

2012

Law and Development as Anti-Comparative Law

Jedidiah Kroncke

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [Comparative and Foreign Law Commons](#)

Recommended Citation

Jedidiah Kroncke, *Law and Development as Anti-Comparative Law*, 45 *Vanderbilt Law Review* 477 (2021)
Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol45/iss2/2>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in *Vanderbilt Journal of Transnational Law* by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Law and Development as Anti-Comparative Law

Jedidiah Kroncke*

ABSTRACT

This Article asserts that during the twentieth century, American law has predominantly structured its relationship to foreign legal experience through a set of ideas and practices known as "law and development," which is irredeemably antithetical to the practice of comparative law. Centrally, law and development is built on the assumption that American law can be exported abroad to catalyze foreign legal development. The dismal record of such efforts has remained paradoxically popular while the field remains locked in repeating cycles of failure and optimism.

This Article demonstrates that the history of law and development's failures is far older than has been traditionally recognized, and dates back to the turn of the twentieth century. In this era, foreign reform became a key part of the professional image of the modern American lawyer. At the same time, the origins of law and development were intimately tied to the decline of comparative law in American legal culture. This history reveals that the paradox of law and development's contemporary popularity can only be understood by recognizing the cultural politics that these developments embedded in the American legal community. The troubling legacy of this widely entrenched view of America as solely an exporter of legal knowledge presents pressing liabilities for American law, both internationally and domestically, on the competitive terrain of the twenty-first century.

This Article concludes that in order to address these liabilities, America should categorically abandon law and development and should fundamentally reorient its relationship

* Senior Research Scholar, East Asian Legal Studies, Harvard Law School. J.D. Yale, Ph.D. UC Berkeley. Earlier drafts of this paper and related research were greatly improved by various workshop participants during my tenure as a Ruebhausen Fellow at Yale, Golieb Fellow at NYU, and Berger Fellow at Harvard. For their specific feedback, I am most indebted to William Alford, Marc Arkin, Asli Bali, Robert Berring, Amy Chua, Jerome Cohen, David Fontana, Robert Gordon, Dan Kahan, Laura Nader, Ugo Mattei, Bill Nelson, Intisar Rabb, Aziz Rana, Jeff Redding, Teemu Ruskola, and Frank Upham.

to foreign legal experience through a self-interested practice of comparative law. As exemplified in the debate over judicial citation of foreign precedents, this shift will require basic changes in how American legislative and administrative bodies relate to foreign law, as well as the place of comparative law in American law schools. Such a reorientation will enable America to strategically perceive foreign legal developments and, most critically, productively adapt foreign legal experience as an energizing stimulant to our own legal innovation.

TABLE OF CONTENTS

I.	INTRODUCTION	479
II.	THE PARADOXES OF A HISTORY WHOSE LESSONS CANNOT BE LEARNED	482
	A. <i>Defining Law and Development</i>	483
	B. <i>The Unending Synergy of Critique and Optimism</i>	484
	C. <i>The Persistent Cycles of Contemporary Law and Development</i>	492
III.	THE ORIGINS OF LAW AND DEVELOPMENT AS ANTI-COMPARATIVE LAW	500
	A. <i>The Early Twentieth Century Birth of Law and Development</i>	501
	B. <i>America's First Wave of Law and Development Goes Global</i>	505
	C. <i>The Cultural Politics of Law and Development</i>	515
IV.	THE INTERNATIONAL LIABILITIES OF LAW AND DEVELOPMENT'S MIRRORED LENS	520
	A. <i>Accepting the Limits of American Legal Expertise Abroad</i>	520
	B. <i>Authoritarianism and Recognizing Unintended Consequences</i>	522
	C. <i>Blinding Reformers, Blinding Ourselves</i>	529
V.	THE DOMESTIC LIABILITIES OF ANTI- COMPARATIVISM	535
	A. <i>Ignoring Foreign Legal Experience in an Age of Common Legal Problems</i>	535
	B. <i>Foreign Citation and the Legacy of Anti-Comparativism</i>	539
	C. <i>Abandoning Law and Development, Reviving Comparative Law</i>	544
VI.	CONCLUSION	552

I. INTRODUCTION

Throughout the past decade, an increasing amount of energy has been devoted to debates over the role of “foreign law” in the American legal system. In both public and academic circles, these debates have primarily focused on the appropriateness of judicial citation to foreign precedents or the enforcement of foreign law in contracts or arbitral arrangements.¹ These debates have generated a great deal of heat, but little in the realm of practical lawmaking—displaying more the characteristics of identity politics than serious inquiry. Moreover, in this furor, the actual state of comparative law in America has been elided more often than not.

Consider how the average American lawyer, or even average American citizen, interacts with and thinks about foreign legal systems. Is it through recounting the foreign influences that shaped early American legal thinking? Is it through public debate on the utility of foreign legal innovations or their relationship to our particular set of legal values and commitments? Or is it instead through the recounting of the inefficiencies of rival industrialized nations and the injustices of those systems deemed “developing?” From bar association programs to law school colloquia, American lawyers are consistently presented with the infirmities of foreign law—even in our own times of domestic crisis—and American citizens are inundated with a mythologized past and noble present of Americans working privately and publicly to reshape foreign legal systems.

Thus, in contrast to even the most cosmopolitan sentiments expressed in American law today, the intellectual and attitudinal terms on which American lawyers and legal institutions relate to most foreign legal systems are dominated by what has come over the past half-century to be known as “law and development.” Although not without its own internal diversity, law and development is built upon the deeply ingrained notion that America is solely an exporter of legal knowledge and, further, that American lawyers and legal institutions can be the altruistic catalysts of positive legal development abroad.² The panoply of American private and public international legal reform projects is the most pervasive driver by which assumptions about foreign legal systems have been shaped and sustained for the modern American lawyer.³

1. See *infra* Part V.B (discussing the debate over judicial citation to foreign authorities).

2. For a taxonomic overview of law and development approaches, see generally Mariana Prado, *What Is Law & Development?*, 11 REV. ARG. TEORIA JURIDICA 1 (2010) (Arg.).

3. This Article is unconcerned with other countries that engage in what could be described as law and development work. The degree to which law and development

This Article demonstrates that beyond the relatively narrow terms of current debates about foreign law in America, the persistence of law and development has directly led to the marginalization of American comparative law in the past century. In the most direct sense, law and development operates as a form of anti-comparative law in American legal culture. The very methodological and conceptual struggles with which comparative lawyers grapple form the exact, nonrevisable presumptions of law and development as an applied field of legal action—from the intimacy of law and politics to the complexities of legal change. Furthermore, the history of law and development is far longer and more problematic than is generally acknowledged. Not only was the rise of law and development in the early twentieth century intertwined with the general decline of comparative law, but at the time, its rise stood in stark contrast to our relative pre-twentieth century legal cosmopolitanism.

Although evaluated by sometimes searching external and internal critiques, law and development has shown an inability to learn from its own history and to transcend the presumptions inherent in the idea of America as an exporter of legal knowledge. Throughout the twentieth century, American legal reform efforts abroad have consistently failed to justify their continued popularity, with perhaps the worst record within the already dismal record of international development efforts more broadly. Even today, when there is a rhetorical convergence across the globe regarding legal ideals such as the rule of law, spare empirical evidence exists to substantiate any consistent or predictable impact of American reform efforts on foreign legal development. As this Article ultimately concludes, law and development and its persistent popularity is best understood not as a critical field of inquiry and action, but as a form of cultural identity politics.

Yet, throughout the twentieth century and continuing today, even those who have held themselves out as cosmopolitan promoters of foreign law in America consistently, if not enthusiastically, participate in efforts to shape foreign legal development that

ideas have spread from America to other nations, have separate origins in Europe, or have migrated into putatively international organizations like the World Bank or IMF is tangential to how America should ideally relate to foreign legal systems. At a minimum, the prevalence of law and development elsewhere is far from as central and extensive as in American law, and to whatever degree it exists elsewhere, all to the detriment of those legal cultures. See generally Ian Manners & Richard G. Whitman, *The Difference Engine: Constructing and Representing the International Identity of the European Union*, 10 J. EUR. PUB. POLY 380 (2003) (discussing the development of the European Union's international identity); Klaus A. Ziegert, *With Law the Land Shall Be Built: The Case of Changing Norms Seriously*, in LAW AND LEGAL CULTURE IN COMPARATIVE PERSPECTIVE 142 (Gunther Doeker-Mach & Klaus A. Ziegert eds., 2004) (addressing law and development efforts by Nordic countries).

reinforce the parochial attitudes they seek to combat domestically. Current debates only hint indirectly at the serious present and future liabilities that the persistence of law and development presents for the American legal community, which subsume but go far beyond current concerns over foreign law in American legal culture.⁴ The consequences of law and development as anti-comparative law are increasingly felt both internationally in our inability to strategically evaluate foreign legal developments, and more significantly in our domestic inability to productively utilize foreign legal experience. Even at the most routine and technical levels where American lawyers increasingly encounter foreign law in this global age, the concerns of law and development are at best orthogonal, and at worst countervailing.

These liabilities are relevant to any debate over the place of America in the shifting tides of global politics. Just as the global order shifted in our favor over the course of the twentieth century, it is shifting again in the twenty-first century toward greater parity and competition. The shrinking terms of twentieth century geopolitics reached their apex in the brief unipolar American moment of the post-Cold War decade, but they have quickly expanded into an increasingly multi-polar order in which America's place is now uncertain. Consider not only China, but the rising prominence of countries including India, Brazil, and Russia, and it becomes plain that in the twenty-first century, we can no longer afford to hold onto the same stagnating twentieth century attitudes about our inherent legal superiority.

Thirty years ago, comparative law legend Eric Stein declared, "[T]he time has come for the American institutions concerned with law revision and for the legislatures at the state and federal levels to institutionalize and make systematic the study of foreign legal solutions."⁵ Comparative lawyers like Stein have long chastised American presumptions about foreign legal knowledge and warned that such conceit would eventually undermine our competitive position.⁶ Such warnings continue to go unheeded.

4. See *infra* Part V.B.

5. Eric Stein, *Uses, Misuses—And Nonuses of Comparative Law*, 72 NW. U. L. REV. 198, 216 (1977).

6. *Id.* For other articulations of the advantages of comparative approaches, see ERIC FELDMAN, *THE RITUAL OF RIGHTS IN JAPAN* 164 (2000) ("One of the most compelling reasons to research other legal and social systems is that it opens up a new window onto one's own system."), Clark D. Cunningham, *Why American Lawyers Should Go to India: Retracing Galanter's Intellectual Odyssey*, 16 LAW & SOC. INQUIRY 777 (1991), and Hugh Scogin, *Civil "Law" in Traditional China*, in CIVIL LAW IN QING AND REPUBLICAN CHINA 41 (Kathryn Bernhardt & Philip Huang eds., 1994) ("The result can be a fuller appreciation of the range of law applications in a variety of human experience.").

To substantiate the claim that law and development is a form of anti-comparative law, this Article proceeds as follows. Part II outlines the cyclical pattern of failure that characterizes law and development's applied and theoretical endeavors—cycles that illustrate how the paradigm's presumptions undermine its ability to function as a productive site of learning about foreign law. Part III shows how current scholarship has missed the deeper history of law and development's role in the development of modern American law during the early twentieth century transformation, when it became both central to the modern self-image of the American legal profession, and also facilitated the progressive marginalization of comparative law in American legal culture. Part IV explores how the ingrained presumptions of law and development present liabilities for American lawyers in the international arena, warping our ability to understand foreign legal developments on their own terms—most notably in authoritarian regimes—and undermining our ability to productively engage with foreign lawyers seeking to learn from our own historical experiences. Part V argues that the most pressing liabilities of law and development as anti-comparative law are counter-intuitively domestic in nature—liabilities foreshadowed, but vastly overemphasized in the judicial realm. This Part further argues that America has lost its ability to integrate foreign legal experience into its own legal development, often attempting to solve problems abroad that are still without clear resolution at home. This Article concludes not by calling for a retreat from international legal engagement, but for a self-interested reinvigoration of comparative law within our legislative and administrative bodies and through reforms in American legal education.

II. THE PARADOXES OF A HISTORY WHOSE LESSONS CANNOT BE LEARNED

This Part summarily describes the current state of law and development as a field of legal inquiry and practice. This practice has, in recent history, evidenced a paradoxical disconnect between its consistently dismal track record of catalyzing positive developments in foreign legal systems with the level of popular and academic support for such efforts. In different decades and in varied geographical settings, law and development has been unable to transcend its violation of the classic challenges of comparative law: formalism, instrumentalism, and idealization. After defining what constitutes "law and development," this Part will show that the persistence of this paradox has an internal structure characterized by a repeating cycle that includes first recognizing these failures, then producing searching but delimited self-critiques, and finally

reasserting psychological defenses of the field based on an unshakable optimism grounded in the field's altruistic intentions.

A. Defining Law and Development

The argument that law and development operates as a form of anti-comparative law in American legal culture requires an understanding of what defines law and development as an academic or practical field of law. As noted in the introduction, there is a wide range of public and private programs directed by American lawyers throughout the world that attempt to impact legal development with regional and national foci. The shape of these programs varies widely and they draw on American lawyers from across contrasting political and legal philosophies—from rule of law initiatives staffed by volunteers from the American Bar Association, to USAID access to justice programs staffed by short- and long-term contract workers.⁷ Parallel to this diversity are law and development theorists who both evaluate such work and propose broad frameworks for thinking about how to impact foreign legal development.⁸ Among such practitioners and theorists, there are many who would claim to actively practice comparative law. However, the traditional difficulties with which comparative lawyers have struggled—the unavoidable intimacy of law and politics, the pitfalls of cross-cultural formalism, and the fallacy of implicit or idealized comparison—are ineluctable characteristics of law and development as a field.

These disparate actors are tied together under the rubric of law and development in two ways: a sense of altruistic contribution to foreign legal development and a reference to a shared set of legal ideals that seeks to differentiate such work from direct political advocacy, most notably “the rule of law.”⁹ Some of the core debates within law and development reflect the difficulty in formulating clear and precise definitions of these two components, namely, how one defines and measures such “contribution,” and what ideals—such as the rule of law—mean in concrete terms.

7. For an overview of this diversity in China, see *Funding the Rule of Law and Civil Society*, CHINA RTS. F. (Human Rights China, New York, N.Y.), no. 3, 2003, at 22.

8. See, e.g., Symposium, *The Future of Law and Development*, 104 NW. U. L. REV. COLLOQUY 164 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/prior-colloquies/future-of-law-and-development.html>.

9. See generally RECRAFTING THE RULE OF LAW (David Dyzenhaus ed., 1999); BRIAN TAMANAHA, ON THE RULE OF LAW (2004); Upendra Baxi, *Rule of Law in India: Theory and Practice*, in ASIAN DISCOURSES ON RULE OF LAW 324 (Randall Peerenboom ed., 2004); David Clark, *The Many Meanings of the Rule of Law*, in LAW, CAPITALISM AND POWER IN ASIA 28 (Kanishka Jayasuirya ed., 1999). For one fifty-year old effort, see INT'L COMM'N OF JURISTS, THE RULE OF LAW IN A FREE SOCIETY (1959).

Nevertheless, one of the most notable characteristics of law and development is how it has accommodated and united a wide-range of support under ever-morphing legal ideals, including human rights, sustainable development, and legal internationalism more generally.¹⁰ While most law and development work was traditionally predicated on the consent of those nations “in development,” the recent American military interventions in the Middle East have given rise to new and presumptively fertile grounds for law and development work with much greater involvement by the American military.¹¹ What has been primarily excluded from this definition of law and development are the many natural legal diffusions that have resulted from the competitive pressures on foreign legal practice by virtue of America’s global political and economic influence.¹²

B. *The Unending Synergy of Critique and Optimism*

What is initially so striking about the literature on law and development is its consistent and ever-present self-critique. At both the theoretical and operational level, very little is written on foreign

10. See David Trubek & Alvaros Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT* 1, 7–13 (David Trubek & Alvaros Santos eds., 2006) (describing the “Third Moment” in law and development theory that “accepts the use of law not only to create and protect markets, but also to curb market excess, support the social, and provide direct relief to the poor”); Jed Rubinfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971 (2004) (discussing law and development in the context of legal internationalism); Philippe Sands, *International Courts and the Application of the Concept of “Sustainable Development,”* in *LAW AND DEVELOPMENT: FACING COMPLEXITY IN THE 21ST CENTURY* 132, 132–35 (John Hatchard & Amanda Perry-Kessaris eds., 2003). See generally Randall Peerenboom, *Varieties of Rule of Law: An Introduction and Provisional Conclusion*, in *ASIAN DISCOURSES ON RULE OF LAW*, *supra* note 9, at 1–55 (discussing the many meanings people have given to the “rule of law”).

11. Thomas B. Nachbar, *Defining the Rule of Law Problem*, 12 GREEN BAG 2D 303, 306 (2009); see also Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the “Rule of Law,”* 101 MICH. L. REV. 2275, 2279 (2003) (noting the increasing role for U.S., UN, and NATO peacekeeping forces in promoting rule of law principles); Jason Brownlee, *Imperial Designs and Empirical Dilemmas: Why Foreign-Led State Building Fails* 1 (Ctr. on Democracy, Dev., & the Rule of Law, Working Paper No. 40, 2005) (discussing the difficulties with nation-building in the context of contemporary military interventions).

12. This transnational influence followed American economic power and spread forms of American legal practice across the globe as part of the competitive dynamics of international legal practice. See generally Volkmar Gessner et al., *Introduction: The Legal Culture of Global Business Transactions*, in *RULES AND NETWORKS* 1, 6 (Richard P. Appelbaum et al. eds., 2001) (noting the hegemony of western rational-legal institutions and values); Vittorio Olgiati, *Process and Policy of Legal Professionalization in Europe: The Deconstruction of a Normative Order*, in *PROFESSIONAL COMPETITION AND PROFESSIONAL POWER* 170, 188–89 (Yves Dezalay & David Sugarman eds., 1995) (describing how American legal practices have spread across the globe).

reform efforts that is not at some point reflective and inclusive of “lessons learned.” Yet, herein lies the central paradox of law and development—the continued and intransigent popularity of its efforts despite its equally intransigent track record of failure.¹³ At the most fundamental level, there is little empirical evidence that establishes accepted models for foreign legal reform efforts or establishes a link between such efforts and economic or political change.¹⁴ Even beyond this lack of current empirical certainty, there is little consensus on systemized metrics for such evaluations.¹⁵

The mainstream of law and development thus works at a peculiar intersection. At this intersection, unending attempts to establish the conceptual and substantive terms by which foreign reform projects contribute to positive legal development abroad merge with various articulations of generalized optimism. Tying together these intertwined critical and uncritical elements of the field is an unquestioned sense of purpose or mission given rise to by law and development’s altruistic intentions—intentions that are often felt in quite personal terms by many practitioners and theorists.¹⁶ Faced with perpetual failure, these participants fervently rebound to a faith that their mission is good and, thus, failure is only an ever-unfolding invitation for further improvement.

Turning then to the internal structure of this cyclical paradox, three broad and foundational critiques bind together the operational and theoretical evaluations of law and development efforts: instrumentalism, formalism, and idealization.

Critiques of instrumentalism reflect a consistent aspiration to divorce legal reform work abroad from politics, and the desire to portray such work as either technocratic or derived from a set of

13. The language of paradox is not completely novel as a way to describe the state of affairs within law and development. See Bryant G. Garth, *Building Strong and Independent Judiciaries Through the New Law and Development: Behind the Paradox of Consensus Programs and Perpetually Disappointing Results*, 52 DEPAUL L. REV. 383, 383 (2002) (writing about law and development’s “Paradox of . . . Perpetuating Disappointing Results”).

14. See Erik G. Jensen & Thomas C. Heller, *Introduction to BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW* 1, 1–4 (Erik Jensen & Thomas Heller eds., 2003).

15. See Kevin E. Davis, *What Can the Rule of Law Variable Tell Us About Rule of Law Reforms?*, 26 MICH. J. INT’L L. 141, 145–48 (2004) (raising methodological concerns about measures of development); David Kaufmann & Aart Kraay, *Governance Indicators: Where Are We, Where Should We Be Going*, 23 WORLD BANK RES. OBSERVER 1 (2008) (presenting a framework for assessing progress in measuring development). For ongoing work in this area, see *Indicators as a Global Technology/Governance by Information Project*, INST. FOR INT’L L. & JUST., <http://iilj.org/research/IndicatorsProject.asp> (last visited Mar. 1, 2012).

16. See, e.g., Jayanath Krishnan, *Academic SAILERS: The Ford Foundation and the Efforts to Shape Legal Education in Africa, 1957–1977*, 52 AM. J. LEGAL HIST. (forthcoming 2012) (describing the deep concern of one group of practitioners that their efforts be understood as nonimperialism and altruistic).

universal legal best practices.¹⁷ Most often this presumption is considered necessary to escape claims of political advocacy or cultural imperialism.¹⁸ It is often coupled with the presumption that the potential adoption of more sophisticated legal forms is an innately positive development, and that some form of broad consensus exists about what constitutes positive legal change in any given field.¹⁹ There is perhaps no harsher critic of this presumption than David Kennedy, who has repeatedly noted and noted the pitfalls of such apolitical views of legal change and universal legal consensus.²⁰

Not only does this dichotomy between law and politics chafe against practitioners' own evaluations of the highly politicized reception of their work,²¹ but this dichotomy reveals the reasons why the classic concerns of comparative law directly conflict with the

17. See Scott Newton, *Post-Communist Legal Reform: The Elision of the Political*, in LAW AND DEVELOPMENT: FACING COMPLEXITY IN THE 21ST CENTURY, *supra* note 10, at 161, 171 (noting how, even in transitional countries such as Kazakhstan, rule of law promotion is carried out with an elision of the political in the mistaken belief it can avoid the "messiness" of process); Marina Ottaway & Thomas Carothers, *Toward Civil Society Realism*, in FUNDING VIRTUE 293, 296 (Marina Ottaway & Thomas Carothers eds., 2000) ("[T]he assumption runs, donors can affect the political development of recipient countries without ever directly intervening in politics. Appealing as it sounds, the idea does not hold up in practice.").

18. See, e.g., Krishnan, *supra* note 16.

19. Michael Likosky, *Introduction to TRANSNATIONAL LEGAL PROCESSES*, at viii (Michael Likosky ed., 2002). The most striking example of this fallacy is the World Bank's move into rule of law promotion, which required an apolitical conceptualization of rule of law promotion because of the bank's charter limitations. See Lawrence Tshuma, *The Political Economy of the World Bank's Legal Framework for Economic Development*, 8 SOC. & LEGAL STUD. 76 (1999).

20. See David Kennedy, *Laws and Developments*, in LAW AND DEVELOPMENT: FACING COMPLEXITY IN THE 21ST CENTURY, *supra* note 10, at 17 ("The idea that building 'the rule of law' might *itself* be a development strategy instead encourages the hope that choosing law could substitute for the perplexing political and economic choices which have been at the centre of development policy-making for half a century."). *Contra* MICHAEL TREBILCOCK & RONALD DANIELS, *RULE OF LAW REFORM AND DEVELOPMENT* 14 (2008) (claiming that global political consensus exists about "optimal institutional arrangements"). See generally JAMES FERGUSON, *THE ANTI-POLITICS MACHINE* 13-15 (1994) ("[P]olitical economists are often too quick to . . . accept the premise that a 'development' project is primarily a device for bringing about a particular sort of economic transformation . . ."); DAVID KENNEDY, *THE DARK SIDES OF VIRTUE* 112 (2004) (arguing that humanitarians are policy makers and the view that there are international policy solutions to some problems is a downside to humanitarian activities that is often ignored); David Kairys, *Searching for the Rule of Law*, 36 SUFFOLK U. L. REV. 307, 328 (2003) ("The undefined, overblown rule-of-law notion inaccurately conveys that freedom, democracy, and equality will be or can be reliably guaranteed by operation of law and irrespective of values or politics.").

21. For example, this apolitical outlook is complicated by the activity of diplomatic officials who often treat law and development programs as a chance to develop personal influence. See THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD* 277 (1999).

aspirations of law and development.²² Not only has comparative law long struggled to place even discrete parts of larger legal systems within their political context, but it is forever challenged by the difficulty of drawing out and distinguishing the intimately bound functional and expressive aspects of foreign legal experience. Perhaps no other area of law and development has been so striking in this respect than tax reform, which is at the very heart of society's most fundamental articulations of its legal values and basic social compromises.²³

In similar fashion, it is not surprising that the second recurrent self-critique within law and development also parallels another classic debate within comparative law: the pitfalls of cross-cultural formalism.²⁴ Here, theorists repeatedly criticize the basic notion that American legal models can be transferred nonproblematically into foreign legal systems with often very different institutional and jurisprudential logics,²⁵ especially to the extent that such universalism has deemphasized specific knowledge of the legal system in question.²⁶ This universalistic aspiration is evidenced by attempts to create "handbooks" for practitioners,²⁷ and the ever-complexifying "blueprints" offered by academic assessments.²⁸ Even at the most basic level, differences between what constitutes a "lawyer" or a "court" in a given foreign system are presumed by the field to be global analogs of an ideal American prototype.²⁹

Sustaining these two problems is perhaps the most foundational assumption of law and development work—that there is a known

22. See REBECCA REDWOOD FRENCH, *THE GOLDEN YOKE* 343 (1995) (providing an extensive overview of the Tibetan Buddhist law system and concluding the lack of dualistic thinking in the Tibetan legal system makes it difficult for Western countries to analyze).

23. See Miranda Stewart, *Introduction: New Research on Tax Law and Political Institutions*, in *TAX LAW AND POLITICAL INSTITUTIONS* 1, 3 (Miranda Stewart ed., 2006) (explaining that tax policies depend heavily on the broader economic and social context of the state).

24. Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 *MOD. L. REV.* 1 (1974); see also PENELOPE NICHOLSON, *BORROWING COURT SYSTEMS* (2007) (explaining the legal borrowing within the Vietnamese legal system and the downsides to legal reforms borrowed from capitalist economies that are much different than the Vietnamese system).

25. Carothers notes the recurrent search for universal templates created where the "false dream of science" holds out the plausibility of a generalizable model that is easily and cheaply applied without specific knowledge of the country at issue. See CAROTHERS, *supra* note 21, at 293.

26. Stephen Golub, *A House Without a Foundation*, in *PROMOTING THE RULE OF LAW ABROAD* 105, 106 (Thomas Carothers ed., 2006).

27. *E.g.*, STUART S. NAGEL, *HANDBOOK OF GLOBAL LEGAL POLICY* (2000).

28. See, *e.g.*, JANE STROMSETH ET AL., *CAN MIGHT MAKE RIGHTS?* 85–133 (2006) (creating a blueprint for governance after military intervention).

