# RATIONAL LAW AND BOUNDARY MAINTENANCE: LEGITIMATING THE 1971 LOCKHEED LOAN GUARANTEE

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Neo-Marxian critiques of Max Weber's theory of rationality have stressed the ideological role of legal formalism. At the analytic level, however, Weber's theory points to sources of potential conflict between legal formalism and economic rationality. This paper critically reconstructs Weber's perspective for analyzing the boundary maintaining categories of legal discourse. A case study of the 1971 federal loan guarantee to Lockheed Aircraft Corporation demonstrates that while both market ideologies and administrative principles partially bounded the debate over the legislation, this debate did not resolve the question of which businesses should potentially receive government support. This substantive issue raised problems of legal particularism that undermined the universal claims of legal rationality and required an expansion of boundary categories beyond legal formalism, yielding a more economically and politically open discourse.

## I. INTRODUCTION

While Max Weber maintained that Western processes of rationalization have "*universal* significance and value" (1958: 13), critical theorists have argued that rationalization can be more adequately comprehended as ideological mystification of underlying sources of social alienation and class-based power differentials. In particular, critics allege that the technical and formal characteristics of legal rationality actually conceal the social processes through which industrial capitalism is propagated.[1] From this perspective, legal rationality as a form

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[1] For an analysis of the various ways in which "rationality" is used by Weber, see Ann Swidler, 1973. Harold Garfinkel has posed a methodological criticism of rationality that focuses in its "everyday" features rather than its idealized scientific formulation (1967: 262-283). The neo-Marxian reformulation of Weber's concept of rationalization is pointed out by Schroyer (1973: 225): "These reformulations stress the sociocultural consequences of stimulated

of social action leads both to an inability to question the necessity of social constraints and to tendencies toward the eruption of narrowly self-interested action orientations which Weber himself recognized as ever-present possibilities but did not formulate as a central feature of industrial capitalist social formations.

Rather than leading to a simple rejection of Weber's categories, however, this critique has invigorated Neo-Marxian perspectives by posing new directions for inquiry.[2] The role of institutionally embedded forms of domination in social reality is given fuller analytic significance. Emphasizing social action focuses inquiry on the accomplishment of an alienated social reality rather than on structural effect. Moreover, conceptualizing legal rationality as fundamentally ideological reformulates the categories of legal rationality, giving them freer analytic scope. Of primary concern is the way these categories constrain discourse and shape activity in the maintenance of dominant social forms. Further, the critical reformulation of Weber's theory provides directions for specifying crisis tendencies inherent in capitalism. Focusing on the way in which forms of discourse mediate relations of unequal power and legitimate them reveals crisis tendencies to be, at least in part, normatively locatable within specific institutions.

In opposition to Marxian perspectives that view law as a reflection of underlying economic structures or as an instrument through which the ruling class exercises its will, an analysis prompted by Weberian theoretical directions views law as not only conditioned by economic structure and class relations, but also as relatively autonomous in shaping social order. Thus, law and legal discourse shape juridical subjects whose beliefs and ideologies form a domain of socially

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economic growth that make the work experience and everyday life less intelligible, transforms the human milieu into a technologically determined system, and systematically blocks symbolic communication by the superimposition of more and more technical rules and constraints derived from rationalizing processes." See Lukács (1971: 92-103), Marcuse (1968: 201-226), and Habermas (1970: 81-122).

[2] For a brief discussion of the relationship between the social theories of Marx and Weber and the analytic possibilities that follow from a synthesis of their perspectives, see Irving Zeitlin (1973: 123-136). Jürgen Habermas has formulated a notion of "legitimation crisis" that brings together analytic categories of Marx and Weber (1975: 33-94). In his concept of "structuration," Anthony Giddens has focused on the issue of the active accomplishment of social structure. He has pointed out that "the notions of action and structure *presuppose one another*, but that the recognition of this dependence, which is a dialectical relation, necessitates a reworking both of a series of concepts linked to each of these terms, and of the terms themselves" (1979: 53).

consequential action that cannot be reduced to economic relations. Indeed, the domain of legal action partially constitutes and circumscribes the economic sphere.[3]

Contemporary conditions reinforce this view. As the state has become more directly engaged in economic relations, the scope of law has expanded. In addition to its role of maintaining social order through expenditures on military, police forces, legal institutions, and social welfare,[4] the state attempts to regulate demand for goods and services through fiscal and monetary policies. Expenditures on research, education, and transportation maintain favorable conditions for private investment and capital accumulation. Moreover, with increased concentration of private economic power, the state becomes more closely associated with particular corporations and economic interests. Since the state carries out these activities primarily through legal action and discourse, law assumes a greater constituting role in the formation of social order.

This essay further develops the critical reformulation of Weber's theory of legal rationality in light of current political and economic relations. In it, I aim to reconstruct Weber's categories in order to delimit boundaries of formal legal discourse. These boundaries maintain capitalist economic relations by constraining the public appearance and recognition of conflicts and contradictions in codified, formal, logically cohesive rules. The way in which issues are presented causes both the range and intensity of antagonistic social relations to congeal into forms that direct their resolution toward the maintenance of a context facilitating the re-creation of capitalist economic relations. To the extent to which these features of legal rationality are transformed, conflicts and

[3] Important directions for going beyond mechanistic and instrumental legal analyses in Marxian theory have been developed by Andrew Fraser (1978) and Isaac Balbus (1977). Peter Gabel has stressed the phenomenological features of law as a domain of interpretive activity that cannot adequately be reduced to its structural conditions (1977). Mark V. Tushnet has pointed to the structural conditions that lead to legal autonomy and ideological implications of legal autonomy (1977). Karl Klare has raised the notion of "legal praxis" as an analytic perspective that is especially important in late capitalism (1979). For a case study that demonstrates the role of law in constituting socio-economic relations, see Klare (1978). William Chambliss has developed a processual model of law creation that focuses on economic contradictions and their legal resolution (1979).

[4] For an analysis of the role of the state in monopolistic capitalist society, see James O'Connor, 1973 and D. Gold, C.Y.H. Lo and E. O. Wright, 1975. Harold L. Wilensky (1975) has compared the growth of state welfare and military expenditures.

struggles for societal resources are given new expression and directions for resolution.

Weber's categories are useful for analyzing the discourse that facilitates capitalism because the boundary-maintaining features of legal discourse are in dynamic tension with other aspects of society. Conflict is especially evident among legal, political, and economic discourse. Economic, political, and legal forms of rationality are not only distinctive but also potentially antagonistic. Conditions of economic monopoly and representative democracy exacerbate the disjuncture between the requirements of legal rationality and the legal initiatives of economic actors. Specifically, monopoly generates conditions for particularism in the creation and implementation of law which undermine the universalistic claims of legal rationality. If legal rationality is pushed in particularistic directions, an underlying source of legitimacy, and with it a source of systems maintenance, is weakened. Inconsistencies among legal rationality, representative democracy, and monopoly have significance for the universality of law and, thereby, for the legitimacy of the state.

While a revision of Weber's theory is central for developing an analysis of the sources of antagonism between legal and economic rationality, this theoretical program can only be realized through empirical elaboration and specification.[5] Theoretical concepts are most fully articulated in case studies that both demonstrate the relations among concepts and specify the historically situated structures and discourse through which action is accomplished. The interpretation of theory and empirical case studies provides the basis for explaining events and critically comprehending their significance. While theoretical formulation and the study of exemplary cases inevitably diverge at some point, they are mutually supportive in the elaboration of research programs to develop a generalized, critical understanding of social relations.

In order to ground the theoretical reformulation of Weber in an empirical study, this essay presents a case study of the 1971 Lockheed loan guarantee. In the debate over the Lockheed loan guarantee, dominant political, economic, and legal categories set the range of debate for the substantive issue of legislating the loan guarantee. This debate went

[5] For a fuller discussion of the relationship between theoretical concepts and case studies within research programs, see Turkel, 1979. A more detailed statement of how legitimation processes constrain discourse can be found in Turkel, 1980.

beyond the confines of legal rationality, displaying the discursive problems for law formation under conditions of concentrated economic power and its political representation. Most important for the revision of Weberian theory, this debate had contradictory features within discursive categories, especially with regard to the extent to which the loan guarantee should be particularized to a single corporate actor. The effects of particularism on legal rationality as a boundary-maintaining discourse point out antagonisms within forms of rationality, as well as in the wider configuration of ideologies that sustain boundary maintenance.

This paper is divided into three sections: (1) a reformulation of Weber's theory of rational law that focuses on the antagonistic tendencies of universalism and particularism resulting from the economic and political relations of advanced capitalism; (2) a presentation of the 1971 Lockheed loan guarantee that elaborates on the boundary-maintaining discourse through which legal particularism is accomplished; (3) an assessment of the above to the critical theory of law.

