ESSAY

LAW AND NEOCLASSICAL ECONOMIC DEVELOPMENT IN THEORY AND PRACTICE: TOWARD AN INSTITUTIONALIST CRITIQUE OF INSTITUTIONALISM

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INTRODUCTION

In his 1993 Nobel Laureate lecture, the leading theorist of institutional economics, Douglass North, emphasized the relevance of his life’s work for economic development policy.1 Twenty years prior, in his book with Robert Thomas entitled The Rise of the Western World, North had laid out the theoretical connection between institutional economics and development: economic growth could not occur without efficient institutional arrangements and property rights, and the “rise of the West” could be explained in these terms.2 In another influential book, Institutions, Institutional Change and Economic Performance, published just a few years before he received the Nobel Prize, North had again argued that his view of institutional economics had primary significance for economic development.3

By the time North accepted the Nobel Prize two decades after his original exposition in The Rise of the Western World, his hypothesis about the relationship between law and economic growth had won extraordinary recognition in development policy. North’s neoclassical theory of the state, in which appropriate laws and institutions supported the market ideal of efficient transactions among private actors,4 provided the conceptual basis for a new era of development programming in which principles of “good governance”—in particu-

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Economic history is about the performance of economies through time. The objective of research in the field is not only to shed new light on the economic past but also to contribute to economic theory by providing an analytical framework that will enable us to understand economic change. A theory of economic dynamics comparable in precision to general equilibrium theory would be the ideal tool of analysis. . . . A theory of economic dynamics is also crucial for the field of economic development.

2 See DOUGLASS C. NORTHC. & ROBERT PAUL THOMAS, THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY 1 (1973) (“Our arguments central to this book are straightforward. Efficient economic organization is the key to growth; the development of an efficient economic organization in Western Europe accounts for the rise of the West.”).

3 See DOUGLASS C. NORTHC., INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 9 (1990) (“If I describe an institutional framework with a reverse set of incentives to those that are efficient and conducive to economic growth, I will approximate the conditions in many Third World countries today as well as those that have characterized much of the world’s economic history.”).

4 See DOUGLASS C. NORTHC., STRUCTURE AND CHANGE IN ECONOMIC HISTORY 20, 23 (1981).
lar, the establishment of the “rule of law” and the implementation of property rights—became key focal points of policy reform efforts.5

In the 1990s, the goals of legal and institutional reform modified the menu6 for the transformation of the developing-country macroeconomic regimes that had come to be known as the “Washington Consensus.”7 Beginning in the 1980s,8 the Washington Consensus was a blueprint for the implementation of the neoclassical economic policies9 of the Chicago School:10 liberalization of trade, privatization of investment, fiscal austerity, and monetary stabilization.11 These

5 For a discussion of how these law and development programs emerged, see infra Part I.B. For a critical evaluation of these programs, see infra Part II.B.
6 For a discussion of this development, see infra Part I.B.
7 This term arose because the three most influential actors in setting the global development policy agenda endorsed it. Those actors were the World Bank, the U.S. Treasury, and the International Monetary Fund. See Narcís Serra et al., Introduction to The Washington Consensus Reconsidered: Towards a New Global Governance 3, 3–4 (Narcís Serra & Joseph E. Stiglitz eds., 2008) (defining the Washington Consensus as “the set of views about effective development strategies that have come to be associated with the Washington-based institutions: the IMF, the World Bank, and the US Treasury”).
8 The economist John Williamson coined the term “Washington Consensus” in 1989. See John Williamson, A Short History of the Washington Consensus, in The Washington Consensus Reconsidered: Towards a New Global Governance, supra note 7, at 14. By the time he coined the term, however, the policy reforms it described had been in place for several years; indeed, this was the very meaning of the term consensus, denoting an observation of agreement on policy reforms arising over a period of time.
9 Williamson himself has repeatedly objected to using this term to denote the neoclassical economic theory associated with the rise of the conservative Reagan and Thatcher governments of the 1980s. See id. at 22. Williamson’s original conceptualization of the term denoted a more moderate set of beliefs. See id. at 16–17; see also Yoram Margalioth, Intellectual History as Legal Analysis, 96 CORNELL L. REV. 1025 (2011). Williamson has acknowledged that a sense of personal ownership over the term fueled his objections. See John Williamson, What Should the World Bank Think About the Washington Consensus?, 15 WORLD BANK RES. OBSERVER 251, 251–52 (2000) (“I find that the term has been invested with a meaning that is significantly different from that which I had intended . . . . I had naïvely imagined that just because I had invented the expression, I had some sort of intellectual property rights that entitled me to dictate its meaning, but in fact the concept had become public property.”). Despite those objections, the association of the Washington Consensus with neoclassicism has prevailed, and in using the term in this way, I join the ranks of, among others, Nobel Laureate Joseph Stiglitz, who attracted Williamson’s ire for the same reason. See Williamson, supra note 8, at 22 & n.6 (objecting to the use of the term “as a synonym for neoliberalism or market fundamentalism” and citing as an example Joseph E. Stiglitz, Globalization and Its Discontents 74 (2002)).
10 See Stiglitz, supra note 9.
11 For a discussion of the Washington Consensus, see Stiglitz, supra note 9, at 67. Stiglitz groups the concepts of fiscal austerity and monetary stabilization into the term macrostability. See id. High inflation and fiscal deficits were viewed as the two major threats to such stability; prevention of inflation through both monetary policies, including high interest rates and through reduced public spending was viewed as paramount to stabilization. See José Antonio Ocampo, A Broad View of Macroeconomic Stability, in The Washington Consensus Reconsidered: Towards a New Global Governance, supra note 7, at 65 (critically contrasting this view with the earlier Keynesian view). Though Williamson did not identify monetary stabilization in his original list of Washington Consensus policies, the focus of many developing-country reform programs of this era, particularly in Latin America, was on curbing inflation. See Andreas Freytag, The Credibility of Monetary Reform—
“structural adjustment” reforms of the 1980s, which focused on pure macroeconomics,12 were theoretical relatives of the later “turn to institutions” of the 1990s.13 In the former era, laws figured primarily as instruments to achieve economic policy reform, whereas in the latter, legal reform was to serve as an end in itself towards economic growth.

Part I.A demonstrates the genealogical connection between these two eras of law and development, beginning from the Coase Theorem, through rent-seeking analysis and public choice theory, to the institutional economics of North and others.14 Neoclassical understandings of the market informed both models, and each constituted progeny of neoclassical theories of the relationship between markets and institutions.15 Although legal and institutional development programs have been portrayed as the result of a learning process in which development practitioners realized that the desired macroeconomic policy reforms were ineffective without appropriate institutions and laws,16 that learning process has been bounded by the theoretical constraints of neoclassicism.

More recently, as Part I.A.5 suggests, human rights and other justice concerns have played an explicit role in shaping law and development priorities, although the impact of those concerns on underlying neoclassical priorities remains indeterminate and a subject for further study. This Essay, part of a larger intellectual history project, concerns itself with delineating (in Part I) the bedrock of the neoclassical law and development paradigm, those aspects of it which persist despite more recent modifications, and the ways (in Parts II and III) in which those aspects could be improved.

New Evidence, 124 PUB. CHOICE 391, 398–99 (2005); see also Chantal Thomas, Labour Migration as an Unintended Consequence of Globalization in Mexico, 1980–2000, in SOCIAL REGIONALISM IN THE GLOBAL ECONOMY 273, 277–79 (Adelle Blackett & Christian Lévesque eds., 2011) (describing Mexico’s stabilization programs of the era). The focus on monetary stabilization was induced not only by the devastating impact of inflation on the domestic populations of these countries but also by the theoretical focus of the neoclassical Chicago School on supply-side economics and monetary policy.

14 See infra Appendix.
15 See also infra notes 221–32 and accompanying text.
16 See Kenneth W. Dam, THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT 4–5 (2006) (describing the rise of “neoclassical economic policy” as a “second stage of economic development thinking,” which challenged and reversed the heavily statist approach of the earlier postwar era and then describing how this “search for new solutions led to an increasing focus on how poorly many developing country governments functioned and especially on widespread inadequacies, even corruption, of public regulatory bodies and of the legal system”).
Part I.B argues that a key opportunity to move beyond macroeconomics to laws and institutions arose out of a crucial shift in the legal interpretation of the World Bank charter’s prohibition against interference in the “political affairs” of borrower states.\(^{17}\) The redistribution of power among members of the international community that occurred at the end of the 1980s\(^ {18}\) supported a reinterpretation of that provision that in turn enabled the adoption of programs which previously would have been considered impermissible interferences in sovereignty.\(^ {19}\) As a consequence of these events, the New Institutional Economics (NIE) could and did join the New Political Economy (NPE) as a basis for international development policy.\(^ {20}\)

What followed was an explosion of programs for the reform of legal institutions in developing countries that has been termed “rule-of-law revival.”\(^ {21}\) This paradigm for thinking about law, economic development, and institutions implemented programmatically the neoclassical “revolution” in economic theory,\(^ {22}\) which was carried out in particular corridors of the economic and legal academies.

The neoclassical institutionalist paradigm in law and development, however, has proved resistant to some forms and sources of knowledge. Part II takes up some of these challenges, as identified by

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18 See DAM, supra note 16, at 4–5, 22 (discussing neoclassical movement’s development policy leadership).


20 See DEZALAY & GARTH, supra note 12, at 164.

21 See Thomas Carothers, The Rule-of-Law Revival, in Promoting the Rule of Law Abroad: In Search of Knowledge 3, 3–4 (2006). Popular programs focused on the judiciary and on property rights. This was consistent with the idea that an independent and well-functioning judiciary was necessary for the effective enforcement of law in general, for the support of stable and predictable legal rules, and for the enforcement of property and contract law in particular. See id. at 17, 20. Programs for the improvement of property law through land-titling systems have also been popular. See generally Stephen Golub, The Legal Empowerment Alternative, in Promoting the Rule of Law Abroad: In Search of Knowledge, supra, at 181 (discussing land-titling systems in Ecuador).

22 Part I is influenced by the Kuhnian argument that scientific knowledge arises through key historical moments—“scientific revolutions”—that establish theoretical paradigms. See infra text accompanying notes 25–27. In adopting a Kuhnian approach, I am influenced by David Scott. See David Scott, Refashioning Futures: Criticism After Postcoloniality 8–10, 124–29 (1999). For a discussion of knowledge practices in law, see Annelise Riles, Legal Knowledge 1–4 (Cornell Law Sch., Research Paper No. 05-034), available at http://ssrn.com/abstract=851885. This approach is consistent with constructivist and discursive analyses, which I have employed in other work. See, e.g., Chantal Thomas, Democratic Governance, Distributive Justice and Development 4, in Distributive Justice in International Economic Law (Chi Carmody, Frank Garcia & John Linarelli eds., forthcoming 2011) (manuscript at 4) (on file with author).
a growing body of contemporary scholarship on law and development. Some of these critiques are particular to neoclassical law and development, but others are generalizable to the field more broadly. Some point to theoretical inconsistencies; others point to difficulties in application. One serious drawback, which the legal literature has not yet sufficiently discussed, stems from the difficulties proponents have encountered in showing that the causal relationship defining the hypothesis—that better institutions lead to stronger economic growth—can be demonstrated empirically.

Part III considers the implications of Part I and II for contemporary law and development discourse. The theoretical and practical challenges described in Part II suggest the need for a framework that would improve the quality of information available to law and development analysts and provide strategies for correcting the influence of powerful interests in donor and beneficiary countries on development policy, as well as the powerful effects of ideational constructs. As such, this Essay suggests that law and development discourse should be more responsive to its conceptual and empirical limitations. Part III identifies specific areas for analytical improvements in theoretical and practical law and development frameworks premised on institutionalism.

Institutionalism propounds a particular set of theoretical assumptions about the role of law in economic growth. In unpacking the development of those assumptions, this Essay adopts a model of intellectual history based on the Kuhnian argument that scientific knowledge evolves through key historical moments—"scientific revolutions"—that establish theoretical paradigms. These paradigms are replaced only when awareness in the field of anomalies—problems that the existing theoretical paradigm cannot solve—presents a crisis for that paradigm that coincides with the emergence of an "alternate candidate."

The paradigm shift in law and development was enabled by dynamics in both the academy and the field. In the academy, the emer-
gence of neoclassicism as an alternate candidate coincided with an internal intellectual crisis arising from the limitations of Keynesianism and, in development economics, statism. This shift was mirrored in the field by the emergence of neoclassicism as a political movement that engendered accompanying changes in the personnel and policy of the development institutions. As such, theory and practice in law and development were linked and mutually reinforcing in describing the arc from modernization to neoclassicism.

In adapting a historiographic method to its purposes, this Essay seeks to contribute to economic as well as legal histories of neoclassicism. In doing so, it seeks to specify how influential theories of law in development grew out of a highly idealized conceptual framework wedded to a particular economic policy agenda. Improving law and development discourse will require addressing the theoretical and practical particularities stemming from the field’s genealogical origins.

I

CONSTRUCTION

A. The Theorists

1. The Theoretical Transition in Law and Development Discourse from Modernization to Neoclassicism

Law and development policy first came into its own with the rise of modernization theory in the mid-twentieth century. Modernization theory promulgated the intuition, later reincarnated by North and Thomas in The Rise of the Western World, that “formal rationality” in governance was central to the rise of Western capitalist democ-

27 First, a great deal of internal pressure in the field stemmed from the fact that Keynesian macroeconomics insufficiently synthesized and incorporated classical economic precepts related to the microeconomic behavior of individuals and firms. Willem H. Buitert, Macroeconomic Theory and Stabilization Policy 5 (1989) (describing “intellectual developments within macroeconomics where there was an intensifying search for ‘deep structure’ and microfoundations for aggregate economic relationships”). Second, the “stagflation” economic contractions of the industrialized world during the 1970s meant that Keynesian economics no longer appeared to be working in the real world and that Keynesian models could not explain the most pressing contemporary problems. See id. In a Keynesian model, increasing money supply should increase real economic output, but in these stagflation economies, monetary inflation was accompanied instead by economic downturns. Externally to the economics academy, economic woes also propelled dissatisfaction with traditional Keynesian policies in public policy circles and the electorate at large. All of these pressures were brought to bear on development economics, causing one of its most illustrious proponents to declare: “Development economics is dead.” Luiz Carlos Bresser Pereira, Development Economics and the World Bank’s Identity Crisis, 2 Rev. Int’l. Pol. Econ. 211, 220 & n.11 (1995) (quoting Arthur Lewis).

This Weberian account provided a foundation for law and development in its first, postwar “moment” of the 1950s and 1960s, influenced by the structural functionalism of Talcott Parsons and the evolutionist political economy of writers such as W.W. Rostow.

Neoclassical law and development discourse built upon this earlier foundation laid by the modernization theorists. While both the mid-twentieth century modernization and the late twentieth century neoclassical versions of law and development discourse shared this intellectual debt to Weber in the conceptualization of law’s relationship to economic growth, the economic policy orientation of the later discourse shifted significantly. The vision of ideal governance in the earlier era was consistent with a Keynesian welfare state, in which liberalism was “embedded” in a regime of benign regulation and redistribution. By contrast, the ideal governance of the later era expressed skepticism about the Keynesian vision, instead calling for a “minimalist” state.

