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# Beyond the Washington Consensus and New Institutionalism: What is the Future of Law and Development

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# Beyond the Washington Consensus and New Institutionalism: What is the Future of Law and Development

## **Cover Page Footnote**

International Law; Commercial Law; Law

# Beyond the Washington Consensus and New Institutionalism: What is the Future of Law and Development?

*Thomas Kelley†*

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## I. Introduction

The 2010 symposium of the North Carolina Journal of International Law and Commercial Regulation recently invited a group of eminent scholars and practitioners to Chapel Hill to discuss the future of law and development under the Obama administration. The aim of this brief introduction is to orient readers who might not be familiar with recent currents in law and development and to give some context for the articles that follow.

As I begin writing these remarks, President Barack Obama has been in office for just over one year.<sup>1</sup> For scholars and citizens who focus on the plight of the world's poor countries, and for the even narrower swath of people who view international development through the lens of the law, there has been relatively little action by the administration on those fronts thus far. The administration has dedicated most of its energy to extricating the country from a severe financial crisis, managing two inherited wars, and repairing the United States' dysfunctional healthcare

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<sup>1</sup> See Carl Hulse, *Obama Is Sworn In as the 44th President*, N.Y. TIMES, Jan. 20, 2009, at A1.

system. Still, the young administration has provided some clues regarding its attitude and its approach toward international law and development.

One thing seems evident: The administration believes that healthy institutions are vital to the future of the developing world.<sup>2</sup> President Obama's speech in Accra, Ghana on July 11, 2009 mentioned institutions five separate times, including the quotable admonition that "Africa doesn't need strongmen, it needs strong institutions."<sup>3</sup> According to the President, "[i]n the 21st century, capable, reliable and transparent institutions are the key to success."<sup>4</sup> When the President specified the institutions to which he was referring, there was a distinct legal tint, including parliaments, police forces, and judiciaries.<sup>5</sup>

A survey of U.S.-funded international aid programs seems to indicate that the focus on institution building is more than mere rhetoric. Many U.S.-funded programs aim to build rational, predictable institutions, with a particular emphasis on putting institutions in place that will stimulate commercial development in poor countries.<sup>6</sup> The Millennium Challenge Corporation (MCC), a relatively new and increasingly important U.S. aid organization,<sup>7</sup>

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<sup>2</sup> Press Release, The White House Office of the Press Secretary, Remarks by the President to the Ghanaian Parliament (July 11, 2009) *available at* [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-to-the-Ghanaian-Parliament](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-to-the-Ghanaian-Parliament).

<sup>3</sup> *Id.* ¶ 25.

<sup>4</sup> *Id.* ¶ 22.

<sup>5</sup> *Id.* Similarly, Secretary of State Hillary Clinton mentioned institutions in a major address at the 8th Forum of the African Growth and Opportunity Act, stating that "[c]itizens and governments need to work together to build and sustain strong democratic institutions." See Hillary Rodham Clinton, U.S. Sec'y of State, Remarks at the 8th Forum of the African Growth and Opportunity Act, at ¶ 34 (Aug. 5, 2009) (transcript *available at* <http://www.state.gov/secretary/rm/2009a/08/126902.htm>).

<sup>6</sup> See U.S. AGENCY FOR INT'L DEV., LAND AND BUSINESS FORMALIZATION FOR LEGAL EMPOWERMENT OF THE POOR: STRATEGIC OVERVIEW PAPER 7 (Jan. 2, 2007), *available at* [http://www.ardinc.com/upload/photos/677Land\\_and\\_Business\\_Formalization\\_Strategic\\_Overview\\_Paper\\_FINAL\\_with\\_Annexes.pdf](http://www.ardinc.com/upload/photos/677Land_and_Business_Formalization_Strategic_Overview_Paper_FINAL_with_Annexes.pdf) [hereinafter USAID Land and Business Formalization Report] (citing Douglass North, the seminal New Institutional Economics scholar, as the inspiration for USAID's development strategy); see also Jefferey Gettleman, *Kenya's Volatile Politics Shadow Clinton*, N.Y. TIMES, Aug. 6, 2009, at A8 (quoting U.S. Secretary of State Hillary Clinton as stating that the new U.S. approach to aid to Africa would include the goal of "bolstering support for African entrepreneurs").

