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## Law in Hiding: Market Principles in the Global Legal Order

Odette Lienau

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# Law in Hiding: Market Principles in the Global Legal Order

ODETTE LIENAU\*

*Standing in the background of the global legal order are a range of what might be called “market principles” or “market givens”—collective presentations or beliefs about how markets work—which are treated as objective descriptions at a particular time and place. This Article argues that such market givens should be understood as a kind of “law in hiding,” shaping the policy space available to states and other actors and affecting global legal developments in important but unrecognized ways. Drawing on examples from global financial law, rules on capital mobility, and sovereign debt practices, I demonstrate how market principles can provide the real substantive content for conventionally recognized law, effectively counter official law, and act as powerful rules in the absence of clear legal standards. I further consider why “law” is a suitable categorization for these market principles, adopting a broad definition that derives from and pushes forward recent international legal scholarship. I contend that deliberately incorporating market principles into our understanding of the global legal order would be not only theoretically plausible but also productive, especially by expanding the field of legal work and activism and by raising important questions about lawmaking mechanisms, accountability, and norm coherence. I also suggest that market principles have thus far escaped attention from lawyers in part because of tendencies and assumptions in multiple variants of international legal scholarship itself.*

*In highlighting how market principles play a role in the global legal order, I do not intend to grant them the legitimacy or presumptive obedience sometimes associated with the label “law.” Indeed, my motivation draws in part from a concern with the capacity of these market principles to effectively undermine policy options that may lead to better outcomes. My goal, instead, is to place them as squarely as possible at the center of legal analysis and critique—and therefore to level the playing field between these market principles and other types of principles and values we may care about.*

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## INTRODUCTION

Standing in the background of the global legal order are a range of what might be called “market principles” or “market givens”—collective presentations or beliefs about how markets work, which are treated as objective descriptions at a particular time and place. Some market principles recently dominant in the international arena include: “Sovereign states must pay debt to maintain access to capital markets”; “Imposing capital controls undermines investment and development”; and “Austerity measures promote growth.” Others can be found, explicitly or implicitly, in the pages of newspapers, economic textbooks, and policy documents. These market principles delineate permissible and impermissible behavior and entail associated rewards or punishments, thus forming part of the shared background for transnational economic relations.

This Article argues that such market givens should be understood as a kind of “law in hiding,” shaping the policy space available to states and other actors and affecting global legal developments in important but unrecognized ways. This does not at all mean they are unchanging—anyone with a passing awareness of economic history (or, indeed, history in general) will know that one era’s certain knowledge is another’s outdated ideology. Still, at any given historical moment, a market principle that distills and presents ostensibly objective knowledge can prove quite powerful, as any government official can confirm. The fact that such givens do not have a clear rulemaker or lawmaker, unlike standards or rules of other sorts, does nothing to diminish their power or their directive capacity. Although “mere” norms or beliefs frequently garner less attention than other rule forms such as hard or soft law, these market principles may actually *gain* in potency because they escape the additional scrutiny associated with the labels “law,” “governance,” “standard,” or “rule.”

Indeed, my motivation draws in part from a concern with the capacity of these market principles to effectively undermine policy options that may lead to better outcomes. This is paired with a sense that market principles seem to gain power from being seen as exogenous to international law and legal criticism, including criticism from the perspectives of human rights and governmental accountability. The goal of this Article, then, involves placing them as squarely as possible into the center of legal analysis and critique—to level the playing field, in a way, between these market principles and other types of principles and values society may care about. This is not to suggest that they should automatically be accorded the legitimacy and presumptive obedience traditionally associated with law. Setting aside the thorny question of when even conventionally recognized law deserves such habitual acquiescence, these market principles have hardly gone through any process that would render them particularly deserving of respect. Rather, the goal is to highlight how such market givens nonetheless act like law, and to suggest that, given this reality, they should be investigated and criticized at least as intensively as law traditionally writ.

So what do I mean by “market principles”? And what impact can they have in the international legal arena? Part I begins this Article by more fully defining my understanding of this concept and by highlighting how market principles in the global arena can generate the substantive content for law, provide its interpretive core, and shape its reputational compliance mechanisms. This Part first considers how market principles can work through more conventionally recognized hard or soft law, acting in ways that are often overlooked but that provide the real clout for the actual functioning of these rules.<sup>1</sup> It then introduces the example

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1. See *infra* Part I.A.

of the international law on capital controls, which demonstrates how market principles can *counter* official hard law, transmitting a rule that effectively undermines or obviates the ostensible law on the books.<sup>2</sup> Finally, Part I looks at the case of sovereign debt continuity to consider how a market principle can itself act as powerful but hidden law, guiding and blocking state action with significant distributional consequences.<sup>3</sup> These examples also emphasize two key elements of market principles that become important for thinking through the potential impact of greater legal scrutiny: First, like much of international law, they are enforced largely through a reputational sanction, which succeeds most when there is a high degree of ideological consensus around the market principle itself.<sup>4</sup> Second, these examples also underscore that, although market principles may be stable for a time, they are not inevitable and are therefore necessarily prone to historical variation, thus inviting a closer look at the constellation of factors that enable change at any given moment.

Still, even if we acknowledge the importance of market principles in shaping global governance outcomes, is it plausible to consider them part of the international legal order itself? Although the motivation for this Article derives in part from the possible consequences of this characterization, the analytical argument should also stand as a separate matter. Part II begins to consider why, at least in the global arena, “law” is a suitable categorization for these market principles, as opposed to something more neutral such as “constraint.” Scholars and practitioners have expanded the traditional boundaries of law in this field, such that it already exists on something of a flexible continuum.<sup>5</sup> In light of this definitional approach, I contend that the expansion could go yet further, particularly given that market principles display many of the features that we associate with law.<sup>6</sup> For example, as the capital controls and debt continuity examples suggest, ostensibly objective market givens may in fact be deeply contingent and largely manmade—one essential element distinguishing law from other regularities or constraints.<sup>7</sup> Market principles themselves, even if they are assumed to be an objective element external

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2. See *infra* Part I.B.

3. See *infra* Part I.C.

4. For a discussion of the importance of reputational sanctions in international law, see ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 33–48 (2008) (noting that reputational sanction is one key mechanism for the enforcement of international law, along with reciprocal noncompliance and retaliation); Rachel Brewster, *Unpacking the State's Reputation*, 50 *HARV. INT'L L.J.* 231, 236–37 (2009). On the centrality of ideological consensus for reputation, see Beth A. Simmons & Zachary Elkins, *The Globalization of Liberalization: Policy Diffusion in the International Political Economy*, 98 *AM. POL. SCI. REV.* 171, 173 (2004).

5. See *infra* Part II.A.

6. See *infra* Part II.B (discussing some of the features associated with law).

7. See *id.* (including discussion of law as manmade).

to (and unmovable by) law at any particular time, should presumptively be understood as among the global rules that are shaped by actor decisions, governance structures, and broader legal ideologies in a mutually constitutive dynamic. Although these economic givens are sometimes loosely called “laws of the market,” part of my argument is that such references need to be thought through more seriously.

Next, Part III considers the potential effect of more deliberately incorporating market principles into our understanding of the legal order, and suggests that calling them “law” is not only plausible but also productive. Taking these norms *out* of hiding and recognizing their importance in legal functioning would encourage several types of productive analysis. First, it would encourage lawyers to take more comprehensive stock of the rules that actually impact particular issues, and could therefore shift certain forms of legal work and activism.<sup>8</sup> Second, this kind of lawyerly attention could make a contribution to the empirical understanding of market principles, even beyond that likely to be generated in the social sciences.<sup>9</sup> Third, we could productively apply certain normative questions and frameworks associated with law to market principles.<sup>10</sup> For example, legal scholars have noted that efforts to determine what the rules are—to identify, codify, and institutionalize rules—tend to trigger a mechanism for assessment and change.<sup>11</sup> This in turn raises a range of thorny questions: If a given market principle is already generating rules in the global legal order, who are its rulemakers? What does it even mean to ask about rulemakers in this context, and how do we raise corresponding questions about accountability? In addition, lawyers are more likely than other individuals to ask whether the rules generated by market principles cohere with other standards in the global legal system. If the rule embedded in a particular market principle conflicts with emerging international rules, such as peremptory norms of human rights, is this a problem? If so, how should it be resolved? Part III also suggests that such questioning might help to enable beneficial policy options that are otherwise blocked by market principles, in particular by undermining the ideological consensus that underpins the reputational enforcement of any market given.<sup>12</sup> Finally, this Article acknowledges the

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8. *See infra* Part III.A.

9. *See infra* Part III.B.

10. *See infra* Part III.C.

11. *See, e.g.*, ANDREI MARMOR, SOCIAL CONVENTIONS: FROM LANGUAGE TO LAW 50–51 (2009). Marmor distinguishes between encyclopedic and legislative codification and suggests that this triggering is associated with legislative codification, which seeks to determine authoritatively what the rules are. However, the disagreement about (or expansion of) the sources and boundaries for international law, discussed in Part II.A, make these types of distinctions less applicable.

12. *See infra* Part III.D.

risk of inadvertently legitimating market principles by calling them “law,” but suggests that this risk is unlikely to materialize in practice.<sup>13</sup>

In light of their seeming importance and the recently expanded understandings of “law” in the global arena, Part IV asks why market principles have escaped serious scrutiny by international lawyers thus far. It suggests that one essential reason they have remained in hiding, so to speak, lies in the tendencies of international legal scholarship itself. Although the dynamic of market principles in the global legal order parallels the interaction of law and norms in other areas, I argue that this dynamic tends to contradict a key assumption in much of international law. In particular, multiple variants of international legal scholarship explicitly or implicitly assume that global rules are deliberately *chosen as rules* in some way, by either states or other agents. Some of this writing even posits the existence of a hierarchy in the importance or effectiveness of legal forms—a continuum (in ascending order of importance) of norms, customs, soft law, and then hard law. This scholarship seems to suppose that advocates of any particular rule will want to move up this hierarchy in order to solidify the effectiveness of their preferred standard. Rational choice and even constructivist scholars, both of whom focus in different ways on how actors construct law, are apt to reinforce this privileging of chosen law, even if they embrace international legal pluralism and acknowledge the mutual constitution of norms, laws, and actors.<sup>14</sup> Critical international legal scholars have considered how knowledge practices can shape the substance and contours of law, but tend to exhort scholars to look beyond law rather than to recognize the ways in which market principles already work or act as law and thus might be subject to more standard tools of legal analysis.<sup>15</sup>

Although the arguments of this Article are grounded in international legal theory and in examples with transnational ramifications, nothing connects these claims exclusively to the global level. Scholars in international law and international relations have thought very explicitly about the multiple possible forms and effects of global rules in recent years, pressed on by bigger questions about what counts as “law” and whether it really can exist in the absence of sovereign power and action. This rich literature thus informs the questions and contentions of this Article. But beliefs about how markets work—indeed, beliefs about the purportedly inevitable causal mechanisms of the social world more generally—can shape expectations and practice across all levels of legal interaction; this phenomenon is hardly unique to transnational economic law. Norms and collective beliefs about ostensibly objective facts are present

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13. See *infra* Part III.E.

14. See *infra* Part IV.A (discussing rational choice approaches); see *infra* Part IV.B (discussing constructivist approaches).

15. See *infra* Part IV.C.

in every facet of social life, including not only economic functioning but also informal strictures related to gender, race, and other areas. Indeed, this key insight underpins many studies of the extent to which legal practice is embedded in broader social structures. But the ways in which this particular subcategory of market norms functions within international economic law is understudied, and this lack of attention seems puzzling and problematic given its actual importance. In a way, the goal here is to argue, with a degree of nuance and specificity appropriate to the subject matter, in favor of an insight relatively easily accepted in other arenas of legal action—namely, that the law on the books and the law in practice may be fundamentally distinct. Acknowledging the law in practice, including how market principles are part of this practice, is essential to a full understanding of the global legal order.

### I. MARKET PRINCIPLES IN THE LAW

So how do I define market principles and where do they fit into the global legal order? Although scholarship on contemporary international law has become capacious in its scope, certain elements have still tended to be understood as exogenous to the legal arena. Among these elements are what I call market principles or market givens—collective beliefs about how markets work as an objective matter. These are not self-consciously politically or morally directed beliefs about appropriate market action (such as “it is wrong to sell humans into slavery” or “markets should be designed to alleviate poverty”).<sup>16</sup> Rather, market principles as defined here are those underlying understandings about market functioning that people often take to be grounded not in political or moral principle but rather in ostensibly objectively determined facts about the world. An example might be the contention that inflation results from soft central bankers, or that the imposition of capital controls will lead to slower growth relative to an accepted baseline.<sup>17</sup> Of course, these principles may still be politically and morally inflected, and they may have important political and moral ramifications. However, that is not how they are presented and initially understood.<sup>18</sup> Indeed, the very effectiveness of these beliefs can draw in part from the fact that they are *not* taken to be based on politics, morality, or law.<sup>19</sup> Instead, these causal ideas are—like principles

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16. Such explicit morally or politically derived norms certainly play a crucial role in shaping international law and have also played an important role in international legal theory, as discussed later in the Article. See, e.g., *infra* Part IV.B.

17. These examples are provided by Jonathan Kirshner, though in a different theoretical framework. See *MONETARY ORDERS: AMBIGUOUS ECONOMICS, UBIQUITOUS POLITICS* 4–12 (Jonathan Kirshner ed., 2003).

18. Kirshner’s edited volume focusing on monetary politics provides several examples or case studies of how economic statements are *not* presented as (or taken to be) political and changeable. See *generally id.*

19. Kirshner notes that “[f]undamentally political struggles about money are routinely cloaked in economic terms, often throwing students of politics off the scent.” *Id.* at 3–4.



of the natural sciences—implicitly understood to be external to and unchangeable by legal mechanisms. They are “givens” or “truths,” more like the majestic law of gravity than the prosaic law of traffic lights. Of course, what counts as a “given” inevitably shifts over time—supposedly objective knowledge changes regularly in both the natural and social sciences. But a closer interrogation of these “matters of fact” is left to other disciplines and, although these facts may become part of the external background for international economic law, they are not scrutinized as part of the legal order itself.<sup>20</sup>

This Part lays the groundwork for the argument that market principles are in fact very much part of the global legal order, broadly understood, and contends that they should be studied as such. Market givens can generate the substantive content for hard or soft law, shape the interpretation of such law, and also construct (or stiffen) its compliance mechanisms. As the example of capital controls demonstrates, they can actually displace the formal law officially on the books, effectively transmitting a contrary rule.<sup>21</sup> Even in the absence of any obvious directive, as in the case of sovereign debt continuity, market principles may constitute law-like rules themselves, constraining state behavior and undermining efforts to develop alternative doctrines.<sup>22</sup>

Each of these examples highlights a key feature that market principles share with many other forms of international law—namely, that they are enforced largely through a reputational sanction.<sup>23</sup> This points to the importance of relative consensus in maintaining the strength of a market principle, and also to the potential for weakening or undermining a market principle by breaking down that ideological accord. As Beth Simmons and Zachary Elkins have noted, ideological consensus “alters the reputational payoffs associated with policy choice.”<sup>24</sup> The capital controls and sovereign debt continuity examples in particular also highlight another important feature of market principles, namely, their contingency and potential changeability.<sup>25</sup> Although rules and regularities of all sorts inevitably constrain and condition actor behavior—while not being law-like themselves—this manmade element of market principles helps bring them into the conceptual orbit of law as opposed to that of other regularities identifiable in the world.

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20. Part III.B discusses how the development and falsification of market principles interacts with theories and models in the social science disciplines, and also suggests that introducing a more lawyerly mindset might be productive in this empirical arena as well.

21. See *infra* Part I.B.

22. See *infra* Part I.C.

23. See, e.g., GUZMAN, *supra* note 4, at 33; Brewster, *supra* note 4, at 236.

24. Simmons & Elkins, *supra* note 4, at 173. The role of ideological consensus is discussed in further detail later in this Part.

25. See *infra* Part I.B; *infra* Part I.C (highlighting the element of changeability).

## A. AT WORK IN CONVENTIONAL LAW

Scholars of law and politics have highlighted that states and other actors can choose from multiple mechanisms in constructing the rules of global governance—from formal hard law such as binding treaties to soft law mechanisms including guidelines and codes of conduct, which may generate less controversy due to their relative flexibility, imprecision, or nonbinding nature.<sup>26</sup> Among the many issues implicated by this literature are the questions of how actors select and interpret the content for these rules and also how these rules are actually enforced.<sup>27</sup> One way in which market principles are part of the global legal order is by working through this type of more conventionally recognized global law—by generating the substantive content for international rules, shaping the interpretation of such rules, and providing the bite for their compliance mechanisms. As such, they can play a dispositive role in determining legal outcomes without, paradoxically, being identified as a key component of the legal order itself.

One central goal of the institutions and laws of global governance is to coordinate state action around a set of rules that ideally constitutes an improvement for all.<sup>28</sup> But where does the substance of these standards come from? From an institutional design perspective, a key way that market principles may shape law is by providing focal points for this type of rulemaking.<sup>29</sup> Certainly, one actor or another, calculating to promote their own interest and their own vision of the public good, may propose correspondingly self-serving rules or standards. But these actors' proposals can also instantiate a set of beliefs about how markets work as an objective matter, and seek to ensure that markets function efficiently and smoothly, in a way that would serve not only the proposals' sponsors but also others in the broader global system.

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26. See, e.g., Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 421 (2000); Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 172 (2010); Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT'L ORG. 495, 500 (1991); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 2–3 (2002).

27. See generally sources cited *supra* note 26; GUZMAN, *supra* note 4. The literature on rational institutions also provides insight into these issues. For a foundational volume, see generally Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT'L ORG. 761 (2001).

28. Although there is no universally agreed upon definition of global governance, the report by the independent Commission on Global Governance in 1995 defined it as “the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and cooperative action may be taken.” MARGARET P. KARNS & KAREN A. MINGST, INTERNATIONAL ORGANIZATIONS: THE POLITICS AND PROCESSES OF GLOBAL GOVERNANCE 3–4 (2d ed. 2010).

29. This resonates with the broader literature on how ideas can serve as focal points for coordination, policy, and rulemaking. For an early example, see Geoffrey Garrett & Barry R. Weingast, *Ideas, Interests, and Institutions: Constructing the European Community's Internal Market*, in IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE 173–206 (Judith Goldstein & Robert O. Keohane eds., 1993).

This foundational role of market beliefs can exist at a very deep background level, as with the complex set of global trade rules and institutions built on the market principles of free trade and comparative advantage. Such beliefs about market functioning not only have grounded and justified the initial founding of institutions and conventions such as the World Trade Organization and Bilateral Investment Treaties, but also continue to shape how these regimes' rules are used and interpreted.<sup>30</sup> This impact can also exist at the level of actors selecting more fine-grained and modest guidelines and codes of conduct. For example, speaking of soft financial institutions, Chris Brummer points out that certain global governance rules may:

[A]rticulate norms that have not previously been systematized. What are, in fact, preferred practices have not been explicitly identified as such but are simply matters of habit or widely followed practice that are implicit and taken for granted. Once regulators identify and express best practices . . . those practices become explicit and prescriptive.<sup>31</sup>

Thus market principles can play an essential role in quietly shaping best practices and expectations, which may eventually be codified (and possibly strengthened) through more conventional legal forms.

