

**POLICING NEO-LIBERAL REFORMS: THE RULE OF LAW AS AN ENABLING AND RESTRICTIVE DISCOURSE**

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## 1. INTRODUCTION

In recent years we have experienced the second wave of the Law and Development movement.<sup>1</sup> Just as the first one, the second wave is characterized by attempts to reform the laws of developing countries.<sup>2</sup> The argument is that particular legal institutions are necessary for economic growth.<sup>3</sup> The task of various International Development Agencies ("IDAs")<sup>4</sup> is to determine first which legal

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<sup>1</sup> See, e.g., Bryant G. Garth, *Building Strong and Independent Judiciaries Through the New Law and Development: Behind The Paradox Of Consensus Programs and Perpetually Disappointing Results*, 52 DEPAUL L. REV. 385-88 (2002) (reviewing both the first [or "old Law and Development"] and second [or "new Law and Development"] waves of "Law and Development" and explaining why they failed to achieve their stated objectives). Some commentators have pointed out that there were earlier waves of Law and Development. Such a list would include the efforts to export the French civil code to the rest of Europe, the attempts to export the same code to parts of Africa and Asia during the colonial period, and the exportation of American law and legal values to Asia after the Second World War and so forth. See, e.g., John Reitz, *Export of the Rule of Law*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 429, 446 (2003) (commenting generally on issues surrounding the exportation of the rule of law, particularly to countries emerging from state socialism and Communist Party-dominated democracy in the 1990s). However, the term "Law and Development" was first applied to the efforts to modernize newly independent states in Africa, Latin America, and Asia. These efforts were centered around efforts to export American-style law and legal institutions to these states on the theory that such laws and legal institutions were central to economic development. These efforts floundered in the 1970s, hastened to their death, in part, by vociferous critics from within the institutions applying the theory. However, the fall of communism and the rise of market models in the 1980s and 1990s led to a re-awakening of the Law and Development movement. This article discusses the treatment of the rule of law in this second wave of Law and Development.

<sup>2</sup> I use "developing countries" in the same sense International Development Agencies use the term, i.e. in terms of low and middle income levels per capita. According to the World Bank, a country with a Gross National Income ("GNI") per capita of \$735 or less in 2002 would be classified as low-income. A country with a GNI per capita of between \$736 and \$9,075 in 2002, would be considered middle-income. See WORLD BANK, WORLD DEVELOPMENT REPORT, 2004: MAKING SERVICES WORK FOR POOR PEOPLE viii (2004) (defining income classifications).

<sup>3</sup> See, e.g., WORLD BANK, WORLD DEVELOPMENT REPORT, 1996: FROM PLAN TO MARKET 86 (1996) [hereinafter, WORLD BANK, FROM PLAN TO MARKET] (arguing that good laws and effective enforcement are critical to the economic growth of institutions).

<sup>4</sup> By "International Development Agencies" ("IDAs"), I am referring to development agencies that sponsor various law reform projects in developing and transitional economies. These include some of the public international financial institutions ("IFIs") such as the International Monetary Fund ("IMF"), the World

institutions spur economic growth and then to sponsor efforts to install such institutions through various legal reform projects.<sup>5</sup> These reform projects are often justified as, and incorporated into the general rubric of, "Rule of Law projects."<sup>6</sup> However, the rule of law is a contested concept.<sup>7</sup> So what rule of law conception do the IDAs apply in the Rule of Law projects that they sponsor? What informs their choice of conception of the rule of law?

In this article, I explore the way IDAs, in general, have deployed the twin concepts of "rule of law" and "democracy." The general argument is that the rule of law discourse by these agencies uses the concept of the rule of law to generate a language of open-ended and participatory politics while simultaneously foreclosing the possibility of multiple and competitive politics. The rule of law discourse justifies Rule of Law projects in developing countries in terms of the rule of law being a neutral device or mechanism that guarantees formal integrity of the process of politics, governance, and economic development. This process is subsequently filled with local politics and conditions in a competitive process.<sup>8</sup> Under this conception, rule of law has no

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Bank Group, and various regional development banks. As I use it, IDAs also include various national agencies tasked with the responsibility of promoting economic development abroad. These national agencies join IFIs in both funding development projects and law reform activities in developing countries. Examples of such national agencies include the United States Agency for International Development ("USAID"); the Swedish International Development Agency ("SIDA"); the Canadian International Development Agency ("CIDA"); and United Kingdom's Department for International Development ("DFID").

<sup>5</sup> World Bank, *FROM PLAN TO MARKET*, *supra* note 3, at 86. The World Bank refers to the legal institutions necessary to spur economic growth as "good laws." The categorization of some laws as "good" recurs throughout this article.

<sup>6</sup> I have capitalized Rule of Law when I am speaking of the various projects which IDAs fund and promote with the aim of promoting the establishment and observance of rule of law in developing countries. I have not capitalized rule of law when speaking of the rule of law itself as an institution or concept or the discourse that emerges from the interactions of the IDAs' experts, consultants, development scholars, and lawyers involved in these projects.

<sup>7</sup> Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 791 (1989).

<sup>8</sup> This is driven by the idea that the state is a "civil association" as opposed to an "enterprise association." This civil association view of the state denies any substantive economic function for the state and views the role of the state as merely to provide the institutional framework in which economic actors make their decisions. In this conception, legal institutions are pragmatic, neutral devices that the economic actors use to exchange freely in the generalized, impersonal marketplace. On the other hand, the enterprise association view of the state concedes the necessity, or at least the inevitability, of the state playing a substantive role in the economic functioning of the society. For example, this

substantive morality that it seeks to impose on a given polity – but only ensures the integrity of the formal procedures that allow individual actors to shape their own decisions in the marketplace.<sup>9</sup> However, it turns out that the rule of law discourse is operationalized in such a way that it forecloses political debate rather than expanding the possibilities of multiple and competitive politics, even though it expresses its objectives in this open-ended vocabulary.<sup>10</sup>

This article argues that, while utilizing the open-ended language of the rule of law, the prevailing rule of law discourse by IDAs sells and entrenches particular policies and political projects that are dissolved into the idea of rule of law. I use the term “thick concept” to indicate how the prevailing rule of law discourse conflates procedural, substantive, descriptive, and prescriptive aspects of the rule of law to imbue it with particular political choices.<sup>11</sup> A “thick concept” as I use it, means a concept that, by being both descriptive and evaluative, hopes to create the conditions for action and to urge the action at the same time. The result is that the Rule of Law projects predetermine politics. The rule of law, as instituted by these Rule of Law projects, serves the purpose of insulating a particular vision of moral foundation or philosophy of the good of the society from the reach of political debate, consensus, or revision by the participants in a given polity. The effect has been that the rule of law becomes the underlying discourse that facilitates and justifies the shift of power and discretion within the government to technocrats who are less responsive to popular demands and politics. Thus, the Rule of Law projects serve the purpose of prescribing the philosophy of the good of the society by technocratic means. This is because these projects succeed in insulating some fundamental political decisions from debate or revision. This is contrary to the articulated objectives of the political reforms that typically accompany these Rule of Law projects, that of democratizing

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view would consider the use of laws to achieve substantive purposes such as social welfare. See, e.g., DEEPAK LAL, THE POVERTY OF ‘DEVELOPMENT ECONOMICS’ 160 (2000).

<sup>9</sup> See *infra* Sections 4 and 5.

<sup>10</sup> See *infra* Sections 6 and 7.

<sup>11</sup> As I explain in Section 6 *infra*, I have borrowed “thick concept” from philosophy to denote the property of a concept to host a union of factual and evaluative content simultaneously. See *infra* notes 159–164 and accompanying text.

political and economic decisionmaking in developing countries. In short, the rule of law as instituted by these projects constricts the emancipatory potential of democracy.

The specific objective of this article is two-fold. First, this article contests the orthodox view that the rule of law in the neoliberal formulation is an institutional mechanism through which government cedes its economic role to the market participants.<sup>12</sup> Rather, I demonstrate that this version of the rule of law becomes a totalitarian imposition of a structure that ensures participation in an already decided politic.<sup>13</sup> Second, I aim to demonstrate how the institution of rule of law in the neoliberal conception subverts democracy by cushioning some fundamental political questions from political debate.<sup>14</sup> Rather than becoming a tool for ensuring accountability and political participation, the rule of law becomes a mechanism for legitimating the introduction and

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<sup>12</sup> As James Thuo Gathii notes, the "good governance" discourse which undergirds the Rule of Law projects is based on "the promise and hope that markets under the good governance regime are an antidote to the restrictions of state involvement in the economy that characterized modernizing nationalism. . . ." James Thuo Gathii, *Retelling Good Governance Narratives on Africa's Economic and Political Predicaments: Continuities and Discontinuities in Legal Outcomes Between Markets and States*, 45 VILL. L. REV. 971, 972 (2000) [hereinafter Gathii, *Retelling Good Governance*].

<sup>13</sup> Amrohini Sahay, *Transforming Race Matters: Towards a Critique-al Cultural Studies*, CULTURAL LOGIC, Spring 1998, available at <http://eserver.org/clogic/1-2/sahay.html>. On the concept of decided politics as a form of coercion and domination, since it involves the totalitarian imposition of the will of those wielding the program of action, see generally DICK HOWARD, *THE POLITICS OF CRITIQUE* (1988).

<sup>14</sup> Prof. Roberto Unger's definition of neoliberalism is useful:

[N]eoliberalism is the program committed to orthodox macroeconomic stabilization, especially through fiscal balance, achieved more by containment of public spending than by increases in the tax take; to liberalization in the form of increasing integration into the world trading system and its established rules; to privatization, understood both more narrowly as the withdrawal of government from production and more generally as the adoption of standard Western private law; and to the deployment of compensatory social policies ("social-safety nets") designed to counteract the unequalizing effects of other planks in the orthodox platform.

ROBERTO UNGER, *DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE* 53 (Verso 1998). In developing countries, efforts to install a neo-liberal state include privatization of state enterprises, deregulation of private economic activity, liberalization of trade, and cut back of state spending, coupled with legal reforms aimed at instituting a free market economy. Typically, these legal reforms are enacted under the banner of Rule of Law projects and include reforms of anti-corruption, judicial administration, and commercial laws.

continuation of a set of economic reform policies enacted "by surprise and independently of public opinion and of representative organizations and institutions."<sup>15</sup>

The suggestion is that, while there might be something to be said about the recent gains in curtailing state power by civil society in developing countries, we need to be careful about exaggerating the virtues of the recent reforms and of the civil society itself. Traditional tools for emancipation, even those as hallowed as rule of law and democracy, may well be used to serve the exact opposite purposes, such as ridding the political and economic development of developing countries of all democratic content. All this while civil society and intellectuals from the Third World cheer energetically.<sup>16</sup>

In sections 2 and 3 of this article, I build the context in which the rule of law is offered in development programs as both a development goal and a means to achieve development. In sections 4 and 5, I explore the ways IDAs define the rule of law and look at the various criticisms to these definitions. In section 6, I introduce the idea of "thick concept" to describe the way IDAs deploy the institution of the rule of law. In section 7, I briefly explore the relationship of rule of law, democracy, and participatory politics in the context of market-oriented reforms. The aim here is to show how a thick conception of the rule of law gives way to a procedural conception of democracy, further insulating fundamental political decisions from revision by democratic majorities. In this way, the rule of law acts as an effective tool for policing neoliberal reforms. Once the reforms are justified by the thick conception of the rule of law, the procedural conception of democracy keeps the reforms safe from revision or subversion even by a democratic majority. In section 8, I use three examples to show this policing in action: (1) in the way privatization was popularized and carried out in Poland; (2) in the politics of regulation of bank interest rates in Kenya; and (3) in the

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<sup>15</sup> ADAM PRZEWORSKI, *DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORMS IN EASTERN EUROPE AND LATIN AMERICA* 183 (1991).

<sup>16</sup> In contrast to the term "developing countries," which I use in this article in the same sense in which IDAs use it, I use the term "Third World" here as an analytical category. See Balakrishnan Rajagopal, *Locating the Third World in Cultural Geography*, *THIRD WORLD LEGAL STUD.* 1 (1998-99) (discussing the differing uses of Third World as a category). As an analytical concept, Third World deemphasizes the importance of geography, political ideology, and historical origins. Instead, it emphasizes both the power contest between holders and actors and its articulation in international relations.

politics and nature of participation in structural adjustment programs generally. In section 9, I provide a link between the thick conceptions of the rule of law, democracy, and the Washington Consensus, before concluding in section 10.

## 2. THE RULE OF LAW, DEMOCRACY, AND FREEDOM

I begin this substantive section with two quotations that are relevant to the discussion of the relationship between the rule of law and democracy in the midst of the market-oriented legal reforms of the 1990s in developing countries.<sup>17</sup> The first is by Dean Roscoe Pound of Harvard Law School, written in 1909. Dean Pound, establishing what would become a watershed point in the history of American contract law and American legal realism generally, wrote:

[L]et us compare the equally positive statement of a sociologist: "much of the discussion about 'equal rights' is utterly hollow. All the ado made over the system of contract is surcharged with fallacy." To everyone acquainted at first hand with actual industrial conditions the latter statement goes without saying. Why then do courts persist in the fallacy? Why do so many of them force upon legislation an academic theory of equality in the face of practical conditions of inequality? Why do we find a great and learned court in 1908 taking the long step into the past of dealing with the relation between employer and employee in railway transportation, as if the parties were individuals – as if they were farmers haggling over the sale of a horse?<sup>18</sup>

Dean Pound supplies the answer to his own rhetorical query: the "juristic fallacy" is caused by an individualistic conception of

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<sup>17</sup> Market-oriented legal reforms are the reforms typically required by the neoliberal model to usher in economic development. See *supra* note 14. These reforms are often described as Rule of Law projects even though they often encompass much more than subjects traditionally known as rule of law.

<sup>18</sup> Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909) (internal citations omitted). Morton Horwitz argues that Roscoe Pound precociously anticipated the legal realist revolution that mounted an internal critique of the 19<sup>th</sup> century Classical Legal Thought formalist doctrines of contract. MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* 34 (1992).

justice, "which exaggerates the importance of property and of contract, exaggerates private right at the expense of public right, and is hostile to legislation, taking a minimum of law-making to be the ideal."<sup>19</sup>

The second quotation is by David Apter. Written in 1987, well into the era that witnessed the third wave of the democracy movement and the rule of law revival in international relations, Apter mourned the death of genuine democracy in the hands of the market-friendly democracy.<sup>20</sup> He stated, "[d]evelopmental rationality—far from legitimizing democracy—presides over the latter's conversion into the bureaucratization and instrumentalization of social life."<sup>21</sup>

In the first quotation, Roscoe Pound complains about the idea that abstract notions, such as equality before the law, render substantively fair or rational distributive outcomes in the society.<sup>22</sup> This is because, often, such notions operate amidst a context of disproportionate inequalities of power and wealth.<sup>23</sup> Hence, justifying procedural legitimacy on abstract notions like equality and freedom of contract is only pretext for justifying the extant distribution of access to political power, wealth, and influence.<sup>24</sup> In order to redress this situation, Roscoe Pound identified mechanical jurisprudence as the main culprit in the jurisprudential formulation that justified the operation of the taxonomic categories marshaled under prior precedents.<sup>25</sup> His solution was to propose the social "double agenda of sociological jurisprudence and

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<sup>19</sup> Roscoe Pound, *supra* note 18, at 457.

<sup>20</sup> SAMUEL HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 3 (1996). Huntington refers to the widespread international push toward democracy beginning with the late 1970s to the present as the third wave of democratization. According to Huntington, the other waves occurred between 1828 and 1926 and between 1943 and 1962, each followed by reversals. He identifies the deepening legitimacy problems of authoritarian governments unable to cope with military defeat and economic failure, and the push to promote human rights and democracy by external actors such as non-governmental organizations and the European Community as some of the most important factors enabling this third wave.

<sup>21</sup> DAVID APTER, *RETHINKING DEVELOPMENT: MODERNIZATION, DEPENDENCY AND POST-MODERN POLITICS* 9 (1987).

<sup>22</sup> See also Robert Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943) (discussing the societal effects, and resulting power struggle, of people bargaining for the goods necessary to satisfy their everyday needs).

<sup>23</sup> *Id.*

<sup>24</sup> BARBARA FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE* 32 (1998).

<sup>25</sup> Pound, *supra* note 18, at 462-3.

socialist doctrines.”<sup>26</sup> In anticipating the realist revolution in American academia, Pound suggested that a particular set of anti-formalist insights associated with sociological jurisprudence could be used to rein the extreme “formal individualism” that had led to mechanical jurisprudence.<sup>27</sup> However, note that he associated this “formal individualism” with ideas that exaggerate the meaning of property and freedom of contract.<sup>28</sup>

In the second quotation, David Apter complains that the nature of democracy instituted by market oriented reform is not one characteristic of peoples’ genuine participation, as the concept of *demos* should reflect.<sup>29</sup> Rather, it implies the meeting of certain structural correlations that can be indexed and checked out as satisfying the democratic criterion.<sup>30</sup> Like Roscoe Pound in an earlier era, Apter complains about the operationalization of democracy as an abstract notion—one that merely stamps approval on an already decided politics—but without real punch to make effective and meaningful changes to the status quo.<sup>31</sup>

Roscoe Pound identified what caused the particular operation of the abstract notion of freedom of contract to unsatisfactorily achieve the very opposite of the contract concept in industrial relations: the operation of the taxonomies of formal individualism.<sup>32</sup> His solution was therefore the enabling of the “antiformalist social.”<sup>33</sup> On the other hand, in this article, I undertake to find a parallel investigation to what causes the impoverishment of genuine participation and decisionmaking

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<sup>26</sup> Amr Shalakany, *The Analytics Of The Social In Private Law Theory: A Comparative Study 186–87* (2000) (unpublished S.J.D. dissertation, Harvard Law School) (on file with the International Law Library, Harvard University).

<sup>27</sup> Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908) (examining the emergence and development of mechanical legal doctrine.)

<sup>28</sup> The nadir of mechanical jurisprudence is reached when conceptions are used, not as premises from which to reason, but as ultimate solutions. So used, they cease to be conceptions and become empty words. *Id.* at 620.

<sup>29</sup> See generally APTER, *supra* note 21 (introducing the concept of development theory).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Pound, *supra* note 18.

<sup>33</sup> *Id.* See also Amr Shalakany, *supra* note 26; Duncan Kennedy, *Two Globalizations of Law & Legal Thought: 1850-1968*, 36 SUFFOLK UNIV. L. REV. 631, 631 (2003) (positing that “critical legal studies as a legal academic school of thought is very much alive, and has an analysis to contribute . . . to the part of the intelligentsia of peripheral countries that is interested in left/modernist/post-modernist critiques of the current world system.”).

abilities in the *demos* after the imposition of market oriented reforms ostensibly in the name of democracy.<sup>34</sup> If we identify the cause of the distortion, then, like Pound, we will set ourselves the task of suggesting a possible solution. I suggest in this article that the conception of the rule of law as deployed by IDAs is responsible for the systematic emptying of democracy.

As a solution, I suggest a conception of rule of law that does not entail a valuation of a society's economic and political system a priori.<sup>35</sup> At the same time, such a conception of the rule of law must be one that does not act merely as a restraint on government power so as to create space for those with other kinds of power – political and economic – to steamroll the rest of society.<sup>36</sup> To cast this negative aspiration of the rule of law in terms comprehensible to Roscoe Pound, I am interested in a conception of rule of law that does not inhibit the deployment of the antiformalist social in the

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<sup>34</sup> Witness the number of democracy assistance and Rule of Law projects by international development institutions and donors, all aimed at establishing viable democracies in developing countries and transitional economies. See generally THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* (1999) (describing the growth of Western aid for democratic building in developing countries).

<sup>35</sup> As John Ohnesorge points out, this is the “jurisprudential” meaning of the term. It takes the rule of law as a set of ideals for the administration of justice and not as shorthand for a statutory regime that protects property rights and the market, and as limitation on government discretion. See John K.M. Ohnesorge, *The Rule of Law, Economic Development, and the Developmental States of Northeast Asia*, in *LAW AND DEVELOPMENT IN EAST AND SOUTHEAST ASIA* 91, 112 (Christoph Antons ed., 2003) (concluding that the “Rule of Law” can have different meanings to different professions and in different parts of the world).

<sup>36</sup> Professor James Gathii has noted that often well-intentioned “good governance” reforms only end up redefining the nature of the corruption being practiced in an economy rather than control the corruption itself. Professor Gathii has argued that:

One of the good governance proposals designed to eradicate corruption is the deregulation of the economy. One assumption underlying the proposal that deregulation can act as an antidote to corruption is that it would reduce the scope of official discretion and therefore opportunities for corruption. Rather than reducing corruption, however, recent research evidence on deregulation and liberalization in South Korea and China has shown how these reforms redefined corrupt relationships away from those initiated and controlled by state actors to those initiated and controlled by private actors. Sub-Saharan African economies are no exceptions. In other words, deregulation and liberalization in those contexts succeeded in privatizing, not reducing corruption. Rolling back the state in the economy only displaces corruption from the state to the marketplace.

Gathii, *Retelling Good Governance*, *supra* note 12, at 1033.

redistributive or altruistic function of law and government.<sup>37</sup>

### 3. THE RULE OF LAW IN THE CONTEXT OF DEVELOPMENT AND MARKET-ORIENTED REFORMS

In this section, I would like to very briefly build the context in which IDAs prescribe the rule of law as an antidote to corruption and *sine qua non* to market oriented reforms in developing countries. This is important because this background will enable us to understand some of the claims about the rule of law discourse that I make later on in this article.

We should understand the “revival of rule of law” in the context of two other concepts commonly associated with it.<sup>38</sup> These are democracy and free markets.<sup>39</sup> The fundamental message of neoliberal political economy has been summarized thus: in settling matters of resource allocation, imperfect markets are better than imperfect states.<sup>40</sup> The general argument is that a comparison between the welfare loss from the imperfect market and the welfare gain from the intervention aimed at correcting the particular distortion yields a negative outcome.<sup>41</sup> This is because the government intervention does not only have direct costs in

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<sup>37</sup> See Pound, *supra* note 18 (discussing the antiformalist social conception).

<sup>38</sup> The language of “revival of rule of law” is from Thomas Carothers. See Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95 (1998) (discussing the revival of the rule of law in China). As noted in note 1 *supra*, enthusiasm with rule of law is a revival because there was similar enthusiasm in the first wave of law and development movement in the late 1950s and early 1960s. This enthusiasm ebbed in the early 1970s. See, e.g., Maxwell O. Chibundu, *Law in Development: On Tapping, Gourding, and Serving Palm-Wine*, 29 CASE W. RES. J. INT’L L. 167 (1997) (tracing the growth of the law and development field); David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 WIS. L. REV. 1062 (1974) (understanding the role of law and development in academia).

