

THE PERSISTENT DILEMMAS OF DEVELOPMENT: THE NEXT FIFTY YEARS

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Introduction: Why Development?

Michael Trebilcock's scholarship has addressed and impacted fields ranging from immigration to tort law, trade and competition to administrative policy, property to contracts. However, at the core of his remarkable corpus of work has always lain a preoccupation with the nature of change and the ways in which institutions can either facilitate or impede policymakers in pursuit of welfare-improving transitions. Trebilcock has challenged assumptions about the motivations of decision-makers, the desirability of various governing instruments, and the ultimate utility that may be captured by a given set of policies, laying bear the basic question as to why change occurs – or fails to occur – in the manner that it does. Across contexts and disciplines, Trebilcock's work asks whether a lack of reform (or the advancement of sub-optimal reforms) reflects bad ideas, bad underlying institutional arrangements that subvert change, or both.

In addressing such fundamental dilemmas, Trebilcock has been remarkably adroit in expropriating insights from economics, liberal moral philosophy, feminism, communitarianism, and political science to explicate the goals and values which underpin policy decisions. This polymathic fluency has been of particular value and significance in his work on the challenges facing the developing world. Transcending conventional arguments centered on the presumed hegemony of economics in the development endeavor, Trebilcock's analyses emphasize the significance of dynamic institutional interactions, exploring the pluralistic yet connected nature of law and economics, and examining why obviously preferable institutional outcomes are not always achieved. Underscoring the significance of the connections and complementarities between and among various areas of law and policy in achieving development goals, his

scholarship acknowledges the role that non-economic values and goals play in the enterprise of building a humane and prosperous society.

On a more personal level, Trebilcock's contemplation of the dilemmas of development reflects his enduring sense of compassion and humanity as well as his seemingly inexhaustive spirit. The yawning gulf between the developed and the developing worlds in terms of wealth, health, liberty, and education stands as a compelling and urgent moral priority that commands our attention, and Trebilcock has declined to stand aside idly when he may contribute to narrowing that gap. Constitutionally incapable of complacency or smug satisfaction, he has harnessed his restless work ethic to address the monumental task of attempting to make society better, especially for its most vulnerable members, in the belief that those who are blessed with the intellectual gifts to observe failed institutions or policies and identify possible contributing factors have a duty to weigh in.

While his work on development may be characterized by some as the culmination of Trebilcock's brilliant career, we caution against any implication of finality in that representation. While the range and depth of his portfolio of work is indeed astounding, his career should not be considered as having reached anything beyond its midpoint. Perhaps selfishly, we offer an outline of some of the most pressing issues of law and development still left unresolved – a proposed research agenda for the next fifty years of Trebilcock's transformative scholarship.

Contributions to Law and Development Scholarship

While the relationship between law and development has fascinated scholars for centuries,¹ the Law and Development Movement (LDM) first emerged with prominence in the

¹ See Michael Trebilcock & Kevin Davis, *The Relationship Between Law & Development: Optimists Versus Skeptics*, 56 AM. J. OF COMP. L. 8985, 8993 (2008) (tracing the history of scholarship addressing this relationship in the European context to the work of Montesquieu, Maine, and Weber). See also Duncan Kennedy, *Three*

1950s and 1960s as legal academics and international donors seized upon the belief that the rule of law could promote development goals more generally. Drawing on Rostowian modernization theory, the LDM adopted a progressive approach to social change of which law was a central component, positing that legal development assistance would effectively “protect individual freedom, expand citizen participation in decision-making, enhance social equality, and increase the capacity of all citizens rationally to control events and shape social life.”² The LDM endorsed a strong instrumentalist conception of law, considering it “a force which [could] be molded and manipulated to alter human behavior and achieve development” by fostering social stability, predictability, and fairness.³

Underlying the Movement was thus the presumption that not only was the nature of law and its role in development well-understood, but that the functions that law could and would serve within a society were universal, unaffected by variations in cultural, historical, economic, and political realities.⁴ Specifically, proponents assumed that, with appropriately tailored legal guidance and assistance, all countries had the potential to follow the Western – if not expressly American – pattern of development, with law underpinning a functioning market system as well

Globalizations of Legal Thought: 1850-2000, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* (David M. Trubek & Alvaro Santos eds. 2006).

² See David M. Trubek and Marc Galanter, *Scholars in Self-Estrangement: Reflections on the Crisis of Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062 (1974).

³ Elliot M. Burg, *Law and Development: A Review of the Literature and a Critique of “Scholar in Self-Estrangement,”* 25 AM. J. COMP. L. 492, 505, 507 (1977). See also David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1, 5 (1972) (“The core conception of legal purposiveness is, therefore, highly instrumental: It assumes that social life can be shaped by some social will, for example a modernizing elite, which brings about development through legal enactment and enforcement.”).

