

## **On the Innately Political Character of Market Regulation**

*Sobre o caráter político inato da regulação de mercado*

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Article submitted and accepted for publication in November 2016.

### Abstract

Market regulation is generally regarded as a technocratic exercise, one which consists of ensuring that the rules and practices of market being regulated correspond as much as possible to those of an objective ideal-type often referred to as a 'perfect' market. The institutional manifestation of this belief is the 'independent regulatory agency', a particular kind of market regulator which is supposed to be shielded from 'political' forces in order to allow it to pursue its objective economic mandate undisturbed by corrupting forces of politics. This article shows that in fact, market regulation can never be completely reduced to a technocratic exercise. Market regulation invariably and inescapably demands political bargaining and political forms of decisionmaking. This is because in fact, there is not simply one ideal of the 'perfect' market ideal but multiple ideals for various kinds of perfect markets. Each of these different ideas contribute something necessary to the state. Moreover, their respective contributions are incommensurate -- loss of one cannot be meaningfully 'compensated' for by increase in some other. They have to be balanced, not optimized, and this can only be done through politics

**Keywords:** market regulation; competition law; variegated capitalism.

### Resumo

A regulação do mercado é geralmente considerada um exercício tecnocrático, de garantir que as regras e práticas de mercado reguladas correspondam, na maior medida possível, a um tipo ideal objetivo frequentemente referido como um mercado “perfeito”. A manifestação institucional dessa crença é a “agência regulatória independente”, uma espécie particular de regulador de mercado que se supõe protegido de forças “políticas” para permitir que cumpra seu mandato econômico sem ser incomodado pelas forças corruptoras das política. Este artigo mostra como, na verdade, a regulação do mercado jamais pode ser completamente reduzida a um exercício tecnocrático. A regulação do mercado inevitavelmente e inescapavelmente demanda negociação e formas de tomada de decisão políticas. Isso ocorre porque não há apenas um ideal de mercado “perfeito”, mas múltiplos ideais para vários tipos de mercados perfeitos. Cada uma dessas diferentes ideias traz contribuições necessárias ao Estado. Além disso, as suas respectivas contribuições são incomensuráveis – a perda de uma não pode ser significativamente “compensada” pelo aumento de outra. Elas precisam ser equilibradas, não otimizadas, e isso só pode ser feito por meio da política.

**Palavras-chave:** regulação do mercado; direito da concorrência; capitalismo matizado.

## 1. Introduction<sup>1</sup>

International ‘best practices’ with regards to market regulation, such as those advanced by the OECD or the World Bank, portray market regulation as a basically technocratic exercise. Being technocratic, this means that such regulation should ideally be insulated from ‘politics’ so as to ensure that particular political factions or interests are not able to cause that regulation to regulate in their interests rather than for the benefit of the common weal. For convenience, I will refer to this as the ‘conventional model’ of market regulation.

In this article, I will show that the conventional model is flawed. At the end of the day, market regulation is and can only be political in character.

To make this demonstration, I will first show, in Part II, that in contrast to the presumptions that inform the conventional model, there are in fact multiple forms of capitalism, and that these different forms invariably co-exist within a national economy – a condition that I will call ‘variegated capitalism’. In Part III, I will then show that this condition of variegated capitalism ultimately has to be regulated politically, because there is no technocratic way to balance the competing needs of these different forms of capitalisms. In Part IV, I will suggest that the seemingly technocratic nature of market regulation probably stems from the unprecedented historical stability of the particular form of capitalism that gave rise to the conventional model, that of Fordism. But as will be discussed in the Conclusion, as Fordism is increasingly being superseded by post-Fordism, recognizing the innately political character of market regulation becomes increasingly important.

## 2. On the Multi-Dimensional Nature of Capitalism

Orthodox technocratic models of market regulation derive from the twentieth century experiences of the advanced industrial economies of the North Atlantic,

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<sup>1</sup> This article was adapted from DOWDLE, Michael W., On the Public-law Character of Competition Law: A Lesson of Asian Capitalism, *Fordham Int’l L.J.*, v. 38, 2015, p. 300 ff.

particularly that of the United States.<sup>2</sup> Embedded in these models are certain presumptions about the nature of a capitalist economy, presumptions that are for the most part unproblematic in the context of these North Atlantic forms of capitalism.

### **A. The Conventional (Fordist) Model of Capitalism**

Most discussion of market regulation presume a particular kind of capitalism, that associated with Fordism. Under Fordism, the principal function of markets is to maximize allocative and productive efficiencies so as to maximize social (material) welfare.<sup>3</sup> In other words, the social value of capitalism is seen as lying in the natural capacity of markets to distribute a limited amount of productive inputs in such a way as to maximize productive output. This ensures that society as a whole has greater access to a wider variety of goods and services at the lowest possible cost (i.e., the cost of production).

The way that markets do this is by encouraging a particular form of market competition called price competition. Under conditions of price competition, firms compete for revenue by offering their goods and services at prices lower than those of their competitors. Since each firm is trying to offer the lowest prices, this eventually pushes the price for these goods and services down to the cost of production – i.e., the aggregate costs of the inputs that go into making producing the product. Once this point is reached, firms must compete by using inputs more efficiently – i.e., by lowering the cost of production which allows them to continue lowering prices relative to their competitors. This promotes productive and allocated efficiency. More productively-efficient firms are able to offer their product at lower costs, which allows them to survive in the market, while less efficient firms either become more efficient or are culled from the productive environment. The overall effect is to cause the market to be able to produce more product from a limited amount of resources (i.e., productive

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<sup>2</sup> See, e.g., ELHAUGE, Einer; GERDIN, Damien, *Global Competition Law and Economics* 2d ed, Oxford: Hart Publishing, 2011, p. v-vi; GERBER, David J., *Global Competition: Law, Markets and Globalization*, Oxford: Oxford University Press, 2010, p. viii.

<sup>3</sup> KAPLOW, Louis; SHAVELL, Steven, *Fairness versus Welfare*, *Harv. L. Rev.*, v. 114, 2001, p. 961 ff.

efficiency). At the same time, since greater market success also gives more efficient firms greater wealth, they are better able than their less efficient competitors to secure the resources used in production, thus ensuring that scarce resources will go first and foremost to more efficient firms. In this way, markets also work to distribute their limited resources in such a way as to promote maximum productive output (i.e., allocative efficiency).