If Weberian thought provided a foundation for the neoclassical theorists on the nature of law’s impact on economics, a more proximate antecedent was Friedrich Hayek. Hayek’s influence over the rise of neoclassicism stemmed not from his economic theory but from his political and legal theory expounding a conception of liberty necessitating a minimal government defined by the rule of law. This work, beginning with the pre–World War II The Road to Serfdom and continuing with 1960’s The Constitution of Liberty and the later three-volume Law, Legislation and Liberty, set forth a forceful denunciation of centralized economic regulation as connected to totalitarianism. Hayek endorsed a vision of ideal society which maximized individual liberty and the fulfillment of individual creative freedom with minimal

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33 See Shiha, supra note 19, at 53–54, 85–87.


35 See Stiglitz, supra note 9, at 92.

regulatory planning or design.37 Political liberty depended on formal rules and the protection of property rights.38

When Hayek received the Nobel Prize in 1974, his academic position was rather marginal, and the general view is that the primary objective of the award was to create balance with the left-leaning politics of the other recipient that year, Gunnar Myrdal.39 The sudden visibility of his Nobel Prize and the nontechnical accessibility of his legal and political writings helped Hayek’s work to become incredibly influential as a scholarly underpinning for the burgeoning conservative political movement.40 Hayek’s other connection to the rise of neoclassical theories of law was personal: he advocated early on for the adoption of the topic as a serious focus of study at the University of Chicago.41 Ultimately joining that faculty,42 Hayek participated in and supported the same scholarly networks as the neoclassicists, building an academic infrastructure that would be mobilized for influence on political and legal reform.43

Hayek’s own brand of economics, however, varied in key ways from standard neoclassical economic thought. The emphasis of the Austrian economists on “imperfect knowledge, decision making under uncertainty, and the possibility of error”44 presaged the emergence of the NIE focus on the inefficiencies of institutions, though the latter remained faithful to standard neoclassicism in its basic methodological and normative commitments.45 Substantively, Hayek emphasized the limitations of human knowledge, rather than the

40 See John Ranelagh, Thatcher’s People: An Insider’s Account of the Politics, the Power and the Personalities ix (1992) (asserting that Margaret Thatcher, during her tenure as Prime Minister, asserted that “this . . . is what we believe” while holding up Hayek’s The Constitution of Liberty).
43 See Dieter Plehwe, Introduction to The Road from Mont Pelerin: The Making of the Neoliberal Thought Collective 1, 15–20 (Philip Mirowski & Dieter Plehwe eds., 2009) (describing Hayek’s role in the establishment of the Mont Pelerin Society and the various roles played therein by Hayek, Friedman, and others); see also Karen Fishet, The Influence of Neoliberals in Chile Before, During, and After Pinochet, in The Road from Mont Pelerin: The Making of the Neoliberal Thought Collective, supra, at 305, 305–416 (focusing on the “historical trajectories of neoliberal knowledge in Chile” as influenced by the Chicago Boys, among others).
perfection of the market, as the primary argument against central economic planning.46 Whereas the neoclassicists conceptualized the market as an efficient aggregator of the rational preferences of self-interested individuals, Hayek’s endorsement of the market stemmed from the imperfections and difficulties inherent in knowledge, which could only multiply the more centralized and detached economic decisions became.47 This same skepticism towards knowledge also influenced the methodology of Hayek and other Austrian economists, who eschewed the quantitative, data-driven techniques of the neoclassicists in favor of a “market process” theory that attempted to reconstruct market decisions from the subjective point of view of market actors.48

Thus, even though Hayek’s theoretical and methodological specifics were at odds with neoclassicism,49 his ultimate political conclusions—minimal government, the rule of law, and strong property rights—were consistent with them. As a consequence, Hayek was able to contribute to the rise of neoclassicism in important ways, namely his support for the study of law by economists within the academy and his influence on political actors who ultimately would look to neoclassical economics as the basis for large-scale, deregulatory government

\[\text{footnotes}
46 \text{HAYEK, supra note 37, at 22–29; 1 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY 12–15 (1973).}
47 \text{HAYEK, supra note 38, at 88–118.}
48 \text{See EBELING, supra note 44, at 43–56.}
49 \text{Cf. Francis Fukuyama, Hayek's Incomplete Victory, 28 WILSON Q. 111, 111 (2004) (reviewing BRUCE CALDWELL, HAYEK'S CHALLENGE: AN INTELLECTUAL BIOGRAPHY OF F.A. HAYEK (2005)) (“Today, . . . Hayek . . . is rightly seen as the intellectual godfather of the pro-market revolution that swept the West with Margaret Thatcher and Ronald Reagan.”). Though Hayek constituted an important influence on Chicago School economists, some key theoretical differences distinguish the Hayekian argument against market regulation from that of many neoclassical economists. One neoclassical view depends on the premises that individuals are rational, self-interested actors and that markets are efficient organizers of actor-generated information; by contrast, the Hayekian view emphasizes the open-ended quality of both individual economic decisions and markets as aggregators of those decisions. See ISRAEL M. KIRZNER, ENTREPRENEURIAL DISCOVERY AND THE COMPETITIVE MARKET PROCESS: AN AUSTRIAN APPROACH, 35 J. ECON. LIT. 60, 64 (1997). Markets, as an aspect of society, work through a process of “spontaneous order” that could never be captured or reproduced by a central planner. See HAYEK, supra note 46, at 2. Though both views conclude that markets are superior to government regulators as organizers of economic activity, the underlying attitude towards knowledge differs fundamentally. See HAYEK, supra note 46, at 8–34 (criticizing the Cartesian conception of rationality as based on perfect knowledge). In this way, Hayek shares more with the NIE branch of neoclassical theory, which also recognizes the importance of incomplete information in affecting the rationality of individual market actors. See DOUGLASS C. NORTH, WHAT DO WE MEAN BY RATIONALITY?, 77 PUB. CHOICE 159, 159–60 (1993) (“In the world of instrumental rationality institutions are unnecessary . . . . But in the real world the actors have incomplete information and limited mental capacity . . . . In consequence they develop regularized rules and norms to structure exchange.”). North and other NIE scholars distanced themselves from NPE and public choice theory, which they thought carried the same erroneous assumption. See id. at 159. This Essay advocates closer attention to the tenet of imperfect information within NIE. See infra Part III.}
reform. Hayek’s deep dissatisfaction with the modern welfare state extended to dismay at the dissemination of that ideal to the developing world.50

2. The Rise of Neoclassical Economics in Law and Development

While Keynesianism reigned in the field during the 1960s, a radically alternative theoretical approach was germinating51 in the academy that would take root some decades later in the second “moment” of law and development discourse in the late 1980s and early 1990s.52

Chicago School economists such as Milton Friedman53 embraced the Hayekian constitutional vision as defined by the rule of law and property rights.54 The “Chicago boys” decried the Keynesian model of governmental intervention in the economy,55 though governmental control was required to ensure law and order, protection of property, and monetary stability.56 As such, the Chicago School established the key components of what would become the Washington Consensus in development policy.57

As with the earlier law and development discourse, which modernization theory shaped, the era shaped by the Chicago School required a social science vocabulary and discipline to translate theoretical commitments into applied policy directives. In that vein, Ronald Coase could be viewed as the founding social scientist of the second law and development moment.58 Introduced by Coase in his 1960 essay The Problem of Social Cost,59 the Coase Theorem argued that

50 See HAYEK, supra note 37, at 2 (“A large part of the people of the world borrowed from Western civilization and adopted Western ideals at a time when the West had become unsure of itself and had largely lost faith in the traditions that have made it what it is.”).

51 See DEZALAY & GARTH, supra note 12, at 79–80 (noting that James Buchanan, a Nobel Prize winner, member of the Chicago School, and founder of public choice theory, “described his position of outsider, hostile to the [Keynesian] establishment, as the source of his application of neoclassical economics to the analysis of political choices”); infra text accompanying notes 87–92.

52 See DEZALAY & GARTH, supra note 12, at 80–83.

53 See id. at 81 (explaining how Friedman published regular opinions in print and broadcast media such as Newsweek, the Wall Street Journal, and a television program called Free to Choose).

54 See MILTON FRIEDMAN, CAPITALISM AND FREEDOM 34 (1962) (describing the neoclassical vision of a “government which maintained law and order, defined property rights, served as a means whereby we could modify property rights and other rules of the economic game, [and] adjudicated disputes about the interpretation of the rules”).

55 See id. at 37–38 (“‘Full employment’ and ‘economic growth’ have in the past few decades become primary excuses for widening the extent of government intervention in economic affairs. . . . These arguments are thoroughly misleading.”).

56 See id. at 38.

57 See id. at 34–38; STIGLITZ, supra note 9, at 53–54.

58 See KERRY RITTIICH, RECHARACTERIZING RESTRUCTURING: LAW, DISTRIBUTION AND GENDER IN MARKET REFORM 115 & n.73 (2002).

“if the pricing system is assumed to work without cost,”60 then contract (“bargains between the parties”61) could prevent social harms arising from negative externalities created by particular market actors equally as well as regulation.62 In addition to not reducing harmful effects of the market (which private bargains would reduce in the absence of regulation), the introduction of legal liability to control such effects could produce unintended consequences that would increase overall social harm.63 Thus, the Coase Theorem provided an argument for refraining from governmental regulation and for not responding to every social harm with a regulatory solution, not only because the market could generate its own solutions and because regulatory solutions might not solve the problem and might only create new ones.64

The Coase Theorem engendered many intellectual descendants, most visibly the law and economics movement in the United States.65 Whereas Keynes concerned himself with macroeconomic aggregates and with the state as their arbiter,66 Coase suggested a microeconomic view.67 The role of the state was not assumed in the microeconomic lens—the idea was to measure the efficiency of microeconomic activity independently of regulation and then to determine how regulation affected that activity.68 The microeconomic methodological orientation was consistent with, but did not necessitate, a dramatically different default position—that regulation was an encumbrance on otherwise efficient market activity.69

60 Id. at 8.
61 Id. at 12.
62 See id. at 17–18, 44.
63 See id. at 30–33. For example, imposing legal liability on a railroad for damage to neighboring farmers’ crops might induce farmers to increase crop production. Such increases would adversely affect overall social welfare because the overall number of crop fires would increase and the penalties imposed on the railroad might ultimately cause it to cease operations due to lack of profitability. See id. Coase focused on this hypothetical because it was provided by the economist Arthur Pigou, see A.C. Pigou, THE ECONOMICS OF WELFARE 134 (Transaction Publishers 2002). Pigou is credited with the welfare-economics tenet that government intervention is necessary to prevent negative externalities. See Coase, supra note 59, at 28–39. Alfred Marchal developed the concept of externalities. See A.C. Pigou, Book Review, 17 Econ. J. 532, 552–35 (1907) (reviewing Alfred Marshall, The Principles of Economics (5th ed. 1907)).
64 See Coase, supra note 59, at 1–2, 26–28.
66 See Anand Chandavarkar, Keynes and the Role of the State in Developing Countries, in KEYNES AND THE ROLE OF THE STATE 136–57 (Derek Crabtree & A.P. Thirlwall eds., 1993).
67 See Coase, supra note 59, at 28–44.
68 See id.
69 Cf. David Kennedy, The “Rule of Law,” Political Choices, and Development Common Sense, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, supra note 13, at 95, 95–98 & 129 (describing how, for “neoliberal development policy[.] . . . [t]he lead passed from macroeconomics to microeconomics” so that “[a]n economy was no longer imagined
The conclusion of the Coase Theorem, that the legal environment could impose effects and costs on market actors that would become variables determining economic output, became an important part of the intellectual heritage of the New Institutional Economics and the New Political Economy, both of which in turn formed theoretical components of the Washington Consensus. NIE focused on the role of the state in affecting property and contract transactions and in particular the importance of private property rights. NPE focused on the role of the state in trade and investment, particularly across borders. The relationship between NIE and NPE was a close one: North described the NPE movement as simply NIE applied to political economy.

These theoretical descendants would transform the field of economic development. NPE became the basis for structural adjustment macroeconomic programs. NIE, of which North was a leading proponent, became the basis for good governance legal and institutional reform programs. Although these perspectives have been recognized as interrelated, there are more systematic connections (graphically represented in the Appendix) than suggested in existing scholarship.

3. The New Institutional Economics (NIE)

Transaction costs . . . become the factor upon which the productivity of the economic system depends.

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See Coase, supra note 59, at 28–44.  
See, e.g., Oliver E. Williamson, The New Institutional Economics: Taking Stock, Looking Ahead, 38 J. Econ. Ltr. 595, 599 (2000) (citing Coase, supra note 59, for the key NIE proposition that “easy” or “costless” enforcement of property rights should not be assumed in economic calculations).  
See supra text accompanying notes 2–3; infra text accompanying notes 93–100; see also Michael P. Todaro & Stephen C. Smith, Economic Development 133 n.16 (9th ed. 2006).  
See infra text accompanying notes 102–14.  
See North, supra note 1, at 121. North’s 1990 book, Institutions, Institutional Change and Economic Performance, was part of a series that he created on NPE, further evidencing his belief in the intellectual link. See North, supra note 3, at 3–10.  
See infra text accompanying notes 138–39.  
See infra Part I.B; Appendix.
However, transaction costs depend, as we learned from the new institutional economics, on the working of the legal system (the system of property rights, the enforcement of property rights, the ability to foresee what the legal decisions will be, and so on).

— Ronald Coase

In his earlier influential essay, *The Nature of the Firm*, Coase had introduced the concept of transaction costs to explain why firms emerge in a market environment. Together with *The Problem of Social Cost*, Coase’s insights provided the foundation for the New Institutional Economics—that the legal and institutional environment could either be conducive to, or impede, market activity and economic growth.

If “[e]fficient economic organization is the key to growth,” the NIE argument held, institutions are key in determining efficient—or inefficient—economic organization. NIE challenged the assumption of some neoclassical theorists that the competitive market would lead to efficient institutions. “The implication [of that assumption] is not only that institutions are designed to achieve efficient outcomes, but that they can be ignored in economic analysis because they play no independent role in economic performance.” By contrast, North argued, institutions can be erroneously designed due to transaction costs including “incomplete information and . . . subjectively derived models” of behavior. Nevertheless, such institutions could and did take hold, often serving those in power even where these ruling interests failed to serve the economic welfare of society at large.

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79 See R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 390–94 (1937). In a completely efficient economic environment, where pricing is always accurate and transacting is costless, market actors have no incentive to establish firms rather than meeting their needs on the “open market.” See id. Consequently, firms must exist because “there is a cost of using the price mechanism” of the open market. Id. at 390.
80 See *id.* at 386–87, 403–05; Ronald Coase, *The New Institutional Economics*, 88 Am. Econ. Rev. 72, 72 (1998) (“It is commonly said, and it may be true, that the new institutional economics started with my article, ‘The Nature of the Firm’ (1937) with its explicit introduction of transaction costs into economic analysis.”); Coase, *supra* note 59, 1–2, 42–44. See *North & Thomas, supra* note 2.
81 See William M. Dugger, *Douglass C. North’s New Institutionalism*, 29 J. Econ. Issues 453, 453–56 (1995); *see also Todaro & Smith, supra* note 73 (“The basic message of the new institutionalism is that even in a neoclassical world, the success or failure of development efforts will depend on the nature, existence, and proper functioning of a country’s fundamental institutions.”).
82 *North, supra* note 3, at 16.
83 *Id.*
84 *Id.* (“Institutions are not necessarily or even usually created to be socially efficient; rather they, or at least the formal rules, are created to serve the interests of those with the bargaining power to devise new rules. In a zero-transaction-cost world, bargaining strength does not affect the efficiency of outcomes, but in a world of positive transaction costs it would.”)
85 *Id.*
Through a process of negative feedback loops in which individual actors conformed their behavior to these initial institutional distortions, inefficiencies would become entrenched and lead aggregate economies down an impoverished historical path.\textsuperscript{86} Thus, NIE stood both for the point that efficient institutional arrangements could not be assumed and for the thesis as to how institutional inefficiencies could persist over time through path dependence.