⁴ 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. OF COMP. L. 457, 459-60 (1977) (arguing that “of all the development fields, law is the one that is most limited and confined by the fact that law is nation- or society-specific” and maintaining that “[t]he difficulty of communicating with the third world was compounded in a variety of subtle and fundamental ways by the fact that their societies have legal traditions and operating legal orders that vary widely from ours.”); Carol V. Rose, *The “New” Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study*, 32 L. & SOC. REV. 93, 124 (1998) (referencing criticisms that U.S. attorneys engaged in LDM projects were ill-informed about the cultures in which they were working).

as a liberal democracy, both empowering and constraining the power of the state.⁵ However, early legal development assistance projects failed to realize more than limited success,⁶ and the Movement was discredited in the 1970s as overly prescriptive, formalistic, and normatively driven.⁷ Critics noted the failure of top-down LDM reforms to demonstrate substantial (or, in many cases, any) impact on social or economic development; even in situations in which reforms had been adopted readily, the “law on the books” had not been effectively transposed to “law in action,”⁸ calling into question the theoretical premises of the Movement.

The rise of New Institutional Economics (NIE) in the 1980s and 1990s triggered a new wave of development scholarship focused on the potential influence of institutions in determining and explaining the success or failures of countries.⁹ Increasingly academics and policymakers began to take “an interest in institutions as independent variables, a turn toward cognitive and cultural explanations, and an interest in properties of supra-individual units of analysis that cannot be reduced to aggregations or direct consequences of individuals’ attributes or motives.”¹⁰ While New Institutional Economists were primarily preoccupied with elucidating

⁵ See Brian Tamanaha, *The Lessons of Law and Development Studies*, 89 AM. J. INT’L L. 470, 473 (1995).

⁶ See, e.g., Merryman, *supra* note 4 at 459-60 (1977) (noting that a 1971 internal review of its law and development projects forced the Ford Foundation to “rethink fundamental questions about field definition and about its program” in that area and that the United States Agency for International Development cut funding for its law and development programs at approximately the same time).

⁷ Specifically, critics charged that the LDM was oriented towards an excessively American notion of law (described by Trubek and Galanter as “legal liberalism”), that emphasized court-centric formal legal systems rather than considering the role of informal or customary dispute resolution mechanisms. See Merryman, *supra* note 4 at 479 (characterizing the LDM as “largely a parochial expression of the American legal style.”); Rose, *supra* note 4 at 128 (1998) (identifying as a central critique of the LDM its “ethnocentric assumption that the Western model of lawyers and legal professionalism could function effectively in virtually all cultural contexts”); Trubek & Galanter, *supra* note 2.

⁸ See Trebilcock & Davis, *supra* note 1, at 10.

⁹ See, e.g., DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990); WALTER W. POWELL & PAUL J. DIMAGGIO, THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS (1991); Dani Rodrik, et al., *Institutions Rule: The Primacy of Institutions Over Geography and Integration in Economic Development*, 9 J. of Econ. Growth 131 (2004); Peter A. Hall & Rosemary C.R. Taylor, *Political Science and the Three New Institutionalisms*, 33 Pol. Stud. 1 (1996). Cf. Jeffrey Sachs, *Institutions Don’t Rule: Direct Effects of Geography on Per Capita Income*, National Bureau of Economic Research Paper Working Paper No. 9490 (2003).

¹⁰ WALTER W. POWELL & PAUL J. DIMAGGIO, THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 8 (1991).

the role of institutions in promoting or impeding economic development, their investigations into the institutional engines of growth soon led them to consider the legal arrangements that would most optimally clarify and enforce the contract and property rights that NIE proponents had identified as precursors to economic development.¹¹ Therefore, as theorists such as Douglass North explored the implications of the proposition that institutions matter for development,¹² scholars again directed their attention to the potency of legal institutions in developing countries and the possible correlations to various measures of development.¹³

Following more than two decades of intense focus on (and funding to) rule of law reform efforts,¹⁴ on the whole the empirical evidence appears to support the claim that law and legal institutions have consequential bearing on a country's development prospects. Beyond the objectively demonstrable correlation between development (especially when measured in terms of economic growth) and strong legal institutions,¹⁵ numerous studies support regarding the relationship as causal, substantiating the claim that strong legal institutions constitute an important prerequisite to development, as measured by a variety of indicia.¹⁶ Generally the

¹¹ See MICHAEL TREBILCOCK & RONALD J. DANIELS, *RULE OF LAW REFORM AND DEVELOPMENT: CHARTING THE FRAGILE PATH OF PROGRESS* 27-29 (Edward Elgar 2008); John Harriss et al., *Introduction: Development and Significance of NIE 5* in *THE NEW INSTITUTIONAL ECONOMICS AND THE THIRD WORLD* (John Harriss et al. eds. 1995).

¹² See generally NORTH, *supra* note 9; Douglass North, *The New Institutional Economics and Third World Development*, in *THE NEW INSTITUTIONAL ECONOMICS AND THE THIRD WORLD*, *supra* note 11.

¹³ The debate over the meaning of "development" and the various rubrics by which it may be measured has been considered extensively elsewhere. See, e.g., TREBILCOCK & DANIELS, *supra* note 11, at 4.

¹⁴ See, e.g., GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPLORATION AND IMPORTATION OF A NEW LEGAL ORTHODOXY (Yves Dezalay and Bryant Garth eds. 2002); Thomas Carothers, *The Rule of Law Revival*, 77 *FOR. AFF.* 95 (1998).

¹⁵ See, e.g., R. J. BARRO, *DETERMINANTS OF ECONOMIC GROWTH: A CROSS-COUNTRY EMPIRICAL STUDY* (1997); C. Clague, et al., *Institutions and Economic Performance: Property Rights and Contract Enforcement in INSTITUTIONS AND ECONOMIC DEVELOPMENT: GROWTH AND GOVERNANCE IN LESS-DEVELOPED AND POST-SOCIALIST COUNTRIES* 67-90 (C. Clague ed. 1997); David Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 *WIS. L. REV.* 720 (1972).

