FEMINISM CONFRONTS HOMO ECONOMICUS
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FEMINISM CONFRONTS HOMO ECONOMICUS

Gender, Law, and Society

EDITED BY
Martha Albertson Fineman
and Terence Dougherty
Deconstructing the State-Market Divide

The Rhetoric of Regulation from Workers’ Compensation to the World Trade Organization

Martha T. McCluskey

The opposition between state and market plays a central role in contemporary analysis of law and policy.¹ In popular discourse, law reforms are frequently divided into market solutions grounded in economic goals and nonmarket solutions grounded in social or moral goals. Because feminist policy proposals often seek government regulation of market practices harmful to women, feminist reforms typically appear on the nonmarket side of the divide.

Neoclassical economic theory—promoted in Law and Economics scholarship—criticizes paternalistic efforts to use governmental “rights” rather than the market to allocate resources. In this theory, ideal free markets induce individual decision makers to rationally weigh the costs against the benefits of obtaining particular goods or services, thereby encouraging decisions that produce a net societal gain. The conventional economic doctrine warns that if government grants people “rights” to certain resources independent of costs—whether safety, environmental protection, health care, or family-friendly workplaces—then, in the long run, such rights may produce a net loss to society, even hurting those who are supposed to benefit from the rights.

In the standard economic analysis, any attempt to promote social values for their own sake—such as equality, democracy, social welfare, or human rights—simply masks the economic costs of the decisions being made. The basic premise of neoclassical economics is that scarce resources make cost-benefit trade-offs inevitable. Because the economic “pie” is limited, each time a government policy diverts resources toward one well-intentioned goal, it takes resources away from something else. In this view, rather than ignoring these cost-benefit trade-offs in the guise of “rights,” governments should face the tough choices between competing resource demands by subjecting those demands to the rigors of the market (or at least by mimicking the market as much as possible through cost-benefit decision making in government policies). The moral of the standard economic story is that government should give up the pretense of transcending the economic goals of the market and should stick instead to the more humble aim of supporting markets.

Rather than defending government intervention in the market, this essay aims to challenge the meta-narrative that frames the debate between state and
market. My argument is that the market and the state cannot be impartially distinguished.

The market is not prior to or independent from the state but depends on and is shaped by the state. This argument has a long and articulate history in legal realist scholarship of the early twentieth century and critical legal scholarship of the late twentieth century—as well as in non-neoclassical economic scholarship and in left-wing grassroots political activism. Although most law and policy experts typically claim to accept the well-developed premise that markets are constituted by and interdependent on politics and law, they typically proceed to deny or diminish this premise by nonetheless framing their analysis as a division between government regulation and market freedom. For this reason, this essay offers yet another illustration of how to untangle the rhetoric and politics of the state–market divide.

Feminist theory has drawn on deconstructive methods from literary theory to explore how apparently “primal” dualisms—such as the dichotomy between male and female—are neither neutral nor entirely natural but instead are socially constructed to serve political ends. Descriptions of such oppositional pairs (such as male versus female) tend to incorporate a hierarchical valuation of one side of the pair over the other (such as male over female). Feminist critiques have shown that simply reversing the hierarchical value—choosing to prioritize traditionally “female” characteristics over those traditionally labeled “male,” for example—risks reinforcing the disadvantageous differences attributed to the subordinate half of the pair. Furthermore, dualisms tend to create a misleading emphasis on the difference between the two “opposites,” repressing the many differences within each side of the dualism—differences among women, for example, can be as important as differences between men and women.

Feminist legal scholars have taken this critical methodology further to challenge other dualisms that are gendered in conception or effect, or both, including the opposition between state and market. I aim to build on this work by analyzing how the opposition between state and market skews contemporary debates over questions of government regulation. To explore the rhetorical use of this state–market dualism, I draw on Jacques Derrida’s deconstruction of a dualistic structure that serves as an organizing ground in Western thought—the opposition between original and supplement. Derrida analyzes the contradictions of this supplement–original dichotomy in the context of literary theory: literature traditionally has been theorized as the artificial supplement to natural reality (a dichotomy between representation and presence). The original–supplement dualism has often been used to promote gender hierarchy; for example, the category male serves as the original (Adam), the category female as the supplement (Eve). This traditional story constructed women as incomplete men and holds women responsible for both fulfilling and corrupting masculinity. A similar analysis can reveal the contradictions and normative
assumptions inherent in the dichotomy between government regulation and the free market—a dichotomy that is not natural, objective, or internally consistent.

In this essay, I focus on two examples of contemporary political controversies involving government regulation of “the market” to show the problems of the conventional economic analysis. First, I explore the crisis of the high cost of workers’ compensation insurance, which provoked controversy and reform in many states in the early to mid-1990s. Second, I examine the crisis of resistance to the 1999 World Trade Organization (WTO) ministerial meeting in Seattle. Mainstream media and scholarship typically portrayed both of these crises as conflicts over the extent to which government policy should attempt to intervene in markets for social purposes. With both of these crises, ideas from neoclassical economic theory shaped the popular discourse and formed the underpinnings of the mainstream media and political views of the problem. Because my premise is that economic ideas are a form of political strategy as much as they are a form of scientific inquiry, and because my goal is to challenge the rhetorical use of these ideas in policymaking, I focus on popular as well as scholarly versions of neoclassical economics in both debates.

Although these two examples of economic rhetoric about the state and market are not typically analyzed as feminist concerns, and although both controversies did not focus primarily on gender, both nonetheless have important implications for feminism. In both debates, demands for more protection of workers from “market” conditions were often cast in gendered terms. Critics of expanded workers’ compensation benefits often blamed injuries associated disproportionately with women and with traditionally female jobs—such as carpal tunnel syndrome and psychological stress—for producing excessive costs that disrupted insurance markets. In the debate over global trade policy, commentators have explained freedom from labor standards in global trade as a means of increasing jobs and opportunities especially for third-world women, who are disproportionately sought as cheap labor for multinational corporations. And with both crises, the prevailing message about the triumph of market over state serves particularly to undermine feminist efforts to reshape the “market” to better meet the needs of most women.

Workers’ Compensation

Workers’ compensation, the oldest social insurance program in the United States, was in crisis in many states in the 1980s and early 1990s because of high costs to employers and because of collapsing markets for private workers’ compensation insurance. Scholarship, political debate, and popular media all tended to narrate the recent workers’ compensation crisis as a classic example of the problems of state intervention in the market. The crisis was
typically presented as an example of the misguided tendency of judges and legislators to try to redistribute resources as a matter of “right” to a particular group—injured workers—without sufficient regard for the economic costs of those goals.

In the early years of the twentieth century, most U.S. states established mandatory workers’ compensation insurance programs covering the majority of employees. Workers’ compensation was a replacement for the tort system, which was widely believed to be unpredictable, costly, and time-consuming for both workers and employers. Workers’ compensation formed a legendary bargain in which workers were said to give up their right to sue for full tort damages in exchange for the right to compensation from their employers for work-related injuries regardless of fault.

