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Escaping the Tyranny of False Dichotomies and the New Gilded Age

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Abstract

Economic discourse is filled with dichotomies such as "free trade versus protectionism", "efficient markets versus market failure", "regulation versus deregulation", "moderate versus socialist policies" and so on. These dichotomies are central to the drama of the US/China trade war, Brexit, and the mass media commentaries on rival policy proposals in the current American election season. Quite simply, they make alternative policies invisible. This paper provides a new analytical framework that challenges the rigidity of the above and allied dichotomies. Drawing on the Law and Political Economy (LPE) tradition it argues that global economic integration can be consistent with different institutional foundations of markets. Given its strong empirical basis, this of course is a familiar argument made by many authors especially those in the broad Varieties of Capitalism (VoC) school. However, the current paper rejects the VoC framework, arguing that LPE provides a better framework for understanding varying trade and social policies. It is argued that the notion of "market failure," at the heart of conventional economic analyses, has no basis in reality once it is recognized that all markets rest on different background regimes of property, contract, and tort laws.

Drawing on John R. Commons' discussion of the *going concern* and the insights of the Legal Realists this paper challenges the conventional theory of free trade and domestic policies linked to it. Commons' going concern framework is related to an established heterodox economic analysis of international trade, the nature of property rights, including its constitutional foundations, and money to explore how markets as fundamentally monetary institutions can be legally structured in a wide range of ways. For example, the paper will point to the important role which central banks have played historically in many countries to promote development. Such a policy framework will require a rejection of the conventional view that central banks can and should be independent.

As both Tamara Lothian and Sabeel Rahman propose, this paper also advocates the need for a fundamental restructuring of markets and not their technocratic regulation. However such a market - reconstitution strategy, involving changes in property owners' bundles of rights, will invariably involve a confrontation with existing power relations. Entrenched business interests will not passively absorb such policies given that they challenge the former's prerogatives. Further, the dynamics of international trade competition, including the tension between dominant and sub-dominant firms located in different countries, considerably complicate domestic policymaking especially in indebted countries in the Global South. Thus if by rejecting austerity a "high road" to globalization with improved trade performance and socially inclusive policies can be attained, a crucial question arises: how is the legal and political framework to be created to *reach* the "high road" and be *maintained* along it? It is suggested that the answer to this question lies in the analytical framework provided by the broad LPE tradition.

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1. Introduction

Economic discourse is filled with dichotomies such as "free trade versus protectionism", "efficient markets versus market failure", "regulation versus deregulation", "moderate versus extreme policies" and so on. The power of these dichotomies is that they are central to the drama of the US/China trade war, Brexit, and the mass media commentaries on rival policy proposals in the current American election season. Quite simply, they make alternative policies invisible. The unraveling of domestic social compacts, labor market precarity [1] even under "full employment" and the concomitant growth of the Far Right in the face of the onslaught of globalization [2] requires new theoretical insights on international trade and domestic social policy.

Drawing on an established literature that has provided a critique and alternative to the neoclassical theory of international trade[3] this paper, drawing on the Law and Political Economy (LPE) traditions, will provide a new analytical framework that will challenge the rigidity of the above and allied dichotomies. Given the law's constitutive role in providing the foundation to the economy, it will argue that global economic integration *may* be accomplished via the construction of different institutional foundations of markets. This of course is a familiar argument made by many authors especially those in the broad Varieties of Capitalism (VoC) school.[4] It is also the perspective of a group of neoclassical economists associated with *Economics for Inclusive Prosperity* (EIP).[5] For example, Dani Rodrik and others involved in this project claim: "We believe the tools of mainstream economists not only lend themselves to, but are critical to the development of a policy framework for what we call 'inclusive prosperity'".[6] At the heart of the EIP framework is an old idea in neoclassical economics which asserts that the existence of "market failures" can provide the rationale for "state intervention". So, quite bizarrely after extolling the virtues of the law of comparative advantage, which is the basis of free trade policies, these authors argue

> "The principle of comparative advantage, which lies behind the case for free trade, is one of the profession's crown jewels – both because it explains important aspects of the international economy and because it is, on the face of it, so counter-intuitive.... The typical course in microeconomics spends more time on market failures and how to fix them than on the magic of competitive markets... In fact, the standard competitive equilibrium model in which free markets are maximally efficient (even if still not necessarily socially optimal, in view of distributional concerns) is the dominant framework only in introductory economics courses. *Serious students of economics quickly move away from it*" (ibid. 2-3. Emphasis added)

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[1] GUY STANDING, THE PRECARIAT: A THE NEW DANGEROUS CLASS (2011).

[2] Andrés Rodríguez-Pose, *The Revenge of the Places that Don't Matter (and what to do about it)*, 11 CAMBRIDGE J. REG. ECON. SOC. 189–209 (2018).

[3] Beginning with the seminal paper by Anwar Shaikh: Anwar M Shaikh, *The Laws of International Exchange*, *in* GROWTH, PROFITS AND PROPERTY: ESSAYS IN THE REVIVAL OF POLITICAL ECONOMY 204–235 (Edward J Nell ed., 1980). For subsequent extensions and implications see ANWAR SHAIKH, CAPITALISM: COMPETITION, CONFLICT, CRISES (2016).

[4] Peter A. Hall & David Soskice, *An Introduction to Varieties of Capitalism*, *in* DEBATING VARIETIES OF CAPITALISM: A READER 21–74 (Bob Hancké ed., 2009).

[5] https://econfip.org

[6] https://econfip.org/wp-content/uploads/2019/02/Economics-for-Inclusive-Prosperity.pdf, 1.

Of course this begs the question: why teach something and then blithely ignore it? But the problem lies at a deeper level, which has to do with the notion of "market failure". The purpose of this article is to argue that from the LPE perspective the notion of "market failure" makes no sense. However it does more. By rejecting the perfect versus imperfect markets dichotomy, it builds on the literature that has critiqued Locke's property rights approach[7] to show that global integration *may* be consistent with social democratic policies. It is argued that the varieties of industrial and social policies (VISP) that one observes in reality can be understood in light of the background laws that structure property rights as Legal Realists such as Robert Lee Hale[8] and Wesley Hohfeld[9] and "old" institutional economists like John R. Commons[10] discussed.

Section 2 discusses the Heckscher-Ohlin-Samuelson (HOS) model of international trade, neoclassical debates about free trade versus state intervention, and a critique of the neoclassical framework. In this section it is argued that all markets are complex bundles of politically-enforced laws and that there is no benchmark "free market". Section 3 then draws on some progressive property rights scholars to argue that social democratic policies could be incorporated into the ways in which markets are constructed. This section shows that there is no correlation between trade performance and human development, suggesting that global integration can have different institutional foundations. Finally, this section discusses the significance of distinguishing between dominant and subdominant firms in international trade and how the dynamics of trade competition complicate the ability of countries, especially indebted ones in the Global South, to implement social democratic policies. Section 4 concludes the article.

2. Foreign Trade: Toward An Alternative to Neoclassical Economics

The drama surrounding President Trump's decision to impose import tariffs on steel and aluminum roiled the Republican Party and wide swathes of the corporate elite. The tariff decision came on the heels of political bluster about the US being treated "unfairly" by other countries.[11] This accusation of "unfairness" when it comes to US trade deficits is well worn. In a previous era, Japan was the alleged culprit of "unfair" trade practices because of its persistent trade surpluses with the U.S.

This type of political theater draws on a romanticized view of international trade and its persistent conflict with empirical reality. As an explanation of global trade relations, the Heckscher-

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[7] JEREMY WALDRON, THE RULE OF LAW AND THE MEASURE OF PROPERTY: HAMYLN LECTURES (2012); A.J. VAN DER WALT, PROPERTY IN THE MARGINS (2009); LAURA UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER (2003).

[8] Robert L Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POLIT. SCI. Q. 470–494 (1923); ROBERT L. HALE, FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER (1952).

[9] Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Legal Reasoning*, 23 YALE LAW J. 16–59 (1913).

[10] JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM (1924); Luca Fiorito & Massimiliano Vatiero, *Beyond Legal relations: Wesley Newcomb Hohfeld's Influence on American Institutionalism*, 45 J. ECON. ISSUES 199–222 (2011).

