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Legal System Network Effects and Global Legal Development

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Cover Page Footnote

Professor, Faculty of Law, Chinese University of Hong Kong; Executive Director, Centre for Financial Regulation and Economic Development. The author would like to thank Ngoc Son Bui, Thomas Coendet, Mike Klausner, Jhy-An Lee, Ryan Mitchell, Katharina Pistor, Ching-Ping Shao, and Wang-Ruu Tseng for their comments on an earlier draft of this paper. All errors remain my own.

LEGAL SYSTEM NETWORK EFFECTS AND GLOBAL LEGAL DEVELOPMENT

DAVID C. DONALD*

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INTRODUCTION

Because law exists as a system¹ of principles, institutions, procedures, and professions, law's network effects² must be understood in order accurately to

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¹ Historical surveys of opinions regarding law's systematic quality have recently been assembled by Gerald Postema and Jeremy Waldron. See Gerald J. Postema, *Law's System: The Necessity of System in Common Law*, 2014 NEW ZEALAND L. REV. 69, 105 (2014) (“[T]here is in the common-law tradition a deep commitment to system and the importance of systematic, reflective thinking in and about law.”); and Jeremy Waldron, *Transcendental Nonsense and System in the Law*, 100 COLUM. L. REV. 16, 47 (2000) (“The conceptual terminology of legal doctrine . . . must be understood as a sort of neutral matrix on which their interlocking relations can be laid out without any assumption that the various elements were, so to speak, made for one another.”). The concept of “legal system” has been parsed in great detail by Catherine Valcke. CATHERINE VALCKE, *COMPARING LAW: COMPARATIVE LAW AS RECONSTRUCTION OF COLLECTIVE COMMITMENTS*, Chapter 60–89 (2018).

² “A [network] is, in its simplest form, a collection of points joined together in pairs by lines. In the jargon of the field the points are referred to as vertices or nodes and the lines are referred to as edges. Many objects of interest in the physical, biological, and social sciences can be thought of as networks . . .” M. E. J. NEWMAN, *NETWORKS: AN INTRODUCTION* 1 (2010) (footnote omitted). Network “effects arise where current users of a good gain when additional users adopt it . . . new entry, especially against established networks with proprietary technology, is often nearly impossible.” Paul Klempner, *Network Goods (Theory)*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS* (2008). Network benefits or externalities save coordination costs for the user of the network. Although expressed in different terminology, the connection between the forms provided by law and market coordination to create network effects is already discussed by Ronald Coase. Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA: NEW SERIES* 386, 386, 389–91 (1937). This connection between Coase’s work and network externalities appears to have been first noted by Jason Johnston. Jason Scott Johnston, *The Influence of The Nature of the Firm on the Theory of Corporate Law*, 18 *J. CORP. L.* 213, 242 (1993).

assess its utility *qua network* to those who read and apply it separately from its substantive quality. The desirability of specific terms in a law or contract to the user has already been thoughtfully analyzed as a function of network effects. With a series of papers beginning in the mid-1990s, Klausner offered a coherent model of network effects when discussing choices by incorporators or other contracting parties between leading law or default clauses and custom drafting.³ He found that network effects make contract terms embedded within a robust network more valuable to the user and can contradict efficient innovation. In papers appearing around 2000, Pistor applied a comparable analysis to the limited options of developing countries when offered standardized foreign, national, or international “best practice” legal principles.⁴ From a community of professional support to a web of semantic stability, network effects facilitate and overshadow socially congruent chthonic norms by standardizing “best practices.” Is this overshadowing important? In a separate body of literature examining the systems, families, and traditions of law, systems theorists have modelled the genesis of such chthonic legal systems. This approach has not only been presented by Luhmann,⁵ and explained well by Teubner,⁶ but has also recently and forcefully been carried forward by Valcke.⁷ According to their view, law should be conceived in its systematically interrelated nature as a network of self-generating (autopoietic) relational concepts that is deeply interlinked with its social environment.⁸

Law thus finds its underlying impetus in social expectations, but takes the form of an internally coherent system of responses. This system becomes increasingly independent as a linguistic product through propagation of concepts

³ Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 764 (1995) [hereinafter *Networks of Contracts*]. (“[N]etwork externalities introduce the possibility that corporate contracts that maximize individual firm values will not be socially optimal Second, if network externalities are significant, corporate law may perform a coordinating function similar to that of technical standards in such fields as telecommunications, computing, accounting, engineering, and many other industries and professions.”); Michael Klausner, *The Contractarian Theory of Corporate Law: A Generation Later*, 31 J. CORP. L. 779, 796 (2006) [hereinafter *Contractarian Theory*] (“[A] plausible inference is that both learning and network externalities have played and continue to play a role in driving firms toward Delaware incorporation and the plain vanilla charter.”).

⁴ Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 AM. J. COMP. L. 97, 104–05 (2002) (“Once a regulatory system has established a head start over others, it benefits from rules that can be interpreted and applied only within that regulatory regime. Superior legal expertise of attorneys and judges is an important asset that is not easily emulated by other jurisdictions. Developing rules that require their expertise can reinforce this advantage.”).

⁵ Niklas Luhmann, *Law as a Social System*, 83 NW. U. L. REV. 136, 138 (1989) (“The legal system is a differentiated functional system within society. Thus, in its own operations, the legal system is continually engaged in carrying out the self-reproduction (autopoiesis) of the overall social system as well as its own.”) (emphasis omitted).

⁶ GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* 45–46 (1993).

⁷ VALCKE, *supra* note 1, at 139 (“Whereas most legal theorists recognize that purpose-definition, like content-building more generally, is achieved within the systems, they nonetheless insist on separating these functions. Hart distinguishes ‘primary’ from ‘secondary’ rules; Dworkin describes the ‘pre-interpretive’ and ‘interpretive’ stages of legal interpretation sequentially. In contrast, Luhmann insists that the purpose-defining operations are, in autopoietic unlike in other organic systems, qualitatively indistinguishable from the systems’ other operations I would suggest that legal practice everywhere largely bears out Luhmann’s insight on this point.”).

⁸ NIKLAS LUHMANN, *LAW AS A SOCIAL SYSTEM* 464 (Fatima Kastner et al. eds., trans. Klaus A. Ziegert trans., 2004) (“We know that law operates in society, performs society, fulfils a social function, and has been differentiated to fulfil this function by its autopoietic reproduction.”).

and remedies forming the network of law.⁹ Law, like language, is ultimately “a structured system ... both a self-contained whole and a principle of classification.”¹⁰ Although the content of a legal system’s norm network exists as a self-contained whole, it arises in a close relationship with its socio-political environment to create the conceptually interdependent arrangement of rights and obligations referred to as law. Because it exists as a network of norms, each additional person using this norm network will make it more attractive to users and correspondingly detract from the utility of competing networks. As Grewal explains, “when a user switches from one network to another, she will not only increase the value of the network she joins, but will also decrease the value of her previous network by leaving it with one fewer member.”¹¹

Two significant consequences of bringing these insights together are, first, that use of nodes taken from a foreign (or even an old) network will mean assumption of the socio-political characteristics embedded in that legal system’s genesis, and second, that use of such foreign (or old) network nodes could well mean sacrificing systematic congruence between a jurisdiction’s legal and social systems. When a jurisdiction esteems law on the basis of network effects, it risks creating a legal system that is quickly and generally understood but exists detached from the guiding impetus of its jurisdiction’s own social needs.

