Developmental States and the Legal Order:
Towards a New Political Economy of Development and Law

by

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Abstract

The emergence of “new developmental states” has important implications for law. The term “developmental state” was used to describe the role of the state in the development of Latin America and Asia. In both regions states played an active role in stimulating and directing economic growth. These policies fell out of fashion during the hegemony of neo-liberalism and the “Washington consensus” Today, however, new practices and new theories of development are emerging and some countries are returning to a more active role in promoting both growth and equity. These new developmental states are experimenting with new modes of legal action. This paper looks at recent theoretical work on the political economy of development, showing that these new developments require a rethinking of the role of law in development; outlines some of the new legal and governance processes and practices that are emerging, and discusses what would be needed construct a robust theory of the role of law in a new developmental state.

Today, there is a new topic emerging in the field of law and development. This is the possible emergence of a “new developmental state” (NDS) and its implications for law. The term “developmental state” has been used primarily to refer to the role of the state in the development of Latin America and Asia. In both regions, in the past, states played an active role in stimulating and directing economic growth. These policies fell somewhat out of fashion during the hegemony of neo-liberalism and the “Washington consensus”

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which promoted a more restricted and passive role for the state. Today, however, new practices and new theories of development are emerging. There is evidence that some countries are returning to a more active role in promoting both growth and equity and a new body of theory is emerging which helps account for this development and suggests directions it should take.

These changes in theory and practice deserve our attention for they could require rethinking theories of law and development. What we see in some countries is not a simple return to the development policy and legal models of the past, but rather a search for a very different kind of developmental state than the one that prevailed in Asia or Latin America in the 1960s and 1970s. While the new theories stress the value of state intervention, they point to very different forms of intervention that have been practiced by many nations in the past. And the little empirical data that we have suggests that some countries are experimenting with novel types of intervention. Both the new theories and the emerging practices suggest a need for new types of laws and legal processes.

This paper analyses these developments in five parts. In Part I, I look at recent theoretical work on the political economy of development and show the relationship between the ideas concerning new roles for the state in development and prior approaches to development policy. In Part II, I show how changes in economic theory in the past have required changes in our theories and doctrines concerning law and development and suggest the time has come for another reappraisal of those theories. In Part III, I show how changing ideas about development in Latin America share a lot in common with new political economy approach. In Part IV, I discuss the issues these changes in development theory and policy may have for law. In Part V I outline a few practices in Brazil that support the idea that some states are experimenting with new approaches to development and either using existing legal tools in new ways or forging new forms of legal intervention. new legal tools. Finally, in the Conclusion, I suggest some of the issues that we must deal with if we are construct a robust theory of the role of law in a new developmental state.
I: A stylized history of the political economy of development

The study of the new developmental state and its significance for law will require extensive empirical study. But it is also necessary to develop the theoretical basis on which new practices in state practice and law are to be understood. The starting point for such an effort is in the new political economy of development. In some of the recent literature on development one can find a shift in emphasis regarding the role of the state. These theories proceed from a very different set of understandings than one finds either in classic developmentalism or in neo-liberal market fundamentalism. And they lead to new ideas about the institutions, including legal institutions, necessary for development.

A) Classic developmentalism

The origins of the idea of a developmental state can be found in the development studies literature of the 1950s-60s and the policy prescriptions related to it. This literature stressed four central themes: industrialization, modernization, de-linkage, and intervention.

Industrialization was seen as a solution to underdevelopment. Heavily dependent on the export of primary products to the developed world, the “less developed countries” as they were known at the time were losing ground due to deteriorating terms of trade. The solution to this problem was to industrialize. But industrialization required modernization, de-linkage, and state intervention. The developing countries were thought to be locked in traditional social patterns and relations and needed to absorb the social and culture values of modernity before they could move into the industrial age. And successful industrialization meant partial de-linking from global markets so that national industries could develop without the threat of competition from lower-cost and higher-quality products from advanced economies. Finally, because the private sector was weak, risk averse and under-capitalized, massive state intervention was essential to get growth growing.
While classic developmentalism did not reject the market, it felt that market based policies were inadequate to meet the challenge of development. Markets did not provide the incentives for investments that might have high social as well as individual returns and developing countries lacked the capital, risk taking entrepreneurs, and financial markets needed to ensure robust growth through the private sector. So states had to step in to provide capital, launch industries, and protect national markets. This was the era of forced modernization through law and state action, state planning and state-owned enterprises (SOEs), detailed regulation, high tariffs, and import-substitution industrialization (ISI).

B) The Neo-Liberal Reaction

While countries following these policies had some successes, by the late 1970s a reaction had set in. Critics questioned whether states had the capacity to guide development and whether de-linkage was the best way to promote growth. They pointed to the limited capacity of state agencies to determine the optimal investment path for a nation and saw markets as capable of doing a superior job. They thought that because of rent-seeking and corrupt behavior by state agents, state intervention in domestic markets was likely to lead to inefficient outcomes. They questioned the ability of governments to process the information needed to put countries on the right growth path. They thought that de-linkage and high tariffs would lead to countries concentrating on products for which they lacked comparative advantage and shield inefficient producers from healthy competition. They thought that deregulating domestic markets and opening them to international trade and investment would produce the optimal outcome for everyone. They pushed for a reduction in the role of the state in the economy, privatization of SOEs, liberalization of trade regimes, openness to foreign investment, more emphasis on the role of exports in growth strategies, institutional reforms to ensure that markets operated efficiently, and constitutional and other restrictions on the scope of state intervention in the economy.

C) North East Asian Exceptionalism
While neo-liberalism secured many adherents in advanced countries, affected the thinking of national development agencies and international financial institutions, and led to the policy mix often called the “Washington Consensus”, another form of political economy of development was being forged in Northeast Asia. There, Japan and later Taiwan and South Korea, managed to achieve exceptionally high growth rates while following policies that differed both from those promoted by either the classic developmentalists or the neoliberals.