## II. LEGAL RATIONALITY, PARTICULARISM, AND BOUNDARY MAINTENANCE

While Weber saw Protestant asceticism as fundamental to the emergence of rationality, legal rationality itself has wide normative and societal effects (Parsons, 1971: 40-44). Legal rationality is the most fully articulated formal normative order that provides legitimate grounds for the state to exercise its coercive power. It also enables the powers of the state to secure increasingly differentiated social and economic relations. Legal rationality provides both the normative and coercive background for the elaboration of rationality in all areas of social life.

Weber sought to discover the specific sources and effects of law in the development of social rationalization. The ideal type of law has two dimensions: organizational differentiation and normative generality. For law to be fully rational, it must have as one of its features a staff of people to bring about compliance or avenge violation (Weber, 1954: 6). A legal staff independent of conflicting social groups would assure the autonomy of law and its impartial application. It would also provide an organizational condition for the internal elaboration of law as a set of categories relatively independent from the vicissitudes of immediate social antagonisms.

The second characteristic of rational law, properties of formal logic that tend to give it universal applicability, provided the main thrust of Weber's study. He wanted to "find out how the various influences which have participated in the formation of the law have influenced the development of its formal qualities" (1954: 64). In his study, Weber relied on an ideal type with the "highest measure of methodological and logical rationality" which "proceeds from the following five postulates":

> [F]irst, that every concrete legal decision be the "application" of an abstract legal proposition to a concrete "fact situation"; second, that it must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal logic; third, that the law must actually or virtually constitute a "gapless" system of legal propositions, or must, at least, be treated as if it were such a gapless system; fourth, that whatever cannot be "construed" legally in rational terms is also legally irrelevant; and fifth, that every social action of human beings must always be visualized as either an "application" or "execution" of legal propositions, or as an "infringement" thereof (1954: 64).

In analyzing the sources of differentiation and universality in law, Weber compared the distinct effects of a range of historical factors. The following ten factors are most prominent[6]: (1) the spread of "consensual and rational agreements" through which actors seek to realize calculable goals and purposes; (2) magic, which despite its irrational process of decision, favors "formal correctness in procedure"; (3) judges who, even in a traditional cultural context, fit particular cases to general legal precepts; (4) war, which erodes traditions and changes social relations from localism to more comprehensive arenas of action; (5) officials who represent centralized sources of authority; (6) prophets to the extent that they make claims of legal universality; (7) priests to the extent that they serve as "directors of procedure in ordeals"; (8) conscious creation of law "by compact or imposed enactment"; (9) revolutionary law to the extent to which it proclaims universality and overcomes localism and tradition; and (10) support by the state of comprehensive legal codes and organizations (Weber, 1954: 65-97).

The two most important sources of rationality in law are the rational authority exercised by modern state apparatuses and the increasing impact of legal specialists. Modern state apparatuses increase legal authority by increasing bureaucratic organization. The proliferation of institutions embodying legal norms tends to eliminate areas of charismatic and traditional

[6] Weber did not formulate a developmental theory of legal rationality but, rather, a comparative model. See Trubek, 1972.

authority in public life and codify norms of public life into general rules. The expanding scope of the state, through intensive growth in defining obligations of political authority, fosters impersonal and rule-oriented social relations. In addition, to the extent to which the state itself is legitimated through rational legality, the very basis of political action, obligation, and political development takes on an increasingly formal legal character.

The development of legal specialists stems from the spread of bureaucratic state apparatuses. The increasing complexity and pervasiveness of bureaucratic rules, and the impersonal relations that they foster, not only require a greater number of legally trained officials, but also generate the need for "a further category [of] private counselors and attorneys" who heighten the density of legal orientations in social life by converting social issues into legal ones (Weber 1954: 96). As the structural differentiation and influence of lawyers increases, law grows into a professional status group with an interest in its own distinctiveness. Moreover, through specialized legal training and legal scholarship, the law is increasingly formulated as a distinct, abstract, and logically consistent specialty. In this sense, it is through the efforts of the legal profession itself that the formal characteristics of law are enhanced.

Economic factors have an independent rationalizing effect on law.[7] In a number of ways, competitive market organization and economic orientations have an affinity with and are supportive of legal rationality. First, the growth of the market extends rational orientations in economic life and "favors" the concentration of coercive power in the state. Market relations tend to erode localized sources of political power and reinforce more centralized and territorially pervasive state structures. The presence of a reliable and generalized agency of legitimate coercion replaces more local and traditional sources. Second, a pervasive and rational legal order allows for greater calculability in economic affairs. To the extent to which those

[7] The role of economic orientations in generating societal rationality is especially prominent for Weber. Exchange on the market is "the archetype of all rational social action" (1954: 191). With the emergence of money, a "community" is realized through relations of "material interest." The market is "the most impersonal relationship of practical life into which humans can enter with one another" (1954: 192). Exchanges fostered through the market are conducted through the objective meanings of commodity values, and generate patterns of transaction requiring "rational, purposeful pursuit of interests" (1954: 192). The calculability in market relations, the spread of an individualized ethic of self-reliance, and the "respect" for "promises once given" generate both cognitive and ethical sources of rationality.

engaged in law making and law finding are bounded by systematically codified rules, limits are placed on the arbitrariness that follows from more personal and traditional legal decision making. Third, since formal justice "guarantees the maximum freedom for the interested parties to represent their formal legal interests," it appeals to those with sufficient economic resources to use the law (Weber, 1954: 228). In this sense, formal justice directly supports economic power by legalizing economic inequality.[8] For this reason, formal law finds a natural source of support among economically powerful interests. Finally, market orientations are conducive to a rational intellectualization of social life that shares the objectivity and impersonality of legal rationality. Objectifying social relations in a form that demands the rational calculation of consequences encourages both "hard" information and logically consistent patterns of thought. Law, in its formal characteristics, both conforms to and contributes to this type of intellectualization.

Despite the analytic scope of Weber's formulation, its capacity as an explanatory theory is severely restricted. First, the notion that there is an affinity between legal rationality and capitalism has limited historical applicability. For example, in England the predominance of common law certainly did not block the development of capitalism. Indeed, core features of the early English legal order which departed from the ideal type of legal rationality may have actually facilitated the formation of a capitalist economic order. The dual legal system in England (one for the rich and one for the poor), the social linkages among judges, the monarchy, and capitalist interests, provided a legal framework for capitalist development without a preponderance of formal legality. The very absence of a state apparatus and a coterie of legal specialists may well have generated the social and political space required for the growth of market relations and the general social transformations

[8] With regard to the United States, Morton J. Horwitz (1977) has argued that legal forms are related to both dominant sources of political legitimacy and relations of economic power. Thus, the growth of "instrumentalism" in common law from 1790 to 1820 was grounded in ideas of popular sovereignty and facilitated the development of new capitalist interests, e.g., railroads. When these new interests became dominant, there was a tendency away from legal instrumentalism to legal formalism. As Horwitz points out:

> This alliance between intellect and power could only finally come into being after the transforming surge of postrevolutionary legal activity has become uncongenial to its beneficiaries. For the paramount social condition that is necessary for legal formalism to flourish is a society to have a great interest in disguising and suppressing the inevitably political and redistributive functions of law (1977: 266).

characteristic of early capitalism.[9] In part as a result of English "exceptionalism," Weber himself concluded that the relationship between legal rationality and capitalism is not causal.

Second, there are intrinsic problems with Weber's conception of the universality and formality of rational law.[10] Fundamentally, the deductive character of law and the extreme clarity attributed to legal concepts provides a reconstructed account of law that does not capture its actual practice. The reality of legal activity has many more complexities and ambiguities than can be captured by an ideal typical reconstruction that relies on "lawyers' law" as its foundation. The taken-for-granted notions that rules underlie action, that particular acts logically fall under specific rules, that there is a clear fit between rules and facts, and that rules themselves are logically interrelated may conform to a legitimating image of law but do not capture the sources of conflict within the law itself. These idealizations are more a projection of rationality grounded in formal logic rather than an adequate set of categories for the analysis of the role of legal rationality in social relations.

Weber's formulation of legal rationality nonetheless displays major features of the discursive and cognitive roles of legal rationality as a legitimating ideology. It points to features of legal discourse that serve to legitimate and define boundaries through which capitalist relations are recreated. First, as I have alluded to above, rational law contributes to the general belief in calculability which is characteristic of capitalist culture. By portraying law as an objective reality that can be included in background sensibilities regarding the certainty of outcomes of social action, legal rationality contributes to the cultural hegemony of capitalism.[11] By

[9] Immanuel Wallerstein (1974) has argued that the political and economic decentralization of Western Europe, and most especially the relative absence of a pervasive state structure, was decisive for the elaboration of market relations in early caplitalist society.