[11] https://www.nytimes.com/2018/03/07/business/trump-tariffs-eu-trade.html.

Ohlin-Samuelson (HOS) model of foreign trade relies on both of the standard neoclassical assumptions about “efficient” markets. First, it assumes perfectly competitive markets, composed of many, small firms, each without any ability to set prices. Second, it assumes that there are zero externalities to economic transactions, meaning that transactions do not have any un-priced, third-party effects. Third, the model assumes the economy is fundamentally based on barter,[12] according no roles for money, credit, and effective demand. The absence of money implies that there is no possibility of an increase in liquidity preference (a term coined by Keynes to describe the increase in idle private money holdings) in uncertain times and thus shortfalls of effective demand.[13]

Together, these propositions of the HOS model predict that a legal framework ensuring “free trade” will produce balanced trading relationships on the international level and full employment in each domestic economy. Significantly, assuming that there is perfect competition implies that firms in each country, regardless of its level of industrialization, has access to the same technology needed to produce goods for the international market.

Finally, in the HOS free trade under both fixed and flexible exchange rate regimes produces balanced trade. Consider trade between the US and China when the latter “opened up” to international trade in the early 1980s. At the time Chinese firms were at a huge international competitive disadvantage compared to American ones. With free trade, the immediate impact would be for China to experience a trade deficit and the US a trade surplus.[14] However, in the neoclassical perspective, the variations of domestic prices relative to international ones (in a common currency) will bring about the automatic elimination of these trade disequilibria.

The real exchange rate (which is just the ratio of domestic and international prices in a common currency unit, i.e. it is the nominal exchange rate x domestic prices/foreign price) has to adjust by the “correct” amount to bring about balanced trade. With perfectly flexible prices prevailing under perfect competition the above result translates into a familiar general equilibrium outcome, i.e. the foreign trade markets clear with price flexibility.

Let us consider international and domestic prices in the same currency unit, say US$. When China runs a trade deficit, by definition its money demand for imported goods/services will exceed foreign money demand for its exported goods/services. Consequently, with a trade deficit the prices of imported goods/services will rise in China while the prices of its goods/services exported to the US will fall. Now, for China’s trade deficit to be eliminated a given percentage decrease in the international price of exported goods/services has to be accompanied by a larger (in absolute terms) percentage

[12] William Milberg, *Say’s Law in the Open Economy: Keynes’s Rejection of the Theory of Comparative Advantage*, Two *in* KEYNES, UNCERTAINTY AND THE GLOBAL ECONOMY: BEYOND KEYNES 239–253 (Sheila C Dow & John Hillard eds., 2002).

[13] John Maynard Keynes, *The General Theory of Employment*, 51 Q. J. ECON. 209–223 (1937).

[14] This is a hypothetical example. In fact, US/China bilateral trade in goods in the 1980s involved small deficits for the US at least in part due to China’s much lower wage costs. Of course this deficit mushroomed over the next three decades as China industrialized rapidly. See https://www.census.gov/foreign-trade/balance/c5700.html.

increase in the quantity demanded for the overall money value of exports to rise. On the other hand, say the international prices of Chinese exports declined by 10%. Now if its output demand by foreigners rises only by 5% (because of the quality of the domestic product relative to competing ones overseas) then China will have experienced a decline in the money value of its exports[15] and its trade deficit will have worsened. In the same vein, if the country is very import-dependent (as all poor countries are as well as a number of wealthy ones such as the US and UK), rising prices of imports will not necessarily depress the quantity of goods/services imported; thus the money value of imports may not fall at all or could even rise if there is growing domestic demand for imports. In short, in the general case there is no theoretical reason why exchange rate appreciation or depreciation will eliminate trade imbalances.

On the other hand, in the neoclassical framework, if one sees persistent trade imbalances then that is evidence of extra-market interference in market mechanism, for example "currency manipulation", "cheating" or "unfair subsidies". Hence the vitriol poured on China.

Of course the "cheating" accusation rests on flimsy foundations. For one thing, none of the above assumptions of the HOS or the conclusions which follow are consistent with empirical reality. This does not appear to trouble neoclassical economists, who persist in upholding the HOS trade model as a benchmark in policy discourse. For example, this trading regime is clearly not producing full employment: The International Labour Organization reports that unemployment in 2015 was around 197.1 million and estimates that unemployment will be close to 200 million by 2017.[16] Further, trade imbalances tend to be persistent. Figure 1 below plots the trade balance/GDP ratios (in percentages) for a number of countries.

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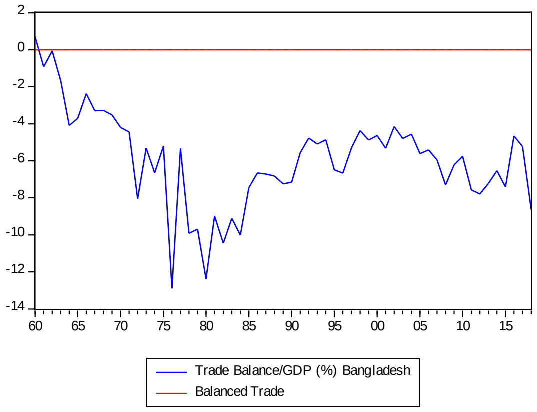
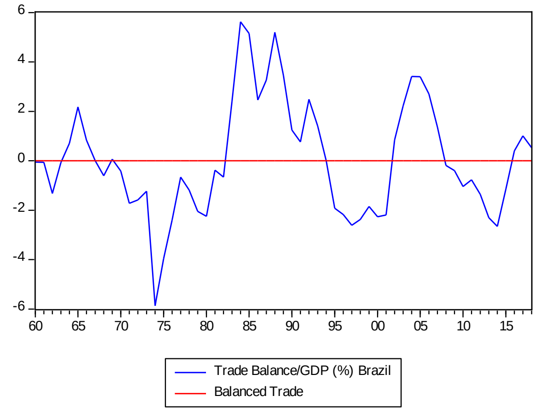
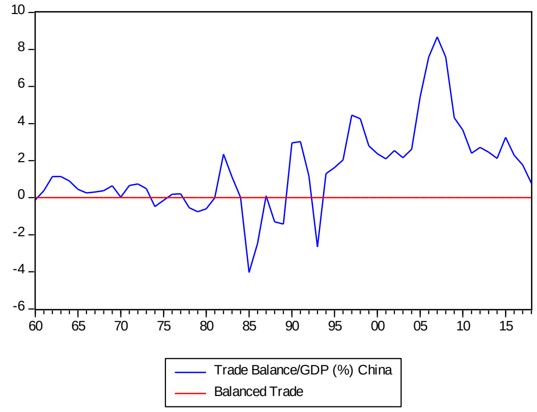
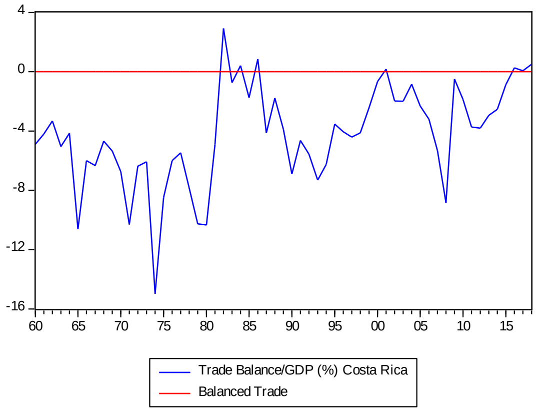
[15] Anwar M Shaikh, *The Economic Mythology of Neoliberalism*, *in* NEOLIBERALISM: A CRITICAL READER 41–49 (Alfredo Saad-Filho & Deborah Johnston eds., 2005).

[16] http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_443500/lang--en/index.htm.


