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## **On the Public-Law Character of Competition Law: A Lesson from Asian Capitalism**

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# On the Public-Law Character of Competition Law: A Lesson from Asian Capitalism

Michael W. Dowdle\*

## ABSTRACT:

This article argues that competition law is best seen as a form of public law – ‘the law that governs the governing of the state – and not as simply a form of private market regulation. It uses the experiences of ‘Asian capitalism’ to show how capitalist economies are in fact much more variegated than the orthodox model of competition law presumes, and that this variegated character demands a form of regulation that is innately political rather than simply technical. Orthodox competition regimes address this complexity by segregating non-standard capitalisms into alternative doctrinal jurisprudences, but this renders conceptually invisible the political balancing that these different forms of capitalism, and their different dynamics of competition, require and innately provoke. Recognizing that competition law is ultimately a form of public law allows us to visualize this inevitable process of political balancing, and thereby begin to address the issues it raises.

Key words: Competition law and antitrust, Public Law, Comparative law, Economic regulation, Asian law

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The idea for this article was initially advanced to me by Ms. Soojin Nam, in a term paper she wrote for a course I taught on Asian Regulation at Sciences Po in Spring 2008. See *id.* at x.

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## I. INTRODUCTION: OVERVIEW AND INSPIRATIONS

*“The right way to think about this complex set of issues is not clear, but it is clear that the [present] competitive paradigm cannot be fully appropriate.”<sup>1</sup>*

Competition law is ultimately a form of public law – ‘the law that governs the governing of the state’. It is, at the end of the day, an innately political form of regulation, one that cannot help but deal with much more than simply promoting the economic efficiency of the market. In this article, we use the experience of ‘Asian capitalism’ to show why this is the case, not simply in Asia, but everywhere.

The political character of competition regulation in Asia is well recognized.<sup>2</sup> But its implications for understanding competition law writ large are as yet unexplored. This is because, at least insofar as the legal and economic literature of the European and Anglo-American worlds is concerned, analyses of the competition laws of non-Euro-American locales invariably proceed according to a particular logic. First, the analysis reminds us as to how competition law is conceptualized in the Euro-American world — a particular conceptualization that we will hereinafter refer to as the ‘orthodox model’.<sup>3</sup> Since the late 1970s, that Euro-American model

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<sup>1</sup> J. Bradford DeLong & Lawrence H. Summers, “The ‘New Economy’: Background, Historical Perspective, Questions, and Speculations,” 2001 (Q4) *Economic Review* 29, 34 (Federal Reserve Bank of Kansas City, 2001).

<sup>2</sup> See, e.g., Lawrence S. Liu, “In Fairness We Trust? - Why Fostering Competition Law and Policy Ain't Easy in Asia” (October 19, 2004), available at SSRN: <http://ssrn.com/abstract=610822> (accessed July 12, 2012). See also note \_\_\_ infra. For a description of what constitutes ‘Asia’ for the purposes of this article, and why, see TAN infra.

<sup>3</sup> See generally TAN infra (describing the elements of the orthodox model). What we are calling the ‘orthodox model’ is perhaps more commonly termed the ‘neoliberal’ model. Compare TAN infra with Hubert Buch-Hansen & Angela Wigger, “Revisiting 50 Years of Market-making: The Neoliberal Transformation of European Competition

has been the dominant, if not the only, means for thinking about competition law.<sup>4</sup> It is the model that presently informs the global diffusion of competition law and competition regulation;<sup>5</sup> and it is the model that is now universally espoused by most developmental agencies and most competition law professors and scholars as the only appropriate way for competition law to be structured.<sup>6</sup> The analysis then compares the law of its non-Euro-American subject with this orthodox model.<sup>7</sup> Where it finds significant differences, it then concludes that these differences either (1) evince de facto deficiencies in the subject jurisdiction's competition law that need to be fixed;<sup>8</sup> or (more rarely) (2) evince that market competition in the subject jurisdiction is 'different' in some significant way from that found in 'the West'.<sup>9</sup>

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Policy," 17 *Rev. Int'l Pol. Econ.* 20 (2010). The term "neoliberal", however, is often interpreted as having a pejorative meaning, see Bob Jessop, "Neoliberalism," in *The Wiley-Blackwell Encyclopedia of Globalization* (George Ritzer, 1<sup>st</sup> ed., Blackwell Publishing, 2012) (online edition, available at <http://onlinelibrary.wiley.com.libproxy1.nus.edu.sg/doi/10.1002/9780470670590.wbeog422/pdf>); see also Oliver Marc Hartwich, "Neoliberalism: The Genesis of a Political Swearword," CIS Occasional Paper no. 114 (The Centre for Independent Studies (CIS), 2009), which is why this article uses the term "orthodox model" instead.

<sup>4</sup> See, e.g., Einer Elhauge & Damien Geradin, *Global Competition Law and Economics* 2d ed. v-vi (2011); David J. Gerber, *Global Competition: Law, Markets and Globalization* 79-120 (2010). Barak Orbach, "How Antitrust Lost Its Goal," 81 *Fordham L. Rev.* 2253 (2013).

<sup>5</sup> For a discussion of what is meant by 'competition regulation' as contrasted against 'competition law', see TAN *infra*.

<sup>6</sup> See also Ngai-Ling Sum, "Cultural Political Economy of Competitiveness, Competition Law, and Competition Policy in Asia," in *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law* 79 (Michael W. Dowdle, et al., eds. Cambridge University Press, 2013); David J. Gerber, "Convergence in the Treatment of Dominant Firm Conduct: The United States, the European Union, and the Institutional Embeddedness of Economics," 76 *Antitrust L. J.* 951 (2010); Buch-Hansen & Wigger, *supra* note [Revisiting].

<sup>7</sup> See, e.g., Toshiaki Takigawa & Mark Williams, "Guest Editors' Note: Asian Competition Laws," 54 *Antitrust Bull.* 1 (2009). Cf. Sum, *supra* note [Cultural], at 85-92 (describing use by World Bank and Asian Development Bank or orthodox model as 'best-practice' in domestic competition regulation).

<sup>8</sup> See Gerber, *supra* note [Dowdle], at 36 (noting that "convergence [with the orthodox model] . . . is widely considered to be the only currently viable strategy for global competition law development"). There are too many examples of these to cite. See, e.g., Kenneth M. Davidson, "Creating Effective Competition Institutions: Ideas for Transitional Economies," 6 *Asian-Pacific L. & Pol'y J.* 71 (2005); Liu, *supra* note [Fairness].

<sup>9</sup> See, e.g., David J. Gerber, "Asia and Global Competition Law Convergence," in *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law* 36 (Michael W. Dowdle, et al., eds., Cambridge University Press, 2013); Cf. Julián Peña, "The Limits of Competition Law in Latin America," in *The Global Limits of Competition Law* 236, 243 (Ioannis Lianos & D. Daniel Sokol, eds., Stanford Univ. Press, 2012). Cf. Tony Prosser, "Competition Law and the Role of the State in East Asia," in *Asian Capitalism and the*

This article reminds us that there is another possibility that may underlie such differences. This is the possibility that the difference shows that some of the presumptions that inform the orthodox model are simply wrong — and that the competition law of ‘the other’ – in this case Asia – is not merely different, it is in fact affirmatively superior. More specifically, it shows us that at the end of the day, the distinctly political character of Asian competition regulation derives from that fact that, contrary to the presumptions of the orthodox model, competition regulation is everywhere an innately political form of regulation known as ‘public law’.

\* \* \*

To say that competition law is a form of public law is to say that it is a kind of law that is ultimately concerned with the governance of the state,<sup>10</sup> and not simply a form of private regulation concerned solely with the governance of private markets. It is to say that competition law is an innately *political* form of regulation in that it involves the constant, political balancing and rebalancing of a wide diversity of public and private concerns.<sup>11</sup> This runs contrary to what we are calling the ‘orthodox model’ of competition law, which demands that competition law be insulated from politics.<sup>12</sup>

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*Regulation of Competition: Towards a Regulatory Geography of Global Competition Law* 228 (Michael W. Dowdle, et al., eds., Cambridge University Press, 2013).

<sup>10</sup> See TAN *infra*.

<sup>11</sup> See TAN *infra*.

<sup>12</sup> See Imelda Maher, “The Institutional Structure of Competition Law,” in *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law* 55, 61-75 (Michael W. Dowdle et al., eds., Cambridge University Press, 2013); Imelda Maher, “Functional and Normative Delegation to Non-Majoritarian Institutions: The Case of the European Competition Network,” *7 Comp. Eur. Pol.* 414 (2009); Gesner Oliveira, Eduardo Luiz Machado, Lucas Martins Novaes & Carla Beatriz Guimarães Ferreira, “Aspects of the Independence of Regulatory Agencies and Competition Advocacy – A Getúlio Vargas Foundation (NGA) contribution,” International Competition Network, Competition Policy Implementation Working Group Subgroup 3 (Competition Advocacy in Regulated Sectors) (São Paulo, 2005), at 5; Pradeep S Mehta & Simon J Evenett, “Introduction,” in *Politics Triumphs Economics? Political Economy and the Implementation of Competition Law and Regulation in Developing Countries (Volume II)* 1, 1-2 (Pradeep S Mehta & Simon J. Evenett, eds., CUTS International 2009).

Of course, many working out of the orthodox model accept that competition law must take into account substantive considerations that are not classically economic in nature, considerations that they often characterize as ‘political considerations.’<sup>13</sup> But as used herein, politics – our more precise term will be ‘political regulation’ – refers to something different: it refers not to a particular class of substantive regulatory considerations, but to a particular class of processes through which such non-economic considerations can be injected into regulatory decisionmaking. More specifically, it means to refer to decisionmaking processes that involve negotiations from self-interest.<sup>14</sup> By contrast, when people working out of the orthodox model advocate taking particular ‘political considerations’ into account, they nevertheless require or assume that those considerations be accounted for in an objective and technical manner that does not involve or allow for bargaining from self-interest – what this article will refer to as ‘juristic regulation’.<sup>15</sup>

As shall be shown below, the orthodox model’s hostility to politics derives from a misconception about the structure of capitalist systems. The orthodox model originated in the particular experiences of the advanced industrial economies of the ‘North Atlantic’<sup>16</sup> during the 20<sup>th</sup> century, an experience that is often referred to as Fordism.<sup>17</sup> As such, it presumes that the national economy it regulates is (or should strive to be) more-or-less Fordist, and moreover, that

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<sup>13</sup> See, e.g., Robert Pitofsky, “The Political Content of Antitrust,” 127 *U. Penn. L. Rev.* 1051 (1979).

<sup>14</sup> See, e.g., John Dunn, *The Cunning of Unreason: Making Sense of Politics* 133 (Harper Collins 2000). See generally TAN *infra* (discussion ‘political regulation’)

<sup>15</sup> See TAN *infra*. See also sources cited in note 4 *supra*.

<sup>16</sup> The particular geography that this article refers to as the “North Atlantic” – i.e., the advanced industrial economies of the United States and Western Europe – tracks that which many refer to as “the West”. But as with the term ‘neoliberal’, the term “the west” carries a lot of political and ideological, as well as simply conceptual, baggage that I would like to avoid in this article. In particular, “the West” is often used to refer to a particular – and often mythologized -- cultural geography. By contrast, “North Atlantic” is meant to refer to a particular economic geography.

<sup>17</sup> See TAN *infra*.

it is what we will call ‘monistically’ Fordist — meaning that no other forms or varieties of capitalism significantly inform the national economic system.<sup>18</sup> Consistent with Max Weber’s understanding of modern capitalism, what he called ‘rational capitalism’, it sees this capitalism as being properly founded upon a rational set of objective economic principles that in turn objectively dictate the construction and demands of competition law.<sup>19</sup> In such an environment, there would obviously be no room for politics: politics would merely introduce extraneous and often corrupting inputs into the regulatory process.

This article uses the alternative experiences of the Asian regional economy – *aka* ‘Asian capitalism’<sup>20</sup> – to show that in fact, national economies are comprised of a diversity of capitalisms; that this diversity is balanced differently in different kinds of economic geographies; and that there are therefore multiple forms of ‘market competition’ operating within any single national economy. Since in any particular national economy, market competition comes in a variety of forms, the regulation of this competition must also adopt a variety of forms, and more importantly must balance the needs for and of the different forms of capitalisms operating within

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<sup>18</sup> See Angela Wigger & Andreas Nölke. “Enhanced Roles of Private Actors in EU Business Regulation and the Erosion of Rhenish Capitalism: The Case of Antitrust Enforcement,” 45 *J. Common Market Studies* 487 (2007); Stephen Wilks, “The European Competition Network: What has Changed?” 18 (European Union Studies Association [EUSA] Conference, May 17-19 2007) available at <http://aei.pitt.edu/8067/1/wilks%2Ds%2D08h.pdf>. Cf. Dani Rodrik, *One Economics, Many Recipes: Globalization, Institutions, and Economic Growth* (Princeton University Press, 2009).

<sup>19</sup> See TAN *infra*. Compare Max Weber, *Economy and Society: An Outline of Interpretive Sociology* 164-166 (University of California Press, 1978); Richard Swedberg, *Max Weber and the Idea of Economic Sociology* 27 (Princeton University Press, 1998). See also Bob Jessop, “The Complexities of Competition and Competitiveness: Challenges for Competition Law and Economic Governance in Variegated Capitalism,” in *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law* 96 (Michael W. Dowdle et al., eds., Cambridge University Press, 2013) (exploring the antecedents to and emergence of the orthodox model’s particular understanding of capitalism). See especially *id.* at 112-3 (noting tendency of people working out of Anglo-American tradition to presume that all capitalism resembles rational capitalism).

<sup>20</sup> See TAN *infra*.

national borders. This is an innately political act, and it is for this reason that competition law properly lies in public law rather than simply in private market regulation.

Moreover, Asian capitalism is not unique in this regard. North Atlantic capitalisms are also variegated. It's just that this variegation has been 'invisibilized'<sup>21</sup> by the particular doctrinal structure that positive competition regulation<sup>22</sup> takes in the United States and the European Union. As we shall see, even in the United States and Europe, competition law takes the form of what we are calling political regulation. It is a form of public law.<sup>23</sup>

\* \* \*

The rest of this article proceeds as follows. Part II gives an overview of what we are calling the orthodox model of competition law. In short, the orthodox model seeks to promote the economic and social well-being of society by allocating the surplus value generated by production via market competition based on price. But this model is not of universal utility: there are several kinds of market environments in which promoting price competition or consumer welfare per se does not promote economic or social well-being. These include export-oriented economies, economies based on product competition, volatile economies, economies for citizenship goods, and small economies.

Part III then explores what we are calling Asian capitalism, and how Asian capitalism comports with the economic presumptions that underlie the orthodox model. One aspect of Asian capitalism in particular stands out in this regard is its variegated character. In contrast to

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<sup>21</sup> It's not a proper word, but I like it.

<sup>22</sup> In fact, national market competition is regulated by a variety of legal regimes in addition to the positive competition law. As used herein, competition 'regulation' refers to the sum total of the regulatory regimes that significantly and intentionally shape market regulation in a particular country—including, for example, in addition to competition law, intellectual property law, labor law, consumer protection, etc. See TAN *infra*.

<sup>23</sup> See TAN *infra*.

the monistic nature North Atlantic capitalism, Asian capitalism appears to encompass a wide diversity of capitalisms within its various national regulatory penumbras. In Part IV, we explore how this variegated character upsets a number of core presumptions that inform the orthodox model, and in the end cause competition regulation to assume a political-regulatory character. This is because different forms of capitalism that comprise the national economies of Asia each serve a different – and often incommensurate – social purposes. Their contributions and interactions, their mutual economic coherence, can therefore only be structured by balancing conflicts, not by resolving them. This is the realm of politics, and it is what makes competition law and regulation in Asia innately political rather than simply technical in character.

Part V then show that the economies of the North Atlantic are in fact also variegated, and that in fact their implementation of competition law also evinces a correspondingly political-regulatory character. It is just that this political regulatory character is masked by doctrinal differentiations that treat the regulation of non-price-competitive forms of capitalism as *exceptions* to the orthodox model rather than true *alternatives* to that model. Finally, in Part VI, we will see how all this makes competition law into a form of public law, both insofar as Asia and the North Atlantic are concerned. At the end of the day, competition law is about nothing less than the construction and regulation of the state itself.

## **II. THE ORTHODOX MODEL FOR COMPETITION LAW: RATIONALE, LIMITS, AND PRESUMPTIONS**

In order to explore for how and why Asian capitalism regulates competition the way it does, we first need to examine what it is that the orthodox model consists of, and what are its

limitations. Its limitations, in particular, are generally overlooked in the orthodox literature. But understanding them is critical to our project. As we shall see, these limitations stem from particular presumptions the orthodox model makes about the social-economic environment it seeks to regulate. These presumptions, which parallel the particular capitalist-industrial ordering known as Fordism, are by no means universal. In particular, we shall see in Part III that they do not accurately describe the situation found in Asian capitalism, and this will explain why Asian capitalism regulates competition the way it does — i.e., by relying more on politics and less on economic expertise.

*A. The Rationale for the Orthodox Model<sup>24</sup>*

There is a surprising level of agreement about the theoretical foundations that should inform global and domestic practices and doctrines of competition law and regulation. Perhaps no other area of law evinces such an unchallenged theoretical underpinning.<sup>25</sup> This is not to suggest that there are not disagreements within the field over theoretical questions: economic libertarians, such as those associated with the Chicago school, are less distrustful of monopolistic practices than those working out of the orthodox theory;<sup>26</sup> German ordoliberalism pays more attention to the democratic implication of market competition than does more orthodox theorizing, which tends to focus narrowly on efficiency.<sup>27</sup> But at the end of the day, the general

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<sup>24</sup> For a good, short overview of the orthodox rationale for North Atlantic competition law, see Tony Prosser, *The Limits of Competition Law: Markets and Public Services* 17-20 (Oxford University Press, 2005).

<sup>25</sup> See also Maher, *supra* note [Regulating]; Gerber, *supra* note [Convergence].

<sup>26</sup> Gordon B. Spivack, "The Chicago School Approach to Single Firm Exercises of Monopoly Power: A Response," 52 *Antitrust L. J.* 651 (1983).

<sup>27</sup> See TAN *supra*.

theoretical justifications for competition law stand relatively uncontested from within the field, even as they find more considerable opposition outside of that field.<sup>28</sup>

At the heart of the orthodox model is the pursuit of a condition commonly referred to as “consumer sovereignty”<sup>29</sup> – “the set of societal arrangements that causes that economy to act primarily in response to the aggregate signals of consumer demand, rather than in response to government directives or the preferences of individual businesses.”<sup>30</sup> Consumer sovereignty optimizes distribution of resources so as to maximize the market’s benefit to consumers, both in terms of maximizing consumers’ aggregate material benefits (i.e., ‘consumer welfare’)<sup>31</sup> and maximizing aggregate consumer choice (i.e., consumer democracy).<sup>32</sup>

Many see consumer sovereignty as an essential contributor to an effective democratic system of government.<sup>33</sup> Of all the possible economic classes towards which a market might direct its benefits, that of the consumer is generally regarded as the most democratically inclusive.<sup>34</sup> Consistent with general understandings of the purpose of democracy, consumer

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<sup>28</sup> For a rare exception, see Frederick M. Rowe, “The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics,” 72 *Geo. L. J.* 1511 (1983-1984). For critique from outside the field, see, e.g., Prosser, *supra* note [Limits], at 17-39 (critique from the perspective of public law).

<sup>29</sup> See also Neil W. Averitt & Robert H. Lande, “Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law,” 65 *Antitrust L. J.* 713 (1997). The modern idea of consumer sovereignty appears to have been coined by William H. Hutt in “Economic Method and the Concept of Competition,” 2 (1) *South African J. Econ.* 3 (1934). See also William H. Hutt, “The Concept of Consumers’ Sovereignty,” 50 *Econ. J.* 66 (March 1940).

<sup>30</sup> Averitt & Lande, *supra* note [consumer sovereignty], at 715.

<sup>31</sup> See K.J. Cseres, “The Controversies of the Consumer Welfare Standard,” 3 *Competition L. Rev.* 121 (2007).

<sup>32</sup> John D. Haskell and Luigi Russi, *Where Does the Critique of Consumer-Based Economic Governance Stand Today?* 15-20 (Harvard Law School, Institute for Global Law & Policy, IGLP Working Paper no. 2011/4, 2011), available at: <http://works.bepress.com/luigirussi/15>.

<sup>33</sup> See Giuliano Amato, *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* 2-3 (Oxford Hart Publishing, 1997). See also Haskell & Russi, *supra* note [critique]. Cf. Gerber, “Constitutionalizing the Economy,” *supra* note \_\_ (describing how this has been a particular focus of German competition law theory).

<sup>34</sup> See, e.g., Walter Lippmann, *Drift and Mastery: An Attempt to Diagnose the Current Unrest* 54-55 (Prentice Hall, 1961) (1914).

sovereignty is seen to allow the greatest portion of the population to get the greatest benefit from a free market system:

In a rich society like ours . . . [we] must be concerned with the mechanisms for getting people what they want, no matter how these wants were acquired. This view I find very close to the idea of democracy or freedom – the idea of normally letting each member of society decide what is good for himself, rather than have someone else play a paternal role. It is also very closely related to the idea of efficiency – efficiency in the use of resources for the greatest possible satisfaction of the needs and desires of people. It is understandable why the full achievement of consumer sovereignty has been called ‘ideal output’.<sup>35</sup>

According to the orthodox model, competition law is supposed to promote consumer sovereignty primarily by allocating the surplus value of production – the difference between the value of the inputs that are used to create the produced good and the value of the produced good itself – to the consumer, maximizing what is called “consumer surplus”.<sup>36</sup> It does this by pushing prices down to the cost of production. Under conditions of what is called ‘perfect competition’ – perfect competition being the ideal that the orthodox model of competition law seeks to produce<sup>37</sup> – producers can only secure customers by offering goods at their lowest

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<sup>35</sup> Abba P. Lerner, “The Economics and Politics of Consumer Sovereignty,” 62 *Am. Econ. Rev.* 258, 258 (1972). See also Hutt, “The Concept of Consumer Sovereignty,” supra note \_\_\_, at 77 (describing consumer sovereignty as “the free and effective expression of all human preferences in respect of ends which are confronted with scarce means”). See generally Amato, supra note [Bounds of Power].

<sup>36</sup> Robert H. Lande, “Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged,” 34 *Hastings L. J.* 65, (1982). at 71-77 The idea of consumer surplus was first developed by Alfred Marshall. See Alfred Marshall, *Principles of Economics* 8th ed. (Macmillan, 1922).

<sup>37</sup> See George J. Stigler, “Perfect Competition, Historically Contemplated,” 65 *J. Pol. Econ.* 1 (1957). See generally Jessop, supra note [Complexities], at 99-103. The notion of perfect competition was first identified in 1836 by the English lawyer and economist, Nassau William Senior. See Nassau William Senior, *An Outline of the Science of Political Economy* 102 (Farrar & Rinehart, 1939 [1836]).

possible price, and that price is the cost of securing the inputs necessary to produce the good. The value that is created by the actual production of the good therefore accrues to the more democratic consumer class, rather than to the (allegedly) more oligarchical producer class.<sup>38</sup>

(Perfect) competition also promotes consumer sovereignty by promoting the economic efficiency of markets.<sup>39</sup> This efficiency comes in two guises. One is ‘productive efficiency’ (also referred to as ‘technical efficiency’), which refers to a market’s ability to maximize output from a given quantity of input (in practical terms, this means producing goods at their lowest possible costs). The other is ‘allocative efficiency’ (or ‘cost efficiency’), which refers to a market’s ability to allocate limited resources so as to maximize that market’s production of aggregate social wealth.<sup>40</sup> Competition promotes productive efficiency by giving evolutionary advantage to firms who use resources most efficiently. More efficient use of resources results in lower production costs; which results in lower product prices; which results in more sales; which allows the producer to better survive in competition with less efficient users.<sup>41</sup> Competition promotes allocative efficiency by ensuring that more efficient users of particular resources will enjoy greater access to those resources due to the greater revenue stream they can generate from

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<sup>38</sup> See also, e.g., Lippmann, *supra* note [Drift], at 54-55.

<sup>39</sup> The germinal explication of this is found in Alfred Marshall, *Principles of Economics* (Cosimo Classics, unabridged 8th ed., 2009) (1920). See especially *id.* at 323, 346. See also Rowe, *supra* note [decline], at 1550-1551. For a critique of the claim that the consumer class is necessarily more ‘democratic’ than the producer class, see James Q. Whitman, “Consumerism Versus Producerism: A Study in Comparative Law,” 117 *Yale L. J.* 340 (2007).

<sup>40</sup> See see Joseph F. Brodley, “The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress,” 62 *N.Y.U. L. Rev.* 1020-1021 (1987); See also Prosser, *supra* note [limits], at 19. Cf. Walter Nicholson and Christopher M. Snyder, *Microeconomic Theory: Basic Principles and Extensions* 611-20 (Cengage Learning, 11th ed., 2011) (on the importance of allocative efficiency and productive efficiency to economic theory).

<sup>41</sup> See Brodley, *supra* note [economic goals], at 1027 (importance of productive efficiency to competition law); Johnsen, *supra* note [Wealth], at 277 (same). Cf. Oliver E. Williamson, “Economies as an Antitrust Defense: The Welfare Tradeoffs,” 58 *Am. Econ. Rev.* 18, 21-32 (1968) (on the general importance of productive efficiency). For a critique of productive efficiency as a “workable antitrust norm”, see Rowe, *supra* note [decline], at 1549.

these resources via higher sales.<sup>42</sup> By generating continual pressures to improve productive and allocative efficiency, perfect competition ensures that the economy over time will generate ever increasing quantities and diversities of the goods available to consumers.<sup>43</sup>

(Perfect competition is also sometimes said to promote dynamic efficiency – or design innovation.<sup>44</sup> But as described further below, this claim is controversial.<sup>45</sup>)

### *B. The Limits of the Orthodox Model*

As described above, the theoretical predicates that underlie the orthodox model derive from the 20<sup>th</sup>-century experiences of the advanced industrial economies of the North Atlantic, particularly that of the United States.<sup>46</sup> Embedded in these predicates are certain presumptions about the nature of a capitalist economy, presumptions that are for the most part unproblematic in the context of these North Atlantic forms of capitalism. These include (1) that consumers are located in the same economy that produced the goods being consumed; (2) that the markets that drive that economy are best governed by price competition rather than by some other form of competition; (3) that the economy is relatively stable; (4) that the delivery of the goods and services associated with citizenship can be adequately provided for by the public sector; and (5)

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<sup>42</sup> See Bork, *supra* note [Paradox], at 90-106; George J. Stigler, *The Theory of Price* 176-90 (Macmillan, 4<sup>th</sup> ed., 1987). See also Brodley, *supra* note [economic goals], at 1027. As between the various kinds of efficiency, promoting allocative efficiency appears to be the principal goal of competition law. See Bork, *supra*; Brodley, *supra*, at 1026. Some argue, however, that it should not be. See Johnsen, *supra* note [Wealth is Value], at 277 (suggesting that allocative efficiency is only important to the extent it promotes productive efficiency). See also *id.* at 273-274; Frederic M. Scherer & David Ross, *Industrial Market Structure and Economic Performance* 460-71 (Houghton Mifflin, 3d ed., 1990). For a critique of allocative efficiency as a concept, see Rowe, *supra* note [decline], at 1549.