<sup>39</sup> Jedediah Purdy has elegantly called these associations “the harmony of liberal ends.” Purdy has written that:

This is the conviction that the features of liberal modernity, as it has developed in the North Atlantic countries—markets economics, liberal democracy or at least the rule of law, the loosening of cultural traditions, tolerance within societies, and peaceable coexistence among them—reinforce and even produce each other.

Jedediah Purdy, *A World Of Passions: How To Think About Globalization Now*, 11 IND. J. GLOBAL LEGAL STUD. 1, 7 (2004).

<sup>40</sup> Christopher Colclough, *Structuralism versus Neo-liberalism: An Introduction*, in STATES OR MARKETS? NEO-LIBERALISM AND THE DEVELOPMENT POLICY DEBATE 1, 7-8 (Christopher Colclough & James Manor eds., 1999).

<sup>41</sup> *Id.* at 8-9.

terms of wages and salaries of the employees of the intervening bureaucratic agency.<sup>42</sup> Additionally, neoliberals point to two indirect costs associated with government failure. One is that government intervention distorts the relative prices elsewhere in the economy consequent upon, for example, the revenue raising measures to finance the intervention.<sup>43</sup> Two, the intervention creates "scarcity rent" which is the:

difference between the value of an imported good at world prices converted through an equilibrium exchange rate and its costs in terms of the over-valued domestic currency. This difference accrues to the license holder as a windfall gain. Capturing such rents becomes the object of competition within and without the bureaucracy, and thus the locus for a range of directly unproductive activities which secure remuneration but produce nothing and use up real resources.<sup>44</sup>

Given the rise of neoliberalism after 1980, the neoliberals were anxious to institute their preference of market failures to government failures in development policy.<sup>45</sup> In doing this, the neo-liberals deployed the language and images of reducing the economic role of the state in the market.<sup>46</sup> In fact, the shift in

<sup>42</sup> *Id.*

<sup>43</sup> See generally Lal, *supra* note 8 (assessing the academic understanding of developing countries' economies).

<sup>44</sup> Colclough *supra* note 40, at 14. See also Anne Krueger, *The Political Economy of a Rent-Seeking Society*, 74 AM. ECON. REV. 491 (1974) (developing "a simple model of competitive rent seeking for the important case when rents originate from quantitative restrictions on international trade").

<sup>45</sup> See generally Lal, *supra* note 8 (looking at the characteristics of good government); Anne Krueger, *Theory and Practice of Commercial Policy: 1945-1990* (National Bureau of Economic Research Working Paper No. 3569) (1990). For example, arguing against the "infant industry" justification for governmental intervention, Krueger argues that "the likelihood that a 'small' distortion or market failure can be corrected by government action is low because any such action is likely to be accompanied by larger government failure." *Id.* at 22.

<sup>46</sup> See, e.g., WORLD BANK, WORLD DEVELOPMENT REPORT 1991: THE CHALLENGE OF DEVELOPMENT 9 (1991) [hereinafter WORLD BANK, CHALLENGE OF DEVELOPMENT] (advocating a "minimalist" state). The World Bank writes:

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

preference of market failures to government failures was implemented by redrawing the axis that separates the market from the state.<sup>47</sup> However, in reality, there are two big questions here that are often collapsed into one in academic literature. For a proper understanding of the rule of law as an institution that is central to market oriented reforms, we need to conceptually distinguish these two questions: (1) to what extent is it necessary to roll back the state and reduce its role in the economy in developing countries?; and (2) what instruments are appropriate to accomplish the task of rolling back the state and reducing its role in the economy?

The first issue is that the government had to be reduced in size, and its role in the economy had to be equally minimized.<sup>48</sup> So the exact question would be to what extent need the state be rolled back? Responses abound and different people within the same agency differ on the answer they give, and the same agencies give different answers at different times.<sup>49</sup> To give an example, the

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work . . . .

*Id.*

<sup>47</sup> Before 1980, IDAs took it for granted that, at least in the developing world, government failure was better than market failure. As such, most development and reform efforts were concentrated on public investments in which the government played a key role. This changed after 1980 when IDAs started concentrating on the costs of governmental intervention. Professor Jeswald W. Salacuse has also written on this shift which he identifies as a shift from "Model I" of development to "Model II." See, e.g., Jeswald W. Salacuse, *From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World*, 33 INT'L LAW. 875, 876 (Winter 1999) (arguing that many developing nations have embraced evolving models to reach developmental goals since the 1980s). Professor Salacuse writes:

Until the 1980s, most developing country governments, with a few exceptions, as well as many international organizations, had in mind a similar model of the development process as they went about their work. That model of how development goals should be attained greatly influenced government policies and institutions. It also profoundly affected national legal systems and the way government officials, lawyers, and legal scholars thought about law and its role in development. Since the late 1980s, most developing countries, in varying degrees, have abandoned that first model of development (Development Model I) and have evolved a new model (Development Model II) that supersedes it.

*Id.* at 876.

<sup>48</sup> See *supra* notes 40 and 46 and accompanying text.

<sup>49</sup> Despite the temptation to see most IDAs as monoliths with singular positions on issues, in truth they often differ wildly on micro issues. This makes a discussion of why, despite such ostensible differences among them, IDAs seem to

World Bank has shifted its position on the extent to which the state needs to be rolled back three times in the course of the immediate past decade. First, of course, the Bank espoused the concept of the "developmental state" through the 1980s.<sup>50</sup> From its notion of the "developmental state," the World Bank evolved the concept of a "minimalist state" in the early 1990s.<sup>51</sup> In the face of mounting pressure and criticisms, the World Bank changed its language barely a year later to embrace the language of an "effective state."<sup>52</sup> Presently, with critiques focusing on the association of "effective state" with domination by the state, the World Bank talks of the "capability" of the state—the need to match the size of the state to its capability.<sup>53</sup>

The first fundamental debate has two aspects to it. First, are the welfare gains of government intervention outweighed by the costs of such intervention? Proponents of the "market imperfection thesis" point to market failures and say that it is

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use a rather stable package of reforms under widely accepted programs such as Rule of Law projects. For a look at the World Bank's many uses of the term "rule of law," see Alvaro Santos, *The World Bank's Uses of the "Rule of Law" in Economic Development* (paper presented at the Law and Development Conference, Cornell Law School, April 2004) (copy on file with the author).

<sup>50</sup> See *supra* text accompanying note 47. For a comprehensive account of how the "developmental state" was responsible for accelerating economic development in Northeast Asia, see ROBERT WADE, *GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION* 34 (1990).

<sup>51</sup> WORLD BANK, *CHALLENGE OF DEVELOPMENT*, *supra* note 46.

<sup>52</sup> In 1997, World Bank President James D. Wolfensohn, in the foreword to the World Development Report wrote:

Far from supporting a minimalist approach to the state, [successful development stories] have shown that development requires an effective state, one that plays a catalytic, facilitating role, encouraging and complementing the activities of private businesses and individuals.

WORLD BANK, *WORLD DEVELOPMENT REPORT 1997: THE STATE IN A CHANGING WORLD* iii, iii-iv (1997) [hereinafter *WORLD BANK, DEVELOPMENT REPORT 1997*].

<sup>53</sup> See generally WORLD BANK, *WORLD DEVELOPMENT REPORT 1998/99: KNOWLEDGE FOR DEVELOPMENT* 130-156 (1999) [hereinafter *WORLD BANK, DEVELOPMENT REPORT 1998/99*] (defining the World Bank's objective as the development of a "dynamic knowledge management system capable of distilling knowledge" and effectively making it available by "building the capability in developing countries to assess and adapt relevant policy and technical knowledge to local situations"). The view expressed here is that states need to tailor their activities to their own capability. The practical effect is to counsel governments of developing countries from taking on "welfare functions" since these governments do not have the "capability" to superintend such functions.

much more pervasive than advocates for free markets admit.<sup>54</sup> On the other hand, proponents of the government failure thesis (who are the advocates for free markets) point to the three types of costs of government intervention outlined above to make the argument that government failure is much more costly than market failures.<sup>55</sup> Within the prevailing neo-liberal discourse, this fundamental debate is bracketed and avoided.<sup>56</sup> Despite the raging controversy and the fact that social scientists are sharply divided on the point, it is simply assumed in the development discourse that market failures are better than government failures. As three development scholars remarked in the early 1990s: "As the 1990s begin, the development debate has all but disappeared in the West. Monumental changes in Eastern Europe and Latin America are widely interpreted as proof of the superiority of development models that are led by the private sector and oriented toward exports."<sup>57</sup>

However, even the acceptance that market failures are better than government failures leaves open another fundamental issue.

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<sup>54</sup> A variant of this argument would posit that some of the basic ideas underpinning the market model are simply not true. For example, studies have shown that firms dealing with each other for a significant period of time eventually abandon the impersonality and autonomy of the market and instead establish relatively durable relationships based on moral standards of trust and fairness, not law. See, e.g., Ronald Dore, *Goodwill and the Spirit of Market Capitalism*, 34 BRIT. J. SOC. 459 (1983) (questioning the divide between goodwill and self-interest by examining the collaboration between firms and mills in Japan when considering a standing relationship over a period of time); Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOC. 481 (1985) (examining the extent to which social relations affect institutions and "economic actions"); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study* 28 AM. SOC. REV. 55 (1963) (finding that businessmen rarely resort to legal sanctions when settling disputes).

<sup>55</sup> See WORLD BANK, DEVELOPMENT REPORT 1998/99, *supra* note 53, at 7-8 (listing the three factors and discussing what governments should do).

<sup>56</sup> See, e.g., Paul Streeten, *Markets and States: Against Minimalism*, 21 WORLD DEV. 1281 (1993) (making an argument in favor of a "strong" state and critiquing the most compelling arguments in favor of a reduction in the role of states in economic functioning, which are: the notion of price distortions, of inherently inefficient public enterprise, of an unambiguous dividing line between the public and the private sectors, and of statism as inherently rent-seeking).

<sup>57</sup> Robin Broad et al., *Development: The Market is not Enough*, in INTERNATIONAL POLITICAL ECONOMY: PERSPECTIVES ON GLOBAL POWER AND WEALTH 392, 392 (Jeffrey A. Frieden & David A. Lake eds., 4th ed. 2000). The authors cite World Bank President Barber Conable as saying, "If I were to characterize the past decade, the most remarkable thing was the generation of a global consensus that market forces and economic efficiency were the best way to achieve the kind of growth which is the best antidote to poverty." *Id.*

What instruments are appropriate for reducing the economic role of the government? The answer to this question depends to a large extent on the nature of prior government intervention. However, eventually all prescribed solutions for minimizing the role of the state in the economy end up with suggestions of the institutional adjustments required to effect the changes. This issue has some ramifications for the role of the law, and for the separation of power between the different branches of the government. One suggested way of resolving the arising issues is to create an enabling atmosphere where the rule of law is clearly established, in order to allow private development to continue.<sup>58</sup>

Hence, the rule of law is offered as one of the institutional mechanisms in which the state cedes its economic role to the market.<sup>59</sup> Since under the rule of law, individuals can best express their choices through the market, individual freedom and prosperity are also simultaneously maximized.<sup>60</sup> This complex relationship between economic development, political freedom, and the rule of law has found increasing but vague consensus in the language of "good governance."<sup>61</sup>

Good governance is defined in terms of institutions that establish predictable, impartial, and consistently enforced rules for

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<sup>58</sup> See WORLD BANK, WORLD DEVELOPMENT REPORT 1996: FROM PLAN TO MARKET 87 (1996) (discussing the necessity of creating frameworks of law in order to move forward with private development).

<sup>59</sup> See *id.* at 144 (arguing that the rule of law is not only imperative in designing good laws, but also in providing a means for the government to signal the private sector; a government that is "re-tooling" itself by reducing its involvement in the economy signals to the private sector that it is serious about reforms by adopting the rule of law).

<sup>60</sup> In this way, neo-liberalism weds political economy and economics. Neo-liberals follow Hayek's lead. Hayek argues that the market is a spontaneously ordered institution and is not a product of human design. Human beings as rational economic actors convey information about the choices and the quality of goods in the marketplace through the laws of supply and demand as equilibrated by the price mechanism. As such, all decisions on the economy should be left to individual units. When the government withdraws from making economic decisions, the powers of officialdom are necessarily circumscribed, hence increasing individual freedom. Since the individual units are the best judges of their economic needs, government withdrawal also enhances efficiency. See FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* (1944) (arguing that important societal goals can only be achieved through a system that maximizes individual freedom).

<sup>61</sup> James Thuo Gathii, *Representations of Africa in Good Governance Discourse: Policing and Containing Dissidence to Neo-Liberalism, 1998-1999* THIRD WORLD LEGAL STUD. 65, 65 (1999) [hereinafter Gathii, *Representations*].

investors.<sup>62</sup> In most World Bank publications, governance is thought of as having five critical institutional dimensions: (i) the executive; (ii) the bureaucracy; (iii) the rule of law; (iv) the character of the policy-making process; and (v) the civil society.<sup>63</sup>

Corresponding with each of these institutional dimensions of good governance, there is a characteristic that is defined as "good governance." Respectively, these are as follows: (i) an executive that is accountable for its actions;<sup>64</sup> (ii) a bureaucracy whose professional standards are high;<sup>65</sup> (iii) a legal framework that is appropriate to the circumstances and command broad consensus;<sup>66</sup> (iv) an open and transparent policy making process;<sup>67</sup> (v) a strong civil society capable of participating in governance.<sup>68</sup>

These institutional dimensions and their corresponding characteristics of good governance can be tabulated as follows:

<u>Institutional dimension of governance</u>	<u>Good governance characteristic</u>
The Executive	Accountability for its actions
The Bureaucracy	High Professional Standards
Rule of Law	Appropriate Framework
Policy Making	Transparency
Civil Society	"Strong" Civil Society

Though the rule of law is identified in this list as only one of the five institutional mechanisms of good governance that underpin market democracy, it would appear that there are two notions of rule of law operating here. For each of the five

<sup>62</sup> WORLD BANK, *GOVERNANCE: THE WORLD BANK'S EXPERIENCE* vii (1994) [hereinafter *WORLD BANK, GOVERNANCE*].

<sup>63</sup> *Id.*; see also Nauro F. Campos & Jeffrey B. Nugent, *Development Performance and the Institutions of Governance: Evidence from East Asia and Latin America*, 27 *WORLD DEV.* 439, 439-440 (1999) (outlining the same five characteristics as critical institutional dimensions); Nauro F. Campos, *Context Is Everything: Measuring Institutional Change in Transition Economies*, (World Bank Working Paper No. 2269, 1999) (using the five institutional dimensions of governance for data collection purposes and indicators in mapping institution building during the transition from centrally planned to market economies).

<sup>64</sup> Campos & Nugent, *Development Performance*, *supra* note 63, at 439.

<sup>65</sup> *Id.* at 439-440.

<sup>66</sup> *Id.* at 440.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

institutional mechanisms, it would seem that the value of subjecting all actions of all officials to the laid down rules is prime – in the same way as the consistent, fair application of these rules.<sup>69</sup> It is only by the application of consistent, clear rules knowable in advance that each of the five institutions can work.<sup>70</sup> As I will indicate shortly, this is in fact one of the three definitions of the rule of law: the procedural notion of applying clear laws, interpreted by an independent judiciary and consistently enforced by an impartial executive.<sup>71</sup>

At the same time however, there is the even more specific and substantive notion of rule of law that is identified as the third institution (itemized as number (iii) above), and whose corresponding “good” quality the World Bank identifies as a legal framework that is “appropriate to the circumstances and adhered to by members of both the private and public sectors.”<sup>72</sup> This is the second notion of the rule of law that is operating in this five-criterion institutional design for good governance. I will explain below that this conflation of the two notions of rule of law plays an important part in justifying economic reforms that may be devoid of democratic content, while satisfying the outward structural criteria of “participation” and “broad consensus.” An argument that I wish to flag here is that the function of fracturing “governance” into five institutional mechanisms actually serves three distinct but related purposes.

First, the new language of “good governance” provides an idiom through which various interventions and debates can be carried out in the public and private arena that would otherwise be questionable.<sup>73</sup> By inventing categories such as governance, which

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<sup>69</sup> The World Bank notes: “There is a tension in the development of the modern state between ensuring that public officials have sufficient power to deliver good governance and ensuring that they are constrained from using this power arbitrarily in the interests of the privileged few.” WORLD BANK, WORLD DEVELOPMENT REPORT 2002: BUILDING INSTITUTIONS FOR MARKETS 99 (2002).

<sup>70</sup> See Richard H. Fallon, Jr., “The Rule Of Law” As A Concept In Constitutional Discourse, 97 COLUM. L. REV. 1, 37 (1997) (averring that people must know of the law in advance in order to consider legal consequences before their actions).

<sup>71</sup> See *infra* Section 4.

<sup>72</sup> Campos & Nugent, *supra* note 63, at 439.

<sup>73</sup> I track Arturo Escobar’s seminal argument about development providing a series of categories that justify particular interventions in the Third World. See generally ARTURO ESCOBAR, ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD (Sherry B. Ortner et al. eds., 1995) (demonstrating how development discourse and practice can become a mechanism of control, influencing both social and economic realities).

command some form of consensus (since everyone supports “good governance”), it becomes possible for IDAs to intervene even in areas that would have seemed off-limits in an earlier era. James Gathii has described this consensus as:

a product of a heterogeneous coalition of forces that include international financial institutions, western countries, and a variety of private actors. Although this diverse range of entities proceeds from specific, and at times contradictory, interests and orientations, in good governance they find a common way of framing the relationship between economic development and political freedom.<sup>74</sup>

Second, it is much more possible to obfuscate the real role that each of the entities and concepts play in deciding the allocation of resources in the economy by dissembling governance into five constituent institutional parts. In particular, it completely obfuscates the role (and meaning) of the rule of law and its relationship with participation and democracy. This is done, as I pointed out above, by conflating the operation of two distinct notions of rule of law – a procedural and a substantive conception. I pick up this theme in the subsequent sections of this article.<sup>75</sup>

Third, the fracturing of governance into five constituent pieces also obfuscates the fact that the language of reducing the size of the government might well mean redirecting the state.<sup>76</sup> For example, by creating an institution called the bureaucracy as distinct from the executive, the real agenda is to transfer decisionmaking abilities from the political organs of the state to the more technocratic organs.<sup>77</sup> In actuality, the state has not been “rolled back” at all, but the reorientation of activities that bear on allocation of resources from the political organs to the technocratic

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<sup>74</sup> Gathii, *Representations*, *supra* note 61, at 65.

<sup>75</sup> See *infra* Sections 4–5.

<sup>76</sup> See Nicholas Hildyard, *The Myth of the Minimalist State: Free Market Ambiguities*, Corner House Briefing 05, available at <http://www.thecornerhouse.org.uk/item.shtml?x=51960> (last visited on Oct. 31, 2005) (asserting that the free market agenda that ostensibly aims to “strip down” excessive state involvement in the economy and in society often results merely in a redirection of power and spending that has largely benefited the private sector).

<sup>77</sup> See TIM LANG & COLIN HINES, *THE NEW PROTECTIONISM: PROTECTING THE FUTURE AGAINST FREE TRADE* 25 (1993) (arguing that free trade advocates reorganize bureaucracies, and do not minimize them).

organs give the impression that the overt regulation of the economy by state officials has ended.<sup>78</sup> In reality, however, the transfer of decisionmaking from the executive to the bureaucrat only has the impact of depoliticizing debates on the allocation of resources in the society.<sup>79</sup> The assumption is that the bureaucrats are more able to make decisions using the efficiency criterion and without undue attention to "uneconomic concerns" that may lie at the forefront of the minds of politicians.<sup>80</sup>

However, this analysis glosses over the fact that, at the heart of the debate, the real issue is regulation. Properly conceived, regulation is a power struggle: some win, others lose. Disassembling governance into different constituent parts achieves regulation, but without engaging in the messy politics of losers and winners.<sup>81</sup> The rule of law legitimates this process by providing a neutral, and transparent process through which these decisions are taken, thereby ruling out "bias" that would be contested and perhaps reversed in the political process. The analysis of the rule of law below would show that, far from playing this role, the rule of law complements the process of depoliticizing key decisions in the economy by insulating them from politics.<sup>82</sup> At the same time,

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<sup>78</sup> *Id.*

<sup>79</sup> See *id.* (noting that the first wave of privatization occurred in profitable segments). See generally Nicholas Hildyard, *The World Bank and the State: A Recipe for Change?*, at [http://www.brettonwoodsproject.org/article.shtml?cmd\[126\]=x-126-16241](http://www.brettonwoodsproject.org/article.shtml?cmd[126]=x-126-16241) (claiming that this transfer in power serves only to redirect attention and does not substantially change the process).

<sup>80</sup> WORLD BANK, GOVERNANCE, *supra* note 62, at 9.

<sup>81</sup> For example, the World Bank, in its 1997 *World Development Report*, wrote that different constituencies in a country need to be persuaded that neo-liberal reforms are beneficial through consensus building. The Bank implies that the reforms as drawn should not be debated at all—a reform-minded government only needs to persuade sectors that maybe opposed to the reforms. The Bank suggests a "political cost-benefit approach" to assess the redistribution and efficiency implications of reforms and set out how different groups are likely to react to reforms. WORLD BANK, DEVELOPMENT REPORT 1997, *supra* note 52, at 146, 154.

<sup>82</sup> Helen O'Connel reports the results of this process thus:

The economic reforms have had the effect of devaluing politicians and political processes as more and more important decisions are taken outside Southern countries. . . . Elected politicians have less and less authority or capacity to decide on national priorities. Ironically, this has facilitated the entrenchment of power in the hands of rich elites; it has reinforced cronyism in some countries and the trade in political and economic patronage. The result is increasing alienation of women and men from political processes.

however, the democratic ideal of "participation" is retained.

This analysis impugns the oft-repeated association between "market-oriented" regimes and democracy.<sup>83</sup> Thus the property of an economic system being democratic does not depend on whether or not it is "market-oriented." Rather, it depends on whether the system operates to distribute the resources in the economy in a way that is acceptable to the great majority of the people in that society.<sup>84</sup> Since oppression and injustice can be generated both by market mechanisms that fail to curb power and economic inequalities (as Roscoe Pound complained<sup>85</sup>) and by repressive state agencies, whether or not an economic system is compatible with democracy is a question that is distinct from the dominant mode of decisionmaking in that economy.<sup>86</sup>

#### 4. THE RULE OF LAW DEFINED

There are two common definitions of the institution of rule of law: the formal conception and the substantive conception.<sup>87</sup> The

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HELEN O'CONNELL, EQUALITY POSTPONED: GENDER, RIGHTS AND DEVELOPMENT 120 (1996).

