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Global Standards; Global Growth?

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CDDRL was founded by a generous grant from the Bill and Flora Hewlett Foundation in October in 2002 as part of the Stanford Institute for International Studies at Stanford University. The Center supports analytic studies, policy relevant research, training and outreach activities to assist developing countries in the design and implementation of policies to foster growth, democracy, and the rule of law.

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GLOBAL STANDARDS; GLOBAL GROWTH?

This volume centers on the movement toward global legal standards, an increasingly recognized dimension of the quest to improve the rule of law. Although the drive to make law uniform across disparate political jurisdictions has a rich and imposing history, the contemporary enterprise to enact and enforce standard legal norms and procedures in fields as diverse as the law of companies, financial regulation, labor, constitutional dimensions of trade disputes resolution, environment and criminal procedure is clearly a growth industry. On the surface, the primary question posed by explaining this push toward standardization is why standard setting is emerging as a more prominent mechanism through which legal uniformity is pursued. There are numerous traditional and contemporary modes of extending the law across polities, among which the recent trend toward standardization commands particular attention. But just below the surface lie two related questions posed by the multiple movements toward legal homogenization.

The first subsidiary, but essential, question is what justifies the specific content and character of the legal norms, rules and practices that are being standardized. There is an analytical literature in economics that examines when and whether standardization is an optimal way to manage the process of innovation, trading off the benefits of reducing the costs that come with diverse, interconnected transactions against the risk that a system locks in around inefficient solutions that seemed preferable early on during a period of change.ⁱ This literature pushes us to ask what is the objective (e.g. economic growth, specific norms of justice) that motivates the campaigns for legal reform expressed as arguments for increased uniformity. Second, there are long-standing debates about how

legal change actually occurs and where should reformers expect serious sources of resistance to such change that must be overcome. Without an effective theory of legal change, standardization, however well justified by functional or symbolic objectives, will either become stalled or remain as formal law on the books with no real impact on behavior. Yet, in both the understanding of what ought to constitute the tie between law and societal objectives and of how legal change actually flows from theory and ideals to revised social practice, there is contest and uncertainty.

To evaluate fully the growth of standardization would suggest that we comment on four issues: (1) why might there be an increased push to make law uniform across jurisdictions; (2) why is standardization becoming a relatively more preferred method of implementing this push; (3) what goals and causal inferences explain why the law should be standardized around one set of rules and procedures rather than alternatives; (4) how has the legal field changed so that such standardized proposals have a better chance of displacing the separate legal orders currently in place. While a short essay within a volume is obviously not the place to answer these questions systematically, what I can do, drawing largely on work in political economy, is to set out positive hypotheses about issues one and two and critically comment on what I perceive as the inadequate foundation in theory or empirical inquiry on the more normative and instrumental issues three and four. In the end, my argument will suggest that we have a better grasp on what is actually going on than on what should be happening in legal reform or how we can reform effectively.

Legal change, including change that extends the reach of one legal system into new territories and contributes to greater legal uniformity, has been a constant in the history of the law. Both conquest and colonialism have been incessant causes of legal transformation, with the “modernization” of legal systems often a major justification for the intrusion of outsiders in the first place. Within national and religious legal systems, the existing state of rules and practices is constantly subject to pressures for reexamination and reform. Most of these pressures are internal to legal systems with their incentives for, and mechanisms of, re-litigating the orthodoxy of interpretation dominant at any moment. But there is also a well-defined tradition of legal transplants by which academic, judicial, legislative and administrative actors scan external legal orders to improve the quality of their own systems. The normal past practice of transplantation has been confined within distinct legal traditions. Whether their commitment to a particular legal culture lies in collective choice or imperialism, civil lawyers monitor other civil law societies, common lawyers cite the authority of common law cases and statutes across the scope of the once British empire, and religious lawyers look systematically to the opinions of their co-believers. Whatever the intricacies and varieties of detail of the dynamics of exceptional processes of imposed legal change and the normalized revisions of litigation/transplantation, it is apparent that the law has long presented an unending flux motivated by political, normative and organizational factors both external and internal to legal institutions.

Beyond the traditional tides of legal change and extension across jurisdictions, even casual observation will note contemporary flows that add to the pace and scope of

change. National legal systems, facing transactions whose scale and effects exceeds the classical bounds of their territories, experiment with extraterritorial applications of their competition, regulatory or criminal conspiracy laws. The United States and the European Union (EU), both through the jurisprudence of the European Court of Justice and through its membership in the European Court of Human Rights, take cognizance of tort or statutory violations involving only non-citizens acting wholly outside their spatial limits. There is increasing participation in multiple transnational regimes like the World Trade Organization (WTO) or the Montreal Protocol for Ozone Depleting Substances and accession to regional governments like the EU or North American Free Trade Agreement (NAFTA) that superimpose homogenous laws over pre-existing national legal diversity. The condition for entry to the EU is the legal priority of the *acquis communautaire* and the legal transformations thereto exemplify the semi-voluntary nature of much modern change. Sovereignty is willingly compromised by national applicants to transnational regimes because, given the operational interdependencies between modern states, exclusion from the benefits is more costly than submission to externally generated and exercised legal authority.ⁱⁱ And, as emphasized in this volume, along side, or in competition with, unilateral extensions of extraterritoriality and commitment to proliferating transnational regimes, both legal actors and nations engage increasingly in the quest to harmonize laws and practices through consensual agreement on, and enactment of, legal standards that promise the added value of uniform norms without the disadvantages of either coercion or surrender of operational autonomy.

While it is not overly controversial to postulate a rising volume of legal change in the direction of transnational uniformity across national legal systems, it is harder to define widespread agreement on the causes that explain the shifting pace or the specific modes of these changes. The standard citations in the literature of legal change often describe change in an evolutionary discourse that took centuries as its scale and was murky in its account of mechanisms. For example, Maine saw the universal displacement of status by contract and Savigny imagined the early modern emergence of subjectivist civil codes within a teleology of legal development that assumed, with the full confidence of both the pure Enlightenment and its Hegelian restatement, the direction and necessity of such reform. Weber turned from an idealist to a more explicitly materialist and sociological story of a potentially universal transformation from irrational (patronistic, oracular, precedential) and substantively rational (religious, class- based) legal systems to law that was both formal (systematic) and procedurally rational.ⁱⁱⁱ Weberian change was the unspecified joint product of the competitive power of logically formal law (as best exemplified in the German Civil Code of 1896) to foster national economic efficiency and the professional drive of legal theorists to articulate universal legal categories that could encompass pluralistic communities within a common frame of institutions. Even though such macro-scale evolutionary impulses still characterize the mood of inexorable modernization, with ever more problematic justification, in much current Rule of Law (formerly law and development) activity and is reflected in the continuing theme that efficient law will in the long run prevail in contemporary law and economics, less overarching, more micro-level hypotheses are needed to deal with problems at the

reduced scale of why the rate or favored mechanisms of legal change toward uniformity are variable.

Donald Horowitz, putting grand evolutionary theory to one side, recently suggested that explanations of legal reform should be divided into social change motivated, utilitarian, and intentionalist.^{iv} Social change advocates, while they share with the utilitarians an axiom that legal change is caused by factors external to the legal system itself, attribute change in the law to more basic, underlying trends in social mores and shifts in normative patterns and beliefs. This class of explanation seems to fit less well in an account of the contemporary standardization for two reasons. First, there is no evident emergent social value of standardization for its own sake. Second, while a normative revival of universal categories, such as that reflected in the human rights movement, is notable, the origins of the change seem as deeply rooted in the law itself as they do in any external social field. I will return to this latter point below, as well as to the somewhat different sociological observation that professional networks may play a growing role in reinforcing the trend toward standardization.

Utilitarians differ from social change theorists in that they emphasize the causal effects of economic or political forces by which the transformation of legal rules and practices may be explained. They assert that the law does or should maximize social welfare in some form, whether through a Paretian criterion or some exogenous social welfare function. In spite of the repeated remonstrances of economic historians like Douglass North and Mancur Olsen that competition between polities has never ensured that any given nation,

or even a majority of nations in any period, will adopt optimal institutions according to utilitarian criteria (let alone that any of these criteria is a successful survival strategy), the combination of a faith that only the efficient endure and a minimalist normative argument that justifies the argument the law should properly be understood as a tool for economic growth provide an, often unstated, foundation for law and economics theory in general and its application to the political economy of global standardization in particular.

Finally, I note that it is not easy to distinguish intentionalist accounts of legal change cleanly from other theories, like the utilitarian, that stress causal factors external to the legal system. Conquerors, like Napoleon, who impose their law through arms, are prime exemplars of intentional actors. So are politicians committed to maximizing social welfare through their legislative agendas. Nevertheless, what we may take away from this distinction is the focus Horowitz gives in his examples of legal intentionalism to legal changes that arise from the practices and beliefs of actors internal to the legal system. His primary reference is to legal transplants across legal systems, normally, though with consequential exceptions to which we will return below, within legal traditions.^v However, for the specific problem of global standardization, the well-taken observation that most legal reforms historically have been endogenous to the legal system would seem to pose a difficulty. Internal monitoring by legal actors of other legal rules and practices within the established legal traditions might lead to legal consolidation within affiliated polities while creating resistances to more comprehensive uniformity.

