CORPORATE POWER AND INSTRUMENTAL STATES: TOWARDS A CRITICAL REASSESSMENT OF THE ROLE OF FIRMS, STATES AND REGULATION IN GLOBAL GOVERNANCE


Dan Danielsen
Northeastern University – School of Law
Corporate Power and Instrumental States: Toward A Critical Reassessment of the Role of Firms, States and Regulation in Global Governance*

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I. Firms, States and Modern Political Economy: Ideological Struggle from within a Common Conception

Since the global financial crisis began in 2008, a commonly proffered view among political progressives and conservatives alike is that the central issue for achieving economic stability and growth in the global economy is finding the appropriate level of public oversight of the economy. Progressives suggest that the level of regulatory oversight is too little and too deferential to the influence of “the regulated,” while conservatives assert that, on balance, there is too much regulatory interference with markets, distorting the efficiency of private transactions and disrupting the tendency of markets to self-correct through private reallocation of resources when imbalances occur. While these two perspectives might seem oppositional or contradictory, a shared conception in both accounts is that the nation-state is the primary institutional mechanism for setting the background conditions for the smooth operation of the economy. From this perspective, whether the global economy functions well or badly depends on whether the nation-state, and by extension the global regulatory institutions by and large created by nation-states, create an appropriate legal architecture to facilitate private economic transactions while maintaining an appropriate level of regulatory oversight to reduce the likelihood of either regulatory capture by firms or regulatory over-reach by states. The ideological struggle, to the extent there is one on this score, turns on what is “appropriate” both with respect to the content of the background rules that structure markets and the scope and implementation of the regulatory oversight functions.

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* Professor of Law, Northeastern University School of Law
Juxtaposed to this vision of the proper role for the “public” regulator is a conception of the “private” economic actor and its proper role in the system. While private economic actors are expected to abide by the rules of the game set by the public regulatory system, they are also expected, if not encouraged like Adam Smith’s self-interested individuals, to follow their (natural?) proclivity to seek their own advantage. Doing so is expected to be accomplished in large part through risk-taking, including regulatory risk-taking that might challenge regulatory limits. If the “rules of the game” are too constraining on private choice, then some transactions that by definition would be welfare-enhancing for the parties to them (because, the story goes, they would otherwise not enter into them) will be discouraged or precluded by the over-zealous rules. Moreover, by reducing the welfare-gains the parties would otherwise have generated had they been permitted to transact, total output is also reduced, thereby reducing total social welfare. If, on the other hand, the rules are too loose, private transactional gains might come at the expense of general welfare by creating adverse effects (or externalities) on third parties that exceed the welfare gains of the parties by transacting.

In a sense, this conception of the global public “regulator” evokes something akin to a mechanical system (not so much in terms of actual function as aspiration)—a largely public regulatory system that if properly calibrated could ensure the smooth operation of a largely private market system. From this perspective, it follows that private economic actors are and should remain “self-interested,” leaving public regulators to provide for the general welfare by endeavoring to achieve the proper regulatory balance for structuring markets—including the productive dynamism of private economic autonomy to flourish while ameliorating externalities and spill-over affects to the extent they reduce aggregate welfare and providing “public goods” where private actors are insufficiently incentivized to do so. Thus, from this vantage point, maintaining the private, “self-interested” orientation of economic actors is important both for inducing welfare-increasing private transactions and for signaling when the public regulatory system might be misaligned with the enhancement of general welfare.
Despite the air of natural inevitability that seems to pervade this familiar description of (prescription for?) the global political and economic order, the system, even by its own account, seems quite fragile. The proper calibration of the regulatory state and by extension, the global public regulatory order, seems more wish than reality—rarely if ever achieved or achievable. This seems particularly true at the global level where national interests and global welfare may often conflict and the challenges to and costs of productive coordination (as well as competition) among states and other public regulatory institutions can be quite high. Of course, despite the apparent fragility of the system on the one hand, and the difficulty of achieving the appropriate regulatory balance on the other, proponents of this view of political economy treat the consequences of "state" or "regulatory failure" as significant—when the regulatory system becomes too misaligned—regulating too much or too little—one foreseeable result is crisis (economic, political or both).

Moreover, since in this conception, the public acts and the private reacts, it is perhaps better, on balance if the public acts less in the global arena. For conservatives, this means shifting the balance of global regulatory governance in the direction of facilitating and supporting private ordering mechanisms and self-regulatory systems. For political liberals and progressives, this means focusing regulatory attention on correcting "market failures." Some types of "market failures" treated as justifying regulatory oversight include situations where economic activity produces more adverse effects on third parties than benefits to the parties engaged in the activity; or where asymmetric access to market information may lead some parties to gain advantage over or others or to enter into welfare-reducing transactions; or where collective action problems or other conditions producing high transaction costs may discourage welfare-enhancing transactions; or where private incentives are insufficient to lead to an adequate supply of "public goods," such as education or transport or public safety or market information. In any case, whether viewed from the conservative or the liberal perspective, economic crises seem an inevitable, if regrettable, part of the operation of this system even
if better calibration of the regulatory system and levels of public oversight were able to reduce the frequency and severity of the crises.

