

# LAW AND DEVELOPMENT THEORY: A DIALOGICAL ENGAGEMENT

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## ABSTRACT

*Using law and development experience in the Global South, this Article dialogically engages with law and development theories advanced by the Global North grouped under three rubrics: liberal legalism, neoclassical institutionalism embraced by the Chicago School, and new constitutionalism. It argues that from the Global South's perspective, the Global North's theories provide some relevant propositions but also entail significant challenges. This Article therefore proposes three pluralist conceptual models of law and development including pluralist legalism, pluralist institutionalism, and pluralist constitutionalism. By doing so, this Article contributes to the understanding of limitations and possibilities inherent in law and development theories.*

## INTRODUCTION: WHY A DIALOGICAL ENGAGEMENT?

Law and development (L&D) refers to both practical and academic projects, which deal with how “to transform legal systems in developing countries to foster economic, political and social development.”<sup>1</sup> The significance of law in development can be traced back to the nineteenth century German sociologist Max Weber and his explanation of the legal origins of capitalism in Europe.<sup>2</sup> However, L&D has only become a part of organized practical projects of international institutions, governments, and established fields of academic inquiry since the second half of the twentieth century.<sup>3</sup> The emergence of L&D in the United States during the 1960s was the result of the U.S. government and international agencies taking an interest in promoting development in the “third world”

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1. David M. Trubek, *Law and Development 50 Years On*, at 1 (Univ. of Wisconsin Legal Studies Research Paper No. 1212, 2012), <http://ssrn.com/abstract=2161899> [<https://perma.cc/C8VM-E7A6>].

2. See generally David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 Wis. L. REV. 720 (1972); MAX WEBER, *MAX WEBER ON LAW IN ECONOMY AND SOCIETY* (Max Rheinstein ed. & trans. 1966).

3. See David M. Trubek, *Law and Development: 40 Years after Scholars in Self Estrangement - A Preliminary Review* 3 (Univ. of Wisconsin Legal Studies Research Paper No. 1255, 2014).

through legal assistance.<sup>4</sup> L&D's emergence incentivized academics to develop theories to guide practical projects.<sup>5</sup>

Today, a wide range of international actors are funding practical programs relating to L&D.<sup>6</sup> Scholars have also developed different theories to explain and guide the practice of L&D.<sup>7</sup> David M. Trubek, one of the founders of the L&D movement, identifies three periods of the field: the inception of L&D in the 1960s and the early 1970s (the first L&D moment or the first moment), the revival of the field in the late 1980s and 1990s (the second L&D moment or the second moment), and L&D in the twenty-first century.<sup>8</sup> Trubek laments that contemporary L&D studies have been marked by "a series of self-referential silos"<sup>9</sup> because while the field has witnessed significant proliferation, not "all these efforts [of L&D studies] in the North are connected to one another or closely linked to the academy in the South where, in the end, the rubber of L&D meets the road of policy and law reform."<sup>10</sup> To mitigate the fragmentation, Trubek argues for "build[ing] mechanisms to increase communication among the silos, both in the North and in the South."<sup>11</sup>

Here, dialogical engagement<sup>12</sup> can be the mechanism through which global communication among L&D actors in both the Global North (developed parts of the world) and the Global South

4. *Id.* at 7–9.

5. David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies*, 1974 WIS. L. REV. 1062, 1065 (1974).

6. These include, *inter alia*, the World Bank, the Ford Foundation, the Carnegie Endowment for International Peace, the American Bar Association, the UN Development Program (UNDP), the U.S. Agency for International Development (USAID), the Inter-American Development Bank, the European Bank for Reconstruction and Development, the United Kingdom's Department for International Development, the Asian Development Bank, the Japan International Cooperation Agency. See Brian Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development*, 44 CORNELL INT'L L.J. 209, 217 (2011).

7. For recent scholarship, see Yong-Shik Lee, *General Theory of Law and Development*, 50 CORNELL INT'L L.J. 415 (2017); LAN CAO, *CULTURE IN LAW AND DEVELOPMENT: NURTURING POSITIVE CHANGE* (2016); JEDIDIAH J. KRONCKE, *THE FUTILITY OF LAW AND DEVELOPMENT: CHINA AND THE DANGERS OF EXPORTING AMERICAN LAW* (2016); RANDALL PEERENBOOM & TOM GINSBURG EDS., *LAW AND DEVELOPMENT OF MIDDLE-INCOME COUNTRIES: AVOIDING THE MIDDLE-INCOME TRAP* (2014).

8. See David M. Trubek, *Law and Development: Forty Years after Scholars in Self-Estrangement*, 66 U. TORONTO L.J. 301, 303 (2016).

9. *Id.*

10. *Id.*

11. *Id.* at 327.

12. Vicki C. Jackson introduces the concept of "engagement" in the specific context of U.S. Supreme Court's citation of foreign legal sources in its constitutional interpretation. See generally Vicki C. Jackson, *The Supreme Court, 2004 Term – Comment: Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005).

(the developing parts of the world) can be facilitated. Dialogical engagement is a communicative process in which L&D actors (including both scholars and practitioners) participate in a dialogue that allows them to seriously learn from each other and exchange their ideas, opinions, and experiences. On the one hand, dialogical engagement is not a passive process because L&D actors are not controlled by universal lessons, theories, and experiences. On the other hand, dialogical engagement is not an aggressive process mainly concerned with criticisms and rejections. In fact, dialogical engagement is a constructive and internalizing process which involves learning and appreciating as well as critical modes of thinking and actions. To engage in a dialogue is to learn from others' lessons, theories, and experiences through serious exploration and explanations; to engage in a dialogical way is to appreciate these lessons, theories, and experiences by considering how they are relevant in a positive manner. Thus, dialogical engagement involves critical thinking, reflection, and consideration of these lessons, theories, and experiences.<sup>13</sup>

Furthermore, dialogical engagement can exist in both academic and practical forms. The academic form concerns the dialogue of scholars while the practical form concerns the dialogue between the law's users and development of knowledge.<sup>14</sup> This Article focuses on the academic form although it also includes some reflections on the practical form.

Furthermore, this Article employs the L&D experience from the South, particularly China and Vietnam,<sup>15</sup> to engage in a dialogue

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13. For example, "a series of dialogues among academics and policymakers from China and around the world" were held at the Brooks World Poverty Institute at the University of Manchester, at Columbia University (under the auspices of the Initiative for Policy Dialogue and the Committee on Global Thought), and in Beijing. DAVID KENNEDY & JOSEPH E. STIGLITZ, INTRODUCTION, *IN LAW AND ECONOMICS WITH CHINESE CHARACTERISTICS* 3 (David Kennedy & Joseph E. Stiglitz eds., 2013).

14. Professor Wang Jianguy at NUS Faculty of Law and I convened a symposium on "Law and Development in China and Vietnam" held by the Centre for Asian Legal Studies, Faculty of Law, National University of Singapore, in Singapore from 20 to 21 April 2016. This provided an academic forum for Chinese and Vietnamese scholars to engage in a dialogue in which the scholars share their views, ideas about law and development experience in the two countries. I have also engaged in conversations discussing issues relating to the theme of this Article with Chinese scholars in Beijing, Shanghai, Xi'an, Hong Kong, and Singapore. I have also engaged in many conversations about the related issues with many Vietnamese scholars, lawyers, legislators, and officials in Hanoi and Ho Chi Minh City.

15. These countries are the beneficiaries and targets of the practical programs of law and developments funded by foreign governments and international legal aid donors. See generally Carol V. Rose, *The "New" Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study*, 32 L. & SOC. REV. 93 (1998); Allen C. Choate, *Legal Aid In China* (The

with the L&D theories advanced in the North grouped under three rubrics: liberal legalism, neoclassical institutionalism embraced by the Chicago School, and new constitutionalism. The Article argues that from the South's perspective, the North's theories provide some relevant propositions but have limited applicability. As such, this Article proposes three pluralist conceptual models of L&D including pluralist legalism, pluralist institutionalism, and pluralist constitutionalism.

Following this Introduction, Part I deals with liberal legalism, Part II with neoclassical institutionalism, and Part III with new constitutionalism. Part IV proposes three abovementioned pluralist conceptual models. Part V concludes.

## I. LIBERAL LEGALISM

### A. *Theory*

The first L&D moment in the 1960s and the early 1970s rested on the paradigm of liberal legalism and attempted to foster economic, political, and social change in the developing countries of Latin America, Africa, and Asia.<sup>16</sup> This Part I will first address the propositions of liberal legalism and will then address the development and fall of liberal legalism.

#### 1. Propositions of Liberal Legalism

The paradigm of liberal legalism is a series of propositions rooted in American legal thought. One set of these propositions describes the nature of modern law and its relationship with the society: (i) individuals voluntarily organize themselves into a state; (ii) law is the instrument for the state to exercise its control over individuals; (iii) law, the main means of social order, is a conscious and rational system of rules; (iv) law represents the majority's interests and is created through a pluralist and participatory law-making process and law is equally enforced; (v) courts are the center of the legal order because they are the main legal interpreters and enforcers; (vi) legal rules are absorbed by all social actors;<sup>17</sup> and finally (vii) law is both a part of and autonomous from the state.<sup>18</sup>

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Asia Foundation Working Paper No. 12, Apr. 2000), <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan017813.pdf> [<https://perma.cc/F72P-3HG2>].

16. Trubek, *supra* note 8, at 303.

17. Trubek & Galanter, *supra* note 5, at 1071–72.

18. *Id.* at 1702 (“A legal system is an integrated purposive entity which draws on the power of the state but disciplines that power by its own autonomous and internally derived norms.”).

Another set of the liberal legalist propositions concerns the relationship between law and development. Under liberal legalism, “development” is not only equated with economic growth but broadly includes social, economic, and political changes to achieve not only material well-being but also “greater equality, enhanced freedom, and fuller participation in the community.”<sup>19</sup> This understanding of development has been described as follows:

“Law” was seen as both a necessary element in “development,” and a useful instrument to achieve it. “Law” was thus “potent,” and because legal development would foster social development and improve human welfare it was also “good.”<sup>20</sup>

The proposition that development includes more than economic growth is influenced by Weberian legal sociology. Weber argued that “rational capitalism has need, not only [of] the technical means of production, but of the calculable legal system and of administration in terms of formal rules.”<sup>21</sup> L&D scholars in both the first and the second moments are in debt to Weber’s account of the relationship between law and economic development.<sup>22</sup>

The final set of propositions from the liberal legalism model concerns the essential role of the state in fostering development through the use of law.<sup>23</sup> By enacting new laws and implementing enacted laws, the state can bring about social, economic, and political changes.<sup>24</sup> The liberal legalism model is the embodiment of liberalism in a Keynesian state<sup>25</sup> where the state’s benign regulation of society for the common good is a necessary condition for the advancement of individual freedom.<sup>26</sup>

## 1. Development and Fall of Liberal Legalism

In this first moment of L&D, L&D scholars and practitioners attempted to extend the liberal legalism model to the developing

19. *Id.* at 1073.

20. *Id.* at 1073–74.

21. MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 25 (Talcott Parsons trans., 2003).

22. See generally Chantal Thomas, *Re-Reading Weber in Law and Development: A Critical Intellectual History of “Good Governance” Reform* (Cornell Legal Studies Research Paper No. 08-034, 2008), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1313718](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1313718) [<https://perma.cc/D35K-HSLU>].

23. See David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 *YALE L.J.* 1, 6 (1972).

24. *Id.*

25. Chantal Thomas, *Law and Neoclassical Economic Development in Theory and Practice: Toward an Institutional Critique of Institutionalism*, 96 *CORNELL L. REV.* 967, 974 (2011).

