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.[191] 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,[192] Shihata characterized governance as consistent with the Bank's mandate.[193] Such explication required both a general exposition of the neoclassical rationale for incorporating an assessment of governmental and regulatory institutions into lending policy[194] 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."[195]

Shihata's expositions were undoubtedly crucial in providing a basis on which the Board of Directors[196] 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."[197] Shihata insisted that a clear line could and

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policy, the World Bank has in recent years considered the legal framework as one of the areas of 'governance' it can address consistently with its mandate"); Ahmed S. El Kosheri, *The Scholar as Practitioner: Ibrahim Shihata*, 5 Y.B. INT'L FIN. & ECON. L. 3, 5–6 (2000) ("A further preoccupation [of Shihata's] was the achievement [of] 'good governance' through well-functioning administrative and judicial institutions . . . . In this regard, [his] Legal Memorandum of February 1991, entitled 'Issues of Governance in Borrowing Members: the Extent of their Relevance Under the Bank's Articles of Agreement,' is a masterpiece. It opened the door for undertaking concrete measures aimed at achieving the legal and judicial reform which are deemed necessary for conformity with the Rule of Law, without exceeding the limits set by the Bank's mandate or infringing its obligation not to be involved in domestic political affairs.").

191 *See* SHIHATA, *supra* note 19.

192 For a revised version of this memorandum, see *id.* at 53 ("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.

196 A weighted formula allocates representation on the Board of Directors according to the size of each country's contributions to lending funds. *See* Galit A. Sarfaty, *Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank*, 103 AM. J. INT'L L. 647, 655 n.47 (2009). The United States exercises the largest single percentage of the overall vote. *See Boards of Executive Directors—Voting Powers*, WORLD BANK, http://www.worldbank.org/ (follow "About" hyperlink; then follow "Boards of Directors" hyperlink; then follow "Voting Powers" hyperlink) (last updated Aug. 26, 2010).

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 132–36.

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 Else*[209] won him widespread acclaim, causing *The Economist* magazine to name

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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)).

206 *See* Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Law and Finance*, 106 J. POL. ECON. 1113, 1115–16 (1998).

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).

209 HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000).

de Soto's think tank one of the most important in the world[210] and landing de Soto on top-innovator lists in both *Time*[211] and *Forbes*.[212]

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."[213] 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*.[214]

In fact, de Soto's work connected institutionalist theory about legal order and property rights to the context of the developing world.[215] 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.[216] 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.[217] *The Other Path* urged policymakers to pay attention to the informal sector instead of focusing on formal-sector trade between organized firms.[218]

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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210 *See And the Winners Are. . .*, THE ECONOMIST, Dec. 2–8, 2006, at 16.

211 *See* Tim Padgett, *Time 100: Hernando de Soto: Unlocking the Secrets of the Poor*, Apr. 26, 2004, at 110.

212 *See* Stephanie Dahle, *Business Visionaries: Hernando de Soto*, FORBES (Nov. 10, 2009, 6:00 PM), http://www.forbes.com/2009/11/10/de-soto-hernando-opinions-business-visionaries-bio.html.

213 DE SOTO, *supra* note 209, at 157.

214 HERNANDO DE SOTO, THE OTHER PATH: THE ECONOMIC ANSWER TO TERRORISM (1989).

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.[219] 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.[220]

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."[221] 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.[222]

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.[223] The analysis provided wind for institutionalist sails while also paying attention to social redistributions that critics charged neoclassicism with failing to achieve.[224] 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").

224 *See, e.g.*, NANCY BIRDSALL & AUGUSTO DE LA TORRE, WASHINGTON CONTENTIOUS: ECONOMIC POLICIES FOR SOCIAL EQUITY IN LATIN AMERICA 6–10 (2001), *available at* http://www.carnegieendowment.org/pdf/files/er.Contentious.pdf.

it became highly influential in legal and institutional reform programs in the field of development.[225]

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.[226] In the same context, and with many of the same intellectual influences, the neoclassical economics of the Chicago School supported the establishment of NPE.[227] 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.[228] 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.[229]

