellectuals associated with right-wing parties in the North, and were first tried in

countries self-consciously making a transition from left to right – starting with Pinochet's Chile, and continuing through the "transition" of exsocialist societies "from plan to market" after 1989. Indeed, during this period, the left largely disappeared from development thinking – into local resistance movements, hostility to development, and various visions of self-reliance and "delinking," a slogan made famous by Egyptian development economist Samir Amin. After 1980, the steam went out of the entire framework of proposals associated with the NIEO. The liberal center in the North continued to promote versions of modest interventionism, but with ever less enthusiasm – indeed, centrist thinkers became critical of top-down instrumental programs, lost interest in development economics altogether and became enamored with small-scale local development initiatives, with empowerment initiatives to encourage participation in local government, with micro-lending, and with the global vocabulary of human rights and dignity. By the late 1980s, the broad framework for thinking about what would have been called "development" was provided by the policy vocabulary of neoliberalism.

These ideas drew strength from their association – largely incorrectly, as it turned out – with the relative success of the Asian tigers. The economic performance of the Asian tigers – striking in comparison to the situation in Africa, Latin America, and elsewhere in the developing world – made it easy to think that they must have been doing something *completely* different. Little was known about their internal governance – but it was clear that they exported a great deal. This export orientation was interpreted as a general *openness* to the global economy – although it was not at all clear foreign investment and ownership was any more welcome than imports that competed with national firms. Openness was then commonly associated with *laissez-faire* – precisely the chain of associations against which Lal had warned. Nevertheless, many of the *ex post* empirical work correlating policy choices with development interpreted the Asian tigers in just this way – as export oriented, open economies, disciplined by world prices with governments committed to the restraint of *laissez-faire*. In a further leap, their success was repeatedly cited for the proposition that introducing *laissez-faire* through a quick dismantling of modest interventionism – a "shock" to "market" prices – was unlikely to be a wrong step.

Looking back, the differences between development regimes in Asia and elsewhere were more fine grained. There was more success outside the Asian tigers than it had seemed in 1980. All import substitution regimes promoted exports, including, after the mid-1960s, various industrial, manufactured, and processed exports. Other differences – prewar industrial experience, land reform, relative income inequality, the rise of national firms, low levels of foreign ownership, administrative quality, and precision in policy targeting – may have been more important in their relative success, as Alice Amsden has most prominently argued. There is no question that the governments

of the Asian tigers were interventionist – and local prices were not always world prices. Most importantly, they had their own histories – that nowhere included the sort of "market shock" advocated by those who would imitate their success.

These various ideas coalesced around a political commitment to the sharp separation of "public" and "private" actors, institutions, and modes of thinking. Public actors were to be mistrusted. They were prone to rent seeking and other failures identified in the public choice literature. Private actors were understood to be more rational in their responsiveness to price cues. Public ordering – government action – was understood to take place upon a preexisting, even natural, background of private ordering, itself innocent of public action. Markets were understood to emerge naturally from the private bargaining of dispersed actors – while governments were more artificial constructions that could easily fail. The government action necessary to support markets could be cleanly distinguished from price distortion, rent seeking, and corruption. These ideas entered the neoliberal policy vernacular as soft background assumptions about the nature and limits of politics.

Neoliberals seemed to share a background memory of nineteenth-century liberalism as a golden age – hence the term "neoliberal." In their memory, politics and economics were cleanly separated in the liberal nineteenth-century world – a separation buttressed by a universal practice of governmental self-restraint. Combined with open borders and a stable global currency, this ideological consensus had functioned, in the words of Wilhelm Roepke, as an "as if" world government.⁷ This historical memory suggested a goal for policy – to build down the legacy of collectivism, nationally and internationally, by reducing tariffs and other national price distortions through a slowly emerging transnational policy consensus.

These various intellectual influences were associated in the period with the right, and it is not surprising that neoliberalism would have been understood – is still understood – as a series of right-wing policy initiatives and theoretical preoccupations. The interesting thing, however, is that as soon as neoliberalism became a policy vocabulary combining technical criticisms and vague historical, political, and sociological observations, it became the host for debates about specific policy directions that were easy to associate with broader left-center-right ideological debates. The slower one proposed to move to market, the more regulations one defended, the more participation by the state in the economy one felt justified, the more one focused on the national economy and the less enthusiastic one was about trade liberalization or foreign investment, the more "market failures" one found, and the more willing one was to associate regulation with their amelioration, the further to the "left" one must be. Eventually, moreover, right, center, and left

⁷ Wilhelm Roepke, *Economic Order and International Law*, 86 REUEIL DES COURS 209 (1954).

regimes adopted broadly neoliberal approaches to development – exactly as they had modest interventionist policies in the postwar period. Experts in all regimes defended their policies in a market, rather than a resource mobilization, vocabulary.

There is no question, however, that the neoliberal vocabulary as a whole, like its predecessors, also had an effect on the range of policies and the modes of justification available to any party. Most significantly, neoliberalism brought with it a sharply diminished level of political or governmental aspiration. One need not worry too much about development – if we get out of the way, private actors will allocate resources automatically to their most productive uses. It became more difficult to imagine and pursue national economic policies that made choices about resource allocation different from those made by private, and generally foreign, parties. It became more difficult for governments to develop expertise in planning and targeting. Social objectives seemed newly distinct from development – to be achieved through tax and transfer later, after the pie had grown. Distributive policies of all kinds became suspect. At the global level, it became difficult for the United Nations and the public law community to imagine a role for itself in development or economic issues.

PHASE FOUR: A CHASTENED NEOLIBERALISM 1995–2005

Rethinking: Economics, politics, society, and law

During the 1990s, disappointment with the economic, as well as the political and social results of the neoliberal “market shock” transition in East/Central Europe and Russia, the Asian and Latin American currency crises of the late 1990s, growing popular opposition to “structural adjustment” policies across the South, and a widespread feeling of vulnerability, also in the North, to “globalization” – opened a space for new thinking. Clinton administration appointees to the international financial institutions took a second look at structural adjustment and “transition” policies. Social movements in the first and third worlds assailed neoliberalism in new terms. As in the 1990s, there were new technical economic arguments about the limits of the maturing model, as well as alternative policy projects animated by ideas about politics, society, and law.

Nevertheless, the neoliberal paradigm has continued to be baseline common sense among development professionals. There has been little call for a return to modest interventionism, to import substitution industrialization or to the development economics of the postwar period. The paradigm shift from macroeconomics to microeconomics, from the idea of an input-output cycle to that of a market, from getting distribution right for the mobilization of savings to getting prices right for the efficient allocation of

resources, has remained decisive. However, it is still thought that first and third world economies obey the same broad laws. Welfare economics remains the dominant economic analytic for assessing regulatory initiatives, and the looser policy discourse of market failures it spawned remains the dominant vocabulary for talking about national economic regulation. The nationalist third world welfare state remains intensely stigmatized – corrupt, inefficient, stagnant, and kleptocratic. Only the military – largely the first world military – is now thought capable of large-scale political projects of nation building or development, and doubts on that score are growing. *Laissez-faire* remains a potent default proposal when governments are thought inept, and the shock of world market prices is still thought a useful tonic – most recently in Iraq. Formalization and anticorruption campaigns remain vigorous.