<sup>7</sup> Doug Johnson & Tristan Zajonc, Can Foreign Aid Create an Incentive for Good

along with the more venerable United States Agency for International Development (USAID), are initiating programs in poor countries around the world based on the assumption that the future stability and prosperity of these countries depend upon unleashing and guiding the entrepreneurial spirit of small- and medium-sized enterprises,<sup>8</sup> and that this can be accomplished by improving the institutions—most notably the laws and legal enforcement mechanisms—that regulate them.<sup>9</sup> The new wave of aid programs aims to remove ineffective, burdensome, and bureaucratic institutions laden with red tape and to introduce streamlined, consistent, business-facilitative institutions that will lend support and structure to poor countries' business sectors.<sup>10</sup>

The idea of alleviating the plight of poor countries by helping them develop strong, rational, highly functioning institutions is not new. That notion has been implicit in various rubrics that have, at least temporarily, dominated international law and development discourse in recent decades, particularly the rubrics of rule of law and democracy and governance. But designating institution building as the keystone of law and development and, indeed, of all international development, is a novel trend.

## II. Looking Backward: The Washington Consensus Gives Way to New Institutionalism

### A. *The Washington Consensus*

When I began paying close attention to international law and development fifteen years ago, the aid discourse was grounded firmly in the Washington Consensus. The Consensus spawned a vast literature promoting it, justifying it, critiquing it, and

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Governance? Evidence from the Millennium Challenge Corporation (Apr. 2006) (unpublished manuscript), [http://www.cid.harvard.edu/cidwp/pdf/grad\\_student/011.pdf](http://www.cid.harvard.edu/cidwp/pdf/grad_student/011.pdf) (referring to the creation of the MCC as the most significant shift in U.S. foreign aid policy since the creation of USAID in 1961).

<sup>8</sup> See generally USAID Land and Business Formalization Report, *supra* note 6, at 2 (noting that elements in robust formalization programs include improved opportunities designed to assist small and newly-formed operations).

<sup>9</sup> See *id.* at 7.

<sup>10</sup> See, e.g., Mary M. Shirley, *Institutions and Development*, in HANDBOOK OF NEW INSTITUTIONAL ECONOMICS 611 (Claude Menard & Mary M. Shirley eds., 2005) (attributing underdevelopment in the Third World to weak, missing, or perverse institutions).

ultimately trying to account for its failure. I will devote one brief paragraph to it, with apologies to all those who experienced it in all of its complexity.

After the fall of the Berlin Wall in 1989, Western nations and the aid agencies they controlled interpreted their Cold War victory as an unambiguous repudiation of government regulation and proof of the value of unregulated free markets.<sup>11</sup> They tailored their international development strategies to this view and more or less imposed their deregulation philosophy on poor countries through *ex ante* “conditionalities” that were written into aid agreements.<sup>12</sup> In essence, the poor countries received the development assistance they desperately needed only on the condition that they agreed to adopt what became a standard package of liberal economic, legal, and political reforms that emphasized democratization through elections; balancing budgets; the shrinking of the state; the deregulation and privatization of the economy; and the removal of perceived barriers to free trade.<sup>13</sup> That standard reform package became known as the Washington Consensus, and it dominated international development for most of the 1990s.

### B. *The New Institutionalism*

By the dawn of the new millennium, the Consensus had caused a good deal of suffering and political turmoil in the developing world and had shown little in the way of positive economic results. Explanations varied,<sup>14</sup> but a new consensus began to take shape, this one agreeing that radical liberalization and deregulation were not necessarily the keys to development in the Third World, and that rational, efficient institutions, especially governmental institutions, were in fact vital for maintaining a healthy economy

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<sup>11</sup> See Edmund Amann, *Introduction* to REGULATING DEVELOPMENT: EVIDENCE FROM AFRICA AND LATIN AMERICA 1-2 (Edmund Amann ed., 2006) (describing 1990s development policy as focusing on privatization and market deregulation).

<sup>12</sup> Johnson & Zajonc, *supra* note 7, at 2 (referring to *ex ante* conditionalities).

