At the heart of Duncan Kennedy's *A Critique of Adjudication: Fin de Siècle* ("Critique") is the claim that an essential aspect of the practice of judging is the denial of the very large degree of choice and agency that the judge ineluctably faces in reaching a decision and crafting the reasons that support it. If it seems incontrovertible that "facts" do not simply speak in a univocal way, and that decisions are not mechanically generated through their encounter with legal rules and doctrines, it is far from universally accepted that legal decision making is therefore a necessarily complex and uncertain process, important aspects of which can be accounted for only beyond the acknowledged practices and boundaries of law.

What is distinctive about Kennedy's analysis is its relentless focus on the moment of instability, the choice available at the point of decision and its inevitable companion, the evasion and mystery in which legal practitioners of almost all stripes feel compelled to cloak the process of adjudication. Whether by design or effect, he ultimately persuades us that it is the attempt to deny this instability that is the aspect of decision making most worthy of attention. This conclusion is not trivial or peripheral; in some profound sense, Kennedy's analysis suggests that legal decision making without this ritual performance of denial would make adjudication into something other than the practice that we now know.

Because of the unavoidably open-ended nature of adjudication, the ideological commitments, disciplinary training, and psychological propensities of judges enter into the decision making calculus and become part of the fabric of the law in innumerable ways and with various effects. The process may play
out along the lines suggested in Kennedy's schematic account and reflect the current ideological polarity of judges along a liberal/conservative axis. Whether it does so may be less important than the underlying insight that any attempt to maintain a zone of pure law distinct from politics and policy and insulated from, yet not out of touch with, the raging disputes in the world outside of law is hopelessly compromised from the outset. Moreover, it is not as if there is an available alternative, such as promoting less activist or more professionally disciplined practitioners of the art of judging to the bench. Instead, instability and choice are part of the structure of adjudication itself; their denial is the source of the bad faith that pervades the system.

The claim that we operate within a legal system in which judges often possess considerable agency and room to maneuver, rather than within a regime of pure constraint and compulsion, is a plausible one for many legal scholars and practitioners. What jurists and theorists make of this margin, however, varies greatly. For many, there are better and worse approaches to the dilemma and right and wrong answers to legal questions themselves. For some, there are external referents, templates, or values that can provide the determinacy and closure to disputes that legal materials themselves fail to provide. For example, law-and-economics scholars and judges suggest that the proper metric is efficiency.

The import of Kennedy's analysis is that one of the great divides in legal practice and scholarship lies between those who recognize and embrace the instability of the process of adjudication and those who hope to contain it or make it go away by one or another technique. The latter category includes those who attempt to balance rights and interests, those who turn to process, and those who go "outside" law and self-consciously attempt to resolve legal dilemmas by resort to determinacy elsewhere. As Kennedy and others have long argued, rights balancing and procedural approaches are transparently inadequate devices by which to avoid or limit the entry of ideology and politics into adjudication. Moreover, seeking determinacy in some other field—whether psychology, sociology, history, medicine, economics, or science—is no solution either. At best, it defers the

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3 See generally id.
moment of decision or displaces the locus of authority, often to some other equally contentious and politicized discipline. Whatever assistance such interdisciplinary ventures provide the judge, they do not dispose of the normative, or even always the factual, determinations involved in adjudication.

In *Critique*, Kennedy aims to cast light on the structure of these controversies as they continually replay themselves within the domestic legal arena. However, *Critique* also provides a means to examine the way that law is invoked to sanction the turn to the market. There are powerful claims made in the name of law and myriad functions that law now performs in the current global economic and political transformation. Within international financial and development institutions, law and legal discourse have come to play a particularly important role in the representation and legitimation of reforms. As development discourse becomes legalized, many of the institutional and value choices that market reform and development projects entail become transmuted or disappear from view; in the process, reforms lose their conflictual character and instead appear necessary or neutral. A particular view of the nature of law and the adjudicative process, one that shares great similarities with the object of Kennedy's sustained attention in *Critique*, appears to lie at the heart of this process.