At the same time, the neoliberal paradigm supporting this baseline common sense has been chastened. It had taken a generation for the goal of a modest interventionist “take off” to seem illusory, and for development professionals to chasten, if not abandon, the postwar paradigm of modest interventionism. Disillusionment with market shock came more quickly. To give a sense for scale – in the decade after 1989, Russian GDP was cut in half, while income inequality grew significantly – doubled in Gini coefficient terms. During the same period, China’s GDP nearly doubled. The difference might have numerous explanations, but one could not help asking whether the fact that Russia embraced a market shock transition from state socialism while China did not might have had something to do with it.

As economists tried to make sense of the results of neoliberal policy in the early 1990s, many concluded, in broad terms, that there turned out to have been more market failures than they had thought. Markets in developing and transitional economies were thin, information costs high, transactions costs enormous, oligopolies and monopolies were everywhere, and so on. The need for careful, situation specific, government policy was consequently greater than anticipated. Although neoliberals had recognized that market failures could call for regulatory policy, the widespread perception of governance failure had led neoliberals to recommend *laissez-faire* as a kind of default best policy. The idea that an all-at-once market shock transition might stimulate *new* markets, overcoming existing market failures, had encouraged policymakers to disregard, rather than carefully assess, the potential for market failures.

Market failure takes us back to Lal’s “subtle” second-best welfare economics analytic. Many, like Lal, called for more careful analysis in these terms. When it came to policy prognostication, however, they also looked for general rules of thumb, rooted in economic analysis, but supported as well by sociological hunches, empirical study of past practices and economic performance in other societies. We might call the vernacular that emerged from this blend of economics and sociology “market failure policy analysis.”

This approach began with skepticism, rather than optimism, about the disestablishment of market regulation *in particular contexts*. Although the elimination of regulation might in principle lead to efficiency gains by reducing public rent-seeking and price distortions, in particular circumstances it could turn out that the elimination of a regulation, on its own, could result in a decrease in efficiency. As economists reviewed the disappointments of neoliberalism, they developed a lengthening list of exceptional conditions that might prevent the efficient operation of markets in underdeveloped or transitional economies. The particular circumstance in which deregulation might not generate automatic efficiency gains turned out to be prevalent in developing economies. The need to go slow, to analyze carefully, to address governance failures not by eliminating government but by building regulatory capacity, came to seem paramount.

This is, of course, a quite different vocabulary for justifying regulations than the modest interventionist preoccupation with distribution and surplus mobilization. The analysis remains focused on market efficiency, and regulations are justified only as responses to market failures. Moreover, policy makers needed to address the possibility for governance failure. Nevertheless, the language of 'market failure' was extremely capacious. Developing and developed economies again seemed different, rejuvenating interest in a specialized 'development' economics. A wide variety of typical market failures suggested a range of default regulatory initiatives. But 'market failure analysis' – whether a tight analytic or a set of default judgments about necessary regulation – was not the end of the story.

Joseph Stiglitz was perhaps the most prominent mainstream economic critic of the Washington Consensus. The Clinton administration had supported his appointment as Chief Economist at the World Bank, and his work from the early 1990s was devoted to analyzing the disappointments first of market shock transition in Russia, East and Central Europe, and then of neoliberal structural adjustment policies elsewhere. His keynote address at the 1999 World Bank Annual Conference on Development Economics summarized a decade of movement away from neoliberalism, and has served as a manifesto for a new approach⁸ – much as Lal's short paper had done a generation before.

Stiglitz's criticism of neoliberalism was rooted in neoinstitutionalist economics. Market failure analysis – itself a marriage of second-best welfare economics and empirical studies of best practice – was a starting point. Stiglitz went further, however, in his embrace of the need for institutional, cultural,

and political analysis of development policy. He begins by displacing the Arrow-Debreu model as the unchallenged starting point for analysis.

... while AD models capture one essential aspect of a market economy – the information conveyed by price signals, and the role that those price signals serve in coordinating production – the information problems addressed by the economy are far richer. Prices do not convey all the relevant information.⁹

What conveys the relevant information turns out to be institutions, culture, and "social glue." Moreover, the dynamic development of markets can only be understood, Stiglitz argued, by taking into account the social and political effects of market shifts on institutions. Economic changes generate results in a relationship to "norms, social institutions, social capital, and trust."¹⁰

Stiglitz chastised neoliberals for assuming that once assets were in private hands, they would eventually find their way to productive uses through price signals. Whether they did or did not would depend on the existing institutional structure, as well as cultural and political context. He worries about obstacles to the emergence of markets after privatization – lack of capital, exceptional transactions costs, information gaps of various sorts, as well as a lack of entrepreneurial experience and culture. In analyzing the dynamic interactions of regulatory change and institutional context, Stiglitz is as concerned about the impact of private behavior – private rent seeking, private efforts to use the political process to thwart the effects of virtuous deregulatory policies, failures of private decision making and entrepreneurial culture – as he is about government failure, capture, or rent seeking.

In sequencing reforms, the effects of one reform on another must be assessed. A first reform might generate a social effect – or political response – that will in turn make later reforms more difficult or impossible. He castigated neoliberals for failing to notice the "role of the institutional blitzkrieg in destroying but not replacing the old social norms – and thus in removing the last restraints against society-threatening levels of corruption."¹¹

In short, for Stiglitz, the development policy maker must reckon with the extreme interrelatedness of everything with everything else in a society. Doing so will require policy makers who can stay the course – not simply a one shot importation of best practice legislation to make "the transition" to market capitalism, but an ongoing attentiveness to institutions, culture, politics and economics. Although Stiglitz shared skepticism about the capacity of governments to do this – and to avoid doing it too much, or in the wrong way – he was equally skeptical of the notion that private actors responding to price incentives would take care of the problem. Government failure was no more or less

⁸ Joseph E. Stiglitz, *Whither Reform? Ten Years of Transition*, Keynote Address at Annual World Bank Conference on Development Economics (April 28, 1999), available at <http://www.worldbank.org/research/abcde/washington.11/pdfs/stiglitz.pdf>, summarizing his book *WHITHER SOCIALISM* (1994).

⁹ *Id.* at 4.

¹⁰ *Id.* at 8.

¹¹ *Id.*

likely than a failure of private decision-making, government rent seeking no more or less likely than private rent seeking.