These states, followed later by a number of countries in South-East Asia, created economies that relied heavily on private firms and stressed exports as their primary growth strategy. But these economies were closely controlled by the state bureaucracy: state technocrats steered the economy using such tools as limited tariff protection for national firms and subsidized credit. Strategic choices were made through processes that involved close collaboration between a state that seemed to be free of the vices of rent-seeking or corruption and a private sector willing to accept state direction. This was the era of the “Asian Miracle”, which relied on the “embedded autonomy” of the state, strategic interventions, rapid growth of exports, and growth with equity. (Ohnesorge 2007a, 2007b)

II: The New Political Economy of Development: Theories for a New Economy

We need a new political economy of development because the context for growth in the nations of the “periphery” has changed. The classic political economy of development as well as some of the accounts of East Asian exceptionalism focused on ways that late developers could industrialize by adopting practices and models that had been created in the advanced nations. The challenge faced was not to invent new processes and products or compete with leading sectors in advanced countries, but to duplicate the prior stages of development in the leading countries. This could be done by finding ways to produce the same kinds of products that advanced countries produced in the past or ways to produce new products those countries had pioneered but which developing countries could produce more cheaply.
The context for development theory has changed. While the contemporary political economy of development has learned from the work of its predecessors, the field is also confronting a new context that has an impact on ideas and policies. Changes from past eras include a much more integrated global economy; the information technology revolution; the growth of a knowledge economy; the growth of global supply chains; and the emergence of major powers in the developing world like Brazil, Russia, India and China.

These “emerging powers” are technologically advanced, relatively capital rich, and regionally powerful. These countries (and some other smaller developing nations) can be active competitors in global markets not simply for primary products and for the products of low-wage, low skilled labor, but also for advanced and sophisticated products and services. Thus they face the need to maintain global competitiveness which entails constant innovation and improvements in quality. Such pressures are not limited just to the developing country firms that seek to penetrate advanced markets: to the extent that all markets are more open than ever, all firms in developing countries are subject to the pressures of global competition and all nations are concerned with national “competitiveness”.

A) Elements of the new political economy of development

The new political economy of development (NPED) has highlighted a number of issues which have led to a reappraisal of the role of the state. They include:

1) Underdeveloped markets: NPED returns to the insights of classic developmentalism concerning market imperfection in developing countries. They recognize that developing country markets contain relatively high levels of information asymmetry, low levels of risk tolerance, weak institutional structures, and other barriers that make them less than perfect allocative mechanisms. NPED
shares with neo-liberalism the importance of perfecting these markets but recognize that this is a complex process that cannot be done easily or quickly.

2) Market failure: Not only are developing country markets often underdeveloped: even if they operate optimally these, like all markets everywhere, have limitations. Thus, all markets fail to provide incentives for certain investments that will produce social externalities including technological know-how and skill-development. And they may be unable to manage coordination between related investments so that market prices will fail to signal the socially optimum level of investment.

3) Strategic trade theory: NPED does not reject ideas of comparative advantage but stresses that in the modern economy comparative advantage is made, not found. That is, nations can actively pursue certain niches in the world economy through planning and targeted investment.

4) Networks: With the proliferation of global supply chains, it is important for developing country producers to be in secure positions in global networks. States can assist in this process.

5) Technological capacity: NPED places strong emphasis on the development of technological capacity as a key element in any strategy to maintain global competitiveness and penetrate advanced markets. Because technical knowledge and technological capacity are to degree public goods, states can play a role in expanding these capabilities and knowledges.

6) Innovation: Reflecting the new context of development as well as new opportunities, NPED places great emphasis on innovation in products and processes to achieve and maintain competitiveness. State action can foster, support, and reward innovation.
B) Development as a Discovery Process—the centrality of learning

These considerations have led the NPED to place great emphasis on processes of learning and discovery. Great attention is paid to how best to secure knowledge of the paths investment should take for maximum social return. This inquiry has highlighted the need for new forms of state action and a call for new public services.

Prior theories had simple approaches to knowledge production. Classical developmentalism assumed that the state could, more-or-less by itself, develop the knowledge necessary for effective investment – that is why such stress was placed on planning ministries and five year plans and why it was thought that SOEs should be created in many areas of industry and finance. On the other hand, neo-liberalism took the opposite position, asserting that states would always – or almost always -- get it wrong. The solution was to bar states from making investment decisions in most sectors of the economy so the market could find the right path by itself. “Industrial policy”, once a progressive slogan, became a dirty word.

The NPED rejects classic developmentalism’s faith in the state and abandons the idea of detailed central planning. Writers in this vein recognize that market signals are important and private actors have much of the information needed to chart effective strategies. But they also assume that, without various inputs and guidelines from the state, private actors may not get the full picture needed to make good investments or be able to capitalize on what they know. In such cases, effective development policy requires close coordination between public and private actors, search, experimentation, and tailoring of public action to specific needs and contexts. (Rodrik 2004; Sabel 2005; Hausmann, Rodrick & Sabel 2007)

It is important to stress the importance of learning in the new political economy of development. It would not be too much of an exaggeration to say that this body of thought makes learning capacity the central ingredient for a successful developmental
state. Many of the features and processes suggested by this literature are designed to facilitate learning. (Sabel and Reddy 2003; Rodrik 2004)

These assumptions about knowledge and learning lead proponents of the new developmental state to move away from “one size fits all” approaches. In a sense, such approaches were common to both the classic developmental state and neo-liberalism. Both assumed there was one set of programs and policies that would lead to growth, although they differed on the nature of the policies. Both came up with recipes that all nations were supposed to follow if they wanted to secure growth.

This “top-down, one-size-fits-all” approach has already been heavily criticized. Scholars have pointed out that even if it is necessary to have institutions for certain functions, there are different ways to deal with such functional needs. And they have noted that given the social embeddness of economic institutions, it is often impossible successfully to “transplant” institutions from one nation to another. They argue that development policy must allow each nation to shape its institutional structure according to its own needs and traditions.

The new developmental state literature embraces this rejection of one size fits all and stresses that there is no one policy or model that will lead to economic progress in all countries at all times. But it goes beyond the idea that different solutions can be allowed at the national level in different developmental states. Because the new theories stress the idea that policies must be constructed through experimentation and public-private collaboration and tailored to the needs of specific industries and regions, the new theories suggest the need for variation within each nation as well as among them. (Hausmann and Rodrik, 2006)

The learning orientation affects NPED’s stance towards trade policy. The literature rejects a static concept of comparative advantage. “New” developmental states see that comparative advantage is not solely dependent on initial endowments, but rather is something that can be constructed. But such strategic trade policy requires
experimentation and public-private collaboration as state agencies and private actors conduct a search for profitable niches in the world economy. Such policy may also require various forms of public support for export industries: these include subsidies of various types and tariff protection. While NPED favors such support, stress is placed on the need to integrate them with a discovery process and to maintain disciplines that will ensure the results are competitive.

