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Franz Neumann – Legal Theorist of Globalization?

Few facts of Franz Neumann's legal theory are as unfashionable today as his Marxist account of the decline of classical formal law. Even sympathetic commentators concede that Neumann relied on an idealized and probably unrealistic portrayal of classical liberal jurisprudence, as well as an excessively functionalist interpretation of legal development.[1] Far too often, Neumann offered an economistic *Verfallsgeschichte* that obscures key features of modern legal development at least as much as it helps make sense of them. Although Neumann sought to overcome the normative deficits of traditional Marxist legal theory by famously ascribing an »ethical function« to the rule of law, even this facet of his theory always remained underdeveloped. Neumann never fully liberated himself from a Weberian-Marxist intellectual background that ultimately minimizes law's immanent normative – and, more specifically, democratic – qualities.

Nonetheless, I would like to suggest that precisely those features of Neumann's thinking most criticized by contemporary commentators represent a rich starting point for understanding key contemporary legal trends. Neumann's famous account of the *economic* origins of anti-formal trends in contemporary law anticipates core legal attributes of the ongoing process of »globalization«.[2] Neumann's explanation for those trends seems prescient as well. Globalization provides substantial empirical support for Neumann's thesis that the altered context of contemporary economic activity tends to reduces capital's traditional reliance on relatively formalistic modes of law and legal reasoning. Neumann's emphasis on the manner in which the traditional »elective affinity« between capitalism and formal law no longer obtains within contemporary capitalism offers a useful corrective to contemporary neoliberal conceptions of globalization, according to which market-oriented economic reforms and liberal legal reform necessarily represent two sides of the same coin.[3] In contrast to the dominant neoliberal view, globalization suggests that Neumann was justified in suggesting that the relationship between capitalism and law was likely to be complicated by a limited interest among privileged business interests in achieving strict, clear, public, and prospective forms of general law.

I begin by revisiting Neumann's account of the »functional transformation of law«,

1 See, for example, the essays collected in Joachim Perels, ed., *Recht, Demokratie und Kapitalismus. Aktualität und Probleme der Theorie Franz L. Neumanns* (Baden-Baden: Nomos, 1984); also William E. Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (Cambridge, MA: MIT Press, 1994).

2 The most useful conceptual clarification of the phenomenon of globalization is found in: David Held, Anthony McGrew, David Goldblatt, and Jonathan Perraton, *Global Transformations: Politics, Economics, and Culture* (Stanford: Stanford University Press, 1999).

3 For an excellent critique of this view in reference to East Asia and inspired to some extend by Neumann, see Kanishka Jayasuriya, ed., *Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions* (London & New York: Routledge, 1999).

before suggesting its virtues as a basis for interpreting ongoing trends in contemporary international econmic law (I). Then I suggest ways in which the legal structure of economic globalization shows how Neumann's analysis of legal development might be reformulated (II).

I. Capitalism, Law, and Globalization

Throughout his intellectual career, Neumann argued that the decline of classical law was ultimately generated by the economic structure of contemporary monopoly capitalism, and thus represented a more-or-less universal trend. To the extent that »the antagonisms of capitalism are operating in Germany on a higher and, therefore, a more dangerous level«, however, Nazi-dominated Europe provided a more unadulterated example of legal decay than the capitalist liberal-democracies.[4] To the degree that non-formal law chiefly serves privileged private interests, for Neumann it was no accident that the legal order most immediately subject to the interests of the oligarchic sectors of capitalism, Nazi Germany, would ultimately abandon classical formal law in a more radical manner than its rivals. The destruction of the rule of law was most complete under Nazism chiefly because of the virtually unchallenged hegemony there of the most privileged capitalist classes, in contrast to the situation in liberal democracy where political and legal devices function to limit the influence of monopoly capital.

The weaknesses of Neumann's Marxist interpretation of National Socialism have been widely documented. Nevertheless, it is telling that Neumann's analysis of Nazi imperialism at least indirectly suggests a provocative view of the nexus between law and economic globalization. One of the oft-neglected claims of Neumann's monumental *Behemoth: The Structure and Practice of National Socialism* is that Nazi-dominated Europe constituted a potential developmental response to the nation-state's declining ability to grapple with the technical and economic imperatives of contemporary society. Nazi *Grossraum* plans provided an ominous answer to the growing mismatch between the traditional nation-state and the transnational scope of key technical and economic activities: as evinced by Nazi expansionism and its origins in the structural contradictions of monopoly capitalism, »[t]he decline of the state in domestic and international law is not mere ideology; it expresses a major practical trend.«[5] Neumann's account of the relationship between the Nazi political economy and the decline of classical formal law, at least implicitly, amounts to suggesting that some features of what we presently describe as globalization – most important perhaps, the nation state's decreased ability to coordinate core economic and social processes – are likely to exacerbate anti-formal trends in the law.