¹⁶ See, e.g., Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000 in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* (David M. Trubek & Alvaro Santos eds., 2006); IBRAHIM F.I. SHIHATA, *COMPLEMENTARY REFORM: ESSAYS ON LEGAL, JUDICIAL AND OTHER INSTITUTIONS REFORMS SUPPORTED BY THE WORLD BANK* (1997); Carothers, *supra* note 14. But see S.N. Sangmpam, *Politics Rules: The*

developmental benefits of strong legal institutions have been attributed theoretically to the efficiency gains that they promote¹⁷ and the freedom and equality they engender.¹⁸ However, while the recognition that institutions in general and legal institutions in particular have an impact on a country's development is certainly an important first-order step, such a deduction provides minimal insight for the ultimate challenges presented to policymakers – which specific institutions are influential? How? What processes should be followed in creating or supporting beneficial institutional arrangements? In what order should such reforms be undertaken?

These are the knowledge gaps that Trebilcock has ambitiously addressed. Working on his own and with a number of different colleagues, Trebilcock has systematically lent rigor, coherence, and pragmatism to the debate. Drawing on his extensive and diverse background of scholarship, he has provided a tremendous crosspollination of ideas and energies, addressing many of the flaws that limited the utility and accuracy of his predecessors. The list of academics and policymakers who have benefited from his vision and insights is too lengthy to mention,¹⁹ but a brief consideration of his primary contributions to the field provides the opportunity to

False Primacy of Institutions in Developing Countries, 55 POL. STUD. 201 (2007) (arguing that while institutions are influential, they are “neither the explanation for outcomes nor the prescription for development problems”).

¹⁷ The efficiency claims generally focus on the value of clear definition of property rights and the reliable enforcement of contracts. See, e.g., KENNETH DAM, *THE LAW-GROWTH NEXUS* (2007); BARRO, *supra* note 15 (characterizing “better maintenance of rule of law” as among the key determinants of the growth rate of real per capita gross domestic product); Tom Ginsburg, *Does Law Matter for Economic Development? Evidence from East Asia*, 34 LAW & SOC'Y REV. 829 (2000); Dani Rodrik et al., *supra* note 9; Barry Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J. OF LAW, ECON. & ORG. 1 (1995).

¹⁸ The developmental benefits that accrue through the presence of strong legal institutions in this sector include restrictions on arbitrary state action and the judicial and legislative protection of core human rights. See, e.g., Trubek & Galanter, *supra* note 2 (describing the emergence of a model which they coin “liberal legalism” which associated “the development of legal institutions” with “curbing arbitrary government action,” “protecting individual freedom,” “ensuring greater governmental responsiveness,” “enlarg[ing] the the sphere of liberty,” and “guarantee[ing] that governments would act in accordance with the wishes of the citizens”) (citations omitted).

¹⁹ See, e.g., TREBILCOCK & DANIELS, *supra* note 11; Michael Trebilcock & Poorvi Chitalkar, *From Nominal to Substantive Democracy: The Role and Design of Election Management Bodies*, 2 L. & Dev. R. 191 (2009); Trebilcock & Davis, *supra* note 1; Michael Trebilcock & Jing Leng, *The Role of Formal Contract Law and Enforcement in Economic Development*, 92 U. VIRGINIA L. REV. 1517 (2006); Michael Trebilcock & Mariana Mota Prado, *Path Dependence, Development, and the Dynamics of Institutional Reform*, 59 U. TORONTO L. REV. 341 (2009); Michael Trebilcock & Paul-Erik Veel, *Property Rights and Development: The Contingent Case for Formalization*, 30 U. OF PA. J. OF INT'L L. 397 (2008).

appreciate the degree to which his scholarship has enriched our understanding of why and how developing countries fail to achieve obviously desirable institutional outcomes.

As an elemental matter, Trebilcock has provided clarity with respect to the nature of the challenge presented. While law and development has been criticized as lacking an internally coherent focus,²⁰ Trebilcock has capitalized on the complex nature of the relationship, allowing his encyclopedic knowledge of the mechanisms and nature of economics, institutions, law, social choice, and politics to inform his analyses. Never content to allow disciplinary boundaries constrain his thought processes, his work on development veers from a narrow conception of the “right” legal institutions, centered around private law and formal courts, to explore the complex interactions among law and culture, procedure and substance, political processes and markets. Prying open the terms of the debate and the enlarging the sphere of factors considered relevant, he has underscored the importance of the police, prosecutors, correctional institutions, administrative agencies, justice access programs, legal education, and professional associations – as well as the courts – in promoting or impeding the development of a strong rule of law.²¹

His breadth of consideration has extended to nontraditional legal elements as well, including the role of history in influencing institutional paths and the capacity for change²² as well as the power of cultural, normative, and informal institutions on policy decisions²³ and the rule of law.²⁴ He has argued consistently that the rule of law enterprise cannot be considered in a

²⁰ See Brian Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development*, St. John’s University School of Law, Legal Studies Research Paper Series, Paper #09-0172 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1406999 5-9 (arguing that law and development should not be considered a “field” because it lacks a “uniquely unifying basis” and its eligibility criteria is defined in negative terms).

