ON THE REGULATORY GEOGRAPHY OF MODERN CAPITALISM: PUTTING 'RULE OF LAW' IN ITS PLACE

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Abstract

Why is rule of law found in some places but not others? Conventional wisdom holds that rule of law is a product of human agency. This article shows, instead, that rule of law is innately limited to particular kinds of spaces by the spatial nature of modern capitalism. Both rule of law and modern capitalism order their respective regulatory spaces in particular ways. Capitalism orders some of its space in a way that makes it amenable to rule of law's own spatial predicates, but it also causes much more of that space to be innately inhospitable to these predicates. All in all, the realms suitable for rule of law are likely to be much less common than we are wont to presume.

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> 'Prophecy now involves a geographical rather than a historical projection; it is space, not time, that hides consequences from us.'[1]

Why is rule of law found in some places but not others? Conventional wisdom holds that rule of law is a product of human agency, and that therefore it should be able to rule any polity that consents to its *imperium*.[2] This article argues that there is good reason to doubt this wisdom, in that it fails to account for how different kinds of spaces respond differently to different kinds of regulatory technologies — ie, it fails to account for what might be called 'regulatory geography'.[3]

The presence of effective rule of law regulatory regimes corresponds closely with the presence of advanced industrial capitalism.[4] It is generally claimed this is because rule of law facilitates the development of this kind of economy.[5] But comparing the regulatory geographies of both rule of law and modern capitalism suggests that this is not the case. Both rule of law and modern capitalism have distinct kinds of regulatory space. But the regulatory space created by modern capitalism is variegated, differing according to place. In some of those places, it generates a kind of regulatory space that is conducive to rule of law. At the same time, however, in many other places, it generates a kind of regulatory space that is not.

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[1] John Berger, *The Look of Things: Selected Essays and Articles* (Viking 1975), 40.
[2] World Bank Group, *The World Development Report 2017: Governance and the Law* (International Bank for Reconstruction and Development / The World Bank 2017) 14.
[3] [anonymized]
[4] Stephan Haggard, Andrew MacIntyre and Lydia Tiede. 'The Rule of Law and Economic Development' (2008) 11 *Annual Review of Political Science* 205; R.J. Barro, *Determinants of Economic Growth: A Cross-Country Empirical Study* (MIT Press 1997).
[5] Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (eds., Guenther Roth and Claus Wittich) (Berkeley: University of California Press 1978) 215-225; Douglass C. North, *The New Institutional Economics and Third World Development* (Routledge 1995); World Bank Group (n 2).

Showing how and why this is so involves comparing the spatial predicates of rule of law with the material attributes of the different kinds of spaces generated by modern capitalism — attributes that are not merely reflections of socially-constructed understandings or practices, but which are innate to the space itself. Principal among these attributes include the costs associated with travel and transportation[6] and spatial constraints on the transfer of knowledge.[7] While there are a growing number of studies that explore the effects on law of socially-constructed aspects of human geographies, [8] there has been little investigation into the regulatory implications of these more material attributes of space. This study looks to fill this gap.

We proceed as follows. The next section explores how embedded in the idea of rule of law are a number of predicates about the nature of the space that rule of law looks to rule. These include predicates about the degree to which the regulatory space is stable and homogeneous; the degree to which it can be made to be stable and homogeneous through juridification; and/or the amount of 'spatial wealth' to which it has access.

The following section then examines the kinds of spaces that are created by modern capitalism. It shows how effects of distance on transportation costs and quality of communication cause modern capitalism to generate a distinctive geographical patterning of industrial activity called the 'core-periphery ordering'. The third section then compares the material spaces that comprise this ordering with the normative space that is presumed by rule of law, revealing that much of the space generated by this ordering is in fact incompatible with the spatial predicates that attend to rule of law. In sum, rule of law has a 'place'.[9] And it

[6] Masahisa Fujita, Paul Krugman and Anthony J. Venables, *The Spatial Economy: Cities, Regions, and International Trade* (MIT Press 1999).
[7] Michael Storper, *The Regional World* (Guilford Press 1997).
[8] See, eg, Irus Braverman, Nicholas Blomley, David Delaney and Alexandre Kedar, 'Introduction: Expanding the Spaces of Law' in Irus Braverman et al (eds), *The Expanding Spaces of Law. A Timely Legal Geography* (Stanford University Press 2014).
[9] John. Agnew, 'Space and Place' in John Agnew and David N Livingstone (eds), *The SAGE Handbook of Geographical Knowledge* (Sage Publications 2011) 316 (translating from Franco Farinelli, *Geografia: Un'introduzione ai modelli del mondo* (Giulio Einaudi editore, 2003) 11).

is a kind of place that is actually quite exceptional insofar as the fuller realm of capitalist space is concerned.

1. The Regulatory Geography of Rule of Law

Modern domestic law – state law – is an innately spatial phenomenon. It is delineated spatially — such as in the form of territorial jurisdiction in the language of the common law, or *ratione loci* and *compétence territorial* in the language of European civil law.[10] And yet, the way that archetypical domestic law 'thinks'[11] is largely blind to the regulatory implications of its distinctly spatial existence.[12] Nevertheless, the effectiveness of a particular regulatory design can be critically shaped by various aspects of the space it looks to govern. In this section, we will explore this phenomenon in the context of one particular kind of regulatory design, that of 'rule of law'.

Rule of law is the principal conceptual archetype for modern state-based law.[13] Of course, at the same time, it means somewhat different things to different people.[14] But nevertheless, it is stipulated here that all these various visions share at least one common element: and that is that 'rule of law' involves the use of abstract rules to identify and/or generate predictable social results (ie, 'material predictability') by identifying and/or generating predictable patterns of human behaviour (ie, 'behavioural predictability')

[10] Richard T. Ford, 'Law's Territory (A History of Jurisdiction)' in Nicholas Blomley, David Delaney and Richard T. Ford (eds), *The Legal Geographies Reader: Law, Power, and Space* (Wiley-Blackwell 2001).
[11] Gunther Teubner, 'How the Law Thinks: Toward a Constructivist Epistemology of Law' (1989) 23 *Law & Society Review* 727.
[12] W.W. Pue, 'Wrestling with Law: (Geographical) Specificity vs.(Legal) Abstraction' (1990) 11 *Urban Geography* 566; Ford (n 10); cf. Gianfranco Poggi, *The Development of the Modern State: A Sociological Introduction* (Stanford University Press 1978) 71-73, 102-103.
[13] Thomas Carothers, 'The Rule of Law Revival' (1998) 77 *Foreign Affairs* 95; World Bank Group (n 2) 14.
[14] Brian Z. Tamanaha, 'A Concise Guide to the Rule of Law' in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Hart Publishing 2009); Michael Trebilcock and Ronald J. Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Edward Elgar 2008) 12-29.

throughout the entirety of the space being ruled (ie, its 'regulatory space').[15] The presence of this element, by itself, may not necessarily be sufficient to establish the presence of rule of law, but it is stipulated that the absence of this element is sufficient to establish the absence of (an effective) rule of law. And since this essay seeks to explore reasons for the *absence* of effective rule of law in many places, a focus on the implications of this minimalist condition is sufficient for our purposes. (Note also that to assert that such a feature is a core feature of *rule of law* is not to say that it is necessarily a core feature of 'law' per se. There may be other forms of law for which such a feature is not a necessary element.[16])

But rule of law's capacity to generate behavioural and material predictability using abstract rules actually depends upon the presence of certain attributes with regards to the particular regulatory space it looks to govern. These include (1) that the regulatory space be relatively homogeneous and stable; or (2) that the regulatory space can be made to be homogeneous and stable through the operation of law itself – ie, through juridification; or (3) that the social space in which the regulation operates enjoys relatively large quantities of 'spatial wealth'. Note that it is not being claimed that all three of these attributes must be present in order for rule of law to enjoy regulatory effectiveness. But if *none* are present, then the rules of rule of law will have difficulty generating material predictability.

A. Spatial Homogeneity and Spatial Stability

Rule of law's need for spatial homogeneity and spatial stability stems from what Robert Merton famously identified as "the law of unintended consequences".[17] An abstract-rule-based system's ability to identify predictable consequences that attend to behavioural conformity with its abstract rules depends upon the presence of many background factors that

[15] Compare Josehp Raz, *The Authority of Law: Essays on Law and Morality* (2nd ed, Oxford University Press, 2009) 220; Weber (n 5); World Bank Group (n 2); Trebilcock and Daniels (n 14) 12-29.
[16] Cf. Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press 2001).
[17] Robert K. Merton, 'The Unintended Consequences of Purposive Action' (1936) 1 *Am. Socio. Rev*. 894.

are not captured or directly accounted for by the rule-system itself. Social life is often too complex to be completely and formally captured by a set of abstract rules.[18] And when one of these background factors is not present, the rule-system can fail to identify or generate material predictability.

An example of how unaccounted-for background factors can significantly affect an abstract rule's ability to generate material predictability is found in the failure of the European Union's efforts to harmonize European contract law by introducing a common good-faith requirement derived from German contract law.[19] Here, the material predictability that was to be generated was European harmonization of judicial interpretation and enforcement of the terms of consumer contracts. But, as famously predicted by Gunther Teubner,[20] introducing a common good faith requirement ultimately failed to generate such harmonization, because it did not take into account the different styles of capitalism found throughout Europe. The effectiveness of the German doctrine of good faith relied upon, but did not formally require, the background presence of a particular form of capitalism, Rhenish capitalism, in which firms within a particular industrial sector coordinate to produce common standards of contracting behaviour, which German courts could then treat as indicative of good faith contracting.[21] By contrast, the form of capitalism found in the United Kingdom does not feature intra-sectorial coordination among firms, and so British courts had no external standards by which to measure good faith behaviour.[22] As a result, British courts

[18] James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press, 1998) 307-342

[19] Regulation 4 of the Unfair Terms in Consumer Contracts, SI 1994 No 3159, implementing the EU Directive on Unfair Terms in Consumer Contracts, Council Directive 93/13/EEC of 5 April 1993 (OJ L95, 21 April 1993) 29.

[20] Gunther Teubner, 'Legal Irritants: Good Faith in British Law or how Unifying Law Ends Up in New Divergences' (1998) 61 MLR 11.

[21] Ibid 25-26. See also David Soskice, 'Divergent Production Regimes: Coordinated and Uncoordinated Market Economies in the 1980s and 1990s' in Herbert Kitschelt, Peter Lange, Gary Marks and John D. Stephens (eds), *Continuity and Change in Contemporary Capitalism* (Cambridge University Press 1999).

[22] Teubner (n 20) 26-27.

have proved extremely reluctant to incorporate this EU mandated doctrine into English contract law,[23] and the rule therefore failed to have its intended material effect.