In the systems established in most states, employers generally must finance workers’ compensation benefits by purchasing insurance from private insurance companies. Traditionally, employers paid noncompetitive, mandatory insurance rates set in concert by an insurance industry association subject to prior approval by a state regulatory agency.10

The Standard Story of the Workers’ Compensation Crisis

In the standard narrative, the current workers’ compensation insurance cost crisis began when state legislatures expanded benefits for work-related injuries and illnesses in the 1970s and 1980s out of concern that the majority of injured workers were left below the poverty level by inadequate benefits. Most agreed that although some expansion of benefits to cover the costs of workers’ compensation was necessary to fulfill the efficient bargain, at some point this trend toward benefit expansion went too far, upsetting the balance between employers and employees that the original bargain represented.

In particular, the blame for the workers’ compensation crisis fell on workers seeking compensation for injuries that do not conform to the paradigm of the classic industrial machine accident. These injuries, such as occupational diseases, repetitive motion injuries, psychological stress claims, and back strains, tended to be viewed as outside the proper scope of the workers’ compensation bargain—and many of these injuries also tended (in popular opinion if not in fact) to be associated disproportionately with women workers.11

As benefits to injured workers increased, businesses protested the rising workers compensation insurance premium rates charged to cover the expansion of benefits paid to their workers. Nonetheless, as the story goes, judges sympathetic to the plight of individual injured workers and legislators beholden to labor interests stymied efforts to restrain rising benefit costs. Caught between the conflicting demands of business and labor, state governments took advantage of the deep pockets of the insurance industry by holding down regulated insurance premium rates despite rising benefit costs.12
The traditional story explains, however, that government regulators cannot escape the elemental laws of economic supply and demand. Private insurance companies responded to what they claimed were inadequate insurance rates by withdrawing from the workers’ compensation market in a number of states.¹³ The story explains that the crisis of an impending collapse of insurance markets finally forced recalcitrant political leaders to face up to the hard choice between businesses’ interest in low insurance rates and workers’ interest in high benefits. State legislatures finally contained costs by enacting major new restrictions on benefits for injured workers. Even though workers and their allies had to accept sacrifices, those costs were necessary to reduce employers’ and insurers’ costs. By the late 1990s, average employers’ costs nationwide had fallen, insurers had record-breaking profits, and insurance markets had returned to normal.

**Rate Regulation as Market Supplement**

This story—and the popularized version of the economic theory that informs it—structures the relationship between insurance rate regulation and the market as one of “supplement” to “original.” Derrida’s exploration of the contradictions of that supplement–original theme in theories of language offers insights into the contradictions underlying the dominant theory of the relationship between government regulation and the market. Derrida explains: “the supplement is exterior, outside of the positivity to which it is super-added, alien to that which, in order to be replaced by it, must be other than it.”¹⁴ In the story of the workers’ compensation crisis, government rate regulation intervenes in the market process of supply and demand as something outside of and defined against that market.

The traditional workers’ compensation story not only distinguishes regulation from the market but also establishes that distinction as hierarchical. Market prices are natural; regulated rates are imitation. In the predominant theory, the market price is the equilibrium that naturally emerges from the interaction of market supply and demand, as a neutral reflection of individuals’ voluntary cost–benefit decisions.

Nonetheless, economists and legal scholars acknowledge that in the real world, the market is inevitably imperfect. Economic analysis of law often focuses on the issue of whether market barriers block individuals from making the free and rational choices that would exist in an ideal market. In the predominant theory, government regulation in some circumstances may properly intervene to remove those obstacles to free competition in order to restore proper market functioning. Electric utilities provide the classic example of government rate regulation. Before the recent period of deregulation, the conventional wisdom was that in a free market, geographically based utility monopolies will develop to avoid duplicative capital-intensive electric
transmission and distribution systems. According to this view, government regulation of utility rates appropriately protected consumers from the rent seeking that would result from these natural monopoly conditions.

Regulatory intervention in insurance markets aims to protect consumers not from a lack of market competition but from its excesses. Unlike utilities, insurance tends to have relatively low entry costs and low fixed costs. In an ideal free market, vigorous competition naturally produces business failures as the market moves toward equilibrium: firms that do not provide the best product at lowest cost lose customers, and the best firms take over the market. In an insurance market, however, the very product being sold is long-term protection from economic risk—a promise to pay for the customer's losses at some point in the future. As a result, the insolvencies that normally would perfect the market instead interfere with its functioning. Solvency protection must be imposed from the outside on insurance markets "because without it the business does not work at all, does not insures." Rate regulation of workers' compensation insurance aims to control predatory pricing and to make up for the difficulties individual customers would have in monitoring insurers' long-term financial strength. Furthermore, because workers' compensation insurance coverage is mandatory for most employers, the traditional view was that rate regulation in workers' compensation substitutes for the natural changes in demand that would normally check fluctuations in price in a completely voluntary market.

Although conventional economic theory acknowledges that regulation may appropriately supplement the market where it falls short, it warns that regulation always risks supplanting the market it is supposed to support. In this view, regulation succeeds to the extent it minimizes its role. The idea of the supplement is that the less you use the artificial addition, the more you get the real thing. In traditional doctrine, rate regulation works when it simulates the pricing that would result from a voluntary, competitive market.

**Regulation as Market Distortion**

Workers' compensation was in crisis in the early 1990s because of "regulation gone amok," according to a *New York Times* op-ed essay by M. R. "Hank" Greenberg, chief executive of American International Group, Inc. (AIG), one of the largest workers' compensation insurance companies. As the *Times* summarizes Greenberg's comments, the problem is that "the rates insurers can charge no longer reflect reality." Greenberg explains that "[i]n a market economy, the price of insurance, like that of any other product or service, must reflect the true cost of providing it." This insurance executive's public relations effort draws on and promotes the standard neoclassical economic story of regulation. Insurance economists Patricia Danzon and Scott Harrington argue that the crisis was a problem of "rate
suppression,” defined as regulatory constraints that forced insurers to charge prices different from “expected costs,” thereby “distorting” behavior of insurers, employers, and employees. In addition, they warn that regulatory constraints on “natural” decreases in insurance supply further distorted costs. Similarly, insurance expert Orin Kramer and law professor Richard Briffault explain the workers’ compensation crisis as a problem of regulators’ unwillingness to set rates “reflecting” rising costs. They contrast “artificially” low regulated prices with “natural competitive forces” and explain that such regulatory “intervention” produces an “unhealthy” insurance market.

Greenberg’s commentary graphically states what the scholarly accounts suggest more subtly: reality and “true costs” lie in an ideal market preceding and separate from government regulation. Regulation causes problems when it intervenes in and distorts the ideal market it is supposed to mirror. Regulated rates should faithfully imitate—not “suppress”—the prices of the prototypical competitive market.

Derrida explains, however, that the logic of the supplement is inherently contradictory: by definition, it compensates for a lack in the original—that “which ought to lack nothing at all.” The supplement brings what is closer to what should be, partially replacing the natural with the imaginary. Yet the supplement only works to the extent that it remains true to the original it must correct. Economic theory decrees that government regulation is “real” (not artificial or distorted) to the extent that it mimics an ideal market acknowledged to lack real existence. The delicate task of regulation is therefore to perfect the real by imitating the ideal without detracting from either.

“Amok” regulation, in the conventional economic view expressed by Greenberg’s op-ed, happens when “political interests” pressure regulators to depart from a faithful representation of competitive market pricing in order to gain at the expense of others. Greenberg complains that faced with rising benefit costs, government regulators have replaced those market values with political values, such as states’ interest in maintaining an attractive business climate: “with states struggling to attract and retain industry, workers’ compensation rates have been artificially suppressed by state governments, even in the face of these enormous cost increases.”