We need not engage in tortured textual exegesis, however, in order to construct an account of the relationship between globalization and legal development on the basis of Neumann's legal theory. His most well-known claim is that the transition from competitive to contemporary monopoly capitalism undermines the economic basis for a legal order resting on clear, prospective, and public general norms. In an economy characterized by a routh equality among competitors, generality within the law was likely to be supported by a broad range of economic actors. General law

4 Franz L. Neumann, *Behemoth: The Structure and Practice of National Socialism* (New York: Harper & Row, 1944), 227.

5 Neumann, *Behemoth: The Structure and Practice of National Socialism* (Fn. 4), 160.

was then not only legally advantageous but also economically sensible because individual legal interventions violate the principle of the equality of competition basic to a classical market economy.[6] In a mode of capitalism dominated by huge corporations possessing quasi-monopolistic status and numerous advantages vis-a-vis small entrepreneurs, general law becomes economically anachronistic:

»In a monopolistically organized system the general law cannot be supreme. If the state is confronted only by a monopoly, it is pointless to regulate this monopoly by general law. In such a case the individual measure is the only appropriate expression of the sovereign power.«[7]

The key political question then becomes who possesses the authority to issue such individual measures, and whose interests are served by them. Neumann believed that the democratic welfare-state provided a forum in which the interests of subordinate social groups could at least gain recognition by non-traditional forms of lawmaking; his own commitment to Weimar labor law represented a fervent attempt to establish new modes of post-classical law sensitive to the needs of the German working classes. But the collapse of Weimar indicated to him that such experiments were likely to prove fragile given the special position of monopoly capital within contemporary society. Privileged private interests would try to reduce the regulatory burdens placed on them in the democratic welfare state by pursuing a legal order better suited to their interests. They would tend to prefer legal forms in which their economic advantages might gain unmediated expression. For Neumann, the proliferation of vague, open-ended standards within contemporary law helped pave the way for the democratic welfare state. Non-formal legal forms might easily portend direct domination by large capitalist interests as well, however:

»Legal standards of conduct (blanket clauses) serve the monopolist … Not only is rational law unnecessary for him, it is often a fetter upon the full development of his productive forces … rational law, after all, serves also to protect the weak. The monopolist can dispense with the help of the courts since his power to command is a satisfactory substitute.«[8]

Unless effectively hemmed in by liberal-democratic political institutions along with welfare state devices geared towards providing the working classes with some say in economic affairs, privileged economic interests are likely to make the most use of their *de facto* power advantages by minimizing meaningful legal constraints on their actions. Easily manipulable legal norms serve this purpose well, as do a host of related legal trends allowing large capitalists interests to avoid scrutiny by the ordinary courts of law. According to Neumann, precisely this had occurred within Nazi Germany, and thus Nazism represented a forceful warning to defenders of the rule of law everywhere about the dangers posed to it by contemporary capitalism.
In a similar vein, Neumann believed that contract law was inevitably hollowed-out by the transition from classical to contemporary capitalism. In early capitalism, the notion of a free contract rested on social as well as juridical postulates, since it presupposed a rough equality between economic competitors, and thus a real possibility that contractual relations might rest on a meaningful degree of reciprocity.[9]

6 For example: a legal standard determining the working day for one firm to be ten hours, whereas other firms are expected to respect the eight-hour day. In Neumann's account, the classical entrepreneur tends to be replaced by cartels and syndicates; capital and management functions separate; the »self-regulating« market tends to decline and state intervention becomes widespread; the elimination of many economic risks for the largest units results. Notwithstanding its flaws, important elements of this picture of capitalist development were widely shared in Neumann's time. See, for example, Joseph Schumpeter, *Capitalism, Socialism and Democracy* (New York: Harper & Row, 1950).

7 Neumann, »The Change in the Function of Law«, in *The Rule of Law Under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer* (Berkeley: University of California, 1996), 126.