Trade Balance/GDP (%) Bangladesh
Balanced Trade


Trade Balance/GDP (%) Brazil
Balanced Trade


Trade Balance/GDP (%) China
Balanced Trade


Trade Balance/GDP (%) Costa Rica
Balanced Trade

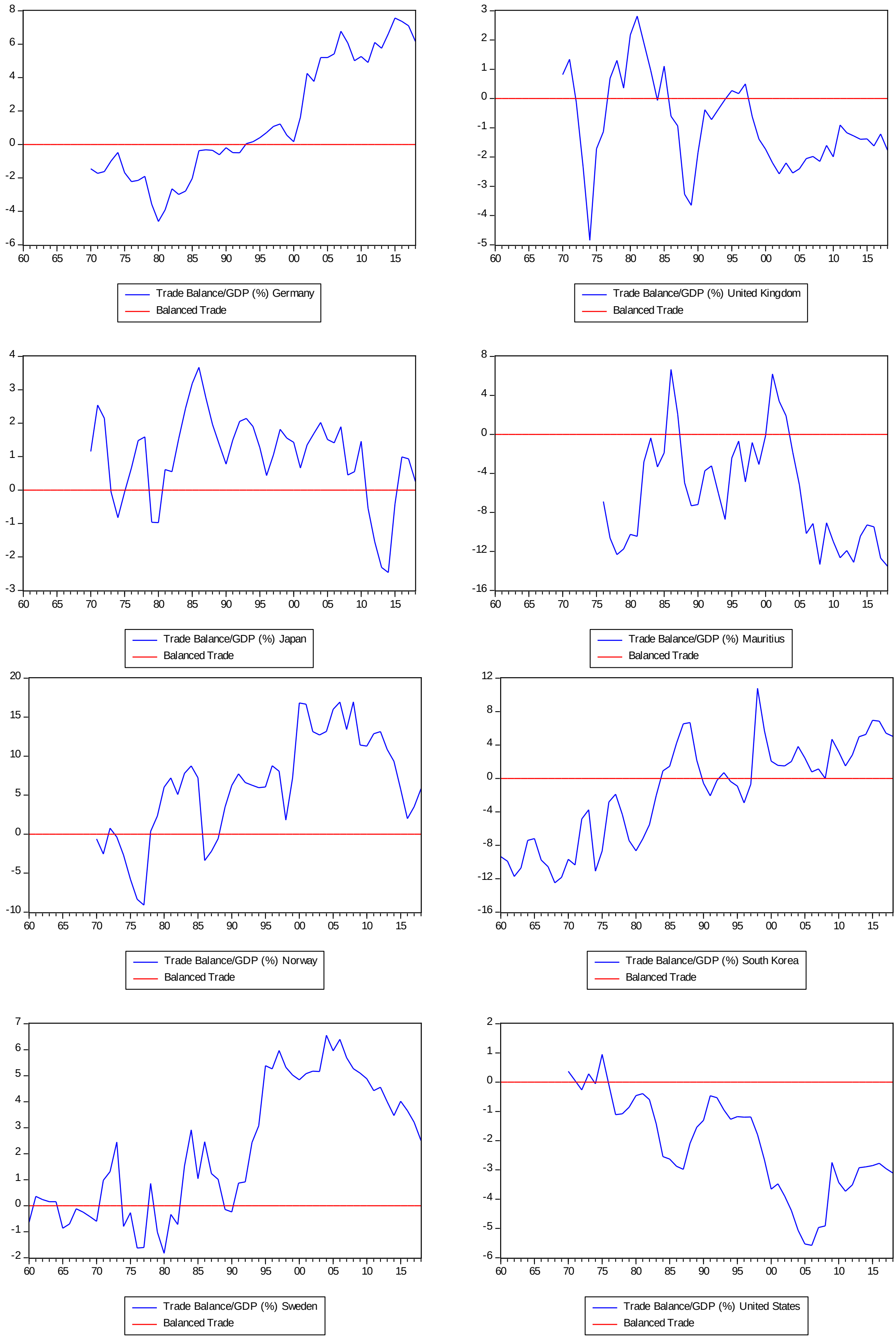


Figure 1: Trade Balance/GDP (%) Relative to Balanced Trade
Source: World Development Indicators, The World Bank[17]

[17] Downloaded December 31 2019.

With the red line as the benchmark balanced trade, the chart shows persistent long-run trade imbalances. In other words there is no evidence of convergence to balanced trade. The charts also show that both trade deficits (Costa Rica, Mauritius, and Great Britain) and trade surpluses (Germany, Norway, and Sweden) can be consistent with welfare states. Thus global integration does not necessarily have to entail a "race to the bottom".[18] This is an issue which is discussed below.

In order to understand the critique presented here,[19] we must first discuss what a country's balance of payments is. The balance of payments is an accounting of the net monetary inflows (or outflows) from a country: [(exports - imports) + net debt service payments] + [net foreign direct investment + net short-term capital flows such as loans] + changes in the cash reserve account. The first term in the brackets is the *current account*, the second is the *capital account*, and the third term accounts for changes in foreign exchange reserves because of net monetary flows in the current and capital accounts. The cash reserve account in effect acts as a residual item in an accounting sense and is the harbinger of what is known as "balance of payments crises" when a country's stock of foreign exchange reserves becomes too low.

To understand the significance of the balance of payments we must first turn to Sir Roy Harrod theory of international trade in which he related exports (and output, more broadly) to firms' new investment plans where the latter are determined by expected future profitability relative to the current rate of interest on bank borrowing to finance the investment.[20] In short, Harrod's point was that a country's export performance is a function of investment that is in turn determined by profitability. The latter relationship, central to Marx, Veblen, and Commons, is what Keynes called the marginal efficiency of capital (MEC).[21] All these authors, in particular Keynes, related investment to the expectation of profits so that past or current profits were not automatically assumed to be invested, i.e. savings do not determine investment contrary to neoclassical economics.[22] The implication is that the implementation of austerity to promote exports, a staple of IMF policies, will backfire since tax cuts to promote savings will not automatically raise investments. Further free trade, by suddenly exposing domestic firms to dominant internationally competitive firms, will lower the former's profit expectations and thus profits.

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[18] William Milberg & Ellen Houston, *The High Road and the Low Road to International Competitiveness*, *in* GLOBALIZATION AND SOCIAL POLICY (Lance Taylor ed., 2002).

[19] This critique draws on the insights of Marx, Keynes, and Harrod. See Anwar M Shaikh, *The Laws of International Exchange*, *in* GROWTH, PROFITS AND PROPERTY: ESSAYS IN THE REVIVAL OF POLITICAL ECONOMY 204–235 (Edward J Nell ed., 1980); ANWAR SHAIKH, CAPITALISM: COMPETITION, CONFLICT, CRISES (2016); Milberg, *supra* note 12; ROY F HARROD, INTERNATIONAL ECONOMICS (1933).

[20] HARROD, *supra* note 19 at 121.

[21] SHAIKH, *supra* note 19; WALLACE C PETERSON & PAUL S ESTENSON, Eighth INCOME, EMPLOYMENT, ECONOMIC GROWTH 262–266 (1996); Jonathan Levy, *Capital as Process and the History of Capitalism*, 91 BUS. HIST. REV. 483–510 (2017); JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY (1953).

[22] Lefteris Tsoulfidis, *Keynes on the Marginal Efficiency of Capital and the Great Depression*, 16 HIST. ECON. IDEAS 65–78 (2008).

In a classic article Anwar Shaikh[23] argued that one would expect to see persistent trade imbalances since, like all prices, real exchange rates are a function of relative unit costs of production which vary across contexts.[24] Following the LPE view unit costs of production are a function of the background rules of property, contracts, and torts[25]. For example these laws provide the context to conflict over wage bargains and labor effort which, given the technology, determine unit labor costs.[26] They also determine the wide range of direct and indirect subsidies provided by governments to domestic firms. In addition to monetary subsidies, the law facilitates legal subsidies e.g. by providing immunities to employers from torts committed by investments.[27] Capital accumulation determines technological change and is centrally shaped by public policies[28] which, jointly with labor relations, are functions of politics and the law. In short the private economy is anchored on a public foundation and politics acting through the law determine the nature of the economy. There is no baseline economy free of government involvement as Daniel Tarullo argued.[29] It is therefore not surprising that successful global integration has been consistent with a wide range of policy frameworks, e.g. with more (China and South Korea) or less (Japan and Germany) reliance on state-owned enterprises.