An important part of the NIE argument was the thesis that institutions could become dominated by powerful actors whose interests did not serve the larger economic welfare.\textsuperscript{87} The theoretical exposition for this part of NIE was provided by the concept of the collective action problem in public choice theory, a perspective that had powerfully emerged in \textit{The Calculus of Consent}, published by James Buchanan and Gordon Tullock a decade before North and Thomas published \textit{The Rise of the Western World}.\textsuperscript{88}

A direct challenge to the idea of the benign welfare state, public choice theory saw decisions by political institutions as merely the aggregate of individual self-interested choices and further asserted that these could be subject to a variety of flaws.\textsuperscript{89} In the 1970s and 1980s, these insights became highly influential as “rent-seeking analysis.”\textsuperscript{90} Collective action problems explained how institutional arrangements could tend towards inefficiency.\textsuperscript{91} If this was true, institutions could not be taken for granted as supporting economic growth but would need to be assessed on that basis. In domestic law, this insight became hugely influential and would define a whole field—the study of law and economics—for the next several decades.\textsuperscript{92}

does and given the lumpy indivisibilities that characterize institutions, it shapes the direction of long-run economic change.” (emphasis omitted)).

\textsuperscript{86} See \textit{id.} at 112 (“Path dependence is the key to an analytical understanding of long-run economic change.”).

\textsuperscript{87} See infra note 325 and accompanying text.

\textsuperscript{88} See \textit{James M. Buchanan \\ & Gordon Tullock, The Calculus of Consent: Logical Foundations of Constitutional Democracy} (1962). North cited this work as contributing to the “intellectual origins” of his theory. See \textit{North \\ & Thomas, supra note 2}, at 159. North also cited it as an early example of interest analysis in institutional contexts. See \textit{North, supra note 3}, at 50.

\textsuperscript{89} See \textit{Todaro \\ & Smith, supra note 73}, at 121 (“Public-choice theory assumes that politicians, bureaucrats, citizens, and states act solely from a self-interested perspective, using their power and the authority of government for their own selfish ends.”).

\textsuperscript{90} See, e.g., \textit{James M. Buchanan et al., Toward a Theory of the Rent-Seeking Society} (1980). For a discussion of the impact of public choice theory and rent-seeking analysis on development policy, see \textit{Rettich, supra note 58}, at 115–25.

\textsuperscript{91} See \textit{North \\ & Thomas, supra note 2}, at 5 (noting that “[t]he costs of creating or enforcing property rights may exceed the benefits to any group or individual” and that “[t]echnique [sic] may be lacking to counteract the free-rider and/or to compel third parties to bear their share of the costs of a transaction”).

\textsuperscript{92} See, e.g., \textit{Robert Cooter \\ & Thomas Ulen, Law \\ & Economics} 108–10 (5th ed. 2008); \textit{Posner, supra note 65}, at 36 n.4.
NIE’s ambitions extended beyond domestic law, however, and sought to provide a basis for assessing governmental and legal orders across space and time. To explain “the performance of economies through time,” North offered a “neoclassical theory of the state” that would explain “the widespread tendency of states to produce inefficient property rights and hence fail to achieve sustained growth.” In this way, he offered institutional economics as a means of understanding the reason that states did not fulfill the ideal set out by the Chicago School.

Indeed, the focus of North’s particular brand of economic history was to explain how it was that “efficient” systems arose in the West and not elsewhere. “Efficient economic organization is the key to growth; the development of an efficient economic organization in Western Europe accounts for the rise of the West.” From here, the basis for institutional analysis of economies over time—the objective of The Rise of Western World—becomes clear. Transaction costs and institutional constraints prevented some economies from reaching the most efficient system of property rights, which included exclusiveness and enforcement.

This thesis echoed the Weberian typology asserting the relationship among law, capitalism, and the West’s economic rise. Where NIE departed from Weber and hewed to the neoclassical line was the central importance of property rights in this account. It was not just legal rationality, as in Weber, that induced capitalistic growth—it was the protection and enforcement of property rights which were required for efficient economic production. According to insights from Coase and public choice theory, however, the protection of property rights could not be assumed to evolve simply because it was objectively the most efficient, because “there is no guarantee that the government will find it to be in its interest to protect those property rights which encourage efficiency.” Hence the study and correction

93 See North, supra note 1.

94 NORTH, supra note 4, at 20–23.

95 See NORTH & THOMAS, supra note 2.

96 See id.

97 See id. at 5 (“If exclusiveness and the enforcement of accompanying property rights could be freely assured—that is, in the absence of transaction costs—the achievement of growth would be simple indeed. . . . Property rights [however] are always embedded in the institutional structure of a society, and the creation of new property rights demands new institutional arrangements to define and specify the way by which economic units can cooperate and compete.”).

98 See supra notes 28–35 and accompanying text.

99 See NORTH & THOMAS, supra note 2, at 8 (“[E]conomic growth will occur if property rights make it worthwhile to undertake socially productive activity.”).

100 See id. at 7.
of inefficiencies in institutions and legal arrangements could contribute to improving efficiencies in markets.

4. The New Political Economy (NPE)

The practitioners of the “New Political Economy” believe that the state should be a maximizer, rationally finding the right combination of minimalist policies which free the “natural” development forces in an economy.

— James M. Cypher and James L. Dietz

The New Political Economy could be viewed, per Douglass North, as an extension of NIE to political economy. In any case, NPE was certainly a direct application of NIE’s shared intellectual influence, public choice theory. NPE scholarship was heavily influenced by the work of Buchanan and his coauthors as well as by Mancur Olson’s *The Logic of Collective Action*. In that 1965 study, Olson showed how protectionist trade tariffs could be adopted as governmental policy even though they did not increase economic efficiency or social welfare.

NPE focused substantially on international trade law policy, whereas NIE was focused on mostly on property and contract regimes. Trade was, after all, the intended activity resulting from a market secured by property and contract rights that NIE studied. From Adam Smith down to modern neoclassical theorists, trade was the genesis of national wealth. As such, trade occupied a central place in the neoclassical theory of economic growth, and therefore, trade policy was a subject of economic and development policy, though the insights of NPE applied equally to investment and other economic sectors.

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102 See generally Rittich, supra note 58, at 115–25 (discussing the origins and influence of public choice theory); Todaro & Smith, supra note 73, at 121 (describing public choice theory as synonymous with the “new political economy approach”).  
104 See Olson, supra note 105, at 10.  
105 See Adam Smith, *The Wealth of Nations* passim (Edwin Cannan ed., Random House, Inc. 1937) (1776) (discussing the importance of trade in generating national wealth). For an example of this rationale, see Jeffrey D. Sachs & Andrew Warner, *Economic Reform and the Process of Global Integration*, 1 Brookings Papers on Econ. Activity 3, 3 (1995) (“The power of trade to promote economic convergence is perhaps the most venerable tenet of classical and neoclassical economics, dating back to Adam Smith. As Smith’s followers have stressed for generations, trade promotes growth through a myriad [of] channels: increased specialization, efficient resource allocation according to comparative advantage, diffusion of international knowledge through trade, and heightened domestic competition as a result of international competition.”).
The economists Anne Krueger and Jagdish Bhagwati, among others,\(^{106}\) propounded NPE as a basis for policy reform both in the United States and in developing countries. In *The Political Economy of the Rent-Seeking Society*, Krueger expanded on the public choice insights of Buchanan and his coauthors and of Olson in arguing that governmental controls, particularly on international trade, reduced economic growth and welfare and reflected capture of economic regulation by harmful minority economic interests.\(^{107}\) Bhagwati’s article, *Directly Unproductive Profit-Seeking (DUP) Activities*, was a widely read application of rent-seeking analysis to international trade.\(^{108}\)

Both Bhagwati and Krueger applied the critique of trade protectionism to development strategies for poor countries seeking growth but also to the economic giants of the West.\(^{109}\) Such writings were politically relevant in the late 1970s and early 1980s when stagnating U.S. industries began to decry unfair trade practices in the rising economies of East Asia.\(^{110}\) As much as their writings were directed towards the “New Protectionism” in the West, however, these theorists were adamant that the state-led growth strategies of the developing world were responsible for choking off growth before it could start and for ensuring that it never would.\(^{111}\)

NPE’s most noteworthy contribution to development economics, then, was providing support for the neoclassical assertion that “trade openness” was the best determinant of economic growth.\(^{112}\) Another

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\(^{106}\) See Todaro & Smith, *supra* note 73, at 120 (naming Bhagwati and Krueger among other economists such as Lord Peter Bauer, Harry Johnson, Deepak La, and Bela Belassa).


\(^{112}\) See *supra* notes 109–11, 113 and accompanying text (describing the works of Krueger and Bhagwati, which focus on criticizing trade protectionism). The neoclassical support for trade openness rested on many pillars, only one of which was rent-seeking analysis. See, e.g., Todaro & Smith, *supra* note 73, at 120–21 (dividing neoclassical approaches into “free-market analysis,” which argues that “markets alone are efficient,” the “new political economy approach,” which “goes even further to argue that governments can do nothing right,” and the “market-friendly approach,” which describes more more “recent variant[s]” that acknowledge some role for government regulation). The analysis in the text is somewhat stylized for heuristic purposes, streamlining a broad range of overlapping contributions in theory and policy.
prominent advocate of this view was Harvard economist Jeffrey Sachs. As Sachs explained:

> [T]rade liberalization is usually just one part of a government’s overall [structural adjustment] reform plan for integrating an economy with the world system. Other aspects of such a program almost always include price liberalization, budget restructuring, privatization, [and] deregulation . . . . Nonetheless, the international opening of the economy is the sine qua non of the overall reform process.\(^{113}\)

Though most of the NPE scholars were from economics, the movement also included some legal scholars. Robert Hudec was the most prominent of these, and in 1987, he published a valuable book, *Developing Countries in the GATT Legal System*, which provided an institutional history, as well as an economic critique, of trade controls as exercised to promote development in poor countries.\(^{114}\)

5. The Moderate Institutionalists

Embracing the concept of transaction costs and transaction costs’ relationship to the institutional environment and economic growth does not require a commitment to the neoclassical view that regulation should be minimized. Possibly, a market without regulatory intervention would be subject to internal “failures” based on transaction costs, and active governance might be necessary to correct those failures. In the context of domestic legal scholarship on private law, for example, this argument could justify legal disclosure requirements and remedies designed to correct for unequal bargaining power between contracting parties. Such inequality, the argument goes, would make access to information for the weaker party prohibitively expensive and, without governmental intervention, produce inefficient transactional outcomes.

Similarly, applying the market-failure concept to the problem of the developing economy writ large could lead to the conclusion that active governmental intervention would be necessary to support efficient outcomes and avoid inefficient ones. In this way, the institutionalist orientation, with its focus on institutional quality supporting economic growth and the minimization of transaction costs, could support a regulatory state as well as a deregulatory state. In doing so, it would come much closer to the Keynesian ideal of the mid-twentieth-century moderate interventionists.

Dani Rodrik, one of the more visible moderate institutionalists, explicitly styled his policy analyses as taking such a dialectical turn:

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Once upon a time, economists believed the developing world was full of market failures, and the only way in which poor countries could escape from their poverty traps was through forceful government interventions. Then there came a time when economists started to believe government failure was by far the bigger evil, and that the best thing that government could do was to give up any pretense of steering the economy. Reality has not been kind to either set of expectations. . . .

. . . .

. . . [W]e now confront a rare historic opportunity. The softening of convictions on both sides presents an opening to fashion an agenda for economic policies that takes an intelligent intermediate stand between the two extremes cited above.115

Rodrik’s reconciliatory view does not constitute a departure from institutionalist commitments. Rodrik clearly holds to institutionalist “first-order economic principles—protection of property rights, market-based competition, appropriate incentives, sound money, and so on.”116 He does, however, insist that such commitments “do not map into unique policy packages.”117

In One Economics, Many Recipes, Rodrik extends this moderate approach both to NPE concerns, such as macroeconomic policy on trade and investment, and NIE concerns, such as legal and judiciary reform.118 On the NIE side, Rodrik states that the protection of property rights need not take conventional form: “Formal property rights do not count for much if they do not confer control rights. By the same token, sufficiently strong control rights may do the trick even in the absence of formal property rights.”119 Thus, even in the absence of a “private-property-rights legal regime,” China’s economic growth might be consistent with the institutionalist outlook because “property rights were effectively more secure under direct local government ownership.”120

Similarly, on the NPE side, Rodrik states that the neoclassical macroeconomic program is not the sole path to economic growth: “Scratch the surface of nontraditional export success stories from anywhere around the world, and you will more often than not find industrial policies, public R&D, sectoral support, export subsidies,

116  Id. at 6.
117  Id.
118  See id. at 109–11, 155–57.
119  Id. at 156.
120  Id. at 24.
preferential tariff arrangements, and other similar interventions lurking beneath the surface.”

Moderate institutionalism also characterizes the “embedded autonomy” perspective of Peter Evans. According to this outlook, the basic dynamism of the private sector should be acknowledged and respected, and safeguards should guard against thoroughgoing and centralized economic planning. Moreover, the susceptibility of the public sector to rent seeking and corruption must be factored into industrial policy design. Nevertheless, the state should “embed” market activity by providing strategic support and intervention.

Robert Lucas, who won the Nobel Prize in 1995, highlighted the importance of interactions between individuals and the potential positive role of institutions and models of organization that favored the concentration of knowledge and expertise. With respect to the question of the role of governmental intervention in the economy, he appeared much more open to that possibility than those identified with the dominant orthodoxy, who had been content to denounce affirmative practices by state actors as forms of rent seeking.

Lucas’s lecture showed how institutionalism and governance had “become the new frontiers of economic theory” by providing a common language for those whose theories could accommodate greater strategic intervention of governments into economic growth strategies, as well as for those advocating less intervention.

Within that frontier, by the late 1990s and early 2000s, the moderate institutionalism derived from the “first principles” of neoclassical economics began to be joined by other voices questioning the more extreme forms of neoclassicism and offering alternative bases for conceptualizing the law and development ideal. On the macroeconomics side, Joseph Stiglitz, who won the Nobel Prize in 2001, was perhaps...
the most visible of the mainstream development economists to acknowledge that the neoclassical program had failed in many cases and had produced a great deal of discontent worldwide. Critiques by Stiglitz and others of the dynamics of globalization as envisioned by neoclassical theory provided a basis for a “chastened” style of economic policy consistent with Rodrik’s approach, in which “market” values were balanced with “social” values.

At the same time, Amartya Sen, who won the Nobel Prize in 1998, had articulated a theory of governance that espoused human rights, rather than neoclassical economics, as the basis for first principles of development policy. In Sen’s rendition, development was intimately interlinked with human “capabilities”—with human capabilities representing both the means and the ends of development policy. Aggregate social development could not occur without a fully developed population who could provide the dynamism to fuel economic transformation; at the same time, the whole point of economic transformation was to increase aggregate social welfare. Consequently, development needed to attend both to the protection of civil and political human rights, which are necessary to protect individual innovation and expression, and to social and economic human rights, which are necessary to provide for basic needs and thereby preserve capabilities.

