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The Geography of Law: Why Law and Development has Failed and What to Do About It

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ABSTRACT

This paper uses insights from economic geography to argue that the reason why law and development has been largely ineffective is because (1) it is asking law to do something that law cannot; and (2) its principal regulatory templates – such as ‘rule of law’ – are ill-suited for the regulatory environments in which they are being used. With regards to the first claim, law and development most commonly looks to use law to promote economic growth. The dynamics of economic geography, on the other hand, argue that promoting economic growth is likely to be outside the reach of law. Such dynamics also render lessor-developed socio-economic environments less responsive to ‘rule of law’ and other regulatory templates commonly emphasized by law and development. Law and development therefore needs to change its focus: (1) from focusing on economic development to focusing on other conceptions of development; (2) from focusing on big issues to focusing on issues of everyday life.

Keywords: Law and Development, Law and Economics, Economic Geography, Regulatory Geography, Rule of law

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I. INTRODUCTION

To date, the scholarly consensus seems to be that ‘law and development’ project has met with little actual success.¹ Surprisingly, however, the project continues much as it did before² — this lack of success often being attributed to the moral failings of political elites.³ Obviously, such an explanation is comforting for those involved in the law and development project. But there is little empirical support for it. The fact seems to be that the economic and political elite of developing countries — the ‘bad guys’ insofar as much developmental narratives are concerned — are often the ones who benefit most from development.⁴

Unfortunately, this leaves the law and development community with some uncomfortable implications. If the problems of law and development do not lie in some character flaw in the beneficiaries, they would seem to lie in the law and development project itself. This is the argument that this paper advances. More specifically, I argue that the problems with law and development are two-fold. First, it asks ‘law’ to do something of which law is generally incapable — namely, to promote *economic* development. Second, it focuses on building legal institutions that are largely unsuited for the developing environment.

The reason why law is unable to do these things has to do with geography — specifically transnational economic geography. Law and development has no sense of space. In the main, it presumes that what is possible in one space is possible in all spaces; and that therefore, legal structures that bring a particular kind of benefit in one space should be able to do so in other spaces. As we shall see, our understandings of economic geography argues that this is not the case. Different countries will have different kinds of *innate* economic and regulatory capacities depending on their location in regional economic space.⁵ This location imposes

¹ See Brian Z. Tamanaha, “The Primacy of Society and the Failures of Law and Development” (2011) 44 Cornell Int’l LJ 209 at 216-219 [Tamanaha].

² See *ibid.* at 235-239.

³ See, e.g., Daron Acemoglu and James Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (New York: Crown Publishers, 2012).

⁴ See Jeffrey D. Sachs, “Government, Geography, and Growth: The True Drivers of Economic Development,” (2012) 91(6) *Foreign Affairs* 142.

⁵ See TAN *infra*.

caps capacity for economic development that operate independent of a country's domestic legal system.⁶ This being the case, there is little that law and development can do to raise national economic wealth. At the same time, this location imposes certain distinctive conditions on the local socio-economic environment – greater environmental volatility and fragmentation, lesser capacity to support and maintain complex organizations – that render ineffective many of the standard institutional foci of law and development, such as rule of law, the 'regulatory state, and transparency.'⁷ This is way law and development has not been successful, not because of some greater propensity for moral failings found in the lesser-developed 'other'.

This is not to argue that law and development is a futile pursuit. What it does mean, however, is that it needs to radically rethink and rescale its purpose and its technologies – focusing on improving the law of the everyday, rather than on triggering socio-political-economic transformation.⁸

Making this demonstration requires first, a discussion of what it is that law and development is most commonly thought to be trying to promote – i.e., what is 'development' insofar as law and development is concerned. This is the focus of Part II. We shall see that law and development generally devotes itself to pursuing economic growth and development, but there are other ways of thinking about the goals of law and development as well, what we will call thick conceptions of development. Part III then introduces us to the principles and dynamics of transnational economic geography, showing how these principles effectively cap capacity for economic growth and development independent of legal arrangements. As we shall see in Part IV, this places the thin concept of development outside the reach of legal engineering. In Part V, we explore geography's implications for more thick understandings of development. Here, we will see how economic geography also shape peripheral socio-economic environments in such a way as to render many of the principal institutional foci of law and development impotent if not dysfunctional for promoting social or

⁶ See TAN *infra*.

⁷ See TAN *infra*.

⁸ See TAN *infra*.

political change. Instead, law and development needs to focus on different kinds of legal institutions. We conclude by exploring what this means for the future of law and development, and in particular how it (unfortunately) may require law and development to significantly lower its ambitions.

II. WHAT IS 'DEVELOPMENT' IN THE CONTEXT OF LAW AND DEVELOPMENT?

A claim that law and development has been largely ineffective in promoting “development” requires us first to identify what ‘development’ means in the context of ‘law and development’. Development is strongly associated with measures of material production, most commonly Gross Domestic Product (‘GDP’) or, more recently, Gross National index (‘GNI’).⁹ Since both GDP and GNI express this production in terms of dollars, we can say that development is strongly associated with an increase in a nation’s capacity to produce wealth.¹⁰

But by itself, this is incomplete. It is commonly held that since around 1990, Brazil has stopped developing – i.e., that it is ‘falling behind’ in terms of development¹¹ or caught in a ‘middle income trap’.¹² In fact, Brazil’s actual per capita production grew 132% during that period, from an economy producing 6,849 Current International Dollars per person (ppp) in 1990 to one producing 15,065 per person (ppp) in 2011. The claim that it has become trapped derives from the observation that despite its material growth in absolute terms, its level of development relative to the rest of the w¹³orld has remained about the same:

⁹ The HDI used Gross National Income (GNI) rather than GDP to measure wealth. “GNI is the sum of value added by all resident producers plus any product taxes (fewer subsidies) not included in the valuation of output plus net receipts of primary income (compensation of employees and property income) from abroad.” World Bank, <http://data.worldbank.org/indicator/NY.GNP.PCAP.PP.CD>, accessed Sept. 23, 2014.

¹⁰ See also Diane Coyle, *GDP: A Brief but Affectionate History* (Princeton: Princeton University Press, 2014), 71-75.

¹¹ André Nassif, Carmem Feijó and Eliane Araújo, “Structural Change and Economic Development: Is Brazil Catching up or Falling Behind?” (2013) UNCTAD Discussion Paper, no. 211.

¹² Homi Kharas and Harinder Kohli, “What is the Middle Income Trap? Why do Countries Fall into It, and How Can it be Avoided?” (2011) *Global Journal of Emerging Market Economies* 281, at 282.

¹³ Cf. Agnus Deaton, *The Great Escape: Health, Wealth, and the Origins of Inequality* (Princeton: Princeton University Press, 2013) (outlining how human welfare, especially longevity and prosperity, has risen considerably over time even in poorer countries).

in 1990, Brazil produced 3.741 percent of the world's total productive output; in 2011 it produced 3.178 percent.¹⁴ This argues that development does not refer simply to absolute increases in wealth production. Rather, it refers to increases *relative* to those of archetypically more 'developed' nations. Thus, 'development' in the context of law and development seems generally to refer to a dynamic in which a country's or territory's capacity to produce wealth converges with that of countries that are regarded as developed.¹⁵

We will refer to this as the 'thin' conception of development.¹⁶ More recently, however, scholars have expressed dissatisfaction with this conceptualization, and have sought to define development more in terms of quality of life, including political as well as social life, than simply in terms of economic growth.¹⁷ Perhaps the most influential of these has been Amartya Sen, who has famously argued that at the end of the day, 'development' needs to be equated with an increase in personal 'freedom' and not simply with an increase in national GDP or GNI.¹⁸ Along these lines, the UNDP has developed an alternative measure of development, the Human Development Index (HDI), which incorporates into its definition of development quality of life conditions – such as access to health-care, educational opportunity, the availability of social welfare protections – in addition to per capita wealth generation.¹⁹

Following the grammar developed for rule of law, we might refer to the HDI and other 'quality of life' measures of development as 'thick' as opposed to 'thin' conceptions of development.²⁰ Thick conceptions of development are related to thin conceptions of development, in that higher levels of wealth seem

¹⁴ Data taken from the International Monetary Fund's World Economic Outlook Database, available at <https://www.imf.org/external/pubs/ft/weo/2015/01/weodata/index.aspx>

¹⁵ This is also evinced by the World Bank's practice of classifying levels of 'development' according to 'high income', 'upper-middle income', 'lower-middle income', and 'low income'. See World Bank, Data: Country and Lending Groups, <http://data.worldbank.org/about/country-and-lending-groups>.

¹⁶ Cf. Tamanaha, *supra* note XX, at 225-232.

¹⁷ See generally Michael J. Trebilcock and Mariana Mota Prado, *What Makes Poor Countries Poor? Institutional Determinants of Development* (Cheltenham: Edward Elgar, 2011), 2-7 [Trebilcock and Prado]

¹⁸ See, e.g., Amartya Sen, *Freedom as Development* (Oxford: Oxford University Press, 1999) [Sen]. See especially ch. 2.

¹⁹ Trebilcock and Prado, *supra* note XX, at 2-3.

²⁰ See generally Trebilcock and Prado, *supra* note XX, at 2-4. See also Randall P. Peerenboom, *China's Long March Toward Rule of Law* (Cambridge: Cambridge University Press, 2002), 65-71.

clearly related to higher qualities of life.²¹ Like thin conceptions of development, thick conceptions also conceptualized ‘development’ as a process of convergence with standards set by the developed world, and not simply in absolute terms.

III. THE SPATIAL PREDICATES OF DEVELOPMENT

How can law be structured to promote ‘development’ as we have defined it above? As noted, relative national capacity to generate and promote wealth has not responded positively²² to strategic efforts to shape or reshape legal institutions.²³ The reasons most commonly given as to why this is the case claims that local elite in developing countries so dilute if not corrupt the normative institutional prescriptions of the law and development project as to render them developmentally impotent. Whether or not this actually is the case is an open question,²⁴ but in any event this explanation begs the question as to whether these prescriptions would promote development even in the absence of local elite obstruction.

Here, it will be advanced that they would not: for most of the countries of the developing world (and the developed world, for that matter), and regardless of the moral disposition of its local elites, the dynamics shaping national ‘development’ – more specifically, those shaping a country’s relative capacity to produce and retain wealth – which as we saw is critical to ‘development’ in both its thin and thick conceptualizations – lie outside the reach of that country’s domestic legal institutions. The reason for this is simple: law and development seeks to promote development by strategic reform of *domestic* legal institutions. But as we shall see in this section, a country’s relative capacity for producing and

²¹ See, e.g., Sen., *supra* note XX, at ch. 4 and 5.

²² It has occasionally responded negatively, as will be discussed below. See *infra* notes XX.

²³ See Adam Przeworski, “The Last Instance: Are Institutions the Primary Cause of Economic Development,” (2004) 45 *European J Sociology* 165; Thomas Carothers, “Promoting the Rule of Law Abroad: The Problem of Knowledge,” Carnegie Endowment for International Peace Rule of Law Series no. 34 (Washington, DC: Carnegie Endowment for International Peace 2003); Roberto Rigobon and Dani Rodrik, “Rule of Law, Democracy, Openness, and Income: Estimating the Interrelationships,” (2005) 13 *Economics of Transition* 533–564, at 533-534.

²⁴ See Jakob Svensson, “Eight Questions about Corruption,” (2005) 19 *J Econ Perspectives* 19, at 38-39 [Svensson]. To be sure, there are innumerable studies finding a correlation between levels of corruption and levels of development. See *ibid* at 38.

retaining wealth is in fact capped by *transnational* dynamics that lie outside the reach of the domestic legal system — dynamics that lie in that country's particular location in transnational economic space.²⁵

A. The Core-Periphery Ordering

The general inability of domestic legal institutions to promote increases in relative capacity to produce and retain wealth – i.e., thin development – is most compellingly evinced in the global presence and persistence of a particular, transnational spatial pattern of development known as the 'core-periphery model'²⁶ – what this essay will refer to as a 'core-periphery ordering'. A core-periphery ordering describes a commonly observed geographical pattern of development in which countries or more local regions with the highest levels of development are concentrated in a relatively small geographical region known as 'the core'. This core is then encircled by a geographical 'ring' of lesser but still somewhat pronounced development, sometimes referred to as the 'intermediary zone', which is itself surrounded by a much larger zone of relative underdevelopment, generally termed 'the periphery'.²⁷

In the context of the transnational regional economy that encompasses East and Southeast Asia, for example, the core of that economy centers on Japan, and includes South Korea and Taiwan. The intermediate zone comprises the Eastern and Southeastern regions of mainland China. Beyond the intermediate zone, as

²⁵ See also Maarten Bosker and Harry Garretsen, "Economic Development and the Geography of Institutions," (2009) 9 J Econ Geo 295.

²⁶ See Masahisa Fujita, Paul Krugman and Anthony J. Venables, *The Spatial Economy: Cities, Regions, and International Trade* (Cambridge [USA]: MIT Press, 1999), ch. 5 [Fujita et al.]; Fernand Braudel, *Civilization and Capitalism, 15th-18th Century*. Vol 3, *The Perspective of the World* (Siân Reynolds, trans., Berkeley: The University of California Press, 1992), 21-70 [Braudel].

²⁷ See Stephen Redding and Peter K. Schott, "Distance, Skill Deepening and Development: Will Peripheral Countries ever get Rich?" *Journal of Development Economics*, 72 (2003): 515–541; Stephen Redding and Anthony J. Venables, "Economic Geography and International Inequality," *Journal of International Economics*, 62 (2004): 53-82; Nicholas Crafts and Anthony Venables, "Globalization in History: A Geographical Perspective," in Michael D. Bordo, Alan M. Taylor and Jeffrey G. Williamson, eds., *Globalization in Historical Perspective* (Chicago: University of Chicago Press, 2003), 323-369. See also Maarten Bosker and Harry Garretsen, "Geography Rules Too! Economic Development and the Geography of Institutions." Cesifo Working Paper No. 1769 (July 2006). Cf. Herman M. Schwartz, *States Versus Markets: History, Geography, and the Development of the International Political Economy* (St. Martin's Press, 1994), pp. 240-258. See also Herman Schwartz, "Dependency or Institutions? Economic Geography, Casual Mechanisms, and Logic in the Understanding of Development" (2007) 42 Stud. Comp.Int'l Dev. 115.

one goes farther south and farther west, one encounters geographies of increasingly less levels of development, i.e., the periphery. This includes the Philippines, Indonesia, Western China, and that vast peripheral area in the Southeast Asian highlands (including parts of Burma, Thailand, Laos, Cambodia, Malaysia and Vietnam) that James Scott has famously named “Zomia”.²⁸

Core-periphery orderings are not simply transnational phenomenon. They manifest in many different scales, including subnational and even locale. They are in this sense nested. Larger countries, such as the United States or China, or even not so large countries such as the UK, will evince their own internal regional core-periphery ordering.²⁹ And these smaller, regional core-periphery orderings will themselves evince even smaller, local core-periphery orderings centered on larger city and consisting of that city and its surrounding countryside.³⁰

Along these lines, different core-peripheral orders will evince different overall levels of development and different internal developmental gradients. Both the core and peripheral regions that comprise the core-peripheral ordering surrounding New York City are more ‘developed’ than the core and periphery regions that surround Kansas City. And while the core of the New York City ordering evinces the same level of development as the core of the American national ordering (because New York City itself is part of the national core), the

²⁸ See Michael W. Dowdle, “On the Public-law Character of Competition Law: A Lesson of Asian Capitalism” (2015) 38 *Fordham Int’l LJ* 1, at 332 [Dowdle, Competition Law]; Andrew Walter and Xiaoke Zhang, “Debating East Asian Capitalism: Issues and Themes,” in Andrew Walter & Xiaoke Zhang, eds., *East Asian Capitalism: Diversity, Continuity, and Change* 3 (Oxford: Oxford University Press, 2013), 3. Cf. Gilbert Rozman, “East Asian Regionalism,” in Mark Beeson & Richard Stubbs, eds., *Routledge Handbook of Asian Regionalism* (London: Routledge, 2012), 22. On ‘Zomia’, See James C. Scott, *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia* (New Haven: Yale University Press, 2010).

For an analysis of the core-periphery ordering of regional Europe, see Rainer Kattel, “Economic Consequences of Location: European Integration and Crisis Recovery Reconsidered,” (2015) 72 *Real-World Econ. Rev.* 135.

²⁹ Keith Robbins, “Core and Periphery in Modern British History” (1984) 70 *Proceedings of the British Academy* 27; Paul Krugman, “The New Economic Geography, Now Middle-aged” (2011) 45 *Regional Studies* 1, at.6 (discussing core-periphery ordering within China).

³⁰ See, e.g., David W. Hughes and David W. Holland, “Core-Periphery Economic Linkage: A Measure of Spread and Possible Backwash Effects for the Washington Economy” (1994) 70 *Land Economics* 364; Luiz Cesar de Queiroz Ribeiro and Edward E. Telles, “Rio de Janeiro: Emerging Dualization in a Historically Unequal City,” in Peter Marcuse and Ronald van Kempen, eds., *Globalizing Cities: A New Spatial Order?* (Malden [USA]: Blackwell, 2000), 78, at 82-85; Cf. Johann Heinrich von Thünen, *Der Isolierte Staat [Von Thünen’s Isolated State]* (Peter Hall ed., Carla M. Watenberg trans., Oxford: Pergamon Press, 1966) [1826] [Thünen].

periphery that surrounds the New York City ordering is more developed than the ‘periphery’ of the American national economy taken as a whole.