Network effects have great explanatory power for how law spreads in an international context where competing legal systems meet, particularly for the attempts of smaller or late-entry jurisdictions to innovate legally. Some aspects have been explained well through individual case studies, but the general phenomenon of network dynamics should be understood as a characteristic of all legal development. One such case is the dominance of Delaware corporation law, where network dynamics have been shown to have a key role in effective regulatory competition.¹² In the debate on the nature of the corporation as a nexus of contracts, Klausner has painstakingly laid out the potentially distorting nature of network effects for efficient choice.¹³ In the context of colonization and globalization, the systemic “transplant” effect, whereby local demand for remedies and institutions may not match standardized law, has also been examined in detail.¹⁴ This examination of dominant legal systems overtaking

⁹It is the professionally self-reflective transition from the first set of relationships (society stimulating legal actors) to the relative independence of the second set of relationships (legal actors providing solutions for society) that constitutes “autopoiesis.” *Id.* at 174–75.

¹⁰FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* 11 (Gerald Duckworth & Co. Ltd., trans. 2013).

¹¹DAVID S. GREWAL, *NETWORK POWER: THE SOCIAL DYNAMICS OF GLOBALIZATION* 26 (2008).

¹²*Network of Contracts*, *supra* note 3, at 848 (“The network externality model may explain this uniformity . . . [O]nce one firm’s product has emerged as dominant . . . other firms have incentives to produce ‘compatible’ products[.] . . . [so that] users can avail themselves of network benefits available to users of the dominant product.”). See also ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* (1993); Mark J. Roe, *Delaware’s Competition*, 117 *HARV. L. REV.* 588, 594 (2003).

¹³*Networks of Contracts*, *supra* note 3, at 849–50.

¹⁴As will be discussed in Part IV, Pistor expressed the general problem of general foreign law against specific local law very early, but limits her focus to the web of subsidiary institutions, such as enforcement mechanisms, that underlie and buttress core law and the conceptual network that allows law to be understood and applied. See Pistor, *supra* note 4, at 98. See also Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 *AM. J. COMP. L.* 163, 189 (2003) (focusing on the necessity of respecting a jurisdiction’s institutional framework and the value of local participation therein). This paper argues that the analysis is improved when the overall legal system is conceived as “system” and the interaction among systems is conceived as a product of network effects.

developing legal systems comes close to the analysis offered in this paper, but stops short of embracing the systems theoretic understanding of law's essential origin in its own social environment;¹⁵ it also does not expressly apply a network effects analysis in the international context. The accumulated insights on competition through network effects and standardization should be combined with the system theorist's view of law as an autopoietic system within larger social systems. The consequence is to offer a robust understanding of law's origin that also allows a clear view of how legal systems compete with and overtake each other. It also brings to light a potential behavioral bias in economic development planning, as a focus on the value of law's network effects can serve to eclipse a search for law's congruence with existing social needs.¹⁶

For a time, persons living within a dominant network might view their condition as an "end of history" because network dominance resembles complete convergence on an ideal embodied in their own legal system.¹⁷ Viewing the historical reality of local conditions, however, there is little concrete evidence that such convergence on perfection has, will, or can be achieved – either as proclaimed by Hegel in nineteenth-century Europe¹⁸ or as argued by Fukuyama in twentieth-century America.¹⁹ Supplanting local law with a dominant legal network also entails risk. Short-term savings gained through reduced international coordination and support costs for the ready-made could eventually lead to long-term incongruence between such law and social needs as the design of solutions for deep-seated social expectations is side-stepped.²⁰ This evolutionary pattern is discussed in Part IV.

Absent a fortuitous, perfect match between the law that a jurisdiction would create locally and the dominant network being adopted, using an off-the-rack framework could both stymie innovation in legal solutions and deny late-comers the opportunity to shape local and global law to meet their own preferences. In this market for law, swapping locally adapted concepts that are not broadly known, and are thus internationally "illiquid,"²¹ for the "liquid" concepts that

¹⁵ The systems theory presented in this paper is that of Niklas Luhmann, and is discussed in detail in Part III.A.

¹⁶ Locally, growing use could lead to growing litigation so that even more social expectations feed into the legal system, but this would not be the case where a jurisdiction borrows off-the-rack foreign or "globalized" law because of its strong network effects.

¹⁷ It has also been powerfully argued that such complement between a network of ideas about how to behave (heuristics) and a specific economic environment to which they are well-adapted can constitute an economic balance viewed as a perfectly efficient market. However, when external conditions of the market change and the heuristic tools built into theoretical network for investment decisions no longer fit these conditions, the mal-adaption of the old heuristics is seen as "irrational" rather than "efficient." See ANDREW W. LO, *Adaptive Markets in Action*, ADAPTIVE MARKETS: FINANCIAL EVOLUTION AT THE SPEED OF THOUGHT 269 (2016).

¹⁸ GEORG WILHELM FRIEDRICH HEGEL, LECTURES ON THE PHILOSOPHY OF HISTORY 197 (HB Nisbet trans., 1975).

¹⁹ FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN 338–39 (2nd ed. 2006).

²⁰ This paper focuses on the network phenomenon in space, as a network originating in one location reaches the tipping point and becomes regionally or globally dominant. However, the same or a similar network phenomenon occurs in time, as an older and better-known body of legal solutions snowballs forward, becoming easier and easier to use and understand. Thus, the analysis offered here could also— with minor adjustments— provide a network view of how 'conservative' or even 'originalist' readings of constitutions or statutes slow or even freeze law's evolution in response to social needs.

²¹ This Article uses the terms "liquid" and "illiquid" as they would be employed on the trading network of a financial market. A liquid asset can be passed at low transaction costs to another participant in the market network, while an illiquid asset will only with difficulty find a taker. See, generally, Michael

are well-known in all their connotations within a dominant network of law, could speed up the appearance of development while killing its roots, much like an overpowering fertilizer.