Such a threat of unaccounted-for factors causing abstract rules to fail to identify or generate behavioural or material predictability can be catalysed by two kinds of spatial conditions. One – the one that disrupted material predictability in the context of The EU's good-faith requirement – is *spatial variegation*. Europe's common good-faith requirement failed to generate material predictability because the capitalist space of Europe is not uniform and homogeneous in the way that the German doctrine of good faith presumes. More generally, the more variegated the regulatory space, the more likely it will be that some places within that space will evince social attributes that deviate from what is presumed by an abstract rule-base system of governance, and which can therefore prevent these rules from identifying material predictability.[24]

Of course, not all kinds of spatial homogeneity or variegation are relevant to a particular abstract rule's ability to generate or identify predictability. The regulatory effectiveness of good faith in the context of European contract regulation is affected by variegations in European capitalism because contracting practices are intimately related to capitalist social structures.[25] But it is not significantly affected by spatial variegations in, say, religious practices. At least in Europe, religious practices and beliefs would appear to have *de minimis* effect on market behaviour insofar as the transnational markets transactions that are the focus of the EU's good faith directive are concerned. So in saying that spatial homogeneity/variegation affects the efficacy of an abstract rule-based system, I am not

[23] Nathalie Hofmann, 'Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe' (2010) 22 *Pace Int'l L Rev* 162-165.
[24] See also Michael W. Dowdle, 'Competition in the Periphery: Melamine Milk Adulteration as Peripheral "Innovation"' in Michael W. Dowdle, John S. Gillespie and Imelda Maher (eds), *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law* (Cambridge University Press 2013); Lisa R. Pruitt, 'The Geography of the Class Culture Wars' (2010-2011) 34 *Seattle Univ L Rev* 804-809.
[25] Oliver E. Williamson, *The Economic Institutions of Capitalism* (Simon and Schuster, 1985).

referring to every possible kind of homogeneity or variegation that is to be found within that system's territorial jurisdiction. I am referring more narrowly to homogeneity or variegation with regards to the particular practices and conditions that delineate and inform that system's particular regulatory focus – its 'regulatory space' as contrasted against its larger social space.

Spatial homogeneity also contributes to the effectiveness of rule of law by making the regulatory space more transparent to regulators. Such transparency catalyses a regulator's ability to perceive and correct for unintended consequences stemming from the operation of an abstract rule. It does this by allowing the remote observer to use knowledge about one place to comprehend the material and social structures of other places in that larger, homogeneous space – a phenomenon that James Scott well captured in his notion of 'seeing like a state'[26] – thus reducing the regulator's dependence on local knowledge for evaluating compliance problems. Examples of homogeneity contributing to remote monitoring include gridded street plans, which allow regulators to locate and understand the relationship between various landmarks and phenomena within a locale even if they have never been to that locale;[27] and Taylorism, which by standardizing the work routines of industrial labour allows management to more effectively monitor the work effort of line workers.[28]

For similar reasons, an abstract rule's capacity to identify or generate material predictability is also catalysed by the *stability* of its regulatory space.[29] The less stable – or more 'volatile' – the regulatory space, the more likely it is that some factor relevant to the generation of material predictability but which is not formally captured by the rule-system

[26] Scott (n 18).
[27] Ibid
[28] E.P. Thompson, 'Time, Work-discipline, and Industrial Capitalism' (1967) 38 *Past & Present* 56.
[29] See Michael J. Piore & Charles F. Sabel, *The Second Industrial Divide: Possibilities for Prosperity* (Basic Books 1984) 56-61.

itself will change and thus cause the rule to begin generating unintended consequences.[30] This is why, for example, firms in more volatile business environments prefer to engage in relational contracting rather than to structure contractual relationships using abstract rules that formally set out contractual responsibilities and liabilities (ie, 'arm's length' contracts).[31]

B. Spatial Susceptibility to Juridification

Where a relevant aspect of a regulatory space is not naturally stable or homogeneous, rule of law can work to generate stability and homogeneity through processes of juridification. This occurs when the law is able to use its power of command to compel its subjects to behave in (new) stable and homogeneous ways so as to allow the law to generate material predictability.[32] But this ability to impose stability and homogeneity via juridification itself depends on the presence of spatial factors. First, it depends on the 'regulatory autonomy' of the regulatory space. 'Regulatory autonomy' refers to the degree to which the behaviours and outcomes relevant to some regulatory space are insulated from influences and forces originating from outside that space.[33] Not only can such forces introduce volatility and fragmentation into the regulatory space, but because they originate outside the reach of the regulatory system, they compromise that system's endogenous ability to impose order and stability through juridification.[34]

Beyond this, not all kinds of spatial variegation or spatial volatility can be tamed using juridification. Some kinds of regulatory spaces are innately volatile or variegated. An example of the former would be an economic regulatory space that encompasses a market,

[30] Gunther Teubner, 'Juridification: Concepts, Aspects, Limits, Solutions' in Robert Baldwin, Colin Scott, and Christopher Hood (eds), *A Reader on Regulation* (Oxford University Press 1998) 406-428.
[31] Williamson (n 25) 30-32, 71-72.
[32] Teubner (n 30).
[33] See also Sally F. Moore, 'Law and Social Change: The Semi-autonomous Social Field as an Appropriate Subject of Study' (1973) 7 *Law & Society Rev* 719.
[34] R.A.W. Rhodes, 'The Hollowing Out of the State: The Changing Nature of the Public Service in Britain' (1994) 65 *Political Quarterly* 138.

like that of the high-end fashion industry, in which consumer tastes are constantly changing.[35] One cannot stabilize changes in consumer preferences simply by demanding that such preferences comport with some stable set of design rules. An example of the latter would be rural regulatory spaces that consists of a number of relatively isolated communities.[36] In fact, in his famous study of democracy in the pre-industrial, largely rural US of the early 19th century, Alexis de Tocqueville located what he saw to be the genius of the US's national regulatory system precisely in its willingness to accept and work with its innately variegated political environment rather than trying to futilely impose homogeneity through centralized legislation. [37]

C. Spatial Wealth

Volatility and variegation are not always fatal to rule of law effectiveness. An abstract rule-based system can internalize volatility and variegation by taking it into account in its rule system. Indeed, the pronounced complexity of many regulatory systems in advanced industrial democracies is often a direct product of the internalization of possible patterns of volatility and variegation into the legal framework by introducing secondary rules about what to do when primary rules generate undesirable consequences.

Such systems are expensive to maintain, however. And this brings us to a third, alternative spatial predicate affecting the efficacy of the rule-of-law regulatory paradigm: in regulatory spaces that are volatile or variegated, which cannot be tamed using juridification, the regulatory effectiveness of rule of law can nevertheless be maintained to the extent that

[35] Fiorenza Belussi, 'Benetton Italy: Beyond Fordism and Flexible Specialisation. The Evolution of the Network Firm Model' in Swasti. Mitter (ed), Computer-aided Manufacturing and Women's Employment: The Clothing Industry in Four EC Countries (Springer 1992), 73-91; cf. Alper Şen, 'The US Fashion Industry: A Supply Chain Review' (2008) 114 *Int'l J Production Econ* 571.
[36] Pruitt (n 24).
[37] Alexis de Tocqueville, *Democracy in America* (J.P. Meyer ed, George Lawrence tr, Doubleday 1969), 62-98. See also Frederick Jackson Turner, *The Significance of the Frontier in American History* (first published 1893, Penguin 2008).

space is able to generate and retain larger amounts of what this article will refer to as 'spatial wealth' – ie, wealth that inheres in that particular space and is not peripatetic.

Internalizing volatility and variegation in a rule-based system increases its complexity. [38] This, in turn, makes it more difficult for subject populations to directly understand and conform to the system,[39] which in turn reduces a rule's ability to generate or identify behavioural predictability. [40] Particularly in advanced industrial states, rule of law responds to this problem through the use of regulatory intermediation – ie., by providing specialists who are fluent in more technocratic aspects of the legal system and can therefore communicate to affected members of the regulatory space what that aspect of the law expects or demands of them, and what kinds of the material predictability the law can be expected to generate.[41] The ability to consult these specialized intermediaries allows the general population to predict and conform to the material consequences and behavioural demands of highly complex regulatory systems without themselves having to devote the considerable amounts of time and resources necessary to directly comprehend the system themselves.[42]

Regulatory intermediation is expensive, however. It requires highly-trained personnel. In the context of a legal regime, this includes attorneys with advanced and specialized training in the laws that govern some particular kind of regulatory complexity (such as securities markets, corporate governance, mining, land use; or local government), and highly-trained accountants, auditors, consultants, and inspectors.[43] Producing such intermediaries

[38] John W. Meyer and Brian Rowan, 'Institutional Organizations: Formal Structure as Myth and Ceremony' (1977) 83 *American Journal of Sociology* 340–6; H.L.A. Hart, *The Concept of Law* (3d ed, Oxford University Press, 2012) 94-96.
[39] Michael Power, *The Audit Society: Rituals of Verification* (Clarendon Press 1997).
[40] Robert Baldwin, 'Why Rules Don't Work' (1990) 53 MLR 321; John Braithwaite, 'Rules and Principles: A Theory of Legal Certainty' (2002) 27 *Austl J Leg Phil* 47.
[41] Kenneth W. Abbott, David Levi-Faur and Duncan Snidal, 'Theorizing Regulatory Intermediaries: The RIT Model' (2017) 670 *The ANNALS of the American Academy of Political and Social Science* 14.
[42] See also Power (n 39).
[43] Edward L. Rubin, 'Administrative Law and the Complexity of Culture' in Ann Seidman, Robert B. Seidman and Janice Payne (eds), *Legislative Drafting for Market Reform: Some Lessons from China* (St. Martin's 1997).

requires many years of specialized education and training, and hence much cost.[44] In addition, regulatory intermediation often involves the use of complex and advanced technologies, which are themselves expensive to secure (either through purchase or in-house development) and maintain.[45]

Effective regulatory intermediation also requires face-to-face interaction, and therefore tends to be grounded in a particular space.[46] At the same time, however, persons with high-levels of skill and training tend to be particularly mobile, and are thus can easily relocate to outside places offering higher salaries and standards of living.[47] This means that in order to support effective regulatory intermediation of complex regulatory systems, the space that houses such a system must be able to generate and retain the considerable amounts of wealth necessary to create and/or attract and retain this kind of labour. This includes not simply wealth in the form of offering higher income levels, but also in the form of having better quality of life, better public services, better educational facilities, etc.

Collectively, these comprise what could be called the 'spatial wealth' that inheres to a particular locale. Spatial wealth is also a property of space. The more a regulatory space lacks homogeneity and stability, the more spatial wealth it must have to support an effective rule-of-law.