[10] For a methodological critique of Weber's legal theory, see Martin Albrow, 1975. The logical problems inherent in formal legal theory as well as the relationship between formal legality and legislative rationality have been fully elaborated by Duncan Kennedy (1973, 1976). The ontological and epistemological tensions underlying Weber's legal theory and their methodological consequences are formulated by Piers Beirne (1979). In his methodological criticisms and concerns with the practical relations underlying legal activity, Colin Sumner (1979) has raised fruitful issues for inquiry.

[11] The notion of "hegemony" developed by Gramsci refers to the "organizational and connective" functions that mediate various levels of society (1971: 12-13). Analytically, hegemony points to the specific moments in a social whole through which class domination and resistance are actualized in thought and action.

sharing a general calculating and objective logic of political and economic rationality, the reconstructed account of legal rationality serves to reinforce underlying forms of capitalism and habituate them in social members' consciousness.

Second, legal rationality has a moral ideological role. The depiction of law as an autonomous social and intellectual institution acting on issues through categories of individualism, equality, and objective notions of justice throws up a barrier against the actual experience of hierarchy and inequality in everyday life. Legal rationality provides a utopian moment within the confines of the everyday practices of individuals attempting to secure material life through activities of exchange, specialized production, and capital accumulation.[12] The insecurity of economic life is mitigated through the cognitive ideals of rational law.

Finally, on a more practical level, rational legal categories facilitate the political dominance of capitalism. As Balbus has argued, formal legal concepts are largely a transposition of economic categories underlying the commodity form to the arena of legal and political relations (1977). Just as the commodity form translates the actual content of human labor and human needs from concrete social relations into a calculus of equivalent exchange, so legal rationality translates the actual needs and political relations among people into legal and political equivalencies. In both the commodity form and the legal form, an abstract appearance is generated which not only obscures social relations from acting subjects, but also provides the necessary symbolic framework through which these mystified relations are conducted. Legal rationality is, therefore, the core ideology through which capitalist relations are recreated politically.

Weber's theory of rational law, I have argued, formulates the taken-for-granted boundaries of legitimating legal discourse by portraying the ways in which formal law contributes to the calculating culture of capitalism, translates economic categories into legal discourse, and provides an ideal within capitalism that enhances a vision of objectivity and equality. These legitimating features of legal rationality, however, must be assessed within a changing constellation of political and

[12] The tensions and contradictions between the reality of social life and legal utopianism can serve as a basis for wider efforts toward the critical transcendence of sociolegal relations. See, for example, Trubek, 1977. In this sense, the morality of law can provide a critical standard from which to evaluate ongoing social relations and, at least in part, a source of resistance to one-dimensional thinking.

economic relations. Not only must the capacity of formal legality to contribute to the boundary maintenance of actions within capitalist forms be reconceptualized within changing economic and political relations, but also the way in which legality itself undergoes transformations must be formulated.

Despite clear affinities, legal rationality and economic rationality are not identical. Actors oriented toward legal rationality have a primary concern with the maintenance and extension of legal definitions and legally consistent outcomes in decision making. Actors oriented toward economic goals, on the other hand, are more concerned with financial gains and economic enhancement. As these orientations diverge, disjunctures between legal and economic rationality are likely to occur.

Disjunctures among legal, economic, and political rationality tend to widen as capitalism develops. Especially under conditions of monopoly capitalism where direct intervention by the state is required for the maintenance of profitable investment outlets and for the realization of exchange values through state-supported effective demand, there are heightened tendencies toward legal particularism which undermine the legitimating power of legal formality. Most importantly, monopoly creates conditions for particularistic law through the exercise of financial and economic influence in law creation and implementation.

Monopoly encourages particularism in law for two major reasons. First, the financial, economic, and organizational power of monopolies leads to the formation of special interest groups that intervene in the law formation process, striving to elaborate particularistic arrangements so that "their legal affairs will be handled by specialized experts" (Weber, 1954: 303). Both legislators and enforcement officers will tend to have a more abstract knowledge of concrete situations than do these specialized experts, since they are further removed from actual participation in market relations. The effect is to particularize legal decision making in narrow terms which conform to dominant definitions. Second, there is a tendency under monopoly conditions for the formalities of law to be "eliminated" so that legal decisions conform to the exigencies of concrete cases. The practical requirements of a concrete situation may have such a potentially wide-ranging impact on social order that "considerations of substantive expediency" overtake concerns with the maintenance of legal formalism.

Monopoly conditions that generate requirements for state intervention and support of particular economic actors give rise to several trends which thwart the boundary-maintaining role of legal rationality. First, there is a heightened tendency for economic power centers to dominate sectors of the state for particularistic purposes. In effect, economic actors "privatize parts of the public administration, thus displacing the competition between individual social interests into the state apparatus" (Habermas, 1975: 62). Under these politicized economic pressures, legal formalism loses some of its capacity to legitimate state actions through abstract notions of equality, individualism, and objective distance from social interests. Rather, it becomes increasingly apparent that state activity and administrative sectors of the state are linked to particular economic interests. This visibility of economic interests in law has the potential to spur the mobilization of other interests which had been inactive and to further undermine the universality proffered by the state through formal discourse.

Second, as a result of the privatization of the state, a "rationality deficit" emerges (Habermas, 1975: 62). It results, on the one hand, from the lack of coherence generated by a state apparatus that is unable to articulate its actions through universalistic categories and, on the other hand, by the increasing conflation of economic and administrative discourse in legal action. Notions of individual rights and objective legal procedures are increasingly displaced by technically and economically defined imperatives to avoid economic crises and breakdowns (Offe, 1972: 103-104). Normatively defined notions of legal formality tend to give way to a technical discourse interlaced with political and economic expediency. Finally, the increased reliance on the state by economic actors fosters expectations that the state will intervene to support dominant sectors of the economy in times of crisis. When these expectations prevail, law is no longer a background condition for rational economic action, but an arena to be more directly shaped by private actors through economic projects. In this way the formality of legal rationality is further undermined as it is replaced by law that is more "purposive" and "substantive":

> As purposive legal reasoning and concerns with substantive justice begin to prevail, the style of legal discourse approaches that of commonplace political or economic argument. All are characterized by the predominance of instrumental rationality over other modes of thought. Indeed, policy-oriented legal argument represents an unstable accommodation between the assertion and the abandonment of the autonomy of legal reasoning. . . (Unger, 1976: 199-200).

Given these tendencies toward privatism, rationality deficits, expectations of state intervention, and the greater purposiveness of law, the capacity of the state to conduct its activities through formal rules and their application is greatly eroded. Decisions grounded in these tendencies invite instrumentalism and throw open to question the assumptions upon which rules are based (Kennedy, 1973: 354-361). The outcome for legal discourse is a wider and more conflicting array of particularistic arguments and demands. Yet these tendencies toward particularism along technical, economic, and purposive lines signify neither a total collapse of legal rationality nor a total openness in law nullifying its boundary-maintaining function. Rather, legal rationality is partially included in forms of boundary maintenance that sustain dominant economic interests and raise additional possibilities for facilitating these interests. It is through and within the framework of legal rationality and legal expertise that particularism is defined and accomplished. Monopolies do not have an affinity with arbitrariness in law or with pure particularism; on the contrary, they serve to support legal formalism as long as its own interests remain dominant.

Just as monopolies do not seek to overthrow the market but rather to dominate it, so they do not seek to dispense with either the norms of administrative rationality characteristic of "public law" regulating state activity or those norms characteristic of "private law" which can be brought into effect to enforce contracts. Indeed, since a monopoly is an actor in a market and in a polity, it supports features of legal rationality that maintain the calculability of economic and political relations.

These considerations suggest that legal discourse expands beyond the confines of Weber's notion of formality to include economic rationality, technical criteria, and political standards. Yet, beyond these theoretical reformulations, it is necessary to develop case studies that specify concepts in historically located situations.

In the following, I present a case study of the federal loan guarantee to Lockheed Aircraft Corporation, the largest defense contractor and the third largest aircraft manufacturer in the United States. This legislation, precipitated by a financial crisis that made the bankruptcy of Lockheed appear imminent, demonstrates the privatization of the state, implies rationality deficits, and prompts a questioning of fundamental directions of government policy and law. Nonetheless, the

legislation was facilitated by a discourse that took for granted the desirability of the market and the private appropriation of capital, incorporated political themes of economic welfare and nationalism, and included many dimensions of administrative rationality characteristic of formal law. This case study enables us to specify more fully the content of these boundary-maintaining categories and the range of disagreements within them. Through this analysis, core features of the legitimating discourse through which particularistic law is accomplished are portrayed. My presentation proceeds by: (1) indicating the background of the financial crisis at Lockheed that led to government intervention; (2) depicting boundary-maintaining features of the legislative debate over the loan guarantee; and (3) analyzing underlying ideological themes of this boundary-maintaining discourse.