<sup>43</sup> See John J. Siegfried & Edwin H. Wheeler, “Cost Efficiency and Monopoly Power: A Survey,” 21 *Q. Rev. Econ. & Bus.* 25 (1981).

<sup>44</sup> See, e.g., Michael E. Porter, “Competition and Antitrust: Toward a Productivity-Based Approach to Evaluating Mergers and Joint Ventures,” 46 *Antitrust Bull.* 919 (2001). Compare TAN *infra*.

<sup>45</sup> See TAN *infra*.

<sup>46</sup> See Gerber, *supra* note [Global Competition], at viii. See also TAN *infra*.

that the economy is large enough to generate and maintain minimally-efficient economies of scale.

But as we shall see, these presumed conditions are by no means universal. In export-oriented economies, for example, consumers are not located in the same economy as producers. In many sectors, goods compete based on product design (i.e., “product competition”) rather than on the basis of price. Many national economies, particularly those outside of the advanced industrial North Atlantic, suffer from significant and persistent volatility. Nor does competition law fit well with economies which are tasked with the distribution of public goods and / or services that are associated with citizenship. Finally, many national economies are too small to allow perfect competition to generate on its own the minimally efficient economies of scale necessary to compete in transnational, price-competitive markets.

- Export-oriented<sup>47</sup> and other forms of ‘producerist’ economies

As described above, the orthodox model of competition law is consumerist in orientation — it works first and foremost to bring benefit to consumers, in the form of consumer sovereignty, consumer welfare, and consumer surplus.<sup>48</sup> The rationale for this is that the consumer class is more democratic and broadly inclusive than are other economic classes (such as workers or industrialists), and thus an economic regime that promotes consumer welfare is the most democratic and egalitarian when compared to its alternatives.<sup>49</sup>

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<sup>47</sup> I use “export-oriented” rather than the more common “export-driven” in order to emphasize that export orientation is not always simply the product of a policy choice. Particularly insofar as more peripheral economies are concerned, export-orientation can be a structural consequence of their Ricardian comparative advantage in lower production costs. See note [Thünen, Schwartz] *infra*.

<sup>48</sup> See TAN *supra*. See Whitman, *supra* note [Consumerism], at 371-383.

<sup>49</sup> See TAN *supra*.

But this rationale assumes that the consumers and producers are all part of the same economy. But this is not always the case. Many economies, particularly lesser developed economies, are export-oriented, in the sense that these economies sustain themselves by producing products that are then consumed by consumers in a different economy.<sup>50</sup> Where this is the case, a competition regulatory regime that focuses on promoting *consumer* welfare and *consumer* surplus can be of lesser domestic benefit, since it would simply be exporting the wealth generated by domestic production to an outside economy.<sup>51</sup> In export-oriented economies, an alternative, producerist-oriented competition regulatory framework can be of greater benefit, since it would allow more of the wealth (surplus value) generated by production to remain in domestic economy.<sup>52</sup>

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<sup>50</sup> See Jonathan V. Levin, *The Export Economics: Their Pattern of Development in Historical Perspective* (1960). Cf. Johann Heinrich von Thünen, *Von Thunen's Isolated State: An English Edition of Der Isolierte Staat* (Peter Hall, ed., Carla M. Watenberg, trans., Pergamon Press, 1966) [1826]. For a good overview of Thünen's model, see Herman Schwartz, "Dependency or Institutions? Economic Geography, Causal Mechanisms, and Logic in the Understanding of Development," 42 *Studies Comp. Int'l Dev.* 115, 125-128 (2007).

<sup>51</sup> See Whitman, *supra* note [consumerism], at 371-383. For examples of this, see , Michael W. Dowdle, "Competition in the Periphery: Melamine Milk Adulteration as Peripheral 'Innovation'," in *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law* 119 (Michael W. Dowdle et al., eds., Cambridge University Press, 2013); Jeffrey Henderson, *Global Production Networks, Competition, Regulation and Poverty Reduction: Policy Implications* (University of Manchester, Centre on Regulation and Competition Working Paper Series, paper no. 115, 2005)

<sup>52</sup> See Sanford M. Jacoby, "Finance and Labor: Perspectives on Risk, Inequality, and Democracy," 30 *Comp. Labor L. & Pol'y J.* 17 (2008). Cf. Mats Bergman, "Antitrust, Marketing Cooperatives, and Market Power," 4 *Eur. J. Law & Econ.* 73 (1997); Aravind R. Ganesh, "The Right to Food and Buyer Power," 11 *German L. J.* 1190 (2010); Frederic M. Scherer, *Competition Policy, Domestic and International* 395-403 (Edward Elgar, 2000). Cf. Joseph E. Stiglitz, "Some Lessons from the East Asian Miracle," 11 *The World Bank Research Observer* 151, 164-165 (1996) (discussing positive role that 'recession cartels' sometimes had in "enabl[ing] the industry in question to avoid the low prices that would damage all the firms" in East Asian economies).

- Economies that are based on product competition rather than price competition

The orthodox model promotes market competition based on price.<sup>53</sup> But some important industrial sectors are not governed by price competition. Instead, their goods compete based on specifics of product design.<sup>54</sup> This kind of competition is often referred to as ‘product competition’ or ‘product differentiation’.<sup>55</sup> A paradigmatic example of a product-competitive market is the consumer market for Hollywood films in the United States. Hollywood films do not generally compete on the basis of ticket price – the vast majority of local cinemas invariably price all movie tickets the same. Instead, people choose which movie to see based simply on the relative appeal of that movie vis-à-vis other available movies.<sup>56</sup>

In fact, product competitiveness is often a more critical component of a country’s economic strength than success in price competitive markets.<sup>57</sup> But product competitiveness is often impeded by promoting price competitiveness.<sup>58</sup> Success in product design development

<sup>53</sup> David B Audretsch, William J Baumol & Andrew E Burke, “Competition Policy in Dynamic Markets,” 19 *Int’l J. Industrial. Org.* 613, 616-619 (2001). See also Daniel J. Gifford & Robert T. Kudrle, “European Union Competition Law and Policy: How Much Latitude for Convergence with the United States,” 48 *Antitrust Bull.* 727, 735 (2003).

<sup>54</sup> Economies founded on this kinds of market competition are sometimes referred to as “new economies” (see, e.g., Cosmo Graham & Fiona Smith, eds., *Competition, Regulation and the New Economy* (Oxford: Hart Publishing, 2004)), or “knowledge-based economies” (see, e.g., Organisation for Economic Co-Operation and Development [OECD], *The Knowledge Based Economy* (OCDE/GD(96)102, 1996) (available at <http://www.oecd.org/sti/sci-tech/1913021.pdf>)).

<sup>55</sup> See, e.g., Robin Roy & Johann C.k.h. Riedel, “Design and Innovation in Successful Product Competition,” 17 *Technovation* 537 (1997). The germinal explication of product competition (what he called “product differentiation” is found in Edward Hastings Chamberlin, *The Theory of Monopolistic Competition: A Re-Oriented of the Theory of Value* (Harvard University Press, 8<sup>th</sup> ed., 1965) (1933). See generally R. Rothschild, “The Theory of Monopolistic Competition: E.H. Chamberlin’s Influence on Industrial Organisation Theory over Sixty Years,” 14 *J. Econ. Studies* 34 (1987).

<sup>56</sup> See Paul DiMaggio, “Market Structure, the Creative Process and Pop Culture,” 11 *J. Popular Culture* 436, 444 (1997).

For another example of a product-competitive market, see C. Storey & C. Easingwood, “Determinates of New Product Performance, A Study in the Financial Services Sector,” 7 *Int’l J. Service Industry Mgmt.* 32 (1996) (product competition in financial services industry).

<sup>57</sup> See TAN *infra*.

<sup>58</sup> Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* 82-85 (Harper and Row, 3<sup>rd</sup> ed., 1975). See also James Crotty, “Core Industries, Coercive Competition and the Structural Contradiction of Global Neoliberalism,” in

often depends upon a firm's embeddedness within wide networks of industrial cooperation among formally competing firms,<sup>59</sup> a type of 'competition' that Joseph Schumpeter famously termed "co-respective" competition.<sup>60</sup> This type of competition seen as being in tension with the 'perfect competition' promoted by the orthodox model,<sup>61</sup> and a competition regulatory regime that focuses on promoting price competition is thus often ill-suited for these kinds of industries.<sup>62</sup>

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*The New Competition for Inward Investment: Companies, Institutions and Territorial Development* 9 (Nicholas Phelps & Philip Raines, eds., Edward Elgar, 2003); Audretsch et al., supra note [competition policy]; Charlie Karlsson & Jan Larsson, "Product and Price Competition in a Regional Context," 69 *Papers in Regional Science* 83 (1990).

<sup>59</sup> See, e.g., Michael Storper, *The Regional World: Territorial Development in a Global Economy* 5, 28 (New York: Guilford Press, 1997); Anthony J. Venables, Shifts in Economic Geography and their Causes 7 (The LSE Centre for Economic Performance, CEP Discussion Paper No. 767, 2006). See also Frederic C. Deyo, "Addressing the Development Deficit of Competition Policy: The Role of Economic Networks," in *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law* 283 (Michael W. Dowdle et al., eds., Cambridge University Press, 2013).

<sup>60</sup> See also TAN infra.

<sup>61</sup> See Katarzyna Czapracka, *Intellectual Property and the Limits of Antitrust: A Comparative Study of US and EU Approaches* 36-91 (Edward Elgar, 2010). Cf. William E. Kovacic, "A Regulator's Perspective on Getting the Balance Right," in *Intellectual Property, Competition Law and Economics in Asia* 23 (R. Ian McEwin, ed., Hart Publishing, 2011).

<sup>62</sup> See James Crotty, "Slow Growth, Destructive Competition, and Low Road Labor Relations: A Keynes-Marx-Schumpeter Analysis of Neoliberal Globalization," at 13 (University of Massachusetts Amherst, Political Economy Research Institute (PERI) Working Paper No. 6, 2000) (available at [http://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1002&context=peri\\_workingpapers](http://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1002&context=peri_workingpapers)). See also Charles F. Sabel, "Learning by Monitoring: The Institutions of Economic Development," in *The Handbook of Economic Sociology* 137 (Neil Smelser & Richard Swedberg, eds., Princeton University Press and Russell Sage Foundation, 1<sup>st</sup> ed., 1994); DeLong & Summers, supra note [New Economy], at 34; J. Gregory Sidak & David Teece, "Favouring Dynamic Competition over Static Competition in Antitrust Law," in *Intellectual Property, Competition Law and Economics in Asia* 53 (R. Ian McEwin, ed., Hart Publishing, 2011); Peter Møllgaard & Jo Lorentzen, "Competition Policy and Innovation," *International Handbook on Industrial Policy* 115 (Patrizio Bianchi & Sandrine Labory, eds., Edward Elgar, 2006); Rowe, supra note [Decline], at 1553-59; Brodley, supra note [economic goals], at 1026; Schumpeter, supra note [Capitalism], at 82-85. For an econometric explication, see K. Sridhar Moorthy, "Product and Price Competition in a Duopoly," 7 *Marketing Science* 141-168 (1988).

- Volatile economies

Another often overlooked limitation of the orthodox model lies in its presumption that the economic environment is generally stable.<sup>63</sup> But many economies, particularly those of less developed countries,<sup>64</sup> feature considerable volatility. In fact, there is good evidence that economic stability is increasingly the exception rather than the rule throughout most of the world.<sup>65</sup>

For economies that are subject to significant volatility, regulatory regimes that focus on promoting price competition can work to further catalyze that volatility. Recall that price competition pushes prices down to cost of production.<sup>66</sup> This forces producers to operate at razor-thin profit margins. So long as an economy is relative stable, as has been the case with American capitalism in particular for most of the 20<sup>th</sup> century, this is not so problematic.<sup>67</sup> But these razor-thin profit margins can also render producers, and even whole industries, vulnerable to economic disruption.<sup>68</sup> Small profit margins impede a firm's ability to maintain the wealth

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<sup>63</sup> See Michael J. Piore, & Charles F. Sabel, *The Second Industrial Divide: Possibilities for Prosperity* 49-54 (Basic Books, 1984) (noting this as a general presumption of American economic regulation during the long 20<sup>th</sup> century). See also Arthur F. Burns, "Progress Towards Economic Stability," 50 *Am. Econ. Rev.* 1 (1960).

<sup>64</sup> See Eswar S. Prasad, Kenneth Rogoff, Shang-Jin Wei & M. Ayhan Kose, "Effects of Financial Globalization on Developing Countries: Some Empirical Evidence," International Monetary Fund, Occasional Paper No. 220 (2003), at 18-28. See also Abhijit V. Banerjee & Esther Duflo, *Poor Economics: Barefoot Hedge-fund Managers, DIY Doctors and the Surprising Truth about Life on Less Than \$1 a Day* 133-155 (2011).

<sup>65</sup> Id. at 279- 80. See also Stephen Gill, "Economic Globalization and the Internationalization of Authority: Limits and Contradictions," 23 *Geoforum* 269 (1992); Adam Tickell & Jamie A. Peck, "Social Regulation after Fordism: Regulation Theory, Neo-liberalism and the Global-Local Nexus," 24 *Econ. & Soc.* 357 (1995). See also DeLong & Summer, *supra* note [New Economy].

<sup>66</sup> See TAN *supra*.

<sup>67</sup> See Piore & Sabel, *supra* note [Second Industrial Divide], at 49-54.

<sup>68</sup> See Paul J. Irvine & Jeffrey Pontiff, "Idiosyncratic Return Volatility, Cash Flows, and Product Market Competition," 22 *Rev. Financial Studies* 1149, 1150 (2009):

The mosaic of evidence suggests that the recent upward trend in idiosyncratic volatility is related to an increasingly competitive environment in which firms have less market power. When the success of one firm in an industry comes at the expense of another firm in that industry, competition contributes to negative covariance in firm performance. In general, markets reflect an environment with less consumer loyalty to a

reserves that would allow it to weather, for example, a sudden tightening of credit,<sup>69</sup> or a sudden decrease in consumer spending power,<sup>70</sup> or the sudden appearance of a new technology in a competing firm.<sup>71</sup> Price competitive markets cause periods of economic volatility to result in high firm turnover. High firm turnover, for its part, creates employment instability. And all of this feeds back to further catalyze the economic volatility.<sup>72</sup> Even during periods of relative stability, a regulatory focus on price competition can be problematic in innately volatile environments. Because the long run-prospects of firms in such environments are considerably less sure, these firms tend to take a short-term business focus and are discouraged from engaging in innovation and upgrading.<sup>73</sup>

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specific firm, perhaps due to better access to information or the reduction of other search costs. Our results coincide with the findings of economics research that indicates increased competition in the US economy.

This is a particular manifestation of the larger market problem known as “destructive competition.”

See also Joshua Aizenman & Brian Pinto, eds., *Managing Economic Volatility and Crises: A Practitioner's Guide* (Cambridge University Press, 2005); Joseph E. Stiglitz, “Some Lessons from the East Asian Miracle,” 11 *The World Bank Research Observer* 151, 164-165 (1996); Steven C. Salop & David T. Scheffman, “Raising Rivals' Costs,” 73 *Am. Econ. Rev.* 267 (1983); William J Baumol et al., *Contestable Markets and the Theory of Industry Structure* (Harcourt Brace Jovanovich, 1982). See, e.g., Andrew R. Goetz & Timothy M. Vowles, “The Good, the Bad, and the Ugly: 30 Years of US Airline Deregulation,” 17 *J. Transp. Geo.* 251 (2009) (showing how increased price competition has contributed to industrial volatility in the American airline industry).

<sup>69</sup> See Gordon L. Clark, “Money Flows like Mercury: The Geography of Global Finance,” 87 *Geografiska Annaler: Series B, Human Geography* 99 (2005); see, e.g., Pasuk Phongpaichit & Chris Baker, *Thailand's Crisis* — (Singapore Institute of Southeast Asian Studies, 2000).

<sup>70</sup> See Joseph Stiglitz, “The Private Uses of Public Interests: Incentives and Institutions,” 12 *J. of Econ. Persp.* 3, 12-13 (1998).

<sup>71</sup> See Crotty, *supra* note [Core Industries], at 17-18; Monti, *supra* note [Article 82], at 22-23. See also Philip A. Anderson & Michael L. Tushman, “Managing Through Cycles of Technological Change,” 34 *Research Technology Mgmt.* 26 (1991).

<sup>72</sup> See Thomas Laursen & Sandeep Mahajan, “Volatility, Income Distribution, and Poverty,” in *Managing Economic Volatility and Crises: A Practitioner's Guide* 101 (Joshua Aizenman & Brian Pinto, eds., Cambridge University Press, 2005).

<sup>73</sup> Crotty, *supra* note [Core Industries], at 18.

- Economies that involve distributional justice.

The orthodox model for competition regulation is hostile to subjecting competition law to concerns about distributional justice. Competition law, as we have seen, focuses on promoting the efficiency of markets.<sup>74</sup> Distributional justice, by contrast, is concerned with issues of equality of distribution. Pursuit of efficiency is generally seen as being structurally incompatible with pursuit of equality of distribution.<sup>75</sup> For this reason, the orthodox model is sometimes said to hold that competition law should not be concerned with issues of ‘fairness’.<sup>76</sup> Rather, such issues should be addressed separately, through the public revenue and appropriations (tax) system. This allows market to focus on what they do best — maximizing wealth. This in turn produces greater aggregate wealth for society, which after being redistributed via the tax system, results more personal wealth for each member of that society than would be the case if markets were tasked with insuring some equality of distribution themselves.<sup>77</sup>

But there are a number of problems with this model. The first, and most obvious is that it is simply not at all reflective of actual practice. Competition law regimes everywhere recognize that sometimes distributional concerns are best addressed directly through market regulation – including competition regulation – rather than indirectly through the tax system. Perhaps the most obvious example of this involves the labor market. In all developed economies, labor is allocated primarily via private markets. But these markets are invariably subject to significant distributional regulation.<sup>78</sup> This is because every modern political system regards access to some form of living-wage employment as something that should be enjoyed by all its citizens, even at

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<sup>74</sup> See TAN *supra*.

<sup>75</sup> See Arthur Okun, *Equality and Efficiency: The Big Tradeoff* (Washington DC, Brookings Institution Press, 1975).

<sup>76</sup> See note \_\_ *supra*.

<sup>77</sup> See generally Louis Kaplow & Steven Shavell, “Fairness versus Welfare,” 114 *Harv. L. Rev.* 961 (2001).

<sup>78</sup> John A. Litwinski, “Regulation of Labor Market Monopsony,” 22 *Berkeley J. Employment & Labor L.* 49 (2001).

a possible cost to productive and allocative efficiency.<sup>79</sup> But at the same time, our understanding of the logic of capitalism also tells us that employment is best allocated by markets rather than by administrative fiat.<sup>80</sup> The orthodox model handles this apparent contradiction by exempting some aspects of the labor market, but not others, from the purview of competition law.<sup>81</sup>

Nor are labor markets the only markets whose regulation takes into account distributional considerations. European competition law carves out a similar exemption for firms that engage in what are termed “services of general economic interest”.<sup>82</sup> Like labor, these are services that are regarded as being best allocated principally through private markets, but which nevertheless are seen as raising significant distributional concerns. Examples include health care, transportation, and telecommunications.<sup>83</sup>

Another problem with locating issues of distribution solely in the tax system is that this ignores the fact that tax-and-redistribution systems have their own, unique set of costs.<sup>84</sup> These

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<sup>79</sup> Id. See also Universal Declaration of Human Rights, art. 23(1), G.A. Res. 217A, at 72, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948); International Covenant on Economic, Social and Cultural Rights, art. 6, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

<sup>80</sup> See *The Global Competitiveness Report 2013-2014: Full Data Edition 5-6* (World Economic Forum, 2013).

<sup>81</sup> Litwinski, *supra* note [Monosopy].

<sup>82</sup> See Treaty of Amsterdam Amending the Treaty on European Union, art. 106 (3), [1997] OJ C 340/1. See also Treaty of Lisbon, Protocol on Services of General Interest, [2007] OJ C 306/158.

<sup>83</sup> See also Dragana Damjanovic & Bruno de Witte, “Welfare Integration through EU Law: The Overall Picture in the Light of the Lisbon Treaty,” in *Integrating Welfare Functions into EU Law — From Rome to Lisbon*, 53 (in Ulla Neergaard et al., eds., DJØF Publishing, 2009). See generally Prosser, *supra* note [Role of the State], at 232-237.

These special distributional concerns are captured in EU law in the notion of “social solidarity”. See *Sodemare and Others v. Regione Lombardia*, [1997] ECR I-3395, AG’s Opinion para. 29. See generally Kathleen Thelen, “Economic Regulation and Social Solidarity: Conceptual and Analytic Innovations in the Study of Advanced Capitalism,” 8 *Socio-Economic Rev.* 187 (2010); Tony Prosser, “Regulation and Social Solidarity,” 33 *J. L. & Soc.* 364 (2006); Tamara Hervey, “‘Social Solidarity: A Buttress against Internal Market Law?’,” in *Social Law and Policy in an Evolving European Union* 31 (Jo Shaw, ed., Hart Publishing, 2000). See also Markus Krajewski, Ulla Neergaard, & Johan van de Gronden, eds., *The Changing Legal Framework for Services of General Interest in Europe: Between Competition and Solidarity* (T.M.C. Asser Press, 2009).

<sup>84</sup> Kaplow and Shavell have recognized that inefficiencies in the tax system could compromise their model, but so far have only considered these “inefficiencies” only in the context of taxation’s disincentivizing of work, not in the context of administrative costs. See Louis Kaplow & Steven Shavell, “Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income,” 22 *J. Leg. Studies* 667 (1994).

include, in particular, their administrative costs. Not only are these costs often not insignificant,<sup>85</sup> but they can differ from economy to economy. For example, economies populated by larger numbers of smaller firms have higher tax collection costs than economies in which wealth is concentrated in fewer but larger firms.<sup>86</sup> Taxation and redistribution are also significantly more expensive to administer in cash-based economies than in credit-based economies, due to the greater difficulties involved in administrative monitoring of cash transactions.<sup>87</sup>

Obviously, if the administrative costs of a tax and redistribution scheme are too great, then they can offset the gains in wealth generation realized by allowing markets unfettered pursuit of efficiency. In such a case, it can be more efficient overall to affect the desired distribution directly through market regulation. This is particularly likely to be the case with lesser-industrialized countries,<sup>88</sup> since both larger firm size and credit-based economies tend to be the product of significant industrial development.<sup>89</sup>

By treating issues of distribution as simply exceptions rather than as affirmative regulatory concerns in their own right, the orthodox model of competition law also invisibilizes

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<sup>85</sup> See note \_\_ infra.

<sup>86</sup> See Richard M. Bird & Eric M. Zolt, "Redistribution via Taxation: The Limited Role of the Personal Income Tax in Developing Countries," 52 *UCLA L. Rev.* 1627, 1665 (2005). See also A. Pınar Yeşin, "Tax Collection Costs, Tax Evasion and Optimal Interest Rates," *Studienzentrum Gerzensee of the Swiss National Bank [Stiftung Der Schweizerischen Nationalbank]*, Working Paper 04.02 (April 2004), at 3 n.1.

<sup>87</sup> See Ilan Benshalom, "Taxing Cash," 4 *Colum. J. Tax L.* 65 4 (2012). See also John L. Douglas, "The Role of a Banking System in Nation-Building," 60 *Maine L. Rev.* 511 (2008). The "credit economy" (*kreditwirtschaft*) as an industrialization-driven successor to the cash-based economy was first identified by Bruno Hildebrand, see Bruno Hildebrand, "Naturalwirtschaft, Geldwirtschaft und Kreditwirtschaft," in 2 *Jahrbücher für Nationalökonomie und Statistik*, 1, 3-4 (University of Michigan Library, 2009) (1864) (e-book edition available at [http://archive.org/stream/jahrbcherfrnati11lexigoog/jahrbcherfrnati11lexigoog\\_djvu.txt](http://archive.org/stream/jahrbcherfrnati11lexigoog/jahrbcherfrnati11lexigoog_djvu.txt)).

<sup>88</sup> See Joseph E. Stiglitz, *Globalization and its Discontents* 119-20 (W. W. Norton, 2002).

<sup>89</sup> See Norman Gemmill & Olver Morrissey, "Distribution and Poverty Impact of Tax Structure Reform in Developing Countries: How Little We Know," 23 *Dev. Policy Rev.* 131 (2005); Bird & Zolt, *supra* note [redistribution], at 1666. Cf. M. Kabir Hassan, Benito Sanchez & Jung-Suk Yu, "Financial Development and Economic Growth: New Evidence from Panel Data," 51 *Q. Rev. Econ. & Fin.* 88 (2011).

the question of how to determine when particular private-market goods deserve distributional considerations. Again, this is not so much of a problem in the case of the advanced industrial economies of the North Atlantic, because the exceptions that they designate simply seem ‘natural’ from the perspective of an orthodox model that itself was derived from the regulatory practices of these particular economies. It becomes much more of a problem, however, when that model is applied to economies outside these North Atlantic economies.

This is because the kinds of goods and services that need to be subject to distributional concerns will differ from economy to economy. Consider, for example, the case of what might call “citizenship goods”.<sup>90</sup> These are goods and services that the state provides its citizenry in exchange for their loyalty — a kind of loyalty that T.H. Marshall famously termed “social citizenship”.<sup>91</sup> Obvious examples would include health care (although perhaps not in the United States), access to employment providing a living wage, and public education and other resources necessary to provide equality of opportunity.<sup>92</sup> Since we are all equal as citizens, we all have an equal claim to these kinds of goods independent of our individual capacity to pay and of whatever personal productive efficiencies that capacity might signify. Citizenship goods must therefore be distributed on the basis of equality and fairness rather than simply on the basis of productive and allocative efficiency.<sup>93</sup>

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<sup>90</sup> Cite to Prosser.

<sup>91</sup> This kind of exchange – goods and services for legitimacy – was famously captured by T.H. Marshall in his notion of “social citizenship”. See T.H. Marshall, *Citizenship and Social Class, and Other Essays* (Cambridge University Press, 1950); See also Desmond S. King & Jeremy Waldron, “Citizenship, Social Citizenship and the Defence of Welfare Provision,” 18 *British J. Pol. Sci.* 415 (1988).

<sup>92</sup> See, e.g., Universal Declaration of Human Rights, art. 23(1), G.A. Res. 217A, at 72, U.N. GAOR, 3d Sess., 1<sup>st</sup> plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948); International Covenant on Economic, Social and Cultural Rights, art. 6, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

<sup>93</sup> See also Okun, *supra* note [Equality].