(Spatial wealth also contributes to rule of law in another way. When rule of law fails to identify or generate behavioural or material predictability in a particular regulatory

[44] Clarence J. Dias and James C.N. Paul, 'Observations on Lawyers in Development and Underdevelopment' in C.J. Dias, R. Luckham, D.O. Lynch and J.C.N. Paul (eds), *Lawyers in the Third World: Comparative and Developmental Perspectives* (International Center for Law in Development, 1981); Richard A. Posner, 'Creating a Legal Framework for Economic Development' (1998) 13 *The World Bank Research Observer* 7; Rubin (n. 43).
[45] Christopher Westrup, 'What's in Information Technology? Issues in Deploying IS in Organisations in Developing Countries' in Chrisanthi Avgerou and Geoff Walsham (eds), *Information Technology in Context: Studies from the Perspective of Developing Countries* (Ashgate 2000).
[46] Cf Calvin Taylor, 'Between Culture, Policy and Industry: Modalities of Intermediation in the Creative Economy' (2015) 49 *Regional Studies* 362.
[47] Gail N. Shields and Michael P. Shields, 'The Emergence of Migration Theory and a Suggested New Direction' (1989) 3 *Journal of Economic Surveys* 277.

instance, it can nevertheless retain regulatory legitimacy to the extent that the population of that space finds the processes of that system appealing even independent of its outcome, ie., to the extent rule of law itself enjoys procedural legitimacy among its subject population.[48] Studies have shown, however, popular attraction to procedure per se as a measure of right-to-rule is an attribute associated primarily with high-income economic spaces.[49])

D. Geography and the Emergence of Rule-based Regulation in the US ca. 1890-1910.

A good demonstration of how the regulatory effectiveness of abstract rules is dependent on the presence of spatial homogeneity, spatial stability, and spatial wealth is found in the efforts of the Interstate Commerce Commission [ICC], America's first national-level regulatory agency, to develop rule-based regulatory effectiveness during the first three decades after its establishment in 1887.[50]

Prior to the establishment of the ICC, rule-base regulation had been an insignificant component of America's national regulatory environments. Regulation in the United States had been largely localized and relational, a kind of regulation that Stephen Skowronek has called "a state of courts and parties."[51] As noted above, for most of the 19th century,

[48] Russell Hardin, 'Compliance, Consent, and Legitimacy' in Carles Boix and Susan C. Stokes (eds), *The Oxford Handbook of Comparative Politics* (Oxford University Press, 2009) 245-247; Trebilcock and Daniels (n 14) 29-37; Morton J. Horowitz, 'The Rule of Law: An Unqualified Human Good?' (1977) 86 Yale LJ 566; Tom R. Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 30 *Crime and Justice* 283. Cf. Weber (n 5) 215-225.

[49] Ronald Inglehart, *Modernization and Postmodernization: Cultural, Economic, and Political Change in 43 Societies* (Princeton: Princeton University Press, 1997), 37-39; Ronald Inglehart and Daphne Oyserman, 'Individualism, Autonomy and Self-Expression: The Human Development Syndrome' in Henk Vinken, Joseph Soeters and Peter Ester (eds), *Comparing Cultures, Dimensions of Culture in a Comparative Perspective* (Brill 2004).

[50] *Interstate Commerce Act of 1887*, 24 Stat. 379, sec. 11. In 1995, the ICC was eliminated by the *Interstate Commerce Commission Termination Act*, Pub.L. 104–88, 109 Stat. 803 (1995).

[51] Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (New York: Cambridge University Press, 1982), 24-31. See also Michael W. Dowdle, 'Public Accountability in Alien Terrain: Exploring for Constitutional Accountability in the People's Republic of China' in Michael W. Dowdle (ed), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge University Press, 2006) 333-341; Tocqueville (n 37) 62-98.

American regulatory space was simply too fragmented and variegated to allow for national regulation founded on abstract rules.[52] And consistent with this, the ICC's initial regulatory efforts were also initially grounded in relational forms of regulation, negotiating its regulatory demands with individual firms on a case-by-case basis.[53]

A good demonstration of this is found in the difficulty the ICC had in promulgating national rules relating to railway safety, particularly requiring that all railcars be equipped with automatic couplers. National legislation along these lines had been passed in 1893. But up through 1900, the ICC had been unable to pass implementing regulation. The problem was that there were many different designs for automatic couplers, and many were not compatible with one another. As described by Peter Strauss:

> This question had been urgent for several years before August of 1900, in forms carrying heavier economic consequences than the prospect of negligence liability. . . [The nation's interstate railroads] had to decide what investments to make in equipping cars with couplers, what policies were permitted or required for interline exchanges, and what might be the legal consequences of failing to keep coupler systems in repair. Against what might seem the obvious impulse to uniformity – variations between cars contributed heavily to the terrible carnage in the yards that generated the pressure for this legislation --were a variety of concerns vivid in the history of the act and of the times: automatic coupling was an emerging technology, and dozens of designs competed; it was impossible to say which would be the best one, and for what purposes; each railroad was accustomed to make its own purchase

[52] Tocqueville (n 37) 71-80, 161.
[53] Skowronek (n 51) 150-162; Mark A. Covaleski, Mark W. Dirsmith and Sajay Samuel, 'The Use of Accounting Information in Governmental Regulation and Public Administration: The Impact of John R. Commons and early Institutional Economists' (1995) 22 *The Accounting Historian's Journal* 1; Alan Jones, 'Thomas M. Cooley and the Interstate Commerce Commission: Continuity and Change in the Doctrine of Equal Rights' (1966) 81 *Pol Sci Q* 602.

> decisions; and it [324] was feared by some that fixing on a single required design would defeat many entrepreneurs and confer monopoly profits on one.

Simply put, the fragmented and still evolving nature of industrial design made it impossible to regulate this aspect of industrial activity using abstract rules.

Beginning in the last quarter of the 19th century, however, the national economic space of the US rapidly became much more homogeneous and stable. This was due to a rapid transition from a capitalism based on craft production to a capitalism based on mass production. In the words of Michael J. Piore and Charles F. Sabel:

> Mass production was therefore profitable only with markets that were large enough to absorb an enormous output of a single, standardized commodity, and stable enough to keep the resources involved in the production of that commodity continuously employed. Markets of this kind, like markets in general, did not occur naturally. They had to be created.[54]

The standardization of national economic space in particular proved critical to the ability of the ICC to become the first regulator to begin using abstract rules to regulate American economic activity at a national scale.[55] The ICC was established primarily to regulate the national railroad industry,[56] and in particular to ensure that the national haulage rates charged by the railroads were "fair and reasonable."[57] At the time of its founding, however, the ICC had no objective way of determining what the actual cost was of operating a particular rail line. In fact, even the railroads themselves could not accurately cost their

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[54] Piore & Sabel (n 29) 49-61. See also B. Jessop, 'Thatcherism and Flexibility: The White Heat of a Post-Fordist Revolution', in B. Jessop et al (eds), *The Politics of Flexibility* (Aldershot: Edward Elgar, 1991), 136-137.

[55] See generally Skowronek, (n 51).

[56] Ibid 24-31.

[57] See *Interstate Commerce Act of 1887*, 24 Stat. 379, sec. 1:

> All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

individual lines.[58] Without such costing information, making a meaningful, objective rule-based determination of whether the relationship between cost and price in some particular instance was 'fair and reasonable' was impossible – hence, the ICC's need to resort to relational regulation, mentioned above.[59]

Ultimately, the key the ICC's ability to develop a rule-based regulatory framework for determining if a rate was fair and reasonable would only emerge in first decade of the 20th century, when it became possible for it to impose rules mandating that the railroads employ uniform accounting standards that gave accurate information about industrial conditions across the industry.[60] This development was due to the invention of standard cost accounting.[61] Standard cost accounting not only compares a firm's costs with its revenue, but also compares a firm's cost expenditures with "standard" costs for such expenditures as derived from similar kinds of expenditures found in other firms and industries. The ability to compare a railroad's expenditures with a global benchmark for such expenditures derived from other firms and industries gave the ICC its first objective measure for determining if a particular rate for a particular line was 'fair and reasonable': if the rate accurately reflected costs associated with similar activities found in other industries, then the rate could be objectively declared fair and reasonable; but if those costs were not consistent with those

[58] Jan Richard Heier, 'The Foundations of Modern Cost Management: The Life and Work of Albert Fink' (2000) 10 *Accounting, Business and Financial History* 216-230; Paul J. Miranti, Jr. and Leonard S. Goodman, 'Railroad Accounting' in Michael Chatfield and Richard Vangermeersch (eds), *The History of Accounting: An International Encyclopaedia* (Garland Science 1996) 487; William Z. Ripley, *Railroads, Rates and Regulation* (first published in 1912, Beard Books 1999) 44.
[59] Covaleski et al (n 53).
[60] Skowronek, (n 51), __. See *The Hepburn Act*, 59th Congress, Sess. 1, ch. 3591, 34 Stat. 584 (1906); Interstate Commerce Commission, *Classification of Operating Expenses as Prescribed by The Interstate Commerce Commission in Accordance with Section 20 of the Act to Regulate Commerce* (Washington DC: US Government Printing Office, 1894), 4753-4845.
[61] Leslie S. Oakes and Paul J. Miranti Jr, 'Louis D. Brandeis and Standard Cost Accounting: A Study of the Construction of Historical Agency' (1996) 21 *Accounting, Organizations and Society* 569.

found in other industries, a rate that was tied to these costs could credibly and with apparent objectivity be found to be unreasonable.[62]

But this is the ending of the story, not its beginning. The standard cost accounting practices mandated by the ICC were themselves the product of almost four decades of organic industrial standardization and stabilization – both within the railroad industry and across industrial sectors – brought about by mass-production industrialization.[63]

The railroads were the first American firms to industrialize; they were the first American firms to operate at a vast geographical scale.[64] Such scales created unprecedented problems in the monitoring of firm operations, problems of which the firms themselves were initially only vaguely aware.[65] One of the solutions involved the standardization of firm operations in order to facilitate centralized management, resulting in a new form of capitalism that Alfred Chandler would term 'managerial capitalism'.[66] Part of this standardization involved the development of standardized, in-firm accounting principles. But well into the 1870s, individual firms trained their own accountants, using unique, in-house accounting practices.[67] Many of these in-house systems were of questionable accuracy.[68] As firms began to standardize industrial processes across the industry, however, railroad accountants could begin developing and sharing accounting techniques that were more effective at visibilizing local operations and financial conditions across firms.[69]

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[62] M. B. Hammond, 'Recent Efforts to Advance Freight Rates' (1911) 1 *The American Economic Review* 766-798. See also Skowronek, (n 51), at 269-270; Oakes and Miranti, (n 61) 574-575, 582.
[63] Darwin L. King, Kathleen M. Premo and Carl J. Case, 'Historical Influences on Modern Cost Accounting Practices' (2009) 13 *Academy of Accounting and Financial Studies Journal* 21-32; S. Paul Garner, 'Historical Development of Cost Accounting' (1947) 22 *The Accounting Review* 385-389, Heier (n 58) 230-231.
[64] Alfred D. Chandler, Jr., *The Railroads: The Nation's First Big Business, Sources and Readings* (Harcourt, Brace and World 1965).
[65] Heier (n 58) 216-218.
[66] A.D. Chandler Jr., *The Visible Hand: The Managerial Revolution in American Business* (Cambridge [MA]: Harvard University Press, 1977).
[67] Heier (n 58) 230.
[68] Ibid.
[69] Chandler (n 64) 99.

