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Doing Business Guidance, Legal Origins Theory, and the Politics of Governance by Knowledge*

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Abstract

This article uses the World Bank's *Doing Business* project to illuminate the politics of "governance by knowledge." It synthesizes scholarship critiquing the project's legitimacy and contributes to research challenging the instrumental benefits of improved *Doing Business* performance. The article's major contribution is an immanent critique of Legal Origins Theory, which was developed largely to provide ex post validation for the project's core claims, but whose premises, when taken seriously, lead to conclusions that contradict its "one-size-fits-all" logic. The article demonstrates much can be learned about the politics of development by engaging rationalizations of power on their own terms.

Keywords

Doing Business, Legal Origins Theory, Immanent Critique, Law and Development, Politics of Development Knowledge

Introduction

The World Bank's *Doing Business* project (DB) offers a fascinating case study in the politics of "governance by knowledge" in development. Every year, DB produces eleven numerical indicators, offering a "snapshot" (Perry-Kessaris 2017, 500–502) of business regulations in 190

* Note that this version of the text does not reflect the final text of the published version in *Canadian Journal of Development Studies*.

countries, on themes ranging from access to electricity to conditions of employment. The project's hallmark is its ranking of countries by a weighted aggregate of indicator scores. Its annual reports, which publish updated rankings and scores, also give explicit expression to imperatives already tacit in the rankings: reallocate legal rights and reform regulatory practices to push each indicator score as high (or, occasionally, as low) as possible. Though its public-facing communications cast it as an exercise in measuring business regulations, it has long been clear that DB functions, as intended, as a governance project (Davis and Kruse 2007, 1098). Indeed, it is an archetype of governance by indicator (Davis, Kingsbury, and Merry 2012). It is also, arguably, today's most influential global law reform project (Broome, Homolar, and Kranke 2018).

This article draws from and contributes to two lines of scholarship on DB's logic, function, and impact. On the one hand, a line of *governance scholarship* has sought both to reveal how DB power is constituted and exercised, and to put the legitimacy of that power in question. By engaging with that literature's key claims from the perspective of national policy-makers, the first section below argues that existing DB governance scholarship gives insufficient credence to a core source of the project's power: the promise that conformity with its guidance will produce predictable economic benefits, based on plausible appeals to objective, scientific knowledge.

The article's next section turns to DB *methodology scholarship*, which has been concerned precisely with the validity of the project's data, methods, and conclusions about the instrumental benefits of prescribed reforms. The section begins by linking DB's "one size fits all" guidance on business regulation to claims that indicated reforms will predictably result in specifiable, uniform economic effects. Those claims have sometimes been advanced based on intuitive, verbal arguments about how laws structure economic incentives. More often, and more fundamentally, they have been grounded in data showing that DB indicators are correlated with salutary economic outcomes and statistical studies leveraging variations in national "legal origin" to give those correlations a causal interpretation. Existing methodology scholarship has established that neither of these methods provide sufficient warrant for DB's causal claims—nor for its guidance.

These prior findings turn out not to be dispositive of the validity of DB knowledge claims. Between 1998 and 2008, the authors of the original legal origin studies developed a Legal Origins Theory (LOT) a richer account specifically intended to bolster DB's causal claims (La

Porta, Lopez-de-Silanes, and Shleifer 2008). While extensive literature has sought to revise, reconstruct, or reject LOT as a model of relationships between legal and economic change (Deakin and Pistor 2012b), existing studies have not carefully distinguished LOT from the premises in the original legal origin studies, nor directly addressed whether LOT can validate DB's causal claims. The critique of legal origins theory in the article's third section makes a unique contribution to existing LOT scholarship; it shows that, when LOT's suppositions and evidence are taken seriously, its conclusions contradict DB's fundamental premise that "one size fits all" in business regulation. In doing so, it also fills a gap in the DB methodology scholarship.

Beyond its contributions to scholarship on LOT and the validity of DB methods and knowledge claims, the article models a methodological strategy for understanding and critiquing the operation of governance by knowledge (McHugh-Russell 2019) and the contemporary politics of development. Like prior DB governance scholarship, it seeks to expose the project's "governmentality"—its "styles of thought, conditions of formation, the principles and knowledges [it] borrow[s] from and generate[s], the practices [it] consist[s] of, how they are carried out, their contestations and alliances with other arts of governing" (Rose, O'Malley, and Valverde 2006). Its engagement with LOT draws from scholarship that looks behind economic knowledge to understand the complex matrix of practices (tools, techniques, methods) and artefacts (materials, data) through which such knowledge is produced (Schabas 2002; Morgan 2012). More pointedly, the article engages in immanent critique. Unlike external critique, which evaluates an object's legitimacy (or coherence, validity, credibility etc.) using norms and frames external to the object, immanent critique "...judges the object by reference to its own standards" (Marks 2000, 25). That orientation informs this article in two ways.