26. See generally J.S.L. MCCOMBIE & A.P. THIRLWALL, *EDS.*, *KEYNES AND THE ROLE OF THE STATE* (1993).

world. This was intellectually associated with the modernization theory of the 1950s and the 1960s.<sup>27</sup> Modernization theory is predicated on the proposition that there are objectively identifiable characteristics of modernity including institutional frameworks such as the modern state and a market economy.<sup>28</sup> “Traditional” societies, which were perceived as “backward,” cannot achieve modernization by repeating the normal process of societal progress which modern societies have experienced.<sup>29</sup> Instead, they must generally replicate modern features of modern societies, as idealized by the United States.<sup>30</sup> Informed by this idea of modernization, L&D scholars and practitioners believed that developing countries could establish a modern legal system and foster societal and economic development by copying “modern” laws of developed countries.<sup>31</sup>

The first moment of the L&D movement ended in the 1970s when empirical evidence indicated that practical L&D projects had failed and academics realized the limits of their field.<sup>32</sup> With the publication of Trubek and Galanter’s *Scholars in Self-Estrangement* paper in 1974, the first moment reached its high point and lost momentum afterwards.<sup>33</sup> In their paper, Trubek and Galanter insisted that a strong state was necessary to create effective law and to remedy the limits of existing law in the third world.<sup>34</sup> However, they rejected the fundamental assumptions regarding the effectiveness of transplanting legal systems from the North to the South.<sup>35</sup> More essentially, in Trubek’s words, “we questioned whether the whole L & D enterprise in the North rested on firm foundations: we thought it proceeded on a priori assumptions accepted by development agencies and lacked both robust theory and valid empirical data.”<sup>36</sup> The decline of the first moment of L&D paral-

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27. John K. M. Ohnesorge, *Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience*, 28 U. PA. J. INT’L L. 219, 231–32 (2007).

28. *Modernization Theory*, in INTERNATIONAL ENCYCLOPEDIA OF POLITICAL SCIENCE (Bertrand Badie et. al. eds., 2011).

29. Ohnesorge, *supra* note 27, at 233–35.

30. *Id.* at 233.

31. *Id.* at 235.

32. JAMES GARDNER, *LEGAL IMPERIALISM, AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1980).

33. Trubek, *supra* note 8, at 306.

34. *Id.*

35. *Id.* at 5.

36. *Id.* at 6.

lels, in a broad way, the decline of the modernization movement from which it drew its intellectual underpinnings.<sup>37</sup>

### B. *Relevance*

Two propositions of the liberal legalism model have resonated in China and Vietnam. First proposition relates to the fact that a strong and centralized state is necessary. China and Vietnam have both created strong and centralized states, which drive and are driven by socioeconomic development.<sup>38</sup> The strength of these states are similar to the Keynesian state in the liberal legalism model because they provide macroeconomic management and basic goods conducive to economic development such as public security, national defense, legal enforcement, and infrastructure.<sup>39</sup> The strong and centralized state was achieved through efforts to create and consolidate the three major branches of the state, namely the bureaucracy, the legislative system, and the judicial system.<sup>40</sup>

The second liberal legalism proposition to resonate with China and Vietnam is that law should be used to promote economic development. The strong and centralized states in China and Vietnam have promoted economic development by creating sophisticated and highly regulatory legal systems.<sup>41</sup> The Chinese and Vietnamese governments have used the law as an instrument for both political control and promotion of socioeconomic development,<sup>42</sup> which is consistent with the instrumentalist proposition of the liberal legalism model.

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37. See generally Zehra F. Arat, *Democracy and Economic Development: Modernization Theory Revisited*, 21 COMP. POL. 21 (1988) (critiquing modernization theory).

38. See FRANCIS FUKUYAMA, *POLITICAL ORDER AND POLITICAL DECAY: FROM THE INDUSTRIAL REVOLUTION TO THE GLOBALIZATION OF DEMOCRACY* 371 (2014); Ngo Thanh Can, *Public Administration Reform in Vietnam: Current Situations and Solutions*, 3 SCHOLARLY J. BUS. ADMIN. 110, 111 (2013) (explaining Vietnam's implementation of reforms to economically develop the country).

39. See, e.g., Katelyn DeNap, *China and the Developmental State Model*, CHINA BUS. REV. (May 12, 2017), <https://www.chinabusinessreview.com/china-and-the-developmental-state-model/> (exploring China's expansion into an economic powerhouse possibly due to government intervention) [<https://perma.cc/8J4D-3WUE>]; Quan Xuan Dinh, *Public Administration and Civil Service Reforms in Vietnam*, in THE VIETNAMESE ECONOMY: AWAKENING THE DORMANT DRAGON 250 (Chi Do-Pham & Binh Tran-Nam eds., 2002).

40. JOHN GILLESPIE & ALBERT CHEN, *COMPARING LEGAL DEVELOPMENT IN CHINA AND VIETNAM: AN INTRODUCTION*, in *LEGAL REFORMS IN CHINA AND VIETNAM: A COMPARISON OF ASIAN COMMUNIST REGIMES* 11 (John Gillespie & Albert H.Y. Chen eds., 2010).

41. *Id.* at 11–12.

42. *Id.* at 14.

### C. *Challenges*

However, the Chinese and Vietnamese experiences present challenges to other propositions of the liberal legalism model, which are representative of Trubek and Galanter's criticisms of the model.<sup>43</sup> As indicated below, the Chinese and Vietnamese experiences pose challenges to five propositions of the liberal legalism model.

First, the liberal model assumes political pluralism while China and Vietnam are dominated by political monism (Marxism combined with local leaders' political visions) and authoritarian regimes ruled by a single communist party.<sup>44</sup> Political monism and socialist authoritarianism challenge many other liberal legalist propositions. For example, while ideas about the necessity of strong and centralized state are relevant, law is used by the socialist state in China and Vietnam for both responsive and repressive purposes.<sup>45</sup> These socialist states' approach to law is pragmatic. On the one hand, socialist states are compelled to enact laws that facilitate social and economic change to consolidate the sociological foundation of political legitimacy and to respond to social demand and international integration.<sup>46</sup> On the other hand, socialist states need laws to protect their existing regimes and consolidate the states' power.<sup>47</sup> To deal with this dilemma, socialist states use laws pragmatically and differentially for divergent purposes. Specifically, some laws such as corporate law or foreign investment law are directed towards economic development whereas other laws such as constitutional law, administrative law, and criminal law are used for controlling purposes.<sup>48</sup> A clear-cut distinction cannot be made between these types of laws. Nevertheless, socialist states' pragmatic and differential approach to law suggests that private law can also be used to protect states' interests while public law can also be employed to foster private empowerment.<sup>49</sup>

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43. See Trubek & Galanter, *supra* note 5, at 1089–93.

44. See XIANFA art. 1 (1982) (China); HIẾN PHÁP [Constitution] art. 4 (2013) (Viet.).

45. Gillespie & Chen, *supra* note 40, at 17 (discussing the tension between legal development and political power).

46. *Id.* at 14–16.

47. *Id.* at 17–18.

48. *Id.* (describing “this tension between legal development and political power” with references to different types of law).

49. See, e.g., CHENXIA SHI, THE POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE IN CHINA (2012) (discussing the government's control of economic and market regulation in China); CHUANHUI WANG, THE CONSTITUTIONAL PROTECTION OF PRIVATE PROPERTY IN CHINA: HISTORICAL EVOLUTION AND COMPARATIVE RESEARCH (2016) (discussing the evolution of constitutional protection of private property in China since 1949).



Second, the proposition that law represents the majority's interests is also invalid in China and Vietnam. Law in the two countries is expressive of the political will of the party. In many cases, the state's promulgation of its constitution and the law is meant to institutionalize the party's policies and political ideology. For example, China revised the Constitution in 2018 to incorporate "Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era."<sup>50</sup> Vietnam's new 2013 Constitution also explicitly states in its preamble that the Constitution is meant to institutionalize the "Party's Political Creed of Building the Nation during the Transitional Period to Socialism."<sup>51</sup> Although public participation in the law-making process is possible, this does not ensure that the law reflects the public's interests because the state is able to control the public discourse to favor elite interests.<sup>52</sup>

Third, the liberal legalism model assumes that the state will use law as the main instrument to order the society, while in China and Vietnam, social order constitutes of a variety of social norms and non-state institutions.<sup>53</sup> In China and Vietnam, law is located at the top of the pyramidal normative social order but the social order includes multiple layers: indigenous rules, customary law, village law, rituals, and positive laws.<sup>54</sup> Further, the implementation of the state's positive law also does not depend exclusively on the state because social actors also participate in the construction of legal meanings.<sup>55</sup>

Fourth, the proposition that courts are the central actor of the legal order also does not hold in China and Vietnam. Courts in the two countries are politically dependent.<sup>56</sup> The courts in China

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50. XIANFA Preamble (1982, amended 2018) (China).

51. HIẾN PHÁP [Constitution] Preamble (2013) (Viet.).

52. See, e.g., John Gillespie, *Localizing Global Rules: Public Participation in Lawmaking in Vietnam*, 33 L. & SOC. INQUIRY 673 (2008).

53. See generally SOCIAL CONNECTIONS IN CHINA: INSTITUTIONS, CULTURE, AND THE CHANGING NATURE OF QUANXI (Thomas Gold et al. eds., 2002) (examining the role of social networks in business decisions, workers' decisions and practices, the construction of legal institution, and the new social order).

54. For further detail, see Bui Ngoc Son, *The Law of China and Vietnam in Comparative Law*, 41 FORDHAM INT'L L.J. 135, 140 (2017).

55. See generally John Gillespie, *Localizing Global Competition Law in Vietnam: A Bottom-Up Perspective*, 64 INT'L & COMP. L.Q. 935 (2015) (discussing bottom-up responses to global laws).

56. See generally WEIXIA GU, COURTS IN CHINA: JUDICIARY IN THE ECONOMIC AND SOCIAL TRANSITIONS, in ASIAN COURTS IN CONTEXT 487 (Jiunn-fong Yeh & Wen-Chen Chang eds., 2015); PIP NICHOLSON, RENOVATING COURTS: THE ROLE OF COURTS IN CONTEMPORARY VIETNAM, in ASIAN COURTS IN CONTEXT 528 (Jiunn-fong Yeh & Wen-Chen Chang eds., 2015).

and Vietnam are not the central actors of the legal order because they do not have the power of legal and constitutional interpretation and are not the institutions that give the law its legal meanings.<sup>57</sup> Instead, political institutions like the legislature and the government play the dominant role in the legal order in China and Vietnam.<sup>58</sup>

Finally, the proposition that all social actors internalize law or rely on law to guide their activities also does not hold in China and Vietnam. The Chinese and Vietnamese people rely more on social norms and social networks to guide their activities or resolve social conflicts.<sup>59</sup>

The above discussions have focused on the positivist argument that some propositions of liberal legalism fail to explain the Chinese and Vietnamese experience of L&D. This has normative implications for international programs which seek to support legal reforms and promote development in these countries. Such programs must be built on careful considerations of the possibilities and difficulties presented by the adoption of L&D templates in the local contexts. Particularly, L&D programs must be sensitive to local factors such as legal pragmatism, elite interests, societal and legal pluralism, and the complex interactions between judicial and political institutions within a non-juricentric institutional framework.

## II. NEOCLASSICAL INSTITUTIONALISM

### A. *Theory*

L&D was revitalized in the 1980s not by legal scholars but by economists. As Ohnesorge points out, the L&D revival was associated with two factors.<sup>60</sup> First, the theoretical influence of NIE and the public choice theory.<sup>61</sup> Second, the fall of the Berlin Wall and the concomitant collapse of the socialist world that created concern about the methods used to nurture the market in transitional countries and incentivize them to turn to the West for assistance, especially the United States.<sup>62</sup> Consequently, the second moment

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57. These powers are vested to the standing committee of the legislature. See XIANFA art. 67 (1982, amended 2018); HIẾN PHÁP [Constitution] art. 74 (2013) (Viet.).

