

PERSPECTIVES FROM THE RULE OF LAW AND INTERNATIONAL ECONOMIC DEVELOPMENT: ARE THERE LESSONS FOR THE REFORM OF JUDICIAL SELECTION IN THE UNITED STATES?

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*The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.*¹

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*Most U.S. judges and court reform organizations regard elections as a poor method for selecting judges. They believe judges can be influenced by the fear of electoral retaliation against decisions that conform to the law but not popular preferences. They also fear that judges may compromise their independence by incurring obligations to those who provide financial support to their election campaigns.*²

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1. Central European and Eurasian Law Initiative, U.N. Basic Principles on the Independence of the Judiciary 2 (2004), http://www.abanet.org/rol/programs/resource_judicial_reform.html (follow "UN Basic Principles on the Independence of the Judiciary" hyperlink).

2. Mira Gur-Arie & Russell Wheeler, *Judicial Independence in the United States: Current Issues and Relevant Background Information*, in GUIDANCE FOR PROMOTING JUDICIAL

INTRODUCTION

I have learned through multiple conversations and extensive study that American writers on domestic judiciaries and American writers on foreign judiciaries seem to be on separate paths. They often publish in different places, and if they read each other's work, it is not obvious from some or perhaps much of what I have read. Not too long ago, I was on one of those separate paths myself (the domestic one) until I was told, in substance, by a friend who was on the other one (the international and rule of law one) that "the issues on both paths are really the same, don't you know?" This simple but perceptive thought gave me an entirely new perspective. The objectives of this article include joining the two paths, applying to the domestic sphere perspectives from the field of rule of law and international economic development, inspiring further scholarship, and starting on the road toward positive change.

This article will consider whether a relationship exists between good business and a fair and impartial judiciary; if so, whether a compelling domestic economic rationale for American judicial reform may be identified; and if so, how it may be achieved. It will begin by focusing on the international principles of rule of law originating in work sponsored by international financial institutions and other governmental and non-governmental organizations, which have disbursed billions of dollars to improve judicial systems in developing countries. These principles include key components of the rule of law, such as judicial impartiality, independence,³ competence, and accountability;⁴ and they are applicable

INDEPENDENCE AND IMPARTIALITY 133, 140 (rev. ed., USAID Office of Democracy and Governance 2002), available at http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacm007.pdf.

3. See MICHAEL J. TREBILCOCK & RONALD J. DANIELS, *RULE OF LAW REFORM AND DEVELOPMENT* 61-63 (2008); Pamela S. Karlan, *Judicial Independences*, 95 GEO. L.J. 1041, 1042-43 (2007); see also Suleimanu Kumo, *The Rule of Law and Independence of the Judiciary Under the Sharia*, 8 J. ISLAMIC & COMP. L. 100, 103 (1978) ("The principle of the rule of law is inextricably mixed with the principle of independence of the judiciary. The latter principle means, in effect, that judges shall enjoy immunity from interference by the government and [be free] to decide issues before them only in accordance with the law without fear of adverse repercussions. This is secured in modern constitutions, by provisions laying down well defined procedures for appointments to the higher judicial offices, charging judicial salaries on the consolidated fund thus giving them fixed salaries and excluding these from parliamentary debates and by the procedure for their removal from office."); Sam Rugege, *Judicial Independence in Rwanda*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 411, 411, 415 (2007) (noting the relationship between the rule of law and judicial independence as well as economic progress: "Judicial independence is a universally recognized principle in democratic societies. It is a prerequisite for a society to operate on the basis of the rule of law," and citing the Asian Development Bank for the following proposition:

The cornerstone of successful reform is the effective independence of the judiciary. That is a prerequisite for an impartial, efficient and reliable judicial system. Without judicial independence, there can be no rule of law, and without the rule of law the conditions are not in place for the efficient operation of an open economy, so as to ensure conditions of legal security and foreseeability.)

See also Evelyn Lance, Commentary, *Emerging Democracies Get Help from Isles*, HONOLULU ADVERTISER, May 2, 2005 at 1, available at <http://www.courts.state.hi.us/attachment/7337E1F0797A8F54EB5741B062/edghfi050205.pdf> (noting that "many [emerging democra-

to the United States as well as to other countries.⁵ This article will also consider the basis for linking the rule of law and economic development, various causation controversies affecting the linkage, and the likely economic consequences of rule of law violations. It will then assess state court judicial elections in the United States in light of the rule of law, whether the American practice of judicial elections is consistent with the rule of law, and the potential economic implications.

The article concludes that a sufficient connection between the rule of law and sustainable economic progress (whether called development or growth) has been demonstrated to warrant the concern of governmental and nongovernmental policymakers, both at home and abroad; that the principles of the rule of law and economic development apply domestically as well as internationally; that state court judicial elections create or appear to create rule of law violations in the United States; and that Americans most concerned about the welfare of our economy should work for the elimination of state court elections in the United States.

I. THE RULE OF LAW AND INTERNATIONAL ECONOMIC DEVELOPMENT

A. *The Enormous International Commitment to Promoting Rule of Law*

The notion that the rule of law promotes economic development is built on various factors, including common sense, practical assumptions, logic, and to some extent, empirical studies.⁶ Based on this level of knowledge, policymakers have made decisions and taken action, includ-

cies] . . . recognize that a strong, independent and professional judiciary . . . is an essential element of a free, orderly and economically vital society”).

4. See TREBILCOCK & DANIELS, *supra* note 3, at 63-65; see also Stefan Voigt, *The Economic Effects of Judicial Accountability: Some Preliminary Insights*, 27 (Int'l Ctr. for Econ. Research, Working Paper No. 19, 2005) (considering the relationship between the rule of law and judicial accountability as well as economic progress):

In this paper, the hypothesis that judicial independence and judicial accountability are not necessarily competing ends but can be complementary means toward achieving impartiality and, in turn, the rule of law is presented. It is argued that judicial accountability can increase economic growth through various channels[,] one of which is the reduction of corruption. *Id.*

. . . Independent judges who are not accountable and do not incur any cost for such behavior, will prevent the judiciary from unfolding its potentially beneficial consequences. A low degree of [judicial accountability] can thus increase uncertainty with regard to the status of the promises made by the legislature [*i.e.*, the laws passed by the legislature, with reference to private property]. Higher levels of uncertainty are expected to induce lower aggregate investment and thus lower levels of economic growth.

Id. at 10-11. See also *id.* at 27 (Voigt recommends further research to test his article's theories).

5. The general applicability of the principles of judicial impartiality, independence, competence, and accountability to the United States judiciary is self-evident. In support of the general applicability of the rule of law to the United States, see, for example, World Justice Project, *Domestic Mainstreaming of the Rule of Law*, <http://www.worldjusticeproject.org/domestic-mainstreaming> (last visited Nov. 4, 2008). See also Symposium, *Is the Rule of Law Waning in America?*, 56 DEPAUL L. REV. 223 (2007).

6. See generally John K.M. Ohnesorge, *The Rule of Law*, 3 ANN. REV. OF L. & SOC. SCI. 99, 100 (2007).

ing disbursing extraordinary sums of money to promote the rule of law as a key component of international assistance to developing countries.⁷ Policymakers are on a timetable: they need to make decisions now on the basis of the knowledge that they have to try to improve or not improve foreign legal systems. If they decide to take action, they must decide what kind of action to take and where.

At the same time, an academic debate proceeds over what we know about the subject, including: what is the rule of law; what is economic development; do improvements to the rule of law promote economic development; what is the measure of each; does economic development in turn bring about a demand for the rule of law; does it do so everywhere; are there exceptions; what caused the exceptions; do they matter; and how do we know and prove the connection between the rule of law and economic development. Is the connection just an association, perhaps a correlation, or is there demonstrated causation? Is there empirical evidence of this; if so, how much; and how much is necessary? If not, what evidence should we obtain and how should we obtain it? The academic discourse is divided, sometimes tentative, other times assertive, and often calls for further research, but it forms a vast literature.

The effort in the “field of law and economic development . . . has been lead [sic] by the international financial institutions (IFIs)—the World Bank, the International Monetary Fund (IMF), the Asian Development Bank, etc.—by the aid and development arms of the U.S. government and the European Union, and to a lesser extent by NGOs. . . . In this context, the Rule of Law is understood as being related to economic development and the workings of a market economy, rather than as a set of normative political commitments.”⁸ These and other organizations, such as and including the Inter-American Development Bank, the United States Agency for International Development (USAID), and the American Bar Association (ABA) through its Rule of Law Initiative (ABA ROLI)⁹ and its diverse activities, have disbursed or overseen the disbursement of billions of dollars.¹⁰ The many activities of ABA ROLI

7. See, e.g., TREBILCOCK & DANIELS, *supra* note 3, at 2.

8. Ohnesorge, *supra* note 6, at 100.

9. See American Bar Association, *About the ABA Rule of Law Initiative*, <http://www.abanet.org/rol/about.shtml> (last visited Oct. 17, 2008) (“The Rule of Law Initiative (ABA ROLI) is a mission driven, non-profit organization with an annual budget of over \$30 million. The Rule of Law Initiative's primary funders are the United Agency for International Development (USAID), the Department of State, and the Department of Justice. It also receives funding from foundations, private individuals, law firms and corporations.”).

10. Richard E. Messick, *Judicial Reform and Economic Development: A Survey of the Issues*, 14 WORLD BANK RES. OBSERVER 117, 117 (1999); Richard E. Messick, *Judicial Reform: The Why, the What, and the How* 1 (Mar. 15-17, 2002), <http://www.pogar.org/publications/judiciary/messick/reform.pdf>. The work of some of the involved organizations includes: for ABA ROLI's judicial reform program, see American Bar Association, *Judicial Reform Programs*, <http://www.abanet.org/rol/programs/judicial-reform.html> (last visited Oct. 17, 2008); for the World Bank, see The World Bank, *Judicial Reform*, <http://tinyurl.com/59njp9> (last visited Oct. 17, 2008); for the Inter-American Development Bank, see Inter-American Development Bank, *A Decade of*

appear on its website and are too extensive to catalog, but cover numerous countries and projects in the area of legal reform, including gender equality projects.¹¹

Judicial Reform, http://www.iadb.org/news/articledetail.cfm?language_EN&artid=2127 (last visited Oct. 17, 2008) (“The reform of Latin America’s judicial systems, once considered a specialized concern of judges and lawyers, is now at the center of the region’s development agenda, IDB President Enrique V. Iglesias said at a recent conference.”); for USAID, see USAID, *Strengthening the Rule of Law & Respect for Human Rights*, http://www.usaid.gov/our_work/democracy_and_governance/rol.html, (last visited Oct. 17, 2008) (“[C]ivil and commercial codes that respect private property and contracts are key ingredients for the development of market-based economies. USAID’s efforts to strengthen legal systems fall under three inter-connected priority areas: supporting legal reform, improving the administration of justice, and increasing citizens’ access to justice.”); for the Asian Development Bank, see Eveline N. Fischer, Deputy Gen. Counsel, Asian Dev. Bank, *Lessons Learned from Judicial Reform: The ADB Experience* (Oct. 20, 2006) (“Since 1995, international donors have invested more than US\$1.0 billion in legal and judicial reform work—for good reason. Strong rules-based institutions promote economic growth. A fair, independent and efficient judiciary supports equitable development.”), <http://www.adb.org/Media/Articles/2006/10829-speech-Eveline-Fischer/>; and for the IMF, see, e.g., Press Release, International Monetary Fund, *IMF Executive Board Approves Three-Year US \$75.8 Million Stand-By Arrangement for Macedonia* (Sept. 15, 2005) (“Comprehensive judicial reform, to be implemented over several years, will create a fairer and more predictable framework for business activity by increasing the independence and professionalism of judges, eliminating court delays, and removing misdemeanors and administrative cases from the regular courts.”), <http://www.imf.org/external/np/sec/pr/2005/pr05196.htm>.

Although not an aid-dispensing organization, Transparency International “raises awareness and diminishes apathy and tolerance of corruption, and devises and implements practical actions to address it.” Transparency International, *About Transparency International*, http://www.transparency.org/about_us (last visited Oct. 17, 2008). It has likewise recognized a connection between judicial reform—specifically, eradication of corruption, economic progress and other societal needs. See Transparency International, *Other Thematic Issues*, http://www.transparency.org/global_priorities/other_thematic_issues/judiciary (last visited Oct. 17, 2008) (“It is difficult to overstate the negative impact of a corrupt judiciary: it erodes the ability of the international community to tackle transnational crime and terrorism; it diminishes trade, economic growth and human development; and most importantly, it denies citizens impartial settlement of disputes with neighbors or the authorities.”); Mary Noel Pepys, *Corruption within the judiciary: causes and remedies*, in TRANSPARENCY INTERNATIONAL, *GLOBAL CORRUPTION REPORT 2007 3* (Cambridge Univ. Press 2007), available at http://www.transparency.org/publications/gcr/download_gcr/download_gcr_2007#download; see also Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 39 (Thomas Carothers ed., Carnegie Endowment for Int’l Peace 2006) [hereinafter PROMOTING] (“Real equality before the law requires courts that are strong and independent enough to enforce it. It also depends particularly on a lack of corruption within the judiciary, because the rich can use bribes to escape equal justice.”).

See also the United States Institute for Peace (USIP) Rule of Law program, which seeks to advance “peace through the development of democratic legal and governmental systems.” United States Institute of Peace, <http://www.usip.org/specialists/bios/current/kritz.html> (last visited Oct. 28, 2008). Also, the “USIP’s Rule of Law Program works to assist institutions and processes that will best bring about law-based management of international conflict and a sense of justice. The program is based on the premise that adherence to the rule of law entails far more than the mechanical application of static legal technicalities; it requires an evolutionary search for those institutions and processes that will best bring about authentic stability through justice.” <http://www.usip.org/ruleoflaw/about.html> (last visited October 28, 2008). For general information about USIP, see <http://www.usip.org/aboutus/index.html> (last visited Oct. 28, 2008).

11. Specifically, the ABA’s Rule of Law Initiative is involved in the following substantive areas: anti-corruption, criminal law reform and human trafficking, gender issues, human rights and conflict mitigation, judicial reform, legal education reform and legal profession reform. See American Bar Association, *supra* note 10. Also, it is involved in over forty countries in Africa (including North Africa), Asia, Europe and Eurasia, Latin America, the Caribbean, and the Middle East. *Id.* Among the many efforts of the Rule of Law Initiative has been the Arab Women’s Legal Network

For example, according to a 2002 report:

The World Bank, the Interamerican [sic] Development Bank, and the Asian Development Bank have extended over \$800 million in loans for judicial reform. . . . [T]he United Nations Development Program, the European Union and its member states, and the American, Australian, Canadian, and Japanese governments have provided significant grant aid to help developing nations improve the operation of the judicial branch of government.¹²

The World Bank reports having lent \$273.2 million in 2002, \$530.9 million in 2003, \$503.4 million in 2004, \$303.8 million in 2005, \$757.6 million in 2006, and \$424.5 million in 2007 on rule of law initiatives.¹³ As one commentator noted, there has been a “massive surge in development assistance for law reform projects in developing and transition economies involving investments of many billions of dollars. The World Bank alone reports that it has supported 330 ‘rule of law’ projects and spent \$2.9 billion on this sector since 1990.”¹⁴

(AWLN), for which the ABA has provided “technical assistance and capacity-building support.” See *Arab Women’s Legal Network Holds General Meeting in Amman*, ABA RULE OF LAW INITIATIVE, July 9, 2007, http://www.abanet.org/rol/news/news_jordan_awln_general_meeting.shtml. The idea of the AWLN was conceived in February 2004 at a conference in Amman, Jordan, and the network was formally launched in 2005. See ABA Rule of Law Initiative, *The Arab Women’s Legal Network*, <http://www.abanet.org/rol/mena/awln.shtml> (last visited Sept. 19, 2008). The purpose of the AWLN included considering and advancing issues facing women in the legal profession and women’s rights generally. *Id.*; see also U.S. Dep’t of State, *Women and the Law—A Regional Dialogue: Conference Summary, Observations, and Conclusions* (2004 Amman conference), <http://www.state.gov/p/nea/rls/31797.htm> (last visited Oct. 10, 2008).

Two of the persons acknowledged in this article were involved with the AWLN, one Evelyn Lance, in the AWLN’s formative phase at the 2004 Amman conference, see, for example, Lance, *supra* note 3, and the other, Martha Dye, in managing the North African segment of the program supporting the AWLN. See, e.g., A Bulletin for CEELI Staff, Volunteers and Friends Around the World, *Women Legal Professionals Come Together for ABA Training in Morocco*, May 20, 2005, available at http://mail.abanet.org/scripts/wa.exe?A3=ind0505&L=ROL_ENEWS&E=quoted-printable&P=75739&B=%3D_NextPart_001_01C55D4D.13469F2C&T=text%2Fhtml;%20charset=iso-8859-1.

12. Messick, *Judicial Reform: The Why, the What, and the How*, *supra* note 10, at 1; see also U.S. GEN. ACCOUNTING OFFICE, FOREIGN ASSISTANCE RULE OF LAW FUNDING WORLDWIDE FOR FISCAL YEARS 1993-98 2-3 (1999), available at <http://www.gao.gov/archive/1999/ns99158.pdf>:

Based on the funding data that cognizant departments and agencies made available, the United States provided at least \$970 million in rule of law assistance to countries throughout the world during fiscal years 1993-98 At least 35 entities from various U.S. departments and agencies have a role in U.S. rule of law assistance programs. The Departments of State and Justice and USAID are the principal organizations providing rule of law training, technical advice, and related assistance. The Department of Defense, the U.S. Information Agency (USIA), numerous law enforcement agencies and bureaus, and other U.S. departments and agencies also have a direct role.

Id. Research has not disclosed an updated study by the General Accounting Office.

13. THE WORLD BANK, SUMMARY OF FISCAL YEAR ACTIVITIES 55 (2007), <http://siteresources.worldbank.org/EXTANNREP2K7/Resources/AR07Section3.pdf>.

14. TREBILCOCK & DANIELS, *supra* note 3, at 2; see also *Economics and the Rule of Law: Order in the Jungle*, THE ECONOMIST, Mar. 13, 2008, available at http://www.economist.com/displaystory.cfm?story_id=10849115 (“Western donors have poured billions into rule-of-law projects over the past 20 years.”).

The Millennium Challenge Corporation (MCC) is a United States government corporation that provides aid to countries meeting certain levels of satisfactory standards of good governance.¹⁵ Founded in 2004, the “MCC is based on the principle that aid is most effective when it reinforces good governance, economic freedom and investments in people.”¹⁶ Eligibility for grants depends, among other things, on whether the country meets certain thresholds in particular categories. These categories include: “Ruling Justly” indicators, consisting of “Political Rights” and “Civil Liberties” (measured by Freedom House indexes); “Control of Corruption;” “Government Effectiveness;” “Rule of Law;” and “Voice and Accountability” (measured by World Bank Institute indexes).¹⁷ Using these indicators, the MCC evaluates countries on, among other things, “public confidence in the . . . judicial system; . . . strength and impartiality of the legal system; . . . independence, effectiveness, predictability, and integrity of the judiciary; . . . [and the training of judges] in order to carry out justice in a fair and unbiased manner.”¹⁸ Eligibility does not require minimum scores in all indicators.¹⁹ The purpose of the indicators is “to identify countries with policy environments that will allow Millennium Challenge Account funding to be effective in reducing poverty and promoting economic growth.”²⁰

Rule of law reform includes both judicial reform and overall legal reform.²¹ What falls into the category of judicial reform or legal reform

15. Carnegie Endowment for International Peace, *Fact-Sheet: The Millennium Challenge Corporation and Political Reform in the Arab World*, <http://www.carnegieendowment.org/files/mccfactsheet1.pdf>.

16. Millennium Challenge Corporation, *About MCC*, <http://www.mcc.gov/about/index.php> (last visited Oct. 17, 2008).

17. Carnegie Endowment for International Peace, *supra* note 15.

18. Millennium Challenge Corporation, *Guide to the MCC Indicators and the Selection Process: Fiscal Year 2008 16-17* (2008) <http://www.mca.gov/documents/mcc-fy08-guidetoindicatorsandtheselectionprocess.pdf>.

19. Morocco received in August 2007 a \$698 million five-year compact, despite passing only two of the six “Ruling Justly” indicators, in light of its qualification in other categories of eligibility. Carnegie Endowment for International Peace, *supra* note 15. Some countries which might not otherwise qualify for funding from the Millennium Challenge Corporation may meet the test for threshold funding. See Press Release, U.S. Dept. of State, Millennium Challenge Corporation Board of Directors Announces 2007 Threshold Countries: Niger; Peru; and Rwanda (Nov. 8, 2008), *available at* <http://www.state.gov/p/af/rls/76110.htm> (“MCC’s Threshold Program is designed to assist countries on the ‘threshold’ of Millennium Challenge Account (MCA) eligibility for Compact assistance. Threshold countries must demonstrate a commitment to reforms that will address the specific policy weaknesses identified by the MCA eligibility criteria.”).

Improving conditions in developing nations, of course, requires attention to sectors in addition to rule of law reform in an integrated approach. See Office of the Coordinator for Reconstruction and Stabilization, Western Hemisphere Planning and Development Section, *Active Response Corps Regional Deployment, Port-au-Prince, Haiti*, <http://www.crs.state.gov/index.cfm?fuseaction=public.display&shortcut=4RPT> (last visited Dec. 7, 2008) (mentioning security and police, judicial improvement, good governance and community building, and economic and infrastructure development).

20. Millennium Challenge Corporation, *supra* note 18, at 2.

21. Cf. Kleinfeld, *supra* note 10, at 47 (“Although most legal scholars define the rule of law by its ends, most programs to build the rule of law implicitly define the rule of law by its institutional attributes. . . . Internally, most practitioner organizations rarely use the words *rule-of-law*

“blurs at the margin,” but the “core of a judicial reform program typically consists of measures to improve the operation of the judicial branch of government and related [or supporting] entities such as bar associations and law schools.”²² This includes “changes in the ways in which judges are selected, evaluated, and disciplined to ensure that decisions are insulated from improper influences.”²³ Overall legal reform may include drafting and revising legislation as well.²⁴ Increasing compensation and respect for the judiciary are also concerns.²⁵

Reforms need not involve transplanting “complicated legal systems that work well in rich countries” to poorer countries “without significant modification.”²⁶ The subject of legal transplantation—what is successful or unsuccessful and why—is one of some complexity; however, merely transplanting an institution from one place to another does not insure that the institution will be functional or effective when it arrives at its destination.²⁷ The “‘hasty transplant syndrome’ is a critical problem in legal

reform and instead discuss legal reform, judicial reform, and police (or law enforcement) reform.”); Carothers, *The Problem of Knowledge*, in PROMOTING, *supra* note 10, at 20 (“[T]he terms *judicial reform* and *rule-of-law reform* [are] often used interchangeably,” but “[t]he question of which institutions are most germane to the establishment of the rule of law in a country is actually quite complex and difficult.”).

22. Messick, *Judicial Reform: The Why, the What, and the How*, *supra* note 10, at 4. See Kleinfeld, *supra* note 10, at 48 (“As practitioners have tried to reform these primary institutions [such as the judiciary], however, they have found that they rely on the proper functioning of a large and ever-growing array of essential supporting institutions. . . . The judiciary is reliant on magistrates’ schools, law schools, bar associations, clerks and administrative workers, and other supporting groups. . . . As new supporting institutions are discovered and deemed to be essential, they are added to the list of areas in need of reform.”).

23. Messick, *Judicial Reform: The Why, the What, and the How*, *supra* note 10, at 5.

24. *Id.* at 4.

25. Kleinfeld, *supra* note 10, at 59 (“When judges are underpaid and underrespected, corruption can take hold, forcing difficult choices between increasing judicial independence and achieving predictable, equitable justice.”).