DB governance scholarship has tended to emphasize the gap between the actual operation of the project's authority and the instrumental rationales expressed in the project's annual reports. Like Marxist critiques of ideology, this scholarship is informed by a concern that illegitimate power relations can be reproduced and maintained by naturalization, normalization, reification, and simplification—and, ultimately, by dissimulation (Marks 2000, chap. 1). Yet as Marks (2000, 19) has emphasized, power relations can also be maintained by "...rationalization...the construction of chains of reasoning of which [particular social and political arrangements] are the logical conclusion." This article takes DB's principals and champions at their word, that the

project's authority rests on the epistemic validity of its claims that DB indicators provide predictable means to achieve specified economic ends.

DB methodology scholarship has sought to highlight flawed measurements, expose inadequate evidence, or show how other frames conform better to available data. In other words, it has judged DB against its own epistemic standards. But an external element remains, insofar as this scholarship has focused on errors in the application of DB reasoning to individual cases, rather than targeting the reasoning itself.¹ My approach, which bears some resemblance to methods critical legal scholars have described as “deconstruction” (McCluskey 2005; Kennedy 2001, 1178–82), is best seen as an example of what Kelman (1984, 293) called “trashing”: “Take specific arguments very seriously in their own terms; discover they are actually foolish ([tragi]-comic); and [only] then look for some (external observer's) order...in the internally contradictory, incoherent chaos we've exposed.”

The conclusion summarizes findings on the economic effect of DB-indicated reforms, considers rationales for conformity with DB guidance that lie beyond DB's causal claims, and addresses the capacities and limits of immanent critique to help understand the global politics of development.

Limits of existing DB governance scholarship and the power of instrumental knowledge

DB governance scholarship has produced invaluable insights for those who hope to participate in, and challenge, contemporary modes of global governance. Yet if we take the global context as a given constraint, and approach this scholarship's key critiques from the perspective of the project's putative subjects—the government actors, especially in developing countries, with a mandate to shape business regulations—it becomes clear those insights are not enough to dispel the project's power.

First, the indicators are “socially constructed and, therefore, contingent and provisional” (Perry-Kessaris 2017, 498–99). Yet this does not make them subjective. DB's advantage over earlier projects to quantitatively compare national legal systems lies in how it “take[s] the measure of the law” (Pistor 2012; Davis and Kruse 2007, 1098–1100). DB indicators are calculated, in part, based on whether national law grants certain mandatory rights to specific actors. For example,

the Protecting Minority Investors indicator is higher when 10% of shareholders in a publicly traded company can force an extraordinary meeting of shareholders. Primarily, however, indicators are based on the estimated time, cost, or number of steps involved in conducting a given regulatory, administrative, or legal task. The Paying Taxes indicator, for example, comprises both tax rates on profits and annual time spent on preparing taxes. Higher indicator scores are given for lower costs, fewer procedures, and stronger rights for favoured actors. The indicators are based on the interpretation of official texts and documents by experts, rather than the actual experience of business actors. Nonetheless, compared to prior projects to measure country legal systems (Deakin and Pistor 2012b, x), the indicators possess a high level of what Porter (1995) calls “mechanical” objectivity: though they integrate some expert judgement, indicator scores are built through relatively clear rules which would allow others to reproduce results.

Second, DB is value-laden (Krever 2013; Broome, Homolar, and Kranke 2018), not least because prioritising DB concerns involves policy trade-offs (Doshi, Kelley, and Simmons 2019). DB reproduces a “neoliberal,” deregulatory development orthodoxy and has clear affinities with the Bank’s “investment climate” agenda (Doshi, Kelley, and Simmons 2019; Krever 2013; McCormack 2018; Perry-Kessaris 2011; 2017, 506–7; Schueth 2015, 151). Indicators like DB work in part through a logic of normalization and naturalization that obscures the partiality of the values they advance (Krever 2013, 131–32; Perry-Kessaris 2011, 416; Van Den Meerssche 2018). Yet DB does not tie the validity of its indicators to any putative value-neutrality but, contrariwise, to the instrumental value produced by correctly manipulating them. Just as DB grounds the credibility of its indicators in their methods of production, it stakes their relevance primarily on claims that improving indicator performance will advance various economic goals. As put by the Bank-commissioned Independent Evaluation Group (2008, xv), DB is “anchored in research that links characteristics of a country’s business environment to firm performance, and thence to macroeconomic outcomes.”

Third, DB indicators simplify a complex reality and, in their narrow, selective choice of inputs (Broome, Homolar, and Kranke 2018), do not quite measure what they name (McCormack 2018; Broome, Homolar, and Kranke 2018, 519). By “measuring the wrong things” (Perry-Kessaris 2017, 505), they “reproduce distorted images of the world” (Broome, Homolar, and Kranke

2018, 516). Yet indicator correspondence with legal reality is of minimal relevance to policymakers. Other ways of looking at national laws may be more precise, comprehensive, or sophisticated. But that does not make DB indicators arbitrary. They are anchored by their incorporation into DB's assemblage of data, claims and arguments concerning the effects of legal means on economic ends. For policymakers, what the indicators "actually measure" is moot: what matters is what manipulating them can achieve.