58. These bodies have enacted a tone of legislations and administrative regulations respectively. See Son, *supra* note 54, at 158–62 (2017).

59. See Gillespie & Chen, *supra* note 40, at 20.

60. Ohnesorge, *supra* note 27, at 244.

61. *Id.*

62. *Id.*

of L&D in the 1980s and the 1990s is characterized by the proposition that economic development requires the free market, the minimal state, and the rule of law to facilitate the free market and limit the state's intervention.<sup>63</sup> In this context, the rule of law is analogous to the existence of private property and contractual rights, which are enforced by an independent judiciary.<sup>64</sup> The logic is straightforward: the absence of judicially enforceable private property and contractual rights would discourage investment and specialization.<sup>65</sup>

While the first L&D moment was underpinned by modernization theory, the second moment is intellectually associated with the rise of neoclassicism particularly influenced by the work of Friedrich Hayek, including *The Road to Serfdom*, *The Constitution of Liberty*, and the trilogy *Law, Legislation and Liberty*.<sup>66</sup> Hayek denounced the Keynesian welfare state as associated with totalitarianism and instead favored a minimal state, free markets, the rule of law, and strong property rights.<sup>67</sup> Hayek's works drew economists' attention to the law, contributing to the rise of neoclassicism.<sup>68</sup> Consequently, Chicago School economists drew on Hayek's constitutional vision to decry the interventionist state and articulate neoclassical L&D arguments, which later became the practical policy called the Washington Consensus.<sup>69</sup>

Ronald Coase is conceived as the "founding social scientist of the second law and development moment."<sup>70</sup> His influential essay, *The Nature of the Firm*,<sup>71</sup> which argues that transaction costs are determined by the institutional environment is commonly viewed as laying down the foundation for the rise of New Institutional Economics (NIE).<sup>72</sup> NIE has tried to explain social, political, legal, and economic institutions and their connections to economic per-

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63. Trubek, *supra* note 8, at 312.

64. *Id.*

65. Donald C. Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 AM. J. COMP. L. 89, 89 (2003).

66. See FRIEDRICH HAYEK, *THE ROAD TO SERFDOM* (2001); FRIEDRICH HAYEK, *THE CONSTITUTION OF LIBERTY* (1978); FRIEDRICH HAYEK, *LAW LEGISLATION AND LIBERTY: VOL. 1 RULES AND ORDER; VOL. 2: THE MIRAGE OF SOCIAL JUSTICE; VOL. 3: THE POLITICAL ORDER OF A FREE PEOPLE* (1983).

67. Thomas, *supra* note 25, at 974–76.

68. *Id.* at 976–77.

69. *Id.*

70. *Id.*

71. Ronald Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).

72. See Ronald Coase, *The New Institutional Economics*, 88 AM. ECON. REV. 72, 72 (1998).

formance.<sup>73</sup> Douglas North, one of the leading figures of the field, defines institutions as follows:

[T]he humanly devised constraints that structure political, economic and social interaction. They consist of both informal constraints (sanctions, taboos, customs, traditions, and codes of conduct), and formal rules (constitutions, laws, [and] property rights).<sup>74</sup>

While Weberian legal sociology has focused just on rational law, NIE scholars have gone further to argue that “it was the protection and enforcement of property rights which were required for efficient economic production.”<sup>75</sup>

However, NIE scholars have to grapple with the issue that institutions may fail to facilitate efficient economic performance because they may be “dominated by powerful actors.”<sup>76</sup> The theoretical exposition for the problem of ineffective institutions is provided by public choice theory developed by economists such as James Buchanan and Gordon Tullock.<sup>77</sup> NIE and public choice theory are interconnected traditions and both affect the second L&D moment.<sup>78</sup> They both not only adhere to “methodological individualism” and rationalism, but also support deregulation, privatization, and the free market, which is illustrated in the following statement:<sup>79</sup> “[P]ublic 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.”<sup>80</sup> While NIE scholars have been concerned with legal systems, public choice theory “helped convince them that governments should not do much more with these legal systems than establish rules respecting property and contract, along with courts to enforce them.”<sup>81</sup>

NIE and public choice theory provided the intellectual base for the Washington Consensus and for the L&D initiatives of developed governments and international agencies. In the 1990s, these initiatives sought to promote development by reforming the legal

73. See, e.g., RUDOLF RICHTER, *ESSAYS ON NEW INSTITUTIONAL ECONOMICS* (2015).

74. Douglass C. North, *Institutions*, 5 J. ECON. PERSP. 97, 97 (1991).

75. Thomas, *supra* note 25, at 982.

76. *Id.* at 981.

77. *Id.* For classical explosion of public choice theory, see JAMES BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962).

78. Ohnesorge, *supra* note 27, at 246.

79. *Id.*

80. Thomas, *supra* note 25, at 981.

81. Ohnesorge, *supra* note 27, at 246–47.

systems of the post-soviet bloc world, including China and Vietnam.<sup>82</sup> L&D initiatives strongly emphasized protection of property rights, the rule of law, judicial independence, and deregulatory government.<sup>83</sup>

### B. Relevance

Some aspects of NIE are relevant to Chinese and Vietnamese experiences of L&D. The transition from the planned economy into the socialist market economy, which is the root of economic growth and social improvement in the two countries, has been accompanied by legal reforms that recognize property and contractual rights.<sup>84</sup> These reforms include privatization of state-owned enterprises<sup>85</sup> and to some extent, governmental withdrawal from extensive regulation of the economy.<sup>86</sup> In 2004, Joshua Cooper Ramo coined the term “Beijing Consensus” to denote the Chinese model of development as an alternative to the Washington Consensus.<sup>87</sup> In a recent volume, a group of scholars examined the question of whether the Beijing Consensus has distinctive features, focusing on tax, property, and corporate law as “key areas of concern for orthodox law and development theory, including the Washington Consensus.”<sup>88</sup> The contributors generally expressed a

82. Rose, *supra* note 15, at 94–95; Matthew C. Stephenson, *A Trojan Horse Behind Chinese Walls? Prospects of U.S. Sponsored “Rule of Law” Reform Projects in the People’s of China*, 18 UCLA PAC. BASIN L.J. 64, 68 (2000) (“the Clinton Administration announced its ‘China Rule of Law Initiative’ in 1997-1998”).

83. See generally WORLD BANK, WORLD DEVELOPMENT REPORT 1996: FROM PLAN TO MARKET (1996), <https://openknowledge.worldbank.org/handle/10986/5979> (exploring the occurrences of economies in transition and discussing the necessity of reform across different institutions) [<https://perma.cc/2ENZ-SJWE>].

84. See RETHINKING LAW AND DEVELOPMENT: THE CHINESE EXPERIENCE 85–87 (Guanghua Yu ed., 2013) (referencing the rise of property rights); see also Property Law of the People’s Republic of China (adopted by the Nat’l People’s Cong., Mar. 16, 2007, effective Oct. 1, 2007); Civil Code of The Socialist Republic of Vietnam art. 8 (promulgated by the Nat’l Assemb., Nov. 24, 2015), <http://www.wipo.int/edocs/lexdocs/laws/en/vn/vn079en.pdf> [<https://perma.cc/U9VK-8K3M>].

85. See generally SHAHID YUSUF, KAORU NABESHIMA, AND DWIGHT H. PERKINS, UNDER NEW OWNERSHIP : PRIVATIZING CHINA’S STATE-OWNED ENTERPRISES (2005); VU QUOC NGU, SOE EQUITIZATION IN VIETNAM: EXPERIENCES, ACHIEVEMENTS, AND CHALLENGES, in SOUTHEAST ASIAN AFFAIRS 327 (2003).

86. See John Gillespie, *Managing Competition in Socialist-Transforming Asia: The Case of Vietnam*, in ASIAN CAPITALISM AND THE REGULATION OF COMPETITION 164, 176 (Michael W. Dowdle et. al. eds., 2013).

87. Maurits Elen, *Interview: Joshua Cooper Ramo*, THE DIPLOMAT (Aug. 10, 2016), <http://thediplomat.com/2016/08/interview-joshua-cooper-ramo/> [<https://perma.cc/JSR8-PPUD>].

88. WEITSENG CHEN, INTRODUCTION, in THE BEIJING CONSENSUS?: HOW CHINA HAS CHANGED WESTERN IDEAS OF LAW AND ECONOMIC DEVELOPMENT (Weitseng Chen ed., 2017).

“skeptical view about the distinctiveness of the Chinese Model.”<sup>89</sup> China’s property regime, the internationalization of the Renminbi (RMB), and China’s tax administration are arguably similar to the experiences elsewhere rather than a unique Chinese experience.<sup>90</sup>

### C. Challenges

Neoclassical institutionalism was developed in the Western developed world, especially the United States, where there is a distinct tradition of the rule of law and liberalism.<sup>91</sup> This presents the question of whether neoclassical institutional assumptions, drawn from the Western developed world, are valid in the developing world. The Great Recession of 2008 has generated critical comments on the Chicago School.<sup>92</sup> David Kennedy and Joseph E. Stiglitz have edited a volume which criticizes the view that the Chicago School’s ideas about regulatory arrangement and property rights should guide Chinese reform.<sup>93</sup> This Article will focus on the challenges presented by China and Vietnam to the neoclassical ideas of the rule of law, property rights, and judicial independence.

#### 1. The Rule of Law

The concept of the rule of law is vague. Even within the Western legal tradition, the rule of law concept is ambiguous and includes different traits.<sup>94</sup> While in Dicey’s theory the rule of law is the end in itself, in Hayek’s theory it is the means for economic development.<sup>95</sup> Yet, they both discussed the rule of law in the constitutional context.<sup>96</sup> Proponents of the second L&D moment have attempted to reduce the rule of law to judicially enforceable private law, particularly property rights and contractual rights.<sup>97</sup> If the concept of the rule of law itself is ambiguous and contested

89. *Id.* at 5.

90. *Id.* at 5–7.

91. For discussion on the relationship between the rule of law and liberalism, see Brian Z. Tamanaha, *The Dark Side of the Relationship Between the Rule of Law and Liberalism*, 3 N.Y.U. J.L. & LIBERTY 516 (2008).

92. See Michael D., Murray, *The Great Recession and the Rhetorical Canons of Law and Economics*, 58 LOY. L. REV. 615, 615 (2012).

93. KENNEDY & STIGLITZ, *supra* note 13, at 3–12.

94. Thomas, *supra* note 25, at 1002; see also Rachel Kleinfeld Belton, *Competing Definitions of the Rule of Law: Implications for Practitioners*, at 5–7 (Carnegie Papers, Rule of Law Series, Jan. 2005), <https://carnegieendowment.org/files/CP55.Belton.FINAL.pdf> [<https://perma.cc/R7LH-TTJA>].

95. Thomas, *supra* note 25, at 1002 n.237.

96. See A.V. DICEY, *THE LAW OF THE CONSTITUTION* 171–92 (J.W.F. Allison ed., 2013); FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 162–75 (1960).

97. See *supra* Part II(A) and accompanying texts.

within the domains in which it was developed, how can it be exported?

Yet, despite the competing meanings, there seems to be an agreement among the scholars of the second L&D moment that the rule of law is distinctive to the Western legal tradition and should be exported to the non-Western developing world.<sup>98</sup> This orientalist assumption tends to deny the potential of a non-Western concept of the rule of law<sup>99</sup> and its potential contribution to development. In the Confucian world, for example, the rule of law can be achieved to some extent not by the institutional independence but by the power of tradition.<sup>100</sup> The role of tradition in the rule of law, however, is not distinctive to the Confucian legal theory.<sup>101</sup> In *Law's Empire*, Ronald Dworkin also argues that law of a community is defined by established conventions shared by that interpretative community.<sup>102</sup>

In addition, L&D scholars of this second moment tend to adopt a formalist concept of the rule of law, which focuses on procedural features of the legal system, such as transparency, predictability, stability, and enforceability.<sup>103</sup> But implementing the rule of law's formalist features is insufficient because, without the substantive features of democracy and civil liberty, the citizen's right to participate in a transparent process of law-making and judicial proceedings is limited. For example, in Vietnam, "[t]rials generally were open to the public, but in sensitive cases judges closed trials or strictly limited attendance."<sup>104</sup> In addition, law enforcement can

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98. See, e.g., PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE (Thomas Carothers ed., 2006) (a collection of essays discussing the Western efforts in promoting the rule of law to Russia, China, Latin America, Central and Eastern Europe, the Middle East, and Africa).