I. APPROACHING LAW IN DEVELOPMENT

Law and governance now occupy a preeminent place in contemporary development efforts. Reports and policy statements of the major development institutions are replete with references to the benefits of the rule of law, and admonitions about the need for "good governance" form a central part of mainstream development discourse. For example, in the recent "comprehensive development framework,"5 in which the World Bank attempts to set out a template for the pursuit of development, good and clean government,6 and an effective legal and justice system7 are identified as the first elements of sustainable growth and poverty alleviation. A mere two-and-a-half years ago, the Bank devoted its annual World Development Report to a reconsideration of the role of the state in fostering

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6 See generally id.

7 See generally id.
growth in a globalized economy. The heightened interest in law and its relation to development continues apace, with a new project to articulate a comprehensive framework for legal and judicial reform.

That the rule of law and good governance could now appear on the top of the list of development concerns, sitting alongside, if not displacing in priority, such traditional objects of concern as investment in health, education, and infrastructure, marks an important shift in the way in which development is conceptualized. The salience of law and governance reflects the fact that the global development project has moved beyond concrete objectives such as the elimination of poverty, lower maternal mortality rates, higher literacy levels, or an increased life span. Now the pursuit of development has also become a method, merged with the commitment to a transformed, more modest role for the state and intertwined with efforts to provide an enabling environment for private sector activity in the context of a globally integrated economy.

"Good governance . . . is synonymous with sound development management." It is this attempt to ensure the institutional frameworks for private economic transactions that underpins the law and governance project and makes it recognizable as a new project and ideology for development. Organized around the effort to encourage local entrepreneurial activity and foreign investment, it places securing entitlements, honoring obligations, and limiting risk for investors at the forefront of the legal reform agenda.

The concerns that marked the first phase of the postwar life of the development movement and endured into the second phase of import substitution are being gradually joined, if not supplanted, by a new project. The move from project-based to adjustment- and policy-based lending in the 1980s on the part of the

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10 World Bank, Governance: The World Bank's Experience (1994) [hereinafter Governance].
11 World Bank, Governance and Development 1 (1992) [hereinafter Governance and Development].
international financial institutions generated an intense interest in
the (dis)functionality of government institutions and practices, and
provided the original point of entry for legal reform. These initial
stirrings toward good governance and law reforms were
consolidated and powerfully fueled by the states in “transition”
from plan economies to market economies, whose emergence gave
rise to wholesale efforts to model the legal scaffolding to support
private activity in globalized markets. The ongoing economic
stagnation and decline in large parts of the third world, particularly
sub-Saharan Africa, continues to provide fertile terrain for the
efforts to reform institutions and promulgate laws of efficient
markets.

In all of these cases, the problem of development has come to
be located in a series of deficient state practices or maladaptations
to the exigencies of the global economy. Law and its absence have
become crucial to this analysis; over and over again, law is
presented as the instrument to remedy stalled development. In the
most basic of ways, it facilitates transactions and stabilizes and
regulates economic life, performing the enabling and coordinating
functions without which the attempt to foster development,
especially in a globally integrated economy, is hopeless.

However, law is also presented as a solution to a broader set
of problems. A central dilemma of development, one that besets
developing and transitional countries to the great anxiety of
mainstream development agencies and major lenders such as the
United States, is the interference of political considerations and
distortions introduced into the process of growth by special
interests. Much of the energy, even the passion and obsession, in
the current efforts of development institutions is rooted in the
desire to rein in, cabin, and control the numerous social and
political forces that threaten the project of economic growth. Law
also enters here, as the counterweight to the political, the
instrument that will remedy corruption, forestall arbitrary state
action, and prevent the capture of resources and economic
institutions by special interests. By providing transparency,
stability and, above all, protection of individual rights against the
state, law is a source of redress and protection against the major
ills that threaten economic growth.

Law, then, is also a fortress, the bulwark against various
threats to economic growth. At some very basic level, one of the
defects that reputedly characterizes developing countries is an
inadequate sense of boundaries. Boundaries between the public
and the private and the state and the market are all weak or absent
in ways that are damaging, if not fatal, to economic growth and the
ability to participate in global markets. The failure of economic development is identified with illegitimate incursions on the part of the state, the predations of special interest groups, and the limitless demands of the social sphere on the economy. Law functions here as the guardian of the market; legal rules and institutions confine such concerns and conflicts to their proper spheres, that is to say, beyond the realm of the market. Against politics and culture, law is identified with efficient markets. In spite of the importance of local participation in and ownership of the development process, the legal reforms necessary to economic development remain a problem of management and expertise, a question of knowing what to do.