International trade adds an additional layer to the analysis of capital accumulation. One can understand this in light of the dynamics of the balance of payments and insights from Marx, Keynes, and Harrod.[30] If a country runs a trade surplus it will experience a net inflow of foreign exchange that will increase its foreign exchange reserves, in particular in the banking sector. The increased liquidity of the latter will drive down domestic interest rates. Conversely, in trade deficit countries, the outflow of foreign exchange will lower bank reserves and raise interest rates. In the latter case, the higher interest rates would be necessary to attract short-term international capital to finance the trade deficit given the falling foreign exchange reserves.

For the trade surplus country the profitability of domestic firms will get a boost from higher global demand and lower domestic interest rates on bank loans. These two factors will jointly raise the MEC and thus investment in new plant and equipment which will further boost their international

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[23] Shaikh, *supra* note 19.

[24] Anwar M Shaikh & Rania Antonopoulos, *Explaining Long-Run Exchange Rate Behavior in the United States and Japan*, *in* ALTERNATIVE THEORIES OF COMPETITION: CHALLENGES TO THE ORTHODOXY (Jamee K Moudud ed., 2012).

[25] Jamee K. Moudud, *Distributional Struggles Always Operate Under the Background Laws That Determine Property, Contracts, and Torts*, XXXVII LAW INEQUAL. A J. THEORY PRACT. (2019).

[26] SAMUEL BOWLES, RICHARD EDWARDS & FRANK ROOSEVELT, UNDERSTANDING CAPITALISM: COMPETITION, COMMAND, AND CHANGE (2005).

[27] MORTON J HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 99–101 (1977). Horwitz argues that in the American context legal subsidies were crucial public levers to promote capital accumulation.

[28] HA-JOON CHANG, KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE (2002); MARIANA MAZZUCATO, THE ENTREPRENEURIAL STATE: DEBUNKING PUBLIC VERSUS PRIVATE MYTHS (2015).

[29] Daniel K . Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. LAW REV. 546–628 (1987).

[30] Shaikh, *supra* note 19; SHAIKH, *supra* note 19; Milberg, *supra* note 12; HARROD, *supra* note 19.

competitiveness.[31] Conversely, in trade deficit countries the opposite dynamic (low profitability because of lower global demand and higher domestic interest rates on bank loans) will depress investment and thus international competitiveness. There is no automatic market mechanism that will bring about balanced trade; trade imbalances will be persistent reflecting different degrees of international competitiveness and differential domestic rates of capital accumulation. The degree of "perfection" of markets has no relevance although that is a central issue in the debates regarding foreign trade and policy in the neoclassical tradition.[32]

It is uncontroversial outside the circles of conventional defenders of global *laissez faire* to argue that global integration can be consistent with a wide range of industrial and social policies. This is a point made by heterodox economists[33]. However, the same argument is made by the Varieties of Capitalism (VoC) school, pioneered by Peter Hall and David Soskice[34], as well as some neoclassical economists such as Dani Rodrik associated with the *Economists for Inclusive Prosperity* (EIP) project. Both the VoC and EIP approaches assume the baseline neoclassical model of perfect markets and then deviations from it.[35]

On the other hand, if one rejects the "perfect markets" versus "market failure" dichotomy and neoclassical economics *in toto* it is important to develop a theoretical understanding of the varieties of industrial and social policies (VISP) that have characterized different types of global integration. The insights of the LPE tradition regarding property are central to this issue.

3. **Why Law? Toward a Theoretical Understanding of VISP**

To motivate the argument that the legal-institutional foundations of an economy are central for different VISPs consider Table 1 which lists the Human Development Index (HDI) value and ranking (in 2019) of each country in Figure 1. The HDI is a composite indicator that combines life expectancy at birth, mean and expected years of schooling, and gross national income per capita. Various refined versions of the HDI exist which are adjusted for income inequality, gender etc. A higher HDI value indicates better human development.

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[31] HARROD, *supra* note 19, p. 140.

[32] James A Brander, *Rationales for Strategic Trade and Industrial Policy*, *in* STRATEGIC TRADE POLICY AND THE NEW INTERNATIONAL ECONOMICS 23–46 (Paul R Krugman ed., 1986); Paul Krugman, *Is Free Trade Passé?*, 1 J. ECON. PERSPECT. 131–144 (1987); Paul R Krugman, *Making Sense of the Competitiveness Debate*, 12 OXFORD REV. ECON. POLICY 17–25 (1996); Jagdish Bhagwati, *Free Trade: Why AFL-CIO, the Sierra Club, and Congressman Gephardt Should Like it*, 43 AM. ECON. 3–12 (1999).

[33] Shaikh, *supra* note 15; William Milberg & Ellen Houston, *The High Road and the Low Road to International Competitiveness: Extending the Neo-Schumpeterian Trade Model Beyond Technology*, 19 INT. REV. APPL. ECON. 137–162 (2005); WILLIAM MILBERG & DEBORAH WINKLER, OUTSOURCING ECONOMICS: GLOBAL VALUE CHAINS IN CAPITALIST DEVELOPMENT (2013).

[34] Hall and Soskice, *supra* note 4.

[35] On the neoclassical foundations of the VoC see Colin Crouch, *Typologies of Capitalism*, *in* DEBATING VARIETIES OF CAPITALISM: A READER 75–94 (Bob Hancké ed., 2009)..

	Bangla-Desh	Brazil	China	Costa Rica	Germany	Japan	Mauritius	Norway	South Korea	Sweden	UK	Sweden	US
HDI Value in 2014 (Rank)	0.570 (142***)	0.755 (75**)	0.727 (90**)	0.766 (69**)	0.916 (6*)	0.891 (20*)	0.777 (63**)	0.944 (1*)	0.898 (17*)	0.907 (14*)	0.907 (14*)	0.907 (14*)	0.915 (8*)
HDI Value in 2019 (Rank)	0.614 (135***)	0.761 (79**)	0.758 (85**)	0.794 (68**)	0.939 (4*)	0.915 (19*)	0.796 (66**)	0.954 (1*)	0.906 (22*)	0.937 (8*)	0.920 (15*)	0.937 (8*)	0.920 (15*)

Table 1: Human Development Indices and Rankings
*Very high human development
**High human development
***Medium human development

Source: UNDP Human Development Report 2019 (http://hdr.undp.org/en/data) and author's calculations. 2014 data from UNDP Human Development Report 2014.

In comparing Figure 1 with Table 1 the following features stand out:

- Bangladesh, Costa Rica, and Mauritius all have experienced persistent trade deficits, however the last two countries have much higher HDI values and ranks and in fact are categorized as social democratic developmental states[36]
- China's export performance is much superior to Brazil's although the latter has a small edge in terms of HDI value and rank
- China, Japan, and South Korea have experienced rapid export-led industrialization although Japan and South Korea rank significantly higher in terms of their HDI values and ranks
- With persistent trade deficits, the UK's export performance has not been impressive compared to Sweden's (persistent trade surpluses) although they both had identical HDI values and ranks in 2014, with Sweden racing ahead in 2019
- Despite having similar social democratic traditions and impressive trade performances, Norway does somewhat better than Sweden in terms of HDI values and ranks
- The US and Germany had identical HDI values and almost identical ranks in 2014, with the latter racing ahead in 2019. However their trade performances are radically opposite to each other; the US's trade deficits have been growing and Germany's trade surpluses have been growing of the past two decades. Virtually the same comparison holds true for the US and Sweden.

Simply put, taken together Figure 1 and Table 1 allow us to conclude that persistent trade deficits do not *necessarily* imply low or falling HDI values and high HDI's can be consistent with trade surpluses. Global integration can, within limits, be consistent with wide variations in domestic social and labor policies and thus HDI. Beyond technological change which is at the heart of export-oriented growth and is state-promoted[37] we need to understand more broadly the political and legal foundations of VISPs.

[36] RICHARD SANDBROOK ET AL., SOCIAL DEMOCRACY IN THE GLOBAL PERIPHERY: ORIGINS, CHALLENGES, PROSPECTS (2007).
[37] ALICE AMSDEN, ASIA'S NEXT GIANT: SOUTH KOREA AND LATE INDUSTRIALIZATION (1989); CHANG, *supra* note 28; FRED L BLOCK & MATTHEW R KELLER, STATE OF INNOVATION: THE US GOVERNMENT'S ROLE IN TECHNOLOGY DEVELOPMENT (2011); MARIANA MAZZUCATO, THE ENTREPRENEURIAL STATE: DEBUNKING PUBLIC VS. PRIVATE SECTOR MYTHS (2015).