Fourth, DB intervenes in a global political economy of what counts as "significant" (Perry-Kessaris 2011, 415–16; 2017, 499, 502). By circulating standards of performance for countries and political actors, it shapes strategies for the accumulation of "symbolic capital" which incites a reflexive dynamic of status competition (Doshi, Kelley, and Simmons 2019). It thereby creates a risk of incentivizing paper reforms that have minimal practical impact (Hallward-Driemeier and Pritchett 2015; McCormack 2018, 650). Of course, for policymakers who are motivated by status and prestige, these claims favour conformity with DB guidance, including by "gaming" the measurements. For those with only their country's best interests in mind, the supposed economic benefits of good faith DB reforms should make bad faith reforms in other countries irrelevant.

Evaluating the instrumental rationale of DB guidance

For policymakers, then, the key concern is not the legitimacy of DB power, but the validity of claims about the instrumental value of its guidance. Assessing those claims must begin with a clear articulation of their causal logic.

The causal logic of Doing Business claims: "one size fits all"

Milhaupt and Pistor (2008, 5) have suggested that DB's methodological architecture embodies a simplistic, "prevailing view" of the relationship between law and economic development, namely:

good law + good enforcement = good economic outcomes.

Beyond Weber's idea, central to the first "moment" of law and development in the 1960s, that formal legal rationality is critical to the establishment of capitalism, beyond Hayek's valorization of legal property rights as the key determinant of successful economies, and beyond even

North's (1990) new institutionalist updating of those precursors (see Thomas 2011, 973–83), this view suggests that specific legal rules and practices are “a kind of technology that can be inserted in the proper places—and imported from abroad when necessary” to achieve desired economic ends (Milhaupt and Pistor 2008, 5). Though legal scholars have fulminated against such a modular, technical view of legal practices, working to pin down “what really works” in law for development remains a popular genre (e.g. Lee 2019).

DB guidance embodies a markedly blunt version of the prevailing view. Law and development orthodoxy long ago moved beyond the banality that “law matters” (Faure and Smits 2011) to an appreciation of context, complementarity, and path dependency in identifying the “proper places” for rules and regimes (Rodrik 2007; Ahlering and Deakin 2007). Since its founding, by contrast, DB has cleaved to a “cookie cutter” approach (Anghie 2005, 259) to using law to achieve economic ends. Though the project is no longer as explicit as its first annual report that “one size often fits all” (World Bank 2004, xvi), the premise is baked into the logic of the country score, and tacit in the meaning its reports give to “improvement,” “performance” and “better” regulation (World Bank 2020, 2-5). Regardless of a country's characteristics, it means equating its ideal regulations with the practices of the top scorer for each indicator.

How has the Bank rationalized this approach?

Defective verbal arguments

One mode of justification has involved intuitive, verbal arguments about how institutions shape incentives. For the set of sub-indicators that can take on an arbitrarily large value, like the number of days it takes to connect to an electricity supplier, a relatively small value is clearly preferable, all else considered. Yet DB relies on the fallacious reasoning that, because some of a thing is good for business (or that too much is bad), it would be best to have as much (or as little) as possible (Arruñada 2009; 2007).

Protecting Minority Investors offers an illuminating example. The indicator embodies a familiar argument about the benefits of bolstering shareholder protection: the greater an investor's confidence that promised returns will be realized, the more they will be willing to invest. Inasmuch as legal protection of their interests will increase such confidence, the argument goes, it will also boost total investment (La Porta et al. 1998). Notably, the locus classicus of this

argument (Jensen and Meckling 1976) did not suggest that strengthening investor rights will invariably increase investment. Rather, it identified a trade off: transferring power to investors increases their willingness to invest, but also raises the cost of production for managers.

Law-and-economics scholars long believed this trade-off was best managed by the private decisions made between shareholders and firm insiders, and that shareholders should benefit from *no* special legal protection (Jensen and Meckling 1976; Easterbrook and Fischel 1996) Today's scholarly consensus sees the right balance as including some mandatory law. The issue is how much (and what kind of) mandatory shareholder protection will tend to promote financial development or maximize welfare (Coffee Jr 1999). Yet the thrust of the Protecting Minority Investors indicator is that increasing shareholder power will always benefit firms and economies. It may be that the specific combination of mandatory corporate law rules privileged by DB will have a salutary effect on financial markets. But that can only be shown through careful empirical investigation.

Shaky statistical grounds

As it turns out, DB has always advanced its guidance largely on empirical studies tracking the economic import of its indicators. In terms of how well that research corroborates DB guidance, the eleven indicatorsⁱⁱ can be divided into four groups (see Table 1). Two depend entirely on the intuitive case critiqued above. The remainder have been advanced based on a demonstrated correlation between “better” scores and specific economic outcomes.