An explanation of global standards would have to discredit or displace this aspect of intentionalism as it is historically contextualized.

For my immediate purposes, I want to underline only two points growing from this analysis. In its current state, the theory of legal change is too disparate and conflated to offer obvious guidance or direction to a positive analysis of standardization. In particular, the classical formulations of intentionalism push against standardization and utilitarians offer no credible legal mechanisms to explain externally driven legal change. Moreover, I shall argue in the final section of this essay that the most plausible utilitarian or functionalist accounts of legal objectives that might explain normatively why legal systems are homogenizing are insufficiently specified in their legal content to justify this development. Nonetheless, it is worthwhile to assert that any adequate positive explanation of a significant legal change, like the proliferation of global standards, must be attuned to two somewhat separable dimensions. It should look for shifts in the external field in which the law develops that would indicate why legal systems that have normally been organized and operated within limited territorial jurisdictions and relatively hermetic alternative legal traditions would be sufficiently disturbed to challenge such long-standing and deeply embedded practices. At the same time, it must examine how such external shifts will be received and interpreted by the judges, lawyers, and law teachers and commentators who are the custodians and ideologues of the legal system as an autonomous institution. An explanation, or a strategy, that picks up only the external dimensions of change, even a change as profound as accession to a transnational or regional regime, is likely to founder on the unwillingness of established

legal actors to use the discretion to interpret and adapt that all legal systems allow in the cause of stasis.^{vi} But, to pay attention exclusively to the internal dimensions of change will likely underestimate the probability that within established legal cultures the relevant legal elites are satisfied with existing legal conduct so as to preclude the reformist outcomes that are to be explained.^{vii} The next section will attempt a two-sided (external and internal) positive explanation of standardization. The final section will come back to the issue of whether this explanation makes good normative sense.

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If we accept the argument above that an adequate positive causal explanation of the recent rise in global standardization must include both an objective account of changes in the external political economy in which the legal system operates and a subjective account of how legal actors re-conceive the internal logic and legitimacy of the law, we may proceed sequentially to examine the structural and phenomenological changes that must occur coincidentally for legal change to take hold. We need not claim here that either external or internal factors have causal priority, as much as that their conjuncture, for what may be quite independent reasons, is necessary for reform. I will look at the political economic context first, leaving evolutionary hypotheses aside as demanding too wide a sweep of history and institutions to explain more specific changes like an increased pace of legal harmonization or standardization. The last half of the 20th century has witnessed a good deal of extension of legal systems across once more fragmented polities through the expression of national power. Conquests generating the

formal spread of American legal rules and practices have stretched from post-war Japan's company, labor and competition laws to Iraq's forthcoming legal reordering by contracted consultants. Extraterritorial applications of antitrust, securities, and racketeering statutes to transactions begun and completed wholly outside national space have moved from a presumptively disallowed status to applications so regular that they have motivated "clawback" or similar defensive responses on a normal basis.^{viii} Still more controversial expressions of raw power to extend national law like the American prohibitions on foreign entities dealing with organizations beneficiaries of properties expropriated during the Cuban revolution are controversial because they can be effectively enforced.^{ix} But, while power can explain a putative increase in an as yet virtual index that would measure an aggregate global level of legal concentration (an increase perhaps more than fully offset by the multiplication of national jurisdictions that have succeeded to the earlier legal homogeneity imposed by colonial power), it cannot do very much to help us with the growth of standardization as the mechanism for greater uniformity.

A more plausible account of legal reform that ends with a rise of standardization might begin with a prime external cause of change being conditional compensation. This mechanism has taken a variety of forms in recent decades. Its more obvious applications could focus on bilateral and multilateral aid programs (official development assistance or ODA) whose funding demands that recipient nations bring their laws or legal institutions into conformity with some extra-national template. Current lending programs from the World Bank dependent on transparent administration or the adoption of environmental

protections may only presage expanding aid offers like the proposed US Millennium Challenge Account wherein improved legal performance is one of the conditions of eligibility. A more subtle, and important, application of conditional compensation as the driver of legal change is accession to international regimes. Arguably, the most effective contemporary incentive to make wholesale reforms in legal institutions and rules has been the requirement that the acceptance of the EU legal order is the precondition to EU membership. However, accession to NAFTA and to the widening portfolio of WTO domains have also brought about lesser, though meaningful, conformity to externally imposed legal practices. National subscriptions to proliferating international legal treaties in the environment, financial regulation, enforcement of judgments and too many other legal subjects to name only add to the virtual legal concentration index.

I want to make three points about conditional compensation as an indirect cause of standardization. First, it reflects at bottom a growing demand for global public goods that are more often supplied at present by minilateral than by multilateral regimes or polities. The capacities of nations to provide these goods individually has substantially diminished, in part because of the larger prevalence of cross-boundary spillovers and in part because of the greater commitment to national borders more open to trade and capital flows that has grown in waves following the successive economic and security debacles of the first half of the last century and the decline of socialist economics in the second. Next, at least in a formal legal sense, the acceptance of conditional legal change is voluntary since the benefits of aid or accession must outweigh the costs of legal subsumption. While the effects of interdependence have undoubtedly altered the

incentives of nations asymmetrically to make the choice for legal homogenization, there is a price to be paid in explaining the rise of standardization if we conflate legal changes brought about by the unilateral exercise of external power and the more nuanced process of conditional compensation.

The final observation about the compensation mechanism builds upon Wolfgang Reinicke's recent argument about the changing character of transnational regimes.^x Transnational regimes can be institutionally constructed as if they are near exact structural homologues of centralized nation states, lifted up to a more inclusive territorial expanse. In such cases, perhaps evidenced by the fear of Brussels (or Geneva) as the future sovereign that Paris once was, authority would be transposed from middle-scale to more inclusive political jurisdictions as it formerly passed from city-states to nations. Unitary bodies would make, enforce and adjudicate law at the supranational level to resolve the global goods issue without structural discontinuity with familiar patterns of governance. In such a transformation, although there would surely be more legal homogeneity, it would be unlikely to take the form of increasing standardization. What is needed to complete an explanation of standardization is a demonstration that transnational regimes are themselves being reorganized more along lines such as those Reinicke denominates as vertical and horizontal subsidiarity.

Vertical subsidiarity denotes regime institutions that operate simultaneously at multiple levels of governance, with the model being the emergent European Union order that maintains fluidity against potential and resisted trends toward excessive centralization by

assuming a shifting balance of competences between member states and European institutions, as well as allowing the possibility of overlapping jurisdiction of subject matters between them. The actual harmonization of European law is not complete as it would be if uniform decrees emanated consistently from Brussels. Rather, laws are harmonized to minimal uniform standards, with deviation and competition of regulatory choices beyond the required threshold. Similarly, horizontal subsidiarity connotes the growing proclivity to delegate rule making and interpretation to quasi-private, public-private bodies or even wholly private groups of stakeholders rather than monopolizing these functions in purely public institutions. My hypothesis is that it is the particular nature of how conditional compensation through accession is unfolding that opens spaces, vertically for ongoing regulatory competition and horizontally for private action, in which standardization is both motivated and likely.

In developing the case that accession is the primary mechanism of compensated legal change, I suggested that the increased interest of states to enter into transnational regimes was a product of recognized strong demand for collective goods and the declining capacity of nations to supply these as independent polities. While a portion of this incapacity can be traced to the technical characteristics of the goods in demand (e.g., environmental spillovers), another measure must be attributed to an evolving disenchantment with the centralized state that questions both the efficiency of governmental provision of these goods and the consequences of public policies such as barriers to international trade and factor flows enacted as protective complements to highly regulated national political economies. Ignoring the intricacies that must

accompany a serious academic presentation of any sweeping generalization, I'll simply propose here that the majority of post-Second World War nations constituted what we might call state-based systems. By this term I imply that an expansive role in governing the national political economy has been exercised by centralized administrative bureaus that coordinated the structure and performance of private markets and dominated the importance of the legislature and the judiciary in so doing. Effecting a broad range of policies through a portfolio of state enterprises, political cooperation with organized business and labor in key sectors, ministerial control of financial institutions and their use for selective capital allocation, protected oligopolistic industrial organization, and asymmetric trade practices increasingly reliant on non-tariff barriers, the modern state-based system substituted specific regulation and particularistic corporatist negotiation (often informal) for generalized legal rules that framed the more chaotic activity of private markets.