Because markets are able to do all this spontaneously (in the famous wording of Friedrich Hayek), market regulation in advanced capitalist countries – at least those of the North Atlantic – has tended to be regarded as a largely technical exercise. Its key focus is on identifying and preserving those environmental predicates – predicates associated with what is called the perfect market (e.g., minimal information costs, minimal transaction costs, minimal externalities; and price competition) – that allow markets to spontaneously work their productive magic. Such predicates are considered objective phenomena. For this reason, market regulation is seen as best pursued by independent regulatory agencies (IRA) – i.e., agencies whose regulatory decisionmaking is insulated from political concerns not related to technical pursuit of market efficiencies.

## **B. Other Forms of Capitalism**

The conventional model is the model that informs our dominant conceptualizations of what market regulation should look like. But in fact, markets can and do take a diversity of forms other than that described by the conventional model.<sup>4</sup> And while these other forms are generally not as effective at contributing to social (material) welfare and consumer democracy, they can nevertheless make other kinds of important contributions to society.

One of the alternative forms that capitalism can take is that of what we might call ‘producerist’ capitalism. The conventional model is a consumerist model. This is because it is driven by price competition, and price competition

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<sup>4</sup> See WHITMAN, James Q., *Consumerism Versus Producerism: A Study in Comparative Law*, Yale L. J., v. 117, 2007, p. 371-83.

allocates the surplus value created by production – i.e., the difference between the value of the completed product as against the aggregated value of the inputs that go into the creating of that product – to the consumer. Indeed, many see this as an important social contribution of capitalist markets. Consumers represent a much more inclusive social class than producers – we are all consumers, after all – and therefore allowing the surplus value generated by product go to consumers seems more ‘democratic’ than allowing it to accrue to the producing firms themselves.

Producerist capitalisms allow the producers to retain a greater share of the surplus value generated by production, generally if not invariably by constraining price competition, and therefore allowing them to charge prices that are significantly above the cost of production. There are at least two reasons why a state might wish to establish or protect producerist markets. One would simply be because the relevant industrial sector is driven largely by exportation rather than by domestic consumption. Since the conventional model works by distributing surplus value to consumers, it only works to promote aggregate social welfare if consumers and producers are all part of the same economy. But this is not always the case. Many industrial sectors, particularly lesser developed economies, are export-oriented, in the sense that their relevant markets sustain themselves by manufacturing products that are then consumed by consumers in a different economy.<sup>5</sup> Where this is the case, a competition regulatory regime that focuses on promoting *consumer* welfare and *consumer* surplus can be of lesser domestic benefit, since it would simply be exporting the wealth generated by domestic production to an outside economy.<sup>6</sup> In export-oriented economies, an alternative, producerist-oriented competition regulatory framework can be of

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<sup>5</sup> See generally LEVIN, Jonathan V., *The Export Economics: Their Pattern of Development in Historical Perspective*, Cambridge [MA]: Harvard Univ. Press, 1960; Cf. THÜNEN, Johann Heinrich von, *Der Isolierte Staat [Von Thunen’s Isolated State]*, HALL, Peter, ed., WATENBERG, Carla M. trans., Oxford: Pergamon Press, 1966 (originally published 1826).

<sup>6</sup> See WHITMAN, 2007, p. 371-83; see also DOWDLE, Michael W., *Competition in the Periphery: Melamine Milk Adulteration as Peripheral ‘Innovation*, in: DOWDLE, Michael W., et al., (Orgs.), *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law*, Cambridge: Cambridge Univ. Press, 2013, p. 119 ff.; HENDERSON, Jeffery, *Global Production Networks, Competition, Regulation, and Poverty Reduction: Policy Implications*, U. of Manchester, Ctr. on Regulation and Competition, Working Paper No. 115, 2005.

greater benefit, since it would allow more of the wealth—surplus value—generated by production to remain in domestic economy.<sup>7</sup>

Another kind of producerism is found in markets in which products compete based on product design rather than on price. As described above, the conventional model presumes that market competition should be based on price.<sup>8,9</sup> But, in some sectors, products compete on the basis of product design rather than prices. This kind of competition is often referred to as “product competition” or “product differentiation.”<sup>10</sup> A paradigmatic example of a product-competitive market is the consumer market for Hollywood films in the United States. Hollywood films do not generally compete on the basis of ticket price—the vast majority of local cinemas invariably price all movie tickets the same. Instead, people choose which movie to see based simply on the relative appeal of that movie vis-à-vis other available movies.<sup>11</sup> Success in product competition (product differentiation) effectively allows the successful firm monopoly to charge monopoly rents, rents that – because they are not governed by price competition – allow the surplus value generated by product to accrue overwhelmingly to the producer rather than to the consumer.

<sup>7</sup> See JACOBY, Sanford M., *Finance and Labor: Perspectives on Risk, Inequality, and Democracy*, *Comp. Labor L. & Pol’y J.*, v. 30, 2008, p. 17 ff.. Cf. BERGMAN, Mats, *Antitrust, Marketing Cooperatives, and Market Power*, *Eur. J. L. & Econ.*, v. 4, 1997, p. 73 ff; STIGLITZ, Joseph E., *Some Lessons from the East Asian Miracle*, *The World Bank Research Observer*, v. 11, 1996, pp. 164-65 (discussing positive role that ‘recession cartels’ sometimes had in “enabl[ing] the industry in question to avoid the low prices that would damage all the firms” in East Asian economies).

<sup>8</sup> AUDRETSCHA, David B; BAUMOLB, William J; BURKE, Andrew E., *Competition Policy in Dynamic Markets*, *Int’l J. Industrial. Org.* v. 19, 2001, p. 616-619. See also GIFFORD, Daniel J.; KUDRLE, Robert T., *European Union Competition Law and Policy: How Much Latitude for Convergence with the United States*, *Antitrust Bull.*, v. 48, 2003, p. 735.

<sup>9</sup> Economies founded on this kind of market competition are sometimes referred to as “new economies”, see, e.g., GRAHAM, Cosmo; SMITH, Fiona, (Ords.), *Competition, Regulation and the New Economy*, Oxford: Hart Pub., 2004,, or “knowledge-based economies”, see, e.g., Organisation for Economic Co-Operation and Development, *The Knowledge Based Economy*, Paris: OCDE/GD(96)102, 1996 (available at <http://www.oecd.org/sti/sci-tech/1913021.pdf>).