99. See generally Qiang Fang & Roger Des Forges, *Were Chinese Rulers Above the Law? Toward a Theory of the Rule of Law in China from Early Times to 1949 CE*, 44 STAN. J. INT'L L. 101 (2008) (detailing Chinese concept of rule of law and its historical development); Tạ Văn Tài, *Confucian Influences in the Traditional Legal System of Vietnam, with Some Comparisons with China: Rule by Law and Rule of Law*, 1 VIETNAMESE SOC. SCI. REV. 11 (2009) (comparing Vietnamese legal development with Chinese).

100. See BUI NGOC SON, CONFUCIAN CONSTITUTIONALISM IN EAST ASIA 10 (2016) (discussing the relationship between Confucianism and rule of law in East Asia).

101. See FRANCIS FUKUYAMA, THE ORIGINS OF POLITICAL ORDER: FROM PREHUMAN TIMES TO THE FRENCH REVOLUTION 151 (2011) (discussing the rule of law tradition in premodern India).

102. See RONALD DWORIN, LAW'S EMPIRE (1988).

103. See Michael Trebilcock, *Between Universalism and Relativism: Reflections on the Evolution of Law and Development Studies*, 66 U. TORONTO L. J. 330, 340–41 (2016).

104. EMBASSY & CONSULATE IN VIETNAM, U.S. DEP'T OF STATE, VIETNAM 2016 HUMAN RIGHTS REPORT 15 (2016), <https://www.state.gov/documents/organization/265598.pdf> [<https://perma.cc/K4RZ-KU7K>].

be unpredictable in authoritarian regimes, which lack substantive, constitutionalist institutions of separation of power and checks and balances to curb various forms of arbitrary power.<sup>105</sup> To illustrate, based on empirical evidence, Yuhua Wang argues that rulers in China enforce the law in commercial areas to remain in power by gaining support from interest groups which control valuable assets.<sup>106</sup> However, they are not willing to enforce the law in the areas of civil and political rights because this would allow citizens to challenge their power.<sup>107</sup>

## 2. Property Rights

The assumption that a strong and clear property rights regime is necessary is also contestable. While NIE scholars define institutions broadly,<sup>108</sup> they tend to adopt a top-down approach to L&D and hence fail to substantively consider the relationship between preexisting local social institutions and the imported legal institutions in the receiving countries.<sup>109</sup> In China and Vietnam, a complex fabric of social norms, rituals, and customs concerning individual obligations and duties shape the meaning and implementation of property rights in society.<sup>110</sup> The Confucian tradition in China and Vietnam makes informal norms and institutions influential in different aspects of the society.<sup>111</sup> In the Chinese context, Frank K. Upham has discussed the informal property rights for

105. See Thomas E. Kellogg, *Arguing Chinese Constitutionalism: The 2013 Constitutional Debate and the "Urgency" of Political Reform*, 11 E. ASIA L. REV. 337, 384–85 (2017).

106. See YUHUA WANG, TYING THE AUTOCRAT'S HANDS: THE RISE OF THE RULE OF LAW IN CHINA 3 (2014).

107. See *id.*

108. See *supra* Part II(A) and accompanying texts.

109. See JOHN GILLESPIE & PIP NICHOLSON, TAKING THE INTERPRETATION OF LEGAL TRANSFERS SERIOUSLY: THE CHALLENGE FOR LAW AND DEVELOPMENT, *in* LAW AND DEVELOPMENT AND THE GLOBAL DISCOURSES OF LEGAL TRANSFERS 3 (John Gillespie & Pip Nicholson eds., 2012) ("Law and development projects are criticised for being top-down and instrumental, state-focused, insufficiently empirical, biased, ethnocentric and/or politically naïve.").

110. See SHITONG QIAO, CHINESE SMALL PROPERTY: THE CO-EVOLUTION OF LAW AND SOCIAL NORMS 17 (2017) (describing Chinese property rights); Annette M. Kim, *North versus South: The Impact of Social Norms in the Market Pricing of Private Property Rights in Vietnam*, 35 WORLD DEV. 2079, 2080 (2007) (describing Vietnamese property rights).

111. See generally DANIEL A. BELL, CHINA'S NEW CONFUCIANISM POLITICS AND EVERYDAY LIFE IN A CHANGING SOCIETY (discussing the relevance of Confucianism to politics and different social issues and social topics such as sex, sports, and the treatment of domestic workers in contemporary China). For Vietnam, see PHAM DUY NGHIA, Confucianism and the Conception of the Law in Vietnam, *in* ASIAN SOCIALISM AND LEGAL CHANGE 76, 76 (John Gillespie & Pip Nicholson eds., 2005) ("as a set of social norms, Confucianism not only substitutes for the law in many aspects of life, but also contributes heavily to the conception of the law in Vietnam").



investment in township and village enterprises, and the informal land market in Chinese cities.<sup>112</sup> Similarly, in Vietnam, property and property rights cannot be understood as isolated spheres. Hue-Tan Ho Tai and Mark Sidel discuss relations between the state, society, and market in Vietnam, stating as follows:

Property is among the most important spheres within which a host of conflicts are played out: the values of the market and social values; legal rights and communal norms; protecting livelihoods while also ensuring local and national prosperity through infrastructure development; the relationship between social and cultural traditions and the marketization of property rights; and the relationship between equity and fairness, property, and market incentives.<sup>113</sup>

### 3. Judicial Independence

The proposition on the judiciary endorsed by neoclassical institutionalists and L&D scholars in its second moment is rooted in an assumption of institutional autonomy.<sup>114</sup> This leads to the argument that the protection of property rights by an independent judiciary is necessary for economic growth.<sup>115</sup> In the Chinese context, Upham argues the following:

It is true that courts were involved in a conventional manner in some small property rights cases, but those were among individuals and not politically dangerous. When property is threatened by important social and government actors, the courts have looked the other way . . . .<sup>116</sup>

In the case of Vietnam, Gillespie and Sidel have also demonstrated that the judiciary's weakness and political dependence mean that political institutions (including party units) and social norms have a significant role in resolving disputes about land and property rights in Vietnam.<sup>117</sup> Thomas Sikor also indicated that

112. See FRANK K. UPHAM, LESSONS FOR CHINESE GROWTH: RETHINKING THE ROLE OF PROPERTY RIGHTS IN DEVELOPMENT, in THE BEIJING CONSENSUS?: HOW CHINA HAS CHANGED WESTERN IDEAS OF LAW AND ECONOMIC DEVELOPMENT 119 (Weitseng Chen ed., 2017).

113. See HUE-TAM HO TAI & MARK SIDEL, PROPERTY AND VALUES: STATE, SOCIETY AND MARKET IN VIETNAM, in STATE, SOCIETY AND THE MARKET IN CONTEMPORARY VIETNAM: PROPERTY, POWER AND VALUES 2 (Hue-Tam Ho Tai & Mark Sidel eds., 2013).

114. See *supra* Part II(A) and accompanying texts.

115. See *id.*

116. Upham, *supra* note 112, at 140–41.

117. See JOHN GILLESPIE, THE EMERGING ROLE OF PROPERTY RIGHTS IN LAND AND HOUSING DISPUTES IN HANOI, in STATE, SOCIETY, AND THE MARKET IN CONTEMPORARY VIETNAM: PROPERTY, POWER AND VALUES 103, 110 (Hue-Tam Ho Tai & Mark Sidel eds., 2013); MARK SIDEL, PROPERTY, STATE CORRUPTION, AND THE JUDICIARY: THE DO SON LAND CASE AND ITS IMPLICATIONS, in STATE, SOCIETY, AND THE MARKET IN CONTEMPORARY VIETNAM: PROPERTY, POWER AND VALUES 103, 124 (Hue-Tam Ho Tai & Mark Sidel eds., 2013).

different state agents, including “top echelons of the central government, members of parliament, high court judges, line ministry staff, and various local official . . . compete against each other” in the process of “making, implementation, or arbitration of property.”<sup>118</sup> For example, to own a house in Vietnam, one has to pass through many administrative procedures provided by not only the relevant legislations but numerous administrative regulations.<sup>119</sup> At the very least, housing ownership is subject to the regulations of the ministries of construction, natural resource and environment, and finance as well as the state bank.<sup>120</sup> This experience suggests that institutional interdependence shapes the context of property rights regimes. The above analysis demonstrates that property and contractual rights are important assets of a state which cannot be controlled solely by courts but involve the conflicting interactions of different state institutions.

### III. NEW CONSTITUTIONALISM

#### A. *Theory*

The turn of the twenty-first century was witness to the burgeoning of new ideas and practices in the field of L&D studies.<sup>121</sup> In 2006, Trubek and Alvaro Santos anticipated the possible rise of the “third” L&D moment.<sup>122</sup> Yet, in retrospect, Trubek argues that the third L&D moment has failed to materialize because the field is discursive and lacks any dominant ideas such as those that were

118. THOMAS SIKOR, PROPERTY AND STATE IN VIETNAM AND BEYOND, *in* STATE, SOCIETY, AND THE MARKET IN CONTEMPORARY VIETNAM: PROPERTY, POWER, AND VALUES 201, 204 (Hue-Tam Ho Tai & Mark Sidel eds., 2013).

119. *See* Law on Housing (promulgated by the Nat'l Assemb., Nov. 25, 2014) ch. II, No. 65/2014/QH13 (Viet.); *see also* Law on Real Estate Trading (promulgated by the Nat'l Assemb., Nov. 25, 2014), No. 66/2014/QH13 (Viet.).

120. Decree No. 99/2015/ND-CP on Guidelines for the Law on Housing (promulgated Oct. 20, 2015) art. 84 (Viet.).

121. *See, e.g.*, BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW (Erik G. Jensen & Thomas C. Heller eds., 2003); KENNETH W. DAM, THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT (2006); THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (David M. Trubek & Alvaro Santos eds., 2003); PROMOTING THE RULE OF LAW ABROAD (Thomas Carothers, ed., 2003); MICHAEL J. TREBILCOCK & RONALD J. DANIELS, RULE OF LAW DEVELOPMENT (2008); MICHAEL J. TREBILCOCK & MARIANA MOTA PRADO, WHAT MAKES POOR COUNTRIES POOR: INSTITUTIONAL DETERMINANTS OF DEVELOPMENT (2011).

122. DAVID M. TRUBEK & ALVARO SANTOS, INTRODUCTION: THE THIRD MOMENT IN LAW AND DEVELOPMENT THEORY AND THE EMERGENCE OF A NEW CRITICAL PRACTICE, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 1, 1 (David M. Trubek & Alvaro Santos eds., 2003).

present in the previous moments.<sup>123</sup> Due to the discursive literature of contemporary L&D studies, this Part IV does not engage in the comprehensive review of literature but focuses on the shift to public law that is unlike the second moment's emphasis on private law.