Sen’s theory broke the impasse that had previously existed in which development economists had suggested that social and political protections were luxuries that government could not provide until after some level of economic development had already been reached. Rather, Sen suggested, economic growth was internally dependent on the protection of human rights. This theory of development also supported a different vision of good governance and the rule of law. Whereas the neoclassical vision of good governance focused on the enforcement of property rights and the stability of private commercial law, the vision informed by Sen’s theory of capabilities focused on respect for human rights. In this way, Sen offered an approach to law and development, consistent with that of the moderate institutionalists, that suggested a broader and more social focus.

130 See, e.g., Stiglitz, supra note 9.
131 See Kennedy, supra note 69, at 150.
134 See id. at 35–40.
135 See id. at 87–96.
136 See id. at 54–72.
137 See id. at 282–91.
Moderate institutionalism, then, allows for variation from the neoclassical baseline on both the macroeconomics side (where the baseline is NPE) and the governance side (where the baseline is NIE). On the macroeconomics side, the moderate institutionalism of Rodrik and others allows a greater role for the state in regulating and directing economic activity. On the governance side, a focus on human rights is consistent with and even constitutive of the rule of law. Development discourse has accommodated both perspectives, and in recent years, the influence of these more moderate views has gained such visibility as to suggest that development discourse has entered into a new era. As of yet, the practical influence of these more moderate approaches, and their theoretical distinctness from neoclassicism, still appears debatable.

Based on an interview he gave late in life, the grandfather of the neoclassical movement himself, Ronald Coase, appeared to espouse the moderate institutionalist approach and to admonish the hardline neoclassicists. In that interview, Coase pointed out that much of the work based on the Coase Theorem erroneously assumed an ideally efficient economic environment. Coase had explicitly flagged this important qualification in his original statement of the Theorem, and in any case, it was implicit from his earlier work on transaction costs. That is, while the Coase Theorem demonstrated “the type of contracts that would have to be made in order to have an efficient economic system,” the immediate next step for any meaningful analysis of real-world problems would be to identify the obstacles to efficiency.

138 See supra Part I.A.
139 See supra Part I.A.
140 See Trubek & Santos, supra note 30, at 1–3; David M. Trubek, supra note 23, at 74.
141 See Rittich, supra note 13, at 252; Trubek & Santos, supra note 30, at 3. Some analysts see the more recent approaches of the World Bank as simply “variants” of neoclassicism. See Todaro & Smith, supra note 73, at 121 (describing a shift in the World Bank from strict free-market and public-choice approaches towards a view that “governments do have a key role to play in facilitating the operation of markets through . . . investing in physical and social infrastructure, health care facilities, and educational institutions”); Ben Fine, The New Development Economics, in The New Development Economics: After the Washington Consensus 1, 2 (Jomo K.S. & Ben Fine eds., 2006) (“[T]he newer development economics, in the form of the post-Washington Consensus, looks much more like the Washington Consensus than the old development economics that the Washington Consensus sought to displace.”).
143 See id.
144 Coase, supra note 59, at 8 (“[T]he ultimate result (which maximizes the value of production) is independent . . . if the pricing system is assumed to work without cost.”).
145 See Coase, supra note 79, at 390–98.
146 An Interview with Ronald Coase, supra note 142, at 4.
Because many Coase Theorem adherents had argued for the inefficiency of legal liability rules and other regulation on the erroneous assumption that transactions were costless, in Coase’s opinion his Theorem has “been very successful for the wrong reasons,” providing an “illustration of what’s wrong with economics.”147 For this reason, Coase strongly endorsed the NIE focus on the effect of existing institutions and laws on transactional processes and dismissed prevailing modes of law and economics scholarship as using abstracted economic analyses to theorize about effects of the legal system on the market.148 As a corollary to this insistence on attention to actual contexts, Coase surmised, “[T]here is no ‘one way’ better economic system, because everything depends on the society you’re in.”149 Thus, Coase appears to be more supportive of a moderate approach than much of the law and economics scholarship begotten from his work.150

6. Conclusion

Neoclassical economics developed during the 1960s and 1970s as a response to Keynesian welfare economics.151 As the foregoing sections demonstrate, neoclassicism included key ideas about the relationship of laws and institutions to market efficiency and economic growth. Though the economic policy orientation shifted from a regulatory to a deregulatory tendency under neoclassicism, the belief in legal rules as potential instruments in development remained continuous with the previous era of modernization theory.

The neoclassical movement extended to thinking about international development.152 Whereas the modernization theorists of the

147 Id.
148 See id. at 3–5.
149 Id. at 5.
151 See supra text accompanying notes 51–57; see also TODARO & SMITH, supra note 73, at 123 (“[T]he neoclassical counterrevolution of the 1980s had its origin in an economics-cum-ideological view of the developing world and its problems.”); Pereira, supra note 27, at 218–19 (describing a process whereby the “Keynesian consensus broke down” and opened the way for “the rise of a New Right intellectually well equipped for fighting the state”).
152 See Sonali Deraniyagala & Ben Fine, Kicking Away the Logic: Free Trade Is Neither the Question Nor the Answer for Development, in The New Development Economics: After the Washington Consensus, supra note 141, at 46, 46 (“Since the 1980s, neoliberal belief in free trade has come to be the orthodoxy in international economics. This orthodoxy has been translated into policy advice, particularly for developing countries, for which trade liberalization has become a major policy objective.”); TODARO & SMITH, supra note 73, at 122 (explaining how traditional neoclassical growth theory was applied to criticize statist economic policies whose “heavy-handedness . . . retard[s] growth in the economies of the developing world”).
earlier era envisioned an ideal of governance which espoused a regulatory and interventionist state, the neoclassicists embraced deregulation and minimalism as the preferred ideals of governance.\textsuperscript{153} It was not until the early 1980s that political events created the opportunity for neoclassical ideas to rise to power and for these ideas to affect international development in practice.\textsuperscript{154}

Thus, the key contours of legal reform in development theory were designed not by lawyers or legal scholars, but by economists. The next section describes neoclassical law and development as it emerged in practice in the 1980s and 1990s. Here, though economists continued to lead the charge, lawyers played an important role in the conceptualization of good governance and in its justification within existing international development law and policy.

B. The Practitioners

In 1982, NPE scholar Anne Krueger was appointed to the World Bank as Chief Economist.\textsuperscript{155} This was a watershed moment in the transformation of law and development discourse: Krueger’s appointment consolidated the influence of neoclassicism, through rent-seeking analysis and trade theory as described above, in development economics.\textsuperscript{156} This influence, aided by the ascendency of the “Reagan

\textsuperscript{153} See text accompanying notes 28–77; see also Todaro & Smith, supra note 73, at 121; Paul Cammack, Neoliberalism, the World Bank, and the New Politics of Development, in DEVELOPMENT THEORY AND PRACTICE: CRITICAL PERSPECTIVES 157, 163 (Uma Kothari & Martin Minogue eds., 2002) (describing how “the neoliberal revolution has thrown the . . . components of postwar political economy . . . into reverse”); Ben Fine, supra note 141, at 4–5 (“[P]rior to the emergence of neoliberalism in the 1980s, development was understood primarily in terms of modernization . . . . Moreover, the influence of Keynesianism . . . suggested that the state should be significant as an economic agent as part of and in achieving modernization. . . . But this was to change, and dramatically, with the rise of neoliberalism. . . . The neoliberal shift against state economic intervention of any sort was then carried over to development . . . .”).

\textsuperscript{154} See infra text accompanying notes 155–60; see also Todaro & Smith, supra note 73, at 119–20 (“In the 1980s, the political ascendancy of conservative governments in the United States, Canada, Britain and [West] Germany came with a neoclassical counterrevolution in economic theory and policy. . . . Neoclassicists obtained controlling votes on the boards of the world’s two most powerful international financial agencies—the World Bank and the International Monetary Fund. . . . [I]t was inevitable that the neoconservative, free-market challenge . . . would gather momentum.”). Michael Todaro and Steven Smith identify dependency theory, rather than modernization theory, as an organizing influence for shaping development economics prior to the “neoclassical counterrevolution.” See Todaro & Smith, supra note 73, at 119–20.

\textsuperscript{155} See CypHER & D IETZ, supra note 101, at 216.

\textsuperscript{156} See STIGLITZ, supra note 9, at 13–14 (“The most dramatic change in [the IMF and the World Bank] occurred in the 1980s, the era when Ronald Reagan and Margaret Thatcher preached free market ideology . . . . The IMF and the World Bank became the new missionary institutions, through which these ideas were pushed on the reluctant poor countries that often badly needed their loans and grants. . . . In the early 1980s, a purge occurred inside the World Bank . . . . [W]ith the changing of the guard came . . . a new chief economist, Ann[e] Krueger, an international trade specialist, best known for her
Revolution,” had already been signaled by the introduction of the policy of conditionality by both the World Bank\(^{157}\) and the International Monetary Fund\(^{158}\) in 1979 and the adoption of structural adjustment lending by the World Bank in 1980.\(^{159}\)

With the Ronald Reagan and Margaret Thatcher revolutions providing political momentum, development agencies now sought broad-based changes in the basic commitments of economic policy by the beneficiary government, a position consistent with neoclassicism. The influence of Krueger and the general shift that her appointment embodied, shaped by NPE and rent-seeking analysis, was heavily imprinted in the structural adjustment programs that the World Bank increasingly emphasized during the 1980s.\(^{160}\)

Structural adjustment programs emphasized the need for dramatic NPE-based reforms to macroeconomic policy to improve the “underlying conditions”\(^{161}\) that would improve growth in developing countries. In trade policy, protective trade regimes influenced by import-substitution industrialization strategies had to be converted to...
trade-liberalization programs. In investment policy, state-led capital investment had to be stopped, state-owned investment enterprises needed to be privatized, and foreign investors needed to be welcomed. In fiscal policy, government spending informed by Keynesian demand-side economics needed to be replaced by fiscal austerity measures to reduce deficits and inflation. In monetary policy, inflation needed to be further controlled through currency “stabilization” programs.

The World Bank first consolidated these two strains of neoclassical economics in its structural adjustment policies in sub-Saharan Africa. By late 1989, the neoclassical program that originally focused on these macroeconomic reforms had explicitly identified “governance” as a basic issue in the development strategy” of borrower countries in sub-Saharan Africa. The time lag between the early Washington Consensus, which did not explicitly include governance, and the post-1989 Washington Consensus, which increasingly did, is best explained against the backdrop of global geopolitics as it bore on the mandate of the World Bank.

In its Articles of Agreement, the World Bank explicitly prohibited its own interference in “political affairs.” For most of the postwar era, Article IV was interpreted consistently with a policy of deference

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162 See David Simon, Neoliberalism, Structural Adjustment and Poverty Reduction Strategies, in The Companion to Development Studies 86, 86–91 (Vandana Desai & Robert B. Potter eds., 2d ed. 2008); see also Dipak R. Basu, Structural Adjustment Program and Public Fiscal Policy in India, 1990–1995, in Advances in Development Economics 155, 156 (Dipak Basu ed., 2009) (describing India’s adoption of a structural adjustment program that required liberalization of import policies). The causes of economic reform are often multifaceted and stem from internal shifts in policy as well as from the external pressure of international financial institutions. See Basu, supra, at 156 (describing earlier shifts in India’s policies); see also Thomas, supra note 11, at 275–77 (describing the influence of the Washington Consensus as one among several factors influencing economic regulatory reform in Mexico).

163 See Simon, supra note 162, at 86–91.

164 See id.

165 See id.


167 Shihsata, supra note 19, at 54 (citing World Bank, Sub-Saharan Africa—From Crisis to Sustainable Growth: A Long-Term Perspective Study (1989)); see also Rittich, supra note 13 (“[T]he legal reforms that have been a feature of the development of agenda [sic] since the mid-1990s . . . gained force from . . . the conclusion that . . . governance failures lay at the root of the ongoing dilemmas of development, particularly in Sub-Saharan Africa.”).

168 See supra notes 12–13 and accompanying text.

169 See supra note 17.
to regulatory goals set by the borrowing state.\textsuperscript{170} Over the course of the 1980s, however, the neoclassical program became increasingly emboldened,\textsuperscript{171} and the bulwark for Third World sovereignty, created by the Cold War and the West’s competition with the Soviet bloc for the allegiance of developing countries, continued to erode.\textsuperscript{172} Soviet leader Mikhail Gorbachev introduced perestroika in the late 1980s,\textsuperscript{173} and Reagan’s 1987 imperative to tear down the Berlin Wall\textsuperscript{174} was realized in late 1989: the existence of the Soviet bloc crumbled along with its effect on the leverage of developing countries.\textsuperscript{175} In the wake of these events, geopolitical impediments to the enshrinement of Western values in the global development policy dissolved. Instead, the existence of neoclassical\textsuperscript{176} and neoinstitutional\textsuperscript{177} perspectives that specifically envisioned institutional qualities as requirements for economic growth fueled this enshrinement.

Thus, by March 1990, the World Bank had introduced a vision of economic reform that explicitly integrated NPE and NIE perspectives and expanded from the regional focus on sub-Saharan Africa to a global lending policy.\textsuperscript{178} The establishment of the European Bank for Reconstruction and Development (EBRD) later in the same year\textsuperscript{179} explicitly reflected this consolidation of the macroeconomic and institutional dimensions of neoclassical economics.

\textsuperscript{170} The policy of deference arose partially out of pragmatic considerations and partially out of a model of development informed by early postwar theoretical influences: Keynesianism and, more specifically, models of development economics which concluded that large-scale industrialization could not occur in poor countries without concerted intervention by the state. For a discussion of these influences, see Pereira, supra note 27, at 217–18.

\textsuperscript{171} See Shihata, supra note 19, at 58.

\textsuperscript{172} For a discussion of the Non-Aligned Movement in which Third World countries sought to leverage the Cold War, see generally The Principles of Non-Alignment: The Non-Aligned Countries in the Eighties: Results and Perspectives (Hans Köchler ed., 1982); see also K. P. Misra, Ideological Bases of Non-Alignment (An Overview), in The Principles of Non-Alignment, supra, at 62, 73 (“[N]on-alignment has evolved over the years [a] multidimensional ideological framework responsive to the dynamic metamorphosis in post-war international relations.”).


\textsuperscript{176} See supra notes 155–65 and accompanying text.

\textsuperscript{177} See infra notes 191–225 and accompanying text.

\textsuperscript{178} See Shihata, supra note 19, at 58 & n.25, 59.

The EBRD preamble reflected the newly candid “political orientation”\(^\text{180}\) of the development community in its emphasis on “the fundamental principles of multiparty democracy, the rule of law, respect for human rights and market economics.”\(^\text{181}\) Thus, this preamble not only encapsulated the full law and development formula\(^\text{182}\) and represented the culmination of the theoretical project that academia had articulated decades before, but it also joined forces with domestic politics in the U.S. and Britain and ultimately influenced international affairs.

The EBRD was a reflection of forces that were also sweeping through the World Bank. Although the EBRD worked closely with the International Bank for Reconstruction and Development (IBRD), it was established by a separate charter.\(^\text{183}\) Moreover, reflecting the “context of the historic political and economic changes” of the moment,\(^\text{184}\) the EBRD Agreement did not contain the same prohibition on political interference contained in the World Bank charter.\(^\text{185}\)

By contrast, the Bank’s explicit turn to governance sparked “considerable debate, both within and outside the Bank,”\(^\text{186}\) and even at the highest level of the World Bank’s own internal governance structure—that is, at the Board of Directors, comprised of twenty-five Executive Directors representing all of the member countries.\(^\text{187}\) At that moment, Ibrahim Shihata, who had been appointed General Counsel for the Bank in 1983,\(^\text{188}\) shortly after Krueger’s appointment as Chief Economist,\(^\text{189}\) provided a “clarification” in response to this controversy and began to articulate the concept of good governance that would define the Bank’s lending policy in the future.\(^\text{190}\)

\(^{180}\) Shihata, supra note 19, at 57.