The view of the global economic and regulatory order I’ve described could be seen as a mélange of contemporary ideological positions loosely reflective of the struggle between Washington Consensus neo-liberals on the one hand, and post-Washington consensus (political) liberals on the other. Yet the genealogy of these general (if sometimes contradictory) notions of a proper relation between state and economy—a limited public regulatory state whose primary function is the creation and preservation of a private economic order—has a history that extends well beyond contemporary debates over the merits of neo-liberal political and economic reforms of the past 30 years. It is perhaps because these conceptions of “state,” “economy” and their proper relations are so deeply embedded in the development of modern political economy since the Enlightenment that they continue to exert so much influence on contemporary understandings of the functioning, problems, possibilities and limits of the global economic and regulatory order across the political spectrum.

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2 See, e. g. JOHN LOCKE, THE SECOND TREATISE ON GOVERNMENT 70-73 (Thomas P. Peardon, ed., The Bobs –Merrill Company 1952) (1690) (asserting that the justification for and appropriate limits of government is the protection of individual liberty and property for the public good); JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 881-888 (Sir William Ashley, ed., Augustus M. Kelley, Publishers 1987) (1848) (treating all government action as interference, the basis for governmental action as the protection of person and property and the legitimacy of government action as a function of the economic effects of carrying it out); Karl Marx, On the Jewish Question, in KARL MARX EARLY WRITINGS 229-230 (Rodney Livingstone and Gregor Benton trans., Penguin Classics 1992) (1843) (arguing that the purpose of the state after the political emancipation of the French and American Revolutions was protecting the “Rights of Man” which he defines as “liberty,” “property,” “equality” and “security” about which he states: “[N]ot one of the so-called rights of man goes beyond egoistic man. . . . The only bond which holds [individuals] together is natural necessity, need and private interest, the conservation of property and their egoistic persons.”); MICHEL FOUCAULT, THE BIRTH OF BIOPOLITICS, LECTURES AT THE COLLÉGE DE FRANCE 1978-1979 3-25 (Graham Burchell trans., Michel Senellart ed., Picadore 2008) (1979) (arguing that in the middle of the eighteenth century the main conception of government shifted from raison d’État constrained only by external limits imposed by divine and natural law to the notion of the self-limiting state governed and constrained by the rationality of political economy).
II. **An Alternative Vision: Why it is Needed and What it Might Look Like**

Despite its historical provenance and contemporary pervasiveness, the conception of a (mostly public) regulatory system charged with and responsible for securing the (mostly smooth) functioning of a global economy driven by (mostly private) self-interested economic actors, is neither helpful as a means of describing the actual operation of the global economic and regulatory order as it currently exists, nor useful in explaining why a public global order intended to promote general welfare is leading to increasing asymmetries in power and resources both among states and within states. Moreover, framing the central issue of political economy to be the creation/preservation of a proper (natural?) relation between public state and private economy, regulator and regulated, general welfare and individual gain through the careful avoidance of the Scylla of regulatory capture of public authorities by private firms on the one hand and the Charybdis of over- or under-regulation by states that may reduce public welfare and precipitate crises on the other, makes it more difficult to recognize or address significant aspects of and issues with the global order.

In particular, two problems with this pervasive conception stand out. First, the conception is premised on a sharp divide between “public” and “private” that makes it difficult to engage the diverse, complex, highly entangled and inter-dependent relations among states, regulatory institutions and firms we see all around us or to explain the impact of those relations on the structure, content and operation of the governance system and the economy locally and globally. Second, the notion that each nation-state bears the sovereign responsibility for balancing the gains and excesses of self-interested private economic actors within its jurisdiction obscures the radical asymmetries in power, capacity and resources among states, regulatory institutions and firms that are significant to regulatory and distributional outcomes both in individual states and across the global system as a whole.
We need only look out at the world to recognize that there are significant asymmetries in the bargaining power, resources and capacities of states and of firms that affect their relative abilities to advance or protect their interests in the global economy. When we bring together the complex, multiple and inter-penetrated relations between “public” and “private” entities as traditionally conceived with the pervasive inequalities and power asymmetries among and between states and firms, it becomes quite difficult if not impossible to generalize about either the ability of firms to capture public regulatory power and advantage or the ability of states (or other public regulatory institutions) to secure the success or control the excesses of self-interested firms either at home or globally. A conception of global governance able to incorporate these two ubiquitous aspects of the contemporary global order would seem to require much more nuanced, particularized and messy accounts of the structure and operation of the global economic and regulatory system, including accounts of the legal, institutional and other mechanisms that shape the current and future distribution of power and resources in the system.