Because rate regulation necessarily must make visible the workings of market pricing in an attempt to faithfully duplicate it, rate regulation inevitably opens up the market to corruption from outside that market. As Derrida explains, the economy of the supplement necessarily frustrates because it exposes at the same time that it protects. “The dangerous supplement . . . is properly seductive; it leads desire away from the good path, makes it err far from natural ways, guides it toward its loss or fall and therefore it is a sort of lapse or scandal.”

If government can only imperfectly follow the market, even governmental attempts to remove market barriers are likely to end up diverting resources
from their market ends. State rate-setting proceedings simulate the market price of workers’ compensation through a process in which interested parties employ numerous lawyers, actuaries, and economists to discover the “true costs” of a particular system of workers’ compensation benefits. Danzon and Harrington warn that the uncertainty involved in rate regulation “creates an opportunity for politically powerful groups to intervene” to obtain prices that depart from costs. In the foreword to their book on workers’ compensation rate controls, the president of the American Enterprise Institute writes, “the regulation of workers’ compensation insurance in many states is a perfect example of good intentions leading to bad results” because the attempt to save small businesses from escalating premiums leads to higher costs overall. Similarly, Kramer and Briffault warn that the “seductive short-term appeal” of rate suppression leads to “devastating long-term consequences.” In the standard regulatory story, the risk of such government failures means that the project of correcting the imperfect real market tends to be less reliable and scientifically rigorous than the project of imagining that an imperfect real market will nonetheless promote the correct ideal.

In his op-ed essay, Greenberg concludes that regulatory failures turned the workers’ compensation system into “a bureaucracy-bloated political football.” Greenberg traces the governmental corruption of the insurance market to an underlying adulteration of the workers’ compensation bargain. In Greenberg’s view, workers (encouraged by profit-seeking doctors and lawyers) violated the original no-fault, exclusive-remedy insurance plan with what he calls “fraud, pure and simple.” He complains that workers filed claims for “real or imagined” injuries, such as psychological stress, “that are unrelated to the workplace,” and that workers and their agents were “increasingly contesting payments administered through the system” through litigation aimed at boosting their awards. Similarly, Kramer and Briffault argue that “the workers’ compensation social compact has been changed to include new terms” without regard to the costs of these terms. They warn of “friction costs” and “over-utilization” because expanded benefits have reached more uncertain illnesses and injuries and have invited participation by attorneys and medical experts. Kramer and Briffault summarize the lesson of the workers’ compensation crisis as the need to accept limits on benefits, emphasizing the standard free market message that resource scarcity requires tough trade-offs.

Echoing and amplifying this message, Greenberg admonishes readers that we can only renounce this “uneconomic behavior” and defy the “special interests” who profit from it through “political courage and a firm belief in our free-market system.” Greenberg concludes his essay: “America has been preaching to the world about the values of a market economy. Let us lead by the example we set at home.”
Greenberg's plea reveals a conundrum in the economic reasoning that grounds the traditional workers' compensation story. The key to solving the crisis was to purge the system of "uneconomic behavior" and politicized "special interests," according to Greenberg and many scholarly commentators. Yet how do they distinguish these "uneconomic" costs that corrupt the market from the "true costs" that preserve the market?

Derrida explains that the original is at once similar to and different from its supplement: the identity of the first is constituted through its reflection in the other to which it appears opposed. Attempts to purify the original of contamination from the artificial are bound to fail. As Derrida notes, "nothing seems more natural than the destruction of nature." Similarly, attempts to expel politics from the market lead straight from the market into politics.

Greenberg, like Harrington and Danzon, presumes that insurers' demands for more profit reflect natural forces of market competition, but that workers' demands for more benefits are anticompetitive market subversions. In the prevailing economic analysis, the answer to the workers' compensation crisis was to pay (not control) the high costs that insurers sought to recover, but to control (not pay) the high costs that workers (and their lawyers and doctors) sought to recover. To make that crucial distinction, however, commentators must depart from the market values they urge us to reaffirm.

Free-market economic theory presumes that the good society follows from a market in which each individual is free to pursue her rational self-interest, according to her own best judgment. This theory generally claims to be descriptive as well as normative. If the free market is the norm and deviations from the market the exception, then individuals must normally tend to pursue their rational self-interest.

This basic tautology (what exists is in our interest because our interests determine what exists) means that traditional economic theory might have little to say if it did not also postulate that the market has borders. Problems come from outside the bounds of the free market, when actors make inefficient, immoral, irrational, or (as Greenberg puts it) "uneconomic" choices. A central point of free market theory thus becomes distinguishing between the market and its exterior.

Yet the market cannot provide a source of value for measuring its own limits. We know something is outside the market if it is an obstacle to competitive pricing, but we only know something is an obstacle to competitive pricing because it is outside the market. So, in this market theory, we must refer to some source of value beyond the market to weed out the nonmarket behavior so that we can determine the proper scope of the market—even though such nonmarket decisions are the source of the problems we seek to solve.
For example, in the traditional story of the workers' compensation crisis, when the private insurance industry withdrew from state insurance markets in the 1980s and early 1990s, the problem of decreased insurance supply was evidence of the economic soundness of the insurance industry's demands for higher costs. Greenberg explains that insurance companies have withdrawn from the market because of "woefully inadequate rates"; only when insurance companies are paid rates that reflect "true costs" can the supply be sufficient to meet demand. That is, we know that insurance companies were correcting market failures, not corrupting the market with uneconomic special interests, when they demanded higher rates from regulators because insurance companies withdrew from the market. As Harrington and Danzon explain, insurers' response to low rates was a "natural" part of competitive market supply and demand. By first locating the insurance industry on the inside of the market boundary, commentators can then (not surprisingly) explain insurance companies' actions as rational competitive market behavior.

In contrast, the standard story of the crisis places workers' increased litigation of claims denials and workers' demand for expanded benefits outside the market boundary. Here the problem—increased benefit demand and increased supply of legal and medical experts—proves that workers' actions are barriers that disrupt competitive pricing. Although both insurance companies and workers are contesting "prices" offered them (either insurance premium rates or payments for injuries), one is explained as an economic pursuit of "true costs" that affirms the free market and the other is explained as "uneconomic" waste and abuse that undermines the free market. Similarly, the standard economic analysis of the crisis explained employers' pressure for lower insurance rates as a problem of "political" intervention in the market that regulators should resist, not a "natural" part of the market that regulators and insurers should accommodate. In the workers' compensation crisis, insurance companies, employers, and workers all made demands of government lawmakers and regulators in pursuit of their ostensible self-interest. It is only the rhetorical location in the story that makes some interests "uneconomic" "special interests" and other interests natural market forces that promote the public interest in overall economic well-being.