Another feature of new developmental state theory is the stress on flexibility and reviseability. This follows from the centrality of experimentation and collaboration in this body of ideas. NDS theorists assume that it is impossible to know the right developmental paths in advance, finding these paths requires experimentation, experimentation must involve public-private collaboration, and a successful path must include the appropriate legal and regulatory framework (Hausmann and Rodrik 2006; Sabel 2005). From this it follows that policy must be flexible enough to permit a variety of efforts and regulatory frameworks must be sufficiently revisable so that the fruits of learning can easily be incorporated.

Finally, new development state theory seems to imply a need for open and transparent forms of governance without which new ideas will not percolate upwards or be widely shared. This raises doubts about the continued viability of older authoritarian models and the importance of some form of democracy.

If we wanted to sum up the NPED in a few words, it might be in envisioning development as a process of discovery in which the state seeks to empower the private sector and state and market function best when they are linked in collaborative structures that foster experimentation and revision.

C) Elements of a New Developmental State

At this stage, the new developmental state is more an idea and a set of partial moves than a crystallized practice or full-blown model. We need to refine the theory and do a lot
more empirical work to determine the extent to which this new orientation is taking hold around the world. It is important to note that the concept of a new developmental state is an ideal type and one need not find all of the elements and characteristics outlined in any given nation. Yet we need some way to measure the extent to which any country is moving in this direction. What follows is a tentative list of policy orientations that would indicate that such a turn or paradigm shift is occurring. In studying the new developmental state phenomenon, we should look to see to what extent there is:

- Primary reliance on the private sector as investor rather than direct state ownership.
- Acceptance of a major role for the state in steering investment, coordinating projects and providing information especially in projects with multiple inputs and long term payoff
- Extensive collaboration and communication between public and private sectors
- Strong interest in exports and relative openness to imports
- Direct attention to entrepreneurship, innovation, and new product development rather than reliance on imported technology and know-how.
- Promotion of productive (rather than speculative) foreign direct investments (FDI)
- Emphasis on making private firms competitive rather than on shielding them from competition
- Privatization or public/private partnerships in provision of public services
- Promotion of domestic capital markets and the financial sector both to generate and to allocate resources
- Attention to social protection including efforts to reduce inequality, maintain solidarity and protect against some of the costs of restructuring.

Further, it would be wrong to treat all of the developing countries which have active state involvement in the economy as examples of the newer tendencies. States may have rejected neo-liberal constraints and become major actors in the economy without being “new” developmental states. For example, states that rely very heavily on nationalization or re-nationalization and fail to create incentives for vigorous private investment are following a developmental state path, but a different one than the approach outlined here.

Possible exception include major natural resources such as oil and gas which may remain in public ownership.
• Welfare programs conditioned to recipients’ work or investment in their human capital

D: Institutions and Policy Implications of the New Political Economy of Development

The assumptions in the new economics of development point to the need for a number of new institutions and policies. These include:

• Organized systems for public-private information sharing
• Subsidized systems that will promote searches for promising products and markets
• Cooperative public-private efforts to construct regulatory regimes that foster global competitiveness and domestic efficiency
• Efforts to create globally competitive national champions
• Major investments in education, R&D, and technological innovation
• Highly selective use of tariffs, taxes and subsidies to jump-start industries
• Public venture capital--investment of public funds in promising companies
• Use of public-private partnerships for major investments in infrastructure
• New mechanisms for solidarity such as basic income grants

A detailed example of the new kinds of institutions and policies can be found in Hausmann, Rodrik, and Sabel’s proposal for industrial policy. This proposal reflects the underlying assumptions of the new development economics and illustrates the kinds of novel institutions it suggests. They note several features of developing country markets that lead to sub-optimal performance and justify state intervention. Such markets may fail to identify new products whose profitability creates positive externalities for the national economy; provide mechanisms to coordinate interrelated investments; or generate knowledge about the public inputs necessary for the success of an industry. To overcome these failures, they propose new approaches to the organization of an industrial policy.
One approach is to be applied in areas where industries exist but need support to become more efficient and competitive and expand existing product or service lines. In this approach, the state must organize a dialogue among the firms in a sector, region or industry and between the firms and the state; provide incentives for the provision of public inputs identified by this kind of collaboration; encourage continuous improvement; create a system to monitor the projects that emerge from the deliberations; and ensure that the fruits of learning through these processes are shared. The authors suggest the creation of public-private “deliberation councils” modeled on East Asian precedents; a special budget to cover the cost of public inputs including new regulatory regimes; and a regular diagnostic or quality review which would lead to direct feedback into council deliberation and project design. (2007).

A second approach is designed to deal with situations in which there is not, as yet, a firm industry base on which to build and in which big and risky investments are needed to move the economy into a new field or to a new level. In mature economies, this is the task of venture capitalists. But, by and large, such actors do not exist in developing countries so the state must fill this gap. The authors think that state development banks can take on the role of venture capitalist, making the kind of strategic bets that are needed (2007). The proposal suggests a new role for development banks, one that would require many to adopt new policies and practices.

All these institutional innovations have significant implications for the law—and vice versa. Take the specific ideas put forth by Hausmann, Rodrik and Sabel. Their proposals for public-private deliberation and specialized budgets for government input in selected industries will raise a series of administrative law and constitutional law issues. The proposal for continuous improvement and regular monitoring of public inputs may encounter problems if they are not consistent with the rules governing who has authority to modify regulations and/or if they clash with traditional forms of ensuring government accountability by use of constitutional or statutory audit units. And the move of development banks from lenders to venture capitalists may require modification of charters, creation of new forms of ownership, and retraining of legal staff.
E: Comparing the New Developmental State to Other Development Approaches: A Map of Development Policy Space

In order fully to situate the emerging idea of a new developmental state, let’s put all the recent theories into an overall framework of analysis. If we look at the most general level, we can see that development theories have varied on two major dimensions: the extent to which it is desirable for the state to play an active role (state intervention), and the extent to which it is thought developing country economies grow best when they are fully liberalized and thus open to the world economy (openness). If we chart the relationship between these two dimensions, we can trace broad lines of changes of policy thinking. This is set forth in Table I.

### TABLE I

**Policy Spaces: Openness and State Intervention**

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^ Helena Alviar has pointed out that this chart radically simplifies a complex process. There are other ways to measure the nature of state involvement than the degree of “intervention” so that a series of charts of this nature might be desirable.
The table has four cells but each cell is a continuum. Thus, the lower left quadrant includes a range of policies that would combine a relatively high degree of openness with a relatively limited role for the state. In such a space, we would expect to find an economy that is open to foreign trade and investment, has an orientation towards export led growth, is highly privatized, and places strict limits on the role of the state in the economy. At the opposite pole, in the upper right hand quadrant, we would find a relatively closed economy and a strong role for the state. At the limit, this could involve high tariffs and low quotas for imports, capital controls and barriers to foreign investment, state ownership of major industries including banks, a strong regulatory regime, and centralized and state-directed allocation of capital.

