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Placeholders: Engaging the Hayekian Critique of Financial Regulation

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Chapter 5: Placeholders

Forthcoming in Annelise Riles, Collateral Knowledge: Legal Reasoning in the Global Financial Markets.

Engaging the Hayekian Critique of Financial Regulation

One of the principal aims of the book has been to reframe current debates about the legitimacy of government regulation of markets. Since Friedrich Hayek, debates about the proper relationship between the state and the market, and about the optimal design of regulatory institutions, often turn on assumptions about the workings of legal expertise—and in particular about the inherent limitations of public legal expertise (bureaucratic planning) as compared private legal expertise (private law). But if, as I have shown in Chapter 2, the State is best understood as just a great accumulation of an infinite number of legal moves of various kinds, then a better understanding of the working of legal knowledge may elucidate new ways of thinking about state regulation. In particular, once one understands private law beyond the State, as I have described it in Chapter 3, as a set of institutions, actors, doctrines, ideas, material documents—of "knowledge practices" (Riles 2005)—remarkable similarities and synergies between the technical workings of global private law and the nature of "government regulation" begin to emerge.

Since Friedrich Hayek, debates about the proper relationship between the state and the market, and about the optimal design of regulatory institutions, often turn on assumptions about the workings of legal expertise—and in particular about the difference between public expertise (bureaucratic knowledge) and private expertise (private law). In his classic text, *The Rule of Law*, Hayek famously decried bureaucratic planning as the instantiation of the engineer mentality of the technocrat who believes he has "complete control of the particular little world with which

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he is concerned … a man whose supreme ambition is to turn the world round him into an enormous machine" (1975:101–102). Hayek's central attack on state regulation and argument for market regulation through private law has been adopted uncritically by a wide array of policy-makers and academics across the political spectrum.[i] These arguments are worth engaging because, as I show in Chapter 4, they are not just academic arguments: they have had very concrete effects in the financial markets, as they have been taken on by market participants and regulators themselves as justifications or criticisms of what they do.[ii]

At its core, Hayek's argument is a temporal one: Bureaucrats were by definition analyzing events that had already transpired, and economic planning, therefore, was continually behind the real-time movements of the market (Hayek 1952). Bureaucratic reasoning is inherently one step behind the market, and hence effective market planning is impossible. Moreover, the mathematical abstraction of economic planning distorted the true complexity of the market, and, hence, such planning could not possibly make accurate predictions about the future (Bockman and Eyal 2002; Reddy and Heuty 2008). In a world in which "preferences and opportunities are constantly changing in response to new information" efforts to centralize information always lag behind the ever-changing information itself (Anderson 2008: 247). Hayek's conservative belief that the knowledge of bureaucratic planning is no match for the temporality of capitalism moreover has a kind of progressive parallel in the anxious claims of present-day theorists of capitalism that the Keynesian state is under attack because of the hypermobility of capital (Wolf 1999: 230).

In contrast, Hayek argues, private ordering is superior because it is of the moment, happening in real time. In a world in which it is impossible to know the future, price, as a private system of coordinating information, creating order out of the "unintended actions of

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millions of economic actors" (Beaulier et al. 2004: 211), is superior to state-sponsored efforts to centralize information. Where state planning undermines and distorts the market price system of information coordination, private property rules facilitate it. Regulation, in other words, is only legitimate if it is ex post—through the adjudication of private property and contractual rights after the fact—not ex ante—through regulatory or fiscal policy that dictates particular courses of private action in advance.

Hayek's description of the limitations of bureaucratic planning resonates with the sense of powerlessness and frustration experienced by many of the government officials I knew as they attempted to manage economic fluctuations. It is important to recognize also that Hayek's rather ideological argument about the limits of traditional technocratic rationality has been demonstrated empirically again and again by social theorists and anthropologists and sociologists of bureaucracy who do not share Hayek's political motivations (cf. Beck 1992; Clarke 1999; Giddens 1991). Unlike some of his latter day followers, such as Hernando De Soto, moreover, Hayek displays a quite sophisticated understanding of the subtleties and internal tensions within the doctrines of private property law, its origins and purposes. But Hayek's rich and suggestive account of the limits of public legal expertise in regulating the market ex ante is far less complete when it comes to the strengths of private legal reasoning. I submit that the ideological dimension of Hayek's argument lies not in his attention to the limitations of technocratic reasoning per se but rather in the way he slips from observations that public legal reasoning has certain temporal weaknesses to a simple assumption that private reasoning must have equivalent temporal strengths. The slippage from a critique of public regulation to an undefended endorsement of private regulation has also been remarkably common among legal theorists over the last two decades.

Working with the material introduced in chapters 2 and 4, this chapter takes on Hayekian arguments against government regulation through a detailed examination of real-world examples of how public and private legal technologies manage the temporal dimensions of risk in the over-the-counter derivatives markets. The specific examples are: the usage of collateral on the private law side, and the usage of "real time gross settlement" payment settlement systems on the public side. I choose these two examples because again they are paradigms of private and public regulation: if collateralization is a core element of private market self-regulation, the administration of the payment system is one of the few functions that even many ardent defenders of free markets would allocate to the state. Global swap markets function outside state control in many ways. But they still rely on state institutions to clear their transactions. The standard view is that at a very minimum, the state must do this. And yet even this last bastion of state action remains controversial: Hayek himself launched an attack on it as nothing more than a monopoly over currency for the benefit of governments late in his career (Hayek 1976), and at the time of my fieldwork, market participants had plans to create a private clearing system for their transactions entirely outside the purview of state institutions.

This chapter is about time, therefore—how legal reason deals with the future, and about the temporal dimensions of legal knowledge of the market.[iii] Here, Hayek's insight is prescient: time--the relationship of present to past and future--is indeed the key problem, as well as the enabling condition of markets and their regulation. Assets have value (positive or negative) that is by definition only discoverable over time, and can never be fully predicted in advance. Or to put it another way, relationships between market participants with respect to those assets unfold in time in ways that can never be fully anticipated or ensured. In Roscoe Pound's words, "In a commercial age wealth is largely made up of promises" (Pound 1945: 2).

At the same time, theorists of finance have shown that the notion of "real time"--the focus on the moment, and the imperative to be up to the moment, is in fact a quite recent socio-technical creation, a product of market technologies and institutional relationships themselves rather than a mere external constraint on these. The philosopher of markets De Goede argues for example that the very notion of the future as something that must be hedged against is a historically and culturally specific understanding of time particular to late capitalism made possible by the development of such things as the Dow Jones Index which made it possible for investors to visualize their investments in time (De Goede 2005; Greenhouse 1996: 49; see also Hope 2006).[iv] Likewise, the historian of market Alex Prada shows how the development of the ticker tape machine, which produced and disseminated price information in real time, fundamentally changed the way time was conceptualized in the market. This literature suggests that rather than view time as a neutral arbiter and constraint on markets and their regulation, as Hayek does, we might think about the definition of time as another ideological battleground, a kind of market politics. To foreshadow my argument: from this point of view we can begin to see the production and manipulation of time as a kind of analog to regulation, and hence also as a regulatory resource.

I begin by reviewing the circumstances surrounding the Bank of Japan's transition to a Real Time Gross Settlement payments system described in the previous chapter, as a quotidian example of the problem that time creates for the public regulation of the financial markets. Here we can see how these temporal problems create a deficit of legitimacy for the state and its regulatory apparatus. But if Hayek's claims concerning the temporal difficulties associated with government planning seem borne out by the experience of these central bankers, I then turn next to an example of the kind of private regulation advocated by Hayek--the property rights

associated with collateral, as described in Chapter 2. Here we see that the very same kinds of temporal difficulties confound private regulation. As George Soros has recently put it, “Market fundamentalists blame market failures on the fallibility of the regulators, and they are half right: Both markets and regulators are fallible” (Soros 2009: 78).

So why then does private governance not suffer the same kind of legitimacy deficit as public governance? This is the core subject of this chapter, and in the following section I explore in detail how exactly collateral, as a private governance mechanism, manages the problem of time in the market. I introduce here a new theory of private law, the concept of private law as placeholder--as device for regulating, and hence for designing, the near future. In the final section I show that there is nothing inherently public or private about the placeholder technique, and I introduce an example of its clever appropriation by the very architects of Real Time Gross Settlement as a model for how public regulation might be revitalized with the methods of private law.