The globalizing push toward convergence²² and efficient unification of law at the turn of the century focused professional attention to such an extent on the advantages of the leading networks and their (liquidity) effects for efficient commerce that the relational advantages of chthonic law receded into insignificance.²³ The harmonizing push was facilitated by the ‘law and economics’ school’s assessment of law in terms of assumed economic efficiency. Once an economic goal was posited, it was possible normatively to measure and project the “best” legal standards in any context—at least theoretically.²⁴ When comparative analysis begins with a fixed ideal in mind, it can resemble the activity of comparing law from a natural law perspective as Valcke explains it:

[A]ll differences between [the legal systems] must necessarily be explainable in terms of such imperfections. Had all legal systems been perfect renditions of the same moral law, they would be exactly the same; their being in fact different hence was taken to confirm that at most one of them is perfect and all others are imperfect. Difference in other words “is perceived as an indication that there must be something conceptually wrong.”²⁵

Particularly when the comparative legal activity is undertaken in the context of law and development,²⁶ the distortion that results from treating local legal systems as “conceptually wrong” *a priori* because they differ from the standard

Aitken & Carol Comerton-Forde, *How should liquidity be measured?*, 11 PACIFIC-BASIN FINANCE JOURNAL 45, 46 (2003). The same can be said generally of an idea or concept that enjoys or does not enjoy currency within a network of communication. It is for this reason, that liquidity and network externalities have been treated as synonyms in financial economic literature. See Hans R. Stoll, *Future of Securities Markets: Consolidation or Competition?* 64 FINANCIAL ANALYSTS JOURNAL 15, 16 (2008).

²² “Convergence” has been generally understood in two ways: either the move of global legal systems toward a mean or the evolution of legal systems toward a perfect model, best represented in US law. For general discussions of convergence, see David Cabrelli & Mathias Siems, *Convergence, Legal Origins, and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis*, 63 AM. J. COMP. L. 109 (2015); Louis F. Del Duca, *Developing Global Transnational Harmonization Procedures for the Twenty-First Century: The Accelerating Pace of Common and Civil Law Convergence*, 42 TEX. INT’L L.J. 625 (2007); Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMP. L. 329 (2001); John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications*, 93 NW. U.L. REV. 641 (1999).

²³ This issue is first raised by thoughtful commentators like Pistor, who began research on the broader issues of legal standardization and the transplantation of law. See, e.g. Berkowitz, Pistor & Richard, *supra* note 14.

²⁴ “Now it may be possible—this is the modern approach to antitrust law—to derive from a text ... a concept such as economic efficiency, and create from that concept a logical system of law, much like the common law of torts or contracts.” Richard A. Posner, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 326, 328 (1988).

²⁵ VALCKE, *supra* note 1, at 73.

²⁶ The term “law and development” is used here with a somewhat broader meaning than that of the Post-WWII initiative advocating appropriate design of law to stimulate socio-economic development, but also goes to the imperative that a jurisdiction understand all criteria and consequences when choosing law in an environment. On general use of the term, see YONG-SHIK LEE, *LAW AND DEVELOPMENT: THEORY AND PRACTICE* 1.3.3. (2018).

offered in the leading network—which is deemed superior because it achieves a posited economic goal—presents a serious threat to contextual objectivity. A developing country setting out to build up its law should understand the evaluation framework that is being applied. This will help it combat distortion arising through overvaluing network effects and the quick “liquidity” spike in value achieved through adopting then-dominant solutions. The developing country should recognize that a large part of the attraction found in an international standard, or the law of a leading jurisdiction, arises not from ability to resolve the country’s problems, but its existing value as a node in a dominant network.²⁷ Moreover, as a legal system ages and expands, its attraction *qua* network increases through breadth of use. Nevertheless, its quality as a system meeting the needs of society may well be decreasing because of societal evolution of new needs not addressed in the previously developed law.²⁸ Awareness of these relationships will facilitate conscious effort to resist bias arising from network effects,²⁹ allowing better judgment about the point on the continuum between custom-tailored and off-the-rack law. Such awareness will also allow a more accurate assessment of when amendment of an existing and well-known network would be beneficial.

This Article sets out in five Parts an analysis of how legal systems are generated within their social environment and take on a life as symbolic systems that enjoy network effects. It places particular focus on the relevance of the relationship between origin and systemic growth for the global development of law. Part II will review the literature on the network property of law as a system with network benefits for its users, explaining the advantages that arise for large and well-known legal systems. Part III will review the theoretical work on how a legal system arises by packaging reactively formulated solutions to social demands into ordered concepts and evolves in dependence on its socio-political environment. This Part will also introduce the idea of platform management conceived on analogy from the modern platform economy, to describe the lawmaking process. Part IV will examine the consequences of legal network effects when legal systems compete in the development context, using as point of reference the “legal origins” debate conducted at the turn of the century. Part V will offer conclusions.

²⁷ A term that can be used analogically to capture the impact of some network effects is “fashion,” which has value even absent underlying substantive function. This is discussed in David C. Donald, *Endowment, Fundamentals and Fashion in the Market for Corporate Law*, in *FESTSCHRIFT FÜR THEODOR BAUMS*, 309–11 (2017) (Cahn and Siekmann eds., 2017).

²⁸ In this case, expansion of use could be driven by other factors, such as connection to a widely used language, a strong economy, and a reserve currency. *See* Part IV.B.

²⁹ DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 417 (2011) (“The way to block errors that originate in System 1 [spontaneous thinking] is simple in principle: recognize the signs that you are in a cognitive minefield, slow down, and ask for reinforcement from System 2 [fully informed, rational judgment].”).

I. LEGAL SYSTEMS ARE NETWORKS OF RIGHTS AND DUTIES

A. THE DEVELOPMENT OF LAW AS NETWORK BUILDING

There is considerable evidence from the examples of Rome and Great Britain that law's (natural)³⁰ historical path leads it from an assortment of sporadic decisions or decrees spawned by randomly occurring circumstances to densely networked systems in which legal professionals reflect on spontaneous solutions, build doctrine, and formulate complex statutes or codes.³¹ At the most basic level, judicial decisions accumulate and become information on possible solutions, which professionals can gather and reflect upon to derive generally applicable rules.³² This pattern is evidenced in history. Both common law and modern civil law took their initial shape in the twelfth and thirteenth centuries,³³ and then significantly accelerated their development after printed books became available in the sixteenth century, leading into the period of codifications and statutes.³⁴ Once mature, these systematic arrangements of remedies, judicial institutions, and procedures incorporating the social expectations of a given culture can be thought of as coterminous with the notion of "legal family" coined by David.³⁵ A similar point can be made for Glenn's concept of "legal traditions."³⁶

If networks are "a collection of points joined together in pairs by lines," in which such points become interrelated "nodes" within the network,³⁷ then the network of law would have many dimensions. Interdependent structures would

³⁰ This, of course, would not be the case for a colony into which law is imposed from abroad or a country that adopts foreign law wholesale, as happened for some countries of continental Europe which used transplanted Roman Law. See ALAN WATSON, *EVOLUTION OF WESTERN PRIVATE LAW* 193 (2001) ("From the eleventh century to the eighteenth and even beyond, the main feature of legal change in western continental Europe was the Reception of Roman law.").