We might also note that the core-periphery ordering is not in fact as segmented as our vocabulary might suggest. There are no stark boundaries delineating core and distinguishing core from intermediate from the periphery. It actually makes more sense to talk about a particular locale and being ‘more core’ or ‘more peripheral’ within some particular ordering, rather than to speak in sharp dichotomies of the core, the intermediate zone, and the periphery.

At least at the transnational level, core-periphery orderings are also remarkably stable and persistent.³¹ Cores can shift, but they do so only very rarely.³² Fernand Braudel calculated that in the context of the North Atlantic regional economy (that comprising central and western Europe, and North America), that since the 12th century, when a regional core-peripheral structuring of post-Roman Europe first became apparent, cores have persisted as cores for an average of 150 to 250 years.³³ Another study suggests that no new transnational-regional cores have emerged anywhere in the world since the end of the 19th century,³⁴ although the *relative balance* among different transnational regions has changed, particular as the development of the Asian regional economy taken as a whole has increasingly converged with that of the North Atlantic regional economy.³⁵

Both the pervasiveness and strong persistence of the core-periphery ordering argues strongly that it operates outside the reach of human institutions.

³¹ See generally *Monitoring the World Economy: 1820–1992* by Angus Maddison. Paris: OECD, 1995, ch. 1. See also Giovanni Arrighi, Beverly J. Silver, and Benjamin D. Brewer, “Industrial Convergence, Globalization, and the Persistence of the North-South Divide,” *Studies in Comparative International Development*, 38 (2003): 3-31. Note that while there is widespread recognition of the fact of this persistence, there is much disagreement as to why some regions initially develop whereas most did not in the first place. See, e.g., *ibid.* at 8.

Corresponding to this observation, institutions also seem to be highly persistent. See William Easterly, “National Policies and Economic Growth: A Reappraisal,” in Philippe Aghion and Steven N. Durlauf, eds., *Handbook of Economic Growth*, vol. 1A (Amsterdam: Elsevier, 2005), 1015-1059. See also Daron Acemoglu, Simon Johnson and James A. Robinson, “Colonial Origins of Comparative Development: An Empirical Investigation,” *American Economic Review*, 102 (2001): 3059 [Acemoglu et al.]; Douglass C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990), at 6.

³² See also TAN

³³ Braudel, *supra* note [xx], at 77-78.

³⁴ See Maddison, *supra* note XX, ch. 1.

³⁵ See Anthony J. Venables, “Shifts in Economic Geography and their Causes,” The LSE Centre for Economic Performance, CEP Discussion Paper No. 767 (2006), at 1 [Venables, Shifts].

As we saw, they are found both transnationally, and within domestic legal orders; they are found in Asia, Africa and Latin America as well as in Europe and North America.³⁶ They were present during the fourteenth century as well as during the twenty-first.³⁷ Sometimes they have centered around civilian legal systems, with the common law at its periphery;³⁸ sometimes around common law legal systems, with the civil law at its periphery.³⁹ In sum, they have and do manifest under just about every large-scale domestic and transnational institutional arrangement our social engineers have been able to implement, and thus would strongly appear to operate outside the reach of either domestic or transnational legal design.

B. The Trans-Legal Dynamics Underlying Core-Periphery Order

1. Prelude: Core-periphery ordering vs. 'dependency theory' (*dependêncistas*)

Claims about the presence and persistence of the core-periphery ordering are sometimes conflated with 'dependency theory'.⁴⁰ Dependency theory, which is associated particularly with Latin American during the 1970s, is a developmental theory that emerged in the 1950s and became the basis for a particular policy prescription known as 'import substitution industrialization'.⁴¹ Dependency theory has both descriptive and prescriptive components. Descriptively, it recognizes the presence of a global core-periphery ordering, and attributes that ordering to the institutional structuring of international trade.⁴² Prescriptively, it argues that a peripheral country can therefore promote development by isolating itself, or certain industrial sectors, from the international trade regime, and allowing these sectors to develop simply by force of *internal* consumer demand

³⁶ See TAN. See also Braudel, *supra* note XX, at Part 5.

³⁷ See generally Braudel, *supra* note XX.

³⁸ See, for example, present-day Europe

³⁹ See, for example, the present-day Americas.

⁴⁰ See, e.g., Alice Amsden, "Good-bye Dependency Theory, Hello Dependency Theory," (2003) 38 *Stud Comp Int'l Dev* 32.

⁴¹ See generally Grosfoguel, Ramon. "Developmentalism, modernity, and dependency theory in Latin America." *Nepantla: Views from South* 1.2 (2000): 347-374.

⁴² In this, it also shares some affinity with today's world-systems theory. Compare Wallerstein, Immanuel. 1974. *The modern World System I: Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century*. New York: Academic Press; see also Petras, James. "Dependency and world system theory: a critique and new directions." *Latin American Perspectives* (1981): 148-155..

(aka via 'import substitution').⁴³ Dependency theory became discredited, particularly among North Atlantic economic developmentalists, in the aftermath the Latin American debt crisis of the early 1980s.⁴⁴

But the simple fact that a theory or hypothesis shares with dependency theory a recognition of transnational core-periphery ordering does not make them one and the same. Geographical economists for example, such as Paul Krugman and Anthony Venables,⁴⁵ have also identified and explained the persistence of a transnational core-periphery ordering, but have been done so without any reference to the institutional structure of transnational trade. Instead, working off of an geographical-economic model first identified by the German agrarian economist Johann Heinrich von Thünen in the early 19th century,⁴⁶ and extended to include the realm of international trade by Fernand Braudel in the 1970s,⁴⁷ they show how a transnational core-periphery ordering can arise spontaneously simply from the effects of a positive correlation between higher transportation costs and greater physical distances between place of production and place of consumption.⁴⁸ Under this model, the terms of international trade are not a necessary component of this ordering. And relatedly, this particular model also does not support import substitution strategies for development.⁴⁹

It is this model, rather than that of dependency theory, that primarily informs this article's analysis. And it is to exploring the particular trans-legal dynamics that this model identifies as both causing and resulting from the core-periphery ordering that our attentions now turn.

⁴³ Bruton, Henry. "Import substitution." *Handbook of development economics* 2 (1989): 1601-1644.

⁴⁴ Matias Vernengo (2004). "Technology, Finance and Dependency: Latin American Radical Political Economy in Retospect" (PDF). p. 5. Archived from the original (PDF) on March 17, 2012. Working Paper No. 2004-06, University of Utah Dept. of Economics.

⁴⁵ See, e.g., Fujita et al., *supra* note XX; Paul R. Krugman and Anthony J. Venables, "Globalization and the Inequality of Nations," (1995) 110. *Q J Econ* 857.

⁴⁶ See, e.g., Thünen, *supra* note XX.

⁴⁷ See generally Braudel, *supra* note XX.

⁴⁸ See also Schwartz, *supra* note XX.

⁴⁹ Diego Puga and Anthony J. Venables, "Agglomeration and Economic Development: Import Substitution vs. Trade Liberalisation," (1999) 109 *Econ J* 292-311 [Puga and Venables].

2. Organizing the periphery transportation costs

According to the Venable-Krugman model, the periphery evolves in response to the presence of core. Below, we shall examine what makes a core a core and what gives it its pronounced persistence. Here, we will examine how particular trans-legal dynamics – primarily transportation costs – cause core-periphery orderings to arise in the first place. Although our ultimate focus is on transnational core-periphery orderings, we will first explore this dynamic through the lens of very local core-periphery orderings, those that center on a city. Later, we will then examine how these local core-periphery dynamics get translated into the transnational sphere.

Humans are social creatures. Such a tendency results in cities. Because of its concentrated population, a city represents a concentrated site of consumption. The areas that surround the city are used to feed this consumption. But feeding this consumption means that the place of consumption is different from the place of production. The need to transporting product from place of production to place of consumption gives rise to transportation costs. As shown by Fujita, Krugman and Venables, such transportation costs alone are sufficient to generate the geographical-economic gradient characteristic of the core-periphery order.⁵⁰

Transportation costs correlate roughly with distance. Everything else being equal, the further a product has to travel to get to market, the greater the cost of transporting that product to market. For this reason, everything else being equal, firms (and people) will prefer to be located closer to rather than farther from the places where their products are consumed. Translated into the context of the city, this means that regions that are closer to a city will command higher land prices than regions farther out. Higher land prices result in higher costs of living, which cause workers to receive higher wages (since workers need to live near the place of production). Conversely, land and labor costs are inherently less

⁵⁰ See Fujita et al., *supra* note XX. See also Krugman and Venables, *supra* note XX. For a general overview of his work on the economics of transportation costs, see Paul Krugman, “Where in the World is the ‘New Economic Geography’?” in Gordon L. Clark, Meric S. Gertler and Maryann P. Feldman, eds., *The Oxford Handbook of Economic Geography* (Oxford: Oxford University Press, 2003), 49-60.

in more peripheral geographies.⁵¹ And at the same time, different kinds of goods have different transportation costs. Some goods are simply easier and less expensive to transport than others: for example, goods that are less subject to spoilage; or that are easier to pack; are that are less fragile.⁵²

From this, we can identify one of the principles that underlie the core-periphery ordering: more peripheral geographies enjoy comparative advantage vis-à-vis more core locales in the production of goods (1) whose production is relatively land or labor intensive and (2) which have relatively low or inelastic transportation costs.⁵³

In other words, transportation costs introduce a kind of asymmetry into economic space. It is out of this economic asymmetry in transportation costs that the developmental asymmetry that is the core-periphery ordering arises. But this is not the only asymmetry that underlies this ordering. Another is that of labor quality. Everything else being equal, people prefer to live in or near cities, if for no other reason than simply because, as centers of consumption, cities generally give the consumer access to a greater variety of goods and opportunities.⁵⁴ This gives more core geographies comparative advantage in attracting labor, including most particularly labor whose job skills that are in relatively high demand.⁵⁵ This generally involves labor whose skills that are knowledge intensive – skills the performance of which requires high levels of education, training and / or experience.

Such skills are associated with what is called ‘high-quality’ labor, and this leads to a second principle underlying the core-periphery ordering: whereas more peripheral locales enjoy comparative advantage in industries that are land or labor

⁵¹ For a good and accessible overview, see Schwartz, *supra* note XX, at 123-128.

⁵² Venables, *Shifts*, *supra* note XX, at 3 (noting that “an 8000km distance chokes off over 90% of the trade that would be observed over a 1000km distance.”).

⁵³ See also Joseph Bowring, *Competition in a Dual Economy* (Princeton Univ. Press, 1986) [Bowring].

⁵⁴ See also Braudel, *supra* note XX, at 39-40.

⁵⁵ See, e.g., Gordon L. Clark and John E. M. Whiteman, “Why Poor People Do Not Move: Job Search Behavior and Disequilibrium Amongst Local Labour Markets,” (1983) 15 *Environment and Planning A* 85.

intensive, more core locales enjoy absolute advantage in industries that require or benefit from high-quality labor.⁵⁶

A third important asymmetry involves forms of market competition. Goods compete for consumers. But they can compete along a variety of dimensions. The paradigmatic form of market competition is ‘price competition’, in which market success depends primarily on being able to offer one’s goods at prices that are less than those of competing goods.⁵⁷ Another form of competition is ‘product competition’, in which market success depends on being able to produce goods whose particular design features customers find more appealing than those of competing goods independent (or at least somewhat independent) of price.⁵⁸ Success in product-competitive markets depends on the quality of one’s labor force.⁵⁹

This gives rise to a third principle underlying the core-periphery order: more core locales enjoy absolute advantage vis-à-vis more peripheral locales in industries that are more product competitive. On the other hand, we also noted above that more peripheral geographies feature lower land cost and labor costs. Land and labor costs are the principal factors affecting cost of production, which in turn is the principal factor affecting price in price-competitive markets. From this derives a corollary to the above third principle: firms located in more peripheral environs enjoy absolute advantage in industries that are primarily price competitive.⁶⁰

Different forms of market competition result in different distributions of surplus value – a fourth asymmetry. Surplus value is the value that is created by the act of production – i.e., the difference between the market value of the sum

⁵⁶ See also Bowring, *supra* note XX. Cf. Gregory Clark, *A Farewell to Alms: A Brief Economic History of the World* (Princeton: Princeton University Press, 2009), XX (identifying labor quality as the major enticement for capital flows that lead to economic prosperity).

⁵⁷ See George J. Stigler, “Price and Non-Price Competition,” (1968) 76 *J Pol Econ* 149.

⁵⁸ Robin Roy & Johann C.k.h. Riedel, “Design and Innovation in Successful Product Competition,” (1997) 17 *Technovation* 537. The germinal explication of product competition, what is also called “product differentiation” is found in Edward Hastings Chamberlin, *The Theory of Monopolistic Competition: A Re-Oriented of the Theory of Value* (Harvard University Press, 8th ed., 1965 [1933]) [Chamberlin]. See generally R. Rothschild, “The Theory of Monopolistic Competition: E.H. Chamberlin’s Influence on Industrial Organisation Theory over Sixty Years,” (1987) 14 *J. Econ. Studies* 34 (1987).

⁵⁹ Maryann P. Feldman, *The Geography of Innovation* (Boston: Kluwer Academic, 1994), 18-21.

⁶⁰ See Charlie Karlsson and Jan Larsson, “Product and Price Competition in a Regional Context,” (1990) 69 *Papers in Regional Science* 83; Bowring, *supra* note XX.

of individual inputs that go into production (price of production) and the utility value the finished product brings to the consumer (a consumer will only purchase a good if she believes that good brings her more value than its market price). Price competition pushes the price of the good down to the price of production. This causes the surplus value produced by production to be distributed to the consumer. Since success in product competition is less sensitive to price, it allows the producer – should it wish – to retain a greater share of the surplus value (called ‘consumer surplus’).⁶¹

Herein lies a fourth principle underlying the core-periphery ordering: because more firms in more core locales are likely to be engaged in product competition, core firms collectively are able to retain more of the surplus value they generate from production than a collection of firms operating in more peripheral locales.

The phrasing of this fourth principle can be somewhat misleading. Here, I am using the idea of the ‘firm’ to include its workers, and not simply its capital structure. Seen in this light, retaining surplus value does not necessarily result in higher returns on investment. In the case of firms engaged in product competition, their retained surplus value generally goes – not to the investor – but to the ‘high-quality’ end of its workforce. Recall that success in product competitive markets depends on the firm’s access to high quality labor, but that high quality labor is in relatively short supply. Firms engaged in product competition must therefore also compete for high quality labor in order to survive in the market. This they do by using their retained surplus value to offer such labor higher wages and benefits.⁶²

Labor and land are factor endowments – in the sense that their quality and value is symbiotically tied to the space in which they located. Because labor must live near where it works, this causes the higher wages given to workers living in

⁶¹ See Chamberlin, *supra* note XX, at 118-119; Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* 3d ed. (New York: Harper and Row, 1950), 83-85 [Schumpeter]. See also Karlsson and Larsson, *supra* note XX.. The idea of consumer surplus was first developed by Alfred Marshall. See Alfred Marshall, *Principles of Economics* 9th ed. (ed., C.W. Guillebaud) (New York: Macmillan 1961 [1890]), 124-27.

⁶² Chinhui Juhn, Kevin M. Murphy, and Brooks Pierce, “Wage Inequality and the Rise in Returns to Skill,” (1993) 101 *J Pol Econ* 410.

more core environment – wages made higher by the higher cost of land, the higher cost of living, and the greater need for higher quality labor – to become embedded in the local spaces in which they live and work. Workers use their higher wages to purchase goods and services in the local economy. This raises income throughout the whole of that economy. This increases the core’s demand for consumption, which results in a greater diversity of goods being offered. Both higher land value and higher wage levels also allow local government to collect more revenue, contributing to better public services.⁶³ All this results in the higher standards of living and higher levels of development associated with the core.⁶⁴

On the other hand, since more peripheral economies enjoy comparative advantage in price-competitive goods, more of the surplus value they generate from production accrues to the consumer. But since peripheral economies operate in significant part to provide goods for the core, they are also relatively export oriented.⁶⁵ This suggests that they export more of the surplus value they generate from production to outside locales. This, together with the periphery’s generally lower wage levels and land costs, makes it much harder for the local economies of the periphery to retain the wealth they generate from production.⁶⁶

Peripheral retention of locally-produced wealth is made even more difficult by the fact that peripheral firms are more likely to depend on outside wealth from the core for capital investment — the greater embedded wealth of core economies make them important sources of investment for firms in more wealth-poor peripheral regions.⁶⁷ Moreover, foreign investors demand higher rates of return to compensate for the greater risks associated with investing in an

⁶³ Cf Richard Baldwin and Toshihiro Okubo, “Tax Reform, Delocation, and Heterogeneous firms,” (2009) 111 *Scandinavian J Econ* 111 741 (discussing ‘agglomeration rents’ enjoyed by local tax authorities in core locales) [Baldwin and Okubo]; Fredrik Andersson and Rikard Forslid, “Tax Competition and Economic Geography,” (2003) 5 *J Pub Econ Theory* 279-303 [Andersson and Forslid].

⁶⁴ See Schwartz, *supra* note XX.

⁶⁵ Bela Balassa, *The Newly Industrializing Countries in the World Economy* (New York: Pergamon Press, 1981).

Cf. C. Rangarajan and V. Sundararajan, “Impact of Export Fluctuations on Income — A Cross-Country Analysis,” (1976) 58 *Rev Econ and Stat* 369 (finding significant correlation between export instability and fluctuations in gross national product).

⁶⁶ See Schwartz, *supra* note XX.

