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Recommended Citation

Lothian, Tamara (1995) "The Democratized Market Economy in Latin America (and Elsewhere): An Exercise in Institutional Thinking within Law and Political Economy," *Cornell International Law Journal*: Vol. 28: Iss. 1, Article 4.
Available at: <http://scholarship.law.cornell.edu/cilj/vol28/iss1/4>

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ESSAY

Tamara Lothian *

The Democratized Market Economy in Latin America (and Elsewhere): An Exercise in Institutional Thinking Within Law and Political Economy

I. The Themes: Neoliberalism, the Imagination of an Alternative, and the Responsibilities of Legal Analysis

Latin America has become a stage for a vast institutional and ideological experiment: a turn to more liberal economies as they are understood and organized in the United States and Western Europe. This neoliberal experiment amounts to a variation on the dominant mode of institutional and ideological change in the world today. Thus, a critical understanding of this event may shed light upon similar changes occurring now almost everywhere. To outline such an understanding and to suggest an alternative trajectory of change is the major theme of this essay. The minor theme is the role that a suitably reoriented style of legal analysis can and should play in the interpretation of institutional changes such as those discussed here as well as in the formulation of alternatives to them.

The method I employ combines a normative vision and a descriptive and explanatory approach to a complex circumstance. It thus differs from both positive social science and Anglo-American political philosophy: the former is characterized by its emphasis on a sharp distinction between fact and value, while the latter is characterized by its quest for a foundational standpoint of impartial judgment and its demotion of institutional concerns to a secondary, merely technical or tactical stage of reflection. Here, by contrast, I begin with, and seek to illustrate (to illustrate rather than to

* Director, International Corporate Finance, Bank of Boston. Many of the ideas in this essay developed through conversations with Roberto Mangabeira Unger. Numerous other friends and colleagues commented on earlier drafts of the essay. Special thanks to William H. Simon, of Stanford Law School, David M. Trubek, of University of Wisconsin-Madison, and Katherine Van Wezel Stone, of Cornell Law School, for inviting me to present my ideas in workshops at their respective institutions.

demonstrate), the hypothesis that thinking about ideals and thinking about institutions are overlapping endeavors.

Although the situations and proposals I discuss are drawn largely from Latin America, my working hypothesis is that the substantive ideas as well as the method of argument have some value for basic issues of reform in market economies and representative democracies anywhere. The American reader should frequently note the analogies connecting the Latin American experiences and possibilities explored here to suppressed American debates. The practical problems and the institutional and ideological repertoires of different societies around the world have become bound together in something analogous to the Wittgensteinian metaphor of the rope: just one rope although none of its countless strands runs from end to end.

Thus, the vision outlined here has no simple geographical domain of application; it can readily be modified to apply to the problems of other contemporary societies, rich and poor alike. Each of these "applications" requires a deepening of insight as well as a revision of proposals. But no one who understood the problems and the alternative solutions in one place would be at a loss to begin understanding them anywhere else. New turns in the conversation would remind her of turns she had already taken.

II. The Political-Economic Background: Protected Fordism and Pseudokeynesianism

A. Protected Fordist Production

Before examining the neoliberal changes, it is useful to recall the background against which these changes react. Although there is some measure of consensus among scholars about how to characterize the background, there is much less agreement about the true nature of its deficiencies. Slogans about the evils of "statism," "economic nationalism," and "populism" cannot stand in the place of real analysis.

Two main elements composed this background: the strategy of autarchic industrialization, oriented to the development through import substitution of fordist mass-production industry, and pseudokeynesian governmental finance.

The core of the industrialization strategy was governmental support, in the form of planning initiatives, overt and covert subsidies, and protectionism to set up a fordist-style industrial complex.¹ In the most developed example, Brazil, state-founded and state-owned industries produced

1. For two classic articulations and defenses of this growth strategy by two of its most influential theoreticians and practical exponents, see CELSO FURTADO, *DESENVOLVIMENTO E SUBDESENVOLVIMENTO* (1963); *TRANSFORMACION Y DESARROLLO: LA GRAN TAREA DE AMERICA LATINA* (1970). For an understanding of this political economy as a genuinely political invention underdetermined by economic constraints, see CARLOS H. WAISMAN, *REVERSAL OF DEVELOPMENT IN ARGENTINA: POSTWAR COUNTERREVOLUTIONARY POLICIES AND THEIR STRUCTURAL CONSEQUENCES* 164-205 (1987).

inputs for private firms—the largest of which were multinationals. Although this strategy has often been described and justified as one of import substitution,² its driving economic feature was a governmental guarantee of the profit margins of private firms in the subsidized sector. On this basis, there developed a style of economic growth which associated a strong measure of internal dualism with a specific position of the national economy within the world economy.

This autarchic style of industrialization deepened the internal division of the economy and the society between the favored, newly industrialized and market-oriented sector and a second economy, bereft of favors and with marginal access to capital, technology, and markets.³ The vast majority of people remained imprisoned within this second sector. Autarchic, import-substituting industrialization led to the aggravation of internal dualism by many intersecting routes.

The fordist-style industry established in the favored sector of the economy was equipped to reproduce in Brazil many of the consumption goods enjoyed by the inhabitants of the developed countries. But it was ill-suited to produce the inputs and the machine tools needed by the small and medium-sized firms of the second economy. Today, a postfordist industry with flexible machines and flexible production practices would, as a technological vanguard, serve as the indispensable partner of the technological rearguard that accounts for most economic activity in countries like Brazil. Organizational and technological stagnation—the failure to develop an array of firms capable of accelerated learning—underlies blanket accusations of inefficiency that conventional economic thinking has traditionally directed against the inward-turning, import-substituting style of industrialization.

If a constraint upon innovation was the first sin of this style of state-protected economic growth, the second was the stark disparity in the distribution of government favors. This strategy characteristically resulted in mounting disparity between the need for governmental support and its availability. As the favored sector—both a social and a geographic reality—became richer, the disfavored sector became ever more needful of public investment. But the government had already committed its resources and energy.

As inequality between classes and regions grew, politicians spoke of the need to expand compensatory entitlement programs. Entitlement mechanisms, however, cannot succeed when faced with extreme degrees of wealth and income inequality, rooted in an entrenched economic dualism. Long before the transfer of resources from the first economy to the second economy reached the dimension necessary to deal with the

2. For a discussion of the development of ideas about the import-substitution aspect of this growth strategy, see Werner Baer, *Import Substitution and Industrialization in Latin America: Experiences and Interpretations*, 7 *LATIN AM. RES. REV.* 95 (1972).

3. For a study of the forms and consequences of economic dualism in a particular Latin American economy, see EDMAR L. BACHA, *Os MITOS DE UMA DÉCADA* (Coleção Estudos Brasileiros, vol. 9, 2d ed. 1978).

problems of the majority of working people caught in the second economy, the transfer would begin to disorganize the first economy, killing the goose that lays the golden eggs.

In fact, this massive transfer never occurs: the same alliances that helped produce the import-substituting strategy in the first place, and that were immensely reinforced by the adoption of that strategy, inhibit a major assault upon the prerogatives and resources of the first economy. The disfavored sector may strike back through the vote—especially the vote in plebiscitarian presidential elections. But, in the age of dualistic, import-substituting industrialization, the characteristic expression of this electoral revenge has been a self-defeating economic populism. The government attempts to achieve by printing and borrowing money what it has failed to accomplish by redistributing resources.

The counterpart to the deepening of internal dualism is the pegging of the national economy in a fordist niche of the world economy. The industrial base of the favored sector gets caught, over time, in a competitive squeeze. It cannot compete with high-skilled postfordist industry. At the same time, it is beset by the emerging, lowest-wage platforms of export-oriented fordist-style industry (today, countries like Malaysia and Indonesia succeed countries like Taiwan and Korea, which have moved to a more advanced technological frontier). As a result, wages in the favored sector of the national economy face a continuing downward pressure, for which the national government is expected to compensate.

Recent international trade theory has emphasized how, contrary to the standard Ricardian doctrine of comparative advantage, small national handicaps or successes may develop into continuing advances or setbacks up or down the evolutionary ladder of productivity.⁴ Once a country gets caught in an unfavorable niche, escape is possible but difficult and costly. The escape from the squeeze of protected late fordism requires, among other initiatives, massive investment in people, especially in their educational capabilities. Such investment, however, proves a daunting task for governments under the conditions against which the neoliberal project is reacting in contemporary Latin America.

B. Pseudokeynesian Public Finance

To understand why the urgent investment in people turns out to be so difficult to make, it is necessary to take a second element of the background into account: the dominant practice of governmental finance accompanying import-substituting industrialization.

This practice has often been labelled populist, but it might more accurately be called pseudokeynesian. It is a policy of cheap money, subsidies for consumption goods as well as for favored production sectors (including the use of public enterprises and public banks to help private firms), overvalued exchange rates, and, above all, massive public borrowing, both foreign and domestic, and large-scale, as well as continuing mon-

4. See PAUL R. KRUGMAN, *RETHINKING INTERNATIONAL TRADE* (1990).

etization of, governmental deficits.⁵

The essence of pseudokeynesian state finance is the inability of the national government to impose the cost of public investment in infrastructure and in people upon the propertied classes of the country. Instead, the government generalizes this cost to the whole society through inflationary finance. This policy superficially resembles Keynesianism in its use of governmental deficits to raise the level of growth and employment beyond the limits that would be imposed by a "low-level equilibrium trap." Original Keynesianism, however, served as both an expression and a reinforcement of governmental strength; by weakening the hold of sound-finance doctrine, it diminished—if only for a while and in certain circumstances—the dependence of governmental policy upon the state of business confidence.⁶ Pseudokeynesian state finance, by contrast, betrays governmental weakness: a failure of power and nerve of central governments in confronting the interests of entrenched elites.⁷

The elementary legal requirement for the practice of pseudokeynesian public finance is a remarkable, and remarkably universal, instance of what Marxists would call fetishism in legal thought: the failure of the law, in Latin America as everywhere else, to consider the seigniorage earnings of the government a taking of private property subject to compensation. My point is not to advocate that seigniorage earnings should be so taken. Such action would result in the creation of a functional equivalent of the gold standard and would drastically diminish democratic control over the course and consequences of economic progress. The point is rather to observe how vastly influential styles of political economy may depend upon very specific, controversial, and perplexing legal concepts. The uncompensable and incontestable character of the earnings that an executive or a central bank may secure, without legislative support or judicial scrutiny, by debasing the currency may coexist, under the same legal regime, with the most severe restraints upon those expropriations that are classified as takings.⁸

5. Macroeconomists interested in Latin America have produced a constant stream of denunciations of populist economic policies, rejecting them as self-defeating while failing to understand them from a broader social and political perspective. See Rudiger Dornbusch & Sebastian Edwards, *Macroeconomic Populism*, 32 J. DEV. ECON. 247 (1990). For an instructive set of national studies, see *THE MACROECONOMICS OF POPULISM IN LATIN AMERICA* (Rudiger Dornbusch & Sebastian Edwards eds., 1991).

6. I recognize that there is also a plausible case for interpreting original Keynesianism as marked by a minimalist technocratic view of state capacity, which would bring it closer to pseudokeynesianism. See Donald Winch, *Keynes, Keynesianism, and State Intervention*, in *THE POLITICAL POWER OF ECONOMIC IDEAS: KEYNESIANISM ACROSS NATIONS* 107, 110-13 (Peter Hall ed., 1989).

7. For a discussion invoking unresolved social conflict as the decisive influence upon populist distributivism, see Jeffrey D. Sachs, *Social Conflict and Populist Policies in Latin America*, in *LABOR RELATIONS AND ECONOMIC PERFORMANCE* 137 (Renato Brunetta & Carlo Dell'Aringa eds., 1990).

8. These restraints are severe enough in many developing countries to make urgently needed agrarian reform practically impossible.

In fact, a very large part of the political and economic life of many Latin American countries today can be explained by examining the cumulative effect of only three legal rules: the almost unlimited right of inheritance (reproducing extreme inequality), the mandatory vote in the context of a strong presidential regime (ensuring that the economically disenfranchised can strike back through politics, although the politicians, thanks to the right of inheritance, will usually be serving two masters), and the uncompensable character of seigniorage earnings (enabling the government by printing money to find a way between the cries of the people and the vetoes of the propertied class). Bentham would here have his work cut out for him.

Pseudokeynesian state finance has a typical history that economists have only recently begun to understand. This history has both a cyclical and a sequential aspect. The boom-bust cycle of economic populism coexists with a slow progression toward circumstances that diminish the benefits and increase the costs of pseudokeynesianism. The cyclical aspect is the now familiar cycle of economic populism. Demand-led inflationary growth produces a short-lived boom and a substantial increase in nominal wages. The boom comes to an end with a balance-of-payments crisis brought about by an overvalued exchange rate and an unsustainable rise in imports. Disinvestment and capital flight finish what the balance-of-payments crisis began. In the end, the government finds itself driven to adopt an austerity program that depresses the real wage and the overall level of economic activity, sometimes to a point below where the cycle began.

The sequential aspect in the recurrent history of pseudokeynesianism is the progressive undoing of a state's ability to mask its weakness by borrowing and printing money. At the outset, massive borrowing at home and abroad may enable the government to maintain economic growth and wage levels even in the face of major economic shocks, such as massive increases in the price of an essential import such as oil. But foreign borrowing requires the government to accumulate a substantial internal debt, which inevitably leads it to print the money with which to buy the private export earnings needed to service the foreign debt. As confidence in government paper diminishes and maturities shorten, the effects of borrowing money come to resemble those of printing it.