29. Donald Clarke, *Puzzling Observations in Chinese Law: When Is a Riddle Just a Mistake?*, in *UNDERSTANDING CHINA'S LEGAL SYSTEM* 93 (C. Stephen Hsu ed., 2003).

legal ideal to be transferred from American law to another country.³⁰ This is the fallacy of idealization. Perhaps what most directly sets law and development and comparative law in conflict is the idea that our legal institutions are not simply superior in some evolutionary sense, but that the sources and causes of their domestic historical development are clearly known with a high degree of scientific objectivity. In contrast, not only are the origins of many core American legal institutions and practices still subject to intense debate within legal history, but the ahistoricism of much law and development work reflects a shallow understanding of the complicated and rare occurrence of significant institutional legal reform in American legal history.³¹ As a result, the deficiencies of foreign legal systems deemed in need of “development” are compared not to the complexity of American legal experience, but to an abstracted ideal which often reflects only one view among many within American legal debates. This is not genuine comparison, but rather implicit comparison.

It takes but a brief foray into the literature on law and development to see how often these critiques and an array of other “lessons learned” are repeated over time and in different geographic settings.³² However, even this consistent circularity has not gone unnoticed by law and development’s internal critiques, and many longtime commentators have tried to discern the root cause of this repetition of errors made and lessons learned. One scholar refers to this phenomenon as a pattern of “discarded fads, crisscrossed by swinging pendulums, and afflicted with frequent bouts of group amnesia.”³³

Some commentators have focused on linking this lack of learning to the operational and financial contexts of most foreign reform

30. See *infra* Part IV.C.

31. *Id.*

32. See generally Brian Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development*, 44 CORNELL INT’L L.J. 209, 209 (2011).

Efforts at law and development have failed for decades. The underlying reasons for the failures have been understood just as long. Nevertheless, law and development initiatives are proliferating, carrying on with similarly unsuccessful projects and methods. Academic work on law and development over the course of this same period has traveled full circle, ending up where it began, even as the number of scholars engaged in the subject multiplies, issuing an outpouring of books and articles. Billions of dollars and the efforts of a multitude of dedicated individuals have been expended in pursuit of law and development. If the reasons underlying the persistent failures are not integrated into our understanding, law and development practitioners and scholars will be standing in much the same place a generation hence.

Id.

33. Thomas Carothers, *Steps Toward Knowledge*, in PROMOTING THE RULE OF LAW ABROAD, *supra* note 26, at 327, 336.

efforts. This search has led to a number of suggested explanations, from the public defensiveness of practitioners over their failures, to the self-referential and insular milieus of law and development practitioners and scholars.³⁴ At the same time, the constant need for fundraising and grant-writing for projects and research creates an acute sensitivity to the public image of reform work and a well-known need to affirm the legal idealism of public and private funders.³⁵ As a result, many project evaluations resemble public relations materials, whereas more critical evaluations are kept internally.³⁶ Other analysts have focused on the institutional and operational logics of reform projects themselves. Project funding is often based on subcontracting that treats new information as a proprietary asset and provides downward budgetary pressures on training costs and long-term investments, while leading to low levels of donor cooperation and coordination.³⁷

Yet, whatever the source self-identified for this near ritualistic repetition of past errors, participants in law and development discourse consistently retreat to an almost fatalistic form of optimism. The turn to optimism is justified by the assumption that the mission is good, and thus pessimism or the abandonment of such efforts is categorically off the table on moral or ethical terms.³⁸ Even those scholars who provide global and systemic catalogs of the failure of reform efforts remain steadfastly invested in the existence of an

34. Carothers points to a deeply defensive culture among practitioners that constitutes a “discrete subculture” insulated within agencies. CAROTHERS, *supra* note 21, at 47. This defensiveness leads to a self-referential practice that resulted in “anodyne lessons” based on limited self-critical assessment. *Id.* at 10. This defensiveness is sustained by a strong sense of shared mission that is permeated by “rosy assumptions,” “missionary zeal,” and a lack of self-doubt. *Id.* at 7–8; see also Eric Jensen, *The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers’ Responses*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW, *supra* note 14, at 336, 369 n.17 (describing this internal culture as a “self-lovefest”).

35. See, e.g., Mary McClymont, *Preface* to MANY ROADS TO JUSTICE, at vii (Mary McClymont & Stephen Golub eds., 2000) (“By intention, [this] is more a studied appreciation than a critical analysis.”). *Contra* Stephen J. Golub, *Democracy as Development: A Case for Civil Society Assistance in Asia*, in FUNDING VIRTUE, *supra* note 17, at 151 (indicating that USAID often dictates the results to be achieved without regard to the ideals of funding partners).

36. CAROTHERS, *supra* note 21, at 1, 9 (noting the defensiveness of law and development organizations when responding to media critiques and the suppression of reports on internal corruption); Luis Salas, *From Law and Development to Rule of Law: New and Old Issues in Justice Reform in Latin America*, in THE RULE OF LAW IN LATIN AMERICA 17, 35 (Pilar Domingo & Rachel Sieder eds., 2001).

37. See generally WADE CHANNEL, CARNEGIE ENDOWMENT FOR INT’L PEACE, LESSONS NOT LEARNED: PROBLEMS WITH WESTERN AID FOR LAW REFORM IN POSTCOMMUNIST COUNTRIES (2005) (discussing these concerns in the context of legal reform efforts in Eastern Europe).

38. Carothers, *supra* note 33, at 337 (concluding that it is “worthwhile” and “that something vital and dynamic lies at the root”).

inherent “learning curve” within law and development,³⁹ where current problems will yield empirical data to form the basis of ever-improving future efforts.⁴⁰ Bound to this faith in gradual progress is the pervasive use of conditional language that qualifies current failures with projected successes based on any partially positive indication in the moment.⁴¹ However current efforts are eventually justified, to reject the possibility of steady progress is equated with accepting the injustices perceived abroad.⁴² It is notable in this respect that very few who write about law and development are not participants in foreign legal reform themselves, or do not continue to write about the subject after they have left such work behind.⁴³

This form of psychological resort reflects in part the reaction of law and development to decidedly unfriendly evaluations by scholars outside of the law. While law and development as a field has remained relatively insulated from the critical social sciences, there is a pervasive awareness among practitioners and scholars that their work is considered a form of “legal imperialism” or adjunct to “American empire” by some disciplines—notably legal sociology,

39. CAROTHERS, *supra* note 21, at 331–33; *see also* PETER SCHRAEDER, EXPORTING DEMOCRACY 235 (2002) (“Each wave of democratization . . . has contributed to the further strengthening of the international democratic context within which individual democracy promotion policies are pursued.”).

40. *See, e.g.*, Ann Seidman & Robert B. Seidman, *Using Reason and Experience to Draft Country-Specific Laws*, in MAKING DEVELOPMENT WORK: LEGISLATIVE REFORM FOR INSTITUTIONAL TRANSFORMATION AND GOOD GOVERNANCE 249, 251–52 (Ann Seidman et al. eds., 1999) (using the problems of legislative drafting projects in multiple countries as the basis for a problem-solving methodology).

41. CAROTHERS, *supra* note 21, at 11, 304–08 (qualifying such progress as “not dramatic, steady, or rapid,” but insisting it will yield “modest results” as “speeding up a moving train,” “slowing the backward slides,” and placing “extra straws on the camel’s back”); *see also* PER BERGLING, RULE OF LAW ON THE INTERNATIONAL AGENDA 198 (2006) (suggesting that there is a need for patience for certain, basic rule of law reforms to be successful).

42. Hammergren writes that while few improvements have been realized through past efforts, what has been learned will mean that future success will be “more likely.” LINN HAMMERGREN, THE POLITICS OF JUSTICE 315 (1998). She claims that there has been a shift in the attitude of donor countries recognizing past logistical and conceptual flaws. *Id.* at 297. This learning process will then help reformers lead foreign countries toward “something approaching modernity” with “stable, relatively irreversible, and generally beneficial” gains. *Id.* at 316. Her optimism is also consistently paired with conditional language such as “there are signs” and “it appears.” *Id.* at 300. She further argues that to ignore this learning process, and do “nothing,” would be an “enormous injustice.” *Id.* at 316; *see also* LINN HAMMERGREN, ENVISIONING REFORM 213–40 (2007) [hereinafter HAMMERGREN, ENVISIONING REFORM] (arguing that judicial reform efforts must learn other experiences and failures rather than continuing “to design and execute projects in a near informational vacuum” in order to fix many of the problems with reform efforts).

43. *See* Seidman & Seidman, *supra* note 40, at 3 (“[These authors] take as given that, under the right conditions, legal change facilitates social and economic change. . . . [Those] actively engaged in the legal aid enterprise, *sub silentio* . . . reject arguments [that legal change cannot affect social and economic change].”).

anthropology, and critical history.⁴⁴ These critiques directly challenge the self-understanding of law and development practitioners as altruistically motivated humanitarians, and cast their presumed cosmopolitanism as simply retreaded ethnocentrism.⁴⁵ Therefore, as tightly as law and development has clung to its claims of contributing to legal progress abroad, so too have critics in the legal imperialism vein steadfastly claimed that such work paves the way for social exploitation and global legal convergence.⁴⁶

The net consequence of charges of legal imperialism has been to reinforce the move toward psychological or abstract ethical defenses of the intentions of law and development work.⁴⁷ It has become a necessary component of even the most strident internal critics to highlight the good intentions of past and current foreign legal reformers.⁴⁸ In the main, there is little direct evidence to question such intentions—to the extent such is considered a relevant defense.⁴⁹ More importantly, the sum of such recurrent claims of imperialism or ethnocentrism has provoked far too much emphasis on

44. See John Flood, *Legal Education, Globalization, and the New Imperialism*, in *THE LAW SCHOOL: GLOBAL ISSUES, LOCAL QUESTIONS* 127, 127–50 (Fiona Cownie ed., 1999) (arguing that law and development is a kind of “legal imperialism”).

45. See PETER FITZPATRICK, *MODERNISM AND THE GROUNDS OF LAW* 212 (2001) (noting that the practice of universal human rights “is definitively situated in the West, a ‘West’ which is the occidental orientation of the community of nations. That situation will now be underlined when human rights are located in that ‘economic law’ which sustains globalism as the new imperialism.”); Peter Fitzpatrick, *Law’s Infamy*, in *LAW AND CRISIS IN THE THIRD WORLD* 27 (Sammy Adelman & Abdul Paliwala eds., 1993) (“Not only has law [denied being in law] to the peoples of the Third World, but that very denial, I argue, is integral to the constitution of Western law itself. If this is so, it follows that the blithe advocacy of law in the cause of development is flawed in its very foundation.”).

46. The predictions of these critics have not materialized. The logic of exploitation and convergence is undermined by the very same record of law and development’s inefficacy. In contrast, the strong predictions of global legal convergence along American forms have instead yielded to more complicated debates on national differentiation. See generally *FIGHTING FOR POLITICAL FREEDOM* (Terence C. Halliday et al. eds., 2007) (presenting several case studies from different countries to suggest that the legal profession has a universally strong role in moving toward political liberalism); KATHARINA PISTOR & PHILIP A. WELLONS, *THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT* (1999) (comparing the level of convergence between different Asian countries’ patterns of legal and economic change to determine how law matters for economic development in Asia).

47. William P. Alford, *Exporting the “Pursuit of Happiness,”* 113 *HARV. L. REV.* 1677, 1681 (2000) (noting the resistance to the critical analysis of intentions, where instead critiques are supposed to be moderate “lest we appear to be dismissive of the worthiness of the objective in question, doubtful of the sincerity of its proponents, or indifferent to the fate of the would-be beneficiaries”).

48. See, e.g., Krishnan, *supra* note 16.

49. See David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 *WIS. L. REV.* 1062, 1088 (1974) (“Liberal legalism was not a cynical sham . . . [i]t was the sincere expression of the American legal elite’s view of itself.”); see also Krishnan, *supra* note 16.

dismissing other more critical claims through the same psychological language of optimism and the looming specter of inaction in the face of humanitarian needs.⁵⁰

In the end, both the internal and external critiques of law and development have created an essentially emotional and aspirational set of defenses that are difficult to fully rebut in empirical terms. Even though law and development work consistently violates the basic challenges of comparative law, it is hard to definitely say that some alchemy of nuance, reflection, humility, and self-critique will not transcend past errors.

C. The Persistent Cycles of Contemporary Law and Development

The fact that law and development so strongly shapes American lawyers' attitudes about and engagements with foreign legal systems, coupled with the longitudinal and expansive investments of time and material resources in such efforts, prompts many questions. At what point does optimism descend into self-delusion? At what threshold do we accept that law and development is intractably at odds with genuine comparative law? And when does the paradox of law and development become recognized as pathological rather than redeemable? The best empirical basis on which to advance the argument that the flaws of law and development are intractable and pathological is then historical. If a sense of progressive learning undergirds the optimism that sustains the field, then one can only counter by exposing the historic breadth and depth of the field's lack of success. To this end, we turn to a demonstration of how law and development has already gone through several geographic and theoretical cycles of critique and optimistic renewal that show little, if any, evidence of transcending its rejection of the core tenets of comparative law.

Traditional accounts of law and development characterize the "first wave" of such efforts as beginning with the American movement to promote reform among Latin American judiciaries and law schools during the 1960s. The most well-known evaluation of this effort was made by David Trubek and Marc Galanter, who cataloged the "malaise" of this generation in light of the movement's generally recognized failure.⁵¹ Strikingly, Trubek and Galanter's evaluation contains almost all of the self-critiques cited by contemporary law and

50. See R. James Orr, *In Review: New Publications on International and Comparative Law*, 2 INT'L JUD. MONITOR 117 (2007) (reviewing STROMSETH, *supra* note 28) ("[T]rue optimism requires only an underlying and deeply held belief that good can come from any situation . . .").

51. Trubek & Galanter, *supra* note 49, at 1064.

development scholars.⁵² Thus, the thrust of their explanation of the failure to export the first wave's model of "legal liberalism" was that participants proceeded from a misleading faith in the cultural neutrality of their legal reform agenda, that they were preoccupied by the transfer of formal models, and presented an idealized version of American legal institutions bereft of domestic variations or criticisms.⁵³

Trubek and Galanter's evaluation of the "first wave" was echoed by a range of other participants. Thomas Franck wrote about the failures of the "New Development" approach and forwarded a similar catalog of "lessons learned."⁵⁴ Others emphasized the lack of empirical validation of connections between legal reform and social development.⁵⁵ The governmental agency reports generated during this era also replicated, to various degrees, the now popular criticism of "blueprints" and other universal models that invariably deaden an emphasis on local knowledge or variation.⁵⁶ What did differentiate this "first wave" was that many of its participants were trained comparativists who, in much higher rates than is common today, subsequently gave up law and development work in total—which inspired some of them to reinvigorate their commitment to refining contextual aspects of their own comparative scholarship.⁵⁷ As would

52. Compare Trubek & Galanter, *supra* note 49 (opposing law and development minded reforms), with BERGLING, *supra* note 41 (espousing law and development minded reforms), and TREBILCOCK & DANIELS, *supra* note 20 (same).

53. Trubek & Galanter, *supra* note 49, at 1094.

54. See Thomas M. Franck, *The New Development: Can American Law and Legal Institutions Help Developing Countries?*, 1972 WIS. L. REV. 767; see also INT'L LEGAL CTR., LAW AND DEVELOPMENT 45–69 (1974) (naming multiple problems revealed by their survey of law and development social and policy research); Robert Seidman, *Law and Development: A General Model*, 6 LAW & SOC'Y REV. 311, 325–37 (1971) (creating a heuristic model to examine several hypothesized problems in law and development in Africa).

55. See, e.g., John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457, 461 (1977) ("[T]he notion that society is somehow moving toward a better state of earthly affairs or, in the alternative, that the possibility of continuous improvement in the social condition is there if we only think clearly and manage things properly . . . is a belief—a faith ultimately not subject to empirical verification.").

56. ROBERT MEAGHER & DAVID SMITH, LAW AND THE DEVELOPMENT PRACTITIONER 13 (1974) ("[T]he state of the art(s) requires a country-by-country approach and the gathering of empirical data around less refined hypotheses, eventually providing the basis for a general theory of law and development.").

57. See Lawrence M. Friedman, *Legal Culture and Social Development*, 4 LAW & SOC'Y REV. 29, 30–31 (1969) (suggesting that difficult cross-cultural work is needed in the disciplines of history, political science, economics, and sociology in order to develop a comprehensive law and development theory); Jayanth K. Krishnan, *Professor Kingfield Goes to Delhi: American Academics, the Ford Foundation, and the Development of Legal Education in India*, 4 AM. J. LEGAL HIST. 447, 472 (2004) (detailing the Ford Foundation's difficulties in developing a western legal education system in India and subsequent decision to discontinue this focus in favor of agricultural reform); Merryman, *supra* note 55, at 460 (analyzing the reasons for the

also be the case in future decades, a small number of former practitioners would publicly issue calls to abandon such work as inherently flawed.⁵⁸

In his 1977 summary of this post-first-wave scholarship, Elliot Burg noted that just a decade later that while issues had "been persistently raised with respect to the efficacy" of such projects, practitioners and scholars had already demonstrated a tendency to repeat these errors in continued efforts "to the extent of ignoring their own findings."⁵⁹ Tellingly, Burg himself ended his summary analysis with a call for optimism that such lessons would inevitably be internalized.⁶⁰

The trajectory of law and development after this first wave followed a similar pattern of criticism and renewed enthusiasm as American legal reformers moved from one new regional emphasis to another. Recent scholarship has revealed earlier systemic efforts to export American legal education in both India and Africa during and beyond this "first-wave" era in Africa and India.⁶¹ Notably, wherever law and development turned its focus in the 1980s, similar evaluations were produced that both admitted poor results, but then reasserted the base desirability of such efforts and their improvement in the not-too-distant future.⁶²

This cycle of critique and optimistic renewal moved beyond the traditional "developing" world during the 1990s, when the fall of the Soviet Union helped usher in a revitalized interest in the catalytic potential of transplanting American legal institutions into the former

decline in funding, foundation activity, and scholarly work in law and development by looking at the origins and style of the law and development movement).

58. See, e.g., TERESA HAYTER, *AID AS IMPERIALISM* (1971) (explaining the critique written by Hayter, an ex-ODI worker, around whom there was a scandal concerning claims that her evaluation was suppressed as it negatively evaluated World Bank policies).

59. Elliot Burg, *Law and Development: A Review of the Literature & a Critique of "Scholars in Self-Estrangement,"* 25 AM. J. COMP. L. 492, 523 (1977).

60. *Id.* at 530.

61. See Krishnan, *supra* note 16 (describing efforts in India and Africa).

62. Maxwell O. Chibundu, *Law in Development: On Tapping, Gourding, and Serving Palm-Wine*, 29 CASE W. RES. J. INT'L L. 167, 173-84 (1997) (stating that law and development efforts in Africa during the 1980s, when "liberal legalism" dominated, generated similarly poor results); see, e.g., James C. N. Paul, *American Law Teachers and Africa: Some Historical Observations*, 31 J. AFR. L. 18 (1987) (showing knowledge of the previous generation, but unapologetic about the potential to do better); Bruce Zagaris, *Law and Development or Comparative Law and Social Change—The Application of Old Concepts in the Commonwealth Caribbean*, 19 U. MIAMI INTER-AM. L. REV. 591 (1988) (same); see also HARRY BLAIR & GARY HANSEN, *WEIGHING THE SCALES OF JUSTICE: STRATEGIC APPROACHES FOR DONOR-SUPPORTED RULE OF LAW PROGRAMS* (1994) (detailing "lessons learned" identical to those discussed during the prior two decades); *LAW AND DEVELOPMENT* (J. Omotola & A. Adeogun eds., 1987) (compiling articles with the focus of "address[ing] major legal issues within the context of social economic and governmental policies with a view to charting new courses for the future development of our legal system").

Soviet Bloc.⁶³ Once again, summary evaluations of this new wave were less than sanguine, and from the outset they repeated the same catalog of flawed assumptions and disappointing results.⁶⁴ Predictably, these results continue to be replicated today, less so in Russia but with greater focus on Central Asia and the Balkans.⁶⁵

From the 1970s until today, perhaps the most consistent object of American law and development work has been China. In the mid-1970s, China began to welcome American lawyers within its borders as it sought to increase its economic dynamism.⁶⁶ Quickly, law and development became the cornerstone of Sino-American relations in law.⁶⁷ Yet, here again in every subsequent decade, reports are produced that lament the inefficacy of such efforts in shaping Chinese legal reforms, and these reports recycle the historical package of law and development criticisms.⁶⁸ Even the temporary disillusionment after the Tiananmen Massacre in 1989 was short-lived,⁶⁹ and such

63. See JANINE R. WEDEL, *COLLISION AND COLLUSION 1* (2001) (noting the interest of western countries in bringing democratic and economic reforms to the former communist East Bloc); Jeffrey Kahn, *The Search for the Rule of Law in Russia*, 37 GEO. J. INT'L L. 353 (2005).

64. See generally WEDEL, *supra* note 63, at 2–13 (2001) (describing a “gigantic disconnect between East and West”).

65. See, e.g., Malcolm Russell-Einhorn et al., *Strengthening Access to Information and Public Participation in Transition Countries—Latvia as a Case Study in Administrative Law Reform*, 54 ADMIN. L. REV. 459 (2002).

66. See Ellen R. Elisaoph & Susan Grueneberg, *Law on Display in China*, 88 CHINA Q. 669 (1981); Ruth Bader Ginsburg, *American Bar Association Delegation Visits the People's Republic of China*, 64 A.B.A. J. 1516 (1978).

67. Jamie P. Horsley, *Doing Business with the People's Republic of China: The Role of Foreign Lawyers*, 7 MICH. Y.B. INT'L LEGAL STUD. 63, 78 (1985) (noting much excitement about the new vision of “foreign lawyers as educators”). See generally *Funding the Rule of Law*, *supra* note 7 (including charts detailing the myriad of actors involved).

68. See Jacque DeLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT'L ECON. L. 179 (1999) (detailing lack of knowledge about China by international participants, the use of detailed prescriptions without local context, and the predominance of short term projects); Sophia Woodman, *Bilateral Aid to Improve Human Rights*, 51 CHINA PERSP. 28 (2004) (describing reform efforts that have proven difficult to assess, possess limited transparency, discriminate against non-English speaking partners, evidence a large urban bias, and are plagued by practitioner and donor exaggeration of results).

69. See Robert C. Berring, *Farewell to All That*, 19 LOY. L.A. INT'L & COMP. L. REV. 431, 435–36 (1997) (arguing the existing common law legal system in Hong Kong and any other Western legal system would not last upon Hong Kong's return to China); Anthony Dicks, *The Chinese Legal System: Reforms in the Balance*, 119 CHINA Q. 540, 576 (1989) (“[T]he effects of the events of May/June 1989 on the legal system, even when not very obvious, will be pervasive and harmful. Even if the rate of growth in numbers of legal officials is maintained, as long as an atmosphere of repression persists it will be difficult to regard China's legal institutions in a very optimistic light.”).

work spread to Mongolia.⁷⁰ Some recent evaluations even continue to directly cite the idea of a “learning curve,”⁷¹ while in tandem a reactive discourse develops against those who “forecast doom.”⁷² Again, even the harshest critics of law and development in China end their critiques with assumptions of optimism and inexorable progress,⁷³ and the faith that such reform will undermine China’s authoritarian politics.⁷⁴

As these past cycles would predict, as reports emerge about law and development efforts in the context of Middle Eastern nation building, this cycle is again repeating itself along similar lines.⁷⁵

Throughout these shifts in time and geography, there is little evidence that, contrary to the aspirations of past evaluations, any new wave of law and development has been able to leave in its wake a better empirical track record or produce a self-critique that does more than simply ignore or repackage what was already observed during the previous decades.⁷⁶ Certainly, there is a great degree of rhetorical

70. See Brent White, *Rotten to the Core: Project Capture and the Failure of Judicial Reform in Mongolia*, 4 E. ASIA L. REV. 209 (2009) (discussing the failed attempts at judicial reform). *But see* Sebastian R. Astrada, *Exporting the Rule of Law to Mongolia: Post-Socialist Legal and Judicial Reforms*, 38 DENV. J. INT’L L. & POL’Y 461 (2010) (discussing the reform in Mongolia in a far more optimistic light).

71. Note, *Adopting and Adapting: Clinical Legal Education and Access to Justice in China*, 120 HARV. L. REV. 2134, 2155 & n.134 (2007) (citing Leah Wortham, *Aiding Clinical Education Abroad: What Can Be Gained and the Learning Curve on How to Do So Effectively*, 12 CLINICAL L. REV. 615 (2006)).

72. See Pierre Landry, *The Institutional Diffusion of Courts in China: Evidence from Survey Data*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 207, 234 (Thomas Ginsburg & Tamir Moustafa eds., 2008) (claiming optimism after detailing the rare but satisfied users of courts, whose successes are largely dependent on social connections).

73. Randall Peerenboom, *What Have We Learned About Law and Development? Describing, Predicting, and Assessing Legal Reforms in China*, 27 MICH. J. INT’L L. 823 (2005); *see* Arwen Joyce & Tracye Winfrey, *Taming the Red Dragon: A Realistic Assessment of the ABA’s Legal Reform Efforts in China*, 17 GEO. J. LEGAL ETHICS 887, 900–02 (2004) (expressing optimism in ABA-Asia’s programs potential to contribute to positive reforms in China after explaining the unlikelihood of success of reforms in China).

74. Matthew C. Stephenson, *A Trojan Horse Behind Chinese Walls? Problems and Prospects of U.S.-Sponsored ‘Rule of Law’ Reform Projects in the People’s Republic of China*, 18 UCLA PAC. BASIN L.J. 64, 74–75 (2000). *Contra* Paul Gewirtz, *The U.S.–China Rule of Law Initiative*, 11 WM. & MARY BILL RTS. J. 603, 621 (2002) (“To achieve true legal reform, even to approximate a minimum conception of the rule of law, and to build a public culture that values and supports it, is truly a vast task.”).

75. See, e.g., Faiz Ahmed, *Shari’a, Custom, and Statutory Law: Comparing State Approaches to Islamic Jurisprudence, Tribal Autonomy, and Legal Development in Afghanistan and Pakistan*, 7 GLOBAL JURIST 1, 47–49 (2007). *See generally* THE RULE OF LAW IN AFGHANISTAN: MISSING IN INACTION (Whit Mason ed., 2011).

76. Carothers is often cited by a range of practitioners, who then restate his conclusions as their own insights or who simply continue to use the same criticized mindset. *See* Elizabeth Barad, *Export and Import of the Rule of Law in the Global Era*, 11 ILSA J. INT’L & COMP. L. 323 (2005) (discussing lessons learned by the author through her experiences with exporting U.S. laws and legal ethics abroad); Sean

recognition of past pitfalls and the development of new verbiage to describe the export process,⁷⁷ but in the end such rhetorical shifts have not changed the outcome or operation of law and development efforts.⁷⁸ Even the few scholars who come to question the general validity of law and development are soon passed over⁷⁹—to the extent that the most recent compilation of law and developments errors by Brian Tamanaha ends with a preemptively fatalistic lament that his own analysis is likely to have no effect on the field.⁸⁰

Hagan, *The IMF's Role in a Post-Conflict Situation*, 38 CASE W. RES. J. INT'L L. 59 (2006) (citing Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge* 8 (Carnegie Endowment for Int'l Peace, Working Paper No. 34, 2003)); John Reitz, *Export of the Rule of Law*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 429 (2003) (citing THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* (1999)). For transcriptions of two recent conferences recycling these critiques, see Katharina Pistor, *Advancing the Rule of Law: Report on the International Rule of Law Symposium Convened by the American Bar Association November 9-10, 2005*, 25 BERKELEY J. INT'L L. 7 (2007) (reporting on the ABA's first International Rule of Law Symposium, held in Washington, DC) and CTR. ON DEMOCRACY, DEV. & THE RULE OF LAW [CDDRL], *REORGANIZING U.S. GOVERNMENT DEMOCRACY PROMOTION EFFORTS* (2008) (summarizing key findings from Stanford University's CDDRL conference in 2008).