In this analysis, if a state follows very strict neo-liberal policies, we would expect it to be located at the lower left corner (point NL1) of the lower left quadrant while the ISI-oriented and interventionist or “classic” developmental states would go on the far corner of the upper right-hand quadrant. CDS1.

Of course, neither neo-liberalism nor developmentalism led to identical policies around the world. Some states that tilted towards neo-liberalism retained some direct role for the state in the economy and placed some limits on openness. To show that the “neo-liberal” quadrant contains a range of possibilities, I have inserted a second possibility labeled point NL2. The same thing can be said for the quadrant containing more interventionist states with closed economies; as there are degrees of closedness and intervention, there are other possible points within the space as is suggested by point CDS2.

This chart also helps us identify the possible positioning of the new developmental state (NDS) and its immediate predecessor, the Asian Developmental State (ADS). Thus, we might imagine both of these configurations as involving more state intervention than neo-liberalism but less intervention and more openness than might be found in the classic development states. Thus I have put both in the lower right hand quadrant, showing the ADS as slightly less open than the NDS (because of limits on foreign investment) and
slightly more interventionist because of the strength and autonomy of the state bureaucracies. I have also used dots to show a possible range of locations on the horizontal axis: this should also be imagined for the vertical axis.

III: Latin America and the New Developmental State

In the 21st Century, Latin America has seen a rebirth in interest in the role of the state in the economy. After a period in which neo-liberal ideas had wide currency and led to deregulation, privatization, and opening of economies to world trade and foreign investment, many countries in the region are exploring policy alternatives. Some see to want to return to some of the classic developmental state policies though renationalization and barriers to foreign investment, while others have followed lines that are closer to policies suggested by the new political economy of development. To understand the later turn, it is useful to explore the role of ideas and practices.

(A) ECLAC & neo-structuralism

One important source of ideas concerning a new role for the state is the United Nations Economic Commission for Latin America and the Caribbean (ECLAC). ECLAC was the source for many of the ideas that animated the classic developmental state. The ECLAC point of view, often referred to as structuralism, rejected the application of neo-classical economics to development. It stressed that structural conditions in the region rendered neo-classical prescriptions ineffective and it proposed what were at the time heterodox solutions. Among the structural conditions of greatest concern were the unequal terms of trade between primary products and industrial goods; low levels of investment; and economic dualism which led to “unlimited supplies of labor” and meant that wages would always lag productivity gains. Among solutions offered were planning, forced savings, state owned enterprises in key industries, and import-substitution industrialization.
Although many policies based on these ideas led to impressive results for a while, eventually the model became exhausted and growth rates declined. This led to a reconsideration of structuralism as scholars and policy makers began to question the doctrine’s emphasis on delinking from the world economy and its faith in the state as a primary actor in the economy. The result was the emergence of a new set of doctrines often referred to as “neo-structuralism”. (Lahera et. al 1995; Leiva, 2008; Bielschowsky 2009; Kirby 2009)

The neo-structuralist analysis differed both from structuralism and from neo-liberalism. One can see these differences in at least three areas: the relation to the world economy; the nature of social policy; and the role of the state. While both structuralism and neo-structuralism recognize that “international engagement tends to be unfavorable” (Bielschovsky 2009, 185) neo-structuralists accept the need to promote exports and allow imports. But unlike neo-liberals, they emphasize structural barriers to global competitiveness and the need for strategic engagement by the state in order to overcome Latin America’s low propensity to invest, supplement its’ weak systems for innovation, and compensate for low levels of private R&D.

The new ECLAC doctrine accepts the need for state action in order to change productive patterns, achieve and maintain global competitiveness, and thus benefit from the growing global economy. (Lahera, Ottone, and Rosales 1995) The role for the state in neo-structuralism, however, differs significantly from ideas and policies prevalent in the structural era. Instead of replacing the market with state owned enterprises, the new approach stresses the importance of public-private partnerships that are designed to unleash the entrepreneurial energies of the private sector while ensuring that the private sector has the support needed to be globally competitive and able to compete in technologically advanced and high-value added fields. Another difference is that the new doctrine places great emphasis on the need for active social policy that not only overcomes social exclusion and reduces poverty, but also contributes to the goal of increased competitiveness by promoting training and reducing the social costs of structural change. (Lahera, Ottone and Rosales 1995).
(B) Brazilian theories

Two Brazilian authors have sought to explain recent developments in that country and elsewhere in Latin America using ideas that bear some relation to the ECLAC perspective. Thus Luiz Carlos Bresser-Pereira (2009) speaks of the “new developmentalism” while Glauco Arbix 2010 refers to “Inclusionary State Activism without Statism”. Both stress the gap between current state strategies and both those that were followed by the “old” developmental state and those championed by neo-liberalism.

IV: Law and the New Developmental State: A Preliminary Analysis

In this section, I discuss the historical relationship between various theories of economic development and the legal approaches they fostered and then set forth a preliminary account of the kinds of legal frameworks and tools that seem to be required by the NPED.

A) The Relationship between Development Theory and Law and Development Doctrine

In this part I set forth a theory of the relationship between economic ideas and various “doctrines” in the field of law and development. The history of thought about law and development shows that there is an intimate relationship between prevailing economic ideas and dominant notions of the proper role of law in development.

When we speak of “law and development”, we sometimes use the term to refer to a body of ideas that guides the reform of legal institutions in developing countries. This “law and development doctrine” is more than a simple recipe book of projects and less than an autonomous academic theory. Rather, as Alvaro Santos and I have argued, it is best seen as the product of the interaction of legal theory, economic development theory, and the practices of development agencies. (Trubek and Santos 2006).
In some periods in the past, economics, legal theory and development agency practices came together to form a relatively coherent vision and doctrine that guided the practices of Western foreign aid agencies and influenced domestic reformers. When law, economics and agency practice are all aligned, a relatively clear set of policies can be derived and projects planned. This has happened twice in recent memory. The first such moment was the law of the developmental state: in this model law was seen primarily as a tool to render state intervention more effective. The second was the role assigned to law in the neo-liberal market order which sees law basically as a framework for the market and a shield against undesirable state intervention in market activities. (Trubek and Santos 2006).