<sup>10</sup> See, e.g., ROY, Robin; RIEDEL, Johann C.k.h., *Design and Innovation in Successful Product Competition*, 17 *Technovation*, v. 17, 1997, p. 537 ff. The germinal explication of product competition (what he called “product differentiation” is found in CHAMBERLIN, Edward Hastings, *The Theory of Monopolistic Competition: A Re-Oriented Theory of Value*, Cambridge: Harvard University Press, 1933. See generally ROTHSCCHILD, R., *The Theory of Monopolistic Competition: E.H. Chamberlin's Influence on Industrial Organisation Theory over Sixty Years*, *J. Econ. Studies*, v 14, 1987, pp. 34.

<sup>11</sup> See DIMAGGIO, Paul, *Market Structure, the Creative Process and Pop Culture*, *J. Popular Culture*, v. 11, 1997, p. 444.

For another example of a product-competitive market, see STOREY, C.; EASINGWOOD, C., *Determinants of New Product Performance, A Study in the Financial Services Sector*, *Int’l J. Serv.Indus. Mgmt.*, v. 7, 1996, p. 32 ff. (describing product competition in financial services industry).

In fact, despite the fact that it is price competitiveness that is emphasized by the conventional model, product competitiveness is often a more critical component of a country's economic strength. Product competitiveness is generally characteristic of what Joseph Schumpeter called 'core industries' – industries that are principally responsible for driving economic growth in advanced industrial nations.<sup>12</sup> A core industry is an industry that, in addition to being product competitive, also (1) produces very large revenue flows; which derive from (2) participation in global markets with (3) high entry costs. Examples of such industries include (at least for the present) high-end automobiles, high-end electronics, computer and software design, commercial aircraft manufacturing, shipbuilding, information technology, entertainment, and service industries that provide highly skilled transnational professional services such as law, finance, accounting, and trading.<sup>13</sup> The critical role that product competition plays in national economic success is well evinced in the transnational importance that advanced industrial economies place in intellectual property (IP) protection. IP law are devices through which capitalist economies ensure that product competitive markets remain product competitive, and do not devolve into price competitive markets.

A third form of capitalism that deviates from presumptions of the conventional model are those that concern themselves with distributional justice rather than or in addition to wealth maximization. The conventional model for market regulation is hostile to concerns about distributional justice. Market regulation, as we have seen, is supposed to focus solely on promoting the efficiency of markets.<sup>14</sup> Distributional justice, by contrast, is concerned with issues of equality of distribution, which can often be structurally incompatible with pursuit of equality of distribution.<sup>15</sup>

<sup>12</sup> See SCHUMPETER, Joseph, A., *Capitalism, Socialism, and Democracy* 3<sup>rd</sup> ed., New York: Harper and Row, 1975, p. 82-85; see also CROTTY, James, *Core Industries, Coercive Competition and the Structural Contradiction of Global Neoliberalism*, in: PHELPS, Nicholas; RAINES, Philip (Orgs.), *The New Competition for Inward Investment: Companies, Institutions and Territorial Development*, Cheltenham: Edward Elgar, 2003, p. 17-18.

<sup>13</sup> Cf. CROTTY, 2003, p. 9 ff.

<sup>14</sup> See KAPLOW and SHAVALL, 2001, p. 961 ff.

<sup>15</sup> See OKUN, Arthur, *Equality and Efficiency: The Big Tradeoff*, Washington DC: Brookings Institution Press, 1975.

The conventional model is not unconcerned with distributional justice. It just holds that distributional justice should not be the concern of market regulation. Instead, distributional justice should be addressed through the public tax system. This allows markets to focus on doing what they do best – maximizing aggregate social welfare. Having markets maximize production and leaving distributional concerns ensures that there is a bigger pie from which everybody is able to draw a slice. Assuming the taxation system does its job, this means that everybody will get to have a bigger slice.

However, there are a number of problems with this model. The first and most obvious is that it is simply not at all reflective of actual practice. Market regulatory regimes frequently recognize that sometimes distributional concerns are best addressed directly through private market regulation rather than indirectly through the tax system. Perhaps the most obvious example of this involves the labor market. All capitalist economy's allocated labor primarily via private markets. But these markets are invariably subject to significant regulation designed to ensure some degree of distributional equality even at a cost to productive efficiency.<sup>16 17</sup> This is because private markets are indeed much better at distributing labor efficiency than is administrative fiat.<sup>18</sup> But at the same time, every modern political system regards access to some form of living-wage employment as something that the state should provide to its citizens simply by virtue of their status as citizens, regardless of possible costs to aggregate social welfare simply taken in the aggregate.<sup>19</sup> And there is no way to compensate for lack of access to meaningful employment via monetary redistributions via the tax system. Meaningful employment has benefit that can extend well beyond the pecuniary. Many see employment as key condition for fully participating in social and political life in a capitalist system. And loss of this cannot be made up by cash compensation.

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<sup>16</sup> See LITWINSKI, John A., Regulation of Labor Market Monopsony, Berkeley J. Employment & Labor L. v. 22, 2001, p. 49 ff.

<sup>17</sup> Ibid.

<sup>18</sup> See The Global Competitiveness Report 2013-2014: Full Data Edition, Geneva: World Economic Forum, 2013, p. 5-6.

<sup>19</sup> Ibid. See also Universal Declaration of Human Rights, art. 23(1), G.A. Res. 217A, at 72, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948); International Covenant on Economic, Social and Cultural Rights, art. 6, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

Nor are labor markets the only markets whose regulation takes into account distributional considerations. European competition law carves out a similar exemption for firms that engage in what are termed “services of general economic interest.”<sup>20</sup> Like labour, these are services that are regarded as being best allocated principally through private markets, but which nevertheless are seen as raising significant distributional concerns. Examples include health care, transportation, public utilities, and telecommunications.<sup>21</sup>

Relatedly, tax systems also come with a set of costs – administrative costs.<sup>22</sup> The administrative costs associated with redistribution via taxation can be quite significant, particularly in less developed or lesser-industrialized economies. For example, economies populated by larger numbers of smaller firms have higher tax collection costs than economies in which wealth is concentrated in fewer but larger firms.<sup>23</sup> Taxation and redistribution are also significantly more expensive to administer in cash-based economies than in credit-based economies, due to the greater difficulties involved in administrative monitoring of cash transactions.<sup>24</sup> Obviously, if the administrative costs of a tax and redistribution scheme are too great, then they can offset the gains in wealth generation realized

<sup>20</sup> See Treaty of Amsterdam Amending the Treaty on European Union, art. 106 (3), [1997] OJ C 340/1; See also Treaty of Lisbon, Protocol on Services of General Interest, [2007] OJ C 306/158.