Those with faith in the market might still protest that workers' and employers' demands differ from insurers' demands for higher rates because workers' and employers' demands are likely to be corrupted by "moral hazard." Moral hazard occurs when protection against loss ("insurance") produces incentives that increase losses beyond the level that would otherwise exist. If it is difficult to distinguish "real" costs from these "extra" costs, then the "insured" can take advantage of the uncertainty to gain more protection—and to produce more losses—than originally contemplated. For example, the standard economic analysis of workers' compensation explains that expanded workers' compensation protections drove up overall costs by allowing workers (and
their doctors and lawyers) to bring claims for losses unrelated to work, or unrelated to real injuries, simply to "profit from the system," as Greenberg complained.44

In the standard economic analysis, state regulators similarly engaged in moral hazard when they took advantage of uncertainties in the rate-setting process to make insurers cover not just previously existing costs but also the costs of expansive benefits, without corresponding rate increases. In this view, the protection of regulatory rate controls allowed states to provide more generous and costly benefits than they would have otherwise because they could force insurers, rather than employers, to cover the costs.

However, this "moral hazard" explanation for distinguishing "uneconomic" or market-disrupting behavior from market-promoting self-interest maximizing again depends on partisan rhetoric rather than on neutral economic principle or empirical evidence. The term moral hazard describes the problem that protection, designed to cover a given set of "real" costs, ends up distorting those costs—magnifying the original problem that was supposed to be alleviated. But how do we know the increased claims filed by workers in response to increased benefit protection constitute "excessive" rather than "real" costs? Or how do we know that decreased profits suffered by insurers in response to regulatory controls reflect "excessive" rather than "real" costs of insurer risk-taking or inefficient business practices?

Workers may stay out of work longer when they receive higher disability payments: for example, they may file more claims for psychological stress when benefit laws change to more readily compensate such injuries. But these increased claims might more accurately reflect "real" injury costs if previous benefit restrictions caused workers to underreport injuries. Whether or not changes in claims costs exaggerate or correct injury costs depends on the perspective from which the previous claims levels are viewed. Similarly, when regulators institute rate controls that make insurers absorb a greater share of insurance risk, they may be correcting excessive insurer profits and encouraging insurer accountability rather than forcing excessive insurer losses. The concept of the "original," as Derrida explains, is an image inherently subject to distortion—a representation whose apparent immediacy is derived from its position in relation to its supplement. "One can no longer see disease in substitution when one sees that the substitute is substituted for a substitute."45

Nonetheless, in an attempt to separate the distorting effects of moral hazard from restoring accurate pricing, economic analysis distinguishes some behavior as strategic market manipulation by responsible agents and other behavior as passive reaction to market forces by innocent victims. In the standard story of the workers' compensation crisis, insurance companies' rates simply and naturally reflect the costs of workers' benefits, unless regulators intervene by rejecting insurers' rate requests. This story assumes that rising benefit costs necessarily and self-evidently produce rising insurance premiums in a
free market. Similarly, this story explains that insurers withdraw from the market when rate controls squeeze their profits because of natural forces of supply and demand.

In contrast, the standard story portrays workers' increased claims filing in response to expanded benefits as an active attempt to reap opportunistic gain. In this story, workers' cost-increasing behavior is suspect because they appear to have the power (with the help of their doctors and lawyers) to take advantage of insurers' and employers' lack of knowledge about actual injuries to exaggerate claims costs. Regulators' profit-squeezing behavior is suspect because they appear to have the power to manipulate the rate-setting process to underestimate insurance costs. In contrast, insurers' cost-increasing behavior—seeking increased insurance rates—is innocent because their increasing costs appear to be a natural and unmediated result of market facts beyond insurers' control.

Nonetheless, the insurers' passive role is determined by their place in the story rather than their power in the market. The traditional analysis reserves agency for the state and injured workers (along with their doctors and lawyers). The range of action afforded multinational insurance corporations such as Greenberg's, with its multibillion-dollar expertise, goes no further than the process of paying out money upon demand to the state and to injured workers. In a New York Times article on Maine's workers' compensation crisis, another insurance executive explained that "[w]e are the messengers who deliver the bad news about what is going on in society, and oftentimes we get shot." Insurance executive Greenberg begins his op-ed essay by describing his company's alleged multimillion-dollar losses in Maine as the "worst case" example of government rate suppression. He warns of workers' strategic control over their injury claims and government's strategic control of rate regulation. Yet the most rational market actor in the story—the private insurance industry—appears to make no choices about how it does business.

By bringing insurers out of the background of the narrative, we can see that the insurance costs that appear neutral and natural are instead colored by insurers' actions. For example, Maine state regulators repeatedly found that serious mismanagement by a subsidiary of Greenberg's company played a significant role in producing that state's record workers' compensation costs. In 1988, this company negotiated a deal in which it received a generous no-risk, up-front fee for providing insurance services to a large portion of the state's "assigned risk pool" businesses, with no monitoring of the company's performance and no liability for the pool's losses. In 1992, many business policyholders testified that the company failed to maintain accurate records of claims paid, failed to provide any loss control services (such as safety training), and was grossly incompetent in processing claims.

Similarly, it is only a partial picture of the market during the workers' compensation crisis that makes the insurance industry's decrease in underwriting
appear to be the natural result of falling profits. By shifting the point of view to include the dramatic growth of a new self-insurance and risk management industry during that time, we can see commercial insurers' declining market supply as the result not of external market forces but of insurers' failed internal business strategies. These new "alternative" insurance providers responded to the rising benefit costs of the period not by raising rates but in part by using innovative loss prevention techniques to control benefit costs. For example, many businesses facing high insurance rates from traditional insurance companies found that by unbundling insurance services such as claims management and safety information and subcontracting these to noninsurance company experts, they could save both on up-front insurance costs and on long-term injury costs. In Maine, while insurance companies were losing money on their workers' compensation policies, many businesses joining together in group self-insurance pools developed large surpluses, despite charging comparable "insurance premium" rates to their members. This revised picture suggests that commercial insurers reduced their supply not because regulators' "uneconomic" behavior artificially suppressed rates but because insurers' "uneconomic" behavior artificially inflated rates. In this view insurers, not workers, employers, or regulators, may be the ones most responsible for (and most profiting from) using rate regulation to avoid the tough choices imposed by market realities. Indeed, a number of studies have found that deregulation of workers' compensation insurance rates leads to lower, not higher, rates.51

This altered frame of reference reveals that insurance costs are not necessarily the original market reality that government regulators must reflect. Instead, insurance costs can be viewed as a supplement that should duplicate the original state that government regulators and benefit claimants' reveal. In workers' compensation insurance regulation, rates must be set based on the projected costs of claims for medical treatment and lost wages that will actually be paid over a period that can last for decades. Those costs are not fixed and inevitable based on a given benefit system; in fact they are produced in part by insurers' actions such as claims management and promotion of safety and reemployment programs. By setting the standards and incentives that shape insurers' actions, rate making acts as a substitute that precedes and enacts the "real costs" it must represent. When insurers complain that rates do not reflect reality, they simply mean that the reality the rates reflect is not a reality insurers like.

The World Trade Organization

Mainstream media and politicians typically have explained the WTO crisis, like the workers' compensation insurance crisis, as a problem of keeping the
state in its proper place in relation to the market. In the prevailing response to the Seattle protests against the WTO, society benefits more in the long run from "free trade" than from "fair trade." This view invokes conventional economic principles to explain that tough-minded adherence to the market should override soft-hearted attempts to put social concerns above the market.

The WTO describes itself as providing the "legal ground-rules for international commerce." The World Trade Organization ... is the only international organization dealing with the global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible. In neoclassical economic theory, global competition from free movement of commerce across borders maximizes aggregate resources.