## 1. New Constitutionalism and Constitutional Economics

Twenty-first century L&D studies have responded to the limits of the second movement by expressing a concern for the role of constitutionalism in promoting development.<sup>124</sup> Kevin E. Davis and Michael Trebilcock call the body of scholarship in this line “new constitutionalism.”<sup>125</sup> The turn to constitutional law in the contemporary moment of L&D coincides with the new wave of constitution-making that occurred in the late twentieth century and early twenty-first century.<sup>126</sup> As Cheryl Saunders observes, at least 100 new constitutions were put in place since the fall of the Berlin Wall.<sup>127</sup>

New constitutionalism can be traced back to a new branch of economics called constitutional economics. In 1982, the term “constitutional economics” was first coined by the U.S. economist Richard McKenzie.<sup>128</sup> However, it was James M. Buchanan who received a Nobel Prize in Economic Sciences in 1986 for developing constitutional economics into a new sub-discipline of economics.<sup>129</sup>

Constitutional economics, as a research program, has been developed within the theoretical framework of public choice. Buchanan explains that, “[i]n one sense, all of economics is about choice, and about the varying and complex institutional arrangements within which individuals make choices among alterna-

123. See Trubek, *supra* note 8, at 21–22.

124. See, e.g., Kevin E. Davis & Michael J. Trebilcock, *The Relationship Between Law and Development: Optimists versus Skeptics*, 56 AM. J. COMP. L. 895, 905–06 (2008) (examining major constitutional amendments of United Nations member states in the late 20th century and theories behind constitutional reform).

125. *Id.* at 905.

126. See Cheryl Saunders, *Constitution-Making in the 21st Century*, 1 INT'L. REV. L. 1, 2 (2012).

127. *Id.*

128. See generally JAMES M. BUCHANAN, *CONSTITUTIONAL ECONOMICS* (1991).

129. See Robert D. McFadden, *James M. Buchanan, Economic Scholar and Nobel Laureate, Dies at 93*, N.Y. TIMES (Jan. 9, 2013), <https://www.nytimes.com/2013/01/10/business/economy/james-m-buchanan-economic-scholar-dies-at-93.html> (detailing Buchanan's life and work) [<https://perma.cc/LQ7E-QNQG>].

tives.”<sup>130</sup> While conventional economics focuses on choices made within constraints externally imposed on individuals, “[c]onstitutional economics directs analytical attention to the *choice among constraints*.”<sup>131</sup> The choice of constraints concerns the choices of grand alternatives or constitutional rules that “define the existing regime.”<sup>132</sup> Within these constitutional constraints premised upon public choice, individuals make subsequent daily choices which are subject to analysis of “orthodox economists.”<sup>133</sup>

Constitutional economics has its underpinnings in two fundamental postulates including methodological individualism and rational choice which are both grounded in conventional economic inquiry. First, methodological individualism is considered the *sine qua non* presupposition of constitutional economic inquiry.<sup>134</sup> It states that autonomous individuals capable of exercising choice calculus are the essential starting point of any serious inquiry in constitutional economics.<sup>135</sup> Second, rational choice posits the idea that “the autonomous individual is also presumed to be capable of choosing among alternatives in a sufficiently orderly manner as to allow a quality of rationality to be attributed to observed behavior.”<sup>136</sup> In constitutional economics, the capacity of rational choice also includes the individuals’ capacity to make a constitutional choice or the choice among constraints or grand alternatives.<sup>137</sup>

Constitutional economics did not emerge in a vacuum. Buchanan has demonstrated that the field “is best interpreted as a re-emphasis, a revival, and rediscovery, of basic elements of earlier intellectual traditions that have seen set aside, neglected, and sometimes forgotten in the social sciences and social philosophy.”<sup>138</sup>

The two intellectual traditions that inform constitutional economics are classical political economy and contractualism in political philosophy. Classical political economy, mainly presented by the work of Adam Smith, focuses on explaining the workings of the

130. James M. Buchanan, *The Domain of Constitutional Economics*, 1 CONST. POL. ECON. 1, 2 (1990).

131. *Id.* at 3 (emphasis in original).

132. JAMES M. BUCHANAN, *THE ECONOMICS AND THE ETHICS OF CONSTITUTIONAL ORDER* 154 (1991).

133. Buchanan, *supra* note 130, at 3.

134. *Id.* at 13.

135. *Id.*

136. *Id.* at 14.

137. *Id.*

138. *Id.* at 10.

free market.<sup>139</sup> Smith aimed to demonstrate that a nation's wealth is most prone to growth under a political regime with minimal governmental intervention.<sup>140</sup> This positive analysis denotes the vision that some regimes (e.g., "a regime of minimal politicization") are better than others (e.g., "closely controlled mercantilist regime") in promoting prosperity.<sup>141</sup> Its normative implication is that individuals are capable of making choices between alternative regimes.<sup>142</sup>

Constitutional economics is also intellectually based on the theories of the social contract developed in the works of seventeenth century thinkers like Althusius, Hobbes, Spinoza, and Locke.<sup>143</sup> Contractualism posits the idea that the monopoly of coercion possessed by the government is legitimized by autonomous individuals who enter into social agreements to be governed by that regime.<sup>144</sup> Constitutional economics rediscovered this contractual idea and developed the argument that public choice among constitutional alternatives forms a constitutional contract.<sup>145</sup>

While Buchanan's constitutional economics is normative, subsequent development of this program has focused more on the positive account.<sup>146</sup> Some studies explain the economic functions performed by the constitution in well-established democracies again. Richard A. Posner, for example, considers the U.S. Constitution to be an economic document, discussing the effects of constitutional design and constitutional interpretation to economic development in the United States.<sup>147</sup> More generally, Torsten Persson and Guido Tabellini have conducted a macroeconomic study of 85 democracies during the 1990s to empirically test the economic effects of constitutions.<sup>148</sup> They examined constitutional rules on elections and forms of government and sought to assess their impact on economic policy and economic performance,<sup>149</sup>

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139. *Id.*

140. *See generally* ADAM SMITH, *THE WEALTH OF NATIONS* (Simon & Brown, 2012).

141. James M. Buchanan, *supra* note 130, at 10 (1990).

142. *Id.* at 11.

143. *Id.* at 12.

144. *Id.*

145. *Id.*

146. *See generally* Stefan Voigt, *Positive Constitutional Economics II—A Survey of Recent Developments*, 146 *PUB. CHOICE* 205 (2011) (surveying positive constitutional economics research).

147. *See generally* Richard A. Posner, *Constitution as an Economic Document*, 56 *GEO. WASH. L. REV.* 4 (1987).

148. *See generally* TORSTEN PERSSON AND GUIDO TABELLINI, *THE ECONOMIC EFFECTS OF CONSTITUTIONS* (2003).

149. *Id.* at 5.

and confirmed that, “presidential systems have smaller governments than parliamentary systems. Majoritarian elections induce smaller governments, less welfare state spending, and small deficits than do proportional elections.”<sup>150</sup> Furthermore, other scholars have also discussed the impact of other constitutional rules concerning judicial independence, human rights, and direct democracy on economic development.<sup>151</sup> In conclusion, such studies suggest that both positive and normative constitutional economics focus on similar components: constitutional rules and institutions of Western democracies.

## 2. Constitutional Economics and Global Constitutionalism

Nowadays, constitutional economics is no longer the area of economists. Constitutional economics has also begun to inform the work of global constitutionalists. The emerging scholarship of global constitutionalism, which focuses on globally disseminated constitutional rules and institutions, is influenced by some economic concepts, ideas, and methodologies. In this Section, three types of influence economics has on global constitutionalism are discussed: substantive, epistemological, and methodological.

First, with regards to substantive influence, global constitutionalists, like economists, have begun to explore the economic consequences of constitutional substance. This is evident in theories about constitutional competition which have as its basic idea the notion that constitutional values and institutions can be used as competitive advantages to attract foreign investment. For example, Daniel Farber has proposed the argument of “rights as signals” relating to how the government may, in some cases, send a credible message to investors that the government will not expropriate their investments because of the constitutional commitments to human rights protected by an independent judiciary.<sup>152</sup> Benedikt Goderis and Mila Versteeg have documented that “economic considerations motivated the constitutional entrenchment of property rights

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150. *Id.* at 9.

151. See, e.g., Lars P. Feld & Stefan Voigt, *Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators*, 19 EUR. J. POL. ECON. 497 (2003); Lorenz Blume & Stefan Voigt, *The Economic Effects of Human Rights*, 60 KYKLOS 509 (2007); Lorenz Blume et al., *The Economic Effects of Direct Democracy—A First Global Assessment*, 140 PUB. CHOICE 341 (2009).

152. Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL STUD. 83, 83 (2002).

and free-market guarantees in South Africa, New Zealand and Egypt.”<sup>153</sup>

Along the same line of reasoning, David Law also discusses “the impact of global investment and migration patterns on the worldwide development of certain constitutional rights”<sup>154</sup> by stating the following:

The potential for a constitutional “race to the top driven by competition among countries for capital and skilled migrants: as capital and skilled labor become increasingly mobile, countries will face a growing incentive to compete for both by offering bundles of human and economic rights that are attractive to investors and elite workers.”<sup>155</sup>

In particular, Law emphasizes the idea that countries compete to attract investors and skilled workers by demonstrating constitutional commitments to the protection of civil liberties and property rights.<sup>156</sup> Because investors favor investment in an environment where they can be certain that their capital will not be subject to arbitrary confiscation by the state,<sup>157</sup> the state can provide such a guarantee by offering constitutional protection of property rights.<sup>158</sup> Moreover, capital will also flow to regimes that respect fundamental political and civil rights in addition to aforementioned property rights such as freedom of expression, rights of political participation, and freedom from political persecution.<sup>159</sup> Law explains that this is because investors favor stability, peace, and transparency, which in turn needs the protection of civil liberty.<sup>160</sup> He also emphasizes that “respect for human rights attracts investment by improving the quality of a country’s workforce.”<sup>161</sup>

The adoption of constitutional review is also explained by the logic of competition. Tom Ginsburg and Mila Versteeg discuss the theories on the relationship between the global spread of constitutional courts and the incentive to compete in attracting foreign investment.<sup>162</sup> These theories hold that countries copy successful

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153. Benedikt Goderis & Mila Versteeg, *The Diffusion of Constitutional Rights*, 39 INT’L REV. L. & ECON. 1, 3 (2014).

154. David Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277, 1281–82 (2008).

155. *Id.* at 1282.

156. *Id.*

157. *Id.* at 1309.

158. *Id.* at 1308–13.

159. *Id.* at 1314.

160. *Id.* at 1316–17.

161. *Id.* at 1319.

162. Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30 J. L. ECON. & ORG. 587, 596 (2014).

constitutional institutions to compete with each other in attracting foreign trading partners and investors.<sup>163</sup> Tamir Moustafa also argues that the Egyptian Supreme Constitutional Court was established in response to the need to institutionalize state functions and attract investment.<sup>164</sup> The Egyptian Supreme Constitutional Court was created in 1979 against the backdrop of “elevated concern about the risks of expropriation and the insecurity of property rights that Sadat attempted to attract foreign investment and Egyptian private investment.”<sup>165</sup> As Moustafa documented, Sadat set up the court with the intention “to keep the foreign investor[s] at ease.”<sup>166</sup>

In addition to substantive influence, economics further provides the epistemological foundation for constitutional questions. Most importantly, the grand idea of “constitutional design”<sup>167</sup> has its underpinnings in the public choice epistemology, which holds that constitutional rules and institutions are something experts can recommend to communities to deliberately reflect on and choose.<sup>168</sup> Consequently, public choice has been translated into “constitutional choice.”<sup>169</sup> The implications of this reasoning is not purely theoretical. The conviction of constitutional choice supports several practical international programs which attempt to provide constitutional templates and send constitutional experts to advise domestic constitutional designers around the world.<sup>170</sup>

163. *Id.*

164. *See generally* TAMIR MOUSTAFA, *THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT* (2007).

165. *Id.* at 76.

166. *Id.* at 77.

167. *See CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION?* (Sujit Choudhry ed., 2008) (discussing how a constitutional system should be designed to respond to constitutional design respond to the opportunities and challenges raised by ethnic, linguistic, religious, and cultural divisions).