77. What is novel beyond the "first wave" are new tropes of displaced responsibility. Here, blame for the failure of efforts—self-criticism aside—is placed on the countries to which American law is meant to be exported, commonly articulated in either terms of cultural incommensurability or a lack of "will to reform." See, e.g., Brian Gill, *Aiding the Rule of Law Abroad: The Kyrgyz Republic as a Case Study*, 29 FLETCHER FIN. WORLD AFF. 133, 151 (2005) (analyzing a decade of rule of law promotion in the Kyrgyz Republic, and concluding that decades of efforts must be expended to "prepare the soil of society for lasting democracy"). *Contra* Matthew Spence, *The Complexity of Success: The U.S. Role in Russian Rule of Law Reform*, in *PROMOTING THE RULE OF LAW ABROAD*, *supra* note 26, at 241 (asserting that criminal justice reform in Russia represents "a rare success story of rule of law promotion").

78. See Julio Faundez, *Legal Technical Assistance, Introduction to GOOD GOVERNMENT AND LAW 1* (Julio Faundez ed., 1997) (arguing that although the phrase "legal technical assistance" has become popular to describe aid provided to developing countries, it is actually "little more than a new phrase to describe an old practice"); Kathryn Hendley, *The Rule of Law and Economic Development in a Global Era*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY* 605, 617 (Austin Sarat ed., 2004) (arguing that the call for "careful research . . . seems compelling. Yet time and time again, this simple prescription is ignored."); Patrick McAuslan, *Law, Governance and the Development of the Market: Practical Problems and Possible Solutions*, in *GOOD GOVERNMENT AND LAW*, *supra*, at 44.

79. Kevin Davis, *Legal Universalism: Persistent Objections*, 60 U. TORONTO L.J. 537, 538 (2010) ("[A]ll claims that any specific feature of the legal system invariably has a causal and positive relationship to development are inherently suspect.").

80. See Carol V. Rose, *The "New" Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study*, 32 LAW & SOC'Y REV. 93, 135 (1998) ("Given the problems inherent in legal transfer, the question for scholars and academics involved in the [New Law and Development Movement] will be not merely *how* to conduct legal exchange but, indeed, *whether* to do so."). See generally Jane Rueger, *From Reluctant Champion to Development Ringmaster: Managing the Expanding Mission of the World Bank*, 10 IND. J. GLOBAL LEGAL STUD. 201 (2003) (examining the World Bank's expanding role, including assistance in establishing legal institutions, in light of the experiences of the British East India Company).

Parallel to this problematic recycling of “lessons learned” is a similar stagnation in law and development’s theoretical debates. Looking back to the work of the “first wave,” Yves Dezalay and Bryant Garth summarily lament that the implications of the first law and development movement did not lead to innovations in legal scholarship.⁸¹ General advances in comparative legal theory generally remain isolated from law and development work,⁸² and whatever outside impact has been present is almost exclusively made by new modes of economic analysis that have only exacerbated the traditional problems of apoliticism, formalism, and idealization.⁸³

Nowhere has this pattern been clearer than in the assumptions made about the link between legal reform and economic development.⁸⁴ Empirical studies based on past development experiences have repeatedly undermined the assumption that both general and specific legal institutions are universally linked to economic development.⁸⁵ Yet, new scholarship continually emerges

81. Yves Dezalay & Bryant Garth, *Law, Lawyers and Social Capital*, 6 SOC. & LEGAL STUD. 109, 120 (1997).

82. See Thomas McInerney, *Law and Development as Democratic Practice*, 1 VOICES OF DEV. JURISTS 1, no. 1, 2004, at 1 (“[R]ule of law promotion activities must respect the internal relation between law and democracy in order to bring about the conditions under which legitimate legal orders can emerge.”); Jonathan Miller, *A Typology of Legal Transplants*, 51 AM. J. COMP. L. 839 (2003) (offering “a first attempt to understand the legal transplant process through the tool of a sociological typology”); Gordon Barron, *The World Bank and Rule of Law Reforms* (Dev. Studies Inst., Working Paper No. 1, 2005) (“The primary argument of this paper is that the [rule of law] is a social and political idea more than anything else.”).

83. See Kalin Ivanov, *The Limits of a Global Campaign Against Corruption*, in CORRUPTION AND DEVELOPMENT 28 (Sarah Bracking ed., 2007) (examining the World Bank’s and the IMF’s global fights against corruption and suggesting that such fights have little hope of success unless narrowly tailored to individual situations); Chantal Thomas, *Law and Neoclassical Economic Development in Theory and Practice: Toward an Institutional Critique of Institutionalism*, 96 CORNELL L. REV. 967 (2011) (noting that such “learning processes” are bounded by theoretical assumptions and have deep causality problems). See generally Amanda J. Perry, *The Relationship Between Legal Systems and Economic Development: Integrating Economic and Cultural Approaches*, 29 J.L. & SOC’Y 282 (2002) (“[T]here is a clear need for a more interdisciplinary approach to the debate over the relationship between legal reform and economic development, and the potential variance in private sector perceptions and expectations of legal systems in particular.”); Kerry Rittich, *Functionalism and Formalism: Their Latest Incarnations in Contemporary Development and Governance Debates*, 55 U. TORONTO L.J. 853 (2005) (reflecting on “functionalist and formalist reasoning about legal rights and the rule of law in contemporary debates on law and development and in the international financial institutions in particular”).

84. Franz von Benda-Beckmann, *Scapegoat and Magic Charm: Law in Development Theory and Practice*, in AN ANTHROPOLOGICAL CRITIQUE OF DEVELOPMENT 116 (Mark Hobart ed., 1993).

85. ASSESSING THE VALUE OF LAW IN TRANSITION ECONOMIES (Peter Murrell ed., 2001); Kevin E. Davis & Michael J. Trebilcock, *The Relationship Between Law and Development: Optimists Versus Skeptics*, 56 AM. J. COMP. L. 1 (2008); John K. M. Ohnesorge, *Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience*, 28 U. PA. J. INT’L ECON. L. 219 (2007).

that tries to remodulate research designs and reassert the argument that such a relationship exists, both for law in general⁸⁶ and for judicial reform specifically.⁸⁷ This scholarship puts its faith in new data or new methodological refinements that will finally demonstrate the connection, the recalcitrant reassertion of which comes across as almost an immutable cognitive imperative.⁸⁸ In turn, a small set of critical scholars emerge to challenge such work, casting such linkages into doubt, and inspiring the next round of reassertions.⁸⁹ Much of this work obsesses over China's consistent defiance of these theoretical presuppositions.⁹⁰

This unyielding desire to prove the normative desirability of transplanting forms of American law abroad is repeated both in the broad terms of political development—primarily couched as democratization⁹¹—and in more narrow assertions about what constitutes legal progress—such as legal formalization,⁹² stronger property rights,⁹³ or stricter intellectual property regimes.⁹⁴

86. See, e.g., KENNETH W. DAM, *THE LAW-GROWTH NEXUS* (2006) (asserting that legal institutions are, in fact, important to economic development).

87. JAMES ANDERSON ET AL., *JUDICIAL SYSTEMS IN TRANSITION ECONOMIES* (2005); Hilton L. Root & Karen May, *Judicial Systems and Economic Development*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES*, *supra* note 72, at 324.

88. See Jessica T. Matthews, *Foreword* to CAROTHERS, *supra* note 21, at vii (asserting that people often have an “instinctive sense” that law and development work is a “good thing”).

89. John K.M. Ohnesorge, *The Rule of Law, Economic Development, and the Developmental States of Northeast Asia*, in *LAW AND DEVELOPMENT IN EAST AND SOUTHEAST ASIA* 91, 107 (Christoph Antons ed., 2003).

90. See Donald C. Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 *AM. J. COMP. L.* 89 (2003); Katherine Wilhelm, *Rethinking Property Rights in Urban China*, 9 *UCLA J. INT'L L. & FOREIGN AFF.* 227 (2004).

91. See generally Matteo Cervellati et al., *Consensual and Conflictual Democratization, Rule of Law and Development* (Ctr. for Econ. Policy Research, Discussion Paper No. 6328, 2007) (examining efforts at democratization and rule of law development); Adam Przeworski & Fernando Limongi, *Modernization: Theories and Facts*, 49 *WORLD POL.* 155, 158 (1997) (“The specific causal chains consist of sequences of industrialization, urbanization, education, communication, mobilization, and political incorporation, among innumerable others: a progressive accumulation of social changes that ready a society to proceed to its culmination, democratization.”).

92. Stephan Haggard et al., *The Rule of Law and Economic Development*, 11 *ANN. REV. POL. SCI.* 205 (2008); Frank Upham, *Mythmaking in the Rule of Law Orthodoxy* (Carnegie Endowment for Int'l Peace, Working Paper No. 30, 2002); cf. LAURA NADER, *THE LIFE OF THE LAW* 150 (2002) (noting the drive for formality is ironic given that American informal dispute resolution is often characterized as more “civilized” in legal discourse).

93. See HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* (2000). *But see* Ulrike Malmendier, *Law and Finance “at the Origin,”* 47 *J. ECON. LIT.* 1076 (2009) (arguing, by drawing parallel to ancient Rome, that the lack of legal progress may not inhibit economic growth as much as once thought).

94. Chibundu, *supra* note 62, at 207; Robert L. Ostergard, *Economic Growth and Intellectual Property Rights Protection: A Reassessment of the Conventional*

For all these cycles of lessons learned and theoretical reassertions, the popularity of law and development has suffered little diminution in both material and intellectual terms. Even those aware of the repetition of past errors and the consistent lack of empirically demonstrable effects reassert the unassailable desirability of continued optimism and renewed effort.⁹⁵ The weight of this cyclical history, restated and repackaged by new critics every few years, has been insufficient to secure a broad recognition that the flaws of law and development remain, intractably and irredeemably, at odds with the traditions of comparative law.

III. THE ORIGINS OF LAW AND DEVELOPMENT AS ANTI-COMPARATIVE LAW

Over the past fifty years, the continued and open paradox of law and development has been insufficient to hasten its demise. The generalized optimism into which its proponents retreat has been successful in justifying this record of failure. This Part argues that the historical burden that should be weighed against such optimism is much greater than is generally recognized today. Rather than beginning with the “first wave” associated with Trubek and Galanter in the 1960s, American law and development ideas and practices have been at work for over 100 years. This Part outlines this deeper history of law and development, and how foreign legal reform in the early twentieth century was intimately tied not only to the formative movements that forged the modern self-image of the American legal community, but also to the decline of American comparative law. The Part concludes by showing how this history helps us better understand law and development’s contemporary paradox as an outgrowth of cultural politics embedded in American law during this era, rather than as a field of legal knowledge production or applied legal action.

Wisdom, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT 115 (Daniel Gervais ed., 2007).

95. David Trubek has made a lifetime contribution to law and development work, often bitingly critical but yet ever hopeful. After over four decades of work in the field, he feels that past lessons have created an endeavor that is “daunting but also more exciting.” David Trubek, *The “Rule of Law” in Development Assistance*, in THE NEW LAW AND ECONOMIC DEVELOPMENT, *supra* note 10, at 37; see also David Trubek, *The Owl and the Pussy-cat: Is There a Future for “Law and Development”?*, 25 WIS. INT’L L.J. 235 (2007).

A. *The Early Twentieth Century Birth of Law and Development*

At the turn of the twentieth century, American lawyers were at the center of vibrant arguments over the proper shape of America's increasingly prominent role in international relations. In the aftermath of the Spanish–American War and the acquisition of foreign territories outside of America's continental bounds,⁹⁶ American lawyers fiercely debated whether the American republican tradition was compatible with forms of European colonial empire from which many had long tried to distance the country.⁹⁷ These debates were resolved doctrinally in the *Insular Cases*, where in a series of hotly contested decisions the Supreme Court legitimized the acquisition of colonial territories.⁹⁸ In fact, one of the most oft-forgotten aspects of this era was how strong the support for American colonialism was among American lawyers.⁹⁹

However, colonial empire was not the path taken after the Spanish–American War. Instead, American foreign policy came to embrace other forms of indirect and consensual engagement with

96. See generally ARTHUR POWER DUDDEN, *THE AMERICAN PACIFIC* (1992); PAUL A. KRAMER, *THE BLOOD OF GOVERNMENT* (2006); ALFRED W. MCCOY, *POLICING AMERICA'S EMPIRE* (2009); SALLY MERRY, *COLONIZING HAWAII* (1999); EFRÉN RIVERA RAMOS, *THE LEGAL CONSTRUCTION OF IDENTITY* (2001); EDIBERTO ROMÁN, *THE OTHER AMERICAN COLONIES* (2006).

97. AMY KAPLAN, *THE ANARCHY OF EMPIRE IN THE MAKING OF US CULTURE* 7 (2005); Roger J. Bresnahan, *Islands in Our Minds*, in *REFLECTION ON ORIENTALISM* 57 (Warren Cohen ed., 1983). See generally EXPORTING DEMOCRACY: RHETORIC VS. REALITY (Abraham Lowenthal ed., 1991). For the formal policy against colonial language in the Philippines, see YVES DEZELAY & BRYANT GARTH, *ASIAN LEGAL REVIVALS: LAWYERS IN THE SHADOW OF EMPIRE* 76–89 (2010) and STANLEY KARNOW, *IN OUR IMAGE* (1989).

98. Most of these new territories had various “Organic Acts” which provided a constitutional infrastructure. Citizens in these territories resurrected old constitutional questions about the rights of foreign citizens under American jurisdiction abroad. See *In re Ross*, 140 U.S. 453 (1891) (upholding the jurisdiction of a military tribunal that sentenced a foreign-born mariner to death for a murder committed on board an American ship at port in Japan). See generally JAMES KERR, *THE INSULAR CASES* (1982) (providing a detailed examination of the *Insular Cases*, including popular sentiment of the time that might help explain the result); BARTHOLOMEW SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* (2006) (chronicling the *Insular Cases* and seeking to place them in their larger historical context).

99. See, e.g., Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393 (1894); John Burgess, *How May the US Govern Its Extra-Continental Territory?*, 14 POL. SCI. Q. 1 (1899); Christopher C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365 (1898); Carman Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291 (1898); James Thayer, *Our New Possessions*, 12 HARV. L. REV. 464 (1898).

foreign legal systems.¹⁰⁰ Primarily drawing on the foreign expertise of religious missionaries, the American government and a swath of private organizations, including philanthropic foundations, professional societies, and universities began to fund efforts to shape foreign legal reform.¹⁰¹ These efforts are easily recognizable today as the forerunners to contemporary law and development projects, and included the writing of constitutions, the export of American legal education, and the organization of foreign bar associations.¹⁰² From the outset, such work was meant to intentionally differentiate the American lawyer abroad from his colonial European counterparts, especially the British.¹⁰³ Historian Paul Carrington has cataloged many of these early efforts, capturing how legal reform projects became tied to the growing presence of American lawyers across the globe.¹⁰⁴ Furthermore, this era witnessed the near domination of American foreign policy by lawyers who, while often divided on issues of international law, shared a common belief in the role of American lawyers as foreign reformers.¹⁰⁵

The rapid proliferation of American engagements with foreign legal reform at this time was intrinsically tied to the idea that law was best understood as a scientific enterprise. Often linked to the popularity of theories of legal evolution,¹⁰⁶ many American lawyers expressed great confidence that law could not only be used instrumentally to effect social change at home—part and parcel of Progressive-era politics—but “that the universality of legal science could achieve the same ends abroad.”¹⁰⁷ These new instrumentalist views of law used the presumption of scientific validity to argue that

100. See LLOYD E. AMBROSIUS, *WOODROW WILSON & THE AMERICAN DIPLOMATIC TRADITION* (1987) (describing the Wilsonian shift in American foreign policy emerging out of the expansionist debates).

101. See *infra* Part III.B.

102. See *infra* Part III.B.

103. Legal reform was an original British justification for colonialism. See generally MARTIN CHANOCK, *LAW, CUSTOM AND SOCIAL ORDER* (1985); NICHOLAS B. DIRKS, *THE SCANDAL OF EMPIRE* (2006); HANS S. PAWLISCH, *SIR JOHN DAVIES AND THE CONQUEST OF IRELAND* (1985); BERNARD PORTER, *EMPIRE AND SUPEREMPIRE* (2006).

104. PAUL CARRINGTON, *SPREADING AMERICA'S WORD*, at ix (2005) (explaining that the book is “about the role of American lawyers in international politics as they have striven to make the governments and laws of other peoples more like their own”).

105. Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era*, 78 N.Y.U. L. REV. 239 (2003); Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: The Twenty Years' Crisis*, 77 S. CAL. L. REV. 583 (2004).

106. See Steven Wilf, *The Invention of Legal Primitivism*, 10 THEORETICAL INQ. L. 485 (2009) (examining the origins and evolution of the theory of legal modernism); cf. e.g., BROOKS ADAMS, *THE LAW OF CIVILIZATION AND DECAY* (1896) (presenting one such theory); LEWIS HENRY MORGAN, *ANCIENT SOCIETY* (1877) (examining the evolution of peoples and their institutions throughout history).

107. Jedidiah Kroncke, *An Early Tragedy of Comparative Constitutionalism: Frank Goodnow & the Chinese Republic*, 21 PAC. RIM L. & POL'Y J. (forthcoming 2012).

legal development was best considered the provenance of legal expertise than of political deliberation and process.¹⁰⁸

The notion of law as legal science had profound effects on American law and transformed the American legal profession at the turn of the twentieth century—a process that forms the substance of the classic works in modern legal history.¹⁰⁹ Scientific notions of law had great appeal to the American legal elite who had long battled more populist views of the profession emergent during the Jacksonian era.¹¹⁰ This was felt directly in American legal education, where the notion of legal science championed by Christopher Langdell had far-reaching effects on the creation of America's modern form of postgraduate legal education¹¹¹ and the concurrent movement away from more localized traditions of apprenticeship.¹¹²

New notions of legal expertise were also central to the shifting professional identity of lawyers, and in turn, central to the growth of bar associations,¹¹³ as well as the growth of urban corporate legal practice.¹¹⁴ The sum force of these shifts was the emergence of a new notion of the “American lawyer” and the underpinning legal institutions that produced him.¹¹⁵ Notably, this new professionalized

108. See ROBERT WIEBE, *THE SEARCH FOR ORDER, 1877–1920*, at 1 (1967) (describing the “new scientific gospel”); see also LISA ANDERSON, *PURSUING TRUTH, EXERCISING POWER* (2003); Eliza Wing-yee Lee, *Political Science, Public Administration, and the Rise of the American Administrative State*, 55 *PUB. ADMIN. REV.* 538 (1995).

109. See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960* (1992); WILLARD HURST, *THE GROWTH OF AMERICAN LAW* (1950).

110. MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY: 1776–1876*, at 137 (1976).

111. Christopher C. Langdell, *Teaching Law as a Science*, 21 *AM. L. REV.* 125 (1887); see also Marcia Speziale, *Langdell's Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Theory*, 5 *VT. L. REV.* 1 (1980). See generally WILLIAM LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN LEGAL EDUCATION* (1994) (tracing the development of modern legal education); Howard Schweber, *The “Science” of Legal Science: The Model of Natural Sciences in Nineteenth-Century American Legal Education*, 17 *LAW & HIST. REV.* 421 (1999).

112. RICHARD L. ABEL, *AMERICAN LAWYERS* 43–44 (1989); LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 526 (2005).

113. Harry Frist, *Competition in the Legal Education Industry*, 53 *N.Y.U. L. REV.* 311 (1978); Edward Gee & Donald Jackson, *Hand in Hand or Fist in Glove?: A History of the Strained Marriage of Law Schools and the Practicing Bar*, 3 *LEARNING & L.* 34, 55–56 (1976); Thomas C. Grey, *Langdell's Orthodoxy*, 45 *U. PITT. L. REV.* 1, 36 (1983).

114. See generally Clarke, *supra* note 90 (using post-Mao China to test the Rights Hypothesis—that “productive capitalism needs formal adjudication, judicially enforced contracts, and inviolable property rights”); Wilhelm, *supra* note 90 (explaining the “the weak protection for urban property rights and the serious consequences this holds for China's economic development and social stability” that stem from China's policy of *chai qian*, or “demolition and relocation”).

115. The American commitment to federalism embraces a legal diversity that goes beyond even Weber's classic lament as to the common law's administrative complexity and doctrinal ambiguities. For a broad revisionist overview of the place of

image of the American lawyer was seen as crucial to progressively integrating both the post-Civil War southern and western states into northeastern civilization, especially through the national standardization of American legal education along the Langdellian postgraduate model.¹¹⁶ This era also witnessed a significant rise in the status of the federal judiciary—following the growing power of the federal government and the nationalization of vast areas of American law—which in turn became closely associated with the new professional law schools.¹¹⁷

Even though many of these developments in American law were hotly contested at the time,¹¹⁸ the allure of law as an apolitical exertion of expertise eventually consumed the profession.¹¹⁹ Critically, these shifts provided the organizational and conceptual basis for private lawyers to participate in foreign reform projects and created the modern law professor as a full-time legal researcher and producer of legal knowledge.¹²⁰

When wedded to a notion of legal science, these novel and newly dominant elements of the American legal community formed what

federalism in American law, see ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010). The mid-nineteenth century case of *Swift v. Tyson* ignited a movement toward the development of a unified federal common law, but resistance to the broad application of *Swift's* reasoning would eventually reassert the primacy of federalist norms in American law. 41 U.S. 1 (1842). The end of the *Swift* doctrine came with Brandeis's repudiation of federal common law in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

116. Alfred S. Konefsky, *Law and Culture in Antebellum Boston*, 40 STAN. L. REV. 1119, 1134 (1988); see also Alfred Konefsky & John Schlegel, *Mirror, Mirror on the Wall: Histories of American Law Schools*, 95 HARV. L. REV. 833 (1982) (offering a critique of the decline of the free market in law schools and increasing standardization, as well as presenting a critique of standard law school histories that mark the adoption of the Langdellian model as an inevitable evolutionary progression).

117. This triumph of the federal judiciary as a repository of legal integration accelerated with the defeat of the South, casting a pall over states' rights. See William Novak, *The Legal Origins of the American State*, in LOOKING BACK AT LAW'S CENTURY 267 (Austin Sarat et al. eds., 2002).

118. WILLIAM JOHNSON, *SCHOOLED LAWYERS: A STUDY IN THE CLASH OF PROFESSIONAL CULTURES* 177 (1978) ("The battle over the case method in the years between 1890–1920 was especially bitter because it represented a fundamental struggle over the image of the professional lawyer.").

119. MORTON HORWITZ, *TRANSFORMATIONS IN AMERICAN LAW, 1780–1860*, at 256 (1977) ("The desire to separate law and politics has always been a central aspiration of the American legal profession."); see also Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 125 (1984) (asserting that Critical historians have "added powerfully to the critique of the functionalist-evolutionary vision that has so long dominated legal studies and that they have produced their own distinctive and exciting brand of doctrinal historiography and successfully taught others how to apply their method").

120. Robert Gordon, *Professor and Policymakers*, in HISTORY OF THE YALE LAW SCHOOL 79 (Anthony Kronman ed., 2004) (noting how the law professor became part of a new cadre of professional academics who could collectively "monopolize their own distinctive disciplinary turf . . . which was law as an autonomous technical subject").

today are the most popular aspects of law and development work: spreading American legal education, organizing and strengthening bar associations, promoting judicial reform, and laying the groundwork for modern corporate legal practice. The specific rise of each one of these aspects of twentieth century American law was a contested development, and belied that there was, and still is, a great deal of underlying diversity in American legal practice.¹²¹ Yet, when confronted abroad with the question of what was “American law” or the prototypical “American lawyer,” these components, along with the American Constitution, would form the basis of the standard response.¹²² Whatever disagreements existed about American law domestically, there was a particular arrangement of these new legal institutions that was presumed necessary to replicate the modern American lawyer abroad.

Although a full retelling of the foreign reform projects of this era is beyond the scope of this Article, through the work of Carrington and other legal historians, new scholarship has begun to explore the extent of such work in the early to mid-twentieth century.¹²³ Notably, these scholarly works all continue to recast the same failures and “lessons learned” inherent in contemporary law and development.¹²⁴

B. America's First Wave of Law and Development Goes Global

A forgotten aspect of American legal internationalism of the early twentieth century was that China was the highest profile arena of foreign legal reform for American lawyers. When the dynastic Chinese system collapsed in 1911 and the new Chinese Republic was declared, a fertile field was seen as opening for the influence of American lawyers and the demonstration of American law's ability to

121. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (reversing the Court's decision in *Swift* and holding that federal courts sitting in diversity jurisdiction must apply state common law as well as state statutory law); *Swift v. Tyson*, 41 U.S. 1 (1842), *rev'd*, *Erie*, 304 U.S. 64 (holding that federal courts sitting in diversity jurisdiction may apply federal common law); LACROIX, *supra* note 115 (tracing the origins and evolution of federalism in America).

122. See generally Paul D. Carrington, *Writing Other Peoples' Constitutions*, 33 N.C. J. INT'L L. & COM. REG. 167 (2008) (providing an account of “the efforts of Americans who sought to shape other nations not by war, but by writing, or helping to write, their constitutions,” and arguing that the practice may be less useful than often imagined).

123. See Dezalay & Garth, *supra* note 81; see also MERLE CURTI & KENDALL BIRR, *PRELUDE TO POINT FOUR* 92–93, 121, 130 (1954) (noting failed legal reform efforts in Cuba, the Dominican Republic, and Haiti).

124. CARRINGTON, *supra* note 104, at ix (“[N]otwithstanding past failures and disappointments, others have persisted in proclaiming again and again the same high and selfless purpose of shaping alien cultures to American models . . . [T]hose coming later who did take notice of the past were often misled about what experience should have been taught.”).

spur liberalization and economic development.¹²⁵ Once studied with interest by Founding Fathers such as Jefferson and Franklin,¹²⁶ Chinese law was now deemed wholly insufficient and in need of the forms and institutions of the modern American lawyer.¹²⁷ Even though China was tangential to American economic and military interests in 1911,¹²⁸ America became fascinated by the prospect that China was committed to emulating America. Many lawyers advanced Sino-American relations as the best example of America's new humanitarian legal internationalism.¹²⁹

During this actual "first wave" of law and development, American lawyers attempted to bring all aspects of the new standard package of modern American law to China. Even before the 1911 revolution, future Harvard law professor Warren Seavey attempted to bring Langdell's methods to China,¹³⁰ and later—staffed by American legal academics and expatriate lawyers—Soochow Law School was founded in Southern China in 1913 with the specific intention of replicating the new American model of legal education in total.¹³¹ American lawyers were also quick to organize national and local bar associations while establishing their own urban corporate practices.¹³² The ABA and other legal organizations sponsored trips

125. Part of the treaty signed after the Boxer Rebellion at the turn of the twentieth century involved American support for Chinese legal reform. CAROLA MCGIFFERT, *CHINA IN THE AMERICAN POLITICAL IMAGINATION* 31 (2003).