³¹ With regard to Rome, see MARÍA JOSÉ FALCÓN Y TELLA, *CASE LAW IN ROMAN, ANGLOSAXON AND CONTINENTAL LAW* 7–9 (Stephen Churnin trans., 2011). Regarding Britain, see H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* 254–55 (4th ed. 2010) [hereinafter GLENN, *LEGAL TRADITIONS*]. This is also the developmental path assumed with respect to law's evolution in LUHMANN, *supra* note 8, at Chapter 6.

³² Glenn explains that in "1747, just 57 years before the codification of French civil law, Bourjon published his treatise on 'the common law of France and the custom of Paris reduced to principles.'" H. PATRICK GLENN, *ON COMMON LAWS* 37 (2005) [hereinafter GLENN, *COMMON LAWS*].

³³ See RAOUL C. VAN CAENEGEM, *THE BIRTH OF THE ENGLISH COMMON LAW* 89–91 (2d ed. 1988); and GLENN, *LEGAL TRADITIONS*, *supra* note 31, at 140–41.

³⁴ Bentham sums up this environment in his 1776 critique of judicial lawmaking as presented in the *Commentaries* of Blackstone with an assertion that the time is a "a busy age; in which knowledge is rapidly advancing towards perfection The most distant and recondite regions of the earth traversed and explored analyzed and made known to striking evidences." JEREMY BENTHAM, *A FRAGMENT ON GOVERNMENT; BEING AN EXAMINATION OF WHAT IS DELIVERED, ON THE SUBJECT OF GOVERNMENT IN GENERAL IN THE INTRODUCTION TO SIR WILLIAM BLACKSTONE'S COMMENTARIES*, Preface (1776). See also RENE DAVID & JOHN E.C. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 61–69 (3d ed. 1985).

³⁵ "The classification of laws into families . . . can be detected by examining those fundamental elements of the system through which the rules to be applied are themselves discovered, interpreted and evaluated." DAVID & BRIERLEY, *supra* note 34, at 19.

³⁶ "[A]dherents to a tradition, or a group within a tradition, constitute a local area network of information. The network is local because it is not—or at least not yet—universal, and it is a network because the exchange of information is a constant and ongoing process." GLENN, *LEGAL TRADITIONS*, *supra* note 31, at 21.

³⁷ NEWMAN, *supra* note 2, at 1.

begin with common language, move upward to specifically legal meaning,³⁸ and then include formally related and institutional supports to the practical significance of this meaning.³⁹ From the point of view of the user of law, a robust network of legal concepts could bring many benefits, including clarity, certainty, and the ability of counterparties to understand and accept it, at low transaction costs. Concepts taken from a well-known and highly developed legal system can in most cases be used “off the rack” without further adjustment by users. This advantage has been exploited well in the harmonized development of U.S. state law by the drafting and publication of “model laws” containing widely accepted concepts by the National Council of Commissioners on Uniform State Law (now called the Uniform Law Commission, or ULC)⁴⁰ and the American Law Institute (ALI).⁴¹

In his analysis of network effects in corporate law, Klausner isolates five network benefits accruing to the users of a broad and deep system of corporate and contract law: (1) interpretive network externalities; (2) common practice network externalities; (3) legal services network externalities; (4) marketing network externalities; and (5) learning effects.

With a focus on the Delaware General Corporation Law and by-laws and judicial decisions made thereon, Klausner sees the benefit of interpretive network externalities for a corporation using open-ended clauses like that found in a director’s duty of care, because within the dense network of Delaware judicial decisions interpreting that duty, uncertainty would be reduced.⁴² This preserves the open-ended nature of the duty necessary for giving directors sufficient freedom of discretion, but protects directors from unpredictable interpretations of the duty. Similarly, uncertainty would be reduced under Delaware law with regard to the meaning of “reasonable grounds” or a “reasonable response” when applied to a director’s action because the network would contain definitions for these common practices fleshed out through repeated litigation.⁴³ The larger network would lead to more cases and more decisions, memorializing practice in a discernable set of possibilities. Klausner also argues that robustly networked law provides benefits in the market for legal representation. When one selects a widely used body of law for one’s dealings, “economies of scale and scope as well as experience-curve phenomena” would reduce the cost and raise the efficiency of legal service providers “drafting . . . reviewing . . . and negotiating the term,” as well as “litigating the term if a dispute arises.”⁴⁴ This would be comparable to seeking service for a well-known and popular make of automobile, for which mechanics, know-how, and spare parts would be readily available. When seeking investors, a company using a

³⁸ See the discussion in GLENN, *LEGAL TRADITIONS*, *supra* note 31, at 164.

³⁹ Such support has been widely discussed, perhaps most interestingly in debate regarding the possibility of transplanting law from one culture to another. See, e.g., Roger Cotterrell, *Is There a Logic of Legal Transplants?*, in *ADAPTING LEGAL CULTURES* 71, 79–84 (David Nelken & Johannes Feest eds., 2001).

⁴⁰ ACTS OVERVIEW, UNIFORM LAW COMMISSION, <https://www.uniformlaws.org/acts/overview> (last visited Mar. 17, 2020).

⁴¹ ALL PUBLICATIONS, THE AMERICAN LAW INSTITUTE, <https://www.ali.org/publications/#publication-type-model-codes> (last visited Mar. 17, 2020).

⁴² *Networks of Contracts*, *supra* note 3, at 777.

⁴³ *Id.* at 780.

⁴⁴ *Id.* at 782.

known network of law will also receive marketing externalities because the “cost and reliability of analyzing and pricing these terms may be affected by their similarity to the terms that other firms use,” and if “a firm employs commonly used terms, investors and securities analysts can use routine financial analysis to estimate the value of its securities.”⁴⁵ Likewise, use of a contract term under the law of an established legal system means the learning process found in “past precedents will still exist and may clarify the term’s meaning.”⁴⁶

Regardless of any inherent doctrinal or conceptual quality, a body of well-established law will therefore enjoy network effects that reduce uncertainty and the cost of legal services, facilitate interaction with investors and other counterparties, and deliver the fruit of a learning process stretching back over the period of its existence. Lined up against what most people might well expect from good law, these network benefits are very significant, providing increased certainty, better access to advice, and lower negotiation costs. Kahan and Klausner examined the terms of underwriting contracts and also in this context found “learning and network externalities, as well as switching costs . . . arise from some contract terms.”⁴⁷ Beyond any reference to substantive quality or impact, the network properties of law make a body of law or contractual provisions attractive in itself.