²¹ TREBILCOCK & DANIELS, *supra* note 11.

²² Trebilcock & Mota Prado, *supra* note 19.

²³ See Trebilcock, *The Choice of Governing Instrument: A Retrospective*, in *DESIGNING GOVERNMENT: FROM INSTRUMENTS TO GOVERNANCE* (F. Pearl Eliadis et al. eds.) (2005).

²⁴ Michael Trebilcock & Ronald Daniels, *The Political Economy of Rule of Law Reform*, 26 *MICH. J. OF INT’L L.* 99 (2004); Trebilcock & Davis, *supra* note 1.

vacuum, detached from the institutional context in which it attempted. In doing so, Trebilcock has – in the Burkean tradition – avoided promoting grand, centralized non-trivial institutional reform exercises, rather seeing virtue in paying homage to and working within existing institutional and cultural frameworks. He has consistently endorsed a context-specific approach to reform, arguing that one-size-fits-all programs, especially in the legal sphere, are likely to be at best suboptimal and at worse devastating.²⁵ Recognizing the tremendous value of knowledge of local conditions in charting courses of reform, he has based much of his work on the crucible of case studies, balancing and testing theory with evidence and practice.²⁶

Trebilcock’s explorations of the unique institutional arrangements that have shaped countries’ development trajectories have allowed him to provide a more nuanced account of the possibilities of and obstacles to reform. For example, Trebilcock has challenged the preeminent position bestowed upon the formalization of property rights by economists and legal scholars. Considered by the New Institutional Economists among the hallmarks of developed modern economies,²⁷ clear property rights are generally presumed to create the incentives necessary to encourage investment and create and capture wealth.²⁸ Reflective of this notion of the primacy of formalized property regimes, Hernando de Soto has famously concluded that “[w]ithout an

²⁵ Trebilcock & Davis, *supra* note 1 (“Optimal institutions generally, including legal institutions in particular, will often be importantly shaped by factors specific to given societies, including history, culture, and long-established political and institutional traditions.”); Trebilcock & Mota Prado, *supra* note 19, at 43-44. *See also* Rodrik et al., *supra* note 9 (“There is growing evidence that desirable institutional arrangements have a large element of context specificity, arising from differences in historical trajectories, geography, political economy, or other initial conditions...”); Rohini Pande and Christopher Udry, *Institutions and Development: A View from Below* (2006).

²⁶ TREBILCOCK & DANIELS, *supra* note 11; Trebilcock & Chitalkar, *supra* note 19; Trebilcock & Leng, *supra* note 19; Michael Trebilcock, *Communal Property Rights: The Papua New Guinean Experience*, 34 U. TORONTO L.J. 377 (1984).

²⁷ Douglass C. North, *Institutions and Economic Growth: An Historical Introduction*, 17 WORLD DEVELOPMENT 9 (1989).

²⁸ *See, e.g.*, ROBERT COOTER & HANS BERND-SHAEFER, SOLOMON’S KNOT: HOW LAW CAN END THE POVERTY OF NATIONS (forthcoming 2009).

integrated formalized property system, a modern market economy is inconceivable.”²⁹ However, while Trebilcock acknowledges the advantages attendant to fully functioning formalized, freely alienable property systems, his examination of the results of reform efforts in this field has led him to advise against the unbridled, uninformed pursuit of such programs. Beginning with his work in Papua New Guinea in the early 1980s, Trebilcock has questioned the thesis that there is a historic and natural evolution from communal land ownership to private property rights in land.³⁰ Recognizing that the social insurance provided by customary or communal land ownership may serve as an effective substitute for the security provided by strong private property rights, he has cautioned that the social costs of creating a formal property rights regime may outweigh the benefits. He has also emphasized the interconnectedness of institutions in the context of property, contending that changes in land titling processes may have extensive and unpredictable impacts on social, economic, and political stability. Finally, he has challenged policymakers to consider the factors underlying the perpetuation of the informal regime when designing any model of property rights transition.

This emphasis on the interconnections among institutions – formal as well as informal – and their impact on the possibilities of policy choice and change has been perhaps the overriding characteristic of Trebilcock’s contributions to law and development. He has expanded the range of factors, motivations, and incentives that must be considered when designing or implementing any reform program. For example, in his recent reflection on his seminal article with Douglas G. Hartle, “The Choice of Governing Instrument,”³¹ he emphasized the limitation of conventional

²⁹ HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 163 (2003).

³⁰ For a more thorough understanding of Trebilcock’s arguments on property rights regimes, see Trebilcock & Paul-Erik Veel, *Property Rights and Development: The Contingent Case for Formalization*, 30 U. OF PA. J. OF INT’L L. 397 (2008); Trebilcock & Kevin Davis, *Legal Reforms and Development*, 22 THIRD WORLD Q. 21 (2001); Trebilcock, *Communal Property Rights: The Papua New Guinean Experience*, 34 U. TORONTO L.J. 377 (1984).