<sup>21</sup> See also DAMJANOVIC, Dragana; DE WITTE, Bruno, Welfare Integration through EU Law: The Overall Picture in the Light of the Lisbon Treaty, in NEERGAARD, Ulla et al. (Orgs.), Integrating Welfare Functions into EU Law — From Rome to Lisbon, Copenhagen: DJØF Publishing, 2009, p. 53 ff. These special distributional concerns are captured in EU law in the notion of “social solidarity”. See *Sodemare and Others v. Regione Lombardia*, [1997] ECR I-3395, AG’s Opinion para. 29. See generally THENEN, Kathleen, Economic Regulation and Social Solidarity: Conceptual and Analytic Innovations in the Study of Advanced Capitalism, *Socio-Economic Rev.*, v. 8, 2010, p. 187 ff; PROSSER, Tony, Regulation and Social Solidarity, *J. L. & Soc.*, v. 33, 2006, p. 364 ff; HERVEY, Tamara, Social Solidarity: A Buttress against Internal Market Law?, in: SHAW, Jo (Org.), *Social Law and Policy in an Evolving European Union*, Oxford: Hart Publishing, 2000, p. 31 ff..

<sup>22</sup> See KAPLOW, Louis; SHAVELL, Steven, Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income, *J. Leg. Studies*, v. 22, 1994, p. 667 ff. Kaplow and Shavell have recognized that inefficiencies in the tax system could compromise their model, but so far have only considered these “inefficiencies” only in the context of taxation’s disincentivizing of work, not in the context of administrative costs.

<sup>23</sup> See BIRD, Richard M.; ZOLT, Eric M., Redistribution via Taxation: The Limited Role of the Personal Income Tax in Developing Countries, *UCLA L. Rev.*, vol. 52, 2005, p. 1665. See also YEŞİN, A. Pınar, Tax Collection Costs, Tax Evasion and Optimal Interest Rates, *Studienzentrum Gerzensee of the Swiss National Bank [Stiftung Der Schweizerischen Nationalbank]*, Working Paper 04.02, Geneva: Der Schweizerischen Nationalbank, April 2004, p. 3 n.1.

<sup>24</sup> See BENSALOM, Ilan, Taxing Cash, *Colum. J. Tax L.*, v. 4, 2012, p. 65 ff. See also DOUGLAS, John L., The Role of a Banking System in Nation-Building, *Maine L. Rev.* v. 60, 2008, p. 511 ff. The “credit economy” (*kreditwirtschaft*) as an industrialization-driven successor to the cash-based economy was first identified by Bruno Hildebrand. See HILDEBRAND Bruno, *Naturalwirtschaft, Geldwirtschaft und Kreditwirtschaft*, in *Jahrbücher für Nationalökonomie und Statistik*, v. 2, 1864, p. 3-4.

by allowing markets unfettered pursuit of efficiency. In such a case, it can be more efficient overall to affect the desired distribution directly through market regulation. This is particularly likely to be the case with lesser-industrialized countries,<sup>25</sup> since both larger-firm-sized and credit-based economies tend to be the product of significant industrial development.<sup>26</sup>

In fact, as with product-competitive industries, state piggybacking on private markets for pursuit of state goals seems to be getting more rather than less common in advanced industrial economies.<sup>27</sup> Examples include the increasing use of privatization<sup>28</sup> and public-private partnerships,<sup>29</sup> both of which look to combine, in increasingly novel ways, public services with market modes of delivery. The conventional model's difficulties in coming to grips with these new developments, even within the context of the core economies of the North Atlantic, have been well described.<sup>30</sup>

### 3. On the Variegated nature of Capitalism and its Regulation

#### A. Variegated Capitalism

As described above, the conventional model presumes that there is a single ideal-type for market capitalism. We might refer to this as the “monistic”

<sup>25</sup> See STIGLITZ, Joseph E., *Globalization and its Discontents*, W.W. Norton, 2002, p. 119-20.

<sup>26</sup> See GEMMELL, Norman; MORRESSEY, Oliver, *Distribution and Poverty Impact of Tax Structure Reform in Developing Countries: How Little We Know*, *Dev. Policy Rev.*, v. 23, 2005, p. 131 ff; BIRD & ZOLT, 2005, p. 1666. Cf. HASSAN, M. Kabir; SANCHEZ, Benito; YU, Jung-Suk Yu, *Financial Development and Economic Growth: New Evidence from Panel Data*, *Q. Rev. Econ. & Fin.*, v. 51, 2011, p. 88 ff.

<sup>27</sup> See also PROSSER, Tony. *The Economic Constitution*, Oxford: Oxford Univ. Press, 2014, p. 20-28. See also FREEMAN, Jody, *Extending Public Accountability through Privatization: From Public Law to Publicization*, in: DOWDLE, Michael W. (Org.), *Public Accountability: Design, Dilemmas and Experiences*, Cambridge University Press, 2006, p. 83 ff.

<sup>28</sup> On contracting out, see Freeman, 2006, p. 83 ff. On privatization, see MEGGINSON, William L., *The Financial Economics of Privatization*, Oxford: Oxford University Press, 2004, p. 14-21..

<sup>29</sup> See GRIMSEY, Darrin; LEWIS, Mervyn K., (Orgs.), *The Economics Of Public Private Partnerships*, Cheltenham: Edward Elgar, 2005; ROSENAU, Pauline Vaillancourt (Org.), *Public-Private Policy Partnerships*, Cambridge [MA], MIT Press, 2000.