For example, the Group of 20 ("G-20") finance ministers and central bank governors regularly issue pronouncements that implicate or adopt particular beliefs about economic functioning; these declarations sometimes explicitly seek to identify the (ideally) objective determinants of particular economic outcomes around which further policy might be formulated. The G-20's September 2013 Leaders' Declaration, for example, noted the endorsement of a work plan to help "assess factors affecting the availability and accessibility of long-term financing for investment and committed to identify and start to implement a set of collective and country-specific measures that tangibly improve our domestic investment environments [sic]."<sup>32</sup> While the ultimate policy

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30. For example, the foundational texts of the global trade regime make exceptions for developing countries, as a carve out from their general commitment to free trade and comparative advantage. However, particularly in the earlier decades of the trade regime, these exceptions tended to be read narrowly. See, e.g., MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 324 (1995). It is possible that World Trade Organization ("WTO") adjudicative bodies are now attempting to make room for greater exceptions on the basis of moral issues, as suggested by the recent EC-Seals decision of the WTO Appellate Body (though this moral exception approach was criticized by some developing countries). For more on the import of EC-Seals, see, for example, Gregory Shaffer & David Pabian, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, 109 AM. J. INT'L L. 154, 154-61 (2015). For a critical take on the main institutions of global governance and the argument that these institutions and their associated rules (and presumably associated market principles) constitute a nascent imperial global state serving the interests of a transnational capitalist class, see B. S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1, 1 (2004).

31. CHRIS BRUMMER, *SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM: RULE MAKING IN THE 21ST CENTURY* 151 (2d ed. 2015).

32. RUSSIA G-20, G-20 LEADERS' DECLARATION 3-4 (2013).

recommendations, which become the focal point for international coordination, are more readily identified as global law, much of the work of that “law” is actually done by the beliefs about how investment markets work, as determined and formulated by the study group called for in the declaration. The post-2008 crisis Financial Stability Board exhibits a similar dynamic, also issuing reports about the determinants of market success or failure along with related recommendations and standards designed to strengthen global finance.<sup>33</sup> Thus, market beliefs about the efficacy or harm of particular actions can remain prior to, and in fact may affect the selection and success of, the subsequent officialized rule.

In addition to this background content-generating function, market principles can also play an important role in reputational enforcement within the global legal order. Concern about reputation, defined as the beliefs about an actor’s likely future actions based on that actor’s past actions, is frequently presented as one reason states choose to comply with international agreements even when it might be in their interest to violate their provisions.<sup>34</sup> While it is possible for reputational effects to be entirely internal (that is, relevant only among the parties to the actual agreement in question), a state’s actions may also affect its reputation in the eyes of a broader range of actors, possibly up to the international community writ large.<sup>35</sup> Indeed, one of the key enforcement mechanisms for a range of legal agreements, particularly but not only those in global finance, is understood to involve the expected reaction of capital markets and broader audiences to a given state action, based on market actors’ likely beliefs about the appropriateness of that action under the circumstances.<sup>36</sup> The capital controls and sovereign debt continuity examples below highlight the centrality of this reputational mechanism for market principles.

Of course, the more specific interrelations of reputational effect, background market givens, and identifiable financial regulations can be

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33. The Financial Stability Board continued the actions of its predecessor, the Financial Stability Forum, on this front. Its reports, including published standards and country peer reviews, are made available on its website. See *Publications*, FIN. STABILITY BOARD, <http://www.financialstabilityboard.org/publications/> (last visited Mar. 11, 2017).

34. For important studies of reputation in political science, see Beth A. Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 94 AM. POL. SCI. REV. 819 (2000); MICHAEL TOMZ, REPUTATION AND INTERNATIONAL COOPERATION: SOVEREIGN DEBT ACROSS THREE CENTURIES (2007); JONATHAN MERCER, REPUTATION & INTERNATIONAL POLITICS (1996).

35. See, e.g., GUZMAN, *supra* note 4, at 33–48; Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 506–07 (2005); Brewster, *supra* note 4; see also ODETTE LIENAU, RETHINKING SOVEREIGN DEBT: POLITICS, REPUTATION, AND LEGITIMACY IN MODERN FINANCE 26–28 (2014).

36. Brummer, focusing primarily on the reputation of regulators among their peers, similarly notes that “international financial regulation, though formally a species of ‘soft law,’ is bolstered by various disciplining mechanisms that render it, under certain circumstances, more coercive than traditional theories of international law predict.” BRUMMER, *supra* note 31, at 120.

hard to tease out. Brummer suggests that “international financial law can help shape the perceptions of investors, lenders, and other relevant market participants as to the value of any particular kind of conduct,”<sup>37</sup> which might in turn impact reputational consequences. But to what degree are these new regulations always *shaping* market participants’ own understandings of economic cause and effect? Or, in other words, do these rules really result in investors buying into a previously unaccepted set of ideas—for example, that heightened bank capital requirements will stabilize a domestic financial system and thus justify a lower cost of capital for firms in that jurisdiction?

The alternative is also possible and at least equally likely—namely, that crucial work is being done by a *prior* set of market beliefs. Jonathan Kirshner has pointed out that a unique feature of monetary politics—and perhaps by extension a range of financial issues—is its distinctive relationship to ideas, given that money has no inherent content or value. Thus, its distinguishing attributes include “the unique link between ideas and ‘market sentiment’ . . . and the overwhelming influence of that sentiment on the ability to practice macroeconomic policy.”<sup>38</sup> Kirshner suggests that the policy most likely to be successful or credible is that “which ‘the market’ thinks is right. Policies that are not credible cannot be sustained because of the responses of market actors to such policies.”<sup>39</sup> Although here Kirshner refers most directly to domestic policy choices and policy autonomy, there is good reason to expect that this market sentiment dynamic would extend to the viability of transgovernmental rulemaking as well.

In short, certain beliefs and principles—grounded in assessments about market functioning and resulting in expectations about appropriate action—are likely to affect not only the initial selection behavior of rulemakers but also the subsequent compliance decisions of actors subject to the resulting rules. To the extent that credibility or reputation play a role in enforcing particular legal rules and the policy choices that they enact, market principles—including beliefs about how particular economic actions will impact market position or market functioning—may themselves delimit the workable parameters of law more conventionally understood. Relatedly, if a preferred law violates underlying market principles—and if it is unable to help shift key beliefs over time—it is unlikely to be successful and so may fall by the wayside, even if it is instantiated in an officially adopted legal rule. So there is good reason to consider the possibility that the crucial enforcement mechanism of reputation in some international law derives force not so much from carefully formalized rules (though certainly those

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37. *Id.* at 150.

38. Jonathan Kirshner, *The Inescapable Politics of Money*, in *MONETARY ORDERS: AMBIGUOUS ECONOMICS, UBIQUITOUS POLITICS*, *supra* note 17, at 13.

39. *Id.*

are still helpful and clarifying) but instead from unchosen and even unacknowledged background beliefs about ostensibly objective market facts.

As a result, these market principles can have surprisingly certain effects within particular issue areas. They can be incorporated into other more conventionally understood legal work, producing the substantive content for law and shaping the important compliance mechanism of reputation. And the violation of these principles can have real consequences for the actors involved, despite the lack of legal attention paid to them. Indeed, it may well be the case that the work or effect attributed to more recognizable legal rules is actually being done by these hidden market principles.

#### B. THE COUNTER-LAW OF CAPITAL MOBILITY

While market principles may act by generating the content and supporting the compliance mechanisms for conventionally recognized law, such embedding and formalization is not necessary for their legal or law-like work. As the example of capital controls demonstrates, market principles can actually displace the formal law officially on the books, effectively transmitting a contrary rule. Indeed, for capital controls, studying the hard law in order to understand the rules on the ground would result in hapless confusion. Although the official law grants states significant policy space to impose capital controls as they see fit, this formal rule has at times been entirely contravened by a market principle—accepted and promoted by key International Monetary Fund (“IMF”) staff—that effectively mandated open capital accounts.

Cross-border capital flows—which are the streams of money into and out of a country that link it to the global economy—have been a significant topic of discussion and a target of potential regulation in international economic relations.<sup>40</sup> From a recipient country’s perspective, such cross-border capital can provide much needed funding for the local economy at more reasonable interest rates than are available domestically, whether for public investment, private business growth, or increased household consumption.<sup>41</sup> And, from a sending country’s perspective, allowing domestic capital to flow overseas may result in higher rates of return on investment.<sup>42</sup> That said, there is certainly no guarantee that cross-border funds will move where they are most productively employed as opposed to moving toward the faddish investment of the moment.<sup>43</sup> A surplus of funds can also facilitate asset bubbles, where the price of certain assets may become unreasonably and unstably high (real

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40. Adam Feibelman calls them “the connective tissue of the international financial system.” Adam Feibelman, *The IMF and Regulation of Cross-Border Capital Flows*, 15 *CHI. J. INT’L L.* 409, 411 (2015).

41. *See, e.g., id.* at 411–12.

42. *See, e.g., id.*

43. *See, e.g., id.*

estate and tech startups are recent examples). It may also fuel inflation, pushing the supply of money beyond what is needed for the goods available for purchase. It can even impact the exchange rate: When significant foreign funds move in and need to be converted into local currency, the value of local currency can increase relative to foreign currencies, thus making the country's export commodities more costly on international markets and potentially dampening a country's export sectors.<sup>44</sup> And all of this works in reverse as well—the rapid outflow of capital can factor in drying up much needed funds, compromising a domestic banking sector, tanking a local currency, and making essential imports too costly.<sup>45</sup>

Unsurprisingly, given both the potential and the problems inherent in global capital flows, sovereign governments have frequently sought to regulate the movement of capital into and out of their domestic economies.<sup>46</sup> The measures for achieving this goal—capital controls—may apply generally or may target specific sectors and can include taxes and tariffs on inflows or outflows, volume restrictions, and other mechanisms.<sup>47</sup> There has been some empirical disagreement about the basic desirability of unregulated capital inflows and outflows, and also about the actual efficacy of any regulations that might be put in place to dampen them.<sup>48</sup> Nonetheless, a number of sovereign states have continued to see the value in such controls, or at least in retaining the policy space to access these measures when needed.<sup>49</sup>

How have sovereign attempts to manage such flows been treated by the relevant global rules? Certain subgroups of states—in particular the developed state members of the Organization for Economic Cooperation and Development (“OECD”) and the European Union—have agreed to mandate capital account liberalization, for example through the OECD Code of Liberalisation of Capital Movements.<sup>50</sup> However, the most

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44. These and other problems are especially associated with “hot money,” and there is some concern that the group mentality frequently at work in finance can exacerbate these dynamics. For a brief policy-oriented overview of the pros and cons of liberalizing capital accounts, see M. Ayhan Kose & Eswar Prasad, *Capital Accounts: Liberalize or Not?*, INT'L MONETARY FUND, <http://www.imf.org/external/pubs/ft/fandd/basics/capital.htm> (last visited Mar. 11, 2017).

45. *See id.*

46. *See* CAPITAL CONTROLS AND CAPITAL FLOWS IN EMERGING ECONOMIES: POLICIES, PRACTICES, AND CONSEQUENCES (Sebastian Edwards ed., 2007); *see also* Andrés Fernández et al., *Capital Control Measures: A New Dataset* (Int'l Monetary Fund, Working Paper No. 15/80, 2015) (presenting a new dataset of capital controls from 1995 to 2013).

47. *See* OLIVIER JEANNE ET AL., WHO NEEDS TO OPEN THE CAPITAL ACCOUNT? 4–5 (2012); HAL S. SCOTT & ANNA GELPERN, INTERNATIONAL FINANCE: TRANSACTIONS, POLICY, AND REGULATION 1274–79 (19th ed. 2012).

48. *See* Kevin Gallagher, *Regaining Control? Capital Controls and the Global Financial Crisis* 8–9 (Political Econ. Research Inst., Working Paper No. 250, 2011); *see also* SCOTT & GELPERN, *supra* note 47, at 1274–79; Feibelman, *supra* note 40, at 422 n.67.

49. *See* all sources cited *supra* note 48.

50. ORG. FOR ECON. CO-OPERATION & DEV., OECD CODE OF LIBERALISATION OF CAPITAL MOVEMENTS (2016). *See* Stephany Griffith-Jones et al., United Nations Conference on Trade and Development,

broadly applicable formal international law relevant to capital controls—the IMF Articles of Agreement, pertinent to the institution’s 188 member states<sup>51</sup>—clearly supports the right of governments to employ such measures. Article VI very explicitly notes that states are permitted to “exercise such controls as are necessary to regulate international capital movements.”<sup>52</sup> A carve out does exist for current transactions—payments for traded goods and services, interest, remittances, and the like—providing that “no member shall, without the approval of the Fund, impose restrictions on the making of payments and transfers for the current international transactions.”<sup>53</sup> But this current account liberalization provision still leaves a significant amount of leeway for a government actor to impose controls in an effort to manage the sizable inflows and outflows of other forms of capital.

This openness in the written law makes sense given that the designers of the modern international financial system were hardly sanguine about unrestricted cross-border capital flows. As Annamaria Viterbo points out, these key architects in the waning years of World War II “did not consider capital account convertibility either necessary or desirable.”<sup>54</sup> In 1956, the IMF executive board reiterated that: “Members are free to adopt a policy of regulating capital movements for any reason . . . without approval of the Fund.”<sup>55</sup> A 1978 amendment to Article IV of the Fund’s Articles, which had legalized floating exchange rates following the end of the Bretton Woods era gold-dollar system, did allow the Fund to “exercise firm surveillance over the exchange rate policies of members.”<sup>56</sup> But this amendment did not reach the issue of capital liberalization, and the process failed to provide even a less ambitious code of conduct, despite preliminary efforts in this direction.<sup>57</sup>

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*Management of Capital Flows: Comparative Experience and Implications for Africa Part 2*, U.N. Doc. UNCTAD/GDS/MDPB/2003/1 (Apr. 2003) (providing an overview of the experience for OECD countries).

51. *IMF Members’ Quotas and Voting Power, and IMF Board of Governors*, INT’L MONETARY FUND (last updated Jan. 17, 2017), <https://www.imf.org/external/np/sec/memdir/members.aspx>.

52. Articles of Agreement of the IMF, Art. VI, § 3.

53. *Id.* Art. VIII, § 2(a). The Articles define current account transactions as “payments which are not for the purpose of transferring capital,” including payments associated with trade, services, short-term banking and credit extensions, loan interest payments, investment income, moderate payments for loan amortization or investment depreciations, and moderate family remittances. *Id.* Art. XXX(d). Of course, this definition itself is complex and leaves some gray areas, and so the IMF Balance of Payments Manual, updated periodically, makes an effort to update definitions and standardize usage of these terms.

54. ANNAMARIA VITERBO, *INTERNATIONAL ECONOMIC LAW AND MONETARY MEASURES: LIMITATIONS TO STATES’ SOVEREIGNTY AND DISPUTE SETTLEMENT* 179 (Alan O. Sykes et al. eds., 2012).

55. RAWI ABDELAL, *CAPITAL RULES: THE CONSTRUCTION OF GLOBAL FINANCE* 132 (2007); *see also* JEFFREY M. CHWIEROTH, *CAPITAL IDEAS: THE IMF AND THE RISE OF FINANCIAL LIBERALIZATION* (2010).

56. Articles of Agreement of the IMF, Art. IV. The precise meaning of “firm surveillance” would of course eventually have to be worked out through staff policies. For an overview of the legal framework of Article IV, *see* INT’L MONETARY FUND LEGAL DEP’T, *ARTICLE IV OF THE FUND’S ARTICLES OF AGREEMENT: AN OVERVIEW OF THE LEGAL FRAMEWORK* 3 (June 2006).

57. *See* ABDELAL, *supra* note 55, at 133–35.



Still, the uniformity, state policy leeway, and stability suggested by the formal international law has not been matched on the ground, particularly because later generations of key IMF policymakers did not share the original concern with unfettered capital liberalization reflected in the written rule. As such, the actual *unwritten* rule has shifted significantly since 1945, at moments resulting in a real constraint on a state's ability to impose capital controls.<sup>58</sup> In particular, the collective beliefs about the market impact and advisability of capital controls changed, especially in the late 1980s and through the mid-1990s.<sup>59</sup> During this period, and despite the absence of a clear legal basis, the IMF began to encourage liberalization by its member states.<sup>60</sup> As a former IMF executive director noted, “[c]apital account liberalization had become an accepted part of our orthodoxy. It had for some time been Fund policy to promote capital account liberalization.”<sup>61</sup>

The Fund did not aggressively press for the elimination of capital controls in every instance, and differences emerged between various groups within the Fund, including between departments in charge of differing regions or areas.<sup>62</sup> However, an official IMF report from 1997 did formally acknowledge that, although the Articles only mentioned an obligation to liberalize current accounts, “the Fund has in recent years sought to promote capital account liberalization.”<sup>63</sup> The IMF also noted that such advocacy proceeded apace “in view of the benefits that can accrue from capital movements and their importance in the international monetary system.”<sup>64</sup> In other words, the perceived market principle—the collective beliefs about market functioning—had changed, particularly within the IMF staff. Some within the IMF even lobbied for an amendment to the Articles of Agreement to further enshrine the new market principle on the topic and place capital account liberalization formally in the IMF bailiwick. This effort was eventually led publicly by IMF Managing Director Michel Camdessus, whose 1997 speech exhorting the board to adopt the amendment argued that countries

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58. See Feibelman, *supra* note 40.

59. See ABDELAL, *supra* note 55; see also CHWIEROTH, *supra* note 55.

60. The IMF was subsequently criticized severely for this advice, along with other policy recommendations that came to be known. See, e.g., PAUL BLUSTEIN, *THE CHASTENING: INSIDE THE CRISIS THAT ROCKED THE GLOBAL FINANCIAL SYSTEM AND HUMBLING THE IMF* 10 (2003) (noting that the IMF's credibility was damaged by the financial crises of the late 1990s, and also that the IMF itself spearheaded the movement to liberalize global capital).

61. ABDELAL, *supra* note 55, at 128–29.

62. See generally CHWIEROTH, *supra* note 55 (providing a detailed look at the differences of opinion across factions of the IMF staff, in particular the differences between those who advocated a more gradualist and carefully sequenced approach to capital liberalization and those who pressed for a “big bang” approach that argued in favor of full liberalization as a “first-best” policy).

63. ABDELAL, *supra* note 55, at 137.

64. *Id.*

cannot “compete for the blessings of global capital markets and refuse their disciplines.”<sup>65</sup>

What accounts for this shift? Although much has been said about the Wall Street-Treasury-IFI complex, implying that perhaps IMF actions are coordinated to promote the interests of the U.S. government or private financial actors, the evidence suggests otherwise.<sup>66</sup> Indeed, scholars highlight that the U.S. Treasury was lukewarm at best in regard to the amendment—certainly not in the driver’s seat—and that the Treasury and the U.S. Executive Director of the IMF fell entirely silent on the issue of the amendment upon signs of disapproval from Congress.<sup>67</sup> And while private financial actors generally supported capital liberalization, they tended to remain suspicious of any policy shift that could concentrate additional power outside of Wall Street, and were especially distressed that they had not been consulted as part of the process.<sup>68</sup>

Although the effort to amend the Articles ultimately failed, it would hardly be accurate to say that this was due to any particular strength of the hard law rule allowing capital controls. The Fund had by then effectively adopted an informal soft law rule in favor of liberalization, though its staff did not necessarily recommend liberalization indiscriminately.<sup>69</sup> Interestingly, the former IMF Director of Research, subsequently serving as the Dutch Executive Director, opposed the amendment by highlighting that the Fund had already “wholeheartedly embraced capital liberalization . . . without being hindered by a lack of mandate.”<sup>70</sup> His opposition rested primarily with the concern that, if given a legal mandate, Fund staff would feel pressured to insist strictly on liberalization, “making sure at each step that any policy it recommends or endorses can pass the test of the new Article.”<sup>71</sup> Others agreed that the lack of a legal mandate did not act as a deterrent or a hindrance to the new rule. Former U.S. Treasury Secretary Larry Summers admitted that “[b]y the 1990s . . . no one thought that the Fund was at all faithful to its charter. . . . The goals they had outlined . . . were anachronistic.”<sup>72</sup> Indeed, Jeffrey Chwieroth highlights that “the initiative to amend the Articles in

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65. *Id.* at 155 (emphasizing the centrality of European IMF officials in these efforts). *But cf.* CHWIEROTH, *supra* note 55, at 156 (emphasizing that internal shift in beliefs happened first—that “the staff had changed their normative outlook in the 1980s prior to any active management involvement on the issue.”).