Institutional variation as the cause of different development trajectories is also central to the Law and Development (L&D) literature, inspired by New Institutional Economics tradition of Douglass North and others.[38] With its twin poles of "government failure" versus "market failure", this literature following Hayek[39] takes the position that because of the necessity of the rule of law to make markets more efficient countries may or may not experience rapid industrial and social development.[40] Anchored in the conventional public versus private divide the L&D literature advocates the need for well-defined private property rights to promote markets that are conceptualized as pre-political.[41]

As inspired by the Legal Realists and central to the emergent Law and Political Economy (LPE) tradition[42] the core premise of the current paper is that property rights, and markets more generally, are fundamentally the outcomes of legal and political arrangements themselves rooted in prior historical processes that have created particular economic, political, and ideological contexts as well as power relations. It will be argued that because of its embeddedness in a social and political context, private property is fundamentally *relatively malleable*. Thus it is non-controversial that the management of the corporation as a legal entity has to be given adequate autonomy to determine investment plans and pricing strategies. However, its investment and pricing decisions always happen in deeper governance contexts that determine its bundle of rights, including of course the nature of its charter. And through the coding of assets and contracts the law is central to the expectation of future earnings.[43] Akin to different breeds of a given animal species, the nature of legal systems, which are constitutive of all production and exchange activities in capitalism, can vary enormously across time and national context among countries at similar levels of development.[44] Change, rather than stasis, is built into the nature of legal systems[45] and results from varying economic and political circumstances and pressures.

On the other hand, the Law and Economics (or L&D) tradition adopts the Lockean view in which private property is pre-political since it is created by individual effort.[46] The Constitution, according to this view, should ensure that government generally pursues a "hands off" policy thus

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[38] John K.M. Ohnesorge, *Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience*, 28 UNIV. PENNSYLVANIA J. INT. ECON. LAW 219–308 (2008).

[39] QUINN SLOBODIAN, GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM (2018).

[40] In regards social development and the L&D see Kerry Rittich, *The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 203–252 (David M. Trubek & Alvaro Santos eds., 2006).

[41] Katharina Pistor, *Rethinking the " Law and Finance " Paradigm*, BRIGH. YOUNG UNIV. LAW REV. 1647–1670, 1652 (2009).

[42] See https://lpeblog.org/2017/11/06/law-and-political-economy-toward-a-manifesto/.

[43] KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY (2019). See also Julia Dehm's article "Law and the 'Value' of Future Expectations: Climate Change, Stranded Assets and Capitalist Dynamics" in the *Verfassungsblog* https://verfassungsblog.de/law-and-the-value-of-future-expectations-climate-change-stranded-assets-and-capitalist-dynamics/, March 6 2020.

[44] CURTIS J. MILHAUPT & KATHARINA PISTOR, LAW AND CAPITALISM (2008).

[45] *Id.*

[46] JOSEPH WILLIAM SINGER, NO FREEDOM WITHOUT REGULATION: THE HIDDEN LESSON OF THE SUBPRIME CRISIS (2015).

guaranteeing negative rights to property owners.[47] This view is in line with Hayek[48] and is also foundational to the neoclassical one. That is, unless warranted by special circumstances, political authority should abstain from interfering in the private realm by rearranging property rights or changing their distribution. However, as Laura Underkuffler argues,[49] conventional Law and Economics scholarship does not deny the need for state intervention in property rights when social needs are urgent. Oftentimes though such actions have entailed a taking per the Fifth Amendment of the Constitution and the deployment of the state's eminent domain prerogative was accompanied by appropriate compensation to the property owner who was affected.[50] As she also argues, a piece of property may have built into it at its purchase a set of strictures regarding its use (e.g. in line with nuisance laws), thereby encoding public claims on the property. However, in the conventional view once it is purchased property establishes a quasi-permanent zone of autonomy for the owner and its properties may not be changed unless urgent social or environmental needs dictate it thereby triggering the strictures of the Takings Clause.[51] Also, in certain extreme situations (e.g. dangers to public health) political authority may use its police powers to alter property rights with no compensation.[52] And of course one should add here that the rationale for state intervention can be justified in the event of "market failures". This is the central point made by neoclassical economists associated with the *Economics for Inclusive Prosperity* project.[53]

Without getting into Underkuffler's discussion on when a type of state intervention in private property is considered a taking and when it is not, it suffices to say here that property rights and values are always a function of the governance context (which of course includes the economy) and vary with changes in that context, e.g. town planning which requires new zoning laws or environmental laws that affect property values[54], labor rights or fiscal and trade policies. And law is central to governance. Thus the very notions of "takings" and "state intervention" are problematic because they assume a prior privately-created set of property rights.

Consider taxation which raises two issues. First, the libertarian view holds that taxes constitute an unwarranted interference by the government in the private sphere. From a neoclassical standpoint the free market distributes income in line with each factor of production's marginal productivity (a conclusion that hinges on perfect competition), thereby reinforcing the notion that each person lives by the fruits of their labor which can only be guaranteed by *laissez faire*. It follows therefore that any

[47] UNDERKUFFLER, *supra* note 7 at 138.

[48] FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY (1982).

[49] UNDERKUFFLER, *supra* note 7.

[50] *Id.* at 53, 87.

[51] *Id.* at 38–42.

[52] *Id.* at 45–46.

[53] https://econfip.org/

[54] UNDERKUFFLER, *supra* note 7.

redistribution of income from this baseline private outcome is a violation of "market efficiency," and is unjust and a violation of property rights.

The famous Capital Controversy, spearheaded by Joan Robinson and Piero Sraffa, demolished marginal productivity theory[55] opening the way to the view that income distribution and wealth accumulation have political foundations, in that the background laws which are politically-enforced provide the contexts to distributional struggles.[56] This of course brings us straight to the path breaking work of Hale, Hohfeld, and the broad Legal Realist tradition.[57] From this framework it follows that if all property has a public foundation then there is no baseline distribution of income and wealth which is pre-political.[58] For example if taxes are earmarked to fund a road construction project in a town then the former will indirectly influence property values especially near the road. Thus, given also the presence of zoning laws, the town government will not enter the scene for the first time when it taxes that property. In short there is no pre-political distribution of income and wealth given the wide range of laws that undergird property. This is precisely why one sees such variations in the distributions of income and wealth[59] and of tax systems[60] across countries and historical periods. Taxes are central to governance[61] and reflect political and economic priorities which cannot be reduced to some "market efficiency". After all, it is unclear what notion of "market efficiency" can be used to explain the fact that the 400 wealthiest Americans in 2018 paid lower tax rates compared to other income groups, a figure that was dramatically different in 1950.[62]

Second, consider the quintessential neoliberal pursuit of balanced budgets or, at the very least, political restraints on the growth of budget deficits. Under such conditions, by being linked to taxation revenue public spending automatically impinges on property rights via the taxes which are levied. Spending may be tied to regressive taxes, as in American state and local budgets[63] or Latin American countries,[64] or progressive ones with the extent of either type of taxes varying over time because of

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[55] See Jamee K. Moudud "Libertarian Doublespeak: Obscuring Distributional Struggles Under the Banner of "Economic Liberty", https://lpeblog.org/2018/04/23/libertarian-doublespeak-obscuring-distributional-struggles-under-the-banner-of-economic-liberty/.

[56] Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, XV LEG. STUD. FORUM 327–366 (1991).

[57] Warren J. Samuels, *The Economy as a System of Power and its Legal Bases: The Legal Economics of Robert Lee Hale*, 27 U. MIAMI L. REV. 261 (1972).

[58] See LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE (2002).

[59] See World Inequality Database (https://wid.world/), THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (2014); EMMANUEL SAEZ & GABRIEL ZUCMAN, THE TRIUMPH OF INJUSTICE: HOW THE RICH DODGE TAXES AND HOW TO MAKE THEM PAY (2019).