It is not surprising that this demand for ongoing policy attention to the interconnectedness of everything would lead to its own default assumptions and rules of thumb. Post-1995 defaults often reversed the prescriptions of the neoliberal era. Be suspicious of best practices from elsewhere. Take it slow. Be cautious about destroying existing institutions, social networks, and economic patterns. The existing import substitution supported enterprise might well be inefficient, compared to firms elsewhere, but it would nevertheless have an elaborate network of suppliers and customers, habits of management, and patterns of employment. Third world administrative bureaucracies, as well as the economic arrangements of Soviet law should be revisited – institutional cultures and industrial forms might better be preserved, or altered only slowly. One should hesitate before throwing out this cultural capital – replacements may not automatically appear.

Stiglitz's most well-known development of this idea focused on the impact of neoliberal corporate restructuring, which led to society-wide unemployment.

An essential part of the transition to a more efficient economy is the redeployment of resources from less productive to more productive uses. Moving workers from low productive employment to unemployment does not, by itself, increase productivity. Indeed, productivity is lowered, and some productivity is better than none. The movement into unemployment is a costly and inefficient intermediate stage – one could only defend it if there were no better way of moving workers directly from a low productivity job to a higher productivity job.¹²

The problem arises when workers, once unemployed, have no productive work to which they can move – when, for example, there is no culture of entrepreneurship to generate jobs, no capital available for new enterprises, or when the existing human capital is invested in “skills in evading government regulations, in arbitrating some of the inefficiencies in government regulations for private profit, and in operating at the interstices between the legal and illegal world.”¹³

Although the initial focus was softening the more extreme market shock policies – overly rapid privatization or sudden opening to world prices – it soon became clear that an extremely wide range of policies might be defended in Stiglitzian terms. Most importantly, the analysis of cultural history and path dependence, institutional experience and political impact generated policy *choices* rather than a single right answer. There might be a range of different paths open to a given society, leading to equally efficient, but different, equilibria. One size does not – or need not – fit all.

¹² *Id.* at 6.

¹³ *Id.*

As a result, policymakers will be required to make choices about the strategies to pursue. Alternative paths will doubtless have different winners and losers. To the extent these choices cannot be made through a tight analytic, a chastened neoliberalism might open the way to a more overtly political analysis. Stiglitz himself does not go this far. He recognizes that the analytic framework he proposes requires such a complex assessment of social and political factors that it may well not generate clear guidelines for policy. For him, the key is procedural rather than political: development policy making should be decentralized. In part, locating decisions as close to the ground as possible reflects a hunch that those with more local knowledge will be more able to understand the cultural, institutional and political context within which development policy will need to be made – they will make “better” decisions, more attuned to local context, culture and institutions. It is clear we have come a ways from the neoliberal's intense suspicion of government failure and the rent-seeking propensity of local elites. In part, the preference for decentralization simply reflects a sense that neoliberal policy making had erred in the other direction – stigmatizing all local knowledge and privileging the foreign expert. The emphasis on decentralization also reflected a political commitment – a shared sensibility among social democrats of the 1990s favoring “stakeholder” participation in private and public decision making, even if it was difficult to identify with precision who *are* “the stakeholders.”

In short, by the mid-1990s, confidence in the availability of a decisive economic analytic for designing development policy had waned. But development professionals did not see the alternative as a set of political choices. Instead, they built a loose vernacular, rooted in market failure analysis, supplemented by default policy preferences and a preference for decentralized local decision making. The choices for policymakers were recast as questions of degree on a continuum between faster and slower movement to markets, more and less complete dismantling of dirigiste regimes, greater or lesser submission to the discipline of laissez-faire and world prices, and greater or lesser national regulatory restraint.

As confidence in the precision of economic analysis declined, development professionals also reached out in other directions. They turned increasingly to empirical studies correlating economic performance with all manner of policy choices, institutional arrangements, and cultural patterns in the effort to identify “best practices.” It might be possible to sidestep the need for a good theory of development – and for detailed context specific analysis of culture, institutions, and so forth. If everywhere they did X they had good economic performance, and wherever they did not do X one found worse performance, it could hardly be a mistake to do X. Of course, correlation is not causation – X might have been the result of strong economic performance, or both might have resulted from some third element. But as economic theories of development became more complex, more situation specific, and less

decisive, correlative evidence seemed more attractive as a guide for policy. Empirical studies were particularly useful in bolstering sociological hunches and default policy suggestions that emerged from the welter of more complex theoretical analysis.

Empirical study was not the only source for default preferences. Stiglitz's emphasis on "stakeholder" decentralization had introduced his own political and ethical sentiments. He was not alone. A professional interest in path dependence, context, and institutional history blurs easily into an ethical or political preference for localism, social networks, and small-scale solutions – microlending, perhaps – on the theory that development "takes a village." The appeal of "slowing down," "respecting the way things are done here," paying attention to "existing human capital," comes as well from its humanist ethics and solidarist politics.

Development professionals now share an intuitive sense about the appropriate size for the state, and the appropriate balance between public and private, which it is hard not to interpret as a political, social, or ethical sentiment about the good society rather than an analytic resolution to the problems of public and private rent seeking or governance failures. In this vision, the state is no longer the neoliberal minimalist small state, keeping the peace and enforcing private rights. But it is also not the modest interventionist state mobilizing the resources of a nation for industrialization – "nation building." The new medium-sized state is to be the economy's ally, not its engine or opponent. The political horizon of this medium-sized state was modest. In addition to these market-supporting efforts, the state needs to assure the ongoing political viability of the policies necessary for growth. It should be a stable state, oriented toward maintaining a social democratic market, integrated with the world economy. Seen longer term, the state is declining – as market failures diminish, the need for the state should lessen. In the meantime, "good governance" is crucial. Programs of institutional reform, capacity building, and technical assistance – all long part of the development policy portfolio – suddenly took on a new urgency and a new direction.

Building and maintaining this public capacity was important not only to achieve development. One might say that the institutions necessary to avoid public and private rent-seeking and ensure a stable, social democratic market, were the very definition of development. To live in a country with an appropriate state is to be developed. And only such a state can develop its citizens – responsive to their needs, investing in their human capital. There is a kind of implicit virtuous cycle here – the good state is the origin, the result, and the definition of development.

As a result, the focal point for development policy was increasingly provided less by economics than from ideas about the nature of the good state themselves provided by literatures of political science, political economy, ethics, social theory, and law. In particular, "human rights" and the "rule of

law" became substantive definitions of development. One should promote human rights not to *facilitate* development – but *as* development. The rule of law was not a development *tool* – it was itself a development objective. Increasingly, law – understood as a combination of human rights, courts, property rights, formalization of entitlements, prosecution of corruption, and public order – came to define development.