But what kinds of goods and services qualify as citizenship goods? Different polities often have different understandings of which goods and services should be treated as citizenship goods. Studies show, for example, that polities of more peripheral, underdeveloped countries tend to regard as citizenship goods those goods and services that provide material security and stability. These include things such as job security, food and water, gasoline and electricity, and a living wage. Citizens in more wealthy industrialized countries, by contrast, tend to regard as citizenship goods goods and services that provide opportunity for self-realization, things such as education and equal job opportunity, reflecting the greater material security that advanced industrial economies naturally afford their citizenry.<sup>94</sup> Because the orthodox theory does not theorize the particular circumstances under which a particular good should be considered a citizenship good, it cannot, particularly in the context of socio-economic conditions that differ from those that tacitly inform the model, distinguish a good or service that has been partially exempted from competition law because it represents a citizenship good from a good or service that has been partially exempted simply due to the self-serving political machinations of some powerful special interest.

A good example of this is found in the intense and sometimes violent public opposition to World Bank and IMF efforts during the 1980s and 1990s to compel underdeveloped nations to subject food, fuel, water in order to private market competition, in order to promote greater

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<sup>94</sup> See Ronald Inglehart, "Post-Materialism in an Environment of Insecurity," 74 *Am. Pol. Sci. Re.* 880 (1981); Ronald Inglehart & Daphna Oyserman, "Individualism, Autonomy and Self-Expression: The Human Development Syndrome," in *Comparing Cultures, Dimensions of Culture in a Comparative Perspective* 74 (Henk Vinken et al., eds., Brill, 2004); Ronald Inglehart, *Modernization and Postmodernization: Cultural, Economic and Political Change in 43 Societies* (Princeton University Press, 1997). Cf. Banerjee & Duflo, *supra* note [Poor Economics].

productive efficiencies in these sectors.<sup>95</sup> The World Bank and IMF were unable to appreciate the symbolic, social citizenship values enjoyed by these particular goods and services.<sup>96</sup> For populations that had long suffered from chronic lack of economic and material security, a state guarantee that they would always have relatively secure access to these essential goods and services despite inevitably volatilities in their personal or local economic circumstances could be a critical source of existential comfort.<sup>97</sup> Under such circumstances, a policy decision to begin distributing such goods in accordance with principles of market competition would be killing the patient in order to save him.

Finally, we might also note that the orthodox demand to maintain strict segregation between markets and public law concerns appears to be on the wrong side of history. Over the last couple of decades, the regulatory trend has been towards greater intermingling of public goals with private markets.<sup>98</sup> Examples include the increasing use of privatization<sup>99</sup> and public-private partnerships,<sup>100</sup> both of which look to combine, in increasingly novel ways, public

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<sup>95</sup> See Raj Patel & Philip McMichael, "A Political Economy of the Food Riot," 12 *Review, A Journal of the Fernand Braudel Center* 9 (2010). John K. Walton & David Seddon, *Free Markets and Food Riots: The Politics of Global Adjustment* (Blackwell, 1994); Bronwen Morgan, "Technocratic v. Convivial Accountability," in *Public Accountability: Designs, Dilemmas and Experiences* 243 (Michael W. Dowdle, ed., Cambridge University Press, 2006).

<sup>96</sup> See Stiglitz, *supra* note [Globalization], at 119-20. See also Joseph Stiglitz, "Financial Market Stability and Monetary Policy," 7 *Pac. Econ. Rev.* 13, 20-21 (2002).

<sup>97</sup> See Patel & McMichael, *supra* note [Food Riot], at 14, 29; Walton & Seddon, *supra* note [Food Riots], at \_\_; Morgan, *supra* note [convivial], at \_\_. See also Annette Aurelie Desmarais, *La Via Campesina: Globalization and the Power of Peasants* (Pluto Press, 2007). Cf. Amartya Sen, "Ingredients of Famine Analysis: Availability and Entitlements," 96 *Q. J. Econ.* 433, 434-439 (1981) (showing how material vulnerability is more a product of distribution of entitlements than of material scarcity per se).

<sup>98</sup> See also Prosser, *supra* note [Limits], at 20-28. See also Jody Freeman, "Extending Public Accountability through Privatization: From Public Law to Publicization," in *Public Accountability: Design, Dilemmas and Experiences* 83 (Michael Dowdle, ed., Cambridge University Press, 2006).

<sup>99</sup> See Jody Freeman, "Extending Public Law Norms Through Privatization," 116 *Harv. L. Rev.* 1285 (2003). On the rise of privatization, see William L. Megginson, *The Financial Economics of Privatization* 14-21 (Oxford University Press, 2004).

<sup>100</sup> See Darrin Grimsey & Mervyn K. Lewis, eds., *The Economics Of Public Private Partnerships* (Edward Elgar, 2005); Pauline Vaillancourt Rosenau, ed., *Public-Private Policy Partnerships* (MIT Press, 2000).

services with market modes of delivery. The orthodox model's difficulties in coming to grips with these new developments, even within the context of the core economies of the North Atlantic, have been well described.<sup>101</sup>

- 'Small' economies

The orthodox model of competition also poses problems for what Michel Gal has recently termed "small economies" – economies that are too small to achieve minimum efficient scales of production ["MES"].<sup>102</sup> The lure of industrialized production lies in its inverse relationship between production quantity and product costs: the more units a firm produces, the less each unit cost to produce. But obviously, this also means that the fewer units a firm produces, the more it costs to produce each unit. As we proceed along this backwards trajectory, cost of production becomes increasingly inefficient, and at some point the small producer cannot compete in markets populated by larger producers. This point is referred to as the minimum efficient scale of production. In other words, MES tells us the number of units that a firm in an industrialized economy needs to produce in order to be economically sustainable.<sup>103</sup>

The fact that firms need to produce at some minimum level of scale in order to be sustainable poses particular problems for "small economies" – "small" in this sense referring to national population rather than GDP. The smaller the economy, the greater its difficulty in supporting multiple firms of efficient MES. In many cases, an economy can only support one or

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<sup>101</sup> For an analysis of the competition law problems raised by privatization, see generally Prosser, *supra* note [Limits], at 20-38. For an analysis of conceptual problems raised by public-private partnerships, see Deyo, *supra* note [Developmental Deficit], at 299-300.

<sup>102</sup> See generally Michal S. Gal, *Competition Policy for Small Market Economies* (Harvard University Press, 2003).

<sup>103</sup> See generally *id.* at 13-45.

two firms operating at MES levels of product.<sup>104</sup> In such economies, competition law's concern with promoting competition by preventing market concentration can cause it to discourage if not prohibit the emergence of MES-level firms, and thus end up inhibiting that market's overall productive efficiency.<sup>105</sup>

### *C. The Orthodox Model and Fordism*

The limited reach of the orthodox model derives from the fact that that model presumes a particular kind of capitalist-industrial organization that is sometimes referred to as “Fordism” (or what Alfred Chandler has called “managerial capitalism”).<sup>106</sup> The North Atlantic economies that gave rise to the orthodox model and that continue to serve as its dominant reference were and for the most part still are Fordist economies. Fordism grew out of the discovery in the late 19<sup>th</sup> century of how to effectively exploit, via mass production, economies of scale.<sup>107</sup> This involved implementing a particular set of production technologies – including task specialization, task standardization, task routinization, (often collectively referred to as ‘scientific management’<sup>108</sup>) – that allowed firms to lower the cost of per-unit production by increasing the number of units produced.<sup>109</sup>

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<sup>104</sup> See, e.g., *id.* at 19 (discussing Sweden).

<sup>105</sup> See *id.* at 44-45.

<sup>106</sup> See Jessop & Sum, *supra* note [Beyond], at 58=68; Piore & Sabel, *supra* note [Second Industrial Divide], at 21-26. Compare Alfred D. Chandler, Jr., “The Emergence of Managerial Capitalism,” 58 *Bus. Hist. Rev.* 473 (1984); Alfred D., Chandler Jr., *The Visible Hand: The Managerial Revolution In American Business* (Harvard University Press, 1977).

<sup>107</sup> Compare Chandler, *supra* note [Emergence], at 479-87.

<sup>108</sup> See Robert Kanigel, *The One Best Way: Frederick Winslow Taylor and the Enigma of Efficiency* 9 (Penguin, 1997).

<sup>109</sup> See Piore & Sabel, *supra* note [Second Industrial Divide], at 52-54.

Fordism that imparted particular structural features to capitalist economies that, as implicated above, have been critical to the effectiveness of the orthodox model. First, by promoting low-cost, high-volume production, Fordism made price competition the predominant focus of industrial competition. Its emphasis on large scale mass production encourages consumerism, in order to promote the ever expanding consumer base that is necessary to generate more efficient and profitable scales of production. Particularly during its earlier stages, Fordism's ability to continually expand into seemingly inexhaustible consumer market rendered concern over achieving minimum efficient economies of scale (as per the small economy problem) unnecessary.<sup>110</sup> Its emphasis on expanding the consumer base also both integrated and standardized national markets,<sup>111</sup> making them amenable to national-level regulation using through positivist law.<sup>112</sup> Fordism also produced markets of exceptional stability, thus alleviating the need for more flexible and responsive production processes, and thereby allowing producers to focus primarily on lowering production cost.<sup>113</sup> This stability also promoted the market's ability to provide essential material necessities to the citizenry,<sup>114</sup> and thus shifted the focus of citizenship good from equitable access to essential material concerns to equitable access to meaningful lifestyle options.<sup>115</sup>

Fordism emerged in the North Atlantic economies in the latter part of the 19<sup>th</sup> century. This was also the same time that the modern, neoclassical economic thought came to be

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<sup>110</sup> See generally *id.* at 61-63.

<sup>111</sup> Braudel, *supra* note [Civilization], at 287-89, 365-68; Piore & Sabel, *supra* note [Second], at 49-54.

<sup>112</sup> See also Michael W. Dowdle, "Public Accountability in Alien Terrain: Exploring for Constitutional Accountability in the People's Republic of China, in *Public Accountability: Designs, Dilemmas and Experiences* 329, 332-41 (Michael W. Dowdle, ed., Cambridge University Press, 2006).

<sup>113</sup> Piore & Sabel, *supra* note [Second Industrial Divide], at 73-104. See also Braudel, *supra* note [Civilization], at 590.

<sup>114</sup> Braudel, *supra* note [Civilization], at 617.

<sup>115</sup> Inglehart, *supra* note [Modernization], at \_\_\_.

theorized.<sup>116</sup> The longevity of Fordism's organizing force, together with the fact that present-day economic theorizing has had little direct experience with non-Fordist forms of capitalism, causes Fordism to appear to many to be a natural part of market capitalism per se. This may be why the limitations explored above are so under-recognized. But in fact, neither Fordism nor the features it brings to capitalist economies are inevitable or eternal. As will be explored further below, there is significant evidence that like the older capitalist ordering that it succeeded – England's factory system<sup>117</sup> and American craft production<sup>118</sup> of the 19<sup>th</sup> century – Fordism too is now succumbing to post-Fordism, and its particular ordering effects on socio-economic space are becoming undone.<sup>119</sup>

#### *D. Conclusion: Competition Law vs. Competition Regulation*

In the countries of the North Atlantic, many of the 'limitations' of the orthodox model are addressed in legal doctrine other than competition law — intellectual property, for example, in the case of product-competitive markets and industries;<sup>120</sup> or public utilities law in the case of certain kinds of citizenship good.<sup>121</sup> In this sense, in thinking about how North Atlantic capitalisms actually structure market competition, it is more accurate to think of this structuring in terms of a regulatory system rather than simply in terms of some doctrinally delimited law. This allows us to see that despite its name, competition law is not the only law regulating market competition in North Atlantic economies—that in fact, North Atlantic market competition is

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<sup>116</sup> See Jessop, *supra* note [Complexities].

<sup>117</sup> See Braudel, *supra* note [Civilization], at \_\_\_\_.

<sup>118</sup> See Piore & Sabel, *supra* note [Industrial Divide], at \_\_\_\_.

<sup>119</sup> See TAN *infra*.

<sup>120</sup> See TAN *supra*.

<sup>121</sup> See TAN *supra*.

regulated by a diversity of regulatory orders, some formal – such as competition law, intellectual property law, public services law – and some informal, such as industrial practices<sup>122</sup> or economic nationalism.<sup>123</sup> Following Hugh Collins,<sup>124</sup> we will refer to this more inclusive ordering of market competition as competition *regulation*, to distinguish it from the positivist and formal doctrinal law of competition *law*.<sup>125</sup> And as we shall see, it is the systemically delineated realm of competition regulation, rather than the much more arbitrary, doctrinally-delineated realm of competition law, that comparisons between Fordism and non-Fordist competition-law regimes become economically and socially meaningful.

### III. FROM FORDISM TO ‘POST-FORDISM’: IDENTIFYING ‘ASIAN CAPITALISM’

We noted above how the orthodox model presumes a Fordist economic system. But both the geographical and temporal reach of Fordism is limited, and there is significant evidence that Fordism is increasingly succumbing to post-Fordism, and its particular ordering effects on socio-economic space are becoming undone.<sup>126</sup> And perhaps nowhere has post-Fordism so penetrated socio-economic space than in the *économie-monde* of East and Southeast Asia<sup>127</sup> – an economy that is often characterized as evincing “Asian capitalism”.<sup>128</sup> It is to this that we now turn.

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<sup>122</sup> An example of this in European law is found in the doctrine of ‘good faith’. See Teubner, *Legal Irritants*.

<sup>123</sup> See also Maher, *supra* note [Regulating Competition].

<sup>124</sup> See Hugh Collins, *Regulating Contracts* (Oxford Univ. Press, 2002). See also Christine Parker, Colin Scott, Nicola Lacey & John Braithwaite, eds., *Regulating Law* (Oxford Univ. Press, 2004).

<sup>125</sup> See also Leigh Hancher & Michael Moran, “Organizing Regulatory Space,” in *Capitalism, Culture and Regulation* (Leigh Hancher & Michael Moran, eds, Clarendon Press, 1989); see also Kanishka Jayasuriya, “Institutional Hybrids and the Rule of Law as a Regulatory Project,” in *Legal Pluralism and Development* 145 (Brian Tamanaha, et al., eds, Cambridge University Press, 2012).

<sup>126</sup> See TAN *infra*.

<sup>127</sup> See TAN *infra*.

<sup>128</sup> See TAN *infra*.

### A. *The Asian économie-monde*

What we (and others) call ‘Asian capitalism’ is associated primarily with the countries of east and southeast Asia [hereinafter ‘ESE Asia’] — a region roughly coterminous with the countries of ASEAN +3.<sup>129</sup> While consisting of a wide diversity of languages and cultures, it is a region that evinces a high level of internal economic interdependence and ordering, sufficient to delineate it as a distinct and coherent economic entity within larger, global-economic space.<sup>130</sup>

In this way, the regional economy of ESE Asia conforms to what Fernand Braudel famously termed an *économie-monde*.<sup>131</sup> An *économie-monde* is a transnational but nevertheless spatially delineated form of economic ordering that is organized and given coherence by some large-scale capitalist technology that binds the region together into a regionally distinct network of economic interdependencies – i.e., reciprocal comparative advantages through which different locales contribute different economic functionalities to the larger, regional economic order.<sup>132</sup>

A distinguishing feature of an *économie-monde* is its ‘core-periphery’ spatial structure.<sup>133</sup> In such a structure, higher value-added forms of production tend to concentrate in a relatively

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<sup>129</sup> I.e., Vietnam, Thailand, Indonesia, Malaysia, Singapore, Thailand, Vietnam, South Korea, Japan, and greater China.

<sup>130</sup> See Heribert Dieter, “Trade Integration in Asia,” in *Routledge Handbook of Asian Regionalism* 116 (Mark Beeson & Richard Stubbs, eds., Routledge, 2012). Cf. Jean-Pierre Allegreta & Essahbi Essaadi, “Business Cycles Synchronization in East Asian Economy: Evidences from Time-Varying Coherence Study,” 28 *Economic Modelling* 351 (2011) (finding significance coherence in business cycles across ESE Asia).

<sup>131</sup> Braudel, *supra* note [Civilization], at 21-22. See also A. J. Scott, *Regions and the World Economy: The Coming Shape of Global Production, Competition, and Political Order* 75-100 (Oxford University Press, 2001).

<sup>132</sup> See generally Braudel, at 21-50.

<sup>133</sup> See generally *id.* See also Ronald L. Breiger, “Structures of Economic Interdependence Among Nations,” in *Continuities in Structural Inquiry* 353 (Peter M. Blau and Robert K. Merton, eds., 1981); Paul Krugman, *The Self-Organizing Economy* (1996); David A. Smith & Douglas R. White, “Structure and Dynamics of the Global Economy: Network Analysis of International Trade, 1965–1980,” 70 *Social Forces* 857 (1992); David Snyder & Edward L. Kick, “Structural Position in the World System and Economic Growth, 1955–1970: A Multiple-network Analysis of Transnational Interactions,” 84 *Am. J. Sociology* 1096 (1979).

small geographic area called the core. Such ‘cores’ are highly developed. The further one moves away from this core, into what is called the ‘periphery’, the less advanced the economy. This results in a special arrangement in which a centralized advanced economic core is surrounded by concentric rings of increasingly less-advanced economic activity.<sup>134</sup> These rings are often referred to as ‘Thünen rings’ (or sometimes ‘Von Thünen rings’), after Johann Heinrich von Thünen, who first identified them in the early 19<sup>th</sup> century.<sup>135</sup>

What makes the core the core is its absolute advantage in some particular economic technology (or set of technologies) that organize the larger regional economic environment. For example, in Europe in during the 14<sup>th</sup> and 15<sup>th</sup> centuries, the Venice was the economic core and its regionally-ordering technology was a unique, highly developed banking system.<sup>136</sup> Later on, during the 18<sup>th</sup> and 19<sup>th</sup> centuries, England was the core and its regionally-ordering technology was a unique combination of colonialism and factory-output systems.<sup>137</sup>

The absolute character of this advantage often comes from a particular kind of external economy of scale called ‘agglomeration’.<sup>138</sup> Agglomeration occurs when the close proximity of a diversity of synergistic industries generate knowledge spillovers that work to give the firms in that locale an absolute (rather than comparative) advantage in some core, highly design-sensitive industrial sector.<sup>139</sup> The key ingredient here is proximity: agglomeration cannot be relocated

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<sup>134</sup> See Braudel, *supra* note [Civilization], at 21-44.

<sup>135</sup> See Thünen, *supra* note [Isolated State]. See also Masahisa Fujita “Thünen’s and the New Economic Geography,” 42 *Regional Sci. & Urban Econ* 907 (2012); Paul A. Samuelson, “Thünen at Two Hundred,” 21 *J. Econ. Lit.* 1468 (1983).

<sup>136</sup> See *id.* at 116-138.

<sup>137</sup> See *id.* at 352-385, 556-588.

<sup>138</sup> See also Michael Storper, “Agglomeration, Trade, and Spatial Development: Bringing Dynamics Back in,” 50 *J. Regional Sci.* 313 (2010); Michael Storper, *The Regional World: Territorial Development in a Global Economy* 83-103 (Guilford Press, 1997).

<sup>139</sup> See Storper, *supra* note [The Regional World], at 5, 28; Venables, *supra* note [Shifts]. See also Braudel, *supra* note [civilization], at 48. See also Gerald A. Carlino, “Knowledge Spillovers: Cities’ Role in the New Economy,”

off-shore.<sup>140</sup> The synergies that give this advantage are created primarily by face-to-face interaction. In order to take advantage of these synergies, firms have to be embedded in the locale. Because the absolute advantage generated by agglomeration lies in product competition rather than price competition,<sup>141</sup> this allows benefiting firms to engage in a certain degree of monopoly pricing.<sup>142</sup> At the same time, a greater portion of the corporate income generated by these synergies remains specific to the locale, for example in the form of higher wages and levels of support that employee with unique, specialized skills and training are able to command.<sup>143</sup> This creates a positive feedback loop, in which agglomeration generates higher corporate incomes, which in turn are allow firms to provide the higher salaries and benefits necessary to attract the kind of labor necessary to generate and sustain agglomeration. This made agglomeration highly persistent, and make the core-periphery ordering highly persistent as well.<sup>144</sup>

Proximity to the core provides greater access to the core's wealth. This means that the farther away one moves from the core, the less one can take advantage of its economic and

*Federal Reserve Bank of Philadelphia Business Review* 17 (Q4 2001). A paradigmatic example of this is found in the Los Angeles' film industry. See Michael Storper & Susan Christopherson, "Flexible Specialization and Regional Industrial Agglomerations: The Case of the U.S. Motion Picture Industry," 77 *Ann. of the Assoc. Am. Geographers* 104 (1987).

<sup>140</sup> See Patricia Rice, Anthony J. Venables & Eleonora Patacchinid, "Spatial Determinants of Productivity: Analysis for the Regions of Great Britain," 36 *Regional Science and Urban Economics* 727 (2006). See also Adam B. Jaffe, Rebecca Henderson & Manuel Trajtenberg, "Geographic Localization of Knowledge Spillovers as Evidenced by Patent Citations," 108 *Q. J. Econ.* 577 (1993); James Fleck, "Expertise: Knowledge, Power and Tradability," in *Exploring Expertise* 143, 158-9 (Robin Williams et al., eds., Macmillan, 1998).

<sup>141</sup> See Crotty, *supra* note \_\_, at \_\_. See also Schumpeter, *supra* note [Democracy], at \_\_.

<sup>142</sup> See Charlie Karlsson & Jan Larsson, "Product and Price Competition in a Regional Context," 69 *Papers in Regional Science* 82 (1990). See also Schumpeter, *supra* note [*Capitalism*], at 84-5.

<sup>143</sup> See See Michael Storper, "Agglomeration, Trade, and Spatial Development: Bringing Dynamics Back In," 50 *J. Regional Sci.* 313 (2010). See also Schwartz, *supra* note [Dependency], at 125-128. See also TAN *infra* (discussing the 'competition state')

<sup>144</sup> See generally Angus Maddison, *The World Economy: A Millennial Perspective* (Paris: OCED Publishing, 2001). See also Giovanni Arrighi, Beverly J. Silver & Benjamin D. Brewer, "Industrial Convergence, Globalization, and the Persistence of the North-South Divide," 38 *Studies in Comp. Int'l Dev.* 3 (2003).

quality-of-life benefits, and of the higher levels of local wealth is able to generate.<sup>145</sup> This reduces the cost of land, which reduces the amount of wealth circulating in the local peripheral economy.<sup>146</sup> Less local wealth means lower wages and hence less personal wealth. This limits both the cost of labor and the quality of labor available to the local economy,<sup>147</sup> which in turn causes the economy to focus on less profitable, price-competitive forms of production that require less skilled labor.<sup>148</sup> This focus on price competitive forms of production further limits a more-peripheral local economy's capacity to generate wealth. Because of their lower standards of living, peripheral economies tend to be export-oriented.<sup>149</sup> A focus on price competition causes the peripheral economy to export the surplus value generated by its production.<sup>150</sup>

Peripheral economies are therefore highly dependent on the outside economies of the core for capital and markets. This makes these economies more susceptible to external sources of shock and disruption (what we above called 'volatility').<sup>151</sup> Combined with the periphery's general lack of local wealth, this in turn exposes peripheral populations to greater threat of

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<sup>145</sup> See Mashisa Fujita, Paul Krugman & Anthony J. Venables, *The Spatial Economy: Cities, Regions, and International Trade* (MIT Press, 1999). See also Paul Krugman & Anthony J. Venables, "Globalization and the Inequality of Nations," 110 *Q. J. Econ.* 857(1995); Paul Krugman, "Increasing Returns and Economic Geography," 99 *J. Pol. Econ.* 483 (1991). Some occasionally suggest that technological advances are rendering transportation costs less relevant. Cf. Krugman, *supra* (showing how regional disparities disappear when transportation costs become sufficiently monotonic regardless of distance). But studies show that this is not yet the case in real life. See, e.g., Anthony J. Venables, *supra* note [Shifts], at 3 (noting that "an 8000km distance chokes off over 90% of the trade that would be observed over a 1000km distance.").

<sup>146</sup> See also Schwartz, *supra* note [Dependency], at 125.

<sup>147</sup> See Frederic C. Deyo, "Reforming Labor, Belaboring Reform: Structural Adjustment in Thailand and East Asia," in *Growth and Governance in Asia* 97 (Yoichiro Sato, ed., Asia-Pacific Center for Security Studies, 2004); see also Schwartz, *supra* note [Dependency], at 125.

<sup>148</sup> See TAN *infra*.

<sup>149</sup> *Id.* at 125. See also note [Fujita, Krugman & Venables; Krugman & Venables, etc.]

<sup>150</sup> See Karlsson & Larsson, *supra* note [Product and Price Competition]. See, e.g., A.J. Scott, "The Semiconductor Industry in South-East Asia: Organization, Location and the International Division of Labour," 21 *Regional Studies* 143, 143-144 (1987) (describing this in the context of the semiconductor industry). See also TAN *supra* (examining the limited benefits price competition brings to export-oriented economies).

<sup>151</sup> See Clark, *supra* note [Money]; Deyo, *supra* note [Reforming Labor]; Eswar S. Prasad et al., *Effects of Financial Globalization on Developing Countries: Some Empirical Evidence* 18-28 (International Monetary Fund Occasional Paper 220, 2003).

economic and material insecurity, which causes these populations to focus more on securing stable provision of basic goods and services (what we termed above ‘citizenship goods’) and correspondingly less on maximization of lifestyle opportunities.<sup>152</sup>

From this, we can see that the Asian *économie-monde* – and hence ‘Asian capitalism’ – is identified and delineated by two factors: a distinct, core-periphery structuring and a distinctive, organizing economic technology that is centered at the core. With regards to the first of these, the core-periphery structure of the ESE Asian regional economic has been well-recognized.<sup>153</sup> The economic core of the Asian *économie-monde* is Japan, South Korea and Taiwan. (Singapore and Hong Kong also have core-like aspects, but the fact that they are small *entrepôt* economies limits the degree to which they might structure the other, more peripheral economies in the region.) On the other end of the spectrum, Indonesia and north and western China are strongly peripheral, as are Vietnam and Thailand, albeit perhaps less so. Malaysia and Eastern China may be regarded as what Braudel termed ‘intermediate zones’ – displaying some qualities of peripheral economies and some of more core economies.<sup>154</sup>

(This is, of course, a very rough mapping. Some locales in otherwise more peripheral countries may function as economic cores for particular industrial sectors. For example, John Gillespie has recently described a particular production network focusing on copper wire production in which South Korean firms serve as peripheral, upstream suppliers to more

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<sup>152</sup> See note [Inglehart] *supra*.

<sup>153</sup> This mapping is consistent with the presentations found in Deyo et al., eds., *supra* note [Economic Governance], and Andrew Walter & Xiaoke Zhang, “Debating East Asian Capitalism: Issues and Themes,” in *East Asian Capitalism: Diversity, Continuity, and Change 3* (Andrew Walter & Xiaoke Zhang, eds., Oxford University Press, 2013). Cf. Gilbert Rozman, “East Asian Regionalism,” in *Routledge Handbook of Asian Regionalism 22* (Mark Beeson & Richard Stubbs, eds., Routledge, 2012).