[60] John L Campbell, *Fiscal Sociology in an Age of Globalization: Comparing Tax Regimes in Advanced Capitalist Countries*, *in* THE ECONOMIC SOCIOLOGY OF CAPITALISM 319–418 (Victor Nee & Richard Swedberg eds., 2005); SAEZ AND ZUCMAN, *supra* note 59.

[61] CHRISTINE DESAN, MAKING MONEY: COIN, CURRENCY, AND COMING OF CAPITALISM (2014).

[62] See https://www.taxjusticenow.org/#/.

[63] See https://itep.org/whopays/ and MEG WIEHE ET AL., WHO PAYS? A DISTRIBUTIONAL ANALYSIS OF TAX SYSTEMS IN ALL 50 STATES (2018).

[64] Enrique Delamonica, Jamee K. Moudud & Esteban Pérez Caldentey, *Power and Politics: Taxation, Social, and Labour Market Policies in Argentina and Chile, 1990-2010*, *in* THE POLITICS OF DOMESTIC RESOURCE MOBILIZATION FOR SOCIAL DEVELOPMENT (Katja Hujo ed., 2020).

changing economic and political pressures.[65] And of course the spending will directly affect property rights and power relations. For example direct and indirect subsidies to stimulate exports will promote export-oriented industries. If such policies stimulate economic activity such as jobs and export earnings they increase the structural and possibly instrumental power[66] of firms in export sectors and those that provide its inputs such as banks. On the other hand, in line with Robert Hale,[67] an expansion of the social safety net and/or public job creation programs (such as a Green New Deal) would increase workers' coercive power vis-à-vis employers since such initiatives would constitute non-market sources of income.[68] To summarize the above discussion fiscal policy, a central element of governance, will determine property rights and thus the distribution of income and wealth.

Finally, since the development of the welfare state is intimately connected to labor rights, as both determine the distribution of coercive powers within the economy, one can also use the history and nature of labor struggles[69] to understand how business property rights have political foundations. For example, one can take as an example industrial and labor relations in modern German history which, at least until the 1980s, gave German workers enormous leverage in terms of their ability to participate in management decisions especially of large export-oriented firms.[70] In short once the ubiquity of trade and industrial policies that all governments have pursued with varying degrees of success[71] are factored in, then one can see that industrial and labor relations, the welfare state, and trade and industrial policies are all different aspects of governance and thereby determine the structure of property rights. And of course these policies change over time, suggesting that property has at its foundation the governance needs of the society.

The varieties of industrial and social policies that exist in reality do so because the background property, contract, and tort laws that create the economy can be structured in a broad range of ways producing more or less socially egalitarian outcomes. This range of variations has nothing to do with some markets being more "liberal" or "coordinated" as the Varieties of Capitalism framework asserts, since in the LPE framework *all* markets are regulated[72] or coordinated in different ways with the legal framework distributing coercive powers in different ways. In short, markets cannot be divorced from

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[65] SAEZ AND ZUCMAN, *supra* note 59.

[66] Jacob S Hacker & Paul Pierson, *Business Power and Social Policy: Employers and the Formation of the American Welfare State*, 30 POLIT. SOC. 277–325 (2002).

[67] Hale, *supra* note 8; HALE, *supra* note 8.

[68] On Hale's discussion of the relationship between public job creation and workers' bargaining power see Robert L Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUMBIA LAW REV. 603–628 (1943).

[69] Karl E. Klare, *Critical Theory and Labor Relations Law*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 539–568 (David Kairys ed., 1998); AMERICAN LABOR STRUGGLES AND LAW HISTORIES, (Kenneth Casebeer ed., 2011).

[70] RUTH DUKES, THE LABOUR CONSTITUTION: THE ENDURING IDEA OF LABOUR LAW (2014); STEPHEN SILVIA, HOLDING THE SHOP TOGETHER: GERMAN INDUSTRIAL RELATIONS IN THE POSTWAR ERA (2013).

[71] CHANG, *supra* note 28; JOE STUDWELL, HOW ASIA WORKS (2014).

[72] SINGER, *supra* note 46. For a critical discussion of the VoC approach's implicit reliance on neoclassical economics see Crouch, *supra* note 35 at 77.

the legal/regulatory infrastructure; there is no pure private sphere separate from the public one.[73] Of course, whether the broader regulatory framework promotes business confidence or social justice or both depends on its components. There is no "optimal" legal framework that in a functionalist sense has to reflect the "needs of an efficient economy"; the law is indeterminate at its most fundamental level quite simply because of the large combinations of regulations that can promote a given economic and social outcome.[74]

Now of course the indeterminacy criterion, emphasized by the LPE tradition, should not allow one to conclude that *any* combination of laws can undergird private property. As Hale argued the coercive power that capitalists exercise is their ability to withhold investment if the rewards are not adequate.[75] As he put it, "A union may have power, for instance, to force an immediate advance in wages; yet if the wages are pushed beyond a certain limit, the impairment of the incentive of the capitalists may before very long react unfavorably on the laborers themselves."[76]

The question is how does one know what the "limits" are to counter-capitalist policies given that generally they lower expected profits? At one level, it is not immediately obvious what the limits are given that successful counter-capitalist policies have oftentimes been put in place in different circumstances. For example the various Factory Acts in England occurred in both boom and slump periods. The first one in the 1830s occurred in a slump and a number of them were enacted during the Great Depression of 1873-1896.[77] The plethora of legislations during the New Deal, not to mention the massive jump in top marginal tax rates and estate taxes after 1932[78] and major environmental and consumer rights legislations and OSHA in the 1970s and 1980s were put in place despite massive capitalist opposition in periods of economic distress.[79]

Howard Botwinick's book *Persistent Inequalities* [80] is a very useful point of departure for the above question. Basing his argument on the classical theory of business competition which rejects the perfect versus imperfect competition dichotomy[81] Botwinick argues that ongoing competition involves a continuous process of technological change, leading to a dispersal of firms of different at varying levels of technological development and productivity. Both because of economies of scale and more capital-

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[73] Tarullo, *supra* note 29.
[74] Robert W Gordon, *Critical Legal Histories*, FAC. SCHOLARSH. SER. PAP. 1368 57–125 (1984).
[75] Hale, *supra* note 8.
[76] Robert L. Hale, *Current Political and Economic Review*, 9 AM. BAR ASSOC. J. 179–180, 179 (1923).
[77] See RICHARD TAMES, THE UK: ECONOMY AND SOCIETY IN 19TH CENTURY BRITAIN. For the years of the various Acts see https://www.parliament.uk/about/living-heritage/transformingsociety/livinglearning/19thcentury/overview/laterfactoryleg/.

[78] SAEZ AND ZUCMAN, *supra* note 59 at 35.
[79] KIM PHILLIPS-FEIN, INVISIBLE HANDS: THE BUSINESSMEN'S CRUSADE AGAINST THE NEW DEAL (2009).
[80] HOWARD BOTWINICK, PERSISTENT INEQUALITIES: WAGE DISPARITY UNDER CAPITALIST COMPETITION (1993).
[81] See also SHAIKH, *supra* note 19.

intensive production processes, larger sized firms in an industry will tend to have lower unit costs compared to smaller ones with generally speaking more labor-intensive production methods. In contrast to neoclassical models of competition, all firms whether big or small set prices on the basis of variable mark-ups on costs in order to stay competitive. In a way that parallels the classic work of R.L. Hall and C.J. Hitch[82] as well as P.W.S. Andrews,[83] in Botwinick's framework the most efficient and lowest unit cost firms, or *dominant firms*, have an advantage in that they can set the lowest prices which enables them to capture a larger share of the market compared to higher cost ones or *sub-dominant firms*. Less efficient firms, in attempting to match prices to try to stay competitive will thus have lower profit margins. In short, an industry in any given historical period will have firms at different levels of profitability. One may consider for example Chinese solar manufacturers who are currently the lowest cost producers and the industry's benchmark price putting at a disadvantage higher cost producers in other countries.[84]

Botwinick's central question is since clearly wage rates cannot attain any level what determines the limits to wage growth in an industry? His central point is that there is more room for wage increases among the lowest unit cost producers which have the highest profit margins and profit rates compared to less efficient higher-cost producers. Consider, for example, the global textile industry. Less technologically efficient firms in the Global South (say in Bangladesh) have little wiggle room in terms of profit margins and have expanded their global market shares on the basis of low wages and poor working conditions, thereby enabling employers to keep overall production costs low.[85] What could enable workers to raise their wages and improve working conditions? For such labor-intensive firms with small profit margins, *in the absence of other public policies*, there is little scope for improved wages and working conditions. Further, Botwinick is careful to stress that in addition to differential unit cost and competitive conditions, an additional constraint faced by workers is capitalist opposition. After all, even among the most efficient firms the profit rate will be squeezed somewhat as a consequence of wage increases. As Botwinick points out an "excessive" wage growth in the dominant firms would render them no more competitive than some of the least-inefficient subdominant ones, thereby rendering a collapse of investment in the former.