Standard Story of the WTO’s Seattle Crisis

The standard story of the Seattle crisis draws on neoclassical economic theory to explain that expanded global competition necessarily weeds out the non-competitive. "The whole point of engaging in trade is to shift resources—capital and labor—to their most productive uses, a process that inevitably causes pain to those required to shift." Liberalized global markets therefore impose costs on individual firms, workers, and communities whose assets cannot satisfy the increased competitive pressure for lower-cost or higher-quality products. Even though this market discipline benefits society overall in the long run, those who lose out are likely to seek political protection. In particular, this story explains that highly paid manufacturing workers in the United States have attempted to impose trade barriers to reduce competition from cheaper foreign labor. In this view, the protests in Seattle were driven by resistance to the short-term costs of global competition—as well by as the sentimental or misguided fear of progress by "flat-earth advocates." The conventional view concedes that protests nonetheless boosted popular support for the ideas that trade agreements should enforce labor and environmental rights and that some decisions about health and welfare should be made not by the market but by the state.

In the standard story, the political pressure from the protests presents government officials and politicians with a hard choice. If they give in to the demands of those who lose out from liberalized global trade, they are likely to sacrifice the societal benefits of that trade—and even to impose more costs in the long run on those who are struggling from the new global competition. The standard story explains that well-intentioned restrictions on liberalized trade will be undermined by the reality of global market forces.

For example, if the government gives in to demands for protectionism by artificially supporting U.S. jobs or high wages, consumers will pay higher prices and will risk lower living standards. Other nations are likely to retaliate by restricting access to their markets, thereby reducing U.S. export jobs. In
addition, if protectionism maintains U.S. jobs at the expense of foreign jobs, poor workers in developing nations may become even worse off and even more likely to accept lower wages and worse working conditions—thereby posing an even greater long-run competitive threat to better-off workers in richer nations. Without the robust growth fostered by free trade, both developing and developed nations will have a harder time establishing or maintaining high labor and environmental standards.

The moral of the standard story is that politicians should once again reject shortsighted efforts to transcend the market for social goals. The unfortunate costs to the losers must be accepted as a necessary part of the price of long-run prosperity that will ensure more winners who can share in greater gains. At most, governments should help losers in the global market make the transition to more competitive activities, or cushion their losses, without disrupting or impeding that competition.

The WTO as Free Market Supplement

In neoclassical economic ideology, trade regulation (like insurance regulation) should mimic the ideal free market. This view presents free trade as natural and government involvement in trade as artificial. A Heritage Foundation report defending the WTO explains that, in the words of nineteenth-century economist Alfred Marshall, “free trade is not a device, but the absence of any device.” This report explains that the strength of free trade is its “neutrality,” “simplicity and naturalness,” in contrast to government “manipulation” of trade.

Following the original-supplement paradigm, this distinction between natural free trade and imitation trade regulation is hierarchical and normative: free trade is a beneficial and generative force; governmental trade regulation is a potentially dangerous, stifling barrier. A Boston Globe report on the Seattle protests explained that the mainstream view holds that “[u]nfettered trade will naturally maximize wealth by focusing each country’s economy on what it does best.”

In the predominant economic analysis, the proper role for trade regulation, like rate regulation in the insurance context, is to support but not supplant the natural—and naturally superior—market. Trade agreements should simulate pricing that would result from the ideal free market. But once again, this idea of regulation incorporates an inherent tension: it must compensate for a lack in the original while remaining true to that original, and it must add to the original without challenging the original market as complete in itself. Trade regulation must act as an artificial device that is as natural as possible.

In the conventional economic story, government regulation of trade in general, and the WTO in particular, corrects a “market failure”—a condition in which unregulated markets fail to produce the optimal results of an ideal free
market. Without multilateral trade rules, countries might fall victim to "protectionist urges." In more technical terms, without a regulatory body such as the WTO, countries may be caught in what economists call a "prisoner's dilemma," in which decisions that maximize self-interest on an individual basis end up, when taken in the aggregate, producing a result harmful to those individuals' interest. It may sometimes be in the interest of a nation acting individually to restrict trade in favor of national products. But if other nations similarly restrict trade, then all will be worse off than they would be under an unrestricted trade regime.

In theory, the WTO corrects this market failure by facilitating cooperation between countries so that all act in their aggregate best interests by pursuing free trade policies. With its establishment in 1995, the WTO added an enforcement mechanism to previous multilateral agreements of the General Agreement on Tariffs and Trade (GATT) and strengthened international cooperation toward the goal of eliminating trade barriers. New York Times columnist and author Thomas L. Friedman explains that "[t]he more countries trade with one another, the more they need an institution to set the basic rules of trade, and that is all the W.T.O. does."

In the prevailing story, then, the WTO governs trade by enhancing rather than restraining natural market forces. Friedman asserts that "when you don't have walls you need more rules." The Economist magazine distinguishes "governments," which it says are driven by political pressure to restrictively regulate trade, from the WTO, which it calls a trade "deregulator." WTO director general Mike Moore asserted that "we are not a world government" but simply a forum for governments to negotiate "global rules to match the acceleration of globalization" and a system for providing a "transparent and predictable framework for business." Moore went on to explain: "We do not lay down the law. We uphold the law... the alternative is the law of the jungle."

The WTO as Market Distortion

Like other attempts to supplement the market with government regulation, the trade policies of the WTO risk distorting rather than reflecting the market. By establishing rules for global market competition, the WTO exposes the global market to political scrutiny and debate. When protesters disrupted the Seattle meeting, an Economist magazine editorial worried that, as a "man-made device" subject to political manipulation, the WTO could become an "apparatus" of government regulation rather than a "de-regulator" that frees natural market forces from constraint. In response to the Seattle protests, an essay in the National Review observed that "trade negotiations naturally lead to anti-trade rhetoric" because such negotiations treat open markets as a concession to be exchanged for access to other nations' markets. As a result, the
process of establishing free trade rules may help construct trade liberalization as a costly loss of market advantage rather than as a beneficial return to an originally advantageous market.

In addition, the WTO's trade negotiation process risks disrupting its free trade ideals because it must enlist and enforce international cooperation in order to promote its goal of unfettered international competition. As the Economist magazine commented after the Seattle crisis, the WTO's purpose of fostering collective action by diffuse interests in support of trade liberalization has instead backfired by facilitating collective action by diverse groups opposed to such liberalization. In particular, the protests at the Seattle meeting put pressure on American politicians to divert the WTO's focus from "free trade" to "fair trade" by including labor, human rights, and environmental standards in trade agreements and WTO enforcement powers.

The prevailing economic wisdom presents such demands for "fair trade" as another example of regulation run amok. In that view, "fair trade" proposals deviate from the WTO's original economic purposes for misguided or pretextual social welfare purposes. In the mainstream analysis, WTO enforcement of labor and environmental standards would not only impede the WTO's primary goal of economic growth but also would fail to promote alternative social goals. That is because attempts to improve "free trade" with "fair trade" fail to recognize the fundamental strength and comprehensiveness of the market ideal (whatever the real market's weakness and imperfection). The Economist magazine chided "militant dunces parad[jing] their ignorance" in the Seattle protests, explaining that demands for "fair" trade fail to understand that "free trade" is fairest because it "makes people better off, especially the poorest people." Former U.S. trade representative Carla Hills testified to Congress that "open markets and rules-based trade and investment raises standards of living, and creates the wealth necessary to deal with important issues like labor and environment."