66. See Jagdish Bhagwati, *The Capital Myth: The Difference Between Trade in Widgets and Dollars*, 77 FOREIGN AFF. 7, 7 (1998) (explaining the general idea of a Wall Street-Treasury-IFI complex as a theme in some commentary is traceable to Jagdish Bhagwati’s coining of the Wall-Street Treasury Complex).

67. ABDELAL, *supra* note 55, at 141, 157–58; CHWIEROTH, *supra* note 55, at 157–58.

68. ABDELAL, *supra* note 55, at 139, 141–42, 153–54; see CHWIEROTH, *supra* note 55, at 159.

69. ABDELAL, *supra* note 55, at 138.

70. *Id.* at 157.

71. *Id.*

72. *Id.* at 136.

the late 1990s was in large part an exercise in empowering the staff with more tools to encourage a policy that many of them had already been promoting informally for nearly a decade.”<sup>73</sup> Thus, the amendment was not really necessary to the goal of clarifying a rule that disfavored capital controls. In effect, the shift in beliefs within the IMF already constituted something akin to an unwritten code of conduct in favor of liberalization.

This is not to say that the successful amendment of the Articles would have made no difference—recognition of the importance of market principles hardly entails a rejection of other rule forms as irrelevant. Nor does it involve an insistence that market givens will gain primacy in every instance. Successful formalization in the late 1990s could well have emboldened those in the IMF who advocated for capital liberalization. It also could have hardened efforts to promote more absolutist, shock-therapy style modes of liberalization even after the financial crises of 1997 and 1998 or the 2008 financial crisis, which dampened the most zealous efforts to promote liberalization in emerging economies.<sup>74</sup>

But it is also worth asking whether the Article amendment project actually ended up helping to undermine the market principle itself. The efforts to formalize what had been a fairly successful informal background rule did draw the attention and the ire of key players—notably the U.S. Congress—who vocally rejected the effort.<sup>75</sup> And the Fund’s seeming hubris of asking for additional power to liberalize capital in the face of the 1997–1998 financial crisis, which some critics believed had been exacerbated by speculative flows enabled by the dismantling of controls, opened the IMF up to a significant degree of criticism.<sup>76</sup> It also drew the attention of scholars of economics and international politics, whose additional scrutiny may have helped to erode the dominance of any ideological consensus in favor of liberalization that previously existed.<sup>77</sup> Of course, any independent impact from the spotlight and discussion generated by the amendment effort is difficult to tease out, especially because the serious launch of the process—recommending the amendment to the IMF Board of Governors at the end of 1997—coincided with the deepening of the Asian crisis as it spread from Southeast Asia to South

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73. CHWIEROTH, *supra* note 55, at 9.

74. See BLUSTEIN, *supra* note 60, at 10; ABDELAL, *supra* note 55, at 159 (noting that the start of the Russian crisis in August 1998 constituted “the final nail in the coffin of the capital account amendment”). For a brief discussion of the more measured approach to liberalization taken after the 2008 crisis, see *infra* sources cited at notes 87–89 and accompanying text.

75. ABDELAL, *supra* note 55, at 141, 157–58; CHWIEROTH, *supra* note 55, at 157–58.

76. See BLUSTEIN, *supra* note 60, at 10; ABDELAL, *supra* note 55, at 159.

77. Among the most vocal scholars and critics has been Joseph Stiglitz, former Chief Economist of the World Bank. See generally Joseph E. Stiglitz, *Capital-Market Liberalization, Globalization, and the IMF*, 20 OXFORD REV. ECON. POL’Y 57, 71 (2004).

Korea.<sup>78</sup> As such, it is likely (one hopes) that the larger global crisis would have focused attention on the possible risks of capital liberalization in any case.

Through all this, it is important to keep in mind that countries were of course free to reject these background mandates, as is the case with any hard or soft law as well. And IMF staff members insisted that capital liberalization ultimately remained a state decision. Certainly, the powerful lever of conditional lending, which has been employed (controversially) to support IMF-preferred policies in other areas—though, again, always with the voluntary acquiescence of states—remained off-limits in staff efforts to persuade countries to liberalize their capital accounts, given that capital liberalization was not one of the official goals stated in the Fund’s Articles. Still, in April 1997, certain executive board members requested an opinion from the Fund’s General Counsel, François Gianviti, on the legal status of this less formal advocacy. According to the board minutes, he responded that he found it:

[D]ifficult to confirm that promotion of capital account liberalization fell within the Fund’s mandate, . . . . The Fund was not promoting liberalization of capital investments or capital transactions as such; the Fund had been assisting members in achieving that purpose, as their purpose and objective, not as a purpose of the Fund itself. In fact, it would be contrary to the right of members under Article VI to restrict capital transactions. The Fund could perhaps persuade, convince, or explain the benefits, but that was something else . . . . That did not mean that the Fund had the power to impose additional obligations and, in particular, the obligation to liberalize capital movements. What the Fund could do at the present stage was to tell a member that there was an undesirable state of affairs, and to change, but that was not an obligation.<sup>79</sup>

Thus Gianviti carefully distinguished between problematic “promotion” and permissible persuading, convincing, and explaining of benefits.<sup>80</sup> Of course, this dividing line is far from perfectly clear, and different actors may well interpret any given episode of promoting versus persuading differently. From the perspective of some countries in the international economic system, being “told to change” by the Fund can feel very much like an obligation—perhaps even more so than other legal or semi-legal obligations generated by more formal hard or soft law instruments.<sup>81</sup>

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78. See BLUSTEIN, *supra* note 60, at 1–10 (detailing the spread of the Asian Financial Crisis into South Korea and the IMF efforts in the South Korean crisis).

79. ABDELAL, *supra* note 55, at 150 (quoting François Gianviti, IMF General Counsel).

80. *Id.*

81. See NGAIRE WOODS, *THE GLOBALIZERS: THE IMF, THE WORLD BANK, AND THEIR BORROWERS* 65–83 (2006). This persuasive power relies at least in part on the existence of willing interlocutors in IMF member countries. Still, this persuasion has been quite effective. The IMF and the World Bank have succeeded in their globalization efforts “by requiring governments to open up to global trade, investment, and capital.” *Id.* at 3.

Part of the mechanism for the influence of a market principle involves its broader reputational enforcement, particularly once key actors, including international economic institutions like the IMF, identify it as economic orthodoxy.<sup>82</sup> As mentioned in the previous Subpart, which discussed how market principles can act in conventional law, hard or soft law rules might actually work through the initial selection and subsequent reputational enforcement of a background market principle. This reputational enforcement can also help to buttress the rule generated by a market principle more directly, without further formalization in a hard or soft law format. While it is an oversimplification to think of capital markets or creditors as a single, uniformly responding entity, in some historical and institutional contexts it may in fact be the case that market actors and even the broader audiences for state actions seem to speak with a more unified voice.<sup>83</sup> The existence of such an ideological consensus “alters the reputational payoffs associated with policy choice.”<sup>84</sup> In particular, a state’s decision to act in a manner that counters the apparent consensus is seen not as a reasonable selection of one among multiple plausible policy options, but rather more like the violation of an accepted rule—an alarming signal of recalcitrance or heterodoxy—and thus deserving of greater reputational sanction in response.

This reaction may happen through investors alone, but can also be magnified or exacerbated with the introduction of institutions such as credit rating agencies, which have played an essential role in judging sovereign financial policy and decisions since at least the mid-1970s.<sup>85</sup> Focusing on Standard & Poor’s (“S&P”) in particular, Rawi Abdelal points out that, at least through the 1980s, agencies did not seem to associate capital controls with heterodoxy. However, “S&P’s views on capital controls tracked the emergence of what appeared to be the new orthodoxy in both official policy circles, such as the IMF, and among financial market participants.”<sup>86</sup> Thus, in the case of capital account liberalization, particularly in its heyday of the late 1980s and through the mid-1990s, a fairly unified reputational enforcement mechanism effectively strengthened the market rule of capital mobility as against the technical hard law of country choice. If a country chose to impose capital controls during this period, it could expect to be the subject of reputational

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82. For more on reputation, see sources cited *supra* notes 4, 35, and 36.

83. See LIENAU, *supra* note 35, at 26–32 (discussing the risk of oversimplifying the views of creditors and their likely reputational assessments, particularly in the sovereign debt continuity context).

84. Simmons & Elkins, *supra* note 4, at 173.

85. See generally Christopher M. Bruner & Rawi Abdelal, *To Judge Leviathan: Sovereign Credit Ratings, National Law, and the World Economy*, 25 J. PUB. POL’Y 191 (2005) (discussing the influence of credit rating agencies on markets in recent decades and arguing that these agencies should be required to provide nuanced ratings); see also LIENAU, *supra* note 35, at 208–09.

86. ABDELAL, *supra* note 55, at 182.

punishment, despite the existence of a hard law rule designed to ensure flexibility and policy space.

Of course, and perhaps unsurprisingly, the market principle and associated informal policy favoring capital liberalization, which reached a high point in the mid-1990s, eventually fell into decline. Adam Feibelman notes the emergence, after 2008 in particular, of “a growing consensus among scholars and policymakers that states must carefully manage capital flows and coordinate their policies for doing so and that direct capital controls are a useful part of their policy toolkit in extreme circumstances.”<sup>87</sup> The Fund’s post-2008 crisis approach, reflected in a new (that is, new as of 2012) institutional view of its multilateral surveillance goals, reflects a concern about the potential that cross-border capital flows can transmit financial instability.<sup>88</sup> Kevin Gallagher notes that, more generally, the change in thinking about capital controls after the 2008 financial crisis, including shifting views within the economics profession, has allowed more policy space for emerging market economies to regulate cross-border financial flows.<sup>89</sup> Still, a look beyond narrow international finance law highlights that ideas and rules about cross-border capital liberalization have migrated outside the financial arena alone. Indeed, the earlier rule favored by the IMF seems to have been incorporated into other legal instruments, in particular international trade and investment instruments that escape the multilateral coordination undertaken by the IMF.<sup>90</sup>

In short, in the realm of capital controls over the last several decades, it would be highly misleading to look at the hard law in order to understand the functioning rules. And no globally applicable soft law standards emerged to supplement the formal rule, despite the existence of codes of conduct relevant to smaller groups of states. But it would also be inaccurate to suggest that this important corner of the global legal order constituted a financial policy free-for-all. For a time, the hard law institutional shell of the IMF simultaneously provided the space for and was contravened by the exercise of a powerful, if ultimately somewhat unstable,

87. Feibelman, *supra* note 40, at 450.

88. See generally INT’L MONETARY FUND, THE LIBERALIZATION AND MANAGEMENT OF CAPITAL FLOWS: AN INSTITUTIONAL VIEW (2012) (describing the increase of capital flows in recent years and how they are a key aspect of the global monetary system).

89. KEVIN P. GALLAGHER, RULING CAPITAL: EMERGING MARKETS AND THE REREGULATION OF CROSS-BORDER FINANCE 3 (2015).

90. Feibelman, *supra* note 40, 440–47. Gallagher too notes that:

[A]t the IMF and at the G20, EMDs have succeeded in creating more room to regulate cross-border finance but have been less successful in opening up space in the trade and investment regimes. . . . The result is a complicated patchwork of overlapping regimes that sends mixed signals to countries looking to regulate cross-border finance.

GALLAGHER, *supra* note 89, at 3. For more on the interaction of capital account liberalization with trade and investment policy, see *id.* at 169–95.

market principle. The collective beliefs about market functioning and appropriate state action held by key policymakers and market actors countered the policy flexibility intended by the original international lawmakers of Bretton Woods in 1945. But the surveillance and technical assistance functions of the IMF nonetheless meant that Fund staff, through practices of policy promotion or aggressive persuasion, were able to press states to align their behavior with this market principle. At least for a time, the market principle itself thus effectively acted as a powerful rule in the global legal order, in spite of an official law allowing much greater sovereign policy space.

### C. THE BACKGROUND LAW OF SOVEREIGN DEBT CONTINUITY

If market principles can generate content for law and even act as counter-law in the face of already existing hard or soft guidelines, what impact might they have in the absence of any clear global legal directive? The issue of sovereign debt continuity offers a look at how collective beliefs about market functioning can operate without a clear institutional or legal anchor. It further demonstrates how market principles may constitute law-like rules themselves, which constrain actor behavior and can undermine efforts to develop alternative doctrines, particularly when these market ideas are backed by a unified reputational sanctioning mechanism.

A core market principle in the sovereign debt arena is that sovereign states that fail to repay debt will undermine their access to capital markets, even if there are political or moral arguments that favor cancellation, including arguments related to major regime change.<sup>91</sup> This market principle of sovereign debt continuity sets the background rule according to which nation-state borrowers are evaluated and against which creditors and others, including credit rating agencies, form their reputational judgments. This rule is not promulgated or enforced through any conventional legal format, such as a treaty.<sup>92</sup> It is related to the general principle of *pacta sunt servanda*—the basic idea that agreements or contracts must be respected. But *pacta sunt servanda* in domestic legal orders also implicates a range of caveats related to theories of agency and unconscionability that have not, it seems, fully translated into the international debt arena.<sup>93</sup>

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91. See generally LIENAU, *supra* note 35 (describing the problematic theoretical basis for and the historical development of the market principle of sovereign debt continuity). This Part draws considerably from this book.

92. Of course enforcement of particular sovereign debt instruments does interact with and to some degree depend upon this larger assumption. This is especially the case given the difficulty of enforcing judgments against sovereign debtors using mechanisms other than reputational sanction.

93. For a consideration of how standard equitable understandings in contract law might translate to the arena of sovereign debt, see generally Adam Feibelman, *Equitable Subordination, Fraudulent Transfer*,

Indeed, the background rule of sovereign debt continuity gains significant power from its popular identity as a market given, with ostensibly definite effects that can be identified and measured but that ultimately cannot be changed. This is hardly to say that a consistent repayment rule has not been criticized or normatively challenged. Activists and legal scholars have argued that there should be exceptions to this rule, especially in certain transitional political situations such as post-apartheid South Africa or post-Hussein Iraq.<sup>94</sup> Largely driven by concerns about justice or fairness, they have proposed (or rather, resuscitated) an alternative standard—the doctrine of odious debt—that would allow debt to be cancelled if it either did not benefit the underlying population or was entered into without the population’s consent.<sup>95</sup> However, development of this doctrine has not moved very far, at least in part due to the sense that it violates the already-existing and perhaps unavoidable market standard mandating uniform debt repayment. Interestingly, the belief in the virtual inevitability of this repayment rule—and also to some degree in the necessity of this rule for ongoing cooperation in sovereign lending—seems to be shared across creditors, borrowers, and other major international actors.<sup>96</sup> Even those successor states that might wish for a different rule—and might be in a strong moral position to press for the alternative approach—tend to accede to the market narrative. As Robert Howse noted in a study for the United Nations Conference on Trade and Development:

[O]ne of the major policy concerns that has deterred some transitional regimes from repudiating ‘odious’ debt from the previous regime is that of reputation in the capital markets; a transitional regime may be concerned that creditors will not in the future provide access to funds, because they are unable to distinguish the exceptional political decision to repudiate debt due to its odiousness from the general creditworthiness of the regime.<sup>97</sup>

In effect, the market principle itself—the belief that nonpayment will result in capital market sanctions across all cases—seems to be doing a

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and *Sovereign Debt*, 70 *LAW & CONTEMP. PROBS.* 171 (2007); Anna Gelpern, *Odious, Not Debt*, 70 *LAW & CONTEMP. PROBS.* 81 (2007); Robert Howse, *The Concept of Odious Debt in Public International Law* (United Nations Conference on Trade and Dev., Discussion Paper No. 185, 2007).

94. For a discussion of the South African and Iraqi cases, see LIENAU, *supra* note 35, at 191–92, 210–15; see also Jai Damle, *The Odious Debt Doctrine After Iraq*, 70 *LAW & CONTEMP. PROBS.* 139, 139–41 (2007).

95. The early formulation was first offered by Alexander Sack in 1927. A.-N. SACK, *LES EFFETS DES TRANSFORMATIONS DES ÉTATS SUR LEURS DETTES PUBLIQUES ET AUTRES OBLIGATIONS FINANCIÈRES* TOME II 157 (1927).

96. For example, a 2003 *Financial Times* leader noted in light of the Saddam Hussein debt repudiation discussions: “The principle [being attacked] is sovereign continuity—the idea that governments should honor debts contracted by predecessors. Without this, there would be no lending to governments.” LIENAU, *supra* note 35, at 5 (alteration in original).

97. Howse, *supra* note 93, at 20.



significant portion of the work in structuring the rules and norms according to which this global arena functions.

Still, despite its seeming strength, the debt continuity rule should not be mistaken for an inevitable feature of the financial world. As I have detailed more fully in previous research, the market principle narrative supporting the repayment rule is both theoretically problematic and also insufficiently supported by the historical evidence.<sup>98</sup> To begin with, the framing and understanding of sovereign debt repayment and reputation as a market principle works in part by propagating the following three flawed assumptions. First, the dominant approach implies that although creditors may assess a specific borrower's political characteristics through the lens of sovereign risk, judgments about a borrower's repayment decisions are not shaped by politics *per se*. Rather, they are simply the best objective assessment of a given set of material facts, and are therefore unchallengeable on the basis of political or moral principle. The second flawed assumption is that the mechanism of sovereign reputation itself is assumed to be similarly free from subjective and historically variable political judgments and, therefore, similarly immune from challenge. And the third assumption is that all rational creditors are expected to respond in basically the same way to particular debt events, suggesting that efforts to understand or reshape their interests would be futile.<sup>99</sup>

But in fact none of these assumptions hold up to closer examination, which means that the strict debt repayment norm should be more politically and historically variable than it first appears—more like other manmade laws than like the regularities of physics. To begin with, any discussion of “sovereign” debt is rendered intelligible *only* by implicitly incorporating one of the most highly politicized and deeply contested terms in international law and international relations: sovereignty.<sup>100</sup> Depending on the theory of sovereignty implicitly or explicitly adopted, the practices of sovereign debt and reputation can be expected to diverge significantly.<sup>101</sup> A theory of sovereignty that considers the population to be merely subject to whichever government is in power should embrace a debt continuity norm without much difficulty. After all, democratic voice and popular benefit are irrelevant under this traditionalist or absolutist approach. Conversely, if a theory of sovereignty privileging popular

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98. See generally LIENAU, *supra* note 35 (explaining the historical and theoretical problems that arise when the market principle narrative is used to support the repayment rule).

99. *Id.* at 2–7 (describing the theoretical basis for and the historical development of the market principle of sovereign debt continuity).

100. See, e.g., JENS BARTELSON, *A GENEALOGY OF SOVEREIGNTY* (1995); ROBERT JACKSON, *SOVEREIGNTY: THE EVOLUTION OF AN IDEA* (2013); STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999) (offering different perspectives on the nature and meaning of sovereignty).