26. Juan Carlos Botero et al., *Judicial Reform*, 18 WORLD BANK RES. OBSERVER 61, 83 (2003). See also *id.* at 77 (“Poor countries, or countries without a developed judicial tradition, should probably concentrate on instituting simple rules and procedures that are easy to enforce. A legal system that will do perfect justice in infinite time and at infinite cost is probably a luxury that the poor can ill afford.”); Richard A. Posner, *Creating a Legal Framework for Economic Development*, 13 WORLD BANK RES. OBSERVER 1, 5 (1998) (recommending simple rules “for the kind of weak judiciary that one is apt to find in a poor country” because, among other reasons, they put “fewer demands on the time and the competence of the judges” and therefore are less costly and make decision-making “more likely to be accurate.”).

27. See Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. COMP. L. 163, 167 (2003) (classifying countries into those that developed their formal legal order internally (“origins”) and those that received their formal legal order from other countries (“transplants”)). Considering receptive and unreceptive transplants, the authors note that “[t]he most common complaint is that while the transplanted law is now on the books, the enforcement of these new laws is quite ineffective.” *Id.* at 165; see *id.* at 179. See also Stephan Haggard et al., *The Rule of Law and Economic Development*, 11 ANNU. REV. POLIT. SCI. 205, 221 (2008) (“[I]nstitutions do not necessarily have the same effects when transplanted from one context to another. To redeploy the memorable line of former Brazilian minister Luis Carlos Bresser Pereira, ‘institutions can at most be imported, never exported.’”) (citation omitted); MASAHIKO AOKI, TOWARD A COMPARATIVE INSTITUTIONAL ANALYSIS 2 (MIT Press 2001) (noting that “a borrowed institution may be neither enforceable nor functional” under certain circumstances); KATHARINA PISTOR, THE STANDARDIZATION OF LAW AND ITS EFFECT ON DEVELOPING ECONOMIES 15 (United Nations Publ’n 2000), available at <http://www.unctad.org/en/docs/pogdsmdpbg24d4.en.pdf> (distinguishing between merely having “the

reform assistance, which ‘involves using foreign laws as a model for a new country, without sufficient translation and adaptation of the laws into the local legal culture.’”²⁸

B. The Linkage Between the Rule of Law and Economic Development at Home and Abroad

1. Definition of the Rule of Law

The concept of the rule of law has been traced to “political theorists like Aristotle, Montesquieu and Locke, who were concerned with devising limits to the power of the government.”²⁹ In the case of Aristotle, the concept appears in the sense of “judging the case rather than the parties” and showing impartiality.³⁰ The phrase “rule of law” itself has been attributed to British jurist Albert Venn Dicey in 1885.³¹ The phrase is susceptible to varying definitions from the limited to the substantial.

For example, definitions of the rule of law have been described as broad and variable; it has been called a “notoriously plastic phrase.”³² The phrase “rule of law” is not a “legal term of art.”³³ Commentators have varying views of its utility. One extreme view is that the phrase has

best laws on the books” and “establishment of effective legal institutions,” which are not necessarily the same thing). Pistor “warns against viewing legal standards as a panacea for building effective legal systems around the world.” *Id.* at 17.

28. Wade Channell, *Lessons Not Learned About Legal Reform*, in PROMOTING, *supra* note 10, at 139. “In some egregious cases, reformers simply translate a law from one language to another, change references to the country through search-and-replace commands, and then have the law passed by a compliant local legislature. The result is generally an ill-fitting law that does not ‘take’ in its new environment as evidenced by inadequate implementation.” *Id.* at 139-40. The mistaken assumption is that if one would

simply help countries adopt the laws that have been proven to support economic development, such development would follow In some sense, this approach could be compared to a hypothetical orchard development program in which analysts recognize that healthy orchards all have a certain quality of apples. The analysts then fly in apples, tie them to the local trees, and momentarily assume success because the result looks like an orchard.

Id. at 145. *See also* Kleinfeld, *supra* note 10, at 52 (“reformers tend to waste time and scarce legal resources within developing countries in efforts to make laws and institutions look like those in their own system.”).

29. Alvaro Santos, *The World Bank’s Uses of the ‘Rule of Law’ Promise in Economic Development*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 257 (David M. Trubek & Alvaro Santos eds., 2006) (citation omitted). A history of the rule of law commencing with the ancient Greeks appears in BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (Cambridge Univ. Press 2004); however, Tamanaha’s book does not cover the subject of the rule of law and economic development.

30. Richard Posner, *The Role of the Judge in the 21st Century*, 86 BOSTON U. L. REV. 1049, 1057 (2006) (internal citation omitted). *See id.* at 1057:

[A] defining . . . element of the judicial protocol is what Aristotle called corrective justice. That means judging the case rather than the parties, an aspiration given symbolic expression in statues of justice as a blindfolded goddess and in the judicial oath requiring judges to make decisions without respect to persons. It is also the essential meaning of the “rule of law.”

31. TREBILCOCK & DANIELS, *supra* note 3, at 15.

32. Matthew C. Stephenson, *A Trojan Horse in China?*, in PROMOTING, *supra* note 10, at 196.

33. Ohnesorge, *supra* note 6, at 101.

no meaning: “The ‘rule of law’ means whatever one wants it to mean. It’s an empty vessel that everyone can fill up with their own vision.”³⁴ If rule of law just means the “rule of good law,” the term is useless, since “we have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph.”³⁵ “Everyone uses the phrase because everyone can get behind it and it might make it easier to get funding.”³⁶ “The rule of law . . . stands in the peculiar state of being *the* preeminent legitimating political ideal in the world today, without agreement upon precisely what it means.”³⁷

One commentator observed that “[w]hen an American writes or speaks on [the rule of law] he usually begins with a confident assumption that everybody knows what the rule of law is and then devotes the rest of his time to a bold and eloquent statement in favor of it.”³⁸ Another commentator noted the following:

Our tradition has produced no agreed definition of the Rule of Law, and there is no important tradition of academic analysis and explication of the term Few American law students study jurisprudence (legal philosophy), and it is safe to say that the overwhelming majority of American law students never address the Rule of Law concept in any systematic way.³⁹

The rule of law should not be the rule of any law, regardless of its content, however. Although that may enhance predictability, such a rule of law would be “compatible with a regime of laws with inequitable or evil content”; and it “may actually strengthen the grip of an authoritarian regime by enhancing its efficiency and by according it a patina of legitimacy.”⁴⁰

34. Stephenson, *supra* note 32, at 196.

35. *Id.* (citing Joseph Raz, *The Rule of Law and its Virtue*, 93 L. Q. REV. at 195-96 (1977)). See also TAMANAHA, *supra* note 29, at 113 (“The rule of law cannot be about everything good that people desire from government. The persistent temptation to read it this way is a testament to the symbolic power of the rule of law, but it should not be indulged.”).

36. Stephenson, *supra* note 32, at 196.

37. TAMANAHA, *supra* note 29, at 4. See also *id.* at 1 (“[T]here appears to be widespread agreement, traversing all fault lines, on one point, and one point alone: that the ‘rule of law’ is good for everyone.”).

38. Harry W. Jones, *The Rule of Law and the Welfare State*, 58 COL. L. REV. 143, 145 (1958).

39. Ohnesorge, *supra* note 6, at 102. Minimalist or thin theories of the Rule of Law emphasize “form and procedure” rather than a set of “substantive rights or norms,” and “maximalist, or thick theories” include “references to democracy and core human rights.” *Id.*

40. TAMANAHA, *supra* note 29, at 120; *id.* at 95-96 (“The rule of law in the service of an immoral legal regime would be immoral. Clarity and consistency of application with respect to pernicious laws—like legalized slavery—makes the system more evil, enhancing its draconian efficiency and malicious effect To see formal legality as moral in itself can have hazardous consequences for a populace.”). See also Norman L. Greene, *A Perspective on Nazis in the Courtroom, Lessons from the Conduct of Lawyers and Judges Under the Laws of the Third Reich and Vichy, France*, 61 BROOK. L. REV. 1121, 1124-25 (1995); *Economics and the Rule of Law: Order in the Jungle*, *supra* note 14, at 84 (“America’s southern states in the Jim Crow era were governed by the rule of law on thin definitions, but not on thick.”).

The World Justice Project has identified four “universal” principles comprising its “working definition” of the rule of law, embodying, among other things, fairness, accountability, independence, and competence:

1. The government and its officials and agents are accountable under the law;
2. The laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property;
3. The process by which the laws are enacted, administered and enforced is accessible, fair and efficient;
4. The laws are upheld, and access to justice is provided, by competent, independent, and ethical law enforcement officials, attorneys or representatives, and judges, who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.⁴¹

Another view likewise ascribes to the rule of law three elements, which generally require that the courts should be accessible, independent, impartial and accountable:

The rule of law is a tradition of decision, a tradition embodying at least three indispensable elements: *first*, that every person whose interests will be affected by a judicial or administrative decision has the right to a meaningful “day in court”; *second*, that deciding officers shall be independent in the full sense, free from external direction by political and administrative superiors in the disposition of individual cases and inwardly free from the influence of personal gain and partisan or popular bias; and *third*, that day-to-day decisions shall be reasoned, rationally justified, in terms that take due account both of the demands of general principle and the demands of the particular situation.⁴²

In turn, judicial impartiality and independence are captured by the notions that decisions “are reached on the factual and legal merits of the

41. World Justice Project, <http://www.worldjusticeproject.org/about/> (last visited Nov. 4, 2008).

42. Jones, *supra* note 38, at 145, *cited with approval in* Ohnesorge, *supra* note 6, at 101-02. See also Carothers, *The Rule of Law Revival*, in *PROMOTING* *supra* note 10, at 4, noting that [t]he rule of law can be defined as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the last half-century. In particular, anyone accused of a crime has the right to a fair, prompt hearing and is presumed innocent until proved guilty. The central institutions of the legal system, including courts, prosecutors, and police, are reasonably fair, competent, and efficient. Judges are impartial and independent, not subject to political influence or manipulation. Perhaps most important, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding.

issues before the court, uninfluenced by considerations that are extraneous to those merits, such as personal relations between the judge and one of the parties, corruption, cronyism, political interference or coercion in particular decisions, especially those affecting the government of the day or its officials.”⁴³ Judicial accountability, among other things, includes such matters as the quality of the decision-making process, compliance with judicial codes of conduct, and the efficiency of judicial administration.⁴⁴

Different concepts of the rule of law are peculiarly referred to as “thick” or “thin,” depending on the number and kinds of requirements they contain, and have been shown in a sliding scale.⁴⁵ The thickest versions contain individual rights, including some social welfare concepts.⁴⁶ For example, the World Justice Project’s concept of the rule of law is not merely one of formalistic legality, but expressly includes concepts of fairness, competence, and the protection of “fundamental rights.” Its definition appears to fall within the “thicker” part of the scale.

The notion of the “rule of law, not of men” has sometimes been considered an alternative view of the rule of law.⁴⁷ This is subject to the caveat that human participation cannot be divorced from the operation of law since laws do not apply or interpret themselves.⁴⁸ It is a valuable reminder that judges should “apply a relevant body of rules to a situation,” rather than “do as they please . . . without regard to rules.”⁴⁹

43. TREBILCOCK & DANIELS, *supra* note 3, at 31.

44. *Id.* at 63-65. The authors elaborated on the concept of accountability as follows:

For example, decisions of judges in lower courts are typically subject to a judicial appeal process to higher courts. Gross dereliction of duty, abuse of office, and other flagrant forms of judicial misconduct are typically subject to some form of judicial disciplinary process, which may be administered by the courts themselves or by a semi-independent body representing a diverse range of relevant stakeholders. Operational accountability in the efficient and appropriate expenditure of public monies is often ensured through various budgetary allocation processes and public audit mechanisms . . .

Id. at 32. See also Stefan Voigt, *The Economic Effects of Judicial Accountability—Some Preliminary Insights* 3 (Int’l Centre for Econ. Research, Working Paper No. 19, 2005):

Of course, we do not want judges to be able to decide no matter what with regard to cases brought before them. We want them to treat the parties appearing in front of them with respect, to separate relevant from irrelevant arguments, and to decide the case within a reasonable period of time according to the letter of the law. We do not want them to let their personal preferences or their sympathy or antipathy with the parties to taint their decision. In that sense, we want judges to be accountable to the law and, at the end of the day, to the people who use the law as a means to structure their interactions.

45. TAMANAHA, *supra* note 29, at 91.

46. *Id.* at 112; Erik G. 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 336, 338 (Erik G. Jensen & Thomas C. Heller eds., Stanford Univ. Press 2003) (“In Western liberal democratic discourse, *rule of law* connotes a commitment to democracy, an emphasis on law and order, limitations on the power of state action (particularly police and prosecutors), respect for legal authority, individual rights, and an effort to hold state actors up to the same rules and standards as everyone else.”) (footnote omitted).

47. See, e.g., TAMANAHA, *supra* note 29, at 122.

48. *Id.* at 123.

49. *Id.* at 126.

Without specifying what the rules should be, the concept calls for government to “sublimate their views to the applicable laws.”⁵⁰

Finally, the World Justice Project recently developed a Rule of Law index that has been and will be applied to a number of countries, including the United States, to measure the extent to which a country acts in conformity with the rule of law.⁵¹ A pilot study performed for the Project by the Vera Institute measured the rule of law to a limited extent in three cities outside the United States and in New York City to “gauge the extent to which all people, particularly those who are poor or otherwise marginalized, experience and benefit from the rule of law.”⁵²

50. *Id.* at 140.

51. World Justice Project, Rule of Law Index, <http://www.worldjusticeproject.org/rule-of-law-index> (last visited Nov. 4, 2008):

The Rule of Law Index is the first index that examines the rule of law comprehensively. . . . Because the Index looks at the rule of law in practice and not solely as it exists on the books, the Index will be able to guide governments, civil society, NGOs and business leaders in targeting efforts to strengthen the rule of law.

....

The WJP has developed a robust and cost-effective methodology to measure more than 100 variables. It utilizes two main sources of new data: a general population poll, and a qualified respondent’s questionnaire. In addition, existing data and data drawn from other indices are being incorporated into the analysis.

....

The WJP has completed field testing Version 1.0 of the Rule of Law Index in Argentina, Australia, Colombia, Spain, Sweden and the USA. The next round of testing will be conducted in Liberia and Tanzania. The WJP anticipates administering the Index in 100 countries in three years. In each country where the Index is administered, the WJP will prepare a Rule of Law Index report that describes its findings. The Index will be administered periodically to show changes in countries over time.

See also MARK DAVID AGRAST ET AL., THE WORLD JUSTICE PROJECT RULE OF LAW INDEX: MEASURING ADHERENCE TO THE RULE OF LAW AROUND THE WORLD 5, 8, 22, 23 (2008); *id.* at 5:

The Index methodology employs a combination of data collection methods and sources of information, including a standardized general population poll, four standardized expert surveys, and analysis and triangulation of data from existing indices and local sources. The methodology developed by the WJP [World Justice Project] team was tested in Argentina, Australia, Colombia, Spain, Sweden and the United States.

52. JIM PARSONS ET AL., VERA INSTITUTE OF JUSTICE, DEVELOPING INDICATORS TO MEASURE THE RULE OF LAW: A GLOBAL APPROACH, A REPORT TO THE WORLD JUSTICE PROJECT 1 (2008). See also AGRAST, *supra* note 51, at 5 (“In addition, the Vera Institute of Justice developed for the WJP a set of new performance indicators to measure the Index, and tested indicators for the last two bands of the Index in [particular cities in] Chile, India, Nigeria and the United States.”). The Vera project commenced in January 2008, and its findings were presented to the World Justice Forum in Vienna, Austria, in July 2008. PARSONS, *supra* at 1. In addition to New York City, the particular cities studied were Chandigarh, India, Lagos, Nigeria, and Santiago, Chile. *Id.* As a pilot project, the Vera report also noted lessons learned, next steps, and future challenges. *Id.* at 23-26.

As its “baseline” definition of the rule of law, the Vera Report accepted a 2004 definition of the United Nations Secretary-General, as follows:

[The “rule of law”] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

2. What is Economic Development?

Although the rule of law obviously applies to the United States as well as other countries, the phrase is still most commonly used these days in the field of international development work.⁵³ For example, starting in the early 1990s, the World Bank and IMF “began conditioning the provision of financial assistance on the implementation of the rule of law in recipient countries,” justified in order to “provide a secure environment for investments, property, contracts, and market transactions.”⁵⁴ Over the past couple of decades, this has grown to be a professional field, whose practitioners use funding from international development institutions, such as USAID, to promote the rule of law in developing countries and post-conflict environments.⁵⁵

Id. at 3 (citing the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, 4, delivered to the Security Council, U.N. Doc. S/2004.616) (August 23, 2004) cited with approval in U.S. AGENCY FOR INT’L DEV., *THE GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK 5* (2008)). This definition in part appears to invoke the rule of good law by bringing in a human rights component to the rule of law and therefore would fall within the “thicker” part of the scale for rule of law definitions. AGRAST, *supra* note 51, at 6.

53. For application of the concept of the rule of law domestically, see TAMANAHA, *supra* note 29, at 130 (providing examples of how the United States has disregarded the rule of law in the international arena). See also Symposium, *supra* note 5, at 223-26; Marci Hamilton, *The Rule of Law Even As We Try to Export the Ideal of Justice By Law, Not Whim, Some in America Resist That Very Ideal*, (Oct. 23, 2003), available at <http://writ.news.findlaw.com/hamilton/20031023.html> (“Public servants . . . have invested enormous amounts of time into the project of exporting the rule of law to countries trying to establish democracy Even as we export this precious principle, however, there is evidence that it has lost ground here at home.”); World Justice Project, *Domestic Mainstreaming of the Rule of Law*, *supra* note 5 (“The rule of law needs to be strengthened in the United States as it does around the world. To promote that effort, a kickoff ‘mainstreaming’ meeting was held in Washington, DC in February 2007. Now, state and local bar associations around the country are designing state-level multidisciplinary outreach meetings that can identify multidisciplinary partnerships for strengthening the rule of law at the state and local levels.”).

54. TAMANAHA, *supra* note 29, at 2.

55. The antecedents of the current “law and development” movement may be traced back to unsuccessful efforts in the 1960s to reform international judicial systems and substantive laws. This effort, sponsored by USAID, the Ford Foundation, and private American donors, ended unsuccessfully but was subsequently resumed in a different form in the 1990s. See Messick, *Judicial Reform and Economic Development*, *supra* note 10, at 125 (1999); *id.* at 128-132 (describing rule of law aid programs); see also Kevin E. Davis & Michael J. Trebilcock, *The Relationship Between Law and Development: Optimists Versus Skeptics*, 56 AM. J. OF COMP. L. 895, 900 (2008) (describing, among other things, the “first wave of law and development theorists that emerged in the 1960’s”); David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1065. The “most significant reason” for the early failure was reportedly the belief that United States legal institutions could be “easily transplanted to developing countries.” Messick, *Judicial Reform and Economic Development*, *supra* note 10, at 126. Before the 1990s resumption, U.S. aid providers “took an interest in law-oriented aid, starting in Central America in the mid-1980’s,” concentrating on criminal justice. THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* 163 (Carnegie Endowment for Int’l Peace 1999).

Many resources are available on international development efforts and practices, including <http://www.bizclir.com/> (“This site is a dynamic knowledge development and knowledge sharing tool to improve the impact of USAID’s efforts on Business Climate Legal and Institutional Reform. The site will host information for development practitioners including: country assessments, best practices, publications, and expert opinions.”).

Many articles refer to the rule of law and economic development; however, little is said in those articles about the definition of economic development, as if all readers knew what this term meant. Sometimes the word “economic growth” is used instead of “economic development,” as if both words were the same; and sometimes the words “development” and “growth” both appear in the same definition, as follows:

Outside the U.S., the concept of local economic development (LED) refers to a broad set of financial and technical assistance provided to less developed countries (LDCs) to reduce global poverty. In this sense, policies and programs focus on a comprehensive approach to economic growth that includes capacity building for citizen, public and private sector participation and collaboration. These efforts may focus on improvements to political, legal, financial, transportation, communications, education, environmental, or healthcare systems. Business or employment specific aspects of LED may focus on entrepreneurial development, foreign direct investment, and the development and maintenance of efficient production and distribution systems for goods and services.⁵⁶

Although the subject is not free from doubt, development is sometimes perceived to be the broader term and more representative of permanent economic progress.⁵⁷ Nonetheless, nothing precludes the rule of law from supporting less extensive forms of economic progress.

56. Int'l Econ. Dev. Council, Economic Development White Paper, 1-2 (2006).

57. My wide-ranging inquiry in July and August 2008 about the meaning of “economic development” to experienced thinkers in the field of rule of law and economic development surprisingly led to responses to the effect that this was a “good question,” with limited suggestions. This led me to consider the subject carefully and reach my own conclusion regarding what economic development meant, as stated in this article.

My similar inquiry about the differences between “economic development” and “economic growth” in August 2008 led to numerous comments to the effect that this too was a “good question” and suggested distinctions and theories on the similarities and differences. For example, there were some responses to the effect that they are not the same; that they should not be applied interchangeably; that development was a broader and more sustainable form of economic progress; and that, among other things, growth may indeed occur (as measured by an increase in GDP) without overall improvement in other indicators of economic progress, such as reductions in unemployment, poverty and wealth disparity. *See, e.g.*, e-mail from Moira Brennan to author and American Society of International Law Interest Group Members for International Economic Law and Transitional Justice and Rule of Law (Aug. 28, 2008, 22:05 EST) (on file with author and *Denver University Law Review*). Among other things, the Brennan e-mail noted “thank you for raising an important question . . . of whether the words ‘economic growth’ and ‘economic development’ should be used interchangeably.” *Id.*

Others commented to the effect that the phrases are often used interchangeably and are essentially the same. *See, e.g.*, e-mail from Frank Upham, Wilf Family Professor of Property Law, New York University School of Law to author (Aug. 28, 2008, 09:13 EST) (on file with author and *Denver University Law Review*) (“I generally think economic growth and economic development denote the same phenomenon, i.e., an increase in the gross national product. The fundamental unit of measurement is economic and does not include the political, social, or psychological measures of well being that Sen was paramount in putting into the term ‘development.’ Of course we are using these terms advisedly. Most people lump them all together.”). *See also* e-mail from Kenneth Dam, Max Pam Professor Emeritus of American & Foreign Law, Senior Lecturer, University of Chicago Law School to author (Aug. 27, 2008, 17:32 EST) (on file with author and *Denver University Law Review*) (“I believe that for most purposes they [i.e., economic growth and economic development]

The definition of economic development may differ from country to country and context to context, especially to the extent that it depends on priorities. For example, for a country with insufficient housing, power plants, highways, and jobs, it might mean more houses, power plants, road construction, and new jobs. For a country with lots of housing, power plants and roads, it might mean, among other things, more hospitals and manufacturing, if those were deficient. If the country lacked certain goods and services, development might mean the production of those goods and services. The definition depends on what is needed in each case.⁵⁸ Furthermore, whether development in particular areas should be left to market forces in laissez-faire economies or otherwise directed or encouraged is a fair ground for discussion in a country-by-country context.

As an alternative or supplemental tool for assessing economic development, one might consider large measures of wealth, such as gross domestic product or per capita income. To the extent that they do not take into account disparities in wealth within a country, however, those measures may be insufficiently meaningful. Therefore, to counterbalance this, one might need to reflect on the “Gini coefficient of inequality.” According to the World Bank, the Gini coefficient “is the most commonly used measure of inequality. The coefficient varies between 0 [zero], which reflects complete equality, and 1 [one], which indicates complete inequality (one person has all the income or consumption, all others have none).”⁵⁹ “To begin to understand what life is like in a country—to know, for example, how many of its inhabitants are poor—it is not enough to know that country’s per capita income. The number of poor people in a country and the average quality of life also depend on how equally—or unequally—income is distributed.”⁶⁰

Thus one might not regard something which exacerbates wealth disparities (*e.g.*, by leaving virtually all the wealth in the hands of a few, such as a dictator or an aristocracy, while the rest of the population remains impoverished) to be positive economic development, even if it

are interchangeable today. But economic development does seem slightly broader in the sense best seen if one looks at an oil rich country which may show rapid growth in GDP but by failing to build the physical and other infrastructure for broader based growth in the future is not enjoying as much economic development as another country which does prepare for continued growth after oil production growth levels out or begins to fall.”)