³¹ Trebilcock & Hartle, *The Choice of Governing Instrument*, 2 INT’L R. OF L. AND ECON. 29 (1982).

public choice theory, noting that its selection of welfare economics as its normative reference point and its commitment to efficiency as its objective function may obscure the importance of a range of noneconomic and non-self-interested values that commonly motivate various participants in collective decision-making processes, including distributive justice, corrective justice, due process, communitarianism, and racial and gender equality.³² Beyond the substantive values that motivate decision-makers, Trebilcock has also stressed the need to consider the processes of change, emphasizing that the policy-making process is “much less rigid, static, and deterministic” than is frequently presumed.³³

The Next Stage: A Research Agenda for the Twenty-First Century

While Trebilcock’s contributions to the field to date have been remarkable, we recognize that the paradoxes and dilemmas of development remain far from resolved. The acknowledgement that legal institutions appear to have consequential relationship with a country’s development prospects³⁴ simply raises another host of queries. To lend shape and structure to the development enterprise, we need to know which institutions matter, or, at least, matter the most, in achieving certain outcomes. We also want to understand whether the ostensibly optimal institutions are equally determinative across all societal contexts and, if so, what scope exists for tailoring these institutions (and on what dimensions) to local circumstances. Finally, given the non-trivial cultural, political, economic, and technical challenges confronting institutional reform, we would like to identify the processes that are more likely to produce strong, productive institutional arrangements.

Sequencing

³² Trebilcock, *The Choice of Governing Instrument: A Retrospective in* DESIGNING GOVERNMENT: FROM INSTRUMENTS TO GOVERNANCE (F. Pearl Eliadis et al. eds.) (2005).

³³ *Id.*

³⁴ See text accompanying footnotes 15-16.

Even presuming we can identify and come to a consensus around the substantive legal elements that promote growth, we have limited information on what the optimal enactment process might be or what even factors to consider in designing an implementation plan. The order in which reforms are undertaken is not a trivial concern. Extending Kenneth Arrow's "General Impossibility Theorem"³⁵ to the institutional context, it becomes apparent that policy "outcomes depend on the procedural structure in which they are determined" when the choice system is intransitive.³⁶ Therefore, the order in which various options are considered and selections made – themselves products of agenda-setting which is influenced by the existing institutional landscape – may prove critical to the end result reached and, ultimately, to the path followed by the legal system. Each reform will produce corresponding (yet often unpredictable) shifts in political incentives that will in turn dictate the margins at which subsequent reform may be possible. However, this fundamental recognition that the order of legal reform is consequential reveals little about the manner in which individual decisions and activities will affect the institutional and political landscape of a given society. Without a thorough and context-specific understanding of the forces affecting the dynamics of institutional change, policymakers will continue to operate semi-blindly, adopting reforms without a comprehensive appreciation for the potential scope of the impact of their choices.

Role of Path Dependency

Recognizing that pure rational choice models fail to explain adequately the variability of performance, stability, and development indicators across countries, scholars of comparative economics and politics have embraced path dependence theories in order to understand why

³⁵ Briefly stated, Arrow's theorem holds that no social choice mechanism involving multiple decision-makers with multiple alternatives will be able to meet the criteria necessary for reasonable fairness.

³⁶ Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 618 (2001).

some states thrive while others stagnate or decline. When conceived broadly as simply the proposition that “history matters,” however, path dependence illuminates little in terms of how previous events impact current situations; the question remains how the past affects the present, particularly which mechanisms sustain the existing institutional constellation and what exogenous or endogenous forces are required to shift or transform that arrangement. While the costs and obstacles associated with changing institutional arrangements increase as they become more socially embedded,³⁷ we still lack concrete, specific strategies that may guide reformers operating within preexisting social, political, economic, and cultural constraints – constraints whose existence they may be threatening, either affirmatively or unintentionally.

In a recent article,³⁸ Trebilcock and Moto Prado explored path dependence theory in the context of development and institutional reform, identifying the challenges of presented to policymakers in the absence of any true institutional *tabula rasa*. Their article offered a critical analysis of the ways in which self-reinforcing mechanisms, switching costs, and critical junctures may promote or undermine reform efforts in developing countries, arguing for a gradualist, incremental, context-specific approach to policy change. While an important insight, the authors themselves also acknowledge that path dependence generally supports the notion that fundamental reform is usually possible only at “unusual” moments – so-called critical junctures – which are inherently difficult to anticipate or predict. Under all other circumstances, the margins at which changes are apt to be politically and institutionally feasible are quite narrow. However, the exact parameters of that bounded change are likely unknown and amorphous, as institutions, themselves impacted by the previous reform, shift. While this recognition of the dynamism of institutional arrangements helps to address some of the more overly deterministic

³⁷See Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POLI. SCI. REVIEW 251 (2000).

³⁸ Trebilcock & Mota Prado, *supra* note 19.

tendencies of path dependence theory,³⁹ it also highlights the theory's minimal predictive utility in the context of development until and unless more is understood how, why, and when such institutional shifts are likely to occur. Recognizing that legal systems do not operate in isolation from the processes by which they were created exposes how limited our knowledge concerning the ways in which they have been and continue to be shaped by the other institutions with which they interact truly is. The incorporation of path dependence theories thus challenges scholars and practitioners to explore – and explain – how the nurture⁴⁰ of institutions can affect their evolving nature.