168. *See, e.g.,* Arend Lijphart, *Constitutional Design for Divided Societies*, 15 J. DEMOCRACY 96 (2004) (presenting a set of recommendations on power-sharing rules and institutions for making the constitutions in deeply divided communities).

169. *See, e.g.,* GABRIEL L. NEGRETTO, *MAKING CONSTITUTIONS: PRESIDENTS, PARTIES, AND INSTITUTIONAL CHOICE IN LATIN AMERICA* 13–106 (2013).

170. *See generally* Gregory Shaffer, *Introduction: Transnational Elements of Constitution-Making*, 2 U.C. IRVINE J. INT'L TRANSNAT'L & COMP. L. 1 (2017) (providing, as examples, the United Nation and the Venice Commission); Maartje de Visser, *A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform*, 63 AM. J. COMP. L. 70 (2015) (assessing the Venice Commission's role of “advis[ing] and assist[ing] on constitutional reform projects”). *But see* Mark Tushnet, *Some Skepticism About Normative Constitutional Advice*, 49 WM. & MARY L. REV. 1473, 1474 (2008) (arguing that “normative recommendations about what ‘should’ be included in a constitution or constitution-making process are largely pointless”).



The emergence of strategic-realist approach in comparative constitutional studies is also connected to rational choice theory. Ran Hirschl explains that the “[s]trategic-realist approach to constitutionalization rests on a number of preliminary assumptions and insights some, though not all, of which embrace what may reflect a ‘rational choice’ approach to constitutional politics.”<sup>171</sup> In this line, the adoption of several constitutional institutions and practices has been explained as the rationalist calculus of material interests. Hirschl, for example, explains the adoption of constitutional rights and judicial review in Canada, Israel, New Zealand, and South Africa as the product of self-interested political elites, economic elites, and judicial elites.<sup>172</sup> Ginsburg explains that the adoption of constitutional review in South Korea, Taiwan, and Mongolia is due to the elite interests of “political insurance” when they anticipate that they may lose power in future elections.<sup>173</sup> More recently, Ozan O. Varol also draws on rational choice theory to explain the material motivation behind what he calls “stealth authoritarianism,” which describes the phenomenon where post-Cold War authoritarian leaders have used legal and sub-constitutional mechanisms (judicial review, libel lawsuits, electoral laws, non-political crimes, and surveillance laws and institutions) to consolidate their powers.<sup>174</sup>

Finally, economics provides the methodological foundation for some studies of global constitutionalism. For example, Ginsburg, Versteeg, and others have employed the econometric method to quantitatively measure the global adoption and impact of constitutional rights, constitutional review, and constitutional design generally.<sup>175</sup>

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171. RAN HIRSCHL, THE STRATEGIC FOUNDATIONS OF CONSTITUTIONS, *in* SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 165 (Denis J. Galligan & Mila Versteeg eds., 2015).

172. RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 12 (2007).

173. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 18 (2003).

174. See Ozan O. Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1678–79 (2015).

175. See, e.g., Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 3 J.L. ECON. & ORGS. 587 (2013); Benedikt Goderis & Mila Versteeg, *The Diffusion of Constitutional Rights*, 39 INT’L REV. L. & ECON. 1 (2014); Mila Versteeg & Emily Zackin, *Constitutions Un-Entrenched: Towards an Alternative Theory of Constitutional Design*, 110 AM. POL. SCI. REV. 657 (2016).

### B. *Relevance*

The general consensus among many economic constitutional theories is that constitutional arrangements yield positive economic outcome. This is positively and normatively relevant to the developing world. Positively, after the collapse of the Soviet bloc during the periods between 1990 and 1996, all post-socialist countries of Europe and Asia—except Hungary and Latvia—enacted new constitutions.<sup>176</sup> Empirical evidence suggests that constitutional reform had positive effects on economic reform in the post-socialist transitional nations.<sup>177</sup>

Normatively, the constitutional reform proposition that constitutional arrangement yields economic consequence is central for development in the developing world. Gerald W. Scully states the following:

There are many talented and ambitious people in the less developed world. Consider the contributions of Indians, Chinese, Soviets, Eastern bloc residents, Latins, Africans, and others in the pure sciences, mathematics, engineering, literature, art, sports, and a wide array of human endeavor. At there has been a lack of economic progress in these countries speaks not of the people but of their ideology and institutions: a failure to structure a constitutional setting that leaves people free to go about their business of self-betterment, unmolested by the state.<sup>178</sup>

The most important normative implication is that the path of development for developing countries will significantly depend on a constitutional setting that enables the people to use their talents and ambitions to engage in economic, political, and social activities for their self-betterment and national socioeconomic development generally.

The general implication of new constitutionalism for China and Vietnam is that economic development requires constitutional development. In fact, during the last three decades, economic development has gone in tandem with constitutional reform in

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176. Katarzyna Metelska-Szaniawska, *Constitutions and Economic Reforms in Transition: An Empirical Study*, 20 CONST. POL. ECON. 1, 3 (2009).

177. See, e.g., László Bruszt, *Market Making as State Making: Constitutions and Economic Development in Post-Communist Eastern Europe*, 13 CONST. POL. ECON. 53, 54 (2002) (“In allowing for the corruption of states and markets by self-seeking groups in several of the countries in the region, the characteristics of constitution making played an important role.”).

178. Gerald W. Scully, *Constitutional Economics: The Framework for Economic Growth and Social Progress*, HERITAGE FOUNDATION (Feb. 20, 1991), <http://www.heritage.org/political-process/report/constitutional-economics-the-framework-economic-growth-and-social-progress> [<https://perma.cc/XYE3-FPMZ>].

China and Vietnam.<sup>179</sup> A central goal of the two countries' constitutions is the achievement of positive economic outcomes. For example, the preamble of the Chinese Constitution lays down the context of "building socialism" in the country as the historical foundation for its enactment.<sup>180</sup> Article 3 of Vietnam's Constitution provides that the state will "pursue the goal of a prosperous people and a strong, democratic, equitable and civilised country, in which all people enjoy an abundant, free and happy life and are given conditions for their comprehensive development."<sup>181</sup>

Apart from the grand goal of socialism, the drafting and amendment of Chinese and Vietnamese Constitutions are driven by the need for a constitutional framework that can both reflect and facilitate economic development.<sup>182</sup> The current Chinese Constitution was enacted in 1982 shortly after the introduction of the reform program<sup>183</sup> and provides both a reflection of the initial economic achievement and a more solid framework for the economy's path forward.<sup>184</sup> This constitution was revised several times in 1988, 1993, 1999, and 2004 and recently in 2018.<sup>185</sup> These constitutional amendments are correlated with economic development as is encapsulated in a Chinese scholars' statement:

Post-Deng leaders have modified the constitution through amendment, rather than replacement, preserving the continuity of economic reform ideology ushered in by Deng. Amendments have been used to constitutionalize ideological landmarks of unfolding economic developments. For example, the constitution was revised in 1988 to make reference to a private sector to complement the 'socialist public economy.' The 1993 amendments added the phrase 'socialism with Chinese characteristics'

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179. See Zhenmin Wang & Yuan Tao, *Achieving Development through Innovative Constitutionalism: A China Story*, WORLD BANK LEGAL REV. 201, 202 (2012); Tran Thanh Huong & Duong Anh Son, *Economic Development and Constitutional Reform in Vietnam*, in CONSTITUTIONALISM IN SOUTHEAST ASIA VOL 3, at 311 (Clauspeter Hill & Jörg Menzel eds., 2008).

180. XIANFA preamble (1982) (China).

181. HIẾN PHÁP [Constitution] art. 3 (2013) (Viet.).

182. See Shan Feiyue, *Economic Constitutionalism: Path for State to Intervene in the Economy*, 3 FRONT. L. CHINA (2006); George Finch, *Modern Chinese Constitutionalism: Reflections of Economic Change*, 15 WILLAMETTE J. INT'L L. & DIS. RES. 75 (2007); Zhenmin Wang & Yuan Tao, *supra* note 179; Dingjian Cai, *The Development Of Constitutionalism in The Transition of Chinese Society*, 19 COLUM. J. ASIAN L. 1 (2005); Randall Peerenboom, *Law and Development of Constitutional Democracy: Is China a Problem Case?*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 192 (2006).

183. Zhenmin Wang & Yuan Tao, *supra* note 179.

184. *Id.*

185. See Mo Jihong, *The Constitutional Law of the People's Republic of China and Its Development*, 23 COLUM. J. ASIAN L. 137, 168 (2009); *China's National Legislature Adopts Constitutional Amendment*, XINHUA (Mar. 11, 2018), [http://www.xinhuanet.com/english/2018-03/11/c\\_137031606.htm](http://www.xinhuanet.com/english/2018-03/11/c_137031606.htm) [https://perma.cc/BD2X-JNAK].

to the preamble and introduced the 'socialist market economy,' thus incorporating Deng's economic theory into the document. A reference to the recently deceased Deng was added to the preamble in 1999. The constitution was amended in 2004 to guarantee private property rights and provide for compensation for expropriated land, an important signal for both foreign investors and China's own business sector. In addition, in keeping with the tradition of each Chinese leader leaving his imprint on the constitution, President Jiang Zemin introduced his theory of the 'three represents' into the preamble. This provided ideological coverage for inclusion of the business class ('bourgeoisie').<sup>186</sup>

In Vietnam, the first Constitution of the Renovation was adopted in 1992 with a clear focus on liberalizing the economy by recognizing the "socialist oriented market economy," private property rights, and the multiple of economic sectors.<sup>187</sup> The 1992 Constitution was recently replaced by the new Constitution adopted in late 2013, which aims to provide a new framework for "the comprehensive renovation period, synchronizing economic and political domains."<sup>188</sup>

Consequently, the current constitutions in China and Vietnam have adopted the following provisions conducive to socioeconomic development: (i) the socialist market economy, which includes the co-existence of both state and private economic sectors, the management of the economy by law; (ii) social-economic rights, which includes private property rights, the right to use land, labor rights, the right to conduct scientific and technological research, the right to education, and so on; (iii) socio-economic policies to promote the development of sciences, medical and health services, social insurance, to protect the environment, among others.<sup>189</sup>

### C. Challenges

#### 1. Constitutional Choice

The proposition of constitutional choice is based on theories that were developed in Western developed countries which share the liberalist conception of rational individuals. The idea of consti-

186. Zhenmin Wang & Yuan Tao, *supra* note 179.

187. See NGO BA THANH, THE 1992 CONSTITUTION AND THE RULE OF LAW, in VIETNAM AND THE RULE OF LAW 92 (Carlyle A. Thayer & David Mart eds., 1993).

188. *Seventy Years of the National Assembly of Viet Nam, 70 Years of Constitutional History*, TAP CHI CONG SAN (Mar. 18, 2016), <http://english.tapchicongsan.org.vn/Home/PrintStory.aspx?distribution=511&print=true> [<https://perma.cc/W86H-NDY2>].

189. For more detailed analyses, see Zhenmin Wang & Yuan Tao, *supra* note 179; Huong & Son, *supra* note 179.

tutional choice motivates international development agencies to provide “best practices in constitutional reform”<sup>190</sup> or “practical guide[s] to constitution building”<sup>191</sup> for developing countries.