8 Neumann, *Behemoth* (Fn. 4), 446–47.

9 Unfortunately, his discussion of contracts in competitive capitalism tends to focus on the *history of political*

Contractual freedom, however, was soon reduced to its narrowly juridical features; even those contracts agreed to by manifestly unequal partners (between large and small business, for example) were deemed legitimate as long as a minimal set of formal-legal conditions were met. In this transformed view, contractual freedom was preserved even if the contract at hand managed to strengthen the position of a privileged monopolist. »Even when utilizing the form of the contract, his [that is, the monopolist's] economic power enables him to impose upon consumers and workers all those rules that he deems indispensable and that the other parties are forced to accept if they want to continue to exist.«[10] Neumann worried that contemporary trends pointed to the demise of even those minimal protective functions performed by a narrowly juridical conception of contractual liberty, which at the very least guaranteed predictability in legal affairs by striving to providing a clear statement of the rights and obligations of parties to a transaction. For example, labor contracts obscure structural inequalities between capital and labor, yet fidelity to classical rule of law virtues (clarity, prospectiveness, and cogency) in labor agreements helps circumscribes capital's potentially awesome prerogatives. In Nazi Germany, Neumann hinted, monopoly capital found itself in the envious position of freeing itself from even such relatively minimal legal restraints: contracts were increasingly jettisoned in favor of untrammeled forms of discretionary command suited to the preservation of the hegemonic position of key capitalist interests. But even where contracts manage to survive in contemporary society, they often rely on vague, open-ended, and moralistic phrases lacking a precisely definable justiciable meaning, thereby opening the door to their manipulation by econmic interests in possession of the greatest *de facto* power.[11]

Now one surely could squabble with many features of this story. Nonetheless, for those familiar with the ongoing debate about globalization and the law, Neumann's diagnosis should seem remarkably prophetic. The most impressive study of global business regulation presently available notes that »the rule of law is not as influential in global regulatory regimes as it is in liberal nations . . . International regulation is not characterized by a rule of law which constrains . . .«.[12] The authors of the same study simultaneously point out that »the recurrently most effective actors« in global regulation tend to be large corporations.[13] Those legal arenas pivotal to economic globalization are plague by anti-formal trends arguably as far-reaching as those that grabbed Neumann's attention over fifty years ago. Core features of international economic law remain, to a substantial degree, *soft* law lacking in key classical rule of law virtues. Moreover, substantial evidence suggests that the most privileged sectors of the global economy tend to benefit disproportionately from this scenario. In accordance with the spirit of Neumann's own reflections, let me briefly underscore some crucial anti-formal trends within the normative structure of international economic law (A), before turning to the role of contracts in global business transactions (B):[14]

and legal ideas rather than legal history itself. Thus, Neumann ends to rely on an exegesis of Adam Smith's jurisprudence in order to discuss early contracts. See Franz L. Neumann, *The Rule of Law: Political Theory and the Legal System in Modern Society* (Leamington Spa: Berg, 1986), 189–98.

10 Neumann, »The Change in the Function of Law« (Fn. 7), 132.

11 Neumann, »Labor Law in Modern Society« [1951], in *The Rule of Law Under Siege* (Fn. 7), 233–34.

12 John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge, U. K.: Cambridge University Press, 2000), 30.

13 Braithwaite and Drahos, *Global Business Regulation* (Fn. 13), 27.

14 The following section draws heavily on a series of papers that make up part of an ongoing research project. For support for some of the (broad) claims made below, for now I can only refer readers to the following: Scheuerman, »Economic Globalization and the Rule of Law«, *Constellations* Vol. 6, No. 1 (1999), 3–25; »Globalization and the Fate of Law«, in David Dyzenhaus, ed., *Recrafting the Rule of Law: The Limits of*

A. International business arbitration today is flourishing as a device for resolving disputes in the sphere of transnational transactions. Yet the legal structure of international business arbitration remains flexible and discretionary, characterized by a relative absence of the formal legal virtues of generality, publicity, clarity, and constancy. A vast legal literature now documents the manner in which arbitrators make use of the *Lex Mercatoria* and its indisputably vague clauses: made up substantially of »general principles« (»usages of faith«, »good faith«), the *Lex Mercatoria* provides surprising support for Neumann's prediction that in *contemporary* capitalism large business firms are likely to dispense with formal law.[15] Although international business arbitration appears to be undergoing a process in which its limited legalistic features have recently been fortified, it remains a system in which confidentiality is far-reaching, and recourse to clearly-focused legal rules (or precedents) circumscribed. Moreover, international business seems to be responding to evidence of a creeping legalization within international business arbitration by seeking alternative dispute resolution devices even more profundly anti-formal in character. Traditional forms of commercial arbitration now face a whole range of competitors (including variants of mediation and conciliation geared towards the business community) promising the speedy resolution of conflicts, and a key selling point to global business for these modes of dispute resolution is their limited reliance on traditional formalistic legal devices. Many practitioners of international business arbitration worry that it has become too akin to traditional judicial settings, aggressively demanding a rollback of even the rather limited formalistic attributes of present-day international commercial arbitration.[16]