<sup>30</sup> For an analysis of the competition law problems raised by privatization, see generally Prosser, *supra* note 24, at 20-38. For an analysis of conceptual problems raised by public-private partnerships, see Deyo, *supra* note 59, at 299-300.

conceptualization of capitalism. As our discussion above demonstrates, however, in the real world, national economic environments are what Jamie Peck and Nik Theodore have termed “variegated.”<sup>31</sup> Variegated capitalism describes a condition in which multiple varieties of capitalisms coexist within a single state-regulatory space. This happens because each of these different capitalisms serve different social needs. As described above, some kinds of capitalisms are structured with an eye towards promoting innovations in design, rather than innovations that simply lower cost of production. Some kinds of capitalisms seek to serve the productive classes, which in export-oriented markets are actually more democratic than the consumer class. Some capitalism must concern themselves with distributional issues, and cannot devote themselves purely to generating social welfare.

Market variegation also results from a wide variety of centrifugal capitalist forces operating at various levels and scales in the larger transnational economies in which any particular state is inevitably embedded. At the national level, for example, modes of capitalism are often diversified by the foreign-imposed nature of the state regulatory frameworks (such as competition law), which have frequently been demanded or counseled by international financial institutions (“IFIs”) and by foreign governments as a condition for international assistance or market access.<sup>32</sup> Such foreign-transplanted regulatory schemes often penetrates local society unevenly, causing different industrial and social sectors to respond differently, and often unpredictably, to the new regulatory frameworks, based – for example – on their different levels of international exposure, or on their different levels of local social embeddedness.<sup>33</sup> At the local level, wealth differentiations cause corresponding differentiations in the content and delivery of citizenship goods. Populations in poorer locales tend to focus their demands for

<sup>31</sup> PECK, Jamie; THEODORE, Nik, *Variegated Capitalism*, *Progress in Human Geography*, v. 31, 2007, p. 731 ff.

<sup>32</sup> See KRONTHALER Franz; STEPHAN, Johannes, *Factors Accounting for the Enactment of a Competition Law – An Empirical Analysis*, *Antitrust Bull.* v. 52 (2007), p. 159-60; see also PALIM, M.R.A., *The Worldwide Growth of Competition Law: An Empirical Analysis*, *Antitrust Bull.*, v. 43, 1998, p. 125-32.

<sup>33</sup> See, e.g., MATSUI, Tomoyou, *Corporate Governance and Closely-held Companies in Japan: The Untold Story*, in: NOTTAGE, Luke, et al., (Orgs.), *Corporate Governance in the 21st Century*, Cheltenham : Edward Elgar, 2008, 108 ff.; GILLESPIE, John, *Managing Competition in Socialist-Transforming Asia: The Case of Vietnam*, in: DOWDLE, et. al. (Orgs.), 2013, p. 164 ff; KWON, Ohseung, *Retrospect and Prospect on Korean Antitrust Law*, *J. Korean L.*, v. 4, 2005, p. 20-28.

citizenship goods on goods and services that promote security and stability,<sup>34</sup> and in these poorer locales, it can often be more cost efficient to do this by intervening in local markets to promote stability and more egalitarian patterns of market distribution, rather than through separate public tax and redistribution schemes.<sup>35</sup>

The different forms of markets that comprise a particular variegated capitalist environment each have their own, distinct regulatory logic: e.g., price competition vs. product competition;<sup>36</sup> efficient distribution vs. fair distribution.<sup>37</sup> Thus, instead of having to promote a single market-regulatory framework as per the monistic vision, market regulation needs to work with multiple regulatory models. We might call this particular kind of regulatory structure “regulatory pluralism.”<sup>38</sup>

Each of these forms of capitalisms serve important social purposes—efficient use of resources and maximization of consumer welfare in the case of price competition and consumerism; industrial upgrading in the case of product competition and producerism; transnational integration and embeddedness in the case of transnational production chains; social security and stability in the case of citizenship goods. At the same time, these different kinds of capitalisms can often conflict with one another. Should labour markets or markets for health care focus

<sup>34</sup> See INGLEHART, Ronald, Post-Materialism in an Environment of Insecurity, *Am. Pol. Sci. Rev.*, v. 74, 1981, p. 880 ff; INGLEHART, Ronald; OYSEMAN, Daphna, Individualism, Autonomy and Self-Expression: The Human Development Syndrome, in: VINKEN, Henk, et al. (Orgs.), *Comparing Cultures, Dimensions of Culture in a Comparative Perspective*, Leiden: Brill, 2004, p. 74 ff.

<sup>35</sup> See OGUS, Anthony; ZHANG, Qing, Licensing Regimes East and West, *Int’l Rev. Law & Econ.*, v. 25, 2005, p. 124 ff. Cf. PHONGPAICHIT, Pasuk; BAKER, Chris, Thailand’s Crisis, *Singapore Institute of Southeast Asian Studies*, 2000, p. 69-106.

<sup>36</sup> See, e.g., MCEWIN, R. Ian (Org.), *Intellectual Property, Competition Law and Economics in Asia*, Oxford: Hart Publishing, 2011.

<sup>37</sup> See, e.g., PROSSER, Tony, *The Limits of Competition Law: Markets and Public Services*, Oxford: Oxford Univ. Press, 2005.

<sup>38</sup> This definition draws on some of the literature on “legal pluralism.” See MERRY, Sally Engle, *Legal Pluralism*, *Law & Soc. Rev.*, v. 22, 1988, p. 869 ff; GRIFFITHS, John, *What is Legal Pluralism?* *J. Legal Pluralism & Unofficial L.*, v. 24, 1986, p 1 ff.

Similar structurings of regulatory space have been identified by Andrew Dunsire and Colin Scott. See DUNSIRE, Andrew, *Manipulating Social Tensions: Collibration as an Alternative Mode of Government Intervention*, MPIG Discussion Paper 93/7, Cologne: Max-Plank Institut fur Gesellschaftsforschung, 1993 (available at <http://www.econstor.eu/bitstream/10419/43732/1/152565922.pdf>); SCOTT, Colin, *Regulating Everything: From Mega- to Meta-regulation*, *60 Administration*, v. 60, 2012, p. 61 ff.

more on egalitarian distribution or on productive efficiency?<sup>39</sup> Should we try to protect a particular firm or industry from price competition in order to allow it to focus on becoming product-competitive in a transnational industrial sector that contributes more substantially to high levels of economic growth and development? Which industries?