Public Governance and the Problem of Time

As explained in the previous chapter, payment systems are the digital, legal and institutional apparatuses by which money is actually transferred from one bank to another. Until the late 1990s, Japan's payment system cleared payments on a "net" basis at several designated times during the day (DTNS--Designated Time Net Settlement). However, this very act of coordination created a new danger of its own: If one bank was unable to meet its obligations to pay others at the designated time, this, in turn, could leave others without the cash to meet their own obligations, and, hence, create a “domino effect” (Folkerts-Landau et al. 1996:1) that would lead to systemic failure (Bank of Japan 2006. The previous chapter therefore chronicles central

bankers' creation of a new "real time" payment system that would clear transactions one by one, in real time.

Behind this reform was an anxiety on regulators' part about their ability to plan--that is, to predict the future of the market and address problems ex ante, before they occurred. At the time of my fieldwork, central bankers in Japan and elsewhere were coming to view systemic risk as ultimately incalculable in economic terms. The problem was not simply computational complexity; some of the risks involved—uncertainty about what law might apply to a particular bank failure or how that law would be interpreted, for example—were altogether outside the realm of what could be quantified, in these technocrats' view. Like Hayek, they struggled with the temporal incongruity between the retrospective methods of positivist science and the prospective demands of the market (Hayek 1952; cf. Miyazaki 2003). As another payment systems expert, Robert Eisenbeis, director of research at the American Federal Reserve in Atlanta, put it, "systems, instruments, and markets are evolving faster than the political entities can bring their various rules and regulations into harmony" (1997:50). What was at issue here was not some anxiety about being responsible for the distant future of the market: regulators lacked confidence about the knowability of even the very immediate, near future of the market--the danger of DTNS was that, on a particular morning, an unknown market crisis might be lurking before the next designated time of net settlement that afternoon.

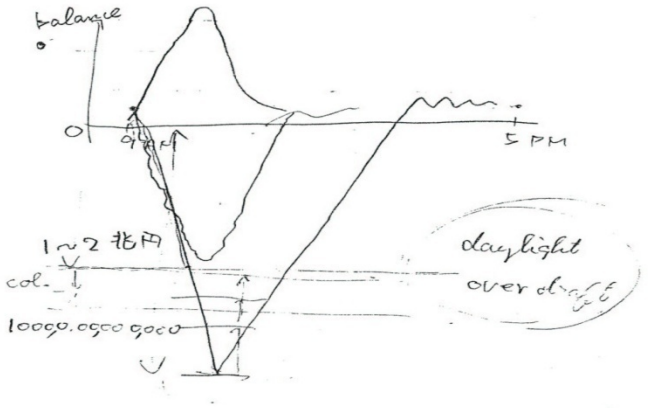
Here we have a practical example of how time creates a problem of legitimacy for state regulation of markets. Critics and proponents of public governance have long commented on the "inevitable tension between democratic control of public policy, including regulatory policy, and regulation of experts" (Shapiro 2004: 343). As described in the previous chapter, this tension has often been recast as a problem of bureaucratic experts pursuing their own self-

interest rather than the wider public interest. But in fact, the problem of bureaucratic legitimacy is deeply intertwined with the problem of the knowability of the market. As we saw, what counted as corruption was in many cases a pragmatic effort to know the market in advance--to gather and act upon market information before it became public and hence already incorporated into prices.

As a technology of governance, then, RTGS is one kind of response to financial crisis—a public regulatory response, but a defensive one, grounded in regulators' anxieties about their inability to plan for the future. We might think of RTGS as an institutional embrace of Hayek's critique of the possibility of government planning. That is, as we saw, these bureaucrats largely shared Hayek's criticism of regulatory planning. The fantasy of unwinding their regulatory positions was theirs as much as anyone's. The lesson of the last chapter then is that Hayek is on to something in his diagnosis of planning as a modality of market governance. The fallacy of progressive regulatory proposals has been to assume that a defense of state intervention in markets must take the form of a defense of the particular knowledge practices associated with technocratic planning. This is a losing battle.

One final point before we contrast technocratic knowledge with private governance technology: did the Real Time governance machine live up to its promises? Could it really obviate the need for planning for the future, get the government out of the day to day management of the market, and hence take the politics out of regulation through automation? In fact, almost as soon as RTGS was on the drawing board, it became clear that the state would remain deeply involved. The diagram below, drawn for me by the head of the Payment and Settlement Division, dramatically illustrates how time continues to pose a problem: where would market participants get the necessary liquidity to clear their transactions in real time? The system

would have to depend on massive loans from the government—so-called “daylight overdrafts” from the central bank:



The Real Time machine did not eliminate human interference nor did it automate the politics of regulation. In this respect, it is no different from other similar projects studied by sociologists of markets (cf. Muniesa 2000). But this does not mean the project was a failure. On the contrary, the feedback loop between regulatory theory and regulatory practice described in the previous chapter rendered this project absolutely crucial to the legitimacy of the central bank. If little changed as a matter of substance, as a matter of form, the central bank moved from opacity to transparency. The relationship between regulatory form and substance is explored further in Chapter 6.

Private Governance and the Problem of Time

But what about problems of time in private responses to risk? For all its sophisticated critiques public regulation, Hayek has surprisingly little to say about how exactly private law

governs the market. In *The Mystery of Capital*, likewise, Hernando De Soto writes only of the security of private transactions, bolstered by collateral, without giving us any picture of how collateral magically makes everything so secure. I now want to extend the Hayekian analysis of the public to the private by turning to the example of the nature and uses of collateral in the global private swap markets. Here we will see that similar problems of time pervade private legal regulation. How then does private law govern? What are the techniques and sources of its authority and legitimacy?

As it turns out, there is also a temporal problem at the heart of the swap transaction. In order to see how this is so, lets reconsider from a slightly different perspective the mechanics of swap transactions laid out in more detail in Chapter 2. Now, we might think of the swap as a temporally stretched form of the classic market exchange—a market exchange with an attenuated but definite temporal horizon. That is, the swap has a definite future point of exit, specified in the initial swap agreement as the future date of the close-out. But unlike in the classical model of market transactions, that point of exit does not happen immediately; it happens at some mutually agreed future time. In this respect, the swap may at first seem unusual from the point of view of standard theories of capitalism. But in fact many forms of market exchange work precisely by means of a time lag between the two sides of an exchange. Examples include the ordinary loan, merchant relations surrounding the sale of goods on account, and in a more general sense all arrangements in which payment is made at the conclusion of an agreed period of mutual involvement, from the purchase of food in a restaurant to a employee's monthly paycheck. But this instability is perhaps even more extreme in the case of the swap, as who is the creditor and who is the debtor even shifts back and forth over the course of the maturation of the swap, as market movements shift in favor of one party or the other (Johnson 2000: 45).

In practice, this raises all kinds of problems--risks--surrounding the future reliability of one's exchange partner and the future interpretation of the relationship. If a trader at Paribas Bank agrees with a trader at Sanwa Bank to swap a certain amount of currency at a certain price at a year's time, what assurance does the risk management staff at Paribas have that Sanwa will be willing or able, in a year, to fulfill its side of the bargain? In the "meantime" (Wiegman 2000: 822) before the close-out of the swap, the parties to a swap are *involved*. Their fates are intermingled. Their fortunes influence one another, and their actions have consequences for one another. In the meantime, we might say, the parties govern one another and submit to being governed. `

Now, in the view of Friedrich Hayek, and in more recent times of Hernando De Soto and the many other proponents of property rights as an antidote to government regulation, this is precisely where collateral comes in, as a "method for dealing in property for the purpose of securing the payment of a debt" (Garrard 1938: 356). As detailed in Chapter 2, in the textbook explanations, collateral is a tool for foreclosing those uncertainties, those risks. Collateral is a tool for *placing limits* on those mutual entanglements: If Sanwa Bank posts collateral today, risk management staff were fond of pointing out, Paribas does not have to think further about Sanwa's whereabouts tomorrow, to inquire about whether it has its financial house in order, to know the messy details of what executives are on the outs with government regulators, or who has been making payoffs to whom. Paribas' risk management staff only needs to know that their positions are fully collateralized. Specifically, ISDA's collateral regime commits the parties to a rigid system of collateral calls to be made and responded to in specific ways when certain "thresholds" are reached (ISDA 2005: 54). This could serve as a textbook example of the Hayekian model of the evolution of private regulation. As Richard Epstein puts it, "According

to Hayek, it is the capacity for error in particular cases that impels individuals within the spontaneous order to gear their conduct by certain standard rules and practices, the precise reason for which they cannot fully understand." (Epstein 2000: 276). This view that private law doctrines and techniques can stand as a bulwark against the complexity and indeterminacy of the market is known as legal formalism.[v]

But in fact, property lawyers know that property produces more entanglement, not less. Contrary to De Soto's simplistic claim that the very existence of registered property rights produces clarity and certainty about the delineation of powers and obligations (and hence that the only necessary reform of the financial markets is the creation of an adequate registration system for property in derivatives) (de Soto 2009), most of property law is in fact about the enormous ambiguities that surround what powers and obligations flow from titled property ownership. If I own a piece of land does that mean I have a right to build a factor on it that billows smoke onto neighboring property? If I own a shopping mall does that mean I have the right to exclude protestors from demonstrating there? If I can be understood to own my body does that mean I have the right to sell my organs (cf. Alexander 1997; Alexander and Penalver 2008; Penalver 2005; Penalver and Katyal 2007)? As Duncan Kennedy and Frank Michelman pointed out in their landmark 1980 piece, formal property law increases certainty for some but reduces it for others; it increases certainty about some expectations but decreases certainty about others. The real issue is whose certainty do you want to maximize, and about what (Kennedy and Michelman 1980: 722-725).