<sup>154</sup> See Braudel, *supra* note [civilization], at 39-40.

downstream Vietnamese manufacturers, reversing the core-periphery relationship that more generally exists between these countries.<sup>155</sup>)

### *B. The Organizing Elements of 'Asian Capitalism'*

In addition to its core-periphery ordering, the other feature that identifies and delineates an *économie-monde* is the presence of a particular economic technology that is centered at the core and that organizes and gives coherence to the regional economy as a whole.<sup>156</sup> In the context of modern North Atlantic capitalisms, this technology, as we saw above, is Fordism.<sup>157</sup> The technology that organizes Asian capitalism, but contrast, has been termed 'post Fordism' – also referred to as 'flexible production', or 'flexible specialization'.<sup>158</sup> This technology focuses on productive adaptability to sudden market changes rather than on exploiting economies of scale.<sup>159</sup> Post-Fordism does not require expanding markets to generate competitiveness, and it is especially suited for market environments that are volatile – particularly in terms of changes in consumer tastes, but also in terms of changes in levels of consumer demand or changes in

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<sup>155</sup> See John Gillespie, "Managing Competition in Socialist-Transforming Asia: The Case of Vietnam," in *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law* 164, 183-185 (Michael W. Dowdle, et al., eds. Cambridge University Press, 2013).

<sup>156</sup> See TAN *supra*.

<sup>157</sup> See TAN *supra*.

<sup>158</sup> See Jessop and Sum, *supra* note [Beyond], at 58-122; Piore & Sabel, *supra* note [Industrial Divide], at 251-280; Frederic C. Deyo & Richard F. Doner, "Introduction: Economic Governance and Flexible Production in East Asia," in *Economic Governance and the Challenge of Flexibility in East Asia* 1 (Frederic C. Deyo et al., eds, Rowman & Littlefield, 2001).

The characterization of post-Fordism is not without critics. Some argue that a critical element of post-Fordism involves the dismantling of Fordism, and thus an economy cannot become post-Fordist without first having been Fordism. Arguably, within the region of Asian capitalism, only Japan has really experienced Fordism, and thus only Japan could technically be labeled post-Fordist. But at the same time, as we shall see, today's Asian capitalism is very much the product of Japan's post-Fordist economic-industrial ordering, and to my mind, that justified calling Asian capitalism 'post-Fordist' as well, because it is the direct projection of a, post-Fordist Japan.

<sup>159</sup> See especially Piore & Sabel, *supra* note [Industrial Divide], at 251-80.

availability of supply.<sup>160</sup> Archetypically, flexible production focuses on flexibility in product design as a means of responding to changes in consumer tastes. It therefore tends to emphasize product competition rather than price competition, and thus is particularly suited for firms in core economic regions.<sup>161</sup>

This focus on flexibility and responsiveness imparts a number of other distinctive features to Asian capitalism. Most particularly, it encourages the transnational disaggregation of production into transnational production chains; and relatedly, it encourages greater reliance on relational networks rather than on positive law as a means of maintaining market discipline. In addition, two other distinctive structural features of Asian capitalism include the greater willingness of Asian states to intervene in their national economies, often to further non-economic goals; and the greater reliance on exports as opposed to domestic consumption.

### 1. *Flexible production and disaggregated production chains*

The structural feature that is perhaps most closely associated with Asian capitalism, and post-Fordism in general, is the transnational production chain – a form of production in which the production process is disaggregated across national boundaries in order to take advantages of different regional comparative advantages.<sup>162</sup> The production chain model of production

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<sup>160</sup> See also Sabel, *supra* note [Learning by Monitoring].

<sup>161</sup> See Jessop & Sum, *supra* note [Beyond], at 58-122.

<sup>162</sup> See John Gillespie, “New Transnational Governance and the Changing Composition of Regulatory Pluralism in Southeast Asia,” 8 *Asian J. Comp. L.* 1, \_\_\_ (2014); Michael Carney, Eric Gedajlovic & Xiaohua Yang, “Varieties of Asian Capitalism: Toward an Institutional Theory of Asian Enterprise,” 26 *Asia Pac. J. Mgmt* 361 (2009).

There are in fact a variety of conceptualizations of and names for the phenomenon this article is referring to as “transnational production chain.” For a good overview of the different ways this phenomenon has been conceptualized and named, see Jennifer Bair, “Global Capitalism and Commodity Chains: Looking Back, Going Forward,” 9 *Competition & Change* 153 (2005). This phenomenon, what they called a “commodity chain”, was first identified by Terence K. Hopkins & Immanuel Wallerstein in “Patterns of Development of the Modern World-System,” 1 *Review, A Journal of the Fernand Braudel Center* 111, 128 (1977).

emerged out of Japanese industrial practices of the 1960s.<sup>163</sup> During that time, global and regional economic instability caused Toyota and later other Japanese automobile manufacturers to emphasize design flexibility and adaptability instead of focusing on exploiting economies of scale (for this reason, ‘flexible production’ is also sometimes referred to – particularly in the field of industrial relations – as “Toyotism”).<sup>164</sup> As part of this evolution, leading firms began to focus on developing more flexible assembly routines, more design-sensitive marketing operations, and more market responsive designing capacities.<sup>165</sup> At the same time, they contracted out those aspects of production – such as the production of standardized component parts that were not particularly design-sensitive and therefore did not require the more expensive processes that promote flexibility and responsiveness – to outside firms located in more peripheral locales, which enjoyed comparative advantages in price-competitive production of design-standardized products.<sup>166</sup>

What drove (and continues to drive) this disaggregation of (flexible) production is the different economic and production logics that attend to these two kinds of production.<sup>167</sup> Design flexibility requires very responsive marketing that can rapidly identify evolving trends in consumer demand. It requires operational redundancy and task flexibility so as to promote

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<sup>163</sup> See Piore & Sabel, supra note [Second], at 223, 226; Sabel, supra note [Learning by Monitoring]; at \_\_\_

<sup>164</sup> See Sabel, supra note [Learning by Monitoring]; at \_\_\_. See also Terje Gronning, “The Emergence and Institutionalization of Toyotism: Subdivision and Integration of the Labour Force at the Toyota Motor Corporation from the 1950s to the 1970s,” 18 *Econ. & Ind. Democracy* 423 (1997); Knuth Dohse, Ulrich Jurgens & Thomas Malsch, “From ‘Fordism’ to ‘Toyotism’? The Social Organization of the Labor Process in the Japanese Automobile Industry,” 14 *Pol. & Soc.* 115 (1985).

<sup>165</sup> Gary Gereffi, “Shifting Governance Structures in Global Commodity Chains, With Special Reference to the Internet,” 44. *Am Behavioral Scientist* 1617 (2001).

<sup>166</sup> See Mitsuyo Ando & Fukunari Kimura, “The Formation of International Production and Distribution Networks in East Asia,” in *International Trade in East Asia* 177 (Takatoshi Ito & Andrew K. Rose, eds., University of Chicago Press, 2005). See also Sabel, supra note [Learning by Monitoring]; at \_\_\_.

<sup>167</sup> See generally Smith, supra note [New Forms] (distinguishing between ‘functional flexibility’ as used by downstream firms and ‘numerical flexibility’ as used by upstream firms); Atkinson, supra note [Manpower] (same).

experimentation, innovation and productive adaptation.<sup>168</sup> This demands a highly educated and highly-trained labor force. Such processes are quite expensive, in particular because they are highly knowledge-intensive and thus require a highly educated, highly trained and thus relatively expensive labor force (costs for which are recuperated by the more monopolistic pricing allowed for by product competition).<sup>169</sup> This type of labor is generally characteristic of core economic environments, and so this kind of production tends to be located in the regional core.<sup>170</sup>

Producers of more design-standardized items, by contrast, obviously must compete on the basis of price. At the same time, being standardized, their production processes are less knowledge-intensive and thus less dependent on more expensive, more high-skilled labor. This benefits producers located in more peripheral economies where labor costs are cheaper.<sup>171</sup> For these firms, productive flexibility in grounded is flexibility in staffing, and in particular in the use of temporary labor, which allows firms to respond and adapt quickly to often seasonal changes in levels of consumer demand – a kind of productive flexibility is sometimes called ‘numerical flex’ as contrasted with the ‘qualitative flex’ or ‘functional flex’ associated with design flexibility.<sup>172</sup>

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<sup>168</sup> See Gereffi, supra note [shifting].

<sup>169</sup> Id. See also Scott, supra note [Regions], at \_\_\_.

<sup>170</sup> See Deyo & Doner, supra note [Introduction], at \_\_\_. See also Richard P. Appelbaum, & Gary Gereffi, “Power and Profits in the Apparel Commodity Chain,” in *Global Production: The Apparel Industry in the Pacific Rim* 42, 43 (Edna Bonacich et al. eds., Temple University Press, 1994).

<sup>171</sup> See Deyo & Doner, supra note [Introduction]. See also Kang H. Park, “Patterns and Strategies of Foreign Direct Investment: The Case of Japanese Firms,” 35 *Applied Economics* 1739 (2003); Nagesh Kumar, “Multinational Enterprises, Regional Economic Integration, and Export-Platform Production in the Host Countries: An Empirical Analysis for the US and Japanese Corporations,” 134 *Weltwirtschaftliches Archiv* 450, 452-455 (1998).

<sup>172</sup> Deyo & Doner, supra note [Introduction]. See also See Vicki Smith, “New Forms of Work Organizations,” 23 *Ann. Rev. Socio.* 315 (1997); J. Atkinson, “Manpower Strategies for Flexible Organizations,” 16 (8) *Personnel Management* 28 (1984).

It is the disaggregated and differentiated production of these production chains that give Asian capitalism its regional economic coherence and regional core-periphery structuring.<sup>173</sup> These chains reify the economic interdependence and respective comparative advantages that both link together and functionally distinguish the core economies of Japan, South Korea and Taiwan, with and from the more regionally peripheral.

## 2. *Relational governance and network capitalism*

Of course, Asian production is not the only form of disaggregated production. In advanced industrial economies of the North Atlantic, for example, production has long been disaggregated as between equipment and parts manufacturer, on the upstream side and assemblers on the downstream side. But what distinguishes the Asian production chain is not disaggregation per se, but the way that coordination is maintained among the different firms engaged in the disaggregated production. In the more traditional industrial economies of the North Atlantic, supplier-assembler coordination is maintained through the establishment of what Oliver Williamson has famously termed as a “market form” relationship – a relationship that revolves around formal contracts negotiated at arm’s length and enforced through threat of legal sanction.<sup>174</sup>

In Asian capitalism, by contrast, such coordination is much more commonly maintained and enforced through mutual embeddedness in social networks<sup>175</sup> — what is sometimes called

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<sup>173</sup> See also Timothy J. Sturgeon & Momoko Kawakami, “Global Value Chains in the Electronics Industry: Was the Crisis a Window of Opportunity for Developing Countries?” in *Global Value Chains in a Postcrisis World* 245 (Oliver Cateaneo et al., eds., World Bank Publications, 2010).

<sup>174</sup> Oliver E. Williamson, *The Economic Institutions of Capitalism* 30-32 (The Free Press, 1985).

<sup>175</sup> See Robert Wade, *Governing the Market: Economic Theory and the Role of Government in East Asian Industrialization* (Princeton University Press, 1990). See also Michael Carney & Eric Gedajlovic, “Corporate

‘relational capitalism’ or network capitalism’.<sup>176</sup> Asia’s greater resort to relational and network forms of capitalisms is due to a number of factors. One is that, as described above, the structuring of production networks discussed above results in greater interfirm interdependence, and this encourages these firms to engage in what Oliver Williamson has termed relational contracting as opposed to arm’s length contracting.<sup>177</sup>

Relatedly, post-Fordism’s more dynamic focus on flexibility and responsiveness discourages rule-based governance.<sup>178</sup> This is because in order to be effective, rule-based governance (including private rule-based governance established via contracting) must operate in

Governance and Firm Capabilities: A Comparison of Managerial, Alliance, and Personal Capitalisms,” 18 *Asia-Pacific J. Management* 335 (2001); Akbar Zaheer & N. Venkatraman,, “Relational Governance as an Interorganizational Strategy: An Empirical Test of the Role of Trust in Economic Exchange,” 16 *Strategic Management J.* 373 (1995); Gary G. Hamilton, “Patterns of Asian Network Capitalism: The Cases of Taiwan and South Korea,” in *Networks, Markets, and the Pacific Rim: Studies in Strategy* 181 (W. Mark Fruin, ed., Oxford University Press, 1998); Max Boisot & John Child, “From Fiefs to Clans and Network Capitalism: Explaining China’s Emerging Economic Order,” 41 *Admin. Sci. Q.* 600 (1996). See also Peter Evans, *Embedded Autonomy: States and Industrial Transformation* (Princeton University Press, 1995); Gillespie, supra note [TPC], at \_\_\_ (contrasting Asian and North Atlantic production chains).

The relational character of Asian capitalism is often referred to – particularly by advocates of liberal market economies – as ‘crony capitalism’. But in fact, Asian relationalism is much, more complex than captured by the epithet. See Joseph E. Stiglitz, “Opening Address: Knowledge for Development: Economic Science, Economic Policy, and Economic Advice,” in *Annual World Bank Conference on Development Economics 1998* at 9, 17-18 (Boris Pleskovic & Joseph E. Stiglitz, eds., The World Bank, 1999); Surajit Mazumdar, “Crony Capitalism: Caricature or Category?” MPRA Paper No. 19626 (Munich: February 2008) (available at <http://mpra.ub.uni-muenchen.de/19626/>); Joel S. Kahn & Francesco Formosa, “The Problem of ‘Crony Capitalism’: Modernity and the Encounter with the Perverse,” 69 *Thesis Eleven* 47 (2002). See also TAN infra (discussing regulatory capture in Asia)

<sup>176</sup> See Walter W. Powell, “Neither Market nor Hierarchy: Network Forms of Organization,” 12 *Research Org. Behavior* 295 (1990); Paul S. Adler, “Market, Hierarchy, and Trust: The Knowledge Economy and the Future of Capitalism,” 21 *Org. Sci.* 215 (2001); Evans, supra note [embedded]. Cf. Oliver E. Williamson, “Comparative Economic Organization: The Analysis of Discrete Structural Alternatives,” 36 *Admin. Sci. Q.* 269 (2001); Mark Granovetter, “Business Groups and Social Organization,” in *Handbook of Economic Sociology* 429 (Neil Smelser & Richard Swedberg, 2d ed., Princeton University Press, 2005).

<sup>177</sup> See Henry Wai-Chung Yeung, “Globalizing Competition in Asia: An Evolutionary Perspective,” in *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law* 265, 276-277, 279-280 (Michael W. Dowdle, et al., eds., Cambridge University Press, 2013); Walter & Zhang, supra note [Debating], at 14-15; Sue-Ching Jou, & Dung-Sheng Chen “Regionalization of Networked Production: Taiwanese Manufacturing Capital in Southeast Asia and China,” 26 *Geography Research Forum* 9 (2006). Compare Williamson, supra note [Economic Institutions], at 71-72 (discussing relational contracting).

<sup>178</sup> See Sabel, supra note [Learning]. See also Caliss Baldwin & Kimberly Clard, *Design Rules: Unleashing the Power of Modularity* (MIT Press, 2000).

a larger socio-economic environment that is generally stable and predictable<sup>179</sup> — the more volatile the regulatory environment, the more likely it is that an abstract rule will have unintended consequences over time.<sup>180</sup> Due to its greater reliance on outside economies for consumption and finance (see below), the economy in which Asian capitalism tends to operate — indeed, in which it was designed to operate — tends to be more volatile.<sup>181</sup>

Finally, particularly insofar as state governance is concerned, rule-based governance is also discouraged by the greater fragmentation of socio-economic and regulatory space caused both by transnational production chains and by greater firm reliance on transnational sources of finance. This causes local firms and even local economies to become more deeply embedded into transnational economic and regulatory environments,<sup>182</sup> and consequently less responsive to domestic regulatory structures — a phenomenon that Kanishka Jayasuriya termed the ‘hollowing out of the [Asian] state’.<sup>183</sup> Moreover, because different domestic firms and locales often become embedded into different transnational environments, they will sometimes respond differently from each other to some particular domestic regulatory input.<sup>184</sup> All this demands

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<sup>179</sup> See Piore & Sabel, *supra* note [Second Industrial Divide], at 165-83; Williamson, *supra* note [Economic Institutions], at 56-61. Cf. Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* at 24-31 (Cambridge University Press, 1982) (arguing that rule of law would not have effective in pre-industrial America due to the geographical fragmentation of its social environments).

<sup>180</sup> Cf. Richard Vernon, “Unintended Consequences,” 7 *Political Theory* 57, 68 (1979) (discussing the effect of ‘contextual change’ on rule-based systems)

<sup>181</sup> See Jason Furman & Joseph E. Stiglitz, “Economic Crises: Evidence and Insights from East Asia,” 1998 (2) *Brookings Papers on Economic Activity* 1, 6-7, 13-14 (1998). See also William Easterly, Roumeen Islam & Joseph E. Stiglitz, “Shaken and Stirred: Explaining Growth Volatility,” in *Annual World Bank Conference on Development Economics 2000* at 191, 198 (Boris Pleskovic & Nicholas Stern, eds., The World Bank, 2001). Cf. Clark, *supra* note [Money] (discussing distinctive volatility of transnational finance).

The distinct volatility of the Asian *économie-monde* is also caused in part by its pronounced dependence on exports. See TAN *infra*.

<sup>182</sup> See Yeung, *supra* note [Globalizing]. See, e.g., Gillespie, *supra* note [Dowdle] (exploring regulatory fragmentation in the context of Vietnam).

<sup>183</sup> See Kanishka Jayasuriya, “Globalization and the Changing Architecture of the State: The Regulatory State and the Politics of Negative Co-ordination,” 8 *J. Eur. Pub. Pol’y* 101 (2001).

<sup>184</sup> See, e.g., Dowdle, *supra* note [melamine] (exploring this in the context of China).

greater use of face-to-face and case-by-case regulation – i.e., relational governance – since such fragmentation tends to cause regulation by abstract, arm’s length rulemaking to have lessor, different and often unforeseeable effects on different domestic actors depending on the particular transnational environment in which that actor is embedded.<sup>185</sup>

This preference for relational forms of capitalism can be seen operating across a number of dimensions. In the area of private, firm-to-firm relationships, perhaps the archetypical example of this are found in the distinctive economic conglomerates known as *keiretsu* in Japan and *chaebol* of South Korea.<sup>186</sup> These conglomerates use private forms of informal ordering to advance what are in effect private industrial policies that in North Atlantic economies would be created and advanced by public institutions.<sup>187</sup> Another example is the distinctive intra-regional, ethnically-based trading and financial networks that have emerged out of many centuries of Chinese diaspora, and that continue to play a significant role in many of the more peripheral economies of the Asian *économie-monde*.<sup>188</sup> ESE Asia’s historically greater tolerance for cartelization is also sometimes characterized as a reflection of preference for more relational forms of private economic ordering.<sup>189</sup>

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<sup>185</sup> See, e.g., Michael W. Dowdle, “The Peripheral Regulatory State,” in *The Rise of the Regulatory State of the South: Infrastructure and Development in Emerging Economies* 209, 214 (Navroz Dubash & Bronwen Morgan, eds., Oxford University Press, 2013) (discussing case-by-case governance); Elinor Ostrom, James Walker & Roy Gardner, “Covenants With and Without a Sword: Self-Governance is Possible,” 86 *Am. Pol. Sci. Rev.* 404 (1992) (discussing face-to-face governance). Cf. Skowronek, *supra* note [Building], at 24-31 (arguing that rule of law would not have effective in pre-industrial America due to the geographical fragmentation of its social environments).

<sup>186</sup> See James R. Lincoln, Micahel L. Gerlach & Chjristina L. Ahmadjian, “Keiretsu Networks and Corporate Performance in Japan,” 61 *Am Socio. Rev.* 67 (1996); Tony Prosser, *supra* note [Role of the State], at 253-261.

<sup>187</sup> See Yeung, *supra* note [globalizing]; Gerber, *supra* note [Global Competition], at 205-222.

<sup>188</sup> See Gordon C.K. Cheung, “The Significance of the Overseas Chinese in East Asia”, in Mark Beeson and Richard Stubbs (eds.), *Routledge Handbook of Asian Regionalism* (London: Routledge, 2012), pp. 77-89.

<sup>189</sup> See, e.g., Frank K. Upham, “Privatized Regulation: Japanese Regulatory Style in Comparative Perspective,” *Fordham International Law Journal*, 20 (1996): 396-511

A second dimension of Asian relational governance involves firm-state relations. This is reflected in a pronounced preference on the part of the state for directing regulatory outcomes through informal negotiation with core firms rather than through neutral application of abstract regulatory rules.<sup>190</sup> The archetypical example of this is Japan's regulatory practice of administrative guidance. Under administrative guidance, public agencies regulate economic behavior by giving informal and often extralegal regulatory requests to particular firms or industries, and later being much more willing to grant discretionary favors or privileges to those firms that choose to comply, while being much less responsive to needs and requests of those firms that choose to ignore such requests. All this takes place outside the reach of the formal legal-regulatory system.<sup>191</sup> Similar forms of informal regulation can be found operating throughout Asia.<sup>192</sup> Asian preference for delegating regulatory responsibilities to politically-embedded, executive regulatory agencies as opposed to the politically-disembedded "independent regulatory agencies [IRAs]" favored in the North Atlantic (discussed further

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<sup>190</sup> See Peter B. Evans, *Embedded Autonomy: State and Industrial Transformation* \_\_ (Princeton Univ. Press, 1995); Wade, supra note [Governing the market], at \_\_; Edmund Terence Gomez, "Introduction: Political Business in East Asia," in *Political Business in East Asia* 1 (Edmund Terence Gomez, ed., Routledge, 2002).

<sup>191</sup> See especially John O. Haley, *Authority without Power: Law and the Japanese Paradox* (Oxford University Press, 1992).

<sup>192</sup> See generally John K.M. Ohnesorge, "Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience," 28 *U. Pa. J. Int'l Econ. L.* 219 (2007). See, e.g., Meredith Woo-Cumings, "Diverse Paths toward 'the Right Institutions': Law, the State, and Economic Reform in East Asia," 21-26 (ADB Institute Working Paper 18, April 2001) (Korea); Hyuk-Rae Kim, "Fragility or Continuity? Economic Governance of East Asian Capitalism," in *Politics and Markets in the Wake of the Asian Crisis* 99, 112-113 (Richard Robison, ed., Taylor & Francis, 2000) (Taiwan); John Ohnesorge, "Chinese Administrative Law in the Northeast Asian Mirror," 16 *Transnat'l L. & Contemp. Probs.* 103 (2006) (China); Martin Painter, "The Politics of Economic Restructuring in Vietnam: The Case of State-owned Enterprise," 25 *Contemporary Southeast Asia* 20 (2003). For a theoretical defence of administrative guidance within the context of post-Fordism, see Sabel, supra note [Learning by Monitoring].

below) is another example of Asia's preference for more relationally-oriented forms of public regulation.<sup>193</sup>

Such public-private regulatory embeddedness is also closely associated with what is called 'state capitalism,'<sup>194</sup> another distinguishing feature of Asian capitalism, and to which we now turn.

### 3. 'State capitalism'

Asian states also show a distinct willingness to proactively direct domestic market outcomes (a task they often pursue using relational forms of administrative governance, as per above<sup>195</sup>). Following the terminology advanced by Aldo Masacchio and Sergio G. Lazzarini,, we might call this 'state capitalism', i.e., an economic regulatory practice in which the government assumes some direct role in the economy and uses it to shape economic outcomes, often to advance non-economic as well as economic goals.<sup>196</sup> Asian resort to state capitalism may be encouraged in part by the small size of many of Asia's national economies,<sup>197</sup> in which some state intervention in the economy may be necessary to promote the development of minimal efficient economies of scale in core, export-oriented industries.<sup>198</sup>

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<sup>193</sup> See TAN *infra*

<sup>194</sup> See Johnson, *supra* note [MITI]; Upham, *supra* note [Fordham]

<sup>195</sup> See note \_\_ *supra*.

<sup>196</sup> See Aldo Masacchio & Sergio G. Lazzarini, "Leviathan in Business: Varieties of State Capitalism and their Implications for Economic Performance," Harvard Business School Working Papers 12-108 (2012), at 3-4, 11. This is a somewhat broader definition than is sometimes used. Compare Ian Bremmer & Devin T. Stewart, "China's State Capitalism Poses Ethical Challenges," *Asia Times* (Aug. 17, 2010) (defining "state capitalism" as "a system in which governments use state-owned companies and investment vehicles to dominate market activity"); Li-Wen Lin & Curtis J. Milhaupt, "We are the (National) Champions: Understanding: The Mechanisms of State Capitalism in China," 65 *Stan. L. Rev.* 697, (2013) (same).

<sup>197</sup> See Mark Beeson, "Southeast Asia and the Politics of Vulnerability," 23 *Third World Q.* 549 (2002).

<sup>198</sup> Compare Gal, *supra* note [Small Economies], at \_\_.

Examples include the ‘developmental state’,<sup>199</sup> the ‘competition state’;<sup>200</sup> the use of sovereign welfare funds;<sup>201</sup> and the use of state-owned enterprises.<sup>202</sup> The developmental state is perhaps the paradigmatic example of Asian state capitalism. The developmental state is a developmental strategy in which state policymakers direct material and regulatory support to particular industries and particular firms in order to promote these firms’ competitiveness in the global economy. Material support most commonly comes in the form of special access to capital or protection from competition in domestic markets. Regulatory support comes from close embeddedness with government regulators.<sup>203</sup> Such economic and regulatory support is generally closely linked to industrial policymaking – the development of strategic, long-range plans to develop particular domestic industrial sectors.<sup>204</sup>

More recently, there is evidence that particularly in core Asian economies, the developmental state is evolving into what Philip Cerny<sup>205</sup> and Bob Jessop<sup>206</sup> have termed a

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<sup>199</sup> See Chalmers Johnson, “The Developmental State: Odyssey of a Concept,” in *The Developmental State* 32 (Meredith Woo-Cumings, ed., Cornell University Press, 1999); Adrian Leftwich, “Bringing Politics Back In: Towards a Model of the Developmental State,” 31 *J. Dev. Studies* 400 (1995).

<sup>200</sup> See, e.g., See Philip G. Cerny, “Paradoxes of the Competition State: The Dynamics of Globalization,” 32 *Government & Opposition* 251 (1997); Bob Jessop, *The Future of the Capitalist State* 96 (Polity Press, 2002).

<sup>201</sup> See Eric Helleiner & Troy Lundblad, “States, Markets, and Sovereign Wealth Funds,” 4 *German Policy Studies/Politikfeldanalyse* 59 (2008). See also Ronald J. Gilson & Curtis J. Milhaupt, “Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism,” 60 *Stan. L. Rev.* 1345, 1346 (2007).

<sup>202</sup> See Lin & Milhaupt, *supra* note [National Champions], at 746.

<sup>203</sup> See also TAN *supra* (discussing ‘administrative guidance’).

<sup>204</sup> See, e.g., Chalmers Johnson, *MITI and the Japanese Miracle: The Growth of Industrial Policy, 1925-1975* (Stanford Univ. Press, 1982). See generally Daniel Yergin & Joseph Stanislaw, *The Commanding Heights: The Battle for the World Economy* 139-184 (Free Press, 2002).