In developing accurate and standardized accounting practices, the railroads were also aided by another development triggered by industrialization, the emergence of specialized accountancy schools. These schools emerged in response to the fact that as more and more American industries industrialized and developed nation-spanning operations, the need for appropriate accounting principles and practices, and for persons trained in these kind of principles and practices, increased rapidly. The centralization of accountancy training further catalysed standardization of accounting practices, not just within the railroads, but across industrial sectors.[70]

Eventually, accounting practices across the railroad industry became consistent enough that in 1894, Henry Carter Adams, a professor of economics at the University of Michigan and the ICC's first Chief Statistician,[71] could systematize these practices into uniform accounting and reporting requirements.[72] In 1901, Milo Maltbie then built upon Adam's system to develop the "uniform system of accounts", a statutorily-mandated accounting system that required public utilities to keep uniformly detailed records of revenues, expenses, and earning for each distinct part of their operations.[73] Because public utilities presented regulatory and accounting problems similar to those presented by railroads – both industries tend towards natural monopolies – the ICC was then able to adapt Maltbie's uniform accounting system to the railroad industry.[74] This in turn, provided a common accounting framework that allowed comparison of costs across industrial sectors – which as

[70] Michael Chatfield, *A History of Accounting Thought* (R. E. Krieger 1977) 167; David Solomons, 'The Historical Development of Costing' in David Solomons (ed), *Studies in Cost Analysis* (2nd ed, R. D. Irwin 1968) 3-49; Garner (n 63) 388.
[71] S. Lawrence Bigelow, I. Leo Sharfman and R. M. Wenley, 'Henry Carter Adams' (1922) 20 *Journal of Political Economy* 201.
[72] See Interstate Commerce Commission, n 69 above, 3; Heier, n 58 above, 230-231; Bigelow et al (n 71) 207.
[73] Milo Maltbie, *The Street Railways of Chicago: Report of the Federation of Chicago* (Chicago: Federation of Chicago, 1901); Milo R. Maltbie, 'The Fruits of Public Regulation in New York' (1911) 37 *The ANNALS of the American Academy of Political and Social Science* 188-189.
[74] Covaleski et al (n 53).

shown above was the core feature of standard cost accounting that allowed the ICC to adapt it into a rule-based regulatory system.

In sum, the ICC's ability to project a rule-based regulatory effectiveness across national regulatory space was able to come about only after America's industrial revolution brought enough homogeneity and stability to that space to allow abstract rules governing accounting practices to uniformly produce meaningful insight into industrial conditions throughout the whole of their regulatory space. On the one hand, this seem to confirm the linkage between modern capitalism and rule of law. But as will be explored below, not all capitalist space is of this character.

2. The Material Geography of Modern Capitalism: The Core-Periphery Model

Having seen how the efficacy of rule of law depends on the presence of certain spatial predicates within its regulatory space, we can now explore for kinds of regulatory spaces that are likely to not evince these predicates. The strong correlation between rule of law and capitalist development suggests a focus on the kinds of spaces that are created by modern capitalism might be promising in this regard. While many attribute this correlation to a claim that rule of law promotes economic-capitalist development, the possible spatial-geographical aspects of this correspondence are yet to be meaningfully interrogated.[75] As shall be shown,

[75] Steven Brakman, Harry Garretsen and Charles van Marrewijk *The New Introduction to Geographical Economics* (2nd ed, Cambridge University Press 2009) 447-53.

looking at the relationship between capitalism and rule of law through the lens of geography and space gives us a very different picture of the nature of that relationship.

A. The Core-periphery Model

Capitalism produces a distinct kind of socio-economic space – a particular patterning of socio-economic activity that is known as the core-periphery model.[76] The core-periphery model describes a commonly-observed, concentric economic-geographical patterning in which higher levels of economic and industrial development are concentrated in a relatively small geographical region known as 'the core'. As one moves farther away from this core – ie, as one moves further into the 'periphery' – the level of industrial and economic development progressively declines. (Note that the core-periphery ordering thus actually manifests itself in the form of a gradient. Nevertheless, it is common to refer to its sub-regions or zones in more simple, tri-partite terms, ie, as simple being part of the 'core,' part of the 'intermediate zone,' or part of the 'periphery'. In fact, it is more accurate to refer to particular locales within this ordering simply as being more or less core, or more or less peripheral.)

Although it can be accentuated by human design,[77] core-periphery orderings appear ultimately to be a material phenomenon. Masahisa Fujita, Paul Krugman, and Anthony Venables have demonstrated that such orderings can arise simply as a consequence of the fact that cost of transporting good to market naturally increases as distance from market increases.[78] Distance is clearly a material attribute of space: its existence and effects are not simply social constructs.

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[76] For a good and accessible overview, Herman Schwartz, 'Dependency or Institutions? Economic Geography, Causal Mechanisms, and Logic in the Understanding of Development' (2007) 42 *Studies in Comparative International Development* 115; See also Fernand Braudel, *Civilization and Capitalism 15th-18th Century*, vol. 3: *The Perspective of the World* (Siân Reynolds tr, University of California Press 1992) 21-45.
[77] See n 88.
[78] Fujita et al (n 6).

The material nature of the core-peripheral order is also evinced by the fact that that ordering is multiscalar: core-periphery orders manifest transnationally, they manifest within national economies, they manifest even in more local environs.[79] In other words, core-periphery orders manifest even in territories that are otherwise institutionally and socially homogeneous. They are also ubiquitous: manifesting in regions as diverse the North Atlantic, East and South-East Asia, South America, South Asia, and Africa.[80] They are a historically long-standing phenomenon: they can identified in Europe by as early as the 12th century; they have even been identified in ancient Mesoamerica.[81] Core-periphery geographies are also remarkably stable and persistence.[82] As will be discussed further below, core-periphery geographies persist for far longer than human intentionality by itself would appear to allow.[83] Within any particular core-periphery ordering, the location of the core within that space will occasionally shift, only very rarely. Fernand Braudel calculated that the core of the European / North Atlantic regional economy has only shifted location only five times since the 14th century.[84] Another study suggests that no new transnational-regional cores have emerged anywhere in the world since the end of the 19th century,[85] although the *relative balance*

[79] Elizabeth Sanders, *Roots of Reform: Farmers, Workers, and the American State, 1877-1917* (University of Chicago Press 1999) 16-17 (identifying a core-periphery ordering in 19th century America); David W. Hughes and David W. Holland, 'Core-Periphery Economic Linkage: A Measure of Spread and Possible Backwash Effects for the Washington Economy' (1994) 70 *Land Economics* 364 (sub-state core-periphery ordering in the American state of Washington); Luiz Cesar de Queiroz Ribeiro and Edward E. Telles, 'Rio de Janeiro: Emerging Dualization in a Historically Unequal City' in Peter Marcuse and Ronald van Kempen (eds), *Globalizing Cities: A New Spatial Order?* (Blackwell 2000) 82-85 (core-periphery ordering at centred around municipalities).

[80] Paul Krugman, 'The New Economic Geography, Now Middle-aged' (2011) 45 *Regional Studies* 6 (China); Ribeiro and Telles (n 79) (Brazil); Richard F. Weisfelder, 'Lesotho and the Inner Periphery in the New South Africa' (1992) 30 *The Journal of Modern African Studies* 643; Edward M. Schortman and Patricia A. Urban, 'Living on the Edge: Core/Periphery Relations in Ancient Southeastern Mesoamerica' (1994) 35 *Current Anthropology* 401.

[81] Braudel (n 76) 98-115; see also Nicholas Crafts and Anthony J. Venables, 'Globalization in History: A Geographical Perspective' in Michael D. Bordo, Alan M. Taylor and Jeffrey G. Williamson (eds), *Globalization in Historical Perspective* (University of Chicago Press 2003); Schortman and Urban (n 80) (core-periphery ordering in ancient Mesoamerica).

[82] Agnus Maddison, *Monitoring the World Economy: 1820–1992* (OECD 1995) ch. 1; Giovanni Arrighi, Beverly J. Silver and Benjamin D. Brewer, 'Industrial Convergence, Globalization, and the Persistence of the North-South Divide' (2003) 38 *Studies in Comparative International Development* 3.

[83] See n 120.

[84] Braudel (n 76) 77-78.

[85] Maddison (n 82).

among different transnational core-periphery orderings has changed, particular as the development of the Asian regional economy taken as a whole has increasingly converged with that of the North Atlantic regional economy.[86]

The core-periphery model is sometimes conflated with dependency theory and world-systems theory.[87] But they are different things. Dependency theory and world-systems theory are theories about *how* transnational core-periphery orderings maintain themselves. They argue that these orderings delineate *political* spaces that are imposed on the periphery by the capitalist interests of the core.[88] But as will be shown below, one can explain the existence of core-periphery orders without reference to dynamics of political domination.[89] One can explain them as simply a spontaneous product of the interaction between capitalism and material space.

A core-periphery ordering can be seen as simply emerging out of a number of material characteristics of socio-economic space. Principal among these are the costs associated with transporting goods from place of production to place of consumption. Simply put, as we shall see, the greater the costs of transporting goods to centres of consumption (ie, cores), the less robust will be the economy at the place of production. In addition, core-periphery orderings are further strengthened and maintained by particular kinds of local geographies known as agglomerations. The presence of agglomeration gives a core geography an absolute (rather than simply comparative) competitive advantage in one or more high-revenue, 'core' industries.

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[86] Anthony J. Venables, 'Shifts in Economic Geography and their Causes' (2006 4Q) 91 *Economic Review* (Federal Reserve Bank of Kansas City) 62-63.
[87] Alice Amsden, 'Good-Bye Dependency Theory, Hello Dependency Theory' (2003) 38 *Studies in Comparative International Development* 32.
[88] Ramón Grosfoguel, 'Developmentalism, Modernity, and Dependency Theory in Latin America' (2000) 1 *Nepantla: Views from South* 347; Daniel Chirot and Thomas D. Hall, 'World-System Theory' (1982) 8 *Annual Review of Sociology* 81.
[89] Schwartz (n 76); Diego Puga and Anthony J. Venables, 'Agglomeration and Economic Development: Import Substitution vs. Trade Liberalisation' (1999) 109 *The Economic Journal* 292.

B. Ordering the Periphery: Transportation Costs and Dynamics of Foreign Investment

Humans are communal creatures – we prefer to live together. As the population within a community increases, the space occupied by that community becomes insufficient for producing all that the community needs to sustain itself. The community begins importing some of the goods necessary for its sustenance from its surrounding environs. It becomes, in other words, a centre of consumption.

Importing goods from the surrounding environs involves transportation costs. Everything else being equal, the further a product has to travel to get to market, the greater the cost of transporting that product to market. Transportation costs add to the cost of production. Consequently, firms producing for export will prefer to be located as close as they can be to the centre of consumption.[90] This causes a progressive decrease in land value. The farther out from the centre of consumption one moves, ie, the further one moves into the periphery, the lower the land value. Land value is a significant factor in local cost of living, which in turn is a significant factor in local wage levels.[91] So, the further one moves out into the periphery, the less expensive labour it as well.