<sup>83</sup> See, e.g., John Williamson, *Democracy and the "Washington Consensus,"* 21 WORLD DEV. 1329 (1993) (discussing the merits of consensus regarding economic ideology among democratic political leaders).

<sup>84</sup> This way of gauging the democratic content of an economic system would accord with the definition of "substantive" democracy that I adopt below.

<sup>85</sup> Pound, *supra* note 18.

<sup>86</sup> For excellent accounts of how the market economy functions to reproduce the command economy in the wake of "market-oriented" reforms in developing countries and transitional economies, see generally James Thuo Gathii, *Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law*, 5 BUFF. HUM. RTS. L. REV. 107 (1999) [hereinafter Gathii, *Good Governance*] (critiquing the effect of the role of the World Bank on human rights advocacy); Gathii, *Representations*, *supra* note 61 (studying the imposition of good governance proposals on African countries, and arguing that such proposals contain many shortcomings); James Thuo Gathii, *Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of Law as an Anti-Corruption Strategy in Kenya* 14 CONN. J. INT'L L. 407 (1999) [hereinafter Gathii, *Corruption*] (discussing various anti-corruption initiatives in Kenya that have been required as part of the rule of law reforms of donors). In this series of articles, Professor Gathii argues that by targeting the "social" as represented by governmental regulation in developing countries, market-oriented reforms also end up disabling and stigmatizing protective governmental capacity to enhance social justice. The result is that the proposals for reform that are advocated (such as human rights enforcement, anti-corruption measures, Rule of Law projects, etc.) are often ineffective because they cannot challenge the structural relations of wealth and power that underlie distributional outcomes in national and international society.

<sup>87</sup> Radin, *supra* note 7, at 783.

World Bank has recently sought to add a third meaning that it identifies as a "functional" definition.<sup>88</sup> In this section, I will first discuss the different aspects of the two original meanings. I will then demonstrate that the third conception, preferred and used by the World Bank, is, in fact, not a principled third conception of the term but a conflation of the first two meanings. I will draw illustrations from Rule of Law projects by the World Bank and other IDAs to show this conflation in practice.

My argument is as follows: far from being a mere conceptual confusion, this conflation between procedural and substantive aspects of the rule of law actually plays a vital role in preferring and sustaining particular legal and economic reforms. I will show that such a conflation enables the deployment of the rule of law as a "thick concept"—one that has both a descriptive and an evaluative property.<sup>89</sup> The deployment of the rule of law as a thick concept operates to justify particular substantive programmatic reforms while maintaining a standard rhetoric of procedural necessity that is easily agreed upon politically. The outcome, then, is that the rule of law is used to justify reforms that are at the same time more substantive (and ideologically particularistic) and narrower in scope in some areas of reform than one would immediately recognize. The Rule of Law projects of IDAs, therefore, end up entrenching substantive inequality in economic and political relations. At the same time, they create categories through which such substantive outcomes can easily be justified by regimes that put in place the programmatic reforms favored by these agencies but whose general impact is to harm the welfare of

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<sup>88</sup> World Bank, *The Rule of Law as a Goal of Development Policy*, <http://www1.worldbank.org/publicsector/legal/ruleoflaw2.htm> [hereinafter World Bank, *Rule of Law*] (last visited Oct. 12, 2005).

<sup>89</sup> I borrow the term "thick concept" from philosophy. Although even in philosophy the exact nature of a thick concept is heavily contested, there is some agreement about the properties of thick concepts that I am referring to here. The best examples of thick concepts given in philosophy include honesty, compassion, and rudeness. The essential characteristic of such concepts is that they combine both description and evaluation. I further explore this meaning and the implications of accusing development agencies of using the rule of law as a thick concept below. Contemporary philosophers who have turned their attention to thick concepts as a means of understanding perspectivism, relativism, objectivity, and universal values include, notably, Bernard Williams, Simon Blackburn, and John McDowell. See generally, BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* (1985) (explaining many of the flaws of modern moral philosophy); Simon Blackburn, *Through Thick and Thin*, 66 *PROC. ARISTOTELIAN SOC'Y SUPP.* 285 (1992) (discussing thick and thin concepts); John McDowell, *Critical Notice*, 95 *MIND* 377 (1986) (analyzing Williams' *ETHICS AND THE LIMITS OF PHILOSOPHY*).

society at large.

#### 4.1. *The Procedural or Formal Conception of the Rule of Law*

The World Bank defines the formal conception of the rule of law as follows:

Formal definitions of the rule of law look to the presence or absence of specific, observable criteria of the law or the legal system. Common criteria include: a formally independent and impartial judiciary; laws that are public; the absence of laws that apply only to particular individuals or classes; the absence of retroactive laws; and provisions for judicial review of government action. There is no definitive list of formal criteria, and different formal definitions may use different standards. What formal definitions have in common is that the “rule of law” is measured by the conformity of the legal system to these explicit standards.<sup>90</sup>

The former World Bank General Counsel Ibrahim Shihata subscribed to this definition of the rule of law.<sup>91</sup> Shihata set out the following as requisites for a functioning rule of law: (i) a set of rules known in advance; (ii) rules that are actually in force; (iii) mechanisms to ensure proper application of rules but that allow controlled departure when deemed necessary; (iv) the existence of an independent judicial or arbitral body to make binding decisions when conflicts in application of rules arise; and (v) procedures for amending rules.<sup>92</sup>

The World Bank argues further that since the formal conception must always be saddled with the need to correlate the formal characteristics with particular substantive outcomes, the formal conception is actually only a pretext for a substantive or functional conception.<sup>93</sup> In reaching this conclusion, the World Bank uses Lon Fuller’s understanding of the function of the law.<sup>94</sup>

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<sup>90</sup> World Bank, *Rule of Law*, *supra* note 88.

<sup>91</sup> IBRAHIM SHIHATA, *THE WORLD BANK IN A CHANGING WORLD* 85 (Franziska Tschofen & Antonio R. Parra eds., 1991).

<sup>92</sup> *Id.* at 85.

<sup>93</sup> *Id.*

<sup>94</sup> See World Bank, *Rule of Law*, *supra* note 88 (citing Lon Fuller’s book expressly and listing it as a reference); *see also* LON FULLER, *THE MORALITY OF LAW*

However, the World Bank turns the criticisms that are usually levied against Lon Fuller's argument about law and morality on their head.<sup>95</sup> Critics of Fuller allege that his conception of law and morality enables him to insulate his preferred notion of morality within his understanding of the law.<sup>96</sup> However, the World Bank argues that, in fact, it is the formal conception of rule of law that ends up imbuing the law with a particular substantive content that is nevertheless not acknowledged:

What we really should be interested in—that is, the essence of the rule of law—is the substantive or functional outcome. Whether or not the formal characteristics contribute to that outcome ought to be a matter for research, not presumption. This suggests that the “objectivity” of the formal criteria may be illusory, since they are selected through subjective (and perhaps culturally biased) assumptions about the actual effect of the rules in question.<sup>97</sup>

I will first outline the other two conceptions of the rule of law, and will then turn back to this criticism of the formal conception of the rule of law levied by the World Bank.

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(Rev. ed. 1964) (discussing law and morality).

<sup>95</sup> See, e.g., H.L.A. HART, *Lon L. Fuller: The Morality of Law*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 343 (1983) (critiquing Fuller's book, the main theme of which he describes as the definition of law as the purposive subjection of men to governance by rules); DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* (1997) (studying the role of judicial lawmaking in the United States). The debate between Lon Fuller and his critics usually revolves around his unique understanding of law as a “purposive activity.” However, this characterization is often misleading. The real issue is whether the purposes that law should achieve should be “extra-legal” or not. Hart's argument is that politicians, moralists, and philosophers should decide the substantive aims of the law and that law can be used as a means to implement those extra-legal aims. However, this does not turn law into a moral entity. Once the extra-legal aims are decided, law achieves these aims in a morally-neutral way. This concept seems to posit a sharp distinction between law as a means of achieving some end and law as an end in and of itself. Fuller's position is that though the law acts merely as a means, it eventually forms an “internal morality.” The impact of this is that it becomes difficult to separate the means from the end, and that this unique combination of means and ends is what can be loosely called “internal morality” of the law.

<sup>96</sup> HART, *supra* note 95, at 347-353.

<sup>97</sup> World Bank, *Rule of Law*, *supra* note 88, ¶ 7.

#### 4.2. *The Substantive Conception of the Rule of Law*

The World Bank defines the substantive conception of the rule of law as follows:

An alternative to the formal approach to the rule of law is one that looks to substantive outcomes such as "justice" or "fairness." This approach is not concerned with the formal rules, except inasmuch as they contribute to the achievement of a particular substantive goal of the legal system. Unlike the formal approach, which eschews value judgments, the substantive approach is driven by a moral vision of the good legal system, and measures the rule of law in terms of how well the system being assessed approximates this ideal.<sup>98</sup>

This "substantive conception" denies that a separation between the rule of law and the substantive values promoted by the law is possible.<sup>99</sup> It sees certain ideas of freedom, rights, and justice as integral components of the rule of law.<sup>100</sup> It is quite easy to criticize this conception of the rule of law if it underlies reform requirements imposed by international development agencies. A definition of the rule of law that has substantive content imbued in it also prescribes a philosophy of the good society.<sup>101</sup> Hence, it sneaks in (via legal institutions) substantive moral and political decisions without political debate and consensus. For example, Harold Berman insists that the rule of law requires laws to be

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<sup>98</sup> *Id.* ¶ 8 (citing RONALD DWORIN, *A MATTER OF PRINCIPLE* (1985)).

<sup>99</sup> *Id.*

<sup>100</sup> See Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, 1997 PUBLIC LAW 467 (distinguishing between *formal* and *substantive* conceptions of the rule of law; summarizing the substantive conception articulated by Ronald Dworkin, Sir John Laws, and Trevor Allan).

<sup>101</sup> By "philosophy of the good," I am referring loosely to the values that a society holds as reflected in its laws, politics, culture, economy, and in the distribution of political, social, and economic power within that society. By values, I am referring to "the conceptions that people [in a given society] hold of what is good and bad in human life." ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* 59 (1990). I have added the bracketed phrase in order to highlight the objections of critical legal studies scholars that it is in fact impossible to craft a neutral legislative process capable of unearthing a "philosophy of the good" that is truly representative of a given society's values. See, e.g., ROBERTO UNGER, *LAW IN MODERN SOCIETY: TOWARDS A CRITICISM OF SOCIAL THEORY* 180 (1976) (arguing that no legislative process can be deemed neutral).

grounded in a "normative foundation" that transcends the legal system itself.<sup>102</sup> The difficulty is that such a "normative foundation" can only be determined by the polity using values that the polity considers itself worthy of respect and protection through the rule of law. This makes it impossible to define a "minimalist" rule of law that must be present in all countries in substantive terms.<sup>103</sup>

The World Bank acknowledges this major problem with the substantive conception of the rule of law. The World Bank states three drawbacks of this conception of the rule of law:

But this explicit link between the rule of law and some conception of substantive goodness has drawbacks. First, and most obviously, determining how "just" a particular legal order is requires a subjective—and extremely complex—judgment call. Second, defining the rule of law as a "good" legal system risks making the concept so vague that it's not very useful. Why should we bother talking

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<sup>102</sup> HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 292-94 (1983) (explaining the value of societal standards vis-à-vis the "rule of law").

<sup>103</sup> However, Randall Peerenboom seems to make the opposite argument. Peerenboom first distinguishes between "thin" and "thick" theories of the rule of law. According to Peerenboom, a "thin" theory stresses the formal and instrumental aspects of the rule of law. Peerenboom's "thin" conception of the rule of law would roughly correspond with the "formal" definition I explained above. According to Peerenboom, a "thick" theory, on the other hand, begins with the basic elements of a thick conception and then incorporates elements of political morality such as particular economic arrangements, forms of government, etc. Peerenboom argues that "there are no freestanding thin rule of law legal systems that exist independently of a particular political, economic, social, and cultural context." Randall Peerenboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China*, 23 MICH. J. INT'L L. 471, 485 (2002). My argument on the "thick conception" of the rule of law that I present below differs slightly from Peerenboom's usage of "thick" theory. Peerenboom argues that it is impossible to have a "thin" conception of the rule of law; that in reality "thin" conceptions often dissolve into "thick" conceptions. A "thick" conception, therefore, necessarily begins with a "thin" conception and then builds substantive values into it. Using Peerenboom's taxonomy, the import of my arguments below would be that IDAs can only rightfully nudge developing countries to install rule of law in its "thin" conception, while letting the local politics, economic conditions, cultural values, etc. of these countries provide the "thick" conceptions which fill in the rule of law to make it wholesome. Rather than do this, I argue that IDAs purport to install the rule of law in its "thin" conception while in fact requiring the installation of a particular instantiation of the rule of law "thickly" conceived.

about whether a society has or doesn't have the "rule of law" when what we really are asking is whether the society is good or not? Third, the relationship between law and societal outcomes is problematic in the substantive definition. It is conceivable that there could be a society that had unjust law, or no law at all, and yet achieved substantive justice according to the normative criteria selected. On the other hand, one could imagine a society that had normatively perfect law and legal institutions, but where law was marginal to the point of irrelevance in actual social life, and where social outcomes tended to be normatively bad. Which society has more rule of law from the substantive perspective? Is it the law that must be good, or the social outcomes? If the former, then don't all the problems with the formal definition apply? If the latter, why talk about law at all?<sup>104</sup>

#### 4.3. *The Functional Conception of the Rule of Law*

As a result, the World Bank seems to prefer a "functional" conception of the rule of law. It defines the functional conception as follows:

The functional definition of the rule of law is broadly consistent with the traditional meaning of the English phrase, which has usually been contrasted with "rule of man." It has the advantage, too, of defining the rule of law according to outcome-related criteria, but not requiring a moral verdict on the desirability of that outcome. The functional definition is narrow enough that it does not overlap with other more general concepts, and it makes questions as to the relationship of formal characteristics to the rule of law, and of the rule of law to substantive goals, researchable rather than tautological.<sup>105</sup>

Even then, the World Bank recognizes several problems with this conception of the rule of law. It enumerates them thus:

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<sup>104</sup> World Bank, *Rule of Law*, *supra* note 88 ¶ 10.

<sup>105</sup> *Id.* at ¶ 12.

Nonetheless, the functional definition suffers from a number of difficulties. First, as with the substantive definition, the relationship between the legal system *per se* and the functional goal can pose problems. It is possible to constrain government officials or realize predictability through means other than the legal system. Suppose one society has less official discretion than its neighbor even though the latter has apparently more restrictive laws. Which enjoys a greater rule of law under a functional definition? Another problem is the fact that looking at “predictability” or “official constraint” or any other function makes it hard to make any definitive statement about the level of rule of law in a whole society. Government officials may make literally thousands of decisions each day in a given system. Some of them may be highly constrained, while others are not. It is not at all clear how to aggregate the levels of discretion for individual types of decisions into an overall measure of the rule of law.

An additional point that the functional definition illustrates most strongly is that, despite contemporary rhetoric, there is no *a priori* reason to believe that the rule of law (defined functionally or formally) is necessarily always a good thing.<sup>106</sup>

##### 5. THE RULE OF LAW IN “RULE OF LAW PROJECTS” BY INTERNATIONAL DEVELOPMENT AGENCIES: A FOURTH MEANING

Let us get back to a definition of the rule of law that would act as our prototype in this discussion. I adopt here the “formal” definition by William Whitford.<sup>107</sup> He defines the rule of law as “the accountability of transparent government decisions [including judicial responses to private law suits] to predetermined standards applied by an independent body, probably a court, through a

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<sup>106</sup> *Id.* at ¶¶ 13–14.

<sup>107</sup> William C. Whitford, *The Rule of Law: New Reflections on an Old Doctrine*, 6 E. AFR. J. HUM. RTS. & PEACE 157 (2002).

procedure that can be practically utilized by the aggrieved.”<sup>108</sup>

According to Whitford, there are three conditions which are essential to the actualization of the rule of law.<sup>109</sup> These conditions are:

*Transparency:* This is the requirement that the predetermined standards against which governments are to be measured must be “pre-announced and publicly available;”<sup>110</sup>

*Access to justice:* There must be widespread access to justice. This implies that “persons aggrieved, either by government action or the wrongful action of another person, have the practical ability to bring a complaint to some agency, usually a court, that will assess the consistency of the action with the law;”<sup>111</sup> and,

*Judicial independence:* “[T]he agency doing the assessing, usually the Judiciary, must have substantial independence (or separation) from the actors whose activities are being evaluated. Independence means that the Judiciary should be free of the fear of sanction for the decisions they reach.”<sup>112</sup>

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<sup>108</sup> *Id.* at 158.

<sup>109</sup> *Id.* at 160.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* The requirement of judicial independence raises troubling questions for democratic theory. If the judiciary is completely independent, how can its accountability be ensured? Additionally, if the judiciary makes as well as applies the law in the process of adjudication, what is the democratic content of the laws they make? *Id.* Some commentators avoid this debate by arguing that the judiciary merely applies the laws that are made by the legislature. However, critiques by critical legal studies and American realists have shown that judges do make law. See generally KENNEDY, *supra*, note 95, at 26-38 (remarking on a judge’s ability to dissolve a law’s ambiguity through the process of adjudication, thereby creating law). Some commentators arrive at the conclusion that it is a good compromise to let the judges play this role since the judiciary is “the least dangerous branch” of the government. This is so because it has so little power to

Whitford's definition of the rule of law is close to Duncan Kennedy's preferred definition.<sup>113</sup> Kennedy roots for a "procedural or institutional definition of the rule of law rather than a definition that builds in or entails a particular substantive legal regime."<sup>114</sup> Kennedy's definition is therefore "instrumental" and not one that purports to have an absolute value.

Conceptualized as such, the rule of law is historically and institutionally particular to a specific legal regime and political system. Therefore, prescribing the rule of law as a panacea for anything in another legal system, apart from its procedural aspects, seems meaningless or illogical.<sup>115</sup> Moreover, as Kennedy shows, the rule of law, as developed in the United States legal system, has a serious downside.<sup>116</sup> This is not as a matter of its internal logic, but rather a result of its particular evolution in American jurisprudence. Kennedy argues that the rule of law in American jurisprudence is the discourse that legal and political theorists use to "deny (suppress, evade, mystify, distort, conceal)" two key phenomena:

(a) the degree to which the settled rules . . . structure public and private life so as to empower some groups at the expense of others, and in general function to reproduce the systems of hierarchy that characterize the society in question;

(b) the degree to which the system of legal rules contains gaps, conflicts, and ambiguities that get resolved by judges pursuing conscious, half-conscious, or unconscious ideological projects with respect to these issues of

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raise armies and impose taxes. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962) (analyzing the powers of the U.S. Supreme Court).

<sup>113</sup> See KENNEDY, *supra* note 95, at 13-14 (detailing the requirements of his notion of the rule of law).

<sup>114</sup> *Id.* at 13.

<sup>115</sup> See *id.* (noting that the rule of law is not "absolute," as it must rely on a normative context that other societal institutions provide).

<sup>116</sup> See *id.* at 14 (arguing that legal institutions legitimate inequalities among societal groups and conceal extensive judicial discretion).

hierarchy.<sup>117</sup>

The above definition of the rule of law makes sense to me to the extent that it does not predefine social goods. As I outlined above, a definition of the rule of law that has substantive content imbued in it also prescribes the philosophy of the good society.<sup>118</sup> Hence, it sneaks in (via legal institutions) substantive moral and political decisions without political debate and consensus.

What is interesting about how IDAs have prescribed the rule of law as a necessary institution in achieving economic growth, is that IDAs at times imbue the rule of law with substantive content or value, and at other times empty it of the same, leaving only its procedural or formal aspects. The following quotes from World Bank literature illustrate this point.

The World Bank's 1996 World Development Report states:

Where the rule of law is in force, laws are applied fairly, transparently, and evenhandedly to all; individuals can assert and defend their rights; and the state's powers are defined and limited by law. People in countries with a well-established rule of law rarely stop to wonder where it comes from. But transition economies need to start over, to replace arbitrary rule by powerful individuals or institutions with a rule of law that inspires the public trust and respect that will enable it to endure.<sup>119</sup>

Furthermore, the World Bank writes, "*The rule of law requires good laws, demand for those laws, and institutions to bring them to life.*"<sup>120</sup> "Failure to pass good laws imposes costs that go beyond the mistakes in individual laws to the integrity of the legal system itself. Laws passed with major inconsistencies and uncertainties, or with clear avenues for abuse, simply deepen public cynicism and mistrust."<sup>121</sup> Finally, the World Bank concludes:

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<sup>117</sup> *Id.*

<sup>118</sup> See notes 106-112 *supra* and accompanying text.

<sup>119</sup> WORLD BANK, FROM PLAN TO MARKET, *supra* note 3, at 87. Here, the World Bank espouses the formal conception of the rule of law.

<sup>120</sup> The idea of "good" laws and institutions intimates the rule of law in its substantive conception. *Id.* (emphasis added).

<sup>121</sup> *Id.* Here, we return to a formal conception of the rule of law.

Many transition economies are well along in the process of drafting and enacting legislation in the fundamental areas of property, contracts, company organization, bankruptcy, and competition, as well as other, more specialized topics. Inconsistencies and omissions remain, however, and many laws are only now beginning to be implemented. Governments are often hesitant to relinquish control, citizens are slow to assert their new rights, judicial and other enforcement institutions are still severely underdeveloped, and a body of legal interpretation to help guide practice in specific areas must be created, largely from scratch.

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Many transition economies have adopted new bankruptcy laws. . . .

Design is only half the issue, however; bankruptcy laws are not yet effectively enforced in any transition economy.

*In sum, although property rights are now recognized on paper and to a growing extent in practice, they are still not free from extensive arbitrary interference.*<sup>122</sup>

It should be clear from the above quotations that there are two conceptions of the rule of law in operation here. The parts that are italicized in these quotes clearly express the idea that there are some "good" laws that are in accord with "the rule of law."<sup>123</sup> Examples of "good" laws include property laws, laws ensuring

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<sup>122</sup> *Id.* at 88, 92. Again, we are back to a substantive conception of the rule of law.