Further economic justification for the developmental state can be found in concern for “minimum efficient scale of production” [MES], which we discussed above in the context of the small economies limitation to the orthodox model of competition law. See TAN *supra*. Even the core economies of Asia have historically been ‘small’ compared to the core economies of the North Atlantic. State protection and promotion of domestic sectors and firms was an effective way of promoting the development of MES in the context of Asia’s smaller economies, particularly during earlier periods of industrial development. See Ha-joon Chang, “Economic Theory of the Developmental State,” in *The Developmental State* 182 (Meredith Woo-Cumings, ed., Cornell University Press, 1999). See, e.g., Danny M. Leipziger, “Industrial Restructuring In Korea,” 16 *World Dev.* 121 (1988).

<sup>205</sup> See Philip G. Cerny, “Paradoxes of the Competition State: The Dynamics of Globalization,” 32 *Government & Opposition* 251 (1997).

“competition state.” The competition state may be a response to the fact that core firms that were earlier being promoted by the developmental state are increasingly disembedding themselves from national economies and embedding themselves instead into transnational economies and economic networks.<sup>207</sup> In doing so, they not only remove themselves from domestic state oversight, but their economic and developmental successes bring less benefit to the territorially-bound state.<sup>208</sup> The competition state therefore focuses on promoting spatial competitiveness, whose economic and social benefits remain embedded in the locale, more so than on promoting firm competitiveness as per the developmental state model.

This done principally through promoting the development of local agglomeration effects, which as we saw above are spatially embedded. A good example of this is found in the ‘industrial parks’ that many Asian states began setting up in the late 1970s and continue to be set up to this day. As described in a study by Frederick Deyo:

At the [Hsinchu Science Industrial Park], as described by Lin Chien-ju, an ensemble of large electronics firms and small high-tech suppliers, together facing high levels of worker turnover among both operators and engineers, were supported in part by government programs that addressed a broad range of shared problems relating to all phases of production. These included an Employment Services Center that provided both job placement and assistance with training and R&D activities. As well, special tax incentives were introduced to allow companies to use stock bonuses to attract and retain engineers, and an Industrial Technology Research Institute was established to encourage

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<sup>206</sup> See Jessop, *supra* note [Future], at 96.

<sup>207</sup> See Yeung, *supra* note [Globalizing].

<sup>208</sup> See also Philip G. Cerny, “Political Globalization and the Competition State,” in *Political Economy and the Changing Global Order* 3rd ed. 300 (Richard Stubbs & Geoffrey R.D. Underhill, Oxford University Press, 2005).

professional collaboration and networking among engineers and technical workers and to foster technology transfer from foreign companies.<sup>209</sup>

Discussing the benefits of these parks, Deyo notes:

First, as noted earlier, inter-firm and professional/technical networks provide modalities for job search, reputation building, and career development that are often compromised by growing labor market contingency and flexibility. Second, the provision and promotion of training, a critical function of industrial labor systems from the standpoints both of employers and workers, has become increasingly important and problematic in the context of organizational de-verticalization, growing economic turbulence, market segmentation, new technologies favoring small dynamic firms, and the growth of contingent and contractual work across all skill groups, including professionals. The state's role in creating or facilitating the development of dynamic supply chains and industrial parks can play an important role in this regard. . . . Third, and as important are the entrepreneurial incentives and opportunities network promotional policies create for workers. . . . Of particular interest here are opportunities for technical and engineering workers to start new businesses, in some cases as spin-off firms supported or sponsored by their former employers. Such spin-offs occur most often in large, well established clusters with nearby research institutions.<sup>210</sup>

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<sup>209</sup> Deyo, *supra* note [Addressing], at \_\_\_ (citing Lin Chien-ju, "Institutions, Local Politics, and Firm Strategies: Two Labor Systems in Taiwan," Binghamton University Department of Sociology, Ph.D dissertation (Binghamton NY: 2010)).

<sup>210</sup> *Id.* at \_\_\_.

Interestingly, efforts to develop such industrial parks in the more peripheral economies of Asia and elsewhere have not met with the same levels of success, reflecting the distinct advantage that the core has vis-à-vis the periphery in cultivating agglomeration effects.<sup>211</sup>

Two other examples of state capitalism closely associated with Asia are sovereign wealth funds and the use of state-owned enterprises. Asian states use sovereign wealth funds -- state managed international investment vehicles that in the context of Asian states are often funded by the state's foreign exchange reserves<sup>212</sup> -- not only for financial gain, but also as devices for securing national autonomy and security against the threat of the volatility brought about by exposure to global markets.<sup>213</sup> Asian countries, particularly but not exclusively the state-socialist countries of China and Vietnam, also use state-ownership of domestic firms to advance non-economic, political goals, such as to provide employment and social welfare or, more nefariously, to promote the state's control over society.<sup>214</sup>

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<sup>211</sup> Compare Deyo, *supra* note [Deficit], at 292-294 (describing the workings of East Asian "high-tech industrial park" model the core economies of Taiwan, South Korea and Singapore) with *id.* at 294-297 (describing what happened when the more peripheral economies of Asia have tried to implement that model). See also José A. Borello, Hernán Morhorlang & Diego Silva Failde, "Agglomeration Economies in Semi-Industrialized Countries: Some Evidence from Argentina and Some General Inferences about Research and Policy in Similar Countries," paper presented at the Association of American Geographers 2008 Annual Meeting (Boston: April 19, 2008) (available at [http://umconference.um.edu.my/upload/43-1/papers/172%20JoseABorello\\_HernanMorhorlang\\_DiegoSilvaFailde.pdf](http://umconference.um.edu.my/upload/43-1/papers/172%20JoseABorello_HernanMorhorlang_DiegoSilvaFailde.pdf)) (accessed April 2, 2012) (describing difficulties in achieving agglomeration effects in automotive and steel sectors in Buenos Aires). Cf. John Luke Gallup, Jeffrey D. Sachs & Andrew Mellinger, "Geography and Economic Development," 22 *Int'l Regional Sci. Rev.* 179, 184 (1999) (noting how high urban-population densities promote economic development in some kinds of geographies but seem to impede development in other kinds of geographies); Ronen Palan, "The Emergence of an Offshore Economy," 30 *Futures* 63 (1998).

<sup>212</sup> See Gilson & Milhaupt, *supra* note [SWF], at 1358.

<sup>213</sup> See Donghyun Park & Gemma Bolotaulo Estrada, "Developing Asia's Sovereign Wealth Funds and Outward Foreign Direct Investment," Asian Development Bank Economics Working Paper Series No. 169 (2009), at 3. Cf. also Gilson & Milhaupt, *supra* note [SWF], at 1346.

Some suspect Asian countries, particularly China, of using international investment from sovereign wealth funds to gain strategically capacity to influence the political or economic environments in host countries. See Gilson & Milhaupt, *supra* note [SWF], at 1349-50.

<sup>214</sup> See generally Xiaobo Lu & Elizabeth Perry, eds., *Danwei: The Changing Chinese Workplace in Historical and Comparative Perspective* (M. E. Sharpe, 1997). See also Louis Putterman, "Dualism and Reform in China," 40 *Econ. Dev. & Cultural Change* 467 (1992). In the case of Vietnam, see Painter, *supra* note [Politics], at 35-35.

#### 4. *Export orientation and 'producerism'*

Finally, Asian capitalism is also associated with the export orientation of its core economies.<sup>215</sup> As noted above, under the classic core-periphery ordering of North Atlantic Fordism, core economies tend to be consumption oriented.<sup>216</sup> By contrast, even the core economies of ESE Asia – namely Japan, Taiwan, and South Korea – are markedly export-oriented, driven to large part by producing high-quality, design-competitive goods for consumers in other parts of the globe.<sup>217</sup>

Consistent with its export orientation, Asian capitalism has shown a marked orientation towards 'producerism', i.e., having a greater portion of the surplus values created by production accrue to the producer rather than the consumer (although this appears to be changing). As described by James Crotty and Gary Dymksi:

Another theme of East Asian development has been deferred gratification for consumers. Tight constraints have been imposed on the domestic consumer goods market in order to free up resources for investment and exports. Current consumption has been sacrificed for high rates of capital accumulation, and thus for future consumption. The guiding idea has been that household needs would be met by the sheer pace of growth.<sup>218</sup>

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<sup>215</sup> See generally Jessop & Sum, *supra* note [Beyond], at 161-174.

<sup>216</sup> See TAN *supra*.

<sup>217</sup> See also Shin-ichi Fukuda & Hideki Toya, "Conditional Convergence in East Asian Countries: The Role of Exports in Economic Growth," in *Growth Theories in Light of the East Asian Experience* 247 (Takatoshi Ito & Anne O. Krueger, eds, Univ. of Chicago Press, 1995).

<sup>218</sup> James Crotty & Gary Dymksi, "Can the Global Neoliberal Regime Survive Victory in Asia? The Political Economy of the Asian Crisis," 5(2) *Int'l Papers in Pol. Econ.* 1, 8-9 (1998).

The export orientation of Asia's core economies makes Asian capitalism less autonomous and more volatile as compared to North Atlantic Fordism, which – as discussed above – encourages promotion of relational as opposed to legalist styles of public and private governance.<sup>219</sup>

### *C. Asian Capitalism as Variegated Capitalism*

These four features of Asian capitalism combine to generate a fourth distinguishing aspect of Asian capitalism, one that will turn out to be critical to our understanding of the nature of Asian competition regulation. This is its 'variegated' character. The orthodox 'varieties of capitalism' literature portrays each variety as national in scope, internally homogeneous, and autonomous vis-à-vis other possible varieties of capitalism. Thus, according to it, the United States has a liberal market economy [LME] and nothing but a liberal market economy. And the LME character of the American national economy has no structural connection – no symbiosis – to the LME or CME character of any other national economy.<sup>220</sup>

We might refer to this as the 'monistic' conceptualization of (national capitalism). Asian capitalism, by contrast, is not structured this way. It is structured along the lines of what Jamie Peck and Nik Theodore have referred to as "variegated capitalism."<sup>221</sup> Variegated capitalism describes a condition in which multiple varieties of capitalisms coexist within a single national-economic space.

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<sup>219</sup> See TAN *supra*.

<sup>220</sup> See Peck & Theodore, *supra* note [Variegated].

<sup>221</sup> *Id.*

To be clear, Peck and Theodore advance the idea of 'variegated capitalism' as a research agenda, not as a particular kind of capitalism. So I am misusing their idea somewhat by conceptualizing it as a particular variety of capitalism. But I think that alternative characterization can be justified by observing that, while all capitalisms are 'variegated' to some degree (the observation that recommends variegated capitalism as a research agenda), some manifestations of capitalism nevertheless might be significantly more variegated than others, and in this way justify being characterized as variegated in contradistinction to other, less variegated varieties of capitalism.

From our discussion above, we can see that Asian Capitalism is actually comprised of a diversity of different forms of capitalism.<sup>222</sup> These include the core, ordering capitalism – post-Fordist flexible specialization – that is organized around exports, transnational product competition, and disaggregated production; more peripheral capitalisms organized around transnational price competition, numerical flex, and embeddedness in transnational production networks;<sup>223</sup> the network capitalisms that govern the transnational economies of production chains;<sup>224</sup> localized, often pre-industrial capitalisms organized around local domestic markets;<sup>225</sup> various state capitalisms devoted to a variety of non-economic goals (e.g., economic development, national autonomy);<sup>226</sup> various ‘welfare capitalisms’ that provide for the social security of the population;<sup>227</sup> what – following the Europeans – we might call ‘solidarity capitalisms’ that focus on providing citizenship goods;<sup>228</sup> and even traditional Fordist capitalisms of the kind presumed by the orthodox model, often devoted to producing lower-end exports to transnational consumer markets.<sup>229</sup>

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<sup>222</sup> See also Walter & Zhang, supra note [Understanding], at 273:

Patterns of business organization, corporate governance, and employment relations within each East Asian political economy vary along more institutional dimensions than can be easily and parsimoniously captured here. More systematic research needs to be done not only to identify the trajectories and properties of internal diversity but also to explore the impact of rising heterogeneity on the organizational cohesiveness of the national systems of economic governance. . . . [I]nternal diversity and hybridity may help to buttress the existing order of economic governance by infusing it with institutional dynamism and allowing it to adapt incrementally to pressures for change

<sup>223</sup> See Deyo et al., eds., supra note [Governance]

<sup>224</sup> See Yeung, supra note {Globalizing}

<sup>225</sup> See, e.g., Phongpaichit & Baker, supra note [Thailand’s Crisis], at \_\_\_; cf. James C. Scott, *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia* (Yale University Press, 2011).

<sup>226</sup> See TAN infra.

<sup>227</sup> See TAN supra.

<sup>228</sup> See note [on solidarity] supra.

<sup>229</sup> Alain Lipietz, “Towards Global Fordism,” 1/132 *New Left Rev.* 33, 38-46 (1982); see also Alain Lipietz, “The Post-Fordist World: Labour Relations, International Hierarchy and Global Ecology,” 4 *Rev. Int’l Pol. Econ.* 1, 7-12 (1997).

(What makes these ‘capitalisms’ – in the sense of the ‘diversity of capitalisms’ literature – rather than simply ‘markets’ is that each is characterized by a particular, systemic ordering of labor, production and capital—they are ultimately social phenomena, not simply market phenomena.)

This diversity is not merely present in the region as a whole, but within most of the region’s individual, national economies. For example, in Japan, you have a post-Fordist capitalism governing the core transnational firm;<sup>230</sup> network capitalism governing local suppliers to these firms; a more local relational capitalism governing many local economies;<sup>231</sup> a developmental-state state capitalism governing national champions;<sup>232</sup> and welfare capitalisms governing labor markets and many local small businesses.<sup>233</sup> In China, you have a state capitalism composed of SOEs governing the commanding heights of the economy<sup>234</sup>; various peripheral Fordist kinds of capitalisms governing lower sectors and much of the export sector;<sup>235</sup> and pre-industrial capitalisms in more peripheral agricultural regions.<sup>236</sup> In Vietnam, you have what John Gillespie calls ‘cadre capitalism’ – a form of network capitalism – governing

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<sup>230</sup> See Makoto Itoh, “The Japanese Model of Post-Fordism,” in *Pathways to Industrialization and Regional Development*, London: Routledge 102 (Allen J. Scott & Michael Storper, eds., 1992).

<sup>231</sup> See, e.g., Tomoyou Matsui, “Corporate Governance and Closely-held Companies in Japan: The Untold Story,” in *Corporate Governance in the 21st Century* 108 (Luke Nottage, et al., eds., Edward Elgar, 2008); Upham, supra note [Fordham] (on Japanese regulation of competition involving small local stores).

<sup>232</sup> See Johnson, supra note [MITI].

<sup>233</sup> See Philip Manow, “Welfare State Building and Coordinated Capitalism in Japan and Germany,” in *The Origins of Nonliberal Capitalism: Germany and Japan in Comparison* 94 (Wolfgang Streeck & Kōzō Yamamura, eds., 2001); Philip Manow, “Business Coordination, Wage Bargaining and the Welfare State: Germany and Japan in Comparative Historical Perspective,” in *Comparing Welfare Capitalism: Social Policy and Political Economy in Europe, Japan and the USA* 27-51 (Bernhard Ebbinghaus & Philip Manow, eds., Routledge, 2004); Upham, supra note [Fordham]

<sup>234</sup> See Lin & Milhaupt, supra note [state capitalism].

<sup>235</sup> See, e.g., Dowdle, supra note [Melamine].

<sup>236</sup> See, e.g., id.

traditional national sectors like the construction industry;<sup>237</sup> a largely Fordist forms of capitalism governing many medium-sized enterprises in urban areas (what Gillespie terms ‘LMEs’);<sup>238</sup> and globalized, network capitalisms among firms embedded in transnational production chains.<sup>239</sup>

Many of these different kinds of capitalism work to exploit market dynamics that are not well-addressed by the orthodox model.<sup>240</sup> For example, post-Fordist capitalisms look to exploit dynamic efficiency and product markets.<sup>241</sup> Peripheral, production-networked capitalisms are designed in considerable part to address concerns of volatility.<sup>242</sup> Local capitalisms often involve the provision of citizenship goods, particularly in more peripheral regions<sup>243</sup>; and state capitalisms, as we have seen, can involve a host of non-economic goals.<sup>244</sup> The greater internal complexity of variegated capitalism as compared to more monistic varieties of capitalisms requires a more complex regulatory response than that provided by the orthodox model. This is the subject of our next Part.

#### **IV. REGULATING COMPETITION UNDER ASIAN CAPITALISM: COMPETITION**

##### **REGULATION AS ‘POLITICAL REGULATION’**

So, how do the distinctive features of Asia’s post-Fordist capitalism effect its regulation of competition? The Fordist predicates of the orthodox model make it a poor fit for Asia’s post-

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<sup>237</sup> See Gillespie, *supra* note [Managing], at 177-180.

<sup>238</sup> *Id.* at 180-185. See also John Gillespie, “Exploring the Role of Legitimacy and Identity in Framing Responses to Global Legal Reforms in Socialist Transforming Asia,” 29 *Wis. Int’l L. J.* 534, 563-8 (2011).

<sup>239</sup> See Gillespie, *supra* note [Managing], at 185-191. See also Gillespie, *supra* note [Exploring], at 566-9.

<sup>240</sup> See TAN *supra*.

<sup>241</sup> See TAN *supra*.

<sup>242</sup> See TAN *supra*.

<sup>243</sup> See TAN *supra*.

<sup>244</sup> See TAN *supra*.

Fordist form of capitalism. And the variegated nature of Asian capitalism demands a pluralist as opposed to monistic mode of organizing competition regulation, since each of the diverse forms of capitalism that comprise its variegated, national capitalist systems will have its own, distinct set of regulatory needs. As we shall see, all this demands a distinctly political form of regulation, as opposed to the a-political juristic form of competition regulation advanced by the orthodox model.

#### *A. Variegated Capitalism and Regulatory Pluralism*

Due to its Fordist predicates, the orthodox model of competition regulation is ill-suited for many aspects of Asian capitalism. The orthodox model presumes that market competition is driven foundationally by price competition, whereas many of the capitalisms in Asia's variegated capitalism – including its dominant form of capitalism, that of post-Fordism – is driven to significant extent by product competition.<sup>245</sup> The orthodox model is consumerist in orientation, whereas key organizing sectors of Asian capitalism (including its core economy) are export-oriented, and therefore better suited to producerism.<sup>246</sup> The orthodox model presumes a relatively stable economic environment, whereas, again, Asian capitalism was developed in significant part to respond to economic volatility.<sup>247</sup> The orthodox model assumes a national economy that is sufficiently large to generate minimally efficient economies of scale, whereas many Asian economies are unable to generate such economies of scale, either due to small national size or internal segmentation and fragmentation.

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<sup>245</sup> Compare TAN supra (discussing orthodox model) with TAN supra (discussing Asian capitalism).

<sup>246</sup> Compare TAN supra (discussing orthodox model) with TAN supra (discussing Asian capitalism).

<sup>247</sup> Compare TAN supra (discussing orthodox model) with TAN supra (discussing Asian capitalism).

Asia's variegated capitalism generates correspondingly variegated arenas of capitalist market competition.<sup>248</sup> Variegation in competition regulation results from a wide variety of centrifugal capitalist forces operating at various levels and scales throughout the region. At the national level, for example, modes of competition are often diversified by the foreign-imposed nature of many national competition laws, which have frequently been demanded or counseled by international financial institutions ('IFIs') and by foreign governments as a condition for international assistance or market access.<sup>249</sup> Such foreign-transplanted legislation often penetrates local society unevenly, causing some industrial and social sectors to adapt these more orthodox modes of competition, while other sectors prove more resistant.<sup>250</sup>

At the regional level, transnational production chains also work to diversify processes of economic competition. As we saw, the transnational disaggregation of production allows firms in core national economies to focus much more single-mindedly on product competition, while at the same time concentrating price competition in more upstream, peripheral nations or regions.<sup>251</sup> Similar bifurcations can also be found even within a national economy, as most national economies are large enough to encompass both core and peripheral regions. The clearest example of this in the context of Asian capitalism is that of China,<sup>252</sup> but core-periphery

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<sup>248</sup> See also Gunther Teubner, "Idiosyncratic Production Regimes: Co-evolution of Economic and Legal Institutions in the Varieties of Capitalism," in *The Evolution of Cultural Entities* 161 (Michael Wheeler et al., eds., Oxford Univ. Press, 2002).

<sup>249</sup> See Franz Kronthaler & Johannes Stephan, "Factors Accounting for the Enactment of a Competition Law – An Empirical Analysis," 52 *Antitrust Bull.* 137, 159-160 (2007); see also M.R.A. Palim, "The Worldwide Growth of Competition Law: An Empirical Analysis," 43 *Antitrust Bull.* 105, 125-132 (1998).

<sup>250</sup> See, e.g., Matsui, *supra* note [corporate governance] (showing this in Japan); Simon Vande Walle, "Competition and Competition Law in Japan: Between Scepticism and Embrace," in *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law* 123 (Michael W. Dowdle, et al., eds., Cambridge University Press, 2013) (same); Gillespie, *supra* note [Discursive Analysis] (Vietnam); Ohseung Kwon, "Retropect and Prospect on Korean Competition Law," 4 *J. Korean L.* 1, 20-28 (2005).

<sup>251</sup> See TAN *supra*.

<sup>252</sup> See especially Dowdle, *supra* note [Melamine].

bifurcations can be found in most other Asian countries (with the obvious exceptions of Hong Kong and Singapore, of course). A good demonstration of this is found in John Gillespie's recent study core vs. peripheral industries in Vietnam.<sup>253</sup>

At the local level, core-periphery differentiations cause corresponding differentiations in the content and delivery of citizenship goods. As noted above, populations in poorer and more peripheral locales tend to focus their demands for citizenship goods on goods and services that promote security and stability.<sup>254</sup> But in more peripheral environments, this can often be best provided by stabilizing local markets (both labor markets and product markets) rather than through public tax and redistribution schemes, even when it may cost the locale something in the way of market efficiency.<sup>255</sup> This, in turn, will shape the way that competition works in these markets, differentiating them from other kinds of local markets that do not play such a significant role in directly providing welfare stability (such as those found in more wealthy regions and in urban environments).<sup>256</sup>

In sum, the variegated nature of competition in Asian capitalism means that there is no single, monistic regulatory system for regulating market competition.<sup>257</sup> The distinct forms of capitalisms that comprise Asia's variegated capitalism each have their own, distinct competitive logic: some are driven by price competition, some are driven by market competition;<sup>258</sup> some are devoted purely to economic growth, some serve important social functions;<sup>259</sup> some are

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<sup>253</sup> See John Gillespie, "Exploring the Role of Legitimacy and Identity in Framing Responses to Global Legal Reforms in Socialist Transforming Asia," 29 *Wis. Int'l L.J.* 534, 559-568 (2011).

<sup>254</sup> See TAN *supra*.

<sup>255</sup> See TAN *supra*.

<sup>256</sup> See, e.g., Phongpaichit & Baker, *supra* note [Thailand], at \_\_\_.

<sup>257</sup> See also Jessop, *supra* note [complexities].

<sup>258</sup> See TAN *supra*.

<sup>259</sup> See TAN *supra*.

classically market-based as per Oliver Williamson's institutional typology (i.e., comprised primarily of arm's length transactions),<sup>260</sup> some are more 'networked' in their economic ordering.<sup>261</sup> And each different competitive logic demands a distinct focus of regulation: promoting price competition vs. promoting price competition;<sup>262</sup> promoting dynamic efficiency vs. promoting static efficiency;<sup>263</sup> and promoting efficient distribution of goods and resources vs. promoting fair distribution of goods and resources.<sup>264</sup>

Thus, instead of having to promote a single competition-regulatory framework as per the monistic vision of competition that informs the orthodox model, competition regulation in Asian-capitalist systems will need to involve multiple regulatory models, even within a single, national jurisdiction. We might call this particular kind of regulatory structure, "regulatory pluralism".<sup>265</sup>

A good example of such regulatory pluralism in the context of Asian-capitalist competition regulation is found in the *Antimonopoly Law of the People's Republic of China*

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<sup>260</sup> See Williamson, supra note [Comparative], at 30-32.

<sup>261</sup> See TAN supra

<sup>262</sup> See, e.g., McEwin, ed., supra note [Intellectual Property].

<sup>263</sup> See DeLong & Summers, supra note [New Economy], at 34.

<sup>264</sup> See, e.g., Prosser, supra note [Limits]. See also Prosser, supra note [Role of the State]

<sup>265</sup> This definition draws on some of the literature on "legal pluralism". See Sally Engle Merry, "Legal Pluralism," 22 *Law & Soc. Rev.* 869 (1988); John Griffiths, "What is Legal Pluralism?" 24 *J. Legal Pluralism & Unofficial L.* 1 (1986). For an application of this regulatory approach to legal pluralism to Asia, see, e.g., Gillespie, supra note [TPN]; see also Michael W. Dowdle, "Asian Regionalism and Law: The Continuing Contribution of Legal Pluralism," in *Routledge Handbook of Asian Regionalism* 226 (Mark Beeson & Richard Stubbs, eds., Routledge, 2012). I use the term "regulatory pluralism" rather than legal pluralism so as to emphasize that a regulatory space is often "regulated" by more than just law. See TAN supra. See See, e.g., Hugh Collins, *Regulating Contract* (Oxford Univ. Press, 1999).

Similar structurings of regulatory space have been identified by Andrew Dunsire, see Andrew Dunsire, "Manipulating Social Tensions: Collibration as an Alternative Mode of Government Intervention," MPIG Discussion Paper 93/7 (Max-Planck Institut für Gesellschaftsforschung, 1993) (available at <http://www.econstor.eu/bitstream/10419/43732/1/152565922.pdf>) (discussing what he calls 'collibration'), and by Colin Scott, see Colin Scott, "Regulating Everything: From Mega- to Meta-regulation," 60 *Administration* 61 (2012) (discussing what he calls 'meta-regulation').

[PRC].<sup>266</sup> Here, the law itself expressly recognizes a two different capitalists models operating simultaneously in the PRC economy. These are what are sometimes called the “private economy”, arguably a variant of CME capitalism, and the state-run economy, a form of state capitalism.<sup>267</sup> The law then applies a different model of competition regulation to each.<sup>268</sup> This is in stark contrast to the orthodox competition laws of the North Atlantic, in which there is only recognized mode of competition and hence only one normative model for regulating it, with exception to that model being defined simply as exceptions rather than as alternative economic-capitalist systems in their own right.<sup>269</sup> .

But the PRC economy, and the regulation thereof, is not simply pluralist along this (what we might call) ‘constitutional’ dimension. It is also pluralist along a spatial dimension. China’s size is such that it encompasses both relatively core and relatively peripheral economic zones within its territory. And as discussed above, peripheral economies operate according to a distinct logic, and thus require distinct regulatory regimes. The melamine milk adulteration crisis of the 2008 is a good demonstration of this.<sup>270</sup> That crisis was caused in significant part by China seeking to impose a singular, monocratic regulatory framework over the whole of China’s dairy industry, when in fact that framework was very ill-suited to the actual economic conditions of the

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<sup>266</sup> *Zhonghua Renmin Gongheguo Fanlongduan Fa* (2007) (effective August 1, 2008) (available at [http://www.gov.cn/flfg/2007-08/30/content\\_732591.htm](http://www.gov.cn/flfg/2007-08/30/content_732591.htm) ; unofficial English translation available at <https://www.amcham-china.org.cn/amcham/upload/wysiwyg/20070906152846.pdf>). See generally Wentong Zheng, “State Capitalism and the Regulation of Competition in China,” in *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law* 114 (Michael W. Dowdle, et al., eds., Cambridge University Press, 2013); Gerber, supra note [Global Competition], at 223-236.