126. JOHN CLEAVES, *THOMAS JEFFERSON'S VIEWS ON PUBLIC EDUCATION* 340 (1890); Benjamin Franklin, *From the Morals of Confucius*, PENN. GAZETTE, Feb. 28, 1738, at 74. See generally A. OWEN ALDRIDGE, *THE DRAGON AND THE EAGLE: THE PRESENCE OF CHINA IN THE AMERICAN ENLIGHTENMENT* (1993).

127. See generally Teemu Ruskola, *Legal Orientalism*, 10 MICH. L. REV. 179 (2002) (combating "the historic claim made by many Western observers that China lacks an indigenous tradition of 'law'").

128. HUGH DEANE, *GOOD DEEDS & GUNBOATS* 38–39 (1990). For pre-twentieth century relations, see William J. Donahue, *The Caleb Cushing Mission*, 16 MODERN ASIAN STUD. 1 (1982) (examining Caleb Cushing's tenure as the American Commissioner to China); Teemu Ruskola, *Canton Is Not Boston: The Invention of American Imperial Sovereignty*, 57 AM. Q. 859, 864 (2005) ("China figured only minimally in the early American diplomatic consciousness . . .").

129. See JERRY ISRAEL, *PROGRESSIVISM AND THE OPEN DOOR* 123–24 (1971) (discussing how the United States sought to have China adopt its legal and governmental structure).

130. See WARREN A. SEAVEY & DONALD B. KING, *A HARVARD LAW SCHOOL PROFESSOR* 17 (2005) (discussing his arrival in China to teach).

131. Alison Conner, *Lawyers and the Legal Profession During the Republican Era*, in *CIVIL LAW IN QING AND REPUBLICAN CHINA* 215 (Karen Bernhardt & Philip Huang eds., 1994).

132. See FAR E. AM. BAR ASS'N [FEABA], *PRESIDENT'S ANNUAL REPORT* (1919); FEABA, *UNITED STATES COURT FOR CHINA DECENNIAL ANNIVERSARY BROCHURE* 6, 19 (1916). See generally Alison E.W. Conner, *Soochow Law School and the Shanghai Bar*, 23 HONG KONG L.J. 395 (1993); Xiaoqun Xu, *Between State and Society, Between Professionalism and Politics: The Shanghai Bar Association in Republican China, 1912–1937*, 1 TWENTIETH-CENTURY CHINA 1 (1998).

to China on topics ranging from prison reform to judicial education.¹³³ The Carnegie Endowment for International Peace funded evaluations of legal reform in China and sponsored Columbia law professor Frank Goodnow's travels to China with the expectation that he would write the new Republic's constitution.¹³⁴ Even America's extraterritorial courts became enmeshed in the great concern over American judges and lawyers' ability to demonstrate the proper functioning of American law to Chinese audiences.¹³⁵

Yet almost immediately, these reform efforts recurrently proved themselves ineffectual in China. In practice, not only was Chinese legal development predominantly influenced by Japanese and then German influences, but China's legal system also remained subordinate to the party politics of what were often American-backed authoritarian regimes.¹³⁶ Nonetheless, throughout this era, the lack of any material impact on Chinese legal development or of any liberalizing effect on Chinese politics did not dampen American enthusiasm for such efforts.¹³⁷

As unproductive as this first wave of law and development was in China and elsewhere, such failures did not stop like efforts from migrating to wherever America's foreign gaze settled. The emergence of America as a superpower after World War II accelerated these efforts globally. In the post-World War II era, America's defeated enemies lay in ruins in the heart of both Asia and Europe, and just as China was deemed a fallen empire, so too now was Europe and Japan.¹³⁸ The legal reform enterprises in Germany and Japan soon became folklore in America, and especially so in the American legal community.¹³⁹

In the case of the Japanese, it became commonplace to proclaim that America had brought constitutionalism to Japan, or that

133. Frank Dikotter, *Crime and Punishment in Early Republican China: Beijing's First Model Prison, 1912–1922*, 21 *LATE IMPERIAL CHINA* 140, 160 (2000).

134. Noel Pugach, *Embarrassed Monarchist: Frank J. Goodnow and Constitutional Development in China, 1913–1915*, 42 *PAC. HIST. REV.* 499 (1973); see also Kroncke, *supra* note 107.

135. EILEEN P. SCULLY, *BARGAINING WITH THE STATE FROM AFAR* (2001); Teemu Ruskola, *Colonialism Without Colonies: On the Extraterritorial Jurisprudence of the U.S. Court for China*, 71 *LAW & CONTEMP. PROBS.* 217 (2008).

136. JAMES BRADY, *JUSTICE AND POLITICS IN PEOPLE'S CHINA* 138–39 (1982).

137. ISRAEL, *supra* note 129, at 202 (“[T]o fail [in China] was, however, to fail at home. Thus to admit faulty goals in the Far East was to confess them in the United States as well.”).

138. This was the transition Henry Luce made when he famously spoke of “The American Century” based on his view of Sino–American relations. See generally Philip Beidler, *China Magic: America's Great Reality Hiatus, 1948–73*, 47 *MICH. Q. REV.* 150, 153 (2008) (noting the almost magical quality to the massive blotting-out of America's decades of fascination with China's Americanization).

139. See, e.g., TONY SMITH, *AMERICA'S MISSION* 146 (1994) (recounting the American experience with legal reform in Germany and Japan).

Americans had completely rewritten the Japanese legal system.¹⁴⁰ These claims ignored the fact that the new Japanese Constitution was enacted as an amendment to the Meiji Constitution, as well as how deeply involved the Japanese were in the process of negotiation and composition.¹⁴¹ It is telling that as commonplace as this story of America's legal reinvention of Japan has become, only recently have studies unearthed the details of the process and brought greater clarity as to how limited the direct export of American legal models was.¹⁴² Quite paradoxically, this myth persists, although only a few short decades later Japanese law would be criticized as the antithesis of American law, not its legal progeny.¹⁴³

The same myth emerged during German reconstruction. Although the process of reforming the West German legal system similarly involved American legal advisers, their participation could hardly be characterized as reorienting the German legal tradition toward American models. Not only was the reconstruction of West Germany a highly contested negotiation with the other Allied Powers, its legal system was ultimately shaped and interpreted by German interests.¹⁴⁴

Furthermore, the deployment of American legal reformers in other areas of Europe as part of the Marshall Plan was predicated on

140. CAROTHERS, *supra* note 21, at 160 ("Americans rewrote the Japanese Constitution after World War II, in a hurry but with some success . . ."); *see also, e.g., Bringing Democracy to Japan*, CONST. RTS. FOUND., <http://www.crf-usa.org/election-central/bringing-democracy-to-japan.html> (last visited Mar. 1, 2012).

141. *See generally* LAWRENCE BEER & JOHN MAKI, FROM IMPERIAL MYTH TO DEMOCRACY (2002) (highlighting the seeds of constitutional democracy already in place when American-led legal reform began in the wake of World War II); KYOKO INOUE, MACARTHUR'S JAPANESE CONSTITUTION (1991) (presenting the first cross-cultural and cross-linguistic examination of the bilateral negotiations surrounding what was to become Japan's system of constitutional democracy and suggesting that due to cultural misunderstanding, the Japanese and the Americans held differing opinions of the meaning of the constitution even as they signed it).

142. RANDE KOSTAL, LAYING DOWN THE LAW: THE UNITED STATES AND THE LEGAL RECONSTRUCTION OF GERMANY AND JAPAN (Harvard Univ. Press, forthcoming 2012); John Haley, American Lawyers in Postwar Japan (unpublished manuscript in progress) (on file with author).

143. *See* ERIC A. FELDMAN, THE RITUAL OF RIGHTS IN JAPAN 1 (2000) ("[C]halleng[ing] the belief that the assertion of rights is fundamentally incompatible with Japanese legal, political, and social norms."). *Contra* CARL F. GOODMAN, THE RULE OF LAW IN JAPAN 3 (2003) ("Japan's legal history is fundamentally different from legal history in England and the United States. . . . The legal history of Japan is mostly a 'borrowed' history with feudal Japan's notions of the functions and purpose of law being fundamentally at odds with a 'Rule of Law' society.").

144. *See* PATRICK THADDEUS JACKSON, CIVILIZING THE ENEMY (2006); Erich J. Hahn, *U.S. Policy on a West German Constitution, 1947-1949*, in AMERICAN POLICY AND THE RECONSTRUCTION OF WEST GERMANY, 1945-1955, at 21 (Jeffrey Diefendorf et al. eds., 1993).

a faith in American expertise, but it also succumbed to the same classic package of law and development critiques.¹⁴⁵

This is not to glibly suggest that Americans did not influence the reform process in these countries. Rather, it is to note that the reform processes were far from “Americanization” processes, nor were they carried out with predictable developmental effects catalyzed specifically by American legal expertise.¹⁴⁶ Nevertheless, both the Japanese and German examples became crucial for strengthening and deepening the doctrinal belief that American legal expertise was deployable in any foreign reform context.¹⁴⁷

The myriad of developments that transformed American law at the turn of the century thus melded with a new vision of American internationalism that had at its core the presumption that there was not only something fresh and vital in American law, but that these developments could be and should be imparted to the rest of the world. In the context of foreign legal reform, the existence of domestic debates over such changes was glossed over.¹⁴⁸ Whatever disunity or contention was present stateside, these changes were carried forth by a general consensus that American law, in whatever form, had undergone an evolutionary leap forward.¹⁴⁹

What is striking about the unearthing of this earlier origin of law and development thinking is that it is co-extant with scholarship that has described and emphasized the early twentieth century as the great flowering of comparative law in America, when foreign legal ideas had a wide-ranging impact on American law.¹⁵⁰ The

145. HARRY BAYARD PRICE, *THE MARSHALL PLAN AND ITS MEANING* 369 (1955) (“American experience, it soon appeared, was far less relevant than had been supposed . . . Any illusion that dollars and technical ‘know-how’ were endowed with mystic qualities that could make economic deserts bloom like the rose was quickly dispelled in the face of hard realities in Asia.”).

146. See, e.g., Alfred C. Oppler, *The Reform of Japan’s Legal and Judicial System Under Allied Occupation*, 24 WASH. L. REV. & ST. B.J. 290 (1949) (detailing how legal changes made in Japan after World War II involved numerous influences, not just American influences); see also David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545 (2009) (offering an account of why the Supreme Court of Japan remains arguably the most conservative constitutional court in the world, declining to take an active role in the interpretation of Japan’s constitution and thus rejecting the strong presumption that American-style judicial review would take hold in Japan after it was formally enabled by the post-War constitution).

147. See CAROTHERS, *supra* note 21, at 3.

148. See, e.g., Kroncke, *supra* note 107.

149. See ADAMS, *supra* note 106 (presenting a theory of legal evolution); MORGAN, *supra* note 106 (examining the evolution of peoples and their institutions throughout history); Wilf, *supra* note 106 (examining the origins and evolution of the theory of legal modernism).

150. See generally John Fabian Witt, *Crystal Eastman and the Internationalist Beginnings of American Civil Liberties*, 54 DUKE L.J. 705, 710–15 (2004) (providing specific examples to explain that “even those features of American law that are

paradigmatic study of what has been called the “transatlantic” discourse is Daniel Rodgers’s *Atlantic Crossings*.¹⁵¹ Rodgers demonstrates how American legal and political developments were influenced by European debates and that American reformers felt free to use European examples as the basis for American social reforms.¹⁵² Duncan Kennedy has recently reemphasized Rodgers’s basic contention with a focus on the import of European ideas into the American legal community.¹⁵³

The impetus and stimulation for this vigorous transatlantic comparativism was well evidenced by the fact that many early twentieth century legal thinkers pursued legal education in Europe, reflecting the international prestige of European law, especially German law.¹⁵⁴ In this era, it was not uncommon for leading legal scholars to draw on a wide range of foreign sources, even beyond Europe, for imagining the legal developments that would properly confront the rapidly changing contours of American life.¹⁵⁵ Thus, in contrast to the contemporary definition of comparative law discussed below, comparative law was not solely the isolated study of foreign legal systems by specialized scholars, but was seen as a commitment to comparative methodology throughout legal scholarship aimed to produce actionable knowledge for domestic reform.¹⁵⁶

Yet, despite the impact and legacy of this more cosmopolitan era, both Rodgers and Kennedy note, with perceivable lament, that this comparative sentiment slowly eroded until it was wholeheartedly

typically described as distinctive . . . are often the result of interactions and ideas on a global scale”).

151. DANIEL T. RODGERS, *ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE* (1998).

152. See *id.* at 74 (explaining America’s goal to catch up with the progressive nations of the world by borrowing their ideas).

153. Duncan Kennedy, *Three Globalizations of Law and Legal Thought*, in *THE NEW LAW & ECONOMIC DEVELOPMENT*, *supra* note 10, at 19.

154. See David S. Clark, *Tracing the Roots of American Legal Education: A Nineteenth Century German Connection*, in 1 *THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES* 495, 499 (Steve Sheppard ed., 2007) (explaining that Americans saw German law schools as the best professional preparation for a gentleman lawyer); Mathias Reimann, *A Career in Itself—The German Professoriate as a Model for American Legal Academia*, in *THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD, 1820–1920*, at 165, 188–94 (Mathias Reimann ed., 1993) (describing the aspects of the German model education model that attracted foreigners).

155. See generally FRANK J. GOODNOW, 1 *COMPARATIVE ADMINISTRATIVE LAW*, at iv (1893) (noting that the study of administrative law should be, like all legal analysis, part of an inherently comparative science where “this knowledge can be obtained only by study, and by comparison of our own with foreign administrative models”).

156. WOODROW WILSON, *THE STUDY OF ADMINISTRATION* 21 (Pub. Affairs Press 1955) (1886) (“But why should we not use such parts of foreign contrivances as we want, if they be in any way serviceable? We are in no danger of using them in a foreign way. We borrowed rice, but we do not eat it with chopsticks.”).

rejected after World War II.¹⁵⁷ In fact, while it is now customary to attribute this post-World War II decline of comparativism to America's growing international power, such an explanation wholly misses how American lawyers simply came to treat Europe and the rest of the industrialized world using the already extant law and development frame.

Thus, what has been missing from this and other attempts to explain the decline of American comparative law is the recognition that many of those who participated in this transatlantic debate were simultaneously engaged in law and development work elsewhere—work that for a time bifurcated the world between Europe and the rest of the global community. While it was indeed true that American legal thought was far more cosmopolitan in this and earlier eras than traditionally recognized, this type of methodological comparativism was geographically restricted, and existed alongside the growth of the American lawyer's new international role as an exporter of legal knowledge. Tying together the fall of comparativism with the origins of law and development helps one understand the foundational opposition of comparative methodologies and the functional presumptions of law and development. Indeed, while some comparativists such as Goodnow were participants in this early history, over time foreign legal reform was seen as requiring little if any comparative expertise.¹⁵⁸ Rather, it was held to be the natural province of the American lawyer, who was ever more isolated from the traditions of comparative law.¹⁵⁹

The entrenchment of law and development as a core aspect of American legal identity only deepened as America descended into the Cold War. As the global ambit of American foreign policy expanded, so did the normalization of foreign reform work.¹⁶⁰ In fact, a key player in the rise of aggressive anticommunist rhetoric in American

157. See Daniel T. Rodgers, *An Age of Social Politics*, in *RETHINKING AMERICAN HISTORY IN A GLOBAL AGE* 250, 259–61 (Thomas Bender ed., 2002) (detailing how, even before the World War II, those involved in the transatlantic discussion increasingly tried to dissociate the influences of this more cosmopolitan discourse on the New Deal).

158. For a discussion of the use and ultimate alienation of comparativists in Latin American and Indian foreign law and development work, see Trubek & Galanter, *supra* note 49 and Krishnan, *supra* note 57.

159. See Otto Kahn-Freund, *The Use and Misuses of Comparative Law*, 37 *MOD. L. REV.* 1, 11–13 (1974) (transforming Montesquieu's comparative law principles into tools for American lawmakers to use in naturalizing foreign institutions); Stein, *supra* note 5, at 216 (“[American] lawyers require better knowledge and deeper understanding of the international scene and particularly of the foreign legal systems within which their counterparts function.”).

160. See Stein, *supra* note 5, at 216 (explaining that after World War II, America was the most powerful nation and with Washington no longer able to carry the burden of advancing freedom across the globe, the burden has fallen on lawyers to advance foreign reform).

law was a once-famed comparativism advocate, Roscoe Pound.¹⁶¹ Pound is characteristic of so many American legal scholars whose commitment to comparative law in America was set aside for law and development abroad—in Pound’s case when he served as a legal adviser to China’s Guomindang government.¹⁶² While Pound’s writings from the era rhetorically evoke comparative sensitivities, in practice he sought to rewrite the entirety of China’s legal system in the image of his ideal form of American law.¹⁶³ Furthermore, Pound glossed over the authoritarianism of the GMD and became a strident promoter of the efficacy of foreign legal reform stateside, even though none of his reforms were implemented or even seriously considered in Chinese politics.¹⁶⁴

As the Cold War progressed, the cultural politics of the Soviet Union’s foreign policy served as a strong stimulant to the growing belief in the necessity of American foreign legal reform as an element of anti-communism.¹⁶⁵ The differentiation of Soviet and American law only intensified the cultural politics of foreign legal reform in America and served to reemphasize America’s humanitarian export of law.¹⁶⁶ As a result, legal comparativism could be stigmatized as un-American, and foreign legal ideas were commonly cast in terms of contagion rather than inspiration.¹⁶⁷ Instead, the American legal community embraced this deepening belief in the centrality of law to

161. For works about Pound, see generally N. E. H. HULL, *ROSCOE POUND AND KARL LLEWELLYN* (1997) and DAVID WIGDOR, *ROSCOE POUND: PHILOSOPHER OF LAW* (1974).

162. Pound came to China to serve as an adviser in 1946. For examples of Pound’s comparative law works while he was in China, see Roscoe Pound, *Comparative Law and History as Bases for Chinese Law*, 61 HARV. L. REV. 749 (1948), Roscoe Pound, *Progress of the Law in China*, 23 WASH. L. REV. 345 (1948), and ROSCOE POUND, *SOME PROBLEMS OF THE ADMINISTRATION OF JUSTICE IN CHINA* (1948). For analysis of Pound’s comparative law works, see *THE LAW IN CHINA AS SEEN BY ROSCOE POUND* (Tsao Wenyen ed., 1953).

163. Jedidiah Kroncke, *Roscoe Pound in China: A Lost Precedent for Liabilities of American Exceptionalism*, 37 BROOK. J. INT’L L. (forthcoming 2012).

164. *Id.*

165. See generally Bui Thi Bich Lien, *Legal Education in Transitional Vietnam*, in *ASIAN SOCIALISM AND LEGAL CHANGE* 135, 150–51 (John Gillespie & Penelope Nicholson eds., 2005) (discussing projects to support legal education and reform in Vietnam since the early 1990s); Brian J.M. Quinn, *Vietnam’s Continuing Legal Reform: Gaining Control over the Courts*, 4 ASIAN-PAC. L. & POL’Y J. 431, 434–36 (2003) (discussing Vietnam’s shift away from the Soviet court system in response to political corruption).

166. See WALTER L. HIXSON, *THE MYTH OF AMERICAN DIPLOMACY* 8 (2008) (arguing that that the need to differentiate America from the Soviets intertwined “foreign policy and the process of creating, affirming, and disciplining conceptions of national identity”); LAWRENCE W. SEREWICZ, *AMERICA AT THE BRINK OF EMPIRE* 26 (2007) (“[T]he Communist threat makes [America’s foreign] aid imperative if freedom is to survive and ripen in vast areas of the world.”).

167. GORDON, *supra* note 119, at 79 (describing how “red-baiting” used interest in foreign law, such as the rights to monopolize resources and to steal property rights).

American identity, and it became standard fare for political and legal leaders to proclaim that the American lawyer was an essential Cold Warrior.¹⁶⁸ Even for many of those who had recoiled from the harshness of McCarthyism and who feared growing military intervention abroad, the noncolonial aspects of law and development remained an attractive framework.¹⁶⁹ Even Thurgood Marshall, who knew the controversies of American law as well as anyone, demonstrated his quintessentially American character when he set out to write a Bill of Rights for the Kenyan constitution.¹⁷⁰

In the end, it was Talcott Parsons, a sociologist, who would most deeply entrench law and development thinking not only in legal thinking but also in modern development discourse most broadly. Parsons drew on Max Weber's theories relating the rise of capitalism to legal rationalization and placed a stylized version of this theory at the core of the American development moment.¹⁷¹ The preeminence that Parsons gave to law only further amplified the reformist self-image of the American legal community abroad, and his interpretation of Weber became a set of unshakable truisms.¹⁷²

168. See Dwight Eisenhower, President of the U.S., Address at the 83rd Annual Meeting of the American Bar Association: The Role of Lawyers in Promoting the Rule of Law (Aug. 29, 1960), in 36 A.B.A. J. 1095, 1096 (explaining the American lawyer's role in seeking world peace); Robert G. Storey, President, Am. Bar Ass'n, Annual Address: Under God and the Law (Aug. 23, 1953), in 78 ANN. REP. A.B.A. 322, 326 (proclaiming that it was now incumbent on the American lawyer "to bring law into the supremacy which it must attain in a world of free men"); Earl Warren, Chief Justice, Supreme Court of the U.S., Address at the World Conference on World Peace Through the Rule of Law: World Peace Through International Legal Consensus (Sept. 13, 1965), in 53 KY. L.J. 5, 10 ("The lawyers of the world should be the first to agree that the responsibility is theirs to initiate a movement to have the problems of nations solved by means other than war.").

169. See, e.g., William O. Douglas, *Lawyers of the Peace Corps*, 48 A.B.A. J. 913, 913 (1962) ("[American lawyers] are peculiarly fitted for the task of instilling in the people of [foreign] countries the principles of the rule of law which will allow them to enjoy the freedoms and opportunities to which they aspire.").

170. See MARY L. DUDZIAK, EXPORTING AMERICAN DREAMS 71 (2008) (explaining the American sources of Marshall's enthusiasm for a bill of rights); see also Makua Mutua, Book Review, 31 HUM. RTS. Q. 1146, 1146-49 (2009) (reviewing MARY L. DUDZIAK, *supra*, and further analyzing Marshall's inspirations).

171. See Chantal Thomas, *Max Weber, Talcott Parsons and the Sociology of Legal Reform: A Reassessment with Implications for Law and Development*, 15 MINN. J. INT'L L. 383, 416 (2006) (describing how Weber's claims about the link between legal rationalization and the rise of capitalism had nothing to do with the common law practices, which were considered by Weber to be neither rational nor just).

172. Attempts to disabuse the American legal community of these truisms have been recurrent and unsuccessful. Compare David Trubek, *Max Weber on Law and the Rise of Capitalism*, 72 WIS. L. REV. 720, 720 (1972) (demanding that modern scholars look to Weber's theory for guidance in twentieth-century problem solving through "law and development"), and Roger Cotterrell, *Legality and Political Legitimacy in the Sociology of Max Weber*, in IDEOLOGY, LEGALITY AND THE STATE 69, 70 (David Sugarman ed., 1983) (stating the Weber's conclusions are a starting point for studies today), with Harold Berman, *Some False Promises of Max Weber's Sociology of Law*, 65

At the same time, in the wake of the entrenchment of law and development ideas, a radical change occurred in the definition of comparative law. In contrast to the broad methodological comparativism of the early twentieth century, comparative law took on a much greater taxonomic and specialized character, where “comparative law” more often than not meant the study of a foreign legal system on its own terms.¹⁷³

The substance of this switch was greatly affected by the inflow of émigré legal scholars from Europe during and after World War II. As this cadre of scholars took up residence in American law schools they were often deemed “comparative lawyers” by virtue of the foreign substance of their expertise, and not necessarily their methodological commitments.¹⁷⁴ The understanding of “comparative law” as a field predominantly staffed by European civil lawyers helped shift the field into moribund debates about the relative taxonomy or superiority of the two Western legal traditions.¹⁷⁵ Immediately in the post-World War II era, some of these émigrés helped promote a domestic interest in foreign constitutional debates, but only to the extent that such debates could be improved through the application of American expertise; far worse, many imported traditional colonial sensibilities from Europe even as decolonization was under way.¹⁷⁶

Perhaps most importantly, the critical comparative scholarship produced within the new comparative law had little chance to affect domestic American legal development. The marginalization of comparative perspectives was intertwined with the new cultural politics of American legal parochialism.¹⁷⁷ Thus, comparativism in the production of American legal knowledge was at best marginalized and at worst wholly dismissed by the broader legal community in favor of law and development.

WASH. U. L.Q. 758 (1987) (analyzing and criticizing widespread acceptance of Weber’s ideas), and Robert Marsh, *Weber’s Misunderstanding of Traditional Chinese Law*, 106 AM. J. SOC. 281 (2000) (explaining the flaws in Weber’s work and suggesting that comparative law scholars “rethink what the defining characteristics of ‘modern law’ should be”).

173. See generally RETHINKING THE MASTERS OF COMPARATIVE LAW (Annelise Riles ed., 2001) (compiling examples of such comparative law pieces).

174. See John Henry Merryman, *Comparative Law Scholarship*, 21 HASTINGS INT’L & COMP. L. REV. 771, 781 (1997) (pointing out that there is little evidence that foreign scholars who came to reside in American law schools in this era paid serious attention to comparative law).

175. CAROTHERS, *supra* note 21, at 8–10.

176. See David Fontana, *The Rise and Fall of Comparative Constitutional Law in the Postwar Era*, 36 YALE J. INT’L L. 1, 17–19 (2011) (admitting that the “comparative constitutional law” of this era was predominantly based on an export model of American constitutional experience).

177. See John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545, 548–49 (1995) (giving examples of the rare success stories of comparative law subjects while explaining their usual place on the fringe of legal-academic life).

C. The Cultural Politics of Law and Development

It has been a long-standing subject of study and commentary that Americans, since the pre-colonial era, have seen American law as a key aspect of America's particular, some say exceptional, place in the world.¹⁷⁸ Alexis de Tocqueville's classic analysis of post-Revolutionary American society is often cited for its emphasis on law and the role of lawyers in public and private life.¹⁷⁹ Paul Kahn has provided a recent articulation of this thesis, emphasizing that America was conceived through an act of popular sovereignty and that a foundational ritual of collective identity was an assertion of its distinction from foreign law.¹⁸⁰ Other scholars have compared America's identification with law to a religious devotion unchanged into the present era.¹⁸¹

However intense this association was, recent scholarship shows that in the international arena, this strong sense of exceptional law or legality was tightly constrained by the reality of America's practical status as a fledgling postcolonial nation. Prior to the twentieth century, Americans were more interested in gaining a sense of parity and respect in the arena of international law than rhetorical assertions concerning America's exceptional legal character might misleadingly represent.¹⁸² While some American lawyers proudly trumpeted American law in foreign contexts, especially the

178. See SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM* 40 (1996) (describing the uniquely powerful role that American lawyers have); ANDERS STEPHANSON, *MANIFEST DESTINY* 25 (1995) (explaining the legal justifications that American expansion relied on); Michael Kammen, *The Problem of American Exceptionalism: A Reconsideration*, 45 *AM. Q.* 1, 5 (1993) (showing that current scholarship on tax laws, among other things, suggests America's exceptional position). See generally IS AMERICA DIFFERENT? (Byron E. Shafer ed., 1991) (compiling various articles discussing the notion of American exceptionalism).