What is true of property in general is all the more true of collateral: collateral has long been recognized as a special kind of property right.[vi] Collateral is a species of *ius in re aliena* in Roman Law, rights in others' property, which "impose restrictions on the exercise of the rights

of ownership by the owner" (Berger 1953: 27; Pound 1959: 185). In property law, we sometimes speak of certain kinds of property arrangements as a "commons" (Dagan and Heller 2001: 552) in which multiple parties' rights of access encourage each to exploit the resources as much as possible in the short run and to shirk their obligations to maintain the property onto other owners, and we speak of situations in which multiple parties have legitimate rights to exclude others as an "anti-commons"--a situation resulting in the underuse of an asset as no one can make use of it without being certain that others might claim that they are in fact entitled to exclusive use of it. In this vocabulary, we might think of collateral as a kind of temporal commons or anti-commons, depending on the situation (Riles, n.d.)--in the near future, that is for a set period of time in the future delineated by the time when the debt is to be repaid--there are two hands on the baton, so to speak, each with legitimate claims that can either chill the other from using the collateral or encourage each to exploit it as much as possible in the short-term to the detriment of long term use. In fact, collateral in the financial markets the pledgor and the pledgee both have rights and obligations vis a vis this property and these rights and obligations are entangled, not delineated.

There is another aspect to the collateral relationship beyond the relational matter of intertwined rights I have just described, and one that distinguishes it somewhat from the traditional commons examples--parks, condominiums, and so on. Collateral is fundamentally a hierarchical relationship: the debtor-pledgor is in a position of structural weakness vis a vis the creditor-pledgee. That is, the pledgor cannot exit the relationship until it satisfies the underlying debt or obligation, and until it does, its assets are hostage so to speak to the pledgee. Conversely, parties often post collateral in order to enter into debts or obligations that are crucial to them financially or otherwise--posting collateral is an act of sacrifice. And in the derivatives world this reality is reflected in the fact that the rules regarding the management of collateral are

written by and for the benefit of dealers--parties who are more often than not collateral takers rather than collateral givers. This is what makes ISDA's official egalitarian claim regarding the benefits of collateral so remarkably ideological: "Collateralization equalizes the disparity in creditworthiness between parties" (ISDA 2005: 21.) An intuitive appreciation of the hierarchies inherent in collateral relations is what perhaps led one early commentator to describe the pledgor-pledgee relationship with respect to collateral as raising problems analogous to the relationship of the trustee to the trust property in trust law--a relationship designed to address possible problems of abuse created by inequalities of power or information.[vii] Collateral then is a compact for a short-term political arrangement (cf. de Goede 2004), a kind of private constitution with a time horizon—something perhaps better analyzed alongside short-term private political institutions like indentured servitude (Kelly 1991).

And like all constitutions, collateral stages further problems of governance. Take for example the issue at stake in the AIG case, of how to value the collateral during the period of the swap. As the market fluctuates day by day, minute by minute, how should the collateral's value be calculated? Who should have the authority to make these calculations? How often should they be made? And what consequences should flow from them—under what circumstances should the collateral holder have the right to demand more collateral from its counterparty as a result of a decrease in the original collateral's value? This latter issue raises the very same risks as the swap itself since it is only because the parties have differing valuation methods or differing views of market value that they are willing to take opposing sides in a swap transaction.

This was absolutely clear to market participants themselves. Indeed, it was common among the banks I worked with to enter into a collateral arrangement *as a kind of swap* —as an investment, a particular risk instrument, in which the underlying swap became, rather, collateral

and it was the collateral that served as the investment tool. Far from separating the interests of Sanwa and Paribas, then, collateralization involves them in a particular way—in the management, the care for, this *thing*, as this political relationship is imagined now, the collateral. Any understanding of private governance methods then must begin with a *understanding of the relational quality of obligations—of entangled, not delineated rights*. As a substantive political or epistemological matter, property poses problems of governance as much as it resolves them.

In summary, there is no reason to believe that either private or public forms of regulation are actually more effective than the other as a stop-gap against the future uncertainties in the market—there is no magic fuse box for separating one person's risk off from another. Politically speaking, private and public genres of regulation are not nearly as distinct as Hayek and his followers would like to suggest.[viii] Neither can inherently make the vast political problems at stake in the management of the near future disappear. But this generates another puzzle: as we saw, there is nevertheless a kind of "Hayekian" perception, by market participants and government officials alike, that private devices for limiting future risk such as collateral are more legitimate. How then does private law govern? What are the techniques and sources of its authority and legitimacy? Here I turn to some aspects of private law as a genre of knowledge that may deserve more careful attention.

An Example: The Legality of Rehypothecation of Collateral in the Derivatives Market

In order to understand how collateral, as a private legal technology, handles the temporal uncertainties surrounding market risk--uncertainties that, as we saw in the previous section, are simply transposed in property law into legal uncertainties surrounding overlapping property rights and obligations-- we need to immerse ourselves first in what those uncertainties look like

in the derivatives market. One example concerns the problems surrounding so-called rights of "rehypothecation" (Johnson 1997: 966) alluded to in Chapter 2: The Sanwa Bank and the Paribas Bank enter into a swap transaction through their traders, and Paribas insists that Sanwa post collateral to cover the transaction. If, within the coming year, Sanwa Bank should prove unable to meet its obligations, Paribas will lay full claim to the collateral. But what about right now, in the present? What can Paribas do with the collateral? Can it use it as collateral of its own in other swaps?[ix] How must the collateral be maintained and accounted for?

In practice, rehypothecation is a tool of large dealers rather than derivatives end-users (such as airlines or manufacturers hedging against future fluctuations in the cost of a key input such as the price of oil). "Although the right is mutual, it is unlikely that the end user would have the financial acumen to fully take advantage of the right" (Johnson 2000: 51). The value of a right to rehypothecate, from the collateral taker's point of view, is that it can put the collateral to some financial use during the time it holds it. This in turn should drive down the price of swap transactions and also ensure that all assets are being used to their fullest potential at all times, rather than having large amounts of wealth parked and unusable as collateral at any given time (Mann 1997). There is now a complex market and set of transactional models and procedures for trading in collateral available to derivatives dealers who wish to use it (Gangahar 2002). As one commentator has noted, "Granting a right of rehypothecation has become a requirement to do business with certain counterparties in the derivatives area" (Johnson 1997: 1000).

But of course the collateral holder's use of the collateral brings with it risks of its own. In the example above, suppose that Paribas rehypothecates the collateral to Bank of America, and then encounters financial difficulties that preclude it from recuperating the collateral by the

time of the completion of the original swap in order to return it to Sanwa Bank? In allowing Paribas to rehypothecate in this way, Sanwa runs the risk of so-called "rehypothecation failure"--the risk that the collateral will not be returned, or that what is returned will not be of identical value.

Hence the legal (as well as political and economic) question about what to do with the collateral in the "meantime" of the swap transaction--what power to accord the collateral holder and what powers to reserve to the pledgor. These are precisely questions raised by the intertwined and political nature of property rights, as described in the previous section. Traditionally, a party holding another's collateral had certain "duties of care" that prevented it from transferring the collateral to a third party, for example, without permission. By the late 1980s, however the dealers in the derivatives industry had obtained an amendment to the American Uniform Commercial Code and Bankruptcy Code (11 U.S.C.) to explicitly permit rehypothecation. But there was no analogous provision in the Japanese civil code.