101. See LIENAU, *supra* note 35, at 34–52.

control or public benefit is accepted, then a debt contract signed by a nondemocratic government—particularly a contract that did not aim to (or actually) benefit the underlying population—should not be presumptively enforceable against successive regimes. Furthermore, creditor uniformity cannot simply be assumed, given the multiple competing pressures in debt markets and also the varying political viewpoints that creditors might reasonably find compelling. In fact, different creditors may interpret—and historically *have* interpreted—the same politicized debt repudiation in opposing ways.<sup>102</sup>

As with the capital controls example previously discussed, factors promoting or undermining ideological consensus along these lines should impact the strength of the market principle and therefore the amount of policy space actually allowed to state actors—all despite the absence of any recognizable global hard or soft law rule on the issue.<sup>103</sup> In particular, the degree of consensus supporting debt continuity should impact the strength of its reputational sanction at any given historical moment. It is hard to imagine a state being punished for paying back even highly questionable debt. However, the reputational response to *nonpayment* will likely vary with consensus on the market principle, and therefore with the material and ideational elements that support or undermine that consensus.<sup>104</sup> In periods of relatively uniform support for debt continuity, states will have less leeway and will be more broadly punished for refusing to repay even arguably illegitimate debt. Conversely, states may have more policy space when the uniformity is undermined.<sup>105</sup>

This encourages a closer look at the historical development and potential variability of the market principle itself. Unlike the capital controls example, in which the IMF plays a particularly dominant role, there is no apparent hard law shell to house the market principle of debt continuity. Also unlike the capital controls example, there is a less clear and circumscribed time period that invites closer consideration.<sup>106</sup> Still, it is possible to recognize the functioning of the debt continuity principle in the global arena, and even to identify periods in which more or less consensus existed.<sup>107</sup> Although the debt continuity rule plays an important function in the global legal order—effectively constituting an injunction against debt cancellations on the basis of principle—its shaky theoretical claim to inevitability is joined by a degree of historical

102. For the theoretical argument on creditworthiness, see *id.* at 26–32.

103. For a discussion on the relevance of consensus to the strength of a reputational compliance mechanism, see Simmons & Elkins, *supra* note 4, at 173.

104. For more on the specific interaction between reputation and ideas of sovereign legitimacy, see LIENAU, *supra* note 35, at 24–28, 34–52.

105. *Id.* at 29–32.

106. For the capital controls example, see the discussion *supra* in Part I.B.

107. For a more comprehensive summary of periodization, see LIENAU, *supra* note 35, at 13–15.

instability in its application. This historical contingency only strengthens the contention that the debt continuity rule is manmade—a social construction rather than an inevitability—though admittedly not in the deliberately rule-selecting method of law conventionally understood.

So where can we see the rule of debt continuity at work, and where do we see its weakening? This is somewhat complicated, as the effective functioning of this market principle results in a series of nonevents—state actors deciding *against* debt cancellation, particularly after a regime change, despite the possibility of a cancellation on the basis of principled claims about sovereign legitimacy.<sup>108</sup> Still, for preliminary insight into its impact, we can take a closer look at cases of major regime change. Given that these tend to be associated with arguments about the illegitimacy of the previous regime, we might reasonably expect these states to consider principled debt cancellation.<sup>109</sup>

Another difficult question is when to begin this historical analysis, particularly given that shifts in the market principle of debt continuity do not have as clear a starting point as in the capital controls example. Still, some guidance can be drawn from the arguments that a state might present in favor of debt cancellation, particularly given that any claims grounded in assertions about sovereign legitimacy would have to find an audience willing to at least consider such arguments. This points to beginning this analysis in the post-World War I era, when ideas of sovereign legitimacy related to self-determination and popular control first became universalized and might reasonably have been more broadly accepted.<sup>110</sup>

Two relatively well-known cases of debt repudiation in the post-World War I era involve the Soviet Union and Costa Rica. Though the cases differ in virtually every other respect, both of these countries repudiated the contracts of previous regimes—those of the tsarist regime and the government of the dictator Federico Tinoco,<sup>111</sup> respectively—on the basis of claims about legitimacy. Interestingly, at least in economics and political science, these cases—and particularly the Soviet case—are sometimes held up to suggest the futility of challenging timeless principles of capital markets.<sup>112</sup> But in fact a closer consideration of these events demonstrates quite the opposite, showing how creditors can

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108. Sovereign default without a claim to principle is, of course, much more common and may also be subject to reputational sanction. For a general consideration of the role of reputation in enforcing sovereign debt agreements, see TOMZ, *supra* note 34.

109. For more on case selection for thinking through debt continuity, see LIENAU, *supra* note 35, at 52–55.

110. For further information on the ideological shifts in the post-World War I era, see *id.* at 59–65.

111. See generally LIENAU, *supra* note 35, at chs. 3, 4 (discussing the political and economic context and the consequences of these two repudiations, respectively).

112. Michael Tomz, for example, cites a number of commentators from the period in support of this view. TOMZ, *supra* note 34, at 80.

reasonably make reputational judgments in favor of post-repudiation lending, at least under conditions of market competition and ideological flexibility. The Soviet case in particular has been misinterpreted in the literature, presented as an example of a strong and universal reputational sanction for principled repudiation.<sup>113</sup> However, attending to the historical bank correspondence rather than only to bond float data demonstrates that private interest *did* in fact exist in lending to the new Soviet regime, at least among new American banks eager to compete with established European financiers.<sup>114</sup> The Costa Rican case culminated in a well-known arbitration in which U.S. Chief Justice William Howard Taft distinguished between debt contracted for “personal” as opposed to “legitimate government” purposes, and found that only legitimate debt could survive a regime’s demise to bind the subsequent government.<sup>115</sup> Notwithstanding the repudiation or the decision in its favor, Costa Rica was not blocked from capital markets in subsequent years. All of this goes to demonstrate that, although the market principle of debt continuity may act as an effective rule today, this rule is hardly inevitable or unchangeable. Its strength, including through the reputational mechanism supporting the rule, depends on maintaining a degree of consensus and in particular a uniform response of disapproval.

What happened in the decades following these notable cases of repudiation? The absence of similar examples with a muted reputational response suggests a subsequent strengthening of the market principle of debt continuity after World War II. Despite regime changes and repudiations in the cases of China and Cuba, as well as significant dissatisfaction with expectations of debt repayment elsewhere, any effort to challenge debt continuity was met with marginalization in international credit markets.<sup>116</sup> But this narrowing of the ideological consensus in sovereign debt was hardly embedded in apolitical market certainties or ahistorical creditor preferences. Rather, the departure from the more open post-World War I moment resulted from changing political structures and sovereignty norms, as well as from shifts in creditor interactions. The post-World War II reconstruction of the financial system was led by public creditors such as the new World Bank, as opposed to the competitive private creditors of the post-World War I era, who had withdrawn from international lending after the wave of sovereign defaults during the Great Depression. And the World Bank promoted sovereign debt practices that comported with its own financial and operational needs,

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113. *Id.*

114. LIENAU, *supra* note 35, at 88–91.

115. *Judicial Decisions Involving Questions of International Law: Arbitration Between Great Britain and Costa Rica*, 18 AM. J. INT’L L. 147, 168 (1924) (providing opinion and award of William H. Taft, Sole Arbitrator). For a discussion of Taft’s decision, see LIENAU, *supra* note 35, at 109–16.

116. For information on Cuba and China in particular, see LIENAU, *supra* note 35, at 149–53.

including a strict insistence on debt repayment that helped to regularize and naturalize debt continuity as a dominant market principle going forward.<sup>117</sup>

When private creditors returned to sovereign lending in the early 1970s, they arrived through a framework of syndicated lending and multinational branching that undermined the space for more flexible approaches and further consolidated consensus around a narrow repayment rule.<sup>118</sup> Notably, sovereign states themselves, increasingly wary of external scrutiny of their internal political and economic choices, hardly forced an open discussion of political principles in the debt arena.<sup>119</sup> This background affected the subsequent loan restructurings of the late 1970s and 1980s. In particular, the systemic risk posed by the private banks' interconnected loans—and the banks' interaction with public actors such as the IMF and the U.S. Treasury—resulted in a joint approach to sovereign borrowers that limited the space for alternative approaches to debt.<sup>120</sup> Thus, despite being grounded in very particular historical moments, these shifts granted the rule of debt repayment an air of inevitability into the 1990s, and meant that even clearly revolutionary governments in Nicaragua, Iran, the Philippines, and South Africa ultimately acknowledged the debts of their predecessors.<sup>121</sup>

This history demonstrates the power and resilience of the market principle of debt continuity, but also suggests that it is not necessarily an inevitable feature of the global legal order. Its strength has depended on the existence of consensus among market participants and other international actors—a consensus that was in turn shaped over the last century by political actors, broader ideological shifts, and changing public and private creditor structures. The post-World War I cases, which underscore how lending can function even in the absence of this supposed market given, further suggest that the rule is hardly essential for a workable sovereign debt regime. Alternative approaches incorporating ideas of illegitimate debt and allowing for limited cancellation have emerged historically and could function more fully in the future. Indeed, the post-Cold War era has witnessed the international move toward a discourse of governance, democracy, and human rights, which has made its way into the language (if not fully the practice) of even major economic organizations and private creditor groups.<sup>122</sup> Although expectations of uniform repayment still dominate, new modes of creditor interaction and new sources of international capital have further enabled flexibility in certain cases. For

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117. For further information on the World Bank's role, see *id.* at 126–44.

118. See, e.g., *id.* at 155–60.

119. *Id.* at 163–65.

120. See, e.g., *id.* at 166–71.

121. *Id.* at 174–92.

122. For a discussion on this shifting language, see *id.* at 194–200.

example, recent debt discussions in Iraq, Ecuador, and even Europe have brought arguments about illegitimate debt more clearly to light.<sup>123</sup>

Thus, the sovereign debt continuity example highlights how a market principle, supported by a reputational sanction mechanism, may limit a state's policy space and undermine the development of alternative doctrines even in the absence of any official global directive. However, this example also demonstrates the mistake in any suggestion that this is an inevitable and ahistorical set of constraints rather than a product of the interactions and decisions of various historically situated actors. At a more general or theoretical level, it further shows how market principles may—in addition to working through the background of conventional hard and soft law or by countering officially existing law—independently constitute law-like rules themselves. These market givens can become a powerful part of the global legal order through multiple mechanisms with varying degrees of formality, all while remaining in the background and escaping the scrutiny accorded to “law” itself.

#### D. DEFINITIONAL COMPLEXITIES

Although the preceding examples help to demonstrate the potential impact of market principles, they also point to another key feature of this category of rules or constraints—namely, its variability. While I have defined market principles as collective beliefs about how markets work as an objective matter, this definition immediately raises several difficult questions: How can a market principle be simultaneously stable enough to generate an impact but also ultimately changeable? Is it always the case that there is a concrete market principle relevant to every issue area? This Article does not at all suggest that every idea held about markets is sufficiently strong or stable to be a market principle, or that there will always be a market principle on point. Certainly, there could be issue areas for which no law or rule of any sort holds, in which case an actor's policy space or range of potential behavior is much greater, whether for good or ill. Similarly, there may be times during which no market principle seems to apply, even if one existed in years prior. It is also possible that certain geographic regions or sub-communities are not subject to a market principle that otherwise appears to be global.<sup>124</sup> My contention is not that the legal order overflows with clearly delineated and broadly accepted market principles; they are not simply synonymous with individually held ideas of market functioning. However, market principles may have a powerful impact at certain moments, for particular issue areas, and perhaps in certain communities. The goal of this Article,

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123. For a discussion of these examples, see *id.* at 210–25.

124. One can imagine the relative bifurcation of the globe during the Cold War as leading to an only partial application of market principles, for example.

as detailed more fully in Part III.A, is to encourage lawyers to be attentive to the role and impact of market principles when they do emerge and to incorporate them into legal analysis and activity when relevant.

Of course, this raises the further question of how to know when market principles have in fact emerged. How collectively held must these beliefs about market functioning be to count? Who should hold or transmit them? And is there not always contestation and controversy in any supposedly collective belief about the market? One great virtue of law, traditionally understood, is its cognizability; it involves a relatively straightforward promulgation of guidelines by some definite body claiming authority.<sup>125</sup> Market principles may be relatively clear in their directive content and even broadly shared without being obviously promulgated or disseminated by a determinate institution or individual. This means that the contours of the collectivity holding the belief are necessarily flexible and historically contingent, roughly encompassing a community of understanding and action around a particular issue area.<sup>126</sup> This also means, as discussed further in Part III.C, that questions about rulemaking and rulemakers are inevitably complicated. The particular mechanisms by which rules are formulated, transmitted, and enforced will almost certainly vary across different market principles. That said, as demonstrated by the preceding examples, the international institutions and epistemic or expert communities discussed in other arenas of global governance will often play a part.<sup>127</sup>

In addition, it is absolutely the case that there will be controversy and contestation about particular market principles—the debt continuity and capital mobility rules had detractors, for example, even as they continued to shape action and reputational consequences. Indeed, this contestation is present for any collective belief about how things work as an ostensibly objective matter, be it in the social or natural sciences. As such, it is difficult to specify in advance the threshold beyond which a market principle ceases to exist and becomes merely a collective discussion or disagreement about various market ideas in a given issue area. As discussed more fully in Part III.D, the ideological consensus that reputationally supports a market principle can be fractured to the point

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<sup>125</sup> For a classic delineation of the features of a legal order, see the discussion of Lon Fuller in Part II.B.

<sup>126</sup> This draws roughly from an understanding of norms generally as expectations of appropriate behavior shared by a community of actors. For a broader consideration of how norms, discourse, and expectations interact and relate to concepts of power and interest, see LIENAU, *supra* note 35, at 15–17. This approach also draws from understandings of epistemic communities in political science and sociology. See, e.g., Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 35 (1992); EMANUEL ADLER, *COMMUNITARIAN INTERNATIONAL RELATIONS: THE EPISTEMIC FOUNDATIONS OF INTERNATIONAL RELATIONS* (Barry Buzan & Richard Little eds., 2005).

<sup>127</sup> See sources cited *supra* note 126 and accompanying text.

that it *stops* constraining actor behavior, thus reopening policy space that may have been closed. Indeed, part of the goal of this Article is to encourage precisely the kind of legal attention and controversy that might undermine those market principles that individuals find normatively lacking. Therefore, as with many rules—from capital mobility to the Fourteenth Amendment—it rests with those studying and applying the rule to assess its contours and strength, and even to decide whether it is determinate enough at a particular moment to warrant attention.

These questions on line-drawing could (and perhaps should) continue indefinitely. And a more definitive set of answers delineating precise boundaries would no doubt be far more satisfying. But such clarity would be disingenuous and premature from my perspective, as I intend this Article to be a first cut at these concepts and issues and an invitation to further study by other scholars. Ultimately, as with my understanding of the concept of law itself, the boundaries of the market principle category are not perfectly precise, and its content is somewhat flexible. Still, this framework is worth further consideration given the power that market principles can have in the global legal order when they are sufficiently identifiable and determinate.

## II. WHY “LAW”?

Even if one accepts the importance of market principles in shaping facets of international law and coordinated global practice, it may still be a stretch to refer to these market givens as *of* the legal order itself, as opposed to just an external constraint or element affecting that order. What is the threshold for calling something law—even hidden law—before we move into the realm of implausible overinclusivity? I begin this Part by noting that the category of law itself has hardly been stable and that, particularly in the international arena, many scholars and practitioners have struggled to define—and have ultimately chosen to expand—the scope of their attention and practice. Although market principles currently stand outside these already flexible global boundaries, this Article suggests that they too belong on this continuum of global law, especially given that their impact can be as important as more conventionally understood “law.” It further argues that this categorization is plausible because market principles tend to have many of the characteristics that we associate with the conceptual category of law, although of course they are not self-consciously *promulgated* as law.

I want to emphasize that the goal here is not to determine the nature of law as a general philosophical matter or to classify market principles as a type of law out of fidelity to an imagined essential concept



of law.<sup>128</sup> Although this Article refers to Lon Fuller's frequently-used definition of legal standards and to the work of other legal philosophers, this is not to elevate or enshrine these particular characterizations as definitive. Furthermore, this Article does not conceive of the legal order as a binary in which there is a clear dividing line between law and not-law. Friedrich Kratochwil's use of Wittgensteinian understandings of language in his characterization of law is apt here: Law as a concept can be understood as a family resemblance. Like a rope, it is "made up of many strings without one string, representing the core, going through the whole length."<sup>129</sup> Kratochwil further notes that law is "a language game in which different exemplars exhibit different features rather than one 'essential characteristic.'"<sup>130</sup> Drawing from this definition, my aim here is to bring market principles within the family of those politically constructed directives and rules that we generally understand to be part of global law.

It is important to reiterate that bringing these market givens into the ambit of law does not necessarily mean that they are *desirable* elements of the legal order or that they should be enforceable by courts. Certainly, many rules are conceived of as part of law even though their normative and source validity are heavily contested. Rather, as will become clearer in Part III, the principal goal of this Article is to argue that—particularly given the relatively flexible and inclusive understandings of global law already prevalent—market principles belong not at the margins of, but rather squarely within, the field of legal vision, criticism, and activity.

#### A. THE EXPANDING GLOBAL LEGAL ORDER

To begin with, how strictly delineated and how binary is the contemporary understanding of the global legal order? Recent decades have seen an expansion of the governance activities understood to fall within the scope of "international law" and therefore clearly within the purview of international lawyers and legal scholars. Traditionally, the sources of international law, as laid out in Article 38(1) of the Statute of the International Court of Justice ("the ICJ Statute"), include treaties, customary international law (evidenced by state practice accompanied by a sense of legal obligation, or *opinio juris*), and "general principles of law

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128. This would, in the words of Friedrich Kratochwil, "mistakenly assume that concepts 'work' by reference rather than by their link to other concepts and to practices that authorize, forbid, or require a certain conduct." FRIEDRICH KRATOCHWIL, *THE STATUS OF LAW IN WORLD SOCIETY: MEDITATIONS ON THE ROLE AND RULE OF LAW* 53 (2014). Acknowledging a conceptual debt to Richard Rorty, Kratochwil notes that such attempts "derive from a false notion of language as a simple mirror of the 'world out there.'" *Id.* at 53.

129. *Id.* at 53 (characterizing Ludwig Wittgenstein's rope example). For more on the idea of family resemblance as a way to think through the notion or concept of a "game," see Ludwig Wittgenstein, *PHILOSOPHICAL INVESTIGATIONS* (G. E. M. Anscombe trans., 1968), ¶¶ 66–67.

130. KRATOCHWIL, *supra* note 128, at 74.

recognized by civilized nations.”<sup>131</sup> The boundaries, content, and force of each of these sources of canonical international law are controversial in their own right. But, even when criticized, they are recognized as legal materials and questions, with a potentially significant impact mediated or framed through legal mechanisms and legal argument, and thus properly deserving the attention of lawyers.

That said, these traditional sources are hardly the only rule forms now anointed with the label “law.” Legal scholars, along with students of other disciplines, have directed considerable thought to governance forms that do not result from the explicit and high-level state activity traditionally associated with international law but that nonetheless generate powerful rules across important issue areas. As part of this research, the lawmaking activities of international organizations, effectively independent of their state members, have been extensively studied and criticized.<sup>132</sup> Scholars have also assessed the rulemaking that exists on a smaller scale than the major multilateral conventions, constituting forms of “minilateral” cooperation more “modest in size, formality, and even inclusiveness.”<sup>133</sup> The important role of “soft law” informal guidelines and codes of conduct, which are not necessarily enforceable in their own right, and which may not even mandate action, is well-acknowledged.<sup>134</sup> Attention has been paid to the role of government networks in the formulation of such guidelines and in providing the foundations for global governance.<sup>135</sup> The codes and conventions of entirely private actors and networks have been studied as part of the legal order, from the medieval *lex mercatoria* to the private conventions promulgated by today’s multinational corporations.<sup>136</sup> And

131. Statute of the International Court of Justice, art. 38(1)(a)–(c). The statute further clarifies that “subsidiary” means for determining or interpreting the content of traditional international law may also include the “teachings of the most highly qualified publicists of the various nations.” *Id.* art. 38(1)(d). Although technically these sources are listed as applicable to the International Court of Justice, in practice the statute is generally followed by other courts as well. *See, e.g.*, Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 482–83 (2003).