The most well-known and articulate proponent of this shift has been the economist Amartya Sen. His 1999 book, *Development as Freedom*, articulates the idea. Development is a matter of human freedom and human flourishing. Freedom and flourishing require good health, nourishment, housing, and longevity – as well as the ability to own property and participate freely in a market society to develop one's potential, and support one's family and oneself. Markets are an arena for the exercise of human freedom – entrepreneurial freedom, consumer freedom, and freedom to work, save, and support oneself and one's family. Freedom is also a matter of life expectancy, education, health, and security. The state should avoid limiting freedom – by violating human rights or obstructing markets – but should also aim to expand human freedom, by providing security and promoting the fulfillment of basic human needs.

By introducing the rule of law and a social democratic state, one can accomplish development *directly*. These are the institutions – not dams or factories – that separate developed and developing economies. Dams and factories may be means, but they can never be ends. Human freedom is not a precursor to a successful market economy – markets are, among other things, necessary precursors to human freedom and human flourishing. The idea that human flourishing and freedom might be promoted directly placed a new spotlight on law, as both a means to secure freedom, and as a definition of freedom. Law was not only an instrument for new policy initiatives, nor simply a necessary precursor to markets – law, and particularly human rights, was part of the *definition* of development.

This approach reduced the felt need for a decisive policy vocabulary to analyze or compare individual policy initiatives. It had seemed crucial to determine *which* rules and institutions will best harness the surplus for take-off, *which* rules would support the market and overcome market failure, and which would distort prices. When should we rely on public, when on private, initiative: we needed a careful analysis of rent-seeking potential, the availability of competitive markets, and more to decide. It now seemed that building the rule of law – the whole rule of law, all the institutions, and all the rules – would be necessary. One should simply build a rule of law – and a state and civil society to go with it – that substantively respected human rights and market freedom. More or less any social democratic state would do. This does not help prioritize when resources are scarce – should we begin with schools, highways, or courts? – but it takes the pressure off. We will need

TABLE 7. A Chastened Neoliberalism 1995–2005

Left (Absent? rising counterpoint?)	Center Mainstream	Right Falling counterpoint
Localism	Chastened neoliberalism Stiglitz to Sen	Retrenched Washington Consensus
Antiglobalism	Market failure policy analysis	Institutionalism
Revival: dependency theory, import substitution	Institutions, culture, "social glue"	Best practices empiricism
Focus on distribution	Default preferences: Local solutions	Substantive law reform
Fair trade is free trade's destiny	Decentralized decisionmaking "Stakeholder" democracy Multiple paths Rule of law Human rights Human freedom/ human flourishing Technology transfer Information/human capital WTO as world constitution Social charter for world trade	

to build a modern, social democracy. Where we start is less significant than where we are going.

Painting with a broad brush, then, we might summarize the 1995–2005 situation as shown in Table 7.

Law and postneoliberal development policy

Certainly, law has remained instrumental and purposive – the agent of development policy. It has remained a site and vehicle for complex policy analysis – for weighing and balancing and conducting nuanced market-failure analysis. Law has also remained the repository of ontological limits to state policy. Just as neoliberalism had contested dirigiste initiatives as violations of individual – often property – rights, so neoliberalism was contested from the start by assertions of rights acquired from modest interventionist administrative and legislative arrangements. Over the last decade, however, law has also become an end in itself. The shape of law has become the shape of development. The "rule of law" defines the good developed state. "International human rights" defines human freedom and human flourishing.

As a result, implementation of familiar legal institutions and constitutional forms has become central to development policy making. In the first phases of neoliberal enthusiasm, becoming a "normal" developed country meant having familiar market institutions – a stock exchange, a banking system, a corporate law regime – interoperable with global market institutions. As faith in the neoliberal transition waned, the legal institutions that functioned as marks for "normal developed country" shifted to elections, courts, judicial review, and local human rights commissions and the legal framework for a robust "civil society."

Rule of law injection projects have generally been promoted in loosely instrumental terms – as necessary for markets to operate effectively and to attract foreign investment for development. But more than that, it also has simply seemed obvious that a liberal constitutional order was a good thing to have – an aspect of what it meant to be developed – regardless of its impact on economic indicators. Those promoting the rule of law have supported criminal prosecutors, built administrative capacity to operate new corporate and financial regulatory institutions, and trained local officials to participate in global trade negotiations and institutions.

The most important and visible institutional object of attention has been the judiciary. Judges and reliable courts seem like good ideas for lots of reasons: to enforce private arrangements, support criminal prosecution, fight administrative corruption, and review government actions for their respect of human rights, including the right to property. Moreover, many development professionals became convinced that the reputation of national judges was an important element in the investment decisions of foreign investors. It is not clear that foreign investors in fact use courts at home that often – or that they expect to when investing abroad. Indeed, there is little reason a priori to imagine that courts would be any less subject to local prejudices, incompetence or rent seeking than administrators – or any easier to reform. There was some empirical evidence that a reputation for good judging correlates with investment and economic performance, but it was hardly compelling. Nevertheless, for a period at the turn of the century, having a "reformed" judiciary with powers of judicial review became a sign for national willingness to respect investors' rights and allow profit repatriation. Alvaro Santos, in his contribution to this volume, describes well the strange institutional politics of the judicial reform initiatives that resulted in the World Bank context.

Neoliberal reforms to build down modest interventionist regimes have continued, as have efforts to reform corporate law, commercial, securities, and bankruptcy law. Development planners have remained, by and large, enthusiastic about the spread of formal property rights and the formalization of the informal economy, particularly where formalization could facilitate the spread of small scale credit arrangements – so-called "microlending" schemes, often targeting local communities of women. But with increased

attention to the positive functions of the state, attention has also gone into development of law enforcement, security, and military bureaucracies, and into "capacity building" for participation in global trade, investment, and currency stabilization arrangements.

Law is also seen as the primary vehicle for managing the relationship between both public and private institutions – checking against rent seeking or capture by special interests, and ensuring that administrative agencies, courts, and legislatures keep their focus on legitimate regulation supportive of market transactions and remedying market failure, rather than distorting prices and disrupting markets. The focus on institution and state building in recent development thinking has also relied on law as a vehicle for democratic transformation – law reform, elections, checks and balances, judicial review.

This enhanced policy role for law, legal institutions, and legal analysis, coupled with a more robust role for judges in weighing acquired rights against justifications for development policies, have all placed the legal system as a whole more centrally in the development story. *Constitutions* have become development vehicles. Only through democratic checks and balances, according to some public choice theory, can the tendency to capture by special interests be blunted. The ability of national regimes to legitimate the often painful adjustment to global market conditions without succumbing to rent-seeking protectionism will depend, it is often asserted, on their constitutional character. There is much disagreement, of course, about precisely *what* constitution is required – a strong state, an open state, or a limited state – but the role of law as a constitutional vocabulary of legitimacy and self-limitation for necessary economic choices is widely accepted.