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.[230] Others discuss neoclassical law and development and macroeconomic policy without elucidating their theoretical interconnections.[231] Still others discuss the influence of NIE on law and development but do not make the connection to the macroeconomic side of development policy.[232] 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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225 *See, e.g.*, Ray Bromley, *A New Path to Development? The Significance and Impact of Hernando de Soto's Ideas on Underdevelopment, Production, and Reproduction*, 66 ECON. GEOGRAPHY 328 (1990); Edesio Fernandes, *The Influence of de Soto's* The Mystery of Capital, LAND LINES (Lincoln Inst. of Land Policy, Cambridge, Mass.), Jan. 2002, at 5, 5–8.

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 relatioship between legal and institutional reform and development. A number of volumes published in the past few years[233] 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[234] and in the field.[235] The critiques are sometimes skeptical of the entire enterprise, but other times, they are proactively devoted towards improving it.[236] 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.[237]

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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 HAMMERGREN, USING CASE FILE ANALYSIS TO IMPROVE JUDICIAL REFORM STRATEGIES: THE WORLD BANK EXPERIENCE IN LATIN AMERICA (2004), *available at* http://www.iij.derecho.ucr.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.[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,[239] whereas Sen's belief that human rights are necessary for the full realization of freedom potentially incorporates both civil liberties and social redistribution.[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.

Trebilcock and Daniels describe these internal theoretical variations as the difference between "thick" and "thin" conceptions of the rule of law.[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.[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.[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-

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Kleinfeld, *Competing Definitions of the Rule of Law*, *in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE, *supra* note 21, at 31, 32.

238 *See supra* Part I.A.

239 *See* HAYEK, *supra* note 37, at 11–38 (evaluating definitions of liberty and coercion to assess the relationship between the terms); *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.").

240 *See* 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); *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.").

241 *See* TREBILCOCK & 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).

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. *Id.* at 16–17.

243 *See id.* at 20–23 (citing LON L. FULLER, THE MORALITY OF LAW 39, 200–24 (2d ed. 1969); JOHN RAWLS, A THEORY OF JUSTICE 235 (1971); JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 211–18 (1979)).

tion."[244] All focus is on the rationality of the system as well on its procedural characteristics, such as transparency and justiciability.[245]

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.[246]

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."[247] 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."[248] For those

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244 TREBILCOCK & 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]

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249 *See* Trubek & Santos, *supra* note 30, at 7–11.

250 *See supra* Part I.A.

251 *See supra* Part I.

252 *See* David Kennedy, *Some Caution About Property Rights as a Recipe for Economic Development* 7 (Harvard Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 09-59, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1468549.

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.[254] 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.[255]

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.[256] 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."[257] 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.

254 *See* M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 85–86 (3d ed. 2010).

255 *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).

256 *See, e.g.*, Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 743–44 (2009) (arguing that "[p]roperty implicates plural and incommensurable values" such as "environmental stewardship, civic responsibility, and aggregate wealth").

257 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.[258] 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.[259] 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.[260] 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.[261]

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.[262] 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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258 *See* Rashmi Dyal-Chand, *Leaving the Body of Property Law? Meltdowns, Land Rushes, and Failed Economic Development*, *in* HERNANDO DE SOTO AND PROPERTY IN A MARKET ECONOMY 83, 83–84, 90 (D. Benjamin Barros ed., 2010).

259 *See* Carol M. Rose, *Invasions, Innovation, Environment*, *in* HERNANDO DE SOTO AND PROPERTY IN A MARKET ECONOMY, *supra* note 258, at 21, 24–30 (discussing the negative externalities of land invasion).

260 *See* Eduardo M. Peñalver, *The Costs of Regulation or the Consequences of Poverty? Progressive Lessons from de Soto*, *in* HERNANDO DE SOTO AND PROPERTY IN A MARKET ECONOMY, *supra* note 258, at 7, 7–8.

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

263 *See* Carothers, *supra* note 21, at 15.
264 *See id.* at 17.
265 *See id.*
266 *See infra* text accompanying notes 267–306.