Table 1 Scientific basis and causal argument underlying the advancement of the 2019 <i>Doing Business</i> indicators.			
Indicator	Scientific basis^a	Causation^b	Additional notes
Trading across Borders	(Djankov, Freund, and Pham 2010)	Other	Includes robust causal argument, using a different instrumental variable
Protecting Minority Investors	(Djankov, LaPorta, et al. 2008)	Legal Origin	Originally called ‘Protecting Investors’
Resolving Insolvency	(Djankov, Hart, et al. 2008)	Legal Origin	Originally called ‘Closing a Business’
Getting Credit	(Djankov, McLiesh, and Shleifer 2007)	Legal Origin	Originally based in part on (La Porta et al. 1998)
Employing Workers	(Botero et al. 2004)	Legal Origin	Originally ‘Hiring and Firing Workers’
Enforcing a Contract	(Djankov, La Porta, et al. 2003)	Legal Origin	
Starting a Business	(Djankov et al. 2002)	Legal Origin	
Getting Electricity	(Geginat and Ramalho 2018)	None	Documenting numerous correlations with desirable economic outcomes but no effort at causal inference
Paying Taxes	(Djankov et al. 2010)	None	
Registering Property	None.	N/A	No study ever published, though one was planned (World Bank 2005, 83); Has clear links with De Soto’s (1989) work on registering property
Dealing with Construction Permits	None	N/A	Originally called ‘Dealing with Licenses’
Notes: ^a published research backing up economic relevance of the indicator. ^b indicates the argument used in that research to characterize any documented links between the indicator and economic variables as causal. Sources: “Data Notes” (World Bank 2004, 107–14; 2018b, 73–125); Methodology < www.doingbusiness.org/en/methodology > and Changes to Methodology < www.doingbusiness.org/en/methodology/changes-to-the-methodology > pages on the <i>Doing Business</i> project website.			

Causation cannot be inferred from correlation alone. Observed associations are compatible with two alternative explanations: it may be that the economic outcomes engender the legal change, or that changes in both variables share a common causal factor. For two further indicators, the causal interpretation of the identified correlations was never justified. For example, while improvements in the Getting Electricity indicator were shown to be correlated with reduced bribes in the electricity sector (Geginat and Ramalho 2018), no evidence was offered that changing the former would have an impact on the latter.

The remaining seven indicators are linked to research which shows a correlation between better scores and salutary economic variables, *and* which offers an empirically grounded account of why that correlation should be given a casual interpretation. For six of those seven—i.e., the majority of DB indicators—policy relevance is tied to the legal origins method pioneered in La Porta et al (1997; 1998). This is no coincidence. Andrei Shleifer was not only central to the development of the legal origins method, the elaboration of “legal origins theory” analysed below, and the design of DB’s methodology, but was also the only participant in all three (Djankov 2016; McHugh-Russell 2019a). For the sake of convenience, Shleifer is therefore used below as a surrogate for the entire intellectual networks behind these projects.

The cornerstone of the legal origins method is the grouping of countries by their “legal origin,” that is, the historical legal tradition that most shaped their present legal system. Insofar as national legal systems were generally founded decades or centuries ago, legal origin can be treated as an exogenous input into current legal and economic arrangements, making it eligible as an instrumental variable for the purpose of causal inference (La Porta et al. 1998, 1126; La Porta, Lopez-de-Silanes, and Shleifer 2008, 286; Deakin and Pistor 2012a, xi).

Legal Origins Theory: rehabilitating DB causal inference?

In light of extensive critiques (Davis and Kruse 2007, 1112–14; Helland and Klick 2011; Deakin and Pistor 2012a, xi; Spamann 2015, 142), Shleifer eventually admitted that the direction of causation between economic outcomes and legal variables cannot be determined by using legal origin as an instrumental variable (La Porta, Lopez-de-Silanes, and Shleifer 2008, 291, 293–94). That was not the end of the matter. In a 2008 article, Shleifer sought to consolidate the extensive

body of “legal origin”-inspired research under an overarching interpretive frame (La Porta, Lopez-de-Silanes, and Shleifer 2008, 285).

Broadly interpreted, the article culminated a project to develop a free-standing “Legal Origins Theory” (LOT). Though legal origins failed as a linchpin for statistical techniques to substantiate the economic effect of legal reforms, its economic salience is hard to deny. In fact, many economic variables correlate more strongly with legal origins than with the legal variables tracked in Shleifer’s original studies (Michaels 2009, 768–69). LOT was thus informed by a desire to explain how and why the founding moments of national legal systems seem to leave such a lasting mark both on legal conventions and on economic relations. Yet LOT was also specifically intended to rehabilitate the claim that the correlations between DB indicators and economic outcomes could be interpreted causally (La Porta, Lopez-de-Silanes, and Shleifer 2008, 287, 291–98, 323–26).

Read together, the 2008 article and its precursors offer a rich account of the relations between legal systems, legal rules, economic institutions—and their co-evolution over time. While a host of studies have critiqued Shleifer’s theories, none have carefully distinguished LOT from the thin premises that originally motivated the use of legal origins as an instrumental variable. The remainder of this section develops an immanent critique of LOT, making a good faith effort at reconstruction by exploring interpretations that give this scholarship the best chance to succeed. To know whether LOT successfully buttressed DB’s causal claims—and thus whether the project’s authority has any legitimate grounds—LOT must be taken seriously on its own terms.

The basic model: New Comparative Economics

Reconstruction starts with what Shleifer dubbed New Comparative Economics (“NCE”). At the core of the NCE framework is an approach to institutional efficiency that uses market equilibrium with perfect property rights as a normative benchmark. Private decisions made in light of mismatches between the controllers and beneficiaries of resources lead to allocations that fall short of a Kaldor–Hicks optimum—shortfalls often labelled “social costs” (Coase 1960). Institutions limit but do not eliminate these costs. The NCE framework represents institutional alternatives as distinct locations in a two-dimensional space of such social costs: “disorder” costs, attributable to the risk of appropriation by other private actors, and “dictatorship” costs, linked to the risk of expropriation by state agents (Djankov, Glaeser, et al. 2003, 597–600).