⁶⁷ Philip W. Porter and Eric S. Sheppard, *A World of Difference: Society, Nature Development* (New York: Guilford Press, 1998).

environment in which one lacks local knowledge.⁶⁸ Such dependence on investment from abroad means that a greater portion of a peripheral firm's income has to be distributed abroad, further limiting the ability of more peripheral locales to locally capture the wealth generated by production.⁶⁹

All this reduces the variety of goods and services on offer in the locale, makes less wealth available for public services, and results in lower standards of living. Hence, the core-periphery ordering.

3. From local cores to transnational cores: the role of core industries

As described above, the core-periphery ordering operates at a wide variety of scales. The above explains how core periphery ordering arises at a local or metropolitan scale. But our ultimate interest is in how core-periphery ordering operates on a transnational scale, since this is the scale most relevant to law and development. So what we are interested in are not 'cores' per se, but particular kinds of cores – cores that structure transnational and not simply local or regional economic space. What determines the scale of the economic ordering produced by a particular 'core'?

What determines the scale of a core's ordering effect is the kind of industry in which it develops comparative advantage. As described above, all cores enjoy comparative advantage in product competitive industries. Transnational cores, however, enjoy comparative advantage in particular kinds of product competitive industries, what Joseph Schumpeter famously termed 'core industries'.⁷⁰

A core industry is an industry that, in addition to being product competitive, also (1) produces very large revenue flows; which derive from (2) participation in global markets with (3) high entry costs. Examples of such

⁶⁸ Gordon L. Clark, "Money Flows like Mercury: The Geography of Global Finance," (2005) 87 *Geografiska Annaler: Series B, Human Geography* 99 [Clark].

⁶⁹ Cf. Eswar Prasad, Raghuram Rajan and Arvind Subramanian, "Foreign Capital and Economic Growth," 2007 (1) *Brookings Papers on Economic Activity* 153 (finding that "reduced reliance on foreign capital is associated with higher growth").

⁷⁰ See Schumpeter, *supra* note XX, at 84-85; see also James Crotty, "Core Industries, Coercive Competition and the Structural Contradiction of Global Neoliberalism," in Nicholas Phelps and Philip Raines, eds., *The New Competition for Inward Investment: Companies, Institutions and Territorial Development* (Cheltenham: Edward Elgar, 2003), 9-38, at 17-18.

industries include (at least for the present) high-end automobiles, high-end electronics, computer and software design, commercial aircraft manufacturing, shipbuilding, information technology, entertainment, and service industries that provide highly skilled transnational professional services such as law, finance, accounting, and trading.

We have already discussed why competition in product competitive rather than price competitive industries is important for core environs. But firms in larger-scale cores do not simply focus on product-competitive industries per se, but on product-competitive industries that that involve higher revenue streams. This is because the key determinant in the scale of a particular core's ordering effects is how much wealth is embedded in the core's locale. The more wealth it has embedded, the greater the reach of the core's consumptive demands. In addition, greater locally-embedded wealth allows for greater amount of investment in outside locales, which further increases the core's capacity to order its surrounding space.

All this requires that local firm have very high revenue flows, since – as we saw above – this is what causes wealth to become embedded in local economic space via higher wages and higher local consumption. Note however, that having a large revenue flow is not the same thing as enjoying high profits. High profits result in larger returns on investment not in higher wages and higher levels of consumption per se. Unlike workers, investors are much more likely to reside in outside locales, and for this reason revenue that goes to return on investment will not become as embedded in the local economy as revenue that goes to wages and consumption.

Such higher revenue flows result from the interplay of two factors. The first is the size of the market. The larger the market, the more wealth it can direct to firms. Along these lines, transnational cores tend to revolve around industries that participate in more global rather than in more local markets. The second factor is number of firms competing in that market. The greater the number of firms who are competing for a market's aggregate revenue, the lower the revenue captured by each individual firm. The number of firms competing in a particular market is a function of start-up costs. Thus, core industries are not simply

industries that compete in global markets, but industries that also involve high start-up costs.

4. Maintaining the core: agglomeration effects

The above explains why core-peripheral orderings emerge, but it does not explain why they persist. Raymond Vernon's 'product cycle theory',⁷¹ for example, argues that cores should die out quite quickly after they emerge, as well-described by Michael Trebilcock and Robert Howse:

According to Vernon's Product Cycle Theory, the USA and other highly developed and industrialized economies, reflecting their superior access to large amounts of financial capital and highly specialized forms of human capital, would enjoy a comparative advantage in the research and development-intensive stage of product innovation. This stage would focus initially on servicing a small, domestic, custom-oriented market. The second stage in the product cycle would see production expanded to cater to a mass domestic market. The third stage would see products exported to other countries and perhaps parent companies setting up subsidiaries in other countries to undertake manufacture there (the phenomenon of the Multinational Enterprise). A further stage in the product cycle would see the production technology becoming highly standardized and adopted by producers in other countries, particularly countries with lower labour costs, and products perhaps then being exported by these countries back to the USA or other countries where the innovations had originated. According to Vernon, quasi-rents could be earned by domestic firms early in the product cycle, but these rents would be dissipated as the product moved to later stages in the cycle and comparative advantage shifted to other countries.⁷²

⁷¹ Raymond Vernon, "International Investment and International Trade in the Product Cycle," (1966) 80 Q J Econ 190-207.

⁷² Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade* 3rd ed. (London: Routledge, 2005), 2.

But as noted above, this doesn't seem to happen. Cores persist as cores well beyond the product cycles of their products.⁷³

What sustains the core is 'agglomeration effects'. Before explaining what this means, we first need to clarify what goes into success in product competition. Success in a product competitive market does not depend simply on the one-time innovation of one new product. It requires *continual* innovation. This, in turn, requires the *continual* production of new knowledge.⁷⁴

Along these lines, agglomeration is a social condition that is largely specific to core locales that gives its locale absolute advantage over other locales (including other core locales) in the continual generation of new knowledge relevant to some product-competitive industry. It describes a condition under which a synergistic collection of highly experienced people with different but complementary skill sets interact to continually generate new knowledge relevant to some particular set of industrial or commercial practices.⁷⁵ This is done through the continual transfer of tacit (non-codified) and/or local knowledge across disciplinary, professional, and / or experiential terrains — a dynamic commonly referred to as 'knowledge spillover'.

Because knowledge spillover involves the transfer of tacit knowledge, it requires face-to-face interaction.⁷⁶ This makes agglomeration a highly localized phenomenon: one study suggests that in order for agglomeration to occur, the involved experts need to work within a 45 minute travel time from each other.⁷⁷ Because of high concentration densities, and higher concentrations of high

⁷³ See TAN

⁷⁴ Marielle Damman, M. van Geenhuizen and Peter Nijkamp, "Innovative Behavior in European Cities: The Relevance of Knowledge Networks," (1997) 1 *Applied Geographic Studies* 13.

⁷⁵ See Edward Glaeser, Hedi Kallal, José Scheinkman and Andrei Shleifer, "Growth in Cities," (1992) 100 *J Pol Econ* 1126; Gerald A. Carlino, "Knowledge Spillovers: Cities' Role in the New Economy," (2001 Q4) *Fed Res Bank of Phil Bus Rev* 17. The term knowledge spillover seems reserved for the generation of new knowledge related to the production of marketable goods and services. But an identical phenomenon, which Edward Wilson famously referred to as "consilience", has also been identified in the context of social life. See Edward O. Wilson, *Consilience: The Unity of Knowledge* (New York: Knopf, 1998).

⁷⁶ Cf. James Fleck, "Expertise: Knowledge, Power and Tradability," in Robin Williams, Wendy Faulkner and James Fleck, eds, *Exploring Expertise* (London: Macmillan, 1998), 143-72 at 158-59.

⁷⁷ See Patricia Rice, Anthony J. Venables and Eleonora Patacchinid, "Spatial Determinants of Productivity: Analysis for the Regions of Great Britain," (2006) 36 *Reg Sci and Urb Econ* 727 [Rice et al.].

quality, knowledge-intensive labor, core regions are particularly conducive to such agglomeration effects.

Moreover, the complexity and density of the social networks that trigger agglomeration prevent such effects from being strategically moved to or reconstructed in another locale. Relevant firms operating within the geographic penumbra of an agglomeration effect thus enjoy an absolute (rather than simply competitive) advantage over non-local firms in the production of new knowledge in industrial activities relevant to that agglomeration.⁷⁸ This prevents firms in core industries from relocating to more peripheral environs: in product competitive markets, the competitive advantages stemming from lower costs of production (i.e., price competitiveness) simply do not compensate for the competitive disadvantages caused by loss in capacity to continually create new knowledge so as to continually create new products.⁷⁹

Moreover, local tax systems can and do take advantage of this aspect of agglomeration by raising tax levels above what would be considered 'competitive' with more peripheral locales. This further increases the quality of life within the agglomerated locale, and through that further entrenches the locale's 'core' status.⁸⁰

Agglomeration relevant to core industries appears to be limited to core economic regions.⁸¹ A good demonstration of this is found in a recent study of Asian industrial parks conducted by Frederic Deyo. Industrial parks seek to concentrate a diversity of synergistically-related firms and research institutions working relevant to core industrial activities in a small area. They also provide

⁷⁸ See Michael Storper, *The Regional World* (New York: Guilford Press, 1997) 5, 28 (discussing the 'untradeable interdependencies' of agglomeration). Adam B. Jaffe, Rebecca Henderson and Manuel Trajtenberg, "Geographic Localization of Knowledge Spillovers as Evidenced by Patent Citations," (1993) 108 *Q J Econ* 108 577; Maryann P. Feldman, "The New Economics Of Innovation, Spillovers And Agglomeration: A Review Of Empirical Studies," (1999) 8 *Economics of Innovation and New Technology* 5. Cf. Rhys Jenkins, *Transnational Corporations and Uneven Development: The Internationalization of Capital and the Third World* (London: Methuen, 1987), 87 (noting that transnational corporations are significantly less likely to spend money on research and development in their peripheral operations than in their core country sites).

⁷⁹ Cf. Baldwin and Okubo, *supra* note XX.

⁸⁰ See *ibid.* See also Andersson and Forslid, *supra* note XX.

⁸¹ See, e.g., José A. Borello, Hernán Morhorlang & Diego Silva Failde, "Agglomeration Economies in Semi-Industrialized Countries: Some Evidence from Argentina," (2011) 3 *Institutions and Economies* 487; Thomas K. McCraw, *Prophets of Regulation* (Cambridge [USA]: Harvard University Press, 1984), 75-76.

services and facilities – child care, restaurants and cafes, fitness centers – that encourage workers from different firms and institution in the part to interact. Their intent is to promote agglomeration effects. But while they have been effective at promoting agglomeration in core Asian economies of Taiwan, South Korea, and Singapore; efforts to replicate this effect in more peripheral economies, such as China, Thailand and Malaysia, have been unsuccessful. There, the industrial park model does not stimulate knowledge spillover, but ends up simply facilitating the formation of supply networks.⁸²

5. Postscript — How cores emerge: exaptation

Cores are persistent, but they are not permanent. As noted above, within a particular transnational economic space, they appear to shift locates every 150 to 200 years or so.⁸³ Some attribute this to differences in the ‘quality’ of domestic institutions, including legal institutions. But even if this is true, the problem with this argument insofar as law and development is concerned is that it only has developmental relevance if one assumes that legal institutions enjoy a particular teleological ‘quality’ that transcends time and space: e.g., that it was somehow foreseeable in the 18th century that that common law would be particularly well suited for 20th century industrial capitalism. It wasn’t.⁸⁴

If it is the case that ‘institutions rule’,⁸⁵ it also seems to be the case that it takes hundreds of years for them to begin to do so.⁸⁶ The emergence of a new core is therefore likely to be primarily due to what from the perspective of

⁸² See Frederic C. Deyo, “Addressing the Development Deficit of Competition Policy: The Role of Economic Networks,” in Michael W. Dowdle, John Gillespie and Imelda Maher eds., *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law* (Cambridge: Cambridge University Press, 2013), 283-300, at 292-299. See also Sri Wulandari, “Malaysia’s Free Industrial Zones: Reconfiguration of the Electronics Production Space,” in Asia Monitor Resource Center, ed., *We, in the Zone (2): Resistance Against the Zone* (Hong Kong: Asian Monitor Resource Center, 2012), 211-228.

⁸³ TAN

⁸⁴ See, e.g., Naomi R Lamoreaux, and Jean-Laurent Rosenthal, “Legal Regime and Contractual Flexibility: A Comparison of Business’s Organizational Choices in France and the United States during the Era of Industrialization,” (2005) 7 *Am Law Econ Rev* 281.

⁸⁵ Dani Rodrik, Arvind Subramanian, and Francesco Trebbi, “Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development,” (2004) 9 *Journal of Economic Growth* 131.

⁸⁶ See also Acemoglu et al., *supra* note XX; North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990), at 6-9 [North].

strategic institutional design is simple serendipity – or to be more precise, to what evolutionary biology calls ‘exaptation’.

Exaptation occurs when a structure – biological or institutional – that emerges in evolutionary response to one kind of stimulus assumes a different function in the face of some other kind of stimulus. A classic example would be bird feathers, which originally served to regulate the creature’s body temperature, but later proved instrumental in facilitating flight.⁸⁷

In the context of economic development, exaptation occurs when changes in the global economic environment cause particular economic institutions that emerged in response to one kind of economic condition to easily adapt to develop new functionality that respond to some other kind of new economic condition.⁸⁸ New transnational cores emerge when a number of technological evolutions interact in such a way as to foundationally change the structure of transnational capitalism. This structural change might involve the development of new modes of finance, new modes of production, new modes of consumption, etc.⁸⁹ This will cause competition in this new global economic structure to emphasize different vectors than it did previously – price competition rather than entrepôt trade in the case of early industrialization, for example; or design flexibility in production rather than economies of scale in the case of post-Fordism. These new vectors will be responsive to different factors of production – which could include new resources, different confluences of product flows, and / or different governance technologies.⁹⁰

When such occurs, the dynamics of comparative advantage can cause more peripheral economies to actually be better situated than the core economies to exploit these new vectors of competition. In contrast to core economies, more peripheral economies are not locked-in via path dependencies

⁸⁷ See Stephen Jay Gould and Elisabeth S. Vrba, “Exaptation – A Missing Term in the Science of Form,” (1982) 8 *Paleobiology* 4.

⁸⁸ See North, *supra* note XX.. See also Douglass C. North, “Economic Performance Through Time,” (1994) 84 *Am Econ Rev* 359.

⁸⁹ Cfr. Braudel, *supra* note XX. Piore and Sabel

⁹⁰ See also Michael J. Piore and Charles F. Sabel, *The Second Industrial Divide: Possibilities for Prosperity* (New York: Basic Books, 1984) [Piore and Sabel].

to exploiting the *existing* transnational economic environment.⁹¹ Their evolutionary pathways have emerged in response to economic conditions that are different from those at the core, but in a transformatively new economic environment, it is precisely such alternative pathways that exaptive utility is likely to be found.

A good example of this can be seen in the emergence of the American east coast as the core of the North Atlantic regional economy in the late 19th century (replacing London). This emergence was triggered by the exaptation of America's western frontier. Originally simply a convenient political location for cultural and social expansion,⁹² the western frontier was transformed into a critical economic space by the twin inventions of industrialization and the railroad (both of which were initially developed in Europe). The railroad greatly reduced transportation costs over land at the same time as industrialization allowed exploitation of economies of scale. Together, these converted the great empty political space of the western frontier into a great economic market space capable of driving and sustaining economic growth.⁹³

Another example is found in the emergence of Japan as a global economic core in the 1970s and 1980s. Charles Sabel has famously attributed this to Japan's earlier discovery of a new kind of post-industrial production process which he termed 'flexible production', which involved promoting industrial responsiveness to changes in market and economic conditions (e.g., supply disruptions, changes in consumer demand) rather than simply exploiting economies of scale by pursuing ever larger markets.⁹⁴ The key to flexible product was the development of a new industrial technology called 'just-in-time' ['JIT'] production, which initially evolved in order to allow factories to respond quickly to the volatilities in parts

⁹¹ North, *supra* note XX, at 6-9.

⁹² See Frederick Jackson Turner, *The Frontier in American History* (New York: Holt, 1921).

⁹³ Paul H. Cootner, "The Role of the Railroads in United States Economic Growth," (1963) 23 *J Econ Hist* 477

⁹⁴ See Charles F. Sabel, "Learning by Monitoring: The Institutions of Economic Development," in Neil Smelser and Richard Swedberg, eds., *The Handbook of Economic Sociology* (Princeton: Princeton University Press and Russell Sage Foundation, 1994), 137 [Sabel, "Learning"]; see also Piore and Sabel, *supra* note XX, at 223, 226.

supply that plagued post-War Japanese industry through the 1960s.⁹⁵ Beginning in the 1970s, consumer demand in global export markets also began to grow increasingly volatile, and Japanese firms were able to adapt JIT production to respond to this kind of instability. This rapid responsiveness gave Japanese firms product-competitive advantage in particular industries in which they had previously only enjoyed price-competitive advantage – namely automobiles and electronics.⁹⁶ And this, in turn, effectively transformed these peripheral industrial firms into core industrial firms.

In sum, the particular exaptive institutions that very occasionally allow peripheries to become new cores cannot be identified or promoted in advance. There is nothing that law and development or developmental economics can do to catalyze this process. The US was not aware when it claimed its Western frontier that that frontier would become a catalyst that would ultimately lead to world economic domination. Neither Japan nor anyone else could foretell that JIT would ultimately allow exploitation of the new post-industrial economic environment. Such developments were fortuitous; they operated beyond the reach of any form of strategic developmental planning.