Like transportation costs, land costs and labour costs can be significant components of cost of production. All this shapes the kind of industries that more peripheral environs are able to support. More peripheral regions are better suited for industries that (1) are land-intensive[92] (eg, agriculture, mining) and/or labour intensive[93] (eg, low-end manufacturing),

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[90] Paul Krugman and Anthony J. Venables, 'Globalization and the Inequality of Nations' (1995) 110 *Quarterly Journal of Economics* 861; Johann Heinrich von Thünen, *Der Isolierte Staat [Von Thünen's Isolated State]* (first published 1826, Peter Hall ed., Carla M. Watenberg tr, Pergamon Press 1966).
[91] Walter W. McMahon, and Carroll Melton, 'Measuring Cost of Living Variation' (1978) 17 *Industrial Relations: A Journal of Economy and Society* 324; Doreen Massey, 'In What Sense a Regional Problem?' (1979) 13 *Regional Studies* 233; David Keeble, *Industrial Location and Planning in the United Kingdom* (Methuen 1976) ch 4.
[92] Stefan Gruber and Anna Soci., 'Agglomeration, Agriculture, and the Perspective of the Periphery' (2010) 5 *Spatial Economic Analysis* 62-65.
[93] Prabirjit Sarkar, 'The North-South Terms of Trade Debate: A Re-examination' (2001) 1 *Progress in Development Studies* 309.

since the lower land and labour costs give their firms comparative advantages in these kinds of industries vis-à-vis those located closer to the centre of consumption; and (2) produce goods which are relatively easy to transport[94] (eg, bulk commodities), since ease of transport lowers transportation costs causing these costs to be less a factor in cost of production.

Because peripheral firms' comparative advantage lies in their lower production costs, they tend to operate in industries that compete on the basis of price (ie, 'price competition') rather than on the basis of design (ie, 'product competition').[95] Price competition allocates the surplus value generated by production to consumers ('consumer surplus').[96] Since peripheral economies are export oriented,[97] they thus end up exporting a significant portion of the surplus value they produce to outside locales. This limits the periphery's capacity to accumulate wealth,[98] which in turn inhibits infrastructural development and the quality of public amenities.[99]

Export orientation and industrial emphasis on low-end manufacturing, agriculture and natural-resource extraction also cause more peripheral economies to be less economically diverse.[100]

Difficulties in accumulating wealth also cause peripheral regions to be more dependent on foreign sources of capital.[101] But foreign capital behaves differently from

[94] Paola Giuliano, Antonio Spilimbergo and Giovanni Tonon, 'Genetic Distance, Transportation Costs, and Trade' (2014) 14 *Journal of Economic Geography* 179.
[95] George J. Stigler, 'Price and Non-Price Competition' (1968) 76 *The Journal of Political Economy* 149; Charlie Karlsson and Jan Larsso, 'Product and Price Competition in a Regional Context' (1990) 69 *Papers in Regional Science* 83; Joseph Bowring, *Competition in a Dual Economy* (Princeton University Press 1986).
[96] Alfred Marshall, *Principles of Economics* (9th ed, Macmillan 1961) 124-127.
[97] Béla Balassa, *The Newly Industrializing Countries in the World Economy* (Pergamon Press 1981).
[98] J. Henderson, 'Global Production Networks, Competition, Regulation and Poverty Reduction: Policy Implications' (Manchester University Centre on Regulation and Competition, Working Paper Series No. 115, 2005).
[99] Bowring (n 95); Schwartz (n 76).
[100] Paul B. Siegel, Thomas G. Johnson and Jeffrey Alwang, 'Regional Economic Diversity and Diversification' (1995) 26 *Growth and Change* 271.
[101] William J. Dixon and Terry Boswell, 'Dependency, Disarticulation, and Denominator Effects: Another Look at Foreign Capital Penetration' (1996) 102 *American Journal of Sociology* 543.

domestic capital. First, it demands higher rates of return relative to risk.[102] This is due to a human psychological phenomenon known as "home bias". First discovered by Daniel Ellsberg[103] (later of Watergate fame[104]), home bias describes the tendency of investors to *irrationally* overestimate the riskiness of investment in geographically remote locales in relation to investment in more nearby locales.[105] For example, a well-known study of investment behaviour in the US, Japan and Britain conducted by Kenneth French and James Poterba[106] found that in spite of the well-known benefits of international equity markets diversification, most investors in these three countries 'hold nearly all of their wealth in domestic assets' and that this lack of diversification 'cannot be explained by institutional constraints, such as tax burdens, transaction costs, or limits on cross-border investment'.[107] Rather, it appears to due to psychological tendencies. Investors reflexively 'expect returns in their domestic equity market to be several hundred basis points higher than returns in other markets' simply because they 'impute extra "risk" to foreign investments because they know less about foreign markets, institutions and firms.'[108]

In the context of core-periphery ordering, these greater feelings of risk result in demands for higher rates of returns from peripheral firms as compared core firms independent of actual investment risk[109] — so much so that in 2002, the head of emerging

[102] Barry Bosworth, Susan Collins, and Gabriel Chodorow-Reich, 'Returns on FDI: Does the U.S. Really Do Better?' (NBER Working Paper No. 13313, 2007), at http://www.nber.org/papers/w13313 (last accessed 24 April 2017).
[103] Daniel Ellsberg, 'Risk, Ambiguity, and the Savage Axioms' (1961) 75 *Quarterly Journal of Economics* 643.
[104] Daniel Ellsberg, *Secrets: A Memoir of Vietnam and the Pentagon Papers* (Penguin 2003).
[105] Tomasz Zaleskiewicz, 'Behavioral Finance' in Morris Altman (ed), *Handbook of Contemporary Behavioral Economics: Foundations and Developments* (Routledge 2015) 707-728.
[106] Kenneth R. French and James M. Poterba, 'Investor Diversification and International Equity Markets' in Richard H. Thaler (ed), *Advances in Behavioral Finance* (Russel Sage 1993).
[107] Ibid 383.
[108] Ibid 389.
[109] See Bosworth et al (n 102).

markets at Barings Asset Management noted that stock markets in emerging countries were 'trading at a 40 per cent discount to developed markets.'[110]

Foreign investment is also more skittish than domestic investment, a behavioural quality that is often captured by the term 'herd behaviour'. Herd behaviour is a natural response to the insecurities foreign investors feel when investing in the less familiar socio-economic environs. As described by Gordon Clark, 'herd behaviour' describes a phenomenon in which foreign investors, because they lack local knowledge of the investment environment, tend to mimic the behaviour of other foreign investors in response to unanticipated events. This can cause market events that do not represent significant changes in market fundamentals to nevertheless quickly snowball into mass buying frenzies or mass selling frenzies[111] (as will be explored further below in the context of the Asian Financial Crisis of 1997).

C. Ordering the Core: Product Competition and Agglomeration Effects

By contrast, core regions enjoy comparative advantage in industries that are product competitive rather than price competitive (ie, industries in which products compete on the basis of product design rather price).[112] This is because product-competitive industries tend to involve knowledge-intensive rather than labour-intensive forms of production, and thus require a higher *quality* of labour rather than a greater *intensity* of labour.[113] High quality labour is relatively scarce, and it is also relatively mobile: locations thus have to compete for

[110] Kate Burgess, 'Unloved and Unwanted — So Buy It' (2003) *Financial Times* 23 March.
[111] Gordon .L. Clark, "Money Flows like Mercury: The Geography of Global Finance' (2005) 87 *Geografiska Annaler: Series B, Human Geography* 106.
[112] Bowring (n 95).
[113] Maryann P. Feldman, *The Geography of Innovation* (Kluwer Academic 1994), 18-21.

its presence.[114] Everything else being equal, cores offer higher salaries and qualities of life,[115] and thus enjoy comparative advantage in securing and retaining this kind of labour.[116]

Product competition allows for monopoly pricing, which allows producers to retain a greater share of the wealth they generate through production.[117] Much of this retained wealth goes to the local labour force in the form of the higher wages necessary to pay for the core's higher-quality of labour and its higher costs of living.[118] This gives local authorities a much larger tax base from which to draw public funds,[119] which in turn allow for the more diverse and developed public amenities – better public schools, better public infrastructure, better public management – characteristic of core regions.

But higher land costs, higher labour costs, higher costs of living and higher taxes also makes core environs more expensive for firms to operate in. This gives rise to a puzzle. Product cycle theory argues that cores should die out relatively quickly after they emerge, because resident firms will relocate to less expensive environs once land and labour costs in the firm get too high (using the cost saving to continue securing high-quality labour).[120] But this doesn't seem to happen. Cores persist as cores well beyond the life-cycles of the particular products they produce. Why is this?

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[114] Shields and Shields (n 47).
[115] J.R. Oppong, R. G. Ironside and L.W. Kennedy, 'Perceived Quality of Life in a Centre-Periphery Framework' (1988) 20 *Social Indicators Research* 605.
[116] Joel Kotkin, *The New Geography* (Random House 2000); Rena Sivitanidou, 'The Location of Knowledge-Based Activities: The Case of Computer Software' in Manfred M. Fischer, Luis Suarez-Villa and Michael Steiner (eds), *Innovation, Networks and Localities* (Springer-Verlag 1999).
[117] Edward Hastings Chamberlin, *The Theory of Monopolistic Competition: A Re-Orientation of the Theory of Value* (8th ed, Harvard University Press 1965), 118-119; .Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* 3rd ed (New York: Harper and Row, 1950), 83-85.
[118] Chinhui Juhn, Kevin M. Murphy and Brooks Pierce, 'Wage Inequality and the Rise in Returns to Skill' (1993) 101 *Journal of Political Economy* 410; William J. Carrington and Enrica Detragiache, 'How Extensive is the Brain Drain?' (1999) 36 *Finance and Development* 46-49.
[119] Fredrik Andersson and Rikard Forslid, 'Tax Competition and Economic Geography' (2003) 5 *Journal of Public Economic Theory* 279.
[120] Raymond Vernon, 'International Investment and International Trade in the Product Cycle' (1966) 80 *Quarterly Journal of Economics* 190; Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade* (3rd ed, Routledge 2005) 2.

The answer is agglomeration. But before explaining what this means, we first need to clarify what goes into success in product competition. Success in a product competitive market does not depend simply on the one-time innovation of one new product. It requires *continual* innovation. This, in turn, requires the continual production of new knowledge.[121] Along these lines, agglomeration is a social condition that gives its locale absolute advantage over other locales in the continual generation of new knowledge relevant to some product-competitive industry. It comes about when large collection of highly experienced people with different but complementary skill-sets relevant to a particular industry continually interact with one another on a face to face basis. This allows for continual transfer of tacit (non-codified) and/or local knowledge across disciplinary, professional, and / or experiential terrains — ie, 'knowledge spillover' – which in turn constantly generates new and competitively-valuable knowledge relevant to that industry.[122] All this gives firms in the area absolute advantage in *continually* advancing product design, thus allowing them to maintain product competitiveness across successive product cycles.