In the current narrative of development, particular legal and institutional reforms are simply coextensive with good governance and inextricably linked to successful development. Yet, although governance is explicitly understood as “the manner in which power is exercised in the management of a country’s economic and social resources for development” and law stands at the right hand of good governance, acting as its instrument, law has become divorced from the question of power and contestable debates over the organization of social life. Nor is law implicated in conflicts over the distribution of social resources.

Such claims provoke inevitable questions about the legalization of development in general and the rise of neoliberal legalism in particular. From what place could law be a global solution to the problems of development? What conception of legal entitlements and legal process makes it possible to imagine law as the fix to the political? How, for example, does law come to be located on the side of economics rather than politics? The instrument of efficiency rather than distribution? The guardian of private right rather than the instrument of democratic will? The domain of experts rather than the concern of the public? What is the understanding of the practice of adjudication and who is the figure of the judge behind the magisterial pronouncements about the benefits of law?

Recuperating the phenomenon of denial in legal practice so thoroughly canvassed in Critique may be one of the routes to unraveling some of these questions. Critique documents not only the pervasiveness and the centrality of politics and ideology in legal decision making, but highlights their routine suppression as part of the very structure of legitimation in adjudication. As such, it suggests the utility of exploring the role that legal reform and rule

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13 Governance and Development, supra note 11, at 3.
of law projects might play in the promotion of market-centered governance. Even where the practice of adjudication does not appear to be directly engaged, Critique provides a frame within which to measure the content and direction of neoliberal legalism. Beyond unsettling the hallowed role that mainstream development theorists and institutions now project for law, the analysis of denial helps illuminate a project to which it now seems allied, the effort to displace politics from current development projects and the process of global economic integration.

Denial appears to operate on at least two levels in neoliberal legalism. At the first level, denial obscures the political choices inherent in the very design and implementation of the legal regimes underpinning market-centered development. However, denial also functions at the level of adjudication and interpretation because adjudication is largely ignored as a critical site of the elaboration of legal norms.

II. DENIAL IN LAWMAKING

The "law" that forms the bedrock of neoliberal legalism consists of a core of private law rules supplemented by other laws and regulations that enhance efficiency and secure investment. Although it is acknowledged that the benefits of the rule of law extend beyond markets into broader civil society, what motivates the legal reform project is the desire to promote private sector growth. Thus, despite cautions about the dangers of a one-size-fits-all approach to legal reform, there are canonical laws without which market economies cannot function. These fundamental laws are the protection of property and enforcement of contract rights, augmented by corporations and bankruptcy law, banking and securities regulations, intellectual property protection, and competition laws.

So defined, law is not fundamentally a matter to be settled by democratic processes. Although there is an unavoidable role for the state in the implementation and enforcement of laws, these entitlements are conceived as the individual rights of natural or juridical persons, techniques for keeping the state and the collectivity at bay and ways to ensure that investors can calculate risk and avoid interference with returns on their investments. The determination of the good law of the market, then, is not fundamentally a question of politics. Instead, certain laws simply

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14 See Shihata, supra note 12, at 3.
15 See generally GOVERNANCE, supra note 10.
are essential and necessary to markets because they promote growth and efficiency.

It follows that a host of other positive laws are either "not law" in this sense or "not good law." Indeed, they are often the very state interventions mainstream development proponents continually seek ways to curtail. A range of laws is potentially subversive of the neoliberal economic order and threatens to undermine the project of global economic integration. For example, states have a history of engaging in predatory behavior, interfering with property rights, and promulgating "arbitrary" rules and regulations that privilege the interests of insiders over foreigners.\(^\text{16}\) Even state attempts to compensate for market failures may introduce problems of their own.\(^\text{17}\) Laws may be inappropriate.\(^\text{18}\) In short, many policies and regulations, however legal in form and democratically derived or sanctioned, constitute the very state interventions or excessive regulations that now fall outside of good economic practice.