<sup>123</sup> *See id.* at 87 (comparing laws in transition and more established economies); *see also* Peerenboom, *supra* note 103, at 484 (analyzing the varied roots of modern law, such as natural, divine, and State law).

freedom of contract, laws that ensure corporate autonomy, and bankruptcy and competition laws.<sup>124</sup> It is this notion that there is some content in the law that is “good” that imbues the World Bank’s conception of the rule of law with a substantive content. However, at the same time, both the passages quoted above are written in language that casts the rule of law as a procedural element that serves Lon Fuller’s “eight general requirements” for the rule of law.<sup>125</sup> According to Lon Fuller, the “eight general requirements” of legality that are inherent in the idea of law are: generality, promulgation, non-retroactivity, clarity, non-contraction, possibility of compliance, consistency over time, and congruence between official action and the declared rules.<sup>126</sup>

The issue here is less that the content and substantive viewpoint with which the World Bank (and the other IDAs) imbue the institution of rule of law with is wrong—as in the fact that it represents particular political choices.<sup>127</sup> Of course, the particular substance the World Bank and other IDAs imbue in the institution also suffers from the serious downsides analyzed by Duncan Kennedy.<sup>128</sup>

This kind of conflation of the two aspects of rule of law can be discerned in various foreign-aided Rule of Law projects in developing countries and transition economies. These views are reflected in the writings of commentators and participants in these Projects. Many of them start by explicitly dichotomizing the two aspects of rule of law and insisting that the only one that is appropriate for IDAs to prescribe to developing countries is the “core” meaning that involves the formal meaning. For example, Anders Fogelklou, giving a Swedish perspective to the rule of law, defines it thus:

[R]ule of law will be defined as a legal order which follows

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<sup>124</sup> WORLD BANK, FROM PLAN TO MARKET, *supra* note 3, at 88–92.

<sup>125</sup> FULLER, *supra* note 94, at 33–39.

<sup>126</sup> *Id.*

<sup>127</sup> Under a liberal conception of the state, citizens hold differing and competing conceptions of what is good and bad in human life. However, “they can still agree to a set of ground rules to abide by in pursuit of the ends that they regard as worthy of their efforts [even if these ends are incompatible]. The establishment and enforcement of such ground rules is the rule of law.” ALTMAN, *supra* note 101, at 60. It is imperative in this liberal conception of the state that the ground rules (the “rule of law”) be neutral between competing conceptions of the good life.

<sup>128</sup> KENNEDY, *supra* note 95, at 14.

certain principles for the exercise of state power.

Two elements form the starting point for an analysis: appropriate legislation following rule of law principles, and compliance with existing legislation and principles by officials, politicians and administrators. If one of these two main points fails in regard to one or more legal areas, the rule of law is defective in this field.<sup>129</sup>

As I pointed out above, the key to the World Bank's definition of the rule of law is the incorporation of the element of "appropriate legislation." It turns out that what is meant by appropriate legislation is specific content of substantive law that is deregulatory in nature:

The idea that the law has to be *comprehensive*, covering basic areas of the social system, is of special importance for states remaking their legal system in view of their present challenge of establishing democracy and a market economy, but is of course valid for all states. But even the main principles of the rule of law themselves have to have a legislative foundation. This idea, of course, does not mean that everything, [sic] must be legally regulated but that major social areas such as business transactions, environmental problems etc., have to be covered by legal rules. *In general, the preferred forms of legal regulation are those which leave as much liberty and decision-making power to individuals themselves to conduct their business activities within the framework of legal rules.*<sup>130</sup> (emphasis added).

As is clear from the above quotation, although Fogelklou agrees that only the core meaning of the rule of law, approximating the instrumental definition I adopted, should be required for all regimes, in enumerating the aspects of the "core," he lists the

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<sup>129</sup> Anders Fogelklou, *Principles of Rule of Law and Legal Development*, in LEGAL ASSISTANCE TO DEVELOPING COUNTRIES: SWEDISH PERSPECTIVES ON THE RULE OF LAW 32, 37 (Per Sevastik ed., 1997) (emphasis added).

<sup>130</sup> *Id.* at 50.

requirement that the law has to be “comprehensive.”<sup>131</sup> By this he means that laws must regulate economic activities in a way that leaves the market as the prime allocator of resources in the economy.<sup>132</sup>

Similar sentiments have led some political scientists to criticize the formal conception of rule of law as too limiting. For example, Richard Flatham has criticized a rule of law conception that places emphasis on “fidelity to the law” only, because such a conception does not pay due attention to the essentially “political” issue of the “proper scope and content of legal regulation.”<sup>133</sup> Again, the suggestion here is that the establishment of the rule of law is “suspect” unless it is imbued with a given content that is insulated from the reach of officialdom.<sup>134</sup>

Similarly, other Western commentators on the rule of law start by recognizing the two aspects of rule of law before they quickly collapse them. The following examples suffice:

Jeffrey Sachs and Katharina Pistor state:

The essence of “rule of law” is the constraint by law of governmental behavior and authority. There is no canon of the definitive elements of rule of law. However, countries

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.* The main problem with this notion of the “market” allocating resources without interference from the state is that the market is itself a creation of the state, influenced by the state’s previous decisions and interventions in the economy. Therefore, the decision to let the “market” do the allocating is, in fact, an argument for a particular allocation by the government. Besides, since the government continues to provide other background rules and institutions, each of which can be operationalized in many different directions, and each direction of which affects the participants in the economy differently, the notion of the market allocating resources is merely mythical. For an excellent analytical exposé of the mythical content of the argument that the “market” can actually allocate resources in a way that is most economically efficient, and most politically free, see Duncan Kennedy, *Law-and-Economics from the Perspective of Critical Legal Studies*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 465 (Peter Newman ed., 1998).

<sup>133</sup> Richard Flatham, *Liberalism and the Suspect Enterprise of Political Institutionalization: The Case of the Rule of Law*, in THE RULE OF LAW 297, 301-07 (Ian Shapiro ed., 1994).

<sup>134</sup> Peerenboom enumerates similar objections by commentators calling for a “thick” conception of rule of law in China. He reports that these commentators argue that “thin” (or formal) conceptions of the rule of law lack sufficient normative content and may therefore give rise to morally reprehensible “evil” empires like Nazi Germany. See Peerenboom, *supra* note 103, at 483 (arguing that to remedy thin rule of law, scholars have suggested that the rule of law requires “good” laws grounded in a normative foundation).

that respect the rule of law usually share the following features: they "divide the powers of government among separate branches; entrench civil liberties (notably, due process of law and equal protection of law) behind constitutional walls; and provide for the orderly transfer of political power through fair elections." . . . *Rule of law is not necessarily identical with "good" or "efficient" laws. However, the two largely overlap. States committed to the rule of law invest heavily in well-designed laws, which reduce transaction costs, and train their legal personnel to enforce laws, contracts, and property rights in a fair and predictable manner.*<sup>135</sup>

As if to reiterate that the establishment of rule of law must entail the writing of substantive content into laws, Sachs and Pistor, in reviewing Russia's performance, argue that: "[i]t takes time to reform the judicial system, to train and/or replace its personnel, and to replace existing laws with new ones."<sup>136</sup>

A similar pattern of reasoning can be discerned in Thomas Owen's *Autocracy and the Rule of Law*.<sup>137</sup> He begins by adopting Gaus's definition of the rule of law, which purveys the impression of being decidedly formal:

A recent fourfold definition of the rule of law in American legal theory likewise had nothing in common with the Russian autocratic principle. First, laws must embody the principles of "generality, publicity, and exclusion of retroactive legislation, clarity, stability, exclusion of legislation requiring the impossible, [and] congruence of official action and declared rule." *Second, laws must protect the personal freedom of citizens.* Third, laws must govern the actions of the executive power through a constitution and an independent judiciary. Finally, citizens are expected to obey the law even when it conflicts with their own moral

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<sup>135</sup> Jeffrey Sachs & Katharina Pistor, *Introduction: Progress, Pitfalls, Scenarios, and Lost Opportunities*, in *THE RULE OF LAW AND ECONOMIC REFORM IN RUSSIA* 1, 14-15 (Jeffery Sachs & Katharina Pistor eds., 1997) (second emphasis added).

<sup>136</sup> *Id.* at 15 (emphasis added).

<sup>137</sup> Thomas C. Owen, *Autocracy and the Rule of Law in Russian Economic History*, in *THE RULE OF LAW AND ECONOMIC REFORM IN RUSSIA* 23, *supra* note 135, at 26.

beliefs.<sup>138</sup> (emphasis added).

Readers would be quick to pick out the first element in this definition as mainly comprised of Lon Fuller's "eight principles of legality."<sup>139</sup> However, what replaces Fuller's purposive coherence and internal morality, which I argued earlier is pretext for substantive filling of the laws in Fuller's definition of rule of law, is the second element in this definition. The requirement that laws must "protect" the personal freedom of citizens is value-laden. It purveys the innocuous impression that it is general and procedural, but in reality the definition of "personal freedom" is given an interpretation that includes specifically defined rules defining private property and freedom of contract. Owen, for example, concludes his essay with the following revealing remark:

"The identification of corporate capitalism with foreign cultural values remains a serious impediment to acceptance, by Russians, of the economic implications of the rule of law: free markets, private property, rational procedures for contract enforcement, and a stable currency."<sup>140</sup>

Thomas Carothers, who has emerged as one of the foremost experts on rule of law in developing countries and now heads the rule of law project at the Carnegie Foundation, displays the same tendency in his two highly influential publications:<sup>141</sup>

Rule of law rests on other important features: laws that are publicly known, clear, and applied equally to everyone; respect for political and civil liberties, especially due

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<sup>138</sup> *Id.* at 26; see also Gerald Gaus, *Public Reason and the Rule of Law*, in *THE RULE OF LAW* 328, *supra* note 133, at 328-330 (discussing the "four ways of being ruled by law" – formal requirements, individual justice, regulation of political authority, and a moral obligation to obey the law – and their incorporation into a theory of rule of law in liberal society).

<sup>139</sup> FULLER, *supra* note 94, at 39.

<sup>140</sup> Owen, *supra* note 137, at 37.

<sup>141</sup> Thomas Carother's publications, *infra*, are cited with approval by the World Bank and the USAID and in various World Bank publications. Jennifer Widner refers to him as an influential "policymaker." JENNIFER WIDNER, *BUILDING THE RULE OF LAW* 205 (1997). As indicated in note 38 *supra*, Carothers discusses the "revival of [the] rule of law."

process in criminal matters; and the subordination of government power to legal authority. Aid providers draw a close connection between advancing the rule of law and promoting democracy.

....

*An economic rationale for rule-of-law assistance is often close by the political one. Aid officials assert that the rule of law is necessary for a full transition to a market economy—foreign investors must believe that they can get justice in local courts, contracts must be taken seriously, property laws must be enforceable, and so on. Not only do economic and political rationales dovetail, but many transitional societies confront growing government corruption and ordinary crime, and the United States and other donors now prescribe strengthening the rule of law for those ills as well. In short, the rule of law appeals as a remedy for every major political, economic and social challenge facing transitional countries.<sup>142</sup>*

Similarly, in his famed *The Rule of Law Revival*, Carothers stated:

The rule of law can be defined as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. *They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the last half-century.* In particular, anyone accused of a crime has the right to a fair, prompt hearing and is presumed innocent until proved guilty. The central institutions of the legal system, including the courts, prosecutors, and police, are reasonably fair, competent, and efficient. . . . *Perhaps most important, the government is embedded in a comprehensive legal framework, its officials accept the law will be applied to their own conduct, and the*

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<sup>142</sup> CAROTHERS, *supra* note 34, at 164 (emphasis added).

government seeks to be law abiding.<sup>143</sup>

Political leaders and foreign affairs practitioners from developed countries prescribing the rule of law as requirements for foreign aid similarly have mixed conceptions of the rule of law. For example, Frank E. Loy, the Under Secretary for Global Affairs during the Clinton administration, is on record as having stated:

No anti-corruption strategy, no matter how well-designed and well-intended, can succeed without a broader commitment to two over-arching requirements: The first is an independent judicial system based on a rule-of-law regime. And that includes the concept of due process and the principle that the rule of law applies equally to everyone—from the poorest and least-privileged among us to the highest echelons of government and society. The second requirement is a government that is open, accountable, and transparent. Here in the United States we often refer to this idea as “government in the sunshine.”

Some of you may be familiar with the International Crime Control Strategy that President Clinton released last year. The President spelled out a series of very specific goals, one of which is to “foster international cooperation and the rule of law.”

....

I don't want anyone to think that our appointing a Rule of Law Coordinator this year means we weren't already working on rule of law issues. In fact, we've been quite active on this front for decades all over the world.

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<sup>143</sup> Carothers, *supra* note 38, at 96 (emphasis added).

*In some Latin American nations where, historically, a lot of crimes have simply gone unpunished, we have actively supported governmental efforts to make their criminal justice systems more aggressive and more punitive. Needless to say, a laissez-faire approach to crime and punishment has a terribly corrosive effect on citizens' confidence in their leaders. So we're quite pleased about the progress that governments in this hemisphere have made.*

*Earlier this month in Guatemala, for example, three men were sentenced to 28-year prison terms for an atrocious attack on a group of American college students just a year earlier.<sup>144</sup>*

This conception of rule of law by Loy is particularly interesting because it includes notions of the severity of criminal law and penalties as constituting the rule of law. It shows how much legal content the rule of law can be clothed in yet maintain the seemingly procedural desideratum of ensuring equality before the law.

As a fitting way to conclude this section, I will point out what Thomas Carothers has termed the "rule of law standard menu."<sup>145</sup> This list clearly states the aim of rewriting and modernizing substantive laws as one of the five most important elements in the rule of law projects by international development agencies. According to Carothers, the rule of law "standard menu" consists of:

- Reforming institutions—including judicial reform, legislative strengthening, retraining prosecutors, police and prison reform, bolstering public defenders and introducing alternative dispute resolution;

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<sup>144</sup> Frank E. Loy, Under Secretary for Global Affairs, Remarks at the Vice President's Conference on Corruption Organization of American States: The Rule of Law and Its Importance (Feb. 25, 1999), [http://www.state.gov/www/policy\\_remarks/1999/990225\\_loy\\_rule\\_of\\_law.html](http://www.state.gov/www/policy_remarks/1999/990225_loy_rule_of_law.html) (emphasis added).

<sup>145</sup> CAROTHERS, *supra* note 34, at 168.

- Political leaders and foreign affairs practitioners from developed countries prescribing the rule of law as requirements for foreign aid similarly have mixed conceptions of the rule of law;
- Rewriting laws—including modernizing criminal laws, updating civil laws and introducing new commercial and corporate laws;
- Upgrading the legal profession—including strengthening bar associations and improving legal education; and
- Increasing legal access and advocacy—including stimulating public interest law reforms, supporting advocacy NGOs, underwriting legal clinics, and training journalists who cover legal matters.<sup>146</sup>

Finally, as Carothers points out, the range of United States institutions involved in the rule of law projects in developing countries and transition economies is also revealing: United States Agency for International Development (“USAID”), State Department, Defense Department, Justice Department, Security and Exchange Commission (“SEC”), National Endowment for Democracy and The Asia Foundation.<sup>147</sup>

I have used the excerpts and quotations in this section as representative of the conceptions of rule of law in the law and development field. The aim has been to show that in actual operation, both the procedural and substantive aspects of the rule of law are present in the understanding of the agencies that support and implement Rule of Law projects. In the next section, I will develop the argument that this conflation of procedural and substantive aspects of the rule of law in these projects plays a vital role in supporting and sustaining particular programmatic reforms

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

in the developing countries and transition economies. In section VIII, I will show the practical effects of this conflation of the procedural and substantive notions of rule of law on politics and participation.

#### 6. THE RULE OF LAW AS A "THICK CONCEPT"

I argue here that the World Bank and other IDAs do not deploy the rule of law in accordance with any of the three conceptions (procedural, substantive, and functional) outlined above. As intimated in the last section, I argue rather that IDAs use the rule of law in a fourth way that combines both the formal and the substantive conceptions. The result of such a conflation of the two conceptions of the rule of law is a usage that is akin to a "thick concept": the formal or procedural conception gives it some descriptive characteristics while the substantive conception gives it some evaluative characteristics. In the process, particular ideas of substantive policies (specific political and economic projects) are dissolved into the idea of procedural rule of law. The resulting *mélange* is then presented as a functional conception of the rule of law.

I borrow the notion of "thick concepts" from Philosophy.<sup>148</sup> By "thick concept" I mean a concept which, by being both descriptive and evaluative, hopes to create the conditions for action and urge the action at the same time. Since I do not wish to be entangled in the philosophical debates regarding the actual operation of thick concepts as concepts that one can use to understand (or reflect on) someone else's ethical perspective, I borrow the term functionally to merely express the property of a concept to host a union of factual and evaluative content simultaneously.<sup>149</sup> I use thick

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<sup>148</sup> For competing notions of "thick concepts" in philosophy, see generally BERNARD WILLIAMS, *supra* note 89 (describing several problems with academia's understanding of modern moral philosophy) and PHILIPPA FOOT, VIRTUES AND VICES AND OTHER ESSAYS ON MORAL PHILOSOPHY (1978) (understanding and assessing the journey of different moral philosophers' beliefs); R.M. HARE, ESSAYS ON THE MORAL CONCEPTS (1972) (examining different philosophers' positions in the field of moral philosophy); HILARY PUTNAM, REALISM WITH A HUMAN FACE 163-75 (James Conant ed. 1990) (gathering divergent ideas on the tradition of American philosophy).

<sup>149</sup> The concept of "thick concepts" is hotly debated in philosophy. While all philosophers accept the definition of a "thick concept" as one that is simultaneously both "descriptive" and "evaluative," they disagree over the nature of the relationship between the two aspects of the concept. Their disagreement over the relationship—whether the "descriptive" and the "evaluative" relate "conceptually" or "conventionally"—has further implications in philosophy in

concept therefore, to mean the property of a concept to straddle the factual and the evaluative spheres.<sup>150</sup> As such, they blend fact with value.<sup>151</sup> By being a union of factual and evaluative content, they, at the same time, guide our application of the concepts and the perception of how things are in the world concerning them, and other associated phenomena, and also provide us with a motivation to act.<sup>152</sup> Put differently, thick concepts both are guided by how the world is, and guide peoples' actions. So they are both world-guided and action-guiding.<sup>153</sup>

However, Bernard Williams and other philosophers use thick concepts to try to understand the possibility of having objective ethical judgments in a cross-cultural setting.<sup>154</sup> On my part, however, I "misread" them by applying the concept in a straightforward way to mean a concept that, by being both descriptive and evaluative, hopes to create the conditions for action and urge the action at the same time.<sup>155</sup> As such, they avoid the

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determining one's positions on epistemological, metaphysical, and semantic issues in the debate over realism. I merely bracket these philosophical disagreements and their implications for the ontological status of "thick concepts," and merely borrow the concept to functionally convey the meaning of a concept simultaneously having a "descriptive" and "evaluative" content. For an excellent discussion of "thick concepts" applied to legal judgments and objectivity in law, see Heidi Li Feldman, *Legal Judgments, Thick Concepts, and Objectivity*, (1993) (unpublished Ph.D Dissertation (Philosophy), University of Michigan) (on file at Harvard Law School Library).

<sup>150</sup> *Id.* at 1.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> BERNARD WILLIAMS, *supra* note 89, at 169.

<sup>154</sup> Bernard Williams, for example, proposes the use of "thick concepts" as a tool that can enable one to suspend ethical judgment in relation to *some* of the practices of societies that are, in a suitable sense, distant from one's own. This suspension will include judgments made using some of our thick ethical concepts. *Id.*

<sup>155</sup> I use the term "misread" as used by Harold Bloom and first applied to comparative law, to the best of my knowledge, by Diego Lopez. See Diego Lopez-Medina, *Comparative Jurisprudence: Reception And Misreading Of Transnational Legal Theory In Latin America* (2000) (unpublished S.J.D. dissertation, Harvard Law School) (copy on file with Harvard International Law Library). Lopez-Medina studies how "deviant," "heterodox," and "incomplete" readings of jurisprudential texts that are considered *magna opus* in the West, render fascinating, rewarding, enriching, relevant, and effectual jurisprudence of local legal systems in Latin America. Harold Bloom uses the term to convey his theory of revisionism. His main argument is that patterns of imagery in poems represent both a response to and a defense against the influence of precursor poems. See HAROLD BLOOM, *MAP OF MISREADING* (1975) (guiding readers through critical reading of poetry). But his principal thought is probably captured in the

necessity of political contest or debate regarding the nature of the action by imbuing the action urged with a value. Since the value is not subjected to debate or consensus but is merely assumed, a thick concept as I use it plays a negative role in governance. It predetermines politics: it brings a value to a situation, and then urges actions based on the situation that is prejudged by the value. The action is then justified in terms of the situation, while the situation is justified in terms of both the value and the action.

My argument here is that the way the concept of rule of law is deployed in the Rule of Law projects described above is that it plays the role of a thick concept conceived in this way. As such, it predetermines politics. To the extent that it enables any form of participation, democracy, choice or freedom, all these political and legal virtues can only be practiced or experienced within the realm of the already decided and predetermined politics. These forms of participation, democracy, choice, and freedom can therefore only be comprehended as technical objectives of the established order rather than real choices aimed at constructing and reconstructing the social, political, and economic relations in the society by consensus, according to changing needs of the society.

The practical effect of the conflation of the two notions of rule of law into a thick concept in the Rule of Law projects, therefore, is fourfold:

First, it makes the rule of law readily available to propose specific programmatic legal and economic reforms.<sup>156</sup>

Second, at the same time, the rule of law appears to assure the democratic right to participate in decisionmaking and determination of policies that govern given the polity. However, the programmatic reforms proposed are already predetermined and pre-decided by the substantive notion of the rule of law and are therefore insulated from the democratic process.<sup>157</sup>

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following quote from an earlier work about "the always wandering meaning" of all literary, representation, according to which "[m]eaning wanders, like human tribulations, like error, from text to text, and within the text, from figure to figure." See HAROLD BLOOM, *KABBALAH AND CRITICISM* 82 (1975). I take the liberty to do this "misreading" myself as, after all, as Jonathan Culler explains, "all readings are misreadings. The best a reader can achieve is a strong misreading: a reading that will in turn produce others. Most readings are weak misreadings, which also attain neither understanding nor self-knowledge but blindly trope upon the text while claiming not to trope." JONATHAN CULLER, *ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM* 175 (1982).

<sup>156</sup> See discussion *infra* Section 8.

<sup>157</sup> See discussion *infra* Section 9.