Because knowledge spillover involves the transfer of tacit knowledge, it requires face-to-face interaction.[123] This makes agglomeration a highly localized phenomenon: one study suggests that in order for agglomeration to occur, the involved experts need to work within a 45-minute travel time from each other.[124] Moreover, the complexity and density of the social networks that trigger agglomeration preclude such effects from being strategically moved to or reconstructed in another locale in order to take advantage of lower production costs. In

[121]Marielle Damman, Marina van Geenhuizen and Peter Nijkamp, 'Innovative Behaviour in European Cities: The Relevance of Knowledge Networks' (1997) 1 *Applied Geographic Studies* 13; cf. Philip Anderson and Michael L. Tushman, 'Managing Through Cycles of Technological Change' (1991) 34 *Research Technology Management* 26.
[122] Edward L. Glaeser, Hedi D Kallal, Jose A Scheinkman and Andrei Shleifer, 'Growth in Cities' (1992) 100 *Journal of Political Economy* 1126; Gerald A. Carlino, 'Knowledge Spillovers: Cities' Role in the New Economy' (2001 Q4) *Federal Reserve Bank of Philadelphia Business Review* 17-24.
[123] James Fleck, 'Expertise: Knowledge, Power and Tradability' in Robin Williams, Wendy Faulkner and james Fleck (eds), *Exploring Expertise* (Macmillan 1998) 158-59.
[124] Patricia Rice, Anthony J. Venables, Eleonora Patacchini, 'Spatial Determinants of Productivity: Analysis for the Regions of Great Britain' (2006) 36 *Regional Science and Urban Economics* 727.

product-competitive industries, the competitive advantages stemming from lower costs of production (i.e., price competitiveness) simply do not compensate for the competitive disadvantages caused by loss in capacity to continually create new knowledge relevant to innovation in product design.[125]

Agglomeration relevant to product competition appears to be limited to core economic regions.[126] A good demonstration of this is found in a recent study of Asian industrial parks conducted by Frederic Deyo. Industrial parks seek to concentrate a diversity of synergistically-related firms and research institutions working relevant to core industrial activities in a small area. They also provide services and facilities – child care, restaurants and cafes, fitness centres – that encourage workers from different firms and institution in the park to interact. Their intent is to promote agglomeration effects. But while they have been effective at promoting agglomeration in more core Asian economies of Taiwan, South Korea, and Singapore; efforts to replicate this effect in more peripheral economies, such as China, Thailand and Malaysia, have been unsuccessful. In more peripheral spaces, the industrial park model does not stimulate knowledge spillover, but ends up simply facilitating the formation of supply networks.[127]

D. On the Future of Distance

It is sometimes suggested that global capitalism is in the process of overcoming the friction of transportation costs. Two arguments seem to support such a conclusion. One involves

[125] Storper (n 7) 28; Adam B. Jaffe, Manuel Trajtenberg and Rebecca Henderson, 'Geographic Localization of Knowledge Spillovers as Evidenced by Patent Citations' (1993) 108 *Quarterly Journal of Economics* 577; Maryann P. Feldman, 'The New Economics of Innovation, Spillovers And Agglomeration: A Review Of Empirical Studies' (1999) 8 *Economics of Innovation and New Technology* 5.
[126] José A. Borello, Hernán Morhorlang and Diego Silva Failde, 'Agglomeration Economies in Semi-Industrialized Countries: Some Evidence from Argentina' (2011) 3 *Institutions and Economies* 487; Thomas K. McCraw, *Prophets of Regulation* (Harvard University Press 1984) 75-76.
[127] Frederic.C. Deyo, 'Addressing the Development Deficit of Competition Policy: The Role of Economic Networks' in Michael W. Dowdle, John S. Gillespie and Imelda Maher (eds), *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law* (Cambridge University Press 2013), 292-299.

advances in transportation technology, which are reducing transportation costs to such an extent that they are on the verge of eliminating their structuring effects. The other is that international capitalism is becoming increasingly driven by service industries and allow such service industries to operate without regards to distance — again reducing the power of distance to shape and maintain core-periphery ordering.[128]

Both of these arguments are unconvincing. Studies suggest that that even very low transportation costs are sufficient to generate pronounced core-periphery ordering – in fact, paradoxically, except at the very extreme fringes of the transportation-cost spectrum, lowering transportation costs actually reinforces rather than corrodes core-periphery ordering.[129] Along these lines, there is no evidence that core-periphery ordering is disappearing.[130]

With regards to the rise of the service sector, distance still matters in the form of agglomeration.[131] Studies suggest that at least for the present, Internet communication is still too clunky to accommodate the complexity and spontaneity of information exchange necessary to trigger agglomeration.[132] As detailed above, it is the core's role as a centre of consumption, not the nature of its production, which generates the core-periphery ordering (although the nature of its production may affect the persistence of its status as a core).

3. The Regulatory Geography of Modern Capitalism and the 'Place' of Rule of Law

[128] Frances Cairncross, *The Death of Distance: How the Communications Revolution Is Changing Our Lives* (Cambridge, MA: Harvard Business Press, 2001); Richard O'Brien, *Global Financial Integration: The End of Geography* (Chatham House 1992).
[129] Paul Krugman, 'Space: The Final Frontier' (1998) 12 *The Journal of Economic Perspectives* 167-168.
[130] Venables (n 86) 77-81; Stephen Redding and Anthony J. Venables, 'Economic Geography and International Inequality' (2004) 62 *Journal of International Economics* 53.
[131] Rice et al (n 124).
[132] Edward E Leamer and Michael Storper, 'The Economic Geography of the Internet Age' (2001) *Journal of International Business Studies* 641.

How does capitalism's core-periphery ordering interact with the spatial predicates of rule of law? As evinced above regarding the modern transformation of capitalist space that catalysed the emergence of the regulatory state in the United States, rule of law is clearly compatible – or at least can be compatible – with some of the socio-economic spaces generated by modern capitalism. But as we also saw, modern capitalism generates different kinds of socio-economic space in different places. We cannot assume that since modern capitalism is compatible with rule of law in some of its places, it is compatible with rule of law in all of its places.

These is a strong correlation between the regulatory effectiveness of rule of law and level of economic development.[133] Implicit in this correlation is a parallel correlation between lack of rule of law and economic underdevelopment. The most common explanation for both these correlations is that rule of law catalyses economic development.[134] But economic underdevelopment could also be a product of the dualist nature of modern capitalist space. This suggests an alternative possibility –that there is something in the nature of peripheral capitalist space that prevents rule of law from enjoying regulatory effectiveness there.

To recall from the first part of this essay, the regulatory efficacy of rule of law depends on its regulatory space being either (1) homogeneous and stable; or (2) being capable of being made to be homogeneous and stable; or (3) having sufficient spatial wealth to be able to use regulatory intermediaries to internalize the complexities of variegation and volatility. As we shall see, the dynamics that generate and sustain capitalism's core-periphery ordering cause peripheral regulatory space to not conform to any of these three predicates.

[133] See n 4.
[134] See n 5.

A. Peripheral Capitalist Space is Distinctly Volatile and Variegated.

The transnational dynamics underlying the core-periphery ordering make peripheral socio-economic regulatory spaces significantly less stable and significantly more fragmented than are the socio-economic regulatory spaces of the core. Such volatility is due to a number of factors.[135] First, because they are more strongly oriented towards production for export, and are more dependent on foreign sources of capital, peripheral economies are more vulnerable to both domestic *and foreign* business cycles.[136] Herd mentality on the part of foreign investors and foreign currency traders works to make peripheral currencies more volatile, thus destabilizing import and export markets, and destabilizing peripheral capital markets.[137] Second, export orientation, higher transportation costs, and a spatial comparative advantage in land-intensive or labour-intensive industries limit opportunities for economic diversification,[138] which is an important contributor to economic stabilization.[139] Finally, home bias on the part of foreign investors raises the cost of capital, which in turn gives evolutionary advantage to peripheral industrial sectors and industrial practices that involve larger amounts of risk, further aggravating socio-economic instability.[140]

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[135] M. Ayhan Kose, Eswar S. Prasad and Marco E. Terrones. 'How do Trade and Financial Integration affect the Relationship between Growth and Volatility?' (2006) 69 *Journal of International Economics* 176; Panos Varangis, Sona Varma, Angelique dePlaa and Vikram Nehru, *Exogenous Shocks in Low-Income Countries: Economic Policy Issues and the Role of the International Community* (World Bank 2004); Eswar Prasad, Kenneth Rogoff, Shang-Jin Wei and M. Ayhan Kose, 'Effects of Financial Globalization on Developing Countries: Some Empirical Evidence' (International Monetary Fund, Occasional Paper 220, 2003), 18-28 (available at https://www.imf.org/external/np/res/docs/2003/031703.pdf (last accessed 26 April 2017).

[136] James A. Caporaso, 'Industrialization in the Periphery' (1981) 25 *International Studies Quarterly* 347; Frederic C. Deyo; Richard F. Doner and Eric Hershberg (eds), *Economic Governance and the Challenge of Flexibility in East Asia* (Lanham: Rowman and Littlefield, 2001); Prasad et al (n 135) 27-28; Clark (n 111); Kose et al (n 135).

[137] Rogerio P. Andrade and Daniela Magalhães Prates, 'Exchange Rate Dynamics in a Peripheral Monetary Economy' (2013) 35 *Journal of Post Keynesian Economics* 399; Maurice Obstfeld and Alan M. Taylor, *Global Capital Markets – Integration, Crisis, and Growth* (Cambridge University Press 2004)

[138] Siegel et al (n 100) 271.

[139] Ibid; Venables (n 86); Jean-Claude Berthélemy and Ludvig Söderling, 'The Role of Capital Accumulation, Adjustment and Structural Change for Economic Take-Off: Empirical Evidence from African Growth Episodes' (2001) 29 *World Development* 323; Jean Imbs and Romain Wacziarg 'Stages of Diversification' (2003) 93 *American Economic Review* 63.

[140] See Ajit Singh, 'Corporate Governance, Corporate Finance and Stock Markets in Emerging Countries' (2003) 3 *Journal of Corporate Law Studies* 41.

