THE ANALYTICAL FOUNDATIONS OF MARKETS

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This paper aims to develop two lines of critical and constructive claims. The first is that to seek to normatively evaluate markets prior to analytically specifying *what markets are* is to put the cart before the horse. Yet this seemingly elementary point—namely, that one cannot assess some phenomenon before first clarifying its character—is often obscured in contemporary legal analysis. In an understandable recoil from an untenable conceptual essentialism (markets are *this* one thing), such analysis has tended to fall back on an equally untenable nominalism (markets can be many different things, and so no one thing in particular). But this response to a reifying essentialism is unavailing—we cannot escape specifying *what we mean by markets* before seeking to assess them.

Second, when we turn to the actual conceptions of the market that (explicitly or implicitly) inform contemporary private law, these tend to oscillate between two poles. On one side is a view of markets as realms of either "natural liberty" (classical liberalism) or "private ordering" (neoliberal law-and-economics and the "new private law theory"). On the other side is a view of markets as largely legal constructs, the product of state-based rules and decisions. What both sides share is an underlying liberal ontology: methodological individualism plus "the state." Where one camp views markets primarily through the individualizing, naturalizing lenses of prepolitical rights or private preferences, the other camp points in reply to the hidden—political, contingent—hand of the state.

Yet attempts to come to grips with markets through *either* individualist- or state-based lenses (or their combination) will, we think, be significantly impoverished in their explanatory understanding of market dynamics and, correspondingly, blinkered in their evaluative assessment and reforms.

Markets, we argue, are *irreducibly social relations* of *price-mediated exchange*. Such relations and their corresponding dynamics are *emergent*, not consciously and voluntarily chosen by individuals nor constructed by states. To come to grips with such relations and dynamics—both explanatorily and evaluatively—requires explicitly conceptualizing their irreducibly social character. *Capitalist* markets, moreover, are a particular, *historically-specific* form of such relations: a system of *generalized markets* whereby most economic agents are increasingly *dependent* on price-mediated exchange and where market social relations are increasingly *disembedded* from non-market social relations. Such generalized markets pose significant concerns from the vantage of both individual and social agency, or self-determination and democracy. Addressing these concerns requires, not an amalgam of doctrinal tweaks, but a *systematic re-embedding* of markets—or bringing to bear explicitly decommodified judgments of affected interests and values in various areas of private law that centrally affect the operation of market processes.

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In developing these arguments and exemplifying what we mean by re-embedding markets, we will draw on cases from distinct areas of what may be called *informational resources* law and policy: intellectual property, innovation policy, and data governance.