In the discourse of development, law—at least the law governing markets—is placed on the side of economics rather than politics.\(^\text{19}\) For institutions such as the World Bank, the successful separation of law from politics is crucial. While governance efforts can be justified if they can be linked to economic concerns, promoting law reform immediately raises the specter of engagement in proscribed political activities.\(^\text{20}\) Thus, the Bank has powerful institutional compulsions to justify the laws that form the core of the rule-of-law projects simply as the necessary, if not natural, features of market economies.

Nonetheless, the border between economics and politics remains problematic, particularly as discussions move beyond the benefits of instituting regimes based on the rule of law \textit{simpliciter} to a more detailed consideration of the place and importance of particular legal rules and regulations. Negotiating this border becomes an increasingly complicated, dangerous, and, often, as it turns out, somewhat arbitrary exercise. It is complicated and dangerous because the more specific and detailed the pronouncements about good versus bad law, the more difficult it is to avoid engaging in the disputes over the allocation of resources and powers that surround regulatory decisions. It is arbitrary, if

\(^{16}\) See \textit{Governance and Development}, \textit{supra} note 11, at 7.

\(^{17}\) See id. at 6.

\(^{18}\) See generally \textit{Governance}, \textit{supra} note 10, at 23.

\(^{19}\) See Shihata, \textit{supra} note 12, at 76.

not incoherent, because arguments for limited forms of intervention and regulation on the part of the state cannot easily be controlled. If one externality or form of market imperfection justifies regulation, why not another? Neoliberals need to walk a fine line: they must avoid discussion, even recognition, of the continually resurfacing distributive conflicts and value choices embedded in the design and application of legal rules and institutions if law is to live up to its advance billing as the antidote to politics and the vehicle to restrain special interests. Yet they must also remain centrally, even increasingly, engaged in elaborating the content of "good law" to ensure that reforms to legal rules and institutions operate to facilitate open, unfettered markets.

Legal reformers attempt to make an end run around these political dilemmas in a number of ways. One technique involves the assertion of a fundamental difference and hierarchical relationship between basic laws, such as private law rules of contract and property, and other rules and regulations. Part of what obscures the political and ideological content of neoliberal legalism resides in the distinctions between law versus legislation and rights versus regulation. Some legal entitlements are described simply as "rights" and placed outside of politics and beyond scrutiny or debate, while other entitlements are cast as interventions in the market and deviations from the regime of private ordering. The result is that the attempt to distinguish between politics and economics is continually replicated inside of law—some laws regulating economic affairs amount to political interventions while the rules and regulations that are efficiency enhancing are seen as neutral and placed on the side of economics rather than politics. In the end, legal reforms become organized around a presumption that Kennedy identifies with American legal discourse of both the liberal and conservative variety: as rights, the basic laws that constitute markets should not be subject to interference through politics. The effect is that respect for the rule of law becomes associated, if not equated, with the adoption of particular types of legal entitlements.

Respect for the rule of law alone, however, implies little about the specific rules that must or might be implemented. The legacy of legal realism is the knowledge that policy determinations are internal to the operation of private law rules, rather than merely the properties of legislation and regulation. Moreover, the optimal legal economic order for states does incorporate various
regulations, such as financial sector regulations. Nonetheless, distinctions between different types of legal rules help provide a normative framework for market ordering and a set of techniques by which to maintain the troublesome distinction between law and politics. They are also used to keep law firmly anchored on the side of efficiency and growth. Even though the protection of property rights itself inevitably involves considering the powers and weighing the interests of different parties, incursions into the property and contract rights of owners become serious, or even suspect, practices. These can be justified only to the extent that they contribute to efficiency or, at minimum, do not interfere with the overall project of promoting growth.

The resulting complex of legal rules inescapably allocates resources and powers to some groups, in particular investors, rather than others, and embodies decisions about how, and how much, particular values and interests should be served. It is precisely the denial of any distributive dimension to these reforms, along with the consignment of law to a management function, that permits the displacement of politics from development. In the intense focus on the place of law in enhancing the efficiency of private economic activity, its other effects—distributional, constitutive, ideological, or normative—are obscured.