132. *See, e.g.*, JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS (2006). This connects to a broader tradition in political science investigating the role of international organizations in global governance. *See generally* MICHAEL BARNETT & MARTHA FINNEMORE, RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS (2004); KARNs & MINGST, *supra* note 28.

133. CHRIS BRUMMER, MINILATERALISM: HOW TRADE ALLIANCES, SOFT LAW AND FINANCIAL ENGINEERING ARE REDEFINING ECONOMIC STATECRAFT 2 (2014).

134. *See, e.g.*, all sources cited *supra* note 132; INFORMAL INTERNATIONAL LAWMAKING (Joost Pauwelyn et al. eds., 2012).

135. *See generally* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004) (providing a paradigmatic example).

136. *Lex mercatoria* can be defined as:

[A] body of oral, customary mercantile law which developed in medieval Europe and was administered quite uniformly across Europe by merchant judges, adjudicating disputes between merchants. In the contemporary world, some scholars believe that there exists a modern *lex mercatoria*, defined to include certain transnational trade usages and commercial customs recognized internationally by the mercantile community.

scholars and proponents of global administrative law, which aims to promote the accountability of global administrative bodies, openly admit that the “law” moniker in their context “diverges from, and can be sharply in tension with the classical models of consent-based interstate international law and most models of national law.”<sup>137</sup> In short, rules and norms formulated at multiple levels of decisionmaking, devised by many types of actors, and involving varying degrees of formality and enforceability have been incorporated into our understanding of global law and the legal order.

To be sure, not everyone is pleased with these developments. As noted in this Article’s conclusion, scholars have highlighted the risks involved in overexpanding the category of international law. Certainly the normative desirability of such “law,” along with its enforceability through particular courts or other adjudicatory and enforcement institutions, remain important questions. But it is clear that both the real-world practice of rule generation and the scholarly study of arguably legal forms have expanded. Setting aside questions of desirability or enforcement for the moment, seriously addressing this new, possibly lawmaking, range of activity has improved our understanding of the global arena.

#### B. NONDELIBERATE RULES IN THE INTERNATIONAL ARENA

How do market principles fit in here and why can they plausibly be understood as a distinct but related element of this expanded global legal order? Or, in other words, why is it the case that our expanded understanding of global law and lawmaking has not gone far enough? While the terms “belief,” “rule,” and “law” have been used fairly loosely in this Article, they deserve greater specification. I have already clarified that the collective beliefs about markets that interest me here are causal beliefs—beliefs about how markets work as an objective matter. In my view, such a shared belief can form the core of a directive or rule, with a “rule” understood simply as a standard that guides conduct. This conversion or translation happens quietly and naturally, rather than through explicit rule formation. As noted previously, the collectively held belief that sovereign states that fail to repay sovereign debt will harm their reputation, even despite political or moral arguments that

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*Lex Mercatoria Law and Legal Definition*, USLEGAL.COM, <https://definitions.uslegal.com/lex-mercatoria/> (last visited Mar. 11, 2017). The nature and scope of *lex mercatoria* and its relationship to earlier historical forms that might have existed remains a subject of debate. See generally Nikitas E. Hatzimihail, *The Many Lives—and Faces—of Lex Mercatoria: History as Genealogy in International Business Law*, 71 LAW & CONTEMP. PROBS. 169 (2008) (considering the uses of history in understandings of *lex mercatoria*).

137. Benedict Kingsbury, *The Concept of ‘Law’ in Global Administrative Law*, 20 EUR. J. INT’L L. 23, 26 (2009); see Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT’L L. 1, 10 (2006).

favor cancellation, is a market principle that has proven powerful in contemporary international finance. This belief generates a concomitant rule or standard—“Repay sovereign debt”—that effectively guides the action of states and serves as a basis for judgment and evaluation. It even includes a built-in sanction: “Repay sovereign debt, or suffer reputational harm.”

The point here is not that market principles directly generate (or are) technical or hard “law” themselves. This certainly is not the case, particularly if one comes anywhere close to accepting the definition found in the ICJ Statute—though, as just highlighted, global law seems to have already escaped these traditionalist bounds. These market principles are not soft law either, in the sense of informal codes or guidelines established by a subset of state, non-state, or sub-state actors. Still, the market principles I am interested in do something akin to legal work, acting in many ways like law, though without the deliberate formulation. While there is considerable controversy surrounding the nature of law, legal rules, and legal norms, among the most widely employed characterizations is Lon Fuller’s understanding of the rule of law as involving eight core principles. In Fuller’s view, legal standards should be: (1) general (in that they are generally applicable rules as opposed to one-time directives); (2) promulgated (publicly known); (3) clear; (4) prospective; (5) consistent (that is, not in conflict with other legal standards); (6) satisfiable; (7) stable; and (8) applied.<sup>138</sup> This basic understanding is echoed with various permutations across multiple schools of jurisprudence, though it is admittedly an ideal. Indeed, any legal standard will almost certainly violate one or more of these elements, for example, by being interpretively ambiguous, not in complete concert with other legal rules, subject to change, and less than perfectly followed or enforced. Any law can be challenged to a degree without losing its basic legal character, though of course there may be line-drawing questions on when a rule is violated so frequently as to no longer exist.

Accepting Fuller’s basic characterization for the purposes of this Article, however, at least some market principles share many of these characteristics and function in a law-like manner—coordinating and constituting social interaction and guiding actor conduct in ways that satisfy many and perhaps almost all of the characteristics of the rule of law. To return to sovereign debt continuity, the rule “Repay sovereign debt” is recognized as general, well-known, clear, prospective, satisfiable, seemingly stable over time, and applied—at least in the sense that a reputational cost is expected to result from its violation. This rule is arguably consistent with other legal standards, at least with a simplified

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138. See, e.g., LON L. FULLER, *THE MORALITY OF LAW* 33–39 (rev. ed. 1969).

version of the basic rules of contract understood to dominate the global economy. There is no public promulgation as a law, which this Article fully acknowledges—these principles are “law in hiding,” after all.

Still, even if, as a narrow definitional matter, there are grounds for suggesting that market principles may have law-like characteristics, this understanding is perhaps overexpansive, lacking any real limiting factor. If this is the analytical mechanism for translating a causal belief (via its embedded conduct-guiding standard) into a rule in a legal order, then virtually *any* causal belief or any understanding about how the world works can be a law. This brings to mind the saying: “Gravity. It’s Not Just a Good Idea. It’s the Law!”<sup>139</sup> This statement is absurd (and amusing) in part because of the implication that gravity is an idea that can be subjectively accepted or rejected—rather than a mere fact or unchangeable force—and also because of the suggestion that our compliance with the rule of gravity would be enhanced if this rule were to be understood or enacted as law.

Even beyond “rules” or “laws” that command action over which we have no control—“comply with gravity” being the paradigmatic example—not all directives aimed at real actionable choices should necessarily be recognized as rules, much less as laws. Andrei Marmor points out that rules should be distinguished from generally recognized reasons or strategies underpinning a particular action. He offers the game of chess as an example: “[O]ne can say, ‘Don’t ever move the king when . . .’; and this sounds very much like a rule. But the formulation is potentially misleading. . . . When you point out a sound strategy . . . [y]ou just sum up the reasons that apply independently, in a rule-like formulation.”<sup>140</sup> In a similar vein, Kratochwil highlights that a given category of rules “might simply embody experiential knowledge concerning the causal nexus among natural phenomena and the likelihood of attaining one’s goals in given circumstances. The obvious examples for this category are ‘instruction-type’ rules such as ‘do not plant tomatoes before 15 April.’”<sup>141</sup> In short, these “rules” are actually only implicit summaries of facts and the ramifications of contrary action in the face of such facts: Assuming ABC goal, do not take EFG action or face XYZ consequences.

Given these distinctions, why are “repay sovereign debt” and “don’t impose capital controls” not more like one of these aforementioned examples—not so inevitable as gravity, in that the possibility of contrary action does exist, but nonetheless still just reformulations of knowledge

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139. There are many variations on this theme—for example, “Obey Gravity. It’s the Law!”—but the original phrase is claimed by Gerry Mooney in 1977. *The History of the Gravity Poster*, GERRY MOONEY STUDIO, [http://www.thegravityposter.com/historyof\\_01.html](http://www.thegravityposter.com/historyof_01.html) (last visited Mar. 11, 2017).

140. MARMOR, *supra* note 11, at 14–15.

141. FRIEDRICH V. KRATOCHWIL, RULES, NORMS, AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS 72–73 (1989).

about near-natural phenomena? Or, put differently, why are market principles plausibly understood as “rules” that might credibly be part of an emerging (but ultimately changeable) global legal order? As Scott Shapiro notes of the gravity example, “[t]he joke works not only because it is crazy to admonish people to obey the laws of physics, but equally because it isn’t crazy to insist that they heed the laws of political institutions.”<sup>142</sup> This political, constructed element is crucial, and if we relax our definition of political institutions to encompass the motley array of rule- and norm-generating actors in the global arena, it remains highly applicable.

Indeed, central to this Article’s argument is the contention that market givens are, for the most part, less like rules of physics (or chess or tomato planting) and more like the rules constructed by political institutions—albeit without the process, intent, or decree-like language usually associated with traditional legal rules. This is likely to be the case even when a market principle is understood to be objective and inevitable at any given moment. Of course, market principles can certainly be understood to exist on a continuum, varying across the spectrum of inevitability or permanence—take as a more stable example the “law” of supply and demand, which observes that prices rise with increased demand, assuming supply is held constant. But my contention is that the rebuttable presumption ought to favor understanding these market principles as socially and politically formed over time, and as giving rise to ultimately manmade (if not self-awarely *chosen*) rules in the global arena. Such constructedness may seem fairly uncontroversial when we take a closer look at any particular topic, as suggested by the capital controls and debt continuity examples. Yet the ways that these constructed beliefs fit into the map of other international rule forms—the ways in which they can direct, block, interpret, or otherwise act in a law-like manner—remain overlooked. In other words, when viewed from a more traditional legal lens, these market givens still fade into the background.

In an important essay in the field of socio-economics, Michel Callon argues that it is “wrong to talk of laws or, worse still, of the law of the market. There exist only temporary, changing laws associated with specific markets.”<sup>143</sup> This insight is in many ways accurate but, as in so many fields, it uses law largely as an under-specified metaphor. Part of my argument is that we need to take this use of the term “law” much more seriously—that lawyers in particular should ask about the ways in which market principles actually function as a frequently silent element of the legal order and therefore should be uncovered and studied as such.

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142. SCOTT J. SHAPIRO, *LEGALITY 201* (2011).

143. *LAWS OF THE MARKETS* 47 (Michel Callon ed., 1998).

If we focus on this broader picture of law, then the continuities between market principles and other international rule forms become more apparent. If a market principle is indeed more like a rule of political institutions—general, well-known, clear, prospective, satisfiable, applied, and stable for a time, but ultimately socio-politically constructed and historically contingent—in other words, a law of sorts—then contemplating how it works in the global legal order is sensical and perhaps even called for. Indeed, to the extent that the principle, along with its associated practices, is *not* acknowledged to be part of the legal order, it retains an element of legal character while escaping the scrutiny and challenge usually accorded to legal rules, acting effectively as a “law in hiding.”

### III. THE RAMIFICATIONS OF EXPANDING “LAW”

If it is plausible to think of market principles as within the boundaries of the international legal order, what are the consequences of doing so? As acknowledged in the Introduction, my motivation derives in part from an interest in the ramifications of this analytical recasting. Indeed, the expansion of law in the international arena to include less traditional legal categories, just noted in Part II.A, seems to have resulted in part from the strategic or political considerations of international scholars and practitioners.<sup>144</sup> Speaking of the translation or reframing of the normative concept of transparency into a principle relevant to international law, Andrea Bianchi notes that:

The “translation” is compelled by the well-known hostility of the lawyerly world towards what positivists would call “extra-legal considerations.” Unless something is expressed in a form that is couched in legal terms, it has a slim chance of being accepted within the discipline. Hence the need to qualify as “principles” those concepts that would otherwise have no standing in the world of legal imagery and representation.<sup>145</sup>

So what does it really mean to have standing in the world of legal representation—as a normative principle or as a rule to be handled in a legal manner by lawyers and legal scholars? Or, put differently, what are the more specific ramifications of analyzing a class of market directives as “law” and suggesting that these market principles be understood as central to the global legal order? Even if this discursive move is plausible, is it *desirable*?

This Part argues that understanding how market givens can act as a type of law would open them up to an important range of criticism and

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144. As Benedict Kingsbury points out, “concepts of law may have *political* significance. . . . The choice among such approaches is a political choice with political implications.” Kingsbury, *supra* note 137, at 26; see Benedict Kingsbury, *Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim’s Positive International Law*, 13 EUR. J. INT’L L. 401 (2002).

145. Andrea Bianchi, *On Power and Illusion: The Concept of Transparency in International Law*, in TRANSPARENCY IN INTERNATIONAL LAW 6 (Andrea Bianchi & Anne Peters eds., 2013).

analysis that they might otherwise avoid. This could work in part by encouraging lawyers to adopt a more complete understanding of how market principles may be among the actual (if not always obvious) rules facing themselves and their clients, and so to direct toward them the scrutiny and the activism generally accorded to law. Including market principles within legal analysis might also contribute to the empirical study of such principles, given that lawyers tend to have a distinct approach to cases and case studies as compared to social scientists. In addition, this shift could place pressure on normatively problematic market principles by encouraging their assessment against value frameworks associated with law—including frameworks of legitimate rulemaking, accountability, and the appropriate hierarchy of conflicting legal norms. This type of legal scrutiny might undermine the power of market principles by fracturing the ideological consensus that supports their reputational sanctioning mechanisms. Finally, this Part turns to the possible risk involved in labeling market principles as law, in particular the risk of granting them a degree of legitimacy that they do not necessarily deserve. Ultimately, because of the very different kind of norm entrepreneurship likely to be associated with support for market principles, I contend that this risk does not outweigh the likely benefits of thinking about market principles as part of the legal order.

#### A. BROADENING THE LAWYER'S FIELD OF VISION

Thus far, I have spoken fairly generally about the need to direct toward market principles the same scrutiny and analysis accorded to law as it is more conventionally understood. But what might this kind of application or scrutiny look like? To begin with the obvious, lawyers tend to study, practice, and criticize law. And the identification of something as law triggers several important questions: How does this fit into the constellation of other laws or rules in this area? Who is the lawmaker for this rule? Is the lawmaker properly authorized and accountable? And, if we are dissatisfied with the rule in question, how might it be changed? H.L.A. Hart emphasized the key connection in any legal order between primary rules, which can direct action and guide conduct—for example, “stop at a red light”—and secondary rules, which include the procedures for making, modifying, or enforcing those rules.<sup>146</sup> This analysis does not

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146. See generally H.L.A. HART, *THE CONCEPT OF LAW* 91–99 (3d ed. 2012). Of course Hart himself seems not to have characterized “law” as existing in the absence of “a union of primary rules of obligation with such secondary rules,” which are not immediately apparent in market principles. *Id.* at 94. Still, part of the argument is to suggest that market principles *can* map onto many of these more generally accepted modes of legal analyses—and that such mapping would illuminate our understanding of how they work—even if the analytical frameworks may need to be modified somewhat. See Mehrdad Payandeh, *The Concept of International Law in the Jurisprudence of H.L.A. Hart*, 21 *EUR. J. INT'L L.* 967 (2010) (providing an analysis that applies Hart’s jurisprudence to international law as it is more generally understood today).



smoothly translate to market principles, which are not chosen as law by a clearly identifiable actor. The primary rules can be difficult to discern, and identifying or thinking through secondary rules—including the procedures for changing these market principles—might be even more difficult.

Still, a good lawyer should comprehend the full constellation of rules relevant to a given issue area. If market principles are indeed acting as a type of under-identified law in the global arena, then this kind of analysis is necessary for a more complete understanding of the actual rules shaping actor behavior and distributional outcomes. Identifying primary rules for market principles may require a degree of uncovering, as previously demonstrated by the examples in Part I. But this project of explicit identification is more likely to happen if lawyers and legal scholars start to conceive of market principles as part of the field of law itself. Along these lines, an initial mapping or identification of the relevant rules for an issue area might start by asking: What are the formal rules, including those hard law rules understood according to traditional doctrines or sources? In addition, what are the informal or soft law rules, whether they are generated by public or private authority? *And also*, what are the relevant market principles—collective beliefs about how markets work, as an ostensibly objective matter—that themselves generate or imply directives for actors? It seems that this may already happen informally in many arenas. For example, returning to a consideration of the rules governing capital mobility, we might first look at the IMF Articles of Agreement, which clearly allow governments to limit the convertibility of capital accounts, as I discuss in Part I.B. But any advisor that stopped here would rightly be accused of a formalistic misunderstanding of the actually existing rules on the ground. The *actual* rule on capital mobility might include, at a given moment, a market principle that effectively blocks or sanctions capital controls, notwithstanding the countervailing hard law technically on the books.

In response to any claims about the inevitability or special strength of this market principle, a savvy lawyer might have her doubts. She may well share the fairly obvious, commonsense background knowledge that one period's objective market principle (and one era's objective knowledge of any sort) is likely to be historically contingent, socially constructed, and eventually overturned. But, so long as we accept that market principles remain primarily the provenance of other disciplines—economics, economic sociology, and perhaps political science—that background knowledge does not translate out of the recesses of the lawyerly mind into the foreground, where it might have a more substantial impact on one's work in the legal world.

And what kind of impact might that be? A wise legal advisor, recognizing and interpreting the full array of primary rules in a particular

issue area, will probably recommend technically complying with the rules, or at least will ensure a full understanding of the consequences of a violation, regardless of whether those rules take the form of hard law, soft law, or market principles. But a sophisticated and long-term advocate for a particular client or for a particular viewpoint probably should not stop there. An additional step might be to take the perspective of an aspiring law-changer as well, which is of course a kind of norm entrepreneur (or, to use a less flattering term, a lobbyist—indeed, the overlap between lobbyists and lawyers can hardly be an accident). The analytical consequence is then to ask: If a particular rule, including a particular market principle, does not fall in line with my preferred position, how might it be changed? Who are the relevant lawmakers here, both the obvious ones and those working behind the scenes? What are the underlying economic and political structures that prevent a modification of the rule, and how might those be dealt with? These inquiries, a type of directed investigation into certain secondary rules, should be relevant regardless of the kind of law or rule under investigation.

Of course, identifying the lawmakers and the underlying constraining structures for a given law or rule is never easy, and it certainly would not be any easier for market principles understood as law. Furthermore, this goal points to questions of power, politics, and the development of organizational expertise and processes—questions central to disciplines other than law, in particular that of political science. But law and lawyers have always used these insights for their own purposes, turning to the social sciences in furtherance of lawyerly goals and folding those insights into legal projects, including the project of identifying and targeting levers for change.

#### B. ANOTHER EMPIRICAL LOOK AT MARKET PRINCIPLES

Still, is the legal field only drawing from these other disciplines or can it also offer something to empirical study? In my view, the project of identifying the underlying social construction and historical contingency of market principles, which is of interest to certain variants of social science, could use the eyes of a lawyerly advocate as well. This is particularly the case because, during certain periods in the social science disciplines, the greatest rewards have gone to those focused on developing broadly applicable explanatory theories. This trend has tended to include an emphasis on parsimonious explanation—those explanations capable of explaining a large amount of data with a relatively simple theory and fewer assumptions.<sup>147</sup> Although this approach to theory development has

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<sup>147</sup> See Jack S. Levy, *Explaining Events and Developing Theories: History, Political Science, and the Analysis of International Relations*, in BRIDGES AND BOUNDARIES: HISTORIANS, POLITICAL SCIENTISTS, AND THE STUDY OF INTERNATIONAL RELATIONS 39–84 (Colin Elman & Miriam Fendius Elman eds., 2001) (discussing

produced incredibly important work, it can also encourage or prefer methodologies and findings that emphasize regularities instead of anomalies. And market principles, of course, can be understood as a type of parsimonious explanation of how markets regularly work, with embedded directives for actor behavior. These market givens can thus derive validation from particular social science frameworks, and any tendency within social science to reward findings of market principles may inadvertently bolster them as seemingly inevitable. In privileging research geared toward regularities, such an approach in the social sciences might overlook the information that could be mined from a closer consideration of anomalous and exceptional cases—information about how a regularity or rule was made or reinforced in the first place, through the work of particular actors or the impact of specific ideational and material structures. These studies may thus neglect information about potential levers for eventually changing that rule.