<sup>13</sup> *Id.*

<sup>14</sup> See, e.g., Hossein Jalilian et al., *Creating the Conditions for International Business Expansion: The Impact of Regulation on Economic Growth in Developing Countries – A Cross-Country Analysis*, in REGULATING DEVELOPMENT: EVIDENCE FROM AFRICA AND LATIN AMERICA, *supra* note 11, at 12 (referring to arguments that privatization failed due to political mismanagement and corruption).

and by extension, a healthy nation.<sup>15</sup> Consequently, the task of guiding poor countries toward more prosperous and stable futures shifted from disassembling their regulatory institutions to improving the quality of those institutions.<sup>16</sup>

This New Institutionalism has deep theoretical roots in the discipline of economics. Explaining the theory in a few paragraphs is a daunting task, particularly for one not inclined toward economics. Once again, therefore, I begin with an apology for an exercise in vast oversimplification.

As is true of many discussions of Western economic theories, this one begins with Adam Smith's *The Wealth of Nations*, which taught that governmental regulation and central planning were not necessary to bring order to economic systems because the "Invisible Hand" of supply and demand and competitive pricing would always accomplish the task more effectively.<sup>17</sup> In the 1960s, renowned economist Ronald Coase generated two important insights that added nuance to Adam Smith's Invisible Hand theory and had a formative influence on today's focus on institution building.<sup>18</sup> Coase argued that Adam Smith's intellectual heirs—with their laser-like focus on pricing as a regulatory mechanism and their unshakeable assumption that the world was inhabited by atomized utility-maximizers—ignored the fact that firms play a vital role in creating economic efficiency.<sup>19</sup> Coase believed there were costs associated with relying on the pricing mechanism.<sup>20</sup> For example, the individual participant in the market had to investigate and negotiate prices, and once those prices were determined, had to enforce them by entering into contracts.<sup>21</sup> When those contracts failed, the individual was forced

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<sup>15</sup> See *id.* at 12-13 (describing the development consensus that institutions matter).

<sup>16</sup> See *id.*

<sup>17</sup> See, e.g., Ronald H. Coase, *The Institutional Structure of Production*, in HANDBOOK OF NEW INSTITUTIONAL ECONOMICS 31, 31-32 (Claude Ménard & Mary M. Shirley eds., 2008). See also ADAM SMITH, *THE WEALTH OF NATIONS* (Penguin Books 1997) (1776).

<sup>18</sup> KOFI OTENG KUFOR, *THE INSTITUTIONAL TRANSFORMATION OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES* 2-3 (2006) (arguing Coase's novel ideas were at the root of New Institutional Economics).

<sup>19</sup> *Id.* at 3.

<sup>20</sup> Coase, *supra* note 17, at 34 (discussing Coase's own initial realization of these costs in 1932).

<sup>21</sup> *Id.*

to seek the intervention of courts and other dispute resolution mechanisms.<sup>22</sup> All of these necessary steps to participation in the market created what Coase termed "transaction costs."<sup>23</sup> In his view, firms naturally form as a means of reducing transaction costs and creating greater efficiency.<sup>24</sup>

Coase also argued that physical things are not traded on the open market; rather, it is the right to perform actions in relation to those physical things that is traded.<sup>25</sup> He believed that the contours of those rights were determined by a given society's legal system and, logically therefore, that a society's legal system had a profound effect on its economy.<sup>26</sup> He asserted that, as a matter of sound economic policy, legal systems should operate in such a way that rights could be assigned to those market actors who would use them most productively and efficiently.<sup>27</sup> Stated otherwise, an economically efficient society's legal system should ensure that the costs of transferring economic rights are low so that they can be expeditiously transferred to their most efficient users. The upshot, according to Coase and his followers, is that laws, particularly those governing the negotiation and enforcement of contracts and the protection of property rights resulting from such contracts, were to be clear, simple and strong.<sup>28</sup>

Building upon Coase's insights about the importance of firms and transaction costs, the work of the American economist, Douglass North, highlighted the vital role that institutions play in efficiently regulating economies. North defined institutions broadly as "humanly devised constraints that structure human interactions,"<sup>29</sup> including both the legal systems that Coase thought were so vital as well as less formal, non-governmental social

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* ("It was the avoidance of the costs of carrying out transactions through the market that could explain the existence of the firm in which the allocation of factors came about as a result of administrative decisions.")