Similarly, existing forms of transnational regulation for multinational corporations and international finance are weak on traditional rule of law virtues.[17] Thus far, attempts at the transnational level to develop a clear set of strict guidelines for multinational corporations have generally been successfully subverted by large firms promising to develop their own voluntary »codes of conduct«. But voluntary corporate codes of conduct are typically vague and openended, enforcement procedures are feeble or even non-existent, and they rarely provide meaningful protection to those (especially employees) affected by them.[18] The dominant trend within transnational banking regulation is to move away from the model of imposing »strict, uniform, quantitative limits on the activities of the banks« in favor of outsourcing important elements of regulatory activity to the banks themselves.[19] Although much can be said in favor of this approach as a way of grappling with the dynamism of the financial sector, it not only raises difficult questions for defenders of traditional formal law, but

Legal Order (Oxford: Hart, 1999), 243–66; »Reflexive Law and the Challenges of Globalization«, *Journal of Political Philosophy* Vol. 9, No. 1 (2001), 1–22; »Global Law in our High Speed Economy«, in: *The Legal Culture of Global Business Transactions,* eds. Wm. Felstiner and Volkmar Gessner (Oxford, Hart, forthcoming); »False Humanitarianism? U.S. Advocacy of Transnational Labor Protections«, *Review of International Political Economy* Vol. 8, No. 3 (2001).

15 Jarrod Wiener, *Globalization and the Harmonization of Law* (London: Pinter, 1999), 151–83.

16 For samples of this debate, see Albert Jan van den Berg, *International Dispute Resolution: Towards an International Arbitration Culture* (Hague: Kluwer, 1998); also R. Lillich and C. Brower, eds., *International Arbitration in the 21st Century: Towards Judicialization and Uniformity?* (Irvington: Transnational Publishers, 1994).

17 On taxation, see Sol Picciotto, *International Business Taxation: A Study in the Internationalization of Business Regulation* (London: Weidenfeld and Nicolson, 1992).

18 Harry Arthurs, »Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation«, unpublished manuscript, York University (1999); L. Compa and T. Hinchliffe-Darricarrere, »Enforcing Labor Rights Through Corporate Codes of Conduct«, *Columbia Journal of Transnational Law* Vol. 33 (1995), 663–89.

19 Wolfgang Reinicke, *Global Public Policy: Governing Without Government?* (Washington, D.C.: Brookings Institute, 1998), 120.

even those sympathetic to it worry about its high price in terms of democratic legitimacy.[20] Neumann's anxieties about the specter of non-traditional modes of law that ultimately represent an abandonment of liberal law's normative bases of legitimacy remain opposite to contemporary debates about self-regulation within global business.

What then of more ambitious inter-governmental attempts – most notably, the WTO – to develop an effective transnational legal basis for the global economy? To be sure, the WTO clearly represents an attempt to develop a »hard« legal shell for the global economy, and there is no question that its enforcement procedures have been substantially buttressed in recent years. The WTO's dispute resolution devices nonetheless fail to conform to traditional models of formal legality, despite the WTO's self-congratulatory declarations of loyalty to the »rule of law«. The WTO Agreement is »riddled with exceptions – grandfather clauses, waivers, balance-of-payment exception«, along with vague and open-ended clauses, loopholes, and sectoral exemptions.[21] It provides substantial leeway for a highly discretionary process of adjudication, and many of its decisions are likely to strike even those familiar with the complex norms making up the WTO legal system as controversial. WTO tribunals are confidential as well, and opinions expressed in the tribunal reports remain anonymous. This failing not only arguably undermines the modern ideal of the *publicity* of law, but it works in conjunction with the WTO's discretionary system of norms to raise the specter of a deeply irregular system of adjudication whose only real commitment is to the core neoliberal beliefs presently driving WTO policy.[22]