By contrast, legal work tends to be attuned not only to understanding the map of legal rules for an issue, but also to actively finding and investigating the cases that seem to be an exception to the rule, or that suggest the possibility of an alternative, inchoate rule that might better serve a preferred position. An anomalous case is valuable precisely because it is the exception and, as such, provides insight into the set of principles and perhaps the constellation of interests that support a surprising outcome in a particular case. At least for this mode of legal analysis and advocacy, the goal is not only to recognize and apply the laws but also to understand—and perhaps to challenge—the conceptual and material apparatus supporting one outcome rather than another. Especially given research trends in the social sciences, then, greater attention by lawyers to how market principles act as law could thus enrich not only the lawyer's own understanding of the global legal order but also provide empirical insights relevant to international economic relations more generally. A full understanding of market principles is important enough to deserve close analysis through multiple disciplinary lenses and could benefit significantly from an advocacy mindset.

#### C. QUESTIONS OF LAWMAKING, ACCOUNTABILITY, AND VALUE CONGRUENCE

Furthermore, attention by lawyers to market principles can also raise important normative questions about accountability and value congruence that have been relegated to the sidelines of other disciplines.<sup>148</sup> The

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how these methodological issues concerning historical developments are approached in history and political science); *id.* at 54–58 (discussing the methodological issues in particularly thorough detail).

148. This is not to say that law is “inherently moral,” and indeed any general theoretical discussion of normativity in the legal sphere is fraught. *NEW ESSAYS ON THE NORMATIVITY OF LAW* (Stefano Bertea &

identification of a phenomenon or rule as legal tends to trigger important scrutiny not only about who the lawmaker is or how the law has developed, but also about whether the law (and perhaps the lawmaker) is actually appropriate or fully deserving of respect and adherence. Rule forms including soft or informal law have recently been scrutinized along these lines, following upon the expanded scope of international law discussed in Part II.A. For example, a volume focused on informal international law has sought to “draw attention to a phenomenon that is omnipresent in global governance, and yet seems largely neglected by international lawyers.”<sup>149</sup> The project was motivated by the Hague Institute for the Internationalisation of Law’s request for a study on the question of “[h]ow forms of informal international public policy-making can be made more democratic and accountable.”<sup>150</sup> The standards for judgment in this type of legal scrutiny vary depending on the analyst, but recent analyses have drawn from the approaches of global administrative law and international public authority, for example.<sup>151</sup>

Of course, market principles do not benefit from having more or less identifiable rulemakers who deliberately select guidelines, which would be helpful in asking questions about accountability and legitimacy. Still, it should be possible to think through who actually develops, formulates, and transmits a given market principle, and to think through where this process could be most subject to pressure. Such a project is distinct from that of this Article, but some preliminary questions and qualifications are worth raising. One temptation might be to challenge (or dismiss) the social science disciplines whose models and findings can come to be understood as market principles. But this would hardly be warranted or useful, particularly as a central virtue of these fields is their explicit interest in challenging and falsifying the causal beliefs and explanations proposed by others. More importantly, as Ngaire Woods points out in her study of the IMF and World Bank, there are problems with any suggestion that “a new and better Washington consensus applied by the institutions could rectify their alleged wrongdoing . . . . What they do is not just a product of how good their economics is or isn’t.”<sup>152</sup> And although this points to politics and power in thinking through the development of market principles, it is important not to oversimplify on

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George Pavlakos eds., 2011) (providing an example of a relatively recent volume that covers several strands of legal philosophy on the general topic).

149. INFORMAL INTERNATIONAL LAWMAKING, *supra* note 134, at 1.

150. *Id.* at 2. Also see Chris Brummer’s discussion of similar issues in international financial law as “soft law.” BRUMMER, *supra* note 133, at 327, 337–42.

151. See, e.g., Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 (2005); Armin von Bogdandy et al., *From Public International to International Public Law: Translating World Public Opinion into International Public Authority* (Working Paper, Sept. 18, 2015), <https://ssrn.com/abstract=2662391>.

152. NGAIRE WOODS, *THE GLOBALIZERS: THE IMF, THE WORLD BANK, AND THEIR BORROWERS* 2 (2006).

this front either—though it is never wrong to say “power matters,” it is also rarely especially insightful.<sup>153</sup>

Instead, for any particular market principle, more fine-grained questions about bureaucracies, political institutions, market structures, ideational frameworks, expert and epistemic communities, and individual actors may all be relevant to different degrees.<sup>154</sup> The constellation of pertinent features will likely be unique to any given rule, though there could also be common themes and actors—the international financial institutions, credit rating agencies, and other formal and informal governance bodies, for example. Indeed, this dynamic of specificity and commonality should already be familiar from case studies of hard and soft law in a number of international economic areas.<sup>155</sup> Furthermore, many of these institutions are already under study by legal scholars, including many of those scholars discussed in Part IV of this Article. The goal here is to enlarge that realm of study to include an investigation not only of pressure points and possible accountability mechanisms for explicitly selected guidelines, but also of how to translate these questions to the processes by which market principles are adopted and emerge as directives for actor behavior.

In addition to considerations of lawmaking and accountability, scrutiny by lawyers and legal scholars would likely involve analytical frameworks that raise normatively inflected questions about rule conflict and value congruence. For example, international law scholarship has focused significantly on questions of norm hierarchy and on the difficulty of reconciling rules that emerge out of disparate or fragmented legal regimes and institutions.<sup>156</sup> This focus on hierarchy and on the question of

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153. For a discussion of the role and meaning of power and interest in norm construction, with a focus on the sovereign debt context, see LIENAU, *supra* note 35, at 15–17.

154. This Article’s goal is not to lay out a comprehensive view or general theory of where market principles come from or how they change, which would be an impossible task (not to mention antithetical to the general spirit of my argument). As should be clear from the capital controls and debt continuity examples, the mechanisms by which particular market principles are initially constructed or transform can vary significantly. Certain market principles may develop, solidify, or change fairly slowly, involving generational shifts of ideas or relatively gradual changes in underlying market structure. Sovereign debt continuity, perhaps, provides an example along these lines. Others may alter more quickly, reflecting a change in the expert opinions or bureaucratic structures central to idea generation in a given area, as seems to have been the case with capital controls in the late 1980s through the early 2000s. Just as with the development of any other type of law, then, both political agency and broader structural issues are very likely to be part of the picture in any instance of the development and change of market principles.

155. For example, see the cases considered in *INFORMAL INTERNATIONAL LAWMAKING*, *supra* note 134.

156. Other legal scholarship that could be relevant in this context discusses the phenomenon of fragmentation—the development of multiple legal issues, institutions, and norms, which may overlap but which operate independently and potentially according to separate logics. There is significant disagreement about how to characterize fragmentation and also about the degree to which this is problematic. But it does seem that the analytical framework of fragmentation has helped to shed light on an array of specialized or individualized legal regimes that otherwise might receive little consideration. Margaret Young provides an excellent annotated bibliography sketching the contours of scholarly debate in *Fragmentation*, in *OXFORD*

which rule takes precedence in the event of a conflict is very much central to the practice of law. As Martti Koskenniemi highlights, “[l]egal reason is a hierarchical form of reason, establishing relationships of inferiority and superiority” between rules and between sources of law or levels of authority.<sup>157</sup> Of course, there is disagreement about whether this characterization is appropriate at the international level, and certainly about what a hierarchy of legal sources or principles might actually look like.<sup>158</sup> While many scholars and some international bodies have embraced the idea of superior or peremptory norms (*jus cogens*), particularly in regard to human rights obligations, neither state actions nor the decisions of adjudicative bodies have offered an especially strong endorsement.<sup>159</sup> But, as Dinah Shelton points out in her centennial essay on norm hierarchy for the *American Journal of International Law*, “[p]erhaps the most significant positive aspect of this trend toward normative hierarchy is its reaffirmation of the link between law and ethics, in which law is one means to achieve the fundamental values of an international society.”<sup>160</sup> It is certainly the case that this analytical framework, and in particular the attempt to conceptually organize various autonomous international legal regimes into possible norm hierarchies, has significantly impacted what legal scholars study and how practicing lawyers make normative claims.<sup>161</sup>

If we conceive of market principles as a type of global law requiring analysis by lawyers, how might this conception fit into the norm hierarchy analytical framework? Such an approach would likely ask whether the rules embedded in market principles cohere or conflict with other standards in the global legal system. For example, if the rule embedded in a particular market principle—for example, the rule of sovereign debt continuity—conflicts with emerging international rules, such as peremptory norms of human rights, is this a problem? In regard to the sovereign debt continuity situation, we have reached a point where we can now imagine prosecuting, or at least condemning, the leaders of a fallen regime for crimes against a state’s population while simultaneously expecting that same population to acknowledge and repay the fallen

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157. Martti Koskenniemi, *Hierarchy in International Law: A Sketch*, 8 EUR. J. INT’L L. 566, 566 (1997); see Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT’L L. 291, 291 (2006).

158. See, e.g., PIERRE-MARIE DUPUY, *DROIT INTERNATIONAL PUBLIC* 14–16 (6th ed. 2008).

159. See, e.g., Shelton, *supra* note 157, at 292, 294, 297–317.

160. *Id.* at 323. Dupuy notes, of course, the continuing difficulty with how to actually identify fundamental values. *Id.*

161. For example, a recent volume considers the hierarchy question in the context of human rights obligations across a range of legal regimes. HIERARCHY IN INTERNATIONAL LAW: THE PLACE OF HUMAN RIGHTS (Erika de Wet & Jure Vidmar eds., 2012).

regime's debts.<sup>162</sup> The basis for condemning the fallen leader might be a peremptory norm grounded in respect for human rights. But this respect for human rights does not currently translate into the assessment of sovereign debt contracts, even if those obligations were entered into in order to purchase the military hardware used in the oppression or to sustain the regime engaged in the crimes.<sup>163</sup>

This is of course an extreme hypothetical, and there would remain the technical difficulty of actually pinpointing such funds and also identifying the breadth of any potentially relevant *jus cogens* norm. But currently this incongruence tends not to come up at all, despite the existence of general calls to attend to human rights as a fundamental legal principle in all areas, including the international economic arena.<sup>164</sup> Still, this inattention is entirely reasonable so long as we conceive of debt continuity as simply an objective economic constraint. With the assumption of an objective constraint, the problematic outcome may be unfortunate and even immoral, but is largely inevitable due to "market reality"—and thus less likely to be part of core debates in international law. But if debt continuity is a contingent legal rule and understood to be part of global law, then this disconnect with a potential *jus cogens* norm is a problem of inconsistency that deserves the attention of practicing lawyers and legal scholars.

#### D. FRACTURING REPUTATIONAL CONSENSUS

This is not at all to say that increased scrutiny and questions about lawmaking, accountability, or normative congruence will immediately change market principles that might be considered problematic. Nor is it to suggest that active supporters or beneficiaries of a market principle in a particular situation will have a change of heart and adopt alternative viewpoints on this basis. Furthermore, there is not likely to be any adjudication in which market principles clearly win out over (or lose to) other rules. However, as detailed in the capital controls and debt continuity examples previously discussed, market principles are effectively enforced or lose power through the mechanism of reputation and the subsequent narrowing or opening of policy space for state actors. And if market principles work through reputation rather than through traditional sanctions, this provides an opportunity for scrutiny and discussion to have some impact.

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162. See LIENAU, *supra* note 35, at 227.

163. Of course the debt may nonetheless be cancelled under the circumstances, at least if it is held by public creditors. But any such cancellation would be characterized as charity on the part of creditors, and not as an act necessitated or mandated by overarching human rights norms and by a related understanding of inherent limits on state borrowing.

164. See, e.g., Shelton, *supra* note 157, at 294 (noting relevant quotations and citing relevant sources).

A useful illustration can be provided by returning to the example of capital mobility. The imposition of controls in one period ( $t_1$ —perhaps 1945 through the mid-1980s) may have been considered unfortunate from the perspective of some international investors but would still have been accepted as a generally prudent and careful economic policy, resulting in only a relatively mild reputational sanction, if any. But not long after (in  $t_2$ —perhaps late 1980s through the early 2000s), the imposition of capital controls was read as a heterodox challenge to market norms due to a different belief about how markets work, and thus interpreted as an act deserving of greater reputational censure. In short, it seems that the specific action of imposing controls—which remained identical—did not really trigger the sanction. Nor was there a change in the official hard law, which remained the same, as discussed in Part I.B. Rather, the sanction was triggered by the fact that, by the  $t_2$  time period, the meaning various actors ascribed to a state’s decision to impose controls had changed. At this later moment, such behavior was read as a *rule* violation rather than a mere policy preference, due to the shifted market principle.

So how does this relate to the possible impact of greater attention from international law? The power of a given market principle rests in part on the expectation that a particular act will be interpreted as inappropriate and that the subsequent reputational response will be largely inevitable. This bolsters its rule-like character and covers over the fact that the ostensibly inevitable market rule may have been starkly different not so long ago. But bringing market principles within the conceptual ambit of legal rules and then treating them as such—highlighting how these market principles shift and are likely to have been politically constructed, asking about the appropriateness of lawmakers, identifying and problematizing inconsistencies with other international norms—can weaken the mystique of these market givens and can also undermine any sense that a “violation” will uniformly be considered inappropriate. In addition, to the extent that a state action can be framed as reasonable—not a violation of unambiguous rules but perhaps a balancing of multiple potential rules—the likelihood of a strong and broad reputational response to any violation should be lower.<sup>165</sup> The

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165. This is particularly true given that any reputational response is likely to be mediated through perceptions of a state’s negotiations with or statements to international actors, including international financial institutions or investors, in conjunction with any policy action. As is well-studied in international relations, negotiations by sovereign states can be understood as a two-level game. See generally Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427 (1988) (providing a classic version of this discussion). The state makes representations to international partners about what will be domestically acceptable, just as it makes representations to domestic constituents and interest groups about what is achievable on the international level. Any background discussion that impacts the perception of how the other party’s audience is likely to react may impact the strategic thinking around these negotiations.



capital controls example suggests that, holding the actual state behavior constant, a reading of the state as a recalcitrant violator of clear rules will result in a higher sanction. Similarly, if the demands made by international actors negotiating with a state seem unreasonable in light of questions about market principle objectivity and normative appropriateness, they may feel pressure to modify their position.

This multifaceted presentation hardly provides a clear theory of how attention by international law could have an immediate impact. However, it arguably maps more accurately onto the ways in which market principles work—not through win/lose adjudications, but rather in negotiations, broader audience perceptions, and subsequent reputational effects. In the sovereign debt continuity case, the example of the Iraqi debt negotiations after the fall of Saddam Hussein may be relevant. On the one hand, there were reasonable arguments to be made that some of the debt incurred by the fallen regime was problematic and should be cancelled. On the other, a unilateral debt cancellation by the Iraqi government would have been viewed as unacceptable and would likely have resulted in reputational consequences. Lee Buchheit, the lead negotiator for the new Iraqi regime, had the following to say on the background popular discussions of illegitimate or odious debt, even though the argument was never raised in the negotiating room itself:

[The issue] was definitely present—the atmospherics are unavoidable. The creditors all dealt with Saddam, and now half castigated him as Beelzebub. But repudiation or full payment was not a binary choice in the negotiating context. . . . If we have reached a point where we could legitimately make a claim on odious debt, then they're already softened up.<sup>166</sup>

Determining when one can “legitimately make a claim,” and arguing that such a claim is reasonable and supported by at least some swathe of the global audience, is precisely the bailiwick of the international legal community. All this is to say that greater international legal scrutiny of market principles may have an impact in several related ways: by questioning the seeming clarity or objectivity of those principles and emphasizing that they are manmade; by asking about the normative appropriateness of the concomitant rules; and by altering or softening the interpretations (and reputational consequences) of a state actor as a recalcitrant violator. Thus, the reputational mechanism itself—the intrinsically interactive way that market principles are enforced—provides an avenue by which conceiving of these market principles as law and bringing them into the ambit of international legal work may have an impact.

#### E. THE RISK OF INADVERTENT LEGITIMATION

Even if there are significant potential benefits to incorporating market principles into our understanding of the global legal order, are there also risks involved? In particular, actors and scholars sometimes seek to label a body of rules as “law” in an effort to cloak it with a type of legal legitimacy, and perhaps even to have that legitimacy secured or confirmed by courts or other decisionmakers. This may be the case for civil society activists or norm entrepreneurs seeking to deepen or enshrine a particular moral or political idea through a legal form. It can also be the case for business entities, which might want to see controversies settled according to their own business customs, tagged an emergent *lex mercatoria* and freed from national regulations that they would rather disregard. Indeed, the potential distributional ramifications of such efforts at legitimation through legal labeling are hardly lost on critics. For example, Stephen Toope has argued that “the so-called *lex mercatoria* is largely an effort to legitimise as ‘law’ the economic interests of Western corporations.”<sup>167</sup>

Although this type of legitimation is certainly part of the impetus for some projects of law-expansion, that is far from the goal of this Article. I

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166. LIENAU, *supra* note 35, at 214 (quoting Author’s Interview with Lee C. Buchheit, Partner, Cleary, Gottlieb, Steen & Hamilton, in New York City, New York (Sept. 23, 2008)).

167. STEPHEN J. TOOPE, *MIXED INTERNATIONAL ARBITRATION: STUDIES IN ARBITRATION BETWEEN STATES AND PRIVATE PERSONS* 96 (1990).

do not at all suggest that courts or other decisionmaking actors should grant these market givens even more legal power than they already have. Despite their law-like character, it would be hard to characterize them as broadly *legitimate*, worthy of further respect and elevation; indeed, these market principles have not been vetted according to any standard of legitimate lawmaking.<sup>168</sup> While there is no need to engage in the thorny debates of whether any inherent link exists between law and morality or law and legitimacy—especially in light of the broad “family resemblance” understanding of law adopted in this Article<sup>169</sup>—it seems clear that we characterize and study a range of rules and directives as law even though they are morally or politically problematic. As such, understanding the rules embedded in market principles as part of the global legal world does not automatically render them worthy of approbation or court application. However, as detailed more fully in the previous Subparts, it can help direct toward these market givens the scholarly attention, critical questioning, and heightened scrutiny generally accorded to law.

Still, to what degree can we really draw such lines or barriers between the different possible ramifications of labeling? Is it possible to identify a class of rules as a type of “law” while denying it the legitimacy frequently (though not uniformly) accorded to the category? There may be hazards involved in any project of categorization, and reasonable concerns exist about giving up on more traditionalist state-based understandings of law. But market principles seem less prone to the risk of inadvertent legitimation or approbation, in particular because they are not positioned as normative or legal claims in the first place. Indeed, they are promoted (if promotion is the right word) by a very different kind of entrepreneurship than one usually imagines when thinking of norm advocacy. The more common or cognizable type of legal-normative entrepreneurship might involve a re-characterization of already present normative ideas into more comprehensibly legal language. As Bianchi points out in the case of transparency, “[n]ormative concepts and prescriptions of a varied nature may exercise significant influence on international legal processes regardless of their formal status. Such concepts are often translated into law by means of ‘principles’ . . . in the sense of normative prescriptions of a general character.”<sup>170</sup> Norm entrepreneurship may also involve claims about law as part of a very

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168. This sets aside for now the fact that conceptions of legitimacy are hard to pin down, particularly in the international arena. See generally Odette Lienau, *The Challenge of Legitimacy in Sovereign Debt Restructuring*, 57 HARV. INT'L L.J. 151 (2016) (providing further discussion on the difficulty of conceptualizing legitimacy in the sovereign debt context).