C. Transportation, Services, and the Future of Distance

It is sometimes suggested global capitalism is in the process of overcoming the friction of transportation costs. Two arguments seem to support such a conclusion. One involves simple advances in transportation technology, which are reducing transportation costs and therefore said to be on the verge of eliminating their structuring effects. The other is that international capitalism is becoming increasingly driven by service industries – such as by financial and legal services; and that at the same time advances in information technology, such as the global penetration of the Internet, allow such service industries to operate without

⁹⁵ See Terje Gronning, “The Emergence and Institutionalization of Toyotism: Subdivision and Integration of the Labour Force at the Toyota Motor Corporation from the 1950s to the 1970s,” (1997) 18 *Econ and Indus Democ* 423; Knuth Dohse, Ulrich Jurgens and Thomas Malsch, “From ‘Fordism’ to ‘Toyotism’? The Social Organization of the Labor Process in the Japanese Automobile Industry,” (1985) 14 *Pol and Soc.* 115.

⁹⁶ Sabel, “Learning”, supra note XX.

regards to distance — again reducing the power of distance to shape and maintain core-periphery ordering.⁹⁷

Both of these arguments are flawed, however. Studies suggest that even very low transportation costs are sufficient to generate pronounced core-periphery ordering — in fact, paradoxically, except at the very extreme fringes, lowering transportation costs actually reinforces rather than corrodes core-periphery ordering.⁹⁸ There is no evidence at present that core-periphery ordering is disappearing.⁹⁹

With regards to the rise of the service sector, distance still matters in the form of agglomeration.¹⁰⁰ Studies suggest that at least for the present, Internet communication is still too clunky to accommodate the complexity and spontaneity of information exchange necessary to trigger agglomeration.¹⁰¹ Core industrial service industries still exhibit pronounced geographic ordering. One does not find Wall Street investment services operating out of Minnesota; one does not find ‘city’ law firms operating out of Manchester. Recall, along these lines, that the core-periphery ordering does not cause cores to arise, rather it arises out of the prior existence of cores (as centers of consumption). A transition to services as the driving force of global economic ordering may affect where cores are located (although so far that does not seem to have been the case), but service cores will still be dependent on the consumption of material goods that will be produced elsewhere. And it is ultimately the core’s consumption, and not the nature of its production, which generates the core-periphery ordering.

⁹⁷ See, e.g., Frances Cairncross, *The Death of Distance: How the Communications Revolution Is Changing Our Lives* (Cambridge MA: Harvard Business Press, 2001); see also Wim Duisenburg, *Developments in International Financial Markets* (Frankfurt: European Central Bank, 2001); Richard O’Brien, *Global Financial Integration: The End of Geography* (London: Chatham House, 1992).

⁹⁸ See Fujita et al., *supra* note XX.

⁹⁹ See Stephen Redding and Anthony J. Venables, “Economic Geography and International Inequality,” (2004) 62 *J Int’l Econ* 53 [Redding and Venables]; Venables, *Shifts*, *supra* note XX, at 3.

¹⁰⁰ See Rice et al., *supra* note XX..

¹⁰¹ Edward E Leamer and Michael Storper, “The Economic Geography of the Internet Age,” (2001) 32 *J Int’l Bus St* 641.

**IV. IMPLICATIONS FOR A THIN CONCEPTION OF LAW AND DEVELOPMENT:
ON THE FUTILITY OF PROMOTING ECONOMIC DEVELOPMENT THROUGH
LAW**

As discussed above, there are two ways law and development conceptualizes ‘development’. These include what we called a ‘thin’ conceptualization – one that equates development solely with increase in financial and material welfare. The other involves ‘thicker’ conceptualization of development, which while perhaps recognizing the pragmatic value and even necessity of increased material welfare, nevertheless locate the ultimate end of ‘development’ elsewhere – such as in ‘freedom’ in the famous articulation of Amartya Sen.¹⁰² In this Part, we will examine the implications of the core-periphery ordering for thin conceptualizations of development.

The core-periphery ordering imposes severe restrictions on thin conceptualizations of law and development. At least at first blush, it implies that there is not much that law can do to promote material economic growth – i.e., ‘development’ in the thin sense – in the more peripheral regions that are law and development’s principal focus. No law, either domestic or transnational, can loosen the lock-in effect that agglomeration gives to core regions; no law, either domestic or transnational, can eliminate the periphery’s dependence on the core for consumption; and no law, either domestic or transnational, can overcome the costs of transporting goods from periphery to the core.¹⁰³ As noted above, the core-periphery ordering’s imperviousness to legal restructuring is evinced by its temporal and spatial ubiquity: core peripheral orderings can be observed throughout history and across the globe; they can be observed operating within nations with unified domestic legal systems, and between nations with diverse legal systems.¹⁰⁴ There is simply no particular aspect of law that it does not transcend.

¹⁰² See TAN.

¹⁰³ See Redding and Venables, *supra* note XX.

¹⁰⁴ TAN

Nevertheless, our description of the core-periphery ordering does in fact leave open two possibilities for growth-promoting legal intervention. First, the core-periphery ordering leaves open the possibility that – even if law cannot promote development above a certain, geographical cap – bad law can still prevent development from reaching its geographic cap. The second is that since the core-periphery ordering is itself a regional phenomenon, law and development might still be able to promote development by itself focusing on regional rather than domestic legal systems. As we shall see, however, neither of these strategies would appear to hold significant promise.

A. Removing Legal Impediments to Development

One way that law remains relevant to thin conceptualizations of development is that even if law cannot promote development beyond the cap set by the country's location in regional economic space, it can clearly prevent a country from reaching that cap. The most obvious example of this would be North Korea in comparison with South Korea. This suggests that law might still be able to promote some degree of thin development if it were the case that most peripheral countries have legal defects that prevent that country's economy from realizing its full potential, even if that potential is less than that of more core countries.¹⁰⁵

Of course, this revolves around an empirical claim – i.e., that a significant portion of peripheral countries are being prevented from achieving their full economic potential by deficiencies in their legal systems – that has yet to be subject to systematic investigation. But anecdotal evidence suggests this is not likely to be the case. First is simply that transnational core-peripheral orderings are so readily observable.¹⁰⁶ If individual domestic legal systems were inducing significant impediments to development, then – assuming that these legal flaws were not themselves regionally based – we would expect to see a much more random distribution of development than we presently do. The fact that transnational core-periphery ordering is so observable in-fact suggests that most

¹⁰⁵ I thank David Kennedy for focusing my attention on this possibility.

¹⁰⁶ See TAN.

of the countries that are articulating that ordering are already performing at or near their geographical cap.¹⁰⁷

Second, even after some 40 years of investigation, we have still not been able to identify the institutional impediments that might be commonly impeding development in any but the most extreme cases (such as the command economies of today's North Korea or the People's Republic of China during the Mao era).¹⁰⁸ One would suspect that if that vast majority of peripheral countries who already have free market economies and already participate in the international trade regime nevertheless still have significant domestic institutional impediments to full development, we would have been able to identify at least some of the more common ones. But so far, while there have been many contenders – e.g., insecure property rights, inability to enforce contracts, corruption – none is yet to be empirically shown to be necessarily impede national economic growth or development.¹⁰⁹

B. Adopting a Regional Rather than Domestic Focus

Our failure to identify common institutional impediments to development is not due to the fact that countries have not in fact been developing. In fact, many have. When and where countries have developed, however, it has often been as a region and not as individual instances.¹¹⁰ But if development, when it occurs, occurs as a regional phenomenon rather than as individuated national phenomena, it is hard to see how individuated (i.e., domestic) legal impediments are what is at issue.

¹⁰⁷ See also Redding and Venables, *supra* note XX.

¹⁰⁸ See note XX *supra*.

¹⁰⁹ See, e.g., Donald C. Clarke, "Economic Development and the Rights Hypothesis: The China Problem," (2003) 51 Am. J. Comp. L. 89.

¹¹⁰ See Kiyoshi Kojima, "The 'Flying Geese' Model of Asian Economic Development: Origin, Theoretical Extensions, and Regional Policy Implications," (2000) 11 J Asian Econ 375 [Kojima]; Alwyn Young, "The African Growth Miracle," (2012) 120 J Pol Econ 696 [Young]; Margaret S. McMillan and Kenneth Hartgen, "What is Driving the 'African Growth Miracle'?" NBER Working Paper 20077 (Cambridge [US]: National Bureau of Economic Research, 2014). Compare with John H. Coatsworth, "Structures, Endowments, and Institutions in the Economic History of Latin America," (2005) 40 Lat Am Res Rev 126.

This brings us to the second possible role that law might play in promoting development even within the penumbra of the core-periphery ordering. Law and development focuses overwhelmingly, if not exclusively, on the developmental effects and potentials of domestic legal systems. But if development, when it does occur, invariably occurs regionally rather than simply in individuated countries, this suggests that law and development may be able to use law to promote development if it were to focus on transnational and regional legal systems and practices rather than on domestic legal systems and practices.

In evaluating this claim, we need to be clear about what it is advancing. In this section, we are examining the relationship between law and thin conceptions of development. As will be explored further below, there is much to recommend looking at regional and transnational legal phenomena in effort to promote thick understandings of development. Here, we are looking at the possible effects of regional and transnational law only insofar as they related to promoting regional economic growth.

Law and development has already explored this issue somewhat, but with disappointing results. Historically, transnational initiatives to promote economic development have revolved principally around promoting free trade: but it is unclear whether such experiments have yet to bear fruit.¹¹¹ The two principal regional developmental success stories over the past 40 years – East / Southeast Asia and sub-Saharan Africa¹¹² – both achieved their successes without resort to such zones. Some have argued that intellectual property law regimes might work to promote transnational development. But these are highly speculative: in fact, there is good evidence that the transnational intellectual property regime impedes rather than promotes peripheral development.¹¹³

The one way in which we could clearly use transnational legal ordering to promote peripheral economic development is through transnational wealth

¹¹¹ See Francisco Rodriguez and Dani Rodrik, “Trade Policy and Economic Growth: A Skeptic's Guide to the Cross-National Evidence,” in Ben S. Bernanke and Kenneth Rogoff, eds., *NBER Macroeconomics Annual 2000* (Cambridge [US]: MIT Press, 2001), 261.

¹¹² See Kojima, *supra* note XX; Young, *supra* note XX.

¹¹³ Ha-Joon Chang, “Intellectual Property Rights and Economic Development: Historical Lessons and Emerging Issues,” (2001) 2 *J Hum Dev* 287.

transfers.¹¹⁴ This is how nation-states address their own internal core-periphery inequalities. But for the present at least, developing such a system would appear to be politically impossible as a practical matter.¹¹⁵ Even the European Union, perhaps the most integrated transnational political entity on Earth, has been unable to agree to such a system.¹¹⁶

**V. IMPLICATIONS FOR THICK CONCEPTIONS OF LAW AND DEVELOPMENT:
ON THE REGULATORY LOGIC OF THE PERIPHERY**

As described above, economic development is not the only goal to which law and development might be directed. Law and development might seek, alternatively, to use law to promote justice, or equality, or human capacity, or freedom. Some of these goals are not directly implicated by core-periphery ordering, to the extent that at some of the goals can be pursued independent of growth in per capita GDP.

But at the same time, the implications of the core periphery ordering, and of human geography more generally, go well beyond the relationship between law and economic growth. The core periphery ordering does not simply limit capacity for economic growth, it causes peripheral societies to evince different social dynamics than those found in more core societies. These have significant effect on what ‘law’ can do and does do within more peripheral societies. And for this reason, even in its thicker guises, law and development tends to ask the wrong things of law.

In order to explore this, we will first examine the deeper social implications of the core-periphery ordering. After that, we will examine how this implicates law and development’s core traditional foci on rule of law, judicialization, and transparency and accountability.

¹¹⁴ Ilan Benshalom, “How to Redistribute? A Critical Examination of Mechanisms to Promote Global Wealth Redistribution,” (2014) 64 U. Toronto L J 317.

¹¹⁵ *Ibid.* at xx.

¹¹⁶ See Maurizio Ferrera, “Towards an ‘Open’ Social Citizenship? The New Boundaries of Welfare in the European Union,” In G. de Búrca, ed., *EU Law and the Welfare State: In Search of Solidarity* (Oxford: Oxford University Press, 2005) 11-38 at 20-21.

A. On the Social Implications of Core-Periphery Ordering

Core-periphery dynamics do not merely implicate capacities for growth and economic performance. They also cause peripheral society to exhibit structural features that are significantly different from those found in core environments. These include greater socio-economic vulnerability and volatility; less coherence in the social and economic space of the nation; and less capacity to support and sustain complex organizational forms.

1. Greater socio-economic vulnerability and volatility

The transnational dynamics underlying the core-periphery ordering make peripheral social environments less stable and more volatile than are the socio-economic environments of the core.¹¹⁷ First, the dynamics of transportation costs, combined with the generally smaller size of peripheral national economies, limits the amount of economic diversity that can be supported by peripheral national economies.¹¹⁸ Economic diversity is an important factor contributing to socio-economic stability: the greater the diversity, the more the economy is buffered from disruptive developments in any one particular industry or sector.¹¹⁹

Low levels of locally-captured wealth further aggravate the social consequences of economic shock: for example, by preventing local businesses from being able to accumulate sufficient reserve capital to survive cyclical economic downturns; or by impeding the construction of social safety nets that can buffer the social consequences of the resulting higher levels of unemployment such downturns thereby trigger.¹²⁰

¹¹⁷ See generally Eswar S. Prasad, Kenneth Rogoff, Shang-Jin Wei, and M. Ayhan Kose, "Effects of Financial Globalization on Developing Countries: Some Empirical Evidence," International Monetary Fund, Occasional Paper 220 (Washington DC: International Monetary Fund, 2003), at 18-28 [Prasad et al].

¹¹⁸ See Venables, shifts, supra note XX; Jean-Claude Berthélemy and Ludvig Söderling "The Role of Capital Accumulation, Adjustment and Structural Change for Economic Take-Off: Empirical Evidence from African Growth Episodes," (2001) 29 World Dev 32; David B. Audretsch, "Entrepreneurship Capital and Economic Growth," (2007) 23 Oxford Rev Econ Pol'y 63.

¹¹⁹ See Jean Imbs and Romain Wacziarg, "Stages of Diversification," (2003) 93 Am Econ Rev 6.

¹²⁰ During the Asian Financial Crisis of the late 1990s, for example, that crisis caused significantly greater social disruption in Thailand's poorer northeast region than in the wealthier areas around Bangkok. See Kevin Hewison, "The World Bank and Thailand: Crisis and Social Safety Nets," (2002) 11 Pub Admin and Pol'y 1. See generally Panos Varangis, Sona Varma, Angélique dePlaa and Vikram Nehru, "Exogenous Shocks in Low-Income Countries: Economic Policy Issues and the

Peripheral societies are also made even more volatile by their higher dependence on foreign economies for their economic functioning. This higher dependence stems both from the periphery's greater economic reliance on exports, and from its greater dependence on foreign sources of productive capital. Greater reliance on exports makes the local economy vulnerable not simply to local business cycles, but to downturns in the business or economy cycles of foreign economies. Similarly, greater reliance on foreign sources of capital also make peripheral economies vulnerable to foreign business cycles.¹²¹

Foreign sources of capital also tend to be more skittish than domestic sources of capital, and thus more prone to cause local disruption simply due to spontaneously-triggered 'herd mentality' panics.¹²² In addition, foreign capital generally demands higher rates of return (in compensation for the greater risk caused by lack of local knowledge), and this imparts an evolutionary advantage to peripheral firm that engage in more risky, and thus more potentially destabilizing, business ventures.¹²³

2. Greater socio-economic fragmentation

The socio-economic space of more peripheral countries tend to be less uniform, more fragmented, and more segmented than those of more core countries.¹²⁴ This is due to a number of factors. National socio-economic

Role of the International Community" (Washington DC: World Bank, 2004). Cf. Joshua Aizenman, "Volatility, Employment and the Patterns of FDI in Emerging Markets," (2003) 72 J Dev Econ 585

¹²¹ M. Ayhan Kose, Eswar S. Prasad, and Marco E. Terrones. "How do Trade and Financial Integration affect the Relationship between Growth and Volatility?" (2006) 69 J Int'l Econ 176-202.

¹²² See generally Prasad et al., supra note XX, at 27-28; Clark, supra note XX.

¹²³ See Ajit Singh, "Corporate Governance, Corporate Finance and Stock Markets in Emerging Countries", (2003) 3 J Corp L St 41.

¹²⁴ Anthony Chambet and Rajna Gibson, "Financial Integration, Economic Instability and Trade Structure in Emerging Markets," (2008) 27 J Int'l Money and Finance 654; Hal Hill, "Spatial Disparities in Developing East Asia: A Survey," (2002) 16 Asian Pac Econ Lit 10; Andres Rodríguez-Pose and Roberto Ezcurra, "Does Decentralization Matter for Regional Disparities? A Cross-Country Analysis," (2010) 10 J Econ Geo (2010) 619.