## III. LEGITIMATING THE LOCKHEED LOAN GUARANTEE

### *Background of Lockheed's Financial Crisis*

On August 2, 1971, Lockheed Aircraft Corporation became the first private manufacturing corporation in the history of the United States to receive direct loan guarantees from the federal government.[13] The $250 million loan guarantee was preceded by years of financial problems and, finally, by the corporation's apparently imminent bankruptcy. Lockheed's crisis involved contracts with the federal government, private airlines, major private banking institutions, and foreign corporations.[14]

In October of 1965, Lockheed had been awarded a $2.2 billion contract by the Department of Defense for 81 C5 cargo transport aircraft. As is fairly typical with such contracts, Lockheed ran into cost overruns and was unable to meet the initial price per aircraft as specified in its contract with the Defense Department (*Business Week*, January 29, 1972: 72). By

[13] For a discussion of the Lockheed financial crisis within its broader political context, see Anthony Sampson, 1977, especially pages 231-248. Sampson points out that the difficulties faced by Lockheed were characteristic of the aerospace industry in general. With production for the Vietnam War peaking, levels of unemployment were rising and financial difficulties plagued companies like Lockheed, Douglas, and Boeing who found it very difficult to adjust to the "commercial marketplace" (243). For a thorough analysis of the economic effects of the military on the United States, see Seymour Melman, 1974.

[14] For an analysis of the cost overruns on the C5, see *The Economics of Military Procurements*, U. S. Congress, Joint Economic Committee, May 1969, and Frederick M. Scherer, *The Problem of Cost Overruns, The Military Budget and National Economic Priorities*, Hearings of the Joint Economic Committee, U. S. Congress, June 1969. Both are excerpted and reprinted in R. H. Haveman and R. D. Hamrin, 1973: 145-165.

1971, the cost overruns amounted to hundreds of millions of dollars.

In September of 1967, the board of directors of Lockheed decided to venture into the production and sale of commercial jetliners. The Chairman of the Board hoped that the L-1011 Tristar would enable Lockheed to capture a portion of the commercial jetliner market and relieve Lockheed's dependence on government contracts ("To Authorize Loans to Major Business Enterprises," Hearings before the Committee on Banking and Currency, U.S. House of Representatives, 92nd Congress, July 13-20, 1971: 185; *Forbes*, October 1, 1967: 28-30). By 1970, $1.4 billion had been invested in the L-1011 Tristar program. Of this amount, Lockheed had invested $410 million directly from its own funds and had borrowed $400 million from banks (*Congressional Quarterly*, May 21, 1971: 1124). Since production of the L-1011 was not planned until 1972, Lockheed was faced with a massive debt to carry for several years before any revenues could be realized.

Throughout 1970 and early 1971, Lockheed's financial position grew increasingly perilous. First, the Department of Defense refused to honor cost overruns in its contracts with Lockheed. Lockheed took the Department of Defense to court in order to obtain the cost overruns. In addition to the considerable litigation costs of this suit, the settlement specified that Lockheed absorb $484 million in losses in these contracts. An ultimate effect of the settlement was that Lockheed wrote off $190 million against its 1970 earnings. This resulted in a net loss of $86.2 million for the year (Hearings, 1971: 152). A second major blow was the announcement in 1971 of the bankruptcy of Rolls-Royce Ltd., the corporation under contract with Lockheed to build the engines for its L-1011 commercial jetliner (*New York Times*, February 5, 1971: 3). William H. Moore, the Chairman of the Board of Bankers Trust Company, stated the effect of the Rolls-Royce bankruptcy on Lockheed:

> This unexpected development created a critical new problem. At the very least its resolution would result in substantial delays in the delivery of, and payment for, the L-1011's which, with the increased costs and higher peak cash requirements, substantially increased Lockheed's financing requirements (Hearings, 1971: 152).

The British government, which took over the bankrupt Rolls-Royce corporation, announced that $640 thousand would be added to the price of each set of engines produced for the L-1011 (*Congressional Quarterly*, May 21, 1971: 1125). This meant that Lockheed was faced not only with the need for additional

revenue, but also with marketing problems for its new, higher priced commercial aircraft.

During this period of mounting problems with government contracts and the L-1011, Lockheed became increasingly dependent on bank loans. By March of 1970, a total of $320 million had been borrowed from a consortium of 24 banks (Hearings, 1971: 151). During the fall and summer of 1970, Lockheed was negotiating a financial package of $400 million in bank loans, $100 million in accelerated payments from airlines for the L-1011, and "provision for an additional $100 million of bank debt, if needed, the latter to be supported by either additional collateral or government guarantees. . . or a combination thereof" (Hearings, 1971: 151).

As a result of Lockheed's settlement with the Department of Defense, its outstanding loans were given a "classified" status (Hearings, 1971: 182). Therefore, bank examiners considered the possibility of payment by Lockheed to be greatly reduced. After the bankruptcy of Rolls-Royce, moreover, the Defense Department did not move to finalize its settlements with Lockheed. In this situation, the 24-bank consortium was no longer willing to proceed with the $600 million financial agreement it had been negotiating with Lockheed. By February of 1971, bankruptcy seemed imminent.

*Particularizing a Legislative Solution*

In response to Lockheed's financial crisis, the Nixon Administration proposed legislation guaranteeing loans of up to $250 million to companies experiencing severe financial difficulties. From the time this legislation was first proposed until it was enacted, the limits to debate were set by an adherence to market ideologies, the need for administrative controls, and rationales for containing the extent of government support to particular economic actors. Sending the proposed legislation to Congress in May of 1971, Treasury Secretary Connally supported it in the following terms:

> The failure of major business enterprises can have serious national and regional consequences, including the causing of substantial unemployment, as well as other business failures. To provide for credit to avoid such consequences, government guarantees may be warranted (*Congressional Quarterly*, May 21, 1971: 1124).

The legislation proposed to the Congress had the following administrative and financial provisions:

1. Authorize the Treasury Secretary to guarantee up to $250 million in loans to major business enterprises.
2. Require as conditions of any guarantee that the business be essential to insure competition and productive capacity in an industry.

3. That assistance be necessary to prevent serious adverse effects on the economy and that credit be unavailable otherwise.
4. Require as additional conditions that there be reasonable assurance of repayment and reasonable protection from the government.
5. Limit a guarantee to five years duration but authorize the Secretary to extend it for an additional five years.
6. Prohibit declarations of dividends while a guaranteed loan was outstanding.
7. Prohibit, during the life of a guaranteed loan, any payment or other indebtedness to a guaranteed lender.
8. Authorize the Secretary to waive the two preceding conditions.
9. Secure payment with a first *lien* on the property of the borrower and give a guaranteed loan priority over all other debts in any bankruptcy proceedings.
10. The bill also provided for the creation of an Emergency Loan Guarantee Board made up of the Secretary of the Treasury, the Chairman of the Federal Reserve Board and the Chairman of the Securities and Exchange Commission. The purpose of this board was to execute any government guarantee approved by Congress.

These provisions defined both the boundaries of government intervention and the conflicts inherent in particularizing government support. Least problematic were those which sought to maintain the financial integrity of the state not only as the ultimate guarantor of the loan, but also as financially sound for general economic activity. Indeed, there appears to be an independent state interest that is compatible with and an underlying part of private economic activity. In this light, provisions 4, 5, 6, 7, and 9 determine the ways in which the potential for losses to the state are to be minimized. While the direction of the bill is to underwrite the financial risks to private economic actors, there is nonetheless an apparent effort to protect the government by controlling the flow of revenue to loan payments rather than to dividends, guarding against further corporate indebtedness, and assuring the priority of guaranteed loans over other corporate indebtedness, especially if the corporation enters bankruptcy proceedings.

More relevant to the issue of particularism are provisions 1 and 10, which specify the officials responsible for administering the loan guarantee. They suggest how privatization of the state facilitates the interests of dominant sectors of the economy. While in Weber's theory, administrative rationality supports formal rationality because of its rule boundness, the Lockheed bill points out that particular interests and formal organization may be mutually supportive in privatizing an emergent state institution. These provisions placed administrative control among high federal officials—specifically, the Secretary of the Treasury, the Chairman of the Federal Reserve Board, and the Chairman of the Security and Exchange Commission. If we

accept the idea that high government officials generally embody the interests of dominant corporate financial interests, as Domhoff among others has demonstrated, then the staffing of the loan control board suggests a substantive direction.[15] Given that high government officials would be most cognizant of the interests of major corporations and financial institutions, the direction of the loan control board in being sensitive to large capital interests rather than other, smaller interests would appear to be likely. While this feature of the legislation served to insure that the range of claims to government assumption of financial risks would be limited, it also provided the most economically dominant sector of the private economy with more than equal access to a potential source of governmental financial assistance. The possible sensitivities of high government officials, moreover, do not constitute formal criteria for determining which loans to private business government should underwrite. The range of discourse covered by the market and principles of rational administration did not answer the question of who should be helped by government loan guarantees.