Moreover, the various kinds of social benefits that different kinds of capitalisms bring to a political society are often incommensurate, in the sense that there is no common metric whereby one can objectively weight a loss on one against a gain in some other. One cannot use a redistribution of the social gains realized by favouring one market or one capitalism over others to offset the social losses—including the lost social opportunities—that accrue by not favouring some other form of capitalism or market. The future opportunities gained by promoting “new economies” cannot be used to compensate the present loss in potential material welfare caused by not promoting Fordist industrialism.<sup>40</sup> Material welfare compensation via tax-and-redistribute schemes, for those who do not reap their fair share of the benefit from neoclassical markets, cannot compensate for the loss of autonomy and dignity that comes from exclusion from economic citizenship.<sup>41</sup>

And it is important to realize, along these lines, that these conflicts cannot be avoided by simply taking hands-off, ‘night watchman’ regulatory approach. All of our capitalisms are ultimately created and maintained by state activity. Product competition, for example, requires the presence and continuous enforcement of intellectual property rights that would not exist were it not for state legislation and enforcement. Price competition requires constant state protection against the innate anticompetitive tendencies of market environments.

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<sup>39</sup> See, e.g., DEYO, Frederic C., *Reforming Labor, Belaboring Reform: Structural Adjustment in Thailand and East Asia*, in: SATO, Yoichiro (Org.), *Growth and Governance in Asia*, Honolulu: Asia-Pacific Center for Security Studies, 2004, p. 97 ff.; Cf. PROSSER, 2005, p.17-38.

<sup>40</sup> See, e.g., WILLIAMS, Fiona, *Social Relations, Welfare and the Post-Fordism Debate*, in: BURROWS, Roger; LOADER, Brian D. (Eds.), *Towards a Post-Fordist Welfare State?* London: Routledge, 1994, p. 49 ff.

<sup>41</sup> See, e.g., JAYASURIYA, Kanishka, *Workfare for the Global Poor: Anti Politics and the New Governance* Murdoch University Asia Research Centre, Working Paper No 98, Perth: Murdoch University, 2003. Cf. SEN, Amartya, *Development as Freedom*, Oxford: Oxford Paperbacks, 2001, p. 10-11.

Thus, these conflicts are conflict in which the state has no choice but to make a choice. They are conflicts in which the state cannot avoid having to take sides.

### **B. Regulating Variegated Capitalism: “Political Regulation”**

What this means is that the pluralist and incommensurate nature of variegated capitalism cannot be effectively regulated using the kinds of regulatory prescriptions dictated by the conventional model. As we saw, the conventional model treats market regulation as a technical – or, if one prefers, “technocratic” – concern: one that can and should be driven by objective pursuit of a singular, monistic vision of what constitutes proper market dynamic.<sup>42</sup> We might call this kind of regulation, “juristic regulation,” because its *normative* aspirations are the same as those that attach to judicial decision making, *i.e.*, to identify the “right answers” to regulatory problems via deduction from a monistic set of first principles.<sup>43</sup>

Regulating variegated capitalism, by contrast, requires the regulator to make choices between incommensurate values. Because regulatory conflicts between markets can often involve tradeoffs between incommensurate social goods, when such conflicts arise, as they inevitably will, the regulatory choice as to which good to prioritize cannot be settled juristically.<sup>44</sup> Such conflicts can only be managed, they cannot be resolved.<sup>45</sup> Put another way, in pluralist environments, the purpose of regulation cannot be to direct the community to a particular goal, such as perfect markets in the case of the orthodox theory, because no such singular goal exists. Rather, it is simply to maintain the integrity

<sup>42</sup> See JESSOP, Bob, *The Complexities of Competition and Competitiveness: Challenges for Competition Law and Economic Governance in Variegated Capitalism*, in: DOWDLE, et al., (Eds.), 2013, p. 96 ff.

<sup>43</sup> Compare DWORKIN, Ronald, *No Right Answer*, N.Y.U. L. Rev., v. 53, 1978, 1 ff. Note that here I am merely describing the normative construction of (rational, Weberian) law. As many have noted, as a matter of actual practice, judicial judgments often deviate from these normative standards. But that is not our concern at present.

<sup>44</sup> See POLANYI, Karl, *The Great Transformation: The Political and Economic Origins of Our Time*, New York: Farrar & Rinehart, 1944 (describing how orthodox promoting of economic competition – what he calls “commodification” – are unable to accommodate the solidarity needs of social systems); see also MORGAN, Bronwen, *Social Citizenship in the Shadow of Competition: The Bureaucratic Politics of Regulatory Justification*, Farnham: Ashgate, 2003.

<sup>45</sup> Cf. Polanyi, 1944.

and coherence of the environment by maintaining a balance among these competing interests.<sup>46</sup>

And as well described by John Dunn, maintaining such a balance is best done through politics—or what we might call, to contrast it against juristic regulation, “political regulation”:

What exactly is politics? It is, first of all, the struggles which result from the collisions between human purposes: most clearly when these collisions involve large numbers of human beings. But it is not, of course, only a matter of struggle. It takes in, too, the immense array of expedients and practices which human beings have invented to co-operate, as much as to compete, with one another in pursuing their purposes.<sup>47</sup>

In contrast to juristic regulation, political regulation reaches its decisions through bargaining and compromise rather than through adamant deductive extrapolation from first principles. Its objective is to balance its decisions in a way that preserves social coherence among the diverse perspective, experiences and needs that comprise any population of a particular size. It is prudential rather than deontological; it is homeostatic rather than teleological. It does not resolve disputes, but manages and massages them so that collectively they do not disrupt the larger solidarity that gives the polity its institutional identity and persistence.

#### 4. Why does market regulation seem Technical?

<sup>46</sup> See GREY, John, *Where Pluralists and Liberals Part Company*, in: BAGHRAMIAN Maria; INGRAM, Attracta, (Orgs.), *Pluralism: The Philosophy and Politics of Diversity*, London: Routledge, 2000, p. 85 ff.; Dunsire, 1993, p. 5-6.