Moreover, such instabilities have greater socio-economic effect in peripheral economic spaces due to the lesser amounts of wealth available to these spaces. Lesser amounts of private wealth prevent local firms from accumulating sufficient reserve capital to survive cyclical economic downturns,[141] causing even small downturns to generate considerably greater amounts of unemployment than would be the case in core environments.[142] At the same time, lesser wealth makes it harder for peripheral governments to construct social safety nets. As a result, what in core places would only be an ephemeral economic downturn can generate far more serious socio-economic disruptions in the periphery.[143]

Core-periphery ordering also causes the socio-economic space of more peripheral countries to be intrinsically less homogeneous, and innately more fragmented than that of more core countries.[144] Lesser access to wealth results in weaker regulatory enforcement, which limits the government's ability to impose spatial uniformity through law.[145] Peripheral national boundaries have often been arbitrarily imposed due to past colonialism, resulting in greater cultural fragmentation.[146] More recently, the disaggregation of production into transnational production chains has further catalysed economic fragmentation in peripheral regions, by causing different subnational economic sub-spaces to become more deeply

[141] Joseph E. Stiglitz, 'Some Lessons from the East Asian Miracle' (1996) 11 *The World Bank Research Observer* 164-165.
[142] John Atkinson, 'Manpower Strategies for Flexible Organisations' (1984) 16 *Personnel Management* 28-31.
[143] Frederic C. Deyo, 'Reforming Labor, Belaboring Reform: Structural Adjustment in Thailand and East Asia' in Yoichiro Sato (ed.), *Growth and Governance in Asia* (Asia-Pacific Center for Security Studies 2004).
[144] Anthony Chambet and Rajna Gibson, 'Financial Integration, Economic Instability and Trade Structure in Emerging Markets' (2008) 27 *Journal of International Money and Finance* 654; Hal Hill, 'Spatial Disparities in Developing East Asia: A Survey' (2002) 16 *Asian- Pacific Economic Literature* 10; Andrés Rodríguez-Pose and Roberto Ezcurra, 'Does Decentralization Matter for Regional Disparities? A Cross-Country Analysis' (2010) 10 *Journal of Economic Geography* 619.
[145] Dowdle (n 24).
[146] See Andreas Winner, 'Who Owns the State? Understanding Ethnic Conflict in Post-Colonial Societies' (1997) 3 *Nations and Nationalism* 631.

integrated in different transnational economic spaces that operate semi-autonomously from state-based regulatory systems.[147]

B. Peripheral Capitalist Space Cannot be Made to be Stable and Homogeneous via Juridification.

Moreover, the major causes of peripheral economic volatility and variegation – most particularly export orientation, transportation costs, lack of economic diversity – are innate to peripheral capitalist space. These causes are products of distance and, related to that, human psychology, and thus cannot be regulated away using juridification or other forms of social engineering.[148] Moreover, the export-oriented nature of their economies, their greater dependence on foreign sources of capital, the smaller size of their national economies (which make them more sensitive to international currency speculation, for example), and their greater vulnerability to outside security threats[149] make peripheral regulatory space less autonomous, and thus even less susceptible to having homogeneity and stability imposed upon it through domestic regulation.

C. Peripheral Capitalist Space Lacks the Spatial Wealth Necessary to Internalize their Greater Spatial Complexities.

As discussed above, rule of law regulatory systems in core economies can often internalize spatial volatility and fragmentation through the use of regulatory intermediation. But regulatory intermediation is expensive, and this requires that the space deploying such

[147] John Gillespie, 'New Transnational Governance and the Changing Composition of Regulatory Pluralism in Southeast Asia' (2014) 9 *Asian Journal of Comparative Law* 65.
[148] Redding and Venables (n 130).
[149] Amitav Acharya, 'The Periphery as the Core: The Third World and Security Studies' (York University Centre for International and Strategic Studies, YCISS Occasional Paper No. 28, March 1995) 4; Evan Luard, *War in International Society* (I.B. Tauris, 1986) appendix 5.
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intermediation have access to pools of wealth sufficient to produce, attract and retain the advanced technologies and highly-quality labour upon which effective regulatory intermediation depends.

More specifically, as described above, the pronounced mobility of high-quality labour means that the local economy must be able to offer standards of living and public amenities comparable to other locales that are also looking to attract such labour. Peripheral economies, by contrast, lack the spatial wealth and corresponding qualities of life that would allow them to compete with core economies for the high-quality labour necessary for effective regulatory intermediation. This, together the peripheral spaces even greater complexity vis-à-vis core space due to their greater socio-economic volatility and fragmentation, would make effective regulatory intermediation difficult to develop and sustain in peripheral regulatory space.

On the other hand, however, there has been considerable recent debate among developmental economists as to how much a particular space's level of economic development is linked to or capped by its geographical location, with a significant contingent of scholars arguing that what *ultimately* determines a country's level of economic development is the quality of its governance institutions, not its location per se.[150] If this were the case, it could suggest that a peripheral locale might be able to bootstrap its way towards effective regulatory intermediation, by first setting up such intermediation, and then using the increased spatial wealth and development that that intermediation might generate to pay for its higher costs.[151] Such a possibility would thus make that rule of law a viable regulatory option even for presently peripheral locales.

[150]Eg, Dani Rodrik, Arvind Subramanian and Francesco Trebbi, 'Institutions Rule: The Primacy of Institutions over Integration and Geography in Economic Development' (2004) 9 *J. Econ Growth* 131; Jeffrey D. Sachs, 'Institutions Don't Rule: Direct Effects of Geography on Per Capita Income' (*NBER Working Paper*, No. 9490, 2003).

[151] Douglass C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, 1990); Anthony Ogus and Qing Zhang, 'Licensing Regimes East and West' (2005) 25 *Int'l Rev. L & Econ* 124.

Whether and to what extent particular institutions allow a particular locale to transcend or transform its economic-geographical conditions insofar as the road to development is concerned is an open question. But at least for the present, it is one that does not seem to significantly impugn the distinct placeedness of rule of law in capitalist space. The geography vs. institutions debate focuses on the comparative determinacy of institutions as compared to physical or absolute geography. The core periphery ordering is a form of relative geography or 'second-nature geography'. The question as to whether and to what degree domestic institutions can overcome such relative ordering effects is yet to be explored.[152] Given that this second-nature economic geography is the product of the material distance, and given – as we saw above – that there is no indication that we are on the verge of transcending the effects of distance via new technologies, it is hard to comprehend how these second-nature spatial orderings can be significantly overcome by the presence of particular domestic institutions.[153]

Of course, cores do occasionally move.[154] Along these lines, some of the scholarly focus on the effect of institutions on development has begun locating that effect in the *longue duree*. Douglass North, for example, has located the emergence of England as an industrial core in the 18th century in institutional developments that occurred in the 15th and 16th centuries.[155] Daron Acemoglu and James Robinson locate the institutional predicates for much of the Global South's lack of development today in particular colonial structures that date to the 16th century.[156] This suggest that institutions could well play a role in why some locales emerge as cores while others do not.

[152] Brakman et al (n 75) 447-53.
[153] Ibid 447-8
[154] See n 84-85
[155] North (n 151) 6.
[156] Daron Acemoglu and James A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (New York: Crown Business, 2012); Daron Acemoglu, Simon Johnson and James A. Robinson, 'The Colonial Origins of Comparative Development: An Empirical Investigation' (2001) 103 *The American Economic Review* 3059.

But this would not contest rule of law's distinct placedness in the core and not in the periphery. The capitalist symbiosis linking core and peripheral emergence means that even if institutions are the ultimate triggers for the shifting of cores; these same institutions are at the same time inducing the construction of new peripheries. In the context of rule of law, it would mean that even if institutional bootstrapping could work to make some spaces compatible with rule of law, it would at the same time generate much other space that is not compatible. Rule of law would still have its distinct placedness in the regulatory geography of modern capitalism.

Finally, it also bears noting that even if institutions are the ultimate cause of economic development, there is significant confusion about what those institutions are, and it is not at all clear that 'rule of law' or regulatory intermediation is one of them. In particular, Dani Rodrik, one of the foremost proponents of institutional primacy during the first decade of the 21st century, has recently argued that our understanding of what kinds of institutions promote development and how they do so is so incomplete that developmental programs need to adopt an experimental approach to promoting development, eschewing presumptive linkages between such development and any *particular* institutional structure.[157] The economic rise of China in particular has led many to question whether the formal institutional architectures associated with rule of law really correlate with capitalist advancement in the way that is commonly assumed.[158]

[157] Dani Rodrik, 'The New Development Economics: We Shall Experiment, but How Shall We Learn?' (Harvard Kennedy School, HKS Faculty Research Working Paper Series Faculty Research Working Paper Series RWP08-055, 2008), at https://ssrn.com/abstract=1296115 or http://dx.doi.org/10.2139/ssrn.1296115 (last accessed 5 May 2017).
[158] ibid; Donald C. Clarke, 'Economic Development and the Rights Hypothesis: The China Problem' (2003) 51 *Am J Comp L* 89.

D. The Ineffectiveness of International Developmental Efforts to use Rule of Law to Regulate Peripheral (Thai) Capitalist-regulatory space in Response to the Asian Financial Crisis of 1997-2001.

The periphery's material incompatibility with the spatial predicates of rule of law is demonstrated in the ineffectiveness of rule of law regulatory frameworks set up by the World Bank, Asian Development Bank ('ADB'), and International Monetary Fund ('IMF') set up to help Thailand negotiate the Asian Financial Crisis of 1997. The World Bank / IMF efforts to address this crisis have been subsequently widely criticized, most commonly for the IMF's and World Bank's initial embrace of 'austerity' as the solution to the crisis. [159] The analysis here, by contrast, will focus on a different aspect of the ineffectiveness of the World Bank's and IMF's response, one most cogently explored by Pasuk Phongpaichit and Chris Baker's study of the crisis, *Thailand's Crisis*.[160] As predicted in the above analysis of the regulatory geography of modern capitalism, the innately volatile, fragmented, and non-autonomous nature of Thailand's peripheral capitalist space ultimately caused these rule-based frameworks to frequently generate unintended consequences. Even after the IMF and World Bank began to embrace the deployment of Keynesian economic stimulus in the form of a Social Insurance Fund, the IMF's continued reliance on implementing this stimulus through rule-based governance prevented these efforts from being effective. Ultimately, the more effective response turned out to be an abandonment of rule-based regulation in favour of more relation-based regulatory strategies.

(i) Thailand's peripheral regulatory terrain before the crisis

[159] Jeffrey D. Sachs, 'The Wrong Medicine for Asia' *New York Times* (3 Nov. 1997), A23; Joseph Stiglitz, 'The Insider: What I Learned at the World Economic Crisis' *The New Republic* (17 April 2000), 56-60; Paul Krugman, 'The Confidence Game: How Washington Worsened Asia's Crash' *The New Republic* (5 Oct 1998), 23-5.

[160] Pasuk. Phongpaichit and Chris Baker, *Thailand's Crisis* (Institute of Southeast Asian Studies 2000).

Thailand is a typically peripheral socio-economic space.[161] Its national economy was and still is heavily dependent on export of price-competitive products.[162] Beginning in the late 1980s, the Thai economy became increasingly inundated with foreign capital.[163] This influx of foreign sources of capital, mostly in the form of short-term lending, made Thai economic space particularly susceptible to volatility.[164] Thailand's economic volatility was transmitted to its industrial labour markets via the practice of 'numerical flex' – a process in which manufacturers respond to changes in market demand by employing casual workers, generally migrants from rural areas, when demand was high and then dismissing them when demand went slack.[165] Thai economic space is also significantly variegated: for example, while the economies of urban geographies deteriorated dramatically during the first two years of the crisis, but then resumed growing thereafter,[166] much of Thailand's rural economy, by contrast, actually grew during that time,[167] only to collapse into critical recession just as urban economies were beginning to show improvement.[168]

As shown below, such variegation and instability made centralized regulatory observation and penetration of rural communities in particular very difficult.[169] The dynamic character of 'quantitative flex' labour practices made national employment and wage levels hard to measure, which in turn made it hard to understand how the national economy is performing and evolving during the crisis.[170]

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[161] Yuk Sī'ariya, *The Political Economy of Thailand: The Thai Peripheral State, 1958-1988* (State University of New York at Binghamton, 1993).
[162] Phongpaichit and Baker (n 160) 26.
[163] Karel Jansen, *External Finance in Thailand's Development: An Interpretation of Thailand's Growth Boom* (Macmillan, 1997).
[164] Phongpaichit and Baker (n 160) 24-25
[165] Frederic C. Deyo, 'Labor and Post-Fordist Industrial Restructuring in East and Southeast Asia' (1997) *Work and Occupations* 97.
[166] Phongpaichit and Baker (n 160) 86-92.
[167] Ibid 91.
[168] Ibid 92-4.
[169] Ibid 102.
[170] Ibid 82-94.