The government forces the typically large public sector to pay a disproportionate part of the cost of inflation containment, limiting the tariffs and prices of the goods and services public enterprises produce and using them as instruments through which to continue foreign borrowing. The result is a progressive disorganization of the public sector.

Finally, as inflation increases and reaches its high and chronic stage, just beneath the threshold of hyperinflation, pseudokeynesianism begins to threaten the favored private sector itself. A general cry arises to get rid of it. But it can only be discarded when there is a political force strong and cohesive enough to impose a specific allocation of the burdens of stabilization.

The vital link between import-substituting, autarchic industrialization and pseudokeynesian state finance cannot be understood in narrow economic terms. The connection lies in the interests and alliances from which each of them draws life and which each, in turn, helps to reinforce. The favored sector that the industrialization strategy helps to define is the same sector that pseudokeynesianism exempts from paying much of the cost of public investment in people and infrastructure.

III. The Neoliberal Project and the Washington Consensus: Their Content and Consequences

A. Influence of the Neoliberal Project

The neoliberal project, as it has been pressed in Latin America in recent years, represents one response to the failures and limitations of autarchic, import-substituting industrialization and pseudokeynesianism. Latin American scholars are quick to point out that different countries have pursued different routes to economic stabilization and liberalization. Chile, Argentina, and Mexico, to take the most significant examples, have indeed diverged in many of their policies as they differ in many of their circumstances. But there is an overriding direction, a body of ideas and a repertoire of solutions, that has been repeatedly enlisted in the defense of these distinctive national trajectories.⁹

This shared direction has sometimes been labelled the "Washington consensus." The label clearly suggests the decisive nature of the American influence upon the ascendancy of neoliberal ideas in Latin America and elsewhere. This influence has two overlapping sources: the world of the American technocracy, established in government and in the major multilateral banks and, more importantly, the world of the American universities, especially the graduate economics departments where so many candidates for Latin American elite status have trained.

In the United States and in Europe, neoliberal ideas (using the term in the Latin American and European, rather than in the American sense) were always kept in their place. Reaganism, Thatcherism, and their continental European counterparts never reigned free, either because the associated country had powerful social-democratic movements and resistant portions of an organized civil society with which the ideology had to contend or because the national governments they took over had much less effective power over the national economy than did their Latin American counterparts. In Latin America, the weakness of these constraining conditions has been vastly accentuated by the widespread sense of crisis produced by the failure of the inherited strategy of economic growth and the dominant style of government finance.

But the neoliberal project had one more simple but easily overlooked advantage: it was there. Developed ideas about alternative pathways of

9. For a progress report on how the neoliberal project was performing in particular Latin American countries as of 1990, see JOHN WILLIAMSON, *THE PROGRESS OF POLICY REFORM IN LATIN AMERICA* (1990).

institutional change are few and far between. Enormous influence will attach to a body of beliefs that is frequently surveyed, easily defended, and that seems to be supported by the example of the successful countries and by the teachings in their universities. No wonder the neoliberal project has had so much going for it.

B. Content of the Washington Consensus

The Washington consensus has four main components.

1. *Orthodox Stabilization*

The Washington consensus calls for economic stabilization and monetary transparency through fiscal adjustment.¹⁰ The primary emphasis in the Washington consensus is on cutting governmental expenditures rather than on increasing tax revenues. The central bank should be made independent, and the treasury should be prevented from financing itself through draws upon the central bank. Wage-price freezes and social-compact negotiations may be grudgingly allowed as secondary stabilization devices.

2. *Liberalization*

Tariff barriers should be brought down, and market reserves (quantitative restraints upon imports) should be abrogated. The internal economy should be exposed to a heavy dose of foreign competition.¹¹ Free trade should extend to services and intangibles, and the ground rules of world trade (e.g., patent rights), as defined by the leading economic powers, should be fully respected. Much less attention is given to internal liberalization (e.g., antitrust initiatives designed to break up the oligopolies accounting for a large part of the private sector). The counterpart to liberalization is free convertibility and unification of exchange rates. The achievement of these convertibility goals may be delayed until stabilization is secured. If, on the other hand, an exchange-rate anchor for the money supply is adopted, the convertibility measures may be implemented simultaneously with the stabilization program.

3. *Export Orientation*

The economy should gear up for a sustained export orientation. Because of the antigovernment bias characterizing the Washington consensus, export drives are supposed to occur spontaneously as a result of free trade

10. For a systematic statement of the stabilization component of the Washington consensus, which demonstrates how mainstream ideas can be broadened to incorporate some of the "heterodox" appeal to social compacts and wage-price freezes as methods of dealing with inertial and expectations-based elements of high and chronic inflation, see Rudiger Dornbusch et al., *Extreme Inflation: Dynamics and Stabilization*, in BROOKINGS PAPERS ON ECONOMIC ACTIVITY 2 (1990).

11. For a discussion of the theory and practice of liberalization and of its links to other elements of the Washington consensus, see NORA LUSTIG, MEXICO: THE REMAKING OF AN ECONOMY 114 (1992). Lustig's book serves more generally as a case study of the implementation of the neoliberal project in a particular country, as viewed by its defenders.

and free convertibility, in a context of worldwide specialization and comparative advantage, rather than as a consequence of strategic coordination. The export orientation is needed to generate the earnings to service the pre-existing foreign debt and to sustain an expanded import capacity. It may also be required to create an exchange-rate anchor for the money supply. No special attention is given to the profile of imports and to the priority of technology transfers and machinery purchases. Market forces are expected to take care of such concerns.

4. *Privatization*

Public enterprises and banks should be privatized—as many, and as quickly, as possible.¹² If necessary, investors should be allowed to buy public companies with government paper, valued, for the purpose, more highly than it is valued by existing secondary markets in government paper. The state should get out of the business of production. (Everyone, the votaries of the Washington consensus repeat, knows that governments are bad producers.) Instead, the government should devote itself to dealing with social problems and developing the conditions for the profitability of private firms.

C. Criticism of the Stabilization Component of the Washington Consensus

The truth in the fiscal-adjustment part of the Washington consensus is just the reverse of the illusions of pseudokeynesianism and of the “heterodox” ideas about inflation and its control. These ideas have given pseudokeynesian approaches a new lease on life in Latin America by emphasizing inertial forces and inflationary expectations rather than the weakness of the state and its tax revenue. There can be no sustained growth with high and chronic inflation and no way of ending such inflation, in the real conditions of the Latin American economies, that fails to address the persistent fiscal crisis of the state. The flaw in the fiscal-adjustment part of the Washington consensus is the supposition that fiscal adjustment can be achieved principally by cutting back on government expenditures and privatizing public companies.

In poor and hierarchical societies, people and firms need government. For there to be a democratizing style of economic growth, one that diminishes inequality while creating opportunities for entrepreneurial innovation by many more people, public savings and investment must increase rather than diminish. To this end, the government must be freed from the shackles of large foreign and domestic debt. (The domestic debt, although often small in absolute terms when compared to certain

12. Discussion of the reorganization of the public sector is tainted by a failure to appreciate the diversity of legal-institutional forms that the public enterprises might assume. For a characteristic statement of the neoliberal view, see Felipe Larrain & Marcelo Selowsky, *Comparative Analysis, Lesson, and Policy Conclusions, in THE PUBLIC SECTOR AND THE LATIN AMERICAN CRISIS* 283, 315-18 (Felipe Larrain & Marcelo Selowsky, eds., 1991).

industrialized Western countries, became in Brazil and several other Latin American countries, the centerpiece of a system for financial speculation, forcing the state to pay very high real interest rates for the acceptance of government paper.) The cost of public investment in people and in infrastructure must be imposed upon the propertied classes through a higher effective tax rate, rather than generalized to the society as a whole through inflationary finance.

D. Criticism of the Structural-Adjustment Component of the Washington Consensus

Three issues are paramount. They intersect at many points.

1. The Washington consensus fails to have a properly critical attitude toward the private sector as it is currently organized. In its present form, in Brazil, Mexico, Argentina, and many other Latin American countries, the private sector, particularly in the protected fordist part of the industrial system, is tainted by oligopolistic, rent-seeking, and familial-nepotistic characteristics. (The largest private businesses not family owned and run are typically foreign.) In such circumstances, public enterprises and banks have often provided a valuable countervailing force, both by countering the oligopolistic market power of their private customers or suppliers and by creating careers for a technical elite of propertyless middle-class youth.

2. The Washington consensus fails to appreciate the requirements for the indispensable investment in infrastructure and in people. It is vitally important to increase public savings and public investment. It is also necessary to have the types of political and social organization that can sustain the pressure to increase public savings and investment while helping to prevent the corrupt, clientelistic use of public funds. Such policy goals mandate rules and practices which heighten the level of political mobilization in society: constitutional arrangements for promoting rapid resolution of deadlocks among branches of government, while maintaining the plebiscitarian element of the presidential regime and a preference for forms of social (i.e., union) organization that encourage civil society to organize.

3. The Washington consensus fails to acknowledge the crucial significance of the partnership between a technological vanguard and the technological rearguard of the economy in order to (a) soften internal dualism and (b) escape the late-fordist niche in the world economy.¹³

13. The dominant approach among influential international economists interested in problems of practical policy in Latin America continues to be characterized by a combination of unjustified faith in spontaneity (markets will do the job once stabilization and structural-adjustment take place) with undisguised disappointment at the slowness or indifference such market forces often continue to exhibit long after the prescribed stabilization and adjustment have been imposed. See Rudiger Dornbusch, *Policies to Move from Stabilization to Growth*, in PROCEEDINGS OF THE WORLD BANK ANNUAL CONFERENCE ON DEVELOPMENT ECONOMICS 19 (1990), reprinted in RUDIGER DORNBUSCH, *STABILIZATION, DEBT, AND REFORM: POLICY ANALYSIS FOR DEVELOPING COUNTRIES* 32 (1993).

The technological vanguard must, to some extent, be in the public sector: public enterprises and public banks can have a longer-term strategic horizon, free from the short-term profit constraint.

But it would be a mistake, characteristic of the thinking that inspires the Washington consensus, to oppose public enterprise and the market economy. Public firms can compete, have entrepreneurial autonomy, and bear financial responsibility (including the threat of bankruptcy).

Each of these criticisms of the Washington consensus points in the direction of a series of institutional innovations to be worked out in detailed legal form. The common element in these innovations is the development of alternative arrangements for the market economy and for its socio-constitutional background. Such arrangements defy the conventional reduction of the "market" and "democracy" to the present economic and political institutions of the United States and Western Europe.

E. The Work of Legal Analysis

The criticism of the Washington consensus I have outlined is therefore institutionalist in spirit. Because it is institutionalist, it is also legal. The details of the alternative arrangements are decisive in determining both the practical prospects and the spiritual meaning of any institutional innovations. Practices and institutions are not pieces of social engineering separable from conceptions, interests, and ideals. The style of legal thinking required is therefore one adept at micro-institutional design and at rethinking the links between abstract institutional conceptions and practical arrangements.

IV. A Democratized Market Economy: The Strategically Coordinated Market and the Cooperative-Competitive Firm

A. Standards a Democratizing Alternative to the Neoliberal Project Should Meet

It is helpful to distinguish general objectives from more specific and circumstantial aims. An alternative to the neoliberal project and the Washington consensus should reconcile sustained economic growth with continuing democratization of the society. Democratization, for this purpose, should be understood to mean the development of practices of collective deliberation and self-determination in all major theaters of social life, the liberation of the life chances of the individual from predetermination by a rigid, steep hierarchy of inherited economic advantage, and the weakening of the reciprocal reinforcement of political power and economic power to the benefit of privileged minorities. The obstacles to such democratization extend from the extremes of economic inequality (Brazil and Mexico stand at the most unfavorable pole of the Gini coefficients measuring economic inequality¹⁴) to the clientelistic style of sociability,

14. See Vincent A. Mahler, *Income Distribution Within Nations: Problems of Cross-National Comparison*, 22 COMP. POL. STUD. 3, 18-21 (1989). The Gini coefficient pro-

mixing power, exchange, and loyalty that mark so much of everyday life in these societies.

The idea of an affinity, or of an area of potential overlap, between the conditions of material progress and the requirements of individual emancipation is central to the alternative I propose, as well as to the normative vision inspiring it. I shall return to it later. For the moment, it is enough to emphasize that a major connecting feature between democracy and economic growth is the capacity for learning. Successful economies are those composed of firms good at learning. Democracy, viewed from an inclusive, pragmatic perspective, is a collective practice of learning. An alternative to the neoliberal project and the Washington consensus, therefore, should provide an answer to this question: under what institutional conditions are collective learning activities, in the production system and in politics, most likely to flourish? Moreover, the question must be addressed not to an abstract and indeterminate audience but to particular countries beset by particular problems.

In addition to these general objectives, the alternative to neoliberalism should offer a response to the twin structural problems that inhibit economic progress and democratization in many Latin American countries: the problems of economic dualism and of the late-fordist niche in the world economy. Moreover, the alternative should resolve these problems while both re-creating the capacity for public savings and public investment and deepening the vitality of the market economy. What counts is the market economy in a real sense—as a collective experience of economic decentralization, opportunity for individual initiative, and facility for innovation—rather than the market economy as defined in a formal sense (i.e., conformity to a preset notion of the regime of private property). In such an enlarged alternative system, government and private producers can collaborate. Public enterprises can become competitive market agents. Private firms, as members of “cooperative competition,” can cooperate in some respects (e.g., by pooling some of their financial, technological, and commercial resources) while competing in others.