179. ALEXIS DE TOCQUEVILLE, 1 *DEMOCRACY IN AMERICA* (1835); see also ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* 12 (1984) (explaining that de Toqueville equated the legal profession to an "intellectual aristocracy"); ROBERT STEVENS, *LAW SCHOOL* 14 (1983) (citing de Toqueville's perceptions of America's class system); Robert W. Gordon, *The Independence of Lawyers*, 68 *B.U. L. REV.* 1, 15 (1988) (noting de Toqueville's view of American lawyers as part of a separate class in society).

180. Paul Kahn, *American Exceptionalism, Popular Sovereignty, and the Rule of Law*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 204 (Michael Ignatieff ed., 2005).

181. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 180 (1988) (regarding the Constitution as the "focus of a faith community"); Steven Calabresi, *A Shining City on a Hill: American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 *B.U. L. REV.* 1335, 1382 (2006) (claiming that America's moralistic foreign policy stems from its unique devotion to religion).

182. See generally David M. Golove & Daniel L. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 *N.Y.U. L. REV.* 932 (2010) (arguing that the primary purpose of enacting the American Constitution was to promote America as a "civilized state").

achievement of the American Constitution,¹⁸³ it was not until the turn of the twentieth century that America as a nation both internationalized and was able to confidently assert its exceptional legal character in the form of an active foreign policy overseas.¹⁸⁴

The history just outlined demonstrates how the idea that modern law could stand as a scientific basis for the professional authority of the American lawyer, domestically and internationally, penetrated deep into the American legal community. This was an idea that appealed to a nation soothed by the thought that American law could convert foreign citizens abroad, as it was doing domestically.¹⁸⁵ The historical narrative that American law had achieved an evolutionary leap forward became the normalized backdrop of the profession.¹⁸⁶ Although Robert Gordon has shown the often ambivalent and inconsistent contribution of lawyers to the health of the rule of law in American legal history, such a historical contribution is today taken as a given.¹⁸⁷ The components of this cultural framework would change somewhat over the course of the twentieth century, but the framework became settled into what Frank Upham labeled the “mythmaking orthodoxy.”¹⁸⁸ Such orthodoxy insists that American law can be described accurately by abstract ideals such as the “rule of

183. See generally GEORGE ATHAN BILLIAS, *AMERICAN CONSTITUTIONALISM HEARD ROUND THE WORLD, 1776–1989* (2009) (demonstrating how the American pride in their Constitution spread globally).

184. Scholars of American foreign policy have long noted that idealized versions of American history are normatively structured and are offered as carrying implied lessons for foreign nations. See RUSSELL L. HANSON, *THE DEMOCRATIC IMAGINATION IN AMERICA* 424 (1985); HIXSON, *supra* note 166, at 9.

185. See Matthew J. Lindsay, *Preserving the Exceptional Republic: Political Economy, Race, and the Federalization of American Immigration Law*, 17 *YALE J.L. & HUMAN.* 181 (2005) (discussing America’s strong policing of immigrants and views that the assimilation could occur abroad as well); Adam McKeown, *Ritualization of Regulation: The Enforcement of Chinese Exclusion in the United States and China*, 108 *AM. HIST. REV.* 377, 385–91 (2003) (discussing the American immigrant exclusion effort as it related to Chinese immigrants).

186. Robert W. Gordon, *Historicism in Legal Scholarship*, 90 *YALE L.J.* 1017, 1038 (1981) (explaining that American lawyers promised they could guarantee liberty better than other learned elites); Christopher Tomlins, *Framing the Field of Law’s Disciplinary Encounters: A Historical Narrative*, 34 *LAW & SOC’Y REV.* 911, 925 (2000) (discussing the prominence of legal discourse as a “policy language”).

187. Robert W. Gordon, *The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, 11 *THEORETICAL INQ. L.* 441 (2010). *Contra* Walter Dellinger & Samuel P. Fried, *Promoting the Rule of Law Abroad: How the U.S. Legal and Business Communities Can Help*, 82 *WORLD POL’Y J.* 79, 82–83 (2003) (“[T]he U.S. legal community is uniquely qualified to help promote the rule of law for the simple reasons that we have been doing it for decades here at home and we possess the know-how and the resources to launch and sustain this effort abroad.”).

188. UPHAM, *supra* note 92.

law,” when in fact American law is rife with a range of legal and nonlegal values.¹⁸⁹

This history demonstrates that in contrast to the more technical or operational terms of the field’s cyclical self-critiques, the paradox of law and development is a permutation of this traditional American focus on legal identity. Although in many ways enabled and given specific character by the standardization of modern American law discussed earlier, the function and perpetuation of the paradox itself is best understood using the terms of cultural analysis advanced by legal scholars working today in the fields of cultural cognition¹⁹⁰ or expressive law.¹⁹¹ Common to these approaches is recognition that the symbolic aspects of law are crucial to the interpretive framework. Popular and professional legal actors use this framework to interpret empirical phenomena, and through it they can explain away such data’s conflict with preexisting world views.¹⁹²

The fact that law and development became a defining characteristic of American legal identity during this crucible era of the new humanitarian internationalism—even in places like China where American interests were remote and influence negligible—allows one to decenter explaining the longitudinal paradox of law and development in material or logistical terms, and moves one to understanding the persistence of law and development as a form of cultural identity politics. Law and development came to supplant and supersede comparativism in American legal culture, but not due to its superiority in explaining or influencing foreign legal developments. Quite the opposite was true, namely, that from its inception in China and elsewhere, law and development grew and thrived because it was tied to both the new professional self-image of American lawyers, an expression of their assertions of scientific legal expertise, and a ritual of their role central in American internationalism.

Within American society, foreign legal reform is likely one of the most successful examples of what cultural cognition scholars Dan Kahan and Donald Braman have called “successful cultural

189. Upham notes how the American judiciary is permeated by politics and that “federalism guarantees, indeed celebrates, national inconsistencies in legal rules and results,” leading to forum shopping. He further examines how one can make arguments on behalf of the jury system, but that “fidelity to the rule of law is not one of them.” UPHAM, *supra* note 92, at 17.

190. Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL’Y REV. 149 (2006). See generally CULTURAL COGNITION PROJECT, <http://culturalcognition.net> (last visited Mar. 1, 2012) (compiling research on how cultural values affect policy beliefs).

191. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000). Disciplines such as legal sociology and legal anthropology have long explored the cultural aspects of law in a range of different societies. See ROGER COTTERELL, *LAW, CULTURE, AND SOCIETY* (2006).

192. See Kahan & Braman, *supra* note 190.

policymaking.”¹⁹³ Almost the entire spectrum of American politics has consistently supported foreign legal reform efforts.¹⁹⁴ While many American legal debates continue to be acrimonious domestically, there is a shared vision of American legal reform abroad to which all American lawyers can contribute and endorse. This is why Tamanaha can identify the ways in which polar opposite American legal philosophies can infuse opposing visions of foreign legal change into law and development, and American law’s role therein.¹⁹⁵ Such successful “cultural policymaking” inherently precludes law and development work in areas that are too controversial and would destabilize this harmony. This explains why very little law and development work confronts the issue of structural economic inequality inherent in modern capitalism or suggests the export of American labor rights over property rights.¹⁹⁶

When we turn to the recurrent flaws that set law and development at odds with comparative law—formalism, instrumentalism, and idealization—we can see that whatever problems these flaws pose for the actual success of law and development’s practical aspirations, they are in fact core virtues for sustaining the cultural politics of law and development within American legal culture. All of these flaws serve to facilitate the continued health of the presumption that America is solely an exporter of law abroad and does so in a manner that both smoothes over domestic disagreements while reinforcing the paradoxical notion that the export of American law can be simultaneously an apolitical process while ever expressive of the most broadly shared American legal ideals. Thus, law and development’s inability to learn from its failures is an inherent aspect of its function as an expressive mode of cultural politics.

This collective image of the American lawyer abroad has become the baseline assumption with which all American lawyers are socialized. A cultural framework allows one to make sense of the inherent optimism that propels law and development and the

193. *Id.*

194. *See generally* CAROTHERS, *supra* note 21, at 4 (noting that multiple presidential administrations of both political parties have championed foreign democratic development).

195. Tamanaha, *supra* note 32, at 225, 232 (identifying the “progressive law and development package” and the “law and capitalism package”).

196. *See* MARK SIDEL, *LAW AND SOCIETY IN VIETNAM* 8 (2008) (explaining the phenomenon in Vietnam); Philip Selznick, *American Society and the Rule of Law*, 33 *SYR. J. INT’L L. & COM.* 29, 33 (2006) (“The history shows that American effort to make good the promise of the rule of law has been very difficult . . . as during the great conflicts between capital and labor in the nineteenth and twentieth centuries.”); Stephen Golub, *Beyond Rule of Law Orthodoxy* 22 (Carnegie Endowment for Int’l Peace, Working Paper No. 41, 2003) (explaining lawyers’ tendency to minimize “the many other factors and actors that affect legal systems development . . .”).

consistent reference scholars and practitioners make to the power of its “special mission” or invoke an amorphous, but positive, “instinctive sense” about such work.¹⁹⁷ On a structural level, the normalization of law and development in American legal culture explains why there is an endlessly recurring circulation of new lawyers in and out of foreign reform projects,¹⁹⁸ even when few experience individual success. While law and development scholars and career practitioners may engage in more sophisticated inquiries that at times verge on actual comparative law, such debates are not only generally far removed from popular discussions,¹⁹⁹ but are disciplined by their need to engage with the ingrained general presumptions of the American legal community.²⁰⁰

In sum, the actual origins of law and development provide a deeper and more expansive history of failure that deflates the generalized optimism still expressed about the prospects of American foreign legal reform efforts. This history also enables us to understand why law and development ultimately speaks not to how we have—or have not—had an impact on other societies, but to the way law and development expresses and affirms a foundational aspect of modern American legal identity. We turn now to an explication of how the inherent resistance of law and development to destabilizing empirical data presents a set of increasingly problematic liabilities that should shift discussions away from abandoning the field because of its inefficacy as a humanitarian policy to the hard road of instead linking it to American self-interest.

197. THOMAS CAROTHERS, *ASSESSING DEMOCRACY ASSISTANCE: THE CASE OF ROMANIA* 132 (1996) (admitting that the popularity of these efforts “depend[s] less on the specific impact of the assistance on others than on what the assistance says and means about ourselves”).

198. See CHANNEL, *supra* note 37, at 4 (criticizing the lack of ownership, insufficient resources, and excessive segmentation in the law and development movement).

199. See *id.* at 4 (discussing similar insights that have been made); Linn Hammergren, *International Assistance to Latin American Justice Program*, in *BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW*, *supra* note 14, at 321–22 (noting the general lack of serious comparative evaluations).

200. See McAuslan, *supra* note 78, at 41–42 (noting that the average American lawyer has internalized this stylized development history and, further, has little basis to reflexively question the export of areas of American law in which he has neither a particular stake nor expertise); Martin Shapiro, *Courts in Authoritarian Regimes*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES*, *supra* note 72, at 326 (explaining the movement away from the presumption that every comparative study needed to concentrate on U.S. Supreme Court decisions).

IV. THE INTERNATIONAL LIABILITIES OF LAW AND DEVELOPMENT'S MIRRORED LENS

The deep history of law and development's failures and its direct relationship with the rejection of early twentieth century comparativism provides a sobering rebuttal to the recurrent claims of optimism that undergirds its contemporary practice. Neither its dire empirical track record nor its inherent conceptual flaws establish any real basis for sober expectations of future rehabilitation. However, this Part and the subsequent Part argue that discussions of law and development's failure must move beyond mere considerations of its efficacy as an instrument for influencing foreign development, and begin to assess the self-interested concerns about the troubling liabilities that the cultural politics of law and development pose for the American legal community in the twenty-first century. To this end, this Part outlines how the normalization of law and development has inculcated in American interpretations of foreign legal development a mirrored lens that trades clear-sighted analysis for warped perceptions in order to sustain the assumption that America is solely an exporter of legal knowledge.

A. Accepting the Limits of American Legal Expertise Abroad

The early history of law and development reveals how enmeshed the origins of the modern professional image of American lawyers were in forwarding assertions about the authority of legal expertise as a form of apolitical science. Such belief was central to a great deal of the legal developments that shaped modern American law, and it co-evolved with the spread of legal standardization and nationalization at the turn of twentieth century. In some ways, it was natural then for American lawyers to take abroad this same faith in the scientific universality of law as they undertook foreign legal reform. Yet, history shows that whatever purchase this belief had historically, it has never been validated as an effective tool for engaging with foreign law.

The deep faith of American lawyers in the liberalizing potential of law is inextricably tied to the cultural politics that have long sustained law and development. Coupled with collective and individual humanitarian impulses, defenders of law and development have never been able to accept the possibility that our legal expertise as American lawyers—however valuable it may be domestically—is orthogonal to foreign legal systems, much less a cure-all for inducing the rule of law, democracy, or other more general legal ideals. In this way, Robert Gordon's suggestion that direct and open political advocacy may be the best route for inspiring what we consider

positive legal changes abroad is significantly more challenging than his subtle and velvet-gloved analysis suggests.²⁰¹ It asks that if we seek to impact developments abroad, we set aside our professional identity and act without the trappings of authority and expertise to which we have become so accustomed.²⁰²

From the more specific vantage point of simple cost-benefit analysis, the track record of law and development has to be more broadly reconciled with the ongoing debates about foreign aid writ large.²⁰³ While most of the self-critiques of law and development parallel the identified pitfalls of development work more broadly, legal reform work has remained relatively insulated from the rigorous criticism voiced in foreign aid scholarship. These critiques have not only questioned the productivity of aid as a general enterprise, but deeply questioned the field's ability to ever produce scientifically objective metrics for evaluating its success or failure.²⁰⁴

Now, let us step back for a moment and simply countenance law and development's century long record of failure alongside the general debates on foreign aid. So much of the search for effective aid interventions has come to focus on the comparative economy of various aid methods. The Millennium Development Goals are a well-known attempt to prioritize the deployment of limited aid dollars to confront humanitarian needs.²⁰⁵ The results of such work have primarily prioritized public health vectors such as access to clean water, basic micronutrients, and forms of preventative medicine. Given the amount of time and money expended by the panoply of individuals and organization engaged in law and development work, where would foreign legal reform comparatively rank on this scale over the past century?²⁰⁶ In comparison to clean drinking water? Or even direct cash transfers?²⁰⁷ And moreover, when proper weight is given to unintended consequences?²⁰⁸

201. GORDON, *supra* note 179, at 10–11.

202. *See id.* at 59–65 (discussing the trappings in the lawyering profession).

203. WILLIAM EASTERLY, *THE WHITE MAN'S BURDEN* (2006); William Easterly & Tobias Pfitze, *Where Does the Money Go? Best and Worst Practices in Foreign Aid*, 22 J. ECON. PERSP. 29 (2008).

204. Compare HAMMERGREN, *ENVISIONING REFORM*, *supra* note 42, at 314 (noting law and development's rejection of experimental methods), with Abhijit V. Banerjee & Esther Duflo, *The Experimental Approach to Development Economics* (Nat'l Bureau of Econ. Research, Working Paper No. 14467, 2008), available at <http://www.nber.org/papers/w14467.pdf> (advocating experimental methods in development economics).

205. *See We Can End Poverty: 2015 Millennium Development Goals*, UNITED NATIONS, <https://www.un.org/millenniumgoals> (last visited Mar. 1, 2012) (providing information about the current UN work on the Millennium Development Goals).

206. CAROTHERS, *supra* note 21, at 264 (noting the high salaries involved in legal work).

207. There has been recognition that legal problems are often simply issues of funding. *See* Rebecca Nelson, *Regulating Grassland Degradation in China: Shallow*

The great seduction of law and development has been that it offers so much more than just the terms of any given project. Programs aimed at promoting judicial independence or American forms of legal education conjure up the possibility that small successes, ever on the horizon, can lead to catalytic changes that will be socially transformative and thus generate exponential multiplier effect upon multiplier effect. Yet, at the same time, it has been exactly these very developmental effects that law and development has failed to ever produce. Individual projects have from time to time delivered on smaller scale aspirations such as temporarily improving docket-clearing rates or winning specific public interest cases.²⁰⁹ However, such programs are not ultimately evaluated on the basis of whether these specific outcomes are economical, but on imagining that these outcomes will trigger a developmental chain that invokes replicating stylized visions of our legal development.

Thus, on a collective and individual level, American lawyers must ask themselves, even from a purely humanitarian perspective, whether it is best to attempt to improve the life of others abroad through their expertise as lawyers per se. As will be discussed shortly, this is not commensurate with a call for some form of legal isolationism or nonengagement. However, to the degree that we inevitably collaborate with foreign lawyers and reformers eager to learn from the American experience, the law and development only clouds and perverts such interface by articulating aspirations derived from a mirrored lens that speaks to our professional identity rather than to the difficult questions posed by our extant track record abroad.

B. Authoritarianism and Recognizing Unintended Consequences

Pulling back from the more generalized question of the comparative utility of legal expertise in development, there are clear and definitive ways in which the history of law and development has

Rooted Laws?, 7 ASIAN-PAC. L. & POL'Y J. 417 (2006) (citing China's decentralized funding structure as an important obstacle to preventing land degradation); Srinivasaraman, *Regulating the Belching Dragon: Rule of Law, Politics of Enforcement, and Pollution Prevention in Post-Mao Industrial China*, 18 COL. J. INT'L ENVTL. L. & POL'Y 37 (2007) (noting the need to create a more centralized administrative agency and increase funding to improve the administration of environmental laws).

208. See generally Mariana Mota Prado, *The Paradox of Rule of Law Reforms: How Early Reforms Can Create Obstacles to Future Ones*, 60 U. TORONTO L.J. 555, 556 (2010) (explaining that reforms create practices that will block future reforms and strengthen interest groups that will resist future reforms).

209. See Scott L. Cummings & Louise G. Trubek, *Globalizing Public Interest Law*, 13 UCLA J. INT'L & FOREIGN AFF. 1 (2009) (examining the successes of the public interest law in the post-Cold War era); Hammergren, *supra* note 199, at 322 (noting the limited scale of success in development projects in Latin America).

repeatedly shown how the attitudes and assumptions of the field warp our ability to understand and accept legal developments abroad on their own terms. Herein, we turn away from questions of measuring the efficacy of attempts to induce change abroad to more self-interested questions about America's ability to evaluate and adapt to foreign legal developments in an increasingly competitive world. In other words, the world has changed and it is an increasingly serious liability that America has consistently misjudged the direction and status of foreign legal systems based on the aspirations and assumptions of law and development.

The most striking example of this misjudgment has been America's collective track record in engaging authoritarian regimes. Core to the faith in legal instrumentalism inherent in law and development work is that, even in politically unfavorable climates, transfers of American law can longitudinally lead to liberalizing effects.²¹⁰ Further, the implicit belief that foreign systems will follow the same imagined developmental trajectory as America has led to a belief that such transfers—again often divorced from their domestic controversies—can have predictable effects.²¹¹ Such teleological presumptions are amplified by the general aversion in American law to the most difficult questions at the heart of democratization studies, that is, the distributive or structural issues of economic and political power.²¹² Instead, law and development theories have chosen to focus on the seductive allure of more generalized evolutionary notions of social development—so broad as to elide distributive debates.

Authoritarian regimes have repeatedly tested these presumptions in large part through their willingness to be open spaces for law and development work.²¹³ However, there has been a persistent if not instinctive presumption that authoritarian regimes would prefer practices of arbitrary rule.²¹⁴ This presumption has resonated with the common liberatory view of American law. America has often engaged in legal work in authoritarian regimes based on the faith that such work would eventually undermine authoritarianism or faith in the purportedly self-evident moral virtue

210. Trubek & Santos, *supra* note 10, at 4.

211. See *supra* note 107.

212. Golub, *supra* note 26.

213. See generally RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES, *supra* note 72 (compiling discussions of the functions of courts in authoritarian politics).

214. STATE AND LAW IN EASTERN ASIA 143 (Leslie Palmiera ed., 1996) (“[I]t is probably safe to assume that all governments would prefer the convenience of arbitrary rule, and abjure it only when compelled.”); C. Neal Tate & Torbjörn Vallinder, *The Global Expansion of Judicial Power: The Judicialization of Politics*, in THE GLOBAL EXPANSION OF JUDICIAL POWER 1, 3 (C. Neal Tate & Torbjörn Vallinder eds., 1995) (referring to judicialization as a “gospel”).

of authoritarians who indicate such virtue by claiming to support law and development work.²¹⁵

Yet, throughout the twentieth century, authoritarian and even fascist regimes have not shied away from developing instrumental law or what is now considered “thin” rule of law principles.²¹⁶ In fact, the attraction of authoritarian regimes to the rule of law is not a new concept historically speaking. A range of scholars describe the pre-democratic origins of rule of law ideals²¹⁷ as well as its common law genesis as a result of elite power struggles in England.²¹⁸ Scholars also note the way that fascism in Germany was compatible with procedural notions of the rule of law.²¹⁹ Others have even cited the complicated relationship between the rule of law and anti-majoritarian debates in U.S. history.²²⁰ Thus, it should not be wholly surprising that reference to rule of law ideals has now become the norm for contemporary authoritarian regimes.²²¹

However, there is a growing body of evidence that shows how promoting instrumental legal development abroad may be strengthening authoritarianism and actively undermining liberalization. In their recent collection on the subject, Thomas Ginsburg and Tamir Moustafa describe how modern authoritarian regimes have recognized the utility of efficient and consistent legal institutions.²²² Others note how authoritarian regimes successfully use law to create a greater capacity for self-reform through internal reallocations of power.²²³ Still others have discussed how legal

215. For the first wave of authoritarian regimes supported by America, see ROBERT A. PACKENHAM, *LIBERAL AMERICA AND THE THIRD WORLD* (1973).

216. Ronald J. Daniels & Michael Trebilcock, *The Political Economy of Rule of Law in Developing Countries*, 26 MICH. J. INT'L L. 100, 106 (2004); Peerenboom, *supra* note 10, at 37. *Contra* Thomas Carothers, *The “Sequencing” Fallacy*, 18 J. DEMOCRACY 12, 26 (2007); Michael McFaul & Kathryn Stoner-Weiss, *The Myth of the Authoritarian Model*, 87 FOREIGN AFF. 68, 68 (2008).

217. See, e.g., Clark, *supra* note 9, at 28–29 (tracing the origins of rule of law in the West to the Ancient Greeks).

218. Ugo Mattei, *Why the Wind Changed: Intellectual Leadership in Western Law*, 42 AM. J. COMP. L. 195, 209 (1994).

219. DAVID DYZENAHUS, *LEGALITY AND LEGITIMACY* (1997); JOSEPH RAZ, *THE AUTHORITY OF LAW* 221 (1979).

220. Amy Chua, *Markets, Democracy and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1, 5 (1998).

221. See Salas, *supra* note 36, at 46 (noting that authoritarian forces have invoked rule of law principles in political contexts, calling for judicial “renovation”); see also *supra* note 72.

222. RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES, *supra* note 72, at 4 (noting five areas of such utility: social control, legitimation, controlling administrative agents and maintaining elite cohesion, credible commitments in the economic sphere, and delegation of controversial reforms to judicial institutions).

223. Sophie Richardson, *Self-Reform Within Authoritarian Regimes: Reallocations of Power in Contemporary China*, in POLITICAL CIVILIZATION AND MODERNIZATION IN CHINA 149, 151 (Yang Zhong & Shiping Hua eds., 2006) (arguing that reforms in China have helped “shift power away from the central state”).

strategies have indirectly legitimated existing state institutions,²²⁴ especially as the internationalization inherent in participating in legal reform projects allows foreign elites of many persuasions to manipulate the resources of such efforts to their own ends and improve their public image.²²⁵ Not surprisingly, a great deal of attention is given in this new work to the prevalent effects of strategic manipulation of judicial elites and adaptations to the American emphasis on judicial independence.²²⁶ Further, the proliferating popularity of anti-corruption frames in law and development has led authoritarian regimes to recast political foes as “corrupt” and so legitimize the exertion of centralized authority.²²⁷ Summarily, most of this recent analysis centers on how such instrumental reforms lead not to developmental change but to the entrenchment of existing elite power in authoritarian regimes.²²⁸

Many of these newer studies replicate the findings of the decades old analysis by law and development dissident James Gardner. Gardner was an ex-rule-of-law practitioner who was involved in the early Latin American efforts described by Trubek and Galanter.²²⁹ Although he wrote the most extensive critique of his generation, he is

224. See Mark F. Massoud, *Myth Making and the Collusion of Rights: Law and Development in Sudan* 37 (Oct. 23, 2008) (unpublished Ph.D. dissertation, University of California, Berkeley) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1288821 (discussing how attempts at increasing awareness of legal rights in oppressive regimes can actually “perversely create and sustain a myth of rights that ultimately provides leverage and legitimacy to the government that the civil society seeks to de-legitimate”).

225. See DEZALAY & GARTH, *supra* note 40, at 7; see also Karen E. Bravo, *Smoke, Mirrors, and the Joker in the Pack: On Transitioning to Democracy and the Rule of Law in Post-Soviet Armenia*, 29 HOUS. J. INT’L L. 489, 575 (2007) (“Members of the governing elite educated in the West, or through trainings in democracy and the rule of law funded by Western taxpayers, are familiar with the images the West yearns for and expects to see.”).

226. See generally LISA HILBINK, *JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP* (2007) (arguing that the apolitical roots of the Chilean judicial system yielded a structure with insufficient incentives for judicial independence); TAMIR MOUSTAFA, *THE STRUGGLE FOR CONSTITUTIONAL POWER* (2007) (analyzing the development of judicial independence in the Egyptian Supreme Court); ANTHONY PEREIRA, *POLITICAL (IN)JUSTICE* (2005) (assessing the role of the judiciary in the support of authoritarian regimes in Argentina, Brazil, and Chile).

227. See Sarah Bracking, *Political Development and Corruption: Why ‘Right Here, Right Now!’?*, in *CORRUPTION AND DEVELOPMENT* 3, 11–12 (Sarah Bracking ed., 2007) (discussing how the discourse of anti-corruption can be used in many contexts, including to discredit rivals in power struggles); see also Sundhya Pahuja, *Global Formations: IMF Conditionality and the South as Legal Subject*, in *CRITICAL BEINGS* 161, 171–75 (Peter Fitzpatrick & Patricia Tuitt eds., 2004) (describing the adoption of anti-corruption rhetoric by elites to suppress local interests).

228. Thomas Walde & James Gunderson, *Legislative Reform in Transition Economies*, in *MAKING DEVELOPMENT WORK: LEGISLATIVE REFORM FOR INSTITUTIONAL TRANSFORMATION AND GOOD GOVERNANCE*, *supra* note 40, at 52.