In the conventional view, therefore, trade regulation that incorporates fairness goals will upset rather than enhance the market. A Heritage Foundation report warns against "artificially increasing wages" through WTO enforcement of labor standards in developing countries. The report explains that cheap and docile labor constitutes developing nations' competitive advantage in the global economy. If the WTO raised labor standards—for example by enforcing trade restrictions on products made with child labor—that would undermine developing nations' natural ability to compete in the global economy. As a result, those nations would have less economic growth, fewer jobs, and more poverty.

Expressing this theme from a "liberal" perspective, the Brookings Institute's book Globophobia explains that "fair trade" rules do not make sense because they "nullify the gains from trade." The authors argue that trade is more beneficial the more labor and environmental standards differ among nations.
They explain that by allowing unrestricted specialization according to variations in national "tastes, conditions, or incomes . . . [t]he country with lenient pollution standards will get what it wants: more output from pollution-intensive industries," and countries with tougher pollution standards get a cleaner (internal) environment and cheaper imported goods. This argument assumes that "free trade" rules allow the market to reflect authentic internal differences; "fair trade" rules, in contrast, impose a contrived and coercive uniformity based on the external subjective preferences of richer nations.

Despite the asserted strength and superiority of the free market model as a model for trade regulation, the conventional analysis acknowledges that "[f]ree trade is a fragile concept." First, free trade is susceptible to challenge because it is so costly to many. Fair trade rules are a seductive alternative because they appear to ameliorate the harsh sacrifices required to produce the purported gains from liberalized trade. For example, a commentary by a scholar from the conservative Hudson Institute warned that "protectionism is a permanent temptation" because politicians want to get the benefits of free trade without paying the price of displacing noncompetitive workers and industries.

In the standard story, however, the temptation to soften the market out of concern for social welfare instead leads to corruption of the market's public benefits for private gain. Rather than accepting the strengthened market discipline of free trade, those at risk of losing out to new global competition use "fair trade" to seek personal protections at the expense of society as a whole. As a Wall Street Journal editorial explained, "[p]lainly the Seattle activists are being used as shock troops by special interests trying to protect their own privileges at the expense of workers in the rest of the world." The Hudson Institute's commentary characterized proponents of trade-based labor standards as part of an "old boys network" afraid of change or as "an amalgam of special interests from rich countries determined to keep the poor out." Similarly, economist and New York Times op-ed writer Paul Krugman argues that U.S. labor's complaints about substandard foreign wages are driven by selfish attempts to price needier foreign workers out of the job market for the benefit of richer Americans. A Wall Street Journal editorial complained that politicians have been tricked by "fair trade" rhetoric into "allow[ing] trade to become hostage to special interests. . . . In a more sensible world, the Seattle fiasco would be understood as a last-ditch ploy by washed-up protectionists to save their own endangered skin."

The WTO's free trade principles are fragile not just because of the power of external special interests resisting sacrifices needed for the greater good, but also because of the uncertainty inherent in the WTO's mission of promoting the greater good through free trade. The WTO was formed in part to extend free trade rules beyond traditional bans on tariffs and quotas to address non-tariff barriers increasingly at issue in the newly complex and expansive
context of international trade in services and information technology. But the Heritage Foundation notes that the WTO's expanded support for free trade has also weakened the very concept of free trade.\(^2\) Nontariff regulations that restrict trade are difficult to distinguish from national policy differences that form the basis for freely competitive trade.\(^3\) The *Economist* warns that the inherent difficulties of combating nontariff barriers make the WTO's free trade goals even more vulnerable to usurpation by special interests.\(^4\) To cure this market fragility, free trade advocates tend to call for stronger regulators capable of making "every effort" to reduce these elusive and unpopular trade barriers,\(^5\) as well as for regulators not "afraid to stand up" to fair trade activists.\(^6\)

**Constructing the State–Market Boundary**

As with workers’ compensation regulation, the idea that trade regulation should reflect rather than alter the market poses a conundrum. In trade regulation as in insurance regulation, attempts to remove politics from the market require more politics. The key to successful trade regulation is to purge the system of politicized special interests that raise costs to others in the guise of higher ideals. But the higher ideal of the unadulterated market can only be achieved through increased political intervention directed at raising costs to some.

Sound regulation, in the conventional view, must make the critical and delicate distinction between true economic ideals and false political ideals. *Globaphobia* cautions that only "impersonal markets," not politicians, can be trusted to tell the difference between rules aimed at market-blocking special interests and rules aimed at market-promoting public interest.\(^7\) Nonetheless, the authors urge that we trust the WTO's government regulators to know that demands for rules enforcing labor standards are about politics, not economics.

Again, the distinction between what is inside and what is outside the market depends not on neutral market principles or on economic facts but on rhetorical location—and political interests. For example, in the standard analysis, when workers in rich nations demand WTO enforcement of higher labor standards, they are seeking to impose political restraints that artificially inflate costs. When multinational corporations from rich nations demand WTO enforcement of higher standards for intellectual property or capital mobility, they are seeking to follow economic principles that reflect natural market costs. The *Globaphobia* authors explain how we should know that weak intellectual property standards, but not weak labor standards, count as trade barriers: "U.S. software companies will be strongly discouraged from exporting their programs to countries where they can be easily copied without penalty."\(^8\)
This rationale presents intellectual property standards as a trade-enhancing public benefit because those standards increase the supply of U.S. exports. In contrast, Globaphobia presents international labor standards as trade-inhibiting private gain because they decrease the supply of foreign jobs. Whether the trade rule is liberalizing or restricting therefore depends on whose trade gets positioned at the center of the story as the normal market and whose trade constitutes a threat to that trade from outside that market.89

The prevailing analysis attempts to ground this rhetorical distinction in impartial economics by constructing labor or environmental standards, but not intellectual property standards, as costly moral hazard: protections that will produce incentives to raise costs in the long run. In this theory, labor standards that protect higher-waged U.S. jobs from international competition impede the “creative destruction” that makes standards of living rise.90 Even though such standards might provide a temporary cushion against U.S. workers’ losses, that cushion might lead to long-term harm by allowing workers and governments to avoid the “job skills enhancement and retraining” that will encourage those workers to adapt to the new global economy so that they will be more competitive in the long run.91 And, as Federal Reserve chairman Alan Greenspan explains, using trade rules to protect workers or the environment will end up creating incentives for lower labor and environmental standards. Because protections from global competition will end up lowering standards of living in developing nations (in the conventional theory), those nations will devote fewer resources to improving labor and environmental conditions. The more that rich nations try to protect poor nations by externally raising labor and environmental standards, the more that developing nations will be unable to afford such standards—leaving those nations with even more problems of substandard labor and environmental conditions than they would have had otherwise.