Third, this usage of rule of law as a thick concept has a powerful emotive appeal by implicitly linking values with action. By juxtaposing facts and values, the thick conception of rule of law is an effective tactic for a successful mobilization of public opinion by appeals to conscience that call on value.<sup>158</sup>

Fourth, the more jurisprudential aspects of the rule of law (i.e. the procedural conception of the rule of law) are then called in aid to "lock-in" the reconfigured socioeconomic formations and relations ushered in by the programmatic, substantive reforms (i.e. the substantive conceptions of the rule of law).<sup>159</sup> In this way, the substantive aspects of the rule of law are justified on the grounds that they are necessary for the procedural aspects of the rule of law to have any effectiveness. On the other hand, the procedural conception of the rule of law is justified on the opposite argument: that the procedural conception of the rule of law is necessary for the substantive reforms to have any effectiveness. Hence, the "procedural" aspects of the rule of law in these projects can then be understood as a supplementary political project to "lock-in" the power gains in the reconfigured political, social, and economic space after the redistribution occasioned by the adoption of the substantive "good" laws dictated by the substantive aspects of the rule of law. Thus, a combination of the core, formal, traditional, jurisprudential conception of the rule of law is united with radically new substantive meanings built into the concept. In this way, the rule of law serves as an instrument for subverting the democratic right of the polity rather than equipping it. Rather than fill the mechanisms that give the citizenry power to determine the

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<sup>158</sup> Since the conception of the rule of law inherently connotes something good ethically, the polity would accept both its procedural and substantive properties. Conversely, any person who is skeptical of its desirability or application is likely to be met with incredulity: "how can anyone be against the rule of law?" It is in the same way various political projects of dubious moral quality can be carried out by appropriating the moral languages of human rights. Anyone who dares oppose them would then appear to be a "whacko" or a "fascist:" How can anyone oppose human rights? These approaches to law and organizing to influence peoples' way of viewing particular political choices as ethical by ensconcing them in ethical values is a frequent technique used by social movements. See Sandra J. Ball-Rokeach & Irving Tallman, *Social Movements as Moral Confrontations: With Special Reference to Civil Rights*, in UNDERSTANDING HUMAN VALUES: INDIVIDUAL AND SOCIETAL 82, 82-94 (Milton Rokeach ed., 1979) (arguing that social movements are successful because of their ability to link values and actions).

<sup>159</sup> See discussion *infra* Section 8 (addressing the effect of the rule of law on participatory democracy).

nature, shape, and direction of economic policies in a country, this conflation of rule of law precludes such effective choice of economic policies while enabling strategic participation in other areas of politics.

Therefore, the version of rule of law that is being instituted in most parts of the world through Rule of Law projects is one that insulates a particular vision of moral foundation or philosophy of the good of the society from the reach of political debate, consensus or revision by the participants in the polity. It imbues on the legal order a certain internal morality of the law that shapes the content of the laws, and the responses and direction of the laws and rules.<sup>160</sup> Because this view of internal morality is purposive, it imbues in the law only a given content of the instantiation of legal, social, economic, and political arrangements between citizens and the government, and among citizens, as mediated by the law. At the same time, however, it presents itself as "anti-design," an open, interactive process resulting in an outcome of processes that determines politics without fixed goals, design or plan.<sup>161</sup> So, while it circumscribes the available choices for the citizenry, it presents itself only as a guarantor of process that merely grants freedom to citizens and other participants in the polity (such as investors) to relate with one another. This position by IDAs is similar to the position long ago taken by Lon Fuller:

[L]aw is not, like management, a matter of directing other persons how to accomplish tasks set by a superior, but is basically a matter of providing the citizenry with a sound and stable framework for their interactions with one another, the role of government being that of standing as a guardian of the integrity of this system.<sup>162</sup>

This conception of the rule of law is complex because it simultaneously incorporates a formalistic or procedural component while at the same time linking it with a positive prescription of a value of internal morality of the law. It is this

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<sup>160</sup> FULLER, *supra* note 94, at 210.

<sup>161</sup> This "anti-design" poise is necessary for the adherents of the view that the state is a "civic association" rather than an "enterprise association." See *supra* note 8 and accompanying text (examining the distinction between the state as a "civil association" and an "enterprise association").

<sup>162</sup> FULLER, *supra* note 94, at 210.

double aspect of it that coheres with the need to have "good laws."<sup>163</sup> It is, hence, both evaluative as a formal criterion, and also prescriptive of values that the purposive orientation of the law must reflect in its internal morality. This, therefore, implies the need for substantive content in certain laws. For Lon Fuller, therefore, as for the IDAs, the internal morality actually forms the "constitutive outside" that politically legitimates and delegitimizes the "zone" of acceptable and unacceptable substantive "good," "comprehensive," or "appropriate" laws.<sup>164</sup>

Hence, the rule of law that emerges from the main message of neo-liberalism (that "imperfect markets can be made to work better than imperfect governments"<sup>165</sup>) ends up not being the institutional mechanism through which the government cedes economic role to the market. Rather, it becomes a totalitarian imposition of a structure that ensures participation in already decided politics. It starts with the innocuous claim that "all social relations be wholly voluntary and private."<sup>166</sup> Markets will then foster "unanimity without conformity, and reduce social strain by decreasing the number of highly contested political decisions."<sup>167</sup> The result is, however, that the law that emerges is "individualistic, microeconomic, and focused towards private law."<sup>168</sup> Such a focus, in turn, serves to define private property, freedom of contract, and private corporate autonomy in absolute ways, the same way as they were constructed within the common law context in the United States during the Classical Legal period.<sup>169</sup> This as opposed to conceptions of property, freedom of contract, and private corporate autonomy that are malleable to collective choices based on ideas of community values, egalitarianism, altruism, social justice, and equity.<sup>170</sup>

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<sup>163</sup> See *supra* notes 129-132 and accompanying text (noting the blurred line between market initiatives and substantive law).

<sup>164</sup> FULLER, *supra* note 94, at 210.

<sup>165</sup> See Purdy, *supra* note 39, at 7 (noting the connection between various "liberal ends").

<sup>166</sup> Paul H. Brietzke, *Designing the Legal Framework for Markets in Eastern Europe*, 7 *TRANSNAT'L LAW* 35, 38 (1994).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> See, e.g., *Adkins v. Children's Hospital*, 284 F. 613 (D.C. Cir. 1922), *aff'd*, 261 U.S. 525, (1923) (holding an act which provided fixed minimum wages for female employees in private employment to be an unconstitutional interference with the freedom to contract).

<sup>170</sup> See, e.g., *West Coast Hotel Co. v. Parrish*, 55 P.2d 1083 (Wash. Sup. Ct.

## 7. THE RULE OF LAW, DEMOCRACY, AND PARTICIPATORY POLITICS

However, it is in the extrapolated interaction between the rule of law and democracy that the rule of law as conceived in the Rule of Law projects achieves paradoxical and destabilizing results. These results threaten the apparent coherence of the reforms. Most liberals assert that for the successful establishment of rule of law, which, in turn is a requirement for market-oriented reforms to be successful, there is a necessity for a moral consensus.<sup>171</sup> However, there is debate about whether a fully participatory democratic system can establish such a moral consensus (which is, I think, Lon Fuller's equivalent to "internal morality" of the law which drives the purposive interpretation of the law).<sup>172</sup> This has led some liberal scholars like Stephen Holmes to suggest that the establishment of such a moral consensus requires a state with sufficient capacity and flexibility to push through difficult policy choices, to outmaneuver political opponents, and to create the institutional foundation for a new, stable order.<sup>173</sup>

The suggestion here is to leave questions of distribution of power incompletely defined to create flexibility that would give the executives in transition economies "wobble room" to outmaneuver the inevitable opposition to economic reform.<sup>174</sup> This

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1936), *aff'd*, 300 U.S. 379 (1937) (holding the Washington Minimum Wages Act did not violate the Due Process Clause of the Fourteenth Amendment as it was a valid exercise of the state's police power to protect the health and safety of women).

<sup>171</sup> See, e.g., Gerald Gaus, *supra* note 138, at 355 (arguing that if a community is deeply divided on a wide range of issues, the practical resolution of moral disputes through the rule of law will be precarious since whatever the umpire decrees, some will declare that it is a violation of fundamental law). I am using "liberal" here in its classical sense. I am referring to the adherents of "liberal democracy" as a socio-political system. I am not using the term "liberal" in its popular U.S. conception as the opposite of "conservatism." See, e.g., RONALD DWORKIN, *A MATTER OF PRINCIPLE*, 181-5 (1985) (proposing that liberalism's meaning had changed during the 1960s and 1970s, but a conception of equality is the static nerve of liberalism).

<sup>172</sup> See, e.g. Tom R. Tyler & John M. Darley, *Building a Law-abiding society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law*, 28 HOFSTRA L. REV. 707, 734-35 (2000) (discussing the problems with using moral consensus as a basis for rule of law).

<sup>173</sup> See Stephen Holmes, *Back to the Drawing Board*, 2 E. EUR. CONST. REV. 21, 21-25 (1993) (making an argument for constitutional postponement in Eastern Europe); Stephen Holmes, *The Post-Communist Presidency*, in 2-3 E. EUR. CONST. REV. 36, 36-39 (1993) (discussing the powers and political styles of the East European presidents) [hereinafter Holmes, *Presidency*].

<sup>174</sup> See Holmes, *Presidency*, *supra* note 173 (discussing the powers and political styles of the East European presidents).

opposition is expected to come from the legislature, organized labor, or any other organized citizen group.<sup>175</sup> Holmes even suggests that it is imperative that executives have sufficient flexibility to re-negotiate the rules of the game in the midst of the game so that they can re-adjust to the changing position if they are to create sufficient capacity for the state.<sup>176</sup>

The aforementioned argument about the rule of law becomes more compelling if one makes a parallel analysis of another institution typically prescribed by the World Bank and other IDAs, namely democracy. Just like the institution of the rule of law, the institution of democracy has two aspects. The first aspect "refers to the idea of popular power and emancipation conceived as a self-reflexive form of politics . . . This notion highlights the *substantial* content of democracy, inconceivable without morality and radical in its ability to constantly redefine politics."<sup>177</sup>

Like Professor Laakso, I call this first aspect of democracy the substantial or emancipation notion of democracy.<sup>178</sup> The second aspect of democracy "reduces the meaning of democracy to a certain institutional design of decision-making, which, in turn, is seemingly value-free and neutral concerning different political programmes. When democracy is interpreted [this way], its salient point is [not] emancipation but functionality and effectiveness."<sup>179</sup>

Again like Professor Laakso, I call this the instrumental or rational notion of democracy.<sup>180</sup> If one looks at these two definitions, it should be easy to see that they closely parallel the two aspects of the rule of law as defined by Duncan Kennedy.<sup>181</sup> The "instrumental notion" mirrors what Duncan Kennedy referred to as an aspect of the rule of law<sup>182</sup> called a "procedural or

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<sup>175</sup> See, e.g., WORLD BANK, DEVELOPMENT REPORT 1997, *supra* note 52, at 144-156 (examining the challenges of initiating and sustaining reforms).

<sup>176</sup> Holmes, *Presidency*, *supra* note 173, at 39. The World Bank has essentially adopted this reasoning. See WORLD BANK, DEVELOPMENT REPORT 1997, *supra* note 52 and accompanying text (investigating how the role of the effective state must adapt in the changing world).

<sup>177</sup> Liisa Laakso, *Whose Democracy? Which Democratisation?*, in THE DEMOCRATISATION OF DISEMPOWERMENT: THE PROBLEM OF DEMOCRACY IN THE THIRD WORLD 210, 210 (Jochen Hippler ed., 1995).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> KENNEDY, *supra* note 95; see also *supra* notes 113 and 114 and accompanying text.

<sup>182</sup> *Id.*

institutional" definition.<sup>183</sup> At some point, he also calls it "instrumental."<sup>184</sup> The "substantial or emancipation notion" is the one Duncan Kennedy would have derided as an "absolute value-oriented" definition were Laakso defining the institution of rule of law.<sup>185</sup>

Given the operationalization of the conception of rule that we have described above, it seems that the only form of democracy that can emerge from the neo-liberal reforms is the instrumental rather than the substantive conception of democracy. This is because, as I pointed out above, the degree of choices that the individuals in the polity are permitted to make are circumscribed by the preferred conception of rule of law. This aspect is illustrated by the way IDAs, for example the World Bank, assume the merit of the policy proposals in adjustment, but require some aspects of them to be put through parliamentary procedure to be rubber-stamped by the representatives. For example, consider the following quote: "[T]he leadership must be able to withstand opposition to reform. . . . Leaders can offset resistance through a combination of compensation and compulsion—for example, by offering fired workers severance payments and by banning strikes in strategic industries or otherwise reducing labor union power."<sup>186</sup>

Indeed, the instrumental notion when it comes to democracy is so strong that it has led Professor Ake to remark that "[The World Bank is] far more comfortable with apoliticism than the political pursuit of democracy . . . . They enforce political conditionality reluctantly and only after reducing democracy to governance and governance to the political correlates of structural adjustment, particularly the rule of law, transparency and, accountability."<sup>187</sup>

I should note here two inconsistencies regarding the World Bank's attitudes towards the institutions of rule of law and democracy. First, the World Bank *chooses* when to root for a "substantial" (or "substantive") definition of an institution and when to prescribe a merely "instrumental" (or "procedural") one. Second, the choice of whether to assign a substantive or procedural conception to an institution turns on the ability to mobilize

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> WORLD BANK, BUREAUCRATS IN BUSINESS: THE ECONOMICS AND POLITICS OF GOVERNMENT OWNERSHIP 190-91 (1995).

<sup>187</sup> CLAUDE AKE, THE DEMOCRATISATION OF DISEMPOWERMENT IN AFRICA 1-2 (1994).

particular legal categories in a given way to purvey its favored meaning. That is to say that the World Bank is more confident in using legal categories in purveying its desired meaning and meeting its favored goals. Hence, it is possible and desirable to imbue the institution of rule of law with substantive (absolute value) content because this can drive the ideological interpretation in a given way *safely*, i.e., without too much risk of opening up the institution to rival interpretation that would politicize the institution. This eschews the possibility that the meaning of the institution could be opened up for political contestation with the possibility that the World Bank's favored interpretation may be modified, subverted or entirely changed.

However, when it comes to the institution of democracy, it turns out the World Bank prefers the "instrumental" notion to the "emancipation" notion of the institution. As Ake points out, even then, it still carefully reduces the "instrumental" down to more particular categories that can be comprehended legally, and in a specific way.<sup>188</sup> Again, the World Bank's confidence is only inspired here, when the institution is stripped to its constituent "legal" categories. After this point, the plot is familiar. Basically each of the legal categories can then be imbued with particular substantive (absolute value) content in the same way as happens in the case of the institution of the rule of law.

We can speculate why a "substantive" definition of the institution of democracy would be threatening to the World Bank. Conversely, we can also speculate why a "procedural" definition of the institution of rule of law would be destabilizing to the World Bank. In both cases, ideological stakes seem supreme. Further, it would be possible to contest the particular meanings given to the concept by the Bank using local practice. In other words, it would be possible to operationalize both institutions, and yet subvert the particular choices that the Bank prefers to see institutionalized in the reform process.

As I have already noted, to the World Bank, a substantive definition of the rule of law is essential for conveying the meaning of the rule of law that denies ideological content in adjudication.<sup>189</sup> A procedural definition of democracy, on the other hand, functions, paradoxically, to deny ideological content in legislation.

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<sup>188</sup> *Id.*

<sup>189</sup> See generally KENNEDY, *supra* note 95 (discussing how the diffusion of law-making power reduces the power of ideologically organized majority).

This might appear alarming and ridiculous even to the most committed liberal thinker. In liberal thinking, ideology in adjudication is denied *in toto*.<sup>190</sup> The play and competition of ideology is restricted and expected to play a role only in the realm of politics or rule making.<sup>191</sup> Though liberal thinkers differ in how sharply they conceive the distinction between rulemaking and rule application, they are united in accepting that in general ideology should play a role in politics but not in adjudication. The bottom line is that "[i]n the liberal tradition . . . politics is interpreted above all as a conflict and compromise between different interests. . . . [It is] about [people's] interests providing the content of politics. . . . Competing interests are not only qualifications given to individuals; rather, they define individual political existence in liberal democracy."<sup>192</sup>

So, it is in the realm of politics, of rule making, of democracy, that ideology is acknowledged to play a role. This is because, in the realm of rule making or politics, ideology is cognitively created into interests.<sup>193</sup> These interests are articulated as "dynamic significations."<sup>194</sup> Or as Duncan Kennedy puts it:

In this [liberal] normative view, the law-making process requires value judgments, which are inescapably subjective, and therefore political. Because law making is political, it should be done by elected officials . . . operating under a norm of accountability to their constituents.<sup>195</sup>

The bottom line is that competing interests can be presented and discussed in the realm of politics and rulemaking. In a conflict situation, compromise or consensus becomes possible. However, under liberal political theory, once this conflict is resolved and

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<sup>190</sup> See *id.* at 196 (arguing that judges should in some sense be non-ideological).

<sup>191</sup> This is because, in liberal democracies, legislatures make the law. Legislatures are the policymaking bodies. In making rules and laws, legislatures choose from among alternative courses of action. In making choices, legislatures may legitimately hear from interest groups or independent groups in order to prudently exercise rulemaking authority. See, e.g., WILLIAM KEEFE, CONGRESS AND THE AMERICAN PEOPLE (1988) (examining how legislative decisions are made).

<sup>192</sup> Laakso, *supra* note 177, at 211.

<sup>193</sup> *Id.*

<sup>194</sup> The term, which I like, is Laakso's. *Id.* at 213.

<sup>195</sup> KENNEDY, *supra* note 95, at 27.

consensus reached as reflected in the law, in the task of rule application or adjudication, there is no room for ideology. In other words, liberal democracy is founded on the idea that rival ideologies only compete and reach a resolution in the more transparent realm of politics. Contrastingly, the rule of law as an institution ensures that the process of adjudication is purged of "ideology."<sup>196</sup> Of course, the bright line between legislation and adjudication has been the subject of intense debate within and without the liberal tradition. The result is that the distinction has been largely blurred. Further, the little integrity that is left to the distinction has fallen prey to the trenchant criticism that:

[I]deology influences adjudication, by structuring legal discourse and through strategic choice in interpretation . . . [further that] the denial of the presence of ideology in adjudication leads to political results different from those that would occur in a situation of transparency.<sup>197</sup>

In other words, according to Kennedy, the illusion created by the appearance of determinacy in adjudication contributes to, influences, or partly causes the patterns of social life rather than just mystifying them.<sup>198</sup> People would be less likely to accept the patterns if they understood that the appearance of determinacy is just a mask for determination by human beings that make political choices.<sup>199</sup> However, this is not even the mischief I am accusing the World Bank of propagating in this specific context.

The argument, rather, is that in prescribing reform packages, the World Bank does flout even this liberal "structuring" of the society. The liberal "structuring" I am referring to here is one that dichotomizes adjudication and legislation and accepts that ideology can and should play an important role in the latter but not in the former. However, in prescribing the reform packages, the World Bank flips the role of ideology in the political

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<sup>196</sup> As Duncan Kennedy has shown, there is a difference between denying the "ideological element in judging" and denying that "judges make decisions that are important to ideological intelligentsias." Most liberals would readily agree with both these formulations since they preserve the ultimate denial that adjudication has no ideological content. *Id.* at 23.

<sup>197</sup> *Id.* at 19.

<sup>198</sup> See *id.* (describing the theory of judicial objectivity's impact on adjudication).

<sup>199</sup> See *id.* (emphasizing the role of political ideology in judicial judgments).

organization of the society. There are two subtle, almost similar ways in which the Bank does this. First, by prescribing an "absolute value" notion of the rule of law, the World Bank prescribes an ideology as "truth." Second, the Bank empties the institution of "democracy" of its substantive content and thereby precludes the ideological debates that ideally should take place in the realm of politics.

#### 8. THE RULE OF LAW AS A TOOL TO POLICE PROGRAMMATIC PROPOSALS: THREE ILLUSTRATIONS

Given the actual operation of the rule of law projects I have described above, it is possible to conclude that the rule of law does not, in the context of neo-liberal reforms, act as a liberating tool for the majority of the citizenry in the Third World. Rather, it merely becomes a vehicle for manufacturing consent through strategic but circumscribed "decided politics."<sup>200</sup> Therefore, the Rule of Law (and good governance) discourses of IDAs become an alibi ideology deployed to contain and police the radicalism and indeterminacy that participatory democracy (which is the opposite of the coin of the rule of law) might unravel. Thus, the rule of law ensures the unavailability of systemic changes by the *demos* while

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<sup>200</sup> Amrohini Sahay, *supra* note 13. While Sahay uses "decided politics" positively to resist the post-modernist conservative debilitating position which dispenses with the politics of "totality" as epistemologically unviable, since such a position ultimately dispenses social phenomena into an indeterminate series of differences without any necessary underlying basis which could explain these differences as part of a global common structure of exploitation, and which thus fixes politics as local. In the absence of such an objective explanatory principle (which can grasp the cause of social phenomena) what are elided are the determinate connections between disparate phenomena—connections which the materialist critique establishes—in order to isolate these off and prevent them from being related to the system of exploitation. It is only on these terms that cultural studies is able to advance politics not as a transformative collective praxis to abolish exploitation, but, rather, as a series of local, cosmetic changes whose ultimate effect is to (re)secure the exploitative practices of the inside. On the contrary, Sahay argues that there is an "underlying principle" which explains the disparate historical series. There is a historical basis for materialist critique as a practice of knowledge of the social totality. Contrary to the bankrupt "pan-insidism" of constitutive outsiders, in short, there is a non-constitutive "outside" which delimits the exploitative practices of the inside and constitutes an "unsurpassable objectivity" as the "foundation of revolutionary praxis and of critique as part of such a praxis." I appropriate the term "decided politics" from Sahay, however, to convey the negative meaning of politics where the significant decisions are made elsewhere by a "constitutive core" in the society who then seek to fabricate consent for these decisions on the rest of the society *via* the law, or instrumental democracy.

ensuring a systematic, patterned change by the *telos* of development. The language of rule of law acknowledges multiculturalism, human rights, and other conceptions that give the impression of participation, but it actually functions to exclude some voices or alternatives to the teleological path of development. At the very best, it functions to relegate to the margins these alternatives.

To this extent, the rule of law no longer evinces the procedural propriety that it expresses itself to be guaranteeing. Instead, it provides substantive concrete proposals about the direction in which the foundational political decisions should be oriented. The decisions of what the concrete proposals contain are made by people other than the general population through debate, and political consensus in the political arena. Therefore, to the extent that politics have already been “decided” in an arena other than politics, there is no genuine democratic participation. “Participation” and “democracy” then become mere signaling rituals that are staged so as to elicit the “consent” of the majority to the already pre-determined programmatic proposals.

I will briefly demonstrate this systematic staging of “participation” that is already predetermined to manufacture consent of the polity or citizens—but in a way that there is really no choice at all presented to the citizens. Rather, what emerges is a deep desire to require the citizens to alter their behavior in the pre-determined way. Democracy and participatory politics are then subverted. All that the people have is the appearance of participation—but this is limited to either the less significant issues (i.e., fundamental questions on the allocation of resources are insulated from political debates) or to deciding from circumscribed choices in an either/or fashion.