The evidence for administrative regulation as the totemic form of governance in the latter half of the 20th century is varied, but pervasive. In Europe, the development of the state as the progenitor and reproducer of national identity, defense against predation of neighboring sovereigns, industrial policy to improve national capacity and reputation, and social welfare measures to share among co-nationals the risks of a modern economy led to the delegation of such sophisticated objectives to national administrations that were at once expert and flexible in their operations, unhindered by either much detailed legislative direction or judicial review.^{xi} This vision of the scope and composition of the modern activist state was pushed to hyperbolic levels in the socialist bloc, with special

emphasis on state monopoly of strategic production, the internalization of welfare functions to industrial groups, and the insulation of the national economy from wider trade and capital movements. In former imperial states, expansive European style administrative governance already put in place by the colonial office was appropriated locally at independence to continue the full menu of state programs, even if more often in organizational formalities alone that in practice led to perverse results. In East Asia, where rapid growth was real after the 1960s, the reach and methods of the development state became a subject of deep international debate that differed more in its evaluations of whether the state erased or only skillfully coordinated market activity.^{xii} Even in the United States, the residues of the New Deal and wartime administration created administrative ambition and power unmatched before or since.^{xiii}

The shift toward what is usually called “deregulation” in America and what may be better named “re-regulation” around the market in Europe and beyond has as many dynamics as the locations in which it proceeds. In the United States, the recession of the forward tide of administration and its co-adapted organizations (labor unions, expanding public expenditure for social security) was in part a regression toward the historical norm. Even as new arenas of regulation were added (environment, securities markets), they were institutionalized with a consistent emphasis on regulation through generalized rules and judicial controls that restricted administrative leeway and, often, effectiveness.^{xiv} In the European Community, the situation was more complex given the pre-existing practices of pervasive administration that were divided one from another by the national

idiosyncracies that demarcated the regulatory identities of distinct European political cultures.

The unification of Europe was imagined and organized as a strategem to prevent further the devastation of continuing European wars by building economic interdependencies among competitor nations. From the beginning there was tension as to whether the internal political economy of the integrated European space would be more market liberal or a transposed modern European statism from the national to a more comprehensive territory. However, except for the common agricultural policy, it became quickly apparent that the several distinct regulatory cultures of even the original six member states would be hard to fuse into a shared centralized administration. With subsequent expansion from six to nine and twelve, in the absence of a political commitment to majority rule that was itself impeded by its implications for the preservation of differentiated national political administrations, the liberalizing dimensions of European integration were enhanced *faute de mieux*.

Reinforced by the assertive constitutional initiatives of the European Court of Justice that could strike down national barriers to a unified economic space, but lacked the affirmative power to order any specific positive program of public policy, the European Community, and its main institutional organ the European Commission, became agents of a liberalization that was far less their principled choice than a pragmatic tactic to speed integration on the only platform politically possible.^{xv} Even with the passage in 1987 of the Single Act that might have afforded the constitutional basis for a European Union

integrated by a common administrative regime, the effort to harmonize the laws and regulations of the wider European space proved too contested and stifling of an economic reform toward less controlled markets that was already on the global horizon. As noted above, harmonization could advance only through directives that allowed national variability above minimal common rules, a process that by the time of the negotiation of the Maastricht treaty in 1992 was colored by widespread demands for the subsidiarity of EU to national regulation as far as possible and the political recognition of the multiple cultures of the national peoples (*demos*).

In the shadow of American and European governance reforms, a movement toward re-regulation around the market was palpable across the globe. The collapse of the Soviet Union and its peripheral client states subjected many successor polities to profess, if not adopt, faith in fundamental restructuring. Across Eastern Europe the combination of a prospect of accession to the Union and important EU preparatory-to-accession assistance programs for institutional reordering brought about radical change. In Russia and the newly independent states along its southern edge, substantial American and European ODA flows proffered conditional compensation to stimulate a first blush of market-oriented legal reform, whose material effects are yet to be proven. In Asia, the Chinese evolution toward a “socialist market” has been marked by non-farm economic growth initiated by innovative forms of semi-private organizations like Township and Village enterprises or export driven joint ventures with hard budgets and non-bank financing that competed with moribund state enterprises.^{xvi} While the early operations of these enterprises have been more often outside than regulated by the official institutional

framework, the jobs and income they produce has afforded time for the gradual, if yet uncertain, reorganization of courts and financial markets. At the same time, stagnation in Japan has called into question throughout the region the most celebrated state-centered development model, destabilizing the tight consensus in Tokyo that carefully coordinated domestic competition could continue to generate acceptable economic gains.^{xvii} Finally, throughout the developing world nations from Latin America through South Asia, anxious for new capital and disillusioned with the failed claims of authoritarian-led growth evident by and through the 1980s, faced the challenge of regulatory competition for external resources. Accepting accession to an expanded WTO regime, scrutinized by multinational rating services that ranked their institutional performance for political stability, corruption, corporate governance and the rule of law, and confronting multilateral financial agencies like the IMF and World Bank themselves converted to theories of micro-institutions as the keys to growth, the pressures in the 1990s to conform to the norms of market re-regulation were pervasive.

The dynamics of re-regulation around the market have, in general, increased the (virtual) index of legal uniformity and, in particular, occasioned standardization as a principal mechanism for homogenization. While the appetite for and digestibility of re-regulation has varied widely among nations to produce a large array of new institutional landscapes in practice, certain directional features of the announced patterns of change in governance are notable. The scale of administrative interventions in the economy is reduced, while the legal character of those regulatory domains that remain in place is transformed. Administrative agencies are more often independent of immediate political (ministerial)

control, rendered more transparent in their operations by new acts of administrative procedure, and subject to more assertive and substantial judicial and constitutional challenge and review. Their scope for mandating or inducing policy conformity through flexible arrangements with regulated firms or sectors and their use of informal negotiations with leading private actors whose conformity to resulting policy norms is secured through selective financing, public procurement or other forms of subsidization and protection have been reduced. Regulatory options are increasingly confined to the issuance of generalized framing rules, open to judicial appraisal and public protest, which have long hindered effective regulation in the United States. In turn, private actors are at once less politically empowered (through industrial associations, labor unions) and more dependent on courts to fill in the incomplete terms of contracts and property rules that define the terms of market organization. Between the new demands of both private and public re-regulation around the markets, the judiciary is forced to assume a more activist role in governance, for which in many legal systems used to a subordinate passivity relative to pervasive administration the legal culture is wholly unprepared. The new burdens on adjudication have expanded to include matters such as a competition law that is more than formal and the monitoring of corporate governance and securities markets previously left to political agencies and semi-official industrial associations. While I want to underscore the point that the degree and practice of re-regulation around the market continues to vary widely by nation and by legal field (e.g. financial law is more uniform across states than is labor/social policy law), it is hard to contest that the ideal of re-regulation around the market has emerged as a focal point for legal change.

In the context of widening re-regulation around the market, the potential for regulatory competition has grown apace. First, contrary to common intuition, regulatory competition is likely to increase when diversity in political economic organization narrows. Extensive variation in forms of governance has induced nations to put in place legal barriers to restrict flows of goods and capital in order to insulate domestic public policy from what was perceived as unfair competition with unregulated foreign actors. Because polities with relatively homogeneous conditions of market governance, like those inside the United States and, more recently, in the European Union, are less prone to suffer from (or to interpret their constitutions to tolerate) effective pressures to close off trade among their peers, more uniform and open markets become more vulnerable to claims that the relatively minor advantages accorded by particular regulatory choices allow highly mobile capital better to bargain for location.^{xviii} Second, modes of regulatory competition have multiplied beyond the simple mobility of goods and capital to include the export of laws and the increased ability of actors to choose the legal system under which they will operate. The extended availability of offshore arbitration with party choice of forum and substantive law, the ability of public corporations to arrange their legal relations with investors by choosing their jurisdiction of incorporation and by listing on foreign stock exchanges with different regulatory regimes, and the growing, if still sporadic, capacity to litigate in judicial systems wholly unconnected to the underlying transactions in contest all contribute to legal uniformity.^{xix} Finally, the province of regulatory competition has been enhanced by the gradual thickening in practice of the concept of the rule of law to encompass substantive subjects like competition or corporate governance. As investors evaluate the relative quality of a

broader range of legal institutions, states with aspirations to attract international capital seek more conformity across their legal system. Whether nations accede only to very loose transnational regimes like the WTO that expose their markets and demand little substantive law reform or enter into stronger regimes like the European Union or NAFTA that require degrees of minimum legal homogeneity for accession and leave room for national variation thereafter, the political effects of regulatory competition complement those of conditional compensation in swelling the wave of legal uniformity.

The missing thread to the argument for standardization to this point remains why uniformity should come through standardization. Throughout the 20th century as the pace of technological innovation accelerated, standardization has been a constant theme in the economics and engineering debate about how to approach systems integration. As new technical possibilities came on line, there were inevitable questions about how to prevent redundant costs associated with competing variants of their applications and how to link the new with existing systems of production or communication. Engineers, usually more confident about *ex ante* optimization of design through professional consultation and analysis, tend to prefer standardization bodies composed of technical experts to resolve these interconnection issues. Economists, more professionally disposed toward a process of competitive experimentation, tend to opt for *ex post* optimization through markets to avoid the lock-in of inefficient standards, even at the cost of resources misallocated to non-surviving applications and to creating temporary gateways between applications during the period of experimentation.^{xx} The same structure of argument can be imposed on regulatory and legal innovation. Standardization can reduce the transaction costs of

operations across discontinuous, but interlinked systems, like those more connected by open trade and factor flows. Whether standardization by legal experts is more or less likely to minimize these costs and mitigate the potential for stable lock-in around poor legal techniques relative to the enactment of uniform legal rules by political authorities remains weakly analyzed.