The standard ISDA collateral documentation has an exceedingly direct and simple solution to this question. It simply grants the collateral holder "the right to: (i) sell, pledge, re-hypothecate, assign, invest, use, commingle or otherwise dispose of, or otherwise use in its business any Posted Pledging Collateral it holds, free from any claim or right of any nature whatsoever of the Pledgor" (1994: Paragraph 6(c)) and imposes on the collateral taker only the obligation to return equivalent securities at the close of the swap. This deceptively simple clause and its uses, an example of technical legal practice of an exceedingly mundane kind--deserves closer attention: it is more sophisticated and consequential than at first meets the eye. I will take it as an example of a technical private law solution to the problem of the "meantime"--the problem of the entanglement of interests, risks, powers, and obligations in time.

The technical solution proposed by lawyers in the derivatives markets, borrowing from the common law of property, and memorialized in the ISDA section quoted above, is best described as a placeholder: in the meantime, that is, for the near future, the parties simply agree to act as if the holder of the collateral (the pledgee) already has clear and complete rights over the collateral (as if the parties are no longer trapped in the messy "meantime"). As one commentator long ago put it, one can think of such a transaction as a "conditional sale of it as security for the payment of a debt or the performance of some obligation. The condition is that the sale shall be void upon the performance of the condition named" (Jones 1881:1)[x] A *conditional sale*: for now, it is a sale, but in the future, who knows--the sale could be rendered void by the payment of the debt, although this does not stop us from thinking of it as a sale, for now. That is, for the near future, the parties agree to treat the collateral As If it were the pledgee's--with the caveat is that this treatment will be subject to later re-evaluation if it turns out to be an inappropriate description of the state of affairs.

Now is this actually an accurate description of the present state of the rights and obligations of the parties? Not in any abstract or logical sense. For all the reasons discussed in the previous section, the powers and obligations of the pledgor and pledgee are actually intertwined. But one of the interesting features of the placeholder is where it puts our attention, on the provisionally settled present, and the near future defined simply as the period in which that provisional settlement holds, that is, the assumption that all that we can really know at the moment is this near future and we will leave final outcomes to unfold as they may. How else to understand the illogical and ungrammatical temporality of the following concluding statement to one canonical twentieth century account of the law of collateral securities: "a debtor who has put up collateral should *never* expect to have it again, or its value, *until* he pays the debt; and the

most he can ask is that the value be credited upon the debt" (Garrard 1938: 379, emphasis added).

This use of this placeholder--this provisional conclusion in the meantime--of course raises all kinds of secondary problems and questions. One important set of questions concern the interface between state law and private contracts—will this agreement actually be enforceable? What law applies? To what extent must the parties' private assumptions about the state of affairs conform to a larger legal framework? Under New York law, the repledge of collateral--the granting of a security interest in the collateral to a third party-- could be done with few formalities and the pledgee had broad latitude with the collateral in its possession. The derivatives industry had succeeded in including express rights of rehypothecation in the 1998 revision to Uniform Commercial Code which was then adopted into law by New York (Kettering 1999: 1113-1116).[xi]

But courts in other jurisdictions perhaps less beholden to the financial services industry, recognizing the problems of intertwined property powers and obligations explored in the previous sections, had long required more formalities to validly pledge or repledge collateral, and also gave greater weight to the legal rights of the pledgor--and hence placed more limitations on the right of the pledgee to repledge the collateral. In the UK, for example, the pledgor retains the right to transfer the asset while it is pledged and the pledgee has very specific duties of care with respect to collateral in its possession, including an obligation to secure the pledgor's consent before transferring the collateral to a third party (Bridge 2002: 176-77). In Japan, likewise, the Civil Code imposed on the pledgee a duty to exercise good care with respect to the collateral (Civil Code Section 298)[xii] and liability to the pledgor for any damages caused by

repledging the collateral without the pledgor's consent (Civil Code Section 350; Section 348 Section 398; Ministerial Ordinance No. 48 of 1998, art. 1; Law No. 108 of 1998)[xiii].

Lawyers for dealers in the UK derivatives industry had circumvented these requirements by structuring collateral transactions as "title transfers." The contrast between a pledge and a title transfer is described in ISDA documentation as follows:

> under a pledge, the collateral provider creates a security interest in favor of the collateral receiver in securities and/or cash. The securities and/or cash are typically delivered either directly to the receiver or to its custodian. The collateral provider generally continues to own the securities and or cash, subject to the right of the receiver to sell the securities and/or take the cash if the collateral receiver defaults; whereas under title transfer, the collateral provider transfers full title in securities and/or cash to the collateral receiver and grants the collateral receiver the right to set off or net, on default of the collateral provider, the collateral receiver's net exposure to the collateral provider under the master agreement against the value of the securities and/or cash. Under this approach, the collateral receiver owns the collateral, without restriction, and the collateral provider, if it performs in full, is only entitled to the return of fungible securities and/or repayment of cash in the same currency.
> A pledge may require greater formality in its creation and perfection than title transfer, possibly including (depending on the various factors mentioned above) registration, filing or some other form of notification of the pledge and other specific requirements as to the form and content of the document creating the pledge. The formalities are necessary to "perfect" the pledge, that is, to ensure its formal validity and priority over any third party with a purported claim to the collateral assets (ISDA 2005: 38).

These differences in the national treatment of collateral rights and duties then raised all kinds of further questions about what law might apply to a collateral transaction, where many transactions involve parties from different jurisdictions, where collateral may be posted through intermediaries in yet other jurisdictions or take the form of particular government bonds or be denominated in particular currencies (Kettering 1999: 1114-1116).[xiv] One traditional rule of private international law suggests that the law of the place of the collateral should control--but where "is" collateral of this kind located? (Hval 1997). Another traditional rule would defer to the parties' choice of applicable law, at least with respect to some issues (Borchers 1998: 186-

87). But when would a court find such deference appropriate and when would it be deemed inappropriate? ISDA's own lawyers favored applying the law of the "place of the relevant intermediary"--the law of the custodian bank holding the collateral (ISDA 2005: 45) and they had succeeded in having this view incorporated into the European Union's Collateral Directive (see Chapter 2). But even this left considerable ambiguity--where "is" a certain custodian bank when it has offices globally, its accounts are maintained electronically, it is incorporated in one location and has its principal place of business in another?

During the period of my fieldwork these problems served became the subject of a flurry of legal argumentation about how to harmonize the terms of the placeholder with the existing framework of Japanese law. One option would be to frame a collateral transaction as a title transfer, as in the UK. But there were several problems with this approach. First, structuring the collateral transaction as an outright transfer had potentially negative tax consequences for the parties. Second, a controversy had arisen about the formal legal consequences of such a structure for the availability of netting (discussed further in the next chapter) between the collateral value and the value of the exposure on collateral transaction is a separate "transaction" not explicitly protected by Japan's Netting Law (Ministerial Ordinance No. 48 of 1998, art. 1; Law No. 108 of 1998). Finally, "repledge is what Americans are familiar with," one Japanese lawyer told me.

An informal group of Japanese lawyers from government, the banks, ISDA and the large law firms ultimately crafted a makeshift solution to this problem--they advocated framing the collateral transaction as a special kind of loan, a loan for consumption with return of the same kind (shouhi taishaku) (Civil Code of Japan: Section 587; Ministerial Ordinance No. 48 of 1998, art. 1; Law No. 108 of 1998).[xv] But this also did not put to rest arguments that collateral

transactions might not be protected by the Netting Law. In this controversy, legal experts within the banks, most of whom were not qualified lawyers, found themselves outranked by the authority of actual bengoshi (lawyers who have passed the bar and are qualified to appear in court) who, to their frustration, made arguments that were in their view ultimately unhelpful to the practical interests of market participants. As one informant described it, "A law firm advised [two large foreign banks] ...that collateral should be stipulated as a transaction....[means netting law doesn't apply]. Even though their interpretation is right...Lawyers--they know the market. But still they insist on their own argument. Their conclusion is that the netting law and set-off are totally different. There is no way to make collateral transactions fit. They are arguing for a literal translation of Minpo."