<sup>47</sup> DUNN, John, *The Cunning of Unreason: Making Sense of Politics*, New York: Basic Books, 2000, p. 133. See also LOUGHLIN, Martin, *The Idea of Public Law*, Oxford: Oxford University Press, p. 52: What I have tried to show is that politics is rooted in human conflict arising from the struggle to realize our varying ideals of the good life. . . . [A]s a set of practices within a state, [it] is as much concerned with devising forms of co-operation as with conflict over them. In this role, the great value of politics lies in its deployment of a range of techniques enabling us to handle these conflicts and enmities constructively.

See also GREY, 2000, p. 98-99; SPICER, Michael W. In *Defense of Politics in Public Administration: A Value Pluralist Perspective*, Tuscaloosa: Univ. of Alabama Press 2011; SCHUCK, Peter H., *Against (And For) Madison: An Essay in Praise of Factions*, Yale L. & Pol’y Rev, v. 15, 1997, p. 553 ff; PILDES, Richard H.; ANDERSON, Elizabeth S., *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, Colum. L. Rev., vo. 90 (1990), p 2121 ff.

In fact, the political aspect of market regulation is well recognized. As noted by former EU Competition Commissioner Karel Van Miert in the context of Europe:

The aims of the European Community's competition policy are [economic, political and social]. The policy is concerned not only with promoting efficient production but also achieving the aims of the European treaties: establishing a common market, approximating economic policies, promoting harmonious growth, raising living standards, bringing Member States closer together, etc. To this must be added the need to safeguard a pluralistic democracy, which could not survive a strong concentration of economic power. *If competition policy is to reach these various goals, decisions must be made in a pragmatic fashion*, bearing in mind the context in which they are to be made: the realization of the internal market, the globalization of markets, economic crisis, technological development, the ratification of the Maastricht treaty, etc.<sup>48</sup>

As we saw above, such an emphasis on the need for a *pragmatic* rather than technical or juristic balancing of these interests is precisely the stuff of political regulation.

And this is not unique to Europe. In the United States, political regulation of competition has been used to effectuate "income redistribution, protection of small business [and] local control of business."<sup>49</sup> Correspondingly, it is also subject to significant political regulation—manifested, for example, in continuous changes in executive enforcement policy, as described in a recent article by Eleanor Fox:

While [competition law enforcement regimes in the United State and Europe] both are affected by politics, in the United States enforcement is more likely to be influenced by the political philosophy current in the administration rather than direct interference in particular cases.<sup>50</sup>

<sup>48</sup> VAN MIERT, Karel, A Pragmatic Approach to Europe's Competition Policy, in *Frontier-Free Eur. Monthly Newsletter*, Apr. 5, 1993,, as quoted in FACEY, Brian A.; ASSAF, Dany H., *Monopolization and Abuse of Dominance in Canada, the United States, and the European Union: A Survey*, *Antitrust L. J.*, v. 70, 2002, p. 527 (emphasis added). See also FOX, Eleanor, *US and EU Competition Law: A Comparison*, in: GRAHAM, Edward Montgomery; RICHARDSON, J. David (Ords.), *Global Competition Policy*, Washington DC: Peterson Institute for International Economics, 1997, p. 334-39.

<sup>49</sup> CALVANI, Terry, *What is the Objective of Antitrust?*, in: CALVINI, Terry; SIEGFRIED, John, (Ords.), *Economic Analysis and Antitrust Law* 2<sup>nd</sup> ed., Boston: Little Brown & Co., 1988, p. 7-13.

<sup>50</sup> FOX, 1997, p. 353. See also DABBAH, Maher M., *International and Comparative Competition Law*, Cambridge: Cambridge Univ. Press, 2010, p. 256 ("Politics in the field of competition law in the USA does play a major role: whether in the legislative process or enforcement actions . . .").

Consistent with the balancing character of political regulation, William Kovacic attributes the political dynamic described by Fox to “‘equilibrating tendencies’ by which forces inside and outside the antitrust agencies motivate and moderate changes in the content of US competition policy.”<sup>51</sup>

The need for pragmatic, prudential “political” market regulation has also been acknowledged in other parts of the world as well. Discussing competition law in Latin America, Julián Peña notes:

The protection of competition is an objective that can be assessed by different governments along with the other policy objectives and should determine the level of priority considering the needs of each particular jurisdiction in each particular time. Therefore, since competition policy is just one of the instruments that governments have to implement their economic policy, it is very common in developing countries (such as Latin America) to find governments that relegate competition enforcement with respect to other priorities such as protecting labor, fighting inflation, combating poverty or attracting foreign investments.<sup>52</sup>

But if this is the case, why the illusion of market regulation being simply a technical exercise?

The answer probably has to do with the particular history of the North Atlantic economies from which the conventional model derives. We noted above that the conventional model reflects the experiences of a particular kind of capitalism that emerged in Europe and the United States at the end of the 19<sup>th</sup> century, i.e., Fordism. This is a kind of capitalism that is able to exploit economies of scale and rapid market expansion to create the kind of consumerist economy presumed by the conventional model. And during the early adjustment to Fordism, we do in fact see considerable emphasis on what we are calling political regulation. In the United States, in the United Kingdom, and in Germany, market regulators ‘regulated’ – not by application of positive regulatory or economic principles – but by negotiating with affected industries and firms. But Fordism also turned out to be a remarkably stable form of industrial ordering. This meant that over time, there was less need to renegotiate particular political settlements.

<sup>51</sup> KOVACIC, William E., *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, *Antitrust L. J.*, v. 71, 2003, p. 403.

<sup>52</sup> See PEÑA, Julián, *The Limits of Competition Law in Latin America*, in: LIANOS, Ioannis; SOKOL, D. Daniel, (Ords.), *The Global Limits of Competition Law* Palo, Alto: Stanford Univ. Press, 2012, p. 243.

The earlier political negotiations and compromises simply came to be seen as a natural part of the regulatory ordering.

At the same time, these compromises were codified, not as compromises within particular fields of market regulation, but as their own independent legal fields. Thus, for example, while IP law clearly regulates market competition, it is not presented as a particular aspect of competition law. It is its own doctrinal thing: one can be an IP lawyer without knowing much if anything about competition law.<sup>53</sup> The same is true with regards to other exceptions from orthodox competition law, such as the law of industrial relations or public utilities law.