Each of these models was associated with the dominant economic theories of the time. In the 1960s development economists favored a strong role for the state, believed that private enterprise lacked the resources to build key industries and state ownership was essential, and thought that import substitution industrialization and delinking from world markets was the only possible road to development. The first moment of law and development doctrine was based on these theories and pointed to the need to strengthen the state apparatus so it could perform these roles. But as the limits and distortions flowing from this model became clearer, economists began to question the prescriptions and counsel a narrowing of the state’s role and an opening to world markets. This move within economics helped generate the second or neo-liberal moment in law and development doctrine. This second moment stressed the role of law in protecting investor expectations, facilitating private transactions, and limited the role of the state.5

Each of the two primary models of law and development doctrine dominated aid efforts for a specific period of time and had a major influence on domestic reform efforts. But

5 Recent scholarship has identified a third model—the role of law in the Asian developmental state (Ohnesorge, 2007a and 2007b) Although this model may have significance for future discussions of the role of law in development, it did not play a role in the history of the law and developmental doctrines of the IFIs or Western bilateral aid agencies.
both those moments have passed. While aspects of both these models remain in thought and practice, neither mode is hegemonic. Rather, we find ourselves in a period in which there is no prevailing orthodoxy either in development theory or in law and development doctrine. This is a period of contending visions which range from the reconstructed neo-liberalism of the World Bank’s *Doing Business* Project to such endeavors as the effort to revive socialism and moves to rebuild a more classical form of the developmental state.

It is in this climate that ideas about a new developmental state are emerging, and in which some people are starting to work out the implications of these ideas for law. The consensus on which the neo-liberal model was built is crumbling and we see new ideas emerging both in development economics and state practice. These ideas point to different models of development and different roles for law.

**B: Law and the New Developmental State**

At an intellectual level, the idea that there is a new developmental state idea emerges from the work of a group of political economists whose theories point to the continued importance of state intervention while eschewing the kind of state ownership and top down centralized controls favored by past developmental state. And the new model can be glimpsed in the practices of some states like Brazil that show signs of wanting to move beyond neo-liberalism without simply trying to return to the developmental state of the 1950s and 1960s.

The theoretical project has yet to be fully accepted in academic circles and the experiments with new forms of state intervention may not have crystallized in a robust model. But there is some evidence that change is occurring and that it will have important implications for the law. In this part I point to some of the implications of the new developmental state theories and practices for the law, and outline some of the issues that must be dealt with if we are to construct a legal theory and practice for the new developmental state.
A) Legal Practices

What changes in the legal order, and what new legal institutions, might be treated as evidence of a shift to a new developmental state? The answer is that we really don’t know: if evidence of NDS state practice is fragmentary, data on legal practices is almost non-existent and the theory of law in the new developmental state has not yet been created. But we would expect that among other things we will find a great deal of interest in creating the legal framework for various forms of public-private collaboration; emphasis on creating the legal structure for a kind of capital market that can will identify and reward entrepreneurship; attention to shifts in corporate governance to encourage investment and promote innovation; recognition of the need for flexibility and for ways to encourage experimentation; legal protection against social exclusion, and efforts to challenge any aspect of international economic law that might hinder state intervention.

B) Legal Theories

We need a legal theory counterpart for the new development economics. This work has yet to be done although there are some ideas now circulating in the legal academy that might be adapted for this purpose. Before turning to that discussion, however, it is important first to explore the implications of the new political economy of development for prevailing theories of law and development. In so doing, we will see more clearly how NPED requires legal ideas that differ from any of the models of law employed in the original developmental state in Latin America, in the Asian developmental state, or in neo-liberalism.. This analysis will help us see the challenge faced by those who seek to develop a legal theory adequate to the NDS phenomena.

1) Conflicting functions: the dilemmas of law in a new developmental state

In the law of the original developmental state, emphasis was placed on the effectiveness of law as a tool for state management of the economy and state led-transformation of
society. Since the role of private investment was secondary, more emphasis was placed on increasing the powers of the state than in protecting the rights of private actors or facilitating their interactions. There was relatively little concern for legal stability and predictability at least if that would get in the way of active measures to be taken by the state.

The neo-liberal model, in contrast, put protecting private property, facilitating contract, and limiting state discretion at the center of its legal model. For neo-liberals, a cardinal feature of the law of the market should be that it was predictable. That meant it should not be easy to change the rules. Neo-liberalism even flirted with the idea of rehabilitating legal formalism as a way to ensure legal certainty, predictability, and stability.

The new developmental state seems to need both flexibility and stability. The commitment to experimentation creates a need for flexible, specialized, and easily revisable frameworks. Such frameworks are needed at the procedural and substantive level. Procedural frameworks are needed to manage the kind of public-private collaboration required to identify new markets, products, and processes. Substantive frameworks are needed to provide the kind of specialized regulatory regime best suited both to elicit private investment and ensure it serves the public interest. Because the whole point of the exercise is to try new ideas and seek new paths, it would seem that procedures need to allow for maximum flexibility and substantive frameworks should be easily and quickly revisable.

But at the same time, because of the new developmental state’s reliance on private investment, its’ legal architects need to ensure that private investors have sufficient confidence in the legal framework so they will be willing to invest in the ventures that emerge from the experiments. How can we provide flexibility and allow a high degree of regulatory specificity without raising a series of concerns on the part of the private sector? How can we ensure that private investment is protected while allowing for rapid revision of the rules? How can we avoid fears that the discretion which is needed for flexibility will be exploited by rent-seeking officials? How can we reduce the risk that
specialized regulatory regimes will be crafted solely to benefit the industry rather than the nation’s strategic priorities? How can we have systems of industry-specific rules that are easily revised without by-passing normal parliamentary procedures and safeguards?

2) **What questions should be addressed by the legal theory of the new developmental state?**

We are yet to find answers for these questions. Indeed, they are only beginning to be posed as we confront the emergence of the new developmental state and begin to understand its importance for the law. But it is possible to identify some of the questions that we would need to explore and to point to some developments in the US and Europe that may be helpful for those who wish to create the legal theory of the new developmental state.