We might begin by theorizing the global economic and regulatory order we see in operation rather than one premised on counterfactual notions of a “public” regulatory order and a “private” economy. Such an order would reflect a dynamic, continuous and cumulative co-production of states and firms with different baseline allocations of power, resources and capacities, bargaining over, making, adapting and resisting the rules of the game on the one hand and anticipating, making and reacting to each other’s assertions of power on the other. Such a conception of continuous bargaining, assertion and adaptation to constantly changing legal, economic, cultural and political conditions is not consistent with the hypothetical steady state equilibrium premised by mainstream economics or a single optimally efficient allocation of power or resources as is often suggested in the law and economics.

3 For an alternative account of state sovereignty and corporate power as mutually constitutive, see JOSHUA BARKAN, CORPORATE SOVEREIGNTY: LAW AND GOVERNMENT UNDER CAPITALISM 1-9 (2013).
literature on bargaining. Such a conception would nevertheless be useful in helping to explain the production of relatively stable configurations of power and advantage that could reinforce inequalities and shape future bargaining among players in the system.\(^4\)

Michel Foucault captures the flavor of the dynamic processes I have in mind, albeit describing a somewhat different context. He states:

Inasmuch as the government of men is a practice which is not imposed by those who govern on those who are governed, but a practice that fixes the definition and respective positions of the governed and the governors facing each other in relation to each other, “internal regulation” means that limitation is not exactly imposed by one side or the other, or at any rate not globally, definitely and totally, but by, I would say, transaction, in the very broad sense of the word, that is to say, “action between,” that is to say, by a series of conflicts, agreements, discussions, and reciprocal concessions: all episodes whose effect is finally to establish de facto, general, rational division between what is to be done and what is not to be done in the practice of governing.\(^5\)

Seeing the global order as a dynamic system emerging from the actual practice of states and firms and perpetually defining and redefining the boundaries among public and private, governors and governed, and legitimate and illegitimate assertions of authority, invites us to rethink the central questions that have dominated the study of political economy since the Enlightenment. More specifically, it invites us to shift the focus of study from how to produce and maintain an appropriate (if not always optimal) balance between “public” order and “private” initiative to consider the practical meaning and implications of regulation, intervention, public welfare and crisis in circumstances where state and firm,

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\(^4\) For a fascinating discussion of the ways in which asymmetries in resource endowments can lead through processes of cumulative causation to vicious cycles of increasing inequality, see GUNNAR MYRDAL, ECONOMIC THEORY AND UNDER-DEVELOPED REGIONS 11-38 (Harper Torchbooks 1971) (1957).

\(^5\) FOUCAULT, supra note 2, at 12.
rule and transaction, public and private, governor and governed blur and blend in ways that challenge simple conceptions of agency, control and domination.

Perhaps more importantly, moving from a conception of the global order premised on the authority and efficacy of public regulatory power to limit the excesses of private economic activity without diminishing its tremendous productive capacity to a conception of global economic governance as a complex co-production of states and firms invites us to consider the “firm” as more than a convenient institutional form for carrying out private initiative. It becomes among the most significant institutions in modern life. From this new vantage point, exploring the significance of the “firm” requires looking beyond the processes by which corporate power shapes state power, to consider much more broadly the social, psychological, political and economic significance of the firm as an allocator of resources, a form of group life, an aggregator of resources, a coordinator of collective projects, a creator of social relations, and a significant influence on the structure of work, family, community and identity.⁶

Foucault once again captures something of what I’m suggesting, though in talking about the state. As you read the following quotation, imagine substituting “the firm” for “the state.” Foucault says:

The state[/firm] is not a cold monster: it is the correlative of a particular way of governing. The problem is how this way of governing develops, what its history is, how it expands, how it contacts, how it is extended to a particular domain, and how it invents, forms and develops practices.⁷

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⁶ For some diverse examples of work exploring the social and cultural implications of “the firm” as well as its economic and political ones, see THORSTEIN VEBLEN, THE THEORY OF BUSINESS ENTERPRISE (1904); PAUL A. BARAN & PAUL M. SWEEZY, MONOPOLY CAPITAL: AN ESSAY ON THE AMERICAN ECONOMIC AND SOCIAL ORDER (1966); HERBERT MARCUSE, ONE-DIMENSIONAL MAN (1964); WILLIAM M. DUGGER, CORPORATE HEGEMONY (1989); JOHN L. COMAROFF & JEAN COMAROFF, ETHNICITY, INC. (2009); and BARKAN, supra note 3.

⁷ FOUCAULT, supra note 2, at 6.
In short, I’m suggesting that we need to investigate the firm with every bit as much ingenuity, rigor, and tenacity as lawyers, social scientists, philosophers and humanists have applied to the study of the state. While undertaking such an investigation of “the firm” is beyond the scope of this essay, it is to the firm and its complex role in the global order that we now turn.