### *8.1. The Politics and Nature of Participation in Structural Adjustment Programs*

The impact of Structural Adjustment Programs (“SAPs”) on the poor has been the focus of an interesting debate between international financial institutions (“IFIs”) and social scientists.<sup>201</sup>

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<sup>201</sup> Structural Adjustment Programs (“SAPs”) are policy-based lending programs designed by the international financial institutions (notably the World Bank and the IMF) to compel recipient countries to reform their economies in a pre-agreed manner. They are based on the starting point that the economic crisis in these countries was precipitated by policy failures. In particular, SAPs aim to address the criticism that the state in developing countries plays too big a role in

IFIs have contended that the reforms supported under SAPs are essential both to reverse unsustainable economic conditions that hurt poor people, and to enhance poverty-reducing growth.<sup>202</sup> Many social scientists have responded that adjustment imposes onerous burdens, including excessive fiscal contraction, on developing countries; forcing on them an agenda of liberalization, deregulation, and privatization that leads to cutbacks in essential services, higher inequality, and deepening poverty.<sup>203</sup> They contend that adjustment has failed either to produce the desired reforms or to increase growth.<sup>204</sup>

By the mid-1990s, studies had shown the extent to which poverty, inequality and human suffering had increased in countries implementing SAPs imposed by IFIs.<sup>205</sup> In the face of the

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the economy. As an incentive for these governments to reform their economies by liberalizing, the international financial institutions grant loans guaranteed not by collaterals but by "conditionalities" that the governments will carry out particular economic and political reforms. Nancy C. Alexander reports that by the late 1980s, the percentage of loans involving SAPs was "42 percent in Latin America; 33 percent in sub-Saharan Africa; 30 percent in Europe, the Middle East, and North Africa; and 10 percent in Asia." See Nancy C. Alexander, *Transcending the Vicious Cycle of Debt and Adjustment*, in *WORLD DEBT AND THE HUMAN CONDITION: STRUCTURAL ADJUSTMENT AND THE RIGHT TO DEVELOPMENT* 171, 173 (Ved P. Nanda et al. eds., 1993) (illustrating the correlation between adjustment and bank lending in certain geographical areas). See generally Jason Morgan-Foster, *The Relationship of IMF Structural Adjustment Programs to Economic, Social, and Cultural Rights: The Argentine Case Revisited*, 24 MICH. J. INT'L L. 577 (2003) (noting the possibility that SAPs conflict with economic, social, and cultural rights).

<sup>202</sup> See generally WORLD BANK, *SUB-SAHARAN AFRICA: FROM CRISIS TO SUSTAINABLE GROWTH* (1989) (discussing the challenges involved in achieving sustainable economic conditions).

<sup>203</sup> See, e.g., THANDIKA MKANDAWIRE & CHARLES C. SOLUDO, *OUR CONTINENT, OUR FUTURE* (1999) (explaining, from the perspective of African scholars, some of the reasons for Africa's poor economic performance).

<sup>204</sup> See *id.* (describing the potential negative impact of adjustment).

<sup>205</sup> For example, in 1994, the World Bank's own study concluded that of the 29 countries under SAPs in Africa, only 6 were "successful" – a failure rate of 80%. Even then, looking at the six countries given a passing score of "successful" in 1994, today, the Bank may be forced to reconsider its evidence. The six "successfully adjusting" countries were named as: Gambia, Burkina Faso, Nigeria, Ghana, Zimbabwe, and Tanzania. Of these six, probably only Ghana would still be in this category today. See World Bank, *ADJUSTMENT IN AFRICA*, 58 (1994) (demonstrating that Ghana enjoyed one of the greatest improvements in macroeconomic policies among sub-Saharan African countries); see also William Easterly, *The Effect of IMF and World Bank Programs on Poverty* (2000), available at <http://www.imf.org/external/pubs/ft/staffp/2000/00-00/e.pdf> (arguing that there is no direct effect of structural adjustment on growth). Many people within the IFIs have acknowledged the adverse impact of SAPs in developing countries. See JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002) (discussing the

growing chasm between the two positions, the World Bank responded, not by re-orienting its lending criterion in a different direction, but instead by emphasizing the correctness of its prioritization. However, they agreed to set up a separate process to help those who are adversely affected by adjustment.<sup>206</sup> In other words, the World Bank was willing to let the participation of others, including those affected by the policies, only to reduce the impact of the adjustment process—but not willing to debate the desirability of the adjustment process itself. While the World Bank justified its position based on the argument that promoting economic growth is the only way to achieve significant poverty reduction, it only allowed refutation of its premises as argument for reforming the way to deal with adjustment—but not as questioning the merits of the adjustment process itself.<sup>207</sup> Indeed, the emerging debate came to be characterized as one between those who favor “adjustment with growth” (like the World Bank and the IMF), and those who favor “adjustment with a human face.”<sup>208</sup> The implication was that adjustment was a foregone

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detrimental effect that globalization can have on developing countries). Easterly was an economist and Stiglitz was the Chief Economist at the World Bank.

<sup>206</sup> For example, the World Bank acknowledged some of the criticisms of SAPs. It joined civil societies in setting up the Structural Adjustment Participatory Review Initiative (SAPRI) and participated in its design and implementation. SAPRI selected ten countries in five continents as a basis for its research and raised independent funding to carry out the research. The report by SAPRI was first released in 2002. The report was damning in its findings. It concluded that, far from reducing poverty, SAPs resulted in increased poverty and economic inequality, as well as numerous economic crises in developing countries. The Report recommended that SAPs do not work and that the Bank needed to rethink its development model. Rather than engage SAPRI on these questions, the Bank tweaked the recommendations and, instead, started advocating for “participation” by “stakeholders” in drawing poverty reduction initiatives in developing countries. See Structural Adjustment Participatory Review International Network, *SAPRI Releases Findings of Joint Participatory Assessment of Structural Adjustment Conducted with World Bank*, available at [http://www.saprin.org/fora\\_report\\_overview.pdf](http://www.saprin.org/fora_report_overview.pdf) (last visited Oct. 22, 2005) (describing the impact of policies and the Bank’s lack of response).

<sup>207</sup> See David Dollar & Aart Kraay, *Growth Is Good for the Poor*, (World Bank, Development Research Group, March 2000), available at <http://www.worldbank.org/research/growth/pdffiles/growthgoodforpoor.pdf> (noting the correlation between an increase in the income of a nation’s poor and the growth of a nation’s economy at large); see also World Bank, *WORLD DEVELOPMENT REPORT 2000/2001: ATTACKING POVERTY (2001)* (discussing poverty, opportunity, and growth).

<sup>208</sup> See, e.g., Giovanni Andrea Cornia, *Economic Decline and Human Welfare in the First Half of the 1980s*, in *ADJUSTMENT WITH A HUMAN FACE* (Giovanni Andrea Cornia, et al. eds., 1988) (discussing economic adjustment and development in Africa); see also World Bank, *AFRICA’S ADJUSTMENT AND GROWTH IN THE 1980S*

conclusion: the only matter for political debate and consensus was how to mitigate its adverse effects.

As a result of this debate within the World Bank, the Bank began to ask that loan documents include a summary analysis of "the short-term impacts of the adjustment program on the urban and rural poor, and the measures proposed to alleviate them."<sup>209</sup> The Bank also began to stress the importance of maintaining social spending for poor people during adjustment, and of having specific measures in place to ensure that poor people benefited when growth resumed.<sup>210</sup>

Hence, when the issue of participation in decisionmaking is raised, it is with respect to generating consensus as to the sharing of the burdens of adjustment. The issue is not framed in a language that suggests that there can be an alternative to the particular adjustment proposed. The only issue opened for social participation is how to share the burdens of that adjustment.<sup>211</sup> For example, at a high-level meeting convened by the International Labor Organization ("ILO") designed to bring together proponents of "adjustment with growth" (the IMF and World Bank), and proponents of "adjustment with a human face" (UNICEF, ILO, IFAD, and UNCTAD).<sup>212</sup> They adopted a set of conclusions about including the less-heard voices in the adjustment debate.<sup>213</sup>

The metaphor of poverty alleviation has thus become the language through which democracy is a participatory process for a polity to decide its own economic system.<sup>214</sup> Rather than design

(1989) (analyzing Africa's economic growth).

<sup>209</sup> World Bank, *Guidelines for Preparation of President's Report for Adjustment Lending Operations*, Annex D1 of Operational Manual Statement 2.01, Guidelines for Preparing and Processing Adjustment Loans and Credits (1987).

<sup>210</sup> See CARL JAYARAJAH, ET AL., *SOCIAL DIMENSIONS OF ADJUSTMENT: WORLD BANK EXPERIENCE, 1980-93* at 104 (1996) (emphasizing the correlation between growth and poverty reduction).

<sup>211</sup> See, e.g., *REPORT OF THE HIGH-LEVEL MEETING ON EMPLOYMENT AND STRUCTURAL ADJUSTMENT*, Geneva, 23-25 Nov. 1987, ILO Doc. GB.239/5/1, at 27-31.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> For example, in 1999, the World Bank and the IMF agreed that Poverty Reduction Strategy Papers (PRSPs) written by developing countries, in consultation with their civil society, will become the basis of future lending by the IFIs under the enhanced Heavily Indebted Poor Country ("HIPC") initiative. See generally Int'l Monetary Fund, *POVERTY REDUCTION STRATEGY PAPERS: A FACTSHEET*, (Sept. 2005), available at <http://www.imf.org/external/np/exr/facts/prsp.htm> (itemizing the major purpose and principles of PRSPs).

ways in which countries can empower their populations to make decisions about their economic well being, the discourse reduces democracy to participation in sharing the burdens. The idea of the "social" is reinvented to deal with the harmful effect of the adjustment.<sup>215</sup> Thus, the idea of the social emerges again to "manage" the masses rather than empower them to control their own destinies. This is because the discourse constructs the adjustment as necessary, and reduces the role of democracy to participation of how to share the burdens. However, the welfare aspects of the "adjustment" introduce a second layer of adjustment—social programs designed precisely "to alleviate some of the negative consequences of the aid itself."<sup>216</sup> Thus, instead of democracy and genuine participation becoming the effective determinants of social and economic goals, the discourse has two elements that both enable participation and disable its full effectiveness. On the one hand, it has the "egalitarian socialism" that fosters the idea of social programs to alleviate the harmful costs of adjustment.<sup>217</sup> On the other hand, it has the distributional conservatism aspects that define the adjustment itself and constructs its policy imperatives as inevitable. Hence, while the World Bank continues to support the idea of adjustment coupled with growth, it has also initiated compensatory programs such as the social dimensions of adjustment program.<sup>218</sup> The purpose of this program is to: "[C]ompensat[e] individuals displaced by reforms and temporarily meeting the basic needs of [groups

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<sup>215</sup> By "social," I am referring to the political or legal consciousness that emphasizes the importance of "interdependence" in social and economic life. This is as opposed to an "individualist" consciousness that insists only on individual autonomy. The former consciousness (the "social") would conceive of the need for governmental regulation in more ways than the latter. The consciousness of the "social" was at the core of the developing countries' heterodox economic policies during the 1960s and 1970s. The opposite "individualist" consciousness (with its concomitant belief in market solutions) is at the core of the neo-liberal development model epitomized by SAPs. The interesting point here is that after justifying SAPs using the "individualist" mantra, the World Bank sought to lull their adverse effects by appealing to the "social"—not to reform the reform agenda but to mitigate its impacts. On the "social" and the "individualist" consciousness and their impact on legal and economic reform programs, see generally, Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 HASTINGS L.J. 1031 (2004).

<sup>216</sup> KATARINA TOMAVESKI, DEVELOPMENT AID AND HUMAN RIGHTS 201 (1989).

<sup>217</sup> See *id.* (explaining the growing focus on eliminating the poverty associated with the adjustment programs).

<sup>218</sup> *Id.* at 35.

excluded from growth], safety nets [address] humanitarian concerns [and temper] the immediate political costs to governments implementing radical . . . reforms."<sup>219</sup>

In this regard, the idea of social programs could be to shield the poor from the full impact of the cost of adjustment.<sup>220</sup> This objective of shielding the poor from the full impacts of economic policies without reforming the economic policies which are responsible for their poverty parallels the invention of the "social" in nineteenth-century England.<sup>221</sup> Both the "poor laws" in nineteenth-century England and the "social dimensions of adjustment program" in twenty-first-century developing countries aim at "managing" the poor in a way that they do not disrupt the system of allocating resources in the society.<sup>222</sup> The poor can participate only in sharing the burdens of the system; they cannot choose an alternative system.

### 8.2. *The Regulation of Bank Interest Rates in Kenya*

By the end of the 1990s, Kenya had initiated rapid liberalization in its financial sector as one of the conditions for concessionary lending by the IFIs.<sup>223</sup> One result of the rapid liberalization of interest rates coupled with rising public debt (especially domestic debt) was that savings deposit rates decreased dramatically while borrowing interest rates increased exponentially.<sup>224</sup> By June of 2000, the nominal average savings deposit rate was 4.8%.<sup>225</sup> The nominal lending rate was 21.7%, resulting in a whopping interest

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<sup>219</sup> JAYARAJAH, ET AL., *supra* note 210.

<sup>220</sup> *Id.* at 3.

<sup>221</sup> See KARL POLANYI, *THE GREAT TRANSFORMATION* 280 (1971) (arguing that the "Poor Laws" in England, while framed as charities for the poor, were, in fact, a systematic aid-in-wages aimed at depressing the wages of the working poor under the subsistence level; for example, that the administration of the "Poor Laws" was coupled with a special anti-trade union law and elaborate subsidies for the industrialists); see also, Arturo Escobar, *Planning*, in *THE DEVELOPMENT DICTIONARY*, 132, 132 (Wolfgang Sachs ed., 1992) (describing how societal planning was a means by which the upper classes subjugated the poor in nineteenth-century Europe and how planning retards Third World development).

<sup>222</sup> See POLANYI, *supra* note 221, at 280; see also Escobar, *supra* note 237, at 133.

<sup>223</sup> Mbui Wagacha, *Interest Rates Under a Treasury Bill Regime: Macroeconomic and Financial Implications for Kenya* 1 (Inst. of Pol'y Analysis & Research, Discussion Paper No. 029/2001, Aug. 2001) [hereinafter Wagacha, *Interest Rates*].

<sup>224</sup> *Id.*

<sup>225</sup> Mbui Wagacha, *A Primer on the Interest Rate Question in Kenya*, 5 IPAR POL'Y Q., Nov. 2000, at 1, available at <http://www.ipar.or.ke/pg5.zip> [hereinafter Wagacha, *Primer*].

rate spread of 16.9%.<sup>226</sup> This widening interest rate spread depressed both savings and investments by creating disincentives for economic actors to save while increasing the price of accessing investments through bank borrowing.<sup>227</sup> This, in turn, triggered second-order problems in the economy. As Dr. Wagacha of the Kenya Institute of Policy Analysis and Research noted:

The ensuing fiscal pressure and lack of banking competition have spawned a high interest rate spread that depresses both saving and investment, while economic activity in both the productive and financial sector is reduced. Coupled with the burden of servicing past debts, enterprises have seen their debt/equity ratios rise and their net worth fall. In the banking sector, mounting non-performing assets have similarly slashed banks' net worth, raising problems of insolvency for enterprises on the margin.<sup>228</sup>

One of the major causes of the crisis was the government's policy of borrowing through high-interest Treasury Bills.<sup>229</sup> The trend of borrowing from local banks using Treasury Bills with high interest rates gave these banks an incentive to lend to the government while distorting their perception of the risks associated with lending to individuals and firms.<sup>230</sup> This trend was exacerbated by inefficiency and lack of competition in the banking sector.<sup>231</sup> As a result, interest rates soared, making credit for productive investments unaffordable to local firms.<sup>232</sup>

Understanding the issue as one of market failure, Parliament responded by enacting the Central Bank of Kenya (Amendment) Act of 2000 (popularly known as the Donde Act).<sup>233</sup> The Donde

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<sup>226</sup> *Id.*

<sup>227</sup> *Id.* For the sake of comparison, the interest rate spread in neighboring Tanzania and Uganda at the time was about 10%. The spread was about 6% in South Africa. The average spread in developed economies was 1.5%. *Id.*

<sup>228</sup> Wagacha, *Interest Rates*, *supra* note 223, at 1.

<sup>229</sup> Wagacha, *Primer*, *supra* note 225, at 4.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 5.

<sup>233</sup> The Central Bank of Kenya (Amendment) Act of 2000, No. 4 (2001), KENYA GAZETTE SUPPLEMENT No. 62, § 2. The Act was proposed and sponsored by Hon. Joe Donde, the former Member of Parliament for the Gem Constituency. *Id.*

Act proposed to deal with the market distortions in four specific ways:

- First, the Act set a maximum lending rate for commercial banks and other financial institutions at four percentage points above the ninety-one day Treasury Bill rate published by the Central Bank of Kenya;<sup>234</sup>
- Second, the Act introduced the *in duplum* rule, which provides that the interest on a loan stops running when the unpaid interest equals the outstanding capital or the principal sum borrowed;<sup>235</sup>
- Third, the Act set a minimum interest rate that commercial banks and other financial institutions may pay on deposits held in interest bearing accounts at seventy percent of the ninety-one day Treasury Bill rate;<sup>236</sup> and
- Fourth, the Act prohibited banks and financial institutions from levying charges other than statutory charges and interests on loans.<sup>237</sup>

This legislative response was heavily criticized. Politically, there were concerns that returning to interest rate regulation was a step in the wrong direction as it would only lead to more state intervention in the market.<sup>238</sup> Pragmatically, it was argued that the law would affect small savers by excluding them from formal banking since banks would respond to the law by raising the minimum amount of deposits required to earn interests on a savings account.<sup>239</sup> Economically, it was feared that the Donde Act would limit the flexibility of banks in dealing with economic

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<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> See Wagacha, *Interest Rates*, *supra* note 223, at 6 (discussing a specific concern that if the Kenyan government continues to dominate the market by borrowing, interest rates will become a function of changes in government debt).

<sup>239</sup> *Id.* at 7.

shocks.<sup>240</sup> All these are valid and justified concerns. However, in a liberal democracy, these concerns should be addressed to and resolved by the legislative branch as they involve issues of resource allocation and political ideology.<sup>241</sup> Supporters of the Donde Act in Parliament responded to these concerns by arguing that they were responding to empirical evidence of a pervasive market failure in the interest rates market which required governmental intervention. They argued that the benefits of making credit accessible to the average economic actor in the country outweighed the costs of such intervention.<sup>242</sup> Opponents of the bill, notably the Kenya Bankers' Association ("KBA"), made the opposite arguments.<sup>243</sup> All in all, proponents of the law garnered sufficient support to enact the law. The ideological question of how much regulation was sufficient in the interest rate market was determined where such ideological issues should be decided—in the realm of politics.<sup>244</sup>

Needless to say, the KBA and the IFIs were unhappy with this return to regulation of interest rates in Kenya.<sup>245</sup> KBA responded with a suit to have the law declared invalid. In *Ruturi & Kenya Bankers' Association v. Minister for Finance*, the KBA argued, *inter alia*, that the new regulation "goes contrary to newly embraced economic policies of liberalization under which things must be governed by market forces, free of control by statute."<sup>246</sup> Rejecting these arguments, Justices Kuloba and Mbaluto of the High Court of Kenya sitting as a constitutional court ruled:

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<sup>240</sup> *Id.*

<sup>241</sup> See *supra* notes 195–199 and accompanying text.

<sup>242</sup> See, e.g., Ochieng Oloo, *Why Interest Rates Should be Regulated*, MARKET INTELLIGENCE, 2002, available at [http://www.mi.co.ke/business\\_and\\_finance/hot\\_topics/why\\_interest\\_rates.asp](http://www.mi.co.ke/business_and_finance/hot_topics/why_interest_rates.asp) (arguing that the provisions of the Donde Bill will not only succeed in making credit accessible to more Kenyans but also make the banking sector more efficient).

<sup>243</sup> See, e.g., *id.* (noting that the Kenya Bankers' Association contends that the Donde Act has hurt banks because the law is being applied retroactively).

<sup>244</sup> See *supra* text accompanying notes 195–96 .

<sup>245</sup> Oloo, *supra* note 242; see also Njeri Rugene & Onesmus Kilonzo, *Kenya MPs Rebel Against WB and IMF*, DAILY NATION, Apr. 28, 2002, available at <http://www.globalpolicy.org/soecon/bwi-wto/wbank/2002/0428mps.htm> (describing the tension between MPs and representatives of the IMF and World Bank over the Act).

<sup>246</sup> (2001) L.L.R. 1706 (HCK) (Kenya), available at <http://www.lawafrica.com/specials/donderuling.htm>.

There was also an argument [for the plaintiffs] that [the Donde Act] goes contrary to newly embraced economic policies of liberalization under which things must be governed by market forces, free of controls by statute. It was said that to introduce controls by law will put us in disharmony with other liberal economies with which we deal; and that the consequence will be that our economy will sink, if not collapse. . . . Attractive arguments as they are, we do not consider it appropriate for the court to comment on, or decide, them, because these are questions of policy. If the Government wishes to introduce controls . . . and a section of the Kenyan people or some interested group does not like such control measures being introduced, then it is a matter which goes beyond the realms of courts.<sup>247</sup>

Here, the High Court of Kenya correctly refused to adjudicate conflicting ideological questions whether the Donde Act is as market-oriented as the KBA wanted. As the U.S. Supreme Court had failed to find in 1908 in *Lochner v. New York*,<sup>248</sup> the High Court of Kenya recognized that it was not within the court's province to adjudicate on the "constitutionality of an economic theory."<sup>249</sup> Like Justice Holmes in his dissenting opinion in *Lochner*, the two justices from the High Court of Kenya recognized that a "constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez-faire*."<sup>250</sup> Instead, the two justices avoided "*Lochner's* error" and deferred to the legislature regarding the wisdom (or lack thereof) of regulating interest rates.<sup>251</sup> The High Court of Kenya refused to review the "reasonability" of a legislative enactment.<sup>252</sup>

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<sup>247</sup> *Id.*

<sup>248</sup> 198 U.S. 45 (1905).

<sup>249</sup> *Ruturi & Kenya Bankers' Association v. Minister for Finance*, (2001) L.L.R. 1706 (HCK) (Kenya), available at <http://www.lawafrica.com/specials/donderuling.htm>.

<sup>250</sup> *Lochner*, 198 U.S. at 75.

<sup>251</sup> See generally David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX L. REV. 1, 2-3 (2003). ("Avoiding *Lochner's* mistake is the 'central obsession' of modern constitutional law. Supreme Court Justices are at pains to deny that their opinions declaring laws unconstitutional are *Lochnerian*, while dissenting Justices use *Lochner* as an epithet to criticize their colleagues.")

<sup>252</sup> *Ruturi & Kenya Bankers' Association v. Minister for Finance*, (2001) L.L.R.