Under this representation, an economic problem will have a set of quasi-efficient institutional solutions—an “Institutional Possibility Frontier” (IPF)—for which disorder costs cannot be reduced without increasing dictatorship costs, nor vice versa (Djankov, Glaeser, et al. 2003, 598–99). In Figure 1, the IPF curve runs from “private orderings” to “state ownership.” The NCE model further assumes that societies end up with an institution lying on the IPF, and that the IPF is a smooth curve with a clear path between institutional solutions. The result is a radical simplification of comparative institutional analysis: with most of the universe of institutional forms precluded, comparisons boil down to a one-dimensional trade-off of disorder costs against dictatorship costs (Djankov, Glaeser, et al. 2003, 598–99; La Porta, Lopez-de-Silanes, and Shleifer 2008, 307). While Shleifer characterized the institutional alternatives in terms of degree of public control (Djankov, Glaeser, et al. 2003, 601), with institutions that are more “dispute resolving” or more “policy implementing” (La Porta, Lopez-de-Silanes, and Shleifer 2008, 286), it will be useful in what follows to describe the dimension in terms of favouring facilitation (reducing the risk of public expropriation) or coordination (reducing the risk of private expropriation) (compare Milhaupt and Pistor 2008, 6-8). Among these quasi-efficient institutions, the efficient alternative minimizes total social costs (Djankov, Glaeser, et al. 2003, 600).

Though this centering of institutional efficiency qua cost minimization joined a long tradition of economic analysis (e.g., Williamson 1981; North 1990), Shleifer’s framework did more than rearticulate prior frames which use efficiency as both the criterion of desirable reform and the index of actual institutional change. The touchstone of the NCE model was the recognition that the shape and location of the IPF varies across contexts and time periods. Accordingly, the optimal institutional alternative must as well (Djankov, Glaeser, et al. 2003, 614–15). Shleifer argued for example that, in the United States, the New Deal’s expanded regulatory state was just as much an efficient response to that period’s socio-economic conditions as the system dominated by private adjudication had been before the Civil War (Glaeser and Shleifer 2003). More notoriously, he explained structural differences between the French civilian legal system and the English common law as reflective of cost trade-offs in the economic circumstances of their creation—17th century (or possible 13th century) France and England, respectively (La Porta, Lopez-de-Silanes, and Shleifer 2008, 303–6; Glaeser and Shleifer 2002; Djankov, Glaeser, et al. 2003, 605–6).

Figure 1. The institutional possibility frontier

Source: (Djankov, Glaeser, et al. 2003, 599)

While LOT identified the optimal solution to a given policy challenge, in a given context with the feasible option that would minimize social costs in that context, Shleifer's conclusions flowed neither from a context-sensitive analysis of feasible alternatives nor from comparisons of their relative cost-benefit trade-offs.

Instead, his arguments primarily used the IPF as an interpretive heuristic in an explanatory scheme that exemplifies what Gordon (1984) calls evolutionary functionalism. Shleifer's starting presumption was that, all else being equal, prevailing institutions in a given context have persevered over alternatives *because* they are more efficient. He posited, for example, that the New Deal's regulatory institutions arose because they offered an efficient way to manage the rise of the robber barons and the expansion of the railroads (Djankov, Glaeser, et al. 2003, 606–7).

Shleifer's scheme offered a striking twist on the approach to institutional change long dominant among economists, which casts institutions as the outcome of an evolutionary search conditioned on the minimization of costs (Alchian 1950; Williamson 1981). To wit, his scheme was much more ecumenical about evolutionary mechanisms. "Politics" had long been the *bête noir* of economic approaches to institutional change (Djankov, Glaeser, et al. 2003, 612), with public policy—regulation, planning, and government intervention—cast as unnatural factors disrupting the efficient institutional equilibria that would otherwise evolve naturally out of private action. Shleifer, by contrast, proposed that political processes might actually be among the mechanisms that push societies toward efficiency. Efficient institutions might result, he suggested,

from democratic pressures, from the influence of growth-seeking interest groups such as merchants, from a Coasean negotiation among the members of the elite, such as the Magna Carta or the American Constitutional bargain, or from the evolutionary process of long term survival of the fittest institutions (Djankov, Glaeser, et al. 2003, 613 (citations omitted)).

Having denied that politics prevents movement toward efficient institutions, the heart of the NCE framework is captured by two postulates: first, the feasibility and cost consequences of institutional alternatives will depend on national context; second, institutions will naturally evolve toward the best alternatives in that context.

These premises are patently at loggerheads both with Shleifer's key causal claim, that changes to specified legal measures will produce uniform economic effects, and with DB's "one size fits all" guidance. Yet the NCE framework did not wholly discard the schema that frames social change as a result of a natural, efficiency-promoting evolution corrupted by unnatural interference with that process. It simply rejected the distinction between private action and politics as the *summa divisio* between natural (efficient) and unnatural (inefficient) change. Thus, the remaining portions of LOT can be characterised as an effort to reconcile NCE's baseline premises with "one size fits all," by specifying the mechanisms that obstruct the uptake of efficient alternatives. The next section turns to Shleifer's articulation of those mechanisms, and an examination of whether that effort succeeded.