These substantive dimensions of the legislation are given further particularistic directions by provision 1. As Kennedy has suggested, "quantitatively precise rules" that emerge out of political compromises generally define the range of application particularistically (1976: 1709). Although the bill was written in general terms, the fact that the first provision limited the authority of the Emergency Loan Guarantee Board to $250 million—the exact amount that Lockheed and the 24-bank consortium required—indicates that the bill was tailored to meet the specific financial needs of Lockheed. Other details of the bill which waived the requirements of notification to and review by Congress of any loan guarantee commitments made before October 1, 1971, further specified the bill's application. Since Lockheed was the only business enterprise that could possibly obtain a government loan guarantee by that date, this time requirement had relevance only for Lockheed.

Beyond these particularistic features, the bill presented potentially contradictory economic goals. These contradictions detracted from a coherent rationale for the legislation. In so doing, they undermined the stability of economic assumptions which are conducive to legal formalism. While the second provision specified the goal of enhanced competition as a

[15] See Domhoff, 1971, 1975. For a recent statement that stresses processual issues rather than outcomes, see Domhoff, 1979.

legislative concern, the third provision sought to prevent "adverse economic effects on the economy." Yet the effort to maintain competition is far from identical with insuring employment, high levels of investment, and economic stability. The fluidity associated with competition requires that some business concerns fail, thereby generating economic instability, at least in the short run. There are all kinds of imaginable situations in which the aim of competition would be served by allowing a dominant corporation in an industry to flounder financially, thereby enabling its smaller competitors to pick up larger market shares. This would necessarily lead to economic dislocations and instability. On the other hand, stabilizing a major corporation through federally guaranteed credit could serve to maintain its dominance and thereby inhibit competition. At the very least, the conflicting provisions would create ambiguities in the administration of the law and further enhance the discretionary power of the Emergency Loan Control Board. The area of subjective interpretation of law is expanded by such ambiguities, while the boundary-maintaining notion of rule application is weakened.

The bill submitted to Congress by the Nixon administration was highly divisive. During the course of the debate, proposed amendments to the bill attempted either to maintain a narrow qualification for federal loan guarantees or to expand the scope of the bill to small businesses. When the bill was finally passed by a vote of 49 to 48 in the Senate and 192 to 189 in the House, it was basically unchanged from its original version. By analyzing the Congressional debate, we can specify more fully the boundaries of discourse around the issue of particularizing the legislation. Table 1 presents major categories that bounded the debate and summarizes the range of favorable and unfavorable arguments in each category.

As formulated in Table 1, the boundaries of the debate went far beyond legal rational and formal criteria to include political and economic arguments. Within each bounding category, favorable arguments tended to be particularistic, while unfavorable arguments tended to be more universalistic and rule oriented. With regard to nationalism, for example, supporting arguments tended to focus on the defense and aircraft industries, while negative arguments were more prone to consider the national economy as a whole and to be critical of support for particular foreign interests. Over the effect on the market, supporting arguments tended to rely on subjective notions such as "business confidence," while opposition

arguments were more oriented toward the potential unbalancing effects of greater government involvement on the

Table 1. Boundaries of Lockheed Loan Guarantee Debate

| Bounding Categories | Range of Disagreement Over Proposed Legislation | |
|---|---|---|
| | Favorable Arguments | Opposition Arguments |
| Nationalism | Bill needed to maintain a viable U.S. defense and aircraft industry | Really a bail-out for Rolls-Royce and Great Britain; engines should be manufactured in U.S. |
| Effect on Market | Maintain market by building business confidence | Disrupt market by raising corporate expectations of and reliance on government support |
| Generalizability | Limit to Lockheed and/or major corporations | Expand to small businesses, ghetto businesses, businesses in health and education |
| Administration of Loan | Reasonable for all parties; would protect the government's investment | Lacked enforceable controls |
| Economic Welfare | Clearly needed to maintain high employment levels and investment opportunities | Negative impact of Lockheed bankruptcy overstated; slack would be taken up by Lockheed's competitors |
| Financial Institutions | Bill required to insure credit | Bill would protect creditors from their own decisions; financial domination of airlines and manufacturers |
| Viability of Lockheed | Loan guarantee definitely needed to avoid bankruptcy | Lockheed would probably survive without loan guarantee because banks would continue to supply credit |

market mechanism. In defining the scope of the bill, supporting arguments maintained the need to help Lockheed or major corporations, thereby favoring the monopoly sector of the economy. Opposition arguments sought to universalize the legislation to the competitive sector of the economy. In addition to stressing themes of equality through generalized assistance to all businesses in the competitive market, opposition arguments tended to discount the need for particularistic legislation to maintain both the economic welfare of the nation and to contribute to the viability of Lockheed. With regard to the administration of the loan and the role of financial institutions, opposition arguments were grounded in themes of individual and corporate responsibility, a separation of the corporate and state sectors, and concerns

over corporate-state dominance of the economy. Supporting arguments, on the other hand, were more oriented to exigencies of the immediate crisis and the good faith of government and corporate officials.

While the discourse had clear boundaries and ranges of disagreement within these boundaries, participants nonetheless differentiated themselves from one another in the context of political debate. Individual participants often combined both favorable and unfavorable arguments in defining their positions. Others were more likely to stick to a single theme as the grounds for their support or opposition. These differences not only served to expand the variety of positions within the boundaries formulated in Table 1, but also enabled the construction of individuality characteristic of representative democratic polities. Through this political discourse, the particularistic legislation was actually accomplished.

Senator John Sparkman (D., Ala.), Chairman of the Banking, Housing and Urban Affairs Committee, scheduled hearings in June of 1971. Senator Sparkman supported the loan guarantee for Lockheed, stating that he was "concerned that the conditions be reasonable for all parties, including the government," and that as long as these conditions were met, he "anticipated little difficulty in passing the bill in the Senate" (*Congressional Quarterly*, May 21, 1971: 1125-1126). Senator John Tower (R., Texas), ranking Republican committee member, supported the bill. He argued that there "was adequate reason to grant the guarantee on economic grounds—to prevent a major company from collapsing and taking other companies with it" (*Congressional Quarterly*, May 21, 1971: 1127). Senator Gambrell (D., Ga.), also based his support for the bill on economic grounds. He stated that "the jobs of tens of thousands of Lockheed employees, both in the L-1011 and the C-5A projects, are in jeopardy" (*Congressional Quarterly*, May 21, 1971: 1127). He maintained that Lockheed could not survive without the government loan guarantee. Both Senators Alan Cranston (D., Calif.) and Edward Brooke (R., Mass.), supported the bill, but with some reservations. Senator Cranston supported the bill with the condition that the Lockheed Board of Directors resign, because he wanted to "avoid rewarding bad management" (*Congressional Quarterly*, May 21, 1971: 1127). Senator Brooke supported the bill with the stipulation that American-made engines be used in the L-1011 instead of British-made engines. Noting that "one of the

primary justifications offered for the guarantee was to protect the jobs of Lockheed employees," Senator Brooke was opposed to the idea of benefitting a foreign manufacturer (*Congressional Quarterly*, May 21, 1971: 1127).

Senator William Proxmire (D., Wis.) was the only staunch opponent on the Banking, Housing, and Urban Affairs Committee. Senator Proxmire, whose Joint Economic Committee hearings in 1968 revealed the C-5A cost overruns, raised three major points of concern. First, he accused the Nixon administration of misleading Congress regarding the loss of jobs that Lockheed's failure would generate. He stated that "even if Lockheed cancelled the L-1011 project, the slack would be taken up by its competitors" (*Congressional Quarterly*, May 21, 1971: 1128). Second, he was critical of some of the international implications of the Lockheed loan guarantee. He called the government loan guarantee "really a bail-out of Rolls-Royce and the British government at the expense of the United States" (*Congressional Quarterly*, May 21, 1971: 1128). Finally, he questioned the likelihood of the 24-bank consortium allowing Lockheed to go bankrupt if the government did not provide the loan guarantee. He expressed his belief that "these bankers would be more than willing to loan an additional $250 million to protect their original investment if there was a reasonable prospect of repayment" (*Congressional Quarterly*, May 21, 1971: 1128).

When the Senate committee opened testimony on the bill, Senator Proxmire added another dimension to his opposition. He stated that in 1970 over 10,000 small businesses failed and that the economic impact of these failures was greater than the potential failure of Lockheed. He rhetorically posed the question of why government guarantees were not considered for these small businesses and answered the question by saying that "the 10,000 small firms do not have the political clout of the Lockheed Aircraft Corporation" (*Congressional Quarterly*, June 11, 1971: 1275). In summarizing his views, he said, "My opposition is against the general principle of insulating big business from failure."