While all this contestation surely felt discouraging to those involved it is actually a quite standard aspect of private technique. First comes a placeholder, agreed upon as such as between the parties. Then the existence of this placeholder raises secondary questions about its integration into state law--framed as problems "down the road" for the placeholder. What will happen if and when it is challenged in court, for example? This in turn gives rise to a plethora of legal moves--from lobbying for law reform to legal argumentation about what existing legal box to put the placeholder in (what is "deemed" to have occurred--a borrowing or a transfer?) I discuss all of these moves, and the complex sociology of the profession they activate, in the following chapter in greater detail. For now, I simply want to point out that at this stage the placeholder has become a kind of reality of its own--something that needs to be dealt with, something that raises real world consequential problems that demand lawyers', and perhaps judges', academics' and bureaucrats' attention. Moreover, in this massive effort to evaluate the "problems" surrounding the placeholder, the agreed understanding was that whatever legal

characterization of rehypothecation lawyers in the market produced only served as placeholders of their own for future government law-making, whether in the form of legislation, court decisions or administrative regulations.

Legal Fictions

So, from the point of view of this detailed example, what is collateral? It is simply a legal fiction--a fiction that the rights of the parties are well-defined--nothing more and nothing less. The legal fiction to which lawyers appeal in rehypothecation—the fiction that the future moment of the swap's completion has already arrived--does not pretend to resolve, in actuality, the indeterminacy of future risks associated with one's investment—it is rather a command, or a mutual agreement, simply to act As If. In fact, as we saw, it is a chain of such legal fictions, each taking over from the next in time, as one fiction (such as the fiction that the pledgee already has full rights to the collateral) gives rise to questions and problems (does this fiction contradict national private and public law?) which then demands the creation of further fictions (it will be "deemed" that the posting of collateral is a transfer, or alternatively, it will be "deemed" that it is a special kind of loan).

Why would market participants believe in something so fictional? The answer is that they don't, at least in the traditional sense of "belief." For them, these fictions are just techniques, tools, means to an end. From the point of view of those who deploy them, legal fictions are more like machines than stories--they are practical interventions with concrete consequences. When I say that legal fictions are technicalities or techniques of private law, therefore, I mean to draw attention in particular to the way they are *nonrepresentational*--in contrast to many other kinds of language, the fiction that the collateral taker has an unfettered right to repledge does not "mean" anything at all (which is not to say that it is not a highly consequential utterance--it

surely is) (Ross 1957: 821; Riles 2003). This is important: one of the most consequential differences between the kind of technocratic language associated with much state-run bureaucratic law-making and adjudication on the one hand, and the kind of private governance through private law I am describing in this book lies precisely here. Technocratic law-making *means* something: bureaucratic actions communicate messages about who and what is politically important or not; technocratic forms of regulation implicate a description--a representation--about what the world is like and where the problems lie. In contrast, private law is mostly "indifferent"[xvi] about what it represents in this epistemological sense (although it certainly represents in the political sense of the term).

But over the course of deploying these As Ifs, they come to take on a cultural reality of their own. In day to day thought practice, the means comes to take over the end (Riles 2004a; Vaihinger 2001[1924]). The fictions become practical, technical scripts for the management of the parties' relationship. In this respect, this technique, something so simple that it is overlooked by observers but also so fantastical that it is difficult to account for, is what I view as the essence of private financial governance. These fictions—which are just as problematically related to market "realities" as government planning technologies—nevertheless come to be much more readily accepted predictors, and indeed creators of market realities.

In traditional social scientific parlance and associated forms of technocratic management, anything that is fictional is by definition illegitimate, and there is in fact a longstanding debate in legal theory about whether legal fictions are the engines of legal progress or lawyerly tools of obfuscation (Riles 2009b). I will only point out here that the critique--going back most notably to Jeremy Bentham--that legal fictions are a cynical trick on the part of insiders to pull the wool over the eyes of unsuspecting outsiders who lack the expertise to understand, for example, that

the mere assertion that collateral rights are well defined does not really make them so--confuses two separate questions. First there is the question of whether such legal fictions favor insiders (such as swap dealers) at the expense of outsiders (end-users of swaps, or the market as a whole). This is of course a legitimate question and a complex one. But it is a different question from whether legal fictions are cynical farces, something asserted by insiders with a wink and a nod, knowing that only an outsider would truly believe in such a thing. This latter question assumes, once again, that what is really at issue in the legal fiction is the truth or falsity of the thing--that the challenging dimension of the legal fiction is the epistemological one. In fact, precisely because the fiction is more machine than text, the truth or falsity of its content is really somewhat beside the point from those very insiders' point of view. What matters rather is what possibilities for action it opens up or forecloses.

And at each stage, the trick is the same: the parties simply assert, and expect, that the law of New York applies and that this law will uphold their obligations. At the heart of "collateral" is a deceptively mundane, but actually quite audacious legal trick called the legal fiction. In legal terms, a legal fiction is a statement that is consciously understood to be false, and hence is irrefutable. Collateral is actually just a set of legal fictions, layered one on top of another. We might say that in response to the temporal problem of finance—the inability to plan—the technique here is to act as if the parties could just bend time and know in the present what the future holds.

My point is therefore a more empirical one: observation in the swap markets reveals that legal fictions--rule forms that create what they express--do have practical legitimacy of this political kind--if not of an epistemological kind--from the point of view of actors in the market, and their legitimacy is enduring, even at times of crisis. I now want to think about these

fictions from a different point of view than the traditional focus on truth and falsity, therefore--I want to focus on their temporal quality.

The Temporality of Legal Technique

Rather than call this technique a legal fiction, I prefer that we call it a placeholder. A placeholder is a technique for managing, and hence also for designing, the near future. A placeholder is primarily a temporal device, a technique for working with and in the meantime, rather than primarily an epistemological device (a device for representing truth). But it is also a political device. The original meaning of the term was overtly political: a placeholder was "a person who acts as deputy for another; a lieutenant, a proxy. A person who holds office, esp. in the government or in government service ("Placeholder." Def. 1. OED Online). Over time, the term evolved to mean, in linguistics, a term that "carries little or no semantic information" ("Placeholder." Def. 4b. OED Online) and in mathematics, "symbol, frequently an empty box, used in teaching to denote a missing quantity or operator in an expression" ("Placeholder." Def. 4. OED Online). So as a placeholder, collateral is a political office, a kind of collective commitment. As such it has no particular content or meaning, except that it defines and manages the near future--the time for which this particular commitment holds true.

So what is the placeholder holding the place for? We can think of the technique as a handoff to the future. Donna Haraway has proposed the image of the Cat's Cradle--a child's game of string in which one person creates a shape only to hand it off to the next who then transforms it in other ways and passes it on--as a powerful image of feminist politics (1994: 66-67). It is an equally powerful image of the workings of technical private law. A placeholder is created in order to pass it on--to pass it on to our future selves, the selves just beyond, or at the threshold of the near future, whomever they may be, to make of it whatever they might choose.

Haraway (1994: 70) proposes this image as an alternative to utopianism, and here again, the parallel to private law is a powerful one. As a placeholder, the claim that it is as if the pledgee already has full rights to the collateral is simply a provisional claim, one that holds for the meantime, that is, for the near future. As such, it is quite anti-utopian: legal technique has little to say about, little interest in, the utopian time of the distant future. In contrast, it directs endless attention, produces great fascination about all the possible intricacies surrounding the near future, the moment just beyond the present one.[xvii]

The placeholder is a material, sociotechnical phenomenon, not simply a concept. As we saw in Chapter 2, documents, and the sociotechnical relations they engender, are a particularly consequential node of this activity. As suggested in Chapter 2, the forms used to define collateral relations are not just instantiations of legal doctrine or government policy, as legal theory would have it, nor are they simply textual descriptions of legal arguments. Rather, they are equally indispensable elements of a singular socio-technical network that includes legal doctrine, legal policy and legal argumentation. Now we can make this point a bit more precise by focusing on the role of documents, as material artifacts, in the temporality of the placeholder. As Hiro Miyazaki has suggested, forms that are made to be filled in, such as the ISDA collateral agreement, are forward-looking artifacts--they are scripts for the future that anticipate future action produced through "anticipatory thinking" (Miyazaki 2006a: 210). And as Mario Biagioli (2006: 127) has suggested, a documents serves as a "hinge between two distinct moments" of productive work. His example is scientific records of authorship, but one could also think of the archival quality of documents, which sometimes purposely and sometimes unintentionally hinge the present to the past.[xviii] Documents then are machines that work in, and with time--they are technologies oriented in time, toward the near future.

In fact, the placeholder has a kind of double temporality--it works in and with two kinds of temporality at once. That is, it is a handoff to the future in the way I have just described. But as it moves through time it also folds time. That is, its mechanism of hand off to future selves is to posit that it is as if the very near future that the placeholder stabilizes has come to an end, and we already know what the outcome of that near future is.