\(^{181}\) EBRD Agreement, supra note 179, at 4.

\(^{182}\) See id.

\(^{183}\) See Shihata, supra note 19, at 57; see also About Us—Multilateral Development Banks, World Bank, http://www.worldbank.org/ (follow “About” hyperlink) (last updated June 30, 2009) (“Each bank has its own its own independent legal and operational status—but with a similar mandate and a considerable number of joint owners, the [multilateral development banks] maintain a high level of cooperation.”).

\(^{184}\) Id. at 55, 54 & n.4. For the World Bank’s description of its composition, see Composition of the Board, The World Bank, http://www.worldbank.org/ (follow “About” hyperlink; then follow “Boards of Executive Directors” hyperlink; then follow “Composition of the Board” hyperlink) (last updated Nov. 1, 2010). The increase from twenty-four to twenty-five Executive Directors occurred in late 2010. See id.

\(^{185}\) See id. at 53–54; see also Robert C. Effros, The World Bank in a Changing World: The Role of Legal Construction, 35 Int’l’l. Law. 1341, 1346 (2001) (quoting Shihata’s remarks to the American Bar Association in 1994 that “[r]ecognizing that good governance is central to fostering strong and equitable development and is an essential complement to sound economic
Shihata had articulated his highly influential vision of the role of law in economic reform in a series of essays that were later published in a single volume in 1991. In documents such as the legal memorandum entitled *Issues of 'Governance' in Borrowing Members: The Extent of Their Relevance Under the Bank's Articles of Agreement*, dated December 21, 1990, Shihata characterized governance as consistent with the Bank's mandate. Such explication required both a general exposition of the neoclassical rationale for incorporating an assessment of governmental and regulatory institutions into lending policy and the establishment of clear distinctions between “[a]spects of [g]overnance [c]onsistent with the Bank’s [m]andate” and “[a]spects of [g]overnance [b]eyond the Bank’s [m]andate.”

Shihata’s expositions were undoubtedly crucial in providing a basis on which the Board of Directors could overcome the legal challenge posed by the Bank’s own charter. Thus, “Shihata’s opinions and memos opened legal room for the Bank’s involvement in areas that were once deemed too political, such as legal and judicial reform and anticorruption efforts.” Shihata insisted that a clear line could and

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191 See SHIHATA, supra note 19.
192 For a revised version of this memorandum, see *id.* at 55 (“This chapter is based on a legal memorandum issued by the author on December 21, 1990.”).
193 See *id.* at 79–85.
194 See *id.* at 85 (“Concern for rules and institutions is particularly relevant . . . . Reform policies cannot be effective in the absence of a system which translates them into workable rules and makes sure they are complied with . . . . The existence of such a system is a basic requirement for a stable business environment; indeed for a modern state. In its absence, the elements of stability and predictability, so basic to the success of investment, will be lacking . . . .”).
195 *Id.* at 81–96.
197 Sarfaty, supra note 196, at 659.
should separate nonpolitical governance reforms and reforms that explicitly embraced Western political thought. 198

With the appointment of James Wolfensohn to the head of the World Bank in 1995, however, that line gradually dissolved. Wolfensohn increasingly emphasized human rights, a position reflected in a 2006 legal memorandum, authored by then–General Counsel Roberto Dañino on his last day in office, explicitly reinterpreting the Articles of Agreement to include attention to human rights concerns. 199 This shift also accommodated the “chastened” and human-rights oriented views of Stiglitz 200 and Sen. 201

By 1991, institutions had appeared as a basis for specific empirical measurement in the World Development Report. 202 Thus, between 1989 and 1991, governance was endorsed as a basis for regional and global lending policies, cleared by legal counsel, and incorporated into ongoing measurements of development. During this period, “institutional scholars such as Mancur Olsen, Oliver Williamson, and Douglass North” were increasingly invited to consult and confer with World Bank economists. 203 When Douglass North won the Nobel Prize for Economics in 1993, “institutional economics took flight,” and its bid for influence in the Bank took root in earnest. 204 Over the ensuing years, the concepts of good governance, rule of law, and anticorruption were extensively elaborated and refined. As before, world events provided particular fulcrums to boost the visibility of governance policy; for example, after the 1997 Asian financial crisis, the World Bank published Beyond the Washington Consensus: Institutions Matter, explicitly stating attention to governance needed to supple-

198 See Shihata, supra note 19, at 93–96 (differentiating between types of governance falling within the Bank’s mandate); see also Ibrahim F.I. Shihata, Democracy and Development, 46 INT’L & COMP. L.Q. 635, 638–43 (1997) (arguing that drawing the World Bank into political affairs would compromise its objective of promoting development finance).

199 See Sarfaty, supra note 196, at 660–65 (“The closing statement of Dañino’s legal opinion reads: ‘[T]he Articles of Agreement permit, and in some cases require, the Bank to recognize the human rights dimensions of its development policies and activities since it is now evident that human rights are an intrinsic part of the Bank’s mission.’ This view represents a significant departure from the previous official interpretation by General Counsel Shihata.” (alteration in original) (footnote omitted)).

200 See supra text accompanying notes 129–31; see also Preface to The New Development Economics: After the Washington Consensus, supra note 141, at vii–x (dividing leadership at the World Bank into the era of the Washington Consensus and Krueger and the “post-Krueger modifications to the Washington Consensus, especially those associated with the Wolfensohn–Stiglitz leadership of the World Bank”).

201 See supra notes 152–36.

202 Dezalay & Garth, supra note 12, at 171.

203 Id. at 172.

204 Id.
ment the macroeconomic policies of the early Washington Consensus.205

Contemporaneously with this focus on governance and legal order, a highly influential study suggested that institutions determine economic growth to differentiate between countries whose institutions followed a common law model and those whose institutions followed a civil law model.206 This thesis was so notorious that it became known as “LLSV” after the first initials of the original article’s authors, Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny.207 The LLSV thesis is consistent with legal and institutional reforms that emphasize a common law sensibility as reflected by, for example, a focus on judge-made law and on court systems. Indeed, much rule-of-law reform has focused on improving the judiciary.208

In addition to the rise of good governance and the rule of law as general concepts, the institutionalist commitment to improving the protection of property rights in particular became widely popular as a central tenet of development policy reform programs. Perhaps more than any other development expert, Hernando de Soto contributed to the popularization of this perspective. In particular, The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else209 won him widespread acclaim, causing The Economist magazine to name

205 Id. at 171 (“This collaborative effort of the Latin American and Caribbean regional office and Public Sector Management unit directly attacked the ‘consensus’ of the 1980s, stating pointedly that ‘good macro policy is not enough; good institutions are critical for macroeconomic stability in today’s world of global financial integration.’” (quoting THE WORLD BANK, BEYOND THE WASHINGTON CONSENSUS: INSTITUTIONS MATTER 3 (1998)) (emphasis omitted)).


207 See id. at 1113; see also Ronald J. Daniels et al., The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies 10–11 (March 24, 2010) (unpublished manuscript) (on file with author).

208 See supra note 21 and accompanying text; see also DAM, supra note 16, at 93 (“One conclusion widely agreed upon, not just in the economic literature but also among lawyers and legal scholars, is therefore that the judiciary is a vital factor in the rule of law and more broadly in economic development.”); id. at 228 (“Substantive law is important, but it is likely that enforcement is even more important, and the judiciary is a main vehicle for enforcement of substantive law.”); LINN HAMMERGREN, ENVISIONING REFORM: CONCEPTUAL AND PRACTICAL OBSTACLES TO IMPROVING JUDICIAL PERFORMANCE IN LATIN AMERICA (2007).

de Soto’s think tank one of the most important in the world and landing de Soto on top-innovator lists in both Time and Forbes.

In many ways, the exposition of The Mystery of Capital appears to be a straightforward recapitulation of the institutionalist argument, i.e. that commitment to a legal order and the protection of property rights were central to the West’s success: “Property is . . . the legal expression of an economically meaningful consensus about assets. Law is the instrument that fixes and realizes capital.”

The success of The Mystery of Capital may therefore be somewhat mysterious to academics who do not normally cite it or de Soto’s earlier work The Other Path: The Economic Answer to Terrorism.

In fact, de Soto’s work connected institutionalist theory about legal order and property rights to the context of the developing world. That connection consisted of an important empirical insight and a normative prescription. The empirical observation was the emergence of the “informal sector” as a central, and perhaps the central, economic mode in many developing countries. By the late 1980s, it had become clear that de Soto’s native Peru was not industrializing in an orderly fashion; instead, Peru’s economic transformation created a megacity of slums around the capital and led to a disorganized market of informal vendors based on familial or pseudofamilial arrangements. The Other Path urged policymakers to pay attention to the informal sector instead of focusing on formal-sector trade between organized firms.

The normative prescription that followed from this observation was a particular application of the institutionalist argument: rather than simply copying Western property laws, Peru needed to ensure

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213 de Soto, supra note 209, at 157.
215 See de Soto, supra note 209, at 172 (“The only systematic way to integrate these social contracts into a formal property system is by building a legal and political structure, a bridge, if you will, so well anchored in people’s own extralegal arrangements that they will gladly walk across it to enter this new, all-encompassing formal social contract.”).
216 See id. at 69–79 (contending that entrepreneurship and the subsequent development of capital cannot be realized among the massive extralegal populations existing in the world’s poorer countries because of the lack of a formal system of property).
217 See generally de Soto, supra note 214.
218 See id. at 17–19 (describing the phenomenon of migration from the Peruvian countryside to Lima, which has grown by 1,200% over the last forty years, and describing the largely informal structures and systems of housing, trade, and transport that characterized this population).
that its property laws actually described its existing economic reality. In particular, de Soto argued that a vast informal system for the recognition and enforcement of property and contract had arisen in Peru that, if captured through formal legal recognition such as land-titling, would accomplish at least two highly productive tasks. First, it would engineer a major redistribution of wealth to the poor who currently held no formal claims to the areas they cultivated and domiciled, and second, it would incorporate these newly propertied actors into the formal market, unleashing the economic dynamism at the center of the neoclassical ideal.

*The Mystery of Capital* extended de Soto’s arguments about Peru into general prescriptions for development policy by arguing that efforts to transfer property law systems to the developing world would fail as long as those systems did not “connect with the extralegal social contracts that determine existing [informal] property rights.” According to *The Mystery of Capital*, economic growth cannot be triggered in developing countries with large informal sectors without the formalization of existing economic activity.

The attractiveness of de Soto’s work lay in its ability to simultaneously express fidelity to the neoclassical belief in the centrality of property rights and to provide an explanation, based on a highly plausible and intuitive hypothesis, about why the institutionalist program for legal transformation of the developing world had so far failed to yield results. The analysis provided wind for institutionalist sails while also paying attention to social redistributions that critics charged neoclassicism with failing to achieve. As such, de Soto’s analysis could preserve the application of NIE and appease both the politically conservative and the more politically moderate. As a result,

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219 See id. at 185–87 (stating that to achieve effective legal rules, “[i]t makes more sense to adapt the law to reality” by taking into account the social systems of the informal sector). See generally id. at 131–87 (describing the importance of formality and access to the law).

220 See id. at 250–52 (“What is needed, then, [to encourage economic development] is not to abolish informal activity but to integrate, legalize, and promote it.”).

221 DE SOTO, supra note 209, at 172.

222 See id. at 171–87 (discussing the importance of recognizing and responding to extralegal social contracts).

223 See id. at 182–87 (explaining his approach to fieldwork and the necessity of uncovering the social contracts stabilizing the informal sector to achieve effective reform); see also id. at 168 (stating that government programs attempting to create formal property rights for the poor have traditionally failed “not because the law has privatized or collectivized [people in developing countries] but simply because it does not address what they want”).

it became highly influential in legal and institutional reform programs in the field of development.  

In the genesis of neoclassical economics, the Coase Theorem laid the basis for the foundation of public choice theory, rent-seeking analysis, the domestic law and economics movement, and NIE.  

In the same context, and with many of the same intellectual influences, the neoclassical economics of the Chicago School supported the establishment of NPE.  

The theoretical approaches of NPE and NIE, in turn, provided the basis for macroeconomic reform programs based on structural adjustment and legal and institutional reform programs based on good governance.  

Although implementation of the latter programs followed a few years after the implementation of the former, geopolitical events and the effect of those events on prevailing approaches to the international legal order can explain this time lag.  

The foregoing history portrays the movement from theory to practice of neoclassical law and development as interconnected with other intellectual and political dynamics of the time. There have been various partial expositions of these connections but none which argue for as comprehensive and coherent an account. Some law and development scholars discuss institutional economics without discussing its neoclassical aspects.  

Others discuss neoclassical law and development and macroeconomic policy without elucidating their theoretical interconnections. Still others discuss the influence of NIE on law and development but do not make the connection to the macroeconomic side of development policy.  

By contrast, this Essay argues a much closer relationship between neoclassical theory and practice as it has affected contemporary development policy in general and law and development programming in particular.

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226 See supra Part I.A.  

227 See supra Part I.A.  

228 See supra text accompanying notes 140–41.  

229 See supra text accompanying notes 157–214.  

230 For example, James Cypher and James Dietz discuss neoclassical economics and the New Political Economy, see CYpher & DIETZ, supra note 101, at 216–20, but their discussion of institutionalism includes only the more politically moderate approaches of Peter Evans, Gunnar Myrdal, and Clarence Ayres. See id. at 180–85, 220–22.  

Kerry Rittich discusses public choice theory, rent-seeking analysis, and moderate institutionalists, but he does not discuss the New Institutional Economics. See RITTICH, supra note 58, at 115–25, 143–51.  

231 See, e.g., Kennedy, supra note 69, at 95–96 (“Although my goal is to decode the politics of expertise in each phase [of development common sense], I say very little about how thinking in these phases was linked to broader social and political events.”).  

232 See, e.g., DAM, supra note 16 (discussing the implications of neoinstitutionalism for legal institutions and economic growth); TREBILCOCK & DANIELS, supra note 23 (addressing issues concerning the role of the rule of law in development).
II
CRITIQUE

With the rise of rule of law discourse, a variety of critiques have also surfaced. This Part synthesizes the legal scholarship that has arisen as a reaction to this massive implementation of law and development field projects, as well as offering some original analysis in particular of the causal relationship between legal and institutional reform and development. A number of volumes published in the past few years appraise neoclassical law and development. These critiques show that law and development discourse is surprisingly limited in both theory and practice. The critiques arise in both the academy and in the field. The critiques are sometimes skeptical of the entire enterprise, but other times, they are proactively devoted towards improving it. In either event, they point out the limitations in the law and development enterprise.

A. Theoretical Critique: Internal Incoherence

1. Rule of Law

One salient critique of the law and development discourse is that, notwithstanding the intellectual heritage outlined above, the theoretical framework deployed in the discourse is broad and at times internally incoherent. Despite its origins in neoclassical thought, rule of law discourse has expanded over time to include a variety of alternative theoretical viewpoints.