Diverse traditions, persistence, transplantation

LOT complemented the NCE framework in three ways. First, it paid closer attention to the timescale over which institutional change occurs. On their own, the claims that institutions will "tend to" lie on the IPF or "eventually" settle at the cost-minimizing alternative are deceptively uninformative about the institutions prevailing in a given context. If institutional adaptations to changing conditions take centuries rather than years, then present institutions will always remain a patchwork of partial responses to past contexts, not a quasi-efficient response to present circumstances (Armour et al. 2009, 1451). One of Shleifer's key claims was that legal systems exhibit a particularly high level of such hysteresis—what he called persistence. Once formed, the legal system's responses to local conditions will be relatively slow (La Porta, Lopez-de-Silanes, and Shleifer 2008, 288, 307–8).

LOT's second addition to the NCE framework, and its trademark claim, concerned institutions' effects on one another. Crucially, Shleifer proposed that a country's legal system exerts a comparatively strong influence on the long-term development of its economic institutions and its regulatory regimes.ⁱⁱⁱ If the NCE framework could explain diversity in the fundamental structure of legal traditions, only these two assumptions could account for the salience of those differences centuries later.

LOT's final element concerned the transplantation of legal traditions.^{iv} LOT's elementary premise is that most countries' legal systems are not the product of processes captured by the NCE framework but should instead be understood as the product of an exogenous

“transplantation” of one of a small number of European legal traditions, as an incident of European conquest and colonization between the 18th and early 20th centuries (La Porta, Lopez-de-Silanes, and Shleifer 2008, 286).

Together, these three key premises—the persistent effect of legal traditions on legal systems, the power of legal systems over institutional settlements, and the historical fact of transplantation—predict that institutional practices across countries will cluster based on their shared legal origin. Critics have shown how that this line of reasoning fails for certain countries: the home country of each tradition, voluntary adopters of a legal tradition, countries whose legal systems draw from multiple traditions, and cases where the legal regime in a particular policy area reflects more recent transplantations (Pistor 2009, 1659–62; Siems 2007). But the theory’s dim illumination of these specific contexts does not invalidate its overall explanatory power. Though the documented correlations between legal origins and various present-day legal variables have other plausible explanations, the correlations are robust, and LOT’s three key premises offer a credible interpretation of them (Djankov, Glaeser, et al. 2003, 609–10; La Porta, Lopez-de-Silanes, and Shleifer 2008, 311–15).

Accepting LOT’s account of the link between legal traditions and legal rules, the question remains: do these three premises buttress interpretations of economic change as a causal outcome of targeted legal reforms? Can they underwrite “one size fits all?”

The economic relevance of legal origins: interpretation one

Shleifer’s effort to use LOT’s key premises to support his causal claims required a richer account of how legal traditions shape institutional practices. His account of the nature of those mechanisms was ambiguous. The basic notion is that a *legal system* is informed by a *legal tradition*, and that this tradition in turn shapes individual laws via the *approach, style, strategy* and/or *attitudes* it brings to bear on economic problems (Djankov, Glaeser, et al. 2003, 598, 601–3, 606, 610, 612–13; La Porta, Lopez-de-Silanes, and Shleifer 2008, 286–88, 293, 304–5, 307–10, 323, 326). Examined more closely, his accounts suggest two broad understandings of a legal system’s economic import. Where the first treats a legal tradition as ideology—a set of *ideas*—the other treats a legal system as an (institutionalized) culture: a set of *practices*. Shleifer seems to not have been cognizant of the importance of this distinction. For example, he occasionally reduced culture to beliefs (La Porta, Lopez-de-Silanes, and Shleifer 2008, 308, 311). Although

both conceptions are discernible in his theorizing, the two are not compatible, and each offers a distinct understanding of how changes to legal rules affect a national economy.

In the first interpretation, the legal system's genesis births a corresponding legal ideology, described variously in terms of "ideas about how the law and the state should work" (La Porta, Lopez-de-Silanes, and Shleifer 2008, 307), the "conception of how economic life...should be organized" (La Porta, Lopez-de-Silanes, and Shleifer 2008, 286) and "beliefs about how the law should deal with social problems" (La Porta, Lopez-de-Silanes, and Shleifer 2008, 308–9). In this account, a legal tradition is *accepting of, seeks out, embraces, or simply delivers* institutional settlements using a predetermined heuristic (Djankov, Glaeser, et al. 2003, 610; La Porta, Lopez-de-Silanes, and Shleifer 2008, 286, 307); it carries a set of preconceived notions about the right balance between facilitation and coordination. The approach of the English common law favours facilitation, while the French civil law favours coordination (La Porta, Lopez-de-Silanes, and Shleifer 2008, 286). Those notions serve as the paradigm for the selection of institutional responses to economic problems (Djankov, Glaeser, et al. 2003, 610–11), substituting for the adaptive process that, according to the NCE framework, would otherwise move institutions and regulations toward their optima (Figure 2).