The Thai variant of the Asian Financial Crisis of 1997 was very much a reflection and product of Thailand peripheral spatiality. In order to reduce trade volatility stemming from currency exchange fluctuations common to peripheral economies,[171] Thailand had long pegged its currency, the Bhat, to the US dollar. Beginning in the late 1980s, Thailand, under pressure from the World Bank, opened its domestic capital markets to foreign investors.[172] Foreign capital rushed into Thailand, but seeking higher returns (in order to offset home bias effects), it quickly moved into more risky and more speculative investment opportunities, particularly real estate investment.[173] Beginning in 1995, sparked in part by a downturn in global demand for Thai exports, international currency speculators began attacking Thailand's currency peg. Defending the Baht against these repeated attacks eventually depleted Thailand's foreign exchange reserves, and by summer of 1997, the Thai government had no choice but to allow the Baht to float.[174]

The Bhat rapidly lost value against the dollar, and foreign capital began to flee Thailand.[175] Without access to the dollars necessary to fund engagement in foreign markets, the financial and manufacturing sectors collapsed.[176] Thai manufacturers began limiting production – or ceasing it altogether – and laying off workers. Unemployment and under-employment rose dramatically, and domestic consumer demand began to fall. This in turn caused wages to fall and unemployment to rise in the domestic retail sector.[177] The urban and industrial parts of the Thai economy consequently entered into extreme recession.

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[171] See n 137.
[172] Phongpaichit and Baker (n 160) 24-27.
[173] Ibid 25, 27
[174] Laurids S. Lauridsen, 'The Financial Crisis in Thailand: Causes, Conduct and Consequences?' (1998) 26 *World Development* 1579-1582; Masahiro Kawai, 'The East Asian Currency Crisis: Causes and Lessons' (1998) 16 *Contemporary Economic Policy* 162.
[175] Jeffrey D. Sachs and Steven Radelet, 'The East Asian Financial Crisis: Diagnosis, Remedies, Prospects' (1998) 1 *Brookings Papers on Economic Activity* 190.
[176] Phongpaichit and Baker (n 160) 40-41.
[177] Ibid 43-44

(ii) The juridified response of the IMF and World Bank

In order to restore its depleted reserves and its domestic financial system, the Thai government took out several emergency loans from the IMF. Believing that Thailand's economic problems were due primarily to a lack of an effective rule of law, the IMF demanded the imposition of rule-based forms of regulation as a condition for emergency loans.[178] This juridification of Thai economic regulation took a number of forms. Conditions for liquidation and bankruptcy were codified through new domestic regulation.[179] Foundational principles governing economic and fiscal policy were codified in formal international agreements between the Thai government and the IMF / World Bank.[180] Brighter jurisdictional boundaries were drawn between the public and private economies.[181] Strict rules regarding loan classification, capital reserve requirement, and insolvency were drawn up for domestic banks.[182] Insolvent banks and companies were to be assessed and handled using new, juridified privatization and bankruptcy regimes.[183]

(iii) Spatial incompatibilities with the IMF response

But IMF and World Bank juridification of its economic policy reforms was incompatible with the regulatory characteristics of Thai socio-economic space. Thailand's spatial-regulatory incompatibility with the ADB and World bank's rule-of-law approach to addressing the crisis was particularly well demonstrated by the Asian Development Bank's (ADB) failed efforts in 1999 to establish a 'Social Investment Fund [SIF]' that would provide a social safety net for Thailand's rural populations, who by that time had become the

[178] Ibid 37-38.
[179] Shalendra D. Sharma, 'Beyond the IMF Medicine: Thailand's Response to the 1997 Financial Crisis' (2002) 5 *International Area Review* 29-30.
[180] Phongpaichit and Baker (n 160) 35-68.
[181] Ibid 64, 72, 80.
[182] Ibid 41; Sharma (n 179) 34-36.
[183] Sharma (n 179) 35.

principal victims of the crisis.[184] The ADB encumbered the SIF with a heavily juridified procedural framework in order to ensure that funding went to its appropriate targets:

> [funds] would be allocated to projects proposed by local groups . . . [t]he machinery for approving local projects was staffed with representatives of NGOs and independent technocrats . . . individual projects would be screened by civil forums from their specific area. . . [t]he guidelines defining acceptable applicants and acceptable schemes were narrow.[185]

Such a scheme proved unworkable, however. After nine months of operation, the SIF could only disburse five per cent of its annually available funding. Three months later, the SIF's funding scheme was terminated.[186] As well described by Phongpaichit and Baker, Thailand lack of effective regulatory intermediation left key actors, including both centralized regulators and local NGOs, unable navigate the complex regulatory routines the IMF used to structure the programme: 'few local groups had the expertise to prepare the project proposals required.'[187] Spatial volatility, particularly the migratory fluidity of the industrial labour force, combined with a general lack of centralized regulatory interpenetration into rural Thai spaces prevented the SIF from being able to identify target populations.[188] In looking to disperse funds, the SIF used rule based criteria developed in the context of urban spaces, such as allocating funding for adult education, that were unsuited to the particular needs of rural communities.[189] As a result, 'few communities saw the point of applying.'[190]

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[184] Maryam Salim, 'The Thailand Social Investment Fund: Providing Social Assistance and Building Social Capital', *Social Funds Innovations Updates* vol. 1 no. 1 (World Bank Social Protection Advisory Service, January 2001), at http://documents.worldbank.org/curated/en/313231468778163769/pdf/multi0page.pdf (last accessed 29 April 2017); Ammar Siamwalla and Srawooth Paitoonpong, 'The Social Investment Fund in Thailand' in Pamela J. Noda (ed), *Cross-Sectoral Partnerships in Enhancing Human Security* (Japan Center for International Exchange 2002), at http://www.jcie.org/researchpdfs/CrossSectoral/cross_ammar.pdf (last accessed 29 April 2017).
[185] Phongpaichit and Baker (n 160) 80.
[186] Ibid 81.
[187] Ibid 77-78, 80.
[188] Ibid 79.
[189] Ibid 80, 97-8. Cf Pruitt (n 24).
[190] Phongpaichit and Baker,(n 160) 80.

(iv) Aftermath: abandoning rule-based regulation

After the failure of the SIF, the Thai government set up its own plan for providing at least a minimal level of social security for rural populations hit by the crisis. Using loans drawn primarily by the Japanese government, the Thai approach 'abandoned all pretence of careful targeting, elaborate bureaucratic procedures, and innovative channels.'[191] Instead, funds were directly disbursed to local rural governments with few conditions attached, a Keynesian crisis-response approach that the Thais had developed in the 1980s and which they called 'crisis spending'.[192] Local governments would then distribute these funds to local SMEs via local public work projects in order to bolster local employment. Rather than relying on juridified and technocratic disbursement processes used by the SIF, the Thai approach made use of the very kind of traditional, relational-driven support mechanisms the IMF, ADB and World Bank had been trying to dismantle[193] – namely local, relationally-embedded public-private business linkages – and which were well adapted to the volatile and fragmented nature of peripheral environments.[194] Regulatory discipline was maintained by the social and economic interdependencies that bound local populations, local businesses, and local government together within local socio-economic space.[195]

[191] United Nations Economic and Social Commission for Asia and the Pacific, *Strengthening Policies and Programmes on Social Safety Nets: Issues, Recommendations and Selected Studies,* Social Policy Paper No. 8 (United Nations Publications 2001) 57-108.
[192] David Morell and Chai-Anan Samudavanija, *Political Conflict in Thailand: Reform, Reaction, Revolution* (Oelgeschlager, Gunn and Hain 1981) 123-131
[193] Chamnan Wattanasiri, '*Poverty Eradication Strategy of Thailand: In Brief*' (Paper prepared for Expert Group Meeting on 'The First United Nations Decade for the Eradication of Poverty (1997-2006): Progress and the Road Ahead', 2005), at http://workspace.unpan.org/sites/Internet/Documents/S3TH05%20Poverty%20Eradication%20Strategy.pdf (last accessed 29 April 2017); Phongpaichit and Baker, (n 160) 81, 98-100.
[194] Yves Dezalay, Bryant Garth, 'Law, Lawyers and Social Capital: "Rule of Law" versus Relational Capitalism' (1997) 6 *Social & Legal Studies* 109.
[195] World Bank, *Thailand Social Monitor: Social Capital and the Crisis* (Bangkok: World Bank, 2000), at http://documents.worldbank.org/curated/en/271021468778163222/Thailand-social-monitor-social-capital-and-the-crisis (last accessed 24 April 2017); Phongpaichit and Baker (n 160) 81, 103. Cf

The IMF and ADB were very critical of this approach.[196] So too was the World Bank initially, but it would eventually acknowledge that the Thai approach in fact proved much more successful in extending at least a minimally acceptable level of social security to rural populations.[197] And perhaps even more surprisingly, it did so without experiencing undue levels of corruption or inefficiency.[198]

4. CONCLUSION

Rule of law a particular place, a place that stands at the commanding heights of modern capitalism. It is a place whose capitalist regulatory space is uniquely characterized by stability, homogeneity . . . and by much wealth and development. But as capitalism gives, it also takes away. In creating a place for rule of law, modern capitalism correspondingly creates many other places that cannot support rule of law's spatial predicates. Those capitalist spaces that sit outside the core spaces of modern capitalism require a different regulatory paradigm.[199]

[196] Ernesto M. Pernia and James C. Knowles, 'Assessing the Social Impact of the Financial Crisis in Thailand' (Asian Development Bank, EDRC Briefing Notes no. 6, Nov. 1998), at https://www.adb.org/sites/default/files/publication/28045/bn006.pdf (last accessed 29 April 2017); Phongpaichit and Baker (n 160) 81, 99.
[197] World Bank (n 195) 7; Phongpaichit and Baker (n 160) 81, 101, 103.
[198] See United Nations Economic and Social Commission for Asia and the Pacific, *Strengthening Policies and Programmes on Social Safety Nets: Issues, Recommendations and Selected Studies*, Social Policy Paper No. 8 (United Nations Publications 2001) 106-107; Phongpaichit and Baker (n 160) 106-107.
[199] Cf. Michael W. Dowdle, 'The Peripheral Regulatory State' in Navroz K. Dubash and Bronwen Morgan (eds), *The Rise of the Regulatory State of the South: Infrastructure and Development in Emerging Economies* (Oxford University Press 2013).