On June 30, the Senate Banking, Housing and Urban Affairs Committee decided to hold further hearings that would focus on a broad government loan guarantee. As a result of these hearings, the Committee reported a broad government loan guarantee bill, S 2308, to the Senate (*Congressional Quarterly*, July 16, 1971: 1521). The bill would have authorized the federal government to guarantee up to $250 million to

individual businesses and to have $2 billion in guaranteed loans outstanding at any one time.

The vote by the members of the Senate Banking, Housing, and Urban Affairs Committee was 10 to 5 in favor of bringing the bill out of committee and onto the floor of the Senate. Senator Proxmire, who voted against the broad legislation, argued that the bill was no more than the original Lockheed proposal in disguise. He maintained that Lockheed supporters dropped the narrow bill after it became apparent that it was not popular enough to pass a Senate vote. He stated that the maneuvering by Lockheed supporters made it apparent that the Lockheed loan guarantee had "no benefits and serious disadvantages." Adding that the bill was "a big business giveaway of the worst kind," he suggested that Congress reject Lockheed's application for a government guarantee and, instead, carefully prepare a general loan guarantee bill (*Congressional Quarterly*, July 30, 1971: 1396).

Senator Taft (R., Ohio), who also opposed the bill, argued that it lacked "enforceable controls." He further maintained that although the committee held "extensive hearings" on the subject, these hearings did not "make a sufficient case for either the rescue of Lockheed or the general approach now before the Senate" (*Congressional Quarterly*, July 30, 1971: 1596). Senator Stevenson, also in opposition, called the bill a "proposal to protect Lockheed and its creditors from the consequences of their own business judgments" (*Congressional Quarterly*, July 30, 1971: 1596). He said that he voted in favor of the bill with the expectation of voting against it on the floor of the Senate.

Senator George McGovern (D., S.D.), who had previously announced that he would propose an additional $250 million for failing businesses in urban ghettos and rural areas, "offered an amendment to double the loan guarantee authority of the bill (S 2308) by adding $2 billion for guaranteed loans to farmers and small businesses. Congress could not justify assistance for major businesses, McGovern said, unless it provided similar help for others" (*Congressional Quarterly*, August 6, 1971: 1645). In a similar vein, Ted Stevens (R., Alaska) "offered an amendment to create a $200-million emergency loan guarantee fund for small business. Stevens said he did not intend to have his amendment called up for a vote. After he was assured by Sparkman that hearings would be held on small business problems, he withdrew it" (*Congressional Quarterly*, August 6, 1971: 1645). The McGovern amendment was rejected by the

Senate by a roll-call vote of 18 to 75. Another amendment that failed had been proposed by Senator Birch Bayh (D., Ind.). This amendment would have authorized a federal guarantee of up to $2 billion for failing businesses, requiring that 50 percent of guarantees be made to educational and health institutions (Congressional Quarterly, July 30, 1971: 1597).

Senate supporters and opponents of the legislation were most at odds over the impact of a Lockheed failure on the economy as a whole. While supporters saw Lockheed's failure as a clear economic threat, opponents tended to both minimize the negative impact of a Lockheed failure and point out the economic problems brought about by other financially distressed sectors of the economy. Despite this clear difference, supporters and opponents were often in agreement about the international implications of the legislation and problems of administering the loan, especially in light of Lockheed's internal management record. Thus, it appears that the main issue in particularizing the legislation hinged around arguments about the functional location of Lockheed in the U.S. economy.

This theme was also a focal point in the testimony submitted by appointed government officials. While Secretary of the Treasury Connally had the most pragmatic attitude in supporting the legislation, Arthur F. Burns was most willing to support a broad bill tied to the financial needs of the monopoly sector. Deputy Secretary of Defense Packard's support was the most ambiguous, since he stressed the difficulties faced by Lockheed and his fear of a precedent for government support of other corporations.

Secretary of the Treasury Connally's testimony supported the economic arguments of the bill's proponents. According to Secretary Connally, the loan guarantee to Lockheed was necessary to maintain "confidence in a renewed business expansion." He pointed out that Lockheed was the largest defense contractor in the United States with $2.5 billion in annual sales, 72,000 employees, and earnings of $830 million annually. He stated that the government loan guarantee posed only a "small" risk to the taxpayers and that "there is a good chance that the guarantee will succeed in financing Lockheed's needs . . . during the . . . next couple of years." He concluded by stating that "the legislation would protect the government's investment" but that "quick authorization" of the guarantee was essential to "preserve the economy" (*Congressional Quarterly*, July 30, 1971: 1275).

Deputy Secretary of Defense David Packard revealed two important discrepancies concerning Lockheed and the proposed government loan guarantee (*Congressional Quarterly*, June 18, 1971: 1309). First, he cited Defense Department studies revealing that Lockheed would have to sell over 300 L-1011s just to recover its development and production costs. This was in contrast to the view of Lockheed officials that the sale of between 195 and 205 planes would meet their break-even point. Second, despite the findings of the Defense Department, Secretary Packard supported the loan guarantee to Lockheed stating:

> I, personally, do not see how Lockheed can avoid bankruptcy if this loan guarantee is not provided. Substantial unemployment would be the immediate result.

While Packard supported the loan guarantee, he maintained that "it would not be desirable to establish a precedent with this legislation that the government would go to the assistance of every company that got into financial difficulty" (*Congressional Quarterly*, June 18, 1971: 1309). He considered the Lockheed situation to be unique and stated his opinion that the Congress could grant the loan guarantee to Lockheed without creating a precedent for other corporations facing financial difficulties.

The testimony of Arthur F. Burns, Chairman of the Federal Reserve Board, was in sharp contrast. Instead of endorsing a narrow bill that would favor only Lockheed, Chairman Burns supported broad legislation that would create a permanent government loan guarantee authority with the power to guarantee loans to overcome future corporate financial emergencies:

> The board (Federal Reserve Board) has agreed on certain principles, which are embodied in a bill (S 2016) introduced by Chairman John Sparkman (D., Ala.), and the ranking minority member of the committee, John Tower (R., Texas). The bill provides for guarantees, limited to a total of $2-billion at any time, for loans to businesses which are essentially sound but are experiencing cash shortages (*Congressional Quarterly*, June 25, 1971: 1380).

Debate in the House over loan guarantees generally parallelled the range of debate in the Senate. As indicated by statements from members of the House Banking and Currency Committee, however, some representatives were more concerned with the financial institutions and financial arrangements that led to proposal of a federal loan guarantee to Lockheed. Wright Patman (D., Texas), who chaired the House Banking and Currency Committee, stated:

> The Lockheed situation appears to be more of a bail-out for large commercial banking institutions than it does assistance to an aircraft

> corporation. It is my belief that these large commercial banking institutions should stand on their own two feet without asking Congress for guarantees and subsidies for carrying out the very purposes for which they were chartered (*Congressional Quarterly*, May 21, 1971: 1128).

The issue of the role played by major banks in Lockheed's financial crisis was most fully articulated by Leonor K. Sullivan (D., Mo.). Rep. Sullivan was concerned with the "tremendous financial involvement" of the 24-bank consortium in the aircraft and airline industry (Hearings, 1971: 166). She pointed out that the willingness of these banks to loan $6.8 billion to the aircraft companies and airline companies not only rendered them financially dependent, but also resulted in unstable financial conditions in these sectors of the economy. She also read into the record information which demonstrated the extreme dependence of these industries on major banks and the strong interrelationships between these banks and the aircraft and airlines industries. As Tables 2 and 3 indicate, major banks had stock holdings in five of the leading airline companies and held 20 interlocking director positions with seven of the leading aircraft and airline corporations.[16]

Based upon this information, Rep. Sullivan argued that over-extension in the airline and aircraft industries could not have occurred without the concurrence of the major banks. They had financed the crisis by loaning the capital both for the production and purchase of the aircraft.

When the House committee began its hearings on the bill July 8, the executive committee had received a staff report recommending rejection of a narrow loan guarantee bill. Beyond questioning the effects of special legislation to bolster a particular corporation in a "free-enterprise system," the report expressed concern over potential financial losses to the federal government (*Congressional Quarterly*, July 16, 1971: 1521). Despite this concern, debate within the committee turned primarily on the merits of a narrow or broad bill. Rep. Widnall (R., N.J.), for example, was opposed to what he called "single-shot aid to one corporation," and instead supported enactment

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[16] The interpenetration of major banks, aircraft manufacturers, and airlines is but one example of the increased dependence of industrial capital on finance capital in the post-World War II period. As Kotz has stated:

> Since the end of World War II, nonfinancial corporations have again used a substantial amount of external finance. Nonfinancial corporations obtained between 40 percent and 45 percent of their total funds from external sources during 1946-1958 and during 1964-1974, as they did in 1900-1910 and the mid-1920s (1978: 61). During 1966-74 commercial bank loans supplied 22 percent of the external funds used by nonfinancial corporations, up from the 14 percent . . . for 1946-1965 (1978: 63).