Although styled as the instrument of progressive and orderly social change and incontrovertibly in the public interest, receiving good economic law may be significantly more brutal in practice than it appears in the narrative of development. Acceptance of neoliberal legal reform prescriptions is presented as coterminous with achieving market normalcy and indispensable to participation in the global economy, as illustrated by events such as the transition to regimes of private property, the restructuring of enterprises in the plan economies, and the financial crises in East Asia. The implementation of reforms is not infrequently disruptive; it may also be experienced as coercive and disempowering, lead to relative impoverishment of certain groups, or even result in a deterioration in the well being of society as a whole.

21 See State in a Changing World, supra note 8, at 65.
22 See Shihata, supra note 12, at 55.
23 For analysis and critique of the Bank’s policies with respect to these events, see Joseph E. Stiglitz, What Have We Learned from the Recent Crises: Implications for Banking Regulation, Remarks at the Conference for Global Financial Crises: Implications for Banking and Regulation (May 6, 1999), at http://www.worldbank.org/html extdr/extme/jssp050699.htm (last visited Sept. 18, 2000), and Joseph E. Stiglitz, Whither Reform? Ten Years of Transition, Keynote Address at the Annual
The possibility that legal reform in aid of development will be coercive or even simply unequal in its benefits varies directly with the degree to which reforms of law and governance are thought necessary. The more that the legal order of a state diverges from the ideal, the more likely it is that changes to the rules will not simply bring transparency and order out of chaos, regularize the process of dispute resolution, and ensure fair and nonarbitrary behavior by the state, but reorder the interests that receive protection as well. The potential for redistribution in the course of regulatory reform is thus high: risks are likely to be shifted, income or wealth reallocated, costs externalized when they might otherwise be internalized, subsidies and cross-subsidies altered or removed, assets created or transferred, and entitlements and access to resources destroyed. This might occur through the recognition of new forms of property rights, including intellectual property rights, changes to the legal regimes in which enterprises operate, or changes to the entitlements of workers.

In the discourse of development, law is presented over and over again as determinate and stable, a mode of ensuring predictability and order in economic life. Indeed, the law reform project gains much of its persuasive power from the view that the enforcement of rights provides the certainty that investors require and desire.24 But “good law,” once implemented, may also be much more uncertain and unstable in its effects than it appears in the neoliberal development narrative. If so, the idea that law reform is the major vehicle for development begins to shift; either law must occupy a much more chastened and provisional role in both economic success and failure, or more work must be done to ensure that it generates the promised outcomes.

Threats to the project of market reform and undesirable legal outcomes need to be continually forestalled, a process that occurs in part through the deployment of a particular conception of adjudication. Here, denial of the politics of judging enters into the calculus through reliance on formalism and conceptualism. When the rule of law is invoked as the antidote to the political, the increased emphasis on the importance of private rights may serve to normalize and sanctify the effects of the legal entitlements already deemed appropriate or necessary for markets.

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24 See GOVERNANCE, supra note 10, at 23; Shihata supra note 12, at 5.
III. *Denial in Adjudication*

Despite the many references to the importance of good laws and effective legal institutions for development, large pieces of neoliberal legalism remain unmapped. It is the practice of adjudication that remains most obscure. How adjudication actually operates, who the judge is, and how the judge is to perform her job when enforcing the rules of the market are questions typically just assumed or outlined only in the broadest terms.

In the current discourse around law and development, there is no discussion about the *possibility* of nonideological judging or the *manner* in which judges negotiate, or ought to negotiate, the distinction between law and politics. Nor is there much effort to articulate how judges should approach interpretive questions and policy disputes. It is as if adjudication simply failed to raise any of these issues. As a result, figuring out what a critique of adjudication in neoliberal legalism would look like involves reading the gaps surrounding the question of adjudication that are implicit in the entire project of legal reform.