B. A Method of Contextual Argument

The method I prefer to use in outlining such an alternative is to take certain contemporary regional experiences (that is to say, regions of the world economy) as my starting points: to present a controversial interpretation of some of their aspects, to criticize them in light of this interpretation, and to suggest in what respect a revised version of their more promising features would contribute to the alternative I propose. In utiliz-

vides one statistical measure of income inequality within nations. For an alternative approach, see UNITED NATIONS DEVELOPMENT PROGRAMME (UNDP), *HUMAN DEVELOPMENT REPORT* 1994, at 164 (1994). This method compares income inequality within countries in terms of the ratio between the highest and lowest fifth of the population. During the period 1980-91, the ratio for Brazil was 32.1, and the ratio for Mexico was 13.6. Ratios for China, Indonesia, and Ethiopia were 6.5, 4.9, and 4.8 respectively.

ing this method, I shall focus primarily upon certain aspects of the experience of the so-called East Asian tiger economies. I shall then complete this critical and reconstructive analysis with a brief, more focused reflection on two other experiences: those of the ex-Comecon countries and those of successful regional economies within Western Europe (countries in which cooperative-competitive networks of small and medium-sized firms have come to play a major role).

In conformity with my context-bound and institution-oriented method of analysis and my skepticism about general justifications, except as they arise from reflection upon historical experience, I prefer to postpone my discussion of the normative vision which underlies my proposal and gives it life.

While somewhat untidy, this method of proceeding has several advantages. First, it prevents the degeneration of institutional thinking into dogmatic design, undisciplined by the stubbornness of real-world constraints. Fantasies project our prejudices; realities undermine them. Thus, a conception guided less by philosophical preconception may turn out to be of greater philosophical as well as practical interest. Second, by the same token, it allows for a more intimate, continuous, and productive conversation between political-economic argument and social analysis. Third, it helps to explore a hypothesis posited at the beginning of this essay: that we can profitably view the entire world today as a series of analogous theaters of experience, where every basic problem or interesting solution has a counterpart almost anywhere else. We can best approach this worldwide analogy not in the spirit of a quest for universal minima but rather in the spirit of the Wittgensteinian metaphor of the rope.

C. General Features of the Alternative

It may help to state at the outset some features of my proposed alternative that recur throughout its several parts. The alternative explores the institutional means by which strategic coordination, both by governments and subgovernmental organizations and cooperative arrangements among firms, can be more fully reconciled with market initiative and decentralized economic experimentalism. It sees public intervention in the economy and market decentralization as being capable of mutual reinforcement at many levels. This reinforcement may not come solely in the priority, dear to traditional social democrats, that is given to public investment in infrastructure and in people, but it will also be seen in the direct collaboration between government and public enterprises or banks with private producers in the actual conduct of production and exchange.

The alternative accords a major role to small and medium-size enterprises, often the most dynamic segment of contemporary economies. But it sees the best hope of realizing their productive potential in their association both with one another, in regimes of cooperative competition, and with a technological vanguard, headquartered in both the public and private sectors alike. The systematic mixture of competition and coopera-

tion, rather than their allocation to rigidly distinct aspects of economic activity, is a major feature of this proposal.

The alternative sees the need and the opportunity to limit economic inequality as both a condition and a consequence of economic progress. To some degree, such limits are a condition (because of the dependence of sustained economic growth upon equalizing reforms such as land redistribution and educational investment) that provides results more secure and dramatic than anything expected from traditional welfare entitlements. At the same time, the acceleration of economic experimentalism, defined organizationally, institutionally, culturally, and technologically, provides an opportunity to carry further the campaign against large and rigid inequalities.

It will always be possible to reconcile accelerated economic experimentalism with stable and entrenched hierarchies of privilege and disadvantage by some variant of social dualism (i.e., the division of society into a class of active participants in the vanguard of production and outsiders marginalized from it). The ultimate constraint upon such a reconciliation lies in the interruption of economics by politics. Thus, for example, a self-defeating populist political economy, ushered in by populist electoral victories has, in Latin America, been the regular response to unequalizing growth. Nothing, however, in the nature of economic experimentalism requires social dualism. In one sense, the proposal I develop is simply an effort to imagine, in conditions such as those we often encounter today in Latin America and elsewhere, the institutional form of experimentalism without dualism.

Finally, the alternative relates economic change to change in the legal organization of politics and society. The direction of economic reorganization that it sketches both requires and supports a style of politics demanding a higher level of civic engagement. It demands a style of constitutional ordering that facilitates the frequent practice of bold innovation. It mandates a style of organization of civil society which allows people to form and express interests and ideals as members of social organizations put at their disposal by public law, rather than just as isolated consumers, self-driven entrepreneurs, or occasional voters. It further requires the development of legal rules and concepts located at two familiar intersections: between administrative direction and private ordering, and between contract and the corporation.

In short, although the alternative may be criticized as statist, it takes seriously the commitment to a market economy. Moreover, although the alternative implicitly criticizes conventional social and liberal democratic policies and attitudes, it represents an effort to realize the contemporary democratic vision on inhospitable terrain, with the proviso that, as we change our ideas about how best to realize the vision, we also revise our understanding of its content.

V. An East Asian Starting Point: Democratizing Hard States and the Government-Business Partnership

A. A Contrasting Historical Sequence

Consider first the experience of the East Asian “tigers:” Taiwan, Korea, Singapore, and Hong Kong—an experience prefigured by Japan and continued, with different characteristics, by Malaysia, Indonesia, and Thailand. For the moment, I shall have Taiwan and Korea especially in mind; they present an instructive contrast while sharing features that Singapore and Hong Kong, as a result of many idiosyncracies, lack.

Much of this East Asian experience of successful industrialization and integration into the world economy is intransferable. It depends upon an accumulation of unique circumstances: the singular history of these countries, including the deeply rooted characteristics of veneration for learning and decisive, one-time upheavals such as the events leading up to the Japanese occupation, the Pacific War, and the American proconsulship, the unique effects of the American and then the shared American-Japanese hegemony, and the state of the world economy when the industrialization of the tigers took place (a circumstance that, following the rise of labor costs in core national economies but preceding the post-fordist industrial reconstruction, created special opportunities for low-cost producers of standardized commodities).¹⁵

Even the idiosyncratic, path-dependent evolution of these economies, however, gains a more general meaning when compared to the Latin American experience.¹⁶ The East Asian tigers passed, in the years after the Second World War, through an extended import-substituting phase. At this time, their political economies resembled, in many respects, the Latin American economies in the heyday of autarchic industrialization and import-substitution. There were, however, two crucial differences. First, import-substitution took place against the background of equalizing reforms, in particular, agrarian reform and public investment in education. Second, foreign direct investment remained low by Latin American standards; there was, on the whole, a reversal of the characteristic Latin American sequence, so that an emphasis on loan capital preceded rather than followed a heightening of direct investment. In fact, the governments of the tigers generally insisted upon national control of the “commanding heights” of their economies, carefully confining direct foreign investment to labor-intensive sectors of industry or to undertakings rich in the potential for technology transfers of strategic value to the national

15. For a discussion emphasizing the path-dependent effects of a singular history, see EZRA F. VOGEL, *THE FOUR LITTLE DRAGONS: THE SPREAD OF INDUSTRIALIZATION IN EAST ASIA* (1991).

16. For a comparative analysis underlining the relation between economic strategies and political capabilities, see David Felix, *Import Substitution and Late Industrialization: Latin America and Asia Compared*, 17 *WORLD DEV.* 1455 (1989).

growth path.¹⁷

This reversal of the Latin American sequence of relations with foreign capital is significant because comparative analysis has repeatedly suggested the existence of a correlation in the contemporary peripheral economies between degrees of economic inequality and levels of foreign direct investment. (The crucial connection may lie in the recurrent entanglement of multinationals with the reproduction of commodities suited to the living standards of the moneyed classes in the core national economies. The impulse to maintain the consequent profiles of consumption and production turns into a constraint upon macroeconomic policy.)

Just as revealing as these contrasts with the practices of protected fordism in Latin America is another device by which the East Asian tigers out "Latin-Americanized" Latin America. The tigers inherited from the Japanese a formidable public sector, which they preserved and developed until well into the export-oriented stage of their growth strategies. Two uses of the public sector turned out to be of special importance in laying the basis for this second stage. One was the development of a technological vanguard, generally pioneered by public-sector enterprises and later nurtured by governmental initiative in partnership with private firms.¹⁸ The other was the use of public-sector banks to direct and often subsidize credit allocation.¹⁹ Through these activities, the partnership between bureaucratic and entrepreneurial elites began to develop.

This background makes it easier to understand the nature of the passage from the import-substituting to the export-oriented strategy—the political economy for which the East Asian tigers are now chiefly known. What is remarkable, in light of current policy debates, is that this shift took place under close governmental direction.²⁰ In some instances, public enterprises themselves spearheaded the export drive and the technology transfers and commercial arrangements that made it possible. In other instances, the government recruited the new exporters, equipped them, and coached their first steps.

Thus, this political-economic trajectory already serves to dispel two connected illusions: first, that the overcoming of import-substituting semi-autarchy is naturally associated with a withdrawal of government from active involvement in the economy and second, more generally, that market-orientation is inversely related to government activism in the economy. The East Asian experience simply refuses to fit the limits of the contemporary progressive democratic compromise, according to which government

17. See Peter Evans, *Class, State, and Dependence in East Asia: Lessons for Latin Americanists*, in *THE POLITICAL ECONOMY OF THE NEW ASIAN INDUSTRIALISM* 203, 215-17 (Frederic C. Deyo ed., 1987).

18. See Denis Fred Simon, *Taiwan's Emerging Technological Trajectory: Creating New Forms of Competitive Advantage*, in *TAIWAN: BEYOND THE ECONOMIC MIRACLE* 123, 138-43 (Denis Fred Simon & Michael Y. M. Kau eds., 1992).

19. See Alice H. Amsden, *Asia's Industrial Revolution*, *DISSENT*, Summer 1993, at 328.

20. For an early study drawing attention to this point, see Bela Balassa, *Industrial Policies in Taiwan and Korea*, 106 *WELTWIRTSCHAFTLICHES ARCHIV* 55 (1971).

leaves production to the producers and limits itself to investing in the conditions of the profitability of private firms.

B. Background of Equalizing Structural Reform

Which specific features of the new East Asian political economy provide starting points for the development of an alternative to the neoliberal project as it is presented today in Latin America?

The first feature is the combination of equalizing structural reforms, such as land redistribution and family-farm support, with large-scale investment in public education. The point is to produce a population of capable and active individuals and not to rely, in the effort to achieve this objective, upon income redistributive techniques.²¹ Government-funded transfer payments are most likely to prove effective within a structure that has already been cleansed of extreme and entrenched forms of inequality and marginalization; they are no substitute for structural change. Note that investment in people and in their educational capital can coexist, and in these countries has coexisted, with what, by comparison to the European social democracies, are very low levels of government-financed social insurance. Consider also that the fundamental precondition for such investment is the maintenance of a high and stable level of tax revenue and public savings.

C. The Government-Business Partnership

The second and best known feature is the development of a series of institutional devices for the operation of a partnership between entrepreneurial and political-bureaucratic elites.²² The experience of the tigers reveals three main patterns in the construction of this partnership. The first, most characteristic of Korea, is the establishment of a few central government agencies working in partnership with major industrial-financial groups and using largely discretionary policy. The second type, more typical of Taiwan, is the establishment of central government agencies that work under a combined regime of rule and discretion with a broader, more decentralized array of large, medium-sized, and small firms.²³ The third variant, best typified by Hong Kong, is the negotiation of a trade and

21. For a discussion of the content, conditions, and consequences of educational investment, see ALICE H. AMSDEN, *ASIA'S NEXT GIANT: SOUTH KOREA AND LATE INDUSTRIALIZATION* 215-39 (1989).

22. My understanding of the variations and instruments of the government-business partnership owes a heavy debt to ROBERT WADE, *GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION* 73-112, 297-381 (1990). It is the great merit of Wade's analysis that he presents a detailed and unsentimental view of the collusive strategies binding political and economic elites together.

23. Yet even in the Taiwanese variant, scholars have identified an alliance between government and big business overshadowing the help given to smaller firms. See Dan Fred Simon, *External Incorporation and Internal Reform*, in *CONTENDING APPROACHES TO THE POLITICAL ECONOMY OF TAIWAN* 144-46 (Edwin A. Winckler & Susan Greenhalgh eds., 1988). See discussion of the need to democratize the government-business partnership, *infra* part V.D.

macroeconomic policy among the representatives of the major economic interests. This corporatist regime reduces government to a more modest coordinating role than it performs in the other variants.

It grossly simplifies and distorts the task of this partnership to characterize it as "picking winners." The key work of the partnership is, in every instance, that of coordinating the private and public contributions to the delineation of a cumulative investment and trade strategy. Modern trade theorists have elaborated on the idea that successful changes of position of the national economy within the world economic system depend upon persistence on a pathway that exploits cumulative advantages of scale and scope, even in the absence of comparative advantages in particular factor endowments.²⁴ To increase the likelihood that such an evolutionary pathway can be identified and pursued, the government must undertake two distinct types of coordinating responsibilities. It must induce a critical mass of firms to converge upon the same path (coordination among firms). It must also satisfy some of the requirements and counterbalance some of the risks associated with a novel line of production and exchange (coordination between public and private agents).

If this twofold coordination for the sake of strategies of cumulative advantage in production and trade is the work of the partnership, its single most important instrument is the direct or indirect allocation of credit. Such allocation in turn presupposes the deployment of free-floating resources, under the strategic control of the partnership. The essential points of such control are: (a) that the commitment of these resources not be subordinate to short-term profit considerations and (b) that the risk of deviating from such considerations not fall solely upon the innovative firm but, thanks to government action, be broadly distributed among firms.