As we think about the legal order of the new developmental state, there are a series of very specific inquiries that we need to make, Preliminary analysis suggests that the success of these approaches will be materially affected by the extent to which domestic and international economic law fosters or impede the kinds of policies and programs thought to be an intrinsic part of the new developmental state. Thus to understand the relationship between the new developmental state and the law, one would want to know answers to such questions as:

- How to protect property rights without stifling innovation or creative destruction
- How to create transparency in public-private relationships without deterring the free flow of information between state and private actors
- How to manage government support and subsidy for specific industries without creating monopolies or inefficient firms or conflict with global trade rules
- How to tailor regulatory regimes to industry needs and global opportunities while maintaining a commitment to legal equality
- How to ensure that private investment in public services and infrastructure meets national objectives
• How to ensure that corporate governance law encourages both investment and innovation
• How to craft legal institutions that will foster attention to social needs and poverty reduction
• How to ensure that “the haves don’t come out ahead” because complex, flexible, and revisable rules of the game unnecessarily favor large economic actors over others

3) **Is there a general theory of law that might allow us to develop institutions capable of managing the complex needs of new developmental state?**

While all these rather specific questions will need to be answered, the multi-functional challenge presented by the new developmental state may require a basic rethinking of the nature and function of law. And for that we may be able to turn to a recent set of developments in legal theory in the US variously called “new governance”, democratic experimentalism, and hybridity. (Sabel and Simon 2006, Trubek and Trubek 2004, Trubek and Trubek 2007; de Burca and Scott 2006). This body of thought seeks to re-imagine the legal order to promote just the kind of public-private collaboration and experimentation that lies at the heart of the new developmental economics. Scholars in this tradition have dealt with many of the issues raised by the legal dilemmas of the emerging new developmental state.

The first and most basic dilemma is how to have a regime that is both flexible and yet provides the certainty and stability that investors may require. Recent studies of “new governance” in the US and Europe point to two basic mechanisms that might operate in this fashion. The first is to create hybrid systems that combine some “hard” and legally binding aspects with softer, more flexible norms and guidelines (Trubek and Trubek, 2007). A second is to make rule revision easy to bring about but allow it only with full participation and consent of all actors. Applied to NDS issues, this might mean having a system that allows rapid change but requires investor approval of them.
The second is the problem of capture. The need for close public-private collaboration and for shared crafting and revision of appropriate regulatory frameworks opens the door to agency capture, or even to collusion, or corruption. The solution to those issues favored by new governance theorists is to require broad participation in the new collaborative regimes so that interests other than industry are at the table and to insist on maximum transparency.

The third are the issues of democratic control, parliamentary sovereignty, and legal uniformity. The classic model of law assumes that parliaments obey the general will, their writ is supreme so that the rules they enact bind subordinate agencies of government, and rules enacted are uniform so like cases are treated alike. Proponents of new governance argue that this “transmission belt” model is a myth and seek alternative mechanisms to ensure that regulatory regimes are accountable to stakeholders. They question whether parliaments respond to the popular will; whether agencies are really constrained by the rules at that are laid down; and whether given the resulting discretion like cases are treated alike. Since this model does not seem to meet the standards of democratic theory, they look to new forms of participation and transparency to ensure that regulations are responsive and regulators accountable. (Sabel and Simon, 2006)

These ideas are neither fully developed nor widely accepted even in the parts of the world where they have emerged. Nor has any effort yet been made to apply the insights of this literature to the developing world. But I believe that within this body of thought we will find clues to dealing with the dilemmas set forth above and help as we seek to construct the legal theory of the new developmental state.

V: Some Evidence from Practice: Brazil

6 This section is based on research done by LANDS as well as other sources. The work by LANDS includes a preliminary research report conducted by Paulo Mattos and Diogo Coutinho of CEBRAP, the Brazilian Center for Analysis and Planning. (For the complete text of the preliminary report and further information on LANDS, go to http://www.law.wisc.edu/gls/lands.html) A second LANDS study is the draft article by Mario G. Shapiro entitled Rediscovering the Developmental Path (2010). See also Arbix 2010, Pires 2010.
In this part, I describe the new approach to an activist state, provide evidence that suggests Brazil is experimenting with new approaches, and list some of the characteristics one would expect to find in any country that is moving in this direction.

**B) Basic Orientation**

In the past in Latin American developmental states operated much of the economy through public ownership, limited contact with the world economy, did not combat monopolistic practices, banned imports that competed with national industries, looked to the domestic market to spur growth, industrialized by importing existing technologies, and focused on growth over distribution. What we are seeing today is a new orientation in which nations still seek to play an active role in promoting growth but are placing primary reliance on the market to allocate resources; privileging private investment and ownership as the engine for growth; exhibiting openness to international markets; and paying direct attention to social equality and protection.

**C) Emerging Practices: Brazil**

If we look at recent developments in Brazil, we can see a number of changes that signal intent to move in the direction of the new developmental state paradigm. Brazil was one of the major proponents of the original developmental state in Latin America. Much of the national economy was owned by the government, government provided substantial subsidies for industry, exports that competed with national industries were effectively banned, and a central planning apparatus created. All this changed in the 1990s when Brazil opened its borders to international trade, embarked on a major privatization process, withdrew from an active industrial policy and created independent regulatory agencies to monitor privatized sectors.

Today we see a number of moves that suggest a desire to return to more active intervention in the economy. Yet this does not seem to signal a desire for a return to the
policies and practices of the classical developmental state of the 1950s-1960s. Rather, it seems that Brazil is exploring new directions along the lines suggested above. Among the important developments are:

1) A public-private coordinating body

The Brazilian Agency for Industrial Development (ABDI) is a network that brings together federal ministries, state funding agencies, private sector representatives, civil society, and universities to promote technological and economic development in sectors of Brazilian industry. ABDI has helped develop Brazil’s new industrial policy and identifies and guides investments in technological research, innovation and industrial development.

2) A new industrial policy

The Lula da Silva administration has experimented with various forms of industrial policy. The most recent is called the “Productive Development Policy Initiative”—PDP. This policy stresses the importance of public investment and support to build capability in infrastructure, capital goods, exports, and technology firms.

3) A new role for development finance

State finance plays a major role in the Brazilian economy. BNDES, the Brazilian National Bank for Economic and Social Development, is one of the largest state development banks in the world, dispersing more funds annually than the World Bank. It is supplemented by other entities at the federal and state level that provide development financing. While most of these institutions have been around for a long time, recently there has been a change in policy emphasis. Of special interest is the role being played by BNDES’s investment bank arm called BNDESPAR.
BNDESPAR’s goals include support for technological innovation, small business and start-ups producing innovative and competitive products, the creation of a seed money and venture capital market, and support for the acquisition of foreign assets by Brazilian firms. BNDESPAR both operates like a private equity fund and venture capitalist and supports other institutions that perform these roles. BNDESPAR can make direct investment in start-ups and unlisted companies, participate in their management, and affect corporate strategy and governance. In some cases, BNDESPAR requires that firms receiving its support submit innovation plans. It also encourages the firms it supports to secure private capital through IPOs. But the bank also supports closed investment funds that provide private equity and venture capital especially for small and medium size firms. BNDESPAR invests in privately managed closed funds that are targeted at specific sectors and attract substantial private funding: currently these funds have raised $4 for every $1 committed by the Bank.