The question of which social groups are best served by anti-formal trends in present-day global economic law obviously is a complicated matter. But many commentators believe that so far they have proven especially opportune for privileged »global players« best able to exploit a »soft« legal structure porous to the influence of powerful economic groups.[23] International business arbitration is favored by transnational business in part precisely because it allows them to minimize the impact of other social constituencies on their activities; it represents an updated form of what Judith Shklar described as »arbitration under chamber of commerce auspices« whose very structure is geared towards maximizing the autonomy of businesses party to a dispute.[24] Multinational corporate codes of conduct too often provide a pseudo-legalistic window-dressing for the mistreatment of labor in poor countries. While new modes of regulation within international finance arguably have helped rid the international financial system of its most blatant pathologies, consumers and others influenced by international finance have exercised little say over the emerging regulatory system. In any event, no one is plausibly arguing that existing global economic law is working to alleviate the injustices of contemporary capitalism or

20 Reinicke, *Global Public Policy* (Fn. 19), 99–100.

21 David Kennedy, »The International Style in Postwar Law and Policy: John Jackson and the Field of International Economic Law«, *American University Journal of International Law and Policy* Vol. 10 (1995), 685. More generally on the legal structure of the WTO, John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (Cambridge, MA: MIT Press, 1999).

22 L. Wallach and L. Sforza, *Whose Trade Organization? Corporate Globalization and the Erosion of Democracy* (Washington, D. C.: Public Citizen, 1999), 198.

23 Although rightly critical of orthodox Marxist accounts of globalization, Braithwaite and Drahos tend to confirm some elements of Neumann's account in their massive *Global Business Regulation.* Reminiscent of Neumann, they see strict antitrust laws as essential to reforming both the global economy and global economic regulation (602–29). In this vein, see Claire Cutler, »Global Capitalism and Liberal Myths: Dispute Settlement in Private International Trade Relations«, *Millennium: Journal of International Studies* Vol. 24 (1995), 377–97. I have tried to sketch out this argument as well in »Economic Globalization and the Rule of Law«.

24 Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, MA: Harvard University Press, 1986), 16–17.

reducing the vast gap separating the rich from the poor on our ever more polarized planet.

B. The transnationalization of capitalism has spawned a number of ambitious recent attempts to harmonize contract law in order to facilitate cross-border transactions. In this vein, the U. N. Commission on International Trade Law *(UNICTRAL),* International Institute for the Unification of Private Law *(Unidroit),* and the Commission on European Law are busily undertaking reforms of contract law so as to make it better suited to the dictates of a global economy. Transnational economic activity continues to require a network of enforceable contracts; Neumann's Nazi-era expectation that contracts might disintegrate altogether remains unfulfilled. Nonetheless, substantial evidence confirms his prediction that fundamental changes in the nature of contemporary capitalism – in this case, the transition to an increasingly transnational economy – would likely contribute to anti-formal trends in contract law.

In the legal literature on globalization and contract law, a large number of voices now argue that transnational exchanges must be free of the excessively »static« as well as »inflexible and irrevocable legal remedies« presumably characteristic of earlier forms of contract law.[25] In this view, heightened possibilities for discretionary judicial activity are called for, and reliance on just those »general principles« whose implications Neumann considered so ambivalent is now identified as a central device for making discretion possible. Indeed, one object of Neumann's own anxieties, section 242 (»in good faith«) of the German Civil Code, features strongly in the Unidroit *Principles of International Commercial Contracts* and the *Principles of European Contract Law* prepared by the European Commission on Contract Law.[26] A pervasive theme in the burgeoning legal literature on transnational contracts is the need for »dynamism« within contracts, along with growing skepticism concerning the virtues of traditional forms of codification: »many of us are becoming increasingly sensitive to the extent that codification of commercial law has not proven to be the most desirable goal.«[27] Legal practitioners are no less unambiguous when describing the motivating force behind the general movement towards increased dependence on open-ended principles within transnational contracts: the changing contours of contract law are »primarily driven by business practice, not the grand theoretical structures of legal scholars« too often influenced by (allegedly) anachronistic and formalistic legal notions.[28] Commercial practice should directly shape contracts, and business practice in the global economy increasingly requires elasticity in the law:

> »[i]f a contract appears insufficiently explicit to finish a direct statement of the parties' rights, duties, powers, and liberties, then the arbitrators will construct it and fill the gaps in it by recourse to their own knowledge of how commerce works in practice, and how commercial men [sic] in the relevant fields express themselves … What is important is the arbitrator should keep constantly in mind that he is concerned with international commerce, with all the breadth of horizon, flexibility, and practicality of approach which that demands.«[29]

Of course, this trend hardly confirms Neumann's claim that anti-formal trends in contract law are of greatest benefit to the most privileged segments of the capitalist

25 Peter Schlechtriem, *Uniform Sales Law: The UN Convention on Contracts for the International Sale of Goods* (Vienna: Manzsche Verlags- und Universitätsbibliothek, 1986), 1. More generally, see the symposium on commercial law in the *American Journal of Comparative Law* Vol. XL, No. 3 (1992).