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-

267 *See* Tom Ginsburg, *Does Law Matter for Economic Development? Evidence from East Asia*, 34 LAW & SOC'Y REV. 829, 830 (2000) (reviewing ROBERT S. BROWN & ALAN GUTTERMAN, ASIAN ECONOMIC AND LEGAL DEVELOPMENT: UNCERTAINTY, RISK, AND LEGAL EFFICIENCY (1998); KATHARINA PISTOR & PHILIP A. WELLONS, THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT, 1960–1995 (1999); LAW, CAPITALISM, AND POWER IN ASIA: THE RULE OF LAW AND LEGAL INSTITUTIONS (Kanishka Jayasuriya ed., 1999)); *see also* ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S. (Randall Peerenboom ed., 2004).

268 *See* Frank Upham, *Mythmaking in the Rule of Law Orthodoxy* 21–22 (Carnegie Endowment for Int'l Peace, Working Paper No. 30, 2002).

269 *See* Randall Peerenboom, *What Have We Learned About Law and Development? Describing, Predicting, and Assessing Legal Reforms in China*, 27 MICH. J. INT'L L. 823, 836, 871 (2006); Michael Trebilcock & Jing Leng, *The Role of Formal Contract Law and Enforcement in Economic Development*, 92 VA. L. REV. 1517, 1554 (2006).

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 countries"[274] and also among the poorest in the world.[275]

Perhaps in partial response to these apparent counterfactual examples, 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 coauthors for the World Bank as well as Dani Rodrik. Kaufmann spearheaded the World Bank's World Governance Indicators project,[276] which is perhaps the most ambitious of theses empirical studies and surveyed over two hundred countries along six indicators.[277] Kaufmann concluded that these indicators suggested "a very high correlation between good governance and key development outcomes

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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 DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT INDEX 2010, at 143 tbl.1 (2010), *available at* http://hdr.undp.org/en/media/HDR_2010_EN_Complete_reprint.pdf. While LLSV's 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/governance/wgi/index.asp (last visited Mar. 28, 2011).

277 *See* Daniel Kaufmann et al., *Governance Matters VI: Aggregate and Individual Governance Indicators 1996–2006*, at 1 (World Bank Policy Research Working Paper 4280, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=999979. The indicators 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 freedom 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 formulate and implement sound policies and regulations that permit and promote 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 corruption, as well as "capture" of the state by elites and private interests[.]

Id. at 3–4.

across countries."[278] Rodrik's 2002 study, *Institutions Rule*, used Kaufmann's data on institutional quality[279] and found that in comparison to other variables, such as trade policy, which NPE argued was a major factor of growth,[280] institutions are much more strongly correlated with growth.[281]

As Rodrik has acknowledged, however, the empirical soundness of such studies is not indisputable.[282] 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.[283] 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.[284] 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."[285]

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

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278 Daniel Kaufmann, *Governance Redux: The Empirical Challenge* 12 (Oct. 2003) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=541322.

279 Dani Rodrik et al., *Institutions Rule: The Primacy of Institutions over Integration and Geography in Economic Development* 1, 7–8 (IMF Working Paper No. 02/189, 2002), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=880291.

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?"[286]

Both the Kaufmann and the Rodrik studies were quite adamant that their data strongly supported a causal inference.[287] 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.[288]

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).[289] 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*.[290] *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."[291] 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).

289 The study is so-named in reference to its three authors. *See* Daron Acemoglu, Simon Johnson & James A. Robinson, *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AM. ECON. REV. 1369 (2001); *see infra* notes 290–93 and accompanying text.

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).").

291 Daniel Kaufmann & Aart Kraay, *Growth Without Governance* 17 (World Bank Policy Research Working Paper No. 2928, 2002), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=316861.

as a good instrument for measuring integration.[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."[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.[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."[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.[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.[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[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.[299]

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292 *See* Rodrik et al., *supra* note 279, at 5–6.

293 *Id.* at 6 (emphasis omitted).

294 *See* Acemoglu, Johnson & Robinson, *supra* note 289, at 1369–70.

295 *See id.* at 1370.

296 *See id.* at 1370, 1395.