Although law reform projects increasingly include a judicial training component, lawmaking from the bench, if recognized at all, does not yet appear to be an issue that merits serious concern. Problems of interpretation and questions about the legitimacy of judicial review of legislative action—issues that occupy a substantial part of the debate regarding the role of the judiciary in the Anglo-American world—are largely absent in neoliberal legalism. By far, the weight of the discussion concerns getting the right set of laws and well-functioning institutions. The judicial role in the project of law reform is simply the task of correct application of the law; only occasionally are there gaps in the law that require creativity on the judge's part. There is little recognition of the element of policy work in the process of adjudication, nor of the overt interest-balancing in which Anglo-American and other judges engage when resolving legal claims. The overall impression is that little of political import happens at the level of judicial decision making, nor are substantive questions likely to arise that cannot easily be disposed of by resort to the legislative mind. Instead, the dominant image is that, given adequate institutions, enforcement, and training, proper legal

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25 *But see* Shihata, *supra* note 12, at 60.
26 *See id.*
reforms will operate in the service of social progress in a relatively seamless and predictable manner.

Of course, adjudication is an arena in which questions about what constitutes social progress are continually revisited. Yet what remains suppressed throughout the narrative of development through law reform are the possibilities for disagreement over the purpose or meaning of a law, conflicts between different laws, or differences among decision makers as to the weight that should be given to different interests and concerns. For example, there may be shifts in the objectives that predominate in the minds of judges over time. Or there may be significant changes, even complete reversals, in the effects of particular rules and doctrines over time and across different contexts, effects to which judges feel compelled to respond. Both possibilities significantly complicate the exercise of relying on law reform to advance development through markets. These complications arise not simply because of "cultural differences" that affect the reception of law. Instead, they reflect the inevitable conflicts and transformations in interests and values within societies that are played out in the process of adjudication of legal claims.

Intimations about the complexities and perils of judging appear from time to time in the analysis of legal reform. For example, judges may require training in complex economic and commercial laws. To the extent that the resolution of gaps, conflicts, or ambiguities is unavoidable, judges should rule as would legislators. However, they are cautioned that in doing so they must rely only on "objective" criteria determined by "scientific research." Above all, judges must safeguard individual rights and ensure the effective administration of justice under the prevailing circumstances. Whether judges must ensure that adjudication is effective with respect to the efficiency of markets is unclear. What is clear is the priority given to the demands of investors for protection of property and contract rights against arbitrary government action and the claims of special interests.

The injunction to safeguard individual rights and restrain arbitrary state decisions indicates that judges are expected to function as a counterweight to any unwise legislative decisions or illegitimate executive actions. There is a role for judges in shoring up good governance and legal reform efforts where they are

28 See Shihata, supra note 12, at 106.
29 Id. at 62.
30 See id. at 63.
31 See id. at 57.
lacking or have gone awry. However, in so doing, the judge is not a political actor; rather, she is simply doing her job.

In the official story, what is important is that people have faith in judges and the rule of law, and that judges themselves be incorruptible and operate in the service of the law. In other words, adjudication as a process should be nonideological and impersonal. The politics of law application and judging emerge as an issue only when the rule of law is perverted and judges overtly serve political masters as, for example, when judicial decisions are directly influenced or controlled by political leaders or party functionaries.

Yet, given how deeply specific legal reforms can reach into the fabric of developing and transitional societies, it would be surprising if adjudication did not turn out to be a site of contention and resistance. To the extent that legal reforms take root and courts become important players in social and economic life, disputes seem likely to surface in ways that make the political dimensions of adjudication difficult to suppress.

Because challenges to rights arise not simply out of deviations from the rule of law but also from differing yet often entirely legitimate interests, projects, and values that are reflected in different legal rules, exhortations to safeguard individual rights often provide no clear direction to judges. The questions are whose rights are to be protected, to what extent, and to what effect? There are necessarily numerous answers to such questions, many if not all of which would be consistent with respect for a regime of rights.

Disputes regarding the regulation of markets often have been most emblematic of these tensions. Notwithstanding the open-endedness of protecting rights, the discourse of individual rights historically has been used as a means of lending weight to the interests of property owners and juridical persons, such as corporations, against the claims of workers and other social groups in such disputes. The (in)famous early-twentieth-century decisions of U.S. courts striking down employment standards in the name of protecting property rights provide one such example.\(^{32}\) These cases brought immediate attacks upon the courts, and simultaneously directly raised the political nature of adjudication. The persistent inability of the courts to respond adequately to the regulatory dilemmas of the market and respect the political choices of legislatures was a factor in both the rise of the

administrative state and the decision to limit and marginalize the role of courts in favor of other institutions during the New Deal.\textsuperscript{33}

In the wake of this history, the preeminence given to the protection of property and contract rights in current development efforts raises the following questions: Does the importance of protecting rights lie merely in shielding the individual from the ravages of the state? Or are the proliferating rule-of-law projects and efforts to educate the judiciary on the correct approach to adjudication also signs of anxiety on the part of market reformers over the possibility of greatly varying outcomes to the disposition of claims, even where the desired rules and institutions are in place?