This is a different move than the fantasy documents of disaster planning because it is always effectuated in an As If modality--the assumption is only a working assumption; it is not even a hypothesis since, as Vaihinger tells us, hypotheses exist to be tested against reality where the As If points inward, away from reality, simply to itself.[xix] So while documents as placeholders move through time, linking one moment with the next, the As If assertions in those documents fold the future into the present. This is an example of the observation I have made elsewhere that documents have their own historicity--they are self-contextualizing (they create their own time) even as they move through time (Riles 2006b).[xx]

From this point of view we can contrast the workings of the placeholder with several other prominent practical and theoretical approaches to the relationship between governance and time. The placeholder's central feature is that it forecloses the question (whatever the question may be) in the present and for the near future--not by resolving it, but by papering over it, we might say--that is, by creating a provisional solution subject to future reevaluation. In this sense, the placeholder is the opposite of ways of thinking about the future that focus on the ambiguity or open-endedness of the present, as for example, philosophical and practical projects that borrow from the pragmatist tradition (Rorty 1989). That is, unlike pragmatists who see the present as an open zone of endless possibility and unpredictability, the placeholder treats the present and the near future as actually already determined, its ambiguity as already resolved.

Likewise, the placeholder is precisely the opposite of the technocratic temporality of projects described in Chapter 4. For technocrats, "the project" delineates the time within which one thinks and acts about a particular problem--the problem of the moment and the moment defined by the problem. In the near future in which the project is "open" and the problem is under review, the project is what commands attention. Conversely, once that problem is resolved, the moment is complete, and one moves on to the next project and "archives" the last one. The present moment is the moment of action, and the future moment is a moment of inaction. In contrast, the placeholder is a tool of forgetting, of putting to one side. For the moment, the near future, the problem is resolved; it is more like the "archived" project than the current project. One puts the placeholder in place in order to think or act on other things. In contrast, the future is the time of possible action, when the validity of the assumptions (collateral rights are held by the collateral taker for example) will be open to evaluation.

Likewise, the placeholder is a very different approach from prominent technocratic ways of thinking about "preparedness" for possible future risk. It has become common for technocracies and organizations to create vast scenarios of possible mass disasters such as a nuclear war or a critical environmental crisis and to run mock responses to these simulated disasters as a way of preparing for what cannot be known in advance. In the financial world, for example, the simulation of financial crisis has become the most common form of regulatory oversight, and indeed the Bank for International Settlements has calculated capital adequacy requirements on the basis of such simulations (often as performed by private banks themselves).

Like the placeholder, disaster preparedness relies heavily on practices of both fictionality and documentation: These scenarios often result in what Clarke has termed "fantasy documents"—documents laboriously produced by organizations outlining their contingency

plans which few actually think will be followed in great detail in an actual disaster event and better understood therefore as narratives of fantasies. Likewise, Andrew Lakoff has described this kind of "scenario based thinking" as a "fictional experience of the future in the present" undertaken in an "affect of urgency" (2008: 401). Clarke terms these documents "rationality badges" (1999: 16)--signals to the public that things are under control. As such although they are ostensibly about the future, they are really more for political consumption in the present. Another way to say this is to say that present day politics is being played out by making assurances and claims about a secure, predetermined future. In contrast, the placeholder makes no assurances about the security of the future--in fact, it says nothing at all about what might happen in the future. Its "rationality badge" is only for the present. Ryan Sayre has recently described disaster preparedness in Japan along precisely these lines (Sayre 2009). He recounts that he used to conclude interviews with earthquake preparedness groups by asking what their organization would do in an earthquake, but the answer he received was confusing and destabilizing-- "we don't know," his informants told him. They then directed his attention to the intensity of their activities, their relations, and their plans in the present. That is, unlike the American disaster preparedness experts described by Clarke and Lakoff who make what Clarke and Lakoff describe as self-aggrandizing assertions about their own ability to know and plan for the future, the Japanese disaster preparedness experts described by Sayre leave the future to their future selves. All that they can do is prepare a handoff to that future self, and what it might choose to do at that moment cannot possibly be known from the standpoint of today.

Sayre's informant here gives us an eloquent performance of the ethics of trust at stake in the placeholder. That is, the placeholder is at its heart a technology of collaboration between those in the present and those in the future (perhaps our future selves; perhaps others' future

selves--in any case persons other than ourselves, in the present). As such, it is an instrument of trust: any As If assertion is made with the clear appreciation that it will be subject to later reevaluation, renegotiation, or downright abandonment in the future, that is, by those to whom one is handing it off. When one hands off the cat's cradle, it is for others to do with as appropriate for their time, their present moment. The motto for the relationship between present and future might be, Not control, which is futile anyway, but trust. And the placeholder does not simply demand such trust of the future on the part of the present; it also engenders trust--it frames and packages the state of thought in the present, entextualizes it in documentary form (Silverstein and Urban 1996), and hands it off to the future where others will be able to trust that they need not reinvent the wheel for those in the present had collected, captured, and synthesized the state of affairs as it was in the present in a trustworthy form.

It is this particular collaborative politics of time that I want to claim as the mundane genius of private legal thought. We can understand it better, as a political form, when we contrast it the predominant and state-centered way of thinking about the politics of time, that is, proceduralism (Habermas 1998). At least in the work of some sophisticated contemporary jurists and philosophers, proceduralism shares with legal fictions a subtle epistemological and ethical grounding—having a set of procedures becomes a tentative way of making democratic connections, a tool for progressive politics, at a moment at which it must be acknowledged that there is no actual universal political truths that hold for everyone and at all times (Vattimo 2003: 161).

In a recent paper, Kunal Parker has argued that a central tenet of the radical democratic politics of the 18th Century was an assumption about the "radical indeterminacy of the future" (2008: 9) and hence of the freedom of each democratic majority to speak for its moment.[xxi]

Parker recounts that this radicalism was a source of considerable anxiety for the framers of the US constitution who saw the Madisonian system of checks and balances as a way of overcoming this radicalism by "making government a matter of different speeds" (2008: 9). Parker then shows how for certain strands of modern conservative constitutionalism, likewise, an insistence on procedural rules and proceduralism becomes a way of slowing things down, of ensuring a continuity of past present and future such that democratic politics may not be subject to the radicalism of future moments (2008: 14).

Parker's account is instructive because it helps to break down the simple knee-jerk equation of state governance with progressive values versus private governance with conservative values by demonstrating how at the heart of proceduralism, a value set often associated with a progressive liberal vision of state governance, is in fact a highly conservative understanding of the democratic relationship of the present to the future. In my view it is here that private law provides a more hopeful alternative. For if the ambition of proceduralism is to make the present and the future overlap somewhat so as to temper the radical consequences of a break between present and future democratic constituencies, the ultimate engine of private technique is a politics of trust in those who will have their hand on the helm in the future. It is a politics of influence, perhaps, but not a politics of control. And this difference is crystallized in the way the impulse of the placeholder is one of skipping ahead--of folding the future into the present, as I suggested--rather than of slowing down, of keeping the future from coming, so to speak, as in proceduralism as Parker describes it. But if the placeholder is not proceduralism, it is important to appreciate that it is not radical democratic politics, in Parker's terms--a sense of the radical incommensurability of one political moment with the next. Moments are not incommensurable in this radical way, although they are distinct, precisely because they are

anchored in this simple, thin technology, the placeholder, that moves through time. Here we have a notion of the political agency of things that outstrips the most radical post-human analyses of Science and Technology Studies (Haraway 1997; Latour 1996): if human actants cannot exist in different political moments at once, certain non-human sociotechnical artifacts--placeholders--can.

I want to dwell for another moment on the quietly radical ethics and politics of this stance of holding the future open, of refusing to speak for the long term--one that, in its definitional provisionality, ironically makes it possible to speak with singularity and clarity about the near future. Indeed, the Science and Technology Studies debate about post-human forms of agency is apposite because what is most challenging about the politics of the placeholder is precisely its approach to the political agent. Robyn Wiegman has written about the generational crisis in feminist politics in terms that resonate here. In her call for a "feminism in the meantime" (Wiegman 2000), Wiegman writes "against generational time and the apocalyptic narrative that it writes" in which present day struggles are about guaranteeing certain changes in the future, and future generations let us down when they don't continue our struggles. But Wiegman points out that thinking in terms other than generations requires thinking differently about political subjects:

> to think feminism as a knowledge formation that is not coincident with women's subjectivities is thus a political project that demands something other from the political than what we already know; that holds out the possibility that the knowledge that feminists will need in different futures is not "our" knowledge; that any particular future and "our" knowledge will have no necessarily productive relationship, no narrative that makes us live in the present of some future feminist time (Wiegman 2000: 821).