<sup>25</sup> *Id.* at 37.

<sup>26</sup> Coase, *supra* note 17, at 37.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Douglass C. North, *Economic Performance Through Time*, 84 AM. ECON. REV. 359, 360 (1994).



networks and norms.<sup>30</sup> Together, the formal and informal institutions define the “rules of the game” for the economy and the “way the game is played.”<sup>31</sup>

In the oversimplified version of North’s work that often appears in action plans and project reports drafted by international aid organizations, good institutions, most particularly good laws and legal enforcement mechanisms that facilitate contracts and protect property rights, lead to strong economies. Weak institutions, most notably laws, regulatory bodies and law enforcement mechanisms that are confusing, laden with red tape, and corrupt, lead to weak economies. The key to successful economic transformation, and ultimately to socio-economic development, is therefore to replace bad institutions with good ones.

When international aid agencies apply North’s institutional theories, they tend to ignore the fact that his writings consistently emphasize the arduous, incremental nature of institutional change.<sup>32</sup> He writes that individuals and organizations invariably exist within an institutional matrix, the logic of which is determined by the society’s history and the norms that have evolved, and on the experiences and belief systems of the individuals who make up the society.<sup>33</sup> The interwoven nature of the society’s institutional matrix creates a path dependency that largely determines the shape that future institutions will take, from which it is extremely difficult to break free.<sup>34</sup> Most policy interventions aimed at a society’s institutions focus only on a given society’s formal laws and regulations, and are often ineffective due to path dependency and because so many of a given society’s institutions are informal rather than formal.<sup>35</sup>

The focus of Coase, North, and their intellectual descendants on the importance of consistent property rights and the necessity of institutional reform was echoed and amplified by Peruvian

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<sup>30</sup> Douglass C. North, *Institutions and the Performance of Economies Over Time*, in HANDBOOK OF NEW INSTITUTIONAL ECONOMICS, *supra* note 10, at 22.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 24.

<sup>33</sup> *Id.* at 23-24.

<sup>34</sup> *Id.*

<sup>35</sup> See *id.* at 27-28 (expressing disdain for simplistic development nostrums that seek to abruptly change developing countries’ institutional frameworks).

social scientist Hernando de Soto, who, perhaps to an even greater extent than Coase and North, has become the guiding intellectual light of the new wave of institutionalists.<sup>36</sup> According to De Soto, poor countries can rise with the economic tide of globalization and grow their way out of poverty if and only if they reform their regulatory institutions to either eliminate or at least reduce the unnecessary red tape that creates insuperable “barriers to entry” for would-be entrepreneurs.<sup>37</sup> Those entrepreneurs, understandably daunted by unnecessarily complex regulatory and legal requirements, simply avoid the mess (described by Coase and North as “transaction costs”) by conducting their businesses underground in the informal sector.<sup>38</sup> This in turn has a deleterious effect, not only on the entrepreneurs’ prospects for economic growth, but on the country’s overall economy.<sup>39</sup>

Since the entrepreneur chooses to operate in the informal sector, he has no secure rights or title to his own assets and therefore cannot convert those assets into productive capital.<sup>40</sup> He cannot pledge his business or his office building as collateral for a loan in order to expand because, in the eyes of the law and necessarily in the eyes of the institutional lender, his business does not exist.<sup>41</sup> Without a formal legal existence, and in the broader context of an unpredictable and inconsistent institutional framework, intensification of investment by the entrepreneur or any capital investment by outside sources is unacceptably risky.<sup>42</sup> Consistent with the theories of Coase and North, De Soto’s solution to the problem is to establish better institutions, particularly those that rationalize and protect private property, allowing property owners to revive their “dead” capital and

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<sup>36</sup> See generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (Basic Books 2003); see also THE WORLD BANK, *WORLD DEVELOPMENT REPORT 2002: BUILDING INSTITUTIONS FOR MARKETS* 34-38 (2001), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2001/10/05/000094946\\_01092204010636?rendered=PDF/multi0page.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2001/10/05/000094946_01092204010636?rendered=PDF/multi0page.pdf) (citing De Soto regarding the importance of secure property rights and formal land titles).