For example, the effect of the Asian Financial Crisis on the Thai economy was much more variegated than the effect the Global Financial Crisis had on the American economy. Overall, the crisis brought a pronounced decrease in GDP and a pronounced increase in poverty to the Thai national economy as a whole. See Sunantha Natenuj, "Poverty and Inequality during Crisis Period in Thailand" (paper presented at the "International Workshop on Strengthening Poverty Data Collection and Analysis," organized by the World Bank Institute and the Philippine Institute of Development Studies, Manila, April 30 to May 3, 2001), at 1 [Natenuj] (available at http://dirp3.pids.gov.ph/ris/wbi/Country%20Report_Thailand.PDF); Hewison, supra note XX, at 8-12. But first year of that crisis saw GDP actually rise in three of Thailand's seven provinces. See

uniformity and coherence have been significantly catalyzed by industrialization, and more peripheral economies are less thoroughly industrialized than are core economies.¹²⁵ In addition, peripheral nations tend to have weaker governance structures, which limit the nation's capacity to impose social uniformity from above.¹²⁶ Many peripheral national boundaries were arbitrarily imposed, either directly or indirectly, through colonialism and / or imperialism, which resulted in considerably fragmented cultural geographies.¹²⁷ More recently, new core-periphery dynamics, such as the disaggregation of production into transnational production chains, have also worked to promote greater fragmentation in peripheral regions, by causing subnational locales to become more deeply

Thailand Office of Office of National Economic and Social Development Board: Economic and Social Development: Gross Regional and Provincial Product: Gross Regional and Provincial Product (Time Series Data): "GPP 1995 - 2009 (16 Sectors)", available at http://eng.nesdb.go.th/Portals/0/eco_dadas/account/gpp/TS_Data/GPP_1995-2009p%20%2816%20Sectors%29.rar (see especially "1.Whole Kingdom_1995-2009p.xlsx"). And poverty rates actually decrease in two of Thailand's five regions. See Natenuj, supra, at 12-13.

By contrast, in the United States, the effect of the crisis was much more uniform. Regional GDP fell relatively evenly across every region of the country, and region poverty rates increased relatively evenly across every region of the country. See US Department of Commerce, Bureau of Economic Analysis: Regional Data: Gross Domestic Income by State, <http://www.bea.gov/iTable/iTableHtml.cfm?reqid=70&step=1&isuri=1> (state and regional GDP); United States Census Bureau: Data: People: Poverty: Poverty Data: Historical Poverty Tables: Table 9. Poverty of People, by Region: 1959 to 2011, <http://www.census.gov/hhes/www/poverty/data/historical/hstpov9.xls> (regional levels of poverty).

¹²⁵ See, e.g., Michael W. Dowdle, "Competition in the Periphery: Melamine Milk Adulteration as Peripheral 'Innovation'," in Michael W. Dowdle, John S. Gillespie, and Imelda Maher, eds., *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law* (Cambridge: Cambridge University Press, 2013), 199 [Dowdle, Melamine]. Historically, national socio-economic coherence has been strongly associated with industrial modernism. See Piore and Sabel, supra note XX, at __; Michael W. Dowdle, "Public Accountability In Alien Terrain: Exploring for Constitutional Accountability In the People's Republic of China," in Michael W. Dowdle, ed., *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge: Cambridge University Press, 2006), 329-357, at 333-341 [Dowdle, Public Accountability]. Compare Pasak Phongpaichit and Chris Baker, *Thailand's Crisis* (Singapore; ISEAS, 2000), 76-86 (describing socio-economic fragmentation in rural Thailand) [Phongpaichit and Baker]. Cf. James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven: Yale University Press, 1998), at 9-84 [Scott].

¹²⁶ See, e.g., Lee, Pak K. Lee, "Local Economic Protectionism in China's Economic Reform," (1998) 16 *Dev Pol'y Rev* 281; . See also – famously – Alexis de Tocqueville, *Democracy in America* (ed., J.P. Mayer; trans., George Lawrence) (New York : Harper Perennial Modern Classics, 2006 [1835]). Cf. Phongpaichit and Baker, supra note XX, at 80-81; Scott, supra note XX.

¹²⁷ See Andreas Winner, "Who Owns the State? Understanding Ethnic Conflict in Post-colonial Societies," (1997) 3 *Nations and Nationalism* 631; Jeffrey Sachs, "Notes on a New Sociology of Economic Development," in Lawrence E. Harrison, ed., *Culture Matters: How Values Shape Human Progress* (New York: Basic Books, 2000), 29-43, at 37, 41-42. Cf. Acemoglu et al., supra note XX.

integrated in transnational economic spaces that operate independent of national economic space.¹²⁸

3. Lesser capacity to support organizational complexity

Peripheral environments also have less capacity to support complex organizational and institutional structures, including governance structures – ‘complex organizational structures’ meaning structures that are designed around more intricate schemes of task specializations, schemes that require an organizational population with high levels of education and training in highly-specialized tasks and / or advanced technologies.¹²⁹

Peripheral limitations on organizational complexity derive directly from periphery’s relative inability to secure, reproduce, and retain the higher-quality labor needed to populate such schemes.¹³⁰ Note that with regards to complex routines of governance, the need for high quality labour vests not simply in the government per se, but in the larger civil society that is to be subject to that governance. Having detailed accounting and reporting requirements with regards to expenditure of governmental grants (such as are necessary to prevent fraud and ensure ‘value for money’ demand not only that government have accountants and auditors sufficiently skilled to makes sense of the information these requirements provide, but also that private recipients also have access to accountants and lawyers sufficiently skilled in this technology so as to ensure compliance.¹³¹ For this reason, more complex forms of governance requires not simply governmental access to high-quality labor, but significant social

¹²⁸ See, e.g., John Gillespie, “New Transnational Governance and the Changing Composition of Regulatory Pluralism in Southeast Asia,” (2014) 9 *Asian J Comp L* 65; Henry Wai-Chung Yeung, “Globalizing Competition in Asia: An Evolutionary Perspective,” in Michael W. Dowdle, John S. Gillespie, and Imelda Maher, eds., *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law* (Cambridge: Cambridge University Press, 2013), 265.

¹²⁹ See Kevin Dooley “Organizational Complexity,” in Malcom Warner, ed., *International Encyclopedia of Business and Management* (London: Thompson Learning, 2002), 5013-5022.

¹³⁰ Cf. Natalia Volkow, “Strategic Use of Information Technology Requires Knowing How to Use Information,” in Chrisanthi Avgerou and Geoff Walsham, eds., *Information Technology in Context: Studies From the Perspective of Developing Countries* (London: Ashgate, 2000), 56-69.

¹³¹ See Edward L. Rubin, “Administrative Law and the Complexity of Culture,” in Anne Seidman, Robert Seidman and Janice Payne, eds., *Legislative Drafting for Market Reform: Some Lessons from China* (New York: St. Martin's, 1997), 88-108; John Braithwaite, “Responsive Regulation and Developing Economies,” (2006) 34 *World Dev* 884.

penetration of such labor.¹³² Moreover, it requires that this labor be maintained (in the face of competition from other places and opportunities), and reproduced. Since the principal competition for such labor will come from core firms, this means that in order to keep that labor, the peripheral environment would have to be able to offer something approaching core-like wages and benefits – something that, as we discussed above, it generally cannot do.¹³³

B. Common yet Mistaken Foci of Law and Development

The domestic socio-economic effects of core-peripheral dynamics calls into question several long-standing strategies by which law and development seeks to use law and legal reform to promote various developmental goals. These include rule of law, the ‘regulatory state’, (juridical) constitutionalism, reliance on public interest litigation, the way that law and development addresses problems of corruption.

1. ‘Rule of law’

Much of law and development focuses on promoting ‘rule of law’. As used in law and development, rule of law refers, at a minimum, to a legal system that is comprised of legal rules that are clear, publically known, stable, and applied neutrally and universally.¹³⁴ Rule of law is seen both as a means for and an ends of development. As a means, rule of law is regarded as essential for promoting economic efficiency, particularly productive and allocated efficiency, leading to economic growth and development.¹³⁵ Rule of law is also seen by many as an essential component of human freedom or human dignity, thus making it an

¹³² See, e.g., Phongpaichit and Baker, *supra* note XX, at 82-85.

¹³³ See William J. Carrington and Enrica Detragiache, “How Extensive is the Brain Drain?” (1999) 36 *Finance and Dev* 46; William Easterly and Ross Levine, “What Have We Learned from a Decade of Empirical Research on Growth? It’s not Factor Accumulation: Stylized Facts and Growth Models,” (2001) 15 *World Bank Econ Rev* 177; Michel Beine, Frédéric Docquier and Hillel Rapoport, “Brain Drain and LDCs? Growth: Winners and Losers,” IZA Discussion paper series, No. 819 (Bonn: Institute for the Study of Labor (IZA), 2003). See also TAN.

¹³⁴ See Trebilcock and Prado, *supra* note XX, at 43-44. See also Joseph Raz, “The Rule of Law and its Virtue,” (1997) 93 *Law Q. Rev* 210.

¹³⁵ See Katharina Pistor and A. Philip Wellons, *The Role of Law and Legal Institutions in Asian Economic Development : 1960-1995* (New York : Oxford University Press, 1998), esp. 33-62.

important ends of development independent of its impact on economic development.¹³⁶

The problem here is that peripheral regulatory environments tend to be much less responsive to regulatory strategies founded upon ‘rule of law’ than standard developmentalist thinking presumes.¹³⁷ The modern regulatory ideal of rule of law evolved out of the on-set of advanced industrialization, and it presumes an industrial regulatory environment. In particular, industrialization brought with it large-scale standardization of local social routines, and introduced an ‘unprecedented stability’ into national society.¹³⁸ Both of these were critical to the effectiveness of ‘rule of law’ as a regulatory strategy, since the abstract-rule based governance that is the core of rule of law only works if the environment it is looking to regulate is itself uniform and stable – otherwise, its regulatory rules can have different effects – sometimes radically different effects – in different parts of the regulatory space. Peripheral nations, by contrast, are invariably much less industrialized than core nations. As we discussed above, their national regulatory spaces are much more volatile and fragmented. In such environments, uniform abstract rules will often have divergent and even dysfunctional effects in different parts of the national regulatory environment.¹³⁹

Related to this are problems of monitoring and enforcement. The greater social diversity and volatility of peripheral regulatory environments can greatly increase the cost and difficulties of monitoring.¹⁴⁰ We will discuss this further below under the heading ‘Transparency and Accountability’.¹⁴¹

The modern rule of law system also tends to involve a significant degree of institutional complexity.¹⁴² It requires a large cadre of persons specially trained in

¹³⁶ See, e.g., Sen, *supra* note XX.

¹³⁷ See Trebilcock and Prado, *supra* note XX, at 47-48.

¹³⁸ See generally Dowdle, Public Accountability, *supra* note XX, at 331-343; Piore and Sabel, *supra* note XX.

¹³⁹ See, e.g., Dowdle, *supra* note [Melamine]. Cf. Richard Vernon, “Unintended Consequences,” (1979) 7 *Pol Theory* 57, at 68.

¹⁴⁰ See also Trebilcock and Prado, *supra* note XX, at 50-51.

¹⁴¹ See TAN *infra*.

¹⁴² See Clarence J. Dias and James C.N. Paul, “Observations on Lawyers in Development and Underdevelopment,” in C.J. Dias, R. Luckham, D.O. Lynch and J.C.N. Paul, eds., *Lawyers in the Third World: Comparative and Developmental Perspectives* (Uppsala: Scandinavian Institute of African Studies; New York: International Center for Law in Development, 1981), 337-361. See also Richard A. Posner, “Creating a Legal Framework for Economic Development,” (1998) 13 *The*

its rule and procedures, and with an intricate interlocking diversity of task specializations: lawyers to advise various kinds of government departments; lawyers to advise the everyday public; lawyers to advise corporations; lawyers trained to litigate claims and defenses.¹⁴³ It also depends upon the pervasive local presence of other highly trained professionals whose education and training allows them to interact with and develop synergies between their particular specializations and the legal system, including for example a professionalized police, a professionalized accountancy, and persons specialized to serve various aspects of public policy and public administration. As we have discussed, producing and maintaining such a complex system is likely to often lie beyond the reach of more peripheral societies.¹⁴⁴

2. The regulatory state

The regulatory state refers to the increasingly common practice of delegating responsibility for regulating economic activity to politically ‘independent’ regulatory agencies (“IRAs”).¹⁴⁵ The idea behind this is that economic regulation is a largely technocratic endeavor, its regulatory decisions being largely dictated by complex but nevertheless objective principles market principles. Too often, however, political interests will attempt to influence such regulation so that it benefits their private interests rather than the public economy as a whole. Therefore, the best response is to isolate these regulators from politics, thus allowing their unfettered allegiance to the public economic needs of the market.¹⁴⁶

World Bank Research Observer 1-11, at 7; Joseph Raz, “The Politics of the Rule of Law,” (1990) 3 *Ratio Juris* 331-339, at 333. See, e.g., José E. Alvarez, “Promoting Rule of Law in Latin American: Problems and Prospects,” (1992) 25 *George Washington J Int’l L and Econ* 281-331, at 293, 294-295, 324.

¹⁴³ See note XX supra.

¹⁴⁴ See generally TAN supra.

¹⁴⁵ See generally Navroz K. Dubash and Brown Morgan, “The Rise of the Regulatory State of the South,” in Navroz K. Dubash and Bronwen Morgan, eds., *The Rise of the Regulatory State of the South: Infrastructure and Development in Emerging Economies* (Oxford: Oxford University Press, 2013), 1-27, at 5-7 [Dubash and Morgan].

¹⁴⁶ See Fabrizio Gilardi, “The Institutional Foundations of Regulatory Capitalism: The Diffusion of Independent Regulatory Agencies in Western Europe,” (2005) 84 *Annals of the Am. Acad. Pol. & Soc. Sci.* 598. See also Imelda Maher, “The Institutional Structure of Competition Law,” in Michael W. Dowdle, John Gillespie and Imelda Maher, eds., *Asian Capitalism and the Regulation*

Like the modern notion of rule of law, the idea of the regulatory state emerged in response to Fordist industrialization.¹⁴⁷ And like rule of law, it presumes a socio-economic environment which has been largely and previously stabilized and industrialized. A good demonstration of this can be found in the early history of the American Interstate Commerce Commission – the ICC. The ICC was the first independent regulatory agency, formed primarily to regulate and through that promote market competition among railroads. But for the first twenty-five years after its founding in 1887, the ICC’s regulated politically rather than technocratically. The terms of its mandate had not been worked out, and railroad industrial practices – particularly its accounting practices – had not yet become standardized to permit technocratic regulation.¹⁴⁸ It was only after this politics of its mandate had been settled, after the railroads had adopted standardized accounting practices, and after industrialization had stabilized and rationalized the regulatory environment enough to ‘naturalize’ the political compromises that had been worked out during the early years of the ICC, that the ICC was able to adopt a more technocratic approach to market regulation.¹⁴⁹

Again, peripheral environments have no such luxuries.¹⁵⁰ Most are newly industrialized, which means that they are yet to work out the innately political compromises between market and society that the US and Europe worked out during the 19th century.¹⁵¹ Moreover, their greater volatility means that these political compromises have to be continually reworked in order to respond to

of Competition: Towards a Regulatory Geography of Global Competition Law (Cambridge; Cambridge University Press, 2013), 55, at 61-75.

¹⁴⁷ See generally Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (Cambridge: Cambridge University Press, 1982) [Skowronek].

¹⁴⁸ See Leonard S. Goodman, “Getting Started: Organization, Procedure and Initial Business of the ICC in 1887,” (1987-1988) 16 *Transp L J* 7 [Goodman].

¹⁴⁹ See also Dowdle, Public Accountability, *supra* note XX, at 335-336.

¹⁵⁰ See also See generally Michael W. Dowdle, ‘The Peripheral Regulatory State’, in Navroz K. Dubash and Bronwen Morgan, eds., *The Rise of the Regulatory State of the South: Infrastructure and Development in Emerging Economies* (Oxford: Oxford University Press, 2013), 211-212; See generally Navroz K. Dubash and Bronwen Morgan, eds., *The Rise of the Regulatory State of the South: Infrastructure and Development in Emerging Economies* (Oxford: Oxford University Press, 2013),

¹⁵¹ See also Michael W. Dowdle, “‘Constitutionalism Beyond Liberalism’ In Indonesian Competition Regulation: Recognizing the Constitutional Role Of Dominion,” in Michael W. Dowdle and Michael A. Wilkinson, eds., *Constitutionalism Beyond Liberalism* (Cambridge: Cambridge University Press, forthcoming) [Dowdle, *Constitutionalism Beyond Liberalism*].

unforeseen changes in the social and economic environment. Greater economic and social fragmentation inhibits the development of standardized industrial practices.¹⁵² And greater difficulty developing and retaining a sufficient pool of high-quality labor makes it very difficult to develop and sustain both professionalized independence among IRA staff and capacity for compliance with highly technical standards among the regulated population.¹⁵³

3. (Juridical) constitutionalism

‘Constitutionalism’ is put in scare-quotes because our actual concern here is with a particular vision of constitutionalism, that of what I have elsewhere called ‘structural-liberal’ constitutionalism.¹⁵⁴ This is the vision that is inspired primarily if not overwhelmingly by the constitutional vocabulary that emerged originally to give shape and meaning to the American constitution of 1787. Ubiquitous in law and development, it conceptualizes constitutionalism first and foremost as a device for constraining state power, which it does through the presence of a particular set of political-institutional structures — most notably separation of powers, judicial independence, and judicial review.¹⁵⁵

But the problem that confronts most peripheral states is not one of a state that is too strong, but one of a state that is not strong enough. We noted above that peripheral socio-economic environments are likely to be particularly volatile.¹⁵⁶ This creates greater demand for state response. But at the same time, the periphery’s generally difficulty supporting complex regulatory systems means that peripheral states will be relatively deficient in capacity to respond to such volatilities. In a peripheral environment where the dominant experience is of a state that is often unable to meet social needs, a constitutional system that

¹⁵² See, e.g., Dowdle, Melamine, *supra* note XX.