At the international level, we see a similar range of legal ideas – promotion of human rights as a development strategy, democratization, and legal reform as the vehicle for strengthening national economic performance, the emergence of "soft law" methods of rule making for social legal fields in Europe and internationally, the expansion of civil society networks as discussion partners for regulatory conversation. Indeed, the international regime is itself increasingly conceptualized in liberal constitutional terms. The WTO has transformed political negotiations over the appropriate national regulatory scheme – you drop this law and I'll drop that one – into a quasi-judicial legal process of interpretation. Commentators have promoted the WTO as a "world constitution" to facilitate the adjustment of national regulatory regimes to one another. International organizations have come to address development almost exclusively in terms of legal rights – social and economic rights, democratic rights, as well as commercial and property rights.

The most significant role played by law in current development thinking, however, is as a vocabulary for policy making. Arguments that would once have been conducted in the vernacular or economics are now made in legal

terms. This reflects two tendencies – the diffusion of economic analytics into broad rules of thumb, default preferences, and conflicting considerations, and the simultaneous development within law of modes of reasoning suitable for arguing about such matters. Purposive interpretation implicates legal reasoning in argument about the appropriate pathway to broad social goals like "development." How broadly or narrowly should we interpret these regulations? Sociological reasoning attunes legal thought to considerations of context, culture, and institutional form. Policy reasoning itself has become part of legal analysis – are there lots of market failures, or few? Is this one? Will this measure correct it or make it worse?

Although one might think these questions might be better answered with a tight economic analysis, or on the basis of careful empirical study, in fact neither is usually available or decisive enough to avoid the need for a policy vocabulary more open to sociological and ideological hunches and default positions. Law, rather than economics, has become the rhetorical domain for identifying market failures and transaction costs, and attending to their elimination, for weighing and balancing institutional prerogatives, for assessing the proportionality and necessity of regulatory initiatives. Development professionals have harnessed the law to the task of perfecting the market through self-limitation – a development paralleled in the United States legal academy by the "liberal law and economics" movement. The policy vocabulary that has developed within law to implement this vision well illustrates the "conflicting considerations" style described by Duncan Kennedy as indicative of the "third globalization" in his contribution to this volume.

As a vernacular for development policy analysis, law retains elements from each of the preceding periods. It puts a wide variety of different analytic frameworks at the disposal of the development professional. The education of women, for example, might be discussed in the vocabulary of antidiscrimination, perhaps to compensate for the inefficient irrationality of market actors, which would otherwise distort the price of women's labor and disrupt the efficient allocation of resources. Or it might be discussed in the vocabulary of human capital investment and capacity building, either to compensate administratively for the collective action problems and transactions costs confronting women seeking to invest in their own skills, or as a component in a national strategy of improving comparative advantage, or mobilizing an underutilized national asset. Women's education might be discussed in a humanitarian or human rights vocabulary, as an element in human freedom, or a responsibility of human solidarity. Or simply as the right thing to do. Traces of neoliberalism, modest interventionism, and postneoliberal thinking, and of right-center-left ideological preferences, have all been sedimented into the legal vocabulary for discussing development.

These are all also technical issues. Will this educational initiative in fact respond to discrimination or be a further distorting affirmative action

measure? Will the human capital investment be recouped – how does it compare to other investment opportunities for the society? What do human rights commitments require in the way of women's education? How do you compare this “right thing to do” with other basic needs? What about backlash, the social and political viability of the educational reform, the costs to other development initiatives, and so on?

As a framework for debating such issues, law has increasingly replaced economics and politics. The legal vernacular is not more decisive or analytically rigorous. It seems, however, to be more capacious. Moreover, economic analysis often requires baseline determinations it is not suited to make. Law provides a vocabulary for debating them, rather than relying on default assumptions. In the trade context, for example, to determine whether a regulation is a “nontariff barrier” to trade or part of the “normal” regulatory background on which market prices are set requires a decision exogenous to the economic analysis. Is Mexico subsidizing when it lowers its minimum wage or fails to enforce its own labor legislation, or is the United States imposing a nontariff barrier when it requires Mexico to meet minimum labor standards? The WTO's policy machinery offers an institutional and rhetorical interface between different conceptions of the appropriate answer to such questions – perhaps different national ideas about the “normal” level of wage protection. The development policy vernacular has a similar effect on issues like women's education – providing a loose argumentative vocabulary that transforms absolute questions – women's education, yes or no – into shades of gray. “Maybe here, to the extent it compensates for discrimination, but not there, where markets work,” and so forth.

The legal vocabulary used in discussions is not infinitely plastic, of course. It emphasizes some things and leaves others behind. The appearance of a technical and “balanced” solution to the question whether a living wage is a “normal” or “abnormal” regulatory imposition on the market, or whether we should fear “private rent seeking” or “public rent seeking” obscures the sense in which these issues present mutually exclusive political choices. There is no technical way to figure out what level of wage support – or women's education – is normal or nondistortive or market correcting – or “required by human rights commitments.” In the trade context, to decide which regulations are barriers to trade and which are “normal” complements to the market, we should ask whether a regulation is part of a nation's legitimate strategic or comparative advantage – whether we might think of a regulatory arrangement, like plentiful labor, as a factor endowment, rather than a distortion of world prices. Once we go down this road, the door is open for analysis of the distributional consequences of regulation, which would take us to a more overtly political frame for debate.

Law offers the opportunity to make these decisions without confronting them as naked political alternatives, while accepting that no economic or interpretive analytic is available to determine which way to proceed. This has

revitalized the law and development field. It is difficult, however, to understand the politics of this move to law. Legal determinations present themselves as operations of logic, policy analysis, procedural necessity, economic insight, or constitutional commitment. In the background, however, lie a set of choices that are difficult to identify and contest. Legal norms and institutions define every significant entity and relationship in an economy – money, security, risk, corporate form, employment, and insurance. Law defines what it means to “own” something and how one can successfully contract to buy or sell. In this sense, both “capital” and “labor” are themselves legal institutions. Each of these many institutions and relationships can be defined in different ways – empowering different people and interests. Legal rules and institutions defining what it means to “contract” for the “sale” of “property” might be built to express quite different distributional choices and ideological commitments. One might, for example, give those in possession of land more rights – or one might treat those who would use land productively more favorably.

Although some minimum level of national institutional functionality seems necessary for economic activity of any sort, this tells us very little. For development we need to strategize about the choices that go into making one “rule of law” rather than another. Attention to the role of law offers an opportunity to focus on the political choices and economic assumptions embedded in development policy making. Unfortunately, however, those most enthusiastic about the rule of law as a development strategy have treated it as a recipe or readymade rather than as a terrain for contestation and strategy. They have treated its policy vernacular of “balancing” as more analytically decisive than it is. As a result, the politics of law in the neoinstitutionalist era has largely been the politics of politics denied.