<sup>37</sup> DE SOTO, *supra* note 36, at 30.

<sup>38</sup> *Id.* at 21.

<sup>39</sup> *Id.* at 21, 28.

<sup>40</sup> *Id.* at 40, 51-54.

<sup>41</sup> *Id.* at 51-54.

<sup>42</sup> *Id.* at 51-54, 56.

generate surplus value from their assets.<sup>43</sup>

### C. Putting Institutional Theory into Practice

Translating these scholars' writings into concrete policy initiatives fell in part to another prominent American economist, Jeffery Sachs, who spearheaded an effort to bring the insights of New Institutionalism, along with the general empirical rigor of economics, to international development work.<sup>44</sup> Sachs took a leading role in orienting both the U.S. government and the United Nations toward what became known as the Millennium Development Goals—specific poverty reduction and development goals that donor countries, along with their partners in the developing world, would commit to achieving. In 2004, the United States created a new agency, the MCC, to tackle its Millennium Development commitments.<sup>45</sup> Because the MCC is the U.S. government's primary organ for carrying out the new institution-focused development policy, we turn our attention there.

The MCC delivers U.S. development assistance to countries that demonstrate that they have good institutions, or are at least on the path toward developing them.<sup>46</sup> In an attempt to avoid past instances where poor countries promised to undertake reforms but then failed to follow through, the MCC has adopted an *ex ante* development strategy; that is, the MCC will not turn over funding until the developing countries have already demonstrated progress in institution-building, and will not continue to invest in countries unless they show ongoing progress.<sup>47</sup>

The MCC's incentive program is based upon a two-tier system of engagement. Developing countries that are heading in the right

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<sup>43</sup> DE SOTO, *supra* note 36, at 54-55; THE WORLD BANK, DOING BUSINESS IN 2005: REMOVING OBSTACLES TO GROWTH 3 (2005), available at <http://rru.worldbank.org/Documents/DoingBusiness/DB-2005-Overview.pdf>.

<sup>44</sup> See generally JEFFREY D. SACHS, THE END OF POVERTY: ECONOMIC POSSIBILITIES FOR OUR TIME (Penguin Press 2005). Sachs advocated "shock therapy," also referred to as "big bang" reform, for developing countries, as opposed to the view of North, who, as noted earlier, characterized institutional change as a slow, iterative process.

<sup>45</sup> Johnson & Zajonc, *supra* note 7, at 1 (referring to the 2004 founding of the MCC as perhaps the most significant shift in U.S. foreign aid policy since President Kennedy created USAID in 1961).

<sup>46</sup> See *id.* at 4 (employing the terminology "sound policy environments").

<sup>47</sup> *Id.* at 5.

direction on institutional and policy reform, but that have not yet achieved sufficient scores on the MCC's quantitative indicators (described below), may be offered comparatively modest, short-term assistance in the form of a so-called Threshold Program.<sup>48</sup> The Threshold countries receive a cash infusion and a period of time to improve their scores and earn full engagement by the MCC. Full engagement comes in the form of an MCC compact, a written agreement in which a package of institutional and policy reforms is proposed by the recipient nation.<sup>49</sup> The reforms can, in theory, provide tens of millions of dollars in development support over a period of several years.<sup>50</sup>

In keeping with the quantitative nature of the MCC's economic philosophy, progress on institution-building is measured empirically rather than by the mere qualitative intuition of policy-makers and aid experts.<sup>51</sup> In the confident and optimistic words of a recent World Bank report, "what gets measured gets done."<sup>52</sup> The MCC has energetically addressed the challenge of finding meaningful quantitative measurements of institutional progress in poor countries by developing seventeen so-called "MCC indicators" that rely on empirical data collected from various existing sources to measure good governance and institutional soundness.<sup>53</sup> The indicators are broken up into three distinct themes or categories: Encouraging Economic Freedom, Ruling Justly, and Investing in People.<sup>54</sup>

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<sup>48</sup> *Id.* at 6.

<sup>49</sup> *Id.* at 5. In theory, the poor countries are supposed to design their own programs. In fact, the process is directed by Americans from the start. The countries use aid money to hire American consultants, who, in close communication with the American Embassy in the country and the USAID or MCC staff, craft the application to meet the expectations of the United States.