From the perspective of the developing world, four aspects of constitutional choice are problematic: the purposes, manners, actors, and substances of constitutional choice. First, the rationalist idea of constitutional choice assumes that a constitution’s instrumentalist purpose is to serve the interests of individuals. Bruce Ackerman makes the criticism as follows:

Constitutional economics takes a totally instrumental view of citizenship. The rational actor in this literature asks himself only one question—“what’s good for me?”—and his citizenship behavior shrivels into nothingness as he contemplates how little it pays off in contrast to the pleasures of tending his own garden.<sup>192</sup>

It is undeniable that constitutional choice in many cases involves concerns of self-interest.<sup>193</sup> However, the instrumentalist view of constitutional choice cannot explain why citizens have sacrificed their freedom, and even their lives, to engage in social mobilization aimed at influencing constitutional choice.<sup>194</sup> Citizens try to influence constitutional choice because of their concerns of state-building and national development, not merely for their own material benefits.<sup>195</sup>

Second, the idea of constitutional choice assumes cooperation, communication, and agreement as the manner of choosing a system. However, constitutional choice in the developing world is much more complex because it involves not only negotiations and coordination efforts, but also divisions and conflicts. Developmental issues addressed in the constitutions of developing countries are consequential and involve different sectors of the community that

190. *E.g.*, TIMOTHY M. MEISBURGER, BEST PRACTICE IN CONSTITUTIONAL REFORM, ASIAN FOUNDATION, <https://asiafoundation.org/resources/pdfs/BestPracticesinConstitutionalReformMeisburger.pdf> [<https://perma.cc/SG9M-E493>].

191. *E.g.*, MARKUS BÖCKENFÖRDE ET AL., A PRACTICAL GUIDE TO CONSTITUTION BUILDING, INT’L INST. FOR DEMOCRACY AND ELECTORAL ASSISTANCE, <http://www.idea.int/publications/catalogue/practical-guide-constitution-building>.

192. Bruce Ackerman, *Constitutional Economics/Constitutional Politics*, 10 CONST. POL. ECON. 415, 416 (1999).

193. *See* William Parlett, *The Elite Threat to Constitutional Transitions*, 56 VA. J. INT’L L. 407, 450 (2016) (providing Romania and Bulgaria as examples of self-interested parliamentary constitution-making).

194. *See, e.g.*, Reza Sayah et al., *Violence Erupts as Egyptians Vote on New Constitution* CNN (Jan. 14, 2014), <https://edition.cnn.com/2014/01/14/world/africa/egypt-referendum/index.html> [<https://perma.cc/68M3-RLSZ>].

195. Bruce Ackerman, *supra* note 192, at 416–17.

have different and competing developmental visions. Consequently, constitutional choice processes may create separation and even deadly conflicts. For example, in 2015, protests broke out against the draft constitution in Nepal because of the concern that the new constitution would impede the betterment of marginalized groups and led to deaths of some forty people.<sup>196</sup>

Third, the proposition of constitutional choice has an idealistic assumption about the involvement of all actors of the community in making the grand choice. Actors participating in making constitutional choice in the developing world are much more complicated. Many developing countries are under authoritarian regimes and constitutional choice does not necessarily present the public choice of the wide range of community's sectors.<sup>197</sup> In fact, constitutional choice sometimes presents the narrow choice of domestic political elites who then impose their choice upon the wider community.<sup>198</sup> Even when wide ranges of the community's actors participate in the constitutional choice process, the choice made is often still within the narrow choice of the elites. An empirical study indicates that in twenty-one post-communist countries in Europe, the Caucasus, and Central Asia, constitutional choice, despite popular participation, represented the self-interests of elites because the elites were able to appropriate the popular constitution-making platforms for their self-dealing.<sup>199</sup> Constitutional choice in the developing world is further complicated by the involvement of international actors as the cases of Bosnia-Herzegovina, Macedonia, East Timor, Sudan, Afghanistan, Iraq, and Kosovo show.<sup>200</sup>

Fourth, the proposition of constitutional choice has a narrow focus on the substance of the choices, mainly the choice among alternative ways for institutional arrangement and individual rights protection. However, the substance of constitutional choices in the developing world is much wider. To be sure, the choices regarding government types and mechanisms of human rights pro-

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196. Charles Haviland, *Why is Nepal's New Constitution Controversial?*, BBC (Sept. 19, 2015), <http://www.bbc.com/news/world-asia-34280015> [<https://perma.cc/GW49-HV5B>].

197. See Gabriel L. Negretto, *Authoritarian Constitution-Making: The Role of the Military in Latin America*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES 83 (Tom Ginsburg & Alberto Simpser eds., 2013).

198. See Partlett, *supra* note 193, at 407.

199. See Partlett, *supra* note 193, at 407, 411.

200. Constance Grewe & Michael Riegner, *Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia-Herzegovina and Kosovo Compared*, 15 MAX PLANCK Y.B. U.N. L. 1, 3 (2011).

tection are also prominent in the developing world as these constitutional choices bring about the developmental outcome.<sup>201</sup> Nevertheless, developing countries have to address many developmental issues in their constitutions, which consequences may impact the type of economic regime, the role of different economic sectors, land issues, environmental issues, and the economic duties of state institutions, among others.<sup>202</sup>

## 2. Constitutional Constraints

The idea of constitutional constraints is prominent in new constitutionalism and programs of international development view constitutional constraints as a necessary framework for economic development in the developing world. For example, the World Development Report of 2017 suggests that the failure to observe “constitutional limitations on power” (such as the separation of power, checks and balance, and civil-political rights) would have a negative effect on economic development.<sup>203</sup>

However, the empirical evidence on the relationship between constitutional constraints and economic development is mixed. Economic development in Japan since Meiji Restoration, the four Asian tigers (Hong Kong, Singapore, South Korea, and Taiwan) since 1960, and China since 1978 was not supported by constitutional constraints.<sup>204</sup> The same has been said about the cases of Botswana and Chile.<sup>205</sup> There are also examples where the practice of some political and civil rights has resulted in political instability which blocked investment flow, as the case of Thailand suggests.<sup>206</sup> Lastly, the Nordic model of development is supported not by the constitutionally constrained state but by the welfare state.<sup>207</sup>

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201. See Office of the U.N. High Commissioner for Human Rights (OHCHR), *Human Rights and Constitutional Making*, at 10, U.N. Doc. HR/Pub/17/5 (2018).

202. See, e.g., XIANFA arts. 6–11 (1982) (China); HIẾN PHÁP [Constitution] ch. 3 (2013) (Viet.).

203. WORLD BANK, *WORLD DEVELOPMENT REPORT 2017: GOVERNANCE AND THE LAW* 91 (2017).

204. Max Everest-Phillips, *Beyond ‘Constraints’: Promoting the Politics of Economic Growth in Developing Countries* 12 (Strategic Pol’y & Research Unit Working Paper No. 22, 2008).

205. *Id.* at 18.

206. See, e.g., *Foreign Investment Plummets 78% in Junta-Ruled Thailand*, STRAITS TIMES (Jan. 13, 2016, 2:41 PM), <http://www.straitstimes.com/asia/se-asia/foreign-investment-plummets-78-in-junta-ruled-thailand> [<https://perma.cc/D8KB-NLDH>].

207. See generally Pentti Arajärvi et al., *WELFARE STATE AND CONSTITUTIONALISM – NORDIC PERSPECTIVES* (Martin Scheinin ed., 2001) (discussing the relationships between the Nordic welfare state and constitutionalism).

Moreover, the accounts focusing on the economic significance of commitment to constitutional constraints do not fully address the questions of how, when, and why politicians actually turn constitutional commitment into action. Investors may not merely rely on formal constitutional commitments to decide whether the investment environment is stable, peaceful, and transparent. In particular, in authoritarian regimes, constitutional commitment and constitutional reality are two different stories. The Vietnamese Constitution, for example, includes a lavish list of civil and political rights, but the practice of these rights has long been met by strong international criticisms.<sup>208</sup> Thomas E. Kellogg argues that the Chinese Constitution performs the function of a “false blueprint,” which means that the Communist Party uses the concept of constitutional supremacy to gain more legitimacy but harbors little intention to realize its commitments.<sup>209</sup> Therefore, when deciding whether to put their money in the market under authoritarian settings, investors must consider the reality of politics, the working of the legal system, and even the role of informal institutions and social networks rather than rely on formal commitments to constitutional constraints.<sup>210</sup>

In addition, the idea of constitutional constraints cannot fully explain the actual relationship between constitutional rules and the economy in developing countries. In developing countries that are struggling for development and the role of the state is significant, their constitutions empower rather than constrain the state's behavior in the economy. For example, the Brazilian Constitution of 1988 facilitates “new state activism” through its provisions on health, education, housing, social protection, and pensions.<sup>211</sup> These provisions “have shaped a new and complex welfare system,” which in turn “has had a major impact on the role of the state and on patterns of government spending.”<sup>212</sup> More generally, the constitutions of developing countries focus not on constitutional constraints but on constitutional empowerment to facilitate the active

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208. See, e.g., *World Report 2017: Vietnam*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2017/country-chapters/vietnam> [<https://perma.cc/8V4S-4JXW>].

209. Kellogg, *supra* note 105, at 351.

210. See, e.g., Feng-jyh Lin, *The Determinants of Foreign Direct Investment in China: The Case of Taiwanese Firms in the IT Industry*, 63 J. BUS. RES. 479, 480 (2010) (discussing the investors' considerations of “network linkages, the expansion of markets, and China's incentive policies”).

211. David M. Trubek et al., *Toward a New Law and Development: New State Activism in Brazil and the Challenge for Legal Institutions*, 4 WORLD BANK LEGAL REV. 281, 284 (2012).

212. *Id.*



role of the state in the economy.<sup>213</sup> This leads to the adoption of many constitutional provisions on state economic principles and policies as well as socioeconomic rights and positive constitutional duties of the state in enforcing these rights.<sup>214</sup>

#### IV. TOWARDS PLURALIST MODELS OF LAW AND DEVELOPMENT

Although the three theoretical models discussed above have different propositions, they share a common mode of theorization: monism informed by liberal values. Liberal legalism focuses the liberal model of developmental state as the single model. Neoclassical institutionalism focuses on a single set of liberal economic policy prescriptions. New constitutionalism focuses on liberal constitutionalism. Descriptively, these monist models fail to fully capture the practical complexity of L&D in the non-liberal developing world where the law, state, society, and economic processes interact in a complex manner. Normatively, “law-and-development monism” underestimates the human potentials of L&D by reducing to some limited liberal paradigms.<sup>215</sup>

This Article proposes that L&D be conceptualized in pluralist terms. The pluralist models of L&D can be grouped together under the rubric called “law-and-development pluralism.” These conceptual models recognize the complexity of the practice of L&D and the variety of L&D models that humans have the potential to advance. The three alternative pluralist conceptual models can be called (i) pluralist legalism, (ii) pluralist institutionalism, and (iii) pluralist constitutionalism. To provide the foundation for fuller theorization in the future, the following Sections adumbrate fundamental pluralist propositions, which can both positively explain and normatively guide the practice of L&D.

##### A. *Pluralist Legalism*

Pluralist legalism, a critical response to liberal legalism, is characterized by the following propositions:

##### 1. There Are a Variety of Developmental States.

These include the East Asian developmental state, the Latin American developmental state, and the socialist developmental

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213. Max Everest-Phillips, *supra* note 204.

214. See, e.g., XIANFA arts. 6–11, 42 (1982) (China); HIÊN PHÁP [Constitution] arts 32, 33, 35, chp. 3 (2013) (Viet.).

215. See *supra* Parts I(A), II(A), III(A), and accompanying texts.

state. Different developmental states use law in different ways to promote development.<sup>216</sup> The normative implication is that the abstract Keynesian model of developmental state is not the only model for developing countries to consider.

2. Law is Used for a Variety of Purposes and by Different Legal Actors.

The normative implication is that L&D programs must recognize the competition between developmental and anti-developmental interests.<sup>217</sup> In addition, this proposition points out the fact that L&D programs should not focus mainly on state institutions but also take social actors into account.

3. There is a Connection Between Development and Legal Pluralism.

Social order consists of a variety of social norms and institutions. Legal pluralism should be taken seriously in the societies where social, economic, and political relationships are deeply embedded in the complex fabric of social norms.<sup>218</sup> The normative implication for L&D programs is that they should not only focus on supporting legal reform and positive law-making but engage in the careful study of customary law of developing countries.