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233 See sources cited supra note 23.
234 See, e.g., DAM, supra note 16; THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, supra note 13 (providing a collection of essays analyzing the relationship between law and economic development); TREBILCOCK & DANIELS, supra note 23.
235 See, e.g., PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE, supra note 23 (presenting a compilation of essays discussing the importance of the rule of law); LINN HAMMERGERN, USING CASE FILE ANALYSIS TO IMPROVE JUDICIAL REFORM STRATEGIES: THE WORLD BANK EXPERIENCE IN LATIN AMERICA (2004), available at http://www.ijj.derecho.uct.ac.cr/archivos/documentacion/inv%20otras%20entidades/CLAD/CLAD%20IX/documentos/hammergr.pdf (discussing problems that have plagued judicial reform in Latin America from the perspective of a Senior Public Sector Management Specialist in the World Bank’s Latin American Regional Department).
236 For a more detailed schematization of law and development scholarship according to degree of apparent skepticism about the enterprise as a whole, see Kevin E. Davis & Michael J. Trebilcock, The Relationship Between Law and Development: Optimists Versus Skeptics, 56 AM. J. COMP. L. 895, 940, 941 (2008).
237 For example, Alvaro Santos has detailed the ways in which the discourse adopts concepts of rule of law that stem from Weberian and Hayekian precepts but also from other influential writers, such as A.V. Dicey and Amartya Sen. According to Santos’s analysis, Weber and Hayek conceive of the rule of law as useful primarily for its instrumental value in effecting economic growth, whereas Dicey and Sen support an intrinsic conception of the rule of law as an end in and of itself. See Santos, supra note 159, at 259–66. For another treatment of the entangled intellectual heritage of rule of law policies, see Rachel
Some visions of the rule of law contain strong substantive components, such as Hayek’s and Sen’s conceptions which focus on the law as embodying human fulfillment through freedom, whereas the Weberian conception is less closely linked to particular substantive policies.\textsuperscript{238} Within these substantive conceptions, there is a marked difference: Hayek’s conception of liberty is consistent with a traditional neoclassical focus on the market,\textsuperscript{239} whereas Sen’s belief that human rights are necessary for the full realization of freedom potentially incorporates both civil liberties and social redistribution.\textsuperscript{240} The Hayekian and Senian visions are normatively oriented towards certain constitutive philosophical commitments of the state: for Hayek, this is a neoclassical state, and for Sen, this is a human rights state.

Treiblick and Daniels describe these internal theoretical variations as the difference between “thick” and “thin” conceptions of the rule of law.\textsuperscript{241} The Hayekian vision is an example of the thick conception because it hews to a specific philosophical tradition propounding Western Enlightenment precepts of democracy and liberty.\textsuperscript{242} By contrast, Trebilcock and Daniels consider thin conceptions to be available from theorists who seek to frame their prescriptions in more proceduralistic terms, such as John Rawls, Joseph Raz, and Lon Fuller.\textsuperscript{243} In these thin conceptions, “the rule of law means, and only means, the rule of a system of rationally comprehensible rules bearing some instrumental relationship to the function of social coordina-

\textsuperscript{238} See supra Part I.A.

\textsuperscript{239} See \textit{Hayek}, supra note 37, at 11–38 (evaluating definitions of liberty and coercion to assess the relationship between the terms); \textit{see also} Santos, supra note 159, at 263 (“In the instrumentalist version, Hayek regards the rule of law as a system that articulates a free market economy.”).

\textsuperscript{240} See \textit{Sen}, supra note 133, at 18 (presenting two reasons for the “crucial importance of individual freedom in the concept of development”: first, substantive individual freedoms define the success of a society, and second, substantive freedoms provide the main source of individual initiative); \textit{see also} Santos, supra note 159, at 265 (“Amartya Sen upholds an intrinsic vision of the rule of law, which propounds that the legal system ought to be judged according to whether it enables peoples’ capability to exercise their rights.”).

\textsuperscript{241} See \textit{Treiblick & Daniels}, supra note 23, at 16–23 (distinguishing the “thick” view, which unites the rule of law with liberal associations, from the “thin” approach, which favors a formalistic, spare definition of the rule of law).

\textsuperscript{242} See id. at 16 (explaining that Hayek “favours a ‘thick’ conception,” considering the rule of law to be inherently linked with freedom). To the neoclassical and human rights constitutions described above, Trebilcock and Daniels add a contemporary American constitutional and political theory that might be loosely associated with civic republicanism. The exemplar of this view is Cass Sunstein’s work on deliberative democracy, which according to Trebilcock and Daniels, sets out to establish a “comprehensive political morality” that fulfills normative goals of democratic constitutionalism. \textit{Id.} at 16–17.

\textsuperscript{243} See id. at 20–23 (citing Lon L. Fuller, \textit{The Morality of Law} 39, 200–24 (2d ed. 1969); John Rawls, \textit{A Theory of Justice} 235 (1971); Joseph Raz, \textit{The Authority of Law: Essays on Law and Morality} 211–18 (1979)).
tion." All focus is on the rationality of the system as well as its procedural characteristics, such as transparency and justiciability.

This variety in theoretical perspectives is not just an academic question; it also leads to different policy and programming choices. For example, rule of law programming influenced by hardline neoclassicism would look much different than rule of law programming influenced by more moderate institutionalism. Development institutions such as the United Nations Development Programme and even the World Bank have moved towards incorporating Sen’s focus on human rights, suggesting a new era in which the social aspect of development has become a central part of the justification for legal reform.

This variety of theoretical perspectives might denote discursive richness rather than discursive incoherence. In other words, law and development discourse is embedded in the same kinds of debates over institutional and substantive values that would characterize discourse over constitutionalism, human rights, democracy, or any other set of values framework. We would expect to see different views being propounded and debates taking place. This would be evidence of vitality and relevance.

Even so, there are still reasons to be worried about this theoretical incoherence. The problem is not that different visions of the rule of law exist but that they have not been clearly articulated and defended. Instead, the theoretical discussions are typically quite sparse in both the policy documents and academic treatments by rule of law proponents. What exists is not a rigorous debate between clearly differentiated points of view but a “hodge-podge.” In addition to the intellectual inelegance of this state of affairs, there might be real costs to application. Blending theoretical attributes in this way leads to programs that, in attempting to meet both neoclassical and socially redistributive values, for example, actually achieve neither, becoming law and development versions of “Cardozo’s Thaumatrope.”

For those

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244 TREFILCOCK & DANIELS, supra note 23, at 20 (describing Rawls’s view on the rule of law).
245 See id. at 20–22 (presenting lists of factors that Raz and Fuller claim are desirable components of a legal system).
246 See Rittich, supra note 13, at 225–27 (contending that human rights have been embraced as an end in and of themselves for social and economic development).
247 See Santos, supra note 159, at 255 (arguing that “the conceptions of the rule of law . . . need not be, and indeed are not, consistent with each other”).
248 See William Powers, Jr., Thaumatrope, 77 TEX. L. REV. 1319, 1320 & n.14 (1999) (reviewing ANDREW L. KAUFMAN, CARDozo (1998)) (“A Thaumatrope is a device in which two objects are painted on opposite sides of a card, for example, a man and a horse or a bird and a cage, and the card is fitted into a frame with a handle. When the handle is rotated rapidly, the onlooker sees the two objects combined into a single picture—the man on the horse’s back or the bird in the cage.” (footnote omitted)).
progressively-minded proponents of “the social” in the more recent, Sen-inflected development reforms, this means that such goals end up being incorporated in only a superficial way.249

If theoretical incoherence leads to programmatic incoherence, then the effects of different theoretical prescriptions could not be clearly distinguished and therefore could not be measured or tested. Based on the different versions of law and development above, legal reform is sometimes thought of as conducive to economic growth, and sometimes to democracy more generally.250

This state of affairs could create a vicious circle in which theoretical incoherence leads to programmatic incoherence which, due to its low testability, further entrenches theoretical incoherence. Indeed, as discussed below, many law and development programs are so characterized by a lack of measurement that the programmatic incoherence already exists. Accordingly, the lack of clearly identified theoretical points of view could be associated with practical flaws.

2. Property Rights

The focus on property rights is a point of common agreement among neoclassicists. It is a primary focus of neoclassicism—and the nature of this basic point—that the state should clearly define and effectively enforce property rights. This is one “genetic trait” that is passed on without much variation through variations of institutionalism.251

Yet if the critique of rule of law discourse above is that it is too theoretically incoherent, the critique of the property rights discourse might be just the opposite—i.e., that it has been too theoretically simplistic. The neoclassical vision of property rights, after all, assumes a particular vision of the state and the relationship between public and private.252 Neoclassical law and development discourse seems to mechanically reflect only a narrow viewpoint from Western theory, rather than the range of debates over the proper role of the state in configuring social relationships as partially reflected by property rights.253

249 See Trubek & Santos, supra note 30, at 7–11.
250 See supra Part I.A.
251 See supra Part I.
253 Id. Kennedy also notes that

[s]ome have sought to strengthen the public at the expense of the private by insisting upon the priority of legislation or regulation or by identifying and expanding the points within private law at which officials charged with implementing private arrangements could exercise discretion and recognize or impose social duties on those in private relationships. For others,
This point has been made before with respect to other aspects of law and development policy—that the vision of law that the West exported to developing countries reflects one substantive neoclassical vision, presents it as natural and inevitable, does not acknowledge the debates within the West, and does not provide development policymakers with the same range of options. For example, M. Sornarajah has made a similar point relating to the enforcement of investor rights—that the perspective of international arbitral tribunals hews much more closely to investor interests than would the legal systems of the investors’ home countries. A recent example might be the contrast between the fiscal-austerity measures suggested by the development agencies for developing countries in capital markets crises, on the one hand, and the soft-landing bailouts provided by Western governments during their own periods of financial crisis. If the West is to be held up as a model, in other words, the portrait held up by neoclassicism is intellectually dishonest because it reflects one narrow vision.

In property law, for example, the law and economics ideal which inherited neoclassicism in U.S. property law discourse is only one strain; other approaches to property emphasize social and community context and relations. Consequently, theoretical critiques would point out that if we truly applied lessons from the West, we would end up with a much broader range of possibilities than the mantra of “‘clear and strong’ property rights.” If the developing world wants to learn lessons from the West by adopting Western property rights systems, those systems are much more internally diverse and contested than suggested by law and development discourse.

the goal has been to strengthen the private against the public by treating private rights as constitutional limits upon sovereign powers or otherwise narrowing the opportunities for officials implementing private arrangements to exercise discretion or impose social obligations. But these two poles are not the only, or even the most important, alternatives. There have also been numerous efforts to see the domains as “equal” if distinct, or to imagine a functional “partnership” between them or “balance” among their respective virtues guided by a larger policy objective such as market efficiency or economic development or social welfare or the provision of public goods.

Id. See M. Sornarajah, The International Law on Foreign Investment 85–86 (3d ed. 2010).

See, e.g., Stiglitz, supra note 9, at 89–132 (discussing the “East Asia crisis” and how “IMF/U.S. treasury policies led to the crisis”); Thomas, supra note 30 (offering an intellectual history to explain the intractability of universalistic solutions).


Kennedy, supra note 252, at 2.
A second theoretical objection is that Western property systems should not be models for the developing world because they contain many flaws that can lead to negative externalities and even economic crises. Property markets in the West are subject to systemic flaws that lead to regular market failures, from land rushes to capital-market meltdowns. A better theoretical understanding of property rights, accordingly, would perceive a susceptibility to negative externalities that would require a much more complex regulatory solution than enforceable land titles. From this point of view, Western property law is far from a panacea to the problems of the developing world.

Another angle on the property rights debate is that property rights proponents themselves can be read in a way that would admit of this broader range of approaches to property. Whereas de Soto’s views are strongly associated with the neoclassical vision, de Soto also makes clear that his goal is to effectuate a transfer of wealth to the poor and redistribution of property through titling. De Soto stresses that “cookie-cutter” property rights models in land-titling reforms should be avoided. Consequently, the problems that result from a one-size-fits-all model, discussed below, might stem from a mis-reading of de Soto. From this perspective, the simplistic quality of property rights as a magic bullet in development policy stems from defects in implementation, rather than theory.

While it is true that de Soto explicitly denounces a one-size-fits-all approach, his exposition of property is not sufficiently aware of the theoretical nuances raised above. A more theoretically sophisticated approach, even within de Soto’s analytical framework, would anticipate possible market failures and other negative externalities of a titling approach. Moreover, a sophisticated approach might also acknowledge the range of conceptions of property in the Western tradition.

3. Conclusion

In both domains of neoclassical law and development policy—rule of law reforms and property reforms—theoretical critiques argue that the discourse is impoverished: the former is impoverished be-

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261 See id. at 10.

262 See Rose, supra note 259, at 22–23, 26, 39.
cause it is too diverse without being clearly delineated, and the latter is impoverished because it is too clearly delineated according to a particular vision. Clearly, then, a vigorous debate is missing in both contexts.

B. Practical Critique: Empirical Flaws

This lack of rigor in the theoretical exposition described above is matched by a lack of rigor in testing the instrumental claims of law and development discourse. For a field which is largely about applied concepts, it lacks systematic information about those concepts in practice. As Thomas Carothers has plainly stated, “When rule-of-law aid practitioners gather among themselves[,] . . . . they admit that the base of knowledge from which they are operating is startlingly thin.”263 Law and development scholars have also attempted to fill this gap. This subpart examines some of the implications of the early forays into empirical assessment of law and development projects.