169. See discussion of “family resemblance” concept of law *supra* Part II, text associated with notes 128–130.

170. Bianchi, *supra* note 145, at 6.

explicit legal policy project, as in the case of the landmine ban.<sup>171</sup> Here, the proffered norm is presented as morally or politically superior to the status quo, and as better according with the underlying identities or values of the actors in question—including values enshrined in law, such as the value of protecting innocent life or respecting human rights.

Although the broad adoption of market principles may well take significant entrepreneurship, it is of a very different sort than that relevant for an issue like the landmine ban. In particular, those in favor of a given market principle—for example, debt continuity or free capital mobility—would likely not consider themselves to be advocates for a particular, changeable *law*. Indeed, there may be very good reasons for market principles to remain, so to speak, in hiding from law. This is because, to anthropomorphize somewhat, perhaps the ultimate goal for all laws, norms, or collective beliefs (and their respective entrepreneurs) is to achieve a kind of taken-for-granted status, with the air of unchangeability it confers. For an openly principled rule such as a prohibition against slavery or against using a technology such as landmines or chemical weapons, an explicit legal obligation can formalize and enshrine a collective belief as being in line with core values of the relevant community. Such formalization also serves as a clear and deliberate decision to reject previous (and presumably less enlightened) rules of international engagement, at least in theory, and can even act as a marker in historical narratives of legal progress.<sup>172</sup> Compliance with the rule ideally becomes the appropriate and assumed choice in any given circumstance, even if material consequences or instrumental thinking might recommend in favor of violating the rule.<sup>173</sup>

But for a collective belief such as a market principle, which purports to narrate how markets function as an *objective* matter, the relationship with a legal or political institution can be more problematic. To achieve ultimate taken-for-grantedness, the consequences of violating *this* kind of rule should, perhaps, not be seen to emanate from something so banal and mortal as an identifiable political institution or legal body promulgating or enforcing chosen (and therefore challengeable) policies. Rather, the consequences of violating the expectations implicated by a market principle should ideally be seen to result from unchanging and objective economic constraints. To the extent that a market principle can be

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171. This example is mentioned briefly in the discussion of constructivism *infra* Part IV.B.

172. Such narratives have, of course, come under considerable scholarly pressure. See, e.g., ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2007).

173. Constructivists might also focus on the possibility that such rules, collective beliefs, and values can impact actors' interests by shaping their identities, such that these actors would consider a violation of that rule to be contrary to not just their interest but also their identity (be it personal or collective). For an overview of key themes in constructivism, see *infra* text associated with notes 188–189 (offering key examples of constructivist scholarship).

maintained *without* any explicit legal groundwork, it may ultimately and counterintuitively command greater adherence and be viewed as more legitimate than other deliberately legalized norms. Again, this dynamic of escaping (or failing to seek) legal characterization does not at all diminish the fact that these market principles may perform legal work, in terms of generating implicit but well-understood rules or by pre-selecting focal points for other legalized forms and undergirding reputational enforcement mechanisms. Indeed, remaining in the shadows of law may even allow this legal work to be more effective. This is precisely why legal scrutiny is important for those market principles considered normatively problematic.

Thus, even if market principles were conceived of as part of law—and therefore ultimately as a politically constructed and changeable set of rules—the risk of inadvertent legitimation seems minimal given that *advocates* of a particular market principle would be unlikely to endorse this conception. The publicity necessary for any effort to promote external recognition as law would not only give lie to the idea of these market principles as objective, but also raise questions about their provenance and legal legitimacy. This is not to say that advocates of a market idea will not sometimes make the effort to move toward formalization as hard or soft law. It is possible that certain groups may consider formal legalization to offer a valuable additional layer of obligation and control—for example, if they believe that the reputational enforcement of a market principle is insufficient incentive to ensure compliance. One instance of this might be the effort within the IMF to amend the Articles of Agreement to enshrine the principle of capital mobility, as previously discussed in Part II.B. But such efforts are no longer law in hiding and, indeed, they can expose these market principles to the type of scrutiny and challenge appropriately accorded to lawmaking and law-reforming activities. This is precisely the type of scrutiny and challenge that should be directed to market principles themselves as a more general matter, even if they never emerge as deliberately chosen hard or soft law.<sup>174</sup>

#### F. INTERACTING RULE FORMS IN THE LEGAL ORDER

Despite its focus on market principles, this Article does not intend to take away from any general attentiveness to “law on the books,” whether those books are formulated by state or non-state actors, and whether the laws take the form of binding rules or “soft” principles. Indeed, the interaction between market principles and other rule forms will be fairly complex for any given issue area, and the analysis in this Article invites

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<sup>174</sup> Indeed, this is especially important given that this formalization effort does *not* always happen. Furthermore, these market principles can act in a powerful legal way even in the absence of formalization (or as a counter to formalized law).

further research into these interactions. For example, under what conditions might a market principle actually obviate formal law, as with the capital controls example? When might a change in the formal law act as a focal point for a change in the rule of the market principle itself? And when does the successful enshrinement of a market principle in hard law make it stickier—as is frequently intended to be the case—and therefore more likely to exert influence even after the underlying market principle itself has weakened or disappeared? Does the legal design of the formal law have an impact on this process—for example, the specificity and strength of contractual obligations or the degree of delegation to other decision-making bodies? In short, in addition to the empirical study of market principles themselves, to which I have already suggested lawyers can make a distinct contribution, studies could be done on how those principles interact with other rule forms in the legal order.

The interaction of market principles with other rule forms also invites deeper thinking on the policy front. For example, it may be the case that market principles can quietly reshape or effectively block and render ineffective principles enshrined in other rule forms. In this case, actors may exclusively direct (or perhaps misdirect) their efforts and scarce resources to these other rule categories—through treaty writing, guideline formulation, or doctrinal development—when in fact market principles themselves are doing the real work. This leads to the questions: When does this dynamic emerge, and what is the best use of resources as a result? Given the particular constellation of actors and institutions that generate and support a given market principle, what should be the target of greater attention? Leaving market principles outside our understanding of the global legal order means that these and many other questions fail to garner the attention they deserve.

#### IV. THE UNDERINCLUSIVENESS OF INTERNATIONAL LEGAL THEORY

If market principles do indeed play an important role in the global legal order—either directly or through other legal forms—why has international law tended to overlook their impact and their potential place in our legal-analytical and normative frameworks? Especially given the recently expanded understandings of “international law,” it is perhaps surprising that international legal scholarship has not given market principles more focused attention. The absence of such inquiry is even more puzzling since disciplines cognate to the field—for example, certain variants of political science and economic sociology—readily embrace the socially and politically constructed nature of market ideas and market functioning.<sup>175</sup> Indeed, the instability of ostensible market givens, and even

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175. For examples of scholarship in cognate disciplines that embrace the constructed nature of markets, see, among others, *CONSTRUCTING THE INTERNATIONAL ECONOMY* (Rawi Abdelal et al. eds., 2010); ON

some of the mechanisms by which they vary, should not sound especially new to anyone familiar with this literature. And much of the international legal scholarship over the last several decades that sought to expand the boundaries of traditional law has very explicitly embraced interdisciplinarity.

One reason for the relative absence of market principles in our understanding of the global legal order may lie in their epistemological facade—they are frequently framed and received as descriptive, factual observations that lead to accepted best practices. As such, their ultimately manmade and rule-like character can be difficult to identify. But the omission might also result from tendencies within international legal scholarship itself—in particular, the tendency of much international legal scholarship to focus on rule forms that are deliberately chosen by state, sub-state, or non-state actors. These rules may be more or less formal and more or less strongly enforced, but legal scholars have tended to define “law”—even in the expanded version discussed in Part II.A—as including only those directives that actors knowingly select as rules or guidelines. Thus, international lawyers can accept without difficulty a key insight from cognate disciplines—namely, that market ideas are politically and socially constructed. But because these market ideas are not presented as rules or laws, their constructedness does not necessarily challenge how lawyers understand their functioning in the legal world. And scholars from cognate disciplines may be very interested in the construction of market givens themselves, but miss their translation into legal activity and legal modes of analysis—or perhaps, as with Michel Callon, tend to use “law” largely as a metaphor.<sup>176</sup>

As such, this Part looks more closely at international legal theory itself, and considers some of the reasons why market givens have failed to enter our understanding of global law thus far. The assumed centrality of deliberate choice in law is true of theoretical approaches that posit states as rational actors working to secure their own interests, but it is also true to an important degree even for frameworks drawn from constructivist theory, which explicitly seeks to demonstrate how broader normative principles and beliefs may shape actor interests and identities. Some variants of these approaches even assume a hierarchy in the strength of legal forms—the idea that there is a legal continuum involving beliefs/norms, custom, soft law, and then hard law—and may also assume that rule advocates will want to move *up* this hierarchy to render their preferred standard more powerful, with the caveat that occasionally a “lesser” form of law can better represent underlying goals. Critical international law scholars perhaps come closest, emphasizing the

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CAPITALISM (Victor Nee & Richard Swedberg eds., 2007); MONETARY ORDERS: AMBIGUOUS ECONOMICS, UBIQUITOUS POLITICS, *supra* note 17; LAWS OF THE MARKET, *supra* note 143; ABDELAL, *supra* note 55; CHWIEROTH, *supra* note 55.

176. LAWS OF THE MARKET, *supra* note 143.

important role of knowledge practices in constituting the content, boundaries, and distributional ramifications of law. But they have neglected to focus directly on the shared attributes of market principles as a class, and their framing of such beliefs and knowledge frameworks as impacting law (rather than as a type of law itself) paradoxically presses these insights to the margins of international legal studies.

Given this range of orientations, it seems natural that international legal theory would tend to overlook the real impact that market principles can have, and also to miss the way in which they may actually *benefit* from escaping the label “law.” In other words, the assumption that beliefs such as market principles work largely outside the global legal system can counterintuitively render them even more powerful within the law, allowing them to act while avoiding the questions about coherence and accountability that we associate with the legal system.

#### A. RATIONAL CHOICE AND OPTIONS IN LAW

International legal theory has moved through several waves following World War II, after which lawyers worked to construct new global rules and institutions that might prevent future chaos. These international lawyers tended toward a positivism that promoted formally binding legal obligations for states, hoping that such rigidity would provide the best chance of stability going forward. Dominant thinkers in the field of international relations, however, discounted the importance of such legal mechanisms, considering them an outgrowth of—and epiphenomenal to—the fundamentally unchanging state goals of preserving security and maximizing power.<sup>177</sup> These scholars working in the post-war realist tradition contended that the idealist vision of a law-based world order would fail to deliver the desired peace, and might even destabilize global relations, due to its naive assumptions about the possible depth of interstate cooperation.

Central to the reconciliation of these views has been the rise of rational choice approaches focused on the ways in which international institutions may serve state ends. This rationalist institutionalist framework, at least in its earlier forms, tended to accept the realist assumptions of a unitary state acting in its own predetermined interests. But it contended that such interests might nonetheless coincide with

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<sup>177</sup> The classic post-World War II text on political realism is HANS J. MORGENTHAU, *POLITICS AMONG NATIONS* (1948). Drawing from this tradition, George W. Downs, David M. Rocke, and Peter N. Barsoom cast doubt on the real meaning of compliance in *Is the Good News About Compliance Good News About Cooperation?* 50 *INT'L ORG.* 379, 406 (1996). Jack Goldsmith and Eric Posner offer an update on certain elements of this realist take, suggesting that customary international law is simply a series of behavioral regularities accompanied by “law-talk” to signal future intentions to continue the behavior. For a recent iteration, see generally JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).



those of other states and thus pave the way for cooperation.<sup>178</sup> Interstate interaction in this model is not necessarily zero-sum, with a clear winner and loser, but rather can enhance the welfare of all actors if coordination and defection problems are overcome. Once states select and establish an institution or set of rules, it shapes state behavior and further incentivizes cooperation by altering the costs and rewards of given choices. However, the institutions and rules themselves are established to serve states' long-run interests, and they are adhered to so long as those interests appear to be promoted.

International law scholars working within this broad rationalist approach have expanded both the range of institutional choice and the actors under study, all while remaining within a paradigm that understands law as a deliberately chosen endeavor. To begin with, they have expanded the legal forms under consideration, moving away from any assumption that stringent obligations are necessarily optimal and highlighting how states can select among a number of institutional forms in response to different foreign policy goals.<sup>179</sup> For example, Kenneth Abbott and Duncan Snidal noted that, while states may opt into hard law legalization, they might also “choose softer forms of legalized governance when those forms offer superior institutional solutions.”<sup>180</sup> Pursuing this theme of a continuum in legal form and commitment capacity from which actors may select, Andrew Guzman suggests that the difference between formal treaties, soft law, customary international law, and international norms “is a matter of degree rather than kind. Formal treaties lie at one end of a spectrum of commitment, with mere norms at the other end and customary international law and soft law in between.”<sup>181</sup> He argues that this categorization corresponds to the likely effect that these forms will have on behavior, asserting that it is “possible to identify a hierarchy of international law rules, with treaties the most likely to affect behavior, norms the least, and soft law and customary international law in between[.]”<sup>182</sup> Speaking specifically of norms, which are at the bottom of this hierarchy, Guzman describes them as “very much like [customary international law]—they lack explicit consent, are unwritten, and are often vague. In addition, they lack the ‘bindingness’ of

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178. See ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984) (providing a classic illustration).

179. Early on in this scholarly development, the editors of a special issue of the flagship international relations journal *International Organization* posited that “legalization” might vary according to rule precision, obligation, and delegation to a third-party decisionmaker. Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT’L ORG. 401, 401 (2000).

180. Abbott & Snidal, *supra* note 26, at 421.

181. GUZMAN, *supra* note 4, at 9.

182. *Id.* at 214; see *id.* at 214 fig.6.1.

custom. As such, the consequences of failing to honor them, while often real, are less than is the case for custom.”<sup>183</sup>

While these rational choice scholars do seem to have assumptions about legal strength and weakness, this does not lead them to say that the strongest legal forms will necessarily be preferable. Early on, Abbott and Snidal argued that soft law, while sometimes a step along the route to full legalization, can also be “preferable on its own terms. . . . [and] provides certain benefits not available under hard legalization.”<sup>184</sup> Guzman also emphasizes the significant choice available in the range of agreement types, including “the decision to adopt a treaty rather than soft law, the provision or omission of dispute resolution and monitoring, and the inclusion or omission of reservations, escape clauses, and exit clauses.”<sup>185</sup> Further highlighting the deliberately strategic dimension of selecting across legal forms, Gregory Shaffer and Mark Pollack note that hard and soft law are not necessarily complements but may also act as antagonists—that is, actors can use these forms to obfuscate and to undermine arrangements with which they disagree.<sup>186</sup> Edward Swaine and others have taken rational choice beyond formalized agreements, arguing that even customary international law may serve an instrumental purpose for states.<sup>187</sup>

Although rational choice understandings of international law originally tended to posit the state as the main actor, the expansions of international law discussed in Part II.A have encompassed an even broader range of lawmaking entities—from transgovernmental networks to corporations and other non-state entities. But these endeavors still

183. *Id.* at 214. As the examples in Part I make clear, this Article suggests that the relationship between official “bindingness” and legal effectiveness is more complicated.

184. Abbott and Snidal identify the benefits of soft law to include that it is easier to achieve, more effective in dealing with uncertainty, and more likely to effectuate compromise. Abbott & Snidal, *supra* note 26, at 423.

185. GUZMAN, *supra* note 4, at 131. For more on the reasons that states might select soft law, see Guzman & Meyer, *supra* note 26, at 171. For an early cautionary note against oversimplifying the category of “soft law,” see C. M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT’L & COMP. L.Q. 850 (1989).

186. For Gregory Shaffer and Mark Pollack, the key question on the interaction of hard and soft law is “one of specifying the conditions under which actors are likely to employ hard and soft law as alternatives, complements, or antagonists.” Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 709 (2010). Kal Raustiala criticizes the hard versus soft law terminology but emphasizes the tradeoffs states must choose between in making decisions about legality (that is, binding versus nonbinding agreements), substantive deviation from the status quo, and structures for monitoring and punishing. Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT’L L. 581, 582 (2005); see Raustiala, *supra* note 26, at 3 (noting that international lawmakers may have a choice of whether to regulate through formal mechanisms or through more informal, network based approaches). All of this resonates with the international rational design literature more generally. See, e.g., Koremenos et al., *supra* note 27.

187. Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559, 565 (2002) (emphasizing that custom fits into rational choice perspectives once we recognize both the broad range and the interdependence of strategic games implied by this approach).

share in common an idea that some range of rational actors are choosing and designing a legal form to best serve their collective interests. This literature has thus undermined the strict positivist assumption that only binding “real law” agreements do meaningful work while remaining within the broader conceptual framework of understanding law as chosen, albeit as chosen in different forms to serve multiple types of actors.

#### B. ASPIRATIONAL LAW IN CONSTRUCTIVISM

Even international law scholarship influenced by constructivist theory in international relations—which is very carefully attuned to the centrality of collective beliefs and shared understandings—has, perhaps surprisingly, often overlooked or under-characterized the multiple ways in which market principles can play a part in the global legal order. In particular, much of this work, even while rejecting key premises of a rationalist framework, has similarly emphasized the deliberate or chosen element of norm propagation in international law. It has also sometimes accepted the assumptions of a progression or hierarchy from mere shared understandings to more concrete forms of law—tending to assume that beliefs (to anthropomorphize for a moment) aspire to higher levels of formality and publicity. But in fact, as was previously suggested in Part III.E, there is reason to think that the legal work done by market principles, in terms of pre-selecting plausible policies and encouraging compliance through reputational mechanisms, may be *more* successful if the norm or standard itself never becomes interpreted as “legal.”

In the last twenty years, thinking and writing in international relations and international law has been affected significantly by theoretical approaches that explicitly emphasize the importance of shared beliefs. Speaking very generally, this constructivist turn in international relations theory highlights the importance of collective ideas and social norms in shaping outcomes in global affairs. It asserts that state and actor interests and preferences cannot simply be assumed, and underscores the centrality of knowledge and of norms, including those developed through international organizations and legal institutions, in constructing state interests and even constituting state identities.<sup>188</sup> States and other actors in this view are motivated not only by an instrumental logic of consequences, as in the rationalist approach, but also by a “logic of appropriateness,” which considers what would be appropriate or legitimate behavior for an

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188. Several key texts on this approach include: ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* (1999); KRATOCHWIL, *supra* note 141; MARTHA FINNEMORE, *NATIONAL INTERESTS IN INTERNATIONAL SOCIETY* (1996); *THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS* (Peter J. Katzenstein ed., 1996). This list is hardly exhaustive, of course.

actor of a given position or identity in a given social context.<sup>189</sup> As such, law and legal rules are not merely an outcome or dependent variable—an end product chosen by parties to facilitate coordination or cooperation in service of their predetermined goals—but rather can be understood as part of a dynamic in which states, other actors, and the larger institutional and social structures in which they are embedded are mutually constituted over time. And part of the distinctive nature of *legalized* norms in this view involves the important (if sometimes amorphous) element of legal legitimacy, supported in part by the interaction between law and collective social practice.<sup>190</sup>

To an important degree, discussions of international law drawing from constructivist theoretical frameworks reject the instrumentalist state choice element of rationalist institutionalism. But this hardly suggests either that purposeful legal action disappears from the account or that the role of less deliberately chosen principles in legal work is promoted to the center of attention. In characterizing purposeful action, constructivist scholars have tended to suggest that states may enter into international legal instruments of various sorts not to promote unwavering interests in maximizing security, power, or wealth, but rather in support of historically contingent political or moral principles (or historically contingent understandings of security and economic interest) that they deem to be legitimate and valuable. In surveying the literature for an edited volume building on the insights of constructivist scholarship, and quite explicitly designed to be “read as a counterpoint to the ‘rationalist’ approach,” Christian Reus-Smit notes that actors create institutions, including international legal institutions, “not only as functional solutions to co-operation problems, but also as expressions of prevailing conceptions of legitimate agency and action that serve, in turn, as structuring frameworks for the communicative politics of legitimation.”<sup>191</sup>

In characterizing norm-based thinking on treaties, Oona Hathaway notes that “governments create and comply with treaties not only because they expect a reward for doing so, but also because of their commitment (or the commitment of transnational actors that influence them) to the norms or ideas embodied in the treaties.”<sup>192</sup> While the state remains a key actor in these processes of social construction and identity formation, non-state actors including international institutions, domestic

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189. See, e.g., James G. March & Johan P. Olsen, *The Institutional Dynamics of International Political Orders*, 52 INT’L ORG. 943, 951 (1998).