Law, Culture, & Institutions

The lack of a coherent understanding of the complex interactions among law, culture, and institutions may be partly attributable to fundamental disagreement about the meaning of the terms themselves. For example, while empirical studies have demonstrated that the quality of institutions “trumps” everything else” in predicting national income levels,⁴¹ the debate over what institutions actually are rages on. Defined by Douglass North as the “humanly devised constraints that structure human interaction,”⁴² including “formal constraints such as constitutions and laws and informal constraints, such as norms, conventions and self-imposed codes of conduct,”⁴³ institutions have also been characterized as: “rule-setting bodies that unlike government lack the power to coerce through the use of legal force but that can use conventions

³⁹ See, e.g., Daron Acemoglu et al., *Reevaluating the Modernization Hypothesis*, NBER Working Paper No. 13334; Stanley L. Engerman & Kenneth L. Sokoloff, *Factor Endowments, Inequality, and Paths of Development among New World Economies*, *ECONOMIA*, Fall 2002; Rafael La Porta, et al., *Legal Determinants of External Finance*, 52 *J. OF FIN.* 1131 (1997); Rafael La Porta, et al., *Law and Finance*, 106 *J. OF POLI. ECON.* 1113 (1998); Rafael La Porta, et al., *The Quality of Government*, 15 *J.L. ECON. & ORG.* 222 (1999); *Judicial Checks and Balances*, 112 *J. OF POLI ECON.* 445 (2004).

⁴⁰ Our use of the word “nurture” does not imply that policymakers should abandon reform efforts. The nurture of institutions may occasionally require significant change or destruction.

⁴¹ Dani Rodrik, et al., *Institutions Rule: The Primacy of Institutions Over Geography and Integration in Economic Development*, 9 *J. OF ECON. GROWTH* 131 (2004).

⁴² DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE* 3 (1990).

⁴³ Mary M. Shirley, *Institutions and Development in HANDBOOK OF NEW INSTITUTIONAL ECONOMICS* (Claude Ménard and Mary M. Shirley, eds., 2005).

– involving ostracism, reputation, or information transmission – to enforce their rules;”⁴⁴ “the humanly devised rules that constrain or enable individual and collective behavior” which may be informal or formal but are always “bureaucratic and socially-embedded;”⁴⁵ “formal or informal procedures, routines, norms and conventions embedded in the organizational structure of the polity or political economy.”⁴⁶ Beyond the litany of constitutive elements, the nature of institutions is similarly unresolved – they may be viewed as inherently static, sources of stability and predictability, or as dynamic, engaged in dialectical exchanges where they are constantly and simultaneously shaping and being shaped by other social, economic, and political forces.

Analysis of the relationship between law and institutions will also be shaped by the degree to which informal norms are included in the equation. While legal centralists⁴⁷ hold that social constraints and rules must be deliberately created and administered – via formal institutional arrangements – in order to be rational, efficient, and effective, scholars such as Robert Ellickson argue that extralegal considerations, such as reputation, social harmony, and future interests, coalescing in the form of community norms, may be just as potent as formal laws and legal institutions in effecting social control.⁴⁸ Rosa Ehrenreich Brooks emphasizes the potential primacy of such informal customs and behavior patterns in resolving disputes and constraining deviant or unfavorable conduct, noting that “at times ‘the law’ in its formal sense is of peripheral importance at best. Although we imagine that the trappings of formal law are

⁴⁴ Richard H. McAdams & Eric B. Rasmusen, Norms in Law and Economics 19-20 (March 29, 2005 (unpublished manuscript, on file with author).

⁴⁵ Jo Beall, et al., *Traditional Authority, Institutional Multiplicity and Political Transition in KwaZulu-Natal, South Africa*. 4 (Crisis States Centre Working Paper 48, London School of Economics, July 2004).

⁴⁶ Peter A. Hall & Rosemary C.R. Taylor, *Political Science and the Three New Institutionalisms*, 44 POLI. STUD. 936, 942 (1996).

⁴⁷ “Legal centralism,” a term coined by Marc Galanter, refers to the Hobbesian notion of the centrality of the state and its imposed, formal constraints (such as law) in the maintenance of order. Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. OF LEGAL PLURALISM AND UNOFFICIAL L. 1.

⁴⁸ ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

central to creating order and reducing violence, there is little evidence that this is so.”⁴⁹

Trebilcock’s work on customary property regimes supports such arguments, positing that informal arrangements may serve important economic and non-economic purposes that may not be attainable through more formalized structures.⁵⁰

In addition, when organically derived, formal laws may themselves be considered the expression of both the cohesiveness and the inefficacy of social norms. Laws serve as mechanisms for regulating behavior when self-interest would not lead to “the correct results as measured by efficiency or fairness.”⁵¹ Their existence may be attributable to uniform social acknowledgement that a given behavior is not to be tolerated (law serving an expressive function, communicating community norms), or laws may reflect the inadequacy of unofficial group sanctions to deter certain activities (law in an instrumental role). Such a conception of the primary purposes of law – motivated by an internally recognized or communicated necessity – calls into question the benefits realizable by externally driven reformers. If law itself arises as an expression of community beliefs or in response to a demonstrated social need, the absence of law that would promote such socially beneficial must be indicative of some unexplained variable. To what is the failure of the internal adoption of such a law attributable – lack of knowledge, lack of political will, lack of institutional or resource capacity, or calculated, rational choice among possible policy instruments? The answer to such queries will depend on the context of the individual country but may have far-reaching consequences for the success (or failure) of legal reform efforts.