We might summarize the legal theory of mainstream development thinking today as shown in Table 8.

Politics of postneoliberal development common sense

The postneoliberal development vocabulary has primarily been the product of the broad political center, seeking alternatives to neoliberal ideas they associated with the right without returning to the postwar “dirigiste dogma” they associated with the left. Both left and right, however, have used the neoinstitutionalist vocabulary, and it is flexible enough to support and attack a wide range of policies associated with a range of ideological positions. In fact, differences within this vocabulary have come increasingly to define ideological differences. In this sense, we might say that the new policy vocabulary *has merged* with the ideological vocabulary of political life.

The postneoliberal development policy expertise offers a series of methodological tendencies, each of which can also be used for ideological differentiation: We might say, for example, that the more market failure one sees, the

TABLE 8. Mainstream: 1995–2005

Basic ideas: Economics	Development policy set	Legal theory	
		Liberal constitutionalism "Rights and policies and adjudication"	
		<i>Instrumental thinking</i>	<i>Rights thinking</i>
Chastened neoliberalism	Medium state	Law as policy	Neoformalism
Stiglitz and Sen	New social policy	Law as instrument	Acquired rights and human rights as
Market failures	Market failure analysis	Pragmatism	limits on national policy discretion
Path dependence	Institutionalism	Law as policy	Social and economic rights
Transaction costs	Build local regulatory context first,	vocabulary	Judges
Efficiency and human flourishing	focus on sequencing and feedback loops from context	Liberal law and economics	Rule of law <i>as</i> development
Freedom as development	Civil society	Neoinstitutionalism	
Culture is important	Courts	Rule of law <i>for</i> development	
	Moderate market tested regulation		
	Regulation <i>can</i> be efficient		
	Local solutions		
	Social norms and expectations		
	Microcredit		
	Local empowerment		
	Rule of law injection		
	Judicial training		
	Human rights at the IMF/IBRD/WTO		

more to the left one must be. It seems "leftist" to emphasize localism, path dependence, and the need for context-appropriate solutions, to be skeptical of empiricism and to link human freedom with larger issues of distribution and social welfare. It seems rightist to focus on local conditions as a limit on efficiency, to stress the usefulness of empirical correlations suggesting "best practice" institutional arrangements from other places, to foreground economic, rather than social or political analytics. It seems right wing to focus on human market freedom, left wing to stress human flourishing and centrist to link and balance them.

These associations are slippery, of course. At times, a focus on local cultures – as something to preserve, mobilize, and respect – marks the left.

Likewise an insistence on heterogeneity, criticism of "one size fits all," or "best practice" and preference for local solutions and decentralization. But when the right asserts a sharp distinction between traditional and modern cultures, or suggests that the institutions of developed societies may not be appropriate in developing contexts, the associations can pivot. Suddenly the left is arguing for the universality of values and continuity between developed and developing. Localism – associated in the 1950s with the left, in the 1970s with the right, and in the 1980s with the center and center-left – is now present across the spectrum from left delinking through center path dependence to right microlending and individual empowerment.

At the same time, the policy ambitions of right, left, and center have become more modest. On the right, we find a resurgence of dismay about the very idea of development as a policy objective, a kind of hand washing after the disappointments of the post-1989 period. Perhaps all we can do is offer humanitarian charity in catastrophe, along with strengthened security measures to contain refugee flows and strengthen local states able to provide the order necessary at least for the most basic natural resource extraction. The right has not been alone in this feeling of disillusionment. Throughout the 1990s the feeling grew among policy elites that there was simply not much one could do – that development policy had become controversial, the experts divided, the problems at once technical and intractable. Better to stick to basics – a relatively clean government, with low ambitions for policy performance, establishment of the key institutions familiar from developing economies and hope for the best – or see the world of development policy as simply a vehicle for funding arrangements for private or bureaucratic gain. On the left, a distrust of development and development policy and a preference for the language of ethics, and for initiatives that remain resolutely local. In this sense, as well, it was a period of "chastening" for left, right, and center. Initiatives from all quarters are vulnerable to discrediting when they begin to run into difficulty – perhaps there was nothing to do, perhaps "those people" just aren't up to it, perhaps the problem is intractable.

At the same time, many voices are stepping outside the new development paradigm altogether. On the right, one finds increasingly a sense that development may not be possible or appropriate – a vocabulary of security and political realism – the "great game" for natural resources and influence – and cultural clash replacing development as a framework for discussing third world societies. Or a vocabulary of Messianic democracy, self-help and self-reliance. On the left, one finds a parallel resistance to the cultural disruptions of economic development and enthusiasm for cultural and ecological preservation. Social movements have opposed development projects in the name of preserving local cultures, local environmental resources, or locally viable agricultural and other economic arrangements. In doing so, they have often asserted the vocabulary of human rights *against* development. Left voices have focused on economic and social rights, and expanded the objective

from modest social welfare to a broader – if also more general – broadside against income inequality and poverty.

Of course, neoliberals remain, who contest the new paradigm from the right. Left voices also raise questions about the limits of the Stiglitz/Sen vision in terms that recollect earlier moments. They ask what happens *after* efficiency – how a one time efficiency gain will be transformed into *development* without focusing again on distribution, targeting, the need to maximize *indirect* gains, and head for the tipping point to an upward spiral. These themes have revived talk about distribution, and the need for national policies very much in the modest interventionist mode. At the international level, voices on the left have been more skeptical of participation in global financial markets, favoring national and regional efforts to limit the vulnerability of developing economies to speculative financial flows. Left voices have revived enthusiasm for more strategic national trade policies associated with earlier programs of import substitution and export led growth. Some have called for the movement of labor to be liberated alongside capital, goods, and services. Left voices have revived interest in the bargaining power of developing nations and firms, returning to themes first sounded in the 1970s. There are signs of new south-south cooperation in agenda setting for global trade talks – targeting agricultural subsidies in the North, or supporting one another in resisting the intellectual property rules of GATT TRIPS for pharmaceuticals. In a revival of dependency analysis, some left voices they have tried to identify and correct bias in the broad trade rules that might affect bargaining power or skew allocation of the benefits from trade, rather than relying on the factor price equalization predicted by traditional trade theory.

Taken as a whole, the current professional vernacular is extremely broad and plastic, including a range of different – inconsistent – ideas and analytic maneuvers developed throughout the postwar period. In ideological terms, development expertise has something for everyone – ideas from across the entire postwar spectrum appear in the programs of left, right, and center. To understand the politics of this broad vocabulary requires attention to its overall blindspots and biases – the policy initiatives it does not think of, those it stigmatizes.