A. Firms “Govern” but do they “Rule”?

While the pervasiveness and significance of the firm in the structure and operation of the global regulatory and economic order might be subject to debate, that firms are not only subject to public regulation but also produce it at both the national and the transnational levels seems an indisputable fact of modern life. I have argued elsewhere that firms “govern” in a variety of ways including through their interpretations, reactions and challenges to extant legal rules, through their business practices and structures, through direct political or economic pressure on regulators from lobbying to bribes, through supplying de facto rules where none exist, through evading rules by doing business elsewhere or threatening to do so, through industry organizations and coordinated standard setting, through public relations and marketing campaigns, sponsored research studies and other forms of public knowledge production, through playing regulatory institutions against each other, through arbitrage of conflicts and ambiguities in often complex, overlapping and sometimes contradictory regulatory regimes to which they may be subject locally, nationally and/or globally. Through these diverse mechanisms, and many others, firms contribute to the global regulatory and economic order, shaping both its substantive content and its distributional effects.

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8 See, e.g. BARKAN, supra note 3, at 1-4.
Hardt and Negri in their book “Empire” describe the impact of the transnational firm on global governance as follows:

The huge transnational corporations construct the fundamental connective fabric of the biopolitical world in certain important respects. Capital has indeed always been organized with a view toward the entire global sphere, but only in the second half of the twentieth century did multinational and transnational industrial and financial corporations really begin to structure global territories biopolitically. Some claim that these corporations have merely come to occupy the place that was held by the various national colonialisit and imperialist systems in earlier phases of capitalist development, from nineteenth-century European imperialism to the Fordist phase of development of the twentieth century. This is in part true, but that place itself has been substantially transformed by the new reality of capitalism. The activities of corporations are no longer defined by the imposition of abstract command and the organization of simple theft and unequal exchange. Rather, they directly structure and articulate territories and populations. They tend to make the nation-states merely instruments to record the flows of the commodities, monies and populations that they set in motion.¹⁰

From this perspective, one might conclude the state is a mere instrumentality of corporate power, and as such, has been transcended as the main institutional form for global governance. To a certain extent, one might see this passage as an extreme version of the conception of political economy with which I began this essay—the struggle to retain public control over the private economy lost, perhaps entirely, to corporate capture. Yet, to recognize that corporate actors shape, participate in and sometimes engage directly in making the global order does not necessarily lead to the conclusion that they control it, at least not in any coordinated, hegemonic sense.

Like governments and quasi-governmental institutions, corporate actors are diverse—in terms of size, power, interests, business needs and regulatory goals. They can be large or small. They can be local, regional or global in terms of production systems or markets. They can be highly mobile or geographically bound. They can be narrow in business focus or quite diversified in their business activities. They can be monopolists, oligarchs or major or minor players in highly competitive industries or markets. They can be vertically integrated or highly disaggregated in complex supply chains. They may focus on short-term gain or long-term profit. They may rely on constant technological innovation and intellectual property investment or efficient exploitation of well-established technologies through sophisticated global strategies of sourcing and production cost management. Even from this brief and incomplete catalog of diversity among firms as to business type, strategy and perspective, it would be difficult to credibly suggest that a single or overarching business interest could be articulated or advanced that could direct the activities of regulators to the benefit of business generally without adversely affecting the interests of at least some powerful business and social actors elsewhere in the system. The “logic of capitalism” is not sufficiently determinate to overcome the fact that regulation rarely creates only winners.

For example, consider a domestic environmental regulation designed to promote cleaner energy through the reduction of green-house emissions from power producers. Such a regulation may benefit solar, wind, hydro-electric and nuclear power producers, engineers, designers and manufacturers of equipment used by those producers locally and globally, workers in those industries, areas and regions where such power production is most feasible, areas, regions or nations where the technological capacity to develop and/or produce the equipment and know-how necessary for this form of power production is most advanced and perhaps that portion of the public that values better air quality or worries about the consequences of global warming or that supports environmental regulation even if it increases energy prices in the short term or imposes economic hardship on some groups. At the same
time, such a regulation may harm traditional power producers based on fossil fuels, extractors and refiners of coal and oil locally and globally, engineers, designers and manufacturers of equipment and technology used in these industries locally and globally, workers in all these industries, areas or regions where alternatives to fossil fuel energy production are less feasible, areas, regions or nations where the technological capacity to develop and/or produce the equipment and know-how necessary to produce alternative energy is less advanced or non-existent, as well as that portion of the public that due to economic hardship or otherwise would trade cleaner air for cheaper energy or that believes concerns about global warming to be over-blown or that opposes environmental regulation that may lead to an increase in energy prices in the short term or that imposes economic hardship on some groups.

Generalizing from this example, we can see that a regulatory change in one jurisdiction that may lead to an economic advantage for a particular firm or group of firms may not similarly advantage, or may actually disadvantage, competitor firms in that jurisdiction. We can also see that a regulatory change may not affect only competitors—it might produce spill-over effects that advantage or disadvantage other firms locally or globally, as well as diverse non-firm constituencies. To the extent that regulatory changes such as the hypothetical environmental rule described result from influence or capture by a firm or group of firms, one would expect that firms would most often pursue regulatory advantage when it conferred just that—a disproportionate gain for them relative to their competitors nationally or globally, regardless of its impact on third-party firms and other constituencies. In other words, the struggle among firms or industry groups for advantage over other firms even within the same jurisdiction or industry may work at cross-purposes with or undermine efforts to coordinate activities among firms for shared advantage vis-à-vis public regulators both locally and globally.