B. NETWORK EFFECTS IN LEADING LAW

Network effects increase with the size of the relevant system network, and as Katz and Shapiro observe, “systems markets are especially prone to ‘tipping,’ which is the tendency of one system to pull away from its rivals in popularity once it has gained an initial edge.”⁴⁸ Kahn characterizes the result of such tipping somewhat stronger from an antitrust perspective: “Since popularity compounds and is reinforcing, markets with network effects often tip towards oligopoly or monopoly.”⁴⁹ If, as argued in the preceding Section A, legal systems display network effects, and if a popular network tends to “pull away from its rivals” and “tip towards oligopoly or monopoly,” it is reasonable to expect that a legal system with early depth and size advantages over its competitors will display a like tendency toward dominance. At a certain level of use, adoption of the network will reach what Grewal refers to as the “threshold of inevitability,” where “the interests of those who use a lesser standard coincide with the interests of those who use the dominant standard,” because adoption of the dominant standard is “preferable to social isolation.”⁵⁰

Such size and depth advantages of one legal system over another can occur when the political-economic development of two jurisdictions are unequal, and the two then come into a close relationship with each other. Osterhammel and Pettersson observe that this occurred (in what we would now call the “developing

⁴⁵ *Id.* at 785.

⁴⁶ *Id.* at 786.

⁴⁷ Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or “The Economics of Boilerplate”)*, 83 VA. L. REV. 713, 760 (1997).

⁴⁸ Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. ECON. PERSP. 93, 105–06 (1994).

⁴⁹ Lina M. Kahn, *Amazon’s Antitrust Paradox*, 126 YALE L. J. 710, 785 (2018).

⁵⁰ GREWAL, *supra* note 11, at 121.

world”) through the second phase of European-led globalization, beginning in mid-eighteenth century:

[B]y the mid-eighteenth century transcontinental networks had been established that were at least economically stable and potentially influential. What comes next, in the period we date from 1750 to 1880, is an expansion of worldwide integration unprecedented in its intensity and influenced by the new capacities in production, transportation, and communication created by the Industrial Revolution. . . . At the same time, European institutions, including the nation-state, and European or “Western” thought are being exported throughout the world.⁵¹

In this “first age of global imperialism”⁵² the imperial powers laid down their law in conquered territories through forced transplantation.⁵³ In Hong Kong, for example, Britain followed its military defeat of China in the First Opium War by imposing on its new crown colony a ‘kit’ of about 20 statutes containing all the rules necessary for a functioning port⁵⁴ and establishing a “supreme court” in which the common law of England would apply.⁵⁵ The ultimate court of appeal for this “supreme court” was the Judicial Committee of the U.K. Privy Council, essentially a colonial management body staffed with seconded law lords and a special group of judges having knowledge of foreign law once used in acquired colonies (such as that of India or the Ottoman Empire).⁵⁶ The Privy Council could adjust English law to the more inflexible elements of foreign circumstances, thus easing the shock of domination by the imperial law network.⁵⁷ By the early twentieth century, the network of British influence spread not only to the 25% of the world they directly controlled, but also to Argentina and Brazil, in which they were among the largest foreign investors, so “that it seems quite legitimate to speak of ‘informal imperialism’

⁵¹ JÜRGEN OSTERHAMMEL AND NIELS P. PETERSSON, GLOBALIZATION: A SHORT HISTORY 28 (Dona Geyer trans., 2005).

⁵² JÜRGEN OSTERHAMMEL, THE TRANSFORMATION OF THE WORLD: A GLOBAL HISTORY OF THE NINETEENTH CENTURY 59 (Patrick Camiller trans., 2014).

⁵³ This did not happen equally in all colonies. Colonies serving for mineral or other resource extraction had far less use for law and other supporting institutions than did settled or trade center colonies. Daron Acemoglu, Simon Johnson & James A. Robinson, *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AM. ECON. REV. 1369, 1370 (2001).

⁵⁴ These included, for example, ordinances on registration of deeds and wills, merchant shipping, usury laws, distillation of spirits, licensing public houses, harbor regulation, salt, opium licensing, weights and measures, and good order and cleanliness. See DAVID C. DONALD, A FINANCIAL CENTRE FOR TWO EMPIRES: HONG KONG’S CORPORATE, SECURITIES AND TAX LAWS IN ITS TRANSITION FROM BRITAIN TO CHINA 23–32 (2014).

⁵⁵ An Ordinance to Establish a Supreme Court of Judicature at Hong Kong, Ordinance No. 15 of 1844, §§2–3 (“there shall be within and for the Colony of Hongkong a Court, which shall be called ‘The Supreme Court of Hongkong’, and . . . the law of England shall be in full force in the said Colony.”).

⁵⁶ Ivor Richardson, *The Privy Council as the Final Court for the British Empire*, 43 VICTORIA U. OF WELLINGTON L. REV. 103 (2012).

⁵⁷ Jonas-Sébastien Beaudry, *The Empire’s Sentinels: The Privy Council’s Quest to Balance Idealism and Pragmatism*, 1 BIRKBECK L. REV. 15, 22 (2013).

in these countries.”⁵⁸ Approximating the commercially relevant law used in its various colonies to that of Britain obviously had enormous network utility. Operating the supply chain for opium under virtually identical law from India to Singapore and on to Hong Kong could greatly reduce transaction costs and legal risk. However, even the poor historical records available show cases of real damage done to local populations, such as loss livelihood and land rights by local Chinese in Hong Kong,⁵⁹ as the colony built up its legal system primarily for purposes of transshipping opium and other inter-colonial merchandise.

Part IV examines how the dominant global network established by Europeans through colonization largely passed to the U.S. in the late twentieth century. With hindsight, the beginning of this process can be perceived early in that century at about the time the U.S. economy became the world’s largest.⁶⁰ Systems of industrial mass production and the generation of mass culture like cinema were first developed in the U.S., giving it first-starter advantage in its interaction with the existing, less-developed organizational forms found in other countries.⁶¹ The U.S. lead in globalization, which began in this way, lurched dramatically forward in both 1945 and 1989, with victories in both World War II and the Cold War.⁶² Use of the English language, which the U.K. had already spread throughout its colonies and major trade routes, facilitated insertion into the American global network.⁶³ As Immerwahr puts it, the British left behind a “world almost designed for the convenience of the United States.”⁶⁴ U.S. institutional ideas were translated into the major global organizations created in the wake of World War II.⁶⁵ As the only major manufacturers left standing in 1945, U.S. corporations became the first collection of post-colonial multinational firms, carrying their standards,⁶⁶ law, and lawyers with them.⁶⁷

⁵⁸ NIAL FERGUSON, *EMPIRE: THE RISE AND DEMISE OF THE BRITISH WORLD ORDER AND THE LESSONS FOR GLOBAL POWER* 203 (Basic Books 2004).

⁵⁹ CHRISTOPHER MUNN, *ANGLO-CHINA: CHINESE PEOPLE AND BRITISH RULE IN HONG KONG, 1841–80, 1889–98* (2003). Such subtle damage of course pales by comparison to the ordinary colonial dispossession and enslavement of indigenous peoples in various European colonial holdings from the fifteenth century, but nevertheless would allow interesting comparison to the slanting of laws still found in places like Hong Kong and Singapore, which benefit international transactions and the exit and entry of capital while creating a difficult and expensive environment for ordinary residents.