⁴⁹ Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the “Rule of Law,”* 101 MICH. L. REV. 2275, 2289 (2003).

⁵⁰ TREBILCOCK & DANIELS, *supra* note 11; Trebilcock & Chitalkar, *supra* note 19; Trebilcock & Leng, *supra* note 19; Michael Trebilcock, *Communal Property Rights: The Papua New Guinean Experience*, 34 U. TORONTO L.J. 377 (1984).

⁵¹ McAdams & Rasmusen, *supra* note 43, at 2.

Finally, culture, whose various definitions⁵² include “the body of values, beliefs, and attitudes that members of a society share,”⁵³ “the flow of meanings that human beings create, blend, and exchange,”⁵⁴ and “part of the set of capabilities that people have—the constraints, technologies, and framing devices that condition how decisions are made and coordinated across actors,”⁵⁵ provides the context, the underlying cognitive lens through which personal, as well as policy, decisions are made within a given polity or community. While debates over the role of culture in influencing paths of development have been extensive,⁵⁶ there has yet to emerge a comprehensive theoretical framework detailing how formal institutions, politics and power structures, and culture interact and shape one another to promote or undermine stability and progress, particularly in the legal arena.

If we accept that cultural factors “lie at the heart of the functioning of formal and informal institutions that determine non-market outcomes in policy decision making, service provision, participation, and conflict management,”⁵⁷ the enterprise of legal reform may be seen

⁵² In 1952, before cultural studies blossomed as an academic school of inquiry, anthropologists A.L. Kroeber and Clyde Kluckhohn identified 161 formal definitions of “culture.” See A.L. Kroeber & Clyde Kluckhohn, *Culture: A Critical View of the Concepts and Definitions*, 47 PAPERS OF THE PEABODY MUSEUM OF AM. ARCHEOLOGY AND ETHNOLOGY (Harvard University, 1952), reprinted in *CULTURE: A CRITICAL VIEW OF THE CONCEPTS AND DEFINITIONS* (1963).

⁵³ LAWRENCE E. HARRISON, *THE CENTRAL LIBERAL TRUTH: HOW POLITICS CAN CHANGE A CULTURE AND SAVE IT FROM ITSELF* 7 (2006). Samuel Huntington echoes this definition, describing culture as “the values, attitudes, beliefs, orientations, and underlying assumptions prevalent among people in a society.” Samuel P. Huntington, *Foreword: Cultures Count* in *CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS*, xv (Lawrence E. Harrison and Samuel P. Huntington, ed., 2000).

⁵⁴ Lourdes Arizpe, *The Intellectual History of Culture and Development Institutions in CULTURE AND PUBLIC ACTION* 164 (Vijayendra Rao & Michael Walton, ed., 2004).

⁵⁵ Vijayendra Rao & Michael Walton, *Culture and Public Action: Relationality, Equality of Agency, and Development* in *CULTURE AND PUBLIC ACTION* 4 (Vijayendra Rao & Michael Walton, ed., 2004)

⁵⁶ Compare DAVID LANDES, *THE WEALTH AND POVERTY OF NATIONS: WHY SOME ARE SO RICH AND SOME SO POOR* 516 (1999) (positing that “culture makes all the difference”) and SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 29 (1996) (asserting “the major differences in political and economic development among civilizations are clearly rooted in their different cultures”), with Amartya Sen, *How Does Culture Matter?* in *CULTURE AND PUBLIC ACTION* 38 (Vijayendra Rao & Michael Walton, ed., 2004) (arguing that it would be a “heroic oversimplification” to conclude “that the fates of countries are effectively sealed by the nature of their respective cultures”).

⁵⁷ Vijayendra Rao & Michael Walton, *Conclusion: Implications of a Cultural Lens for Public Policy and Development Thought* in *CULTURE AND PUBLIC ACTION* 360 (Vijayendra Rao & Michael Walton eds., 2004).

as a subversion of those organic processes of institutional creation and development. Rosa Ehrenreich Brooks notes that “the rule of law is not something that exists ‘beyond culture’ and that can be somehow added to an existing culture by the simple expedient of creating formal structures and rewriting constitutions and statutes,”⁵⁸ an important consideration in understanding the effect of legal reforms on a given society. If “culture is the mother [and] institutions are the children,”⁵⁹ the “stickiness” and success of legal reforms in receptor countries reflects not only the merit of the substance of the new law⁶⁰ and the process of transference⁶¹ but also the compatibility of the imposed/adopted system with the existing social values and cultural norms. Therefore, as Brooks notes, those societies which already embody or embrace some of the characteristics of the new order will be more “receptive” to the changes in the institutional landscape, substantively—not just formalistically—integrating the rules and attitudes into their social interactions:

In societies that lack a strong and shared substantive commitment to the rule of law, changes in the formal law are likely to have little effect on people’s behavior. To put it a little differently, what we have is a serious chicken-and-egg problem; we know, more or less, that given certain widely shared normative commitments in a given society, formal law can lead to changes in cultural assumptions and behavior. But when such normative commitments are not widely shared, changes in formal law and the structure of legal institutions are likely to have little real impact. The paradox is that when

⁵⁸ Brooks, *supra* note 48 at 2285.

⁵⁹ Daniel Etounga-Manguelle, *Does Africa Need a Cultural Adjustment Program?* in CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS 75 (Lawrence E. Harrison & Samuel P. Huntington, ed., 2000).