A second argument for standardization is that it is preferable to mandatory regulation as a response to regulatory competition that undercuts the strongly felt demand for collective goods that continues in political economies re-regulated around the market. This hypothesis recognizes the seeming paradox that contemporary governance has moved toward a *cul de sac* wherein the demand for global goods exceeds the capacity of reorganized states to provide them. However, building on the distrust manifest in public choice theory and popular politics about the efficiency of public production by state agencies, it is asserted that private firms and stakeholders with greater practical knowledge of the collective problems to be solved should be delegated the authority to manage them through voluntary standards associations. Much of the current fervor for private-public partnerships, best practice comparisons, performance benchmarking and soft law coordination can be traced to the concept that the organization of the new space between the state, individuals and firms that has been created by re-regulation around the market will be better handled by those immediately concerned than by more representative, even if democratic, politics.

Standardization, understood as the compendium of these new institutions and mechanisms, with or without more complex specifications about how best to structure the more voluntary and soft processes that determine which standards emerge as the attractors for uniform practice, then may stand for a component strain in the effort to provide a reasonably efficient quantity of new public goods in an era of disenchantment with the more obvious and time-tested strategy of public monopoly by hierarchical governmental organizations.^{xxi} This larger effort would include greater reliance on a portfolio including providing goods of a more inclusive or global character through multiple, minilateral, competing transnational regimes than through multilateral centralization; EU style multi-level governance with vertical integration constrained by only partial harmonization (Reinicke's vertical subsidiarity) within political hierarchies; and the horizontal subsidiarity of delegated standardization. The motivation to reshape political economy implicit in the standardization movement is reinforced by the increasingly dense and specialized professional networks that have proliferated along side conditional compensation and re-regulation around the market. As the population of independent regulators of banking, securities, energy and telecommunications markets has grown so has the frequency of their interaction as professionals with technical expertise that is institution, rather than nation, specific. Judges, constitutional and civil, arbitrators, and private lawyers charged with new responsibilities by re-regulation and operating under the universal flag of the rule of law meet internationally and interact more on the basis of their shared tasks and experience than their national legal cultures.^{xxii} The sociological dynamics of peer organizations create identities that stress professional commonalities, recently re-labeled epistemic communities, as they expand the demand

for the delegation of projects to be managed by these networks.^{xxiii} Standardization grows through positive feedback that increasingly thickens an institutional framework that claims and justifies its own jurisdiction.

In summary, we have contended that over the last several decades the homogenization of rules and institutional powers has grown in varied legal fields across many legal systems against an external context of increasing interdependence of political economies and a rising demand for transnational collective goods and services. Under the inducements of conditional compensation, especially in the form of accession to a plethora of regional and multilateral regimes, and a comprehensive trend in governance to re-regulate around the market, incentives to limit diversity in legal practice have been widely felt. At the same time, among the portfolio of mechanisms through which greater uniformity might be sought, standardization by means of relatively more voluntary agreements has assumed new prominence. This particular surge is itself an artifact of a widened distrust in the likelihood that modern governments, as organizations with characteristic peculiarities and infirmities recently exposed in theory and conduct, should be the primary agents in satisfying these shifting demands to the exclusion of substantial, sometimes dominant, delegation of powers to private experts and stakeholders. As international professional networks of these experts and stakeholders expand and consolidate, they reinforce through their availability and self-legitimation the trend to employ non-traditional methods of governance, including standardization.

Trends in political economy, like those in technology and fashion, no matter how well motivated or widely subscribed, are neither necessarily efficient nor effective. Two dangers stand out. The first problem with bandwagons is that they may be headed in the wrong direction. For example, within the professional networks that are charged or charge themselves with legal and institutional reform, the influence of multilateral bodies like the World Bank or the Organization for Economic Cooperation and Development (OECD) is often recognized. These organizations have contributed to the thesis that best practice in reform is oriented to the positive effects of good law on economic growth. They subscribe to and propagate an emergent consensus that expert knowledge has established a series of propositions about the security of property rights (including complex rights like those of minority shareholders or intellectual property owners) and the roles of courts in securing them. As I will question below, consensus is not propriety and premature standardization around a poor practice is no panacea.

The second risk of trends and fashionable movements is formalism. Organizational sociology has detailed how actors and nations flock to the symbols of modernity in order to proclaim their adherence to the up-to-date.^{xxiv} Fancy airports in the national capital, educational curricula that mirror those of leading edge schools, scientific institutes in fields barely known proliferate around the world for their announcement effects in spite of the absence of flights, teachers or scientists. Legal reform is equally today a symbol of modernity. Nations sign international treaties that are unenforced and unenforceable. Legislation passes that has no impact on practice. Independent regulators administer markets without competitors and act transparently when there is no one to examine their

actions. In the remainder of this essay, I will briefly examine how the risks of formalism (effectiveness) and propriety (here efficiency) may play out in the context of legal standardization. With respect to formalism, I will return to my earlier argument that unless shifts in the external context of the law are coincident with changes in its internal culture, the behavior of legal actors will remain fixed in established patterns. Campaigns for legal change will be marked by the frequently lamented gap between law and the books and law in action. With respect to propriety, I can do more than note how legal and institutional reform has emerged as the best practice of economic growth and pose a series of puzzles, for better exploration elsewhere, about what we really know about justifiable legal standards.

The internal landscape of legal cultures has been the traditional domain of diversity, rather than uniformity. Not only are legal rules and practices everywhere distinctive in their details, but legal actors—lawyers, judges, law professors and commentators—divide themselves into grand legal traditions like civil, common or Islamic law. Though they quibble endlessly over the boundaries of these traditions, they profess great certainty over the core distinctions they have long struggled to protect. I have argued elsewhere that there may or may not be much coherence or accuracy in these images of the legal culture's core.^{xxv} Civil law judges have often been active interpreters of the law; common law judges regularly unbound by precedents. However much reified stereotypes and generalizations about legal traditions may be, they have normally been quite resistant to transplants of rules, procedures or sources of authority that originate outside their frontiers. On the other hand, legal change within a legal tradition is constant, under the

rubric of perfecting the law according to the textual, logical or evolutionary canons that organize the internal structure of the legal culture. My point is that legal change is always present, but in processes that run against the tide of globalization more than in its favor.

If we look into self-representations of legal systems and actors beyond the normal internal dynamics they envision, nearly every legal culture incorporates some normatively charged hierarchy of sources. In other words, its norms are ranked in descending order of authority and legal deference is owed to those at the top of the order. For example, normally in the absence of constitutional priorities discussed below, the enactments of the legislator or the word of the principal text and its immediate interpreters take precedence over lesser regulators or judges. With the recent growth in the scope of international law through treaty accessions, in most legal systems these norms have direct superiority (self-execution) over national laws such that an increase in uniformity would be automatic. To the extent that international law expands further through the acceptance of customary (i.e. non-treaty) law, the internal hierarchy of norms of diverse legal systems may itself operate against diversity in practice. However, the scale of these slightly perverse consequences of multiple legal traditions are constrained by the lack of consensus on the nature of customary international law and by the dynamics of even self-executing agreements. Most such treaties are written at considerable levels of abstraction, allowing room for adaptation of their prescriptions to local legal practice. They famously provide occasions and anecdotes wherein the formal bows of national legal elites to their mandates run very thin in conduct. The maxim from

the experience of the Spanish empire-- *se obedece, pero no se cumple* (we obey, but we do not comply)-- has constant echoes far beyond that time or place.^{xxvi}

Although neither internal change within legal traditions nor their internal recognition of a hierarchy of norms seems to provide a good foundation for a reformed culture among legal subjects that would complement coincident contextual pressures to explain effective legal change, two other contemporary movements within the law—constitutionalism and functionalism—may be more useful. Constitutionalism, understood as the active interpretation by courts, whether of general or specialized jurisdiction, of an explicit legal text whose norms are recognized as supreme within a legal hierarchy and which thereby trump both legislation and regulation inconsistent with them, has only recently entered the mainstream of legal thought. Still, its diffusion across legal systems is prolific. From its idiosyncratic roots in the United States, it gained a serious hold in European law, in part through the American occupation of Germany and its attempt to impose institutional limits on unrestrained state power seen to have unleashed the Second World War. Whatever its initial motivations, the idea and practice of constitutionalism quickly took on its own forms and momentum within civil law systems that had no indigenous legal categories of this character. From that alien base, it has spread across national jurisdictions more generally in its amended European version than in the American original.