58. This definition of economic development does not define “needs.” Nor does it specify if a country needs many things how the priorities for filling those needs should be established. For example, it does not answer the question of how many hospitals should be built if the country lacks hospitals. This level of precision may be determined by the policymakers in each particular country.

59. The World Bank, *Measuring Inequality*, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTPA/0,,contentMDK:20238991~menuPK:492138~pagePK:148956~piPK:216618~theSitePK:430367,00.html> (last visited October 29, 2008).

60. The World Bank Group, *Beyond Economic Growth Student Book*, Chapter 5, *Income Inequality*, <http://www.worldbank.org/depweb/english/beyond/global/chapter5.html> (last visited October 29, 2008).

raises the country's overall wealth dramatically. Countries with extraordinary disparities of wealth and poverty may also be unstable and thus be poor investment climates for business. "High inequality threatens a country's political stability because more people are dissatisfied with their economic status, which makes it harder to reach political consensus among population groups with higher and lower incomes. Political instability increases the risks of investing in a country and so significantly undermines its development potential"⁶¹

Regardless of the measure of economic development, certain principles arguably support economic progress—namely, enforcement rather than violation of legitimate bargains,⁶² encouragement rather than discouragement of investment in useful enterprises, creation rather than dissipation of legitimate and useful employment opportunities, and increase rather than shrinkage in the production of valuable goods and services. The words "legitimate" and "useful" in this sentence are intended to reflect the notion that there is no societal interest in enforcing corrupt contracts or contracts otherwise against public policy,⁶³ creating unlawful employment opportunities or ones which are not socially useful, or in providing poor quality or undesirable goods and services. For example, undesirable employment opportunities might be the following: jobs building x when the country already makes too much x, and there is no export market for x; or jobs in industries which do not benefit society, such as building arms for aggressive war, serving in a dictator's secret police, and engaging in narcotics production and human trafficking. The armaments and narcotics themselves might also be examples of undesirable production.

The use of the phrase "public policy" brings up the question of "whose public policy," since public policy may vary from country to

61. *Id.* See also *id.* at Chapter VI, *Poverty and Hunger*, <http://www.worldbank.org/depweb/english/beyond/global/chapter6.html> ("A favorable *investment climate* includes many factors that make investing in one country more profitable and less risky than in another country. Political stability is one of the most important of these factors. Both domestic and foreign investors are discouraged by the threat of political upheaval and by the prospect of a new regime that might impose punitive taxes or expropriate capital assets.").

62. See KENNETH W. DAM, *THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT* 93 (The Brookings Institution 2006).

63. See Harry W. Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 153 (1958) ("It is not that the right of property or the right to contract were ever absolute; . . . the rule that courts will not enforce contracts against public policy are sufficient reminders that every legal system has put outside limits on the autonomy of property owners and contracting parties."). Nor is the rule of law voided by certain contractual limitations. See also *id.* at 154:

[S]tatute barring forfeiture of premiums paid on a lapsed life-insurance policy diminishes freedom of contract only in the doctrinaire sense that insurers no longer can impose forfeiture clauses on a "take it or leave it" basis. Because of the inequality of bargaining power, such clauses were never the subject of genuine negotiation between insurer and insurance applicant. Similarly, it would be wildly unrealistic to see in a minimum wage law only an interference with the individual employee's right to contract for less than subsistence wages.

country.⁶⁴ Western institutions attempting to bring rule of law reforms to foreign countries would undoubtedly find it difficult to encourage enforcement which substantially offended their own public policy standards; and ignoring foreign standards of public policy would presumably lead to resistance from the foreign nations concerned.

3. The Linkage Between the Rule of Law and Economic Development

Many have linked the rule of law to economic development in developing countries, and statements to that effect are common and long-standing.⁶⁵ “The argument that the rule of law fosters economic development has been made many times.”⁶⁶ Although the principal focus of

64. See Messick, *Judicial Reform and Economic Development*, *supra* note 10, at 129 (noting research on contracting in Africa and finding to the effect that “rigid compliance with the terms of a written contract was difficult if not impossible, in developing countries. Their economies are simply subject to too many exogenous shocks for contracts to be strictly enforced . . .”).

65. See Messick, *Judicial Reform and Economic Development*, *supra* note 10, at 121. The article goes on to trace that argument to, among others, John Fortescue, Henry VI’s chancellor, in the 15th century, Adam Smith in the 18th century, and Max Weber in the 19th century. *Id.* at 121-22. It also links the notion to Thomas Hobbes in the 17th century. See *id.* at 3 (“Without a reliable judicial system, he [Hobbes] argued, traders will be reluctant to enter into wealth-enhancing exchanges for fear that their bargains will not be honored.”). The full quote from Hobbes’s *LEVIATHAN* is as follows:

For he that performeth first has no assurance the other will perform after, because the bonds of words are too weak to bridle men's ambition, avarice, anger, and other passions, without the fear of some coercive power; which in the condition of mere nature, where all men are equal, and judges of the justness of their own fears, cannot possibly be supposed. And therefore he which performeth first does but betray himself to his enemy, contrary to the right he can never abandon of defending his life and means of living.

THOMAS HOBBS, *LEVIATHAN* ch. XIV (Richard Tuck ed., Cambridge Univ. Press 1991), available at <http://oregonstate.edu/instruct/phl302/texts/hobbes/leviathan-c.html>. The proof of Hobbes’s theory of transactions is difficult since it would require showing how many bargains were not made because of a poor judicial system. Messick, *Judicial Reform and Economic Development*, *supra* note 10, at 120. A similar task would be to show how many dogs do not bark at night because of a particular set of circumstances.

66. Messick, *Judicial Reform and Economic Development*, *supra* note 10, at 121; see Posner, *supra* note 26, at 3 (“If it is not possible to demonstrate as a matter of theory that a reasonably well-functioning legal system is a necessary condition of a nation’s prosperity, there is empirical evidence showing that the rule of law does contribute to a nation’s wealth and its rate of economic growth [citation omitted].”).

However, there is some controversy, among other things, concerning the strength of the connection between rule of law and economic development in certain countries. See 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, 256 (2008); see also Kevin E. Davis, *What Can the Rule of Law Variable Tell Us About Rule of Law Reforms?*, 26 MICH. J. INT’L L. 141, 143 (2004) (“Optimistic claims about the role of legal institutions in achieving development have a long lineage. In fact, most contemporary versions of this theory can be traced back to the turn-of-the-century writings of Max Weber. But theoretical analyses that are skeptical about whether legal institutions play an independent role in achieving development, or any other form of social change, are equally easy to find.”) (footnote omitted); David A. Skeel, Jr., *Governance in the Ruins*, 122 HARV. L. REV. 696, 696 (2008) (book review of CURTIS J. MILHAUPT & KATHARINA PISTOR, *LAW AND CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD* (2008)) (reviewer notes that authors of reviewed book describe themselves as caricaturing, “[i]n [their] more cynical moments,” what they call the “endowment perspective,” to the effect that “good economic outcomes” result from “good law + good enforcement.”).

the rule of law and economic development discussion is in the context of international development, some American business organizations have noted the relationship between law and American economic prosperity as well.⁶⁷ For example, one multinational company has recognized that “the business community [has] a particular opportunity to help spread the word that if countries want to grow economically, if they want to create better futures for their people, if they want to build new jobs, the independence of the judiciary in fact plays a critical role in economic development.”⁶⁸ In addition, the United States Chamber of Commerce has concluded as part of its “tort” or “civil justice” reform agenda that the American tort system costs businesses billions and harms both employment and productivity.⁶⁹ Similar statements have been made by others, including the American Tort Reform Association:

67. Construed broadly, the civil justice reform agenda, to the extent that it seeks greater fairness and even-handedness, is consistent with the rule of law. To the extent that the goal is not an impartial system but one in which victory is assured or nearly assured in each case, it would not be. See, e.g., JOHN GRISHAM, *THE APPEAL* (Doubleday 2008). Much of the reform language, however, asserts the benefits of an unbiased and even-handed system, the proverbial “level playing field.”

68. Text of prepared remarks by Brad Smith, Senior Vice President, Legal & Corporate Affairs, General Counsel and Corporate Secretary, Microsoft Corporation, American Society of International Law Second Century Dinner, Washington, D.C., November 3, 2006, available at <http://www.microsoft.com/presspass/exec/bradsmith/11-03-06InternationalLaw.msp> (last visited October 28, 2008). See also *id.* (emphasis added):

One of the things I first discovered when I was working in Central and Eastern Europe in 1990 and 1991, when the Iron Curtain had just fallen, was how enthusiastic people were to welcome foreign investment, especially investment that they perceived as having real potential to generate economic growth. That remains the case today. People want corporations to be subject to their laws and regulations, and quite rightly so, and they also want them to be present and investing in the local economy. I think that one of the important messages we have the opportunity and indeed do convey is that we're able to make those kinds of investments only if we have *confidence that there is a legal system with principled rules applied in an objective manner by an independent judiciary.*

The remarks likewise commented on the importance of respect for a fair and independent judiciary on a national level for respect for law at an international level:

The second challenge that I think we need to confront . . . is the critical need for the broadening and deepening recognition of the importance at the national level of a fair and independent judiciary. You might ask “what does that have to do with international law”? In answering, I would say this: one of the greatest threats to international law is and has always been the prospect that executive power will simply ignore it. I don't know how one can create a world in which executive power respects law at the international level if executive power doesn't respect the independence of the law and the judiciary at the national level.

Id.

69. See U.S. Chamber of Commerce, Institute for Law Reform, *Lawsuit Abuse Impact*, http://www.instituteforlegalreform.org/index.php?option=com_ilr_issues&issue_code=LAI&view=ilr_issue&expand=1 (last visited Jan. 5, 2009):

America's runaway legal system imposes burdensome costs on workers, consumers, small businesses, and healthcare. The cost of America's lawsuit-happy culture totals \$261 billion a year, or \$880 per person, according to seminal research by Tillinghast-Towers Perrin (2006). According to a 2007 study commissioned by the Institute for Legal Reform, small businesses alone pay \$98 billion a year to cover the cost of America's tort system—money that could be used to hire additional workers, expand productivity, and improve employee benefits.

See also U.S. Chamber Institute for Legal Reform, *Lawsuit Climate 2008: Ranking the States*, <http://www.legalreforminthenews.com/2008PDFS/HarrisPoll08.pdf> (last visited Oct. 31, 2008).

While most judges honor their commitment to be unbiased arbiters in the pursuit of truth and justice, judges in Judicial Hellholes do not. These few judges may simply favor local plaintiffs' lawyers and their clients over defendant corporations. Some, in remarkable moments of candor, have admitted their biases. More often, judges may, with the best of intentions, make rulings for the sake of expediency or efficiency that have the effect of depriving a party of its right to a proper defense. What Judicial Hellholes have in common is that they systematically fail to adhere to core judicial tenets or principles of the law. They have strayed from the mission of being places where legitimate victims can seek compensation from those whose wrongful acts caused their injuries. . . . *Rulings in these Judicial Hellholes often have national implications because they involve parties from across the country, can result in excessive awards that bankrupt businesses and destroy jobs, and can leave a local judge to regulate an entire industry.*⁷⁰

The linkage between the rule of law and economic development (including foreign investment) has been described as the "dominant theory."⁷¹

70. AM. TORT REFORM ASS'N, JUDICIAL HELLHOLES—2007 1, <http://www.atra.org/reports/hellholes/report.pdf> (emphasis added). Thus both the U.S. Chamber of Commerce and the American Tort Reform Association have identified the relationship between legal reform and the economy. Nonetheless, to the extent that either group is identified with reforming judicial selection methods as a cure, they appear to be divided on how to proceed. Both do support legislative methods of civil justice reform, however.

71. See Amanda Perry-Kessaris, *Finding and Facing Facts About Legal Systems and Foreign Direct Investment in South Asia*, 23:4 LEGAL STUDIES 649, 651-52 (2003):

The dominant theory therefore proposes that foreign investors are attracted to states with "effective" legal systems—that is, those which are efficient and predictable, imposing relatively low transaction costs on investors; and that they avoid states with "ineffective" legal systems—that is, those which are inefficient and unpredictable, imposing relatively high transaction costs on investors.... The central focus of this paper is how this dominant theory can be tested—that is, what methods can we use to test the extent to which the effectiveness of legal systems affects success in attracting FDI [foreign development investment]?

See also Dani Rodrik et al., *Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development*, 9 JOURNAL OF ECONOMIC GROWTH 131-65, 157 (2004) (noting the types of things that investors care about, including "the likelihood that investors will retain the fruits of their investments, the chances that the state will expropriate them, or that the legal system will protect their property rights Obviously, the presence of clear property rights for investors is a key, if not the key, element in the institutional environment that shapes economic performance. Our findings indicate that when investors believe their property rights are protected, the economy ends up richer."). Foreign direct investment is not synonymous with economic development; nonetheless, "[r]ecognizing that FDI can contribute to economic development, all governments want to attract it." Padma Mallampally & Karl P. Sauvant, *Foreign Direct Investment in Developing Countries*, FINANCE & DEVELOPMENT, March 1999, <http://www.imf.org/external/pubs/ft/fandd/1999/03/mallampa.htm>. See also *id.* at 3 ("Given the potential role FDI can play in accelerating growth and economic transformation, developing countries are strongly interested in attracting it."). Some foreign direct investment can meet resistance from the country which might otherwise receive it. See Daniel Bases, *Global FDI to hit record \$1.47 trln in 2007—survey*, Sept. 5, 2007, <http://www.reuters.com/article/mergersNews/idUSN0518321220070905?pageNumber=1> (citing "protectionist behavior including U.S. lawmakers resistance, cited for security reasons, to Dubai Ports World owning six U.S. ports . . .").

A set of common sense assumptions appears to underlie the connection between rule of law and economic development, with some limited or questioned empirical study covering various possibilities,⁷² including a country's historical origins.⁷³ These assumptions relate to the key components of the rule of law. For example, "[m]ore independent judges are often more efficient judges. . . . [T]he combination of judicial independence and efficiency seems to be essential for judicial reforms to have a positive effect on economic development."⁷⁴ "Judicial independence is a key determinant of growth as it promotes a stable investment environment."⁷⁵ Reforms which strengthen judicial accountability—and thus efficiency—improve judicial performance.⁷⁶ A sound judicial system promotes economic development "[b]y enforcing property rights, check-

72. See Messick, *Judicial Reform and Economic Development*, *supra* note 10, at 122 ("Rigorous econometric methods for verifying the rule-of-law hypothesis and the role played by the judicial system are still in their infancy."); *id.* ("These studies also do not rule out competing explanations such as increases in trade and investment or even the effects of other institutional reforms such as the introduction of an independent central bank."); *id.* at 123 ("In sum, while history and comparative analysis support the view that a better judicial system fosters economic growth, there is . . . no clear, empirical evidence showing the economic impact of a weak judicial system. The most that can be said at the moment is that the weight of opinion and evidence suggests the existence of some type of relationship."). In addition to judicial reforms, other contributors may exist, including a free press or other free media, civic education, and an independent business community. See, e.g., Davis & Trebilcock, *supra* note 55, at 910 (referencing body of literature connecting a free press "independent of government influence" as well as a "competitive press" with rule of law and development).

73. Some have proposed "the legal origins approach, as applied to economic development . . . [which attempts] to show that the origin—say, English common law or French civil law—of a particular country's law is associated with that country's rate of economic growth." DAM, *supra* note 62, at 31. Using this legal origins approach, "[t]he central inquiry is to determine which legal families have the best substantive law for financial development, using substantive legal criteria determined by the authors." DAM, *supra* note 62, at 38 (for a detailed discussion of the "legal origins" approach, see *id.* at 26-55). Dam finds the approach "interesting from a scholarly point of view," but of "dubious relevance" for "public policy formation for the poorer developing countries." *Id.* at 54. 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, 160 (2004) ("Even if one accepts the notion that these studies succeed in demonstrating a connection between legal heritage and development, the studies are of little direct use to prospective legal reformers, simply because a society's legal heritage cannot be changed.") (footnotes omitted). Cf. Acemoglu et al., *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 THE AM. ECON. REV. 1369, 1395 (2001) (the nature of a country's "colonial experience" is "one of the many factors affecting [its] institutions."; the colonial experience varied, among other things, depending on whether the colonizers "settled in the colonies and set up institutions that enforced the rule of law and encouraged investment[]" or "set up extractive states with the intention of transferring resources rapidly to the metropole[]"; however, according to the authors, these "findings do not imply that institutions today are predetermined by colonial policies and cannot be changed.").

74. Botero et al., *supra* note 26, at 80; see also Lars P. Feld & Stefan Voigt, *Economic Growth and Judicial Independence: Cross-Country Evidence Using A New Set of Indicators*, EUR. J. POL. ECON. 497 (2003) (correlating de facto judicial independence with economic growth); USAID, *The Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework* 6 (Aug. 2008), available at http://pdf.usaid.gov/pdf_docs/PNADM700.pdf:

Rule of law provides a stable basis for democracy to develop. It ensures the protection of those rights critical to maintaining an orderly and productive society, creating the conditions that enable a democratic society to develop and thrive. . . . Such rights are also essential to ensuring economic development and addressing poverty.

75. Millennium Challenge Corporation: *Guide to the MCC Indicators and the Selection Process: Fiscal Year 2008*, <http://www.mca.gov/documents/mcc-fy08-guidetointicatorsandtheselectionprocess.pdf>.

76. Botero et al., *supra* note 26, at 81.

ing abuses of government power, and otherwise upholding the rule of law and in enabling exchanges between private parties.”⁷⁷ “[T]he claim that judicial independence is a necessary condition for the protection of property rights or economic growth should give any American political scientist pause.”⁷⁸

“No one, whether local or foreign, wants to invest in a country that is politically unstable or where there is no confidence in the justice system, as investors would not be assured of a fair return on their investment.”⁷⁹ “An independent judiciary could thus also be interpreted as a device to turn promises—*e.g.*, to respect property rights and abstain from expropriation—into credible commitments. If it functions like this, citizens will develop a longer time horizon, which will lead to more investment in physical capital. . . . All these arguments imply that [judicial independence] is expected to be conducive to economic growth.”⁸⁰

“The link between property rights, the integrity of contract, and economic growth comes through several channels, but incentives play a central role: The more well-developed and secure are property rights, the greater incentives individuals have to invest.”⁸¹

Thus “the [World Bank] sees law as facilitating market transactions by defining property rights, guaranteeing the enforcement of contracts, and maintaining law and order.”⁸² As a former president of the World Bank noted:

Without the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible. A

77. Messick, *Judicial Reform: The Why, the What, and the How*, *supra* note 10, at 2 (citing THOMAS HOBBS, *LEVIATHAN*); *see also* Perry-Kessaris, *supra* note 71, at 650 (footnote omitted) noting:

[C]ommentators and development agencies argue ever more regularly that FDI [foreign direct investment] flows are to some extent determined by the effectiveness of host state legal systems—that is, the institutions and officials involved in the creation and implementation of law, including courts and judges; bureaucrats; and politicians, in their capacity as makers and implementers of law.

Her article proposes the type of data which she contends is necessary to prove this argument and the extent of its availability.

78. Haggard et al., *supra* note 27, at 217. The article also notes that “[m]ost legal scholars believe that appointment of judges is more likely to guarantee independence than election, which requires a campaign for votes, organized interest group support, and campaign contributions.” *Id.* at 216 (footnote omitted). This subject is discussed in more detail below.

79. Rugege, *supra* note 3, at 4; *see also* Kleinfeld, *supra* note 10, at 61 (“An investor does not read the constitution of an emerging market economy but asks other businesspeople whether contracts are enforced fairly and predictably.”).

80. Lars & Voigt, *supra* note 74, at 499. Judicial independence may act as a counterweight to avoid “takings of property by the state” where the “government itself is a litigant” and “in purely private disputes when one of the litigants is politically connected and the executive wants the court to favor its ally.” La Porta et al., *Judicial Checks and Balances*, 112 J. POL. ECONOMY 445, 446-7 (2004); *see also* DAM, *supra* note 62, at 93 (“One conclusion widely agreed upon, not just in the economic literature but also among lawyers and legal scholars, is therefore that the judiciary is a vital factor in the rule of law and more broadly in economic development.”).

81. Haggard et al., *supra* note 27, at 207.

82. Messick, *Judicial Reform and Economic Development*, *supra* note 10, at 127.

government must ensure that it has an effective system of property, contract, labor, bankruptcy, commercial codes, personal rights laws and other elements of a comprehensive legal system that is effectively, impartially and cleanly administered by a well-functioning, impartial and honest judicial and legal system.⁸³

Another World Bank commentator stated that “the payoffs from a successful [judicial] reform, in terms of economic growth and development, more than justify the work involved.”⁸⁴ “One conclusion widely agreed upon, not just in the economic literature but also among lawyers and legal scholars, is therefore that the judiciary is a vital factor in the rule of law and more broadly in economic development.”⁸⁵

C. *The Challenges to Promoting Economic Development through Rule of Law*

1. What to Do and Where to Start

Addressing rule of law reform and economic development in any specific country presents particular challenges. “Specifying the optimal set of judicial and legal institutions for any given country is a . . . difficult and context-specific task.”⁸⁶ “The question . . . becomes one of sequencing: Where does one start?”⁸⁷

As in the case of economic development, the answers may depend on what the country needs. Obviously, if the country has undertrained

83. Ohnesorge, *supra* note 66, at 256 (quoting James D. Wolfensohn, *A Proposal for a Comprehensive Development Framework* (January 21, 1999)); *see also* Botero et al., *supra* note 26, at 79 (citing Wolfensohn to the same effect). Ohnesorge’s article argues for a modified approach to law and development theory which takes account of the Northeast Asian economic successes in Japan, South Korea and Taiwan despite their “failure to conform to law and development theories.” Ohnesorge, *supra* note 66, at 230-31. The article notes that “studying only a country that has a weak legal system and a weak economy, such as Russia in the early to mid-1990’s, encourages the confusion of correlation with causation.” *Id.* at 226. Others have questioned in specific contexts how much formal legal institutions have contributed to economic success, particularly in China. *See* Donald C. Clarke et al., *The Role of Law in China’s Economic Development*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=878672 (last visited Oct. 17, 2008).

84. Messick, *Judicial Reform: The Why, the What, and the How*, *supra* note 10, at 9; *see also* Alan Greenspan, Chairman, of the Fed. Reserve, Remarks at the 2003 Financial Markets Conference of the Fed. Reserve Bank of Atlanta: Market Economies and Rule of Law (April 4, 2003), <http://www.federalreserve.gov/BoardDocs/speeches/2003/20030404/default.htm> (“Uncertainties that stem from the arbitrary enforcement of the body of prevailing rules are reflected in higher risk and cost of capital which, in turn, inhibit economic growth.”).

85. DAM, *supra* note 62, at 93; *see also* Christopher Clague et al., *Contract-Intensive Money: Contract Enforcement, Property Rights, and Economic Performance*, 4 J. OF ECON. GROWTH 185, 207 (1999) (contending that “economic growth and investment significantly accelerate when governments impartially protect and precisely define the rights of all participants in the economy.”).

86. Matthew C. Stephenson, *Judicial Reform in Developing Countries: Constraints and Opportunities*, in ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS 2007, REGIONAL: BEYOND TRANSITION 311, 314 (François Bourguignon & Boris Pleskovic eds., 2007).

87. Kleinfeld, *supra* note 10, at 50.

judges, insufficient computer systems,⁸⁸ and lack of courthouses, one would have to look at those items. Other considerations in deciding on reform include resource constraints, which make it important to prioritize among reform projects: “[E]very dollar spent on judicial reform is a dollar that cannot be spent on other public goods or put toward economically productive private investment,”⁸⁹ including public health.⁹⁰ Researchers and policymakers may assess the effectiveness of past reforms, and if inadequate, they may wish to revise their future approach.⁹¹ Other activities beyond legal and judicial reform might be needed to improve the rule of law. “Rule of law is an end-state, not a set of activities.”⁹² For instance, one may need to inquire whether “developing the judiciary is sufficient to advance the rule of law or whether it is also important to invest in improving political processes.”⁹³ Establishing and reviewing the effectiveness of rule of law programs is an ongoing process.