Table 2. Percentage of All Bank Financing of Major Airlines and Wide-Bodied Jet Manufacturers Carried Out by Ten Large Banks Financing Lockheed*

| | Percentage of total loan commitments | Percentage of total equipment leasing | Percentage of total loan commitments and equipment leasing |
|---|---|---|---|
| Airlines | 64.0 | 61.7 | 62.6 |
| Wide-bodied jet manufacturers | 61.7 | — | 61.7 |
| Airlines and wide-bodied jet manufacturers | 63.0 | 61.7 | 62.4 |

*Source: "To Authorize Loan Guarantees to Major Business Enterprises," Hearings Before the Committee on Banking and Currency, U.S. House of Representatives, 92nd Congress, July 13-20, 1971: 166.

Table 3. Summary of Interrelationships Between Ten Large Banks and Major Airlines and Wide-Bodied Jet Manufacturers (Dollars in Thousands)*

| | Loan Commitments | Equipment Leasing | Stock-holding | Interlocking directors since 1966 |
|---|---|---|---|---|
| Major airlines: | | | | |
| Transworld Airlines | $128,000 | $456,513 | 11.1 | 4 |
| Eastern Airlines | 85,000 | 204,669 | 5.6 | — |
| Delta Airlines | 122,641 | — | — | — |
| Pan American Airways | 196,500 | 405,980 | — | 4 |
| United Airlines | 163,800 | 341,788 | — | 3 |
| American Airlines | 172,000 | 483,998 | 5.3 | 3 |
| Northwest Airlines | 183,835 | — | 3.1 | — |
| National Airlines | 120,150 | — | 8.9 | — |
| Western Airlines | 97,313 | - | - | 1 |
| Continental | 43,766 | — | — | — |
| Total for Airlines | $1,313,005 | $1,892,948 | — | 15 |
| Wide-bodied jet manufacturers: | | | | |
| Lockheed | 268,000 | — | — | 2 |
| Boeing | 466,800 | — | — | 3 |
| McDonnell-Douglas | 336,000 | — | — | — |
| Total for wide-bodied jet manufacturers | $1,070,800 | | | 5 |
| Total for major airlines & wide-bodied jet manufacturers | $2,383,805 | $1,892,948 | — | 20 |

*Source: "To Authorize Loan Guarantees to Major Business Enterprises," Hearings Before the Committee on Banking and Currency, U.S. House of Representatives, 92nd Congress, July 13-20, 1971: 167.

of a broad proposal with strict regulations that did not give the "special treatment" of a narrow proposal (Hearings, 1971: 3). The bill reported out of committee, HR 8432, dealt with this issue by expanding the original bill. As reported to the House

floor, the bill authorized government loan guarantees of up to $2 billion with a maximum of $250 million to any single borrower. This bill passed in committee by a vote of 23 to 11.

On the House floor, Rep. Ashley (D., Ohio), proposed amendments to the bill that essentially narrowed it to the original Administration bill (*Congressional Quarterly*, August 6, 1971: 1646). The two most important amendments limited the total loan guarantee to $250 million and deleted a provision that required Congressional review of proposed loan guarantees. The bill was voted on in this amended form by the House and passed by a vote of 192 to 189.

Faced with the inability to end debate or to bring an alternative Senate-initiated loan guarantee to a vote, on July 31 the Senate agreed by unanimous vote to debate House bill, HR 8432. After a limited debate, the bill passed the Senate by one vote, 49 to 48.

*Underlying Ideologies*

Both the Lockheed bill and its congressional debate went far beyond the discursive limits of legal rationality specified by Weber. The bill had a number of features that demonstrate elements of legality conceptualized by critical scholars. As a result of the structural relations of concentrated economic power and representative politics, aspects of state sector privatization, rationality deficits, and expectations of state intervention are apparent in the Lockheed legislation. Yet the legislation did have recognizable parameters. It was bounded by categories of nationalism, market rationality, administrative rationality, economic welfare, the role of financial institutions, the financial viability of Lockheed, and legislative generalizability. Within each of these categories, there was a range of disagreement. While supporting arguments tended toward particularism in backing the loan guarantee, opposition arguments tended toward more universalistic notions of legal and economic rationality. Furthermore, supporters and opponents elaborated individualized positions that often incorporated both particularistic and universalistic arguments.

Despite this complexity, underlying themes suggest taken-for-granted limits to discourse. These themes are ideological in the sense that they constrain discussion in ways that block resolutions to economic issues that would lead to more fundamental restructurings of capitalist modes of economic and administrative action. In effect, ideological limits to discourse restrict the resolution of issues so as to preclude

transformations in the structure of economic and political power.

One taken-for-granted boundary of legitimating discourse is the private ownership and control of capital and the prerogative of private investment decisions. While the wisdom of particular corporate initiatives were questioned and while management was criticized to the point of Senator Cranston's demand for their resignation as a condition for government support, there was a total absence of proposals either for nationalization or direct government supervision of investment decisions. In this regard, the discussion of the involvement of major banks in the Lockheed financial crisis initiated by Representative Sullivan was directed at determining why the major banks were unable to foresee financial difficulties rather than as an effort to interfere with their prerogatives. Thus, the fundamental condition for private control of economic initiatives was left intact.

Maintaining corporate prerogatives over investment decisions affirmed a major limit to state intervention. The central role played by the market in the loan guarantee debate also limited state involvement and private control. As we have seen, participants in the debate argued that the loan guarantee would maintain competitive market conditions, that it would hinder the operation of the market, or that it would pose potential problems of government interference in market relations. Despite these differences in evaluating the impact of the loan on the market, the range of discussion indicates an underlying consensus on the importance of maintaining the market as the institutional nexus through which economic activity is regulated.

Yet in the case of the Lockheed loan guarantee, the affirmation of market control, when considered in light of structural relations, was largely without substance. As Seymour Melman pointed out, approximately 88 percent of Lockheed's total sales from 1960 to 1967 were to the Pentagon (1973: 129). In addition, Lockheed held 8,359 pieces of industrial equipment, worth approximately $77 million, which were owned by the federal government. Thus, the state was not only overwhelmingly Lockheed's major customer, but also a major supplier of Lockheed capital before the loan guarantee was initiated (Melman, 1973: 130). As John Kenneth Galbraith argued, to affirm market discipline in such a situation is to leave political power unchecked:

> General Dynamics, Lockheed, North-American Rockwell and such are public extensions of the bureaucracy. Yet the myth that they are

> private allows a good deal of freedom in pressing the case for weapons, encouraging unions and politicians to do so, allowing executives to press the case and otherwise protecting military power. We have an amiable arrangement by which the defense firms, though part of the public bureaucracy, are largely exempt from its political and other constraints (1973: 113).

The belief that the market disciplines and directs the behavior of economic actors toward efficient use of resources underlay the limited character of state intervention specified in the loan guarantee bill. Yet the loan guarantee, since it involved government financial obligations, required a public presence. This presence took the form of public administration of the loan program. The administrative component of the loan guarantee bill supervised the allocation of funds beyond the "laws" of the market.

In the various versions of the bill debated in Congress, the public dimension of the loan guarantee took the form of an administrative loan control board composed of high government officials who would have the responsibility of determining when guaranteed government loans would be necessary to avoid serious disruptions to the national economy. They would also be responsible for monitoring the guaranteed loans in order to prevent losses to the federal government. The loan control board would be subject to Congressional oversight in order to maintain public knowledge of the program and to allow for the implementation of the legislative mandate.

While adherence to the market and private control over investment decisions demonstrates the continuity of principles of private enterprise in legitimating the loan guarantee, the administrative dimension of the loan control board and Congressional oversight demonstrate the continuity of principles of administrative rationality. Yet, as I suggested, the staffing of the loan control board with high government officials indicates substantive power rather than the application of purely administrative principles. Furthermore, as in the Lockheed case, state officials must base their proposals and actions on decisions they expect from private economic actors. In relying on these expectations, government officials are subject to pronouncements made by private corporate executives. Would the banks have refused to extend credit to Lockheed without government loan guarantees? Would the financial crisis of Lockheed, if the banks had refused more credit, have led to the anticipated economic dislocations? The answers to these questions, even if based on clear information about Lockheed's finances and its role in the U. S. economy, would require speculation about the behavior of private

economic actors. Yet it is on the basis of this speculation that the government sought to legitimate its economic actions. This greatly diminishes the ability to use rules in making decisions, thereby further undercutting formal features or rationality and enhancing the privatized, particular character of legality.