26 Roy Goode, *Commercial Law in the Next Millennium* (London: Sweet & Maxwell, 1998), 19–20.

27 Arthur Rosett, »Unification, Restatement, Codification and Reform in International Commercial Law«, *American Journal of Comparative Law* Vol. XL, No. 3 (1992), 687.

28 Rosett, »Unification, Restatement, Codification and Reform in International Commercial Law«, 695.

29 Lord Justice Mustill, »The New *Lex Mercatoria:* The First Twenty-Five Years«, *Arbitration International* Vol. 4 (1988), 118–19.

economy. In fact, Neumann's own account of the transformation of competitive into monopoly capitalism fails to offer a sufficient conceptual framework for making sense of the process of economic globalization. In my view, the economic developments at hand are far more multi-faceted and complex, and many of Neumann's economic claims (for example, concerning the internal structure of the firm) are now badly in need in revision: the concept of monopoly capitalism is far too closely related to Fordist forms of capitalist production and accumulation that increasingly are of limited significance in some core areas of economic activity. If we keep in mind, however, that firms operating on the global level (and thus most likely to make use of the emerging contractual forms described here) more likely than not belong to the most privileged sector of the capitalist economy, Neumann's claim that the largest and most powerful capitalist interests are likely to seek non-formal modes of law seems anything but outdated.

II. Globalization and the Postwar Welfare State

Neumann believed that powerful capitalist interests tried to escape the confines of Weimar's cautious quest to develop the outlines of the modern regulatory and welfare state by irresponsibly opting to support fascist dictatorship. As noted earlier, he considered the decline of classical formal law for the most part irreversible; which social interests could successfully harness antiformal legal trends hence became the key political question. In the Weimar Republic, socially subordinate groups possessed a real chance to influence legislation. The Nazis promised to eliminate that influence, and key business interests thus were willing to take their chances with them.[30] Although it would be absurd to equate fascist dictatorship with globalization, it might be useful to apply elements of Neumann's analysis to contemporary legal development. Economic globalization rests on a panoply of distinct (technological, political, as well as immanently economic) sources. Nonetheless, it is striking that one of its more noteworthy facets consists of the attempt to release key forms of legal decision-making authority (international arbitration, for example, or the WTO) from the direct oversight of the regulatory and welfare states that came to determine the contours of nationally-based polities in significant segments of the developed world in the postwar era. Whatever its flaws, nation state-based liberal democracy has provided relatively substantial possibilities for social groups historically excluded from the political process to shape both legislation and the administration of justice in accordance with their needs. From the perspective of Neumann's analysis, it should come as no surprise that privileged business interests ultimately sought to throw off the burdens of the postwar regulatory and welfare states. Globalization, in part, represents one result of that backlash. David Harvey's fascinating analysis of the manner in which the economic crisis of the 1970s played a powerful role in initiating the economic changes that we now associate with globalization accords disturbingly well with elements of Neumann's own analysis of how the Great Depression generated new economic and political strategies within German industry: in both cases, a crisis not only forced key business groups into an increasingly hostile political stance vis-a-vis the achievements of the regulatory and welfare state, but also un-

30 Far more clearly than Neumann, the late Tim Mason demonstrated that this political option ultimately proved dangerous for some key business groups. Tim Mason, *Nazism, Fascism and the Working Classes* (Cambridge: Cambridge University Press, 1990), 53–76.

leashed a series of economic innovations (Harvey talks of »postfordism«) ultimately subversive of those achievements as well.[31]