¹⁵³ See, e.g., Phongpaichit and Bakere, *supra* note XX, at 80-81; cf. Rubin, *supra* note XX.

¹⁵⁴ See Michael W. Dowdle, “Constitutional Listening” (2012) 88 *Chicago-Kent L Rev* 115-155 [Dowdle, Listening].

¹⁵⁵ See also Michael W. Dowdle and Michael A. Wilkinson, “On the Limits of Constitutional Liberalism: In Search of Constitutional Reflexivity,” in Michael W. Dowdle and Michael A. Wilkinson, eds., *Constitutionalism Beyond Liberalism* (Cambridge: Cambridge University Press, forthcoming).

¹⁵⁶ See TAN *supra*.

focuses on limiting state capacity does not find much purchase, either within the state apparatus or among the general populace.¹⁵⁷

Some might respond that I have created a false dichotomy. By constraining the state, they will argue, constitutionalism actually makes it stronger.¹⁵⁸ Constitutionalism does this by forcing the state to develop and rely on what Michael Mann has famously termed ‘infrastructural power’ rather than despotic power.¹⁵⁹ Infrastructural power lies in the capacities of the institutions of the state to *routinely* carry-out their policy mandates, without having to rely on extraordinary (i.e., ‘despotic’) powers or intrusions. The problem with this argument, however, is that infrastructural power demands higher levels of institutional complexity,¹⁶⁰ and as we saw, more peripheral states have greater difficulty supporting complex institutional structures, particularly insofar as governance is concerned. Thus, in peripheral countries, constitutional constraints will not likely lead to the development of greater infrastructural power.

To be clear, our concern here is not with ‘constitutionalism’ per se, but with that particular vision of constitutionalism that focuses overwhelmingly on the need simply to limit state power – i.e., the ‘structural-liberal’ vision. But structural-liberalism is not the only vision of constitutionalism. And some of these other visions, most notably that which is called political constitutionalism, are indeed well-suited for addressing the particular needs and concerns of the periphery, as we will explore later in this article.¹⁶¹

¹⁵⁷ See Ronald Inglehart, and Daphna Oyserman, “Individualism, Autonomy and Self-Expression: The Human Development Syndrome,” in Henk Vinken, Joseph Soeters and Peter Ester, eds., *Comparing Cultures, Dimensions of Culture in a Comparative Perspective* (Leiden: Brill, 2004), 74-96. Cf. Harold James, ‘Economic Reasons for the Collapse of the Weimar Republic’, in Ian Kershaw, ed., *Weimar: Why Did German Democracy Fail?* (New York: St. Martin’s Press, 1990), 30-57.

¹⁵⁸ See, e.g., Stephen Holmes, “Precommitment and the Paradox of Democracy,” in Jon Elster and Rune Slagstad, eds., *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988), 195-240, at 225-230.

¹⁵⁹ Michael Mann, “The Autonomous Power of the State: Its Origins, Mechanisms, and Results,” (1984) 25 *European J Socio / Archives Européennes de Sociologie* 185 [Mann].

¹⁶⁰ See also Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010), at 166; Michael Oakeshott, *Lectures in the History of Political Thought* (Exeter: Imprint Academic, 2006), 370-371.

¹⁶¹ See TAN *infra*.

4. Public-interest litigation

Relatedly, much of law and development is seeks to promote ‘development’ – particularly in the thick sense – through private litigation: i.e., ‘public interest’ litigation, or ‘social impact’ litigation.¹⁶² In fact, such strategies appear generally to have had little significant impact in peripheral countries.¹⁶³ This is for a number of reasons. First, following on from our discussion regarding the problems that rule of law facing in a fragmented regulatory environment, the greater socio-economic fragmentation and diversity of national space means that any particular judicial decision will have different – sometimes radically different – meanings and implications for different parts of the regulatory environment.¹⁶⁴ Second, it takes significant amounts of infrastructural power, particularly on the part of the judiciary, to endow litigatory decisions with social meaning and then embed them in social and political institutions. As we saw above, peripheral countries – and their judiciaries – are likely to lack such infrastructural power.¹⁶⁵ Third, and related to our discussion above about constitutionalism, the dynamics of public interest litigation serve principally to promote structural-liberal visions of constitutionalism,¹⁶⁶ visions that are not as likely to resonate among peripheral societies.

¹⁶² See, e.g., “Articles Presented at the Spring 2013 *Wisconsin International Law Journal* Symposium on *A Comparative Perspective on Social Justice Lawyering in Asia: Conditions, Practices, & Possibilities*,” in (2013) 13 *Wisc. Int’l L J [Comparative Perspective on Social Justice Lawyering in Asia]*

¹⁶³ This observation stems from a survey or writings looking at public-impact litigation in Asia, see *Comparative Perspective on Social Justice Lawyering in Asia*, supra note XX, and Africa, see Jeremy Perelman and Lucie E. White, eds., *Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty* (Palo Alto: Stanford Univ. Press, 2011), neither of which show significant examples of successful social-impact litigation. Exceptions do exist, of course – perhaps most notably in Colombia (see, e.g., Rene Urueña, “The Rise of the Constitutional Regulatory State in Colombia: The Case of Water Governance,” (2012) 6 *Regulation & Governance* 282); South Africa (see e.g., Marius Pieterse, “Health, Social Movements, and Rights-based Litigation in South Africa,” (2008) 35 *J L and Soc* 364); and India (see, e.g., Surya Deva, “Public Interest Litigation in India: A Critical Review,” (2009) 28 *Civil Just. Q.* 19), although the actual social impact of public interest litigation even in the case of India and South Africa is somewhat debatable. See Pieterse, supra, and Deva, supra.

¹⁶⁴ See, e.g., Anthony Milner, “Contesting Human Rights in Malaysia,” in Thomas W.D. Davis and Brian Galligan, eds., *Human Rights in Asia* (Cheltenham: Edward Elgar, 2011), 91, 91-97; Cf. Mathew John, “Social Intuitions in the Shadow of Liberal Constitutionalism: An Indian Perspective,” in Michael W. Dowdle and Michael A. Wilkinson, eds., *Constitutionalism Beyond Liberalism* (Cambridge: Cambridge Univ Press, 2016).

¹⁶⁵ See also Michael William Dowdle, “Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: The Curious Case of China,” (2002) 35 *NYU J Int’l L & Pol* 1, 24-29.

¹⁶⁶ See, e.g., Cass R. Sunstein, “Against Positive Rights,” in András Sajó, ed., *Western Rights? Post-Communist Application* (The Hague: Kluwer Law International, 19967), 225, see esp 225-232.

As noted above, efforts to promote or make use of judicialization, generally through promotion of (often high-profile) public interest and public impact litigation, seem rarely to be effective.¹⁶⁷ High-profile public interest and public impact rarely prevail in court, and even when they do prevail, they are even more rarely respected by the government.¹⁶⁸ This often serves to diminish, rather than promote, both official and public trust in 'rule of law' and in the potential of the domestic legal system.¹⁶⁹ As with many other unsuccessful efforts of law and development, such failings are often attributed to the venality of local and national elite. But understanding the distinct conditions of peripheral society suggest another possibility: that this lack of success may well be due, to considerable extent, to the fact that judicialization per se can often work against rather than with the lived experiences of a society.¹⁷⁰

5. (Anti-)corruption and transparency

Law and development virtually obsesses over corruption.¹⁷¹ Corruption correlates strongly with GDP per capita, and thus is highly prevalent among peripheral countries. Not only is corruption seen as being a major impediment on development (particularly in the thin sense), but it is also commonly cited as the *deus ex machina* that prevents the developmental prescriptions of the law and development community from working.

¹⁶⁷ See note XX supra.

¹⁶⁸ See, e.g., Cecília MacDowell Santos, "Transnational Legal Activism and Counter-Hegemonic Globalization: Brazil and the Inter-American Human Rights System," (2007) 4 Sur. Revista Internacional de Direitos Humanos [Sur – Int'l J Hum Rts] 26 (available at http://www.scielo.br/pdf/sur/v4n7/en_a03v4n7.pdf).

¹⁶⁹ See, e.g., Tim Lindsey and Melissa Crouch, "Cause Lawyers in Indonesia: A House Divided," (2013) 13 Wisc. Int'l L J 620.

¹⁷⁰ Cf. Jürgen Habermas, *The Theory of Communicative Action*, vol. 2: *Lifeworld and System: A Critique of Functionalist Reason* (trans., Thomas McCarthy) (Cambridge: Polity Press, 2004), 359-373. See, e.g., Grant Gilmore, *The Death of Contract* 2d ed. (Columbus: Ohio State Univ Press, 1995), ch 2.

¹⁷¹ See David Kennedy, "The International Anti-Corruption Campaign," (1999) 14 Conn. J. Int'l L., 455 [Kennedy]; Kalin S. Ivanov, "The Limits of a Global Campaign against Corruption" in Sarah Bracking, ed., *Corruption and Development: The Anti-Corruption Campaigns* (New York: Palgrave Macmillan, 2008), 28 [Ivanov].

Despite this obsession, law and development has yet to find a way of effectively addressing corruption.¹⁷² This is likely due in significant part to the fact that law and development fails to account for how much corruption is affected by transnational economic geography. The problem here is three-fold. First, law and development mischaracterizes the nature of the harm that corruption brings to peripheral societies. Second, like thin conceptions of development more generally, there is good evidence to suggest that the actual incidence of corruption – particularly in peripheral environments – lies beyond the reach of domestic legal structuring. Third, the devices that law and development uses to address corruption are ill-suited for the social environment that the core-periphery ordering imposes on more peripheral geographies.

Law and development tends to conceptualize corruption in terms of harm to economic development.¹⁷³ However, as noted above, there is little evidence to support this claim.¹⁷⁴ And in any event, corruption clearly does not inevitably *prevent* economic growth.¹⁷⁵ China, has enjoyed considerable – possibly unprecedented – levels of persistent economic growth despite sporting endemic levels of corruption, as was the case with the American economy during the latter part of the 19th century.¹⁷⁶

As described above, the pronounced geographical patterning of development argues strongly that most development is being capped by geography, not domestic institutions (of which corruption is a kind).¹⁷⁷ In sum, it is not corruption that causes peripheral countries to be peripheral. And therefore the goals of anti-corruption should not be framed in terms of helping peripheral

¹⁷² Thomas Herzfeld, and Christoph Weiss, “Corruption and Legal (In) effectiveness: An Empirical Investigation,” (2003) 19 Eur J Pol Econ 621; Svensson, *supra* note XX, at 34-36. Ivanov, *supra* note XX, at 28-45.

¹⁷³ See Kennedy, *supra* note XX, at 460.

¹⁷⁴ See Kennedy, *supra* note XX, at 462-464; Svensson, *supra* note XX, at 37-39.

¹⁷⁵ See Svensson, *supra* note XX, at 37-39. See also Joseph E. Stiglitz, “Some Lessons from the East Asian Miracle,” (1996) 11 World Bank Research Observer 151; Dani Rodrik, “Getting Interventions Right: How South Korea and Taiwan Grew Rich,” National Bureau of Econ. Research Working Paper No. 4964 (Cambridge US: National Bureau of Econ. Research 1994); Alice Amsden, *Asia’s Next Giant: South Korea and Late Industrialization* (Oxford: Oxford Univ Press, 1989).

¹⁷⁶ See Andrew Wedeman, *Double Paradox: Rapid Growth and Rising Corruption in China* (Ithaca: Cornell Univ Press, 2012); Sean Dennis Cashman, *America in the Gilded Age* 3rd ed. (New York: NYU Press, 1993).

¹⁷⁷ See TAN *supra*.

countries to become rich. But to the extent that law and development's concerns about (obsession with) corruption seem to be directed primarily to these particular goals, these concerns will be of little actual developmental relevance to peripheral countries.¹⁷⁸

(This is not to argue that corruption is innocuous, simply that its harms are not economic. Perceptions of corruption clearly effect regime legitimacy, and through that its efficacy in implementing domestic policy. Corruption may also contribute to internal inequality, which by reducing state solidarity also negatively affects the state's efficacy. We will return to this point later in this section.)

Second, there is good reason to suspect that peripheral corruption, like peripheral development (in the thin sense), operates outside the reach of domestic institutional engineering. Like development generally (with which it closely correlates), levels of corruption show a distinct, transnational spatial ordering.¹⁷⁹ Along these lines, *persistent* changes in levels of corruption also tend strongly to be transnational (regional) rather than domestic in character.¹⁸⁰

All this suggests strongly that levels of corruption are the most prominently the product of levels of development, which as we have seen are themselves the product of transnational economic organization.¹⁸¹ Some scholars have recognized this, but portrayed the relationship as reciprocal – i.e.,

¹⁷⁸ See also Ivanov, *supra* note XX.

¹⁷⁹ See Sascha O. Becker, Peter H. Egger and Tobias Seidel, "Common Political Culture: Evidence on Regional Corruption Contagion," (2009) 25 *Eur J Pol Econ* 300 [Becker et al.]; Miguel A. Márquez, Javier Salinas-Jiménez and Ma del Mar Salinas-Jiménez, "Exploring Differences in Corruption: The Role of Neighboring Countries," (2011) 14 *J Econ Pol Reform* 11 [Márquez et al.]. See also Kwabena Gyimah-Brempong and Samaria Munoz de Gyimah-Brempong, "Corruption, Growth, and Income Distribution: Are There Regional Differences?" (2006) 7 *Economics of Governance* 245.

¹⁸⁰ See Becker et al.; Márquez et al. Becker et al. attribute this to what they call 'contagion' – i.e., the hypothesis that bad institutions in one jurisdiction are directly corrupting domestic institutions in the neighboring jurisdiction. Márquez et al. show that this is not the case – that the regional correspondences in levels and changes in national corruption are the products of similarity of environmental conditions.

Hong Kong and Singapore are the exceptions here. But they are exceptions that generally prove the rule. Both are city-states with small *entrepôt* economies that are only loosely linked to a larger regional economy. As such, they enjoy considerable regional economic autonomy in comparison with more typical countries. Especially notable, along these lines, is that the particular device that both these city-states used to effectively combat domestic corruption – the independent anti-corruption agency – has not worked when transplanted to other countries in the world. See John R. Heilbrunn, "Anti-corruption Commissions: Panacea or Real Medicine to Fight Corruption," World Bank Institute Working Paper 37234 (Washington DC: World Bank, 2004).

¹⁸¹ See also Paul B. Stephan, "Rationality and Corruption in the Post-Socialist World," (1999) 14 *Conn. J. Int'l L* 533 at 547-548 [Stephan].

hypothesizing that while corruption is indeed a product of lower levels of development, corruption also contribute to those lower levels of development.¹⁸² However, this hypothesis ignores the distinct possibility that development is generally being capped by geography. Where development is being capped by geography (and as noted, that seems to be most places), then whatever debilitating effects corruption might have on development in general would be irrelevant.

This is not to suggest that corruption is not a problem. Clearly, even if its effects on development and growth are unclear, it has significant effect on regime legitimacy, and thus on regime effectiveness.¹⁸³ But the principal devices that law and development advocates to combat corruption – namely ‘rule of law’ and transparency – are actually ill-suited for the task, and is particularly ill-suited for more peripheral environs.

We have already addressed the limited regulatory capacity that ‘rule of law’ has in more peripheral regulatory environments.¹⁸⁴ Insofar as transparency is concerned, its prescriptions too are largely incompatible with the dynamics of such environments.¹⁸⁵ First, due to their greater fragmentation and volatility, peripheral environments are innately less transparent than the more core environments that define what ‘transparency’ should look like.¹⁸⁶ Second, much of what we think of as transparency is actually the product of social intermediaries who convert complex (and hence innately untransparent) data into socially accessible claims about the political environment.¹⁸⁷ Peripheral environments, because they have difficulty supporting complex organizational structures, are much less able to do this.¹⁸⁸ We might also note that law and development tends

¹⁸² Cf. Toke S. Aidt, “Corruption, Institutions, and Economic Development,” (2009) 25 *Oxford Rev Econ Policy* 271.

¹⁸³ See, e.g., Mitchell A. Seligson, “The Impact of Corruption on Regime Legitimacy: A Comparative Study of Four Latin American Countries,” (2002) 64 *J. of Politics* 408.

¹⁸⁴ See TAN *supra*. In the context of corruption, see also Kennedy, *supra* note XX, at 464-465; Stephan, *supra* note XX, at 546-549.

¹⁸⁵ See also Kennedy, *supra* note XX, at 461.

¹⁸⁶ See Kennedy, *supra* note XX, at 464-465.

¹⁸⁷ See Michael Power, *The Audit Society: Rituals of Verification* (Oxford: Oxford Univ Press, 1997); cf. Rubin, *supra* note XX.

¹⁸⁸ See Samia Costa, “Do Freedom of Information Laws Decrease Corruption?” (2013) 29 *J Law, Econ and Org* 1317 [Costa]; See, e.g., Phongpaichit and Baker, *supra* note XX, at 82-85; Anthony Ogus and Qing Zhang, “Licensing Regimes East and West,” (2005) 25 *Int’l Rev L and Econ* 124-

to conflate lack of transparency and perceptions of corruption with the presence of corruption per se.¹⁸⁹ But these are different phenomenon.¹⁹⁰ In fact, in peripheral countries, greater transparency sometimes results in greater perception of corruption.¹⁹¹

This is not to argue that developmentalists should ignore corruption. But it is to suggest that there may be little that *law* (in the sense of ‘rule of law’) can do in the fight against corruption. At least insofar as peripheral environments are concerned,¹⁹² effective anti-corruption initiatives have revolved around new technologies rather than new legal reforms (perhaps the best known example being the use of electronic cash transfers for delivering individual poverty relief).¹⁹³

C. ‘Working with the Grain’¹⁹⁴: How Law and Development Can Make Use of the Regulatory Logic of the Periphery

Recognizing the kind of socio-economic environment that peripheralization works to impose on less developed societies, allows us, not simply to see what is less likely to work, but also what is more likely to work. We might call this the ‘regulatory logic’ of the periphery. Some of the strategies suggested by this regulatory logic include focusing on political rather than juridical forms of regulation, using relational governance, using institutional pluralism, focusing on the executive rather than on the judiciary, and focusing on the law of the everyday rather than on ‘big cases’.