## IV. DISCUSSION

In Weber's theory, rational law provides the most universal, internally consistent, and formal type of political legitimacy. As a type of social orientation resting on abstract and depersonalized rules, it is the most suitable framework for the conduct and extension of rational economic action. "The belief in legality, the readiness to conform with rules which are formally correct and have been imposed by accepted procedure" characterizes a legitimate basis for political action that most fully complements the impersonal market orientations of capitalist economic action (Weber, 1964: 131). Just as capitalist economic relations are reinforced through the exigencies of economic life, it is also the case that once legal rationality is imposed, whether on the basis of voluntary agreement, force, or previous legitimate authority, it has a tendency to become self-perpetuating through everyday activities.

While legal rationality may be secured through mundane action, as a form of legitimacy it has mystifying, ideological characteristics. The formal features of legal rationality serve to obviate against the appearance of private sources of political and economic power in public discourse. Through the abstract categories of individualism, equality, and formal rules, disparities of power among social actors are shielded from view. Rational legality provides a discourse by which action is mediated through categories that block the recognition of the social grounds of power differentials. The actual differences in power and social location that are the basis for the re-creation of private capital accumulation are given abstract legal form, thereby preventing their full political articulation.

While legal rationality and economic rationality have strong affinities, they tend to become more conflictual as capitalism develops. As capital becomes more concentrated and controlled by fewer institutional actors and as the involvement of the state in economic relations expands, it becomes more difficult to legitimate actions through abstracted, formal rules. Most important, it is increasingly difficult to exclude private actors and their relations from public

discourse. As a result, rational law undergoes a transformation toward particularistic law. This raises both new arenas for legal action and new problems of legitimation.

My concern in this essay has been to analyze discursive aspects of these transformations. Grounded in neo-Marxian and critical reformulations of Weber's theory, I have sought to reconstruct Weber's theory of rational law in directions that heighten analytic attention to discursive conflicts and limits to those conflicts. In viewing law as an arena of practically constituted action, I have argued that the formal features of rational law are most adequately construed as boundary-maintaining categories to discourse that allow for the legitimate re-creation of capitalist economic relations. Under conditions of monopoly and representative democracy, formal legality is included in a boundary-maintaining discourse that admits of wider, often contradictory, economic and political dimensions.

These conceptual departures were demonstrated and elaborated in the analysis of the Lockheed loan guarantee legislation. Despite the fact that the bill was written in general terms, it lacked orientation toward formal rules because of its contradictory economic goals, the discretionary power allowed to the loan control board, and the quantitative rules that defined it particularistically. The composition of the loan control board, moreover, insured that the range of application of the bill would be limited. Thus, the application of law was delimited both by the officials responsible for administering the loan guarantee and by the discursive limits of the law itself. In effect, the privatization of a new state institution and state power constituted the substantive boundary of state financial assistance.

While the interests mobilized by the law were particularistically circumscribed, the congressional debate manifested a wider range of societal interests. The greatest controversy hinged around the economic impact of a Lockheed failure in comparison to the detrimental effects in other sectors of the economy.[17] The potential effect of a corporate

[17] Birgitta Nedelmann and Kurt G. Meier (1979) have pointed out that different levels of political and legal action may be characterized by more open or closed forms of interest representation. This aspect of boundary maintenance was even more problematic in the 1980 Chrysler loan guarantee than in the Lockheed case, because of both the greater size of the Chrysler loan guarantee and, more important, the greater number of relevant actors participating in it. The Chrysler case, for example, involved approximately 700 banks and mandated participation of federal as well as state governments. For an intriguing case study of the complexity of interests in the automobile industry and their effects on politics and law, see Stewart Macaulay, 1966.

bankruptcy on domestic economic growth and levels of unemployment was raised by supporters of the loan guarantee as well as by its critics. While supporters of the loan guarantee pointed out the detrimental effect of a Lockheed bankruptcy on employment and economic growth, critics questioned both the likelihood and the seriousness of these projected economic dislocations. Others, such as Senators McGovern, Stevens, and Bayh, sought broad financial assistance through loan guarantees to small businesses in urban and rural areas. In addition, arguments presented by Senator Proxmire regarding the impact of the failure of small businesses on employment and the nation's general economic well-being suggest that there are no simple criteria for determining where government financial support should be allocated. These ambiguities in an economic rationale for law not only undermined the rational underpinnings of state action but also held out the implication of expanded state financial support to other economic actors. Furthermore, the international implications of the Lockheed loan guarantee underscored this point as both supporters and opponents pointed out that financial assistance to Lockheed would benefit foreign interests and bolster employment in foreign countries. The determination of where government financial assistance should be directed—even within the boundaries of private control over investment decisions, belief in the market, and the organizational and administrative constraints on government-guaranteed loans—remained the most open and least formally resolvable feature in government economic intervention.

As we have seen, supporters of the Lockheed loan guarantee tended toward particularistic arguments while opponents tended to criticize the legislation on the basis of more universal principles. Despite this disagreement, general consensus on underlying themes kept the debate within the bounds of maintaining private enterprise. While the legislation and the debate surrounding it heightened tendencies toward blurring distinctions between political and economic spheres of action and furthered state economic intervention, the main result was to provide government support for the private accumulation of capital.

While this study points out the multifaceted dimensions of particularistic law, it also suggests two primary themes through which particularistic law is legitimated. First, and perhaps most important, is the legitimating theme of functional

necessity for the economy as a whole. In the face of departure from a competitive market rationale for legal action bolstered by formal legality, the salience of technological, strategic, and labor force features of a particular corporation increases. In the case of Lockheed, the combined factors of maintaining a technologically sophisticated national defense and employment of the labor force were clear legitimating themes. While these issues were reasonably debated and subjected to disagreement, their importance was never put in question. Second, and most politically significant, is the potential for further support of other corporations and sectors of the economy. The willingness to accept support of a particular economic actor implies a possibility of future financial assistance to another interest. While the Lockheed legislation was specific to the financial needs of Lockheed, both the general terms of the law and the willingness of key supporters to see it expanded may well have encouraged the acceptance of the legislation by those who envisioned a wider governmental role.

Beyond serving as an exemplary case study that demonstrates discursive boundaries for particularistic law creation, the Lockheed legislation has historical significance. As some participants in the Lockheed debate foresaw, the legislation became the starting point for the expansion of loan guarantees to major corporate actors. While loan guarantees have been used since the 1930s to provide credit in the form of small loans to individuals and households and, increasingly, to small firms and individuals who are marginal borrowers, the expansion of federal loan guarantees to help finance discrete ventures by major corporations did not fully emerge until the early 1970s (Congressional Budget Office, 1978: 13-25). From 1960 to 1967, total guarantees of discrete ventures never exceeded $50 million. Between 1968 and 1971, the total for all such loan guarantees was under $250 million. Beginning with the Lockheed loan guarantee and through 1976, loan guarantees to major corporations expanded from $250 million to $3 billion. More recently, with the passage of such legislation as the Chrysler Corporation Loan Guarantee and the formation of the Synthetic Fuels Corporation, billions of dollars in federally guaranteed credit to major corporations have been added. The Chrysler loan guarantee alone added $1.5 billion in federally guaranteed loans.

One important feature of the loan guarantees that began with Lockheed is that, in contrast to small loan guarantees to many borrowers, they are not actuarially sound. Since the

risks associated with default cannot be spread across many borrowers through insurance premium payments, the federal government is itself placed in a precarious financial position:

> It is impossible to anticipate the timing and magnitude of losses associated with these guarantees. The number of such guarantees have been small, and their circumstances so individual that their default rates cannot be compared from program to program . . . . Because the guarantees are for large amounts, the default of only one or two borrowers can impose large financial burdens on the government (Congressional Budget Office, 1978).

With the expansion of government support for private corporations initiated by the Lockheed loan guarantee, a new arena of state-corporate cooperation has emerged. This has enhanced the role of the financial and economic relations of private corporations in public discourse. In this new configuration, the categories of rational law put forth by Weber are still important for capturing features of legitimacy associated with the maintenance of the market. However, new elements of legal action based on corporate-governmental interpenetrations have emerged, and they require legitimating rationales that facilitate public support of dominant corporations and the assumption of financial risks by government while providing boundaries that maintain private accumulation of capital and its prerogatives.

My effort in this study has been to develop categories for the analysis of such legitimating rationales that open them for critical inquiry. The character and implied action orientations of these legitimating rationales, however, are not given once and for all. Rather, they are themselves features of sociolegal reproduction located in a wider constellation of social relations. As such, the development of adequate categories requires continued conceptualization and empirical study.

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