For Botwinick a central political implication of his analysis is the need for workers across all firms within an industry to organize and impose what he calls *obstruction costs* on employers in the form of strikes and other oppositional tactics. As he points out, these obstruction costs are determined

[82] R L Hall & C J Hitch, *Price Theory and Business Behavior*, 2 OXF. ECON. PAP. 12–45 (1939).

[83] FREDERIC S. LEE & PETER E. EARL, THE ECONOMICS OF COMPETITIVE ENTERPRISE: SELECTED ESSAYS OF P.W.S. ANDREWS (1993); JAMEE K MOUDUD, STRATEGIC COMPETITION, DYNAMICS, AND THE ROLE OF THE STATE: A NEW PERSPECTIVE (2010).

[84] See "Why China Is Dominating the Solar Industry" (https://www.scientificamerican.com/article/why-china-is-dominating-the-solar-industry).

[85] SARAH LABOWITZ & DOROTHEÉ BAUMANN-PAULY, April BUSINESS AS USUAL IS NOT AN OPTION: SUPPLY CHAINS AND SOURCING AFTER RANA PLAZA (2014), http://www.stern.nyu.edu/sites/default/files/assets/documents/con_047408.pdf.

by workers' relative bargaining power vis-à-vis employers.[86] This argument of Botwinick's, involving the collision between social/labor reforms and the dynamics of competition between dominant and subdominant firms has been discussed by a number of authors in an historical and international context.[87] A key bone of contention, as these authors discuss, between business goals and social/labor policies is the former's emphasis on cost containment.[88]

The conflict/competition theory of wage determination in Botwinick's book is very insightful. However, there are two lacunae in the book that need to be filled to develop a comprehensive theory of VISP, one which avoids the problematic foundations of the Varieties of Capitalism framework. First, in his correct critique of institutionalism, both its neoclassical and radical variants, Botwinick ignores the insights of the "old" Institutionalists such as Commons, Hale, and the broader Legal Realist tradition that came into dominance in the interwar period. Second, while Botwinick cautions us against seeing competitive constraints to wage determination in rigid terms,[89] he does not elaborate on the ultimate determinants of obstruction costs, how the cost structures of firms are determined, or what determines the income-earning capacity of an investment asset. In turns out that both of these two issues are intimately connected.

To understand the theoretical issue at stake here, it is important to remember that much of the Marxist tradition tends to make law and politics a part of the "superstructure" which is said to reflect, though not necessarily in a mechanical way, the "needs" of the economic base.[90] However, drawing on E.P. Thompson, Robert Brenner and others the late Ellen Meiksins Wood critiques this dichotomy[91] emphasizing the legal-institutional foundations of the economy. And of course those political and legal foundations vary enormously within any given mode of production, a point well captured by the following conclusion of Thompson:

> For I found that law did not keep politely to a "level", but was at *every* bloody level; it was imbricated within the mode of production and productive relations themselves (as property-rights, definitions of agrarian practice) . . . it was an arm of politics and politics was one of its arms . . . it contributed to the definition of the self-identity both of rulers and of ruled; above all, it afforded an arena for class struggle, within which alternative notions of law were fought out.[92]

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[86] BOTWINICK, *supra* note 80 at 178.

[87] See for example JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 122–125 (2006); PETER A SWENSON, CAPITALISTS AGAINST MARKETS: THE MAKING OF LABOR MARKETS AND WELFARE STATES IN THE UNITED STATES AND SWEDEN (2002); THOMAS PASTER, THE ROLE OF BUSINESS IN THE DEVELOPMENT OF THE WELFARE STATE AND LABOR MARKETS IN GERMANY: CONTAINING SOCIAL REFORMS 43–46 (2012).

[88] Dennie Oude Nijhuis, *Analyzing the Role of Business in Welfare State Development*, *in* BUSINESS INTERESTS AND THE DEVELOPMENT OF THE MODERN WELFARE STATE 1–27, 12 (Dennie Oude Nijhuis ed., 2020).

[89] BOTWINICK, *supra* note 80 at 179.

[90] There is no implication here that this is necessarily Botwinick's view.

[91] Ellen Meiksins Wood, *The Separation of the Economic and the Political in Capitalism*, NEW LEFT REV. 66–95 (1981).

[92] E.P. THOMPSON, THE POVERTY OF THEORY AND OTHER ESSAYS 96 (emphasis in the original) (1978). See also Gordon, *supra* note 74.

Law's constitutive role in the determination of class conflict is implicitly evident right at the beginning of *Capital* Vol.1where political decisions acting through the law determine titles to property ownership, the legal status of trade unions[93] and thus the context to class conflict over distributional conflicts, including the length of the working day.   Law cannot possibly be epiphenomenal.

The above discussion implies that the background laws of property, contracts, and torts determine distributional outcomes in the economy, as the Legal Realists argued.[94] As John R. Commons asserted[95] all firms need to be going concerns (i.e. be financially viable) and in a vein that paralleled Wesley Hohfeld[96] he emphasized the legal foundations of the economy. In a previous article[97] I argued that not only does this imply no baseline free market or a deviation from it, but also firms' historically-varying bundles of rights determine both the level and composition of business costs. For example, however they are determined, the legal-institutional foundations will provide the context to the level of wages and labor productivity, i.e. unit labor costs. As Martha McCluskey put it, all costs are based on legally-enforced rights.[98] And of course as Katharina Pistor discusses, all income-earnings need to be legally-encoded.[99]

Seen in this vein, politics and the law are at the core of both business profitability and the obstruction costs that workers can inflict on capitalists. In short, as the Legal Realists argued, the public/private divide which is at the heart of neoclassical economics is theoretically untenable once one considers labor law[100] or the history of industrialization.[101] In regards the latter, for example, politics have always been foundational to the construction of the market economy, from successful industrial policies in early capitalism[102] to those after World War II.[103] Given this argument, one can therefore understand why countries at similar levels of industrialization have achieved varying types of social, labor, and taxation policies and why a historically-informed analysis is absolutely central to understand such variations. Botwinick's argument regarding the importance of obstruction costs to bring about progressive policies becomes more powerful once one factors in the different ways by which firms' bundles of rights could be restructured so as not to reduce the incentive for investment. For example,

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[93] See http://www.nationalarchives.gov.uk/pathways/citizenship/struggle_democracy/trade_unionism.htm.

[94] Kennedy, *supra* note 56.

[95] COMMONS, *supra* note 10; Glen Atkinson, *Going Concerns, Futurity and Reasonable Value*, 43 J. ECON. ISSUES 433–440 (2009).

[96] Fiorito and Vatiero, *supra* note 10; Luca Fiorito, *John R. Commons, Wesley N. Hohfeld, and the Origins of Transactional Economics*, 42 HIST. POLIT. ECON. 267–295 (2010).

[97] Moudud, *supra* note 25.

[98] Martha T. McCluskey, *All Costs Have a Right*, XXXVII LAW INEQUAL. A J. THEORY PRACT. 105–110 (2019).

[99] PISTOR, *supra* note 43.

[100] Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 UNIV. PA. LAW REV. 1358–1422 (1982); Morton J Horwitz, *The History of the Public/Private Distinction*, 130 UNIV. PA. LAW REV. 1423–1428 (1982).

[101] HORWITZ, *supra* note 27.

[102] CHANG, *supra* note 30; ALICE AMSDEN, ASIA'S NEXT GIANT: SOUTH KOREA AND LATE INDUSTRIALIZATION (1989).