In contrast, in the standard story, rules protecting gains from high intellectual property standards produce incentives that reduce overall losses. Why don’t these standards protect less competitive U.S. businesses from cheaper foreign competitors, thereby providing incentives for continued investment in losing industries rather than adjustment to a new economic reality? Why don’t these standards reduce foreign nations’ standards of living, thereby creating incentives for those nations to further disregard intellectual property rules? Because, in the standard story, WTO enforcement of intellectual property standards provides incentives for more competition and more trade, leading to greater overall economic wealth. In the conventional answer, intellectual property protections in trade rules encourage more investment in innovative technology and prevent foreign competitors from “hitching a free ride on research-and-development spending elsewhere.”92

This moral hazard distinction, however, depends not on objective logic or empirical evidence of costs and benefits, but on the narrative construction of
some costs as "real" or original, and some as extra and abnormal. Incentives for more high-wage jobs only distort the new reality of global markets if a market dominated by below-subsistence wages is the norm to which many workers must adjust. WTO enforcement of higher labor and environmental standards will only produce poorer nations less able to maintain such standards in a market structured to make poor labor and environmental conditions a necessary precondition for competitive market growth for poor communities.

In contrast, WTO enforcement of high intellectual property standards appears to enhance competition only because of a prior assumption that increased competition is not a market reality to which wealthier nations and producers of intellectual capital must adjust but a market distortion that regulators must correct. Legal scholars John McGinnis and Mark Movsesian assert that international intellectual property standards, but not labor and environmental standards, are economically beneficial on the theory that "weak intellectual property standards decrease trade in goods because counterfeit goods decrease the demand for real ones." McGinnis and Movsesian contrast international regulation of water purity as uneconomic, saying that "Indians may not be able to afford American water safety standards, just as they unfortunately may not be able to afford many other goods that Americans can." According to this reasoning, ensuring the purity of, for instance, videotapes of Hollywood movies benefits India's impoverished citizens more than ensuring the purity of their water. That is because, in this vision, more consumer purchases of authentic videotapes (in place of, for instance, homemade entertainment less subject to uncertainties about originality) count as an objective increase in overall economic "growth," whereas more consumer demand for clean water (in place of, for instance, bottled soft drinks less subject to contamination) is a matter of personal (or national) subjective preference about economic "distribution." Even if one assumes that demand for drinking water will not be affected by its purity, unlike the demand for videotapes, it would also seem reasonable to calculate the possibility that increased drinking of safe water could have positive spillover effects such as healthier citizens capable of producing and consuming more wealth at lower cost. By locating impoverished consumers' interest in pure water (however real), but not impoverished consumers' interest in pure videotapes (however theoretical), outside the realities of the existing market, McGinnis and Movsesian can count the indirect economic effects of pure videotapes as more beneficial to the market than the indirect economic effects of pure water. In the conventional rhetoric, intellectual property standards become a necessity for impoverished nations while labor, environmental, or human rights standards become a luxury reserved for the wealthy. That distinction rests on the prior and unsupported assumption that intellectual property standards are inherent in a growth-producing
market, whereas labor, environmental, or human rights standards are external barriers to such a market.96

By focusing on which trade rules produce unnecessary costs that hinder economic growth—moral hazard—and which produce costs necessary to promote economic growth, the standard economic analysis obscures the question of what kind of economic growth, and for whom, should count as the undistorted market ideal. Trade rules, like all regulations, inevitably shape the market reality they aim to reflect. The standard story, however, presents the market as the result of neutral economic forces, not human design, and therefore as fixed and inevitable—as long as it is not distorted by political manipulation.

The standard story of trade regulation, like the standard story of the workers’ compensation crisis, tends to construct the characters with the most market power and greatest personal gain under the WTO’s “free trade” regime as the most passive and impartial. In this view, if developing nations rely on child labor and polluting industries to maintain their economies, that is simply the result of supply and demand and inherent national differences, not because multinational corporations and wealthy global investors have structured the global market to increase their short-term profits at others’ expense. If consumers from rich countries benefit from cheap imports made possible by the sacrifice of life and health from polluting and unsafe factories in poor nations, the standard story assumes that those consumer benefits are not selfish market manipulations at the expense of others, but the result of neutral and natural market forces that promote the general welfare. If wealthy transnational corporations support strict international rules on intellectual property, but not strict labor or environmental standards, McGinnis and Movsesian imply that we can trust that those regulations will not protect wealthy capital owners at the expense of others but will simply and accurately reflect the public’s economic interest in distinguishing “real” from “counterfeit” goods.97

In contrast, if workers from rich nations benefit from rules linking trade to labor or environmental standards, their gains are portrayed as extra or artificial benefits conferred by political intervention at others’ expense: a kind of “foreign aid program funded by selectively higher prices on certain imports and lost job opportunities,” as Globaphobia argues.98 McGinnis and Movsesian warn that even if international labor and environmental standards might correct market failures in theory, in practice they would fall victim to untrustworthy “special interests.”99 This vision portrays organized labor or environmental activists as powerful threats naturally inclined to undermine both democracy and the global economy.100 In contrast, it presents the wealthy transnational corporations (and perhaps even third-world despot5101) that gain the most from the WTO’s trade policies as ingenuous bystanders needing only the WTO’s guidance to align their interests with the world’s poorest.102

In the standard story, any harm from unrestrained global competition in low-paid and otherwise substandard labor is natural and beyond regulatory
control, whereas harm from restrictions on low-paid labor is the product of unnatural and misguided regulatory intervention. For example, the standard story warns that trade rules incorporating restrictions on imports made with child labor would result in more children in misery and fewer jobs in developing nations. The villains of this story are rich nations' labor advocates, whose political intervention in the name of rescuing poor children masks self-serving greed. In contrast, when multinational corporations withdraw jobs from poor countries, or pay adult workers wages so low their children must work for survival, they are simply passive and innocent victims forced by the market to seek higher profits elsewhere. Similarly, when higher-waged adult workers are laid off because of liberalized competition from nations with lower labor standards, the problem is simply the tragic but ultimately beneficial "wheels of progress," in Alan Greenspan's words. The personal gains to wealthy capital holders from this "tragedy," or the personal and political choices that drive these "wheels," are not part of this story.

Of course, rules "liberalizing" trade are not just "wheels" that inevitably and impartially raise living standards but are hotly contested actions of self-interested political players. For example, insurance executive (and workers' compensation op-ed writer) Hank Greenberg led his multinational company AIG to contribute nearly $1 million to both Democrats and Republicans in the late 1990s, while playing a major role in negotiating WTO rules to protect and increase his company's access to Asian financial services markets.\(^{103}\) Greenberg's political pressure helped produce a 1997 WTO agreement that granted international insurers such as AIG rights to own and operate financial services businesses in more than a hundred countries.\(^{104}\) Yet just as in the workers' compensation crisis, the standard story positions Greenberg's political power to shape the market to his personal advantage as a part of the invisible workings of an impersonal market in which capital is destined to flow to the place of greatest profit, regardless of the costs of that profit seeking to smaller financial service industries in developing nations, for example. But just as in the workers' compensation context, those who pay the costs of Greenberg's vision of regulation lose out not because they fail to adjust to the reality of competitive market forces but because they lack the political power to make rules for market competition based on a vision of reality that promotes their interests.

| Beyond the State-Market Divide |

In the traditional economic story, regulators face two choices: either remain faithful to the goals of the free market by setting insurance rates or trade rules that mimic costs of "real" market competition as much as possible, or give in to competing social welfare values. Conservatives tend to swear by the first; liberals tend to confess to the second.
Feminist strategies for resistance to traditional free market economic arguments sometimes get outmaneuvered by presuming that the free market model is a matter of logical and consistent principles. The typical liberal response to market efficiency claims tends to accept the basic structure of the traditional neoclassical economics tale, but then tries to reverse the hierarchy of the values it presents. Labor advocates may argue that goals "external" to the market—such as social welfare and democracy—are worth the sacrifice in economic growth that inevitably comes from government intervention in the market. But, as Derrida suggests, the rhetorical operation of the traditional supplement—original binary tends to turn simple reversals into confirmations of the original supremacy.105

When liberal proposals take market rules at face value, and accept a tragic choice between the competing social and economic values those rules appear to offer, those liberal alternatives tend to appear less desirable than the free market options they reject. The dichotomy between the free market and government regulation privileges the market, while masking its dependency on (and overlapping identity with) the state. Within this framework, the ideal free market is by definition perfect—it furthers both social and economic welfare. In contrast, the state is by definition imperfect because it frustrates both the market it mimics and the social ideals toward which it aims. Unless the market–nonmarket dichotomy itself is undone, choosing to value the state over the market—social goals over economic goals—means choosing tails instead of heads in a game of "heads l win, tails you lose."