D: A new role for law?

Do these and other shifts in state policy suggest a changing role for law in Brazil? We lack the detailed information necessary to answer those questions. But, surveying the current situation in Brazil in the area of investment and finance, Brazilian scholars Paulo Mattos and Diogo Coutinho concluded that:

“New mechanisms, legally institutionalized by the state, have been identified. They share risk with private investors to increase investments in technological research and innovation, industry capacity and exports, and the acquisition of foreign assets for the internationalization of Brazilian companies. The main characteristics of these new mechanisms, considering their objectives, tools, and arrangements are

a) Flexible industrial policies defined by governmental letters of intention that bind public investments strategies and are indicative for the private sector, inducing private investments decisions;

b) Governmental investments through private equity, venture and seed capital, alongside subsidized credit, as the main tools to support or complement private investments;

c) Public-private partnerships and cooperation agreements between governmental agencies and public credit companies, research centers, and private companies; and
d) Use of flexible private contracts (credit contracts, shareholders and fund investors agreements) by public credit institutions to bind private companies to industrial policy’s investments and corporate governance objectives.” (Mattos and Coutinho, 2008)

E: Is there a new development model?

In a paper produced in 2007, Paulo Mattos states that while there may not as yet be a completely coherent set of policies and practices, the current Brazilian administration is searching for a “…new conception of the role of the state in the promotion of economic development.” This role, he argues, differs from the “…nationalist, bureaucratic ‘Keynesian State’ model of the fifties and sixties which engaged in direct intervention through artificially created monopolies or barriers to entry…” in which the government chooses the winner. But it also deviates from the neo-liberal approach of the 1990s. Rather, the current administration seeks to institute new forms of industrial policy and new governance arrangements based on collaboration between the public and private sectors “…in which government and private sector exchange information and get engaged in learning processes to promote economic development.” (2007).

In their recent study, Mattos and Coutinho (2008) stress that the emerging model involves a substantial degree of collaboration and risk sharing between public and private sectors and employs new tools and legal-institutional arrangements. They see this as marking a new period in state action in Brazil and contrast it with prior periods in the history of state action and economic law. This analysis is summarized in Table II, below:
Table II

<table>
<thead>
<tr>
<th>State-Owned Companies Model</th>
<th>Privatization Program Model</th>
<th>The State - a Risk Taker Model</th>
</tr>
</thead>
<tbody>
<tr>
<td>Objectives</td>
<td>Direct production of goods and services.</td>
<td>Shares risk with private investors to increase investments in technological research and innovation, industry capacity and exports, and the acquisition of foreign assets for the internationalization of Brazilian companies.</td>
</tr>
<tr>
<td>Tools</td>
<td>Direct public investments to develop industrial sectors of the Brazilian economy.</td>
<td>Private equity, venture and seed capital, as well as subsidized credit.</td>
</tr>
<tr>
<td>Legal-Institutional Arrangements</td>
<td>Selling of state-owned companies’ assets; concession contracts.</td>
<td>Flexible industrial policies defined by governmental letters of intention; public-private partnerships; cooperation agreements; private contracts.</td>
</tr>
</tbody>
</table>

Source: Mattos and Coutinho 2008

F: Some case studies of law in Brazil’s new approach to development

While research on the role of law in some of the new approaches being tried in Brazil and other Latin American countries is in its infancy, there are two recent case studies that suggest that new policies are eliciting new legal responses. In one case, we can see how Brazil’s state development bank has adopted private law techniques to help manage its move into the venture capital field. In another we see how government inspectors are using forms of “new governance” in partnership with the unions and business sector to find ways that firms can restructure operations in order to comply with labor regulations.

a) BNDES and Venture Capital: old tools for new policies
In a recently completed study of the venture capital program of BNDES, Mario Schapiro has shown that the Bank has shifted from its traditional reliance on public law to the use of private law tools that allow greater flexibility and experimentation. The venture capital program involves support for technological innovation, loans to new companies, direct participation as a venture capitalist in individual start-ups, and participation in venture capital funds managed by private operators. The Bank is not developing new forms of law: when the Bank participates directly in the operation of firms, it employs legal tools similar to those that might be used by private investors. What is significant is that because it is dealing with the need to support learning and innovation, the state is shifting to more flexible legal tools than it employed in the past. Shapiro states:

The tools that were developed for this new mission have not only represented a break in the Bank’s paradigm (used to financing large enterprises with physical assets), but has also represented a different type of state intervention in the economy. As explained in this paper, instead of the top-down standard and pre-defined operations, designed to meet economic planning requirements, the financing of innovations has been based on cooperative alliances and public-private partnerships between the companies and the Bank. For such, it relies on different legal management structures that, formally or informally, favor a financial relationship subject to trajectory revisions and alterations. (Schapiro 2010).

The new approach places much more emphasis on agreements that in effect create the structure for a public private partnership that will evolve as the partners learn more about the market and prospects for innovation. Among the legal tools the Bank is using are:

(i) Technology contracts—the Bank has signed contracts with technological institutes. The institutes receive funds and make best efforts commitments to develop technology in areas determined to be priority by the PDP;

(ii) Relational loan contracts—when the Bank loans money to small and new companies it uses a different form of agreement than are employed with larger and established borrowers. Instead of merely stating repayment terms, these
relational contracts establish governance systems allowing for constant interaction between the Bank and the borrower;

(iii) Governance for Bank participation as an equity investor—In its venture capital operations the Bank employs a number of tools to give it flexibility and ensure that it can participate actively in the management of the company. In return for its investment, the Bank receives convertible debentures or preferred stock that can be converted into common stock. The most important tool is the Stockholder agreement. Shapiro describes this as follows:

“Despite its minor[ity] participation, the Bank’s monitoring capacity is disproportionally high. This is supported by the Stockholder Agreement which rules the relations between investors and beneficiary companies. Through contractual clauses the Bank formally ensures an expressive participation in the administration of the company, which guarantees a considerable political advantage in corporate decisions… the standard Stockholder Agreement for this type of financing combines three types of dispositions: (i) previous consent by BNDES for certain company activities; (ii) participation in the Board of Directors (regardless of its corporate representation) and (iii) free access to corporate information. Previous consent by the Bank is required for many company decisions, such as: (i) equity alterations like the increase or reduction of equity capital; (ii) the realization of mergers and acquisitions; (iii) the investment in areas other than the core business; (iv) the concession and acquisition of technology, amongst other topics related to corporate administration. Participation in the Board of Directors and free access to corporate information allow a constant scrutiny of and cooperation in corporate decisions. The routine of this scrutiny consists of monthly or bimonthly meetings between Bank representatives and company administrators. It is in this collective forum that corrective measures, paths and revisions of the investment and business plans are stipulated, to the extent that the role played by BNDES in equity sharing goes beyond that of mere financer: it also includes the improvement of equity administration and cooperation towards the definition of competitive strategies. Furthermore, the standard Stockholder Agreement ensures the Bank’s technical team free access to corporate information, including that of a strategic nature, which supports the Bank’s participation in decisions concerning corporate issues. (Shapiro, 2010 p____)