Moreover, even if one or more firms were able to capture some states or regulators for some purposes, we could not easily conclude that business advantage achieved in one regulatory context
would translate into consistent business advantage across the global economy as a whole. As a consequence, one might reasonably expect that many firms would need to employ different regulatory and business strategies in different jurisdictions if the goal were securing economic advantage in global operations. But deploying different business or regulatory strategies would likely lead to new complexities even if it also produced the potential for new sources of economic gain. For example, such different strategies might produce different effects on competitors and different spill-over effects on third party firms and other constituencies both within and outside each jurisdiction, resulting in different configurations of bargaining, influence, resistance and counter-strategy among both firms and regulators locally and globally.

For all these reasons, it seems likely that efforts by firms or industry groups to capture some relevant segment of regulatory authority, whether within or among nation-states, would be but one among many available strategies for seeking advantage in the complex global economic order. And, it would not be easy with so many rival firms and groups seeking regulatory control for their own purposes. Moreover, even if firms exert significant influence and occasionally even capture public regulatory institutions to promote their advantage, and even if some firms predictably win more regulatory advantages and a larger share of the global economic surplus than others, this does not mean that there is a generalizable ‘firm’ or common business perspective on global regulatory authority. To put this point differently, without imagining some shared and consistent business interest that could both trump the drive for particular firm advantage and steer corporate power toward particular forms of public institutions and regulatory structures, asserting that “firms rule” would seem to tell us little more about the particularities or distributional consequences of the current global order than asserting, as has historically been the case, that “states rule.”
While all “states” may be formally equal in some international law definition kind of way, different states with different interests, structures, resources and goals rule differently, with different effects, to the benefit of different constituencies. We might expect the same of firms, and looking at the behavior of firms, we can see a great diversity of business strategies, goals and governance practices. More fruitful inquiries might explore questions such as which states? Which firms? How rule? For whose benefit? With what constraints? Through what concrete practices? My point here is that shifting our focus from a theory public rule to corporate rule seems only to shift our gaze from one illusory conception of political economy to another. If we remain focused on the behaviors of states and firms we see manifesting all around us, it becomes harder to conclude that firms “rule”—in the sense of consistently control or dominate nation-states or the global regulatory order—except perhaps in ad hoc, disaggregated, incoherent and incomplete ways similar to those frequently attributed to states by many scholars and policymakers narrating the decline of national sovereign power.\textsuperscript{11}

\textsuperscript{11} Narratives of the decline of state sovereignty and claims of the emergence of a new world order of limited state power and policy autonomy abound in public international law discourse. \textit{See, e.g.}, LOUIS HENKIN, INTERNATIONAL LAW POLITICS AND VALUES 10 (1995) (“For legal purposes at least, we might do well to relegate the term sovereignty to the shelf of history as a relic from an earlier era.”); Boutros Boutros-Ghali, \textit{Empowering the United Nations}, 71 FOR AFFAIRS 89, 98-99 (1992) (“While respect for the fundamental sovereignty and integrity of the state remains crucial, it is undeniable that the centuries-old doctrine of absolute and exclusive sovereignty no longer stands. . . . Related to this is the widening recognition that states and their governments cannot face or solve today’s problems on their alone.”); Secretary-General Kofi Annan, \textit{Annual Speech to the General Assembly}, UN Doc SG/SM/7136, GA/9596 (September 20, 1999) (“State sovereignty, in its most basic sense, is being redefined by the forces of globalization and international cooperation. . . . In short, it is not the deficiencies in the [UN] Charter which have brought us to this juncture, but our difficulties in applying its principles to a new era: an era when strictly traditional notions of sovereignty can no longer do justice to the aspirations of peoples everywhere to attain their fundamental freedoms.”); JOHN H. JACKSON, \textit{et al}, LEGAL PROBLEMS IN ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT 1 (5th ed. 2008) (“Despite all the talk about sovereignty and independence, these concepts can mislead when applied in today’s world economy. How ‘sovereign’ is a country with an economy so dependent on trade that its government cannot readily affect the real domestic interest rate, implement its preferred tax policy, or establish an effective program of incentives for business or talented individuals? Many governments face such constraints today including, increasingly and inevitably, the United States.”)
B. States “Govern” but do they “Rule”?