D. Hard States

The third feature of general interest is a precondition of the other two: the existence of a "hard state." A state is hard when it enjoys a substantial capacity to form and implement strategies which impose the cost of public investment upon present consumers and the propertied classes, and a corresponding ability to resist influence by powerful factional interests (including the interests of its own partners in the government-business partnership).

Hard states have been necessary as agents of public investment and structural reform. They have also been required both to make the strategic partnership between government and business possible and to contain its risks. Common sense suggests that, in evaluating the costs and benefits of such a partnership, we must balance the burdens of dispersion and interference among productive undertakings (burdens that the absence of such a partnership imposes) against the dangers of rent-seeking and

24. See STRATEGIC TRADE POLICY AND THE NEW INTERNATIONAL ECONOMICS (Paul R. Krugman ed., 1992).

clientelism that the same partnership multiplies. The hardness of the East Asian states limits the proclivity toward the cannibalization of government policy by private interests. It cannot ensure strategies against illusion, but it can diminish their vulnerability to corruption by narrow self-interest. Thus, a successful strategic partnership, and the performance by government of the twin coordinating roles discussed earlier, can work only when the state is hard.

These features of hardness have been associated with authoritarian regimes in the history of the East Asian tigers. There is no necessary relation between hardness, so defined, and authoritarianism; a democratic or even a radically democratic society can certainly be a hard state. It is nevertheless also true that the way in which these Pacific states are hard has been thoroughly shaped by their undemocratic and authoritarian character. This uncontroversial remark introduces the central problem of imagining the revisions the East Asian political economy would have to undergo in order to supply institutional and ideological materials for a democratic and experimentalist alternative to the neoliberal project.

E. Democratizing the Government-Business Partnership

There are two basic changes that this East Asian model has to undergo if it is to inform an attractive alternative to the neoliberal project. These two changes are connected in several respects: they respond to analogous concerns, they reinforce each other, and the first is, in a certain sense, a special case of the second. The first change is an institutionalized broadening of the partnership between business elites and political-bureaucratic elites that has provided the political economy of the tigers with its motor. The second change is a style of democracy (in the organization of government, of electoral party politics, and of large-scale economic power) that makes the state more fully accountable to a more equally organized civil society while ensuring to the state the requisite characteristics of hardness.

The partnership of business and government as developed by the tigers can be faulted on economic as well as on political grounds. In broader social terms, it puts government power at the service of the export-oriented firms it supports. Even in Taiwan, which has developed the most broad-based version of the partnership, there seems to be a widespread appreciation of the gap between insiders and outsiders. An incipient dualism grows out of the division between those entrepreneurs and workers who belong to the partnership and those who are excluded from it. The truth in the more focused objection, according to which any such arrangement will likely end up in an attempt to "pick winners" when it does not generate into cruder forms of clientelism and corruption, is that the East Asian variant of the partnership goes but a small distance toward occupying the intermediate space between strategic direction (or coordination) and decentralized market-oriented initiative. The central reason for its failure to achieve such an advance is that it leaves the conduct of the partnership in a highly centralized form. Typically, one elite government

agency directs internal industrial policy, while another directs foreign trade.

But we can imagine, instead, the coordinating responsibilities of the government being vested in multiple pairs of agencies with a considerable measure of decision-making independence and financial autonomy. There is no reason to suppose that the benefits of coordination (among firms publicly induced to coordinate and between firms and the public providers of the requirements of efficient production and trade) can only be realized if all firms and authorities converge on a single menu of strategies. The existence of multiple pairs of coordinating agencies will ensure that the coordinating, strategic functions will be performed, albeit in a disjunctive rather than unified form. At the same time, this regime will capture some of the experimentalist benefits of a market order, in particular, the realization of multiple trials and the consequent opportunity to observe, and to act upon, their practical results.

Serendipity and coordination are not simple opposites; the degree of their reconcilability depends directly upon their particular institutional forms. That is one of the chief lessons we learn when we subject any programmatic conception to legal-institutional analysis. It is a principle of imagination shaping many of the arguments of this essay.

F. Democratizing the Hard State

As we pass from the more narrow need to broaden the government-business partnership to the broader objective of democratizing the hard state while maintaining its hardness, the same principle continues to hold. If the pertinent characteristics of hardness are to be maintained, the form of democratization of the state and of its relation to society must respond to certain concerns. Although these concerns can be satisfied by a wide range of institutional alternatives, they are far from being institutionally empty.

1. *The Devices for Preventing and Breaking Deadlock*

First, the national government must be institutionally capable of devising and implementing strategic initiatives that confront powerful interests and enjoy staying power in the face of opposition. The grant of substantial powers and funds to multiple, competitive, and semi-independent pairs of agencies hardly diminishes the need for this ability to act. The rule-regime of the agencies, the basic allocation of resources and responsibilities among them, and the interpretation of the practical results of their actions all call out for government action focused on comprehensive national strategies.

Such a requirement is incompatible with an extreme form of divided government, as is the American version of checks and balances under a presidential regime. It is also irreconcilable with a form of the parliamentary regime that fragments political parties, concentrates power in the class of professional parliamentary politicians, allows the election of these parliamentarians to be dominated by local concerns and dependencies,

and requires power and policy to develop by a broad measure of consensus (the lowest common denominator) within this political class.

This style of constitutional organization is compatible with both presidential and parliamentary institutions. Most often, a specific combination of presidential and parliamentary traits may prove most promising (especially one that maintains the plebiscitarian and destabilizing force of presidential elections and a strong presidency while enabling both the president and the parliament to call anticipated elections for both branches in the face of programmatic deadlock).

Just as important as the ability to break a constitutional stalemate while ensuring the plebiscitarian potency of power is the creation of conditions favorable to the emergence of strong parties. For strong parties to emerge, technical rules, such as a system of lists under a regime of proportional representation, have to converge with arrangements assuring a high level of political mobilization (more on this later). Such rules must also be able to draw upon a style of national politics focused upon debates about structural change rather than upon the combination of symbolic cultural issues and marginal redistribution characteristic of the industrial democracies today.

It is interesting in this light to reconsider the ongoing constitutional debate in Latin America. There has been in recent years a concerted effort by political and intellectual elites in several Latin American countries to institute a parliamentary regime. The people have, on the whole, refused to convert to the new constitutional religion. The complaint against presidentialism is that it promotes the election of demagogues unable to deliver on their promises, while leaving the political parties in parliament marginalized from power and uninterested in seeing the president succeed. But the proposed solution, the wholesale adoption of parliamentarianism, mistakes a superficial stabilization for a change of the social circumstances that gives rise to political instability in the first place.

When conventional constitutional institutions, such as those of American-style presidentialism, are projected into a world of extreme inequalities and exclusions, some of the consequences of these institutions are exaggerated while others change their content. In many Latin American countries, the presidential election has been by far both the most important and the least controlled aspect of politics—the political space least likely to mirror the surrounding social space. The concentration of power in the parliamentary class would indeed be most likely to increase short-term and superficial stability, but only because it would withdraw the principal instrument for political rebellion by the underprivileged.²⁵

25. In recent years there has been a concerted effort by political and intellectual elites in several Latin American countries, including Brazil, Argentina, and Paraguay, to replace American-style presidential regimes with parliamentary government. Brought to a plebiscite in Brazil on November 15, 1992, with the support of the great majority of the politicians and the media, the parliamentary proposal was overwhelmingly rejected by the voters, who correctly understood it as an effort to confiscate popular sovereignty. A small group of academics, associated with Yale University Professor Juan Linz, have

The traditional presidential regime, however, suffers from two related disadvantages as a context for the reiterated practice of structural reform and the framing of bold national strategies of production and trade. Although powerful enough to favor friends and punish enemies, a Latin American president is usually too weak to implement structural change. (Mexico, a technocratic dictatorship, is the exception that proves the rule.) Moreover, Latin American regimes encourage the recurrence of political impasse between a populist president and a conservative congress. These deficiencies account for the importance of arrangements, such as the plebiscite-setting and election-calling powers, that not only break a deadlock but also engage the citizenry in its resolution.²⁶

2. *The Intermediate Organizations*

A second feature of the arrangements needed to democratize states while preserving their hardness is the existence of a level of organization between government and industry. It is at this level that the multiple, competitive, and semi-independent pairs of government agencies responsible for strategic coordination in production and trade would operate. We can imagine several variants of this intermediate level of organization: public entities with substantial decision-making and financial autonomy, which are subject to competition among themselves, mixed public-private bodies in which the independence of the organization from central control is counterbalanced by the temporary, inalienable, or otherwise conditional character of the private rights assigned to it, and private bodies which arise from the pooling of resources among private firms and gain public support in exchange for restraints upon the exercise of private property.

The broad significance of the development of this intermediate level of organization is to moderate the tension between decentralized market initiative and strategic coordination between public authorities and market agents as well as among market agents themselves. The point is not that the development of the intermediate organization dispels these tensions but rather that it softens them by altering the institutional form of each of the elements in contrast. The statement of this programmatic goal, however, conceals a daunting task of institutional design and legal imagination. Two bodies of ideas and techniques, one about public accountability and the other about private property and contract, must be mixed together and turned into something novel and different. A theory of restricted and fragmentary property rights, a theory of associational contracts occupying the continuum between contract and the corporation

been influential in the advocacy of parliamentary ideas. Their proposals provide a case study of the infirmities associated with thinking about government institutions deficient in both social-structural insight and constructive institutional imagination. See Juan J. Linz, *The Perils of Presidentialism*, in *PARLIAMENTARY VERSUS PRESIDENTIAL GOVERNMENT* 118 (Arend Lijphart ed., 1992).

26. I owe my view of these problems to ROBERTO MANGABEIRA UNGER, *A Forma de Governo Que Convém ao Brasil*, in *A ALTERNATIVA TRANSFORMADORA: COMO DEMOCRATIZAR O BRASIL* 345 (1990).

(viewed as a nexus of contracts), and a theory of double accountability (by both political control from above and participatory-proprietary control from below) all have something to contribute to such a body of rules and doctrine.

3. *The Institutionalized Heightening of Political Mobilization*

A third feature of arrangements favorable to the reconciliation of deepened democracy with the hardness of the state is a preference for rules and practices tending to heighten political mobilization and maintain it at a high level. An organized and engaged citizenry, formed by individuals who are reluctant to draw a sharp contrast between the pursuit of their own interests and the redirection of public affairs, is a requirement for the reconciliation of hardness and democracy. The multi-sided business of a hard state, burdened by strategic responsibilities in a setting of harsh scarcity and unyielding conflict, presents an ever present danger of authoritarianism of one type or another. It is this risk that must be met by a countervailing rise in the level of political mobilization. Although no one measure can ensure such a rise in political mobilization, a combination of initiatives tend to produce it, including: rules of mandatory voting, free access to means of mass communication for political parties and organized social movements, public financing of campaigns combined, where possible, with severe restraints upon the use of private resources, and (in most but not all circumstances) proportional representation, with party-strengthening arrangements such as a system of closed lists. That context changes the meaning of each such arrangement when taken in isolation is illustrated by recent Italian events: in Italy the adoption of single-district majority voting promises to allow underlying progressive and conservative coalitions to free themselves from the distracting chicanery of the political class.

Note that just as the legal innovations represented by the development of a level of power between government and industry tends to soften the tension between strategic coordination and market initiative, the practices that promote political mobilization dissipate the force of the supposedly inverse relation between mobilization and institutionalization. The failure to appreciate the concept that sets of political institutions differ, by large amounts, in their hospitality to political mobilization has been one of the abiding illusions of conservative political science.

4. *The Public Law Organization of Civil Society*

The fourth characteristic of the democratization of a hard state is the adoption of a legal regime facilitating the self-organization of civil society while ensuring that social organizations remain independent of government control. Society, when organized, can resist, but it can also speak and deal. In counterbalancing the increased power of the hard and active state, an organized civil society also provides the state with the interlocutors it requires both to identify coordinating strategies with broad appeal and to implement them effectively. I have described elsewhere a particu-

lar instance of such an institutional approach: the combination of the contractualist type of union organization, independent from government, with the corporatist type of automatic unionization of everyone within a comprehensive union scheme, open to internal factional struggle and governed by principles of democratic representation.²⁷

VI. The Law and Constitution of Economic Vanguardism: Lessons from Russia and Northern Italy

A. Two Themes To Be Developed

In this and in the succeeding section, I develop two aspects of the alternative outlined in the preceding pages. One theme to be developed is the contribution that public-private organizations between the government and the firm, and more generally a highly organized civil society, can make to the partnership between a technological vanguard and a technological rearguard. Such a partnership is crucial to both self-sustaining economic innovation and the acceleration of learning in production. It requires, especially but not exclusively in backward economies, a legal-constitutional framework departing in significant ways from the traditional structure of the regulated market economy.

The other theme to be developed is the relationship between the raising of fiscal resources uncommitted to government operations and social entitlements and the creation of a credit and finance system making these resources available to firms, entrepreneurs, and workers. This fiscal-financial nexus depends upon changes in the tax laws, in the law governing capital markets, and even in more basic rules and ideas about private property.

The theme of economic vanguardism and its constitutional framework is developed here through reflection on a few elements of current Russian and northern Italian experience. The theme of the fiscal-financial nexus is presented without any suggestive historical context. If one were desired, the closest approximation might be debates and experiments about tax reform and capital-market reform within the European Union.