CONCLUSION

The field of “development” expertise has existed since the middle of the last century. In successive periods, experts working in the field have defined development differently, and presented the path forward in different terms. The relative significance of economics, politics, and law has shifted – what begins as an economic analytic often becomes mixed with default preferences imported from political science, sociology, or ethics. Interestingly, the entire

profession has increasingly turned to law – to define development, as the route to development, and, most importantly, as the framework and vocabulary for debating about development policy. Ideas and ideological projects from other fields find their way into the vernacular of legal policy analysis. Theories are turned into common sense assumptions, arguments, and counterarguments.

Debates about development policy carried on in this vernacular seem both saturated with political significance, and are puzzlingly difficult to pin down in political or ideological terms. Although political and ideological debate seems to take place in these terms, these terms seem strangely drained of overt ideological or political significance. Nevertheless, in each period it has been possible to identify debates within the reigning vocabulary whose poles have marked ideological differences.

As they are developed, elements in such a general vocabulary are often associated quite firmly with political projects of the left, right, or center. These associations become more difficult to pin down, however, as these ideas become part of a more general common sense. In each period, ideas about what development is and how it can best be brought about came to dominate – but they also gave rise to endless technical and political struggle about the details, and sometimes the broad direction, of implementation. In these struggles, people across the political spectrum were often arguing in the same general vocabulary – was there a market failure, how large, would the proposed remedy make things worse? In this process, very few arguments have been completely lost – we find import substitution ideas, localist ideas, all reemerging over the last decade. More commonly, as they are borrowed by various political projects, they lose their left-center-right identification. Something of the sort seems to have happened to de Soto’s ideas about formalization and corruption, for example, as they have been used by left, right, and center in debates with one another.

It may be that the politics of development expertise, across the period, lies more significantly in the things taken for granted, solutions and approaches it seems impossible to imagine. There is no question that in each period, the vernacular for development policy has focused attention on some problems and ignored others, defaulted to some solutions and found others hard to fathom. We might rather think about the politics of these ideas by focusing on issues they make it difficult to see. In each period, the broad vocabulary of disputation has made some problems and some solutions less visible. Thinking about distribution seems stigmatized and old-fashioned – the more sophisticated analyst focuses on market failures. Thinking of development in directly political terms – as a series of choices between ideological associations or the material interests of opposed groups in society seems difficult in a vocabulary that transforms development questions into matters of professional expertise.

The antiformalist social legal vocabulary of the postwar period may well have made it more difficult to see the distributional effects – and policy potentials – for private law and private ordering, just as insistence on legislative or administrative positivism may have made it more difficult to build checks on corruption into the system. The liberal constitutional sensibility of the NIEO may have made it more difficult to devise global policies focused on redistribution rather than fairness, just as neoliberal attention to the world price system may have made it more difficult to focus on local social and political conditions.

I have been particularly interested in the politics of finding it difficult to focus overtly on distributional issues – a common experience in the field at least since the 1970s. Contemporary “rule of law” ideas are particularly suited to submerging attention to distribution. In each period, policymakers allocated resources, taking from some and giving to others, to maximize the potential for the broad social and economic transformations evoked by the word “development” as they understood it. The broad development strategies – import substitution, export-led growth, and neoliberal market development – expressed quite different background ideas about how and to whom resources should be distributed to maximize development. These distributive commitments – to take from agriculture and give to industry, to transfer from public to private management, to favor foreign over domestic investors or vice versa – were then written as law. Each strategy required numerous further allocative decisions – to encourage one investment, discourage another, and subsidize one industry at a cost to another.

That distributive policies of this sort characterized development in the decades of government planning after World War II is easy to see. Import substitution and export-led growth strategies depended upon discretionary decisions taken by vast planning bureaucracies interpreting all manner of complex regulations. But the market-based development strategies more common since the emergence of neoliberalism after 1980 or 1989 also require numerous distributive choices. The price mechanism may do much of the allocating, but markets come in many varieties, and prices are negotiated against the background or quite different legal regimes. Renewed interest in law as an instrument for development could offer the opportunity to view and contest these distributive choices and alternative market arrangements.

Unfortunately, too often this has been an opportunity missed. Rather than supplementing the earlier policy vocabularies of import substitution, export-led growth or neoliberalism, the rule of law has become a development policy vernacular of its own. The idea that building “the rule of law” might *itself* be a development strategy encourages the hope that choosing law *in general* could substitute for all the perplexing political and economic choices that have been at the center of development policy making for half a century. The politics of allocation is submerged. Although a legal regime offers an arena

to contest those choices, it cannot substitute for them. The campaign to promote the rule of law as a development path and as a vernacular for policy refinement through “balancing” has encouraged policymakers to forego a more straightforward pragmatic and political analysis of the choices they make in building a legal regime – or to think that the choices embedded in the particular regime they graft onto a developing society represent the only possible alternative.

The ideas about development that fuel contemporary interest in the law also encourage the hope that law could simplify development policy, toning down its engagement with political and economic controversy. I encounter these ideas first in the classroom. In the first world settings where I have recently taught law and development, the field now draws numerous students from the broad center and center-left of the political spectrum. The more technocratic specialists of the center-right who flocked to the field in the 1980s and early 1990s and saw law as a technical vehicle for neoliberal market reform seem to have retreated, or have come to express themselves in more restrained terms. But gone also are the social democratic internationalists of the 1950s and 1960s who inaugurated the field after the Second World War and who saw law as an instrument for state-led development planning through the implementation of import substitution or export-led growth policies.

Contemporary students of law and development are a genial group, well meaning and liberal in outlook. They share a broadly humanitarian, cosmopolitan, and internationalist sensibility. They also seem to share a mid-level conception of “development policy” – neither a narrow matter of technical economic detail nor a broad vocabulary for political struggle, but something in between. Fifteen years ago, students of development policy in first world institutions were split between confident, largely right-wing first worlders for whom “development” was a project of technical adjustment or economic management and equally confident, if often angrier left-wing students from developing societies for whom the term “development” brought to mind the entire field of national – and international – political struggle. For both groups in those days, “development” was a universal phenomenon. For the technocrats of the north, it meant the adjustment of developing societies to economic axioms of universal validity – growth is growth. For students from the south, development meant broad questions of political economy and social theory that must be confronted by all societies, regardless of their place in the world system – politics is politics.

The last decade has chastened both groups. Today’s first worlders, in retreat from one-size-fits-all neoliberalism, share an intuition that “development” must mean something particular – to the specific market conditions of transitional or developing societies, and to the cultural setting of each national economy. They are often drawn to technical accounts of what makes underdeveloped economic settings unique – characteristic market

failures in particular. Demand curves that don't slope gently off to the right, oligopolies, thin markets, peculiar information problems, transaction costs, and sometimes even disparities in bargaining power. They are also eager to replace economics with the softer – and often legal – vocabularies of ethics or human rights. Third world students meet this intuition from the other direction – in flight from political generalities, they hope for a more technocratic development science. They aspire to participate in “governance” rather than government, and are also often drawn both to human rights and to more universal ethical expressions of their political aspirations.