In precisely this way, what I find engaging about the placeholder is that it is a political project premised on the fact that it is about something more than what we already know and

understand in the present. This is the irony, the farce we might even say, of collateral--as a guarantee of something that by definition cannot be guaranteed, that is, the politics of the future. But it is a consequential farce, because just as the claims about the future at stake in disaster preparedness really constituted political claims in the present, collateral documents in a sense call forth a particular "we"--the we whom, *for the moment*, the As If assumption holds (Teubner 2004b). In this precise sense, they are private constitutional moments, as I suggested earlier.

Perhaps this all sounds a bit too grand and theoretical—too distant from the technical and financial realities of collateral. But this is precisely the point: the ultimate insight of this book is that there is far more at work in the mundane techniques of private law--far more epistemological complexity, far more political imaginativeness--than the existing ways of thinking about financial regulation are even willing to entertain, let alone address.

Indeed, what we have done is to give substance to Hayek's somewhat impressionistic arguments on behalf of the temporality of the private--arguments that, as we saw, were left far less developed than Hayek's arguments against the temporality of technocracy. In essence, Hayek's own argument for private law technologies was a negative argument--private law was what technocratic market regulation was not. Hayek and his followers do little more than to assert with wonder that private actions result cumulatively in collective good without much explanation of how this might be the case. Like the solution deployed by the technocrats described in the previous chapter, Hayek's private law is more a fuse box than an engine. It is an argument for a limited form of regulation premised on the assumption that all that the law can do is to cause as little harm as possible, to literally work in a collateral role, on the sidelines of market action, as guarantors but nothing more. In contrast, I have tried to provide a much richer account of the political and epistemological possibilities that inhere in the temporality of

private law technique, an account that is positive, not simply negative. Collateral in this view is both a technology and a kind of politics, both a means to an end and a special kind of relationality. Most of all, collateral is a compact for a politics of the near future, of the meantime of the exchange, itself defined by the way it is also a handoff to the time beyond the near future, that is, to what and who cannot and should not, be predicted and controlled from the point of view of the present (Teubner 2004b).

To return to the central question of this chapter, then, how is it that if private law mechanisms of market governance and public law mechanisms of market governance are equally indeterminate, as a matter of the control they exercise on the ambiguity and risk associated with the future, how is it that private law governance does not suffer from the legitimacy deficit of technocratic regulatory practice?[xxii] Here, we can think in Weberian terms about legitimacy as essentially nothing more fancy than calculability (Callon 1998b)--as the techniques of standardization, simplification, entextualization, reification and so on that allow certain working truths to hold in certain conditions, the limits of which are clearly defined and acknowledged by the technology itself.

Private Legal Techniques for Public Regulatory Purposes

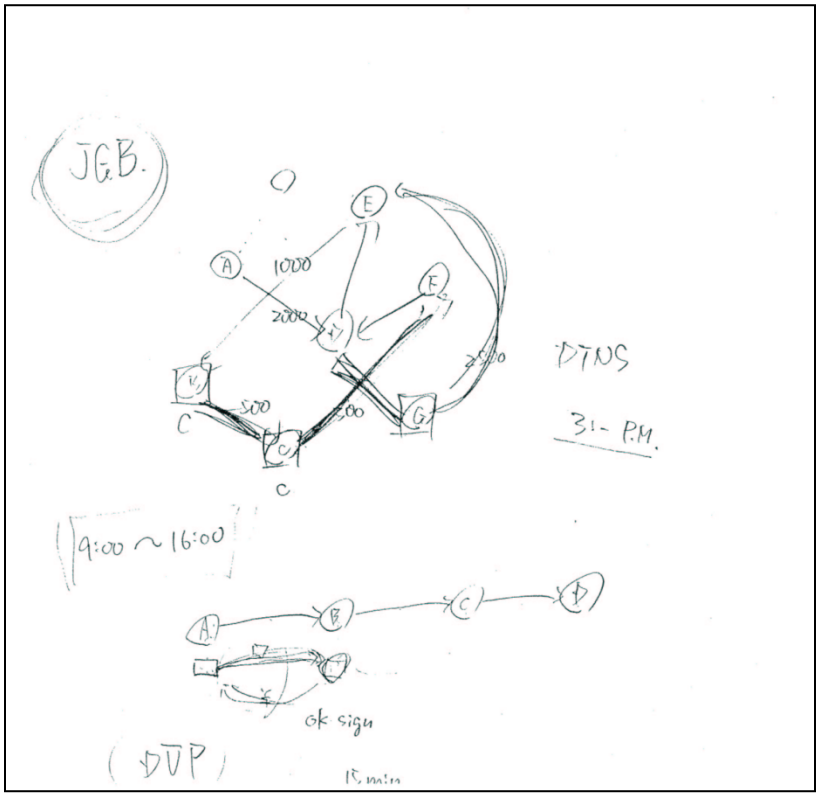
So does this mean that, as Hayek and his followers assert, private regulation is inherently superior to public regulation? The fallacy of the Hayekian argument is the assumption that these “private” technologies can only be deployed by private actors. In fact, there is nothing inherently private or public about the techniques associated with private law. Indeed, Hayek himself implicitly admitted as much when he described the control states assert over markets in the form of national currencies as resting precisely on a *legal fiction*: "the legal fiction that there is one clearly defined thing called 'money' that can be sharply distinguished from other things"

(1976: 48). For Weber, likewise, the role of the state in the market was to enable calculability--to be legitimate in precisely the way I have posited private law as legitimate, so to speak (Swedberg 1998: 49).

I want to explore how this might be so with an example of how financial regulators in Japan redeployed the trick of the legal fiction and hence regained legitimacy in their own eyes and in the eyes of market participants. The example concerns an ingenious solution the Payments and Settlements Division devised to the problem of liquidity created by RTGS. As described earlier in this chapter, the problem was that Party A needed cash to pay Party C before it had received the payment it was owed on the same day by Party B. The old system, DTNS, had taken care of this liquidity problem by clearing all transactions simultaneously at 3:00 PM.

The solution they devised was this: As sketched out in the following diagram produced by the Division head, it was simply "deemed" before the fact that after the fact the transactions had occurred in proper order—A had first paid B, who then paid C and so on. In other words,

the solution was a legal fiction, a placeholder.[xxiii]



Now functionally speaking, it will be obvious that this is not really different from DTNS nor is it different from a bank overdraft. But if these other two solutions raised concerns about illegitimate interference in the market by regulators, the legal fiction was apprehended by market participants and regulators as a legitimate technical solution to a practical problem, nothing more. Does this mean that it was a sham? Just a clever way of pulling the wool over the public's eyes? I think such an explanation would be too simple. The power of legal techniques lies in their ability to serve as placeholders—ways of leap-frogging over problems that by definition cannot be resolved in the short run. Legal fictions differ from lies, as Lon Fuller tells us, because everyone knows them to be fictions (1930: 367). But along the way—and here lies the governance element—they begin to serve as pathways, scripts, private constitutions for particular kind of action.

Conclusion

Let me be clear about what I am not advocating: First, as discussed further in the concluding chapter, I am not advocating the actual privatization of regulation, including experiments with encouraging the parties to self-regulate. These proposals assume, with Hayek, that there is something mysterious about governance that only private entities can do well. My point is exactly the opposite, that there is nothing inherently private or public about the temporal politics of the placeholder, and hence public regulators can effectively appropriate and redeploy legal governance techniques that have characterized private legal technologies on their own regulatory terrain. Second, I do not mean to suggest that transparency and accountability are not crucial elements of a stable financial system. But I am suggesting that legal technique creates its own forms of legitimacy and its own scripts for governance. Legitimacy—both among market participants and in the wider political arena—is the hallmark of a stable market. Legitimacy is generated on a grand scale by transparency and political accountability. But on a day to day, mundane scale, legitimacy may also be generated by the availability of techniques that inspire confidence in the near future. Here, I am suggesting that there may be unexamined possible uses to technical legal knowledge at moments of financial and political crisis, and, counter-intuitively, these possibilities may inhere in the way law serves as a placeholder for, rather than a reflection of, market realities.