229. See generally JAMES GARDNER, *LEGAL IMPERIALISM* (1980) (analyzing American legal assistance to Latin America).

decidedly less well known, in part because he did not continue to write or teach in law, but also because of the nature of his critique. Gardner wrote about the first wave of rule of law promotion and its “vulnerability to authoritarian ordering and abuse . . . converting law into an instrument and exercise of repressive policy and power.”²³⁰ Even further, he claimed that the substance of American legal institutions and practices are themselves inherently prone to authoritarianism—a line even those affiliated with Critical Legal Studies within the American academy often shy away from crossing when abroad.

In doing so, Gardner committed what this Article will call the “Gardner Taboo.” That is, he transgressed the normative practice among ex-practitioners of not linking failed law and development efforts to the strengthening of authoritarian regimes, or to recognizing the negative effects of law and development beyond simple inefficacy.²³¹ As discussed earlier, the norm of self-critique is to portray failures as both benign and redeemable with further experience. In contrast, Gardner failed to express a favorable thought toward the amelioration of this vulnerability through continued self-critique and renewed effort.

There is likely no better modern example of the Gardner Taboo than the case of China. Although the early history of American law and development in China described in Part III is often forgotten, after China’s global reopening in the 1970s, Americans again rushed to imagine shaping the course of the country’s legal reform.²³² As noted, they promptly began to participate in the cyclical paradox of law and development work.²³³ Many China law scholars have been loathe to transgress the Gardner Taboo, especially as China has been so popular for the “Trojan Horse” view of legal work in authoritarian settings.²³⁴

However, in recent years the surprising-to-some ability of the Chinese Communist Party (CCP) to use legal methods to

230. See *id.* at 5.

231. See, e.g., Davis, *supra* note 79, at 553 (“In short, the claim here is not that universalistic theories of law and development should be rejected out of hand. Rather, they should be regarded skeptically, and each one ought to be tested against a powerful set of objections to which even the most sophisticated theories of this kind have proven vulnerable.”).

232. See generally Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 NW. J. INT’L L. & BUS. 383 (2000) (describing reforms in China over the last twenty years, discussing the United States’ involvement in some of these reforms, and recommending that the United States use restraint in attempting to reform Chinese law).

233. CHRISTOPHER JESPERSEN, *AMERICAN IMAGES OF CHINA* 188 (1996).

234. See Alford, *supra* note 47, at 1708 (arguing that such “promotion must account for unintended and undesired consequences”); see also Stephenson, *supra* note 74, at 78–80 (explaining how the United States is employing a “Trojan Horse” strategy to encourage reform in China).

simultaneously bolster its regime while repressing dissent²³⁵ has led to a new wave of critical scholarship in and outside of legal circles.²³⁶ State power has been described as being reorganized through law, or what Lubman described as the process as “legalization.”²³⁷ Several authors have focused on how improvements in instrumental law have strengthened the regime’s legitimacy, both domestically²³⁸ and internationally.²³⁹ The CCP also strategically deployed the legal terms of international discourse to legitimize its actions, using concepts such as “eminent domain,” “corruption,” and “terrorism.”²⁴⁰

235. See SARAH BIDDULPH, *LEGAL REFORM AND ADMINISTRATIVE DETENTION IN CHINA* (2007); see also Fu Hualing, Commentary, “*Transforming Family Law in Post-Deng China*,” 191 CHINA Q. 696, 697 (2007) (“[T]he paradox in the Chinese political and legal reform is the contrast between severe repression in core policy areas and the lack of restrictions in peripheral areas.”). But see Flora Sapio, *Shuanggui and Extralegal Detention in China*, 22 CHINA INFO. 7, 24–25 (2008) (discussing an extralegal Chinese method of detaining those suspected of corruption that still operates outside the law, but is being reformed).

236. See generally Andrew Nathan, *Authoritarian Resilience: Institutionalization and the Transition to China’s Fourth Generation*, in *US–CHINA RELATIONS IN THE TWENTY-FIRST CENTURY* 13 (Christopher Marsh & June Dreyer eds., 2003) (analyzing the surprising resilience of a reconsolidated authoritarian Chinese regime).

237. See Lubman, *supra* note 232, at 384 (defining “legalization” as a “basis for law reform” that was “established when the leadership affirmed the position of law as a source of authoritative rules”); see, e.g., KEVIN O’BRIEN, *REFORM WITHOUT LIBERALIZATION* 178 (1990) (discussing the CCP’s efforts in the 1980s to restructure and reorganize the political system to create more stability and predictability).

238. See Margaret Y.K. Woo, *Law and Discretion in Contemporary Chinese Courts*, in *THE LIMITS OF THE RULE OF LAW IN CHINA* 163, 163 (Karen G. Turner et al. eds., 2000) (discussing China’s expressed commitment to predictability and the “rule of law,” though also exposing China’s ambivalence about this concept and its allowance of discretion); see also Robert C. Berring, *Chinese Law, Trade, and the New Century*, 20 NW. J. INT’L L. & BUS. 425, 431–36 (2000) (“[L]aw and legality are one of the routes that the Chinese government has seen as a means to entry into the world trading order.”); Pitman B. Potter, *Riding the Tiger: Legitimacy and Legal Culture in Post-Mao China*, 138 CHINA Q. 325, 358 (1994) (“Regardless of the eventual outcome, the post-Mao regime’s decision to ride the tiger of legal reform has created an interdependency between legal culture and political legitimacy for the first time in the PRC’s history.”).

239. See Pitman B. Potter, *China and the International Legal System: Challenges of Participation*, 191 CHINA Q. 699, 710–13 (2007) (discussing China’s efforts to become involved and respected in the field of international human rights); Nicole Schulte-Kulmann, *US–China Legal Cooperation*, 42 CHINA ANALYSIS 1, 8 (2005) (describing various mutually beneficial interactions between Western states and China).

240. See Tahirih V. Lee, *The United States Court for China: A Triumph of Local Law*, 52 BUFF. L. REV. 923, 1014 (2004) (describing some of the local laws made by the Shanghai Municipal Court, including ones that incorporate the concept of eminent domain); see also Christopher Chaney, *The Despotic State Department in Refugee Law: Charting Legal Fictions to Support Falun Gong Asylum Claims* 6 ASIAN-PAC. L. & POL’Y J. 130, 132 (2005) (discussing the PRC’s vilification of Falun Gong as an “impermissible social entity” and a “heretical cult”); Pamela N. Phan, *Enriching the Land or the Political Elite? Lessons from China on Democratization of the Urban Renewal Process*, 14 PAC. RIM L. & POL’Y J. 607, 639–45 (2005) (describing China’s use

Thus, the net effect of these adaptations is a greater and more coherent institutionalization of governmental power²⁴¹ and the co-optation of the private elite, who were long presumed to be the vanguard of liberalization in authoritarian regimes.²⁴² Many scholars have noted how the supposed liberalizing force of promoting legal professionalization has instead led to an emergent private legal practice that is deeply dependent on the state.²⁴³ Even the promotion of public interest lawyering in China has raised questions as to what extent authoritarian regimes can use lawsuits against the state as both information gathering tools and to improve the provision of public goods.²⁴⁴

The sum force of these studies on law and development's historical and contemporary interface with authoritarianism compels us to move beyond arguments about the comparative disadvantage of legal work within the development world. They require us to measure this already shaky record of inefficacy not against inaction, but against the very real dangers of countervailing instrumental and developmental effects. At the most fundamental level, these countervailing effects are simply one aspect of how the assumptions built into law and development have warped our ability to not only

of a similar concept to eminent domain, but suggesting that their use of this concept should be carefully tailored to their own culture).

241. See Mark Sidel, *Dissident and Liberal Legal Scholars and Organization in Beijing and the Chinese State in the 1980's*, in URBAN SPACES IN CONTEMPORARY CHINA 326, 345 (Deborah S. Davis et al. eds., 1995) ("[S]tate intrusion continues to occur in specific areas, and that intrusion is specifically legitimized and fortified by law.").

242. See Bruce Dickson, *Do Good Businessmen Make Good Citizens?*, in CHANGING MEANINGS OF CITIZENSHIP IN MODERN CHINA 255, 286 (Merle Goldman & Elizabeth J. Perry eds., 2002) (discussing the fact that Chinese entrepreneurs seek to become "embedded in the state" rather than create political change); see also David S.G. Goodman, *The New Middle Class*, in THE PARADOX OF CHINA'S POST-MAO REFORMS 241, 260-61 (Merle Goldman & Roderick MacFarquhar eds., 1999) ("Politically, the new middle classes, far from being alienated from the party-state or seeking their own political voice, appear to be operating in close proximity and through close cooperation [with the party-state]."); Liu Xiaobo, *China's Robber Barons*, 2 CHINA RTS. F. 1, 1 (2003) (discussing how the Chinese elite benefit disproportionately from the state's reforms of property ownership).

243. See generally Ethan Michelson, *Lawyers, Political Embeddedness, and Institutional Continuity in China's Transition from Socialism*, 113 AM. J. SOC. 352 (2007) (discussing reforms made in the Chinese legal profession that have paradoxically caused many lawyers to become more embedded in the state); Ethan Michelson, *Unhooking from the State: Chinese Lawyers in Transition* (Aug. 2003) (unpublished Ph.D. dissertation, University of Chicago), available at <http://www.indiana.edu/~emsoc/Dissertation.html> (same).

244. See Eva Pils, *Asking the Tiger for His Skin: Rights Activism in China*, 30 FORDHAM INT'L L.J. 1209, 1209-12 (2006) (describing other tactics that human rights lawyers in China employ to encourage legal change); see also Wang Yi, *Human Rights Lawyers and the Rule-of-Law Camp*, 3 CHINA RTS. F. 1, 2 (2006) (outlining the extreme restrictions on Chinese lawyers).

understand foreign legal developments on their own terms, but interact productively with foreign legal counterparts.

C. *Blinding Reformers, Blinding Ourselves*

Most law and development critiques focus on how the classic flaws of the field militate against effective implementation.²⁴⁵ However, at a much more basic level these flaws undermine the very transmission of legal information between America and foreign legal actors. All the traditional law and development characteristics of formalism, instrumentalism, and idealization act to fundamentally warp how foreign actors are able to interpret American law. The consistent idealization of our experience in instrumental models both inhibits our constructive participation in cooperative international legal dialogue and undermines the possibility that foreign legal experts might be able to critically integrate the American legal experience into their own contexts. Such is a core international liability of law and development.

Some comparative scholars have already noted the effect of law and development's disruption of clear and productive international legal exchange.²⁴⁶ Certainly, there is no small demand internationally for assistance in legal reform efforts by a number of interested—though not always representative—parties in foreign countries.²⁴⁷ Many activists abroad are fighting for social change that most Americans would see as normative, and have sought assistance in constructing legal strategies.²⁴⁸ Even those critical of American law have embraced ideals such as the rule of law.²⁴⁹

Yet, while idealizing the American legal experience is central to the cultural politics of law and development, it has often misled

245. See *infra* Part II.B.

246. OHNESORGE, *supra* note 85, at 302–06 (calling for practitioners to be candid about U.S. experience and models).

247. TAMANAHA, *supra* note 9, at 2–4 (noting that support for the rule of law and rhetoric purporting to support the rule of law is present across the world in numerous different countries).

248. See generally P. Ebow Bondzi-Simpson, *Overview: Confronting the Dilemmas of Development Through Law*, in *THE LAW AND ECONOMIC DEVELOPMENT IN THE THIRD WORLD 1* (P. Ebow Bondzi-Simpson ed., 1992) (outlining the various legal tools and organizations that are available to help establish economic development).

249. See Boaventura de Sousa Santos, *Law, Politics, and the Subaltern in Counter-Hegemonic Globalization*, in *LAW AND GLOBALIZATION FROM BELOW 1*, 12 (Boaventura de Sousa Santos & César Rodríguez-Garavito eds., 2005). When famed Marxist E.P. Thompson judged rule of law ideals a universal human good he sparked debate among Marxist theorists who could not disassociate such affirmation from imperialism. E.P. THOMPSON, *WHIGS AND HUNTERS* 262–66 (1975) (discussing the importance of the rule of law); see also Daniel H. Cole, 'An Unqualified Human Good': E.P. Thompson and the Rule of Law, 28 *J.L. & SOC'Y* 177, 182 (2001) ("This assertion of the intrinsic virtue of the Rule of Law, far more I suspect than his denunciations of simplistic Marxist dogmas, stunned Thompson's colleagues on the left.").

foreign legal reformers who take such representations on face value and then confront great difficulty when applying them in practical terms.²⁵⁰ The idea that there is a ready-made “American model” also grates against the nationalist sensibilities of other nations—a charge that authoritarian regimes have used selectively.²⁵¹ Law and development further privileges those foreign actors who are willing to affirm the self-image of American reformers, in exchange for quite real financial and material rewards, over those who are often far more embedded in domestic politics.²⁵² The material and symbolic incentives of participating in American reform projects can even draw such domestically embedded actors away from more effective, locally driven engagements.²⁵³ More generally, the eventual failure of the aspirational promises that law and development offers creates not only cynicism about legal reform itself abroad,²⁵⁴ but also creates a

250. See Michael Dowdle, *Preserving Indigenous Paradigms in an Age of Globalization: Pragmatic Strategies for the Development of Clinical Legal Aid in China*, 24 *FORDHAM INT'L L.J.* 556 (2002) (“[I]nternational assistance’s understandable focus on more familiar kinds of legal aid institutions and activities can unintentionally impede the development of indigenous legal aid practices and institutions that might ultimately be better suited for the particular domestic environment.”).

251. See James Richter, *Integration from Below? The Disappointing Effort to Promote Civil Society in Russia*, in *RUSSIA AND GLOBALIZATION* 181, 196 (Douglas W. Blum ed., 2008) (discussing Russia’s use of Western models and NGOs and Russia’s vilification of these bodies as “puppet masters from abroad”).

252. See Julie Mertus, *The Liberal State vs. the National Soul: Mapping Civil Society Transplants*, 8 *SOC. & LEGAL STUD.* 121, 127 (1999) (noting the lack of strategic analysis of domestic sponsors as a central phenomenon in the subjective experience of law and development work: “Moreover, just as ‘experts’ read their subjects, the observed read the ‘experts.’ Locals carefully select the information they disclose to visiting ‘experts’, calculating how best to serve their own agendas. Acknowledging locals as subjects and not mere objects can be disturbing for ‘experts.’”).

253. See Mustapha Al-Sayyid, *A Clash of Values: U.S. Civil Society Aid and Islam in Egypt*, in *FUNDING VIRTUE*, *supra* note 17, at 71 (noting that aid can create dependencies and prevent domestic efforts from taking root); Marina Ottaway, *Social Movements in Africa*, in *FUNDING VIRTUE*, *supra* note 17, at 100 (“[D]onor-assisted NGOs of limited effectiveness may weaken potentially more effective organizations by depriving them of leadership . . .”).

254. This effect of failed legal reform projects has been detailed in Africa, Russia, Latin America, and even in nonauthoritarian settings such as India and Mexico. See, e.g., Diane Davis, *Undermining the Rule of Law: Democratization and the Dark Side of Police Reform in Mexico*, 48 *LATIN AM. POL. & SOC’Y* 55, 58–59 (2006) (“[D]emocratization of the state . . . seems to have contributed to the emergence of new and more vicious intrastate and bureaucratic conflicts. . . . The result has been rising criminality, a dissatisfied civil society, and an overall situation of public insecurity in which every-day citizens feel compelled to take the law into their own hands.”); Jorge L. Esquirol, *Continuing Fictions of Latin American Law*, 55 *FLA. L. REV.* 41, 113 (2003) (“[D]evelopment scholars accepted their inability to challenge the existing political deal. Cowed by fears of lawless societies out of control, absent a well-maintained formal discourse of law’s above-politics authority, developmentalists desisted.”); Timothy Frye, *Keeping Shop: The Value of the Rule of Law in Warsaw and Moscow*, in *ASSESSING THE VALUE OF LAW IN TRANSITION ECONOMIES* 229, 229 (Peter Murrell ed., 2001) (“Perhaps nowhere is the need for strengthening the rule of law greater than in the

negative backlash against the international reputation of American lawyers and scholars.²⁵⁵

Even in purely academic settings, the strong tendency to represent American legal experience as providing a “model” rather than a set of conflicting experiences and contested debates transmits a shallow comprehension of the richness of American legal history.²⁵⁶ For example, despite long-standing critiques of American legal education and bar associations, such legal institutions are held out as universal goods that have a definitively positive impact on the quality of lawyers in any context.²⁵⁷ Even for those elements of American law related to producing public interest lawyers or litigation, proponents more often than not share idealizations, held out with democratizing promise, rather than the difficulties and setbacks experienced domestically during long and often cyclical political struggle.²⁵⁸

postcommunist world. Deserved or not, many of the former republics of the Soviet Union have quickly acquired a reputation as mainstays of ‘bandit capitalism’”); Marc Galanter & Jayanth Krishnan, *Debased Informalism*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW, *supra* note 14, at 107 (discussing efforts in India); Yash Ghai, *Law, Development and African Scholarship*, 50 MOD. L. REV. 750, 766–70 (1987) (describing the effects of law and development in Africa and some of the mistaken assumptions that were part of it); Jeffrey Kahn, *The Search for the Rule of Law in Russia*, 37 GEO. J. INT’L L. 353, 358 (2006) (“The rule of law is not the sort of institution that can be established by putting pen to paper or setting bricks on mortar. That has been a painful, and painfully expensive, lesson for Russian would-be reformers”).

255. The highest profile trip by an American legal scholar in the post-Mao era was made by Ronald Dworkin in 2002. Dworkin’s critical comments on Chinese legal academia inspired a heated backlash in China. Ronald Dworkin, *Taking Rights Seriously in Beijing*, 49 N.Y. REV. BOOKS 5 (2002) (recounting his trip to China and commenting on the status of human rights); Liufang Fang, *Taking Academic Games Seriously*, 3 PERSPECTIVES 1 (2002) (criticizing Professor Dworkin’s misguided conception that the purpose behind his invitation “was to trigger a serious debate about individual rights”); Yanan Peng, *Taking Dworkin Seriously*, 4 PERSPECTIVES 1 (2003) (analyzing and responding to Professor Fang’s article).

256. CLARKE, *supra* note 29, (discussing the inherent flaws of using idealizations of contemporary American law in a historically and developmentally decontextualized manner when making comparisons to foreign legal systems).

257. See generally ABEL, *supra* note 112 (discussing the changing practices and perception of American lawyers over time); JEROLD S. AUERBACH, *UNEQUAL JUSTICE* (1976) (critiquing the American legal system as being overly stratified and discussing how that has led to unequal distribution of justice); *RAISING THE BAR* (William Alford ed., 2007) (discussing the effect of American legal education and practices on numerous countries in both positive and negative lights). *Contra* DANIELS & TREBILCOCK, *supra* note 216, at 115 (claiming that “the primary function of bar associations is the regulation of the legal profession in the public interest”).

258. For example, clinical legal education in America has grown in response to the very real pedagogical needs. However, clinical legal education as promoted abroad often presents a highly idealized version of its still marginal place in American legal education. This distortion leads to an over-promotion of clinical legal education as a motor force for positive social change. See, e.g., James Kraus, *Legal Education in the People’s Republic of China*, 13 SUFFOLK TRANSNAT’L L.J. 75, 106–07 (1989) (describing the role of clinics in legal education in China); Jay Pottenger, *The Role of [Clinical]*

This criticism does not mean that such foreign exchanges should be abandoned or such interest in collaborations ignored. America should enthusiastically take advantage of these existing investments and pathways. Like most of our foreign legal engagements, these relationships need to be remodeled along a fresh dialogic model. By removing the presumptions of export and superiority from these interactions, American can better inform the foreign interrogation of the American legal experience, while at the same time take advantage of the insight that outside expertise can produce for domestic legal debates.²⁵⁹ This allows America to receive critical feedback on its actual legal quandaries while enabling foreign reformers to situate the complexity of its historical debates within the complicated reform politics of their own countries.

Turning this critique to America's own view of foreign legal reform, the mirrored lens produced by law and development disables America's strategic interpretation of foreign legal developments. The easy analytic commensurability that law and development's formalism inspires often creates a false confidence that foreign legal systems are full of analogs to American common law actors, institutions, and logics.²⁶⁰ More, this formalism also causes foreign legal developments to be interpreted based upon what they would mean in our legal context, especially in the foreign judiciaries.²⁶¹

To directly confront a thorny example, attempts to export American public impact litigation abroad have been encouraged by the often episodic acts of individual judges. Notably, the vast majority of the world is heavily influenced by the civil or Soviet legal traditions that do not operate on the same constitutional or jurisprudential

Legal Education in Legal Reform in the People's Republic of China: Chicken, Egg—or Fox?, 6 INT'L J. CLINICAL LEGAL EDUC. 65, 68–70 (2004) (describing China's evolving clinical legal education system and the way United States encourages it, for example, through conferences and demonstrations).

259. WILLIAM ALFORD & LIUFANG FANG, LEGAL TRAINING AND EDUCATION IN THE 1990'S 52 (1994).

260. See CLARKE, *supra* note 90, at 110–11 (discussing misconceptions about what kind of legal system is truly needed in developing countries); see also Donald C. Clarke, *How Do We Know When an Enterprise Exists? Unanswerable Questions and Legal Polycentricity in China*, 19 COLUM. J. ASIAN L. 50, 52 (2005) (discussing the confusion that arises when Americans try to determine Chinese corporate status by analog to American corporate law).

261. See JODI FINKEL, JUDICIAL REFORM AS POLITICAL INSURANCE 4–6 (2008) (evaluating judicial reforms in Latin America based on aspects of a judiciary found in America, including whether or not the reforms furthered the rule of law, checks and balances in government, and a strong, independent judiciary); see also WILLIAM PRILLAMAN, THE JUDICIARY AND DEMOCRATIC DECAY IN LATIN AMERICA (2000) (giving the example of the U.S. Agency for International Development's suggestion to structure Guatemala's judiciary system like that of the United States).

logics on which public impact litigation in America depends.²⁶² Judicial aberrations are often greeted with wild speculation as indicators of the ever imminent liberalization promised by law and development in the given legal system—and usually just as quickly debunked.²⁶³ Simply the idea that foreign legal development will follow the same path as our own inspires a host of predictions that are self-affirming rather than self-critical.²⁶⁴

In recent years, an even clearer picture has emerged concerning the way in which law and development has warped America's analytic lens. America has engaged in military interventions in the Middle East based on the explicit justification that it has done so in the past, and thus can again transmit its system of law to another country.²⁶⁵ The fate of these justifications already speaks for itself.²⁶⁶

262. Tom Ginsburg, *Constitutional Courts in New Democracies*, 2 GLOBAL JURIST 15 (2002); Benjamin Liebman, *China's Courts: Restricted Reform*, 191 CHINA Q. 267 (2007).

263. Arguments about judicial review in China exemplify the misapplication of American legal analogs. In a handful of cases, Chinese judges have attempted to invalidate laws by reference to the text of the Chinese constitution. However, the civil-Soviet hybrid Chinese judiciary is not governed by precedent nor is empowered to engage in judicial review. The consistent desire of law and development work to see such self-validating changes leads to an exaggeration of the importance of individual cases as evidence of larger structural shifts. See, e.g., Keith Hand, *Can Citizens Vitalize China's Constitution?*, 170 FAR E. ECON. REV. 15, 18–19 (2007) (“It would be premature to suggest that the government responses described here herald the emergence of an institutionalized and independent legal process for constitutional review.”); Thomas E. Kellogg, *Courageous Explorers? Education Litigation and Judicial Innovation in China*, 20 HARV. HUM. RTS. J. 141, 142–44 (2007) (suggesting that a series of lawsuits against educational institutions, some of which include striking down regulations, have extremely broad implications about Chinese law). Contra Stephanie Balme, *The Judicialisation of Politics and the Politicisation of the Judiciary in China*, 5 GLOBAL JURIST 1 (2005).

264. This predictive distortion is a problem in our relationship with China, where we have become accustomed to presuming future liberalization, from the state banking reform to the revaluation of the Yuan to the impact of China's joining the WTO.

265. See generally MASON, *supra* note 75 (outlining the failure of Western intervention in Afghanistan and some of the misconceptions that contributed to it).

266. See Ahmed, *supra* note 75, at 49 (discussing Western misconceptions about law in the Middle East and “challenging the stranglehold of conventional stereotypes in Western popular media and even academic literature regarding the supposed rigidity and regressive nature of Islamic law and ‘ulama’”); see also Ash Ü. Bâli, *Justice Under Occupation: Rule of Law and the Ethics of Nation-Building in Iraq*, 30 YALE J. INT'L L. 431, 433 (2005) (“[O]ngoing repression and violation of rights in Iraq in the initial post-conflict period have already seriously diminished Iraqi and international public confidence in the prospects for the rule of law in Iraq.”); David Mednicoff, *Middle East Dilemmas*, in PROMOTING THE RULE OF LAW ABROAD, *supra* note 26, at 269 (discussing the general failure of rule of law projects in post-invasion American reconstruction projects); Jason Brownlee, *Imperial Designs, Empirical Dilemmas: Why Foreign-Led State Building Fails* 4 (Ctr. on Democracy, Dev., & the Rule of Law, Working Paper No. 40, 2005) (“Unless architects of interventionist democratization contend with the root causes of failed nation building, they risk exacerbating the very instabilities they seek to remedy.”).

With some irony, we should remember that the only other modern country to so systemically misjudge foreign legal developments through an export-oriented legal culture was the Soviet Union.²⁶⁷ Notably, there are many other historical precedents that show how legal idealism has too easily, and too often, led international history down dark paths.²⁶⁸

However one feels about what the proper normative or strategic reaction should be to particular foreign legal developments, such an assessment should avoid the distortions of overstating the larger meaning of instrumental legal developments or the alienation of foreign interlocutors by offering up orthogonal legal models that continue to disappoint. The sum effect of these dynamics is the widespread persistence of a warped lens through which we view foreign legal developments. We recurrently force foreign legal developments to fit the demands of sustaining the presumptions of law and development to an ever changing, complex global landscape. Insofar as we take seriously the proposition that the twenty-first century will be one of competition, we must not presume that foreign legal systems are converging toward our own legal developments.

All of this begs one question: if law and development is intractably flawed, what should the basis of our relationship to foreign legal systems be? Here, this Article offers an answer—a self-interested return to comparative law, not as the isolated study of foreign legal systems, but to its full flower as a widespread commitment to comparativism throughout American legal culture.

267. See generally PENELOPE NICHOLSON, *BORROWING COURT SYSTEMS* (2007) (describing the how the Soviet Union tried to transplant its legal system in Vietnam, but explaining that the Vietnamese legal system has been shaped based on its own politics). For an examination of the role of law in Maoist development failures, see generally Elisabeth Croll, *The Negotiation of Knowledge and Ignorance in China's Development Strategy*, in HOBART, *supra* note 84, at 176–77 (discussing the state's reduced ability to control knowledge after 1976 reforms) and also Gregory J. Massell, *Law as an Instrument of Revolutionary Change in a Traditional Milieu: The Case of Soviet Central Asia*, 2 *LAW & SOC'Y REV.* 179, 228 (1968) (describing Soviet attempts at reforming Central Asian law and suggesting that these efforts are a valuable case study for “the identification and evaluation of factors that determine the role, and the success or failure of law as an instrument of revolutionary change”). See generally JAMES SCOTT, *SEEING LIKE A STATE* (1998) (giving a general overview of the failure of top-down social engineering projects carried out by socialist and communist governments).