Turning now to the “public” side of the story, one reason it seems unconvincing to treat “the firm” as the “new global sovereign” is in part because of the undeniable fact that regulation promulgated by nation-states both at the domestic level, and at the global level through bi-lateral or multi-lateral institutions comprised of nation states, undeniably has a significant impact on the behavior firms both domestically and globally. Yet, to suggest that public regulation affects firm behavior is not necessarily to suggest that states control or manage firms or the economy effectively, coherently or in the service of a “public interest” that reflects an aggregation of the collective interests of their constituents. This may in part be a function of the fact that, as public choice theorists so frequently remind us, states are themselves made up of diverse interests, institutions and constituencies engaged in struggle over the present and future distribution of power, prestige, votes and/or resources in their own regulatory jurisdictions and institutions. Moreover, sometimes portions of the regulatory apparatus get captured for particular purposes by well-organized interests (including, as we’ve already seen, firms or groups of firms) as well as by political or institutional constituents within the governance institutions themselves. Such capture may lead states or institutions to take or refrain from taking action that benefits some powerful interests or players at the expense of others or that results in a reduction of aggregate general welfare.

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Multiply the diverse interests and divisions within each nation-state and each transnational regulatory institution comprised of states by the number of countries and transnational regulatory institutions that make up the “public” global regulatory order and add to that the diverse interests trying to capture institutional power and special advantage from these states and institutions and it becomes quite difficult to have any confidence that the regulatory activity of states or international institutions reflects an effective aggregation of the collective interests of their respective constituencies or an increase in aggregate global welfare.\(^\text{13}\) Without some reasonable assurance that the global “public” regulatory system deploys its regulatory power to manage the economy in a way that leads to increased global welfare most of the time? usually? not infrequently?, it would be difficult to justify continued fealty to a conception of global governance that relies on a “public” regulatory regime to manage the “private” economy in the public interest on the hope that it can overcome interest-group capture and achieve something like a proper balance between laissez-faire and regulatory oversight of economic activity.

At the same time, it is becoming increasingly difficult under current global conditions for states to secure domestic or global economic advantage through assertions of sovereign regulatory power. Looking first to powerful states, while it would be hard to deny that the domestic legal rules of jurisdictions like China or the US produce local and global effects, the effects may not be the ones intended, and they may not result from conscious assertions of sovereign will over the global economy.

\(^\text{13}\) See, e.g. ERIC A. POSNER, THE PERILS OF GLOBAL LEGALISM 94-99 (2009) (arguing that the proliferation of international legal norms reflects efforts by the most powerful states to maintain power in the face of increasing fragmentation of the sovereign order); ANTHONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2004) (arguing that since its inception international law has consistently reflected the imperial power and ambitions of colonizer (later the developed world) by the colonized (later the developing world); HA-JOON CHANG, BAD SAMARITANS: THE MYTH OF FREE TRADE AND THE SECRET HISTORY OF CAPITALISM 19-39 (2008) (arguing that the developed world uses trade agreements and international institutional arrangements to extract higher levels of growth and prosperity at the expense of the developing world); but see JOEL TRACHTMAN, THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW 9, 10 and 37 (2008) (asserting that “[t]he state acts as agent of its citizens[,]” public welfare maximization reflects the maximization of the regulatory concerns of states, and that “for analytical purposes, [he] assume[s] national laws to be perfect expressions of constituent preferences.”).
For example, China’s domestic wage regulations shape wage rates around the globe putting pressure on higher wage jurisdictions to lower domestic wages while simultaneously calling into being lower wage strategies in other jurisdictions that undercut China’s economic advantage. Or consider the fact that while US mortgage rules and home ownership promotion policies during the 2000s produced an economic boom for a time at home they also brought down the global financial system when the real estate bubble burst, resulting in sustained hardship both at home and abroad.

Adding to these complex challenges is that fact that sometimes the rules of relatively weak jurisdictions, at least in terms of political power or economic clout, can affect the economic sovereignty of even the most powerful states. For example, Delaware corporate law shapes business practice globally, though not by institutional design or sovereign hegemony, but through the decisions and ordinary business practices of Delaware-incorporated firms which make up a significant percentage of the world’s largest firms. Similarly, the bank secrecy laws of countries like the Bahamas, Guernsey, Luxembourg, Lichtenstein all challenge the fiscal sovereignty of the world’s most economically powerful states—again not by assertions of sovereign power or even global economic clout outside their territories but by the magnetic force their domestic rules enact on global capital flows.

Domestic rules such as the ones just described seem important to understand precisely because their economic effects do not result from extra-territorial sovereign application. Rather, the effects of these rules are transnationalized through often ordinary economic activity of firms sometimes undertaken in reaction or in relation to the rules.\(^{14}\) Moreover, the magnitude of the transnational economic effects of these rules often do not easily correlate with traditional sources of international sovereign authority such as political or military power or market size. Some of the sovereign rule-

makers in the examples just described are, by international economic and political standards, weak players in the global system. Nevertheless, in some circumstances, their rule-making produces significant economic effects that even the world’s most powerful states have difficulty combating or containing. Finally, from a political perspective, these rules evidence a disjuncture between the political constituencies responsible for the adoption or implementation of the rules and the economic constituencies affected by them. This disjuncture between economic effects and the political and institutional mechanisms for addressing them poses complex challenges for the legitimacy and functioning of the global order that cannot easily be addressed through traditional conceptions of territorial sovereignty or consensual sovereign deference to international norms or institutions. This disjuncture seems particularly important in circumstances where the economic benefits of the global order are so inequitably distributed and when the presumption of formal sovereign equality is belied by significant differences in the abilities of states to shape their economic destinies through regulation.