<sup>50</sup> *See id.* at 6 (noting that the first two MCC compacts included a combined \$34 million in development assistance).

<sup>51</sup> Johnson & Zajonc, *supra* note 7, at 6.

<sup>52</sup> THE WORLD BANK, *DOING BUSINESS IN 2010: REFORMING THROUGH DIFFICULT TIMES* 3 (2010), <http://www.doingbusiness.org/features/Highlights2010.aspx> (follow "Download the full report" hyperlink).

<sup>53</sup> Millennium Challenge Corporation, *Guide to the MCC Indicators and the Selection Process 2* (2008) [hereinafter MCC Guide to Indicators], 3-4, available at <http://www.mcc.gov/mcc/bm.doc/mcc-2010-guide-to-the-indicators-2.pdf>; *see also* Johnson & Zajonc, *supra* note 7, at 6 (citing sixteen indicators, as compared to the seventeen listed in the MCC Guide to Indicators).

<sup>54</sup> *Id.*

The MCC gathers the empirical data described above, along with quantitative information on thirteen other topics as diverse as immunization rates, girls' primary education, and natural resource management, and as vague as "government effectiveness." Analysts then plug the data into a formula and summarize it on easy-to-read charts. Active and aspiring participants in MCC Threshold Programs and Compacts are supposed to vie with one another in what is essentially a horse race to see which performer makes the most progress on the various indicators. Only the best performers will continue to receive financial support.<sup>55</sup>

As discussed in the introduction to this article, early indications show that the Obama administration will continue to focus on institution building as the fulcrum of its international law and development policy, and that it will continue to measure the health of Third World institutions with reference to the Millennium Challenge goals.

#### *D. Dissenting Voices*

The building of efficacious institutions has become a central tenet of Western—in particular the United States'—aid policy in recent years, but not all commentators accept the notion. Some skeptics point out that although scholars—economists in particular—have carried out many empirical studies over the last decade, there is little evidence that the institutional package promoted by the United States and the Bretton Woods organizations do in fact lead to economic growth.<sup>56</sup> The many empirical studies of this proposition have come to contradictory conclusions. The world around us, with China as the prime example, demonstrates quite dramatically that economic success does not hinge on Western-style institutions that uphold the

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<sup>55</sup> *Id.*

<sup>56</sup> See Johnson & Zajonc, *supra* note 7, at 4; USAID Land and Business Formalization Report, *supra* note 6, at 119-27 Annex 6 (Jan. 2, 2007) (summarizing results of multiple empirical studies, some concluding that improved institutions lead to economic growth, others concluding they do not); see also CURTIS J. MILHAUPT & KATHARINA PISTOR, *LAW AND CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD*, (Univ. of Chicago Press 2008) (concluding that there is no meaningful relationship between economic growth and the purely formal attributes of a country's legal system, regardless of whether its origins are in a civil law or common law system).

sanctity of contract, property rights, and the rule of law.<sup>57</sup>

A second empirical critique does not necessarily dispute that good institutions will lead to economic growth, but questions the more specific claim put forward by Hernando de Soto's work: Bad institutions in the form of red tape, bureaucratic rent-seeking, and costs, create the primary "barriers to entry" that persuade businesses to remain in the informal sector.<sup>58</sup> Studies have found a weak causal connection between bureaucratic red tape and informality, and suggest other reasons for entrepreneurs' decisions to keep their businesses informal.<sup>59</sup>

In addition to these empirical critiques, recent scholarship has challenged the new institutionalist approach to Third World development on more normative grounds, arguing that it oversimplifies complex social and political realities by treating law as if it were a politically neutral technology, a fixed endowment that can be transplanted and left behind in a developing country like a road or a hydroelectric dam.<sup>60</sup> This law-as-technology approach ignores the reality that law is always produced by and embedded within a political economy that has winners and losers.<sup>61</sup> All legal systems must balance conflicting interests, not only at the initial allocation of citizens' rights but whenever such rights conflict with the rights of others.<sup>62</sup> Such reallocation of rights involves value judgments and political bargains that affect the distribution of wealth and the society's conception of what is just.<sup>63</sup> Invariably, institutions—especially legal institutions—introduced as mere technology from the outside

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<sup>57</sup> Johnson & Zajonc, *supra* note 7, at 19. See also MILHAUPT & PISTOR, *supra* note 56, at 209.