In this process of adaptation and diffusion, the political instincts that once defined the constitutionalist variant of democratic theory as no more than a series of negative

mandates on the scope and instruments of state action have been transformed to demand, in some cases, the positive assertion of governmental duties.^{xxvii} Moreover, constitutional adjudication has been generally severed from courts of general jurisdiction and assigned to new specialized bodies with legal capabilities to review legislative and executive action in advance of, or subsequent to, its exercise. As constitutionalism, however varied in its particular institutionalization, has spread from European national courts to the European Court of Justice and European Court of Human Rights, to the wide range of developing countries caught up in the democracy movement of the 1990s, and finally to the Commonwealth states with a common law tradition that most resisted it (save India that has had its own peculiar brand of aggressive judicial constitutionalism almost since independence), it has homogenized the propriety across legal traditions of an increased activist enmeshment of courts in the design and execution of legitimate governance.^{xxviii}

The rate and form of the general acceptance of constitutionalism into the internal logic of legal cultures is not easily explained through either political coercion (e.g. U.S. military occupations) or the wave of democratic social movements that grew up after the authoritarian excesses of the 1970s and 1980s in developing and socialist nations. The forms constitutionalism has assumed are too much artifacts of preexisting political and legal traditions in the converting jurisdictions to be seen as foreign impositions. Nor do democratic political campaigns lay their stress on the constitutional, as much as the populist, strains of reform. Instead, some of the impulse toward constitutionalism within this external context and nearly all of its evolving substantive content came from the subjective incorporation by legal elites of the categories of constitutional law as an

internal legal discourse. In other words, constitutionalism has spread and developed as a movement within and across legal networks that look principally to the concepts and practices of other legal (constitutional) actors for their justification and references. In these circumstances, constitutionalism has been transnational and promotional of increasing legal uniformity for two reasons. First, because legitimating references are thin within the legal categories of traditionally non-constitutionalist legal systems, there is a tendency to look for guidance and confirmation outside to the actions of other constitutional professionals rather than within the established national legal tradition. Second, constitutionalism represents an appropriation of relatively more independent judicial authority against other branches and agencies of national governments. Given the existing positivist political traditions of state-centered governance that had limited judicial activism in the name of the direct sovereignty of national peoples, constitutionalists are more prone to seize upon universalist terms and principles to rationalize their greater assertion of institutional powers.

The internal evolution of constitutional law as a transnational practice has commanded an expanding legal domain, locating itself sequentially in national, regional, and multilateral (e.g., the International Criminal Court) tribunals. However, its major dynamic is in the reach and ambition of its claims to substantive jurisdiction. The minimal content of constitutional law is contained by the idea of the *Rechtstaat* wherein judicial review is constrained to the examination of the formal conformity of legislative or executive pronouncements with mandates of whatever process is traditionally due. Notions of public notice of the law, not exceeding delegated authority, giving reasons, or general

applicability of rules define the scope of traditional judicial intrusions on governance. More recently, especially following the more substantive concepts of review widely propagated under the flag of proportionality by the European Court of Justice, constitutional courts have consistently reduced their deference to administrative bureaus. Even further, constitutional courts have become the institutional locus and advocates of generalized human rights to classical liberal freedoms and formal equality of treatment. The material (i.e. non-procedural) claims of the rule of law to personal liberties and associational voice have been transposed from natural law to national constitutional law discourses with largely common, if not universal, content with far greater success than they have been instantiated through international or multilateral adjudication.

Finally, there are still experimental substantive constitutional claims that threaten to thicken still further what constitutional protections are generally alleged. Some of these are grounded in newer dimensions of the original constitutional function of preserving property rights, now scaled up to include particular ownership interests like those of holders of patents or public securities. Others grow up from the comprehensive portfolio of expansive social, economic, and environmental rights that characterized the constitutional texts and norms of European and developing nations far more than they did the original American constitutional landscape. Whatever the outcomes of these newer legal arguments, for the purposes of this paper, the points to be noted are the exploding reach of constitutionalism, its now deep embedding inside the legal cultures of most of the world's legal systems, and the internal legitimacy of constitutional references to legal discourse and networks that lie beyond national borders. Constitutionalism has come to

constitute a subjective acceptance by legal actors of homogenizing practice that allows and encourages universal standards.

A second opening within established legal cultures that has reduced legal diversity between them is the growing tolerance in legal thought for more overtly functionalist conceptions of law in economy and society. As with constitutionalism, the dynamics of this change internal to legal cultures are too complex to allow simple, comfortable assertions of cause that run from shifts in law's external context to modifications in the self-representation of legal actors. As with constitutionalism, minority currents of dissent and critique of diversity could be found within separate legal cultures prior to a notable increase in legal uniformity. And again, the unpredictable specific ways in which legal change is adapted, organized and resisted suggest a more modest argument for a loose coincident association between reform within legal culture and developments in wider social fields.^{xxix} However we theorize the causal relations between the prevailing subjectivity of legal actors and their external situation, it is clear that functionalism as a mode of self-understanding within legal theory challenges well-established, though quite different, concepts of legal autonomy in the both the common and civil law traditions.

For common law actors, institutionally tuned to a British empiricism that cut across fields from psychology to gardening, the autonomy of the law was less an articulated position than a form of life.^{xxx} Although it might be rationalized by modern Burkeans as an evolutionary standard for truth finding through marginal deviations from established practice, for its legal practitioners from judges through advocates the virtue of common

law method was its self-discipline in referring to no arguments beyond internal legal precedents for justifiable decision. This innate conservatism was reinforced even in times of radical legal activism, like those that surrounded Lord Coke's judicial attacks on incipient early modern British absolutism, in that the defense of legal change was framed as a return to legal origins whose legitimacy lay in "time out of mind".^{xxx} If functionalism in legal thought begins with the proposition that well-formed law ought refer to some explicit social or economic criterion to rationalize its propriety, it still lies uneasy in the purer common law domains whence it emerged.

The disturbance of legal functionalism to actors in civil law cultures is still greater. Civil law theorists have consistently viewed the superiority of their tradition in its unwavering commitment to the autonomy of law and legal decision from its surrounding environment. The self-representation of the core of the civil law as a systematic and consistent hierarchy of legal concepts that can be professionally applied without reference to texts, arguments or influences external to the appropriate codes is far more explicit and celebrated than is the corresponding canon of autonomy in the common law. The philosophical, perhaps normative, sources of the civilian lawyer's creed that better law is law insulated from context are not as evident today as is the faith itself. Analysts of Continental intellectual history could assimilate the civil law quest for a true and autonomous legal science to the more comprehensive effort to describe what Toulmin has formulized as "a rational method, an exact language and a unified science".^{xxx} In other words, continental theorists, including their legal peers, sought to ground their knowledge of the world in natural kinds of being, unmediated by either psychologically complex

processes of perception or languages that demanded conventional agreements on the meaning of concepts. The role of legal theorists was to clarify and organize legal concepts so that they corresponded only to such natural classifications, free of the distorting impacts of political or economic ideologies.

In fact, as has often been pointed out by critics within the civil law tradition, the natural kinds imagined by the classical legal theory of civilian autonomy began with individual subjects whose centrality and construction are artifacts of unspoken social conventions that corrupted the purity of the law in the moment of its formation. These legal critics could have fortified their assaults with citations to the wave of deconstruction of the rationalist canon from Wittgenstein's views on exact language through Kuhn's on unified science, but it is not clear that their suggested turn to some form of legal functionalism as the corrective for misplaced belief in objective legal categories would have succeeded in upsetting the civil lawyer's basic faith in legal autonomy. Rather, by the mid-20th century this belief had become central both to the defense of a (limited) judicial sphere of action theoretically insulated (or institutionally protected) against administrative intrusion and to the implicit political norms of liberal subjectivity frozen in the core civilian legal categories. Any pretended exposure of weak philosophical foundations had every reason to go unattended.

How then, especially in the plurality of legal systems attached to the civil law tradition, does legal functionalism emerged as an effective movement accepted widely among legal actors in multiple legal systems that invites standardization and reduces legal diversity

between established traditions? In the United States in the first decades of the last century, criticism of traditional common law culture that relied on claims that the law was more the actual product of social forces, political positions, or the psychological disposition of judges and other lawmakers were particularly strong. Disconnected from the British assurance that the common law reflected a continuous community history, faced with contextual change that proceeded at unprecedented rates, and dealing with a judiciary with no reason to fear eclipse of its power by an exuberant political administration, sociological and realist schools gained a foothold inside the American legal system far more stable than did their *Freirecht* or other comparable intellectual brethren in civilian Europe or the United Kingdom. However, legal realism was never able to formulate a coherent counter-narrative to reconstitute a new normative basis for a post-autonomous law and remained suspended in fragmented critiques whose accuracy offered legal actors little consolation for their prospective surrender of theoretical independence. Further discredited by the claim that the absence of a *nomos* of legality had contributed in Europe to the rise of dictatorship, external attacks in the United States on law's internal logic were displaced after the Second World War by legal theories that sought to reestablish the principles of legal culture on different objectivist foundations.

Following a flirtation with a re-conception of the theory of law based on neutral principles and legal processes that were too open ended to provide a compellingly determinate account of justifiable legal practice, the American legal community gradually honed in on an overtly functionalist position through the application of normative economics to the problem of legal choice. As elaborated by legal theorists and as

interpreted by judges and other law-makers, law and economics entered and transformed legal discourse and culture because it, at one moment, offered an expert technique for legal decision and explicitly mirrored a normative commitment to a market-centered social order. In their desire to re-equilibrate a well-functioning but poorly theorized American legal culture, legal actors at all levels gradually revised their internal self-representation to privilege an objective technology of law with a comfortable, even if externally grounded, normative fit.