142, at 133-134. See also Kim Lane Scheppele “The Inevitable Corruption of Transition,” (1999) 14 Conn. J. Int'l L 522-528; cf. Monica Escaleras, Shu Lin, and Charles Register, “Freedom of Information Acts and Public Sector Corruption,” (2010) 145 Public Choice 435-460 (finding no correlation between the introduction of freedom of information acts and reductions in corruption in developing countries); Daniel Sutter, “Media Scrutiny and the Quality of Public Officials,” (2006) 129 Public Choice 25 (finding that free press does not necessarily reduce corruption).

¹⁸⁹ See Kennedy, supra note XX, at 461.

¹⁹⁰ See, e.g., Benjamin A. Olken, “Corruption Perceptions vs. Corruption Reality,” (2009) 93 J Pub Economics 950.

¹⁹¹ See Costa, supra note XX.

¹⁹² Independent anti-corruption commissions, such as those developed in Hong Kong and Singapore, to date have been ineffective when transplanted to peripheral societies.

¹⁹³ See, e.g., Leora Klapper and Dorothe Singer, “The Opportunities of Digitizing Payments,” (Washington DC: World Bank, 2014). See generally Banerjee and Duflo, supra note XX, at XX.

¹⁹⁴ Title taken from Brian Levy, *Working with the Grain: Integrating Governance and Growth in Development Strategies* (Oxford: Oxford Univ Press, 2014) [Levy].

1. Political constitutionalism and political regulation

If the predominant governing force in core countries is that of law, the predominant governing force in more peripheral environments is that of politics.¹⁹⁵ Politics here refers to governance systems that rely on consensus derived from negotiation from self-interest. Its regulatory logic is homeostatic rather than principled – in the sense that the political regulatory environment generates cohesion, not through universal application of foundational principles (i.e., what Michael Oakeshott famously termed ‘*societas*’¹⁹⁶), but by maintaining an acceptable balance between the political wins and losses of the various interests, including private interests, that constituted the regulatory environment.¹⁹⁷

Politics here is not the sanitized politics of 20th century modernism – what Hermann Heller called authoritarian liberalism.¹⁹⁸ It is not a politics that is cabined and confined to elections and formal notice and comment opportunities with regards to rule making.¹⁹⁹ It is politics in its 19th century form – a politics that revolves around patronage and the blending of public and private interests.²⁰⁰ It is the politics more of machines,²⁰¹ patronage (or ‘neo-patrimonialism’),²⁰² and

¹⁹⁵ See also Dowdle, *Constitutionalism Beyond Liberalism*, supra note XX.

¹⁹⁶ Michael Oakeshott, *On Human Conduct* (Oxford University Press, 1975), 202-203. See also Loughlin, supra note XX, at 160-161.

¹⁹⁷ See generally John Dunn, *The Cunning of Unreason: Making Sense of Politics* (New York: Basic Books, 2001). See also Dowdle, *Competition Law*, supra note XX, at 349-366.

¹⁹⁸ Hermann Heller, ‘Authoritarian Liberalism?’ (2015) 21 *Eur L J* 295 (trans S. Paulson). See also Hermann Heller, ‘Autoritärer Liberalismus,’ (1933) 44 *Die Neue Rundschau* 289. See also Michael A. Wilkinson, ‘The Reconstitution of Postwar Europe: Liberal Excesses, Democratic Deficiencies,’ in Michael W. Dowdle and Michael A. Wilkinson, eds., *Constitutionalism Beyond Liberalism* (Cambridge: Cambridge Univ Press, 2016)

¹⁹⁹ See also Martin Loughlin, ‘The Concept of Constituent Power,’ (2014) 13 *Eur J Pol Theory* 218.

²⁰⁰ See Peter H. Argersinger, ‘New Perspectives on Election Fraud in the Gilded Age’ (1985-1986) 100 *Political Science Quarterly* 669.

²⁰¹ See Raymond E. Wolfinger, ‘Why Political Machines Have Not Withered Away and Other Revisionist Thoughts,’ (1972) 34 *J of Politics* 365; James C. Scott, ‘Corruption, Machine Politics, and Political Change,’ (1969) 63 *Am Pol Sci Rev* 1142.

²⁰² See Robin Theobald, ‘Patrimonialism,’ (1982) 34 *World Pol* 548; Alice Sindzingre, ‘The Concept of Neopatrimonialism: Divergences and Convergences with Development Economics,’ in German Institute of Global and Area Studies (GIGA) Workshop: ‘Neopatrimonialism in Various World Regions’, vol.1, 1-1 (Hamburg: GIGA: German Institute of Global and Area Studies, Sept 2010) [Sindzingre]. See also Gero Erdmann and Ulf Engel, ‘Neopatrimonialism Revisited – Beyond a Catch-All Concept,’ GIGA Working Paper, No. 16 (Hamburg: GIGA: German Institute of Global and Area Studies, 2006).

collective action (e.g., James Scott's famous 'weapons of the week'²⁰³) than of a neutered, Rawlsian 'public reason'.²⁰⁴

The innately political character of peripheral regulation has both inevitable and functional aspects to it. On the one hand, political regulation is all that's left when legal regulation isn't available – and as we saw above, the volatile, fragmented and less-developed nature of the periphery diminishes the effectiveness of law-based forms of regulation. But it is also functional. In contrast to the more stable regulatory environments of advanced industrial core, the more dynamic regulatory environments of the periphery require constant negotiation and renegotiation among constituent interests, as compromises that were seemingly acceptable under one set of environmental conditions become unacceptable as those conditions change.²⁰⁵

Law and development, and modern Euro-American jurisprudence more generally, greatly distrusts this kind of politics — which it equates with corruption and, in the context of thin understandings of development, with economic inefficiency.²⁰⁶ But our understanding of what I am calling regulatory geography, and the regulatory logic it imposes on the periphery, argues that this is far too simplistic.

First, our understanding of the stark limitations that economic geography impose on a country's ultimate capacity to generate wealth means that politics is not likely to be what is impeding development – peripheral reliance on politics is more likely to be the product of its economic geography and not its cause.²⁰⁷ Second, recognizing that the wealth of peripheral nations is innately limited forces us to re-think our understanding of 'corruption' in the context of peripheral nations. For example, neo-patrimonialism (the use of patronage relationships to

²⁰³ James C. Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (New Haven: Yale Univ Press, 1987).

²⁰⁴ John Rawls, "The Idea of Public Reason Revisited", in *The Law of Peoples* (Cambridge: Harvard Univ Press, 1999), 165-66. For a more developed critique somewhat along the lines of that offered in this article, see Joseph Raz, "Disagreement in Politics," (1998) 43 *Am J Juris* 25.

²⁰⁵ See, e.g., the emergent 'nullification' doctrine that the American south tried to introduce into American constitutionalism in response to unforeseen addition of slave-free states to the Union. See Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* (New York: W.W. Norton, 2006).

²⁰⁶ See also Kennedy, *supra* note XX, at 461-462.

²⁰⁷ See also Ronald Inglehart, *Modernization and Postmodernization: Cultural, Economic, and Political Change in 43 Societies* (Princeton: Princeton University Press, 1997).

blend public and private interests) is often equated with corruption. More sophisticated studies²⁰⁸ argue that it is a kind of ‘low-road’ equilibrium – an arrangement that is functional in the sense that it is able to generate political and policy cohesion, but at the same time dysfunctional in that it is thought to prevent the economic development necessary to support more rationalized and legalized forms of governance.²⁰⁹ But if economic development is being capped by geography, then neo-patrimonialism loses at least this aspect of its alleged dysfunctionality. Its ‘low-road’ equilibrium becomes an ‘only-road’ equilibrium.

So what is the solution? Traditional law and development argues that the proper response to the neo-patrimonialism that is seemingly rampant in peripheral countries is to isolate regulatory decisionmaking from politics.²¹⁰ But as we saw above, this is neither possible, nor is it wise. Instead, a number of theoretical and empirical studies argue that the better solution may actually be to open regulatory decisionmaking to even more politics – i.e., that the best solution to the problem of regulatory capture is more regulatory capture.²¹¹ This is because the greater the abundance and diversity of regulatory capture, the more the regulatory system comes to resemble a pluralist democracy.²¹² We will return to this point below, where we discuss ‘institutional pluralism’.

2. Relational governance

Closely related to the periphery’s necessarily greater reliance on political forms of regulation is its correspondingly necessarily greater reliance on relational as opposed to juridical (i.e., arms-length) forms of governance. As discussed above, law and development (rule of law) focuses on promoting rule-based forms

²⁰⁸ For a discussion of why these arguments from corruption are unpersuasive, see TAN *supra*.

²⁰⁹ See Sindzingre, *supra* note XX.

²¹⁰ Cf. Dubash and Morgan, *supra* note XX.

²¹¹ See Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: Oxford Univ. Press 1995), 63-71. See also Navroz Dubash and Bronwen Morgan, “The Embedded Regulatory State: Between Rules and Deals,” in Navroz Dubash and Bronwen Morgan, eds. *The Rise of the Regulatory State of the South: Infrastructure and Development in Emerging Economies* (Oxford: Oxford Univ Press, 2013), 279, 289-290.

²¹² See generally Dowdle, Competition Law, *supra* note XX, at 360-367. See, e.g., Richard F. Doner and Ansil Ramsey, “Rent-seeking and Economic Development in Thailand,” in Mustaq H. Khan and Jomo K.S., eds., *Rents, Rent-Seeking and Economic Development: Theory and Evidence in Asia* (Cambridge: Cambridge Univ Press, 2000), 145 [Doner and Ramsey]; cf. Angela Huyue Zhang, “Bureaucratic Politics and China’s Anti-Monopoly Law,” (2014) 48 *Cornell Int’l L J* 671, 685 [Zhang].

of governance. Peripheral regulatory environments, by contrast, are often regulated using what is called relational governance. Relational governance is in many ways the antithesis of formal rule-based governance: it is a style of governance in which both regulatory normsetting and regulatory enforcement operate through case-by-case processes of private negotiation between the regulator and the members of its regulatory space. Under conditions of relational governance, the relationship between the regulator and the regulated is interdependent rather than hierarchical; relational and collegial rather than impersonal; intimate rather than formal.²¹³

As with political regulation more generally, law and development is highly skeptical of relational governance, which it often pejoratively characterizes as ‘crony capitalism’. Relational governance, since it relies on case-by-case negotiation rather than pro forma application and enforcement of regulatory rules, is not neither objective, consistent nor autonomous. Since their decisionmaking processes are intimate and interpersonal rather than open and formalized, it is neither public nor transparent. It is often simply presumed to be corrupt.²¹⁴

But if we take the special environmental features of peripheral socio-economic space into account, relational governance actually appears often to be better suited to peripheral regulatory environments than rule-based governance. Operating on a case-by-case basis makes relational governance significantly more responsive to both environmental volatility and conditions of environmental fragmentation.²¹⁵ Its emphasis on interpersonal and direct communication (and observation) alleviates the need for both a large cadre of personnel, operating in

²¹³ See Yves Dezalay and Bryant Garth, “Law, Lawyers and Social Capital: ‘Rule of Law’ versus Relational Capitalism,” (1997) 6 *Social and Legal Studies* 109. See, e.g., Phongpaichit and Baker, *supra* note XX, at ___; Scott Guggenheim, Tatag Wiranto, Yogana Prasta and Susan Wong, “Indonesia’s Kecamatan Development Program: A Large-Scale Use of Community Driven Development to Reduce Poverty. (Jakarta: World Bank, 2004).

²¹⁴ See, e.g., David C. Kang, *Crony Capitalism: Corruption and Development in South Korea and the Philippines* (Cambridge: Cambridge Univ Press, 2002).

²¹⁵ See generally Peter B. Evans, *Embedded Autonomy: State and Industrial Transformation* (Cambridge: Cambridge Univ Press, 1995); Cf. Oliver E. Williamson, *The Economic Institutions of Capitalism* 56-61; Stephen J. Carson, Anoop Madhok, and Tao Wu, “Uncertainty, Opportunism, and Governance: The Effects of Volatility and Ambiguity on Formal and Relational Contracting,” (2006) 49 *Academy of Management J* 1058; Walter W. Powell, “Neither Market nor Hierarchy: Network Forms of Organization,” (1990) 12 *Res Org Behavior* 295.

both the public and the private spheres, specializing in interpreting and working with and through complex, abstract rule-based systems.²¹⁶

Complaints about corruption and economic inefficiency are no more persuasive in the context of relational governance than they are in the context of political regulation more generally. There is no real evidence that relational governance impedes growth. The Asian regional economy is famously based on relational forms of governance, and for the last 50 years or so it has been the fastest growing regional economy in the world.²¹⁷ Claims that the Asian Financial Crisis of the late 1990s was the product of this particular reliance on relational governance – aka ‘crony capitalism’ – have found no real empirical support²¹⁸ (particularly in light of the similar, Global Financial Crisis that occurred some ten years later²¹⁹).

3. Engaging institutional pluralism

The particular social characteristics of peripheral regulatory environments – in particular their innately more volatile and fragmented character – argues that law and development should focus, not on promoting ‘efficiency’, but on promoting responsiveness (aka ‘dynamic efficiency’). Political regulation thrives in peripheral environments precisely because it is likely to be more responsive in such environments than legal regulation. How might law and development be adapted to such needs?

I have described how law and development takes a particular constitutional approach that I have called structural liberalism. Above, we

²¹⁶ See, e.g., Goodman, *supra* note XX (discussing pre-industrial US). Compare Skowronek, *supra* note XX, at 24-31 (arguing that rule of law would not have been effective in pre-industrial America due to the geographical fragmentation of its social environments).

²¹⁷ See John KM. Ohnesorge, “Ratcheting up the Anti-Corruption Drive: Could a Look at Recent History Cure a Case of Theory-Determinism,” (1999) 14 *Conn J Int’l L* 467.

²¹⁸ Joseph E. Stiglitz, “Opening Address: Knowledge for Development: Economic Science, Economic Policy, and Economic Advice,” in Boris Pleskovic and Joseph E. Stiglitz, eds., *Annual World Bank Conference on Development Economics 1998* (Washington: World Bank, 1999), 9, 17-18; Surajit Mazumdar, “Crony Capitalism: Caricature or Category?” ISID Working Paper 2008/02 (New Delhi: Institute for Studies in Industrial Development, 2008).

²¹⁹ See Bob Jessop, “The Complexities of Competition and Competitiveness: Challenges for Competition Law and Economic Governance in Variegated Capitalism,” in Michael W. Dowdle, John Gillespie and Imelda Maher, eds., *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law* (Cambridge: Cambridge University Press, 2013), 96, at ___.

focused primarily on the ‘liberal’ component of that approach.²²⁰ Here, I want to focus on its structural component. Structural liberal equates particular constitutional functionalities with particular constitutional structures. Dispute resolution is equated with courts; rule of law is equated with an independent judiciary; democracy is equated with multi-party elections; clean government is equated with transparency. Moreover, the presumption is that there is a one-to-one correlation between these particular structures and these desired outcomes: that one cannot have rule of law without an independent judiciary; or that only courts should be the ultimate resolvers of legal disputes; or that only law can provide the ‘freedom’ that is the ultimate goal of development.²²¹

But this is a very impoverished view of the human possibilities of institutions, including legal institutions. Institutions can have multiple functions, and can develop different functions in response to different contexts of changes in their regulatory environment.²²² The ‘function’ of a court in the context of public interest litigation, for example, is different from what it is in the context of dispute resolution.²²³ At the same time, institutions that are differently classified as a formal matter can have overlapping or even identical functions. The French *Conseil d’État* is formally an administrative body, but in the context of administrative law not only does it function like a judicial body,²²⁴ but for much of the 20th century, it was arguably more effective in its particular judicial function – that of administrative law – than was the actual judiciary of England.²²⁵

Peripheral environments are likely to be more susceptible to this phenomenon – what we might call ‘institutional polymorphism’, due to their greater fragmentation and lesser capacity to centralize and rationalize state

²²⁰ See TAN *supra*.

²²¹ See Dowdle, *Constitutional Listening*, *supra* note XX.

²²² See Colin Crouch and Henry Farrell, “Breaking the Path of Institutional Development? Alternatives to the New Determinism,” (2004) 15 *Rationality and Society* 5 [Crouch and Farrell].

²²³ See, e.g., Michael W. Dowdle, “On the Regulatory Dynamics of Judicialization: The Promise and Perils of Exploring Judicialization in East and Southeast Asia,” in Tom Ginsburg and Albert HY Chen, eds., *Administrative Law and Governance in Asia: Comparative Perspectives* (London: Routledge, 2009), 23.

²²⁴ See generally L. Neville Brown and John S. Bell, *French Administrative Law* 5th ed. (Oxford: Oxford University Press, 1998) [Brown and Bell]. See also Denis Baranger, “Uncovering the Foundations of Administrative Law?” in Michael A. Wilkinson and Michael W. Dowdle, (Oxford: Hart Publishing, forthcoming).