In such circumstances it is perhaps not surprising to look to the nation-state and to sovereign consent-based efforts by nation-states working through international institutions to manage the “private” economy for the “public” good. Yet, even if we set aside the concern about interest group or firm capture and assume states effectively aggregate the interests of their constituents, there seems to be no reason to conclude that the promotion by grossly unequal individual states of their respective national interests in the global order is likely to lead to an increase aggregate global welfare rather than further increasing the power and resources of the most powerful states. Moreover, if national rules domestically applied can lead through the pursuit of ordinary business activity to widespread and diverse global consequences even in the absence of sovereign intent, it seems unlikely that even

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15 For a concise and interesting perspective on this problem, see Dani Rodrick, One Economics, Many Recipes: Globalization, Institutions, and Economic Growth 195-196 (2007) (arguing that economic globalization and its benefits come at the cost of undermining the strength and effectiveness of nation-state institutions, perhaps leading, in the long run, to a global politics to match a global economy).
powerful states could exercise effective regulatory control over economic welfare within their geographic territories, let alone effectively shape the behavior of economic actors in the global economy in their national interest.

It could be that imperialist dreams of economic domination by sovereigns lives on and continues to shape the behavior of states, perhaps as a kind of institutional or cultural path dependence harkening back to the days when empire meant economic power secured through the assertions of sovereign authority, military power and economic clout, yet in the current global order the ability of even the most powerful states to secure consistent economic advantage abroad while securing welfare gains for citizens at home seems to be significantly diminished, even if some states frequently capture disproportionate economic spoils while others seem to lose almost systematically. Thus, while states can affect economic behavior locally and globally, some states more effectively or more consistently than others, to suggest that states “rule” in the sense of control or dominate private economic activity would seem to overstate both their role and their capacity in the contemporary global order.

III. If not States or Firms, but States and Firms, then What?

V.I. Lenin argued in 1916 that world capitalism would mature into regimes of monopolist firms and great power states dividing and dominating the world for economic exploitation.16 Perhaps, this is where we have come to. Or perhaps, as Hardt and Negri suggest in the passage quoted earlier, the proliferation of business power and what Thorstein Veblen calls pecuniary “business principles”17 into

17 For a discussion of the evolution of pecuniary norms into the governing principles of business enterprise, see Veblen, supra note 5, at 66-91. See also Thorstein Veblen, The Theory of the Leisure Class (1899).
every state, legal order, and culture across the globe suggests that business has already triumphed—the age of imperialism of states has been or is in the process of being replaced by an age of imperialism by firms.\textsuperscript{18} While each has some appeal, neither seems to capture adequately the complexity or diversity of the regulatory and business practices we regularly see in the contemporary global economy or the roles and relations among states and firms in the construction or operation of that order.

In seeking a more compelling, realistic and nuanced account of states, firms and the construction and functioning of the global order, I would like to return us to Foucault. More particularly, I would like to return to Foucault’s notion of governance as the playing out of processes of “conflicts, agreements, discussions, and reciprocal concessions” in the ordinary practices of states and firms in pursuing their interests through which “a de facto, general, rational division of what is to be done and what is not to be done in the practice of governing” is dynamically produced.\textsuperscript{19} As we have seen, while regulatory power is not evenly distributed and the ability of states to shape economic activity either outside or inside their jurisdictions is limited, regulation still matters—can shift power relations, produce distributional effects. Similarly, while the power of firms is not evenly distributed or consistently effective at obtaining either individual or collective advantage and conflicting interests both within and among firms challenge the articulation or the implementation of a coherent global governance policy agenda, corporate power still matters. There are predictable winners and losers, but there are also surprises. The system does not seem random in its distribution of power and resources globally even if it also does not seem governable in any systemic or hegemonic sense by either what has traditionally been conceived as “public” or “private” power.

In such circumstances, the challenge will be finding new institutional and political mechanisms for contesting the pervasive inequities in power, resources and well-being across the globe. Doing so

\textsuperscript{18} See HARDT & NEGRI, supra note 9, at 31-34, 304-309.
\textsuperscript{19} FOUCAULT, supra note 2, at 13.
will require us to look beyond the dream of autonomous and effective public regulatory oversight as the solution and periodic capture by firms of regulatory institutions as the problem to be solved. More particularly, we will need to reconsider what we mean by and what we can expect from “the firm,” “the state,” “regulation” and “markets” when we loosen our attachment to a stable distinction between “public” and “private” ordering or the “legal rules” and the “transactions” that result from, for lack of a better term, “bargaining” between and among states and firms over the content of rules and the allocation of resources in the global order.