Law and economics as a functionalist legal theory has spread from the United States across diverse legal systems through legal, not political, networks that were essentially marginal to the core actors in the established legal cultures. Its diffusion rarely posed a direct threat to legal elites grounded in claims to legal autonomy as much as it colonized new arenas of law that had little recognized legal orthodoxy. In numerous states where re-regulation around the market gave rise to experimentation with new independent administrative bodies that sought to re-structure previously monopolized sectors like telecommunications or energy, the techniques of law and economics implanted themselves as operational methods. As competition law was reformulated in national and growing transnational economies as something other than industrial policy, law and economics provided the formerly absent theory. As public capital markets replaced banks as the principal sources of corporate capital, the statutory base of securities law was transplanted widely from known American models and American concepts of corporate governance became relevant in legal systems where corporate behavior was earlier monitored largely by industrial ministries and associations. Especially in as much

as these new fields of law practice were most often also the arenas in which larger, non-traditional law firms emerged that were able to compete with American firms and support specialists competent to manipulate the innovative legal technologies, the reorganization of the bar reinforced the internal legitimacy of the imported legal culture. These firms, in turn, increasingly sent their junior associates to the United States for graduate legal education that further integrated formerly diverse legal systems around an internal cross-national community of law actors, unified through its normative underpinning to an external referent (normative economics).

In effect, a schism within legal traditions has grown up that is wide enough to allow the non-traditional legal culture to accumulate an empowered and numerous coterie of national legal actors who welcome and seek standardization of law as a functionalist technique from the inside of once insulated legal communities. Through their participation in transnational professional networks specific to these integrated legal fields, they press for a legal engineering of standardized norms as best practice that replicates the concurrent practice of technical (ISO) standardization now rampant in industrial products and processes. But, it is important to remember that legal cultures have only partially opened to functionalist standardization. The segments of the bar, legal academia and the higher judiciary familiar and complicit with these developments are frequently both influential and shallow within the larger legal community. In the case of constitutionalism as a progenitor of legal uniformity, although there is little explicit discord about the institutional legitimacy of constitutional courts, there remains great question about the penetration of their rulings into the lower reaches of the legal

order. In the case of functionalism, there is still an absence of consensus about its propriety that ought to stimulate suspicion about the level of formalism that may attach to the enforcement throughout the legal culture of practices increasingly standardized. A positive theory of legal change that requires both a shift in external context and a revision of internal legal culture to produce effective reforms across legal systems with diverse legal traditions would suggest that we remain agnostic about what the tide of standardization will yield.

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Standardization faces two challenges. The first, discussed above, is whether standardized legal rules and procedures will remain formal and unimplemented. The second is whether the standards will, if implemented, produce the normative outcomes that motivate their adoption. With respect to constitutionalism, the normative justifications for such issues as the standardization of procedural fairness and the definitions of human rights are mainly internal to legal discourse. Debates about impartiality of decisions, the objectivity of evidence, and equality of treatment may be general problems of method that apply to areas across the natural and the human sciences, but they are probably better and in more concrete detail developed within the legal realm than outside it. If the propriety of standards circulating through constitutionalism is law defined, the normative content of functionalist standards is externally derived. For our immediate purposes, let me assume that functional legal debate is largely confined to law and economics and that the normative relation that underlies the case for adhering to standardized laws and practices is that of well-structured laws and institutions to economic growth. While I obviously have neither will nor ability to evaluate seriously this relation here, what may

be useful is to sketch out the path that has led to the current focus on the hypothesis that proper law and institutions are strongly correlated with economic growth and unsystematically raise a series of questions that might give us concern about what we really know about the standardized legal programs we tend to advocate.

The recent history of economic growth theory has only lately turned to law and institutions as they are now commonly understood. Basically, over the last fifty years, specific policies and programs dominated the debate over how nations might grow, with law and institutions playing an instrumental role in effecting these measures. In other words, if a particular tax policy were important for capital accumulation that was seen as the driver of economic take-offs, then the tax law should be brought into conformity with that policy objective. There was no real discussion of the quality of law or legal institutions generally as a functional requisite for economic performance during the several decades in which growth theorists sequentially shifted their attention from the need in developing countries for added supplies of financial capital and foreign exchange, for physical infrastructure provision, for human capital formation, and for improved technological innovation and total factor productivity. The role of the developmental state was always to increase the amount of the neglected factors; the law was an implement to do so.

Faced with the failure of most nations outside of East Asia to sustain the growth programmed through these policies, by the 1970s and 1980s theorists turned to macroeconomic concerns including budgetary macro-stability, exchange rate accuracy,

and trade openness as the necessary conditions for expansion. Again, there was minimal attention paid to legal rules or institutions for economic purposes, although these same years and the excesses of declining authoritarian regimes did stimulate an initial turn to constitutionalism as one dimension of broad based democracy movements. It was not until the still stalled pace of economic development across much of the globe pushed analysts in the 1990s to look for additional missing elements in the growth agenda that micro-institutions and the quality of law commanded center stage. The limelight stimulated the rapid emergence of a new legal orthodoxy, to which I turn below, that prescribed what institutional reforms ought to become standard and, in even more contemporary work, an increasing examination of what are the historical conditions that are more or less favorable to their occurrence.^{xxxiii} I do not contest the importance of the evolution in growth theory from remedial policies to accumulate difference types of capital to macro-policies to micro-institutions. Instead, I have some questions about the propriety of our standardized knowledge about the tie between growth and legal institutions.

First, what do we mean by growth, if that is the index by which we calculate the utility of micro-institutions? Is the apt measure per capita income increase, poverty reduction, or even a complex value that looks at a combination of absolute income growth and openness to immigrants who share in the incremental wealth (as they lower per capita income)? Do we understand enough about the sources of growth to design institutions that facilitate it? Smith and Ricardo emphasized the scale of division of labor, with access to trade and geographic ease thereto as consequential. Later associations have

challenged these links, substituting those between growth and physical factors like disease, availability of water, or natural resources. For each positive relation one can imagine appropriate institutions such as tariff and customs administration, public health laws, the rules to structure efficient water markets or to re-invest natural resource rents.

Or, should we think of diverse aspects of growth as separate problems to which different sets of institutions should be fitted?^{xxxiv} The initial phases of growth in Vietnam may now involve principally the removal of established inefficient restrictions that release resources to new uses. Capital long tied up in the repressive Chinese state banking systems can be released to more productive employ without the need for efficient financial markets. In Japan, Taiwan and Korea early growth was robust with closed national markets to trade. In Mauritius, the economy took off because it found niches to exploit within the generally deplored institutional fabric of the Multi-Fiber (trade) Agreement and the European Union's discriminatory rules of sugar trade. Beyond the initial stages of growth, what are the institutions best programmed for dealing with macro-economic shocks to which developing nations are particularly sensitive? How does one manage through law the social redistribution of the burdens of shocks such that political stability is maintained? Or, is the new legal orthodoxy only really appropriate for the steady state growth that has characterized the core European and American states for the last one hundred years? Is law and economics about the refinements of total factor productivity alone rather than the sharper bursts of growth from one steady state to a higher level? If so, perhaps the canon of micro-institutions is an attribute of a sequential theory of growth that calls upon orthodoxy only when more extreme growth

phases have run into some natural limit. I have no doubt there are better and worse laws and institutions to deal with growth spurts, macro-shocks and steady state growth, but is it true that they are always the same?

Second, let's bypass the intricacies of how we define and understand economic growth or its several stages and ask what have we come to mean by good institutions therefore? Micro-institutional orthodoxy, benefiting from the pioneering work of North and Olsen and the more industrial scale labors of law and economics as a field, recommends a standard program of stabilization (both regime and macro-stability), liberalization, privatization and democratization (especially for its constitutional and political restrictions on the tendencies of governments and majorities to expropriate).^{xxxv} In a recent formulation, prelude to a more cautious revisionist view on exactly which institutions are right for development, Rodrik writes:

“Institutions that provide dependable property rights, manage conflict, maintain law and order, and align economic incentives with social costs and benefits are the foundation of long-term growth.... [C]ases of success ... owe their performance to the presence (or creation) of institutions that have generated market-oriented incentives, protected the property rights of current and future investors investors and enabled social and political *instability* (sic).”^{xxxvi}

Each element of the standard formula can be broken down more finely. Democratization may imply transparency, widespread participation in politics or multi-party electoral rules. Liberalization and privatization refer to the institutions and legal structures of market-dominated political economies, with differing emphases on getting prices straight, minimizing distorting taxes, strengthening the role and competence of courts to frame private action and control arbitrary government, de-politicizing labor markets, building up effective corporate governance and intellectual property or policing market

competition. However, rather than multiply the attributes of well-constructed law and institutions, I'll just concentrate here on the core learning of legal orthodoxy—the protection of property rights.