⁶⁰ For example, in a series of influential articles, Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, Robert Vishny argue that substance of the legal system adopted in a given country (specifically whether it belongs to the common or civil law tradition), is determinative with regard to the subsequent rules and institutional arrangements that develop and in turn support or undermine economic progress. See Rafael La Porta, et al., *Legal Determinants of External Finance*, 52 J. OF FIN. 1131 (1997); Rafael La Porta, et al., *Law and Finance*, 106 J. OF POLI. ECON. 1113 (1998); Rafael La Porta, et al., *The Quality of Government*, 15 J.L. ECON. & ORG. 222 (1999); *Judicial Checks and Balances*, 112 J. OF POLI ECON. 445 (2004).

⁶¹ See, e.g., Katharina Pistor, Daniel Berkowitz, and Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003) (arguing that the way in which the law was transplanted—both the method of adaptation and the harmony between the new and old laws—determines the effectiveness of the transplant and thus the rule of law outcomes).

people already believe law matters, it will matter; when people think law doesn't matter, it never can, and it is unclear how to go from the latter state to the former.⁶²

Brooks' arguments underscore yet again the influence of the past in constructing present and future opportunities. The inherited artifactual structure of a society—incorporating cultural norms as well as institutional arrangements—may reflect a set of beliefs that are impervious to a given change either because that adjustment runs contrary to that existing value system or because the proposed institutional alteration threatens entrenched elites.⁶³ Therefore, while history “matters not just because we can learn from the past, but because the present and the future are connected to the past by the continuity of a society's institutions,”⁶⁴ similarly, the cultural norms and customs that characterize a given community directly influence the prospect of their acceptance of or receptivity to an imposed formal legal order.

However, the recognition of the power of culture may be read too pessimistically. The characterization of cultures as either “good” or “bad” for development, legal institutions, or rule of law may too easily be translated into a defeatist approach⁶⁵ that overlooks the dynamic potential of culture itself. Development programs would benefit from acknowledging not only that culture matters but also that it is contested and living. As noted by Amartya Sen, if “culture is recognized to be nonhomogenous, nonstatic, and interactive, and if the importance of culture is integrated with rival sources of influence, then culture can be a very positive and constructive part in our understanding of human behavior and of social and economic development.”⁶⁶

⁶² Brooks, *supra* note 48, at 2301.

⁶³ See, generally, DOUGLASS C. NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE, 2005.

⁶⁴ DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE vii (1990).

⁶⁵ Such as that that accompanied the wave of “toxic culture” literature in the late 1990s. See, e.g., SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (1996); DAVID LANDES, THE WEALTH AND POVERTY OF NATIONS: WHY SOME ARE SO RICH AND SOME SO POOR (1998).

⁶⁶ Amartya Sen, *How Does Culture Matter?* 44 in CULTURE AND PUBLIC ACTION (Vijayendra Rao & Michael Walton eds.) (2004).

The task for law and development researchers and practitioners remains to elucidate the manner in which the clearly powerful yet amorphous elements of law, culture, and institutions can interact and support productive reform.

Role for International Institutions

While much of Trebilcock's work in law and development has emphasized the importance of considering internal conditions when developing reforms, his endorsement of the need to engage local actors and communities does not imply a rejection of the continued role of the international community in the development enterprise. However, while we may have a firm grasp on the instruments⁶⁷ and range of actors available to assist developing countries, we lack an appreciation for which types of interventions are likely to have the largest possible productive impact given the particular institutional arrangements in the target country. Even within the limited context of assistance programs, there is limited literature on whether unilateral, bilateral, or multilateral aid programs are more effective and why. The plethora of variables that may contribute to the success or failure of a given intervention creates challenges in isolating the truly determinative factors. Even if such components can be identified within an individual program, the complexities of institutional and situational factors that might have affected that outcome may limit the utility of the lessons learned for other contexts. In short, we as an international community still do not know the recipe to allow underdeveloped countries to achieve their optimal level of growth and stability, and, perhaps more disarming, we have not clearly charted a course that will allow us to get there. Such a strategy will require circumspect consideration of the multitude of political, economic, and cultural elements that may encourage or prevent

⁶⁷ Broadly, such tools range from technical and/or financial assistance to imposed conditionalities in exchange for a predetermined benefit to sanctions. See TREBILCOCK & DANIELS, *supra* note 11, at 341-52.

productive decision-making in a given country – a task for which Trebilcock’s talents are aptly suited.

Conclusion

While the extraordinary breadth of Trebilcock’s career highlights the facility with which he engages across fields, fundamentally, Trebilcock’s value lies in his identity as an interdisciplinarian rather than a “mere” multidisciplinarian. This ability to recognize and analyze the interconnections that characterize modern society has been demonstrated notably in his work on law and development. At the core of law and development lies a central conundrum: why do obviously desirable institutional outcomes not happen in the developing world? The answer to this central pressing question requires nuanced consideration of the nature of institutions, their strength, and their potential to produce destructive/detrimental results even when (or particularly when) they are weak. It also requires an appreciation for the roles and power of history, culture, and political incentives and the ways in which they interact. Trebilcock has made an admirable and imposing start in resolving these dilemmas, and we look forward to witnessing what the next fifty years of his scholarship reveals.