<sup>58</sup> See, e.g., Michael A. McPherson & Carl Liedholm, *Determinants of Small Micro Enterprise Registration: Results from Surveys in Niger and Swaziland*, 24 WORLD DEV. 481, 485-86 (1996) (concluding that heavy bureaucratic requirements do not have a significant effect on entrepreneurs' decisions whether or not to register their businesses).

<sup>59</sup> *Id.* at 483-84.

<sup>60</sup> MILHAUPT & PISTOR, *supra* note 56, at 20.

<sup>61</sup> See generally Giorgio Blundo & Jean-Pierre Olivier de Sardan, *Why Should We Study Everyday Corruption and How Should We Go About It?*, in EVERYDAY CORRUPTION AND THE STATE: CITIZENS AND PUBLIC OFFICIALS IN AFRICA 6 (Susan Cox trans., David Philip 2006) (2006) (arguing that the rule of law-as-technology, stripped from political considerations, is ignorant of context in the subject country).

<sup>62</sup> MILHAUPT & PISTOR, *supra* note 56, at 31.

<sup>63</sup> *Id.*

ignore the existing political economy of the subject country and are either rejected by the people or used by elites to solidify their positions, often in ways that are manifestly unjust.<sup>64</sup>

Two theories attempt to explain why law and development experts have put forward this sterilized, essentially technological view of law and law reform. One can be described by the adage that “if you are a hammer, every problem looks like a nail.” That is, if you are an economist, as it seems most development experts these days are, notions such as justice and the distribution of political power are hard to measure, squeeze into regression analyses, and plot on charts. Therefore, you ignore, or at least marginalize, such important considerations.<sup>65</sup> A slightly more cynical version of this explanation points out that the international financial organizations such as the World Bank and the IMF that have taken the lead in implementing the law-as-technology approach are forbidden by their charters from straying into the realm of politics, whereas nothing prevents them from being involved in technology transfer.<sup>66</sup> They therefore adopt, consciously or unconsciously, strained definitions of law that permit them to take what they view as appropriate action.<sup>67</sup>

### III. The Obama Administration and Beyond: The Future of International Law and Development

The remaining question is where international law and development is headed in the near and intermediate future. Will we continue to focus on institution building and scientific measurement of outputs, or will a new paradigm emerge? The quick answer is that I do not know, and that this was the question the symposium hoped to address. This brief conclusion can, however, point to some of the possibilities.

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<sup>64</sup> See UGO MATEI & LAURA NADER, *PLUNDER: WHEN RULE OF LAW IS ILLEGAL* 3, 7 (Wiley-Blackwell 2008) (arguing that current aid policy too often focuses on efficiency and competition to the exclusion of social justice, which tends to favor local elites over the poor).

<sup>65</sup> See *id.* at 49, 94 (stating that economists find ideology intellectually uninteresting and that they consider obsolete any argument that cannot be understood and described in graphs and numbers); see generally NGAIRE WOODS, *THE GLOBALIZERS: THE IMF, THE WORLD BANK AND THEIR BORROWERS* (Cornell Univ. Press 2006) (examining the role of the IMF and the World Bank in international relations).

<sup>66</sup> MILHAUPT & PISTOR, *supra* note 56, at 20-21.

<sup>67</sup> *Id.*

Among academic commentators, there has been a recent chorus of critiques arguing that future international law and development programs should focus more intently on adapting their interventions to the cultures of subject countries.<sup>68</sup> I mention this group first, not because it predominates, but because I count myself as part of it. Those cultural critiques have, in turn, spawned a backlash of literature arguing that the focus on culture is misplaced. Amy Cohen from The Ohio State Moritz College of Law, who participated in the symposium, can be counted among those voices.<sup>69</sup>