Somewhat similar arrangements are made when the Bank participates as an investor in privately-managed venture capital funds.
b) **Experimentalist governance and public-private cooperation in labor law enforcement: new tools for old problems**

In a recently published study of new approaches to the enforcement of labor laws in Brazil, Roberto Pires (2010) showed that labor inspectors using flexible and reflexive experimentalist governance approaches had more success than their peers who employed more traditional management tools. The study compares two different styles of enforcement: one, drawn from new public management (NPM), stresses specific targets and quotas; the other, which draws more on the experimentalist governance (EG) literature, stresses public-private cooperation, dialogue, exploration of options for compliance, careful analysis of the causes of violations, and revision of goals and standards as mutual learning progresses. Pires shows that through a system of hybrid governance that employed experimentalist methods while keeping sanctions in the background, health and safety inspectors in Pernambuco were able to significantly reduce the incidence of industrial accidents. The key to this success, he suggests, was in creating institutions that allowed interaction among government, business, and labor, encouraged the search for ways companies could revise their business plans so they could comply with the law and still prosper, and facilitated experimentation with new technologies that might reduce risks of accidents at a low cost. He notes that because of successes of these methods in this and other enforcement areas the experimentalist model has been scaled up to the federal level. While Pires does not relate his study and the growth of experimentalism in governance directly to the new political economy of development or possible shifts in the way the Brazilian government is redefining its role in development, the elective affinity between these developments in public administration and policies the development literature supports and the Brazilian government has adopted seem obvious.

**Conclusion: Beyond the “Rule of Law” Consensus**

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7 For a discussion of such hybrid regulation see Trubek & Trubek 2007
Both the law and development movement and neo-liberal thinkers focused on the relationship between state and law, but they came to opposite conclusions about both. For L&D, the state was central to effective development and law should be its sword. For Neo-liberalism, state efforts to promote growth were likely to prove counterproductive, so the law should be a shield against the state. That led to the “Rule of Law” initiative and to massive reform efforts.

Each of these approaches was important for a time and elements of both are still with us. But neither today is dominant. Just as development experts once became disillusioned with the strong developmental state, so today many are questioning some of the assumptions behind neo-liberal prescriptions. And these concerns should bring about a reappraisal of some of the legal reform models that were prescribed.

One area of interest to those concerned with the political economy of law in the development process is the growing interest in reviving—or rediscovering—the role for the state in growth. In first place, while neo-liberalism did lead to a reduction of the state role in many developing countries, and major segments of the economies in many countries were privatized, the privatization process was often selective. Moreover, when privatization was carried out it was often accompanied by the creation of regulatory bodies that maintained substantial state control. So even in the heyday of neo-liberalism many states continued to play a central role in economic governance. Secondly, as the neo-liberal era wanes, we see some states beginning to experiment with new forms of intervention and new tools of governance. It is these forms and tools that present the current challenge for the ROL initiative.

The continuation of a major role for the state in developing economies, and the emergence of forms of intervention not employed in the past, suggests that we may be seeing the emergence of a “new developmental state” that is inspired by a new
political economy. If so, we would expect that new forms of law and legal order may be needed.

Of course, some of the things going on seem to be more a reversion to older and possibly discredited forms of state intervention. For example, in some countries privatized industries are being renationalized in ways that may prove counterproductive for growth. But there also are a number of initiatives that involve substantial state action of a new kind. These include efforts by states to share risks with the private sector through venture capital investment; the growth of public-private partnerships; new forms of social policy that stress activation and workforce development; and a variety of efforts designed to promote innovation and ensure competitiveness.

At the core of these new initiatives is the effort to use state action to empower the private sector. Unlike the classic developmental state, new developmental states often prefer to assist the private sector rather than directly engaging in finance, manufacture or other primary economic activities. But unlike neo-liberalism, the political economy of the new developmental state recognizes that the private sector may lack the entrepreneurial orientation, technical capacity, or risk-taking proclivity necessary to exploit new opportunities and maintain competitiveness in an open world economy. As a result, state intervention may be needed to empower the private sector by stimulating entrepreneurship, subsidizing knowledge creation, and reducing risk.

This doesn’t mean a return to the centralized, planned forms of state intervention common in the past. Scholars and policy-makers have come to recognize that states have no monopoly on strategic economic wisdom. As a result, the new initiatives
are often carried out through close partnership between the state and the private sector and are often based on experimentation and constant program revision.\(^8\)

To the extent that we see the rise of a new development state, and a new political economy of development, what may be the consequences for the law? It seems to me that there will be less interest in fixed, specific rules of general application and more in open-ended standards, individualized contracts, flexible legal regimes, and revisable partnerships. There will be less attention to courts, and more to agencies, regulation, state development banks as venture capitalists, conditional grants and loans, administrative law, and the creation of a problem-solving orientation in the bar.

Both neo-liberals and proponents of the new political economy believe that the ultimate goal is to empower the private sector. Neo-liberals taught that the best way to do that was to limit state action, curb discretion, and employ the courts to police the resulting boundaries. But if states are entering into risk-assuming partnerships with private actors, promoting experimentation, accepting the need for constant fine-tuning and revision of legal regimes, there will be more concern for effective use of discretion and alternative approaches to ensuring accountability.

All this may bring about a move from classic “rule of law” prescriptions to a broader idea of economic governance in which traditional legal tools and new forms of governance will be found in complex and hybrid constellations. This will not only require some rethinking of ROL practice; it also should reunite the ROL movement with broader trends in legal theory and practice. There is a strong movement in legal thought today that seeks to envision new forms of governance and law that are more experimental, participatory, flexible, multi-level, and

\(^8\) LANDS, the Project on Law and the New Developmental State, has assembled literature on the political economy of the new developmental state: for a selection, go to http://www.law.wisc.edu/gls/lands.html.
revisable. As ROL confronts the new developmental state, this literature may prove a valuable source of ideas and practices.

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