The precise nature of the relationship between traditional forms of national authority and the emerging modes of transnational business regulation described above is a complicated matter that would take us beyond the scope of this short essay. Yet the ascent of international business arbitration, proliferation of soft law and self-regulation, and establishment of the WTO arguably constitute ambitious attempts to minimize the potential impact of the democratic nation-state over the supervision of transnationally-operating business. Non-formal modes of law were obviously commonplace in the postwar welfare and regulatory states, but they were undertaken by political bodies resting on liberal democratic procedures and committed to the ideals of the regulatory and welfare state. Whatever the legal ills of the regulatory and welfare state from the standpoint of traditional liberal jurisprudence, they often represented a worthwhile trade-off in the quest to assure democratic legitimacy and social stability. The same cannot be said about most present-day forms of transnational business regulation. In order to free itself from what Carl Schmitt angrily described as the regulatory burdens of the »weak quantitative total state«, business groups in the 1930s pursued a risky – and occasionally self-destructive – alliance with right-wing dictatorship.[32] At the beginning of the twenty-first century, powerful economic interests may no longer need the help of right-wing dictatorship in order to ward off challenges from below. Instead, they can preach the virtues of the »rule of law«, while in fact establishing dispute resolution devices for the global economy that perpetrate their privileged position and make a mockery of traditional rule of law virtues. Where economic and technological innovations permit large-scale business to reduce the *de facto* and *de jure* significant of national regulation while simultaneously opting for an alternative supranational regulatory system lacking the minimal preconditions of formal legality (generality, clarity, prospectiveness, and publicity), we risk abandoning precisely those features of liberal democracy that allowed it to rein in privileged economic interests.

Many criticisms have rightly been directed at Neumann. My argument suggests two additional ones. First, like his colleagues in the Frankfurt School, Neumann was too quick to see the transition from liberal democracy to fascism as portending western civilization's general course of development. According to the argument developed here, he was right to worry about the »elective affinity« between contemporary capitalism and anti-formal legal trends, even if many details of his account today must be considered misleading and even incorrect. But he was clearly wrong to imply that the elective affinity between contemporary capitalism and anti-formal legal trends might only realize itself fully within fascist dictatorship; the present-day course of globalization suggests that alternative developmental paths cohere with the basic outlines of this trend as well. At the same time, even here Neumann still provides useful guidance. An immediate implication of his analysis is that one of the great political questions of our times is likely to concern the possibility of subjecting anti-formal trends in international economic law to democratic and social purposes. If I am not mistaken, this is precisely one of the key questions confronting participants in the ongoing debate about the prospects of transnational democracy and, on an even more immediate political level, the possibility of a democratic and socially-sensitive Eu-

31 David Harvey, *The Condition of Postmodernity,* 121–200.

32 On this aspect of Schmitt's theory, see William E. Scheuerman, *Carl Schmitt: The End of Law* (Lanham, MD.: Rowman & Littlefield, 1999), 85–112. Also, in a distinct vein, Renato Cristi, *Carl Schmitt and Authoritarian Liberalism* (Cardiff: University of Wales, 1998).

ropean Union. It also remains crucial to ongoing debates about the possibility of achieving basic social and labor standards within international economic law.[33]

Second, Neumann's tendency to underscore the manner in which vague and open-ended legal clauses *directly* serve privileged economic interests means that his understanding of the nexus between capitalism and anti-formal trends in the law too often took an overly mechanistic form. The legal literature on globalization hints at a more complex picture. To be sure, substantial evidence confirms Neumann's expectation that large firms often prefer anti-formal law for reasons familiar to anyone who has spent time at the children's playground: when the rules of the game are vague or unclear, it is often the biggest boys (and sometimes girls) who succeed in enforcing their interpretation on the other players. This is only the tip of the iceberg, however. Transnational economic processes are characterized by high levels of simultaneity and instantaneousness, chiefly because new technologies (rapid fire computerized economic transactions, for example) are playing a pivotal role in the global economy. The globalization of financial markets would be unimaginable without dramatic recent developments in information technology, as would numerous parallel developments among major »global players.« Subcontracting, outsourcing, »small batch« and short production runs, and »just in time« inventory flows and delivery systems: each of these innovations can be interpreted as manifestations of a larger trend towards accelerating production and consumption, and each has been facilitated by technological changes allowing transnational enterprises to minimize the significance of distance and duration while maximizing the economic opportunities provided by new possibilities for instantaneousness and simultaneity. To be sure, modern capitalism has always operated to revolutionize the time and space horizons of economic activity. As Harvey reminds us, capitalism is a

> »revolutionary mode of production, always searching out new organizational forms, new technologies, new lifestyles, new modalities of production and exploitation and, therefore, new object social definitions of … time. The capacity to measure and divide time has been [constantly] revolutionized, first through production and the diffusion of increasingly accurate time pieces and subsequently through close attention to the speed and coordinating mechanisms of production (automation, robotization) and the speed and movement of goods, people, information, messages, and the like.[34]

Nevertheless, when high-speed forms of informational technology make it possible for firms to produce distinct components of a single commodity in dozens of different countries, or when internet stock brokers in Hong Kong can communicate instantaneously with their peers in Toronto, it becomes difficult to deny that the time and space horizons of contemporary economic activity are experiencing especially far-reaching changes in our day and age. Although always essential to capitalism, the »compression of time and space« is now taking particularly dramatic forms, as evinced by a variety of economic innovations deriving from new technologically-based possibilities for instantaneousness and simultaneity.