B. Economic Vanguardism and Legal Reorganization: A Russian Lesson

The circumstances of Russia and other formerly communist countries are very different from those of Latin America. It is therefore all the more interesting that certain basic structural problems and possibilities that become clear in a Russian context suggest how some aspects of the alternative I have begun to outline can best be developed. Here again, the metaphor of the rope holds good: the strands of substantive analogy in

27. See Tamara Lothian, *The Political Consequences of Labor Law Regimes: The Contractualist and Corporatist Models Compared*, 7 CARDOZO L. REV. 1001 (1986). Such a hybrid labor-law regime was subsequently enshrined in the new Brazilian constitution, and is now a topic of debate in other Latin American countries.

political economy and legal organization run from everywhere to everywhere else. Differences in national circumstance simply bring into stronger view the extent to which what at first appears to be incomparable problems and solutions turn out, on closer view, to be variations upon common themes.

The reader should bear in mind two rudimentary features of the industrial structure that present-day Russia inherited from the Soviet Union. The first feature is a striking economic dualism, different in content but no less marked in force and effect than the economic dualism characterizing many Latin American countries. This Russian dualism is the division between the relatively advanced technology and production styles of the military-industrial complex and the hyperfordist and largely autarchic character of the general production system: protected fordism with a vengeance. Foreign experts dismiss many of these hyperfordist producers as "value-subtracting." But the more significant and more general fact is that hyperfordism imposes a severe constraint upon productivity-raising innovation. Similarly, although it is true that much in the military-industrial complex is as worthless for production as it may have been for warfare, there are also islands of technological sophistication, many of them informed by advanced science.

The second feature of the industrial structure is the combination of extreme horizontal concentration with pervasive, episodic, and small-scale vertical integration. The production of key inputs and standardized commodities is often dramatically concentrated in just a few producers. These producers then attempt to diminish their dependence upon each other by producing some of their own key requirements in-house, without orientation to the market.²⁸

Any promising path of industrial reconstruction must include an effort to spin smaller, more flexible firms out of the archaic, oversized production complexes. Such a reconstructive program should also relate regionally or sectorally defined groups of such firms to the technological vanguard, which remains largely imprisoned within Russia's military-industrial complex. In Russia, as in Latin America, accelerated growth requires the establishment of a vital link between the technological vanguard and the technological rearguard of the production system.

Debates about economic development have often been misdirected in the past by the false idea that countries must choose between emphasis on a capital-intensive, high-skill, low-job type of production and a labor-intensive, low-skill, high-job alternative. In fact, the evolution of technology and of organizational forms, in this age of post-fordist industrial reconstruction and numerically controlled machine tools, has made it evermore apparent that a technological vanguard and a technological rearguard are natural partners. The vanguard can produce, in customized fashion, the

28. See HEIDI KROLL, REFORM AND MONOPOLY IN THE SOVIET ECONOMY 3-10, 22-23 (Center for Foreign Policy Development, Brown University, Briefing Paper No. 4, 1990).

machines and inputs that the rearguard needs if it is to increase and improve production. The vanguard can produce according to the growing capacity for assimilation which the rearguard acquires.

The partnership between the vanguard and the rearguard is a device to create an economy of learners, and learning is the heart of production. The trouble is that the forging of such a partnership is not itself a technological operation; it is, to a very large extent, a legal-institutional operation.

To understand this legal-institutional imperative it is useful to consider another aspect of current Russian experiences and debates. One of the chief ideas commanding the great debate over the future of Russia caricatures a conception that also influences the advocacy of the neoliberal project in Latin America. Modern societies, according to this idea, could develop along two different routes: the command economy route and the market economy route. Russia took the wrong turn. It must go back to the fork and take the other road. The shift is cumbersome and costly, but about the direction of the path, there can be little dispute. (By contrast, the implicit central theme of this essay is that there are no such predefined roads. The illusion that there are such predefined roads begins to dissipate as soon as one starts to investigate the detailed legal materials that must be used to build these supposedly pretraced roads.)

Under the shadow of illusion cast by this idea, one group (now precariously in power) offers an extreme and even reckless version of the neoliberal program. This version offers no distinct strategy of economic growth or industrial reconstruction, but rather it claims that the stabilization of the money supply, the clarification of property rights, and the tightening of economic relations with the West will suffice to ensure growth. It holds that a sharp decline in production is, given the nature of the industrial system inherited from the Soviets, unavoidable and even beneficial.²⁹ The other faction clings, out of fear and self-interest, to the defense (and private appropriation) of the existing production system; its self-interest becomes, by default, entangled with the popular interest in defending production. What is missing from this Russian debate, and to a lesser extent, from its Latin American counterpart, is the development of a realistic and democratic program of industrial reconstruction, with a strategy of growth and a proposal for the favorable positioning of the national economy within the world economy.³⁰

The newly liberal legal elite, prominent in the political class and in the intelligentsia, witness this contest with painful passivity. Many believe

29. For a discussion of the gap between what the neoliberal project prescribes for the formerly communist economies and the minimal requirements for economic growth, see JAN KREGEL ET AL., *THE MARKET SHOCK: AN AGENDA FOR SOCIO-ECONOMIC RECONSTRUCTION OF CENTRAL AND EASTERN EUROPE* (1992).

30. I have developed these views in the course of a series of business trips to Russia. Particularly illuminating have been conversations in June and September of 1992 with industrial managers, hold-overs from the Soviet regime, associated with the League of Industrialists, chaired by Arkady Volsky.

any form of politicized organization of civil society to be an unaffordable luxury for the country at a moment of transition.³¹ They acquiesce to practices permitting rule by decree and leaving civil society largely shapeless and voiceless. Yet it is precisely this lack of social organization, and of the institutional arrangements and legal rules that would foster organization in civil society, that stands as the greatest obstacle to the development and expression of programmatic alternatives.

In this circumstance, one institutional idea stands out as an involuntary institutional invention of potential significance: the commitment to develop a popular capitalism, based upon universal distribution of shares in privatized state enterprises and the pooling of these fragmented shares by investment funds or holding companies (an idea with which both Poland and the Czech Republic are also experimenting, in quite different forms.)³²

Note that this institutional innovation arises from the difficulty of clinging to a conventional sale-and-auction mechanism for mass privatization. With such a scheme, no one would have money to pay, other than foreign investors, the nomenklatura, and black-market speculators. Even to the last two groups, firms would have to be sold for a song. Thus, a substantial part of ownership (the part not sold and not reserved for the workers and managers) must be distributed universally and gratuitously. The resulting fragmentation of ownership, however, would leave managers without effective control unless these popular shares were pooled in investment funds and holding companies.

What only now begins to be appreciated, however, is that these funds, a would-be example of the intermediate organizations I have already discussed, can become effective agents of a truly democratic market economy only if reformers satisfy two fundamental conditions. First, there must be an industrial policy to save and reconstruct the production system, most especially by establishing a partnership between the vanguard and the rearguard. In the absence of such a policy, vast expanses of the industrial system become worthless, except for the firms that domestic entrepreneurs may, with the help of foreign capital, spin off. Second, the funds must benefit from a legal structure that both stabilizes them and makes them accountable to the regions and populations among which they operate as well as to the investors whose shares they pool. Without the fulfillment of these conditions, the rapid concentration of ownership will

31. Interview with Valery Zorkin, Chairman of the Russian Constitutional Court, in Moscow (Jan. 1992).

32. For studies of different possible and actual combinations of widespread share distribution with their pooling in government established investment funds, see David Lipton & Jeffrey Sachs, *Privatization in Eastern Europe: The Case of Poland*, in 2 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 293, 313-32 (William C. Brainard & George L. Perry eds., 1990); ROMAN FRYDMAN & ANDRZEJ RAPACZYNSKI, *PRIVATIZATION IN EASTERN EUROPE: IS THE STATE WITHERING AWAY?* 46-74 (1994). On the extension of these concerns and proposals to Russia, see Maxim Boycko & Andrei Schleifer, *The Voucher Program for Russia*, in *CHANGING THE ECONOMIC SYSTEM IN RUSSIA* 100-11 (Anders Aslund & Richard Layard eds., 1993).

gradually overtake the system of popularly distributed ownership and holding companies. The recipients sell their shares, like peasants who have been given a little land and no support, and the funds become instruments of a new speculative finance capital rather than the agents of democratically organized regional economies.

Thus, there can be no stable diffusion and pooling of ownership without a successful strategy of industrial reconstruction. Conversely, however, it is hard to see how such a strategy could advance far, in a direction consistent with democratic experimentalism in society as well as in production, without a legal-institutional framework empowering workers, regional governments, and social organizations. In a large and complex country, prosperous industry requires vital regional economies—economies in which local populations and governments are willing and able to invest in the material and human infrastructure of production, and gain, in turn, some influence over the social forms and consequences of production. One can imagine that workers, regional governments, and social organizations would, together with individuals, become stakeholders in the investment funds, and that the funds, although specializing in different sectors of production, would also compete with one another for investors and for capital.

The general point is that technological-organizational and legal-institutional innovation depend upon each other. The more specific point is that the organizations between the government and industry³³ come to life in the environment of a regional economy organized to take account of the claims of many different kinds of stakeholders. It is an ideological dogma, which the contemporary experience of the peripheral economies is helping to discredit, that the law should use one set of rights and arrangements to organize the market and another to organize society. The legal structure of a democratized market economy can be stretched—increasingly it must be stretched—until it becomes as big and as diverse as civil society itself.

C. Cooperative Competition Among Firms and its Legal and Cultural Framework: A Lesson from Northern Italy

Much of the recent literature about industrial reorganization has been dominated by discussions of the possible sequel to fordist-style, mass-production industry.³⁴ This style of production is characterized by the large-scale manufacture of standardized commodities by rigid machines and production processes, with sharp hierarchies of distinction between unroutinized supervisory activities and routinized executory activities and an equally sharp contrast between the domains of cooperation (within firms) and competition (among firms). Students of industrial organization have shown how the economic success of the advanced economies is

33. See part V.F.2.

34. See, e.g., CHARLES F. SABEL, *WORK AND POLITICS: THE DIVISION OF LABOR IN INDUSTRY* 194-231 (1986); see also MICHAEL J. PIORE & CHARLES F. SABEL, *THE SECOND INDUSTRIAL DIVIDE: POSSIBILITIES FOR PROSPERITY* (1984).

closely related to their varying ability to make the transition to a postfordist style of industrial organization, namely, one that achieves substantially higher levels of productivity and, above all, a stronger capacity for ongoing innovation by deploying flexible machinery and processes, achieving a more continuous interplay between task-definition and task-execution, and by jumbling up the categories of cooperation and competition.³⁵

Networks of small and medium-sized firms, or semi-independent divisions of large corporations, can continue to compete while cooperating through the pooling of financial, technological, and commercial resources. The boundaries between what is inside and what is outside a single contractual-corporate structure can be softened. The coexistence of cooperation and competition makes it possible to combine, to a greater degree, economies of scale with decentralized initiative. It also extends opportunities for learning in production. Under a regime of cooperative competition, invention through imitation now has two tracks on which to move, each with distinctive costs and benefits.

Certain regional economies in Western Europe, such as that of northern Italy, have proved thus far to be the most successful theaters of this brand of industrial restructuring.³⁶ A prefordist craft tradition and the developed set of associational structures with which it has historically been connected have offered a favorable environment for the development of postfordist industry.³⁷

As the rich industrial democracies struggle, half-consciously, with the problems of industrial reconstruction and deal with the demands of a labor force stuck in either the declining mass-production sector of the economy or in its penumbra of joblessness, fordist industry is transported to the leading tier of the peripheral economies, especially to its biggest members: China, Russia, India, and Brazil. In these countries, fordist industry continues to be profitable, thanks to the repression of internal wages. Many a receiver of discarded fordism, however, finds itself caught in a tightening grip between the high-skill, high value-added industry of the successful restructurers and the even lower wages of the endless reserve labor army of the world economy.

I have already observed how fordist mass production in the typical social and cultural conditions of the peripheral economies helps to rein-

35. For a general exploration of postfordist production that emphasizes the weakening of the contrast between task-setting and execution in production, see PIRE & SABEL, *supra* note 34. For a view exploring the development of regimes of cooperative competition both among networks of small firms and within large firms, see MICHAEL BEST, *THE NEW COMPETITION: INSTITUTIONS OF INDUSTRIAL RESTRUCTURING* 17-19, 236-50 (1990). My view of cooperative competition draws heavily on Best's work.

36. Students of postfordist industrial organization have explored the significance of the northern Italian experience. See SABEL, *supra* note 34, at 145-67; BEST, *supra* note 35, at 203-26.

37. See Charles Sabel & Jonathan Zeitlin, *Historical Alternatives to Mass Production: Politics, Markets and Technology in Nineteenth-Century Industrialization*, PAST & PRESENT, Aug. 1985, at 133.

force dualism as well as prevent a productive partnership between the vanguard and the rearguard of the economy. One of the main concerns of the institutional program developed in this essay is to describe a trajectory of institutional change along which developing countries might escape the niche of discarded fordism that they are now invited to occupy within the world economy.

However, the northern Italian example suggests a major obstacle in the path of postfordism for peripheral economies such as those of Latin America. This obstacle is the absence in those economies, as well as in those of most of the world, including most of the United States, of the rich texture of craft and associational traditions (the guilds and schools, clubs and leagues, family and neighborhood-based apprenticeships) that have so immensely benefitted an old regional economy, such as northern Italy. On this problem, of such crucial importance to the developing world, the literature on industrial reorganization has thus far had little to say.

For there to be postfordism in the absence of this background, some functional equivalent has to be created through collective action and political initiative. There must, at the outset, be massive investment in education and in the social-support systems that make it possible for children to attend school. To be sustained in conditions of extreme inequality, this investment requires hard states, capable of securing high tax revenue and escaping the disintegrative cycle of pseudokeynesian public finance.