Figure 2 - The effect of legal tradition - interpretation 1

Source: (Djankov, Glaeser, et al. 2003, 611)

Drawing on this interpretation, Shleifer emphasized that legal rules influenced by a transplanted tradition will be less efficient than those resulting from a legal system that developed more autonomously (Djankov, Glaeser, et al. 2003, 610–11; La Porta, Lopez-de-Silanes, and Shleifer 2008, 324). Yet the inefficiency of transplants on its own divulges little about what an indigenous legal system would have counterfactually selected, nor about what legal rules would be efficient in the actual present.

At this point, Shleifer made use of the data linking particular legal traditions to particular economic outcomes. The legal rules associated with the French civil law tradition are associated with worse outcomes on some economic variables than those linked to the English common law tradition (La Porta, Lopez-de-Silanes, and Shleifer 2008, 302). He inferred from these associations that the French civil tradition, in general, picks out rules (i.e., locations on a

country's IPF) that lie further from the optimum than those picked out by the common law tradition.

Even together, these pieces of the argument are not enough to support “one size fits all.” First, this inference depends on a false equivalence between a rule's efficiency and its association with specific economic outcomes. Though e.g. unemployment, corruption and financial market size are important economic variables, they are not reliable indicia of aggregate social costs, that is, of efficiency. More critically, the *average* distances from an optimum of conventions picked out by the common law and civil law tradition offers little guidance about where those optima lie in a *specific* country.

The keystone of the argument was one additional premise: Shleifer simply assumed that the shape of the IPF in developing countries is systematically skewed, so that the trade-off between dictatorship costs and disorder costs predictably places the optimum far up the IPF in the direction of facilitative institutions (see Figure 2). This assumption appeared as a tacit bias against coordinating institutions (La Porta, Lopez-de-Silanes, and Shleifer 2008, 287, 323–24; Djankov, Glaeser, et al. 2003, 610) but was occasionally stated in stark terms: viz the claim that, relative to developed countries, “developing countries need less regulation” (Djankov, Glaeser, et al. 2003, 611). The difference between the economic outcomes associated with the French civil law tradition and those tied to the common law tradition thus works to corroborate a more general problem of overregulation in every developing country. While “...transplantation [always] leads to excessive intervention and regulation [i.e. over-coordination],” it specifically does so “more so in civil than in common law countries” (Djankov, Glaeser, et al. 2003, 611). Note, if this assumption is correct, then every developing country is best off deregulating: one size fits all.

If this efficiency interpretation of the legal origins data was right, though, one would also expect legal origin to affect growth. As Shleifer admitted, it does not (La Porta, Lopez-de-Silanes, and Shleifer 2008, 301–2). Not only does the first interpretation of LOT rests on an unmotivated deregulatory bias. Even with that crutch, its claims are not corroborated by the available evidence.

The economic relevance of legal origins: interpretation two

The weaknesses of the “ideology” interpretation of legal traditions may have been why Shleifer warned that the idea of a legal system *choosing* the trade-off is “not quite right” (Djankov, Glaeser, et al. 2003, 609). Perhaps the proper way to interpret Shleifer’s account of legal traditions, in line with the broader NCE framework, is to understand traditions as embedded in the tacit knowledge (“human capital”) of legal actors, and in the structure of the legal system. By this interpretation, a tradition is maintained by its incorporation into a country’s “legal and political infrastructure” (La Porta, Lopez-de-Silanes, and Shleifer 2008, 2288, 308). It offers a toolkit—a set of strategies, and a distinctive set of institutions (La Porta, Lopez-de-Silanes, and Shleifer 2008, 307). It is not just characterized by regulatory attitudes, but by the role and status of judges, the allocation of fact-finding functions, the relative priority of adjudication and codification, and systems of adjudicative review (Djankov, Glaeser, et al. 2003, 605) In other words, traditions operate not as supervening preferences, but through the institutional life of the legal system in which they are embedded.

Viewing a country’s legal tradition as the operative logic of its legal institutions has important consequences. Early articulations of the NCE framework left ambiguous whether each country had a unitary IPF, that determines every optimal institution, or a distinct IPF for each area of policy. More critically, early accounts were equivocal about the nature of the context determining the shape and location of the IPF—what Shleifer calls civic capital. While foregrounding long-term factor endowments and economic macro-variables, Shleifer’s account of the relevant context tacitly acknowledged the importance of evolving characteristics of the state and the impact of deliberate policy (Djankov, Glaeser, et al. 2003, 600–601). A careful reading thus suggests that IPFs should be understood as institution-specific, with the shape and location of a country’s IPF in a particular area of law shaped by a context that includes the form of other prevailing institutional settlements in that country—including the legal system.

What is thus at play in the second interpretation is not what the legal system “chooses” but which institutional settlements its strategies support; or which are roughly consistent with the legal tradition’s ways of doing things (La Porta, Lopez-de-Silanes, and Shleifer 2008, 286, 308). Shleifer mustered evidence, for example, to show that the policy feasibility of military conscription is conditioned by how involved in economic life a state otherwise is—and thus by

the overhead costs of putting conscription in place—a factor that varies systematically between French civil law and common law origin countries (La Porta, Lopez-de-Silanes, and Shleifer 2008, 308; Mulligan and Shleifer 2005a; 2005b). To put it in terms of the NCE model, a legal tradition works by influencing the shape and location of the IPF itself (Djankov, Glaeser, et al. 2003, 612).