A related challenge will be discovering the potentialities as well as the limits of influence and intervention in what may appear to be a chaotic and ungovernable system of governance. If neither the state nor the firm can control the system, to what institutional forms or mechanisms might we look? If states and firms co-produce both the regulatory order and the economy then they will also both be implicated in the production as well of the possible amelioration of systemic risk and crisis. Perhaps more significantly, if neither state nor firm is wholly regulator or regulated, public or private, hegemonic or helpless, we will need to develop a much better understanding of the variety and diversity of the complex and dynamic processes—both and neither public nor private—through which we are governed globally, including the ways in which our shifting conceptions of “state” and “firm,” “public” and “private,” “appropriate regulation” and “legitimate self-interest,” “intervention” and “laissez-faire” themselves emerge through these processes of bargaining, conflict and compromise rather than simply existing as the “natural” background pre-conditions from which the global order develops or upon which it depends.

Doing so will require the development of both concepts and analytic methods than enable us to trace dynamic processes of cumulative causation and patterns of interdependence, shifting advantage, adaptation and crisis across a broad range and diversity of local and global actors and in a variety of cultural and institutional contexts. We might begin by producing numerous, detailed, particular and
necessarily partial studies of some of the diverse and multiple processes of bargaining, assertion, resistance, cooperation and adaptation among states, firms and other institutional players in relation to particular changes in global economic conditions or in pursuit of particular regulatory changes in the global system. In the development of such studies we should include an investigation of whether and if so how these processes are affected by the relative distribution of power, resources, capacities and other endowments of the players and the relative impact of these processes on the players themselves and the broader global system. Such new, if partial accounts should help to illuminate particular inflection points of mutual advantage, inter-dependence, vulnerability and resilience among the players studied as well as whether particular institutional configurations seem more likely to create or exacerbate advantages among some players or more equitable distributions of power and well-being. This information might lend support to state-focused regulatory strategies or mechanisms for ordering led by firms or may suggest previously unexamined sites or modes of intervention based on new institutional formations to bring about more equitable distributions of power, resources and advantage both in present conditions and in future economic and governance relations. Of course, there is no way of knowing what the ramifications or potential of this more dynamic institutional approach to political economy and global governance might be until we give it a try.

At least one thing seems certain. What I’m proposing will take us a long way from the conception political economy comprised of public states, private firms and the creation of appropriately limited public regulatory structures that has dominated political and economic philosophy and theory for some three hundred years. There is comfort in familiar concepts and institutional expectations even when they seem to take us quite far from the world we see around us. But, as we have seen, these familiar and comfortable conceptions of global political economy neither reflect the hybridity, multiplicity and complexity of contemporary relations between states and firms they purport to describe nor help to explain why a system premised on public oversight of private power in the interest of
general welfare persists in producing ever-increasing asymmetries in power and resources both between states and between firms and states.

There are good reasons to suspect that an alternative conception of global political economy that better reflects the complex, dynamic and inter-connected activities of states and firms we observe as they pursue their interests locally and globally should also better enable us to imagine the institutional mechanisms necessary to bring about the more equitable order we hope to create. Moreover, we are no means alone in traveling this complex institutionalist path. Excellent examples of some of the analytic strengths and policy insights that can be derived from dynamic institutional analyses of economic and social phenomena can be found in the work of more historic forebears such as Thorstein Veblen and Gunnar Myrdal or more contemporary scholars such as Joshua Barken and Neil Fligstein.20

Doubtless as we endeavor to capture more complexity, variety and particularity in our accounts of the diverse arrangements of power, institutions and resources that comprise the contemporary global order, we will find ourselves in a messier, more uncertain and less coherent world than the one premised on public order and private initiative with which I began this essay. Perhaps critics will claim, as they often have with institutionalists past, that complexity and particularity are inconsistent with generalizable theory and that simplifying models are better able to guide us in what to do. Of course, the value of theoretical insights based on simplifying models can only be measured against the relative merits of alternative accounts in capturing the phenomena they seek to understand or explain and policy prescriptions based on models that, by virtue of their underlying assumptions, bear little resemblance to the concrete practice of social actors may do more harm than good. What seems

20 See VELEN, supra note 5; MYRDAL, supra note 4; BARKAN, supra note 3; NEIL FLIGSTEIN, THE ARCHITECTURE OF MARKETS: AN ECONOMIC SOCIOLOGY OF TWENTY-FIRST-CENTURY CAPITALIST SOCIETIES (2001).
undeniable is that the dominant conceptions of the political economy of the global order do not reflect the observable phenomena either at the level of description or prescription. We can and must do better. In the spirit of Foucault and the very best of our institutionalist forebears, my hope is that by beginning to explore the concrete practices of the governance regime we observe all around us, in the gaps and conflicts in the logics of the regime’s self-articulation, we will invent new ways of seeing, modes of understanding, strategies of resistance and mechanisms for progressive transformation.