190. See, e.g., Martha Finnemore & Stephen J. Toope, *Alternatives to “Legalization”: Richer Views of Law and Politics*, 55 INT’L ORG. 743, 744 (2001); JUTTA BRUNNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT 75 (2010).

191. THE POLITICS OF INTERNATIONAL LAW 5 (Christian Reus-Smit ed., 2004). Reus-Smit specifically identifies the 2000 *Legalization and World Politics* special issue of INTERNATIONAL ORGANIZATION, mentioned in text above, as paradigmatic of the rationalist approach the volume aims to challenge. *Id.* at 11.

192. Hathaway, *supra* note 35, at 47.

and transnational interest groups, nongovernmental organizations, and even individuals also play an important role in this element of choice and agency. Providing one key example, Martha Finnemore and Kathryn Sikkink have highlighted the role of “norm entrepreneurs,” who very deliberately promote particular visions of appropriate conduct and who work to eliminate alternatives in order to further their values and beliefs.<sup>193</sup> Thus, this scholarship on shared beliefs in international legal processes, while emphasizing the ways in which norms can actively constitute law and actors, has still paid less attention to the role played by more quiet assumptions about markets and their causal effect.

Perhaps deepening this tendency to overlook the role of market principles, constructivist work in international law, like variants of rationalist institutionalism, has also sometimes assumed a continuum of effectiveness that corresponds to the “hardness” or at least the “legalness” of the law in question. Suggesting the greater strength of more concrete legal forms, Finnemore notes that, “[p]articularly for new or emergent normative claims where few ‘hard’ law obligations exist, activists seek to generate this kind of felt obligation as a means of promoting ‘harder’ legal obligations in the future.”<sup>194</sup> Implying an intermediate or stepping-stone character of soft law, David Trubek notes that such instruments may help to develop “non-binding standards that can eventually harden into binding rules once uncertainties are reduced and a higher degree of consensus ensues.”<sup>195</sup> And a consideration of practice confirms this dynamic across multiple issue areas. For example, legally binding environmental treaties such as the Montreal Protocol on Substances Depleting the Ozone Layer, now involving third-party review of implementation, progressed from more aspirational language developed by key non-state and state supporters.<sup>196</sup> And perhaps the greatest success understood along these lines is the adoption of the Landmines Convention in 1997, only five years after the launch of the campaign to ban landmines by six NGOs in 1992.<sup>197</sup>

Jutta Brunnée and Stephen Toope, also working from a constructivist perspective, offer a valuable caveat here, cautioning “against undue faith

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193. Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887-917 (1998).

194. Martha Finnemore, *New Directions, New Collaborations for International Law and International Relations*, in INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: BRIDGING THEORY AND PRACTICE 271 (Thomas J. Biersteker et al. eds., 2007).

195. David M. Trubek et al., 'Soft Law,' 'Hard Law,' and EU Integration, in LAW AND NEW GOVERNANCE IN THE EU AND THE US 89 (Gráinne De Búrca & Joanne Scott eds., 2006).

196. See, e.g., BRUNNÉE & TOOPE, *supra* note 190, at 126-219 (providing further information on the development of the climate regime).

197. Richard Price, *Emerging Customary Norms and Anti-Personnel Landmines*, in THE POLITICS OF INTERNATIONAL LAW, *supra* note 191.

in formal law-making.”<sup>198</sup> They draw from Lon Fuller’s previously mentioned theory of the rule of law to develop an interactional account of international legal obligation that emphasizes the centrality of ongoing and shared practices of legality in creating and maintaining law.<sup>199</sup> Brunnée and Toope thus disrupt the assumption of a clear hierarchy among legal forms, allowing for the possibility that less formal codes may more effectively generate a sense of legal obligation, which they consider to be “the value-added of law.”<sup>200</sup> They note that “it is not enough to cast socially shared understandings in legal form . . . [W]ithout sufficiently dense interactions and participation of its members, positive law will remain, or become, dead letter.”<sup>201</sup>

Brunnée and Toope’s project resonates with my own in shifting attention away from what is *called* law and instead focusing on the various criteria of legality and the multiple ways and forms in which such criteria may be met. But the focus on identifying law for the purpose of understanding legal obligation differs from my effort to understand how market principles function as a type of law in global governance. While legal obligation may indeed be a central value-added of law, it is also the case that certain rules that we now understand without much controversy to be worthy of study as part of international law do not in fact provide this element, at least not in much depth—certain informal rules on banking, perhaps, or even the “dead letter” hard law we nonetheless require our students to understand (and maybe criticize, helping to ensure it remains dead). Indeed, certain types of market beliefs may meet important criteria of legality and act as law *without* generating a subjective sense of legal obligation—without being recognized or felt as law. Again, my goal in making this suggestion is not to contend that these market principles *should* in fact generate felt legal obligation or that they should be applied by decisionmaking bodies as if they do generate such obligation. Rather, the goal is to put them at the core of legal analysis and criticism.

### C. CRITICAL LAW AND DISCIPLINARY BOUNDARIES

All that said, certain insights drawn from constructivism clearly resonate with this Article’s understanding of the potential roles of market principles in international law. In particular, studies of how shared understandings may shape and predetermine meaning and interest have informed my thinking. Constructivist and critical work in the political

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198. BRUNNÉE & TOOPE, *supra* note 190, at 75.

199. Brunnée and Toope list the criteria of legality as: generality, promulgation, nonretroactivity, clarity, noncontradiction, not asking the impossible, constancy, and congruence between rules and official action. *Id.* at 6.

200. *Id.* at 77.

201. *Id.* at 69–70.

science subfield of international political economy, which questions the possibility of a purely materialist theory of market functioning, emphasizes that “international norms define the boundaries of choice and thereby affect how societies, policymakers, and market participants discern the meaning of various policy stances.”<sup>202</sup> These collective ideas become most powerful when they are taken for granted—when actors accept them as the only realistic response to a given issue rather than one among several plausible policy choices.<sup>203</sup> And research on epistemic communities, which has looked at knowledge-based networks organized around technical areas such as science or economics, has demonstrated the impact of shared understandings that gain authority in part from perceptions of expertise and impartiality.<sup>204</sup>

To an important degree, these insights from related disciplines do resonate with elements found in international law studies, particularly with those variants of critical international legal scholarship that attend to the effect of background narratives and collective beliefs. At a theoretical level, scholars have highlighted how such background ideas construct elements of international law, and also how these ideas are shaped—and indeed are shaped *as background*—by the concepts and practice of international law itself. For example, Martti Koskenniemi has highlighted that “[t]he law constructs its own field of application as it goes along, through a normative language that highlights some aspects of the world while leaving other aspects in the dark.”<sup>205</sup> Fleur Johns demonstrates through a range of close case studies how international lawyers “make non-law . . . that is, routinely shape understandings of what stands opposed to or outside the reach of legal norms.”<sup>206</sup> David Kennedy has written of how knowledge practices and expertise, including legal and institutional expertise, shape our understanding of the world (and thus shape the world itself)—for example, by marking out certain economic frameworks and activities as natural or inevitable and insulating them from political contestation.<sup>207</sup> Kennedy argues that participants in global governance “underestimate the plasticity and policy potential of what they take to be

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202. ABDELAL, *supra* note 55, at 9.

203. *See, e.g., id.* at 10–11. Constructivist theory outside of political economy also emphasizes the power attaching to a norm when it achieves this “taken for granted” character.

204. *See, e.g.,* Haas, *supra* note 126, at 1–35 (1992); ADLER, *supra* note 126.

205. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 570 (2005).

206. FLEUR JOHNS, NON-LEGALITY IN INTERNATIONAL LAW: UNRULY LAW I (2011). Johns further notes that this constrains what is considered politically possible: “lawyers’ practice of making non-legalities entails the continual making and remaking of global political possibilities.” *Id.* at 1.

207. *See generally* DAVID KENNEDY, A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY (2016). Kennedy developed these arguments through a series of earlier pieces. *See, e.g.,* David Kennedy, *International Legal Theory: Law and the Political Economy of the World*, 26 LEIDEN J. INT’L L. 7, 12–13, 40–41 (2013) [hereinafter Kennedy, *International Legal Theory*].

the ‘background’” and also fail to fully recognize “their own complicity in what they see as background.”<sup>208</sup> Focusing on ideas of democracy in international legal practice, Susan Marks uses the concept of ideology to emphasize how meaning and ideas (including legal meaning) can sustain relations of domination, and notes the international legal relevance of the concept of reification, developed by Georg Lukács, to describe “a process by which human products come to appear as if they were material things, and then to dominate those who produced them.”<sup>209</sup>

Why, then, are these insights not already closer to the core of mainstream international law scholarship and practice?<sup>210</sup> And, relatedly, why have market principles not fully entered our conception of global law through this scholarly pathway? The critical scholars just mentioned are engaged in an uncovering project of sorts—an effort to bring understudied but significant issues into legal vision, even to make them part of “law,” broadly understood. Johns notes that part of her aim is “to make politically navigable and questionable some aspect(s) of international legal work previously, for the most part, un- or under-acknowledged.”<sup>211</sup> Kennedy calls upon international lawyers to recognize their own disciplinary assumptions—including their narratives and knowledge practices—as part of policymaking, governance, and rulership, and to embrace the political contestation and choice within these activities.<sup>212</sup>

But, in a way, the language and framing of these arguments may not always further the goal of encouraging more direct engagement by a broader swathe of the legal profession. Indeed, they may even work at

208. David Kennedy, *The Politics of the Invisible College: International Governance and the Politics of Expertise*, 5 EUR. HUM. RTS. L. REV. 463, 491 (2001) [hereinafter Kennedy, *The Politics of the Invisible College*].

209. Susan Marks uses John Thompson’s formulation of ideology as “ways in which meaning serves to establish and sustain relations of domination.” SUSAN MARKS, *THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY, AND THE CRITIQUE OF IDEOLOGY* 10 (2000). For discussion on reification, see *id.* at 21. Indeed, we could go even further back to Karl Marx himself, the grandfather of studies of law, ideology, and political economy.

210. Beyond these theoretical insights, more specific studies by these scholars resonate with the arguments in this Article about how market principles can work in the global legal order. For example, Johns’ chapters on “pre-legality” in cross-border investment deals and “supra-legality” in the international legal treatment of climate science are very relevant. JOHNS, *supra* note 206. Also of importance is David Kennedy’s frequently cited article on the post-Cold War narratives shaping West European engagements with the post-Communist countries of Eastern Europe. David Kennedy, *Turning to Market Democracy: A Tale of Two Architectures*, 32 HARV. INT’L L.J. 373 (1991).

211. JOHNS, *supra* note 206, at 9. Echoing Kennedy’s suggestion:

[That] [i]f international law and lawyers are shown to be complicit in constituting and/or entrenching that which they purport to stand against . . . then attributions of responsibility and questions of reform might emerge that are different to those currently circulating in much contemporary international legal literature.

*Id.*

212. See, e.g., Kennedy, *International Legal Theory*, *supra* note 207, at 37, 40; Kennedy, *The Politics of the Invisible College*, *supra* note 208, at 495–96.



cross-purposes. In particular, lawyers and legal scholars ultimately (and understandably) are most comfortable working with and within “law.” Even those attorneys who do not conceive of themselves as mere functionaries will probably prefer to engage in their practice and professional projects in a recognizably legal manner. Requesting that they also expressly adopt political struggle, non-law, ideology, or the dark spaces left by law’s “going along” (in Koskenniemi’s words) is, potentially, a significant pivot away from their disciplinary comfort zone. Kennedy seems to understand this difficulty, and quite explicitly aims to inspire or exhort attorneys to political consciousness. But asking them to cast off their disciplinary selves to emerge (like superman, perhaps) as Weberian politicians might be too much—many lawyers, perhaps unfortunately, have not entered the profession to confront politics and be faced with the burden of political choice at every turn.

Similarly, Johns acknowledges that she adopts a vocabulary of “non-legalities” that lawyers tend not to use.<sup>213</sup> Indeed, the harried law firm associate featured in Johns’ study of the micro-foundations and pre-legalities of a cross-border investment deal is no doubt only too grateful to rely on those pre-legalities, and to avoid further expanding her analytical duties to include recognition of the non-legality shaped through her own legal work. Even as many lawyers and legal scholars are enriched by these important reframings, others will resist (and even resent) the conceptual moves. These critical analyses represent a real paradigm shift—a simultaneous elevation and diminution of legal activity—for a professional group historically committed to the uniqueness of its disciplinary practice, identity, and distinctive forms of reasoning.

Furthermore, this paradigm shift is not entirely necessary. The concept of law itself—particularly in its current expansive manifestation in the international arena—is already sufficiently broad and flexible to include market principles. The point is not only to make the functioning of these market givens visible, which they are to some degree in other fields, but to make them visible *as law* and as engaging in cognizably legal functionality. Lawyers have a range of analytical methods and questions for dealing with law—*lex* in Latin—that are entirely appropriate for approaching a kind of *lex clandestinus* or *lex furtivus*, but translate somewhat more awkwardly to the framework of ideology, non-law, or knowledge practices. In some ways, critical international legal scholars have shared with rational choice and constructivist scholars a willingness to accept the conventional conceptual boundaries of law, in that they seem to implicitly concur that the components of law and of a

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213. JOHNS, *supra* note 206, at 1.

legal order itself must be deliberately chosen.<sup>214</sup> Despite the embrace of immanent critique, there has been insufficient recognition of the critical potential immanent within the category of law itself.

In sum, multiple variants of international legal scholarship—by implicitly or explicitly assuming that international rules must result from deliberate choice—have tended to ignore the possibility that certain collective understandings may act as law without aspiring to be recognized as such. This disregard pushes the legal functioning of these market principles further from critical scrutiny, especially when compared to the substantial scholarly activity directed at other areas now included within (but traditionally excluded from) international law, including informal soft law guidelines, *lex mercatoria*, and normative concepts and principles. And to the extent that scholarship helps to shape the broader understanding and treatment of rules that we live under, the insufficient (or insufficiently direct) treatment of market principles in legal scholarship may help to entrench their quiet and under-examined power globally. This means that market principles have many of the benefits of law—as being politically constructed directives that command a significant degree of power and adherence—without the attendant scrutiny usually accorded to law. By contrast, I hope that identifying how market givens act as a type of law, albeit a hidden and sometimes problematic law, can help to put them squarely at the center of such examination.

#### CONCLUSION: THE SAILING SHIP OF INTERNATIONAL LEGAL EXPANSION

It may come as a surprise that, although I nest these arguments about market principles within expanded understandings of international law, I actually wish to remain agnostic on whether this conceptual expansion of law has been an entirely good thing. Almost three decades ago, Sally Engle Merry expressed concern that “calling all forms of ordering that are not state law by the term law confounds the analysis.”<sup>215</sup> And scholars such as Jean d’Aspremont note that lawyerly scrutiny can be employed without expanding the idea of international law itself. Indeed, it might be a *problem* that legal analysts seem unwilling or unable to direct their examination beyond legal boundaries:

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214. This may result, in part, from an understanding of international law as grounded in “what international lawyers say and do.” *Id.* at 12; see sources and quotations provided *id.* at 12 n.24. Although I agree with this flexible practice-based framework to an extent, this provides insufficient conceptual space for thinking through the ways in which market givens function in (and as) international law as well.

215. Sally Engle Merry, *Legal Pluralism*, 22 *LAW & SOC’Y REV.* 869, 878 (1988).

[I]nternational legal scholars are uneasy when grappling with a given question without including it in the realm of international law. It is as if international legal scholars cannot zero-in on non-legal phenomena without feeling a need to label them as law. . . . One continues to wonder, however, why international legal scholars cannot study the phenomenon without portraying it as a legal phenomenon.<sup>216</sup>

In some ways, this concern resonates with the encouragement from critical scholars and also law and society scholars to look beyond the traditional boundaries of law itself, though d'Aspremont has a different theoretical perspective. While this is certainly fair, and indeed I do not disagree that lawyers should feel free to look beyond the boundaries of law, I also worry about the degree to which these exhortations are likely to be successful. Certainly international legal scholars *can* study phenomena without portraying them as legal. But *will* they to the same extent? And will they study and criticize them in similar types of ways? Part of my goal here is to lower the conceptual and analytical threshold for engagement, and to encourage the more widespread application of a lawyerly analytical toolkit to market principles.

Furthermore, I wonder if this concern tends to over-essentialize the category or concept of law itself. A narrower understanding of the concept of international law may be useful for certain political projects—including, perhaps, the important project of protecting state sovereignty. So I leave others to debate whether it is *best*, as a normative matter, to insist that the classic, state consent-based sources of law should be defended against encroachment, particularly in courts and other decisionmaking bodies. But this is ultimately an argument about political and doctrinal strategy, and does not necessarily undermine the idea that the conceptual family of law itself is broad enough to include market principles.

Of course, it is possible that by participating in this expansion—even if only at the level of theory—this Article entrenches it further. While this is a fair concern, my own perspective is that the ship of expanding international law has already sailed. If that is the case, the focus should be on a careful consideration of the distinctions between more or less acceptable law, and, relatedly, on which law should be challenged and remade. My suspicion is that many market principles, subjected to this analysis, will be found lacking not only in inevitability but also in those factors that might lead actors to consider a legal rule to be legitimate. To the extent that a normative hierarchy is thought to exist—at least in the

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216. JEAN D'ASPREMONT, EPISTEMIC FORCES IN INTERNATIONAL LAW: FOUNDATIONAL DOCTRINES AND TECHNIQUES OF INTERNATIONAL LEGAL ARGUMENTATION 57–58 (2015); see also Jean d'Aspremont, *From a Pluralization of International Norm-Making Processes to a Pluralization of the Concept of International Law*, in *INFORMAL INTERNATIONAL LAWMAKING*, *supra* note 134, at 199.

arguments and atmospherics that can impact reputational judgments and so shape a state's policy space—market principles are unlikely to stand at the apex. But if they stand *outside* of these questions altogether, they may well come out ahead without much thought or scrutiny. Writing in the context of legal pluralism, and with concern for protecting independent normative orders, Ralf Michaels has noted that, “[t]he power of non-state norms may lie in their otherness, in their character as non-law. This power is easily reduced, these non-state orders are domesticated, once we reconceptualize these norms as law.”<sup>217</sup> While the application and motivation is different, this basic insight is relevant: Reframing a phenomenon as “law” can have a domesticating and demystifying effect. To the extent that international legal scholarship has already accepted the step of conceptual expansion, we lose considerable power—relative to market principles themselves—by *not* including them within the conceptual family of global law.

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217. Ralf Michaels, *The Re-state-ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, 51 WAYNE L. REV. 1209, 1257 (2005).

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