Under the second interpretation, then, a legal tradition does not so much substitute for the adaptive process that determines the institutional settlement as play a direct role in that process, serving as a key element of the environment in which institutional adaptation takes place.

This interpretation of the theory implies that prevailing economic and regulatory institutions in the present should be understood as optimal, in light of a country's existing civic capital, especially its legal system. At moments, Shleifer seemed to grasp the implication of his theory: where institutional or regulatory adaptation has for some reason been incomplete, he said, countries should pursue “‘appropriate institutions,’ those that...achieve the optimal trade-off between dictatorship and disorder in ways compatible with each country's level of economic development and *legal tradition*” (La Porta, Lopez-de-Silanes, and Shleifer 2008, 324–25, emphasis added). The “best solutions might differ across legal systems” (La Porta, Lopez-de-Silanes, and Shleifer 2008, 324–25). As for causal inference, the theory gels uncomfortably with the idea that legal reforms can be expected to have similar economic effects across different national contexts. It suggests that prevailing laws and economic practices are both shaped by a country's civic capital—especially its legal system. The development of the two kinds of variables may have been complementary, but neither can be pegged as primary. As for policy, it completely contradicts “one size fits all”.

Conclusion

Should countries follow DB guidance? Viewed as economic inputs, regulatory reforms which impact DB indicators are likely to have *some* output: law does matter. But the critique of LOT above finds DB's own architects advancing arguments in which the economic effect of indicator-linked reforms—and the trade-off against other values—varies from country to country. In some countries or circumstances, the costs and trade-offs of some DB-favoured reforms may be worth

the benefits. Unfortunately, DB scores and rankings make for poor indicators of whether, when, or which ones.

Given the global context, many countries may nonetheless find reason to abide by project guidance. A key finding of DB governance scholarship is that DB's prescriptions are operationalized through a coercive logic, turning not on direct instrumental benefit but on reasonable fear of financial penalty for nonconformity with project dictates. Conditioning access to aid and lending on DB performance was a founding goal of the project (Davis and Kruse 2007, 1098). Via the Bank's Country Policy and Institutional Assessments (CPIA), DB scores have presumptively influenced the allocation of IDA grants (World Bank 2018a, 13, 18, 37, 42; Riegner 2016, 10–13). Scores have been used directly as benchmarks in IBRD loans (Brunswijck 2018) and by development agencies in donor countries, notably USAID (Davis and Kruse 2007, 1115–16; Schueth 2015). Critics have also emphasized that indicators like DB work reflexively, by shaping the perceptions of economic actors—above all foreign investors—who policymakers might want to influence (Perry-Kessaris 2011, 407–8; Doshi, Kelley, and Simmons 2019). Doshi, Kelley and Simmons (2019) have provided convincing qualitative evidence that the decisions of elite global investors are strongly shaped by information about DB rankings.

DB's integration into development finance regimes and its cognitive choreography of global financial markets may convince some countries to use project guidance as a criterion for reform. The prudence of that decision ultimately depends on the suitability of development models beholden to the predilections of global financial markets.

Notably, these reasons for complying with DB guidance further attenuate the legitimacy of the project's power, rather than bolstering it.

Critical theorists sometimes take for granted that the discourses which underwrite the operation of (oppressive) power are “always” pregnant with contradictions (Marks at 27) and, a fortiori, that revealing those contradictions requires no more than viewing those discourses by the appropriate lights. When we understand the instrumental knowledge deployed by projects like DB not as a *langue* structured by a field of binary oppositions (Kennedy 2001) but, like this article, as a bricolage of stylized fact, interpretive technique and unmotivated convention, it becomes hard to hold faith that such revelations are inevitable. Deconstruction, ideology critique,

and trashing are neither necessary nor sufficient to grasp the operation of global governance. Nonetheless, the insights produced in this case suggest that, for those who want to put in question particular exercises of governance by knowledge in international development, the tools of immanent critique retain significant promise. In some instances, the strongest case against rationalisations of global power may ironically be produced by taking those rationales very seriously indeed.

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Endnotes

ⁱ There is an underexplored “what doesn’t kill you makes you stronger” dynamic to attacks on DB methodology. As with two Bank-instigated reviews of DB methodology (Independent Evaluation Group 2008; Independent Doing Business Report Review Panel 2013), the Bank has responded to concerns raised about individual measurement decisions, indicator design, or overall transparency through continual reform that has deflated criticisms while bolstering the project’s process legitimacy. (cf Van Den Meerssche 2018, 172–75; McHugh-Russell 2019b, 406)

ⁱⁱ A new indicator concerning public procurement was to be introduced in the 2021 annual report (World Bank 2020, 3).

ⁱⁱⁱ Though Shleifer sometimes refers to the effect of the legal system on individual legal rules (La Porta, Lopez-de-Silanes, and Shleifer 2008, 291), a generous reading suggests that the issue is the effect of legal systems on regimes and institutions broadly understood.

^{iv} Shleifer admits that legal systems are not the only institutions that can be transplanted, but does not consider more narrow transplants (Djankov, Glaeser, et al. 2003, 612).

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