The court stated:

A statute reversing a given economic policy, or introducing a new commercial or economic regime may have political repercussions for the political party in power, but it does not of itself thereby become an unconstitutional statute. Such a statute may influence the voting at a national election time, but it remains a valid statute within the constitution of Kenya. Some people want a State controlled economy; others do not want any form of control, and desire a free enterprise. That is for economic policy makers. The court cannot go into this arena. No constitutional provision is violated.<sup>253</sup>

This is a position that would find favor in U.S. constitutional jurisprudence. After the U.S. Supreme Court briefly toyed with the idea of substantive due process in which judges routinely struck down New Deal legislation, the U.S. Supreme Court backed away from "Lochnerism."<sup>254</sup> However, despite the widespread acceptance of anti-Lochnerian constitutional principles in modern U.S. constitutional jurisprudence, the High Court of Kenya's decision in the *Ruturi* case was not greeted with a chorus of approval. Instead, it was assailed as a reversal of market-friendly economic policies. The World Bank threatened to withhold concessionary lending unless the Donde Act was declared unconstitutional or otherwise reversed by parliament.<sup>255</sup> As a result of this pressure on the government, the government sponsored and a chastened parliament passed a new amendment in 2004 repealing the sections of the 2000 amendment that introduced regulation.<sup>256</sup>

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1706 (HCK) (Kenya), available at <http://www.lawafrica.com/specials/donderuling.htm>.

<sup>253</sup> *Id.*

<sup>254</sup> However, there is controversy over what exactly the Supreme Court backed away from—or differently put, what exactly *Lochner's* error was. See, e.g., Bernstein, *supra* note 251, at 3–8 (noting the evolving view of *Lochner's* error).

<sup>255</sup> See, e.g., Rugene & Kilonzo, *supra* note 245; Muna Wahome, *IMF Ups Pressure Against Donde Act*, DAILY NATION, Apr. 22, 2002. The World Bank Representative to Kenya expressed concern at the High Court decision, and hoped that the Kenya parliament would reverse the law.

<sup>256</sup> Central Bank of Kenya (Amendment) Act of 2004, No. 8 (2004) KENYA GAZETTE SUPPLEMENT. At §5 this Act amends the Central Bank Act by entirely

The argument here is not that the position of the IFIs on the regulation or deregulation of interest rates in Kenya was right or wrong as a policy matter. As was the debate during the *Lochner* era, the issue was one of the right to regulate. Who has the authority to decide on questions of allocation of power, resources, and authority in a society? Under liberal theory, such decisions are decided within the realm of politics where ideologies play out. The problem with the IFIs' position on the regulation of interest rates in Kenya is that they aimed to stunt these ideological debates in the political sphere by dismissing the possibility that the Kenyan parliament could rationally resolve to respond to market conditions in the banking sector by regulation. At the same time, by hoping that the High Court of Kenya would strike down the Donde Act, there was an implicit aspiration that the judiciary would act ideologically, as the *Lochner* court had done. In other words, the IFIs would have ideology play no part in the politics of legislation, but would not mind it playing a role in adjudication so long as it aids market-oriented policies. Therefore the rule of law should not be fully enabled when it unleashes anti-market discourses and legislation.

### 8.3. Privatization in Poland

A third, brief illustration of the rule of law in use is in its discourse to police neo-liberal economic reforms, as seen in Poland's experience with privatization. After a slow start with privatization of state-owned enterprises ("SOEs"), Poland has arguably become one of the more successful market economies in Eastern Europe.<sup>257</sup> One of the toughest hurdles the reform-minded Polish government faced in the early 1990s in its efforts to privatize SOEs was a strong organized labor movement.<sup>258</sup> Poland's

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deleting § 39. Section 39 of this Act was the new section inserted by the Central Bank of Kenya (Amendment) Act of 2000 that introduced regulation of interest rates. See *supra* notes 234-37.

<sup>257</sup> See, e.g., Gerald A. McDermott, *The Politics of Institutional Learning and Creation: Bank Crises and Supervision in East Central Europe*, (William Davidson Institute, Working Paper No. 726, 2004), available at <http://www.bus.umich.edu/KresgeLibrary/Collections/Workingpapers/wdi/wp726.pdf> (arguing that the Polish approach to bank sector reforms led to "one of the most cost-effective bad debt resolutions, a stable banking sector with increased lending, and a strong supervisory authority" among the three leading postcommunist democracies).

<sup>258</sup> *Id.* at 11-12; see also Witold Gadmoski, *Poland: A Confused Public, A Divided Parliament*, ECON. REFORM TODAY, Summer 1993, available at

transition from a centrally planned economy to a market democracy allowed the labor movement to exercise its considerable political influence to sponsor a privatization law requiring consent of SOE workers before they were privatized.<sup>259</sup> The 1990 law established employee committees which had the power to veto ownership changes in SOEs.<sup>260</sup> Witold Gadmoski, a Polish member of Parliament, explained the effect of the 1990 law on privatization as follows:

The Privatization Law of 1990 requires the consent of employee committees before a state-owned enterprise can be converted to private ownership. Furthermore, the committees are entitled to decide which type of privatization they want the firm to undergo, and in what legal business form it will exist. When privatization began, employee committees demanded that certain conditions be satisfied prior to privatizing their enterprises. For example, in September 1992, the Italian auto maker Fiat made plans to take over the Polish auto company FSM. The workers, however, went on a lengthy strike, demanding salaries equal to those received by Fiat's employees in Italy. These protests postponed the privatization of FSM by a few months, with the delay resulting from the privileges granted by the privatization bill.<sup>261</sup>

In 1992, with the encouragement and technical assistance of the World Bank, the government of Poland developed a comprehensive Enterprise and Bank Restructuring and Privatization Program ("EBRP").<sup>262</sup> EBRP's objective was to restructure and privatize Poland's state-owned banks and financial institutions.<sup>263</sup> However, EBRP faced a veritable hurdle. As

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<http://www.cipe.org/publications/fs/ert/e08/7poland.htm> (discussing the unique and dominant role that workers' councils play in Polish politics, and the manner in which their strength was underestimated by the Polish government in regard to privatization efforts in the early 1990s).

<sup>259</sup> The Law on Privatization of the State-Owned Enterprises Act of July 12, 1990 (hereinafter the "1990 Law on Privatization"). An unofficial translation of the law is available at 29 I.L.M. 1226 (1990).

<sup>260</sup> McDermott, *supra* note 257, at 128; Gadmoski, *supra* note 258.

<sup>261</sup> Gadmoski, *supra* note 258.

<sup>262</sup> ALICE AMSDEN ET AL., *THE MARKET MEETS ITS MATCH* 114 (1998).

<sup>263</sup> See McDermott, *supra* note 257, at 8-9 (discussing Poland's plan to

pointed out above, the 1990 Privatization Law stipulated that the employees of SOEs had to approve privatization through employees' councils.<sup>264</sup>

To circumvent this legislative stipulation, the EBRP devised an "innovative" procedure.<sup>265</sup> The government of Poland describes this "innovation" as follows:

To facilitate privatization as an outcome of enterprise restructuring, the EBRP gives creditors (state-owned banks and others) holding at least 30% of a public enterprise's debt the right to convert their claims into shares. In the case of SOEs, this conversion will automatically trigger a transformation into a joint-stock company. This provision constitutes nothing less than a breakthrough in the Polish Government's privatization policy since, for the first time, it makes privatization of an enterprise possible without the legal consent of its workers.<sup>266</sup>

Thus, to circumvent the requirement that employee councils consent to privatization of SOEs, the government of Poland and the World Bank devised this "innovative" creditor-led restructuring whereby an agreement reached among certain creditors of an SOE trumped the legislatively-required consent of the workers.<sup>267</sup> The

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purposely tie "bank restructuring and recapitalization to firm restructuring to solve the stock and flow problems together through legislative enactments such as the EBRP").

<sup>264</sup> Article 5 of the 1990 Law on Privatization provides:

The Minister of Ownership Transformation may transform a state-owned enterprise into a corporation:

- (1) upon the joint request of the executive director of the state-owned enterprise and the employees council filed after receiving an opinion from the general assembly of employees (delegates) and an opinion of the founding body of the enterprise; or
- (2) request of the founding body filed with the consent of the director of the enterprise and employees council and after receiving an opinion from the general assembly of employees (delegates).

29 I.L.M. 1226, 1231.

<sup>265</sup> AMSDEN ET AL., *supra* note 262, at 114.

<sup>266</sup> *Id.* (quoting GOVERNMENT OF POLAND, SUMMARY OF ENTERPRISE AND FINANCIAL SECTOR ADJUSTMENT PROJECT (1993)).

<sup>267</sup> WORLD BANK, FROM PLAN TO MARKET, *supra* note 3, at 46 (1996).

logic here is ironic. It suggests that it is perfectly legitimate for the government to use undemocratic means if only it aims at establishing the "market." *The Market Meets Its Match* captures this remarkably: "[t]he irony seemingly went unnoticed that in countries committed to eradicating their communist past, undemocratic means were now used to achieve capitalist ends."<sup>268</sup>

The irony of the government using "innovative" means to subvert democratic governance is remarkable for two reasons. First, democratic governance is clearly stipulated as one of the causes and consequences of efficient market societies that produce high growth rates.<sup>269</sup> IDAs, therefore, articulate democratic governance as one of the objectives in market-oriented legal reforms.<sup>270</sup> Indeed, in the 1990s, the link between democratic governance and economic performance has been made explicit. Second, such an "innovation" really means that the government must devise and use laws for its substantive purposes. As I already discussed above, this goes against the very grain of the dominant liberal "civil association" view of the state that formally denies any substantive function for the state.<sup>271</sup> This is as opposed to the "enterprise association" view of the state that concedes the necessity (or at least inevitability) of the state having a substantive purpose in the economic functioning of the society.<sup>272</sup> What emerges here is another flip in justification and reasoning in World Bank practice. The World Bank's view of Poland's privatization seems like a clear admission that the state should, at least at times play the role of "legislator of substance."<sup>273</sup> It then appears that the difference between the two views of the state (the state as "civil association" or "enterprise association") is not disagreement over the substantive propriety of the state's role in undertaking some functions—"legislating substance." Rather, the disagreement is

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<sup>268</sup> AMSDEN ET AL., *supra* note 262, at 114.

<sup>269</sup> See, e.g., Int'l Monetary Fund, *Exchange Arrangements and Surveillance: The Role of the Fund in Governance Issues-Guidance Note*, IMF Document EBS/97/125, July 2, 1997, available at <http://www.imf.org/external/pubs/ft/sd/index.asp?decision=EBS/97/125> (discussing the "strong consensus among Directors on the importance of good governance for economic efficiency and growth"); WORLD BANK, *GOVERNANCE AND DEVELOPMENT* (1992).

<sup>270</sup> International Monetary Fund, *supra* note 269.

<sup>271</sup> See *supra* note 8 and accompanying text.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

really about the specific function for which the state is legislating—and not the procedural or substantive impropriety of the action itself. Both views do, at different times, propose that the government legislates for its own substantive functions. And both views do, at different times, deny that the state can or should do that.

9. THE LINK BETWEEN THE “THICK CONCEPTION” OF RULE OF LAW, DEMOCRACY, AND THE “WASHINGTON CONSENSUS”

One does not have to accept Duncan Kennedy’s critique of rule of law and adjudication to accept the critiques I have made about how IDAs structure their reform packages.<sup>274</sup> Even if one accepted that it is okay for the institution of rule of law to have “absolute value” content, one does not necessarily accept that the content with which the rule of law should be imbued is the same one in all countries. In other words, IDAs would have to *persuade* that the “absolute value” content they attach to the institution of the rule of law is the “right” one for the particular society for which they are prescribing reform. This would, in part, require that IDAs open up the realm of politics for ideological debate and presentation of conflicting interests.

If this should happen, two things will become clear. First, IDAs would have to replace the merely “procedural” prescription of democracy with a “substantial” conception. Second, IDAs would lose, in the process, their ability to shape the discourse by use of legal categories. If democracy can no longer be defined in terms of its structural correlates such as “rule of law” or “accountability,” then a whole range of choices become available. Countries would be free to debate and choose the different aspects of reform. And the different competing groups and citizens of the countries would be at will to pick and choose the best way to structure their economies. However, this would run afoul of the economic conditionality of the IFIs.<sup>275</sup>

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<sup>274</sup> See *supra* notes 114–17 and accompanying text.

<sup>275</sup> On its website, the IMF defines conditionality as follows:

Economic policies that members intend to follow as a condition for the use of IMF resources. These are often expressed as performance criteria (for example, monetary and budgetary targets) or benchmarks, and are intended to ensure that the use of IMF credit is temporary and consistent with the adjustment program designed to correct a member’s external payments imbalance.

Quite bluntly, a conditionality is a purchase of policy change by the IFIs.<sup>276</sup> The consideration for the purchase is “external financing, whether debt rescheduling or relief, multilateral credits, bilateral loans, or grants.”<sup>277</sup> To drive this point home sufficiently, I need to quote *in extenso* from Barbara Stallings:

One [of the international factors accounting for the policy changes] was greater use of leverage. While the IMF increased its role in coordinating debt service policies and promoting stabilization in the 1980s . . . . [T]he World Bank was brought into the center of activity in Third World economic policy. Baker’s plan emphasized structural adjustment, and the World Bank became the lead organization for such activities through increased concentration of SALs [Structural Adjustment Loans] and SECALs [Sectoral Adjustment Loans]. The quid pro quo for these large loans was economywide or sectoral adjustment programs.<sup>278</sup>

And what does leverage exactly mean? “These range from relatively simple demand management policies for an IMF standby through extensive structural reforms for a World Bank structural adjustment loan.”<sup>279</sup>

If we consider this definition and historical explanation of the genesis of the economic reforms that the World Bank prescribes, it is clear why a “substantial” notion of democracy would destabilize the World Bank’s preferred reform path. Such a notion would entail the possibility of choosing *ideological* as well as the structural aspects of the reforms. This would then clash head on with the *ideological* underpinnings of the structural reforms themselves. As Barbara Stallings writes:

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external/np/exr/glossary/showTerm.asp?term\_id=19 (last visited on Oct. 22, 2005).

<sup>276</sup> See Miles Kahler, *External Influence, Conditionality, and the Politics of Adjustment*, in *THE POLITICS OF ECONOMIC ADJUSTMENT* 89, 89 (Stephan Haggard & Robert R. Kaufman eds., 1992) (exploring conditionalities as tools to influence economic policy choice).

<sup>277</sup> *Id.*

<sup>278</sup> Barbara Stallings, *International Influence on Economic Policy: Debt, Stabilization, and Structural Reform*, in *THE POLITICS OF ECONOMIC ADJUSTMENT*, *supra* note 276, at 41, 83.

<sup>279</sup> *Id.* at 55.

The loans were the embodiment of the new ideological consensus that had been building for some time among economists and governments in the industrial countries, together with the international finance institutions. That consensus stressed the value of liberalization and privatization; the loans were a mechanism for bringing them about.<sup>280</sup>

The consensus Barbara Stallings is referring to here is now popularly known as the "Washington consensus."<sup>281</sup> The inventor of the term, John Williamson, argued that the set of policy reforms which most of official Washington thought would be good for economic reform in developing countries could be summarized in ten propositions:

- Fiscal discipline
- A redirection of public expenditure priorities toward fields offering both high economic returns and the potential to improve income distribution, such as primary health care, primary education, and infrastructure
- Tax reform (to lower marginal rates and broaden the tax base)
- Interest rate liberalization
- A competitive exchange rate
- Trade liberalization
- Liberalization of inflows of foreign direct investment
- Privatization

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<sup>280</sup> *Id.* at 83.

<sup>281</sup> See John Williamson, *What Washington Means by Policy Reform*, in *LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED?* 5, 7 (John Williamson ed., 1990) (discussing what would be regarded in Washington as a desirable set of economic policy reforms).

- Deregulation (to abolish barriers to entry and exit)
- Secure property rights.<sup>282</sup>

At the World Bank, this ideological consensus coincided with another development that few people point to in the literature. Devesh Kapur, however, captures it succinctly:

Autonomy has been the desire of every World Bank President, and, for the most part, the degree of freedom that the management has sought has been freedom from control by the United States, both from the executive branch personified by the U.S. Treasury, and, in particular, from micromanagement by the U.S. Congress. . . . But diminished autonomy, albeit resisted, was the trend from 1981.<sup>283</sup>

I will end by making four points about this consensus by way of linking it with a “thick concept” conception of the rule of law. All of the four points indicate that the nature of “market-oriented” reforms in which the rule of law is expected to be one of the

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<sup>282</sup> John Williamson, *What Should the World Bank Think About the Washington Consensus?*, in 15 THE WORLD BANK RESEARCH OBSERVER 251, 252-3 (2000). Arguably, the World Bank has moved from this “fundamentalist” prescription as evidenced by several publications in the post-1999 period, including several written by Joseph Stiglitz, who was Senior Vice-President and Chief Economist at the World Bank. However, despite views of critics like Stiglitz, the World Bank continues to operate as though these critiques do not apply. The view seems to be, as Williamson says, that such views that criticize the market solution can only be entertained at the next level: after the government has ostensibly established the market “from above.” See, e.g., Joseph Stiglitz, *Thanks For Nothing*, THE ATLANTIC MONTHLY, Oct. 2001 (offering a case study to illustrate how the conduct of international economic organizations can steer globalization and arguing that the two troubling aspects of the IMF’s characteristic behavior include secrecy and governance); Joseph Stiglitz, *Whither Reform? Ten Years of the Transition*, Keynote Address at the World Bank Annual Bank Conference on Development Economics (Apr. 28-30, 1999) (arguing that the failures of reforms by certain countries in transition are due to a misunderstanding of the foundations of a market economy and of the basics of an institutional reform process); Joseph Stiglitz, *More Instruments and Broader Goals: Moving Toward the Post-Washington Consensus*, in WIDER ANNUAL LECTURES 2, Jan. 1998, available at <http://www.globalpolicy.org/soecon/bwi-wto/stig.htm> (discussing the emergence of what the author calls the “Post-Washington Consensus”).

<sup>283</sup> DEVESH KAPUR ET AL., THE WORLD BANK: ITS FIRST HALF CENTURY: VOLUME 1, HISTORY 5 (1997).

procedural institutions, is a pre-determined form of politics. The concepts of rule of law and democracy are then required only to superintend the imposition of the "decided politics" in the exact form pre-determined elsewhere, by the international development agencies.<sup>284</sup> Since, the "universalizing" of these very particular political choices is really "the natural and largely unconscious outgrowth of lives lived in particular social positions within a competitive social system," I will, in this section, refer to these choices as "ideological."<sup>285</sup>

First, we should not lose sight of the fact that this "consensus" in international development circles:

coincided neatly with the rising tide of opposition to "big government" in the United States and the United Kingdom. The convergence reinforced technical reassessment with ideological commitment, at least in U.S. official circles. Neoorthodox [Neo-liberal] assumptions wholly dominated the reactions of the Bretton Woods institutions and of the United States, Germany, and Japan. Linked to balance of payments support through the new emphasis on policy-based lending and backed by formal or informal cross-conditionality among creditors and donors, neoorthodox prescriptions were urged on governments in all regions and

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<sup>284</sup> See *supra* Section 6.

<sup>285</sup> I use "ideological" here in a value-free sense and not as the false consciousness associated with Marxian conceptions of ideology. Thus, I adopt Althusser's definition of ideology, which refuses to see ideology simply as the product of a conspiratorial power group. Rather, for Althusser, ideology is omnipresent; it inheres in every representation of reality and every social practice, and all of these qualities inevitably confirm or naturalize a particular construction of reality. See Louis Althusser, *Ideology and Ideological State Apparatuses*, in *CRITICAL THEORY SINCE 1965* at 239, 239 (Hazard Adams & Leroy Searle eds., 1986) (discussing the concept of ideology and analyzing ideological state apparatuses). The definition that best captures the value-free sense I want to convey is Leslie Paul Thiele's: "Ideology is the natural and largely unconscious outgrowth of lives lived in particular social positions within a competitive social system." Leslie Thiele, *THINKING POLITICS: PERSPECTIVES IN ANCIENT, MODERN, AND POSTMODERN POLITICAL THEORY* 220-21 (1997). This means that, based on a group's social position, that group makes judgments about the relative place or worth of other individuals and groups. These judgments then construct belief and value systems used to advocate for and/or establish particular power structures corresponding with these views. At the same time, group members propound beliefs that justify both the judgments and the particular power structures established or proposed to be established. If the group dominates, it creates practices that reinforce and perpetuate the original judgment and power arrangements.

in varied situations.<sup>286</sup>

Given this coincidence, it is rather disingenuous to maintain the argument that the World Bank policies are not “ideological” in the sense of favoring and legitimating a particular form of societal organization that rewards different economic actors.

This brings us to my second point. While, as I have pointed out above, the real debate is not whether the market can “handle everything,” the World Bank and its protagonists on the one hand, and its critics on the other, have elected to clash over a more sterile debate. The debate on whether the World Bank tends to be ideological is cast in the terms of whether or not the World Bank adheres to the dogmatic belief that “markets can handle everything.”<sup>287</sup> This debate, at best, replays the unending debate that asks whether market failure is preferable to government failure.<sup>288</sup> It is in response to this shadow debate that John Williamson forcefully states in favor of his invention, the “Washington consensus”:

Specifically, there is a real danger that many of the economic reforms favored by international development institutions—notably macroeconomic discipline, trade openness, and market-friendly microeconomic policies—will be discredited in the eyes of many observers, simply because these institutions are inevitably implicated in views that command a consensus in Washington and the term “Washington Consensus” has come to be used to describe an extreme and dogmatic commitment to the belief that markets can handle everything.<sup>289</sup>

However, the ideology that the World Bank purveys is not a dogmatic faith that the “market can handle everything.”<sup>290</sup> Indeed,

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<sup>286</sup> Joan M. Nelson, *Introduction: The Politics of Economic Adjustment in Developing Nations*, in *ECONOMIC CRISIS AND POLICY CHOICE: THE POLITICS OF ADJUSTMENT IN THE THIRD WORLD* 3, 11 (Joan M. Nelson ed., 1990).

<sup>287</sup> Williamson, *supra* note 282, at 252.

<sup>288</sup> See *supra* notes 40–47 and accompanying text.

<sup>289</sup> Williamson, *supra* note 282, at 252.

<sup>290</sup> This caricatured debate is most likely a response to radical criticism of the “market ideology” by the likes of critics including Robert Kuttner. See ROBERT KUTTNER, *EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF MARKETS* 3, 10 (1996)

if this were the ideology, it would be easier to debunk the World Bank's ideology! However, the ideology is in the fact that while the World Bank does believe that the market *cannot* handle everything, it does *decide*, politically, what the market can and should handle. Moreover, the World Bank also does *decide* what the market is. In other words, the defense like that of Williamson above leaves the most interesting questions unanswered.