[103] BLOCK AND KELLER, *supra* note 37; MAZZUCATO, *supra* note 37.

as Mazzucato discusses,[104] public subsidies play a key role to finance investments, in particular of the more capital-intensive types, especially in the early phases when it is more risky and less likely to attract private funds. There is no reason why such subsidies could not be attached to the recipient firms to improve working conditions and wages as a legally binding *quid pro quo.* One can for example consider the important role of the state in Nordic business history, propelling the countries out of the global periphery into becoming dynamic export-oriented social democratic countries.[105]

Further, it would be important to emphasize constitutional considerations in the battle over labor and social policies, and thus workers' ability to legally institutionalize their demands subsequent to their obstructionist politics, given the growing literature on the relationship between economic and social rights, inequality, and constitutions.[106] Challenging the liberal nightwatchman view of constitutions, Gregory Alexander points out that given property's inherent social and relational nature the courts have always been involved in distributing property rights in line with changing economic and political contexts. And of course in such court battles over the structure of property rights the content and interpretation of constitutions play a key role. In contrast to the American constitution some such as the German and especially the South African ones have more explicit commitments to social rights and human dignity. However, as Alexander cautions us, the actual textual material in regards property rights is not enough since what he calls a country's "background legal and political traditions and culture" as they have arisen are extremely relevant to how judges interpret constitutional property rights clauses.[107] As he points out, given its conservative history the courts in post-apartheid South Africa have been quite effective in blunting the highly progressive nature of the country's constitution. Thus, as with the need to train heterodox economists, a key component of a different development trajectory is the importance of educating legal scholars in the Law and Political Economy tradition. One cannot envisage a progressive industrial and social policy framework without the necessary intellectual "raw material" to promote it.

Finally, a common objection to the above claim regarding subsidies is that a country, especially a poor one, may not have enough money to finance both industrial and progressive social and labor policies. There are three issues that need to be unpacked here. First, as a matter of historical record central banks have played a crucial role in industrialization.[108] As creator of the sovereign currency a central bank is at the heart of any state's governance and the former's money creation legal power

[104] MAZZUCATO, *supra* note 37.

[105] SUSANNA FELLMAN ET AL., CREATING NORDIC CAPITALISM: THE BUSINESS HISTORY OF A COMPETITIVE PERIPHERY (Susanna Fellman et al. eds., 2008).

[106] Joseph Fishkin & William Forbath, *Reclaiming constitutional political economy: An Introduction to the Symposium on the Constitution and Economic Inequality*, 94 TEX. LAW REV. 1288–1299 (2016); Courtney Jung, Ran Hirschl & Evan Rosevear, *Economic and Social Rights in National Constitutions*, 62 AM. J. COMP. LAW 1043–1093 (2014); GREGORY S. ALEXANDER, THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE (2006); VAN DER WALT, *supra* note 7.

[107] ALEXANDER, *supra* note 106 at 18.

[108] See the symposium in *Review of Keynesian Economics* (2013) volume 1, number 3 and Jamee K. Moudud, *A Critical Legal History of French Banking and Industrialisation: an Alternative to the Law and Development Framework*, 7 LONDON REV. INT. LAW 215–251 (2019).

implies that governments can never "run out of money" although under certain circumstances the money created may lose credibility.[109] On the other hand, legal restrictions may be put on the central bank making it less than accommodating to the state's budgetary needs in which case the public expenditures depend on the politics of taxation and society's ability to challenge the power of the privileged.

Second, those countries facing persistent trade deficits and accumulating foreign debt, do indeed confront foreign currency shortages. To the extent that economic development objectives require foreign exchange such countries face a cash shortage unless they can renegotiate their foreign debt contracts. And of course foreign creditors, such as the International Monetary Fund, may impose harsh austerity measures leaving very little wiggle room for development purposes. The absence of what Alvaro Santos calls a country's *development legal capacity*[110] will exacerbate its ability to carve out a greater policy space for itself in global trading laws in order to pursue export-oriented development objectives. Third, challenging capitalist prerogatives always risks the threat of capital flight although the latter may be slowed down with capital controls and/or tax penalties.

In short, open economy considerations create considerable uncertainties in the constructing of a progressive VISP. On the other hand, if state financing of industry is part of a broader national system of innovation strategy and both impose legally-enforced progressive social and labor laws on industry as a quid pro quo, such uncertainties may be reduced and trade performance *may* improve. However this last outcome is the most challenging since domestic firms in poorer countries face much more competitive ones in richer countries that also have far better developed legal capacities to challenge export-promotion policies.[111]

4. Conclusion

The liberal mantra of our current Gilded Age of massive domestic and international inequalities has elevated the "market" to a Foucauldian Panopticon status with little room for maneuver in the prison yard of "market forces". In the conventional wisdom rejection of neoliberalism is equivalent to espousing socialism, thereby hopelessly paralyzing policy debate.

Drawing on John R. Commons' discussion of the *going concern* with its distinctly Hohfeldian foundations and the insights of the Legal Realists, this paper has challenged the false dichotomies created by neoclassical economics. Commons' going concern framework was related to an existing

[109] Jamee K. Moudud, *Analyzing the Constitutional Theory of Money: Governance, Power, and Instability*, LEIDEN J. INT. LAW (2018); DESAN, *supra* note 61; Christine Desan, *Money as a Legal Institution*, *in* MONEY IN THE WESTERN LEGAL TRADITION: MIDDLE AGES TO BRETTON WOODS 18–36 (David Fox & Wolfgang Ernst eds., 2016).

[110] Alvaro Santos, *Carving out Policy Autonomy for Developing Countries in the World Trade Organization*, *in* LAW AND THE NEW DEVELOPMENTAL STATE: THE BRAZILIAN EXPERIENCE IN LATIN AMERICAN CONTEXT 167–245 (David M. Trubek et al. eds., 2013).

[111] See *Id.*

heterodox economics analysis of foreign trade, the nature of property rights including its constitutional foundations, and money to explore how markets as fundamentally monetary institutions can be legally structured in a wide range of ways to promote export-oriented policies, i.e. different variants of industrial and social policies can be constructed. This discussion was situated in the context of international competition between dominant and subdominant firms located in different countries and the relative constraints imposed on domestic policies. The realities of global trade competition do indeed constitute an objective constraint to progressive policies especially for countries confronting persistent trade deficits and accumulating foreign debt. On the other hand, given that its "foreign debt" is in its own currency the US's dominant international currency gives it exorbitant privilege[112] and thus enormous leeway to potentially create a type of social democratic economy that could move it beyond its current Gilded Age condition.

As both Tamara Lothian[113] and Sabeel Rahman[114] propose, this paper too advocates the need for a fundamental restructuring of markets and not their technocratic regulation. However such a market - reconstitution strategy, involving changes in property owners' bundles of rights, will invariably involve a confrontation with existing power relations. Entrenched business interests will not passively absorb such policies given that they challenge the former's prerogatives. As Robert W. Gordon argued "If the program of Realists was to lift the veil of legal Form to reveal living essences of power and need, the program of the Critics is to lift the veil of power and need to expose the legal elements in their composition."[115]

Thus if by rejecting austerity a "high road" to globalization with improved trade performance and socially inclusive policies can be attained[116], a crucial question arises: how is the legal and political framework to be created to *reach* the "high road" and be *maintained* along it? It is suggested that the answer to this question lies in the analytical frameworks of John R. Commons, Thorstein Veblen, and the Legal Realist tradition. Crucially, it requires rejection of the Lockean theory of property. At a theoretical level it entails recognition of the *legal indeterminacy* of the bundles of rights undergirding property and money and the ways in which laws structure property rights along with the distribution of power. This insight is at the heart of this paper's goal of shattering pervasive false dichotomies.

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[112] BARRY EICHENGREEN, EXORBITANT PRIVILEGE: THE RISE AND FALL OF THE DOLLAR AND THE FUTURE OF THE INTERNATIONAL MONETARY SYSTEM (2011).

[113] TAMARA LOTHIAN, LAW AND THE WEALTH OF NATIONS: FINANCE, PROSPERITY, AND DEMOCRACY (2017).

[114] K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION (2017).

[115] Gordon, *supra* note 74 at 109.

[116] Milberg and Houston, *supra* note 18.