2. Assessing the Level of Causation

a. Recognizing Causation Controversies

Determining, as a social scientific or empirical matter, whether economic development is caused or at least facilitated by rule of law reform

88. *But see id.* at 52 (“Reform programs that focus on providing computers to improve court efficiency in the midst of a political autocracy, for example, seem rather like treating heartburn in a patient suffering from cancer.”).

89. Stephenson, *supra* note 86, at 314. *See also id.* at 315:

A similar resource constraint problem, and a similar set of hard choices, appears when we think about how to allocate resources among different types of judicial reform projects . . . [H]ow should priorities be set? Is it more important to train judges or to computerize the case filing and tracking system? Is it more important to invest in fighting corruption or in educating the poor about their legal rights? Does it make more sense to concentrate resources on creating a few highly capable specialized tribunals—say, to deal with disputes involving foreign investors or major business transactions—or to spread resources more widely to improve the average local court?

See also Stephen Golub, *A House Without a Foundation*, in *PROMOTING*, *supra* note 10 at 105, 119 (questioning the value of the argument that judicial reform is a valuable “development priority” in itself (even if not “a direct path to poverty reduction”) in light of the need to set priorities, noting that resources are limited and there are other options “for serving the poor” besides improving judiciaries).

90. *See* Kevin E. Davis & Michael B. Kruse, *Taking the Measure of Law: The Case of the Doing Business Project*, 32 *LAW & SOC. INQUIRY* 1095, 1116 (2007):

Given the limited empirical support for the claim that reforms recommended by the DB project [*i.e.*, the World Bank’s Doing Business Project] will have positive effects on development outcomes, it is far from clear to us that widespread implementation of those reforms is an accomplishment worth boasting about. We believe that it is an open question whether the energy and resources invested in legal reforms would have been better put to other uses, including medical research, vaccines, distribution of mosquito nets, and sanitation projects.

91. *See* Channell, *supra* note 28, at 145.

92. USAID, *supra* note 74, at 19; *see also* Kleinfeld, *supra* note 10, at 34 (“Current definitions of the rule of law used by organizations working to create it abroad tend toward ad hoc laundry lists of institutions to reform”); *id.* at 57 (objecting to “defining the rule of law by institutional reform rather than by end goals.”); *id.* at 56-57 (“Rule of law reformers believe, by definition, that they are trying to create the rule of law. . . . Any work to reform laws, any change to police policy, is considered rule of law reform.”).

93. USAID, *supra* note 74, at 19.

or any of its aspects, including sound judicial institutions, is beyond the scope of this article. Such an approach requires an adequately designed research study, perhaps on a country by country basis, controlling for the effect of perhaps many other circumstances that might affect development.⁹⁴ One commentator, for instance, has identified the questions she would like answered in order to determine the extent to which foreign investment is influenced by legal reform, but noted that the data was so far unavailable.⁹⁵ The questions are as follows:

- Did or will you investigate Country X's legal system before you deciding [sic] to invest there? (Are legal systems a factor?)
- If yes, did or do you consider it to be an attractive legal system? (What is an attractive legal system?)
- Would you refuse to invest in, or remove investment from, Country X if you did not consider its legal system to be effective? (How much of a factor are legal systems?)
- How much importance do you place on the legal system as a factor in determining where you should invest? (How much of a factor are legal systems?)
- Have you had or do you expect to have much interaction with the legal system in Country X? (How much of a factor are legal systems?)⁹⁶

The results may be inconsistent from country to country; and researchers or commentators may not achieve consensus because of disputes over the variables selected, the presence or absence of data,⁹⁷ the

94. The World Bank's Governance project gathers subjective measures of institutional quality and groups them into six clusters—of which the rule of law is only one—in order to measure the quality of governance in many countries. In addition to “rule of law,” the clusters are “voice and accountability,” “political stability,” “government effectiveness,” “regulatory quality,” and “control of corruption.” The Governance project concludes that there is a relationship between institutional quality and its measure of development, “hence their conclusion that ‘Governance Matters.’” Davis & Trebilcock, *supra* note 55, at 938. The Governance project is also described on the World Bank's website. See World Bank, *Governance Matters 2008: World Wide Governance Indicators, 1996-2007*, <http://info.worldbank.org/governance/wgi/index.asp>; see also DAM, *supra* note 62, at 52-55; Daniel Kaufmann, Aart Kraay, & Massimo Mastruzzi, *Governance Matters VII: Aggregate and Individual Governance Indicators, 1996-2007* 7-8, 11 (World Bank Policy Research, Working Paper No. 4654, 2008) available at <http://ssrn.com/abstract=1148386>. The governance data is updated annually, and a website is dedicated to the cross-country data on institutional quality. See www.govindicators.org.

95. Perry-Kessaris, *supra* note 71, at 688.

96. *Id.* (describing the questions that she would like to have answered).

97. Davis & Kruse, *supra* note 90, at 1114 (“Given the often sweeping conclusions drawn by the . . . authors, it is clear that they want to draw inferences about the relationship of regulation to development that go well beyond the limited set of regulations and social and economic outcomes they have studied.”). Compare Marcus J. Kurtz and Andrew Schrank, *Growth and Governance: Models, Measures, and Mechanisms*, 69 J. POL. 538, 547, 552 (2007) (pointing out that “[r]ecent scholarship has emphasized the importance of good governance for economic performance,” yet contending that “the oft-asserted connection between growth and governance lies on exceedingly

definition of terms (including what is “rule of law” and what is “economic development”),⁹⁸ other methodological controversies, such as countries that arguably do not fit within the overall theory, and the contention that correlation between rule of law reform and economic development is being confused with cause.⁹⁹ Some even suggest that causation flows in reverse, with economic development leading to rule of law reform, rather than rule of law reform leading to economic development.¹⁰⁰ Causation may also flow in both directions.¹⁰¹

Moreover, certain northeast Asian countries have weak rule of law and had substantial economic progress.¹⁰² Some may question, if this is established, what this means for the general rule: for example, are they outliers or anomalies which leave the rule intact; is it too early to tell whether the progress is sustainable;¹⁰³ might past progress have been

shaky empirical pilings”), *id.* at 541 (“Clean, effective government is desirable, but what is not so clear is whether it is an essential or even important antecedent of rapid economic growth . . .”), and Marcus J. Kurtz and Andrew Schrank, *Growth and Governance: A Defense*, 69 J. POL. 563 (2007), with Daniel Kaufmann, Aart Kraay, and Massimo Mastruzzi, *Growth and Governance: A Reply*, J. POL. 555, 555 (2007) (responding to Kurtz and Shrank articles, among other things, by noting that there is a “rich body of recent work in the economics literature that has documented a sizeable long-run effect of governance on growth.”), and Daniel Kaufmann, Aart Kraay, and Massimo Mastruzzi, *Growth and Governance: A Rejoinder*, 69 J. POL. 570 (2007) (further rebuttal to Kurtz and Shrank articles).

98. Davis & Kruse, *supra* note 90, at 1097 (referring to the “complexity and uncertainty of law, the contested nature of the concept of development, the opacity of the causal connection between these phenomena . . .”).

99. *Id.* at 1112-13.

100. See Daniel M. Klerman, *Legal Infrastructure, Judicial Independence, and Economic Development*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L. J. 427, 430 (2007) (“Although independent courts are usually viewed as a cause of economic growth, the reverse may be true. . . . As wealth increases, private parties have more to offer the government and become more politically powerful. As a result, as economic growth occurs, demand for independent courts may increase and such demands are more likely to be heeded.”). Nonetheless, despite acknowledging the reverse causation argument, Klerman also acknowledges that independent courts promote growth, noting that “economic theory suggests that effective, independent courts promote investment and economic growth. . . . The empirical literature provides some support for the idea that independent courts encourage economic growth, but causation remains unclear and much work remains to be done.” *Id.* at 434.

101. DAM, *supra* note 62, at 276 (“The econometric evidence examined in earlier chapters showing that causation runs from institutions to growth rather than vice versa may be interpreted to say that *on balance* the causation runs from institutions to growth but that to some extent increasing wealth helps to build institutions.”).

102. See Ohnesorge, *supra* note 66, at 258-60 (2007). Others point out that in some situations the rule of law may be weak and foreign investment may be strong or that foreign investment may not even be required for economic development. See, e.g., Carothers, *Steps Toward Knowledge, in PROMOTING*, *supra* note 10, at 17. For policymakers, unquestioned social scientific proof of the connection between the rule of law and economic development may be unnecessary or at least only be a long-term objective; and common sense may sometimes be enough for reasoned decision-making.

Even in a country with “weak” rule of law, the rule of law need not be weak in every aspect. For example, the rule of law may be weak in cases involving the government or the rich, but not involving two ordinary citizens having a breach of contract case. Or it may be weak in criminal law cases but not in family law cases.

103. See DAM, *supra* note 62, at 277 (China’s experience is consistent with the view “that considerable development is possible without strong legal institutions but sustainable growth to higher per capita levels requires considerable development of legal institutions.”). Dam noted that “[i]t is certainly too early to accept the notion that recent Chinese experience is a counterexample to

greater still in those countries if rule of law were stronger; or is substantial future progress possible only with stronger rule of law?

Even some skeptical commentary, however, would not entirely deny the connection between rule of law reform and economic development, much less suggest that law reform efforts cease; rather, these commentators suggest law reform efforts go forward.¹⁰⁴ For example, questions about a World Bank study relating to the connection of law to economic development nonetheless concluded with appreciation for the work and suggestions for improvement, not cessation.¹⁰⁵ Another commentator noted:

the need for a focus on institutions in the developing world and, indeed, for a rule of law in China itself,” and that “little thus far in the Chinese experience leads to the conclusion that rule-of-law issues are not important in economic development.” *Id.*

104. See, e.g., Frank Upham, *Mythmaking in the Rule-of-Law Orthodoxy*, in PROMOTING, *supra* note 10, at 101 (objecting to certain aspects of rule of law rhetoric, but noting that “I do not intend to discourage legal reform or the borrowing of legal rules or institutions from other countries.”).

Thomas Carothers singled out as one of the objects of his concern “an unusually strong initial sense of certainty, often verging on hubris, about such [rule of law] work” Carothers, *Steps Toward Knowledge*, in PROMOTING, *supra* note 10, at 329. He likewise has referred to the “enthusiasm of many rule-of-law assistance providers who believe fervently in the centrality and naturalness of the rule-of-law agenda” and “unrealistic expectations.” Thomas Carothers, *Rule of Law Temptations* 18 (Oct. 2008) (unpublished manuscript, on file with author and *Denver University Law Review*) (earlier Preliminary Draft, Prepared for World Justice Forum available at http://www.lexisnexis.com/documents/pdf/20080806033651_large.pdf). See also *id.* at 2:

The rule-of-law field continues to radiate an almost constant sense of discovery. Policy actors and aid practitioners continue discovering it and becoming seized with enthusiasm for the rule of law. They are often surprised to learn that what seems to them a vital discovery is in fact a relatively late arrival to a revival that has been going on for quite some time.

See also Carothers, *Steps Toward Knowledge*, in PROMOTING, *supra* note 10, at 337 (“The subject [of rule-of-law] commands strong interest in many quarters and continues to be invested with high expectations.”).

But Carothers nonetheless applauds the rule of law effort, stating “that something vital and dynamic lies at the root of rule-of-law promotion, something that will continue to sustain commitment and hope in such work despite the daunting complexities and conundrums that exist all along the way.” *Id.* at 337. See also Carothers, *Rule of Law Temptations*, *supra* at 7. In addition, when it comes to the connection between the rule of law and economic development, Carothers notes that it is “real” and “plausible”:

This continued attention to rule-of-law development reflects the fact that the connections of the rule of law to economic and political development, although perhaps not as straightforward as some early enthusiasts presumed, are real. In the economic domain, the simplistic idea that the rule of law automatically helps foster economic growth has come under useful critical scrutiny. Yet at least some positive link appears plausible and is enough to animate many aid practitioners.

Id. at 2. See also *id.* at 7 (“The rule-of-law agenda on the international policy stage is of tremendous potential importance and value.”).

105. See Davis & Kruse, *supra* note 90, at 1117 (“Assessed solely as a research project, the [World Bank’s 2004 Doing Business] project is extremely impressive in terms of the creativity of its design, scale, and rigor. The criticisms set out above are not meant in any way to detract from our overall appreciation of the data-collection exercise that the participants in the project have undertaken and its contribution to the enterprise of understanding the relationship between law and development. Our sense is that the limitations of the project reflect challenges inherent in achieving its ambitious objectives.”).

It is hard to argue that an effective, efficient, and fair judicial system is not a good thing or that a country will be better off without “an effective system of property, contracts, labor, bankruptcy, commercial codes, personal rights and other elements of a comprehensive legal system that are effectively, impartially, and cleanly administered by a well-functioning, impartial and honest judicial and legal system,” and I will not attempt to do so.¹⁰⁶

. . . I do not intend to discourage legal reform or the borrowing of legal rules or institutions from other countries. . . . It would be foolish and futile to argue against it, and it would mean arguing against transnational legal learning.¹⁰⁷

Still others contend that “[w]hile there appears to be an increasingly firm empirically grounded consensus that institutions are an important determinant of economic development . . . there is much less consensus on which *legal* institutions are important”¹⁰⁸ In any event, although doing a study as an academic or future policy matter is undoubtedly worthwhile and may fall under the heading of “next steps” or “future challenges,” it is unnecessary for the purposes of this article. Nor, as shown below, need it delay policymakers from making the decisions that they need to make in light of what they already know.

b. Informal Legal Systems and Incentives

Some contend that formal legal systems are not the only systems causally linked to economic development or are not essential for development. Instead, they identify informal legal systems consisting of various incentives which also help ensure that persons keep their promises: for instance, the negative consequences of failing to maintain a good reputation.¹⁰⁹ This, of course, does not prove that formal legal systems are not linked to economic development, but rather suggests only that other informal incentives may be at work too.

For example, “[a] vendor who is a member of a community is unlikely to risk his reputation by failing to perform his obligations under a contract. The result would be a loss of respect and a subsequent lack of

106. Upham, *supra* note 104, at 78.

107. *Id.*; see also Carothers, *The Rule-of-Law Revival*, in *PROMOTING*, *supra* note 10, at 7 (“Although its wonderworking abilities have been exaggerated, the desirability of the rule of law is clear. The question is where to start.”).

108. Davis & Trebilcock, *supra* note 55, at 945. The authors noted that the reduced consensus on the role of legal institutions in economic development is affected by “the existence of informal substitutes, [questions concerning] what an optimal set of legal institutions might look like for any given developing country, or for those developing countries lacking optimal legal institutions (however defined) what form a feasible and effective reform process might take and the respective roles of ‘insiders’ and ‘outsiders’ in that process.” *Id.*

109. See, e.g., Messick, *Judicial Reform and Economic Development*, *supra* note 10, at 129.

business.”¹¹⁰ In other words, a company which does not carry out the first bargain may lose the opportunity to have a second bargain, because the company’s reputation was harmed. Alternatively, the company may not lose the opportunity to do another deal, but it may lose the opportunity to do so at a reasonable price. Thus the cost of credit or sales price or any other cost indicators may escalate because of the perceived danger of a breach or noncompliance. “A country that cannot establish to the satisfaction of the contracting private party that the rule of law will ensure fair treatment can expect to pay more, perhaps much more, just to cover the risk.”¹¹¹

In developed legal systems, reputation likewise plays a role in ensuring compliance, especially given the uncertainties involved in contract enforcement even in those systems. The availability of an action for breach of contract may be of limited benefit even in developed countries. Even if one has a valid claim, recovery is not assured. For example, the party in breach may assert defenses or counterclaims or be insolvent; a lawsuit may be time-consuming, slow and expensive; and the judge or jury may simply “get it wrong.” In many ways, it is important to deal with someone with a good reputation under any circumstances. Although reputation is not referred to as law (a phrase generally restricted to formal law), this does not make reputation any less effective as a persuasive (if not coercive) force to ensure compliance.

Sometimes it will be uncertain which mechanisms (formal or informal) cause some to keep their bargains. Some may keep their bargains because of reputational or informal legal systems, some may do so because of the formal legal system or threat of lawsuit, and others may do so because of the mixture of the two.¹¹² It might be difficult to guess which is the most efficacious as opposed to supporting both.¹¹³ Furthermore, both systems may provide greater safety than one, resources permitting.¹¹⁴

110. Kevin J. Fandl, *The Role of Informal Legal Institutions in Economic Development*, 32 *FORDHAM INT’L L. J.* 1, 14 (2008).

111. DAM, *supra* note 62, at 126.

112. See e-mail from Richard E. Messick, Senior Public Sector Specialist, World Bank to author (July 18, 2008, 10:01 a.m. EST) (on file with author and *Denver University Law Review*):

Consider the following two scenarios—1) Firms observe the terms of their contracts because they fear that if they don’t the bad reputation they get will prevent them from doing future business. 2) Firms observe the terms of their contracts because of the threat of lawsuits. Would you say the rule of law exists only in #2? What if some firms comply with contracts because of #1, some because of #2, and some because of concerns about both #1 & #2?

113. *Id.*

114. See Messick, *Judicial Reform and Economic Development*, *supra* note 10, at 129 (referring to the “incentive to maintain a good reputation.”). See also Erik G. Jensen, *Justice and the Rule of Law*, in *BUILDING STATES TO BUILD PEACE* 119, 121 (Charles Call & Vanessa Wyeth eds., 2008), noting that informal institutions are less costly:

I am pragmatic. Formal institutions are expensive to build. Enforcement through formal institutions is complex. Formal enforcement is also expensive. These realities . . . lead to

D. *The Policymakers' Decisions*

A tension exists in the field of law and development between policymakers and researchers. They have different timetables and different knowledge requirements. Policymakers (including international financial institutions) and companies and their CEOs may (and will) act on the basis of sound policy, logic and common sense. None of these factors requires a demonstration of causation to a reasonable degree of social scientific certainty. Nor will they insist on such a high level of proof given their time constraints: if necessary decisions awaited the completion of time-consuming research, the time to act might have passed. Decisions may have to be made on the basis of scientifically imperfect, although otherwise sound, information:

Policy decisions on economic development issues are being made every day in every developing country and in bilateral and multilateral agencies in the developed world as well. Economy policymaking is necessarily carried out under conditions of uncertainty—uncertainty about the facts and about underlying principles and causes. So decisions about whether to change legal institutions and substantive law will be taken—if only by inaction—in substantive fields, such as land, equity markets, and credit markets as well as in enforcement, including the role and nature of the judiciary. Since policymakers know that institutions matter to economic development, it would be foolish for them to assume that legal institutions—both the rules of the game and law's organizations, especially the judiciary—do not matter.¹¹⁵

That does not mean that research should not proceed and hypotheses and dominant theories should not be tested. Common-sense principles include the concept that economic transactions may be unsafe where there is no reliable legal system to enforce them, and foreign investment is less likely where the chances of investment protection are uncertain.¹¹⁶ The lack of reliable enforcement may make doing business risky and complicate business planning; among other things, it may impede the

a very practical approach. Figure out what informal institutions are doing; which types of disputes are handled reasonably well by informal institutions and which are not; and tailor formal institution building to handle matters that are not being handled well by informal institutions yet are crucial to the strategic dependent variables or outcomes identified.

115. DAM, *supra* note 62, at 231; *see also id.*, at 230 (describing the position that the law matters for economic development, or, otherwise stated, that “institutions matter” for development and “that, in particular, legal institutions matter.”). According to Dam, “[p]roof of the correctness” of the premise that law matters for development “would be an . . . exercise . . . more appropriate for economists and perhaps other social scientists than for lawyers and policymakers.”). *Id.* *See also* Kleinfeld, *supra* note 10, at 64 (“The new field of rule-of-law reform did not emerge slowly . . . It grew from action—action needed right away—as states tried to keep regions from falling into poverty and anarchy . . .”).

116. *See* DAM, *supra* note 62, at 94 (“Better courts reduce the risks firms face, and so increase the firms’ willingness to invest more.”).

formation of long-term or complex contracts or contracts involving large sums:

From the standpoint of economic development, perhaps the most unfortunate consequence of the unreliability of court enforcement is that it impedes the effective use of long-term and complex contracts. . . . Today such contracts are essential in developing countries, especially for electric generating plants, ports, highways, and many other infrastructure projects.¹¹⁷

It may also discourage the formation of new business relationships and lead to more conservative business practices overall.¹¹⁸ Also, “[t]he prospect that courts will resolve these disputes impartially if the contracting parties cannot agree often leads to more reasonable bargaining positions and more prompt compromise.”¹¹⁹ The argument connecting judicial reform and foreign investment has “undeniable common sense appeal—investors will want predictability, security, and the like.”¹²⁰

In addition, although some countries reportedly have attracted businesses to invest in their economies despite a weak rule of law, the weaknesses still may have been a negative factor for businesses considering whether to invest and may have deterred more investment.¹²¹ Furthermore, even if weak rule of law may not deter investment in some circumstances, strong rule of law may positively encourage it; and investment may have been greater if rule of law were stronger. No one would be expected to argue that strong rule of law is a “negative” or that the rule of law should be weakened or corruption increased in order to improve the investment climate.¹²² Also, no one can preclude the possibility that

117. *Id.* at 123.

118. See THE WORLD BANK, *DOING BUSINESS IN 2004: UNDERSTANDING REGULATION* 41 (2003) explaining:

In the absence of efficient courts, fewer transactions take place, and those transactions involve only a small group of people linked through kinship, ethnic origin, and previous dealings.

. . . Courts have four important functions. They encourage new business relationships, because partners do not fear being cheated. They generate confidence in more complex business transactions by clarifying threat points in the contract and enforcing such threats in the event of default. They enable more sophisticated goods and services to be rendered by encouraging asset-specific investments in their production. And they serve a social objective by limiting injustice and securing social peace. . . . Companies that have little or no access to courts must rely on other mechanisms, both formal and informal—such as trade associations, social networks, credit bureaus, and private information channels—to decide with whom to do business. Companies may also adopt conservative business practices and deal only with repeat customers. Transactions are then structured to forestall disputes. Whatever alternative is chosen, economic and social value may be lost.

119. DAM, *supra* note 62, at 123.

120. Carothers, *The Problem of Knowledge*, in *PROMOTING*, *supra* note 10, at 17.

121. See *id.* (“It is clear that what draws investors into China is the possibility of making money either in the near or long term. Weak rule of law is perhaps one negative factor they weigh in their decision of whether to invest, but it is by no means determinative.”).

122. *But see* TAMANAHA, *supra* note 29, at 120 (noting problems with rule of law in service of an authoritarian regime).

investment may occur even if rule of law is limited: some percentage of companies may tolerate high transaction risks in exchange for high potential gains or even successfully “navigate” corrupt systems through bribery or other means.¹²³ However, that is not the optimal situation.

E. The Consequence of Rule of Law Failures or Violations

Rule of law failures may have important consequences. Unfair judicial decision-making may lead to adverse judgments which will damage litigants and their families economically, harm shareholders, eliminate jobs, and interfere with society’s ability to create goods and services. The causes of failure include lack of judicial independence (*e.g.*, cases are not decided on the law and facts but as directed by another branch of government or person or to favor campaign contributors or

123. See LINN HAMMERGREN, ENVISIONING REFORM: IMPROVING JUDICIAL PERFORMANCE IN LATIN AMERICA 91 (2007):

There are also many less formal means for moving beyond the initial dispute and returning to business as usual. A company, unlike an individual, can factor any additional costs into its price structure—and this is what commonly happens to bribes, speed money, and negotiated agreements. Businesses resolve their credit problems by recourse to supplier credit (a euphemism for not paying your bills on time).