Another suggestion for future law and development work is that it be targeted at sub-national actors in developing countries, avoiding as much as possible the top-heavy, unwieldy, and often corrupt aid infrastructure that inevitably develops when law and development (and indeed, all development) programs are carried on from government to government. Such is the view espoused by the American economist William Easterly, whose curmudgeonly skeptical books and articles have gained broad readership in recent years.<sup>70</sup> This preference for smaller-scale interventions with sub-national actors such as local governments was echoed by Ronald Johnson and Dan Goetz, law and development practitioners from RTI International who participated in the symposium.<sup>71</sup>

Two other symposium participants, in contrast, focused on the future importance of supra-national law and development

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<sup>68</sup> See generally Thomas Kelley, *Unintended Consequences of Legal Westernization in Niger: Harming Contemporary Slaves by Reconceptualizing Property*, 56 AM. J. COMP. LAW 999 (2008) (describing the unintended negative consequences that result when law reform fails to account for local culture in developing countries); Stephen Golub, *Beyond Rule of Law Orthodoxy, The Legal Empowerment Alternative* 25 (Carnegie Endowment for Int'l Peace, Working Paper No. 41, 2003) (criticizing recent law and development efforts for failing to understand on the ground conditions in subject countries); JAMES A. GARNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* 8-9 (Univ. of Wisconsin Press 1981) (emphasizing the importance of culture in establishing legal frameworks in subject countries).

<sup>69</sup> See generally Amy Cohen, *Thinking with Culture in Law and Development*, 57 BUFF. L. REV. 511 (2009).

<sup>70</sup> See, e.g., WILLIAM EASTERLY, *THE WHITE MAN'S BURDEN: WHY THE WEST'S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD* (Penguin Books 2006) (calling for fundamental change in the West's approach to aid, including vast reduction in wasteful, large-scale aid programs).

<sup>71</sup> See generally RTI International; *Governance and Economic Growth*, [http://www.rti.org/page.cfm/International\\_Development](http://www.rti.org/page.cfm/International_Development) (last visited Mar. 30, 2010).



institutions. Claire Dickerson from the Tulane University School of Law, the symposium's keynote speaker, described the benefits of regional business codes, such as Organisation Pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) in West Africa, that have the potential to spur economic development by providing a consistent legal infrastructure while limiting the role for involvement by sticky (that is, inefficient and/or corrupt) state-level institutions.<sup>72</sup> Somewhat similarly, James Gathii from Albany Law School addressed the symposium on the utility of regional free trade agreements in Africa.<sup>73</sup> In combination, the calls for a focus on sub-national institutions and the separate calls for focus on supra-national institutions lead one to wonder whether a possible path for the future of law in the developing world is to create legal interventions that avoid states as much as possible, and instead target the interventions at both sub- and supra-national institutions.

The exercise in speculation regarding the future of law and development would not be complete without at least mentioning the increasingly popular view that the United States, other western powers, and the financial institutions they dominate ought to abandon altogether their efforts to spur development in poor countries through economic and legal reform. According to this view, their interventions consistently go awry, result in little if any good, and tend to cause suffocating dependence and corruption rather than economic growth. Among such aid pessimists, Dambisa Moyo's voice is the most ubiquitous if not the most eminent.<sup>74</sup>

The 2010 symposium did not resolve the question of what comes next in the realm of international law and development.

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<sup>72</sup> See, e.g., Claire Dickerson, *The Cameroonian Experience under OHADA: Business Organizations in a Developing Economy*, 112 BUS. & SOC. REV. 191 (2007). See also Claire Dickerson, *The Future of International Law and Development: Flying Under the Radar*, 35 N.C. J. INT'L L. & COM. REG. 555 (2010).

<sup>73</sup> See generally James Gathii, *The High Stakes of WTO Reform*, 104 MICH. L. REV. 1361 (2006) (discussing the importance of multilateral trade agreements for developing countries). See also James Gathii, *African Regional Trade Agreements as Flexible Legal Regimes*, 35 N.C. J. INT'L L. & COM. REG. 571 (2010).

<sup>74</sup> See generally DAMBISA MOYO, *DEAD AID: WHY AID IS NOT WORKING AND HOW THERE IS A BETTER WAY FORWARD FOR AFRICA* (Farrar, Straus & Giroux 2009) (discussing how the flow of aid to Africa has created an aid-dependency that has stunted economic and political growth).

Those who participated, however, hope that the discussion might in a small way help chart a course for the future.