268. LAURA NADER & UGO MATTEI, *PLUNDER* (2008) (cataloging historical invocations of the rule of law that were used to justify interventions abroad, often with disastrous consequences).

V. THE DOMESTIC LIABILITIES OF ANTI-COMPARATIVISM

Given that the putative subject of law and development is the actions and efforts of American lawyers abroad, it might seem natural that such debates are most often considered distinct from the domestic concerns of American law. However, the early history of law and development demonstrates how intimately tied the origins of American efforts to shape foreign legal systems were to the progressive abandonment of comparative methods in American law domestically. The loss this transition caused in terms of domestic legal innovation during the twentieth century is difficult to measure retrospectively. However, it is increasingly evident that as the twenty-first century unfolds, the anti-comparativism of law and development is an ever progressing liability in our comparative capacity for legal innovation.

In turn, this Part demonstrates that law and development has repeatedly sought to solve legal problems abroad that have no fixed answer within the American legal community. Further, such legal challenges are now part of an increasingly common global legal terrain that foreign legal experience collectively and individually confronts. Despite this, foreign legal experience has primarily been used in American debates to manufacture unilluminating proxies that recycle what are in essence political debates. This Part examines how the atrophied state of American comparative law is reflected in the contemporary debate on judicial citation of foreign legal precedents. The limitations of this debate lead to several suggestions about how comparative law can be reinvigorated domestically in our legislative and administrative bodies, as well as in American law schools.

A. Ignoring Foreign Legal Experience in an Age of Common Legal Problems

Legal historians often point out that the development of American law has more often than not been one of contentious conflict and bitter acrimony. The very nature of legal change has been a hot topic in recent years, with great interest given to the relationship between law and social movements, or ideas of popular constitutionalism.²⁶⁹ All of these debates affirm how diverse

269. See MERRY, *supra* note 96, at 4 (“[I]n the long run the law incorporates resistance, defining the terms and the strategies within which resistance takes place and establishing itself as the fundamental terrain for challenges to the existing social order.”).

American legal values can be, especially over time, but also how little is understood about the number of America's own legal institutions that evolved over time.²⁷⁰ Imagine the variety of answers that would emerge from any grouping of American lawyers if one were to ask them how domestic legal change happens, much less how to best provoke it. The diversity of such answers to essentially a key but unresolved issue in contemporary American debates resounds with loud dissonance when compared with attempts to export idealized models of American law.

It is not then surprising that throughout the history of law and development we have repeatedly found ourselves trying to solve problems abroad that continue to be contested or unsettled at home. Several scholars have noted the irony that those sectors of the American legal community most unsuccessful in domestic legal debates in any given historical era often are those most active in law and development efforts abroad.²⁷¹

In recent years, this dynamic has been hard to miss, as even foundational legal ideals such as the rule of law have become the object of heated debate in American law. In the past decade, critiques and defenses of our national security policies have revealed deep domestic cleavages in what the rule of law requires.²⁷² Such debate has called into question the very health of our tripartite system of the separation of powers. Tamanaha notes that this throws a stark light on our efforts abroad. He states that "even as politicians and development specialists are actively promoting the spread of the rule of law in the rest of the world, legal theorists concur about the marked deterioration of the rule of law in the West, some working to accelerate its demise."²⁷³

More specifically, law and development has long been at work on legal issues that have proven intransigent at home. The structure

270. See generally ROBERT DAHL, *POLYARCHY* (1971) (discussing conditions that favor the development of legal systems that allow opportunities for public contestation).

271. See Kennedy, *supra* note 20, at 17–26; see also Garth, *supra* note 13, at 386–88 (describing the American economic community's attempts at promoting legal and economic development in other countries despite waves of economic scandal at home).

272. See Kairys, *supra* note 20, at 326 (stating that some of America's post-9/11 detention policies run counter to the rule of law); see also Jackson Maogoto & Benedict Sheehy, *Torturing the Rule of Law: USA and the Post 9-11 Legal World*, 21 ST. JOHN'S J. LEGAL COMMENT. 689, 725 (2006) ("While still holding the United States out as the white knight, victim of terror and beacon of democracy, it has become despotic in its own territory, denying the application of the principles of the Rule of Law to individuals in its own territory."). See generally Wade Mansell, *Goodbye to All That? The Rule of Law, International Law, the United States, and the Use of Force*, 31 J.L. & SOC'Y 433 (2004) (discussing the history and critiques of the perceived U.S. policy of increasingly ignoring public international law).

273. TAMANAHA, *supra* note 9, at 4.

and process of our electoral politics has been under attack from a variety of different perspectives as we struggle with the systemic nature of voter apathy, incumbent entrenchment, and campaign finance.²⁷⁴ Such debates invoke a host of problems when we link legal reform to promoting “good democracy” abroad.²⁷⁵ Even the area of anti-corruption work has often taken for granted the very real and ongoing issues of corruption stateside.²⁷⁶ Beyond these more structural concerns, challenging American legal problems as wide-ranging as basic access to justice—notably in indigent criminal defense—to proper antitrust regulation have long been active areas of law and development work.²⁷⁷ Currently, the hottest topic in the legal academy is the very desirability of our system of legal education, a model that we have for over a century sought to spread globally.²⁷⁸

Even more fundamentally, at the heart of law and development work have been attempts to shape the creation and regulation of foreign legal professions. Efforts to increase both legal professionalization and independence in developing countries occur at a time when the professional role of private and public American lawyers has been the locus of contentious domestic debate.²⁷⁹ Yet, again, law and development work has rarely presented these debates abroad or prompted us to ask how foreign systems already confront such issues. The recent growth of interest in exporting American public interest lawyering belies the ongoing domestic debates on

274. Thomas Carothers, *Promoting Democracy in a Post-Modern World*, DISSENT, Spring 1996, at 35.

275. Thomas Heller, *An Immodest Postscript*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW, *supra* note 14, at 391.

276. See Kalin S. Ivanov, *The Limits of a Global Campaign Against Corruption*, in CORRUPTION AND DEVELOPMENT 28, 28–36 (Sarah Bracking ed., 2007) (discussing the anti-corruption efforts of the United States and European nations while acknowledging that Western nations are not free from corruption themselves).

277. See Richard J. Wilson, *Beyond Legal Imperialism: US Clinical Legal Education and the New Law and Development*, in THE GLOBAL CLINICAL MOVEMENT 135, 140–44 (Frank S. Bloch ed., 2011) (describing three waves of “law and development,” the political contexts at each point, and the types of issues that were addressed); see also D. Daniel Sokol & Kyle W. Stiegert, *Exporting Knowledge Through Technical Assistance and Capacity Building*, 6 J. COMP. L. & ECON. 233 (2010) (discussing the use of technical assistance to improve the efficacy of antitrust agencies internationally).

278. See, e.g., Annelise Riles & Takashi Uchida, *Reforming Knowledge? A Socio-Legal Critique of the Legal Education Reforms in Japan*, 1 DREXEL L. REV. 3, 50–51 (2009) (discussing the implications of Japanese efforts to adopt the American post-graduate model of legal education for contemporary American debates).

279. See Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 444–47 (2001) (outlining some of the debates over American legal aid since the 1970s); see also Aziz Rana, *Statesmen or Scribe? Legal Independence and the Problem of Democratic Citizenship*, 77 FORDHAM L. REV. 1665 (2009) (describing ongoing debates about legal ethics and the perceived legitimacy of the American legal profession).

evaluating the nature of the “public interest” and its methods or how access to justice is addressed abroad.²⁸⁰

The dissonance inherent in exporting contested areas of law is accompanied by the unproductive use of foreign legal examples as warped proxies in many of our extant legal debates.²⁸¹ The cyclical theoretical debates noted in Part III about property rights or intellectual property are often regurgitated domestically as fodder for reinforcing existing positions rather than opening up further self-inquiry.²⁸² The most obvious area where this occurs is the debate on “legal origins” in law and finance, where a full cycle of assertion and rebuttal has already occurred over the use of foreign experience to assert straightforwardly chauvinist ideas about the superiority of American law, which are in practice proxies for existing positions in America debates.²⁸³ This dynamic is a corollary of the cognitively close-ended loop of law and development studies, where the study and interpretations of the outcomes of law and development work is driven by preexisting interpretive frames.

In fact, the unending cycles of critique and optimism inherent in law and development work reflects the field’s need to accommodate the unresolved debates and tensions in American law. If law and development ever succeeded in devising a definitive solution to such problems abroad, it would imply that such solution was applicable at home as well. However, given that law and development tackles the whole gambit of contested issues at home when abroad, if the field found such solutions abroad, it would instantly subject law and development to charges of politicization. This is often the case

280. See Garth, *supra* note 13, at 394 (discussing the debate over public interest law in the United States and its intersection with law and development efforts in Latin America).

281. See Tamanaha, *supra* note 32, at 239 (citing our self-directed “battle of ideas” using foreign legal proxies).

282. See William P. Alford, *Making the World Safe for What? Intellectual Property Rights, Human Rights, and Foreign Economic Policy in the Post-European Cold War World*, 29 N.Y.U. J. INT’L L. & POL. 135, 146–47 (1997) (noting how this focus is hypocritical, to the extent that it ignores American disregard for British and European intellectual property laws in our early development).

283. See generally Rafael LaPorta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998) (comparing the laws protecting corporate shareholders and creditors in different countries). “Law and finance” as a field was shaped by this article’s claim that the “common law” produced superior growth results than “the civil law” because of its treatment of creditors and shareholders rights. *E.g.*, *id.* at 1115–17. For a full treatment of its revisions, see Symposium, *Evaluating Legal Origins*, 2009 BYU L. REV. 1413. For a parallel take on “comparative law and economics,” see Ralf Michaels, *The Second Wave of Comparative Law and Economics?*, 59 U. TORONTO L.J. 197 (2009) (suggesting the arrival of an emerging second wave of comparative law and describing it as “a humbler endeavor” that “shows greater respect for the complexity of law”).

whenever the field notes the very partial track record of property rights or deregulation in development outcomes.²⁸⁴

Instead, the extent to which American law has influenced the rest of the globe through our economic preeminence only points to the need to explore how such influence has resulted in inevitable hybrid legal forms and hybrid legal solutions. Even the least influential aspects of American law abroad, such as the jury trial, have been tested and modified in ways that beg not for triumphalist affirmation, but for a call for inquiry and comparative reflection into lessons learned from these variations' experiences.²⁸⁵

Notably, these peculiar attempts to solve our problems abroad occur at a time when it is widely recognized that we live in a legally internationalized age where, not only are legal issues commonly confronted abroad, but cooperation in solving international legal problems is at the forefront.²⁸⁶

B. Foreign Citation and the Legacy of Anti-Comparativism

Domestically, debates over the citation of foreign judicial precedent in constitutional decision making give the most attention to the relationship of American law to foreign legal experience.²⁸⁷ This

284. See Frank K. Upham, *From Demsetz to Deng: Speculations on the Implications of Chinese Growth for Law and Development Theory*, 41 INT'L L. & POL. 551, 554 (2009) (challenging the need for clearly defined property rights for economic growth).

285. See, e.g., Jae-Hyup Lee, *Korean Jury Trial: Has the New System Brought About Changes?*, 12 ASIAN-PAC. L. & POL'Y J. 58, 59 (2010) (outlining different reactions to the institution of jury trials in Korea in 2008); Daniel Senger, *The Japanese Quasi-Jury and the American Jury: A Comparative Assessment of Juror Questioning and Sentencing Procedures and Cultural Elements in Lay Judicial Participation*, U. ILL. L. REV. 741 (2011) (comparing the Japanese quasi-jury with the American jury and recommending that the United States use this point of comparison to learn more about its own jury system); Spence, *supra* note 77, at 19 (discussing the Russian adoption of jury trials and suggesting that more than just United States influence led to this development).

286. See Ming-Sung Kuo, *(Dis)Embodiments of Constitutional Authorship: Global Tax Competition and the Crisis of Constitutional Democracy*, 41 GEO. WASH. INT'L L. REV. 181, 182 (2009) ("This blurring not only necessitates international cooperation to deal with transboundary regulatory issues, but it also exposes the limits of the constitutional state's governing ability over traditional domestic affairs.").

287. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005) (comparing U.S. death penalty laws with that of other countries); *Lawrence v. Texas*, 539 U.S. 558, 572–73 (2003) (discussing the invalidation of sodomy laws in other countries); *Printz v. United States*, 521 U.S. 898, 976–77 (1997) (Breyer, J., dissenting) ("At least some other countries, facing the same basic problem, have found that local control is better maintained through application of a principle that is the direct opposite of the principle the majority derives [T]heir experience may . . . cast an empirical light on the consequences of different solutions to a common legal problem."); *Washington v. Glucksberg*, 521 U.S. 702, 734 (1997) (providing support for the decision to uphold an anti-euthanasia statute by citing a euthanasia study from the Netherlands); cf. *Atkins*

debate serves as an ongoing site of public contest, as it has expanded outside of the legal profession to include even the judicial enforcement of foreign legal principles in arbitral proceedings and private contracting.²⁸⁸

Proponents of foreign citation have invoked quite broad cosmopolitan sentiments as they advance the education and empirical values of foreign decisions.²⁸⁹ Such proponents argue for the “mind-broadening” practice of foreign citation abroad while they criticize detractors as possessing an “insular” or “hostile” mentality misguided by “arrogance.”²⁹⁰ Some point to the historical scholarship cited above that describes the more cosmopolitan legal culture in early American history.²⁹¹

v. Virginia, 536 U.S. 304, 322 (2002) (Rehnquist, J., dissenting) (criticizing the majority’s choice to invoke foreign decisions to support its opinion).

288. Muhammed Elsayed, *Contracting into Religious Law: Anti-Sharia Enactments and the Free Exercise Clause*, 20 GEO. MASON L. REV. (forthcoming spring 2012)

289. See Sandra Day O’Connor, *Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law*, 4 INT’L JUD. OBSERVER 2, 3 (1997) (“Our [legal system’s] flexibility, our ability to borrow ideas from other legal systems, is what will enable us to remain a progressive legal system, a system that is able to cope with a rapidly shrinking world.”); see also Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 773 (1997) (referencing important documents and developments from other countries and criticizing the fact that these “beacons of the new era do not appear on American radar screens”); Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 824 (1999) (“The impetus to make sense of comparative constitutional interpretation is the premise that law is the source of, and the means for the exercise of, the coercive power of the state.”); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1309 (1998) (encouraging comparison to foreign constitutions to broaden our understanding of our own constitutional law); Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129 (2005) (promoting an approach to foreign citation that is defined by a “scientific spirit that relies not just on our own reasoning but on some rational relation between what we are wrestling with and what others have figured out”); Ruth Bader Ginsburg, Assoc. Justice, Supreme Court of the U.S., *Lecture Delivered at the University of Puerto Rico as Part of the Temas Juridicos Contemporáneos IV: La Funcion Judicial: The Value of Comparative Perspective in Judicial Decisionmaking: Imparting Experiences to, and Learning from, Other Adherents to the Rule of Law* (Feb. 10, 2005), in 74 REV. JUR. U.P.R. 213 (2005) (arguing that the U.S. judicial system will be weaker “if we do not both share our experience with, and learn from, legal systems with values and a commitment to democracy similar to our own.”).

290. See BASIL MARKESINIS & JÖRG FEDTKE, *JUDICIAL RECOURSE TO FOREIGN LAW* 167, 211–23 (2006) (“This ambivalence is not only confusing; it can also be arrogant.”). Other proponents cite the diplomatic benefits of such citation. See Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 111 (2005) (suggesting that considering foreign law can be helpful in constitutional adjudication and has a history in this country); Harold Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 57 (2004) (“Like it or not, both foreign and international law are already part of our law.”).

291. See Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1 (2006) (describing the influences of international law and legal concepts on the American Constitution); see also Daniel A. Farber, *The Supreme Court, the Law of*

In contrast, opponents to such citation interpret this practice as forwarding a fundamental challenge to American sovereignty,²⁹² and judge it to be the product of a deep disconnect between the American judiciary and the American public.²⁹³ In contrast to the more apolitical, technocratic view of legal knowledge forwarded by proponents, such opponents assert the intimate bond between legal decision making and American cultural values as a bar to such borrowing.²⁹⁴ Opponents of foreign citation thus invoke many of the parochial sentiments that the triumphalist presumptions of law and development have so long inculcated—often while promoting export work themselves.²⁹⁵

At first blush, the argument advanced in this paper would seem to neatly align with the pro-citation camp. It is indeed true that there is something of value in the general promotion of cosmopolitan sentiments that the debate has provoked. Yet, at the same time the debate itself has put in stark relief the fecklessness of such debate. Not only has the impact of such foreign citation been relatively

Nations, and Citations of Foreign Law: The Lessons of History, 95 CALIF. L. REV. 1335, 1336 (2007) (“[F]oreign law has deeply permeated our legal system from the very beginning, not only in private law but also in constitutional discourse and adjudication.”).

292. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 624–28 (2005) (Scalia, J., dissenting) (rejecting the majority’s suggestion that American laws should conform to those of other countries and describing many ways in which the American legal system is deliberately different from other legal systems); *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (“The Court’s discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since this Court . . . should not impose foreign moods, fads, or fashions on Americans.” (alteration in original) (citation omitted) (internal quotation marks and citation omitted)); *Foster v. Florida*, 537 U.S. 990, 990–91 (2002) (Thomas, J., concurring in denial of certiorari) (disagreeing with Justice Breyer’s dissent that encouraged looking to the law of other nations to determine what was a sufficient delay of a trial to be considered “cruel”); see also ROBERT BORK, *COERCING VIRTUE* 51 (2003) (suggesting that international law undermines a nation’s ability to make clear laws and operate in the nation’s interest); Kenneth Anderson, *Foreign Law and the U.S. Constitution*, POL’Y REV., June–July 2005, available at <http://www.hoover.org/publications/policy-review/article/6657> (exploring the limits of the effect of Justice Breyer’s *Roper* majority opinion and discussing the role of international law in U.S. adjudication); Richard Posner, *No Thanks, We Already Have Our Own Law*, LEGAL AFF. 40 July–Aug. 2004, at 40.

293. See RAN HIRSCHL, *TOWARDS JURISTOCRACY* (2004); see also Calabresi, *supra* note 180, at 1338 (“On the other hand, following precedent and borrowing foreign law to decide cases on issues such as the constitutionality of sodomy laws or the execution of juvenile offenders goes against the wishes of the American people.”).

294. See Judith Resnik, *Law as Affiliation: “Foreign” Law, Democratic Federalism, and the Sovereignism of the Nation-State*, 6 INT’L J. CONST. L. 33, 35–37 (2008) (describing how legal regimes are interconnected with the values and preferences of the subjects they govern).

295. See Calabresi, *supra* note 180, at 1416 (“America is a special place, with a special people, and a special role to play in the world We seek only to spread democracy and individual rights around the world.”).

marginal as an actual jurisprudential practice,²⁹⁶ but the whole debate is undermined by the atrophied state of comparative law in American legal culture.

Proponents of foreign citation have been most vulnerable when critics raise the basic question of whether courts have any capacity, much less comparative institutional advantage, in interpreting foreign legal experience. Critics of foreign citation also rightly point to the near absence of comparative training in American law schools, which has an impact not only on judges, but on the young law graduates on whom they rely on as clerks.²⁹⁷ Proponents cannot point to any supportive institutional infrastructure for comparative legal analysis even at the most elite levels of the American legal profession, a fact that is far more important than the oft-asserted social peregrinations of elite judges.²⁹⁸ Many proponents respond to the need to specify a rigorous mechanism by which foreign legal citation could become a part of constitutional adjudication by retreating to calls for moderation and, hence, leaving the comparative process still relatively undefined.²⁹⁹

Centrally, proponents' amorphous cosmopolitan invocations take for granted that foreign judicial decisions are somehow self-evident in their meaning for our own debates. In this regard, it is important to note that many proponents have deep internationalist commitments

296. See JACKSON, *supra* note 144; Ruth Bader Ginsburg, Assoc. Justice, Supreme Court of the U.S., Address Before the Constitutional Court of South Africa: A Decent Respect to the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication (Feb. 7, 2006), in 64 CAMBRIDGE L.J. 575, 588–91 (2005) (recounting the Supreme Court's most recent decisions involving foreign or international sources as an aid to the resolution of constitutional questions); Frank Michelman, *Integrity-Anxiety?*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 241, 243–73 (Micahel Ignatieff ed., 2005) (sketching a history of the U.S. Supreme Court's willingness to look to foreign laws).

297. See Basil Markesinis & Jorg Fedtke, *The Judge as Comparativist*, 80 TUL. L. REV. 195, 195 (2005); see also Taavi Annus, *Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments*, 14 DUKE J. COMP. & INT'L L. 301, 340 (2004) ("There is a danger that such comparative constitutional legal analysis would devolve into a contest of determining who could produce a better anecdote."). Note that few American participants in this debate cite the content of parallel debates abroad. See *generally* JUDICIAL ACTIVISM IN COMMON LAW SUPREME COURTS (Brice Dickson ed., 2007) (compiling essays surveying judicial activism in different common law Supreme Courts).

298. See David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 523 (2011) (demonstrating how the impact of international judicial socialization on comparativism is vastly overstated and instead reflects the actual comparative training of judges).

299. See David M. O'Brien, *More Smoke than Fire*, 22 J.L. & POL. 83, 87 (2006) (finding that the Justices' uses of foreign legal materials remain infrequent and very limited); Mark Tushnet, *When Is Knowing Less Better than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275, 1302 (2005) (concluding that most of the problems with references to non-U.S. law could be dealt with through more careful attention).

that are not only tied to foreign legal reform work generally, but are predicated on the same naïve instrumentalism that is a core flaw in law and development work.³⁰⁰ Here in a domestic context, this instrumentalism again agitates one of the very core challenges of genuine comparative work, namely, mediating between the contextual and the common in foreign legal experience.³⁰¹ As such, proponents often do not recognize the fact that, especially in the federal judiciary and legal academy, their own participation in foreign reform work has historically ingrained the very attitudes toward foreign law which they now seek to upend.³⁰²

It is perhaps not surprising that the pressing issues of American law's relationship to foreign legal systems are being addressed in the constitutional context. Constitutional politics are central to American legal identity, and the American legal academy and legal scholarship are decidedly jurist-centric in their focus.³⁰³ However, even if this debate were to resolve itself with an earnest revolution in the use of comparative analysis in constitutional adjudication, this would raise doubt as to whether the judiciary is the best or most appropriate sector in our legal system to inspire a broad revival in comparative law.

For all the recent focus on constitutional litigation in American public interest lawyering, historically, the American judiciary has been the least consistent and aggressive branch of American government when it comes to social change, especially at the structural level.³⁰⁴ Tellingly, proponents have limited their promotion

300. See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 100-03 (2004) (discussing judges from around the world coming together in ways that are achieving many of the goals of a formal global legal system); Cleveland, *supra* note 291, at 9-11 (discussing the role of law in constitutional analysis); Ruti Teitel, *Comparative Constitutional Law in a Global Age*, 117 HARV L. REV. 2570, 2584-87 (2004) (book review) (outlining the dialogical approach to comparative constitutionalism).

301. See David Fontana, *The Imperialism of American Constitutional Law*, 56 AM. J. COMP. L. 1085 (2008) (reviewing RONALD J. KROTOSZYNSKI, JR., *THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE* (2006)) (arguing that American comparative constitutionalism has suffered from a projection of American constitutional problems and debates onto quite divergent foreign legal contexts).

302. See MARKESINIS & FEDTKE, *supra* note 290, at 259 (noting the irony that American judges who so often seek to export American judicial practice have made the partial and tepid turn to learning from abroad).

303. See generally JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999).

304. See GERALD N. ROSENBERG, *THE HOLLOW HOPE* 3 (1990) (noting the view that the judicial branch wields limited power to affect political and social change due to inability to control the "sword or the purse"); Vivian G. Curran, *Racism's Past and Law's Future*, 28 VT. L. REV. 683, 683 (2003) (arguing that historical propensity of courts, even in democratic states, to legitimate and enable racist policies provides compelling evidence that the current level of faith in law is misplaced); William E. Forbath, *Popular Constitutionalism in the 20th Century: Reflections on the Dark Side, the Progressive Constitutional Imagination, and the Enduring Role of Judicial Finality in Popular Understandings of Popular Self-Rule*, 81 CHI.-KENT L. REV. 967 (2006) (discussing popular constitutionalism versus judicial finality).

of foreign citation to a narrow range of contemporary social issues and have not included examining foreign judicial experience more broadly to examine the structural aspects of the American judiciary, such as judicial elections and appointment, which are seen as great weaknesses across the globe.³⁰⁵ Moreover, the emphasis on resolving contested legal problems through constitutional adjudication involves an inherent calcification of legal possibilities that runs counter to the type of cognitively open-ended legal innovation comparative law should inspire.³⁰⁶ Finally, the concerns of legitimacy and sovereignty that critics have advanced are indeed most acute when one considers whether the judiciary is the appropriate branch of government to engage in comparative analysis, as a central challenge of comparative analysis is disentangling the functional and expressive aspects of foreign law.³⁰⁷

C. *Abandoning Law and Development, Reviving Comparative Law*

For many decades, comparative lawyers like Stein have spoken from their marginal positions to call for the renewal of comparative law.³⁰⁸ They point to the dizzying array of legal experiments conducted abroad that demonstrate the salutary effects of comparative rigor for understanding our own problems.³⁰⁹ Yet, at the same time a leading comparative scholar concluded decades ago that the rising influence of American law in the twentieth century meant that “[i]t is highly unlikely, however, that the traffic will flow equally

305. For an overview of the debates over judicial elections, see generally Jed H. Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061 (2010).

306. See Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1697 (2008) (discussing the American bar’s unique role in governance through administering the constitutional scheme on which American democracy is built); Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 31 (2004) (discussing how the constitutionalization of democratic politics means that states can no longer structure direct democracy in line with their own ideas of participatory democracy); Robin West, *Ennobling Politics*, in LAW AND DEMOCRACY IN THE EMPIRE OF FORCE 58 (Jefferson Powell & James Whyte eds., 2009) (arguing that the adjudicated constitution cannot effectively regulate the processes of politics).