Such doctrinal isolation serves to further invisibilize the political compromises and negotiations that went into the construction of the present market-regulatory framework, as well evinced in the following passage from Robert Bork's germinal textbook on competition law, *The Antitrust Paradox*:

A different line of attack comes from those who observe, quite correctly, that people value things other than consumer welfare, and therefore, quite incorrectly, that antitrust ought not to be confined to advancing that goal. As non sequiturs go, that one is world class.<sup>54</sup>

Of course, from the perspective of the real world as it actually operates, as distinguished from Bork's legal-formalist perspective, these "other things" are not "non sequiturs" at all. As we have seen, they are critical to our understanding of how competition law is to contribute effectively to the national regulation of the many private and state capitalisms that populate the national economic order. They are critical to our understanding of how competition law and the larger competition-regulation framework contribute vitally to the identification and "constitution" (*cōnstitūtī*) of the state. But doctrinal line-drawing of the orthodox model prevents us from appreciating this.

Finally, both Fordism and its attendant political-regulatory compromises emerged at the same time as modern, neoclassical economic thought came to be

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<sup>53</sup> See MCEWIN (Ord.), 2011.

<sup>54</sup> BORK, Robert H., *The Antitrust Paradox: A Policy at War with Itself*, New York: Simon & Schuster, 1993, p, 428.

theorized.<sup>55</sup> The caused its particular compromises and its jurisprudential boundaries and insularities to further become naturalized in mainstream economic theorizing.<sup>56</sup>

For all these reasons, although our present practices of market regulation were born out of extensive processes of political balancing and rebalancing of numerous forms of capitalism, and of the different kinds of state capacities and public goods they provided, over time the political character of these regimes became obscured by the multi-generational predominance and stability of Fordism.<sup>57</sup> This stability alleviated these regulatory regimes' need to revisit the particular capitalist balancing they had ultimately settled upon. Fordism, the regulatory regimes that developed to control it, and the particular balances these regimes have struck between Fordism and other kinds of capitalism, have all been around for so long so as to now seem natural. This in turn has given these regimes, and the orthodox model that has been constructed out of them, their seemingly technical—as opposed to political—character.

### **5. Conclusion: On the Need to Recognize the Innately Political Character of Market Regulation**

In sum, the conventional model invisibilises the critical role that politics must play in an effective competition regulation regime. It does this by drawing doctrinal boundaries around what it calls “competition law” that delineate a narrow range of technical matters related to a particular kind of capitalism—that of Fordism—and that conceptually isolate those matters from the rest of the larger competition-regulatory system. By artificially isolating competition law in this way, it creates the illusion that they are unrelated to and independent from other regulatory issues involving other forms of capitalism, and more critically from other regulatory issues involving how the state constitutes itself.

<sup>55</sup> See ASPROMOURGOS, Tony, On the Origins of the Term ‘Neoclassical’, *Camb. J. Econ.*, v. 10, 1986, p. 265-66.

<sup>56</sup> See, PIORE, Michael J.; SABEL, Charles F., *The Second Industrial Divide: Possibilities for Prosperity*, New York: Basic Books, p. 49-54.

<sup>57</sup> See *ibid*, p. 55-65; CHANDLER, Alfred D., Jr., *The Visible Hand: The Managerial Revolution In American Business*, Cambridge [MA]: Harvard University Press, 1977, p. 10-11, 212-14.

Regulating the complex interactions and interdependencies between these other issues and the issues that the orthodox model seeks to artificially isolate can only be done through politics—political regulation. It is simply too complex a regulatory task to be done juristically or bureaucratically, in the way that the orthodox model would seem to advise. In order for this political regulation to work, we have to adopt a competition law model that acknowledges and embraces the vital role that politics must play in competition regulation. Again, the orthodox model—with its innate fear of politics—does not allow us to do this.

And indeed, there is evidence that the political character of market regulation is growing as Fordism is increasingly being superseded by post Fordism – a new industrial technology that emphasizes responsiveness and flexibility rather than exploiting economies of scale. As Lawrence Summers and Brad DeLong have recently noted:

[I]f we call the economy of the past two centuries primarily “Smithian,” the economy of the future is likely to be primarily “Schumpeterian.” In a “Smithian” economy, the decentralized market economy does a magnificent job (if the initial distribution of wealth is satisfactory) at producing economic welfare. . . . The competitive paradigm is appropriate as a framework to think about issues of microeconomic policy and regulation.

In a “Schumpeterian” economy, the decentralized economy does a much less good job. Goods are produced under conditions of substantial increasing returns to scale. This means that competitive equilibrium is not a likely outcome: The canonical situation is more likely to be one of natural monopoly. . . . [I]t is clear that the competitive paradigm cannot be fully appropriate.<sup>58</sup>

Recognizing that market regulation is and remains ultimately a form of political regulation rather than simply a technocratic exercise serves to highlight critical aspects of market regulation to which the conventional model blinds us. The conventional model tells us that the allegedly innately technocratic shape of market regulation flows naturally from the essential nature of capitalism;

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<sup>58</sup> See DELONG, J. Bradford; SUMMERS, Lawrence H., The ‘New Economy’: Background, Historical Perspective, Questions, and Speculations, *Economic Review*, v. 2001 (Q4), p. 33-24; see also CONKLING, Roger L., *Marginal Cost in the New Economy: A Proposal for a Uniform Approach to Policy Evaluations*, Armonk: M.E. Sharpe, 2004, p. 3-23; World Trade Organization, *World Trade Report 2008. Trade in a Globalizing World*, Geneva: WTO Publications, 2008.

recognizing the innately political character of market regulations reminds us that there are multiple varieties of capitalisms, each serving a different social purpose, and each created and sustained by human intentionality. The conventional model tells us that market capitalism operates independently from the political state; recognizing that market regulation is and can only be ultimately political reminds us that market capitalisms ultimately exist to serve the state by providing various forms of public good. The conventional model tells us that the purpose of ‘the market’ can only be to maximise the benefits of market capitalism; recognizing the political character of market regulation reminds us that markets serve many purposes, that these purposes often conflict, and that they ultimately have to be continually balanced both against each other, and against the competing aspects of the public and private good.

Finally, and perhaps most importantly, recognizing the political essence of market regulation reminds us that for these reasons, the state’s markets, and its various capitalisms, ultimately have to be subordinated to politics, not the other way around. To remove “politics” from market regulation is to subordinate, inevitably and without reflection, the needs of the society to the “needs” of the markets. In fact, markets exist to serve us.

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