See also Russell Gold & David Crawford, *U.S., Other Nations Step Up Bribery Battle*, WALL ST. J., Sept. 12, 2008, at B1, available at <http://online.wsj.com/article/SB122116624489924911.html> (“A global crackdown on companies that use bribery to advance their foreign business interests is rapidly gathering steam ‘U.S. companies that are paying bribes to foreign officials are undermining government institutions around the world. . . . It is a huge destabilizing force.’” (quoting Mark F. Mendelsohn, Deputy Chief of the U.S. Justice Department’s fraud section)); *id.* at B-6 (“Until 1999 in Germany and until 2000 in France, tax laws allowed bribes to be deducted from corporate taxes”); Marlise Simons, *U.S. Enlists Rich Nations in Move to End Business Bribes*, N.Y. TIMES, April 12, 1996, available at <http://query.nytimes.com/gst/fullpage.html?res=950DE3D71039F931A25757C0A960958260&sec=&spn=&pagewanted=print>:

[T]he world’s richest nations today took an important step to fight corruption in international business dealings by agreeing that bribes paid to foreign officials, often listed as commissions or fees, should no longer be tax deductible Today’s decision by the Organization for Economic Cooperation and Development, a club of industrial countries, commits its 26 members to rewrite tax rules that have effectively encouraged the bribery of foreign officials by making such payoffs tax deductible.

See also Siri Schubert & T. Christian Miller, *At Siemens, Bribery Was Only a Line Item*, N.Y. TIMES, Dec. 21, 2008, available at http://www.nytimes.com/2008/12/21/business/worldbusiness/21siemens.html?_r=1&scp=2&sq=siemens&st=cse.

The company [Siemens] turned to markets in less developed countries to compete, and bribery became a reliable and ubiquitous sales technique Inside Siemens, bribes were referred to as “NA”—a German abbreviation for the phrase “nützliche Aufwendungen” which means “useful money.” Siemens bribed wherever executives felt the money was needed, paying off officials not only in countries known for government corruption, like Nigeria, but also in countries with reputations for transparency, like Norway, according to court records.

. . . “Bribery was Siemens’s business model,” said Uwe Dolata, the spokesman for the association of federal criminal investigators in Germany. “Siemens had institutionalized corruption.”

. . . Siemens will pay more than \$2.6 billion to clear its name: \$1.6 billion in fines and fees in Germany and the United States and more than \$1 billion for internal investigations and reforms.

local voters); lack of accountability (judges are uneducated, inefficient, or otherwise perform poorly); and even criminal conduct, such as corruption.¹²⁴ As a commentator noted, the rule of law is particularly important to developed societies, including their economies:

The relationship between the rule of law and liberal democracy is profound. The rule of law makes possible individual rights, which are at the core of democracy. . . . Basic elements of a modern market economy such as property rights and contracts are founded on the law and require competent third-party enforcement. Without the rule of law, major economic institutions such as corporations, banks, and labor unions would not function, and the government's many involvements in the economy—regulatory mechanisms, tax systems, customs structures, monetary policy, and the like—would be unfair, inefficient, and opaque.¹²⁵

Besides the economic consequences, such violations may also threaten the legitimacy of the court system, dissuade people from using the courts, and effectively deprive them of a fair place for the resolution of their disputes.

II. AMERICAN JUDICIAL ELECTIONS AND THE RULE OF LAW: ARE OUR PRINCIPLES AT HOME CONSISTENT WITH OUR PRINCIPLES ABROAD?

*To casual observers, the epitome of the rule of law is the United States, and the United States is a leading exponent of the new rule-of-law orthodoxy. When we look closely at the U.S. legal system, however, we find few of these characteristics . . .*¹²⁶

* * *

A dark shadow is falling, fairly or unfairly, upon the perceived integrity of judges in many states that elect judges. Justice has been characterized as being "for sale." Impartiality and the judiciary's rule-of-

124. See Susan Rose-Ackerman, *Judicial independence and corruption*, in TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT 2007, *supra* note 10, at 16; Greg Mayne, *Judicial integrity: the accountability gap and the Bangalore Principles*, in TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT 2007, *supra* note 10, at 41.

125. Carothers, *The Rule-of-Law Revival*, in PROMOTING, *supra* note 10 at 4-5. The essay describes its version of the rule of law using a relatively "thick" definition, including "political and civil liberties," as follows:

The rule of law can be defined as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the last half-century. In particular, anyone accused of a crime has the right to a fair, prompt hearing and is presumed innocent until proved guilty. The central institutions of the legal system, including courts, prosecutors, and police, are reasonably fair, competent, and efficient. Judges are impartial and independent, not subject to political influence or manipulation. Perhaps most important, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding.

Id. at 4.

126. Upham, *supra* note 104, at 83-84.

*law function are plainly threatened. . . . [C]urrent thinking on how to protect the impartiality of the judiciary is gravitating toward the use and refinement of appointive methods of selection and related processes.*¹²⁷

This section suggests that rule of law dialogue should enter the domestic arena, that domestic reform advocacy should reflect rule of law values, and that lessons learned internationally should be introduced into reform in the United States.¹²⁸

In supporting the rule of law abroad, Americans are advocating concepts of judicial reform that our judicial systems sometimes fail to comply with at home. For example, although international rule of law efforts stress judicial impartiality, independence and accountability, many Americans tolerate judicial elections that do not adequately protect these qualities.¹²⁹ Some judicial elections seem to be efforts to achieve the opposite: namely, a tilted or slanted judiciary accountable to interest groups seeking to elect judges likely to decide cases “their way” or to hold judges accountable to popular and party preferences.¹³⁰

In addition, the rule of law embodies the predictable application of the laws to all because the rules are open, known, and equally applied. But if the rules for decision depend on which side contributed or might contribute to (or against) the judge’s campaign, or on who votes locally, the rules are no longer known or susceptible to equal application. Instead, they may shift—or appear to do so—from case to case according to the varying identities of the parties, depending on whether they are funders or potential funders, or where they vote.

127. Donald L. Burnett, Jr., *A Cancer on the Republic: The Assault Upon Impartiality of State Courts and the Challenge to Judicial Selection*, 34 *FORDHAM URB. L.J.* 265, 281-82 (2007).

128. Various terms come to mind to describe the difference in the approach at home as opposed to the approach abroad, including hypocrisy, inconsistency, or cognitive dissonance. None of them is necessarily comprehensive or apt. For example, the same actor may not be involved in both situations so it is difficult to attribute those concepts to a single actor. Thus the United States government or the World Bank may be supporting judicial reforms abroad but are not known to have taken positions on state court judicial elections. Nonetheless, taking the United States as a whole or as a single actor, which may or may not be fair, a pattern of at least inconsistency appears to be arguable. See, e.g., Kleinfeld, *supra* note 10, at 53 (“[R]eformers open themselves to charges of hypocrisy. . . . The highly political process of judicial choice in the United States would never be permitted by reformers elsewhere.”); *id.* at 52 (“Practitioners are often following an idealized blueprint of their home system that ignores its own difficulties and flaws, such as the intense political involvement in the picking of the U.S. judiciary or the corruption residing in some European judiciaries.”).

129. See Charles G. Geyh, *Rethinking Judicial Elections*, BILL OF PARTICULARS, Spring 2003, at 5, available at <http://alumni.indiana.edu/conpubs/archives/Law-spr03-combined.pdf> (last visited Oct. 17, 2008) (“I have reached the conclusion that judicial elections are fundamentally incompatible with judicial independence, and fundamentally incapable of adequately promoting judicial accountability. The time has come to rethink judicial elections, to the end of gradually phasing them out of existence all together.”).

130. See, e.g., Upham, *supra* note 104, at 83-84. See also *id.* (“The U.S. judiciary is permeated by politics. . . . If they [i.e., judges] are not constantly aware of the effect of their important rulings on the electorate and the party’s leaders, they will not be reelected, and they will cease to be judges.”).

A. The Rule of Law Concept Is Not Merely International: It Should Be Applied to United States Institutions

The U.S. and U.S.-based or -supported international development institutions have been looking at rule of law reforms, including judicial reform, worldwide, sometimes country by country.¹³¹ They have spent considerable time studying and assisting foreign states needing such reform.¹³² While these organizations are looking outward toward reform, other organizations within the United States are addressing the need for similar reforms in the United States, though rarely under the banner of “the rule of law.”¹³³ In the foreign context, rule of law reform is driven by the need for economic stability and development, and, in some cases, human rights.¹³⁴ In the United States context, however, the same principles should apply, with a similar effort, starting with a closer look at state court judicial elections.

This is not to say that the words “rule of law” do not appear in the domestic context. They do, occasionally. Rather, these words do not appear to be commonly used in the same comprehensive sense domestically as they are abroad; sometimes they appear in passing; and they do not appear often enough.¹³⁵ Notable exceptions include Justice Anthony

131. 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).

132. See *id.* at 384-85.

133. There are many court reform organizations, both national and local; those with a national focus include the National Center for State Courts, Justice at Stake, and the American Judicature Society. The Sandra Day O'Connor Project on the State of the Judiciary at Georgetown University Law Center has also had a substantial impact. See generally National Center for State Courts, http://www.ncsconline.org/D_About/index.htm; Justice at Stake Campaign, <http://faircourts.org/contentViewer.asp?breadcrumb=8,284>; American Judicature Society, <http://www.ajs.org/ajs/about.asp>; and Sandra Day O'Connor Project on the State of the Judiciary, <http://www.law.georgetown.edu/judiciary/> (all sites in this footnote last visited Nov. 19, 2008).

134. The focus of this article is on the economic aspect of the rule of law, not the human rights aspect. The need for judicial reform to ensure human rights is fundamental, even in the United States. See, e.g., Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 832-33 (1995); Norman L. Greene et al., *Rethinking the Death Penalty: Can We Define Who Deserves Death?*, 24 PACE L. REV. 107, 115 n.33 (2002) (relating to the effect of judges' rulings in capital cases on their ability to remain in office). See also *Harris v. Alabama*, 513 U.S. 504, 519-20 (1995) (Stevens, J., dissenting). Arguably, the concepts of human rights and economic rights are linked to the extent that both relate to having a decent living standard.

135. See David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 327-28 (2008) (commenting in passing on the problem of rule of law and judicial elections):

On account of recent changes to judicial elections making them more open and competitive, elected state courts will indeed have better majoritarian credentials than ever before. But for anyone whose vision of democracy incorporates robust protections for individuals, minorities and the *rule of law*, this does not mean that they will be more democratic. ... In the new era [of judicial elections], the connection between elected state courts and the people grows ever more vigorous, but at a grave cost to other democratic and *rule-of-law* values.

Id. (emphasis added). See also Symposium, *supra* note 5, at 225; Bright & Keenan, *supra* note 134, at 785 (“A few rulings in highly publicized cases may become more important to a judge's survival on the bench than qualifications, judicial temperament, management of the docket, or commitment to the Constitution and the *rule of law*.”) (emphasis added).

Kennedy's observation in a recent concurrence that the aspirations of the rule of law "may seem difficult to reconcile" with state court judicial elections,¹³⁶ as well as the work of the World Justice Project.¹³⁷

Popular judicial elections are a peculiarly American custom.¹³⁸ Research has not disclosed any concerted effort to encourage judicial elections as part of any international program to improve judiciaries in foreign countries. The opposite appears to be true, with judicial elections simply left out of the sophisticated rule of law and reform dialogue directed internationally. They are not part of the rule of law reform package. Thus it has been observed that the American Bar Association's Rule of Law Initiative, in promoting the rule of law, does not encourage the election of judges.¹³⁹ Instead, it considers judicial elections as

136. *N.Y. State Bd. of Elections v. Lopez Torres*, 128 S. Ct. 791, 803 (2008) (Kennedy, J., concurring). Justice Anthony Kennedy, in his concurrence upholding the constitutionality of New York's election of state court trial judges, used rule of law language to question state court judicial elections. Although finding a rule of law violation was beyond the scope of his concurrence, Justice Kennedy was evidently troubled by the possibility that judicial elections constitute rule of law violations, noting as follows:

When one considers that elections require candidates to conduct campaigns and to raise funds in a system designed to allow for competition among interest groups and political parties, the persisting question is whether that process is consistent with the perception and the reality of judicial independence and judicial excellence. The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges. And it may seem difficult to reconcile these aspirations with elections.

Id. Although not using rule of law language, Justice Stevens's concurrence suggested that the lower court findings "lend support to the broader proposition that the very practice of electing judges is unwise." *Id.* at 801 (Stevens, J., concurring).

137. See, e.g., World Justice Project, *Domestic Mainstreaming of the Rule of Law*, *supra* note 5.

138. Few other countries elect any judges, and even there, the practice is limited. See Adam Liptak, *Rendering Justice, With One Eye on Re-election*, N.Y. TIMES, May 25, 2008, at A1 ("Smaller Swiss cantons elect judges, and appointed justices on the Japanese Supreme Court must sometimes face retention elections, though scholars there say those elections are a formality."); Herbert M. Kritzer, *Law as a Mere Continuation of Politics*, 56 DEPAUL L. REV. 423, 431 (2007) ("The United States is almost unique in its use of elections in the judicial selection and retention process."). See also Posting of Walter Olson to PointofLaw.com, *Judicial Elections: A Dissenting View*, <http://www.pointoflaw.com/archives/2008/07/judicial-elections-a-dissenting.php> (July 17, 2008, 1:25 EST) ("Again, business litigants widely regard the judicial process of most other advanced democracies—in Western Europe, Japan, Canada—as more predictable and rational than that of state courts in the U.S. And again, in those other advanced democracies, elected judgeships are virtually unknown, being widely seen as part and parcel of the distinctive 'American disease' of law.").

139. E-mail from Simon R. Conté, Director, Research & Program Development, American Bar Association Rule of Law Initiative to author (July 16, 2008, 10:44 EST) (on file with author and *Denver University Law Review*). Mr. Conte noted as follows:

I wanted to confirm that, consistent with the relevant international standards, ABA ROLI [*i.e.*, Rule of Law Initiative] does not encourage the election of judges. Judicial selection is one of the most important factors analyzed in ROLI's Judicial Reform Index, which is drawn from various international and regional standards, including the UN Basic Principles on the Independence of the Judiciary, Council of Europe Recommendation R(94)12 "On the Independence, Efficiency and Role of Judges," the Universal Declaration on the Independence of Justice, the Syracuse Draft Principles on the Independence of the Judiciary, and the International Bar Association Code of Minimum Standards of Judicial Independence. All of these standards state a clear preference for judicial selection based on

the method [of judicial selection] least likely to achieve [international] standards [of merit, including professional qualifications, integrity, and independence], due to the politicization of the election process, the conflict of interest arising from the need to fundraise and campaign, and the risk that judges looking ahead to reelection might be influenced by popular opinion.¹⁴⁰

“To the rest of the world . . . American adherence to judicial elections is as incomprehensible as our rejection of the metric system.”¹⁴¹ Notably, “[t]he rest of the world . . . is stunned and amazed at what we do, and vaguely aghast. They think the idea that judges with absolutely no judge-specific educational training are running political campaigns is both insane and characteristically American.”¹⁴²

B. State Court Judicial Elections—An Overview of Concerns

*Insofar as all state judicial offices are filled through the electoral process, every judicial officer in this state is subject to having to decide the merits of a case that involves a party or attorney who contributed to or supported, or, conversely, opposed his or her campaign for office.*¹⁴³

merit, including professional qualifications, integrity, and independence. Electing judges is the method least likely to achieve those standards, due to the politicization of the election process, the conflict of interest arising from the need to fundraise and campaign, and the risk that judges looking ahead to reelection might be influenced by popular opinion.

140. *Id.*; see also Kleinfeld, *supra* note 10, at 31 (“The highly political process of judicial choice in the United States would never be permitted by reformers elsewhere.”); *id.* at 53 (“Many legal professionals in the developing world know that the rule of law is a goal toward which even Western institutions are still evolving.”).

141. Liptak, *supra* note 138 (quoting Hans A. Linde, a former justice of the Oregon Supreme Court, at a 1988 symposium on judicial selection); see also e-mail from Donald Chisholm, then an employee of USAID, to author (Aug. 18, 2008, 16:22:38 EST) (on file with author and *Denver University Law Review*), stating as follows:

From 2004-2005, I was the Chief of Party for a USAID-financed Rule of Law project [in Peru]. One of the project’s chief counterparts was . . . the Presiding Judge of the Anti-Terrorism Chamber. [The judge] was an extremely sophisticated counterpart who had traveled in the US as part of a Department of State-funded program and had good comparative knowledge about other legal systems . . . We . . . delved into the subject of the election of state judges in the US. He found it surprising that a country that preached the doctrine of judicial independence in its work overseas would permit the election of state court judges by voters.

See also e-mail from Erik Jensen, Co-Director, Rule of Law Program, Stanford Law School to author (Sept. 5, 2008, 03:28 EST) (on file with author and *Denver University Law Review*) (“Even with all of [the] shortcomings . . . [of the international rule of law industry,] however, I am not aware of a single international rule of law project that has stooped to consider[] support for a system of judicial elections. The inherent distorting effects of such a selection process are so obvious that it does not pass the most minimal plausibility test.”).

142. Liptak, *supra* note 138 (quoting Mitchel Lasser, a law professor at Cornell Law School). Professor Lasser compared the American system of judicial selection to the “much more rigorous French model, in which aspiring judges are subjected to a battery of tests and years at a special school” where “you have people who actually know what the hell they’re doing . . . They’ve spent years in school taking practical and theoretical courses on how to be a judge. These are professionals.” *Id.*

143. *Caperton v. A.T. Massey Coal Co.*, No. 33350, 2008 WL 918444, at *21 (W. Va. July 28, 2008), (Benjamin, Acting C.J., concurring) (refusing to recuse himself from the hearing of the case),

* * *

*Still another objection to the judicial elections has to do with how they are financed. They are usually financed, at least in the Midwest, by contributions from practicing lawyers. The result is the same kind of quasi-corruption that campaign financing generally produces. The people who contribute heavily are doing so, at least in part, in order either to obtain the kind of judge who will make their practice more successful or a judge who will be inclined to favor them out of gratitude or hope for future support. The combination of the financing and selection effects of judicial elections is very bad.*¹⁴⁴

1. Is Justice For Sale? The Dangers of “Cash in the Courtroom”

No citation is required to establish that the sale or apparent sale of justice does not comply with the rule of law. But concerns arise short of sales or apparent sales. According to USAID, “[i]f a judiciary cannot be relied upon to decide cases impartially, according to the law, and not based on external pressures and influences, its role is distorted and public confidence in government is undermined.”¹⁴⁵ The United Nations Basic Principles on the Independence of the Judiciary provide that judges must “decide matters before them impartially, on the basis of facts and in accordance with the law, without . . . improper influences, inducements, [or] pressures . . . direct or indirect, from any quarter or for any reason.”¹⁴⁶

There is increasing alarm from Sandra Day O’Connor and other well-known reformers and reform organizations that our system of judicial elections creates precisely the scenario in which money and the need to be elected influence or appear to influence justice among elected state court judiciaries. That is, rather than there being a rule of law, there is

cert. granted, 77 U.S.L.W. 3051 (U.S. Nov. 14, 2008) (No. 08-22). See Marcia Coyle, *High Court Review Sought on Judicial Recusals*, NAT’L L.J. (Aug. 4, 2008), available at <http://www.law.com/jsp/article.jsp?id=1202423489061> (discussing *Caperton* and describing petition for a writ of certiorari to the United States Supreme Court and background of contributions to judicial campaigns in the case). See also Editorial, *Too Generous*, N.Y. TIMES, Sept. 7, 2008 (“Situations like the Massey Energy case create an unmistakable impression that justice is for sale.”); Editorial, *Tainted Justice*, N.Y. TIMES, Nov. 13, 2008, available at <http://www.nytimes.com/2008/11/13/opinion/13thu3.html> (“The justices would do a great deal to protect essential fairness by making clear that outsize campaign expenditures trigger a duty of recusal on the part of the beneficiaries.”). On November 14, 2008, the United States Supreme Court granted certiorari and agreed to review the case. See *Caperton v. A.T. Massey Coal Co.*, No. 33350, 2008 WL 918444 (W. Va. July 28, 2008), *cert. granted*, 77 U.S.L.W. 3051 (U.S. Nov. 14, 2008) (No. 08-22); Marcia Coyle, *Justices to hear recusal case of W.Va. high court judge*, NAT’L L.J. (Nov. 17, 2008), available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202426044460> (free registration required).

144. Richard A. Posner, *Judicial Autonomy in a Political Environment*, 38 ARIZ. ST. L.J. 1, 6 (2006).

145. USAID OFFICE OF DEMOCRACY AND GOVERNANCE, GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY 6 (Jan. 2002, revised ed.), available at http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacm007.pdf.

146. *Id.* at app. A para. 2.

the rule of the campaign contributor, not to mention the local voter.¹⁴⁷ As Justice Stephen Breyer noted, judicial “independence means you decide according to the law and the facts. The law and the facts do not include deciding according to campaign contributions.”¹⁴⁸ That is the subject of this section.

Various groups (loosely called “special interests”) have been extensively funding judicial election campaigns intended to seat judges committed explicitly or implicitly to favor their particular interest group or the group’s objectives. These are not the only types of judicial elections, but they are the most notorious. Other types include elections where voters do not turn out to vote or do not know who the candidates are.¹⁴⁹ Alternatively, the candidates are hand-picked by political bosses or otherwise unopposed, with the results then provided to the voters for ratification.¹⁵⁰

Seeking judges inclined to support one side or another in a dispute—whether that side is a business or an individual plaintiff—may be futile as well as damaging to the rule of law. This is self-evident if only one category of party is involved in the case. For example, the election of a “pro-business” judge has little meaning in the cases which are “business-against-business” and no individual is involved. Conversely, the election of a “pro-individual plaintiff” judge may be futile in cases where individuals are suing each other and no business is involved. In still other cases, both litigants may not be businesses or individuals, but instead one party may be the government.

147. Gur-Arie & Wheeler, *supra* note 2, at 140. See also *id.* (providing the quote from Mira Gur-Arie and Russell Wheeler introducing this article); Upham, *supra* note 104, at 84 (“Most state judges are elected and serve for a term of years. . . . If they are not constantly aware of the effect of their important rulings on the electorate and their party’s leaders, they will not be reelected, and they will cease to be judges.”).

148. *Frontline: Justice for Sale* (1999) (PBS television interview of Stephen Breyer & Anthony Kennedy), <http://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/supremo.html>.

149. See, e.g., Norman L. Greene, *Perspectives on Judicial Selection Reform: The Need to Develop a Model Appointive Selection Plan for Judges in Light of Experience*, 68 ALB. L. REV. 597, 601-02 (2005) (“Voters in New York, as elsewhere, generally do not even know who the candidates for judge are, and they often do not vote for judicial candidates at all.”); see also Geyh, *supra* note 129, at 6 (“[A]s much as 80 percent of the electorate typically does not vote in judicial elections . . . [A]s much as 80 percent of the public—including many who cast ballots in judicial elections—are unfamiliar with and unable to identify the judicial candidates.”).

Given the number of arguments, it “would be impractical (not to mention tedious) to canvas[s]” all objections to judicial elections or rebuttals to those objections. David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 293 (2008). See also Norman L. Greene, *Appointive Selection of Judges, Limited-Jurisdiction Courts with Non-Lawyer Judiciaries, and Judicial Independence*, 43 CT. REVIEW 80, 80-83 (2007) (describing problems of judicial elections and Fordham symposium on what makes a good appointive system).

150. See Norman L. Greene, *What Makes A Good Appointive System for the Selection of State Court Judges: The Vision of the Symposium*, 34 FORDHAM URB. L.J. 35, 41-47 (2007) (discussing Second Circuit’s decision in *N.Y. State Bd. of Elections v. Lopez Torres*, 462 F.3d 161 (2d Cir. 2006), *rev’d* 128 S.Ct. 791 (2008) and describing political-boss-controlled elections).

In sum, fueling judicial races to elect a judge inclined to support one category of litigant as against another is not only damaging to the rule of law, but it is pointless in a number of circumstances.