Thus, the specter of lawmaking from the bench remains, even in the absence of staged battles between legislatures and courts. Judges may turn out to be crucially important actors in the drama of development, moderating or strengthening the effects of law reform efforts in accordance with their disciplinary training, institutional sense, or ideological proclivities. Variants of the very judicial personae identified in \textit{Critique}—the constrained activist, the difference splitter, the bipolar judge—seem likely to appear on the scene. Judges may limit the radical transformations that law reformers sometimes seek to secure in developing and transitional states. It could be expected that some judges may attempt, for example, to further national autonomy as opposed to internationalism, promote particular cultural or social norms rather than a society organized around liberal individualism, or engage in other forms of resistance to neoliberal development. Some may simply use law for unexpected purposes.

\textbf{IV. LINKING LEGAL REFORM AND ADJUDICATION}

The global legal reform project is a multifaceted phenomenon with diverse effects and different implications—some beneficial, some less so—in different locales. As the central insight of \textit{Critique} might suggest, the turn to law is simultaneously political and implicated in the flight from politics. What is distinctive about current legal reforms is that law is used not just as an aid to development, but also as a mechanism to deny or normalize the distributive implications of market-centered development. By drawing in a deep way on the idea that good laws are simply not political, the legalization of development adds a layer of justification to the economic arguments behind reform, while at

the same time erecting another set of barriers to those who wish to contest, resist, or merely question the direction of global institution building.

There are two deeply intertwined forms of suppression and denial of politics and ideology at work in this process: one at the level at which the legal rules are established, and another at the point of rule application and interpretation. The ideology that permeates current legal reform efforts is that the canonical set of market rules are not only efficiency enhancing and necessary to the participation in global markets, but also provide an uncontrovertibly beneficial framework in which to order economic life. The ideology surrounding adjudication is that the resolution of legal disputes engages no serious questions of politics and distribution either.

It is possible to characterize the constructions of law reform and adjudication as simply mistaken or misleading in important ways. However, such denials and omissions are also functional to the legal reform project as a whole and are necessary in order for law to perform as a counterweight to politics and guardian of the economic sphere. Any admission that law will not bear the weight that neoliberals seek to place on it, that the troublesome controversies surrounding development may merely be displaced or replicated in the arena of rights determination and rights adjudication, undermines the project of institution building that currently preoccupies mainstream development institutions.

Critique describes the mainstream legal idea that lawmaking and law application are distinct functions that should be housed in different institutions and subject to different constraints. Ideology and interests do have a place in law, but not in adjudication. In the global legal reform project, however, important parts of lawmaking also are carved out of the political process and turned over to bureaucrats and experts, or left to the control of private parties. While neoliberal legalism clearly draws on the legitimating properties of law, law in development is not only intended to be status quo reinforcing, but also deeply transformative.

Despite these apparent differences, a focus on adjudication suggests how the two may be linked. In trying to figure out how arguments for the specific legal rules and reforms gain plausibility, maybe we must entertain the possibility that legal reforms gain force from the mainstream understanding of adjudication. This is that the adjudication of private rights really is just a question of getting it right, figuring out the right application of the rules, of finding, rather than making, law. Put another way, maybe it is an
idea of the possibility of "correct" adjudication of rights that lies beneath, and makes possible, the idea of a neutral, apolitical set of legal rules. If so, adjudication may be more fundamental to neoliberal legalism than presently appears, feeding back into and enabling the project as a whole. If questions about the distribution of power and resources are to remain peripheral considerations in market design, secondary to the project of creating wealth and facilitating economic integration, the vagaries of adjudication, like the other politics of lawmaking, just may be where neoliberals do not want to look.