307. See Annus, *supra* note 297.

308. See Stein, *supra* note 5.

309. See Cunningham, *supra* note 6 (advocating increased comparative study of Indian law); Tom Ginsburg, *Studying Japanese Law Because It’s There*, 58 AM. J. COMP. L. 15, 25 (2010) (citing instrumental and noninstrumental reasons for studying Japanese law); Hugh Scogin, *Civil “Law” in Traditional China*, in CIVIL LAW IN QING AND REPUBLICAN CHINA, *supra* note 6, at 53.

in both directions, that there will be much Europeanization, let alone Asianization or Africanization of U.S. law.”³¹⁰

On the whole, this latter prediction has proven true. While American participation in private and public international law has kept apace, if not without its own controversies, modern American lawmaking has been little impacted by foreign legal models.³¹¹ In part, this is due to insulation from the same type of adaptive pressures felt by other nations and the relative success of America in the twentieth century. Yet, as the world changes and America is increasingly removed from some of the competitive luxuries of the twentieth century, the lack of learning from foreign legal developments represents a troubling liability reflecting the deep entrenchment of law and development attitudes in our legislative politics and in the American legal academy. It is in these two arenas then that a revival of comparative law as an engine for legal innovation must occur if at all.³¹²

Our legislative bodies are ideally charged with the proactive collection of information and deliberation over legal reform, in contrast to the reactive and episodic deliberation of courts. In part to counter the overly jurist-centric focus of American legal scholarship, Jeremy Waldron has long argued for the important capacity of legislatures to engage in vigorous social and empirical debate,³¹³ a point which many others also argue is central to the rule of law in a democratic society.³¹⁴ And as the expansion of the administrative state has come to dominate large areas of traditional legislative activity, the same is likewise true for agency decision making.

As much as it may fall from ideal practice, the very messy cauldron of political values and functional solutions that is at the

310. Martin Shapiro, *The Globalization of Law*, 1 IND. J. GLOBAL LEGAL STUD. 37, 63 (1993).

311. Langbein, *supra* note 177, at 549.

312. A claim for a revival of comparative law is not meant to make the glib elision that comparative law as a field has not been without its controversies, failures, and self-criticism. See generally RETHINKING THE MASTERS OF COMPARATIVE LAW (Annelise Riles ed., 2001) (compiling essays by comparative law scholars reflecting on the character of comparative law); Günter Frankenberg, *Critical Comparisons: Re-Thinking Comparative Law*, 26 HARV. INT’L L.J. 411 (1985) (arguing that because of comparative legal scholarship’s faith in an objectivity that allows culturally biased perspectives to be presented as “neutral” the practice of comparative law is inconsistent with the discipline’s high principles and goals).

313. WALDRON, *supra* note 303; JEREMY WALDRON, LAW AND DISAGREEMENT (1999); Jeremy Waldron, *Legislation and the Rule of Law*, 1 LEGISPRUDENCE 91 (2007); see also Luc J. Wintgens, *Legisprudence as a New Theory of Legislation*, in THE THEORY AND PRACTICE OF LEGISLATION 22 (Luc J. Wintgens ed., 2005) (arguing that politics makes disagreements workable in an effort to find the best possible legal rules).

314. See Christopher L. Kutz, *Just Disagreement: Indeterminacy and Rationality in the Rule of Law*, 103 YALE L.J. 997, 1029 (1993) (“The ideal of the rule of law is far better served by lively debate than by wooden consensus because debate renders the law’s many values perspicuous in the actual exercise of authority.”).

heart of legislative activity makes it far more compatible with the challenges of comparative law than judicial decision making. True, the invocation of the lurking contagion of foreign legal values is more strongly felt in the legislative than the judicial context, but this is simply due to the proximity of the legislature to popular politics, where such debates are not seen as driven by American self-interest.³¹⁵ Whatever one's concerns are about legislative politics, take a moment and consider the irony that law and development work has often aspired to make foreign legislators more receptive to foreign law and engage in more "rational" lawmaking.³¹⁶

In many ways, American law and lawmaking is itself already comparative in an often unrealized sense. One comparative advantage that American legislatures possess is the robust potential for social experimentation provided by our system of federalism. Justice Brandeis famously used the phrase "laboratories of democracy" to describe how localized innovations could diffuse through legislative bodies.³¹⁷ Much of America's regulatory diversity derives from experimentation in states and other jurisdictions with quite different material, and even cultural differences.³¹⁸

Yet, structurally America's legislative bodies have been equally marked by the legacy of law and development when it comes to legal diversity outside of its borders. Unlike many countries, America has no comparative law bureaus in national or state legislatures, nor are comparative experts often sought after to assist in the drafting of new legislation. American legislatures not only ignore relevant foreign experience in designing far-reaching responses to such issues of social welfare and financial bailouts, but they often explicitly work to portray legal responses as untainted by foreign experience.³¹⁹

315. In similar stead, American legal internationalists have also more broadly neglected legislatures in their scholarship as domestic legislatures are often resistant to claims of universal expert knowledge that so often permeate such work. See, e.g., SLAUGHTER, *supra* note 300, at 5 (describing a world of governments whose regulatory, judicial, and legislative institutions interact both with each other domestically and also with their foreign and supranational counterparts).

316. See LEGISLATIVE DRAFTING FOR DEMOCRATIC SOCIAL CHANGE: A MANUAL FOR DRAFTERS 3 (Anne Seidman et. al. eds., 2001) (describing law as governments' primary tool for transforming institutions).

317. G. Alan Tarr, *Laboratories of Democracy? Brandeis, Federalism, and Scientific Management*, 31 PUBLIUS 37 (2001).

318. See David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 554 n.74 (2001) (describing the process of "law canvassing," or looking to the laws of other states to help decide an issue).

319. William Alford, Professor, Harvard Law Sch., Address Before the Royal Irish Academy: *China and America: More Alike than Either Might Imagine* (Dec. 12, 2006) (noting that many countries are facing common issues of economic inequality, environmental pollution and, more generally, "addressing their great common challenge of ensuring an equitable society protective of the dignity of all").

Take, for example, Kahan's argument on abortion rights, one of America's most contentious social issues.³²⁰ Kahan argues that France performed its own successful example of "cultural policymaking" by enacting a system of maternity care that serves the symbolic needs of both opponents and proponents of abortion rights.³²¹ However, if this solution were introduced to our Congress, the identity politics of foreign knowledge would quickly become apparent as association of the innovation with "French" culture would severely decrease its chance of adoption.³²² Recent debates over health care reform were rife with invocations of foreign legal models and the bugaboo of foreign legal values, but without much input by actual experts who knew the inner workings of such systems—even from those arguing for reform more in line with foreign models.

Furthermore, the few legislative committees that do exist to evaluate foreign legal experience are almost exclusively structured to either promote law and development work or simply judge whether foreign legal systems are emulating our own laws—presuming again, of course, that we have in the past and will continue to influence such developments.³²³ Turning to the classic law and development defined relationship, take for example the Congressional Executive Commission on China (CECC), the congressional body specifically conceived to "monitor human rights and the development of the rule of law in China."³²⁴ While the CECC funds quite sustained and extensive research on Chinese law, it does so within the frame of export, assessing whether China is or is not moving toward American norms.³²⁵ The CECC is headed by political appointees and, as a result, the tenor of its hearings reflects scant consideration of any domestic use for the research that the CECC carries out.³²⁶ Contrast this with the broadly experimental attitude that the Chinese

320. Kahan & Braman, *supra* note 190, at 168–69.

321. *Id.*

322. Such is true for innovations even from the country whose legal system American law is so often claimed to have reshaped and revitalized, Japan. See FELDMAN, *supra* note 6, at 143–48 (describing Japan's preference for reforms based on Japanese preferences); Toshimitsu Kitagawa & Luke Nottage, *Globalization of Japanese Corporations and the Development of Corporate Legal Departments: Problems and Prospects*, in RAISING THE BAR, *supra* note 257, at 201 (examining corporate legal departments in Japan).

323. See generally Stanley Lubman, *The Dragon as Demon: Images of China on Capitol Hill*, 13 J. CONT. CHINA 55 (2004) (describing congressional committee with legislative mandate to monitor human rights and the development of the rule of law in China); see also, e.g., Orrin Hatch, *Address*, in DEMOCRACY AND THE RULE OF LAW 3, 4–6 (Norman Dorsen & Prosser Gifford eds., 2001) (evaluating reforms in other countries based on aspects of the American legal system).

324. See CONG.-EXECUTIVE COMMISSION ON CHINA, <http://www.cecc.gov> (last visited Mar. 1, 2012).

325. *Id.*

326. *Id.*

government has taken toward critically adapting foreign law and even promoting a broadly experimental attitude in its own legal culture—a legal culture so often held out as stagnant and reactive by American legal scholars.³²⁷

Also consider the relatively frequent history of borrowing by foreign legislatures, both industrialized and developing,³²⁸ and the long and comparatively high-status traditions of comparative law abroad, notably in Sweden and Japan.³²⁹ Moreover, a change in legislative attitude has the potential to promote innovative endeavors such as legislative exchanges or cross-border cooperative policy studies that are again far more popular worldwide than in America.

Additionally, consider how the collective budgets for foreign legal reform sponsored by state and federal governments dwarf those allocated for the study of foreign law.³³⁰ While the funding practices of private foundations and international agencies are outside direct political control, legislative choices in this regard can help shape the fundraising and cooperative culture within which they operate. Also consider, especially in light of recent decisions to cut the already miniscule support for academic study of foreign countries in recent budget negotiations,³³¹ how central governments worldwide are creating a range of incentives for individuals to acquire the skills and training needed to carry out foreign legal research.³³²

327. See MARK LEONARD, *WHAT DOES CHINA THINK?* 71–75 (2008) (describing China's conspicuous lack of progress on promoting the rule of law); THE SEARCH FOR DELIBERATIVE DEMOCRACY IN CHINA (Ethan J. Leib & Baogang He eds., 2006) (containing essays considering how China might govern in a manner consistent with deliberative democracy and continue to design and modify its deliberative democratic institutions).

328. Brian Tamanaha, *A Pragmatic Approach to Legislative Theory for Developing Countries*, in *MAKING DEVELOPMENT WORK: LEGISLATIVE REFORM FOR INSTITUTIONAL TRANSFORMATION AND GOOD GOVERNANCE*, *supra* note 40, at 145, 147–49 (discussing the necessity of “borrowing” law in various circumstances and explaining a particular application to Micronesia).

329. See, e.g., *Swiss Institute of Comparative Law*, SWITZ. FED. DEPT JUST. & POLICE, http://www.ejpd.admin.ch/ejpd/en/home/die_oe/organigramm_ejpd/institute/sir.html (last visited Mar. 1, 2012) (Switz.). See generally LAWRENCE BEER & JOHN M. MAKI, *FROM IMPERIAL MYTH TO DEMOCRACY* (2002) (giving an overview of the role of comparative law in modern Japanese legal history).

330. See Thom Ringer, *Development, Reform and the Rule of Law*, 10 *YALE HUM. RGTS & DEV. L.J.* 178, 179–180 (2007) (discussing the budgets of various American governmental agencies for promoting foreign legal reform). This is not surprising as there is no active American governmental program to promote the study of foreign legal development for domestic use.

331. Kelly Field, *Federal Budget Deal Spares Pell but Shrinks Research and Education Programs*, *CHRON. HIGHER EDUC.* (Apr. 12, 2011), <http://chronicle.com/article/Federal-Budget-Deal-Spares/127095>.

332. For a sample of government-sponsored foreign legal scholarship program, see *External Scholarships*, UNIV. OXFORD, <http://www.ox.ac.uk/feesandfunding/prospectivegrad/scholarships/external/#d.en.16653> (last visited Mar. 1, 2012).

If legislative, and by extension administrative, bodies are the key arena for reversing the legacy of law and development in the public sector, it is American law schools that are at the very heart of the private production of legal knowledge and the training of those who come to inhabit public bodies. As noted in Part III, it is in law schools that most American lawyers, international in orientation or not, encounter prevailing law and development attitudes.

The legacy of law and development operates on a variety of different levels in American legal education. While some law schools actively recruit foreign scholars to visit, such scholars rarely teach or participate in core classes, if they teach at all. This particular view of foreign legal talent is one of the longest standing and most fundamental aspects of the past century of America's law and development work. Herein, foreign legal students are often explicitly understood as future missionaries of American law and not as reservoirs of useful knowledge, even when such students are scholars in their home countries.³³³

In comparison, it is also strikingly rare for American legal academics to take extended leaves to teach abroad, especially outside of traditional law and development agendas.³³⁴ This one-way emphasis is also quantitatively reflected in the number of foreign law students in America in contrast to not simply the opportunity but the actual encouragement of foreign study for America law students.³³⁵ This state of affairs is at odds with trends showing how often American graduates find themselves working in foreign legal systems or with foreign law.³³⁶

On a more informal but equally crucial level, law schools coordinate and influence how American lawyers have a chance to interact with foreign law. This coordination customarily includes symposia, workshops, and lectures that are not only often a part of fundraising efforts for law and development work but can even satisfy continuing legal education requirements. Thus, law schools not only pedagogically shape academic attitudes toward foreign law, but they are quite commonly the locus of activities that enable legal elites to

333. See YVES DEZALAY & BRYANT GARTH, *THE INTERNATIONALIZATION OF PALACE WARS* 7 (2002) (describing how national actors seek to use foreign capital to build their power at home).

334. *Contra, e.g.*, Eli Wald, *Notes from Tsinghua: Law and Legal Ethics in Contemporary China*, 23 *CONN. J. INT'L L.* 369 (2007) (describing the author's experiences from teaching a legal ethics class in Tsinghua School of Law in Beijing).

335. See Carole Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, 25 *FORDHAM INT'L L.J.* 1039, 1046–58 (2001) (examining experiences of foreign lawyers at U.S. law schools).

336. See Laurel S. Terry et al., *Transnational Legal Practice 2009*, 44 *INT'L L.* 563 (2010) (describing U.S. regulators' efforts to compete effectively in cross-border legal services).

engage with foreign law and lawyers, with bar associations close behind.³³⁷

In the simplest terms, law schools structure the material pathways and subjective experiences that condition how most American lawyers engage foreign law. To this end, comparative law proponent David Fontana has already produced a wide-ranging and thoughtful catalog of the various innovations that could productively include comparative law in American law schools curriculums and programming.³³⁸

There has been some movement in American legal education to adapt to the challenges that the internationalized and competitive twenty-first century presents. What characterizes most all of these efforts is that while they may emphasize the globalization or internationalization of law, they rarely encourage comparative law, and instead focus on international law.³³⁹ Predominant academic hiring practices continue to create incentives for aspiring scholars to pursue international law that are far more attractive than incentives for those pursuing comparative law or developing deep foreign legal expertise.³⁴⁰ These practices pressure those who study foreign legal systems to justify their expertise solely in terms of facilitating law and development programming.

Part and parcel of this condition was the mid-twentieth century shift to conceptualize “comparative law” as a discrete sub-field that strictly defines the expertise of legal academics.³⁴¹ This marginalization of comparative law as the scholarly province of a few select specialists, rather than as a shared sensibility among American legal scholars, has been critical to the entrenchment of law and development thinking.³⁴² While many comparative lawyers try to bring foreign legal experience to the critical awareness of American scholars, outside of a few specialized fields these attempts have been marginal—often not due to the lack of erudition of the comparative

337. The ABA’s role in law and development early in the twentieth century has only expanded into a now global presence. See *ABA Rule of Law Initiative*, A.B.A., <http://apps.americanbar.org/rol> (last visited Mar. 1, 2012).

338. Fontana, *supra* note 176, at 47–53.

339. See Law & Chang, *supra* note 298 (challenging other scholars characterization of foreign citations as a “dialogue”).

340. See *id.* at 559, 574 (arguing that because academic institutions neither reward potential hires with international legal education nor teach international law to their students, such training is not likely to be pursued in the future).

341. There has been a long debate about how to teach comparative law. For the anti-sub-field approach, see Roscoe Pound, *The Place of Comparative Law in the American Law School Curriculum*, 8 TUL. L. REV. 161 (1934), Mathias Reimann, *The End of Comparative Law as an Autonomous Subject*, 11 TUL. EUR. & CIV. L.F. 49 (1996) and Max Rheinstein, *Teaching Comparative Law*, 5 U. CHI. L. REV. 615 (1937). Contra Rudolf B. Schlesinger, *The Role of the “Basic Course” in the Teaching of Foreign and Comparative Law*, 19 AM. J. COMP. L. 616 (1971).

342. Dezalay & Garth, *supra* note 81, at 120.

lawyer, but simply because they are so few.³⁴³ Even so, such efforts run up against the reality that the sub-field concept has made American legal scholars far more comfortable engaging in law and development work—where formalism, instrumentalism, and idealization are welcomed—and yet somehow hesitant to do the difficult work required to thoughtfully adapt foreign legal experience to the complexity in American legal reform. What the current state of affairs elides is that when comparative law was at its height in earlier eras of American legal history, it was as a commitment to methodological comparativism, not solely a circumscribed sub-field.

It is affirming then that a number of American scholars have begun to understand the need for comparativism. They have approached comparative law not simply as a taxonomic or descriptive endeavor, but as an effective tool with which to analyze and contemplate domestic reform. Gillian Hadfield describes how the United Kingdom is undergoing a revolution in the provision and regulation of legal services.³⁴⁴ She outlines how this experiment can help provide answers to long-standing problems in America's legal system.³⁴⁵ Peter Shuck comments on how the radical New Zealand experiment in tort reform has remained curiously understudied. He laments that ideal conceptions of American tort law have stifled the intuition that "good feasible ideas are in short enough supply that one would expect them to be seriously considered wherever . . . they can be found."³⁴⁶ Amalia Kessler discusses the utility of integrating insight from the French legal system into America's own rapidly expanding administrative law bodies that are replete with many parallel inquisitorial procedures.³⁴⁷ The rapid pace of competition in international capital markets moves Jonathan Macey to write about how America is at risk of losing its "first mover advantage" in capital markets by confusing historical opportunity after World War II with superior knowledge and practice.³⁴⁸ Macey's argument is perhaps the most telling, as it directly places in the foreground the need for comparative analysis as driven by the competitive dynamics of the

343. Comparative administrative law is one area that seems to be undergoing an internationalized moment. *See, e.g.*, *COMPARATIVE ADMINISTRATIVE LAW* (Susan Rose-Ackerman & Peter Lindseth eds., 2011); *see also* Donald C. Clarke, "Nothing but Wind"? *The Past and Future of Comparative Corporate Governance*, 59 *AM. J. COMP. L.* 75 (2011) (discussing parallel aspirations for comparative corporate law).

344. Hadfield, *supra* note 306, at 1731.

345. *Id.* at 1732.

346. Peter H. Shuck, *Tort Reform, Kiwi-Style*, 27 *YALE L. & POL'Y REV.* 187 (2008).

347. Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 *CORNELL L. REV.* 1181, 1260-73 (2004).

348. Jonathan Macey, *What Sarbox Wrought*, *WALL ST. J.*, Apr. 7, 2007, at A9.

twenty-first century.³⁴⁹ Others have emphasized the basic methodological advantages of comparativism in the field to which it is almost always contrasted, international law.³⁵⁰

The proactive and aggressive amplification and broadening of these initial sentiments across American legal culture are necessary to dislodge the now pervasive legacy of law and development's negative influences on our domestic capacity for legal innovation and adaptation.

VI. CONCLUSION

This Article has shown how law and development has influenced and structured the twentieth-century American relationship to foreign legal systems, and that its inherent qualities are antithetical to the productive practice of comparative law. This antagonism grew in strength over the course of the twentieth century as foreign legal reform became firmly entrenched in the professional self-image of the modern American lawyer and American culture writ large. The paradoxical persistence of foreign legal reform efforts in the face of their repeated failures was shown to be intelligible only when understood as an extension of the cultural politics that asserted America as solely an exporter of legal knowledge. Beyond simple explanation, this Article has argued that this persistence has not only had far from benign effects on American foreign relations, but that it has left the state of American comparative law painfully atrophied both institutionally and intellectually.

Two law and development practitioners reflecting on what they saw as the “next fifty years” of law and development recently asked, “At the core of law and development lies a central conundrum: why do obviously desirable institutional outcomes not happen in the developing world?”³⁵¹ Should we not be asking ourselves the same questions about American law? Is such an answer apparent to anyone concerned with our domestic and international challenges? The presumption that this challenge lies elsewhere is central to Tamanaha's plea for law and development proponents to recognize that “legal development” is happening everywhere, especially at home.³⁵²

349. *See id.*

350. *See* Boris N. Mamlyuk & Ugo Mattei, *Comparative International Law*, 36 BROOK. J. INT'L L. 385, 391 (2010) (discussing how the emerging field of comparative international law, like comparative law, satisfies our basic instinct to catalog, shelve, sort, and understand).

351. Lindsey Carson & Ronald Daniels, *The Persistent Dilemmas of Development: The Next Fifty Years*, 60 U. TORONTO L. REV. 491, 511 (2010).

352. Tamanaha, *supra* note 32, at 216.

In this light, we should remember that history has repeatedly shown itself unfriendly to societies that become too satisfied with their own successes.³⁵³ In an era of increasingly unpredictable innovations, active adaptation will not be an option.³⁵⁴ However one diagnoses the near or long-term course of America's place in global society, complacency seems as great a potential danger as any external threat. For a nation conceived as a nation of values, complacency arises when specific institutions or practices are considered the final articulations of these values.

At the same time, this fundamental critique of our past efforts to shape foreign legal cultures is not a call for isolation, nor should it be equated with a classic conservative critique of American empire.³⁵⁵ Nor is it a fatalistic call for inaction that defenders of current practices abroad so often conjure up.³⁵⁶ Neither does this critique presume that competition with foreign nations must be grounded in any form of animus.³⁵⁷ Rather, it recognizes that the world is increasingly aware of our own internal struggle to adapt law to the challenges of modern life,³⁵⁸ and that there is a world full of nations already vibrantly engaged in a legal dialogue both cooperative and competitive, including many nations we have long considered lesser "developing" countries.³⁵⁹

If American legal history teaches anything, it is that America has realized its greatest achievements when holding itself to its highest standards and when recognizing, as one theorist phrased it, that "democracy is a journey without end."³⁶⁰ In too many important legal and political debates, we only rehash our contested past,

353. The literature on civilizational decline recurrently points to the value of innovation, creativity, and self-critique, and the liabilities of hubris and self-satisfaction. See IBN KHALDUN, *THE MUQADDIMAH, AN INTRODUCTION TO HISTORY* (Rosenthal trans., 1967); OSWALD SPENGLER, *THE DECLINE OF THE WEST* (1917); ARNOLD TOYNBEE, *A STUDY OF HISTORY* (1934); GIAMBATTISTA VICO, *THE NEW SCIENCE* (Thomas Goddard Bergin & Harold Fisch trans., 1984).

354. See AMY CHUA, *DAY OF EMPIRE*, at xxi (2007) (finding that the decline of empire has repeatedly coincided with intolerance, xenophobia, and calls for racial, religious, or ethnic "purity"); JARED DIAMOND, *COLLAPSE* (2005) (arguing that addressing increasing social complexity is necessary for the survival of civilizations); JOSEPH TAINTER, *THE COLLAPSE OF COMPLEX SOCIETIES* (1988) (emphasizing the nature and quality of collective decision-making processes for modern societies).

355. See, e.g., CLYDE PRESTOWITZ, *ROGUE NATION* (2003) (generally criticizing the increasingly nationalistic posture of the United States in matters of foreign affairs).

356. FERGUSON, *supra* note 20, at 285 (pointing out that doing something different is not doing anything in the development context).

357. LYDIA LIU, *THE CLASH OF EMPIRES* 1 (2004) ("[C]ivilizations don't clash, empires do.").

358. Issa Shivji, *Law's Empire and Empire's Lawlessness*, 1 J.L. SOC'Y JUST. & GLOBAL DEV. 1 (2003).

359. See LAW AND GLOBALIZATION FROM BELOW, *supra* note 249.

360. DEMOCRACY ASSISTANCE 357 (Peter Burnell ed., 2000); see also ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 340 (1989).

searching for transcendent solutions that are only possible in political theology, not in the imperfect realm of human governance.

Even our proudest collective achievement, the birth of modern constitutionalism, emerged out of hot debate, was forged from compromise not science, and was hardly believed to be an end of history.³⁶¹ Trying to take ourselves beyond legal borrowing is in essence trying to take ourselves outside of the main engine of global legal history.³⁶² If America continues to see its legal institutions as end of history models, we may truly end up only exporting distortions of all we have achieved as we ourselves stumble as history passes us by.

Over the past century, American law has in fact had a great impact across the globe. Our conceit has been that we understand this impact fully and that we have been, in any instance, able to control and direct this influence to predictable ends. There has been great value in actors from around the world having looked to America as a symbol of democratic aspiration, but in our parochialism and stagnation America is now more than ever jeopardizing that dynamic³⁶³ and has even seen our once monumental influence of global constitutionalism fade.³⁶⁴

We can be proud of our institutions, but not merely as monuments. We must continually assert any presumed leadership by demonstrating a dynamic capacity to consistently improve upon the realization of our values. We must not be captured by a backward-looking satisfaction. In the twenty-first century, the only thing we are guaranteed to control is how we adapt to this change—not how others

361. See, e.g., SAUL CORNELL, *THE OTHER FOUNDERS* 19 (1999) (“The publication of the Constitution in September 1787 inaugurated one of the most vigorous political campaigns in American history.”).

362. See ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993) (outlining history of transplanting legal materials from other legal systems).

363. See Richard J. Goldstone, *US Antagonism Toward the International Rule of Law: The View of a Concerned “Outsider,”* 4 WASH. U. GLOBAL STUD. L. REV. 205, 206–08 (2005) (articulating concerns over human rights abuses and violations of the rule of law by the U.S. government).

364. See David Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. (forthcoming 2012) (demonstrating empirically the declining citation of American constitutional law abroad). See generally Heinz Klug, *Model and Anti-Model: The United States Constitution and the “Rise of World Constitutionalism,”* 2000 WIS. L. REV. 597, 598 (examining both the enduring contributions of American constitutionalism and the ways in which American constitutionalism is being used as an “anti-model” in many more recent constitution-making processes throughout the world); Wiktor Osiatynski, *Paradoxes of Constitutional Borrowing*, 1 INT’L J. CONST. L. 244, 244–45 (2003) (examining experiences of constitutional borrowing and the limits to such borrowing).

will adapt.³⁶⁵ Thus understood, legal cosmopolitanism can be a form of legal nationalism.

There is nothing inherently wrong with striving to be an exemplar, as America has often presumed to do. Most importantly, nothing in a revival of comparative law and a setting aside of law and development means ending America's engagements with foreign legal systems. In stark contradiction, it means that we should aggressively set out to capture the mutual benefits that our own desire to explore foreign legal experience implies for all parties involved. America may have found and will find better solutions than others to particular social problems, but we should not trade away our own innovations and experience without reciprocity—great benefits can flow from an open, honest, and yet self-interested intellectual exchange. Even if America desires that our involvement abroad be a value-based endeavor and not one that simply affirms our self-perception, we cannot afford to suffer any comforting illusions or soothing optimism.³⁶⁶

In essence, we judged others at the cost of learning how to critically judge ourselves. Every nation is at once in competition with itself and in competition with history. In this context, and in the most succinct terms, the future of American law is not in international law, or even in global law, but in comparative law.

365. See CHARLES A. KUPCHAN, *THE END OF THE AMERICAN ERA* 336 (2003) (stating the necessity of preparing for the end of the American era).

366. See J. WILLIAM FULBRIGHT, *THE ARROGANCE OF POWER* 256 (1966) (“[I]t is not merely desirable but essential that the competitive instinct of nations be brought under control . . .”).