⁶⁰ MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* 5 (1982).

⁶¹ OSTERHAMMEL & PETERSSON, *supra* note 51, at 108–09.

⁶² ALFRED W. MCCOY, *IN THE SHADOWS OF THE AMERICAN CENTURY: THE RISE AND DECLINE OF US GLOBAL POWER* Kindle Location 1063 (2017) (“[Decolonialization] became the foundation for an expanding American presence Despite its rapid retreat, the British Empire left behind both models and methods that would influence this emerging hegemony.”).

⁶³ *Id.*

⁶⁴ DANIEL IMMERWAHR, *HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES* 597 (2019).

⁶⁵ The work of Henry Morgenthau and Harry White in the U.S. Treasury to devise the key Bretton Woods institutions is described in some detail by Benn Steil. BENN STEIL, *THE BATTLE OF BRETTON WOODS: JOHN MAYNARD KEYNES, HARRY DEXTER WHITE, AND THE MAKING OF A NEW WORLD ORDER* 125–28 (2013). See also TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945* 107–08 (2005); and OSTERHAMMEL & PETERSSON, *supra* note 51, at 121–26.

⁶⁶ In 1945, the Anglophone powers created the International Organization for Standardization (ISO), which worked to make U.S. industrial standards the world standards. IMMERWAHR, *supra* note 64, at Kindle Location 5228–40.

⁶⁷ It should also be remembered that the converging impetus of these multinational enterprises was accompanied by a well-known tendency to engage in regulatory arbitrage between diverging national laws, triggering fears of a “race to the bottom” as states competed for their presence. Peter Muchlinski,

II. LEGAL SYSTEMS ARISE FROM THEIR SOCIO-POLITICAL ENVIRONMENT

A. SYSTEMS THEORY ON THE SOCIAL CONTENT OF LAW

“A legal institution, to be at all meaningful, depends on a societal institution.”⁶⁸ Nevertheless, Watson can also advocate transplantation of law between very different social environments because law can serve as “a kind of shorthand” for the solution a society has reached.⁶⁹ Luhmann focuses much of his work on this (autopoietic) aspect of law as a system that depends first on society for its content and purpose, yet secondly operates independent from society, with its own rigorous logic and rules.⁷⁰ In the present Article it is argued that law’s network strengths observed by Klausner and others should be understood as a property of the “second-order” functions defined by Luhmann. They are legal-system-inherent rather than socially interactive, for they regard the sematic value of specifically legal concepts and specifically legal support systems. This Part explores the tension between the two systemic facets found in law—the creation of responses to social expectations and the systematic integrity of self-affirming rules and procedures that can be transferred and transplanted to different societies. The discussion begins with an obvious point of departure: Luhmann’s sociologically oriented systems theory. It then also examines more traditional theories of law, where a structurally similar, socially dependent view can also be found – albeit expressed with different terminology. Lastly, this Part will examine the platform of legal institutions that takes in social values as input to generate doctrinally coherent law and issue remedies as its output.

Luhmann’s systems theory explores in minute detail the interaction between expectations based on social norms and the creation of legal rules. Like common law scholars, Luhmann sees disputes as a driving force in the development of law, and the strength of his theory is in showing the active dynamics of a legal system that is both dependent on and (autopoietic) independent from society. “Expectations” regarding rights and duties arise within the social system, as Luhmann explains: “The term ‘norm’ refers to a certain form of factual expectation, which has to be observable either psychologically or as the intended and understandable meaning of communication.”⁷¹ The interaction between the legal system and the environment of the social system is communicative, as legal institutions are constantly receiving requests to resolve disputes about right and wrong according to social expectations.⁷² When differing expectations lead to conflict, they “irritate” the legal system by challenging it to settle the matter: “The system itself registers the irritation—for instance, in the form of the

Multinational Enterprises, in 1 OXFORD PUBLIC INTERNATIONAL LAW, 40–43 (2nd ed., 2007). The phenomenon shows a certain schizophrenia, with firms seeking uniformity in areas like contract law and perhaps financing techniques, but working to preserve heterogeneity in areas like tax, environmental, labor and safety standards.

⁶⁸ *Id.*; WATSON, *supra* note 30, at 196.

⁶⁹ *Id.*

⁷⁰ LUHMANN, *supra* note 8, at 73–75.

⁷¹ *Id.* at 71.

⁷² *Id.* at 142–143.

problem of who is right if there is a conflict.”⁷³ If the legal system does not already contain a solution for the conflict between expectations, it may be forced to evolve:

The decisive variation, as far as the evolution of law is concerned, relates to the communication of unexpected normative expectations . . . which—with hindsight—turns out to be a disappointment. This disappointment brings to mind the norm, which did not exist as a structure for communication in society before this occurred . . . Such events happen as soon as there are normative expectations . . . It is sufficient for one to see a reason to reject certain conduct and to be successful in having this rejection accepted by others.⁷⁴

For Luhmann, this act of creating a new structure, essentially a legal concept, will mean that the legal system’s reaction to this expectation is evolution. That is, when faced with the variation made by the new expectation, the legal system adapts to address the new normative expectation, the legal system will use its own conceptual framework to stabilize the law in a new form.⁷⁵

The legal system relies completely on stimulus from society for this evolution, “so that the law of modern society must *make do without a certain future* . . . [T]here is no general faith in ‘salvation’, ‘progress’, or ‘apocalypse’”⁷⁶ or any other conceptually determined telos (such as the “end of history” with law reaching the ideal of maximum economic efficiency). Luhmann’s theory embraces the Darwinian concept of evolution⁷⁷ because he finds that it allows system boundaries to be conceived as porous and change to be understood as unplanned, rather than evidencing unified teleology.⁷⁸ This evolutionary interaction is conceived in the same way as physical evolution, with the significant qualification that the interaction between social environment and operatively closed legal system occurs through medium of language. The “autopoiesis”⁷⁹ of the legal system “shifts the idea of self-referential make-up to the level of the elementary operations”⁸⁰ (i.e., to individual concepts formed in judicial or legislative decisions and away from any type of overall *telos*). Unplanned prompting from the social environment in a developing country would be exactly the kind of “irritant” that would allow the legal system to develop as that society’s law, but such stimulus would not feed development if the effectiveness of a legal system were to be judged by similarity to a leading network of law with high global recognition and use.

⁷³ *Id.* at 383.

⁷⁴ *Id.* at 243–244.

⁷⁵ *Id.* at 258–59.

⁷⁶ *Id.* at 470–71 (italics in original).

⁷⁷ LUHMANN, *supra* note 8, at 230–31. (“We shall use the concept of evolution in accordance with Darwin’s theory which . . . must be counted as among the most important achievements of modern thought.”)

⁷⁸ *Id.* at 231.