Neumann's legal theory never adequately thematizes this feature of capitalist development, notwithstanding its obvious centrality to Marx's own account.[35] Yet its implications are profound for legal development. The literature on globalization includes numerous suggestions that traditional formalistic legal procedures too often are rapidly rendered anachronistic given the dynamic character of contemporary

33 Lance A. Compa and Stephen F. Diamond, eds. *Human Rights. Labor Rights and International Trade* (Philadelphia: University of Pennsylvania Press, 1996).

34 Harvey, *Justice, Nature & the Geography of Difference* (Oxford: Blackwell, 1996), 240–41.

35 On the account of globalization implicit in the *Communist Manifesto,* see Harvey, *Spaces of Hope* (Berkeley: University of California, 2000), 21–52.

economic change and high speed pace of innovation: the »half-life« of many forms of traditional legal regulation indeed appears to be undergoing a dramatic decline. The legal sociologist Boaventura de Sousa Santos adeptly captures the enigma at hand at when he points out that the »speed and social acceleration« of contemporary social and economic processes means that »law will be easily trapped in the dilemma: either to remain static and be ignored, or to keep up with social dynamics and be devalued as a normative reference.«[36] *Unidroit* justifies its own reliance on »soft« law by underscoring the necessity of contractual law able »to take account of the constantly changing circumstances brought about by the technological and economic developments affecting cross-border trade practice.«[37] In a discussion of corporate codes of conduct, the political scientist Kathryn Sikkink has suggested that large transnational corporations (TNCs) are often hostile even to relatively modest forms of strict, codified regulations because »[f]lexibility in export and marketing strategies is one of the essential requirements of a corporation, and … detailed, specific marketing regulations … could seriously hamper the TNC's ability to organize its activities globally«.[38] In the same vein, a prominent international business lawyer observes that large transnational firms are now oftentimes hostile to »hard« transnational regulation because »[a]dvanced technology and organizational techniques permit MNCs to transmit information, shift production, alter marketing strategy, and otherwise adapt to changing business conditions on a scale and a pace unthinkable only a decade or two earlier.«[39] The altered time and space horizons of crucial forms of transnational economic activity means that strict uniform norms are likely to constrain large firms so as to reduce unduly their capacity for dealing with the breathtaking pace of change in the global economy.

On one level, this diagnosis merely confirms Neumann's prescient observations from the 1930s and '40s: contemporary capitalism offers a surprising challenge to traditional conceptions of the rule of law as resting on strict, clear, prospective, general norms. But it also raises the ante for those of us sympathetic to a relatively traditional concept of the rule of law. To the extent that anti-formal trends in the law seem integrally related to the *dynamism* of contemporary economic development, how can we preserve that dynamism while simultaneously guaranteeing a reasonable measure of rule of law virtues? Must we choose between the rule of law and a system of production driven incessantly to accelerate the pace of economic life? Or might it be possible to preserve what is worthwhile about the dynamism of contemporary economic life – *and* achieve both greater social justice *and* the rule of law?

The intellectual legacy of Franz Neumann offers no easy answers to these questions. But Neumann's increasingly unfashionable legal theory offers a useful starting point for those trying to answer them.

36 Boaventura de Sousa Santos, »The Postmodern Transition: Law and Politics« in *The Fate of Law,* eds. Austin Sarat and Thomas Kearns (Ann Arbor: University of Michigan, 1993), 115.

37 International Institute for the Unification of Private Law (Unidroit), *Principles of International Commercial Contracts* (Rome: Unidroit, 1994), viii.

38 Kathym Sikkink, »Codes ofConduct for Transnational Corporations: The Case of the WHO/UNICEF Code,« *International Organization* Vol. 40, No. 4 (1986), 836.

39 John Kline, »Advantages of International Regulation: The Case for a Flexible Pluralistic Framework«, in: *International Regulation: New Ruies for a Changing Worid Order,* ed. Carol Adelman (San Francisco: Institute for Contemporary Studies, 1988), 36.