1. Causality Problems

The subpart above discussed theoretical incoherence and concluded that it could endanger the coherence of applied policy. As one of the most openly critical law and development practitioners, Carothers has noted that “there is a surprising amount of uncertainty about the basic rationale for rule-of-law promotion. Aid agencies prescribe rule-of-law programs to cure a remarkably wide array of ailments.”264 Two widespread beliefs are that the rule of law assists in economic growth and that it helps to engender democracy.265 Yet the causal direction of each of these correlations is seriously questionable.266

Some authors have used case studies to challenge the question of the causal relationship between the rule of law and economic growth. The strongest of these challenges rests on the observation that East Asian countries have experienced the most robust economic growth
in the postwar era, \[^{267}\] from Japan in the early postwar years, \[^{268}\] to China more recently. \[^{269}\] At least according to conventional Western analyses, the legal systems in these countries featured very few of the attributes associated with the rule of law ideal at the time that economic growth began to accelerate. \[^{270}\]

Similarly, law and development scholars, looking at both the analytics of the argument as it relates to specific case studies and at broader statistical analyses, have questioned LLSV’s thesis. Kenneth Dam has sharply criticized the suggestion that Anglo-American legal systems are more conducive to economic growth, which supports some of the rule of law reforms. For example, the LLSV thesis suggests in part that a legal system which features judge-made law is more flexible than a legal system built around statutory law, and it also suggests that this flexibility explains why common law countries have seen more growth in their capital markets than civil law countries. \[^{271}\] Dam, however, points out that there are a number of flaws in this thesis. First, the LLSV thesis that common law systems are associated more strongly with judge-made law and the predominance of courts than civil law systems is factually severely flawed because many civil law systems have adopted judicial review systems, constitutional courts, and other courts of appeal. \[^{272}\] Second, common law systems have not always been associated with higher growth rates, even in the countries in which these systems originated. \[^{273}\] Third, many countries inheriting common-law systems, such as the former British colonies in sub-


\[^{270}\] See Trebilcock & Daniels, supra note 23, at 4–5.

\[^{271}\] See Dam, supra note 16, at 35–39.

\[^{272}\] See id. at 42–49.

\[^{273}\] See id. at 38–39 (discussing empirical work showing that for substantial parts of the nineteenth and twentieth centuries, economic growth rates in France outpaced those in Britain).
Saharan Africa and South Asia, remain “lower-quality rule-of-law coun-
tries” and also among the poorest in the world. Perhaps in partial response to these apparent counterfactual ex-
amples, but in any case in supportive of the turn to institutionalism in
economic development policy, a number of scholars have undertaken
extensive cross-country studies—most notably, Daniel Kaufmann and his
coworkers for the World Bank as well as Dani Rodrik. Kaufmann
spearheaded the World Bank’s World Governance Indicators pro-
ject, which is perhaps the most ambitious of these empirical stud-
ies and surveyed over two hundred countries along six indicators.
Kaufmann concluded that these indicators suggested “a very high cor-
relation between good governance and key development outcomes

274 See id. at 52 (naming the former British colonies or protectorates of Kenya, Nigeria, Somalia, Bangladesh, and Pakistan).
275 For example, Kenya, Nigeria, Somalia, Bangladesh, and Pakistan all rank in the bottom third of the United Nations Human Development Index. See United Nations De-
velopment Programme, Human Development Index 2010, at 143 tbl.1 (2010), available at
hypothesis has now been largely discredited in its original form, other commentators have
advanced more refined versions of their argument, such as the colonial origins thesis that
the institutional legacies left by colonizing powers in particular territories significantly
determined the growth prospects of those territories. See, e.g., Daniels et al., supra note 207,
at 7 & n.23, 9.
276 See World Governance Indicators, World Bank, http://info.worldbank.org/govern-
277 See Daniel Kaufmann et al., Governance Matters VI: Aggregate and Individual Govern-
are:
1. Voice and Accountability (VA) – measuring the extent to which a country’s
citizens are able to participate in selecting their government, as well as free-
dom of expression, freedom of association, and a free media;
2. Political Stability and Absence of Violence (PV) – measuring perceptions of
the likelihood that the government will be destabilized or overthrown by
unconstitutional or violent means, including domestic violence and
terrorism;
3. Government Effectiveness (GE) – measuring the quality of public services,
the quality of the civil service and the degree of its independence from
political pressures, the quality of policy formulation and implementation,
and the credibility of the government’s commitment to such policies;
4. Regulatory Quality (RQ) – measuring the ability of the government to for-
mulate and implement sound policies and regulations that permit and pro-
mote private sector development;
5. Rule of Law (RL) – measuring the extent to which agents have confidence
in and abide by the rules of society, and in particular the quality of contract
enforcement, the police, and the courts, as well as the likelihood of crime
and violence;
6. Control of Corruption (CC) – measuring the extent to which public power is
exercised for private gain, including both petty and grand forms of corrup-
tion, as well as “capture” of the state by elites and private interests.

Id. at 3–4.
across countries." Rodrik’s 2002 study, *Institutions Rule*, used Kaufmann’s data on institutional quality and found that in comparison to other variables, such as trade policy, which NPE argued was a major factor of growth, institutions are much more strongly correlated with growth.

As Rodrik has acknowledged, however, the empirical soundness of such studies is not indisputable. One potential empirical weakness lies in the soundness of the data and therefore of the asserted correlation. Specifically, the data are based entirely on surveys and therefore on subjective perceptions. This methodology opens up the possibility that preconceptions and biases regarding different levels of corruption in different countries or regions will simply become self-reinforcing. In addition to individual data points, Trebilcock and his coauthors have also questioned the strength of the correlation, stating that closer “inspection of the cross-country data shows that the performance of legal institutions shows considerable variation within countries over fairly short periods of time. This is inconsistent with any suggestion that the quality of legal institutions is shaped in important ways by largely immutable economic, cultural or political features of societies.”

Even if institutional quality and economic growth are correlated, however, this relationship does not establish the direction of causality.

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280 See supra notes 101–14 and accompanying text.

281 See Rodrik et al., supra note 279, at 10.

282 Rodrik has acknowledged the precariousness of econometric studies for proving broad causal relationships: “Econometric results can be found to support any and all of these categories of arguments. However, very little of this econometric work survives close scrutiny . . . or is able to sway the priors of anyone with strong convictions in other directions. Moreover, there is little reason to believe that the primary causal channels are invariant . . . . There may not be universal rules about what makes countries grow.” Dani Rodrik, *Introduction to In Search of Prosperity: Analytic Narratives on Economic Growth* 1, 9–10 (Dani Rodrik ed., 2003).

283 See Kaufmann et al., supra note 277, at 4 (explaining that “data sources consist of surveys of firms and individuals, as well as the assessments of commercial risk rating agencies, non-governmental organizations, and a number of multilateral aid agencies and other public sector organizations”).

284 See id. Of the thirty-three sources of survey information, most are directed towards the staff and experts of development organizations; only four include the views of households based in the developing world. See id. at 5, 41, 51, 54, 59.

285 See Davis & Trebilcock, supra note 236, at 940–41 (2008) (“One would expect the impact of geographically determined colonial policies to diminish with the amount of time that has passed since independence . . . .”); see also TREBILCOCK & DANIELS, supra note 23, at 9 (listing flaws such as “imperfect correlations” and “unexplained variation”).
Dam inquires: “Do more independent legal institutions cause higher incomes? Or is it a case of reverse causality? In other words, do higher incomes provide the resources that lead to a higher rule-of-law level?”

Both the Kaufmann and the Rodrik studies were quite adamant that their data strongly supported a causal inference. The papers themselves do not devote a great deal of attention to proving the causal relationship, however, but focus instead on other methodological issues relating to the measurement of the data points and the validity of cross-country and cross-historical comparisons across those data points.

In fact, the extensive empirical data, statistical discussions, and graphic representations of these projects wrap themselves around a seemingly rather thin argument for causality. Both projects ultimately base the assertion of the causal relationship between institutional quality and economic output on a single study published by the *American Economic Review* in 2001: *The Colonial Origins of Comparative Development: An Empirical Investigation* (the AJR study). The reluctant exposition of the causal argument in both projects seems circuitous and provisional.

Kaufmann’s article, *Governance Redux*, discusses causality extensively, but it does not actually elucidate the analytic basis for establishing that causal relationship. Instead, footnote sixteen of *Governance Redux* refers readers to *Growth Without Governance*. *Growth Without Governance* discusses a variety of studies investigating causal relationships between governance and income and ultimately selects settler mortality rates as the “preferred instrument.” Rodrik’s essay, *Institutions Rule*, similarly selects settler mortality rates as establishing a “good instrument for institutional quality” and constructed trade flow

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286 See DAM, supra note 16, at 52.
287 See Kaufmann, supra note 278, at 15 (finding “a large direct causal effect from better governance to improved development outcomes” (emphasis omitted)); Rodrik et al., supra note 279, at 6.
288 See Kaufmann, supra note 278, at 15–17 (comparing the historical legal origin of countries and rule of law quality); Rodrik et al., supra note 279, at 10 n.6, 12–15 (explaining why their large sample size increases the validity of the country data points and performing robustness checks on variables such as legal origins and geography).
290 Kaufmann, supra note 278, at 13 n.16 (“Untangling the directions of causation underlying the strong correlations is explained in detail in ‘Growth Without Governance,’ Kaufmann and Kraay (2002).”).
as a good instrument for measuring integration.\footnote{292} He further claims that these two “instruments, having passed what might be called the AER (American Economic Review)-test, are our best hope at the moment of unraveling the tangle of cause-and-effect relationships involved.”\footnote{293}

The AJR study, acknowledging the difficulty of disentangling measures of income and institutional quality, provocatively “propose[s] a theory of institutional differences among countries colonized by Europeans,” arguing that settler mortality rates constitute a measure of institutional quality that allows for this disentanglement.\footnote{294} According to this argument, colonies with large settler populations were more likely to feature good institutions because settlers would bring with them European commitments to good governance, meaning “strong emphasis on private property and checks against government power.”\footnote{295} Settler mortality rates could be used as an inverse measure for this phenomenon because settlers would avoid areas that were particularly inhospitable and uninhabitable.\footnote{296} Thus, the AJR study argues, low actual and potential settler mortality rates in the colonial era led to high colonial settlement, which led to good early institutions, which supported the development of good current institutions, which in turn support good current economic performance.\footnote{297}

The AJR analysis, though provocative and clever, ultimately seems to be far too thin a basis to argue the strong causal effects asserted by Kaufmann and Rodrik. Trebilcock and Davis have raised some objections to the AJR analysis; specifically, they question the external validity of early differences in institutions as a measure for current institutional quality\footnote{298} and a moral question about the validity of “the position that exploitation of non-settler colonies was inevitable,” which they assert underlies the argument that only settler colonies were graced by any efforts to build good institutions by the colonizers.\footnote{299}
Beyond these objections, however, the AJR analysis seems susceptible to a much more direct and damaging question about the nature of the causal relationship that it asserts. Rather than providing a way out of the entangled causality between institutional quality and economic performance, the AJR assertion of inverse causality with settler mortality rates seems to me simply to raise it in another form. There would be any number of factors that could be coefficients of low settler mortality rates, high institutional quality, and economic performance and that could establish alternative causal relationships to the one that AJR assert. For example, high settlement rates could also have led to much higher early investments of capital and technology that the settlers brought with them. Under this alternative explanation, settlement led to greater capital and technology early on, which led to strong early economic performance, which led to strong current economic performance; institutional quality was simply a by-product of this relationship. In other words, early economic performance led to early institutions. The AJR does not get out of the “endogeneity problem”: it correlates historical settler mortality rates only with current economic performance and not with early, contemporaneous economic performance. As a consequence, the AJR study does not answer the question of the direction of causality between institutional quality and economic performance but merely restates it.

Surprisingly, AJR do not seem to address this analytical flaw. While they do successfully control the analysis for other “variables potentially correlated with settler mortality and economic outcomes,” such as “the identity of the main colonizer, legal origin, climate, religion, geography, natural resources, soil quality, and measures of ethnolinguistic fragmentation,” none of these factors go to the impact of settler economic inputs (such as capital and technology) or economic outcomes at the time of settlement, which would seem much more directly relevant to disentangling the causal relationship between institutional quality and economic performance.

Ultimately, the AJR study and subsequent studies seem to be much more useful for rebutting the LLSV’s “legal origins” thesis that

Id.

See Acemoglu, Johnson & Robinson, supra note 289, at 1371, 1377–78, 1386 n.13 (explaining the choice of GDP per capita in 1995 as a measure of economic performance).

See id. at 1372.
attempts to argue the superiority of British legal influence on institutional characteristics and quality than the more fundamental law and development thesis. Despite these difficulties, though the AJR analysis has been elaborated and expanded as the basis for a great deal of subsequent law and development literature on governance, its logic has not been fundamentally reopened. The hesitation of the leading empiricists in the field, Kaufmann and Rodrik, to do so no doubt suggests the difficulty of this “disentanglement” project.302 However, given the pervasiveness and persuasiveness of the thesis, such difficulty does not appear to be a justification for avoidance.

Indeed, Rodrik acknowledged in his subsequent book, *One Economics, Many Recipes*, that the AJR study by itself could not support the hypothesis that institutional quality determines economic growth. In that work, Rodrik confronted the fact that the “difficulty with the empirical analysis of institutional development has been that institutional quality is as endogenous to income levels as anything can possibly be. Our ability to disentangle the web of causality between prosperity and institutions is seriously limited.”303

Rodrik’s later work refines his earlier claim for the large causal effects of institutional quality, arguing that the evidence, including both large aggregate cross-country comparisons and consideration of particular country case studies, “suggests [that] large-scale institutional transformation is hardly ever a prerequisite for getting growth going.”304 Instead, building from in-depth examination of case studies such as China and South Korea, Rodrik suggests that “an attitudinal change on the part of the top political leadership toward a more market-oriented, private-sector-friendly policy framework often plays as large a role as the scope of policy reform itself.”305 This more circumspect argument holds that institutional quality and institutional transformation are important for sustaining economic growth.

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302 See supra notes 287–93 and accompanying text.
303 See Rodrik, supra note 115, at 185. Part of Rodrik’s intention in distancing himself from the AJR study seems to have been to avoid supporting the “colonial origins” thesis that has emerged in that study’s wake and which suggests that contemporary economic growth in developing countries stems in part from the quality of the institutional infrastructure created during the colonial era. See id. at 186 (“If the roots of underdevelopment lie in contrasting encounters with colonizers, how can we explain the fact that countries that have never been colonized by Europeans are among both the poorest and richest of today’s economies?”). This rebuttal seems oddly misdirected, as the AJR study does not necessarily argue anything about non-colonized countries. In fact, some promising evidence supports the argument that the quality of institutions left behind by colonizers has been important in shaping the postcolonial period for those countries. See Daniels et al., supra note 207, at 3–4.
304 See Rodrik, supra note 115, at 190.
305 Id. at 191.
The problem with causality, however, does not appear to have affected the momentum behind programs that are designed to improve institutional quality in developing countries.306

2. Program Design Issues

Even assuming that these empirical studies establish causality, the formidable question of how to convert this explanatory insight into prescriptive analysis remains. How can good governance and the rule of law be achieved? The law and development literature has made a variety of points relating to programmatic shortcomings.

Many scholars have stressed the futility of adopting a one-size-fits-all approach based on the belief that stylized aspects of Western legal systems will produce economic growth if they are “transplanted” into developing countries.307 Moreover, practitioners from de Soto to Rodrik have emphasized the importance of avoiding one-size-fits-all solutions.308 Yet one clear limitation of rule of law programs has been the difficulty in resisting precisely such cookie-cutter approaches.

Thomas Carothers, for example, has detailed the “breathtakingly mechanistic approach to rule of law development—a country achieves the rule of law by reshaping its key institutions to match those of countries that are considered to have the rule of law.”309 In reviewing rule of law reforms in Latin America, Carothers describes a context in which the “staggeringly obvious” point that one-size-fits-all legal-transplant programs has constituted a “lesson learned” after various efforts

306 See Carothers, supra note 21, at 3–4.
307 See, e.g., Katharina Pistor et al., Evolution of Corporate Law and the Transplant Effect: Lessons from Six Countries, 18 WORLD BANK RES. OBSERVER 89, 92–95 (2003) (explaining that establishing the contribution of legal institutions to economic growth is empirically difficult and that transplant countries that adapted the imported law or had a population familiar with the imported laws fair better than others). For an intellectual history that helps to explain the intractability of universalistic solutions, see generally Thomas, supra note 28, at 383–85.
308 See de Soto, supra note 209, at 171–72 (explaining the importance of incorporating whatever existing informal conventions the people already have for the property law regime); Rorot, supra note 115, at 4 (“I believe that appropriate growth policies are almost always context specific.”).
309 Carothers, supra note 21, at 21. Carothers also notes that attempting to reproduce institutional endpoints consists of diagnosing the shortcomings in selected institutions—that is, determining in what ways selected institutions do not resemble their counterparts in countries that donors believe embody successful rule of law—and then attempting to modify or reshape those institutions to fit the desired model. If a court lacks access to legal materials, then those legal materials should be provided. If case management in the courts is dysfunctional, it should be brought up to Western standards. If a criminal procedure law lacks adequate protections for detainees, it should be rewritten.