To be fair, some special interest groups consider themselves victims of a system in which opposing groups are seeking to slant the judiciary and in order to prevent another interest group from obtaining a slanted judiciary, they are waging a “defensive” effort to obtain a judiciary with a different “slant.”¹⁵¹ Still others involved in judicial elections might believe that they are supporting candidates who are dedicated to classic principles of impartiality, independence, and accountability; however, if that is occurring, it is not making the news.

Judicial elections have drawn the negative attention of many commentators, including, most notably, former United States Supreme Court Justice Sandra Day O’Connor. According to Justice O’Connor, “[s]pecial interest appeals to emotion and policy preferences tempt voters to join efforts to control the decisions of judges.”¹⁵² “No other nation in the world does that [*i.e.*, elects judges] . . . because they realize you’re not going to get fair and impartial judges that way.”¹⁵³ She added that “[w]hat worries me is the manner in which politically motivated interest groups are attempting to interfere with justice.”¹⁵⁴ Also, the spending of large campaign sums endangers the legitimacy that the public accords to court decisions, which has led Justice O’Connor to call for the elimination of judicial elections entirely:

When so much money goes into influencing the outcome of a judicial election, it is hard to have faith that we are selecting judges who are fair and impartial. If I could do one thing to solve this problem, it would be to convince the states that select judges through partisan elections—that is, when a Democrat and Republican run against one another—to switch to merit selection instead.¹⁵⁵

151. See Joanne Albertsen & Malia Reddick, *Conference Considers Judicial Reform*, 92 JUDICATURE 80 (Sept.-Oct. 2008) (reporting on a conference on the judiciary featuring, among others, Justices Sandra Day O’Connor and Stephen Breyer at Fordham Law School on Apr. 8, 2008; a co-author of the JUDICATURE article, Malia Reddick, was a panelist at the conference; and the author of this article in the *Denver University Law Review* was the organizer of the conference). One panelist observed that the campaign contributions of businesses to judicial elections may be attempts at “fighting bias with bias.” *Id.* at 82. Although that may explain the reason that certain businesses believe that they are contributing to judicial campaigns, that would not justify providing slanted information to the public on judicial candidates, let alone false information, if that were occurring. *Id.*

152. Sandra Day O’Connor, *Justice for Sale: How Special-Interest Money Threatens the Integrity of Our Courts*, WALL ST. J., Nov. 15, 2007, at A25.

153. Liptak, *supra* note 138 (quoting Justice O’Connor at the conference on the judiciary at Fordham Law School on Apr. 8, 2008; the reporter, Adam Liptak, was a panelist at the conference, which, as noted above, the author of this article organized). See also Albertsen & Reddick, *supra* note 151.

154. Sandra Day O’Connor, *How to Save Our Courts*, PARADE, Feb. 24, 2008, available at http://www.parade.com/articles/editions/2008/edition_02-24-2008/Courts_O_Connor.

155. *Id.*

As Justice O'Connor noted, "We put cash in the courtrooms, and it's just wrong."¹⁵⁶ A New York Times editorial referred to the "escalating millions that special interests are pouring into state judicial elections in an effort to buy favorable rulings."¹⁵⁷ The Times added that "special interests are finding that buying up judges likely to side with them in big-dollar cases is a good investment—the real-life grist for John Grisham's new fictional legal thriller, 'The Appeal.'"¹⁵⁸

Cash distorts the intended purpose of the American judiciary—namely, to decide cases on the law and the facts, not on who the parties are—and leads some to believe that justice is for sale. Justice O'Connor echoed her positions in the Wall Street Journal, singling out, among others, the State of Pennsylvania:

The final four candidates running for open seats on the Supreme Court of Pennsylvania raised more than \$5.4 million combined in 2007, shattering fund-raising records in Pennsylvania judicial elections.¹⁵⁹

. . . Most of this money comes from special interest groups who believe that their contributions can help elect judges likely to rule in a manner favorable to their causes. As interest-group spending rises, public confidence in the judiciary declines. Nine out of 10 Pennsylvanians regard judicial fund raising as evidence that justice is for sale, and many judges agree.¹⁶⁰

Whether bias is a fact or only an appearance, the appearances are not good. "Elections can be very expensive to win, and elected judges may well be viewed by the public as being beholden to their supporters."¹⁶¹ The potential for bias was highlighted in a recent New York

156. Dorothy Samuels, *The Selling of the Judiciary: Campaign Cash "in the Courtroom"*, N.Y. TIMES, Apr. 15, 2008, at A22. See also Roy A. Schotland, *Judicial elections in the United States: is corruption an issue?*, in TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT 2007, *supra* note 10, at 26 ("[A]buse would occur if the judge's performance on the bench were affected by [campaign] contributions received, or hoped for.") (with the exception of Professor Schotland's brief article in the Report, the focus of the Global Corruption Report is international).

157. Samuels, *supra* note 156.

158. *Id.* See also O'Connor, *supra* note 152, at A25; John Grisham, THE APPEAL (Doubleday 2008).

159. O'Connor, *supra* note 152.

160. *Id.*

161. J. Clifford Wallace, *An Essay on Independence of the Judiciary: Independence From What and Why*, 58 N.Y.U. ANN. SURV. AM. L. 241, 243 (2001). See also *id.* (comparing federal to state elected judiciary):

The method by which federal judges in the United States are selected, appointment by the President and confirmation by the Senate, is an attempt to free federal judges from the political pressures associated with elections. Elections can be very expensive to win, and elected judges may well be viewed by the public as being beholden to their supporters. The appointment and confirmation process, combined with the constitutional guarantee of tenure during good behavior and a salary that will not be decreased, is the Constitution's effort both to ensure the independence of the federal judiciary in the face of political pressures, and to assure the people that their disputes will be fairly settled by independent and unbiased arbiters.

Times study of the Ohio Supreme Court. In that study, the New York Times “found that [Ohio Supreme Court] justices routinely sat on cases after receiving campaign contributions from the parties involved or from groups that filed supporting briefs. On average, they voted in favor of contributors 70 percent of the time.”¹⁶²

Elections could hardly be advocated, much less exported, to another country. If judicial elections were occurring in foreign countries, some of the same international organizations mentioned above would undoubtedly be concerned enough to target the country for rule of law reform. The rule of law, however defined, encompasses impartial decision making. It is therefore unlikely that any credible institution could validly advocate in foreign nations a system that not only requires the raising and expenditure of substantial sums, but which leads the public to believe that courts are deciding in favor of their campaign contributors, let alone local voters. Instead of encouraging foreign investment in a particular country, this is the sort of enterprise that would cause contracting parties to doubt that their bargains would be respected, especially the party which (or who) did not contribute to the campaign, did not vote locally, or even worse, contributed to the judge’s opponent.

A Nigerian commentator grasped this point exactly in rejecting judicial elections for Nigeria on the grounds that elections fail sufficiently to promote the concept of judicial independence as he defined it:

Those appointed to the bench because of their learning in law, their experience at the bar and their moral character are likely to support and defend the independence of the judiciary. . . . Accordingly, it is not desirable that judges should be elected by the people, especially where, in the absence of mutual tolerance, the constituent groups have widely divergent, conflicting and irreconcilable interests.¹⁶³

The commentator told an anecdote about how a Louisiana Supreme Court judge refused to meet him during his visit to New Orleans because of a prejudiced electorate. The author noted that the judge informed him that “such a meeting [with the Nigerian] would be odious to the electorate, making his future election difficult.”¹⁶⁴

The Nigerian article may be dated in terms of its racial references, and the author was a Senior Lecturer at the University of Nigeria at the time it was written and perhaps not steeped in the tradition of American judicial elections. Nor is this article cited to suggest that Nigeria or any other developing nation enjoys a superior judicial selection system to the

162. Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court’s Rulings*, N.Y. TIMES, Oct. 1, 2006 at A1. See also Liptak, *supra* note 138; Geyh, *supra* note 129, at 6 (“80 percent or more of the public perceives that when a judge is obligated to raise the monies needed to win election or re-election, she is influenced by the campaign contributions she receives.”).

163. D.L.O. Ewelukwa, *The Independence of the Judiciary*, 14 NIGERIAN BAR J. 38, 48 (1977).

164. *Id.* at 48 n.25.

United States. Indeed, one may readily conjure up worse selection systems, such as one that makes a judge's job virtually dependent on another branch of government so that the judge could be effectively told what to decide at the risk of losing her job.¹⁶⁵ Examples of this even appear in United States history.¹⁶⁶ But the Nigerian article recognizes the same problems with judges pandering to the voters that other modern American commentators, including Justice O'Connor, have recognized. The comments in the article are especially significant since they preceded the recent escalation of the costs of such elections, which may make judicial candidates even more beholden to campaign contributors and less likely to risk offending them.

Exportation of American judicial elections to foreign nations is a fantasy. But the scenario is interesting to contemplate. It would undoubtedly result in different elections, consistent with local traditions and means. For example, in some nations, it is difficult to imagine major media campaigns. The types of campaign promises would undoubtedly differ in light of local conditions; the candidates might be subject to different canons of ethics governing what they could say (if anything); campaigning itself might be different as would be voter education (if any); and millions of dollars might not be spent on campaigns, although in relative terms the cost might still be expensive. Also, in some places, recruitment of candidates might be difficult, since being a judge might neither be well paid nor desirable; and it might also be dangerous.

The United States has some institutional counterweights and traditions, which some other nations might lack, that would reduce the chance that an elected judiciary fully subject to the negative incentives to pander, may veer off course.¹⁶⁷ (Conversely, the United States may lack

165. A modern example of this appears in Justice Stephen Breyer's description of "telephone justice" in which Russian party bosses told the judges how to decide their cases:

I mean, years ago, we heard Russian judges—I did once at a conference—and they were talking about what's called "telephone justice." And telephone justice is where the party boss calls you up on the telephone and tells you how to decide the case. So they said, Well, don't you have that in the United States? Now, really don't you? So I said, No. And I looked around and I said, Well I know you're thinking that even if we did, I would say no. They said, That's right. And I said, Well how can I explain it? It's just that no one in the United States wants that kind of system and it would be outrageous and beyond belief that someone would call up on the phone.

Frontline, *supra* note 148.

166. For example, "in the years immediately following the Revolution," state courts were placed "very much under the thumb of state legislatures." F. Andrew Hanssen, *Learning about Judicial Independence: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431, 441 (2004). Thus in Rhode Island, judges who "nullified a legislative act were called before the legislature to explain themselves and were replaced by the legislature when their terms expired the following year." *Id.* "The substantial powers exercised by state legislatures over courts were largely the result of two factors: the lack of a clearly distinct judicial role and an ingrained distrust of colonial judges." *Id.* at 443.

167. For a discussion from an economist's standpoint of the workings of "negative incentives" on judges see F. Andrew Hanssen, *The Political Economy of Judicial Selection: Theory and Evidence*, 9 KAN. J.L. & PUB. POL'Y 413, 413-24 (2000). See, e.g., *id.* at 418 ("Are there groups today that judges might be a little leery about displeasing? It depends on the institutional structure, and

some of the counterweights that other developing countries might have to substitute for an adequate judicial system, such as a well-developed body of informal law.)¹⁶⁸ For instance, appointed courts, such as federal courts,¹⁶⁹ are available for some cases, as well as alternative dispute resolution. In still others, choice of forum clauses may allow parties to select particular states for dispute resolution.¹⁷⁰ To observe that elected judiciaries are sometimes avoidable, however, is hardly to compliment the system that produces them.

Moreover, in some states, such as Indiana and New York, only some or all lower court judges are elected, with appellate judges appointed, which permits correction, if necessary, by an appointed judiciary.¹⁷¹ The opportunity for appellate correction should not be overstated.

whether that structure gives particular groups the means to affect a judge's career."). *See also id.* at 417:

[S]uppose that we are back in the days of King George II and that you are the colonial judge. You serve at his pleasure, and here is how the system works: You render decisions that he likes, you get a big house, a nice fancy carriage with fancy horses, a lot of servants to wait on you. If you render a decision he doesn't like, he cuts your head off. So that is the institutional structure: good decision, nice house and carriage; bad decision, no head.

168. *See, e.g.*, Messick, *Judicial Reform and Economic Development*, *supra* note 10, at 129. As noted previously, informal legal structures, such as reputation based systems, even if otherwise adequate, might be inadequate for a number of transactions or the disputes arising from them, including larger and more complex transactions. *See* Jensen, *Justice and the Rule of Law*, *supra* note 114, at 121; DAM, *supra* note 62, at 125.

169. Andrew J. Art, *Sometimes It's OK to Just Go Ahead and Make A Federal Case Out Of It*, COLUMBUS BUS. FIRST (Aug. 24, 2007), available at <http://www.cwslaw.com/CmsData/ModuleNews/SDM%20federal%20case%20reprint.pdf> (Ohio article observing that reason for bringing cases to federal court includes the perceptions that "the system of electing state court judges can give rise to the appearance of partiality, particularly when the defendant is from out of state" and "that federal judges are less susceptible to local economic or political pressures."); note that state judges are elected in Ohio). Certain state court decisions are also reviewable in federal court on due process grounds. *See e.g.*, *State Farm Mutual Ins. Co. v Campbell*, 538 U.S. 408 (2003) (review of punitive damages decision under the due process clause).

170. Alternative dispute resolution, such as arbitration, which is essentially consensual, would have limited applicability in tort cases.

The use of alternate dispute resolution is, of course, not limited to domestic controversies. International arbitration tribunals may also provide a method for limiting the negative impact of certain foreign country court decisions. *See* Michael Trebilcock and Jing Leng, *The Role of Formal Contract Law and Enforcement in Economic Development*, 92 VA. L. REV. 1517, 1541 (2006) ("In contemporary international trade, three non-state institutions of contract enforcement are utilized extensively to mitigate contracting problems arising from cross-border transactions" including "international commercial arbitration. . . . International commercial arbitration has emerged over the past two decades as a common mechanism for settling trade and investment disputes among private parties in different countries."). *But see id.* at 1541 (2006) (referring to "some persistent forms of contractual uncertainty relating to the limits of the enforceability of international arbitration awards within national borders.").

171. *See* American Judicature Society, *Judicial Selection in the States: Indiana*, http://www.judicialselection.us/judicial_selection/index.cfm?state=IN (last visited Oct. 17, 2008); American Judicature Society, *Judicial Selection in the States: New York*, http://www.judicialselection.us/judicial_selection/index.cfm?state=NY (last visited Oct. 17, 2008). The preferred method is commission-based appointment, and variations exist even among those systems. For model provisions for such a system, see generally Norman L. Greene, *The Judicial Independence Through Fair Appointments Act*, 34 FORDHAM URB. L.J. 13 (2007). The American Judicature Society has recently published some of its own model provisions for judicial selection.

For example, in some states, including New York, the highest court is a certiorari court, with no automatic right to appeal to that court in most cases. Furthermore, not every question is reviewable by appellate courts de novo, and deference in various situations is typically given to certain trial court decisions. Finally, in order to prevent enforcement of lower court judgments pending appeal, a monetary judgment often must be bonded; and appeals may be otherwise expensive.¹⁷²

Much is to be said for getting a fair and impartial decision in the first instance; and the question remains why any state judicial system should rely on counterweights, rather than have a good system at the outset.¹⁷³

2. The “Other Problems”: Lack of Screening and Voter Knowledge of Candidates and Participation in Judicial Elections

Judicial competence has been made part of the rule of law dialogue by the World Justice Project;¹⁷⁴ and Justice Anthony Kennedy would add a “functioning judiciary respected for its independence, *its professional attainments*,”¹⁷⁵ as well as “neutrality,” to that dialogue.¹⁷⁶ The concern about elections is not only a concern about judges and candidates pandering to the electorate or campaign contributors, or retaliation against opponents. Judicial elections are not the most effective way to secure highly qualified judges, and such a judiciary is essential to fair adjudication:

See AMERICAN JUDICATURE SOCIETY, MODEL JUDICIAL SELECTION PROVISIONS (2008 REVISION), http://www.judicialselection.us/uploads/documents/MJSP_ptr_3962CC5301809.pdf.

172. The damage caused by unfair justice in the United States may also be softened in some respects by the availability of insurance to bear or share the costs in some cases. But not every risk is insurable, covered by insurance, or within policy limits; and although the insured may have some of its losses covered by insurance, that coverage does not prevent the harm from falling upon the insurance companies themselves. Thus insurance shifts the risk of substantial loss from one company to another, but loss is still present. Insurance companies may also attempt to recoup some of their losses from the insured and perhaps others through imposing higher future insurance premiums and to spread the risk of loss to other companies through reinsurance.

173. The lack of restriction on judicial campaign speech as a result of the Supreme Court’s decision in *Republican Party of Minn. v. White*, 536 U.S. 765, 786 (2002), and subsequent cases also threatens a loss (or at least perception of loss) of judicial impartiality. Under the rulings of these cases, judicial candidates may now announce their personal views on certain legal and political issues, and within limits, may solicit funds for their campaigns.

174. See World Justice Project, *supra* note 41 (providing the World Justice Project’s definition of the Rule of Law).

175. *N.Y. State Bd. of Elections v. Lopez Torres*, 128 S.Ct. 791, 803 (2008) (Kennedy, J., concurring) (emphasis added).

176. *Frontline*, *supra* note 148. As Justice Kennedy noted:

We have certain constitutional principles that extend over time. Judges must be neutral in order to protect those principles. . . . There’s a rule of law, [and it is in] three parts. One: the government is bound by the law. Two: all people are treated equally. And three: there are certain enduring human rights that must be protected. There must be both the perception and the reality that in defending these values, the judge is not affected by improper influences or improper restraints. That’s neutrality.

Most of what courts do is opaque to people who are not lawyers. It is completely unrealistic to think that the average voter will ever know enough about judicial performance to be able to evaluate judicial candidates intelligently. That is a decisive objection to Arizona or any other state deciding to elect judges. In states like Wisconsin and Indiana in my circuit, states that have partisan elections of state supreme court justices, the system is putting an unfair burden on the voter of trying to figure out which candidates would be good judges.¹⁷⁷

If judges are to be selected with the “utmost care,” elections are the wrong way to select them.¹⁷⁸ This is not the same as saying elected judges are more qualified than appointed judges or vice versa. The question is which method used to select judges is better designed to focus on the judge’s qualifications. For example, judicial candidates for elections need not undergo mandatory screening¹⁷⁹ or evaluation to run for election; and the only qualifications for office are that they have a law degree, have a specified amount of time in practice (if required), and be elected. These “qualifications” alone are insufficient. A judge requires legal knowledge and ability, including the capability to understand and apply the complexity of the law, a good judicial temperament, and rule of law values.¹⁸⁰ Litigants spend substantial sums in preparing their cases and rely on the courts properly to evaluate and understand their arguments and experts. But legal ability and temperament are rarely meaningfully discussed in an election campaign. The voters are generally unaware of the specific judicial qualifications of the judicial aspirant¹⁸¹

177. Posner, *supra* note 144, at 5.

178. See TAMANAHA, *supra* note 29, at 125.

179. New York has a limited amount of bar association screening, political party screening and certain other voluntary screening known as Part 150 commissions. See generally 22 Rules of the Chief Administrative Judge, Part 150, Independent Judicial Elections Qualification Commissions, available at <http://www.nycourts.gov/rules/chiefadmin/150.shtml> (last visited Nov. 10, 2008). None of these screening procedures is mandatory or required to enable one to run for a judgeship, and an unfavorable rating does not preclude election.

180. See TAMANAHA, *supra* note 29, at 125:

[J]udges must be selected with the utmost care, not just focusing on their legal knowledge and acumen, but with at least as much attention to their commitment to fidelity to the law (not inclined to manipulate the law’s latent indeterminacy), to their willingness to defer to the proper authority for the making of law (accept legislative decisions even when the judge disagrees), to their social background (to insure that judges are not unrepresentative of the community), to their qualities of honesty and integrity (to remain unbiased and not succumb to corruption), to their good temper and reasonable demeanor (to insure civility), and to their demonstrated capacity for wisdom.

181. The voters may know the judge’s educational background and years of judicial or related experience. But these factors may or may not relate to the judge’s legal skills or temperament which may be better identified through a screening process which reviews the judge’s performance in detail. This process, most commonly used in connection with retention elections in appointive systems, such as in Colorado, is known as judicial performance review or evaluation. In Colorado, judges are initially appointed to the bench through a commission-based system; the only judicial election is a retention election for a judge whose term is expiring; and in that election, judges are unopposed. See, e.g., INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SHARED EXPECTATIONS: JUDICIAL ACCOUNTABILITY IN CONTEXT (2006), <http://www.du.edu/legalinstitute/publications2006.html> (last visited Oct. 6, 2008) (considering various types of judicial performance

and as previously noted, what judges do is generally “opaque” to the public.¹⁸² Moreover, American judges do not receive pre-judicial education before ascending to the bench, and they either learn on the job or through post-selection judicial education programs.¹⁸³

Electing judges “means that people whom society wants to be exercising a professional judgment, have to engage in a popularity contest instead, and the most popular are unlikely to be the most professional.”¹⁸⁴ Voters typically do not know enough about a judge’s performance to decide:

[I]f only a few people can identify the [judicial] candidates, and only a few people vote, can elections really hold judges accountable in any meaningful way? . . . [H]ow are voters supposed to assess the professional competence of judges? It is one thing to expect voters with no training in the law to decide whether the policies favored by legislators and governors (who may not be lawyers themselves) coincide with their own, and quite another to expect them to decide whether the rulings of judges coincide with the law.¹⁸⁵

Among other things, voters may be generally unable to assess a judge’s technical skills, including the judge’s mastery of the rules of evidence and the judge’s ability to understand complex issues of substantive law.¹⁸⁶ Lacking useful information about judicial candidates, voters sometimes vote “blind” based on cues having nothing to do with judicial quality or perhaps upon the basis of the last political sign or other political advertisement (regardless of its accuracy) that they observed; many do not vote at all.¹⁸⁷ “Without accurate and relevant knowledge about

review, including reports on particular judges made available to the public before retention elections as voter education).

182. Posner, *supra* note 144, at 5.

183. See Gur-Arie & Wheeler, *supra* note 2, at 137; Marc T. Amy, *Judiciary School: A Proposal for a Pre-Judicial L.L.M. Degree*, 52 J. LEGAL EDUC. 130, 134 (2002) (recommending pre-judicial education for U.S. judges).

184. Posner, *supra* note 144, at 6.

185. Geyh, *supra* note 129, at 7.

186. Jeffrey W. Stempel, *Malignant Democracy: Core Fallacies Underlying Election of the Judiciary*, 4 NEV. L.J. 35, 44-45 (2003).

187. *Id.* at 51. See also Sarah Elizabeth Saucedo, *Majority Rules Except in New Mexico: Constitutional and Policy Concerns Raised by New Mexico’s Supermajority Requirement for Judicial Retention*, 86 B.U. L. REV. 173, 217 (2006) (noting that in retention elections, most voters abstain or “vote blind” because they have to make a “decision on which they have no basis for judgment” (quoting Robert C. Luskin et al., *How Minority Judges Fare in Retention Elections*, 77 JUDICATURE 316, 318-19 (1994)); Karlan, *supra* note 3, at 1046 (“[V]oters [in judicial elections] are likely to cast their ballots in ignorance; they often seem to support (or oppose) every incumbent, vote a straight ticket without any knowledge of the relationship between party and judicial philosophy (if there is one), or simply not vote at all.”).

The problem of voters voting on the basis of false or deceptive political advertising in judicial campaigns is a matter of concern. One notable example of such advertising was in the 2008 election campaign between Gableman and Butler for the Wisconsin Supreme Court. See Adam Liptak, *supra* note 138, observing the following about the campaign:

The vote came after a bitter \$5 million campaign in which a small-town trial judge [Gableman] with thin credentials ran a television advertisement falsely suggesting that the

the specific judges at issue, voters are prone to base their decisions on factors such as ethnicity, gender, name recognition, party affiliation, or length of time on the bench. Even worse, without information to inform their choices, a significant number of voters apparently cast a vote without any rationale at all.”¹⁸⁸

only black justice on the state Supreme Court [Butler] had helped free a black rapist. The challenger unseated the justice with 51 percent of the vote, and he will join the court in August.