Good institutions must protect property to foster the multi-period, especially collective, investment that all economists agree is the lynchpin of economic growth. The problem is how to specify these rights. It is easy to decry predation, in the sense of Olson's classic stationary bandit as the representation of the state, which steals from its subjects the returns from their productive projects. But such predation is not the stuff of a realistic history in as much as governments across the ages have seen such activity as a bad organizational strategy that brings them little stable return. In fact, governments have usually been the entities that ended the short periods of anarchic predation by gangs or other small-ambition tyrants who played games with short-term horizons. The pre-liberal state-- mercantile, authoritarian or colonial--, though fully lacking the legal and institutional attributes prescribed by modern orthodoxy, has normally limited through organizational self-interest its revenues to the rents from the monopolization, through state enterprise or state franchise, of specific high-value sectors like arms, mines, canals, ceramics, salt or foreign trade.

If predation is not the normal form of derogation of property rights, do we then mean expropriations like those in the natural resources industry in the 1970s? But these were carried out in the particular context of the assertion of long-standing private appropriation of resource rents, managed with variable compensation, and have fallen away in

frequency. If these extreme cases of absence use of property rights lack relevance, we might shift our inquiry to the instability of investment returns through lesser, more usual intrusions like those produced, often differentially for local and foreign investors, by regulation, taxation, inflation, devaluation or corruption. Here, however, micro-institutional orthodoxy has yet little to say about the propriety or effects on growth of these derogations of pure property entitlements. Rather, the field is turned over to the fine tuning of conventional law and economics whose inquiries into comparative static efficiency may be good practice for the steady state growth of advanced economies, but lack any empirical grounding concerning the relations of such laws to what we conventionally think of as economic development.

There are two lines of inquiry that might follow from this observation. On one hand, there remains considerable room for investigation whether it is true that liberal or market-centered legal institutions can maximize total factor productivity in ways that the administrated wealthy political economies of France, Germany and Japan could not, at least on a sustained basis. On the other hand, there is ongoing uncertainty about the value of orthodox micro-institutions for fast growth from one steady state to another. Even if we use only the recent set of studies of growth and institutions collected by Rodrik, it is evident that there are, as one would expect, cases of high growth and good (orthodox) institutions (Poland, Botswana) and of low growth and bad institutions (Bolivia, Romania). The problem is that there are equally cases of low growth and good institutions (Venezuela) and high growth and unorthodox institutions (China, Mauritius, Japan). The array instigates added concern of what we might mean by good institutions.

Third, as suggested by the empirical cases just cited, what do we know about the substitutability of alternative institutions, legal and non-legal, for the standard functionalist proscriptions for law and institutions? If we understand that the law, as conventionally defined, is a public good monopolized by government enterprises, it is apparent that the cost and efficiency of its production is likely to be problematic. Substitutes will be more or less imperfect depending on the quality and relative costs of their services in comparison with actual state provision, since it would be and unrealistic to compare the costs of possible substitutes for law with law as ideally delivered. It is an empirical question how actors will best compose a portfolio of legal and other means of reducing transactional risk or whatever other functional value legal services deliver. There is a rich and growing literature on social and civic capital, reputation, or the non-state provision of legal services like arbitration that provides an entry into this field.^{xxxvii} Related work divides on whether predictable corruption is a close or remote substitute for enforceable contracts where courts function poorly. But, these inquiries are the tip of the iceberg. The costs of weak law may be altered profiles of investment or other behavioral substitutes. How much is development impeded by more labor-intensive industrial structures or the use of penultimate technologies to minimize the legal risks to physical or intellectual property? What is the price in growth of the underground economy that substitutes for over-regulated legal systems? Or what is the degree of substitutability within legal systems themselves? Can active markets for corporate control with thick private networks of private market monitors substitute effectively for elected directors, activist securities regulators, or judicial remedies for breaches of fiduciary duties? Can

greater specification of terms in thicker contracts make up for the uncertainties introduced by jury trials or more passive judges in the United States than in Germany?^{xxxviii} Does it matter in India if cases never come to a close as long as adequate motions practice defines who has effective controls of resources?

In all of the Rodrik volume studies of high growth and low quality institutions, some creative account explains how unorthodox institutions have been effectively substituted for legal orthodoxy. For example, China is said to have employed township and village owned enterprises (TVEs) as functional substitutes for private property rights, relied on a cash heavy economy to reduce the possibility of government expropriation of more transparent transactions, and used financial decentralization of government authority to stimulate a productive internal regulatory competition.^{xxxix} But the same volume finds that a cash (underground) economy is prime evidence of institutional failure in Bolivia and my own experience in rural China has made clear that local government protectionism and private appropriation of nominally state property with substantial demoralization effects are rife.^{xl} While I subscribe to the emerging revisionist view that the substitutability of non-orthodox institutions for the standard prescriptions is probably high, I also believe that to empty the conventional micro-institutional program of any generalizable content is not a happy result.

Fourth, we might ask how the marginal benefits of legal rules and practices standardized around the orthodox economic growth program will vary with the extent to which they are effectively implemented. The usual institution building accounts seem to assume that

legal standards will penetrate throughout the legal system and be consistently enforced. But the positive analysis of legal change in this paper led towards a suspicion of formalism and descriptions of the legal systems operating in most developing countries regularly note that the acceptance and reach of the law declines rapidly with the distance of institutions and actors from the national capital and from higher to lower courts.^{xli} Although Kaufman and others have properly insisted that it is not the number of well-devised laws and regulations enacted but the scope and quality of their implementation that is statistically related to output, statistical correlations of formal laws on the books and economic indicators continue to cloud the intellectual horizon.^{xlii}

Fifth, do we know the causal direction between law, institutions and economic growth? Lipset argued that democracy did not precede economic development, but was its consequence.^{xliii} Subsequent work has never demonstrably overturned this finding.^{xliv} In the case of law and growth, we not only have the unorthodox institutional patterns that have characterized the high growth periods of China and the East Asian rim countries, but could ask hard questions about the state of the courts, corruption and legal rules during the most rapid period of expansion of the U.S. economy in the later 19th century.^{xlv} If orthodox legal institutions are basically about refinements in total factor productivity, they could well be the artifact of growth from low to high steady states of economic performance rather than its precondition.

Finally, how much do we know about effective strategies for improving the performance of the legal institutions charged with implementing the legal standards on which we

normatively settle? The recent history of the substantial funds devoted by official development assistance agencies to rule of law reform is almost wholly unpromising.^{xlvi} Yet, without a decent organizational program able to improve the output of resources invested in the quality of public legal services relative to resources dedicated to (or saved by) managing risks through legal substitutes, we cannot estimate the real cost effectiveness of orthodox prescriptions of law reform.

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Given the normative uncertainty of the functional program of law and growth theory, we in the end must fall back to more modest, positive conclusions about the case for legal standardization. There is a notable, if yet problematic and still partial, turn within national legal cultures that cuts through the classical legal traditions to reorder legal rules around common constitutional and economic precepts. This shift in the internal self-construction of law coincides with a widespread disenchantment with state-centered political economies seen as too much locked into established routines in a period when innovation is prized. In the resultant push to move polities toward a re-regulation around the market, greater regulatory competition and accession to transnational regimes have increased legal uniformity across diverse legal systems. Standardization is more often the form the legal homogenization assumes as professional networks of private and non-governmental actors claim increased jurisdiction in the new organizational space that re-regulation exposes. From this point forward, to bring our normative instincts into line

with more effective and efficient practice, legal scholars and theorists still have much work to do.

ⁱ W. Brian Arthur, *Increasing Returns and Path Dependence in the Economy* (University of Michigan Press: Ann Arbor 1994)

ⁱⁱ Public international law, as a source or uniformity across national laws, may generally be seen as a special case of an accession to regime theory in that in its classical and still predominant conception, only those states that consent to its recognition by means of treaties or their commitment to widely consensual practice (customary international law) are bound by its norms. While such treaty-driven efforts to establish universal legal rules and practices have been underway since at least the anti-slave trade agreements of the early 19th century, see Roger S. Clark, "Steven Spielberg's *Amistad* ...", 30 *Rutgers L.J.* 371, 435-36 (1999), there is little question that programmatic treaties that define international law have proliferated in the second half of the 20th century. Less orthodox interpretations of international law in which states, and, increasingly, non-state actors, are said to be bound without their consent merit separate discussion, but are not normally associated with the growth of standardization.

ⁱⁱⁱ The standard reference to Weber's typology of the alternative forms of legitimate domination (rational domination including legal domination, traditional domination and charismatic domination) is Max Rheinstein, *Max Weber on Law in Economy and Society* (Harvard University Press: Cambridge MA 1954) xxxix-xlii, 322-337.

^{iv} Donald Horowitz, "The Qura'n and the Common Law: Islamic Reform and the Theory of Legal Change, 42 *American J. of Comp. L.* 233 (1994) "244-252

^v Alan Watson, *Legal Transplants* (University Press of Virginia: Charlottesville 1974); important exceptions to transplantation of legal thought and practice across legal traditions, as well as the difficulty of those changes being accepted as such might include Jeremy Bentham's efforts to systematize the common law on a the model of civil law codes or Langdell's attempts to import legal science from continental jurisdictions to American law through inductive organization (case method) of common law legal materials.