Id.
proved unsuccessful.\textsuperscript{310} More disheartening still is the “persistent problem of lessons learned not actually being learned”: “externally supported law reform efforts in many countries, especially those efforts relating to the commercial domain, often continue to be simplistic exercises of law copying.”\textsuperscript{311} Similarly, popular programs such as judicial training continue to be implemented despite repeated assertions by “[e]xperienced practitioners . . . that judicial training, while understandably appealing to aid agencies, is usually rife with shortcomings and rarely does much good.”\textsuperscript{312}

A related difficulty is the low quality of self-assessment and constructive revision of programs. Linn Hammergren, an economist who has worked extensively with various development agencies,\textsuperscript{313} has endeavored to point out the importance of better self-assessment in development policy. Alvaro Santos notes that careful assessment in particular cases shows that “much of the conventional wisdom on what is wrong and what needs change in countries’ judicial systems is unwarranted by the available evidence.”\textsuperscript{314} In addition, Hammergren has pointed to the lack of internal consistency within development agencies in the identification and application of legal reform policies.\textsuperscript{315}

The lack of rigorous self-assessment in programs means that they are rarely able to survive or overcome dysfunctional encounters with the host environment. For example, various scholars have observed that rule of law programs in Latin America were flawed because they were either met with entrenched resistance by local actors or co-opted and manipulated by particular local actors in power struggles with others.\textsuperscript{316} In both cases, the programs may end up being manipulated in such a way that they fail to change, and in some cases exacerbate, the very domination by powerful interests that good governance and rule of law ideals are supposed to counteract.\textsuperscript{317}

\textsuperscript{310} See id. at 25 (“Aid institutions do seek to come up with ‘lessons learned’ . . . as evidence that they are taking seriously the need to reflect critically . . . . Often [these lessons] are too general or obvious, or both.”).

\textsuperscript{311} See id.

\textsuperscript{312} See id.

\textsuperscript{313} See HAMMERGREN, supra note 208 (describing the author’s experience).

\textsuperscript{314} See Santos, supra note 159, at 295 (discussing Hammergren’s work).

\textsuperscript{315} See id. at 292.

\textsuperscript{316} See, e.g., Kleinfeld, supra note 237, at 43–44 (“[P]redictability and efficiency are often used by local power brokers as code words to achieve their own goals, which can undermine other rule-of-law ends.”); see also TREBILCOCK & DANIELS, supra note 23, at 39–40 (discussing how vested interests will resist rule of law reforms).

\textsuperscript{317} See Carothers, supra note 21, at 23–24 (arguing that case management assistance is a popular program because it is a way to funnel funding into improving the judicial system without challenging the underlying independence or appointment of judges or the relationship of the courts to the social context and asking “if the system has significant unfair-
Such difficulties may go some distance towards explaining the lack of efficacy of foreign aid programs more generally. An increasing number of studies, outlined by Dam, have lent considerable force to the proposition that foreign aid “has had little impact on growth” and that this is true even where aid is implemented in the desired economic environment of neoclassical “good fiscal, monetary and trade policies.”

3. Conclusion

Despite the mammoth enterprise that development policy represents in the postwar era, and despite the vigor of efforts to achieve development through legal and institutional reform, these efforts are flawed on a number of levels. Conceptually they are incoherent, leading to muddled programmatic strategy. Moreover, programs are implemented in simplistic ways and are not subject to systematic assessment. Aid policies, including law and development policies, too often constitute repeated, mechanistic and cookie-cutter approaches that fail either because they are resisted by or incompatible with the local context, or because they are manipulated by powerful interests at the expense of the larger population whose social welfare is the nominal goal.

III
TOWARD AN INSTITUTIONALIST ANALYSIS
OF INSTITUTIONALISM

The foregoing Parts have offered a critical intellectual history of the rise of neoclassical law and development in theory and practice. This historical account has been critical in two senses of the term. First, critical in the sense of discernment, Part I described the origination and diffusion of neoclassicism in law and development from the academy to the field. Stemming from Coasian analysis of the relationship between institutional environment and microeconomic behavior, neoclassical law and development emerged out of the elaboration of that analysis into a series of prescriptions against macroeconomic governmental controls on trade and investment (New Political Economy) and for the establishment of legal institutions to enforce property rights and support commerce (New Institutional Economics). Bound up with the reemergence of conservative political movements in the Anglo-American world, the ideational constructs of NPE and NIE took power when those movements did, leading to the emergence of neoclassicism built into it, such as political bias or control, does increasing the speed of cases through the system actually represent a gain for the rule of law?”

classical law and development in the field of international development policy by the early 1990s, as evidenced by the rule of law revival.

Second, critical in the sense of judgment, Part II summarized the analytical shortcomings of the neoclassical law and development model. The thesis that institutional quality determines economic growth suffers from a series of troubling empirical flaws. One flaw is the analytical vagueness of the asserted causal relationship: how does institutional quality improve economic growth? The range of possible answers (enforcement of property rights, effective judiciary systems, democratic participation) necessarily impedes the formulation of effective development policy. Beyond this vagueness is the uncertainty that causality even exists: empirical studies have so far been unable to prove it and are instead crippled by the endogeneity problem that institutions and income levels seem inextricably intertwined.

Finally, even if institutional quality were clearly measurable, and proven to cause economic growth, a number of problems in the field of development policy would still inhibit the success of any reform program: the manipulation of programming by entrenched interests in both the donor and beneficiary countries, the difficulty in designing contextually responsive and informed programs in the face of the continued temptation to implement one-size-fits-all directives, and the undersupply of effective self-evaluation and long-term assessment in programming choices, reducing prospects for improvement of development knowledge over time.

These impediments greatly resemble the kinds of obstacles that Douglass North himself might describe as transaction costs to institutional effectiveness. The prolongation of law and development programs that are demonstrably ineffective (according to veterans of the field such as Thomas Carothers and Linn Hammergren) suggests precisely the kind of suboptimal path dependence that North identified as a barrier to economic growth in the developing world.

In other words, there appears to be a need for an institutionalist analysis of institutionalism in the field of development. Although the neoclassical law and development policy matrix was intended to improve institutional quality in poor countries, it appears that the institutions of development policy themselves—the formal and informal “rules of the game” that shape organizational and individual behavior by development theorists and practitioners—may need to be examined if the underlying project is to have any hope of success.

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319 See supra note 316 and accompanying text.
320 See supra notes 307–08 and accompanying text.
321 See supra notes 313–15 and accompanying text.
322 See supra notes 84–86 and accompanying text.
323 See supra notes 81–86, 309–17 and accompanying text.
In explaining the basis for the persistence of inefficient institutions over time, North emphasized the following variables that would induce individuals to accede to and reinforce them: imperfect information,\textsuperscript{324} unequal bargaining power that allows powerful interests to design institutions to fit their ends at the expense of larger society,\textsuperscript{325} and “subjective models”\textsuperscript{326} that preclude individuals from perceiving institutional inefficiencies.\textsuperscript{327} The next subpart will briefly address these three elements, as indeed, there appear to be serious flaws in all three of these areas insofar as law and development is concerned.

A. Imperfect Information

As Part II.B demonstrated, the quality of information is lacking about specific contexts—i.e., laws and institutions in particular developing countries, how those laws and institutions function, what aspects of them might affect economic productivity, and what methods might best improve productivity.\textsuperscript{328} To be sure, the field is vast and the lack of good information is perhaps to be expected, but more troubling are the institutional flaws that have avoided or even resisted improving the information that is available.

To improve development programming, better mechanisms for evaluation and knowledge building over the long term are needed. Development agencies themselves should institute such mechanisms, but the broader community of scholarship and analysis can greatly assist them. Recent initiatives by law and development scholars to implement mechanisms of “processes of learning and discovery” are promising in this regard.\textsuperscript{329} Beyond the acquisition of research and reports, development agencies would ideally change their approach to the staffing of development projects to allow for better institutional learning, with more emphasis on local expertise or long-term placements and fewer of the short-term field rotations and consultancies that ap-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{324} See supra notes 85–84 and accompanying text.
\item \textsuperscript{325} See North, supra note 3, at 134 (“And because much of human economic history is a story of humans with unequal bargaining strength maximizing their own well-being, it would be amazing if such maximizing activity were not frequently at the expense of others.”).
\item \textsuperscript{326} See id. at 16.
\item \textsuperscript{327} See id. at 9 (“[S]ubjective perceptions of the actors resulted in choices that were certainly not always optimal or unidirectional toward increased productivity or improved economic welfare (however defined).”).
\item \textsuperscript{328} See supra Part II.B.
\end{itemize}
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The impact of such personnel issues is probably quite adverse.

B. Powerful Interests

The susceptibility of development programs to the interests of both donor and beneficiary countries is a thorny reality in the field. Evidence of political pressures is everywhere. Such pressures are evident when aid programs are designed to serve the economic or military interests of the donor, including requiring the beneficiary to funnel resources back to companies that are nationals of the donor country. Those pressures are also evident when aid programs are designed to serve powerful interests in the beneficiary country, as with programs that flatter the pet projects of elites in beneficiary countries or otherwise reinforce or fail to address social inequalities that may be central impediments to economic vibrancy.

Such factors may be an inevitable feature of the institutional context for development policy. It is ultimately a diplomatic context, shaped by the interests of the sovereign states involved as donors and beneficiaries. The existence or absence of democratic politics is ambiguous in effect in terms of making these programs more or less skewed: the conditions to U.S. aid are most directly a product of demands by the Congress, which must authorize all development spending. Nevertheless, the professional corps in development policy may be able to at least control these political dynamics by assisting in their candid assessment and by contributing to habits and practices that could help to establish normative pressures that would serve as a counterweight.

C. Subjective Models

"Ideas and ideologies matter, and institutions play a major role in determining just how much they matter. Ideas and ideologies shape the subjective mental constructs that individuals use to interpret the world around them and make choices." If North was correct in this statement pointing to ideational constructs as crucial determinants of behavior and as explanations for unproductive or inefficient behavior, then an institutionalist analysis of institutionalism requires a serious investigation into the paradigm-shaping knowledge about law and development.

Neoclassical law and development became established, as this Essay suggests, following a transformation in the 1980s and 1990s in which the intellectual contributions of a generation of social scientists

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330 NORTH, supra note 3, at 111.
from Ronald Coase onwards gained currency.\textsuperscript{331} Yet neoclassicism itself did not originate, but rather added to, a more basic construct of knowledge about the relationship between law and development.\textsuperscript{332} That construct had been shaped in part by the earlier contributions of Weberian modernization theorists in the 1950s and 1960s.\textsuperscript{333}

Even more fundamentally, however, knowledge about law and development exists within the broader paradigm of economic development. Arturo Escobar has placed the birth of development discourse in U.S. President Harry Truman’s 1949 inaugural address.\textsuperscript{334} In his promise to achieve a “fair deal” for the “entire world,” Truman “initiated a new era in the understanding and management of world affairs, particularly those concerning the less economically accomplished countries in the world.”\textsuperscript{335} The international community quickly picked up this logic, so that by the 1950s, a paradigm had been established: “Development had achieved the status of a certainty in the social imaginary.”\textsuperscript{336}

Identification of the development paradigm does not undermine the basic desirability of development, however that might be defined, as a goal: clearly enough, development of some kind or another remains almost universally normative.\textsuperscript{337} Nor does it necessitate a unidirectional view of power relations in which ideas and influence travel from the global North to the global South.

A critical approach to knowledge about development, however, may allow for a more perceptive assessment of its efficacy in particular contexts and therefore for a greater chance of its improvement. A growing body of scholars has taken on the project of deconstructing development discourse.\textsuperscript{338} These deconstructionists have conducted intensive studies of particular development projects, paying close attention to the ways in which development policies have been shaped by ideas and narratives on the one hand and by powerful interests on

\begin{itemize}
\item \textsuperscript{331} See supra Part I.A.
\item \textsuperscript{332} See supra notes 32–35 and accompanying text.
\item \textsuperscript{333} See supra notes 28–35 and accompanying text.
\item \textsuperscript{334} See \textsc{Arturo Escobar, Encountering Development: The Making and Unmaking of the Third World} 3 (1995).
\item \textsuperscript{335} \textit{Id.}
\item \textsuperscript{336} See \textit{id.} at 5. Escobar’s timeline is not infallible; Antony Anghie pointed out to me that the independence movement and accompanying debates in India before World War II arguably contributed to the formulation of this vocabulary. See O.P. Misra, \textsc{Economic Thought of Gandhi and Nehru: A Comparative Analysis} 101–04 (1995) (describing the formulation of economic development planning as one part of India’s independence).
\item \textsuperscript{337} See \textsc{Escobar, supra} note 334, at 5 (“The fact that most people’s conditions not only did not improve but deteriorated with the passing of time did not seem to bother most experts.”).
\item \textsuperscript{338} For a review of this literature, see \textsc{Escobar, supra} note 334, at 12–14.
\end{itemize}
the other.\footnote{See, e.g., James Ferguson, Expectations of Modernity: Myths and Meanings of Urban Life on the Zambian Copperbelt (1999) (studying the emergence and decline of Zambian copper mines); Timothy Mitchell, Colonising Egypt (1988) (discussing the intellectual and political impact of Europe on nineteenth century Egypt); Timothy Mitchell, Rule of Experts: Egypt, Techno-Politics, Modernity (2002) (studying colonial and postcolonial Egypt from the nineteenth century to the close of the twentieth century); David Scott, Conscripts of Modernity: The Tragedy of Colonial Enlightenment (2004) (describing how anticolonialists and postcolonial scholarship narrated transition from colonialism to postcolonialism as romance and the conceptual limitations such narrative imposes); David Scott, Refashioning Futures: Criticism After Postcoloniality (1999) (studying the postcolonial relationship to modernity in Sri Lanka and Jamaica).} Such careful assessments have revealed the gap between the noble goals of development and the ways in which development projects are carried out. Continued intensive, qualitative assessments of this type seem necessary to tease out the reasons for the continued institutional flaws that development practitioners have observed in the general evaluations discussed in Part II.

**CONCLUSION**

In addition to better information about the ways that ideas and interests affect institutions of development in particular national contexts, a need exists for institutional analysis of the international actors that guide development policy.\footnote{See Rittich, supra note 13 (“So far, deficiencies in the realm of governance are mostly attributed to national rather than international rules, norms, and institutions.”).} There has been surprisingly little qualitative empirical study of how international rules and organizations work in terms of specific habits, practices, behaviors, actors, ideas, and contexts. International law and policy tends to be treated as exogenous to analysis, with doctrinal or empirical assessment following from exogenously given rules and institutions. Within the legal academy, qualitative studies of how international economic and development organizations function internally are beginning to appear, with promising insights.\footnote{See, e.g., Sarfaty, supra note 196, at 647–50.}

Such studies can shed valuable light on the theory and practice of law and development and the reasons for both its failures and its successes. Ultimately, if the ideal of law and development is to support the emergence of governance in poor countries that is both legitimate and conducive to social good, careful reassessments of its theoretical and practical aspects seem to be necessary steps on that path.
APPENDIX

The Neoclassicists in Theory and Practice

THE THEORISTS

The Coase Theorem
(Coase)

Public Choice Theory & Rent-Seeking Analysis
(Buchanan, Tullock)

Chicago School
(Friedman, Stigler)

Law and Economics
(Posner, Cooter)

New Political Economy
(Bhagwati, Krueger)

New Institutional Economics
(North, Rodrik)

THE DEVELOPMENT PRACTITIONERS

Structural Adjustment in Macroeconomic Policy Reform
(Krueger)

Good Governance in Legal and Institutional Reform
(Shihata, de Soto)