Notes

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[i] The location of the critique of state regulation of markets in the limitations of bureaucratic knowledge is as much a project of the left as a project of the right. In his classic mid-century critique of U.S. politics, Theodore Roszak assails the "technocracy" as "that society in which those who govern justify themselves by appeal to technical experts who, in turn, justify themselves by appeal to scientific forms of knowledge. And beyond the authority of science there is no appeal" (1969:8). Like other theorists of his time (e.g., Meynaud 1969), Roszak follows Hannah Arendt (1979), Herbert Marcuse (1964), and Max Weber (Weber and Eisenstadt 1968) to focus on the way technocratic power is "the product of knowledge and extraordinary performance" (Winner 1977:139). Recent social scientific work revives this tradition to show, for example, how the assumptions and inner workings of bureaucratic knowledge impede citizen participation (Espeland 1994, 1998; Fischer 1990; McAvoy 1999).

[iii] The nature of time is a longstanding anthropological subject (e.g. Greenhouse 1996; Miyazaki 2002).

[iv] In her chapter, "Relative Time and the Limits of Law," Carol Greenhouse (1996: 49) has argued that the 'real reality' of linear time and its official status are "socially reproduced against rival ideas of agency and sovereignty within and beyond the West." In particular, she argues that time's particularity is maintained as a contradiction in ethnographic practice, where nature, death and change are pitted against the so-called relativities of culture.

[v] For some latter day formalist arguments of this kind, see Alexander 1999, Scalia 1989, Schuck 1992, Wilson 1985.

[vi] Some commentators tend to characterize collateral as more of a contractual right than a right in property. Interestingly, progressive and conservative commentators alike tend to assume that characterizing collateral as property will produce more conservative doctrinal outcomes while characterizing collateral as contract will produce more progressive outcomes (e.g. Harris & Mooney 1994)--an assumption I would vigorously contest. Whether collateral is "actually" property or contract need not concern us here--most sophisticated theorists of either contract or property would recognize many kinds of rights or doctrines that contain elements of both.

[vii] "The relation of the immediate parties to the contract, where negotiable instruments have been placed in the hands of a creditor by a debtor as collateral security, for the payment of a valid debt or obligation, resembles that of a trustee and cestui que trust. The

responsibilities of the pledge to the pledgor are similar to those of a trustee: First, to collect and apply the securities at their maturity to the payment of the debt, …and secondly, to pay over the surplus, if any, to the plegor. The pledge is also likened to a trustee, as he may not deal with the trust property so as to destroy or impair its value." (Colebrooke 1883: 117).

[viii] I leave to one side another important realist critique of the Hayek-De Soto line of argument, which is the point that there is no such thing as a truly private property regime in any case since all private property rights are ultimately defined and enforced by public authority. I leave this to one side because my focus is not upon the "truth" of private law in some existential sense but on the kind of thinking that traditionally characterizes private law--the moves, metaphors, and methods of analysis.

[ix] In practice, it is common to structure the repledge as a repurchase contract in which the collateral taker sells the collateral to a third party and simultaneously agrees to rebuy it at a future date (Johnson 1997: 968-69).

[x] Jones is careful to add the following caveat recognizing the interaction of private law and state law: "If the condition be not performed according to its terms, the thing mortgaged is irredeemable at law, though there may be a redemption in equity, or by force of statute." (Jones 1881: 1).

[xi] 9-207(c)(3) and 9-314(c).

[xii] This includes a duty to collect and account for the fruits of the collateral during the pledge period (Section 297).

[xiii] There are two kinds of sub-pledge under Japanese law: *sekinin tenshichi* (literally "responsibility sub-pledge") and *shodaku tenshichi* (literally "approval sub-pledge"). They are respectively covered by sections 348 and 350 of the *Minpo* (Civil Code). The main difference between the two types of sub-pledge are that in *sekinin tenshichi*, the pledgee sub-pledges without the pledgor's approval, and in so doing, assume responsibility for any losses arising from the sub-pledge, even if the loss is caused by force majeure. *Minpo* (Civil Code), Law No. 89 of 1986, art. 348, "Pledgees may sub-pledge the Thing pledged within the duration of their rights, upon their own responsibility. In such cases, the pledgees shall be responsible for any loss arising from the -pledge even if the same is caused by force majeure." In *shodaku tenshichi*, the pledgee gains the pledgor's approval first, and the pledgee is not responsible for losses arising from the sub-pledge caused by force majeure. The extent of the pledgee's liability in a *shodaku tenschichi* is determined between the pledgor and the pledgee.

[xiv] "Japanese Conflict of Laws (hourei) requires that the perfection of a security interest or title transfer be governed by the law of the jurisdiction where the collateral (security) is located. This does however create, in the event of a cross border security collateralisation,where securities are held through several tiers of custodians and a settlement system, some difficulties. The reason herefor (sic) is that it is almost impossible for the parties to a collateral transaction who want to create a security interest

over foreign securities, to know where and how such foreign securities will be finally located and held" (Wani 2000).

[xv] The group actually proposed three different models of how such a transaction could be structured--as a straight out loan for consumption with return of the same kind (shouhitaishaku) (Civil Code Section 587), as shouhitaishaku (Section 587) plus netting (sousai) (Civil Code Section 505); and shouhitaishaku (Section 587) plus Section 482). *Minpo* (Civil Code), Law No. 89 of 1896, art. 587, "A loan for consumption shall become effective when one of the parties receives money or other things from the other party by promising that he/she will return by means of things that are the same in kind, quality and quantity."

[xvi] "The indifference of the text with regard to its referential meaning is what allows the legal text to proliferate, exactly as the coded, preordained repetition of a specific gesture or set of gestures allows Helen to weave the story of the war into the epic" (de Man 1979: 286).

[xvii] A recent article by Karen Knop (2010) offers a powerful image of how the legal fiction might travel back to feminist theory. Knop describes a creative deployment of the constraint of form of the legal fiction by feminist activists seeking to cast sexual slavery during World War II as a war crime. These activists staged a meeting of the Tokyo War Crimes Tribunal to adjudicate the claims "as if it were a reopening or a a continuation" of the original trial. The brilliance of this move is that it reorients technical legal knowledge (Miyazaki 2004) by deploying its strict constraint of form in reverse--rather than deploying the placeholder as a handoff to the near future selves it reaches back in time to stage a "prequel" of the present and hence to affirm how the present is staged as a handoff from the past.

[xviii] Archeologists have long had sophisticated debates about what difference the material quality of the document makes --the fact that it survives, but also decays, and hence exists through cycles of "production, use, discard and reuse" (Hodder 1994: 395)-- to its interpretation. The temporality of the object also has implications for its meaning: an image that is at first metaphorical over time becomes a cliché, for example; "An artifact may start as a focus but become simply a frame, part of an appropriate background" (1994: 398).

[xix] As Lon Fuller has argued, a legal fiction differs from a hypothesis for Fuller because there is no question of proving its truth (Fuller 1930: 367).

[xx] As I explain elsewhere in more detail, documents can be seen to collapse time and analysis, two kinds of units usually imagined to be of different orders (Riles 2006b: 18). This condition can be a problem as much as a solution for bureaucratic practice, of course. I have described how "the collapse of time and institutional progress, two key parameters of [bureaucratic] work, such that no measurement of one against the other was possible" produces the ubiquitous phenomenon of "organizational gridlock."

[xxi] "Thus understood, the democratic majorities of the future could not be predicted, determined and reduced to the democratic majority of the present. They could not, and should not, be susceptible of being conceived as "simultaneous" with the majorities of the past." (Parker 2008: 8).

[xxii] I refer here of course to legitimacy as an empirical matter--as a matter of whether or not a governance regime is perceived as legitimate by its diverse stakeholders. Whether or not it is legitimate as a normative matter is a separate, and in my view, independent question.

[xxiii] Since my fieldwork, the Bank of Japan has formalized this legal fiction in the form of a revised RTGS system. The new system, presented as simply a technological upgrade, complete with a name that invokes computer systems upgrades, RTGS-XG (RTGS--neXt Generation), addresses the liquidity problem through an "algorithm" that searches for transactions that would be better reordered, and reordering them (Bank of Japan 2006). This does not raise issues of transpareny and legitimacy for its architects because the system is automatic (the algorithm resides in a computer) and because market participants can see their transactions in a queue and move to reorder them themselves. We might say that in this case the placeholder was a handoff to a machine. Science and technology studies of course gives us reason to doubt whether computerizing such transactions actually depoliticizes them as it is suggested here.

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