<sup>267</sup> See Robert Boyer, “How the Specificity of Chinese Capitalism Explains its Position in the World Economy” (undated) (available at <http://robertboyer.org/?p=58>); see also Lin & Milhaupt, supra note [National Champions].

<sup>268</sup> See also Prosser, supra note [role of the state], at 250-252; Zheng, supra note [state capitalism], at 162-163. Cf. Mark Furse, *Antitrust Law in China, Korea and Vietnam* 69 (Oxford Univ. Press, 2009).

<sup>269</sup> See also TAN *infra*.

<sup>270</sup> See generally Dowdle, supra note [Melamine].

peripheral economies that supplied most of that industry's raw milk.<sup>271</sup> It was through this regulatory disconnect that the crisis unfolded, a point that is demonstrated by the fact that the crisis only affected national dairy companies – and did not impact local and regional dairy companies that were locally regulated in accordance with locally distinct regulatory norms and frameworks.<sup>272</sup>

Another example of a pluralist regulatory regime for competition regulation can be found in John Gillespie's recent study of market competition in Vietnam. In that study, he identifies three distinct forms of capitalism operating in Vietnam, each with its own way of structuring market competition.<sup>273</sup> In contrast to China, the diversity of capitalisms found in Vietnam, which corresponds to different class-based "networks", are not codified or recognized in Vietnam's *Competition Law*.<sup>274</sup> But they are nevertheless accepted by soft law norms that the state itself tacitly endorses.<sup>275</sup>

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<sup>271</sup> See id. at 219-22.

<sup>272</sup> See id. at 221.

<sup>273</sup> See Gillespie, supra note [Managing Competition]. Gillespie identifies these as "cadre-capitalism", which is organized around former governmental officials (see id. at 177-180); "LME networks", which emerged among large and medium scale enterprises (see id. at 180-182); and SME networks, which emerge among small and medium scale enterprises (see id. at 183-185). See also TAN supra.

<sup>274</sup> *Luật Cuộc thi*, No. 27/2004/QH11 (2004) (effective July 1, 2005) (English translation available at [http://www.wipo.int/clea/docs\\_new/pdf/en/vn/vn057en.pdf](http://www.wipo.int/clea/docs_new/pdf/en/vn/vn057en.pdf)).

<sup>275</sup> See also Painter, supra note [Politics], at 38-39:

There is a powerful domestic structural and political logic to the pace and trajectory of the SOE restructuring programme in Vietnam. State commercial interests are deeply embedded in the structure of the Vietnamese state, and help to sustain both the bureaucracy and the party. . . . On the one hand, the delays and prevarications in the SOE restructuring programme would seem to depict a weak state that is unable to implement a coherent reform strategy. On the other hand, it could also be said to demonstrate a resilient state comprising a plurality of interests, which is able to resist unwelcome pressures to marketize while leaving scope for many innovations and adjustments to produce a more efficient set of economic enterprises.

For a discussion of how competition regulatory regimes are comprised of both hard law and soft law norms, see Maher, supra note [Regulating Competition]. Cf. Hugh Collins, supra note [Regulating Contract] (describing mixture of hard and soft law systems that make up English contract regulation).

Japan presents us with yet another example of regulatory pluralism, one that manifests itself *temporally* rather than sectorally or geographically.<sup>276</sup> Japan has had an American inspired (some would say ‘imposed’) competition law on the books since the late 1940s.<sup>277</sup> But its actual engagement with that law has been ambivalent. Despite the best efforts of American post-War rebuilders to rid Japan of its pre-war, corporatist-economic reliance on industrial cartels called *zaibatsu*, postwar Japan retained significant elements of its prewar corporatism, with *keiretsu* taking over corporatist-economic functionality of the *zaibatsu*.<sup>278</sup> And at the same time as the American-inspired Japanese Fair Trade Commission was looking to construct Japan’s positivist market-competition regulation along firmly orthodox lines, Japan’s Ministry of International Trade and Industry (MITI) was using that informal form of regulation known as ‘administrative guidance’<sup>279</sup> to develop an alternative regulatory structure that served the needs of this continuing, corporatist part of the Japan’s post-war economy.<sup>280</sup> For the remainder of the 20<sup>th</sup> century, Japan’s national competition policy would oscillate between favoring MITI’s corporatist regulatory framework and favoring the JFTC’s orthodox framework.<sup>281</sup> But throughout this period, both frameworks – and the particular forms of capitalism that each served – actually

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<sup>276</sup> See generally Vande Walle, *supra* note [Japan]. See also Gerber, *supra* note [Global Competition], at 123-143. Cf. Ulrike Schaefer, *Cooperative Capitalism: Self-regulation, Trade Associations, and the Antimonopoly Law in Japan* (Oxford University Press, 2000).

<sup>277</sup> See *Shiteki dokusen no kinshi oyobi kōsei torihiki no kakuho ni kan suru hōritsu [Act on Prohibition of Private Monopolization and Maintenance of Fair Trade]*, Law No. 54 of 1947 (English translation available at <http://www.jftc.go.jp/e-page/legislation>).

<sup>278</sup> See Vande Walle, *supra* note [Japan], at 140. See also Hiroshi Iyori & Akinori Uesugi, *The Antimonopoly Laws and Policies of Japan* 320 (Federal Legal Publications, 1994). See also TAN *supra* (discussing *keiretsu*).

<sup>279</sup> See Mitsuo Matsushita, “The Antimonopoly Law of Japan,” in *Global Competition Policy* 151 (Edward Montgomery Graham & J. David Richardson, eds., Peterson Institute, 1997). See also TAN (for a general description of administrative guidance).

<sup>280</sup> See Vande Walle, *supra* note [Japan], at 126-131. See also Frank K. Upham, “Privatized Regulation: Japanese Regulatory Style in Comparative Perspective,” 20 *Fordham Int’l L. J.* 396 (1996). For a description of the Japanese use of administrative guidance, see TAN *supra*.

<sup>281</sup> See Vande Walle, *supra* note [Japan], at 131-143.

continued to operate in a sometimes dominant, and sometime subaltern, capacity.<sup>282</sup> In this sense, Japan's policy oscillations represented a political shifting of emphasis, and never the triumph of form of capitalism, or one form of competition regulation, over the other.<sup>283</sup>

*B. Regulating Regulatory Pluralism: 'Political Regulation'*

Regulatory pluralism is inapposite to the presumptions and prescriptions of the orthodox model. Put succinctly, the orthodox model treats the regulation of market competition as a technical – or, if one prefers, 'technocratic' – concern: one that can and should be driven by objective pursuit of a singular, monistic vision of what constitutes proper market competition, i.e., perfect competition.<sup>284</sup> We might call this kind of regulation, 'juristic regulation', because its *normative* aspirations are the same as those that attaches to judicial decisionmaking: i.e., to identify an authoritatively 'right answer' via deduction from a monistic set of first principles.<sup>285</sup>

But in a pluralist regulatory environment, responses to regulatory issues cannot be deductively extrapolated from a monistic set of first principles. The pluralist nature of that environment means that many regulatory responses will require one to choose between competing but equally legitimate visions of capitalist market organization.<sup>286</sup> Within the context of Asian capitalism, the consumerist needs of markets driven by domestic competitiveness often come into conflict with the producerist needs of markets driven by transnational

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<sup>282</sup> See also Schaede, *supra* note [Cooperative Capitalism]. See also Matsui, *supra* note [Corporate Governance].

<sup>283</sup> A similar dynamic has been observed in South Korea. See Prosser, *supra* note [Role of the State], at 246-249; Kwon, *supra* note [retrospect], at 20-28; see also Gerber, *supra* note [Global Competition], at 222.

<sup>284</sup> See Jessop, *supra* note [uncertainties]

<sup>285</sup> See Ronald Dworkin, "No Right Answer," 53 *N.Y.U. L. Rev.* 1 (1978). Note that here we are merely describing the normative construction of (rational, Weberian) law. As many have noted, as a matter of actual practice, judicial judgments often deviate from these normative standards. Compare with Pitofsky, *supra* note [Political], at 1065-6 (acknowledge, but not endorsing, the 'illusion of certainty' that pervades orthodox competition law thinking)

<sup>286</sup> Cf. Merry, *supra* note [Legal Pluralism].

competitiveness;<sup>287</sup> the regulatory needs of private markets that deal in consumer goods often conflict with the needs of markets that deal in citizenship goods;<sup>288</sup> the dynamic needs of product-competitive markets and markets that focus on industrial upgrading often conflict with the regulatory needs of price competitive markets that are driven by efficiency concerns.<sup>289</sup> Each of these forms of capitalisms serve an important social purpose – efficient use of resources and maximization of consumer welfare in the case of price competition and consumerism; industrial upgrading in the case of product competition and producerism; transnational integration and embeddedness in the case of transnational production chains; social security and stability in the case of citizenship goods.

Moreover, these different social purposes are often if not invariably incommensurate: one cannot use a redistribution of the social gains realized by favoring one market or one capitalism over others to offset the social losses (including the lost social opportunities) that accrue by not favoring some other competing capitalism or market.<sup>290</sup> The future opportunities gained by promoting ‘new economies’<sup>291</sup> cannot be used to compensate the present loss in potential material welfare caused by not promoting Fordist industrialism.<sup>292</sup> Material welfare compensation via tax-and-redistribute schemes for those who do not reap their fair share of the

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<sup>287</sup> See, e.g., Gillespie, supra note [Managing]; Vande Walle, supra note [scepticism]; Dowdle, supra note [Melamine]. Cf. Whitman, supra note [Consumerism].

<sup>288</sup> See, e.g., Deyo, supra note [Reforming]. Cf. Prosser, supra note [Limits], at 17-38.

<sup>289</sup> See, e.g., Deyo et. al., eds., supra note [Economic Governance]. Cf. Schumpeter, supra note [Democracy].

<sup>290</sup> See John Grey, “Where Pluralists and Liberals Part Company,” in *Pluralism: the Philosophy and Politics of Diversity* 85 (Maria Baghramian & Attracta Ingram, eds., Psychology Press, 2000).

<sup>291</sup> See TAN infra.

<sup>292</sup> See, e.g., Fiona Williams, “Social Relations, Welfare and the post-Fordism Debate,” in *Towards a Post-Fordist Welfare State?* 49 (Roger Burrows & Brian D. Loader, eds., Routledge, 1994).

benefit from neoclassical markets does not compensate for the loss of autonomy and dignity that comes from exclusion from economic citizenship.<sup>293</sup>

Because regulatory conflicts between markets can often involve tradeoffs between incommensurate social goods, when such conflicts arise, as they inevitably will, the regulatory choice as to which to prioritize cannot be settled juristically.<sup>294</sup> Such conflicts can only be managed, they cannot be resolved.<sup>295</sup> Put another way, in pluralist environments, the purpose of regulation cannot be to direct the community to a particular goal, such as perfect markets in the case of the orthodox theory, because no such singular goal exists. Rather, it is simply to maintain the integrity and coherence of the environment by maintaining a balance among these competing interests.<sup>296</sup>

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

What exactly is politics? It is, first of all, the struggles which result from the collisions between human purposes: most clearly when these collisions involve large numbers of human beings. But it is not, of course, only a matter of struggle. It takes in, too, the immense array of expedients and practices which human beings have invented to co-operate, as much as to compete, with one another in pursuing their purposes.<sup>297</sup>

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<sup>293</sup> See, e.g., Kanishka Jayasuriya, “Workfare for the Global Poor: Anti Politics and the New Governance” (Murdoch University Asia Research Centre Working Paper No 98, 2003). Cf. Amartya Sen, *Development as Freedom* (Oxford Paperbacks, 2001) (discussing importance of market participation to citizenship).

<sup>294</sup> See Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press, 2001 [1944]) (describing how orthodox promoting of economic competition – what he calls “commodification – are unable to accommodate the solidarity needs of social systems); see also Bronwen Morgan, *Social Citizenship in the Shadow of Competition: The Bureaucratic Politics of Regulatory Justification* (Ashgate, 2003).

<sup>295</sup> Cf. Polanyi, *supra* note [Transformation].

<sup>296</sup> See Grey, *supra* note [Pluralist]. See also Dunsire, *supra* note [Collibration], at 5-6.

<sup>297</sup> Dunn, *supra* note [Cunning], at 133. See also Martin Loughlin, *The Idea of Public Law* 52 (Oxford University Press, 2003):

As many have noted, Asian capitalism does indeed show a strong preference for political rather than juristic modes for regulating market competition.<sup>298</sup> The clearest demonstration of this is found in its resistance to the use of politically ‘independent’ regulatory agencies [“IRAs”]. The IRA model (also referred to as the “regulatory state”<sup>299</sup>) works to isolate regulatory agencies from political influences,<sup>300</sup> and is a key component of the orthodox model, which as we will be described in more detail below, is extremely hostile to politics.<sup>301</sup>

Asia’s resistance to ‘independent’ regulators in the context of competition regulation has been well demonstrated in a recent study by Tony Prosser.<sup>302</sup> Of the six jurisdictions he surveys – Singapore, Hong Kong, Taiwan, South Korea, China and Vietnam<sup>303</sup> – only in Hong Kong is market competition regulated by a truly independent regulatory agency.<sup>304</sup> Hong Kong is the exception that proves the rule in this case, however, because as a small, wholly-urbanized and highly Fordist jurisdiction, Hong Kong’s economy is likely to be significantly less variegated

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What I have tried to show is that politics is rooted in human conflict arising from the struggle to realize our varying ideals of the good life. . . . [A]s a set of practices within a state, [it] is as much concerned with devising forms of co-operation as with conflict over them. In this role, the great value of politics lies in its deployment of a range of techniques enabling us to handle these conflicts and enmities constructively.

See also Gray, *supra* note [Pluralists], at 98-99; Toby Handfield, “Rational Choice and the Transitivity of Betterness,” *Philosophy and Phenomenological Research* (forthcoming 2013). See also Michael W. Spicer, *In Defense of Politics in Public Administration: A Value Pluralist Perspective* (University of Alabama Press, 2011); Peter H. Schuck, “Against (And For) Madison: An Essay in Praise of Factions,” 15 *Yale L. & Pol’y Rev.* 553 (1997); Richard H. Pildes & Elizabeth S. Anderson, “Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics,” 90 *Colum. L. Rev.* 1212 (1990). Cf. Ralf Michaels, “The Re-state-ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism,” 51 *Wayne L. Rev.* 1209, 1255-1258 (2005)

<sup>298</sup> See, e.g., Prosser, *supra* note [Dowdle]; Liu, *supra* note [Fairness]

<sup>299</sup> Giandomenico Majone, “The Rise of the Regulatory State in Europe,” 17 *W. European Pol.* 77 (1994).

<sup>300</sup> See Fabrizio Gilardi, “The Institutional Foundations of Regulatory Capitalism: The Diffusion of Independent Regulatory Agencies in Western Europe,” 84 *Annals of the Am. Acad. Pol. & Soc. Sci.* 598 (2005); Nicola Phillips, “States and Modes of Regulation in the Global Political Economy,” in *Regulatory Governance in Developing Countries* 17, 24 (Martin Minogue & Ledivina V. Cariño, eds., Edward Elgar, 2006).

<sup>301</sup> See Maher, *supra* note [Institutional Structure], at 61-75;

<sup>302</sup> See Prosser, *supra* note [Role of the State]. See also Liu, *supra* note [Fairness].

<sup>303</sup> Prosser, *supra* note [role of the state], at 238-253.

<sup>304</sup> See *id.* at 242-244.

and therefore significantly more amendable to monocratic regulation (via IRAs) than those of other Asian countries.

Both South Korea and Taiwan have also recently set up a formally independent competition authorities, the Korean Fair Trade Commission and Taiwan's Fair Trade Commission respectively.<sup>305</sup> But the actual independence of these commissions is significantly compromised. In the case of South Korea, this is due to the fact that a considerable portion of the Korean economy, that which revolves around the state-supported *chaebol*, is not covered by Korea's competition law, and thus lies outside the reach of Korea's new, independent-regulatory framework.<sup>306</sup> In the case of Taiwan, technocratic independence is weakened by a legislative provision requiring the Fair Trade Commission consult other agencies or ministries whenever competition-regulatory issues arise that concern their authorities.<sup>307</sup> The overall effect of this provision is to cause the technocratics of competition law to become mixed up with the politics of industrial policy.<sup>308</sup>

Although not included in Prosser's survey, Japan's Fair Trade Commission [JFTC] also warrants discussion in this context. The creation of the American post-War occupation, the JFTC was set up as an 'independent' regulatory agency.<sup>309</sup> But as discussed above, the regulatory impact of that Commission has been severely compromised by the fact that for considerable periods of time, the implementation of Japan's competition law regime has been

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<sup>305</sup> See *Monopoly Regulation and Fair Trade Act*, art. 37(3), 35(1) (South Korea, 1980).

<sup>306</sup> Prosser, *supra* note [role of the state], at 248-249.

<sup>307</sup> *Fagui Huibian [Fair Trade Act of 1992]*, art. 9 (Republic of China, amended 2002).

<sup>308</sup> See Pijan Wu & Caroline Thomas, "Taiwan's Fair Trade Act: Achieving the Right Balance," 26 *Nw. J. Int'l L. & Bus.* 643, 654-5 (2005-2006). See also Liu, *supra* note [Fairness], at 16-17; Mark Williams, *Competition Policy and Law in China, Hong Kong and Taiwan* \_\_ (Cambridge University Press, 2005).

<sup>309</sup> *Act on Prohibition of Private Monopolization and Maintenance of Fair Trade*, Law No. 54 of 1947, art. 28 (Japan). See also Vande Walle, *supra* note [japan], at 126.

administered, not by the JFTC, but by Japan's Ministry of International Trade and Industry [MITI], which as its name indicates, is not a politically-independent agency. Moreover, the choice of how to balance the competing regulatory authorities of the JFTC vis-à-vis MITI has always itself been a highly political choice.<sup>310</sup> For this reason, despite having a nominally 'independent' competition regulator, Japan's actual competition-regulatory experience paradoxically has before emblematic of the Asia's distinctly politicized, "developmental state" competition-regulatory model.<sup>311</sup>

Similarly, as we saw above, Indonesia also has established a formally independent IRA. But as with Taiwan, Japan and South Korea, regulators there have chosen to promote a more politically-regulated 'fair competition' rather than the apolitical free competition advocated by the orthodox model.<sup>312</sup>

All the other jurisdictions surveyed by Prosser – Singapore, China, and Vietnam – have rejected the IRA model in favor of more political forms of regulation.<sup>313</sup> To this list, we might also add Thailand, which has a competition commission, but not an 'independent' one, in form or in practice.<sup>314</sup>

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<sup>310</sup> See Gerber, *supra* note [Global Competition], at 216-9; Vande Walle, *supra* note [Japan], at 123-39.

<sup>311</sup> See Vande Walle, *supra* note [Japan]. Compare Johnson, *supra* note [the developmental state].

<sup>312</sup> See TAN *supra*.

<sup>313</sup> See Prosser, *supra* note [role of the state], at 238-253.

<sup>314</sup> See Mark Williams, "Competition Law in Thailand: Seeds of Success or Fated to Fail?" 27 *World Competition* 459 (2004).

### C. Political Regulation vs Regulatory Capture

Of course, many criticize Asian capitalism precisely because of its general unwillingness to insulate competition regulation from politics.<sup>315</sup> As noted in the introduction, the orthodox model is intensely hostile to politics.<sup>316</sup> In a regulatory environment in which every regulatory issue is best resolved through technical application of the objective demands of perfect competition, all politics does is introduce extraneous considerations that can impede, and often corrupt, this kind of decisionmaking.<sup>317</sup>

The orthodox model's fear of politics is most commonly expressed in terms of 'regulatory capture'.<sup>318</sup> 'Regulatory capture' describes a condition in which the subject of a regulatory regime uses political power to gain influence over a regulator, and thereby cause the regulator to regulate so as to promote that subject's private interests rather than the public interest. In the context of competition regulation, the capturing firm or industry will use this influence to cause the regulator to impede market competition, generally by restricting market entry by new firms, thereby allowing the capturing firm or industry to enjoy monopoly-like rents at a cost to the social welfare of society as a whole.<sup>319</sup>

Of course, fear of regulatory capture makes perfect sense in a competitive-regulatory regime governed by a monistic conceptualization of what variety of market capitalism should

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<sup>315</sup> See, e.g., McEwin, *supra* note [Business, Politics]. David C. Kang, *Crony Capitalism: Corruption and Development in South Korea and the Philippines*, (Cambridge University Press, 2002).

<sup>316</sup> See, e.g., Morgan, *supra* note [Social Citizenship]. Cf. Michael A. Wilkinson, "The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union," 14 *German L. J.* 527 (2013).

<sup>317</sup> See TAN *supra*.

<sup>318</sup> See George Stigler, "The Theory of Economic Regulation," 2 *Bell J. Econ. & Mgmt. Sci.* 21 (1971). See also Jean-Jacques Laffont & Jean Tirole "The Politics of Government Decision Making: A Theory of Regulatory Capture," 106 *Q. J. Econ.* 1089 (1991). In the context of competition law, see Maher, *supra* note [Institutional Structure], at 62.

<sup>319</sup> See, e.g., McEwin, *supra* note [Business, Politics].

constitute the national economy. If regulatory decisions are properly governed by technical pursuit of objectively best answers, then politics can only introduce extraneous considerations that threaten to detract from the regulator's ability to arrive at the correct regulatory decisions.<sup>320</sup> But as we have seen, under Asian capitalism, the capitalisms at play are variegated rather than monistic, and the regulatory framework is (incommensurately) pluralist. Conflicts have to be balanced and negotiated rather than resolved and harmonized. How does the phenomenon of regulatory capture play out in this kind of regulatory environment?

In actuality, in such an environment, regulatory capture is not necessarily that bad a thing — it can even be an important component of political-regulatory effectiveness.<sup>321</sup> In order to see why this is so, we have to unpack the dynamics of regulatory capture a bit. The variegated nature of Asian competition regulation works to 'fragment' regulatory environments. A fragmented regulatory environment is one in which there are multiple regulators performing the same function, or in which a single regulator requires the coordination of multiple regulators in order to be effective.<sup>322</sup> In fragmented environments, capture of a particular regulator does not have as great an effect on the overall pattern of regulation, because capture of any particular regulator does not result in capture of the system as a whole. Moreover, in fragmented regulatory environments, some particular kinds of patterns of regulatory capture can actually promote rather than impede competition, by offering multiple and competing channels for market entry.

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<sup>320</sup> See TAN *supra*.

<sup>321</sup> See TAN *infra*.

<sup>322</sup> See Andrei Shleifer & Robert Vishny, "Corruption," 109 *Q. J. Econ.* 995, 606 (1993).

A striking example of this is found in the context of Asian competition regulation in Richard Doner and Ansil Ramsey's study of competition and competition regulation in Thailand textile industry.<sup>323</sup> Paradoxically when compared to the orthodox theory, they found that the highly fragmented nature of Thailand's regulatory environment – one in which “[e]ssential government goods, such as permits to open factories, could ‘be supplied by at least two government agencies’”<sup>324</sup> – actually worked to promote rather than inhibit market competition. This was because it caused different government agencies to compete for capture by offering parallel regulatory services, which in turn facilitated market entry:

[F]ragmented political patrons eager to obtain extra-bureaucratic funds helped to facilitate a constant flow of new private sector claimants' access to markets. Put simply, an aspiring entrepreneur could nearly always find a patron.<sup>325</sup>

In fact, Doner and Ramsey credit the Thai textile industry's particular structure and pattern of regulatory capture with “enabling Thailand to overcome collective action problems that hampered sustained economic growth in many other less developed countries.”<sup>326</sup> Capture made industry dependent on the captured regulator, which resulted in “various public, private and mixed public-private institutional arrangements”<sup>327</sup> that promoted industry flexibility,

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<sup>323</sup> Richard F. Doner & Ansil Ramsey, “Rent-seeking and Economic Development in Thailand,” in *Rents, Rent-Seeking and Economic Development: Theory and Evidence in Asia* 145 (Mustaq H. Khan & Jomo K.S., eds., Cambridge University Press, 2000).

<sup>324</sup> *Id.* at 154 (citing Shleifer & Vishny, *supra* note [Corruption], at 606).

<sup>325</sup> *Id.* at 154.

<sup>326</sup> *Id.* at 147.

<sup>327</sup> *Id.* at 147.

responsiveness, and competitiveness in export markets.<sup>328</sup> Similar dynamics have also been observed in Thailand's rice and automotive parts industries.<sup>329</sup>

A comparable observation about how fragmented regulatory capture can promote rather than impede competition and competitiveness, this time in China, has been made by Gabriella Montinola, Yingyi Qian, and Barry R. Weingast, in their study of "Federalism, Chinese Style."<sup>330</sup> Here, the fragmented capture is in the form of local industrial capture of local government, resulting in a highly fragmented pattern of local economic protectionism. Nevertheless, similar to the dynamic observed in Thailand, this fragmentation "induce[d] competition among local governments, serving both to constrain their behavior and to provide them with a range of positive incentives to foster local economic prosperity."<sup>331</sup>

Montinola et al.'s observation about the positive effects of local regulatory capture in China's economic regulation parallels the finding of a more recent study by Angela Zhang of the administration of China's competition law regime. Here, the competing captures are bureaucratically dispersed (as was the case in the study of the Thai textile industry discussed above) rather than regional, but the ultimate effect is generally the same:

Chinese ministries are organized by either function (e.g., education, culture, finance) or economic sector (e.g., agriculture, telecommunication, transportation). This complex structure gives virtual (i.e. nonelectoral) representation to all those economic groups and interests on whom the CCP leadership depends for political support. It also provides some checks and balances among the agencies. As each of them has particular missions,

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<sup>328</sup> See also *id.* at 155.

<sup>329</sup> *Id.* at 154.

<sup>330</sup> Gabriella Montinola, Yingyi Qian, and Barry R. Weingast, "Federalism, Chinese Style: The Political Basis for Economic Success," 48 *World Politics* 50 (1996).

<sup>331</sup> *Id.* at 79.

they are expected to pursue them with zeal. Therefore, when ministries and provincial leaders are called together to discuss a policy proposal, they are expected to represent and articulate the views of their units.<sup>332</sup>

Later on, she concludes:

The endless struggle among these government actors for control of policy therefore accounts for the heterogeneity of China's seemingly paradoxical antitrust enforcement outcome. As illustrated in consensus building in merger enforcement, the incorporation of industrial policy into merger decisions is in fact the result of a protracted process that involves intense negotiation and bargaining between [the Ministry of Finance and Commerce] and the other government agencies who have a say in [Anti-Monopoly Law] enforcement.<sup>333</sup>

Simon Vande Walle's historical study of competition regulation in Japan shows a similarly fragmented pattern of regulatory capture, wherein different political interestxs capture different regulatory agencies (the Japan Fair Trade Commission vs. the Ministry of Ministry of International Trade and Industry) within a larger regulatory environment in which these and other agencies compete for regulatory authority.<sup>334</sup> In the context of this higher-level competition, regulatory capture tends to be short-term rather than long-term, as the center of regulatory gravity has consistently oscillated over the years between the JFTC and MITI.<sup>335</sup> A

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<sup>332</sup> Angela Huyue Zhang, "Bureaucratic Politics and China's Anti-Monopoly Law," 48 *Cornell Int'l L.J.* \_\_, \_\_ (forthcoming) (p. 17 in original manuscript).