297 *See id.*

298 *See* Davis & Trebilcock, *supra* note 236, at 941 ("One would expect the impact of geographically determined colonial policies to diminish with the amount of time that has passed since independence . . . .").

299 *See id.* at 941–42. Davis and Trebilcock also object to the AJR study because

> [AJR] argue that high rates of settler mortality led European powers to make two fundamental policy choices: to avoid settlement and to establish exploitative institutions consistent with an "extractive state" rather than a "Neo-Europe." Even if we accept their characterization of the Europeans' dilemma, we would argue that the combination of inhospitable geographic

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.[300] 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,"[301] 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

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> conditions and political power necessitated the first policy decision but not the second. Unless one takes the view that racism, greed, and rapaciousness are fundamental and immutable features of human nature it is difficult to defend the position that exploitation of non-settler colonies was inevitable. It should be viewed as a deliberate decision on the part of the Europeans that was enabled but not wholly determined by geographic conditions and the distribution of power.

Id.

300 *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).

301 *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

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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, 92–93 (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); RODRIK, *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.[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."[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."[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,[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."[314] In addition, Hammergren has pointed to the lack of internal consistency within development agencies in the identification and application of legal reform policies.[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.[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.[317]

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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.").

311 *See id.*

312 *See id.*

313 *See* HAMMERGREN, *supra* note 208 (describing the author's experience).

314 *See* Santos, *supra* note 159, at 295 (discussing Hammergren's work).

315 *See id.* at 292.

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).

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."[318]

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 neo-

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ness 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?").

318 *See* DAM, *supra* note 16, at 19–20.

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,[319] the difficulty in designing contextually responsive and informed programs in the face of the continued temptation to implement one-size-fits-all directives,[320] and the undersupply of effective self-evaluation and long-term assessment in programming choices, reducing prospects for improvement of development knowledge over time.[321]

These impediments greatly resemble the kinds of obstacles that Douglass North himself might describe as transaction costs to institutional effectiveness.[322] 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.[323]

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,[324] unequal bargaining power that allows powerful interests to design institutions to fit their ends at the expense of larger society,[325] and "subjective models"[326] that preclude individuals from perceiving institutional inefficiencies.[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.[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.[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-

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324 *See supra* notes 83–84 and accompanying text.

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.").

326 *See id.* at 16.

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).").

328 *See supra* Part II.B.

329 *See* David M. Trubek, *Developmental States and the Legal Order: Towards a New Political Economy of Development and Law* 8 (Univ. of Wis. Law Sch. Legal Studies Research Paper Series, Paper No. 1075, 2009), *available at* http://ssrn.com/abstract=1349163. David Trubek and others have initiated a long-term research project entitled Law and the New Developmental State (LANDS). *See Law and the New Developmental State*, UNIV. WISC. LAW SCH., http://www.law.wisc.edu/gls/lands.html (last updated Oct. 9, 2009).

pear to be the norm. 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."[330] 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

330 NORTH, *supra* note 3, at 111.

from Ronald Coase onwards gained currency.[331] Yet neoclassicism itself did not originate, but rather added to, a more basic construct of knowledge about the relationship between law and development.[332] That construct had been shaped in part by the earlier contributions of Weberian modernization theorists in the 1950s and 1960s.[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.[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."[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."[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.[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.[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

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331 *See supra* Part I.A.

332 *See supra* notes 32–35 and accompanying text.

333 *See supra* notes 28–35 and accompanying text.

334 *See* ARTURO ESCOBAR, ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD 3 (1995).

335 *Id.*

336 *See 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, 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).

337 *See* 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.").

338 For a review of this literature, see ESCOBAR, *supra* note 334, at 12–14.

the other.[339] 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.[340] 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.[341]

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.

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339 *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).

340 *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.").

341 *See, e.g.*, Sarfaty, *supra* note 196, at 647–50.

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	New Political Economy	New Institutional Economics
(Posner, Cooter)	(Bhagwati, Krueger)	(North, Rodrik)

THE DEVELOPMENT PRACTITIONERS

Structural Adjustment in Macroeconomic Policy Reform	Good Governance in Legal and Institutional Reform
(Krueger)	(Shihata, de Soto)