^{vi} Gunther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences", 61 *Mod. L. Rev.* (1998) 11; see also See J.W.F. Allison, *A Continental Distinction in*

the Common Law, (Clarendon Press: Oxford 1996) for discussion of the complexities of legal transplants in practice.

vii On the distinction between internal and external perspectives in the law, see Thomas C. Heller “Political Science and Law: How Much Common Ground?”, especially 36-52, in Christoph Engel and Adrienne. Heritier (eds), *Linking Politics and Law*, (Nomos Verlagsgesellschaft: Baden-Baden 2003); on explorations in the practice of legal change see generally Erik Jensen and Thomas C. Heller, *Beyond Common Knowledge: Empirical Investigations of the Rule of Law* (Stanford U. Press, Stanford 2003)

viii George A. Berman, *Transnational Litigation* (West, St. Paul MN 2003) 237-247.

ix *Ibid*, 247-249.

x Wolfgang H. Reinicke, *Global Public Policy: Governing without Government?* (Brookings, Washington 1998), 75-101

xi See Eugen Weber, *Peasants into Frenchmen* (Stanford U. Press: Stanford CA 1976); Alexander Gershenkron, *Economic Backwardness in Historical Perspective: A Book of Essays* (Belnap Press: Cambridge MA 1962); see also generally, Heller *supra* note vii.

xii Chalmers A. Johnson, *MITI and the Japanese Miracle: the growth of industrial policy 1925-1975* (Stanford U. Press: Stanford CA 1982); Alice H. Amsden, *Asia's Next Giant: Korea and late industrialization* (Oxford U. Press: New York 1989), Robert Wade, *Governing the Market: economic theory and the role of government in East Asian industrialization* (Princeton U. Press: Princeton 1990).

xiii Thomas C. Heller, “Modernity, Membership and Multiculturalism”, 5 *Stanford Humanities Rev.* 2 (1997)

xiv Richard B. Stewart, “A New Generation of Environmental Regulation?”, 29 *Capital U.L.Rev.* (2001) 21

xv for discussion of the comparative politics of negative and positive integration measures in Europe see Fritz W. Scharpf, “Negative and Positive Integration in the Political Economy of European Welfare States”, in Gary Marks, Fritz W. Scharpf, Philippe Schmitter and Wolfgang Streek, *Governance in the European Union* (Sage, London 1996); for the central role of the European Court of Justice, see J. H. H. Weiler, “The Transformation of Europe”, 100 *Yale Law J.* 2403 (1991)

xvi Edward S. Steinfeld, *Forging Reform in China: The Fate of State Owned Industry* (Cambridge U. Press: Cambridge 1998) 27-44

xvii Tom Ginsburg, Dismantling the ‘Developmental State’? Administrative Procedure Reform in Japan and Korea”, 49 *Am. J. Comp. Law* 585 (2001)

xviii The claim that regulatory competition actually influences capital location is highly contestable and contested. Its threat to political actors may be its more effective form of motivating legal uniformity.

xix In particular on corporate mobility see John Coffee, “The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications”, 93 *Northw. L. Rev.* 641 (1999); see also the recent holdings of the European Court of Justice allowing relatively free incorporation within the Union not unlike that long available in the United States: Centros Ltd. v. Erhvervs-og Selskabsstyrelsen, European Court of Justice, Case 212/97, March 9, 1999; Übersee ring b.v. V. Nordic Construction Company Baumangement GmbH (NCC), European Court of Justice Case 208/00, November 5, 2002. See Berman, *supra* note viii at 195-210 on the expansion of the U.S. Alien Torts Claim Act and other forms of universal jurisdiction.

xx Paul A. David & Shane Greenstein, “The Economics of Compatibility Standards: an Introduction to the Recent Research”, 1 *Economics of Innovation and New Technology* 3 (1990)

xxi See, for example, on the uses of competition within this new institutional space Susan Helper, John Paul MacDuffie, and Charles Sabel, “Pragmatic Collaborations: Advancing Knowledge While Controlling Opportunism” (draft paper, May 2000 on file with author)

xxii Jenny S. Martinez, “Towards an International Judicial System”, 56 *Stanford L. Rev.* 429 (2003)

xxiii See Walter W. Powell “Neither Market nor Hierarchy: Network Forms of Organization” *Research in Organizational Behavior* (1990) 12:295; see also Peter M. Haas, “Introduction: Epistemic Communities and International Political Coordination” 46 *International Organization* 1 (1992). It is important to point out that transnational networks have grown not only in the private and scientific sectors, but among non-governmental and non-profit organizations whose claim to participate and actual participation in these networks has grown apace.

- ^{xxiv} John W. Meyer et. al. "The Structuring of a World Environmental Regime, 1870-1990" *International Organization* (1997) 51:623; also John Meyer, John Boli, George Thomas and Francisco Ramirez, "World Society and the Nation State" 103 *Am. J. Sociology* 144 (1997); Francisco Ramirez and John Meyer, "Dynamics of Citizenship Development and the Political Incorporation of Women" in C. McNeely (ed) *Public Rights, Public Rules: Constituting Citizens in the World Polity and National Policy* (Garland 1998) 59-80
- ^{xxv} Heller, *supra* note vii, 26-36.
- ^{xxvi} David G. Victor, Kal Raustiala, and Eugene B. Skolnikoff, eds. *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (MIT Press: Cambridge 1998)
- ^{xxvii} for discussion of the adaptation of constitutional theory to a European context, see Donald P. Kommers, "German Constitutionalism: A Prolegomenon" 40 *Emory L. J.* 837 (1991)
- ^{xxviii} Stephen Gardbaum, "The New Commonwealth Model of Constitutionalism", 49 *Am J Comp L* 707 (2001).
- ^{xxix} Teubner, following the systems theory of Niklas Luhmann, has used the term "structural coupling" to denote this loose association. Gunther Teubner, *Recht als Autopoietisches System*, (Frankfurt: Surkamp 1989)
- ^{xxx} On the breadth and depth of the British commitment to empiricism, see Stephen Toulmin, *Return to Reason*, (Harvard U. Press: Cambridge 2001) 37-40.
- ^{xxxi} See J. G. A. Pollack, *The Ancient Constitution and the Feudal Law* (Cambridge U. Press: London 1957).
- ^{xxxii} see Toulmin, *supra* note xxx, at 67-77.
- ^{xxxiii} Candidates historical conditions argued to be favorable to good legal quality have varied from common law traditions, to having been a British settler colony, to the ethnic make up of the national state. For good discussion of these hypothesis, see Damon Acemoglu, Simon Johnson and James Robinson, "The Colonial Origins of Comparative Development: An Empirical Investigation" 91 *American Economic Rev.* 1369-1401 (2001).
- ^{xxxiv} See Lant Pritchett, "A Toy Collection, a Socialist State, and a Democratic Dud? Growth Theory, Vietnam and the Philippines" in Dani Rodrik (ed), *In Search of Prosperity: Analytic Narratives on Economic Growth* (Princeton U. Press: Princeton and Oxford 2003), 125-134
- ^{xxxv} Douglass C. North and Robert Paul Thomas, *The Rise of the Western World* (Cambridge University Press: Cambridge 1973) 91-156; Douglass C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press: Cambridge 1990) 107-140. Mancur Olson Jr., *Power and Prosperity* (Basic Books: New York 2000).
- ^{xxxvi} Rodrik, *supra* note xxxiv, 11
- ^{xxxvii} Partha Dasgupta & Ismail Sarageldin, *Social Capital: a multifaceted perspective* (World Bank: Washington D.C. 2000); Avner Grief, *Informal Contract Enforcement: lessons from medieval trade* (Working Paper #145 John M. Olin Program in Law and Economics, Stanford Law school, Stanford CA 1997). For analysis of dimensions of substitutability from an economic theorist's position, see Avinash K. Dixit, *Lawlessness and Economics: Alternative Modes of Governance*, (forthcoming Princeton U. Press: Princeton and Oxford 2004).
- ^{xxxviii} John Langbein, "The German Advantage in Civil Procedure" 52 *U Chicago L.Rev.* 823 (1985).
- ^{xxxix} Yingyi Qian, "How Reform Worked in China" in Rodrik, *supra* note xxxiv, 297-333
- ^{xl} D. Kaufmann, M. Mastruzzi, and D. Zavaleta, "Sustained Macroeconomic Reforms, Tepid Growth: A Governance Puzzle in Bolivia", in Rodrik *supra* note xxxiv, 334, 361-375
- ^{xli} see, for example, the ethnographic study of the organizational incentives and behavior of lower Indian courts, Robert S. Moog, *Whose Interests are Supreme?: Organizational Politics in the Civil Courts in India* (Association for Asian Studies: Ann Arbor MI 1997).
- ^{xlii} Kaufmann et. al. , *supra* note xxxix, 337-361
- ^{xliiii} Seymour Martin Lipset, *Political Man* (Doubleday : Garden City 1960)
- ^{xliv} Adam Przeworski and Fernando Limongi, "Political Regimes and Economic Growth", 7 *Journal of Economic Perspectives* 51-69 (1993)
- ^{xl} World Bank, *The East Asian Miracle: Economic Growth and Public Policy* (Oxford University Press: Oxford 1993) 1-26; Qian, *supra* note xxxviii
- ^{xlvi} see Jensen & Heller, *supra* note vii, 336-413