More difficult to identify is the character of the associational equivalent to the traditionalist background of postfordism as found in an economy like that in northern Italy. A network of cooperative competition thrives, ordinarily, in a regional economy and depends, invariably, upon a supporting structure of local government and community life. The reasons for this dependence are both practical and cultural. The practical reason is the need of cooperative-competitive firms to supplement the economies of scale achieved through cooperation. Help comes from investment in material infrastructure and in people that the existence of strong local government, sustained by a vital civil society, makes possible. The cultural reason is the need to encourage trust, especially trust among relative strangers, which is the single most important resource of a regime of cooperative-competition. Trust flourishes when people not only live but also act together, in civic life and social organizations. It is not irreconcilable with conflict; it is incompatible with anomic fragmentation and distance.

Among the contributions that legal-institutional innovations can make to cooperative competition in industry, two are particularly significant: one relates to the legal form of cooperative competition and the other to its social framework. The first is the development of a wider repertory of contractual-corporate forms that equip the network of cooperative competitors with many legal options along the continuum from allowing contract between separate firms to allowing management decisions within a single firm. Similarly, there must be ways to recognize

legally the varieties of stakeholding now developing within these networks of cooperative competition.

The second key legal-institutional contribution is the invention of legal forms facilitating the creation of intermediate organizations,³⁸ especially organizations involving some combination of public and private investment and activity. The cooperative arrangements set up by otherwise competitive firms are themselves examples of such organizations. Other examples are investment funds, development banks, labor exchanges, technical and technological assistance programs (on the model of agricultural extension), retraining and continuing-education facilities, and regional healthcare and daycare alliances and cooperatives. Particularly intriguing and delicate is the problem of finance; I discuss later the role of special banks, charged with a mission both supportive and reconstructive.

These organizations prosper, in turn, in a setting of strong, and strongly participatory, local government and in a setting of public law that facilitates the organization of civil society. The associational structures created by public law (such as a structure of automatic unionization within which different labor movements compete for position) may remain empty shells or be captured by activist minorities. But, when taken over and inhabited, these associational structures may also make possible a valuable economy of organizational effort, counteracting the tendency toward fragmentation and passivity. Where the prefordist conditions of postfordism are missing (and they are almost universally missing in Latin America) their counterparts must be created by politics and imagined by law.

VII. The Fiscal-Financial Nexus: Making Resources Available for Investment and Innovation

A. Idea of the Fiscal-Financial Nexus

The Latin American economies have been characterized by the combination of capital scarcity and extreme inequality. They have also been governed, most of the time, by soft states, hamstrung in their efforts to impose the cost of public investment upon the propertied classes, prodigal in the distribution of subsidies to the strong, and fatally attracted to inflationary sleight of hand. In such a circumstance, both the quickening and the democratization of economic growth require an enlargement of the fund of resources available to the government for investment in people and infrastructure and available to innovators for innovation. These must be resources that are not under the command of existing property owners in a society in which the inheritance of capital and economic advantage remains the overriding mechanism for generating extreme inequality. There must also be resources whose commitment will not be driven by the

38. See part V.F.2.

logic of short-term profit maximization, unrelated to productive contribution.

A long-standing dispute in the theory of economic growth centers on the relative importance of savings and technological innovation as conditions of growth. For the purposes of my institutional argument here, these categories are both too narrow and too crude. We may need to think of the kind of savings that can collect resources effectively made available for productive experiments and experimenters, in other words, made available to people with energies and ideas but without capital or patrons and made available to the public agencies that can help supply the experimenters with the physical and cultural apparatus they need. In a democratized market economy, the struggle to increase the amount, and to accelerate the circulation, of free-floating resources (free-floating in the precise sense just defined) is the object of a fiscal-financial nexus.

The legal-institutional development of this nexus includes three sets of arrangements. The first set concerns the reform of taxation, expanding the means for both public investment and venture capital. The second set concerns entitlements ensuring people of access to educational capital, and the third set concerns the legal framework for socially funded and socially oriented banking and venture-capital operations.

B. The Tax System of a Democratized Market Economy

In many Latin American countries, the estimated tax revenue is low by comparative standards. It is, above all, highly skewed in its actual incidence. The two major departures from the professed aims of most tax systems are the heavy reliance upon regressive indirect taxes and, within the area of direct taxes, the disproportionate contribution of salary earnings. The very high real rates of return to capital, especially to speculative finance capital, increase the significance of this substantial fiscal immunity of nonwork-based earnings.

Massive tax evasion, particularly by those who operate in the grey economy or move finance capital around, magnifies these distortions. The paralyzing result is to superimpose upon the insolvency of the government a widespread sense of the illegitimacy of taxation.

The recent experiences of Mexico and Argentina demonstrate that relatively modest investments in the tax-collecting apparatus can produce a substantial rise in tax revenue and, eventually, in voluntary tax compliance. Such investments could be followed by the exemplary indictment of rich and powerful tax evaders, a measure that would itself do much to signal the hardening of the state. All such initiatives, however, would fall short of the tax reform that a democratized market economy needs in conditions like those of Latin America today; a radical reform of the tax laws is also indispensable.

In the outline of such a reform, redistributive commitments must be tempered against realism about the demands of reliable revenue collection. The tax system must have a reliable base in an indirect tax that is relatively neutral in its economic impact and capable of raising large

amounts of revenue with modest distortion and disruption of economic activities. Comparative experience and analysis suggest that such a tax is a comprehensive, flat-rate value-added tax. In a federal state, the value-added taxes imposed by state and local governments can piggyback on the federal value-added tax.

Once a sound basis of revenue collection is assured, the government can experiment without fiscal danger in the redistributive direct taxes. The mistake is to try hitting the funding and the redistributive targets with the same tax tools. The most attractive direct tax system is one that relies on the combination of a Kaldor-style expenditure tax³⁹ (taxing, for each individual, the difference between income from all sources and savings) with a wealth tax (to which the gift-and-estate tax can be assimilated). Such a system applies specialized tools to specialized targets: one tax for the hierarchy of standards of living and another tax, or group of taxes, for the restraint upon economic power. The income tax, combining as it does these two objectives, characteristically achieves both badly. Moreover, the replacement of the income tax by the Kaldor tax has a special interest for a capital-starved economy because it helps put taxation on the side of savings and investment.

My proposal is that a generic connection be established between the sources and the uses of revenue. The funds produced by a comprehensive, flat-rate value-added tax go to public investment in the cultural and physical infrastructure of production and to the capital accounts of the socially and strategically oriented banking and venture-capital operations I shall later describe. The economically neutral tax funds the improvement of the production system and of the labor force. The funds generated by the redistributive direct taxes finance the core operations of government and those entitlement or welfare programs that are not directly linked to basic or continuing education.

One rationale for this system is to guarantee a relatively secure source for public savings and strategic investment. A tax comparatively neutral in its redistributive and cost-shifting effect finances the development of the overall productive capacity of society. The fiscal mechanism of this financing remains relatively disentangled from the politics of redistribution. It does, however, fund what the experience of developing countries has shown to be the single most important redistributor: investment in an education system that is open in fact as well as in form to everyone. On the other hand, the redistributive taxes count among their objectives the funding of the most controversial redistributive programs: those unrelated to the collective interest in education.

A secondary rationale for this system is that the self-interest of the political and bureaucratic apparatus of the state becomes tied to the success of redistributive taxation, for it is from the redistributive direct taxes that the funding for the operational expenses of the government must come.

39. See NICHOLAS KALDOR, *AN EXPENDITURE TAX* (1955).

C. Educational Capital

Investment in education enjoys a special status among the commitments and techniques of a democratized market economy, especially one whose installation must move forward through the disruption of extreme privilege and inequality.

Comparative research has shown that no other form of public investment is more important in diminishing inequality. Thus, in the East Asian countries, beginning with Japan from the time of the Meiji restoration onward, heavy and persistent educational investment, rooted in social traditions as well as in political decisions, has helped equip and more nearly equalize the population. Even in Latin America, political economists have shown how countries like Colombia, which has invested more heavily in education, have seen their investment translated into a climb of a few notches down the ladder of Gini coefficients, which measures economic inequality.

In addition, the economic and political institutions I have, in outline, proposed all require if not a definite repertory of knowledge and skill, then at least a strengthened capacity for experimental learning. The political and economic agents of such a society must, early on, have learned to learn. Moreover, these institutions aggravate a problem that European social democrats are only now beginning to discuss in earnest: the incompatibility of strong and widespread claims to job tenure with a quickened economic experimentalism.

Job security has played a prominent role in the historical agenda of working class movements, especially in countries such as those of central and northern Europe, in which social-democratic parties have enjoyed power for long periods and in which corporatist styles of political economy have flourished. (In Japan, the lifetime employment system has evolved as a result of a very different form of oligopoly in markets, dualism in the labor force, and business unionism in labor-management relations.) Even in many Latin American countries, including Brazil and Argentina, workers in the protected fordist sector and civil servants in the enormous apparatus of central and local government have achieved a degree of job tenure that the neoliberals are now trying to revoke or to loosen. But the emphasis on job tenure depends for its realization upon particular political and economic conditions, the same conditions guaranteeing the stability of a fordist mass-production sector of industry, that are able to distinguish between a core of stable workers from a periphery of temporary workers and subcontractors at home and abroad.

If, by both necessity and design, firms must have ample room to hire and dismiss workers and to rearrange people and machines, states must satisfy in other ways the concerns underlying the struggle for job security. These concerns go to establishing trust and cooperation in the production system, and they go to developing practical bases for the individual and collective empowerment of workers. A major part of the compensation for the loss of nearly absolute job tenure should be a claim to continuing

retraining and reeducation throughout a lifetime as well as a claim to an original educational endowment.

What legal-institutional form should this claim take? Consider first the original education of the individual and then consider continuing education and reskilling.

The effective provision of basic education in very unequal societies, such as those of Latin America, is a many sided task. The experience of countries as different as Uruguay and Costa Rica demonstrate that such a task is feasible. The school must have a physical support structure, including food and health assistance, that keeps children there. It must also develop a pedagogic orientation privileging capacities to analyze and recombine. It must have community engagement but also have a nationally set agenda. Localism in school organization is incompatible with the central educational mission to rescue the child—any child—from its family, its class, its community, and even its country—giving it access to remote forms of experience and standards of judgment.

In light of this ideal there is every reason to supplement the public school with an educational-capital account set up by the state for each individual. The points in this account could be applied to payment for non-state educational institutions or they could be contributed to independent public schools that, exempt from the nationally set educational agenda, try to pursue distinctive directions.

For the provision of continuing reeducation and reskilling throughout a working life, such a government funded account for payment to experimental private, public, or mixed public-private educational facilities may be the sole and sufficient mechanism. Moreover, these organizations should occupy all points of a spectrum going from practical reskilling to more comprehensive education. The system may require some measure of paternalism. Thus substantial drawing upon this account may require the agreement of trustees, who are recruited both from public counselling services and from union or professional associations. The core idea is that, whatever the differential transmission of economic advantage through familial gifts and inheritance, every worker continues to inherit from the state the equipment she needs to reinvent a little bit of herself from time to time.

D. The Financial Agents of Economic Experimentalism

I complete the institutional definition of the fiscal-financial nexus with a sketch of the financial agents of innovative investment. It may help to begin this sketch with a few remarks about the history of banking in Latin America and elsewhere, for these remarks will help to clarify the central problem and mission of finance in a democratized market economy.

Discussions of banking in Latin America often begin with the observation that banks there fail to perform their standard and necessary role of mediating between individual savings and productive investment. Instead, they have frequently become enterprises almost entirely devoted to financial speculation and to the easy gains made possible by the government's

financial dependence. This observation, in its first part, presupposes an idea about banking that has in turn been given historical validation.

Alexander Gerschenkron conducted a famous study of the transition in nineteenth-century Europe from commercial banks of the early Rothschild type, dealing in short-term commercial credit and sovereign lending, to universal banks, committed to long-term industrial investment and heavily involved in the management of enterprises in which they held equity stakes.⁴⁰ If the Credit Mobilier was the prototype of the investing and entrepreneurial bank, the German, Austrian, and Italian banks completed the development. They were able to establish their investing activity upon the solid basis of short-term credit activities and consumer banking. Bankers like J.P. Morgan demonstrated how such a universal bank could be used to turn around failing enterprises and to capture the benefits of hidden synergies.

If, however, we look further ahead, we see that what at first seems to have been a progressive and irreversible transition in the history of banking turns out, in retrospect, to appear like a brief interlude between long periods of financial passivity and short-term vision. Recent studies, for example, suggest that German banks, despite their vaunted ascendancy over industry and their industrial cartel-building proclivities, increasingly fail to exercise any real supervision over the firms to which they lend or in which they hold equity.⁴¹ The postkeynesian economists have studied how firms struggle to free themselves from capital markets by generating investment funds internally. And even merchant banks, on the old-European model of a Julius Baer or a Warburg, seek to prosper as intermediaries of corporate finance and of markets in corporate control rather than as primary investors and industrial reorganizers. Like the American investment-banking houses, they find themselves running after the latest opportunity for arbitrage in financial intermediation. The decried hegemony of finance capital, as theorized by Hilferding, has not survived this retreat.

It seems that the most powerful obstacle to the execution of the larger investing and reorganizing mission of the universal bank is cultural rather than narrowly economic or legal. Given who they are and what they know and want, the bankers are wholly unable to serve as the super entrepreneurs, the shakers and recombiners of industry, that they were invited, by that mission, to be. They more regularly stand at some point on the continuum between accountants and gamblers, all of the points of which are equidistant from the world of production.