For both groups, the economies and political systems of developing societies again seem to differ from those of the north and west – and to differ in ways that encourage attention to particular legal arrangements rather than universal economic or political theories. In this new vernacular, development policy must be attuned to specific political, social, and cultural conditions. Institutional issues are central. As politics and economics have become local, they seem to merge with the professional world of informed, empathetic, and humble expertise. On the economic side, institutional economics, transaction cost problems, and market failures are back. On the political side, attention to human rights, cultural and social costs, policy sequencing, planning, and the institutional mechanics of policy making is in. All this places law, legal institutional building, the techniques of legal policy making and implementation – the “rule of law” broadly conceived – front and center. Unfortunately, however, this new interest in “*law and development*” is often accompanied by an ambition to leach the politics from the development process and to muddle the economic analysis. Students – like policy professionals – often turn to law in flight from economic analysis and political choice.

But development policy requires sharp economic analysis and forces political choices – for neither of which is “law” a substitute. The tools for development policy making – including the legal tools – are distributional. Whether rules of private law or acts of bureaucratic discretion, they allocate resources and authority toward some and away from others. For development to occur, these distributions must put things into the hands of those whose return on their use will cause whatever we mean by “development.” If we mean a transformation of the economy through industrialization, for example, resources must be allocated to those whose use of them will have the greatest multiplier effect in that direction.

There are lots of different theories about how to do this – and they are economic theories. If development means more than a one-time growth spurt – means some sort of sustained, upward spiral, or some kind of socioeconomic transformation – then one needs an idea about how a particular set of distributional choices will generate such a change. Development policy making also requires political choices – about whose ox should be gored in the name of which development path. Where there turn out to be more than one equally

efficient way to the same upward spiral, political choices among possible strategies become even more salient. There is politics, in other words, right at the start – in the distributive choices that underlie the aspiration for growth and development.

Although often quite sophisticated about the broad choices facing developing societies, contemporary students of development policy tend not to think these choices implicated in efforts to build the rule of law. Some self-consciously refuse the hard choices of economic policy making, advocating instead broad and aspirational commitments to human rights, “freedom,” “social welfare,” “democracy,” “health,” or “human flourishing.” For others, the tough distributional choices seem far downstream – after development gets underway, they imagine, we will face choices about what to do with our new wealth. For these young policymakers, development means “economic growth *plus* . . .” Growth can be assured, they suggest, by implementing a technical rule of law, following the “best practices” of efficient market economies. Any later redistribution for social equality, education, or health will involve a completely separate policy commitment. These secondary objectives could then form the basis for all sorts of humanitarian policy campaigns – for human rights, for labor protections, for universal primary education, and so forth. In development planning, their general invocation will suffice – for now we must focus on the less contentious matter of getting growth going. The deferral of these political choices, and of any pragmatic assessment of strategies for their attainment, makes the development policy that remains seem a matter of relative consensus.

Take proposals to increase women's educational opportunities. The vocabularies I suggested earlier arise from competing – and conflicting – political and economic visions of what development is and how it might be achieved. Should we seek to harness women's productive capacity – invest in their human capital – on the theory that doing so will be more effective in generating development than other investments? Or should we seek a more efficient market in women's skills and labor? Most students of development today are uncomfortable with both ideas. They prefer to affirm the ethical importance of women's education – women's right to education – and leave vague how this relates to development. Perhaps development simply *means* women's education rather than growth, perhaps we should *assume* women's education will spur economic growth, perhaps we should think of women's education as a redistributive necessity, even at significant cost to growth. The point is not to be forced to choose among these possibilities, and not to focus on the *costs*, to others, society, growth, even to some women, of investment in women's education rather than in something else.

Focus on the rule of law as a development strategy fits well with a resistance among today's center and center-left students to think of themselves as rulers, making contestable distributive choices with real consequences. Partly this

represents a retreat from the cold realization that policy making breaks eggs, imposes costs, *intervenes* in foreign places with a view to changing them. One encounters instead the vague sentiment that getting governance right, injecting the rule of law, enforcing human rights, will somehow bring a softer gentler development graciously in its wake. Partly the resistance to rulership arises from the intuition that political and economic debates about what development is and how to make it happen have not generated a technical consensus on how to bring about development. As a result, focus on politics or economics places the ruler in the awkward position of having to *choose* in a way that will have consequences that cannot be accurately predicted or guaranteed – but will undoubtedly make some people worse off. This makes people who aspire to act from expertise uncomfortable.

The “rule of law” promises an alternative – a domain of expertise, a program for action – that obscures the need for distributional choices or for clarity about how distributing things one way rather than another will, in fact, lead to development. Unfortunately, this turns out to be a false promise. The focus on rights, constitutions, government capacity, or judicial independence may all be to the good – but without a sharp sense for how one is intending to affect the economy, it is hard to compare building the rule of law with leaving the economy to operate more informally, and hard to compare building the rule of law one way with building it another.

In this, the focus on law as a development policy shares a great deal with other efforts to replace political and economic thinking with a general appeal to technical expertise and ideas about best practice. The result, by default or design, is a narrowing of the ideological range. Political choices fade from view – as do choices among different economic ideas about how development happens or what it implies for social, political, and economic life. Where once there might have been ideological and theoretical contestation, there is a somewhat muddy consensus.

It need not be this way. One could focus on law in ways that sharpened attention to distributional choices and rendered more precise the consequences of different economic theories of development. The choices between import substitution and export-led growth, or between neoliberal market-based development and strategies of either import or export promotion, offer the opportunity for sharp debate about economic theory and political preferences. Even during periods of broad consensus – on import substitution or neoliberalism – there were numerous implementation decisions to be made that required both economic theory and political commitment. The choices within and between regimes are made and implemented in legal terms.

In short, development strategy requires a detailed examination of the distributional choices effected by various legal rules and regimes to determine, as best one can, their likely impact on growth and development. It requires that we identify the choices that might lead to different development paths

and compare them in social, political, and economic terms – even if we lack a strong consensus or decisive expertise about how to make them. One makes policy to distribute – by price or administrative action – hoping to allocate resources to their most productive, most developmentally promising, use. It is unfortunate that there is no distributional recipe for development, but that is our situation. There are contending ideas, contending interests, contested theories, and complex unknowables. Not knowing, we must decide. We might even experiment.

The law should be a terrain for these inquiries and a site for this experimentation – not a substitute for them. Building a legal regime involves choices that distribute differently and contribute to development in different ways. Sometimes, no doubt, increasingly formal legal rules would be a good idea. Sometimes less governmental discretion, sometimes more vigorous criminal enforcement, broader distribution of supply relationships, less local preference in contracting, all might be very helpful. But sometimes we would also expect the opposite. The emergence of the rule of law as a development strategy has become an unfortunate substitute for engagement with the politics and economics of development policy making.