4. Different Actors Including State Actors and Social Actors Enforce Different Legal and Social Norms.

This proposition has important implications for practical programs supporting L&D. Given that the judiciary is not the only legal enforcer, the focus of L&D projects on legal education and legal profession is hard to justify.<sup>219</sup> The role of political institutions in legal development and the role of social actors in the construction of legal meanings suggest that the central concerns of L&D projects should be political institutions, social actors, and civil society.<sup>220</sup> This, however, does not reject the necessity of improving legal education and legal profession. The improvement of the legal education and legal profession is needed not only to pursue

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216. See generally Esteban Caldentey, *The Concept and Evolution of the Developmental State*, 37 INT'L J. POL. ECON. 27 (2008) (examining the history of the developmental states in different parts of the world).

217. See *supra* II.B and accompanying texts.

218. For a discussion of legal pluralism in the context of law and development, see Tamanaha, *supra* note 6, at 244.

219. See *supra* Part I(A) and accompanying texts.

220. See *supra* Part I(B) and accompanying texts.

justice in the judicial platform but also (perhaps principally) improve law-making, public governance, and public participation in the law-making and policy-making process.<sup>221</sup>

### B. *Pluralist Institutionalism*

Pluralist institutionalism, a critical response to neoclassical institutionalism, is defined by the following propositions:

1. There Are Different Forms and Strands of the Rule of Law, Which All Have the Potential to Facilitate Development.

Richard H. Fallon, for example, points out the four strands of the rule of law, which include the historic, formalist, legal process, and substantive strands.<sup>222</sup> The rule of law can take both liberal and authoritarian forms.<sup>223</sup> There are three important normative implications for L&D programs. First, it is not hopeless to promote the rule of law under authoritarian institutional settings. Second, programs promoting the rule of law cannot focus on some particular dimensions (e.g., procedural) of the rule of law and ignore other dimensions (e.g., substantive) as they are interconnected. Third, the indigenous concepts of law and the rule of law should be taken into account.

2. A Property Right Regime is Significant for Economic Development, But There Are a Variety of Property Rights Regimes.

Even within Western developed countries, there is no single property rights system as pointed out by David Kennedy as follows:

In fact, the developed economies of the modern West have experienced periods of aggressive industrialization and economic growth with a wide range of different property regimes in place. Property regimes differ, sometimes dramatically, among industrialized societies, and all such societies are home to a variety of different formal and informal regimes.<sup>224</sup>

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221. For example, the priority of legal education in Vietnam is not produce “lawyers,” but to provide qualified human resources for the government. See Ai Nhan Ho, *Legal Education in Vietnam: The History, Current Situation and Challenges*, 26 *LEGAL EDUC. REV.* 70, 74 (2017).

222. Richard H. Fallon, “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 *COLUM. L. REV.* 1, 10 (1997).

223. See JOTHIE RAJAH, *AUTHORITARIAN RULE OF LAW* 8 (2012).

224. David Kennedy, *Some Caution About Property Rights as a Recipe for Economic Development*, 1 *ACCT., ECON., & L.* 1, 3 (2011).

Simply put, developing countries may have their own property regimes<sup>225</sup> which cannot be simply neglected in the normative programs of L&D.

### 3. The Enforcement of Property Rights is Shaped by the Interdependence of Different Institutions.

Property rights regimes cannot deal with only rights but have to also deal with “lots of reciprocal obligations, duties and legal privileges to injure.”<sup>226</sup> All of these property entitlements cannot stand independently but “have always been embedded in a broader legal fabric which qualifies and complicates their meaning.”<sup>227</sup> Kennedy also emphasizes that “the exercise of property entitlements is set within a complex and dynamic social context that further modifies their meaning and qualifies their enforcement.”<sup>228</sup> Pluralist institutionalism would appreciate the social embeddedness of the institutional framework for property rights and contractual rights. There is an extensive literature on informal and social sanctions, repeated games, and self-enforcement mechanisms.<sup>229</sup> The normative implication is that the thesis on the autonomy of property rights regime must be rejected. Furthermore, caution must be taken against transferring Western-style property rights regimes into the developing world to promote development there.

#### C. *Pluralist Constitutionalism*

Pluralist constitutionalism,<sup>230</sup> a critical response to new constitutionalism, is defined by the following propositions:

##### 1. There Are a Variety of Constitutionalisms.

These include liberal constitutionalism, communitarian constitutionalism, progressive constitutionalism, socio-democratic constitutionalism, Confucian constitutionalism, Islamic constitutionalism, and Buddhist constitutionalism.<sup>231</sup> These models of constitutional-

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225. See, e.g., TAIJU ZHANG, *THE LAWS AND ECONOMICS OF CONFUCIANISM: KINSHIP AND PROPERTY IN PRE-INDUSTRIAL CHINA AND ENGLAND* (2017) (discussing kinship network and property in late Qing and Republican society (1860–1949) in China).

226. Kennedy, *supra* note 224.

227. *Id.* at 4.

228. *Id.*

229. Clarke, *supra* note 65, at 94 n.23.

230. William A. Galston uses the term “pluralist constitutionalism” in a different way to connect constitutionalism with value pluralism. William A. Galston, *Pluralist Constitutionalism*, 28 SOC. PHIL. & POL’Y 228, 228 (2011).

231. For non-liberal forms of constitutionalism, see generally BEAU BRESLIN, *THE COMMUNITARIAN CONSTITUTION* (2006); ROBIN L. WEST, *PROGRESSIVE CONSTITUTIONALISM: RECON-*

ism diverge in their underlying principles, values, and mechanisms of constitutional enforcement. “New constitutionalism” is new in the sense that it emphasizes the economic outcome of constitutionalism.<sup>232</sup> But “new constitutionalism” is not new because it is attached to the conventional ideas, values, and institutions (e.g., individual rights, democratic election, limited government, and separation of power) of liberal constitutionalism rooted in liberalism of the enlightenment era.<sup>233</sup> “New constitutionalism” fails to appreciate different, new, and non-liberal forms of constitutionalism,<sup>234</sup> which can also yield positive economic outcomes. Furthermore, continued development may require the support of constitutionalism, but constitutionalism is not necessarily identical to liberal constitutionalism.<sup>235</sup> There are two important normative implications for L&D programs. First, they must be cautious in promoting liberal constitutional values and institutions in non-liberal societies. Second, local experience of constitutionalism must be taken into account.

## 2. Different Forms of Constitutionalism Seek to Achieve Different Developmental Purposes and Have the Potential to Facilitate Development in Different Ways.

For example, in the American constitutional debate, while liberal constitutionalism is mainly concerned with judicially enforced constitutional restraints in the name of individual rights, progressive constitutionalism focuses on improving the “conditions of severe material deprivation” through empowering political institutions (such as the Congress).<sup>236</sup> Pluralist constitutionalism would

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STRUCTURING THE FOURTEENTH AMENDMENT (1994); THIO LIAAN, CONSTITUTIONALISM IN ILLIBERAL POLITIES, in OXFORD HANDBOOK ON COMPARATIVE CONSTITUTIONALISM 133 (Andras Sajó & Michel Rosenfeld eds., 2012); CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY (Rainer Grote & Tilmann Röder eds., 2012); THE WELFARE STATE AND CONSTITUTIONALISM IN THE NORDIC COUNTRIES (Martin Scheinin ed., 2001); BUI NGOC SON, CONFUCIAN CONSTITUTIONALISM IN EAST ASIA (2016); Benjamin Schonthal, *Formations of Buddhist Constitutionalism in South and Southeast Asia*, 15 INT’L J. CONST. L. 705 (2017).

232. *Supra* Part III(A) and accompanying texts.

233. *Id.*

234. See Mark Tushnet, *Varieties of Constitutionalism*, 14 INT’L J. CONST. L. 1, 1–5 (2016).

235. See Kevin Tan, *Constitutionalism in Times of Economic Strife: Developments in Singapore*, 4(3) NTU L. REV. 115, 125 (2009) (discussing how the elected executive presidency with powers of veto over the purse is designed to address economic problems).

236. Mark Tushnet, *Progressive Constitutionalism: What is “It”?*, 72 OHIO ST. L.J. 1073, 1075 (2011). For a collection of essays on progressive constitutionalism in the United States, see *THE CONSTITUTION IN 2020* (Reva Siegel & Jack Balkan eds., 2009).

be open to a wide range of public goals that a constitutional government may try to achieve. These goals may be individual rights in liberal constitutionalism, but they can be other public goods in other forms of constitutionalism. In addition, pluralist constitutionalism would be open to different institutions and non-institutional mechanisms for limiting arbitrary power. Liberal constitutionalism may rely on free elections, separation of power, and judicial review, but other forms of constitutionalism may have other mechanisms such as public discourse and social mobilization.<sup>237</sup>

### 3. There are Different Dimensions in the Relationship Between Constitutional Law and Economic Development.

Pluralist constitutionalism does not merely consider the impact of liberal constitutional institutions on economic performance, but is directed towards different dimensions in the relationship between constitutional law and economic development as below:

#### a. Economic Goals of the Constitution

This requires a reconsideration of the goals of constitutions. In the liberal definition, the goal of constitutions is to protect individual rights. Pluralist constitutionalism would redefine the goal of constitutions to include other developmental goals such as the establishment of markets, economic growth, and the public well-being.

#### b. Constitutional Determinants of Economic Development

This concerns the non-economic determinants of economic development, which include constitutional determinants such as constitution-making process, separation of power, constitutional rules of election, constitutional referendum, constitutional rights, constitutional review, judicial independence, and decentralization. Some of these aspects have been examined in existing scholarship.<sup>238</sup> Other issues such as how the constitution-making process can affect subsequent economic performance have not yet been fully studied.

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237. See, e.g., Keith Hand, *Resolving Constitutional Disputes in Contemporary China*, 7 U. PA. E. ASIA L. REV. 51, 66–67 (2011).

238. See, e.g., TORSTEN PERSSON & GUIDO TABELLINI, *THE ECONOMIC EFFECTS OF CONSTITUTIONS* (2003).

### c. Economic Determinants of Constitutional Development

This concerns how constitutions are affected by economic factors, which includes topics such as how economic development drives constitutional reforms.

### d. Constitutional Regulation of the Economy

This concerns constitutional provisions directly relevant to the economy. These economic constitutional provisions concern economic rights such as property rights or the right to do business. Some constitutions, especially socialist constitutions, have provisions regarding fundamental principles of the economy and state's economic policy.<sup>239</sup> Constitutional law of the economy also includes provisions regarding institutions directly responsive to the economy such as state banks and state audit offices.

## V. CONCLUSION

“Law-and-development pluralism” suggests that there is no single model of L&D operating as the convergent point of all countries. Rather, the pluralist conceptualization of L&D suggests dialogical engagement in the practice of L&D.

As a practical mechanism, engagement requires different forums and networks for L&D practitioners in both the North and the South to engage in equal conversations in which they can learn from each other lessons on L&D. L&D theories and general templates provided by L&D international agencies are not totally irrelevant but should operate as a point for engagement, not convergence.<sup>240</sup> These theories and templates should not be treated as the authoritative points that developing countries are compelled to comply with. In other words, developing countries should learn from, but should not be controlled by, these international templates and theories. Engagement also requires L&D international agencies to seriously explore local conditions, local experiences, and local lessons in addition to engaging in equal conversations with local scholars.

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239. See generally Pham Duy Nghia, *From Marx to Market: The Debates on the Economic System in Vietnam's Revised Constitution*, 11 *ASIAN. J. COMP. L.* 263 (2016) (analyzing the socio-economic and political contexts behind the 2013 Vietnamese constitution).

240. For discussion on the difference between engagement and convergence in the context of transnational constitutional interpretation, see Jackson, *supra* note 12, at 114.





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