This involution, fortunate as a diminishment of unaccountable economic power, is unfortunate to the extent it represents a withdrawal of agents capable of investing and reorganizing with a long-term strategic

40. See ALEXANDER GERSCHENKRON, *ECONOMIC BACKWARDNESS IN HISTORICAL PERSPECTIVE* 11-16 (1962).

41. See Josef Esser, *Bank Power in West Germany Revised*, W. EUR. POL., 1990, at 17; Charles F. Sabel et al., *Making Money Talk: Towards a New Debtor-Creditor Relation in German Banking* 12-16 (Conference on Relational Investing, Center for Law and Economic Studies, Columbia University, School of Law, 1993).

perspective. Public development banks have very modestly filled the vacuum in Latin America. These banks are now under attack by the champions of the neoliberal project and under attack in the world economy generally by multilateral public institutions such as the International Financial Corporation. The central problem highlighted by this continuing lack of capable agents is the relative absence of a form of finance that is liberated from the constraint to ensure short-term profits and that is able to nurture and deploy a long-term strategic approach to industrial investment.

A democratized market economy, established under conditions of capital scarcity, must rely on financial agents that are able to make socially useful investments over a broad range of sectors and in a rich diversity of forms. These agents must be able to perform two functions in addition to the functions now performed by conventional commercial and investment banks. One is the public venture-capital function: to make capital available and to take equity stakes in firms and projects in a fashion that is liberated from short-term vision. The other is the super entrepreneurial function: to take the lead in pressing for the reorganization of production and of corporate control whenever such a reorganization seems a promising way to capitalize on unexploited productive possibilities.

Conventional economic analysis will object that market forces, and market forces alone, can be fully capable of producing the agents best suited to perform these two functions, rewarding those who guess right and punishing those who guess wrong. This objection raises a central implicit theme of my argument. The program I outline is predicated less on a belief that the market is inadequate than on a belief that the market needs to be defined institutionally and can be so defined in different ways and with different consequences. In this argument, each proposal has to meet a double test, showing signs of being located in a zone of overlap between the conditions of economic growth and the conditions of the progressive democratization of society. Every banker and manager understands the severe although varying restraints that, in the existing regulated market economies, reinforce short-term vision in the dealings between the worlds of finance and industry. These constraints have been the primary motor driving successful firms to generate investment funds internally.

Three kinds of financial agents can perform the two functions I have identified: independent public banks (modelled on the International Finance Corporation arm of the World Bank and on the Brazilian Banco Nacional de Desenvolvimento Economico, with special responsibility for investment and super entrepreneurship at the frontiers of production), mixed public-private banks (specializing in large-scale projects of strategic interest to the national economy, in the style of the joint ventures of European Union governments and private firms in the airplane industry and other high-technology areas), and private banks (linked to a network of cooperative-competitive firms, as their financial arm and brain, in the fashion of the banks that have already developed special relations with such firms in northern Italy and elsewhere).

The public and the mixed banks would differ from network-oriented private banks in two respects. First, in their investment-making and credit-granting work, they would go beyond freedom from short-term vision to occasional financial initiatives that could not be justified on a pure calculus of profit and risk but that nevertheless satisfied some perceived strategic or social interest. Second, they would count upon, as a major source of capital, the funds generated by the comprehensive flat-rate value-added tax, which, through their activity, would circulate in the economy. This circulation is what justifies the claim that this tax represents a levy on production for the sake of production. For the use of these moneys, the public and mixed banks would have to pay a return to the government or to the higher-level public banks responsible for administering such funds.

The most important legal innovations in such a scheme lie in two areas. One area is the definition of a framework within which public and private banks can be independent from government tutelage, competitive with one another, and financially responsible while nevertheless remaining ultimately accountable to the elected agencies of government. A natural starting point for thinking about such an arrangement is the experience accumulated in the relations between democratic governments and independent central banks. Another point of departure is the record of some of the more successful public banks or public enterprises in Latin America itself. It is sheer legal superstition, arising from a failure to grasp the diversity of possible market forms, to mistake non-private ownership for lack of competition.

The other area for legal innovation lies in the relationship between the public or mixed banks and the government that makes funds generated out of the value-added tax available to them. It is doubtful that standard contract and property norms would suffice to inform this relation. These rules would have to be supplemented by forms of personal liability, both civil and criminal, of both the bureaucrats and the bank managers, under broadened standards of fiduciary responsibility. In fact, a predictable legal consequence of any economy joining public or private activities more intimately, rather than segregating them rigidly, is to require a great expansion of fiduciary principles and sanctions.

VIII. The Animating Vision: Democratic Experimentalism in an American Key

A. Nature of the Justification of the Alternative

The alternative to the neoliberal project presented and developed in the preceding pages draws life from a reinterpretation of the democratic vision. Faithful to my method, I shall not pretend that this vision is neutral in its consequences for different conceptions of the good or different ways of life. The vision has developed in the course of a political tradition that, although many-sided and inclusive, is nevertheless specific. Moreover, I shall express it in a vocabulary that is characteristically American (and in

certain respects also Latin American) and connected with the most persistent anxieties of American democracy.

The vision can be justified in one way by the help it provides to both the imagination and to the defense of trajectories of institutional change possessing two connected features. First, these directions of change must be promising in their ability to satisfy (better than the alternatives one can think of and hope to advance) the recognized interests of the broad masses of ordinary working people. Second, they must also prove superior to their rivals in dealing with the fundamental structural problems of the society (in Latin America today, problems such as the persistence of economic dualism, the continuing fiscal crisis of government, and the inadequacy of an entitlements-based style of redistribution). Such problems regularly impede a fuller realization of recognized interests. The basic difference between these two standards of judgment, and the reason why they may occasionally diverge, is that the second, unlike the first, allows for the possibility of ignorance or "false consciousness."

A conception such as the one I shall invoke can also be justified in a more general way: by its capacity to help inform vocabularies, attitudes, and ideas that maintain a living bond between aspirations and practical desires over a broad range of changing circumstances. Here the standard bears some kinship with the "wide reflective equilibrium" discussed in contemporary Anglo-American political theory. The point is to describe the contours of an imaginative space in which some roughly stable relation between what people really feel, really want, and really need and what they believe ought to be the case becomes feasible. The historical testing such a standard invites is never direct, unambiguous, or conclusive. Neither, however, is it wholly elastic. The untidiness of the view of justification resulting from these premises may be disconcerting to the rationalist. It is nevertheless better in its consequences, and more realistic in its claims, than the familiar oscillation between hyperrationalistic pretenses to impartiality or objectivity and the inhibiting or complacent skepticism to which such pretenses so often give way.

B. The Search for an Area of Overlap Between the Institutional Conditions of Economic Progress and of Individual Emancipation

The essence of the normative vision I propose is the commitment to search for the area of potential overlap between the conditions of economic progress and the conditions of freedom from subjugation. This quest has oriented many of the arguments and much of the theorizing about the democratic project over the course of the last two centuries. The conception of economic progress to which I allude is straightforward. It is a self-sustaining increase in output and productivity, counting among its principal instruments a strengthened capacity for learning, a persistent power to innovate, and a broadened freedom to recombine organizational arrangements as well as factors of production.

More subtle is the conception of the good of emancipation. I prefer to interpret this good as a lessening of the tension between the demand for self-direction and self-expression and the need for solidarity and engagement in group life. The tension diminishes to the extent that group life loses some of the terrors of practical and spiritual oppression. These terrors have the effect, as they mount, of exacting for each strengthening of community a marginal price in autonomy. To disrupt this equation is the work of emancipation.

The radical-democratic doctrines of the past differed from the academic democratic theories of today in, among other things, their insistence on keeping in focus the relation between the requirements of prosperity and the demands of emancipation. They would have no truck with a view of democracy as remorseful idealism carping at the heels of the devotees of worldly success. Their frequent error was a dogmatic optimism, supported by a deterministic view of history, according to which economic progress and individual emancipation naturally and necessarily converge. But we would be just as dogmatic and misguided as they were if we merely inverted this conviction and subscribed to the belief that freedom and prosperity are doomed to conflict.

The proposed revision of the classical doctrine is the belief that the conditions of economic progress can, although they need not, overlap with those of individual liberation. Each of these two goods can advance through alternative sets of institutions and practices, or alternative pathways of change. The point is to identify an intersecting (and available) subset of each of the two sets.

The deep reason to believe that such an area of overlap exists is the affinity between the increased power to recombine things and people that continuing economic progress requires and the demand, implicit in the agenda of emancipation, to disengage the life chances and social opportunities of the individual from predetermination by inherited advantage or stereotyped roles. To state the same affinity in another way, a strengthened capacity to learn (to learn more and to learn more quickly) is the most powerful unifying thread in the pursuits of economic progress and antistatization. An engaged citizen of a democratized hard state and a successful economic agent in a democratized market economy must both be quick studies; they must also have at their disposal the instruments and materials of organizational transformation.

No belief is more characteristic of the old (and now downtrodden) American optimism than the hope that the road to collective riches may also become the path to individual liberation. In fact, in the American vision, this belief stands on an equal footing with our other great hope: that the development of originality among individuals can increase the opportunity, rather than diminish the chances, for solidaristic cooperation in social life (the central hope of an Emerson or a Whitman). In labelling these beliefs hopes, I mean to suggest that they are more than reasonable gambles; they are attempts to exploit a possibility that, by being believed in and acted upon, becomes more likely to be realized. By drawing attention

to the special status these hopes enjoy in American culture, I want to emphasize not their dependence upon a particular national tradition, but rather the openness of this tradition to aspirations that have become increasingly worldwide and now exercise a revolutionary influence everywhere.

C. Cooperation and Competition, Strategic Coordination and Market Initiative

The search for the common ground of the conditions of economic progress and of individual emancipation describes only the most general aspect of the vision animating the alternative to neoliberalism outlined earlier. At a lower level of generality, this vision includes a conception connecting these general concerns to the preferred direction of institutional change explored earlier in the essay. The main idea here is that the most promising route to making good on the common ground is a form of economic organization and legal ordering combining, more fully than most present political economies allow, strategic coordination, decentralized initiative, cooperation, and competition.

In the programmatic argument of this essay I have emphasized the practical advantages and institutional vehicles of such a combination. But I also believe that this effort holds a larger political and spiritual promise as well. This promise relates to the value that I described in the preceding section as exercising among American beliefs an authority coequal with the commitment to make economic progress and individual emancipation converge: the impulse to develop a form of genuinely common life that is nevertheless able to forgive, to use, and, eventually, to inspire the originality of individual people.⁴²

The point is to build a bridge between originality and solidarity. Such a bridge is more likely to be built in a society where people experience frequent and easy passage between the cooperative and the competitive aspects of their workaday lives.

The thesis that market initiative and strategic coordination, competition and cooperation, can and should combine stands opposed to the idea, familiar today in debates about the meaning of the failure of state socialism, that all varieties of "third wayism" have been discredited. If institutional innovation, or the lack of it, is political fate, third, fourth, and fifth ways are not only possible, they are unavoidable. The real question is which are the best? Indeed, the experience of the formerly communist countries, as my earlier discussion of Russian industrial reorganization implies, suggests the need to resurrect and reconstruct some of the undeveloped ideas of "market socialism." We need to distinguish the bad part of these ideas, the trimming about political constraints upon economic experimentation, from the good part, the insight into the diversity of possible market forms.

42. On John Dewey's characteristically American formulation of this idea, see ROBERT B. WESTBROOK, *JOHN DEWEY AND AMERICAN DEMOCRACY* 433 (1991).

On the other hand, the commitment to combine, more fully and continuously, cooperation with competition, and strategic coordination with market initiative, is reminiscent of some of the familiar slogans of present-day European social democracy when they call for "more of the market in the state and more of the state in the market." The difference lies in the conviction, central to all my arguments, that this more energetic synthesis requires a sequence of legal-institutional inventions changing the practical forms of both government activism and market decentralization. Institutional conservatism taints the solutions of European social democracy, severing them from the democratic experimentalism I have advocated.

D. Contrast with the Dominant Perspective of Anglo-American Legal and Political Philosophy

The way of thinking that produces the vision I have outlined differs in several respects from the habits of mind and modes of argument characteristic of much contemporary Anglo-American political and legal philosophy. First, it treats relative impartiality, distancing from one's own circumstance, as the horizon rather than as the starting point of inquiry. Second, it takes legal and institutional analysis to be an integral part of the imaginative development of ideal conceptions rather than a tactical or empirical afterthought. Third, it focuses on institutions and practices and upon the varieties of social activity and relations they favor or discourage, rather than upon distributive ends as the ultimate objects of political-legal argument and action. Fourth, it refuses to organize thinking about democracy around an overriding value such as equality of resources or respect, preferring to explore the reciprocal connections between practical economic success and rescue from oppression.

E. The Twin Disciplines of Institutional Thinking

Two disciplines would be most important to the systematic development of such a way of thinking: an institutionally oriented practice of political economy and a style of legal analysis devoted to an understanding of the legal agenda of alternative pathways of institutional change. These two disciplines would be so close in subject matter and method that each would simply designate a different region of a continuous imaginative space. In fact, however, neither of these disciplines exists in other than a fragmentary form.

Dominant macroeconomic theory deals with institutions episodically, as stipulated boundary conditions, when it does not identify a particular system of economic institutions and legal rights with the efficiency-promoting framework of the market. As a result, it has trouble avoiding half-truths, circumstantial truths, or temporary truths of the kind exemplified by the Phillips curve or the Laffer curve. It often fails to rise above misleading trivialities of the type which holds that unified party governments are better at keeping down government deficits than coalition or divided governments. In the following section, I argue that the conventional forms of policy analysis in legal thought are equally unsuited to the task.

In the absence of ready-made disciplines and methods, we have to work with what we have, using programmatic proposals as occasions to try out ways of thinking and talking that join empirical understanding and normative visions more intimately than we are accustomed in either positive social science or political and legal argument. If one did not believe in the value of institutional alternatives, she would have reason, out of sheer intellectual curiosity, to pretend that she did.