. . . Judge Gableman’s campaign ran a television advertisement juxtaposing the images of his opponent, Justice Louis B. Butler Jr., in judicial robes, with a photograph of Ruben Lee Mitchell, who had raped an 11-year-old girl. . . . “Butler found a loophole,” the advertisement said. “Mitchell went on to molest another child. Can Wisconsin families feel safe with Louis Butler on the Supreme Court?”

Justice Butler had represented Mr. Mitchell as a lawyer 20 years before and had persuaded two appeals courts that his rape trial had been flawed. But the state Supreme Court ruled that the error was harmless, and it did not release the defendant, as the advertisement implied. Instead, Mr. Mitchell served out his full term and only then went on to commit another crime.

[Former Justice Butler noted that] “people ought to be looking at judges’ ability to analyze and interpret the law, their legal training, their experience level and, most importantly, their impartiality. [T]hey should not be making decisions based on ads filled with lies, deception, falsehood and race-baiting. The system is broken, and that robs the public of their right to be informed.”

Part of the section relating to the problems of judicial elections, particularly the lack of voter knowledge, is taken from Norman L. Greene, *Appointive Selection of Judges, Limited Jurisdiction Courts with Non-Lawyer Judiciaries, and Judicial Independence*, 43 CT. REVIEW 80 (2007).

188. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SHARED EXPECTATIONS, JUDICIAL ACCOUNTABILITY IN CONTEXT 15 (2006) [hereinafter SHARED EXPECTATIONS] (footnotes omitted) available at <http://www.du.edu/legalinstitute/form-shared-expect.html> (registration required). See also *id.* at 3 (“As a consequence, voters tend to vote based on cues unrelated to a judge’s performance, such as ethnicity or party affiliation, where that information is available.”).

The importance of a judicial candidate’s name recognition was reaffirmed in the West Virginia Supreme Court election of 2008, where an advertisement connecting the candidate’s name to “ketchup” was concededly helpful in the candidate’s success. See Justin D. Anderson, “*Ketchup*” spot left its mark on voters deciding Supreme Court race, CHARLESTON DAILY MAIL, Nov. 7, 2008, available at <http://dailymail.com/News/statenews/200811070217>:

It was a short, simple television ad, meant to familiarize voters with the candidate’s uncommon last name. And it was arguably the cleverest and most entertaining ad of the whole election season. [Menis] Ketchum believes it was that ad, and later a sequel, that got him elected [in 2008] to one of two seats coming open on the [West Virginia] Supreme Court by a surprisingly wide margin. “I worked hard, I worked continuously,” Ketchum said. “I never stopped. I met a lot of people. But I think the ketchup ad elected me.”

Party affiliation determined the results in 2008 trial court elections in Harris County, Texas, where 22 out of 26 Republican judges were replaced by Democratic judges. See Mike Tolson, *Sweep revises debate on election of judges: Straight-ticket ballots contributed to multiple defeats at the courthouse*, HOUSTON CHRON., Nov. 8, 2008, available at <http://www.chron.com/disp/story.mpl/front/6102615.html> (describing, among other things, the Democratic sweeps or near sweeps in Dallas County in 2006 and in Harris County in 2008). Texas Supreme Court Chief Justice Wallace Jefferson took the opportunity to comment on the uninformed electorate in judicial elections:

This is a strange way to select those who guard our legal rights It is time to decide whether partisan election is the best means to ensure judicial competence. It has become clear that in judicial elections, the public (particularly in urban areas) cannot cast informed votes due to the sheer number of candidates on the ballot.

Id.

Also, the amount of money required to run a campaign and the political nature of the election process may discourage qualified candidates from running. Would-be judges just may not want to go “through all of that”:

[E]lecting judges greatly narrows the field of selection. Most people do not have the skills or personality to be a campaigning candidate. Nor is there any correlation between the skills of a judge and the skills of a political candidate. So we lose a lot of people who would be excellent judges but would be total flops as political candidates. And that is certainly bad.¹⁸⁹

In contrast, seeking a judgeship in an appointment system does not entail the same costs as in an election system: all that is needed is filling out an application and interviewing.¹⁹⁰ The relative simplicity of the process may encourage those qualified persons unlikely to excel in the political arena to apply.

None of these considerations—lack of screening, disincentives to run because of the need for political involvement, or lack of voter knowledge and insight—pertains to a well-designed appointment system. In such an appointment system, screening of the candidate according to established criteria, including knowledge of the law and temperament, is not only commonplace but required.¹⁹¹ Although adopting the federal system of appointment is rarely suggested for the state courts (and the federal system has its own flaws), federal judicial candidates typically are screened by the senators who suggest them, the presidents who appoint them, and the senate which confirms them. While some may question the suitability of certain appointment systems, what makes a good appointive system was the subject of a recent symposium and could be studied further.¹⁹²

189. Posner, *supra* note 144, at 6.

190. City of New York Mayor’s Advisory Committee on the Judiciary, Judicial Application, http://www.nyc.gov/html/acj/html/application/judicial_application.shtml (last visited October 27, 2008). Cf. Sharon E. Grubin & John M. Walker, *Report of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts*, 1997 ANN. SURV. AM. L. 11, 56 (1997) (appointment system for federal magistrate judge system).

191. See, e.g., *id.* at 52-53 (federal bankruptcy court judges); Greene, *supra* note 171. But see Stephanie K. Seymour, *The Judicial Appointment Process: How Broken is It?*, 39 TULSA L. REV. 691, 693-97 (2004) (overview of federal judicial appointment for federal district and circuit court judges during various past administrations, focusing on problems with the system of appointment).

192. See *Symposium on Rethinking Judicial Selection: A Critical Appraisal of Appointive Selection for State Court Judges*, 34 FORDHAM URB. L.J. 1 (2007). My model judicial appointment legislation, which is part of the symposium, appears at Greene, *supra* note 171. Compare JOSHUA C. HALL & RUSSELL S. SOBEL, IS THE ‘MISSOURI PLAN’ GOOD FOR MISSOURI? THE ECONOMICS OF JUDICIAL SELECTION, SHOW-ME-INSTITUTE (May 21, 2008), http://showmeinstitute.org/docLib/20080515_smi_study_15.pdf. HALL & SOBEL overlooks this symposium in its discussion on the supposedly little work done on the differences among appointive systems. See *id.* at 9 (“While there has been a tremendous amount of research about the differences between elected and appointed systems, there has been almost no empirical work about the differences among appointive systems.”). Some defenses of judicial elections suggest that since appoint-

This does not mean that elected judges are never highly qualified and that appointed judges are always highly qualified. Furthermore, “[t]he quality of the elective judiciary, or of any given elected judge, does not validate the deficiencies of the election system. Good judges can emerge from poor selection systems. Even a monarch, dictator, or a political boss can be capable of selecting a good judge from time to time, but that does not mean that we wish to have our judges selected by such persons.”¹⁹³ But it does suggest that the system for selecting judges by election is not conducive to identifying the best qualified judges because it does not require screening and depends on fund-raising or campaigning, which have little to do with judicial ability.

This article is well aware of the difficulty in measuring quality and applying the test of quality to each individual judge.¹⁹⁴ An empirical or quantitative comparison would be a major undertaking. The study would have to isolate agreed criteria of quality; the criteria would not only have to be valid but measurable; and the study would need to take account of the different types of elections and appointment systems. All appointment systems are not the same, and for a study to be useful, it would have to include the precise system being studied; and that may or may not be a system that is even in place in any given state.¹⁹⁵ From a structural standpoint, however, all commission-based appointment systems should involve screening of judicial aspirants, and that gives the system an advantage over any electoral system, if the screening is properly done.¹⁹⁶

ive systems may have problems, states should stay with the flawed elective systems that they have; or they engage in rhetorical praise of the so-called benefits of the democratic electoral process used to select judges. See, e.g., Norman L. Greene, *Reflections on the Appointment and Election of State Court Judges: A Response to Adumbrations on Judicial Campaign Speech and a Model for a Response to Similar Advocacy Articles*, 43 IDAHO L. REV. 601, 612-14, 622-23 (2007); cf. Stempel, *supra* note 186, at 44 (noting not every office needs to be elected in a democracy, and well-functioning appointive systems may be substituted for elective systems).

193. Greene, *supra* note 149, at 954 n.26.

194. See Greene, *supra* note 192, at 613-14.

195. *Id.* Even if the appointment system were only a model and not yet in effect, the study might evaluate whether such a model was conducive to selecting qualified judges. The issue is not merely what results appointment systems have achieved in selecting qualified judges in the past but what they may be designed to achieve in the future. By way of comparison, in order to evaluate the likelihood of an appointive system achieving diversity, one might consider analyzing the extent to which past comparable appointive systems have done so. But it is also necessary to consider how appointment systems may be designed so as to maximize the chances of achieving diversity in the future. See e.g., Leo M. Romero, *Enhancing Diversity in an Appointive System of Selecting Judges*, 34 FORDHAM URB. L.J. 485 (2007); see also *id.* at 487 (“Ensuring diversity is most likely to occur when the law establishing the appointive system, whether in a constitution or statute, includes language that mandates consideration of diversity.”).

196. The author acknowledges that many of our elected judges may be excellent judges and that the criticism of the election system is not intended to be a criticism of any of those selected by it. He trusts that this is obvious regardless whether the criticism of the election system is in this article or coming from Justice O'Connor, who was both elected and appointed to the bench, herself.

C. *The Economic Consequences of Judicial Elections*

Although research is ongoing, considerable international development experience teaches that the presence of the rule of law is linked to economic progress, and its failures to the reverse. Thus, if judicial elections are or lead to rule of law violations, economic setbacks may be anticipated in the United States where they occur.¹⁹⁷ Litigants and potential litigants—business and non-business interest groups¹⁹⁸ and policy-makers—may consider the evidence, and if the potential consequences are unacceptable, consider how to respond.

The economic consequences of domestic rule of law violations may appear in various ways. For example, if the judicial systems of some states or municipalities are presumed to be unfair, few businesses may wish to locate or sell there, unless, perhaps, the risk is worth it. That hurts businesses by depriving them of potential profits, and it injures the localities by depriving them of tax revenues, jobs, and otherwise available goods and services. In addition, foreign direct investment may be discouraged in those localities. After all, based on international experience, it is questionable whether companies would wish to invest where they could not rely on a judicial system which fairly judged and respected contracts.¹⁹⁹ Foreign investment is desirable in the United States

197. Whether states with elected judiciaries are poorer than states with non-elective judiciaries or whether they are poorer than they would otherwise be if they had commission-based appointed judiciaries is beyond the scope of this article. Similarly outside the scope is determining if they are poorer, the reason is the fact that the judges were elected and for no other reason.

HALL & SOBEL, *supra* note 192, considers some economic literature with an international focus relating to legal systems and economic development, without extensive analysis of the subject or discussion of the rule of law; however, it concludes that there is a “positive relationship between legal quality and [economic] growth.” *Id.* at 3. The authors contend that “[j]udicial independence is critical to a well-functioning legal system, and the quality of a state’s judicial system is an important determinant of economic growth.” *Id.* (footnote omitted). After taking “as given the existence of a positive relationship between legal quality and growth,” they note that “the interesting question here is how judicial selection influences legal quality.” *Id.*

198. These other interest groups would cover those historically called trial lawyers or plaintiffs groups, although businesses may equally be plaintiffs as well as defendants. All Americans have a stake in our economy and business, whether through stock ownership, pensions, jobs, bank accounts, and other things too numerous to mention. *See e.g.*, Paul Krugman, *A Slow-Mo Meltdown*, N.Y. TIMES, Apr. 4, 2008, available at <http://www.nytimes.com/2008/08/04/opinion/04krugman.html?scp=1&sq=economic%20meltdown%20and%20very%20scary%20things&st=cse>.

199. *See* DAM, *supra* note 62, at 94 (“Better courts reduce the risks firms face, and so increase the firms’ willingness to invest more.”) (citation to World Bank report omitted). The author acknowledges the comments made by Sheila K. Davidson, General Counsel of New York Life; Mary C. McQueen, President and CEO of the National Center for State Courts; and Thomas J. Sabatino, General Counsel of Schering-Plough Corporation, all of whom were panelists at the conference which the author organized at Fordham Law School on April 8, 2008 entitled *Enhancing Judicial Independence, Accountability, and Selection for the State Court Judiciary: A Program for Reform*. *See* Albertsen & Reddick, *supra* note 151, at 81-82 for an extensive account of the conference.

Justices Sandra Day O’Connor and Stephen Breyer also made remarks at the conference, where four panels were presented on topics related to judicial reform. The conference was sponsored by the Sandra Day O’Connor Project on the State of the Judiciary (www.law.georgetown.edu/judiciary) and many other organizations, including bar associations, law schools, and court reform organizations. Press coverage or references to the conference included Adam Liptak, *supra* note 138. Other press coverage included Dorothy Samuels, *supra* note 156;

as well as internationally.²⁰⁰ Company employees may even be disadvantaged if they have personal cases to bring before the courts, and an unfair or otherwise substandard judiciary may make it difficult to attract and maintain such employees. Such effects have been collectively recognized, as follows:

When entrepreneurs decide where to open a new business, expand operations, or market a new product, they weigh the comparative costs and benefits of different locations. The tax structure, education level of local workers, transportation networks, technological capabilities of area universities, and weather are all factors that are assessed. Another factor is the state's legal system. Is it a secure legal system that is fair and predictable? Does it protect private property rights and render timely court decisions? If the answer is yes, the state will attract entrepreneurs and capital, foster competition, and experience faster economic growth as a result.²⁰¹

Dirk Olin, *Judicial Reports: Judicial Abacus* (April 9, 2008), http://www.judicialreports.com/2008/04/judicial_abacus-print.html; and Maggie Barron, O'Connor & Breyer on Judicial Independence (April 9, 2008), http://www.brennancenter.org/blog/archives/oconnorbreyer_on_judicial_independence/.

This was the seventh conference sponsored by the Sandra Day O'Connor Project: three were at Georgetown Law Center in 2006, 2007, and 2008, and three others were held in 2007 in Dallas at Southern Methodist University's Dedman School of Law; Chicago at Loyola School of Law; and Atlanta at Emory School of Law. The author of this article was a speaker at the Dallas conference in 2007.

200. See Frank Lavin, *Remarks of Frank Lavin Under Secretary of Commerce for International Trade at the American Business Group of Abu Dhabi, Abu Dhabi, United Arab Emirates*, (Mar. 12, 2007) (transcript available at http://www.commerce.gov/opa/press/Secretary_Gutierrez/2007_Releases/March/03_12_07_Lavin_UAE_Spch.pdf):

Perhaps alone among the major economies, the United States has not had a federal government program to attract or retain inward foreign investment. All other major world economies have mechanisms such as investment boards and investment promotion activities to encourage FDI [*i.e.*, foreign direct investment].... I am pleased to inform you that the U.S. Government last week launched the Invest in America initiative to facilitate foreign direct investment into the United States.

See also JAMES K. JACKSON, *FOREIGN DIRECT INVESTMENT IN THE UNITED STATES: AN ECONOMIC ANALYSIS* (Aug. 15, 2008), <http://fpc.state.gov/documents/organization/109490.pdf>; U.S. Dept. of State Fact Sheet, *How Foreign Direct Investment Benefits the United States* (March 13, 2006), <http://www.state.gov/r/pa/prs/ps/2006/63041.htm> (among other things, considering the extent of foreign direct investment in the United States).

201. LAWRENCE J. MCQUILLAN & HOVANNES ABRAMYAN, *U.S. TORT LIABILITY INDEX: 2008 REPORT 53* (Pacific Research Inst. 2008). See also HALL & SOBEL, *supra* note 192 (relating quality of courts to economic growth and finding higher quality courts in states using commission-based appointments relying on the U.S. Chamber of Commerce's Institute for Legal Reform's State Liability Systems Ranking Study). Hall & Sobel noted:

Judicial independence is critical to a well-functioning legal system, and the quality of a state's judicial system is an important determinant of economic growth. States with highly regarded legal systems better protect and define property and contract rights, providing the proper foundation for entrepreneurial activity and economic growth. Bad court systems, on the other hand, can impede economic development by creating uncertainty, driving up the costs of doing business (such as liability insurance or worker compensation), and infringing on the liberties that underpin a free and prosperous market economy.

Id. at 3.

Businesses may also be “more likely to incorporate in states with a higher quality judicial system.”²⁰² This likewise has economic consequences.

Business litigants may or should accept the risk that the courts will be impartial and they will sometimes lose. But no litigant would or should have to accept the risk that it is likely to lose unfairly most if not all the time.²⁰³ Fairness and impartiality add predictability to the dispute resolution and corporate planning process. But judicial elections—as rule of law violations—result in unpredictability. Roughly the same facts may lead to different results in different jurisdictions for various reasons, including the influence of cash and local electorates and varying and inconsistent rules on judicial recusal under which judges who receive campaign funds from a litigant may (or may not) disqualify themselves from cases.²⁰⁴ It is a common concern that judges make or appear to make decisions that are favored by their campaign contributors and local electorates rather than based on the law and the facts; indeed, the danger of state courts adhering to the whims of the local electorate is a concern even apart from campaign contributions. All this interferes with the ability of businesses and others to plan their transactions and forecast risk.²⁰⁵

202. Marcel Kahan, *The Demand for Corporate Law: Statutory Flexibility, Judicial Quality, or Takeover Protection*, 22 J.L. ECON. & ORG. 340, 348-49, 363 (2006) (using the U.S. Chamber of Commerce’s 2001 State Liability Ranking Study as its indicator of state court quality). See also Albertsen & Reddick, *supra* note 151, at 82 (panelist notes that “corporations, when they are considering branching out to other states, often take into account the reputation of the courts in these states for fairly and reliably resolving disputes”).

203. A study on how much business is not being done in a state because of an unfair judicial system if properly conceived might be useful. Questions to be asked as part of that study might be similar to those discussed earlier, such as whether a particular company or companies did or will investigate a country’s legal system before deciding whether or not to invest there. See discussion *supra* Part I.C.2.a entitled Recognizing Causation Controversies (citing Perry-Kessariss, *supra* note 71, at 688). Designing such a study, however, is beyond the scope of this article. Furthermore, policymakers undoubtedly need to make decisions in advance of such a study.

204. See *Caperton v. A.T. Massey Coal Co.*, No. 33350, 2008 WL 918444, at *31-51 (W. Va. July 28, 2008) (Benjamin, Acting C.J., concurring) (citing extensive authority to the effect that campaign contributions from a party or his attorney do not mandate disqualification), *cert. granted*, 77 U.S.L.W. 3051 (U.S. Nov. 14, 2008) (No. 08-22); JAMES SAMPLE, DAVID POZEN & MICHAEL YOUNG, *FAIR COURTS: SETTING RECUSAL STANDARDS* 18-20 (2008), <http://www.ajs.org/ethics/pdfs/Brennancenterrecusalreport.pdf>. The American Bar Association’s Standing Commission on Judicial Independence has an ongoing project on judicial disqualification, and a draft report for discussion purposes only is available; AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON JUDICIAL INDEPENDENCE, *REPORT OF THE JUDICIAL DISQUALIFICATION PROJECT* (Sept. 2008), http://www.abanet.org/judind/pdf/JDP_DRAFT_FOR_DISCUSSION_PURPOSES_9-08.pdf (last visited Nov. 12, 2008) (on file with author and *Denver University Law Review*).

205. The combination of judicial elections and some other element of unfairness, such as the absence of a right to appeal to a higher court from an adverse trial court judgment, may be a combustible mixture. Yet that occurs in West Virginia where judges are elected, and the losing party has no automatic right to any appeal from a judgment. In a recent case in West Virginia, the Governor stepped in to petition the Supreme Court to review a multi-million dollar trial verdict so that the losing party, DuPont, would have some appellate review. The prevailing party argued that the procedure was fair despite no appeal and that the first and only decision was sufficient:

Attorney Brian Barr said ... trial Judge Thomas Bedell already reviewed the punitive damages for propriety during and after trial. Had Bedell found the amount excessive or

According to Justice Stephen Breyer, the public's loss of confidence in the judiciary from the campaigning and fund-raising alone may have a negative economic impact on business.²⁰⁶

D. Some Observations on Judicial Selection Reform

1. Considering Judicial Election Reform

Reforming the state court judicial election process may involve changing it as well as replacing it. Although various commentators suggest such reforms if elimination of judicial elections is impractical in the short term, some recognize that these are limited remedies for a flawed system.²⁰⁷ The types of change available for state court judicial elections vary in potency and address various deficiencies in the election process.²⁰⁸ These include creating private campaign conduct committees to discourage inappropriate activities;²⁰⁹ increasing the filing and disclosure of campaign contributions; improving voter education on specific candidates (such as through preparing and making voter guides widely available); lengthening judicial terms to reduce the number of elections; increasing qualifications for judicial office (including using screening committees, where possible); and instituting nonpartisan elections (which is not recommended).²¹⁰

Heightened recusal standards and public financing of campaigns might reduce the incentive or need to contribute to judicial campaigns

unfounded, "The court could have taken the punitive damages away," Barr said. "The whole idea that DuPont has not had a review at all is senseless," Barr added, accusing DuPont of stalling. "All DuPont is trying to do right now is protect its money." Only West Virginia and Virginia give their appeals courts complete discretion on whether to hear most civil cases, the governor's brief argued. The rest grant the kind of automatic appeals that West Virginia lacks.

Lawrence Messina, *Manchin Seeks Review of Appeal in Du Pont Lawsuit*, CHARLESTON GAZETTE, July 3, 2008, available at <http://www.wvgazette.com/News/200807020756>. See also John O'Brien, *DuPont appeal accepted by W.Va. SC*, THE WEST VIRGINIA RECORD, Sept. 25, 2008, available at <http://wvrecord.com/news/contentview.asp?c=215028>.

206. *Frontline*, *supra* note 148. Justice Breyer noted:

It [*i.e.*, raising money for judicial election campaigns and campaign advertisements] de-mans the process. We all know there are other countries where, for various reasons, the public lacks confidence in the judiciary...And where those things have happened, I think there have been bad results for the people who live in the country, not just for the judges, not just for the lawyers, but for the ordinary man and woman who lives in the country. There tends not to be a method of fairly resolving disputes. *And that means that it's harder to develop businesses.* It's harder to just live an ordinary life in a fair way and it's harder to protect liberty.

Id. (emphasis added).

207. See ABA COMM'N ON THE 21ST CENTURY JUDICIARY, JUSTICE IN JEOPARDY 74-81 (2003), <http://www.abanet.org/judind/jeopardy/pdf/report.pdf> [hereinafter ABA COMM'N].

208. See *id.* at 70-86 (2003) (detailing various options for election reform).

209. See Al Cross & William H. Fortune, *Kentucky 2006 Judicial Elections*, 55 DRAKE L. REV. 637, 642-51 (2007) (describing, among other things, the Kentucky Judicial Campaign Conduct Committee). See also *id.* at 651 ("While the [Kentucky Judicial Campaign Conduct Committee] cannot claim a great impact on Kentucky's 2006 judicial elections, the authors of this article believe that the committee played a positive role.").

210. See ABA COMM'N, *supra* note 207, 74-82.

and therefore might do the most to eliminate cash from the courtroom.²¹¹ The lack of knowledge of candidates by voters may be partly addressed by voter education, such as voter guides, depending on the content and accessibility of the guide to voters.²¹² Although campaign conduct committees may have some effect in counteracting unfair judicial campaign conduct, the committees have no power to stop such conduct.²¹³

Screening of judicial candidates, whether by bar or governmental committees, is limited and voluntary, and a poor rating does not bar a candidate from running for election.²¹⁴ Nonpartisan elections appear to be a poor device, since without party labels, voter knowledge of candidates will be further depleted, leaving the voters to rely on name recognition, demographic factors, or nothing at all on which to base their choice.²¹⁵

In sum, while limited election reform is available, it may not cure the rule of law violations set forth in this article. Based upon international learning in the rule of law field and domestic experience, whether such reforms are sufficient is doubtful. Hazarding a cliché, one might view this as rearranging the deck chairs on the Titanic, or otherwise stated, futile.