⁷⁹ The term originated in biology. See Francisco J. Varela, Humberto R. Maturana & Ricardo Uribe, *Autopoiesis: The Organization of Living Systems, Its Characterization and a Model*, 5 BIOSYSTEMS 187, 188 (1974).

⁸⁰ LUHMANN, *supra* note 8, at 81.

The self-referential autopoiesis reacts to information received (social expectations) with legal concepts through the systematic processing that occurs between the operationally closed legal system and its social environment.⁸¹ The autopoietic activity is capable of adjusting both the contents of the legal system and the procedure the legal system uses to determine such contents: “Autopoietic systems ... not only ... produce and eventually change their own *structures* but their self-reference applies to the production of other *components* as well.”⁸² This “requires a synthesis of three selections: namely, information, utterance and understanding,” and the synthesis is produced “by the network of communication, not by some kind of inherent power of consciousness, or by the inherent quality of the information.”⁸³ Indeed, the information processed is already part of the system processing it: “[p]ieces of information don’t exist ‘out there’, waiting to be picked up by the system. As selections, they are produced by the system itself.”⁸⁴ This resembles what we see in Section B, below, with respect to theory of common law: the ‘writs’ or ‘causes of action’ built into the procedural system of the law only allow certain information to matter, to have significance for the legal system.

At the points where “irritating” interaction occurs between the legal system and society (or its other subsystems), the legal system develops interfaces that respond to expectations presented to the legal system. Luhmann calls these interfaces “structural couplings.”⁸⁵ They are concepts and formal institutions that straddle the line between the legal system and the social environment. “Property,” “contract,” and “capacity” are important structural couplings that allow the legal system to arbitrate over the society’s conflicts on right or wrong, win or lose, legal or illegal in important and problematic interactions with significant economic and social importance.⁸⁶ The concept of property allows a thing of value contested in the social sphere to be an object of specified rights and duties, and the concept of contract permits a relationship among persons bristling with potential dispute to become a bundle of obligations which are created, performed and dissolved in specified ways. Luhmann shows how these couplings evolve with society, so that the contents of the concepts “property” and “contract” were able to be systemically adjusted from the medieval to the modern periods as private autonomy and commercial flexibility became more central in the social and economic systems.⁸⁷ “The coupling turns operations of the economic system into irritations of the legal system and operations of the

⁸¹ The legal system also acts by choosing not to react to a given stimulus. *Id.* at 293. As discussed in Section III.B, the filter on what the legal system will recognize as a complaint and what it will refuse—that is the shape and extension of the writs—is the key to the early common law.

⁸² Niklas Luhmann, *The Autopoiesis of Social Systems*, in *SOCIOCYBERNETIC PARADOXES: OBSERVATION, CONTROL AND EVOLUTION OF SELF-STEERING SYSTEMS* 174 (Geyer & Van Der Zouwen, eds., 1986).

⁸³ *Id.*

⁸⁴ *Id.* at 175. Thus if foreign law were to be adopted solely due to strong network effects, not only would such law fail to reflect social needs in the basic arrangement of the legal system, but that arrangement would also determine how society would be read as meaningful for the legal system.

⁸⁵ LUHMANN, *supra* note 8, at 265.

⁸⁶ *Id.* at 266, 388–392.

⁸⁷ *Id.* at 392–397.

legal system into irritations of the economic system.⁸⁸ The manner in which these structurally coupling “applications” function in the legal system will be determined by the architecture of the legal system, but the content of each of the legal platform’s concepts will be under continued “irritation” by any changes in the expectations of the social and economic environment.

Luhmann’s systems theory thus presents an operationally closed legal system with porous openings to its environment in the shape of these “structural couplings.” The content of law is adjusted by the legal system’s choice of reaction to “irritations” that social expectations present in the form of demands for a declaration of right or wrong, win or lose, legal or illegal. Society and the legal system can communicate, but the professionally crafted technical coherence (Luhmann calls it “programing”)⁸⁹ of law controls the ultimate form of the concept it will select in its evolutionary adjustment. In this theory, expectations shape the creation of rules through pressure at the system periphery (legislature) or formal requests at the system’s core (courts) in connection with disputes.⁹⁰

This activity of law is “a general form of system-building using self-referential closure”⁹¹ that is also necessarily open to its environment. The legal system processes material from its environment into and through itself in a way that also supports that same environment. The legal system embedded within society spins out its own network of concepts, institutions and procedures through which to meet the expectations of society. This legal system reacts to social pressure, but the product of its reaction takes on the objective reality of a systematically coherent network. As will be explained in Section C, this synthesizing activity of the legal and social systems resembles a “platform” used in businesses like iTunes, Uber, or Airbnb because the information coming into the legal system is necessary but not sufficient to make law, and must be filtered and reconstructed according to the internal logic of the legal platform before it can be consumed by the society as law. On the other hand, the platform has no purpose of its own other than to react to and process the available information found in the environment in order to meet the needs and expectations of its users.

⁸⁸ *Id.* at 392. For example, the concept of property requires activity of the legal system to protect ownership and transfer of objects considered to be property, and the decisions of the legal system will shape possible forms of ownership and transfer in the economic system—each system “irritating” the other.

⁸⁹ *Id.* at 118; “We will call the rules for allocation (with whatever margin for interpretation) programmes The operative closure of the legal system is secured by coding [of legal/illegal]. But at the level of programming it can be determined on which grounds and in which respects the system has to process cognitions.” *Id.* at 118.

⁹⁰ “Only courts have to transform indeterminacy into determinacy where necessary, only courts have to construct fictitiously the availability or unavailability of principles, where necessary Consequently, the organization of the courts as a sub-system is at the centre of the legal system All other areas of law belong to the periphery. This applies . . . to legislation legislation proliferates, yielding to political pressure and seeping into previously unregulated areas It is in the periphery that irritations are translated into legal form—or not.” *Id.* at 292–293.

⁹¹ Luhmann, *supra* note 82, at 172.

B. COMMON LAW IS LOCAL, NEITHER TRANSPLANTED NOR OFF-THE-RACK

The review of Luhmann's systems theory presented above shows that the robust operation of a legal system generated in response to the needs of a given social environment would be disrupted if law were to be mainly self-contained, a constellation of concepts and solutions existing as a network of abstract values.⁹² Such a view of law as a network with transcendental, internal grammar would indeed mean that it could easily be transplanted "shorthand" from one environment to a completely different one. However, law is much more than a network of symbolic logic, and this point does not require a reader to accept Luhmann's socially-oriented systems theory

As this Section will show, law's genesis in "social irritations" is central to the formulations of legal theorists having no connection with systems theory, and even when these legal theorists do not consider their work to be in any way "sociological" in character. For example, in 1881, Holmes characterized law as a two-part cultural aggregation in which societal contents are processed by an enduring professional platform: "The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depends very much upon its past."⁹³ The following paragraphs will examine in some detail conceptions of law presented by H. Patrick Glenn's comparative law theory of legal traditions, Melvin Eisenberg's theory of the common law, and Sir John Baker's history of English law.