IX. The Task of Legal Thought

A. Legal Thought as Vehicle and as Obstacle

What style of legal thought is needed to inform the kind of structural diagnosis and programmatic argument to which this essay points? Before addressing this question, consider a few characteristics of legal culture in Latin America. These observations have a twofold relation to my theme. First, they describe a typical way in which legal culture comes to impede the work of understanding, reimagination, and reconstruction. Second, they serve as a second-hand commentary on some of the problems of American legal culture, for in this, as in much else, Latin American traits represent a lopsided exaggeration of flaws that continue to afflict American legal culture.

The dominant legal culture of Latin America is marked by an ever-widening opposition between doctrinal formalism, of a very conventional nineteenth-century sort, and a demand for the creative, ad-hoc reinterpretation of law by judges and other professional law-appliers. In Brazil, for example, there is a well-established movement of "alternative law," complete with its own journal, collective meetings, and a degree of influence upon the judiciary as well as a legal academy that far outreaches the American critical legal studies movement and its European counterparts. The proponents of "alternative law" demand, in a manner most reminiscent of the "free-law movement" of early-twentieth century Germany, an ongoing reinterpretation of law. This reinterpretation should attend to the needs and expectations of the marginalized and the disadvantaged, and it should resist the crushing of what Habermas would call the "life world" (the fine structure of moral reciprocities in everyday life) by the wooden and violent generalities of state law. In societies in which the oppressed form the vast majority of the population, such a mission represents a formidable undertaking. It in effect changes the judges and other law-appliers from government officials into mediators between the government and ordinary people, trojan horses who, through competitive examinations, wheel themselves into the walled space of state power.

The underlying political-professional context in which this contest between a reaffirmed doctrinal formalism and the "alternative law" movement takes place is one in which legal professionals have been dramatically pushed aside by technocrats, especially economists, as the experts with the most to say to powerholders and the strongest claim to the "arcana imperii." Until the 1960s, lawyers remained the dominant seg-

ment of the political and economic elite in Brazil as in all Latin America. For most of the history of Brazil, legal education has been the generic form of elite education. Similarly, in Mexico, until recently, political and economic leaders, and even writers and philosophers, have been "licenciados." This predominance has now been undone with a vengeance as the lawyers seem to have increasingly less to say about the real problems of their societies.

Faced with this abrupt and decisive fall from influence, lawyers have responded by alternatively reaffirming the constraints of the rule-of-law upon technocratic policy-making (the reassertion of doctrinal formalism) and engaging in guerrilla warfare against the episodic interpretation and application of law (the alternative-law movement). These responses have in common the lack of any structural understanding or proposal. They fail to respond to the technocrats at the level at which the technocrats operate: the level of the understanding of an institutional system and its requirements of successful management and improvement. To answer that, by its nature, legal thought has less to say than other disciplines about the structural issues and alternatives is to beg the conclusion in a particular way. It is to assume that detailed institutional understandings and proposals, of just the sort that a reformed style of legal thought should be good at generating, form no part of the alternative message.

There is little in this description that readers will find unfamiliar in the present U.S. legal culture. The only substantial difference is that, for the American jurists, the fall from influence has been less marked. Much of the mainstream legal culture has moved toward a functionalist or policy analysis that shades more continuously into the methods and ideas of the nonlegal technocrats. The invocation of routinized sets of countervailing policies in each legal discipline, however, often resembles nineteenth-century formalism, albeit with a different vocabulary. It typically remains as bereft of a sense of structural alternatives as it is disconnected from sustained empirical study of the consequences of different rules and arrangements. The truth is that practical American legal culture has escaped the fate of its Latin American counterpart only in part and only to the extent that it has surrendered to what the Latin Americans try, albeit ineffectively, to resist. What we miss, in Latin America, in the United States, and everywhere else, is a practice of legal thought that can speak structurally about structural problems, exploiting the hidden strengths of a legal imagination—the reciprocal probing of ideal visions and practical arrangements and the discovery of real and potential institutional diversity, contained, suppressed, and concealed under the lid of power, tradition, and dogma.

In the following pages, I present in the form of a small number of dogmatic theses, possible starting points for a legal culture that could work as an active contributor to debates such as those considered in this piece. They describe some beginnings and presuppositions of an approach equipped to escape the Hobson's choice of doctrinal formalism

and "alternative law" without turning legal analysis and legal thought into an institutionally conservative policy science.

B. Rejection of Legal Dualism

The belief that structural alternatives need not and should not hold the attention of legal thought has sometimes been made plausible by the idea that the reexamination of basic practices, arrangements, and assumptions takes place in certain culminating foundational or reconstructive moments of social life. Thus, the normal legal science of the nonrevolutionary moments takes its agenda from the most recent reconstructive movement. American legal thought, for example, would still be bound to complete the unfinished work of the New Deal. This essentially Durheimian notion of the rhythm of collective enthusiasm and prosaic reality has recently been developed by Ackerman as the basis of an approach to law and legal history.⁴³

There is a truth in legal dualism: the basic truth of discontinuity in institutional and conceptual change. The political economy of autarchic import-substitution and pseudokeynesianism, discussed here, was indeed a political invention with large and long-lasting consequences. But the thesis of legal dualism goes wrong when it overestimates the determinacy of each foundational settlement and underestimates the endless opportunities that practical problems present to reopen the ambiguities and to refine the direction of the settlement. For example, are the privatization of public services by local governments impatient with welfare bureaucracies, the development of a common market with Canada and Mexico increasing the mobility of capital while maintaining the immobility of labor, or the enshrinement of affirmative action based upon formal group classifications rather than upon real and varying circumstances of disadvantage, for or against the New Deal settlement? Is it for or against the New Deal settlement to express skepticism about the efficacy of tax-and-transfer programs as the principal device of egalitarian redistribution?

At a more fundamental level, the thesis of legal dualism errs insofar as it implies that there is an inalterable or uncontrollable rhythm of structural stagnation and innovation requiring us to wait, should we be born at the wrong time, for the next wave of enthusiasm and restructuring. Moreover, by pushing the structural themes back to the exceptional revolutionary interludes, legal dualism makes it seem that, with respect to basic arrangements and conceptions, there can be no science, normal or otherwise, only prophecy. Thus, what should have been an opening risks becoming an alibi; if structural change or thinking is not in the cards, the best we can hope for is to humanize what we have.

43. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6-7 (1991); cf., EMILE DURKHEIM, *THE ELEMENTARY FORMS OF RELIGIOUS LIFE* 240-42 (J.W. Swain trans., 1969) (contrasting the ecstatic and the routinized moments of collective consciousness, as exemplified by the experience of religion).

C. The Opportunity-Creating Translation of Legal Conceptions into Legal Details

Every time a legal conception, in particular the legal conception of an institutional regime, gets translated into a detailed set of arrangements and rights we find that the conception admits alternative possibilities of imaginative and practical development. This is the truth in legal skepticism or indeterminacy. From this truth arises the possibility of a mutually subversive and progressive interaction between legal-institutional conceptions and their detailed legal translations. Far from being a species of reflective equilibrium, this is a kind of permanent disequilibrium. The disequilibrium keeps legal and political thought on the run when they do not surrender to some fetish about the necessary or final institutional form of their preferred conceptions.

The model of protected-fordist industrialization and pseudokeynesian government finance, the neoliberal project, and the alternative to both outlined here are all interpretations of a regulated market economy and a constitutional democracy. But, as each of them adds legal-institutional detail, each develops these conceptions in a distinct direction.

Moreover, choices about alternative developments of both the conceptions and their practical forms continue to be made at every turn. We may find solace in the thought that once we have made the big selections (among models of political economy or legal-constitutional regimes) the remaining options will be of a more contained technical character. But we shall find that we have bought this solace at a heavy cost if it obscures the recurrence, within the work of defining a regime in detail, of choices as significant in their reconstructive potential as those which led us to the regime in the first place.

Thus, the fiscal-financial nexus, which I have presented as an important but technical part of my alternative to the neoliberal project, requires, to be developed in legal detail, a series of conceptual and institutional innovations in the structure of the tax laws, the arrangement of welfare rights, and the organization of capital markets. Although each of these innovations is in itself modest, each requires us to make choices about some feature of economic and political pluralism. The legal definition of a regime is just an accumulation of such decisions, repeated many times across a wide range of concerns. What seems to be a technical afterthought, like the material about the fiscal-financial nexus, could equally well serve as the starting point for the whole proposal of a political and economic regime.

D. Structural Solutions to Structural Problems

Every society has problems that, remaining just beyond the horizon of active concern, doom to frustration a host of recognized interests and professed ideals. Characteristically, these problems have to do with the institutionalized organization of social life and with the social understandings that this organization enacts. The pieces that make up this background form no indivisible system, but neither are they readily separable. They

become entangled with one another. The combination of the features of entanglement, of distance from everyday action, and of influence upon what people can do and how they can connect are what define an arrangement or a conception as "structural."

To bridge the gap between this opaque structural background to social life and its surface of need, demand, and difficulty is the ambition of every form of legal and social understanding that wants to be more than a technique. A style of legal thought that is more than a technique of social compromise and rights-assignment must try to grasp the legal-institutional aspect of the structural problems besetting a society. It must also identify the legal-institutional element in the possible solutions to the problems. In this enterprise, legal analysis finds a natural ally in a certain kind of political economy, one attentive to institutions and their consequences.

It is the failure to take seriously the responsibility of structural analysis that makes inadequate the conversational focus of much recent legal and political theory. For this theory, a democratic legal order is one that ensures a widening conversation in which more voices can be heard and heard with more nearly equal time. The problem, however, lies in what is left unspoken: the structural restraints and assumptions that, unchallenged, come back to shackle the conversationalists. Thus, the conversational focus may lend a philosophical halo to the dominant style of American progressivism with its "what about me?" perspective and its difficulty in addressing the reorganization of society and its institutions.

E. Legal Pluralism

In another piece,⁴⁴ I have explored, in the setting of disputes about the sovereign debt of developing countries, a principle that ranks high among the central ideas of contemporary legal thought: the idea that individual and collective self-determination depend upon factual and defeasible conditions and that we cannot ensure freedom merely by clinging to a predefined system of rights without worrying whether or how these rights can be exercised. Some things have to be withdrawn from the area of free choice to make free choice real. Remarkably, contemporary legal thought has on the whole failed to draw from the idea that self-determination depends upon empirical conditions what would seem to be an inescapable corollary: that such conditions can always be defined and satisfied in different ways. Which of these different ways of defining and satisfying the requirements of effective freedom and effective rights-holding we accept ends up shaping the constitutional democracy and the regulated market economy that we have. The point is that the choices we make about these matters need not, and do not, converge in the same direction.

If we gave freer reign to such experimentation with different ways of defining and satisfying the requirements of individual and collective self-determination, we would have legal pluralism. We would realize that, to a

44. Tamara Lothian, *The Criticism of the Third-World Debt and the Revision of Legal Doctrine*, 13 WIS. INT'L L.J. (forthcoming Spring 1995).

much larger extent than we now imagine possible, different systems of market-defining contract and property rights can coexist in the same economy, different arrangements for accountability (ranging from the most indirect to the most direct forms of democracy) can coexist in the same polity, and different ways of mixing private initiative with public coordination can coexist within the same state and the same society. (In my proposal for a democratized market economy I have tried to turn some of these possibilities of coexistence to advantage.) We would be unembarrassed in our experimentalist eclecticism because we would be free at last from the residual illusion of nineteenth-century legal science: that regimes of rights and institutional orders lose integrity and efficacy if they fail to coalesce into a master scheme.⁴⁵

From the standpoint of the thesis of legal pluralism, it is interesting to reconsider one of the seminal developments of modern legal thought: Hohfeld's attack upon the idea of a single logic of rights.⁴⁶ The meaning of the Hohfeldian analysis has usually been understood to be the discovery that rights and their counterparts (powers, privileges, and immunities) may conflict and that nothing in the real logic of rights guarantees them a preestablished harmony. The conflicts invite "balancing" according to policies and interests. However, this reading robs the Hohfeldian analysis of half of its force, the undeveloped constructive half. A different reading would emphasize that alternative systems and logics of rights (and their counterparts) can coexist within the same legal order and that the coexistence we see and have is only a small part of the coexistence we can imagine and construct.

F. Comparative Law: Trading Influence for Insight

A major obstacle to the development of a style of legal thought with the characteristics and ambitions I have listed is that it requires the lawyer to assume a perspective distancing her from her own political society and legal culture. It may distance her from the ongoing conversation, depending upon the extent to which that conversation lacks structural focus. It will in any event distance her from the focused policy-making and adjudicative roles. But the distancing may pay off; it can produce insight.

One of the most promising vehicles for such insight through distancing is comparative law. The point of comparative law, practiced in this light, is to force us to think beneath the surface, to think structurally, because we are thinking about an experience remote from our own. We have no influence to lose among these far-away peoples and readily renounce what we never really possessed. Then we bring the insights home to the space which we remain anxious to influence.

45. American legal thought has explored legal pluralism through the lens of legal-process insight while resisting or ignoring its pertinence to substantive law. See Lon L. Fuller, *The Forms and Limits of Adjudication*, in *THE PRINCIPLES OF SOCIAL ORDER* 11-121 (Kenneth J. Winston ed., 1981).

46. See Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913).

Viewed in this light, comparative legal study is like the story-telling capacity, increasing the imaginative power with which we resist experienced constraint by giving us a glimpse of greater freedom to change, far away. The difference is that the comparativist should tell stories that really happened and be prepared to accept that truth is indeed stranger than fiction.