<sup>333</sup> *Id.* at \_\_ (p. 38 in original manuscript).

<sup>334</sup> See Vande Walle, *supra* note [Competition Law in Japan].

<sup>335</sup> See also Upham, *supra* note [Fordham]; Matsui, *supra* note [Nottage].

recent study by Tony Prosser suggests a similarly bureaucratically-fragmented pattern of competitive-regulatory capture operates in South Korea.<sup>336</sup>

John Gillespie's study of variegated market competition in Vietnam also shows a regulatory environment in which a diversity of regulatory captures appear to operate in homeostatic balance, although here, the balance appears to be maintained through mutual regulatory indifference rather than through more proactive inter-regulatory negotiation<sup>337</sup> (something that more resembles 'legal pluralism' in its classic meaning – i.e., the simultaneous existence of multiple legal systems within a particular jurisdictional space that operate autonomously from one another<sup>338</sup> – rather than the more actively negotiated pluralism described in the countries discussed above).

All in all, the particular form of competition-regulatory fragmentation caused by Asian capitalism is consistent with the particular forms of regulatory capture that do not impede, and sometimes promote, market functionality.<sup>339</sup> We might note, along these lines, that the original critique of regulatory capture addressed itself to regulatory capture in the context of North Atlantic capitalisms. As that critique saw it, the principal problem with regulatory capture was not that it allows private interests to shield themselves from market competition per se, but that it allows particular *classes* of private interests – those that had relative advantage in overcoming collective action problems – to shield themselves from *regulatory* competition with other kinds of public interests that have greater difficulty overcoming such collective-action problems. Most critically insofar as the consumerist capitalisms of the North Atlantic are concerned, it

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<sup>336</sup> See Prosser, *supra* note [role of the state], at 247.

<sup>337</sup> See Gillespie, *supra* note [Dowdle]; Gillespie, *supra* note [TPN]. See also Painter, *supra* note [Politics].

<sup>338</sup> See Merry, *supra* note [Legal Pluralism].

<sup>339</sup> See note \_\_\_ *supra*.

allows producer interest to shield themselves from regulatory competition with the consumer interests that are ultimate focus of those forms of capitalism.<sup>340</sup>

But as we saw, Asian capitalism is distinctly producerist as opposed to consumerist in its orientation. This would suggest that the negative consequences of regulatory capture would be much less of an issue even when evaluated under the standard critique.

The implications of regulatory capture are made even more ambiguous by the incommensurate nature of Asia's pluralist capitalisms<sup>341</sup> and the fact that there is often no 'right answer' to regulatory conflict. Here, as noting by Angela Huang in the quoted passage above,<sup>342</sup> fragmented patterns of regulatory captures actually come to resemble political representation. Parliaments, for example, can be regarded as bodies whose global representative character is generated by a large number of bureaucratically fragmented regulatory captures – i.e., the individual geographic constituency's capture of its particular member of parliament. Madison's particular theory of federalism could also be characterized in this way – federalism being a form of government that works by allowing different levels of government (local, national) to be captured by different 'factions' (a political variant of the 'Chinese style federalism' described by Montinola, Qian, and Weingast).<sup>343</sup> Montesquieu's particular vision of separation of powers, which anticipated that the executive, legislature, and courts would be captured by different classes of society (i.e., the monarchy, nobility, and commoner, respectively), can also be seen in

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<sup>340</sup> See Ha-Joon Chang, "The Economics and Politics of Regulation," 21 *Cambridge J. Econ.* 703, 710 (1997). This is because producers are better able to overcome collection action problems than consumers. *Id.*

<sup>341</sup> See TAN *supra*.

<sup>342</sup> See TAN *supra*.

<sup>343</sup> See, of course, *The Federalist* No. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961). Compare Montinola et al., *supra* note [Federalism], at 51 (drawing comparisons between their "Chinese federalism" and the more conventional, Madisonian version).

this light.<sup>344</sup> In a parliamentary democracy, the representative character of the constitutional order comes from the temporally-limited nature of the factional capture of government brought about by elections, a point brought home by the common characterization of England's constitutional structure as an "elective dictatorship".<sup>345</sup>

In incommensurately pluralist regulatory environments, fragmented patterns of regulatory captures are in fact not only consistent with processes of what we are calling political regulation, but can even be constitutive of it.<sup>346</sup> For example, in their 1992 study of 'responsive regulation', Ian Ayres and John Braithwaite present econometric demonstration not only of how regulatory capture can sometimes be 'efficient',<sup>347</sup> but how the best solution to inefficient regulatory capture can often be to encourage more capture by a greater diversity of interests.<sup>348</sup> A recent study overseen by Navroz Dubash and Bronwen Morgan finds evidence of the dynamic described by Ayres and Braithwaite in the competition-regulatory practices of selected countries in Asia, as well as in Latin America.<sup>349</sup> This argues that in the context of a pluralist regulatory environment such as that of Asian competition regulation, an environment that ultimately has to be regulated via political rather than juristic forms of regulation, contrary to the claims of the orthodox model, regulatory capture could be a feature rather than a bug.

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<sup>344</sup> Charles-Louis de Secondat, Baron De Montesquieu, *The Spirit of Laws* 201-7 (David Wallace Carrithers ed., Univ. of Cal. Press 1977) [1748] (Bk. VI, Chapter 6).

<sup>345</sup> See William Wade, *Constitutional Fundamentals* 23 (Stevens, 1980). The phrase was famously coined by Quintin McGarel Hogg (Lord Hailsham). See Lord Hailsham [Quintin McGarel Hogg], "Elective Dictatorship," *The Listener*, Oct. 21, 1976, at 497.

<sup>346</sup> Cf. Martin Loughlin, *The Idea of Public Law* 157 (Oxford Univ. Press, 2003) (describing how interest representation is the foundation of public law). On the relationship between competition law and public law, see TAN *infra*.

<sup>347</sup> Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* 63-71 (Oxford Univ. Press, 1995).

<sup>348</sup> See generally *id.* at 54-97.

<sup>349</sup> See Navroz Dubash & Bronwen Morgan, "The Embedded Regulatory State: Between Rules and Deals," in *The Rise of the Regulatory State of the South: Infrastructure and Development in Emerging Economies* 279, 289-290 (Navroz Dubash & Bronwen Morgan, eds., Oxford University Press, 2013).

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This is not to suggest that political regulation always works. Even in regulatory environments in which it is called for, a particular political-regulatory system can operate dysfunctionally. In order to be functional, a political regulatory system, like all regulatory systems, requires or benefits from the presence of appropriate organizational structures.<sup>350</sup> The point here is that insofar as regulating competition within variegated capitalism is concerned, this is what we need to be focusing our attention on — whether the (inevitably) political regulatory system that governs market competition is effective; and if not – why not? This is a question that we cannot ask if we presume, as per the orthodox model, that competition regulation must simply be isolated and immunized from politics. Recognizing that under conditions of Asian capitalism, competition regulation can ultimately *only* be politically regulated reminds us that it is ultimately in the details of its political embeddedness, and not simply in its economic expertise, that the effectiveness of Asia’s variegated competition-regulatory systems ultimately lies.

## **V. IS ASIAN CAPITALISM AND THE ‘POLITICAL’ REGULATION OF MARKET COMPETITION REALLY SO UNIQUE?**

We have been describing Asian capitalism by comparing and contrasting it against what we have been calling North Atlantic capitalisms, reflecting the fact that the orthodox model regards North Atlantic capitalism as ordinary and Asian capitalism, to the extent it deviates from

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<sup>350</sup> See, e.g., Ayres & Braithwaite, *supra* note [Responsive], at 54-97 (discussing ‘tripartitism’); Julia Black, “Proceduralizing Regulation,” 20 *Oxford. J. Leg. Studies* 567 (2000).

the presumptions of that model, as exceptional. But is there really any reason for assuming this? When Jamie Peck and Nik Theodore first proposed their idea of variegated capitalism, they actually did so the context of North Atlantic economies.<sup>351</sup> As we shall see herein, there is good reason to suspect that it is the capitalism described by the orthodox model, not Asian capitalism, that is the exception.<sup>352</sup> And this being the case, it also suggests that Asia's political regulation of market competition is not something that is or should be distinct to Asia. It is the political regulation of competition evinced in Asian capitalism, and not the technical regulation proposed by the orthodox model, that should be regarded as the global norm.

#### *A. Capitalist Variegation within and among North Atlantic Economies*

Variegated capitalism is not unique to Asia. As we shall see, North Atlantic capitalisms show many of the same dimensions of variegation as Asian capitalism, including core-periphery ordering, variations between price-competitive and product competitive economies, disaggregated production, a hollowing out and fragmentation of domestic regulatory space, and the deployment of a variety of state capitalisms.

North Atlantic capitalisms evince the same core-periphery ordering as Asian capitalism.<sup>353</sup> As with Asian capitalism, more peripheral economies are more reliant on exports,

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<sup>351</sup> See Peck & Theodore, *supra* note [Variegated], at 759-760.

<sup>352</sup> It is true that increasing numbers of countries are at least paying lip-service to the orthodox model, and there has been an explosion in the transplant of the orthodox model into the Global South. But empirical studies suggest that outside of advanced industrial economies, there is little fidelity to the orthodox model in actual practice, even when such fidelity is professed in the abstract. See generally Gerber, *supra* note [Global Competition]. See also David J. Gerber, "Asia and Global Competition Law Convergence," in *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law* 36, 50-51 (Michael W. Dowdle, et al., eds. Cambridge University Press, 2013).

<sup>353</sup> See Stephen Redding & Anthony J. Venables, "Economic Geography and International Inequality," 62 *J. Int'l Econ.* 53 (2004); Paul R. Krugman, *Geography and Trade* (MIT Press, 1991) (see especially *id.* at 1-14, 83-92); Paul Krugman, "History and Industry Location: The Case of the Manufacturing Belt," 81 *Am. Econ. Rev.* 83 (1991).

but as we have seen, and unlike Asian capitalisms, core North Atlantic economies are primarily consumption-oriented rather than export-oriented.<sup>354</sup> Thus, in this particular dimension, the core-periphery ordering of North Atlantic economies might generate even greater capitalist variegation than it does in the Asian economy. This aspect of North Atlantic capitalist variegation is further augmented by the fact that, like Asian economies, production in North Atlantic economies is becoming increasingly disaggregated,<sup>355</sup> although, as noted above, North Atlantic disaggregation tend to be structured using contractual relationship rather than by using network relationships.<sup>356</sup>

Because of this, North Atlantic economies are also experiencing a hollowing-out of the state similar to that experienced by Asian economies.<sup>357</sup> Indeed, like that of variegated capitalism, the notion of the ‘hollowing-out of the state’ was initially developed to describe the regulatory evolution of European states.<sup>358</sup> In fact, this hollowing may be more pronounced in

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<sup>354</sup> See TAN *supra*.

<sup>355</sup> See Gene Grossman & Esteban Rossi-Hansberg, “The Rise of Offshoring: It’s Not Wine for Cloth Anymore,” in *The New Economic Geography: Effects and Policy Implications* 59 (Federal Reserve Bank of Kansas City, ed., Federal Reserve Bank of Kansas City, 2006); Robert C. Feenstra, “Integration of Trade and Disintegration of Production in the Global Economy,” 12 *J. Econ. Persp.* 31 (1998); R. D. Norton & J. Rees, “The Product Cycle and the Spatial Decentralization of American Manufacturing,” 13 *Regional Studies* 141 (1979). See generally Olivier Cattaneo, Gary Gereffi & Cornelia Staritz, eds., *Global Value Chains in a Postcrisis World: A Development Perspective* (World Bank Publications, 2010).

<sup>356</sup> See TAN *supra*.

<sup>357</sup> See Sol Picciotto, “Regulatory Networks and Global Governance,” paper presented at the W. G. Hart Legal Workshop 2006: The Retreat of the State: Challenges to Law and Lawyers (Institute of Advanced Legal Studies, University of London June 27-29, 2006) (available at [http://eprints.lancs.ac.uk/232/1/Reg\\_Networks\\_%26\\_Glob\\_Gov.pdf?origin=publication\\_detail](http://eprints.lancs.ac.uk/232/1/Reg_Networks_%26_Glob_Gov.pdf?origin=publication_detail)); R. A. W. Rhodes, “The Hollowing Out of the State: The Changing Nature of the Public Service in Britain,” 65 *Political Q.* 138 (1994), Bob Jessop, “Towards a Schumpeterian Workfare State? Preliminary Remarks on Post-Fordist Political Economy,” 40 *Studies in Pol. Econ.* 7 (1993) (see especially *id.* at 22-25). See also Jayasuriya, *supra* note [Institutional Hybrids].

<sup>358</sup> See Jessop, *supra* note [Schumpeterian Workfare], at 10, 22-25. However, the term itself seems more commonly credited to R.A.W. Rhodes, note [Hollowing] *supra*.

Europe than in Asia, due to the European state's greater embeddedness in the transnational regulatory system of the European Union.<sup>359</sup>

And as noted above, North Atlantic capitalism also rely heavily on promoting competitiveness in product-competitive markets, particularly in core industrial sectors,<sup>360</sup> as well described by Joseph Schumpeter:

[In core industries,] it is not ordinary [i.e., price-based] competition which counts but competition from the new commodity, the new technology, the new source of supply, the new type of organization (the largest scale unit of control, for instance) — competition which commands a decisive cost or quality advantage and which strikes not at the margin of the profits and outputs of the existing firms but at their foundations and their very lives. [Under this kind of competition] . . . it becomes a matter of comparative indifference whether competition in the ordinary sense functions more or less promptly; the powerful lever that in the long run expands output and brings down prices is made of other stuff.<sup>361</sup>

Finally, North Atlantic economies also frequent construct state-capitalist capitalisms to address particular national or social goals.<sup>362</sup> Examples include various welfare capitalisms to promote social security and stability,<sup>363</sup> solidarity capitalisms to promote social citizenship,<sup>364</sup>

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<sup>359</sup> Cf. Bob Jessop, "Hollowing out the 'Nation-State' and Multi-level Governance," in *A Handbook of Comparative Social Policy* 2d. ed., at 11 (Patricia Kennett, ed., Edward Elgar, 2013).

<sup>360</sup> See TAN *supra*.

<sup>361</sup> Schumpeter, *supra* note [Democracy], at 84-85.

<sup>362</sup> See Robert B. Reich, *The Work of Nations: Preparing Ourselves for 21st Century Capitalism* (Vintage, 1992).

<sup>363</sup> See, e.g., *Treaty on the Functioning of the European Union* (Consolidated Versions), [2008] OJ C 115/1, art. 106(3); *Treaty of Lisbon, Protocol on Services of General Interest*, [2007] OJ C 306/158 (providing antitrust

and public-private partnerships and other kinds of state-market hybrids whose purpose is to promote national industrial competitiveness.<sup>365</sup>

As discussed above, North Atlantic capitalisms handle variegation by doctrinally removing these alternatively structured markets from orthodox competition law and locating them in other doctrinal frameworks, such as intellectual property<sup>366</sup> or “services of general economic interest”,<sup>367</sup> or via ad hoc statutory or judicial exceptions such as those for labor markets<sup>368</sup> or, in the case in the United States, for professional baseball.<sup>369</sup> The problem is what happens when these regulatory exceptions end up swallowing the rule? As Joseph Schumpeter famously put it:

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exceptions for ‘services of general economic interest’. See generally Colin Scott, “Services of General Interest in EC Law: Matching Values to Regulatory Technique in the Public and Privatised Sectors,” 6 *Eur. L. J.* 310 (2000).

<sup>364</sup> See *Sodemare and Others v. Regione Lombardia*, [1997] ECR I-3395, AG’s Opinion para. 29 (discussing solidarity rights). See also *British United Provident Association Ltd (BUPA) and Others v. Commission*, [2008] ECR II-81; *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v. Commission of the European Communities*, [2006] ECR I-6295. See generally Tony Prosser, “Competition Law and Public Services: From Single Market to Citizenship Rights?” 11 *Eur. Pub. L.* 543 (2005); Prosser, *supra* note [Dowdle], at \_\_\_.

<sup>365</sup> See, e.g., White House [US], “Cyberspace Policy Review: Assuring a Trusted and Resilient Information and Communications Infrastructure,”

[http://www.whitehouse.gov/assets/documents/Cyberspace\\_Policy\\_Review\\_final.pdf](http://www.whitehouse.gov/assets/documents/Cyberspace_Policy_Review_final.pdf) (2009), at 18-9:

Some members of the private sector continue to express concern that certain federal laws might impede full collaborative partnerships and operational information sharing between the private sector and government. For example, some in industry are concerned that the information sharing and collective planning that occurs among members of the same sector under existing partnership models might be viewed as “collusive” or contrary to laws forbidding restraints on trade. [18-19]

...  
As part of the partnership, government should work creatively and collaboratively with the private sector to identify tailored solutions that take into account both the need to exchange information and protect public and private interests and take an integrated approach to national and economic security.

See also Albert N. Link & John T. Scott, “Public/Private Partnerships: Stimulating Competition in a Dynamic Market,” 19 *Int’l J. Ind. Org.* 763 (2001); Tony Bovaird, “Public-Private Partnerships: from Contested Concepts to Prevalent Practice,” 70 *Int’l Rev. Admin. Sci.* 199 (2004). See generally Mariana Mazzucato, *The Entrepreneurial State: Debunking Public vs. Private Sector Myths* (Anthem Press, 2013); Erik S. Reinert, *How Rich Countries Got Rich and Why Poor Countries Stay Poor* (Constable, 2008).

<sup>366</sup> See note \_\_\_ *supra*.

<sup>367</sup> See note \_\_\_ *supra*.

<sup>368</sup> See note \_\_\_ *supra*.

<sup>369</sup> See *Federal Baseball Club v. National League*, 259 U.S. 200 (1922) (judicially-created doctrine holding that American antitrust law does not apply to professional baseball); *Toolson v. New York Yankees*, 346 U.S. 356 (1953) (same)

[P]erfect competition is the exception and . . . even if it were the rule there would be much less reason for congratulations than one might think. If we look more closely at the conditions . . . that must be fulfilled in order to produce perfect competition, we realize immediately that outside of agricultural mass production there cannot be many instances of it.<sup>370</sup>

When the exceptions are so great as to swallow the rule, they really aren't 'exceptions' — they are alternatives. Recognizing them as alternatives allows us to see that even in the North Atlantic, capitalism is actually much more variegated than recognized by the orthodox model. And bear in mind, Schumpeter wrote this in the heyday of Fordism. As Lawrence Summers and Brad DeLong have recently noted, such variegation appears to be getting more pronounced in the 'new economy' of today's post-Fordist world:

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

In a "Schumpeterian" economy, the decentralized economy does a much less good job. Goods are produced under conditions of substantial increasing returns to scale. This means that competitive equilibrium is not a likely outcome: The canonical situation

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<sup>370</sup> Schumpeter, *supra* note [Capitalism], at 78-79.

is more likely to be one of natural monopoly . . . . [I]t is clear that the competitive paradigm cannot be fully appropriate.<sup>371</sup>

*B. On the Ultimately Political Character of Competition Regulation in the North*

*Atlantic*

As discussed above, variegated capitalism requires political rather than juristic or technical regulation.<sup>372</sup> And contrary to the protestations of the orthodox model,<sup>373</sup> North Atlantic competition regulation is permeated with political balancings of competing and often non-economic concerns and interests—and overtly so. As noted by former EU Competition Commissioner Karel Van Miert in the context of Europe:

The aims of the European Community's competition policy are economic, political and social. The policy is concerned not only with promoting efficient production but also

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<sup>371</sup> DeLong & Summers, *supra* note [New Economy], at 33-24. See also Roger L. Conkling, *Marginal Cost in the New Economy: A Proposal for a Uniform Approach to Policy Evaluations* 3-23 (M.E. Sharpe, 2004); World Trade Organization, *World Trade Report 2008. Trade in a Globalizing World* (Geneva: WTO Publications, 2008).

<sup>372</sup> See TAN *supra*.

<sup>373</sup> See Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 428 (Simon & Schuster, 1993):

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

See also Louis Kaplow, "On the Choice of Welfare Standards in Competition Law," in *The Goals of Competitive Law* 3 (Daniel Zimmer ed., Edward Elgar, 2012); See also R. Shyam Khemani, "Competition Policy and Economic Development," *Policy Options* 23, 26-27 (October 1997); Kenneth G. Elzinga, "The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?" 125 *U. Pa. L. Rev.* 1191 (1977). Cf. Kaplow & Shavell, *supra* note [fairness], at 961:

Legal rules should be selected entirely with respect to their effects on human welfare, which is to say, on the well-being of individuals in society. [I]deas of fairness should . . . receive no independent weight in the evaluation of legal rules.

This exclusion of fairness from competition law concerns was not always the orthodox position. Historically, competition regulation in both the United States and Europe did in fact regard issues of equality and fairness as appropriate competition regulation concerns. See David J. Gerber, "Fairness in Competition Law: European and U.S. Experience," paper presented at a Conference on Fairness and Asian Competition Laws 4-5 (Kyoto, Japan: March 5, 2004) (available at [http://www.kyotogakuen.ac.jp/o\\_ied/information/fairness\\_in\\_competition\\_law.pdf](http://www.kyotogakuen.ac.jp/o_ied/information/fairness_in_competition_law.pdf)). See also Eleanor Fox, "The Modernization of Antitrust: A New Equilibrium," 66 *Cornell L. Rev.* 1140 (1991).

achieving the aims of the European treaties: establishing a common market, approximating economic policies, promoting harmonious growth, raising living standards, bringing Member States closer together, etc. To this must be added the need to safeguard a pluralistic democracy, which could not survive a strong concentration of economic power. *If competition policy is to reach these various goals, decisions must be made in a pragmatic fashion*, bearing in mind the context in which they are to be made: the realization of the internal market, the globalization of markets, economic crisis, technological development, the ratification of the Maastricht treaty, etc.<sup>374</sup>

Such an emphasis on the need for a *pragmatic* rather than technical or juristic balancing of these interests is precisely the stuff of political regulation.<sup>375</sup> And it is not unique to Europe. In the United States, political regulation of competition has been used to effectuate “income redistribution, protection of small business [and] local control of business.” Correspondingly, is also subject to significant political regulation – manifest, for example, in continuous changes in executive enforcement policy, as described in a recent article by Eleanor Fox:

While [competition law enforcement regimes in the United State and Europe] both are affected by politics, in the United States enforcement is more likely to be influenced by the political philosophy current in the administration rather than direct interference in particular cases.<sup>376</sup>

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<sup>374</sup> Quoted in Brian A. Facey & Dany H. Assaf, “Monopolization and Abuse of Dominance in Canada, the United States, and the European Union: A Survey,” 70 *Antitrust Lawyer* 513,527 (2002) (emphasis added). See also Fox, *supra* note [comparison], at 334-339.

<sup>375</sup> See TAN *supra*.

<sup>376</sup> Eleanor M. Fox, “US and EU Competition Law: A Comparison,” in *Global Competition Policy* 339, 353-4 (Edward Montgomery Graham & J. David Richardson, eds., Peterson Institute, 1997). See also Maher M. Dabbah, *International and Comparative Competition Law* 256 (Cambridge University Press, 2010) (noting that “[p]olitics in

Consistent with the balancing character of political regulation,<sup>377</sup> William Kovacic attributes the political dynamic described by Fox to “‘equilibrating tendencies’ by which forces inside and outside the antitrust agencies motivate and moderate changes in the content of U.S. competition policy.”<sup>378</sup>

Interestingly, the need for pragmatic, prudential ‘political’ regulation of competition has also been acknowledge in other parts of the world as well. Discussing competition law in Latin America, Julián Peña notes:

The protection of competition is an objective that can be assessed by different governments along with the other policy objectives and should determine the level of priority considering the needs of each particular jurisdiction in each particular time. Therefore, since competition policy is just one of the instruments that governments have to implement their economic policy, it is very common in developing countries (such as Latin America) to find governments that relegate competition enforcement with respect to other priorities such as protecting labor, fighting inflation, combating poverty or attracting foreign investments.<sup>379</sup>

All in all, the innately variegated nature of capitalism seems indeed to have produced a markedly political form competition regulation in Europe, in the United States, and in Latin America, just as it has in Asia. It is just that the orthodox model obscures this, due to the North Atlantic’s preference for framing alternative capitalisms as technical and doctrinal exceptions to

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the field of competition law in the USA does play a major role: whether in the legislative process or enforcement actions)

<sup>377</sup> See TAN *supra*.

<sup>378</sup> William E. Kovacic, “The Modern Evolution of U.S. Competition Policy Enforcement Norms,” 71 *Antitrust L. J.* 377, 403 (2003).

<sup>379</sup> Peña, *supra* note [Competition Law in Latin America], at 243.

the universal law, and then correspondingly locating the political balancing that much take place between these diverse capitalisms in the more opaque policymaking spaces of politically ‘independent’ courts<sup>380</sup> and administrative agencies, rather than in open political deliberation.<sup>381</sup> But politics works best in the sunlight.<sup>382</sup> It is therefore the political Asian model, not the artificially homogenized, orthodox model of the North Atlantic, that should be the principal model for our conceptualizations of competition law as a global phenomenon.

## VI. THE LESSON OF ASIAN CAPITALISM: COMPETITION LAW AS PUBLIC LAW

*There is a fundamental tension within competition law that is linked to opposing theoretical bases. One emphasises its roots in private law and the other takes a more constitutional orientation.*<sup>383</sup>

Competition law is not just about market regulation. It is not just about promoting consumer or social welfare. It is, at the end of the day, about the construction of the state itself.

It is, in other words, a form of public law. Public law can be defined as the law that governs the governing of the state.<sup>384</sup> Trite and vague as this definition might be,<sup>385</sup> it still allows

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<sup>380</sup> Cf.

<sup>381</sup> Cf. Fox, *supra* note [Comparison], at 353-4 (noting that in the United States, politics in the enforcement of competition law resides primarily in administrative decisionmaking).

<sup>382</sup> Cf. Samuel Issacharoff, “Judging Politics: The Elusive Quest for Judicial Review of Political Fairness,” 71 *Tex. L. Rev.* 1643 (1992-1993). See also Louis D. Brandeis, *Other People's Money and How the Bankers Use It* 62 (Cosimo, 2009) [1914] (“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”).

<sup>383</sup> Maher, *supra* note [Regulating Competition], at 189.