²²⁵ See also William Wade and Christopher Forsyth, *Administrative Law* 9th ed. (Oxford: Oxford Univ Press, 2004), 18-19 [Wade and Forsyth].

governance. But such institutional polymorphism is not simply the inevitable product of reality (and especially peripheral reality), it is also likely to be a prime catalyst for institutional evolution. Recall our discussion above about exaptive forms of adaptation – adaptation that involves changing the functionality of some physical-structural feature.²²⁶ Institutional polymorphism, perhaps ironically from the perspective of traditional law and development, facilitates exaptation, and through that institutional adaptiveness, responsiveness and ultimately – i.e., ‘development’.²²⁷

Thus, instead of denying institutional polymorphism – instead of demanding that only judiciaries should carry out judicial functions – law and development should embrace the dynamic, adaptive and developmental potential of this phenomenon. Institutional polymorphism resonates particularly well with the periphery’s greater reliance on political regulation. Recall that if the danger of political regulation is regulatory capture, one promising way to address this problem is via having even greater and more diverse regulatory capture.²²⁸ Institutional polymorphism is one way to make this happen. The presence of co-functional institutions increases opportunity for institutional capture, but at the same time their different organizational locates will encourage capture by different social interests – thus to some degree replicating functionally the political dynamics of democratic pluralism.²²⁹

(Such a developmental focus resonates closely with Mariana Prado’s on-going work on ‘institutional bypass’, which argues that one way law and development can promote institutional reform is by setting up parallel regulatory institutions and having them ‘compete’ for regulatory control over the regulatory environment.²³⁰ But understanding both the periphery’s structural gravitation to

²²⁶ See TAN *supra*.

²²⁷ Cf. Crouch and Farrell, *supra* note XX.

²²⁸ See TAN *supra*.

²²⁹ See note XX *supra*. Cf. Michael William Dowdle, “Of Parliaments, Pragmatism and the Dynamics of Constitutional Development: The Curious Case of China,” (2002) 35 J Int’l L and Pol. 1, at 121-161 (discussing ‘discursive benchmarking’)

²³⁰ See Mariana Mota Prado, “Institutional Bypass: An Alternative for Development Reform” (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1815442. See also Mariana Mota Prado and Ana Carolina da Matta Chasin, “How Innovative was the Poupatempo Experience in Brazil? Institutional Bypass as a New Form of Institutional Change,” (2012) 5 Brazilian Pol Sci Rev 11.

political forms of regulation and the phenomenon of institutional polymorphism actually suggest that his strategy has much greater potential than may be presently acknowledged. Most significantly, it is a potential that includes not simply facilitating institutional reform, but – perhaps even more importantly – facilitating new and unforeseen possibilities in institutional evolution.)

4. Focusing on the executive (rather than on the judiciary)

Moreover, in thinking about the possibilities of institutional polymorphism, the distinctly regulatory logic of the periphery counsels that law and development should focus its attention primarily on the institutions of the executive rather than those of the judiciary.²³¹ The executive naturally tends to be the locus of political regulation. It is the branch that most ‘benefits’ from multiple pluralities of regulatory capture. It is the branch that has the most direct contract with its regulated society, and thus is the branch that is most likely to be susceptible to the adaptive pressures that emanate from changes in the regulatory environment.

Precedent for such an approach can be found in the history of the *Conseil d’État*. As noted above, the *Conseil d’État* is actually an executive body. But ironically, the fact that it was and is an executive rather than a judicial organ may actually have allowed it to be more effective in exercising judicial oversight of executive action than judicial bodies. Being embedded in the administration gave it a source of power and authority among administrative actors that the more institutionally remote judiciary lacked. What it lost in ‘judicial independence’, it gained in soft power, and this soft power allowed it to be as much, and often more autonomous, assertive, and effective in subjecting administrative behavior to legal discipline than the English judiciary.²³²

This suggests, for example, that instead of focusing on judicial dispute resolution, judicial review and judicial independence, rule of law might actually be better promoted by focusing on such things as administrative review and

²³¹ Cf. Trebilcock and Prado, *supra* note XX, at ___ (noting how law and development focuses primarily on the judiciary)

²³² See Brown and Bell, *supra* note XX, at ___. Compare Wade and Forsyth, *supra* note XX, at 18-19.

administrative professionalism (for example police professionalism).²³³ And this brings us to a second way in which law and development can adapt itself to the distinctive regulatory needs and regulatory logic of the periphery – by focusing on what I will call ‘the law of the everyday’.

5. The ‘law of the everyday’

So what is left for ‘law’? If rule of law is unresponsive, if litigation is highly unlikely to have significant social-transformative impact, and if the actual regulatory dynamics of the periphery lie in the extra-legal – what Carl Schmitt famously termed ‘exceptional’²³⁴ – realm of politics and the executive, one might be tempted to conclude that there is actually little for ‘law’ to do in peripheral environs. But in fact, law still has its relevance. It is just that this relevance largely operates at a different scale than that imagined by the law and development movement. It does not operate at the level of social, political, or economic transformation; rather it operates at a much more mundane level that I will call ‘the law of the everyday’. It is here that law and development should focus its legal-developmental attentions.²³⁵

This involves using law to negotiate through the everyday administrative apparatus rather than to challenge that apparatus. In the context of public administration, this would involve focusing on improving everyday distribution of

²³³ See, e.g., Fu Hualing, “Access to Justice and Constitutionalism in China,” in Stéphanie Balme and Michael W. Dowdle, eds., *Building Constitutionalism in China* (New York: Palgrave Macmillan, 2009), 163 [Fu Hualing]; Murray Scot Tanner, “Rethinking Law Enforcement and Society: Changing Police Analyses of Social Unrest,” in Neil J. Diamant, Stanley B. Lubman, and Kevin J. O’Brien, eds., *Engaging the Law in China: State, Society, and Possibilities for Justice* (Palo Alto: Stanford University Press, 2005), 193.

²³⁴ See Carl Schmitt, *Political Theology* (ed. and trans., George Schwab) (Chicago: Univ of Chicago Press, 1985 [[1922]]). See also George Schwab, *The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt between 1921 and 1936* (Berlin: Duncker and Humblot, 1970).

²³⁵ Cf. Abhijit Banerjee and Esther Duflo, *Poor Economics: A Radical Rethinking of the Way to Fight Global Poverty* (New York: Public Affairs, 2012) [Banerjee and Duflo].

To some extent, this ‘law and the everyday resonates with Stephen Golub’s idea of ‘legal empowerment.’ See Stephen Golub, “The Legal Empowerment Alternative,” in Thomas Carothers, ed., *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington DC: Carnegie Endowment for International Peace, 2006), 161. However, Golub directs the attentions of legal empowerment expressly to “disadvantaged populations.” My notion of the law of the everyday expands that focus to include the everyday citizenry, even where it is not particularly ‘disadvantaged’.

and access to public goods and services²³⁶ – as opposed to, say, lobbying the state to implement technocratic forms of antitrust regulation²³⁷ or to promote international investment arbitration in the hope of triggering large-scale industrial upgrading.²³⁸ It is, to wax philosophical, to switch the focus of ‘legal development’ from a liberal emphasis on negative freedom, aka ‘freedom from . . .’ to a more emphasis on positive freedom, i.e., ‘freedom to . . .’ rather than ‘freedom from . . .’²³⁹ — or alternatively, a focus on promoting the state’s infrastructural powers rather than on restraining its power of imperium.²⁴⁰

In the context of ‘access to justice’, it involves, for example, deploying appeals to law in processes of negotiating with political authorities. It involves a significant focus on lobbying,²⁴¹ petitioning,²⁴² and the use of everyday administrative tribunals and mediation.²⁴³ It involves being willing to offer compromise on claims of right (even constitutional or human rights) in pursuit of a result that represents some degree of justice, but less than an absolute justice

²³⁶ See, e.g., Jean Legroux, *From Discourse to Reality: Impacts of Rio's 'Transportation Revolutiono' on Socio-spatial Justice in Luiz Cesar de Queiroz Ribeiro, ed., The Metropolis of Rio de Janeiro: A Space in Transition* (Rio de Janeiro: Letra Capital, 2014), 343-370 (public transport); Levy, supra note XX (public education for the poor); “Mobile Money in Africa: Press 1 for Modernity.” *The Economist*, April 28, 2012 (distribution of public benefits). See also Banerjee and Duflo, supra note XX.

²³⁷ See Ngai-Ling Sum, “The Cultural Political Economy of Competitiveness, Competition Law, and Competition Policy in Asia,” in Michael W. Dowdle, et al., eds., *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law* (Cambridge: Cambridge Univ Press, 2013), 79-95; Dowdle, *Constitutionalism Beyond Liberalism*, supra note XX.

²³⁸ See M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge: Cambridge Univ Press, 2015), 394-406.

²³⁹ For a good description of the distinction between positive and negative freedom in the context of private law, see Hugh Collins, “On the (In)compatibility of Human Rights Discourse and Private Law,” Hans-W. Micklitz, ed., *The Constitutionalization of European Private Law* (Oxford: Oxford Univ. Press, 2014) 26-60, at 58-60.

²⁴⁰ Compare Mann, supra note XX (describing infrastructural power) with Terence Daintith, “The Techniques of Government,” in Jeffrey Jowell and Dawn Oliver (eds.), *The Changing Constitution* (Oxford: Oxford Univ. Press, 1994), 209-236, at 212 (describing ‘law’ more traditional focus with constraining powers of imperium).

²⁴¹ Michael William Dowdle, “Preserving Indigenous Paradigms in an Age of Globalization: Pragmatic Strategies for the Development of Clinical Legal Aid in China,” (2000) 24 *Fordham Int'l L J* S56.

²⁴² See Keith J. Hand, “Citizens Engage the Constitution: The Sun Zhigang Incident and Constitutional Review Proposals in the People’s Republic of China,” in Stéphanie Balme and Michael W. Dowdle, eds., *Building Constitutionalism in China* (New York: Palgrave Macmillan, 2009), 221.

²⁴³ See Fu Hualing, supra note XX; Stéphanie Balme “Ordinary Justice and Popular Constitutionalism in China,” in Stéphanie Balme and Michael W. Dowdle, eds., *Building Constitutionalism in China* (New York: Palgrave Macmillan, 2009), 179 [Balme]; He Baogang, and Stig Thøgersen, “Giving the People a Voice? Experiments with Consultative Authoritarian Institutions in China,” (2010) 19 *J Contemporary China* 675.

would demand. Its causes of choice often revolve around ordinary issues and struggles of everyday life — consumer protection; securing access to public benefits; employment issues. It addresses problems by working through and with the regime structure rather than by challenging that structure.²⁴⁴

At least some in the law and development community tend to regard this less confrontational form of public-interest lawyering as ersatz.²⁴⁵ They associate it with timidity rather than principle. Some condemn this particular form of public interest work, arguing that by working through rather than against the system, its successes are merely propping up the legitimacy of an innately and irrevocably odious regime.²⁴⁶ But there is good reason to suspect that focus on ‘the law of the everyday’ is likely to be more effective in the long run in promoting peripheral respect for ‘law’ – and through that for ‘rule of law’ than the big-case litigation that tends to be the focus of the international legal-development networks.

To understand why this is so, it helps to distinguish between the law’s *institutional* authority and its *intellectual* authority. The institutional authority of law is a positive form of authority that compels obedience solely by virtue of the constitutional pedigree of the promulgator. By contrast, the law’s intellectual authority compels obedience by causing us to believe that obeying that law is the appropriate thing to do. As discussed above, the real problem plaguing ‘rule of law’ in more peripheral societies is often likely to lie in the fact that be that it population, both elite and ordinary, are less likely to see reason to respect the law *qua* law when that law seems to conflict with competing social, moral or pragmatic concerns. The problem with rule of law, in other words, ultimately lies in its lack of intellectual authority.

²⁴⁴ See, e.g., Frank W. Munger, “Trafficking in Law: Cause Lawyer, Bureaucratic State and Rights of Human Trafficking Victims in Thailand,” (2015) 39 *Asian Studies Rev* 69; Fu Hualing, and Richard Cullen. “*Weiquan* (Rights Protection) Lawyering in an Authoritarian State: Building a Culture of Public-interest Lawyering,” (2008) *China J* 111; Lynette J. Chua, *Mobilizing Gay Singapore: Rights and Resistance in an Authoritarian State* (Singapore: NUS Press, 2014); John Wagner Givens, “Sleeping with Dragons? Politically Embedded Lawyers Suing the Chinese State.” (2013) 31 *Wisc Int’l L J* 734.

²⁴⁵ See Eva Pils, “Rights Activism in China: The Case of Lawyer Gao Zhisheng,” in Stéphanie Balme and Michael W. Dowdle, eds., *Building Constitutionalism in China* (New York: Palgrave Macmillan, 2009), 243, at 246-248.

²⁴⁶ Cf. Fu Hualing, *supra* note XX, at 171.

Focusing on social impact litigation is unlikely to address this more foundational problem. At the end of the day, litigation seeks to promote rule of law by evoking the law's institutional authority: a successful big case says to the government or the political elite that "the law compels you to do this because the courts say that the law compels you to do this." Because this leaves unaddressed the deeper and much more fundamental question of why one should respect what the law says in the first place (and derivatively through that, the question of why one should respect some dictatorial pronouncement about what the law says simply because that pronouncement issues from a court rather than from somewhere else).²⁴⁷

On the other hand, promoting the law of the everyday can work to promote the intellectual authority of law. It does this by normalizing law, by making it part of ordinary experience, both insofar as the general population is concerned and – perhaps even more importantly – insofar as political officials and the ruling classes are concerned as well. Fu Hualing gives us an example of this from the People's Republic of China, and in particular China's state-sponsored legal aid centers.²⁴⁸ These legal aid centers are paradigmatic examples of the law of the everyday. They generally focus on negotiation, mediation and relationship building rather than on litigation.²⁴⁹ They prefer to work within the existing political-legal system rather than in confrontation with it.

And while these legal aid center will engage in litigation, Fu notes that while "the vast majority of legal [aid] cases in China are not socially significant" [177], nevertheless:

[r]outine grievances, like those involving personal injury, traffic accidents, or family disputes, carry their own significance, both for the parties involved and for society at large. . . . A legal aid case not only represents a decision, it also disseminates information that there are procedures and institutions for aggrieved individual to voice their claim and seek remedies.

²⁴⁷ See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 865 (1992) (O'Connor, J., concurring). See also Charles W. Collier, "Intellectual Authority and Institutional Authority," (1992) 35 *Inquiry* 145.

²⁴⁸ Fu Hualing, *supra* note XX, at 163-178.

²⁴⁹ See *ibid.* at 166-168.

Former legal aid clients are themselves among the best promoters of legal aid.²⁵⁰

Perhaps even more significantly given the generally poor quality of China's lower court system in particular, such everyday experience with the legal system produces social rule-of-law 'learning' even when the result is disappointing. As recounted by Mary Gallagher in the context of ordinary employment litigation in Shanghai:

While plaintiffs' attitudes and evaluations of the legal system were almost always uniformly negative and critical after the dispute had ended, they were surprisingly resilient when it came to actual and expected future behavior. The vast majority of the plaintiffs pledged that they would sue again for a similar problem; indeed, a small but not insignificant number of disputants had already moved on from their first dispute to other legal battles. A sense of disenchantment did not lead to despondency or resignation; plaintiffs put more emphasis on the educative aspects of legal mobilization.²⁵¹

Or as Fu Hualing puts it:

All in all, the ultimate test for legal aid is not whether an individual case is won or lost. It is whether the process of legal mobilization has empowered the disadvantaged in society. The legal aid process should be treated as an educational process.²⁵²

And just as significantly, the 'learning' did not simply vest in the aggrieved citizenry. Experience with legal aid also appears to have promoted a greater understanding of and appreciation for in rule of law even among local governmental officials, again as recounted by Fu Hualing:

[B]ecause legal aid lawyers enjoy the status of public officials, and because they are 'repeat' players' in the court system, legal aid lawyers are generally received and treated with significant respect by the courts.²⁵³

²⁵⁰ Ibid at 177.

²⁵¹ Mary E. Gallagher, "Mobilizing the Law in China: 'Informed Disenchantment' and the Development of Legal Consciousness," (2006) 40 *L and Soc Rev* 783-816, at 212.

²⁵² Fu Hualing, *supra* note XX, at 177.

²⁵³ Ibid at 173.

And not just the courts:

As one county legal-aid center director succinctly put it, when facing a public rally by a group of aggrieved individuals, the relevant authority's immediate reaction used to be to use the police to detain the organizers and disperse the crowd. Now, it is to use the legal aid center to negotiate with the organizers and participants to resolve the dispute through legal means.²⁵⁴

VI. CONCLUSION

At the end of the day, all this suggests that law and development needs to significantly lower its ambitions. Law and development presently revolves around 'the big gesture' – promoting social and economic transformations that will strike dramatically at the economic and political foundations of developmental injustice. Such transformations, however, are simply beyond our reach. But that does not mean that injustice per se is beyond our reach.²⁵⁵ What it means is simply that law and development would be better to focus its attentions of mundane, everyday forms of injustices. We do not need to transform the peripheral environment – simply helping to make lives of those living there meaningful and gratifying is itself a noble endeavor.²⁵⁶

²⁵⁴ Ibid at 171.

²⁵⁵ See also the exchange between Randall P. Peerenboom and Eva Pils in (2015) 7 (1) Hague J Rule Law (2015) forthcoming.

²⁵⁶ See, e.g., Banerjee and Duflo, supra note XX.