The traditional free market model typically has been a strategy for having it both ways; behavior is described as rational and public-spirited competition motivated by economics when the behavior benefits the personal interests of free market proponents (and frequently those with whom they share class, race, and gender identity). When the same kind of behavior would disadvantage the personal interests of free market advocates and those with whom they identify, it often may appear just the opposite—an immoral, irrational "special interest" outside the market.

Inconsistency and incoherence should not be mistaken for weakness, nor deconstruction for revolution. The free market theory that pervades law and public policy has power that exceeds its advocates' rhetorical skills and economic logic. Yet those who share neither the goals nor the power of free market ideologues must not limit their resistance to supplementing conventional economic analysis with alternative methods designed to close market gaps or trim market excesses. By appropriating conventional economic rhetoric and capitalizing on its inconsistencies, we may be able to maneuver the instabilities of the market–state dichotomy toward different political ends—and to work toward displacing this dichotomy with a story that better recognizes the interrelationship of politics and economics.
Notes

1. Thanks to Terence Dougherty and Carl Nightingale for comments on drafts of this essay and to Rick SwartZ, whose expert and inspiring teaching gave this project its start. I am also grateful for opportunities to present earlier versions of this essay at the February 1995 Feminism and Legal Theory Workshop at Columbia Law School and at the 1994 New Economic Criticism Conference at Case Western Reserve University.


8. See Valentine M. Moghadam, Gender and the Global Economy in Revisioning Gender 128, 134–47 (Mera Marx Ferree, Judith Lorber, & Beth B. Hess eds., Sage 1999) (discussing the “feminization of labor” in the recently restructured global market and how “free market” structural adjustment policies have increased female poverty).

9. For a critical analysis of this crisis and subsequent reforms, see McCluskey, Illusion of Efficiency, supra note 7, at 657.


12. For an example of this standard story, see Patricia M. Danzon & Scott E. Harrington, Rate Regulation of Workers’ Compensation Insurance: How Price Controls Increase Costs ix–xxi, 1-11 (AEI Press 1998).

13. Id. at 15.

14. Derrida, supra note 6, at 145.
17. Id.
18. Id.
22. Id. at 11, 50, 52.
23. Derrida, supra note 6, at 145.
24. See Danzon & Harrington, supra note 12, at 108-9, 118; Harrington & Danzon, supra note 20, at 569; Kramer & Briffault, supra note 21, at 52.
25. Greenberg, supra note 16.
26. Derrida, supra note 6, at 155.
27. Id. at 151.
29. Id. at ix.
31. Greenberg, supra note 16.
32. Id.
34. Id. at 4.
35. Id. at 4.
36. Greenberg, supra note 16.
37. Id.
38. See Kramer & Briffault, supra note 21, at 11 (criticizing "politicized" rate-making process).
39. See Derrida, supra note 6, at 149.
40. Id. at 151.
41. Greenberg, supra note 16.
42. Harrington & Danzon, supra note 20, at 569-70.
44. Greenberg, supra note 16.
45. Derrida, supra note 6, at 314.
47. See McCluskey, Insurer Moral Hazard, supra note 10, at 106-8.
48. See id.; Donald M. Kreis, The "King" of Workers' Comp, 23 Maine Times 2 (Sept. 6, 1991).
49. McCluskey, Insurer Moral Hazard, supra note 10, at 108.
50. Id. at 115-31.
51. See Terry Thomason, Timothy P. Schmidle, & John F. Burton Jr., Workers' Compensation: Benefits, Costs, and Safety under Alternative Insurance Arrangements 287 (W. E. Upjohn Inst., 2001) (concluding that the change from administered pricing to comprehensive deregulation is associates with lower employer costs); id. at 176-77 (summarizing previous empirical studies correlating deregulation with lower insurance costs but concluding that the overall evidence from these studies is inconsistent).
53. Id. at http://www.wto.org/english/tratop_e/inbrief_e.
56. Brett D. Schaefer, *The Bretton Woods Institutions: History and Reform Proposals* 68 (Economic Freedom Project of the Heritage Foundation 2000). The fine print on the cover of this report, whose author is a senior staff analyst of the foundation, notes that "nothing here is to be construed as necessarily reflecting the views of The Heritage Foundation" or as lobbying, but I take this disclaimer on writings funded and distributed by the foundation more as a protection of the foundation's economic interests than as a real denial that this report represents political views it supports.
57. Id.
60. Bernard Hoekman & Michel Kostecki, *The Political Economy of the World Trading System: From GATT to WTO* 21, 57-58 (Oxford U. Press 1995). This theory applies to large countries capable of changing the terms of trade; for small countries, unilateral free trade is likely to be economically efficient, in the typical neoclassical analysis.
61. Friedman, *supra note* 55.
62. Id.
65. Id.
71. Testimony of Carla Hills, Senate Finance Committee (Feb. 27, 2001).
73. Burtless et al., *supra note* 54, at 94.
74. Id. at 93-94.
75. Id. at 94.
81. *While the WTO Burns*, supra note 78.
82. Schaefer, *supra note* 56, at 84.
83. Id. at 85.
86. *While the WTO Burns*, supra note 78.
88. Id. at 122.
89. For more detailed explanation of the indeterminacy (and politics) of "free trade" principles and the underlying pseudo-scientific concept of comparative advantage, see Michael H. Davis.
90. See Testimony of Alan Greenspan, chairman of the Federal Reserve, Senate Finance Committee (Apr. 4, 2001) (arguing against dealing with “adjustment trauma” by “thwarting competition”).
91. Id.
92. The Standard Question, Economist Jan. 15, 2000) (citing arguments of Keith Maskus but questioning the political merits of continuing to distinguish between intellectual property and labor or environmental standards).
93. John O. McGinnis & Mark L. Movsesian, The World Trade Constitution, 114 Harv. L. Rev. 511, 555 n. 251 (2000). They acknowledge, however, that intellectual property standards might be suspect on “sovereignty” grounds, which they distinguish from “economic” grounds. Id. 94. Id. at 553.
95. Id. at 555.
97. See McGinnis & Movsesian, supra note 93, at 555 n. 251.
98. Burtless et al., supra note 54, at 125.
100. Id. at 556.
105. See Dezida, supra note 6, at 325.