<sup>384</sup> See Martin Loughlin, *The Idea of Public Law* 153 (Oxford University Press, 2003) (“[t]he claim that public law is special rests on the singular character of its object—the activity of governing). This is a somewhat different

us to identify its two defining aspects, one regulatory, the other constitutive. In its regulatory aspect, public law governs how and when the state may deploy its regulatory tools. In its constitutive aspect, public law also ‘constitutes’ the state – i.e., defines it, delineates it, gives it its coherence as a social construct. As we shall see, competition law is intimately involved in both these projects.<sup>386</sup>

### A. *Regulating the State*

As vague and conflicted as our understanding is of “the state”, that notion still plays a critical and irreplaceable role in our social construction of political society.<sup>387</sup> The state is irrevocably linked to something that is often called “the public good”.<sup>388</sup> Even as a simple placeholder word, “the state” allows us to identify those issues and phenomena that have claim to be critical to our common weal, to the public good, however we choose to define it.<sup>389</sup>

Of course, governing the governing of the state is different from simply providing for the public good. It is the governing of *how* the state is to provide for the public good. The state, in

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characterization than that used by civil law systems, which commonly define public law as the law that governs the relationship between citizens and the state. But these two definitions are largely coterminous.

<sup>385</sup> Id. (“[t]his may sound trite . . .”).

<sup>386</sup> Although using a different vocabulary, and approaching from a different tack, I believe that the framework for understanding public law presented in this article parallels that developed by Martin Loughlin in his *Foundations of Public Law*, supra note [Foundations]. See especially id. at 157-182 (describing public law as ‘political jurisprudence’). For an analysis of how other aspects of economic regulation are better viewed as a form of public law, see Tony Prosser, *The Economic Constitution* 1-57 (Oxford Univ. Press, 1014).

<sup>387</sup> See Michael Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977-78*, at 286-7 (Michael Senellart, ed., Graham Butchell, trans., Palgrave, 2007). See also Martin Loughlin, *Foundations of Public Law* 205-8 (Oxford University Press, 2010).

<sup>388</sup> Cf. “*Alus populi suprema lex esto* [the health of the people should be the supreme law].” Marcus Tullius Cicero, *De Legibus* (3.3.7). John Locke used this line to open his *Second Treatise on Government*.

<sup>389</sup> See Jane Mansbridge, “On the Contested Nature of the Public Good,” in *Private Action and the Public Good* 3 (Walter W. Powell & Elisabeth Stephanie Clemens, eds., Yale Univ. Press, 1998).

providing that good, must nevertheless balance such provision against competing concerns.<sup>390</sup> This balancing has two dimensions. First, provision of the public or collective good frequently comes into conflict with, and must therefore be balanced against, countervailing political-moral demands for some level of individual autonomy.<sup>391</sup> Second, within any given society, there will inevitably be multiple, equally legitimate, understandings of what the ‘public good’ demands, understands that will inevitably sometimes conflict, and must therefore be balanced against one another.<sup>392</sup> Thus, in saying that public law governs the governing of the state, what we are really saying is not that public law governs the provision of the public good, but that public law governing how the provision of some particular public good is to be balanced against other, equally legitimate, but competing concerns.<sup>393</sup>

As per our discussion above regarding what we termed “political regulation”, public law, too, must effectuate this balancing via the use of politics. As noted by Martin Loughlin:

[W]e might best understand the way in which [public] law establishes the governing framework of a state as a continuation of the political engagement. . . . The heterogeneity of human purposes and the plasticity of human judgments in combination ensure not only that ‘there is a clear surplus of conflict over co-operation in human interaction’ but also that ‘there will always continue to be so’.<sup>394</sup>

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<sup>390</sup> See *id.* at \_\_\_\_.

<sup>391</sup> See *id.* at \_\_\_\_.

<sup>392</sup> See also Loughlin, *supra* note [idea], at 52.

<sup>393</sup> See also Loughlin, *supra* note [Foundations], at 164:

Rather than treating public law as the unfolding of some science of political right, then, public law should be understood to involve an exercise in . . . negotiat[ing] between the various conflicting accounts of political right that form part of its evolving discourse.

<sup>394</sup> Loughlin, *supra* not [Idea], at 52 (quoting from Dunne, *supra* note [Cunning], at 361).

In its own political-regulatory balancing of the different and sometimes competing capitalisms in society, competition regulation thus resembles public law. But does this political balancing of different market capitalisms go so far as to constitute an act of ‘governing the governance of the state’? More precisely, are the various capitalisms that competition law ultimately balances ‘regulatory tools of the state’?

In fact, the state’s various forms of capitalism are indeed critical tools for the state’s provision of certain aspect of the public good.<sup>395</sup> Capitalisms are clearly creations of the state, they are creations of the state’s law. And the state creates them for a purpose. For example, states use both Fordism and post-Fordism to provide national wealth and social material welfare.<sup>396</sup> They use welfare capitalisms to provide security to the population,<sup>397</sup> they use solidarity capitalisms to provide social and political citizenship, and through that national identity,<sup>398</sup> they use state capitalisms to promote national development and national autonomy;<sup>399</sup> and they use transnational, network capitalisms, such as those involving participation in transnational production chains or transnational trade, to promote cosmopolitanism and greater embeddedness in the world community.<sup>400</sup>

Each of these particular aspects of the public good – i.e., material welfare; safety and security; political and social citizenship; sovereignty; and global integration – contributes something vital to the ultimate success of the project we call the state. Each therefore must be able to enjoy some significant degree of space in a state’s construction of its national economy.

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<sup>395</sup> See, e.g., John Maynard Keynes, “National Self-Sufficiency,” 22 *The Yale Rev.* 755 (1933); Reich, *supra* note [work of nations]. See also TAN *infra*.

<sup>396</sup> See TAN *supra*.

<sup>397</sup> See TAN *supra*.

<sup>398</sup> See TAN *supra*.

<sup>399</sup> See TAN *supra*.

<sup>400</sup> See TAN *supra*.

As we have seen, competition regulation regulates how this space is to be continually apportioned and reapportioned so as to ensure that each contributes appropriately and with appropriate moderation to the commonweal that state is ultimately constructed both to provide and to regulate.

We have seen this balancing well at play in Asia. But this balancing was also apparent in the North Atlantic, particularly in the early days of both the American and the European competition law regimes.<sup>401</sup> In the US, it was not until the 1980s that today's unitary focus on productive and allocative efficiency came to be established as the sole, guiding light of American antitrust law.<sup>402</sup> As noted by William Kovacic as quote above,<sup>403</sup> American competition regulators have continually negotiated and balanced, renegotiated and rebalance, among the various forms of capitalisms and associated political interests.<sup>404</sup> In Europe, different capitalist visions – ordoliberalism, liberalism, social democracy –jostle continuously in the ever-changing

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<sup>401</sup> On the early years of the ICC and the emergent antitrust regime, see Skowronek, *supra* note [Building], at 138-62, 248-84; Mark A. Covalleski, Mark W. Dirsmith & Sajay Samuel, "The Use of Accounting Information in Governmental Regulation and Public Administration: The Impact of John R. Commons and Early Institutional Economists," *Accounting Historian's J.* 1 (1995); Alan Jones, "Thomas M. Cooley and the Interstate Commerce Commission: Continuity and Change in the Doctrine of Equal Rights," 81 *Pol. Sci. Q.* 602 (1996). On the early years of the Sherman Antitrust Act, see William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (Univ. of Chicago Press, 1981); see also Christopher Grandy, "Original Intent and the Sherman Antitrust Act: A Re-examination of the Consumer-Welfare Hypothesis," 53 *J. Econ. Hist.* 359 (1993).

<sup>402</sup> See Barak Y. Orbach, "The Antitrust Consumer Welfare Paradox," 7 *J. Comp. L. & Econ.* 133 (2011); Orbach, *supra* note [How Antitrust]. Cf. Edward Hirsch Levi, "The Antitrust Laws and Monopoly," 14 *U. Chi. L. Rev.* 153 (1948).

<sup>403</sup> See note \_\_ *supra*.

<sup>404</sup> See Rudolph J. R. Peritz, "Competition Policy in America, 1888-1992 (Oxford Univ. Press, 1995). Cf. Martin J. Sklar, *The Corporate Reconstruction of American Capitalism, 1890-1916: The Market, the Law, and Politics* (Cambridge Univ. Press, 1988).

landscape of European competition law,<sup>405</sup> as reflected most recently in the new emergence of the doctrinal exceptions for “general economic interests” and “solidarity” discussed above.<sup>406</sup>

### *B. Constituting the State*

Public law does not just regulate the state, it regulates the state in a particular way. It regulates the state by bringing it into being.<sup>407</sup> Thus, for example, public law regulates how and when parliament may legislate by (1) structuring the creation of parliament as a public body, what we might call its ‘structuring function’; and by (2) defining and empowering the parliamentary statute as a regulatory tool, what we, following Michael Mann, might call its ‘infrastructural empowering’ function.<sup>408</sup> In other words, neither parliament nor the parliamentary statute exists except for the command of public law, and it is therefore only through the terms of that command that they are both brought into being (structured) and empowered.

This aspect of competition law is fairly evident in the context of Asian capitalism. Insofar as its state-structuring function is concerned, we see this quite clearly in the names that we have given to various Asian competition regimes, e.g., the ‘developmental state’, the ‘competitive state’.<sup>409</sup> Insofar as its infrastructural empowering function is concerned, we see this

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<sup>405</sup> See generally David J. Gerber, “The Transformation of European Community Competition Law?” 35 *Harv. Int'l L.J.* 97 (1994); cf. Giorgio Monti, *EC Competition Law* 1-18 (Cambridge Univ. Press, 2007).

<sup>406</sup> See TAN *supra*. See also Gerber, *supra* note [Transformation]. Cf. Laraine Laudati, “The European Commission as Regulator: The Uncertain Pursuit of the Competitive Market,” in *Regulating Europe* 229 (Giandomenico Majone, ed., Routledge, 2002).

<sup>407</sup> See Loughlin, *supra* note [Foundations], at 11-12.

<sup>408</sup> See Michael Mann, “The Autonomous Power of the State: Its Origins, Mechanisms and Results,” 42 *Eur. J. Sociology* 185 (1984) (discussing ‘infrastructural power’); Michael Mann, “Infrastructural Power Revisited,” *Studies Comp. Int'l Dev.* 355 (2008). Compare generally Loughlin, *supra* note [Foundations], at 164-171 (discussing what he terms, following Baruch Spinoza, the *potestas* and *potentia* functions of public law).

<sup>409</sup> See TAN *supra*.

in the various state capitalisms that have been a defining feature of Asian capitalism.<sup>410</sup> But as we shall see below, both functions are also in evidence in North Atlantic competition-regulatory regimes.

- Constituting structure

The regulation of competition plays a key role in the construction of both the American and European ‘states’ (i.e., the United States of America and the European Union). As prime example of this is found in the Commerce Clause of the United States Constitution.<sup>411</sup> The Commerce Clause was in part a form of competition regulation: one of its principal intents being to regulate local markets within the new nation state so as to ensure that non-local domestic products were able to compete on equal footing with local products<sup>412</sup> — the alleged prevalence of local protectionism under the pre-constitutional Articles of Confederation being one of the principal concerns behind the creation of the Constitution.<sup>413</sup> But its intent was primarily

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<sup>410</sup> See generally TAN *supra*.

<sup>411</sup> U.S. Const., art. I, sec. 8: “Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.”

<sup>412</sup> See, e.g., Max Farrand, *The Fathers of the Constitution: A Chronicle of the Establishment of the Union* 29-30, 97, 99 (Yale Univ. Press, 1921); *The Federalist No. 6*, at 30-36 (A. Hamilton) (J. Cooke, ed. 1961); *The Federalist No. 7*, at 39-41 (A. Hamilton) (J. Cooke ed. 1961). See generally Albert S. Abel, “The Commerce Clause in the Constitutional Convention and in Contemporary Comment,” 25 *Minn. L. Rev.* 432 (1941); Richard B. Collins, “Economic Union as a Constitutional Value,” 63 *N.Y.U.L. Rev.* 43, 53 (1988).

The principal expression of this concern, albeit one that emerges primarily only after the Constitution was ratified, is the ‘negative’ or ‘dormant’ interpretation of the Commerce Clause. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). See also Collins, *supra*, at 54-55.

<sup>413</sup> See 1 Joseph Story, *Commentaries on the Constitution of the United States* § 259, at 240 (Da Capo Press, 1970) [1833] (“[Under the Articles of Confederation,] each state would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view”). See generally Julian N. Eule, “Laying the Dormant Commerce Clause to Rest,” 91 *Yale L.J.* 425, 430 (1982) (concern over local protectionism “is almost uniformly conceded to be the primary, if not sole, catalyst for the convention of 1787”). But see Edmund Kitch, “Regulation and the American Common Market,” in *Regulation, Federalism and Interstate Commerce* 9, 15-19 (A. Dan Tarlock, ed., Oelgeschlager, Gunn & Hain, 1981) (arguing that during the Articles of Confederation, local protectionism was not so big a problem as the

political rather than economic. As noted by Laurence Tribe, “the function of the [Commerce] clause is to ensure national solidarity, not economic efficiency.”<sup>414</sup> By insuring fair and uniform competition across the American nation, the Commerce Clause forged for the United States a truly *national* economy – one that bound the desperate regions of the country together in common economic interdependence. The framers believed that such a distinctly *national* economic structuring was critical for securing the national unity necessary for the state to develop a political identity.<sup>415</sup>

A similar dynamic can be found in post-War Europe. Here, the catalytic force was the German economic school known as ‘ordoliberalism’,<sup>416</sup> as has been well described by David Gerber in his masterful study tellingly entitled “Constitutionalizing the Economy”:

Classical [economic] liberals had been content to argue that the market, if left to itself, would promote economic growth and thus eventually enhance social welfare, but [ordoliberals] approached the problem from a different methodological starting point, referring back to the social liberals in situating such justice concerns in a broader context.

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founders claimed); Alan Nevins, *The American States During and After the Revolution 1775-1789*, at 602-5 (MacMillin, 1924) (same)

<sup>414</sup> Laurence H. Tribe, *American Constitutional Law* 6-6, at 417 (2d ed. 1988). See also Collins, *supra* note [Economic Union], at 63-64.

<sup>415</sup> See, e.g., See, e.g., James Madison, “Notes on the Confederacy – April 1787,” in 1 James Madison, *Letters and Other Writings of James Madison, Fourth President of the United States* 320, 321 (J. B. Lippincott and Co. 1865):

The practice of many states in restricting the commercial intercourse with other states and putting their productions and manufactures on the same footing with those of foreign nations, though not contrary to the Federal Articles, is certainly adverse to the spirit of the union, and tends to beget retaliating regulations, not less expensive and vexatious to themselves than they are destructive of the general harmony.

<sup>416</sup> See generally David J. Gerber, “Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the ‘New’ Europe,” 42 *Am. J. Comp. L.* 25 (1994). See also David J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* 232-65 (Clarendon Press, 1998).

For them, the economy was the primary means for integrating society around democratic and humane principles.<sup>417</sup>

Under the influence of ordoliberalism, competition law playing a critical role in the construction West Germany's new, post-War, democratic state.<sup>418</sup> The founders of West Germany were greatly concerned about the possibility of a relapse back into authoritarianism. Germany's new, ordoliberal competition law was to prevent this from happening. Many attributed the rise of Nazi authoritarianism in the 1930s to the pre-War German economy's strong reliance on industrial cartels as a means for creating and maintaining economic and social order.<sup>419</sup> These cartels amassed large concentrations of private wealth, and through that considerable political power. It was through the political capture of these cartels that the Nazi party was able to secure its authoritarian dominance of Germany's national political system. By preventing a cartelization, the new competition law was thought critical for ensuring the stability and perpetuation of West Germany new democratic state.<sup>420</sup>

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<sup>417</sup> Gerber, *supra* note [Constitutionalizing], at 37-8.

<sup>418</sup> See Gerber, *supra* note [Prometheus], at 232-65.

(Oxford Univ. Press, 1998); Hannah L. Buxbaum, "German Legal Culture and the Globalization of Competition Law: A Historical Perspective on the Expansion of Private Antitrust Enforcement," 23 *Berkeley J. Int'l L.* 474, 478-80 (2005).

<sup>419</sup> See also John C. Stedman, "The German Decartelization Program — The Law in Repose," 17 *U. Chi. L. Rev.* 441 (1949-1950); Heinrich Kronstein, "The Dynamics of German Cartels and Patents. II," 10 *U. Chi. L. Rev.* 46 (1942) (discussing German cartelization during the Nazi era). Cf. Heinrich Kronstein, "The Dynamics of German Cartels and Patents. I," 9 *U. Chi. L. Rev.* 643 (1942) (discussing German cartelization before the rise of the Nazi party). A similar concern was behind American introduction of an American-style competition law into post-War Japan. See Harry First, "Antitrust in Japan: The Original Intent," 9 *Pac. Rim L. & Pol'y J.* 1, 21-9 (2000); Marlene Mayo, "American Economic Planning for Occupied Japan: The Issue of Zaibatsu Dissolution, 1942-1945," in *The Occupation of Japan: Economic Policy and Reform* 218 (Laurence H. Redford, ed., MacArthur Memorial, 1980); T.A. Bisson, *Zaibatsu Dissolution in Japan* (Greenwood Press, 1976). See generally John Owen Haley, *Antitrust in Germany and Japan: The First Fifty Years, 1947-1998*, at 14-24 (University of Washington Press, 2001).

<sup>420</sup> *Id.* at 36-7.

As shall be discussed further below, ordoliberalism was also a guiding principle in the formulation of the European Union.<sup>421</sup>

- Constituting infrastructural power

Also consistent with the state-constituting character of public law, the competition law regimes of the United States and Europe were not constructed simply or even primarily to promote material welfare, they were constructed to empower the state.

In the United States, this is fairly obvious in the case of the Commerce Clause -- national solidarity being itself a critical source of a state's regulatory capacity.<sup>422</sup> It is also quite evident in the early development of the antitrust regime. During the latter part of the 19<sup>th</sup> century, the rapid emergence in America of industrial capitalism – early Fordism – had plunged the American state into crisis. This new kind of capitalism had allowed massive private accumulations of wealth that many felt the still small national state was powerless to control.<sup>423</sup>

In response, the United States developed new ways of regulating competition within this new capitalism, precisely so it could reassert national regulatory control over the national economy. This involved, first, the invention and empowering of a new organ of national

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<sup>421</sup> See Gerber, *supra* note [Prometheus], at 263-5; Gerber, *supra* note [Constitutionalizing], at 71. See also Tony Prosser, *The Economic Constitution* 8 (Oxford University Press, 2014):

[The] use of the concept of an 'economic constitution' is particularly associated with the German 'ordoliberalism' of the post Second World War period, a movement which was to have considerable influence over the development of competition law in what is now the EU.

See generally *id.* at 8-9

<sup>422</sup> See TAN *supra*.

<sup>423</sup> See Robert Wiebe, *The Search for Order, 1877-1920* at \_\_\_ (Farrar, Straus and Giroux, 1967). See also Leon Fink, "Labor, Liberty, and the Law: Trade Unionism and the Problem of the American Constitutional Order," 74 *J. Am. Hist.* 904, 913-4 (1987).

regulation, our old friend the ‘independent regulatory agency’,<sup>424</sup> which allowed the national state to respond more quickly to and counter more effectively industry efforts to privately structure market competition via cartelization and trusts.<sup>425</sup> Secondly, it involved finding ways of re-empowering the state so that it could reassert national regulatory authority over this new manifestation of private industrial capitalism.<sup>426</sup> Ultimately, it did this, as we have seen, by assigning the surplus value generated by industrial production to the more democratic and more diffuse consumer class rather than allowing it to continue to accumulate in large industrial firms,<sup>427</sup> thus diminishing the ability of these firms to compromise national regulatory autonomy and to transcend national regulatory reach.<sup>428</sup>

On the other side of the Atlantic, the infrastructural-empowering capacities of competition regulation were again on display in the role that such regulation played in the initial formation of what is today the European Union. The European Union emerged, through several stages, out of the European Coal and Steel Community [ECSC], founded in 1951.<sup>429</sup> Similar to the Commerce Clause of the U.S. Constitution, the ECSC was primarily a competition regulation regime, one whose principal intention and effect was to empower a new kind of transnational

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<sup>424</sup> See also TAN *supra*.

<sup>425</sup> See The Interstate Commerce Commission Act of 1887, 24 Stat. 379 (Feb. 4, 1887). See generally Skowronek, *supra* note [Building], at 138-62, 248-84.

<sup>426</sup> See The Clayton Antitrust Act of 1914, 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53, 38 Stat. 730, Pub. L. 63–212 (Oct. 15, 1914); The Federal Trade Commission Act of 1914, 15 U.S.C. § 41, 38 Stat. 717, Pub. L. 113-86 (Sept. 26, 1914).

<sup>427</sup> See Sandel, *supra* note [Democracy’s Discontent], at 211-212. See also *id.* at 231-49.

<sup>428</sup> See Skowronek, *supra* note [Building], at \_\_\_. See, e.g., Walter Lippmann, *Drift and Mastery: An Attempt to Diagnose the Current Unrest* 54-5 (Prentice Hall, 1961) [1914]; cf. Louis D. Brandeis, *Other People’s Money and How the Bankers Use It* (Richard M. Abrams, ed., Harper & Row, 1967) [1915]. But see Michael J. Sandel, *Democracy’s Discontent: America in Search of a Public Philosophy* 231-38 (Belknap Press, 1996) (describing antitrust’s focus on consumerism as more the product of anti-labor sentiment than of anti-firm sentiment).

<sup>429</sup> See Treaty Establishing the European Coal and Steel Community [The Treaty of Paris], 18 April 1951, 261 U.N.T.S. 140 (expired by its terms 23 July 2002). See generally John Gillingham, *Coal, Steel and the Rebirth of Europe, 1945-1955: The Germans and French from Ruhr Conflict to Economic Community* 299-363 (Cambridge Univ. Press, 1991).

political entity<sup>430</sup> that could overcome Europe's long-standing divisive local animosities.<sup>431</sup> As noted in the 'Schuman Declaration' that proposed the establishment of that Community:

Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity. The coming together of the nations of Europe requires the elimination of the age-old opposition of France and Germany. Any action taken must in the first place concern these two countries.

With this aim in view, the French Government . . . proposes that Franco-German production of coal and steel as a whole be placed under a common High Authority, within the framework of an organization open to the participation of the other countries of Europe. The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims. . . .

By pooling basic production and by instituting a new High Authority, whose decisions will bind France, Germany and other member countries; this proposal will lead to the realization of the first concrete foundation of a European federation indispensable to the preservation of peace.<sup>432</sup>

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<sup>430</sup> See, e.g., Stefano Bartolini, *Restructuring Europe: Centre Formation, System Building and Political Structuring Between the Nation-state and the European Union* (Oxford University Press, 2005) (discussing the ongoing evolution of the European Union in terms of 'state formation') (see especially id. at 67-71).

<sup>431</sup> See Gillingham, *supra* note [Coal, Steel], at 97-177.

<sup>432</sup> *Schuman Declaration of 9 May 1950*. See generally Fabrice Larat, "Present-ing the Past: Political Narratives on European History and the Justification of EU Integration," 6 *German Law J.* 764 (2005).

*C. Conclusion: Towards a New Orthodoxy?*

In sum, both the American antitrust regime and European competition law were, no less so than the Asian model, are born out of public law concerns. As these regimes began to take shape, their administering agencies engaged in extensive periods of political balancing and rebalancing against other forms of capitalism. But over time, this public-law character became obscured by the multi-generational stability of Fordism,<sup>433</sup> a stability that alleviated these regulatory regimes' need to revisit the particular capitalist balancings they had ultimately settled upon. Fordism, the regulatory regimes that developed to control it, and particular balances these regimes have struck between Fordism and other kinds of capitalism, have all been around for so long so as to now seem natural. This in turn has given these regimes, and the orthodox model that has been constructed out of them, their seemingly technical (as opposed to political) character.

But Fordism will not be eternal. Many now suspect it is nearing the end of its dominance.<sup>434</sup> As this happens, the innately public law character of competition law – which has always been there – will again be returning to the fore in the North Atlantic, as it already has done in Asia. And as that happens, it is the Asian experience with competition regulation, rather than that of the North Atlantic, that may well provide the foundation, and properly so, for the new orthodoxy.

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<sup>433</sup> See Piore & Sabel, *supra* note [Second Industrial Divide], at 55-65; Chandler, *supra* note [Visible Hand], at 10-11, 212-214.

<sup>434</sup> See Summer & DeLong, *supra* note [New Economy]. See also Braudel, *supra* note [Perspective of the World], at 628-632; Piore & Sabel, *supra* note [Second Industrial Divide], at 184-187, 251-308. See also Robert Boyer & Michel Juillard, "The United States: Goodbye, Fordism!" in *Régulation Theory: The State of the Art* 239 (Robert Boyer & Yves Saillard, eds., Routledge, 1995).

## VII. CONCLUSION: WHY PUBLIC LAW?

*Given the important role economics plays in the field of competition law, being aware of policy questions and designs would help economists not only identify the inevitable tensions with the disciplines of law and politics but also understand the continuing interactions between economics and politics in particular.*<sup>435</sup>

The orthodox model invisibilizes the critical role that politics must play in an effective competition regulation regime. It does this by drawing doctrinal boundaries around what it calls “competition law” that delineate a narrow range of technical matters related to a particular kind of capitalism (that of Fordism) and that conceptually isolate those matters from the rest of the larger competition-regulatory system. By artificially isolating competition law in this way, it creates the illusion that they are unrelated to and independent from other regulatory issues involving other forms of capitalism, and more critically from other regulatory issues involving how the state constitutes itself, as evinced in an oft-quoted passage from Robert Bork’s seminal *The Antitrust Paradox*:

A different line of attack comes from those who observe, quite correctly, that people value things other than consumer welfare, and therefore, quite incorrectly, that antitrust

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<sup>435</sup> See Dabbah, *supra* note [International and Comparative Competition Law ], at 29.

ought not to be confined to advancing that goal. As non sequiturs go, that one is world class.<sup>436</sup>

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

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

The experiences of Asian capitalism, by contrast, does suggest such a model. It is a model that sees competition law as lying in public law rather than simply in economic law or private market regulation. Recognizing that competition law lies in public law rather than in simple market regulatory serves to highlight critical aspects of competition regulation to which

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<sup>436</sup> See Bork, *supra* note [Paradox], at 428. For a critical intellectual history of Bork's singular focus on consumer welfare, see Orbach, *supra* note [How Competition Law].

the orthodox model blinds us. The orthodox model tells us that the shape of competition regulation flows naturally from the essential nature of capitalism; competition law as public law shows us how it is competition regulation that constructs market capitalisms, not the other way around. The orthodox model tells us that market capitalism operates independently from the political state; competition law as public law shows us that market capitalisms ultimately exist to serve the state by providing various forms of public good. The orthodox model tells us that the purpose of competition law is to maximise the benefits of market capitalism; competition law as public law shows us that the purpose of competition law is actually to balance the costs and benefits of various market capitalisms, both against each other, and against the competing aspects of the public and private good.

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

The competition law produced by Asian capitalism does this. It is therefore a *better* model for understanding of how competition law actually contributes to and interacts with both the economy and the society it looks to govern. In short, it is the public law model of Asian capitalism, and not the market-regulatory model of the North Atlantic capitalisms, that should be the foundation for our 'orthodox' understandings of competition law.