The World Bank has been able to shape the development discourse by delimiting and redefining the state and the market, private and public.<sup>291</sup> It then uses this posited distinction as the axis for determining what interventions are allowable, which are economically efficient, and which are not. It is in drawing these distinctions that the World Bank acts ideologically – and not in its belief or lack of a belief that the markets can handle everything. This explains the convergence between good governance and economic efficiency on the one hand and democracy and human rights on the other.<sup>292</sup> A further illustration can be made by exposing the fact that the World Bank has not actually weakened the government in its policy proposals, but strengthened it.<sup>293</sup>

For now, let me state the third point: the ten propositions that Williamson himself puts up as the core “Washington consensus” can themselves be ideological, notwithstanding the fact that everybody – left or right, socialist or capitalist, reformer or conservative – might agree that they comprise “core” reform principles.<sup>294</sup> This is so for three reasons. First, the different aspects of the package can be understood and interpreted in markedly different ways. Just as we have argued above respecting the institution of rule of law, each of these policy formulations can be shown to be capable of widely differing interpretations. The different interpretations are not right or wrong – they are just

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(arguing that “good society requires a mixed economy . . . using such principles as regulated competition and freer trade”).

<sup>291</sup> See *supra* notes 48–53 and accompanying text.

<sup>292</sup> See generally James Gathii, *supra* note 12, at 972 (noting that the “good governance” discourse which undergirds Rule of Law projects is based on “the promise and hope that markets under the good governance regime are an antidote to the restrictions of state involvement in the economy that characterized modernizing nationalism”).

<sup>293</sup> See generally Nicholas Hildyard, *supra* note 76 (arguing that the 1997 World Development Report of the World Bank “represents less a change of direction than a repackaging and updating of neo-liberalism in the face of a popular backlash against the policies promoted by the Bank”).

<sup>294</sup> Williamson, *supra* note 82, at 252.

different.<sup>295</sup> As such, there is indeterminacy as to the interpretation to be given to the different aspects of the package.<sup>296</sup> Hence, whenever the World Bank or its protagonists claim that they have identified the “core” elements of economic orthodoxy and then proceed to explain the meaning of the concepts, what they are doing in truth is assigning a preferred meaning to the concepts. When they claim that the meanings are “universal” (the word economists prefer is “convergence”) or “scientific,” it is because that particular meaning is driven by a particular motive. However, due to this motive, the indeterminacy of the concept and meaning is denied. The “core” aspects can therefore be understood to be ideological in the sense that they are susceptible to interpretive manipulation. The definitions that the World Bank and its protagonists assign to them appear “natural,” “scientific,” or “universal” because they involve previously built-in definitions about the issues that they deal with. By claiming that the meanings are universal rather than particular choices (that may well be justified on the facts and according to the lived realities of those who advocate them), the World Bank would have provoked the admonition by Karl Mannheim:

What is needed, therefore, is a continual readiness to recognize that every point of view is particular to a certain definite situation, and to find out through analysis of what this particularity consists. A clear and explicit avowal of the implicit metaphysical presuppositions which underlie and make possible empirical knowledge will do more for the clarification and advancement of research than a verbal denial of the existence of these presuppositions

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<sup>295</sup> As I have shown elsewhere, even a category that seems as “technical” as “land registration” can be capable of widely varying interpretations. See Joel Ngugi, *Re-examining the Role of Private Property in Market Democracies: Problematic Ideological Issues Raised by Land Registration*, 25 MICH. J. INT’L L. 467 (2004) (analyzing land registration in Kenya to challenge some of the “rigid assumptions of the resurgent neo-liberal orthodoxy”).

<sup>296</sup> Conceived this way, this core can simply be seen as formal categories. Like all formal categories, these concepts do not have any natural meaning. They have to be given meaning through an interpretive process. See MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 12-13 (1987) (“[E]very post-Realist law student ought to know that when the town council declares that there shall be no vehicles in the park, it becomes no easier to tell whether it meant to bar wheelchairs, bikes, or a statue of a general in his jeep if we simply think harder about what the word *vehicle* means”).

accompanied by their surreptitious admission through the back door.<sup>297</sup>

Three hinges hold up the back door through which the World Bank and its protagonists have surreptitiously admitted the specific interpretations that are construed as scientific or natural. The first hinge is made of the legal institutions that the World Bank uses. The Bank attributes to these legal institutions the quality of objectivity, which, as I have shown using the concept of rule of law, is often illusory.<sup>298</sup> The second hinge is "economistic." By this I mean using formal methods of portraying economic data and content with models and formulae, but without acknowledging the models' limitations or correctly acknowledging the exceptions. This hinge almost always turns on the question of allocative efficiency. The meaning adheres because it can rationally be proved mathematically. The third hinge is empirical: the argument that empirically it can be shown that particular meanings are correct. The ease with which it is possible for the World Bank and its proponents to use any of these three arguments to justify the meaning of one of the core aspects makes it the second way in which the ten core aspects can be ideological.

My point here is that it is possible to oscillate among the three hinges that the World Bank uses, to fluidly shift the justification for a prescribed reform from one to another. As a result, this oscillation gives the impression of a coherent whole that seems solid and unimpeachable, simply because it can alternate between the three available justifications. Hence, if one made a critique based on the usage of legal institutions, then the World Bank would style its response in terms of allocative efficiency. If one criticized the World Bank on allocative efficiency, then it would turn to empiricism. The empiricism justification is particularly hard to critique. This is because, every time one critiques the essentialism or reifications implicit in the models that are self-reproducing, one receives the likely response that the model reduces the complexities for the sake of making useful abstractions that are necessary for constructing models which can then be tested empirically. Hence, if one proved in one specific case that

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<sup>297</sup> KARL MANNHEIM, *IDEOLOGY AND UTOPIA* 80 (Louis Wirth & Edward Shils trans., 1936).

<sup>298</sup> See *supra* Sections 6 and 7 (considering the lack of objectivity in World Bank norms).

the model constructed and used does not fit and match the specific case under analysis, then one would encounter the response that that specific reality does not repudiate the model. So, the fact that the empiricism justification promotes the use of models tends to reify without recourse. This is because one cannot use the semantic mode, the critique of an incorporated ideology, to question the empirical mode. And even if one marshals empirical evidence to question it, then the argument shifts to the viability of the model in general and not just specific instances in which it can be disproved. Yet, the empirical mode, in making its claims and justifications, freely oscillates between both the legal institutionalism mode and the allocative efficiency mode as bases for its assumptions.

One example amply illustrates this practice of oscillating as a significant tool-in-trade for the World Bank. This is how the case of the East Asian miracle was handled at the Bank level in terms of explication and exegesis.<sup>299</sup> I discuss this here briefly.

The East Asia miracle economies were enabled by:

governments' activist policies to quicken the pace of industrialization and export an increasing proportion of industrial output. Outward-oriented development, in conjunction with exchange rate policy, was a means of achieving viable external balances and generating the demand needed to accelerate GDP growth, force producers to absorb technology, and strive after competitiveness. In their efforts to industrialize, East Asian governments made selective use of tariff protection and export incentives, ranging from moral suasion to subsidies and mild financial repression, so as to provide industry with financing at lower cost.<sup>300</sup>

Contrary to neo-liberalism's tenets, East Asia developed by

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<sup>299</sup> The "East Asian miracle" refers to the spectacular growth of the economies of East Asian countries between the mid-60s and mid-90s. During this period, the economies in Hong Kong, Indonesia, Japan, Korea, Malaysia, the Philippines, Singapore, Taiwan Province of China, and Thailand grew at variable rates between 4 and 8%. See, ROBERT WADE, *GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION* 34-51 (1990) (discussing economic growth in East Asia).

<sup>300</sup> Shahid Yusuf, *The East Asian Miracle at the Millennium*, in *RETHINKING THE EAST ASIAN MIRACLE* 1, 7 (Joseph E. Stiglitz & Shahid Yusuf eds., 2001).

"getting the prices wrong" and subsidizing industry for lengthy periods in an attempt to create viable exporters.<sup>301</sup> This was facilitated by a strategy that created a bureaucracy that was able to conceive and implement the designs of a strong state.<sup>302</sup> These bureaucrats were well paid; insulated to a significant degree from political pressures and empowered to take development initiatives aimed at maximizing the growth of output and employment.<sup>303</sup> As such, these states achieved remarkable economic success, despite the fact that their governments had substantial discretion, property and contract rights were often not specified clearly, and court enforcement of such rights was relatively infrequent.<sup>304</sup>

However, when the World Bank sought to document the lessons of the East Asian miracle, the bank failed to face up to the inadequacy of the "*laissez-faire* market economy is always optimal" paradigm.<sup>305</sup> Instead, contrary evidence on the strong states of East Asia was contained and diffused. Robert Wade has written that "[i]n November 1991 the top management of the Bank and some key Western executive directors opposed publication of a study . . .

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<sup>301</sup> See Alice H. Amsden, *Diffusion of Development: The Late-Industrializing Model and Greater East Asia*, 81 AM. ECON. REV. 282, 284 (1990) (discussing the use of subsidies to get prices wrong in order to stimulate investment and trade); ALICE AMSDEN, *ASIA'S NEXT GIANT: SOUTH KOREA AND LATE INDUSTRIALIZATION* (1989) (arguing the reasons behind South Korean growth and industrialization).

<sup>302</sup> This refers to a more centralized, developmental state as was supported by the conception of the market in the pre-1980 period. This conception of the "strong state" is opposed to the concept of the "minimalist state" championed by the World Bank. See *supra* notes 46-48 and accompanying text.

<sup>303</sup> See *supra* notes 46-48 and accompanying text.

<sup>304</sup> See Ohnesorge, *supra* note 35, at 91 (discussing the rule of law as a set of ideals for the administration of justice); see also Yash Ghai, *The Rule of Law and Capitalism: Reflections on the Basic Law, in HONG KONG, CHINA, AND 1997*, at 343, 343 (Raymond Wacks ed., 1993) (providing an earlier study in support of this view regarding Hong Kong). The Ghai article concerns the relationship between the basic law governing Hong Kong's status after unification with Chinese "Basic Law," the rule of law, and Hong Kong's market economy. *Id.* at 344-45. Ghai argues that despite widespread perception that capitalism requires the rule of law, and the fact that the legitimacy of the Basic Law in Hong Kong has been anchored in this belief, the legal system has not been particularly important to Hong Kong's economic development. *Id.* at 355-56. Rather, Hong Kong has fostered a kind of "Chinese capitalism" in which personal relationships and families are more important than formal legal rules. Ghai further argues that after reunification with China, the law will become even less important, which could undermine the legitimacy of the "Basic Law." *Id.* at 356.

<sup>305</sup> See WORLD BANK, *THE EAST ASIAN MIRACLE: ECONOMIC GROWTH AND PUBLIC POLICY* 23-26 (1993) [hereinafter WORLD BANK, EAST ASIAN MIRACLE] (discussing the lessons of the high performing Asian economies).

. on the grounds that it gave to strong an endorsement of government intervention . . . ."<sup>306</sup>

Thus, whereas the developmental states of East Asia, represented by the efficient state-led interventions in post-World War II Japan and post-1960 South Korea, could easily have provided fodder for an alternative to the *laissez-faire* (neo-liberal) model of market-led growth, the World Bank study ended up reinforcing the neo-liberal model. The Bank succeeded in doing this by downplaying the non-market-oriented aspects of the miracle so much that the dominant paradigm remained intact.<sup>307</sup> For example, and pressure from vested interests was such that the study ended up saying nothing of consequence; in other words, the dominant paradigm remained intact.<sup>308</sup>

- The bureaucrats with large discretionary powers to direct the economies are explained in the study, not as evidence of strong states but as means of co-ordinating the market.<sup>309</sup> The presence of bureaucrats with power to make choices that influenced the

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<sup>306</sup> Robert Wade, *Japan, the World Bank, and the Art of Paradigm Maintenance: The East Asian Miracle in Political Perspective*, 217 NEW LEFT REV. 3, 11 n.17 (1996).

<sup>307</sup> Robert Wade documented the process of preparation of the World Bank study in his article *Japan, the World Bank, and the Art of Paradigm Maintenance*. He wrote about the conflict between various intellectual actors within the Bank, notably Joseph Stiglitz and Lawrence Summers who sought a more open-minded view of the East Asian experience against the opposition of more close-minded officials within the Bank. Wade suggested that given the United States' investment in the current orthodoxy, the study would not have been allowed to be a source of a more thorough going critique of neo-liberalism. Wade wrote:

The story of *The East Asian Miracle* shows the determining importance of essentially American values and interests . . . . The influence comes partly through the Bank's dependence on world financial markets, and the self-reinforcing congruence between the values of the owners and managers of financial capital and those of the US state. It also comes through the Bank's staffing and professional norms . . . . [T]he Bank forms part of the external infrastructural power of the US state . . . .

*Id.* at 35-36.

<sup>308</sup> Robin Blackburn, the editor of the *New Left Review*, summarizes the lesson of Wade's narrative as another affirmation of "a classic instance of reality being tailored to fit dogma and vested interests." Robin Blackburn, *Themes*, 217 NEW LEFT REV. 1, 1 (1996). Wade himself states that: "like the Vatican, and for similar reasons, [the World Bank] cannot afford to admit fallibility." Wade, *supra* note 306, at 35.

<sup>309</sup> See WORLD BANK, EAST ASIAN MIRACLE, *supra* note 305, at 14 (discussing how economic technocrats tackled coordination problems and devised economic strategies).

allocation of resources "built a business friendly environment."<sup>310</sup> So the Study attached much importance to the interaction between administrators and business people through such means as deliberation councils, so as to forge national priorities, induce an exchange of market information, and promote networking as well as coordination, rather than the discretionary rules that allowed the administrators to direct the economy.<sup>311</sup>

- The activist policies of quickening the pace of industrialization, exporting an increasing proportion of industrial output, selectively using tariff protections, and exporting incentives ranging from suasion to subsidies and mild financial repression in order to provide industry with financing at lower costs were all downplayed by pointing out that they were used sparingly and with caution.<sup>312</sup>

The third way in which the core (of the set of policy reforms known as the "Washington Consensus") can be ideological is by its very own fit. When presented as a consensus or convergence, the implication, for the most part not unintended, is that the whole range of aspects or prescriptions is necessary for each economic reform package. That is, there is the implication that all the aspects of the convergence have to be implemented or else the reform process cannot be complete. This occurs because the World Bank conflates liberal universalism (political ideals) with the establishment of specific macroeconomic regimes (the first nine aspects in the list by John Williamson reproduced above).<sup>313</sup> It then forms a linkage between these policies and the microeconomic regimes of countries, hence forcing them to shift their microeconomic policies as well. Liberal democracy achieves this by implicitly establishing liberal democracy as the *telos* of history, and then positing a linkage between human rights and an economic system in which all these aspects are present.

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<sup>310</sup> *Id.*

<sup>311</sup> *See id.* at 14 (discussing how the deliberation councils supplemented the markets information transmission function).

<sup>312</sup> *See Wade, supra* note 306, at 22-26.

<sup>313</sup> *See supra* note 282 and accompanying text.

Once this point is made, a move is then made to link liberal democracy with specific macroeconomic theories which are in turn linked with very specific microeconomic policies. The program then becomes not just one for ensuring economic development but transferring specific institutional arrangements. Further, in this complex and clouded web in which certain arguments are derived from debatable premises but which are put off the table by the posturing of the discourse, one otherwise bright fact is clouded or lost. It is simply that different successful nations have practiced very different forms of liberal democracy, varying macroeconomic policies and wildly varying microeconomic policies. In this sense, the prescription of the whole range of aspects as wholesome and necessary is ideological. It gives the impression that the reform would be diluted, incomplete and likely to be unsuccessful if one chose only some aspects and only to some extent. In truth, however, even industrialized countries of the North that provide the model for the reform exercise practice different fits of the aspects of reform listed by Williamson.

Hence, when and if the World Bank publishes a list of the aspects, which a reform package *must* include, that particular fit of reforms will be but one choice of the different ways to package the reform. Many different ways to package the reform are possible, and indeed the different countries in the North that are used as models have utilized different fits of the aspects to different extents.

Fourth, Williamson tells us exactly why the democracy that this triad of rule of law, democracy, and free markets can only support a given system of allocation of resources in an economy. Williamson says:

*I can see no advantage to democracy in having major parties espousing economic nonsense. If they win an election, the economy will suffer . . . .*

Consensus on good economics is important if economic reform is to succeed. Continual policy reversals are obviously disruptive.

Since the world has its share of cranks, however, we cannot expect unanimous endorsement of the universal convergence. A democratic political system needs a way of allowing dissent to be expressed. This is important both because suppression is the best way to convince the conspiratorially minded that there is something to hide, and because there must always remain some doubt as to whether what deserves to pass for conventional wisdom today will remain valid for the indefinite future. The system needs some mechanism whereby orthodoxy can be challenged . . . .

. . . .

Thus my position is not that democracy should be in any way circumscribed so as to promote good economic policy, but rather that both economic policy and democracy will benefit if all mainstream politicians endorse the universal convergence and the scope of political debate on economic issues is *de facto* circumscribed in consequence.<sup>314</sup>

Williamson tells us that the democracy that the World Bank espouses is one that springs only from the "universal convergence."<sup>315</sup> This must be a given, and to the extent that electoral competition might take place that might involve parties that do not espouse this convergence, it is only to the extent that they can participate in the electoral competition. In other words, democracy means only electoral competition. Hence he ends predictably that:

[C]ivilized politics, meaning the use of the electoral and parliamentary systems in order to determine the specification of the social welfare function that economic policy should seek to maximize, still has a crucial role to play, because there will still be a tradeoff between equity and efficiency when Latin America [or Africa] finally gets

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<sup>314</sup> John Williamson, *Democracy and the "Washington Consensus,"* 21 WORLD DEV. 1330-31 (1993) (emphasis added) (footnote omitted).

<sup>315</sup> *Id.* at 1330.

its policies sufficiently in order to reach the frontier.<sup>316</sup>

Williamson may as well endorse the parodied version of Kwame Nkrumah's clarion call: Seek ye first the economic efficiency kingdom.<sup>317</sup> The bottom line, however, is that the only notion of democracy that the World Bank is willing to root for is one that entails first, the "universal convergence" as its starting point, and second, one that postpones the equity and efficiency argument until sufficient development has occurred. In the meantime, democracy in the form of "civilized politics meaning electoral and parliamentary competitions" can go on. After all, the options available to the electorate are already sufficiently circumscribed to take off the table particular possibilities by excluding particular economic policies from the realm of politics. In other words, the "Washington Consensus" as an argument for particular legal, social, political, and economic relations in the polity, interacts with the rule of law as prescribed by the international agencies that peddle the "Consensus" to empty effective democratic participation from politics. It does this by institutionalizing a form of participation that is disabled from making any real changes in allocating economic, political, and social power to the different actors in the economy and politics. Hence, the "Washington Consensus" and the Rule of Law projects can be seen as supplementary projects aimed at simultaneously legislating and legitimating a particular system of distributing resources in an economy.

## 10. CONCLUSION

Calls for economic and political reforms in developing countries have invariably involved calls for the reduction of the role and size of the state in economic affairs. The assumption is that the reduction of the role and size of the state automatically leads to less intervention in the economy. The rule of law is often offered as one of the institutional designs which can achieve the purpose of reducing the role of the government in economic functioning. However, in this Article, I hoped to show the

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<sup>316</sup> *Id.* at 1333.

<sup>317</sup> See Chris N. Okeke, *The Debt Burden: An African Perspective*, 35 INT'L LAW 1489, 1490 n.6 (2001) (quoting the first President of Nigeria, who, in his pursuit for African political unity, preached the slogan: "Seek ye first the political kingdom, and all else will follow").

different ways in which the rule of law discourse imbues market-oriented reforms with particular substantive content and may be deployed to increase or decrease the state's role in the economy. Similarly, depending on the functionality of such rule of law discourses, the rule of law may be used to enhance or undermine the polity's democratic participation in economic decisionmaking. Further, both legal intervention, and abstention could result in either more or less state intervention. There is no general a priori formula to tell how a particular intervention would result in a particular outcome. Indeed, most attempts to justify a legal intervention or abstention by determinately linking it with particular outcomes are often bad faith arguments aimed at justifying particular programmatic proposals. This is because such interventions or abstention do not occur *in vacuo* but within a certain social, political, and economic context that is an aggregation of preexisting social and economic relations. Hence, a particular intervention or abstention necessarily involves the marginalization, suppression, qualification, or consolidation of preexisting social and economic relations, and therefore of specific historical alternatives.<sup>318</sup>

In this Article, I aimed to show how international development agencies' making the institution of rule of law operational through development agencies ends up subverting democracy in application. It does this by simultaneously cushioning some fundamental political questions from political debate while enacting the politically agreed upon procedurally fundamental rules. The conception of the rule of law that is in operation, therefore, is one that constricts its meaning to purely economic desiderata (at the same time assuming that there is an objective way to determine the economic desiderata, and excluding other socially relevant desiderata). At the same time, this conception of the rule of law operates by simultaneously appealing to more widely agreed upon and less controversial notions of procedure. In other words, this conception of the rule of law is neither solely formalist (reducible to a checklist of formal criteria) nor substantive (justifiable or reflective of particular political or economic interests). It reflects the political and economic interests, while meeting the more formal, legal criterion. It can take the

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<sup>318</sup> GERRY R. RUBIN & DAVID SUGARMAN, *LAW, ECONOMY & SOCIETY, 1750-1914: ESSAYS IN THE HISTORY OF ENGLISH LAW* (G. R. Rubin & David Sugarman eds., 1984) (describing how preexisting social and economic relations influenced English law on occasion).

substantive or the procedural conception at different times in the same place.

The main argument of this article then is that while the assault of the developmental states of the developing countries has been, in large part, justified on the grounds that it allowed leaders to dispense with the substance of democratic participation while retaining its formal aspects, the rule of law agenda that international development agencies hope will return democracy in these countries acts by precisely the same means: reducing the political options of the polities. While most developing countries in the pre-1980 period reduced political participation by the use of violence and coercion, this article has shown that the new reform agenda uses the rule of law and other legal categories to achieve the same purpose. The panacea for reforming the reform agenda, therefore, might require us to do more than merely expand the rule of law and its promises.<sup>319</sup> Seemingly, we will have to modify our understanding about how the rule of law operates to shrink political space, and in the process replace the establishment of public-command-political predatory rule with private-market-technocratic predatory rule.

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<sup>319</sup> See Gathii, *Good Governance*, *supra* note 86, at 108 (arguing that the World Bank's conception of the rule of law is too restrictive).