211. See generally SAMPLE ET AL., *supra* note 204 (“[C]urrent recusal doctrine makes it extremely difficult to disqualify a judge for having received contributions from a litigant or her lawyer, even though there is ample evidence to suggest that these contributions create not only the appearance of bias but also actual bias in judicial decision-making.”) (footnotes omitted). Stricter recusal standards may be necessary not merely in light of the receipt of campaign contributions but also in connection with things which have been said in judicial campaigns. See also Thomas R. Phillips & Karlene Dunn Poll, *Free Speech for Judges and Fair Appeals for Litigants: Judicial Recusal in a Post-White World*, 55 DRAKE L. REV. 691, 707-20 (2007) (focusing on recusal in view of campaign statements made by candidates).

212. Greene, *supra* note 149, at 602. The utility of the voter’s guide will vary, among other things, depending on the relevance of the information to judicial performance; the adequacy of the mechanisms used to collect the information; how effectively the information is conveyed to the voters; and whether the voters are motivated to review the information.

Nothing could be done to remove the incentive on elected courts to favor local voters in cases where the parties before the court are not all local voters, especially since the judge’s future position depends on the good opinion of the voters. Although a judge will not be able to tell whether a local voter had voted for her in the past, every local voter is a potential voter for the judge, and every non-local voter is not a potential voter.

213. Cross & Fortune, *supra* note 209, at 643. Despite such committees, false and misleading attack advertisements may still deceive the public into voting for the judge who is the beneficiary of the attack against her opponent.

214. For an example of governmental screening, see Rules of the Chief Admin Judge, *supra* note 179. A New York commission had previously recommended state sponsored screening of candidates for election. See COMM’N TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 15-26 (2004), available at <http://law.fordham.edu/commission/judiciaelections/images/jud-freport.pdf>.

215. Anthony Champagne, *Tort Reform and Judicial Selection*, 38 LOY. L.A. L. REV. 1483, 1513-14 (2005). See also Tolson, *supra* note 188, stating that:

Texas is one of only four states that uses partisan elected races for all of its state courts. Some states opt for nonpartisan races, but [former Texas Supreme Court Chief Justice Tom] Phillips and others say removing the label does not eliminate many of the problems of partisan races, including the involvement of special-interest groups, the need to raise money and curry votes, and the lack of voter knowledge of judicial candidates.

2. Commission-Based Appointments: Already an American Institution

There is an important difference between American judicial selection reform and international rule of law reform. Since Americans are reforming their own system, the risk of a bad, improper or ill-fitting rule of law reform is less likely. In addition, the proposed reform is not alien to Americans; rather, it is very much an American institution. Commission-based appointive systems are in effect in various states already; they were first established in Missouri in 1940;²¹⁶ and Americans have experience with them. There is no need to deal with the problem of a strange or inhospitable institution in the nature of an unreceptive transplant moving from one country to another which may be a concern in international development work.²¹⁷ Nor should cost be an issue as in the case of international reform. The change to a commission-based appointment system may even be less costly than an election system since it will eliminate campaign money-raising and campaigning itself.²¹⁸ Moreover, the appointment system which is to replace an election system should be a model system which may be the same as or superior to other appointment systems now or previously in place.²¹⁹

One requirement for reform applies to both developing nations and the United States: a political will for change. As stated with respect to developing nations:

Rule-of-law reform will succeed only if it gets at the fundamental problem of leaders who refuse to be ruled by the rule of law. . . . Even the new generation of politicians arising out of the political transitions of recent years are reluctant to support reforms that create competing centers of authority beyond their control.²²⁰

216. Rachel P. Caufield, *How the Pickers Pick: Finding a Set of Best Practices for Judicial Nominating Commissions*, 34 *FORDHAM URB. L.J.* 163, 170 (2007).

217. See Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 *AM. J. COMP. L.* 163, 167-68 (2003); Haggard et al., *supra* note 27, at 221 (“[N]otwithstanding the passion of the development policy community for spreading judicial best practice, caution should be exercised in the introduction of an alien legal system.”).

218. See, e.g., Kelley Armitage, *Denial Ain't Just a River in Egypt: A Thorough Review of Judicial Elections, Merit Selection, and the Role of State Judges in Society*, 29 *CAP. U.L. REV.* 625, 647 (2002). Especially since there may be a cost-savings by eliminating judicial elections, there is no question of added costs to consider. Nor should there be the same concern of scarcity of resources that otherwise may be important when deciding on rule of law reforms in developing countries. The United States is not a “developing” country with the same resource concerns, at least not on the same scale. Developing countries may also need to choose between various rule of law reforms, such as between reforming their criminal law or commercial law, increasing their competency and efficiency, and enhancing the government’s compliance with law. See, e.g., Thomas Carothers, *The Rule-of-Law Revival*, in *PROMOTING*, *supra* note 10, at 7-8 (2006) (identifying type one, type two, and type three reforms). It is unlikely that any state in the United States would need to make the same choice between improving its criminal or civil law—which may well not need any substantial reform in any case—and reforming its judicial selection methods.

219. See Greene, *supra* note 171, at 13-14.

220. Carothers, *Steps Toward Knowledge*, in *PROMOTING*, *supra* note 10, at 4.

It would be unfair to suggest that those who support judicial elections do so because they believe that judicial elections subvert the rule of law. Rather, one may only assume that the supporters share the same values that the opponents of elections do on judicial impartiality and fairness, but that they differ on the means to achieve them. However, in order to bring about change in the United States as well as abroad, a political will to accomplish it is needed.²²¹

E. Reflections on the Money Race in State Judicial Elections: What to Do in the Meantime and the Next Steps

The argument that special interest groups should cease the money race in judicial elections is a difficult one to make, especially since some groups think that campaign spending brings at least short-term benefits.²²² However, those benefits seem to be offset by substantial costs,

221. See Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 73 (2003) ("To gain traction with the public, judicial selection must achieve the status of a movement. . . . [and capitalize] on catalyzing events that galvanize public opinion and give [the] movement focus and drive."). In most states which have judicial elections, the requirement is in their constitutions, requiring a constitutional amendment in order to effectuate change. See, e.g., Michael E. Solimine, *The False Promise of Judicial Elections in Ohio*, 30 CAP. U. L. REV. 559, 560 (2002). The 2008 judicial elections showed a positive trend toward expanding commission-based appointment systems in certain counties in Alabama (for vacancy appointments) and Missouri and retaining a commission-based appointment system in a county in Kansas. American Judicature Society, *Voters in Four Jurisdictions Opt for Merit Selection on November 4* [2008], http://www.ajs.org/selection/sel_voters.asp (last visited November 9, 2008).

222. Olson, *supra* note 138. Olson is a senior fellow at The Manhattan Institute who has written favorably about tort reform and against excessive litigation in the United States. See Manhattan Institute for Policy Research, Walter Olson, <http://www.manhattan-institute.org/html/olson.htm>. The 2008 elections showed some of the polarization noted by Olson, including in the Michigan Supreme Court race in which incumbent Cliff Taylor was defeated. See Zachary Gorchow, *Hathaway pulls off an upset in Michigan Supreme Court race*, DET. FREE PRESS, Nov. 5, 2008, available at <http://www.freep.com/article/20081105/NEWS15/811050449?imw=Y> ("Business interests and Republicans said Taylor and his fellow conservatives have taken a more literal interpretation of the law that has created a better climate to do business in Michigan. But Democrats and plaintiffs' attorneys said Taylor has been part of a majority that has overturned years of precedent and stacked the deck against individuals trying to sue businesses and government."). An advertisement in the Michigan Supreme Court campaign made a contested charge that Taylor had slept on a case. Justice at Stake, *Attack Ad Targets "Sleeping Judge"*, Oct. 24, 2008, available at <http://www.justiceatstake.org/ThisWeek/24Oct08.htm#article2>. The fact that the sleeping charge may have been untrue raises the possibility that voters may not merely have voted without knowledge of the candidates but on the basis of false information concerning the candidates. See also Dawson Bell, *Balance Tilts on State Supreme Court*, DET. FREE PRESS, Nov. 6, 2008, available at <http://www.freep.com/article/20081106/NEWS15/811060419/1215/NEWS15> (although Taylor denied the charge, "[t]he sleeping judge ad, coupled with multiple phone, mail and in-person voter contacts from party and interest group activists, appeared to have been particularly effective."). Attack advertisements likewise beset Taylor's opponent. See Ben Timmins, *Michigan Chief Justice Loses in Nation's "Dirtiest Campaign"*, <http://www.gavelgrab.org/?p=701> (last visited Nov. 11, 2008) ("Ads by the state Republican Party and the Michigan Chamber of Commerce portrayed Hathaway as soft on terrorism and sexual predators, while serving as a County Circuit Court Judge.").

In 2008, Mississippi's Supreme Court judicial elections reportedly ranked "among the nastiest in modern state history--this time with third-parties slinging the mud." Jerry Mitchell, *Third party mud prompts cries for election reforms*, THE CLARION-LEDGER, Nov. 9, 2008, available at <http://www.clarionledger.com/article/20081109/NEWS/811090363/1001/RSS01>. See also *id.* (third-party advertisements in 2008 Mississippi Supreme Court elections unfairly attack candidates, including, among other things, by an advertisement accusing candidate of supporting baby-killers;

and today's prevailing party in judicial elections may be tomorrow's loser. As a commentator noted in observing pro-business gains in judicial elections:

[I]t is a mistake to observe a tide that has been sweeping out to sea, and conclude that it will continue to sweep out indefinitely. It is hard to deny that the substantive improvement in some of these courts has been bought at a cost of politicization and polarization which inevitably invites the other side to respond in kind when its day comes.²²³

Justice Stephen Breyer expressed a similar thought in an interview regarding the structural damage to democracy threatened by election battles over the courts:

no disclosure required by third-parties of source of contributions to such advertisements under Mississippi law).

223. Olson, *supra* note 138. *But see* posting of Walter Olson to PointofLaw.com, <http://www.pointoflaw.com/archives/2008/07/judicial-elections-some-reacti.php> (July 17, 2008, 23:59 EST) (providing links to some positive and negative reactions to the prior Olson article). For a positive reaction, see, for example, posting of Dale Carpenter to The Volokh Conspiracy, <http://www.volokh.com/posts/1216311330.shtml> (July 17, 2008 23:15 EST) ("Olson makes a good argument and provides some evidence that, on the whole, business interests are better served by a merit system where the judges themselves are more likely to understand the law and try to apply it in a principled way."). For Dale Carpenter's website, see Dale Carpenter's Faculty Profile, University of Minnesota Law, <http://www.law.umn.edu/facultyprofiles/carpenterd.html> (last visited Oct. 14, 2008).

Some negative reactions express the concern that commission-based appointment systems may be unfair. Among other things, they contend that commissions are dominated by elites or other special interests, are unaccountable to any elected officials, and operate in secret; some prefer the views of at least some elected judges as well. See Dan Pero, *A Dissent to Olson's Dissent, The American Courthouse*, <http://americancourthouse.com/2008/07/17/a-dissent-to-olsons-dissent.html> (July 17, 2008), noting how "rule of law judges"—which the author uses synonymously with judges supporting a particular point of view as opposed to "rule of law" in its traditional sense—have had great success recently in winning elections. *See also* Kathy Barks Hoffman, *Ever-More-Expensive Court Races Heading Higher*, Assoc. Press, August 24, 2008, available at http://www.mlive.com/news/index.ssf/2008/08/evermoreexpensive_court_races.html, describing Pero's position as follows: "Dan Pero, head of the American Justice Partnership, makes no bones about the fact that his group wants to get more business-friendly judges on state courts." But the use of the phrase "rule of law" to describe judges as pre-committed to any class of litigants, pro-business or otherwise—rather than to characterize them as dedicated to the notions of independence, impartiality and accountability—violates the phrase's generally accepted meaning.

Also, the Pero argument, like others of the same sort, focuses on perceived flaws in certain commission-based appointment systems; relies on words with connotations intended to be negative, such as trial lawyers, unaccountable, secret and elite to characterize them; overlooks or minimizes the flaws in judicial election systems, including the influence of money and lack of screening of candidates; ignores the world-wide peculiarity of the system of electing judges, with judges being appointed essentially everywhere else; and disregards the development and variability of commission-based appointment systems. *See e.g., Symposium on Rethinking Judicial Selection: A Critical Appraisal of Appointive Selection for State Court Judges*, 34 *FORDHAM URB. L.J.* 1 (2007) (including my model judicial appointment legislation, Greene, *supra* note 171, at 21-34). *See also* Statement of Gordon L. Doerfer, *Regarding Recent Attacks on Merit Selection Systems*, American Judicature Society (Aug. 28, 2008), http://www.ajs.org/ajs/ajs_whatsnew-statement.asp:

The composition and selection of nominating commissions is different in each state A blanket condemnation of judicial nominating commissions is irresponsible and misleading. Thirty-three states use merit selection to choose some or all of their judges. [T]he vast majority of merit selection systems operate without political controversy and promote public confidence in the judges who are selected.

[I]f you have one group of people doing it, you'll get another group of people doing it. And if you have A contributing to . . . affect a court one way, you'll have B trying the other way. And you'll have C yet a third way and pretty soon you'll have a clash of political interests. Now, that's fine for a legislature. I mean that's one kind of a problem. But if you have that in the court system, you will then destroy confidence that the judges are deciding things on the merits And as I said our liberties are connected with that.²²⁴

By accepting less control over judges now, and agreeing to impartiality rather than judges aligned with one's current preferences, even powerful interest groups may mitigate their losses when they fall out of power.²²⁵

One might wonder how the world was able to stop the missile race which was theoretically harder or more dangerous. Although the competitors did not unilaterally disarm, they certainly explored the options for ending the race while maintaining their defenses. While expecting unilateral disarmament by either side in the judicial election wars may be unrealistic, all concerned should consider whether there is a better way than the uniquely American mode of electing state court judges and how it may be implemented. In addition, campaign contributors should further consider the importance of the rule of law, how dangerous this continued conduct may be for the rule of law, and whether they should continue to support this practice.

Therefore, while not asking any special interest group to cease their spending on judicial elections, this article suggests that all those involved investigate and support alternatives, including individuals and groups who are working for them. Such alternatives potentially include the election reforms mentioned above but, most importantly, the end of judicial elections and the development and use of well-designed commission-based judicial appointment systems to replace them.²²⁶ In the meantime, questions remain over what is happening to the rule of law in the United States; how severely is our democracy being damaged; what is the financial cost to our economy; and who is being affected and how.

224. *Frontline*, *supra* note 148.

225. See J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721, 741-43 (1994). Judicial independence is part of a trade which political parties are willing to make depending on their view as to whether they believe that they will have to cede political power at some future time. Parties expecting to lose political power at some point are more willing to accept independent judges than those expecting never to lose. *Id.*

226. An additional alternative is public funding of judicial elections; however, for reasons stated in this article and elsewhere, that reform would still not remove many problems with judicial elections. See Charles Gardner Geyh, *Publicly Financed Judicial Elections: An Overview*, 34 LOY. L.A. L. REV. 1467, 1478-80 (2001).

CONCLUSION AND OUTLOOK

*The laws are upheld, and access to justice is provided, by competent, independent, and ethical law enforcement officials, attorneys or representatives, and judges who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.*²²⁷

This article seeks to shift the dialogue in the judicial selection debate to the rule of law and economic development and take the lessons learned from the international development sphere home. Thus it begins this conclusion by quoting a key definition by the World Justice Project of the rule of law.

Analyzing judicial elections through the lens of the rule of law raises substantial concern that judicial elections are threatening or causing violations of the rule of law.²²⁸ At a minimum, judicial elections and the rule of law are difficult to reconcile;²²⁹ however, the better view is that they are irreconcilable.²³⁰ If judges are favoring or appearing to favor campaign contributors or local voters, they are disregarding key components of the rule of law, including fairness, impartiality, independence, and accountability. Also, “to live under the rule of law is not to be subject to the unpredictable vagaries of other individuals;”²³¹ and if judges are subject to the preferences of campaign contributors and local voters, litigants and potential litigants are in that very unpredictable position. Nor do elections maximize the selection of qualified judges, let alone the selection of judges for their understanding of the rule of law. There is no appropriate screening mechanism for those purposes.

If one were to compare the U.S. judicial system to that of developing countries, despite its flaws, the American system may come out better overall. “Every lawyer in a developed country can point to numerous shortcomings in his own country. Yet judiciaries in developing countries frequently fall far short of developed country standards.”²³² But that is

227. The World Justice Project, Rule of Law Index, *supra* note 51 (stating the World Justice Project’s four principles of the rule of law).

228. By suggesting that the rule of law be applied to the United States, the article in essence is suggesting that the telescope be turned backward to determine whether rule of law violations are occurring in the United States as well as internationally and to assess whether the United States economy is being undermined as well.

229. *N.Y. State Bd. of Elections v. Lopez Torres*, 128 S. Ct. 791, 803 (2008) (Kennedy, J., concurring).

230. See e-mail from Simon R. Conté, Director, Research & Program Development, American Bar Association Rule of Law Initiative, to author (July 16, 2008, 10:44 EST) (on file with author and *Denver University Law Review*). See e.g., Kleinfeld, *supra* note 10, at 53 (“The highly political process of judicial choice in the United States would never be permitted by reformers elsewhere.”). See also Burnett, *supra* note 127, at 281-82.

231. TAMANAHA, *supra* note 29, at 122.

232. DAM, *supra* note 62, at 96. See also Daniel Kaufmann, *Illinois Governor Blagojevich: sign of endemic corruption in the US?*, The Kaufmann Governance Post, <http://thekaufmannpost.net/illinois-governor-blagojevich-sign-of-endemic-corruption-in-the-us/#more-505> (Dec. 11, 2008) (last visited Jan. 5, 2009) (“Granted, the US in general is not a model for the world in terms of control of corruption. Countries like New Zealand and the Nordics are

little solace for an American litigant damaged in a case where the rule of law has failed. The economic damage may be widespread or just in particular states or courts. But for the company or other litigants involved in an unfair decision—its workers and its shareholders, or their families—a repair will come too late.²³³

Policymakers spend billions of dollars on rule of law reforms internationally because they believe, among other things, that the rule of law and economic development are related. The strength of the connection is open to discussion. But even those raising questions are reluctant to deny any relationship and call for the expenditures to stop. The international financial commitment, its rationale, and international learning overall are too substantial to ignore.

Finally, the rule of law is not something that is only applicable to other countries but rather is fully applicable to the United States.²³⁴ It is risky to assume that Americans are the only people in the world who abide by the rule of law; indeed, this assumption overlooks much of our past and present history and ignores critiques from respected sources. American-based or sponsored organizations are trying to uphold the rule of law worldwide; yet if they do not uphold the rule of law in the United States, this may be a proverbial case in which the shoemaker's children have no shoes.²³⁵

Americans should carefully consider whether state court judicial elections violate the rule of law; if so, whether they may disregard the relationship at home between the rule of law and economic development; and whether the violation mandates an end to judicial elections. This article submits that the case has been made; that further study of the available options and next steps should be undertaken; and that the way

closer to being a model of integrity instead. There are 18 countries rating better than the US in controlling corruption according to the Worldwide Governance Indicators. Yet there are about 190 countries rating worse.”)

233. The focus of this article is on the economic effects of rule of law violations, rather than violations of individual rights. The rule of law concerns reflected in this article, however—*e.g.*, lack of judicial independence—would also apply to individual rights. See Theodor Mearon, *Judicial Independence and Impartiality in International Criminal Tribunals*, 99 AM. J. INT'L L. 359, 359-60 (2005):

Judicial independence is also instrumental in the protection of individual rights. Such rights may be enshrined in the country's constitution or laws, but an authority, such as the courts, must be empowered to review, independently and impartially, citizens' complaints and, if necessary, order that infringed rights be vindicated. To do so effectively, judges must be assured that, irrespective of their ruling, no unpleasant repercussions will be visited on them in terms of threats of dismissal, demotion, or even salary diminution.

234. See, *e.g.*, World Justice Project, Domestic Mainstreaming of the Rule of Law, *supra* note 5.

235. See The Shoemaker's Children, MICE Website, <http://mice.org/blog/about/the-shoemakers-children/> (“[T]he phrase, ‘The shoemaker’s children has no shoes’ . . . [m]eans . . . [w]hatever a person’s skill or talent, those closest to her or him rarely benefit. The proverb appeared in John Heywood’s book of proverbs in 1546. It was used by Robert Burton (1577-1640) in ‘The Anatomy of Melancholy’ (1621-51).”).

Americans select judges where they are presently elected should be comprehensively reformed.²³⁶

*Additional publications by the author**

236. If the international efforts to establish the rule of law in developing countries could be analogized to the Peace Corps program, it is time to establish its domestic equivalent—a Vista program—to achieve the rule of law in the United States. See AmeriCorps VISTA: “The Domestic Peace Corps,” VolunteerLounge, April 13, 2007, available at <http://www.volunteerlogue.com/organizations/ameri-corps-vista-the-domestic-peace-corps.html> (“Developed in 1964, soon after the Peace Corps, VISTA sends volunteers—who receive a monthly stipend of around \$600-800—to communities throughout the US as part of a strategy to alleviate poverty.”).

* The author has written a number of previous articles on issues intrinsic to rule of law reform, including some cited in this article. They include the following: *What Makes A Good Appointive System for the Selection of State Court Judges: The Vision of the Symposium*, 34 FORDHAM URB. L.J. 35 (2007) (study of judicial selection reform, including report on symposium organized by author and held in 2006 on designing the best appointive system for selecting state court judges); *The Judicial Independence Through Fair Appointments Act*, 34 FORDHAM URB. L.J. 13 (2007) (proposed model legislation for the selection of state court judges); *Reflections on the Appointment and Election of State Court Judges: A Response to Adumbrations on Judicial Campaign Speech and a Model for a Response to Similar Advocacy Articles*, 43 IDAHO L. REV. 601 (2007) (response to article supporting judicial elections and expanded judicial election campaign speech and model response for similar articles); *Perspectives on Judicial Selection*, 56 MERCER L. REV. 949 (2005) (study and recommendations on judicial selection reform in states where judges are elected); *Perspectives on Judicial Selection Reform: The Need to Develop a Model Appointive Selection Plan for Judges in Light of Experience*, 68 ALBANY L. REV. 597 (2005) (study and recommendations on judicial selection reform in states where judges are elected); *The Governor’s Power to Appoint Judges: New York Should Have the Best Available Appointment System*, 7 NYSBA GOVERNMENT, LAW AND POLICY JOURNAL 46 (2005) (a joint publication of the New York State Bar Association and Albany Law School; recommendations for improvement in New York’s judicial appointment systems); *Appointive Selection of Judges, Limited Jurisdiction Courts with Non-Lawyer Judiciaries, and Judicial Independence*, 43 CT. REVIEW 80 (2007) (Court Review is a publication of the American Judges Association; study and recommendations on judicial selection reform with observations on New York’s use of non-attorney judges in certain courts and on judicial independence); *Preface, Executioners, Jailers, Slavetrappers and the Law: What Role Should Morality Play in Judging*, 19 CARDOZO L. REV. 863 (1997) (judges deciding against conscience; introduction to symposium on the subject); *Introduction, Politicians on Judges: Fair Criticism or Intimidation*, 72 N.Y.U. L. REV. 294 (1997) (observations on judicial independence); *A Perspective on Temper in the Court: A Forum on Judicial Civility*, 23 FORDHAM URB. L.J. 709 (1996) (judicial intemperance or incivility; introduction to a symposium on the subject); and *A Perspective on Nazis in the Courtroom, Lessons From The Conduct of Lawyers and Judges Under The Laws of the Third Reich and Vichy, France*, 61 BROOKLYN L. REV. 1122 (1996) (introduction to symposium on the functioning of legal systems in totalitarian regimes; questions of conscience versus complicity on the part of judges and lawyers).