As one would expect, when compared to Luhmann, legal scholars bring a more detailed analysis of the various practical components of the legal system, including law's origins, evolution, function and inter-dependence with society. They also articulate a deep understanding of the thought processes and training of persons—like judges or legal counsel—who shape the law through their professional activity.

Baker is a legal historian concerned with evaluating trustworthy historical sources of information on legal development, as well as a barrister, and finds that law exists largely in the minds of legal professionals: "The law today is not what particular courts or parliaments in the past have said it is, but what lawyers at present think the relevant courts would do in a given case."⁹⁴ Baker finds in early English common law that writs, claims and court procedures channel the general norms and usages of the community for the court.⁹⁵ Supplementing this, however, legal professionals act as a living archive of social expectations on what justice means: "[T]he law may be perceived as being what the courts ought

⁹² If this were the case, Saussure's study of language as an arbitrary, yet internally coherent system of signs would also be a fitting analysis of law. See Saussure, *supra* note 10, at 25–26 ("The language itself is a system which admits no other order than its own. This can be brought out by comparison with the game of chess. In the case of chess . . . everything which concerns the system and its rules is internal.")

⁹³ OLIVER W. HOLMES JR., *THE COMMON LAW* 1–2 (Little, Brown and Co. 1923).

⁹⁴ J.H. BAKER, *THE LAW'S TWO BODIES: SOME EVIDENTIAL PROBLEMS IN ENGLISH LEGAL HISTORY* 4 (2001).

⁹⁵ J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 8, 22 (4th ed. 2002). "We do not hear of the king's law or the lord's law, but of communal justice or the justice of the people." *Id.* at 8. Even in the twelfth and thirteenth centuries, "Communal justice and its ancient methods of proof were too deep-rooted for anyone to think about abolition." *Id.* at 22.

to do, in the opinion of the best legal minds of the day, even if those are not the minds currently controlling the decisions of the highest appellate court.”⁹⁶ The social content of law—particularly including the sub-system of the law’s caretakers—is as important as the logical and doctrinal content of texts. Baker explains that as used in English law, the maxim “*communis error facit jus*” (common error makes law) has meant that usage will take precedence over doctrine, and thus innovative usages technically violating the law have eventually become law themselves.⁹⁷ Social action eventually becomes the content issued by the platform of the legal system:

People sometimes manage their affairs on the basis that they do not mind whether the law protects them or not. Sometimes they may explicitly avoid the forms and the protection of the law . . . Far more often, people will follow practices or enter into arrangements with complete disregard of their legal consequences. They rely on other kinds of security, such as trust and reputation, or the fact that everyone else does the same, and simply do not contemplate the possibility of litigation. Such practices may in time become so widespread that to deny legal protection begins to seem perverse. The trust of land is an obvious example.⁹⁸

Baker goes on to provide an example from Lord Coke in which “common assurances” are given force of law in the conveyancing of property.⁹⁹ Baker’s particular contribution to our understanding of law is that even as a highly versed barrister, lecturer, and historian with an intimate knowledge of statutory and case law, he still looks to societal sources of order outside of written law for the origin of law’s content. It is difficult to imagine how this content could be captured in a network of concepts that can be transferred “shorthand” to far-flung jurisdictions.

Eisenberg steps away from his work in corporate and contract law to investigate the nature of the common law in a work primarily examining the creation and evolution of various legal doctrines and principles during the twentieth century.¹⁰⁰ Like Baker, Eisenberg sees the common law as originating within a social and professional environment, taking shape even before a court discerns it and memorializes it in a decision: “The common law does not consist of doctrinal propositions found in binding official texts. Rather, it consists of the rules that *would be generated at the present moment* by application of the institutional principles that govern common law adjudication.”¹⁰¹ While this may appear to be the manifestation of a Platonic ideal, it is rather the systemic creation of a solution along the lines described by Luhmann, and the “institutional principles of adjudication” are for Eisenberg divided—to use

⁹⁶ BAKER, *supra* note 94, at 5.

⁹⁷ *Id.* at 6.

⁹⁸ *Id.* at 25.

⁹⁹ *Id.* at 73.

¹⁰⁰ MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* (1988).

¹⁰¹ *Id.* at 3 (emphasis added); *see also id.* at 154.

Holmes' terminology—between what is deemed “convenient” and how the “machinery” should operate. For Eisenberg, just and legitimate law consists of achieving a “consistent” and “congruent” balance of key elements taken from the legal system and other aspects of the social environment (social beliefs, science respected at the time, and accepted routines).¹⁰² In the framework for law developed by Eisenberg, “justice” finds a close analogue in “congruence” of the law and the expectations formulated in society with regard to the problem in question.

Eisenberg refers to the manner in which social expectations shape law's content as an inclusion of “social propositions.” This term includes the categories of “moral norms” (characterizing conduct as right or wrong),¹⁰³ “policies” (characterizing choices as “conducive or adverse to the general welfare”),¹⁰⁴ and “experiential propositions” (social or hard science understandings about “the way the world works”).¹⁰⁵ In systems theory terms, these arise out of different social sub-systems. Moral norms are for Eisenberg, “moral standards that claim to be rooted in aspirations for the community as a whole, and that . . . can fairly be said to have substantial support in the community.”¹⁰⁶ Eisenberg demonstrates how moral norms enter law to adjust rules for liability in landmark products liability cases (shifting protection from manufacturers to consumers) and malpractice allegations for a failed vasectomy (previous understanding of pregnancy as indisputable blessing changes to a parental choice).¹⁰⁷ Eisenberg's most serious challenge when modeling the incorporation of moral norms into written law is understanding when such norms are truly “rooted in aspirations for the community” and how courts can discern this. His explanation that courts can look to existing cases and legislation, news media, and their own common knowledge,¹⁰⁸ remains ultimately unsatisfying. This is a practical problem Luhmann avoids within his much more generalized theory of constant communication and autopoiesis. With Luhmann, we understand that there will be a “structure for communication” in response to a social expectation, but beyond the shape of a specific judicial complaint we do not see how the expectation of right and wrong materializes.

Eisenberg also asserts that “policy” will shape the materialization of common law, and those he identifies show how law can be changed in relation to changes in social positions. Policies he examines determine whether a court should hear an action and who should bear burdens within the proceeding. The policies are “social gravity,” “private autonomy,” “opportunism,” and “information asymmetry,” which he argues were applied by a court refraining from the exercise of its power over a matter not considered socially important

¹⁰² *Id.* at 44.

¹⁰³ *Id.* at 15.

¹⁰⁴ *Id.* at 26.

¹⁰⁵ *Id.* at 37.

¹⁰⁶ *Id.* at 15.

¹⁰⁷ The cases Eisenberg analyzes are *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916) and *Donoghue v. Stevenson*, [1932] LR App. Cas. 562 with regard to a liability of negligent manufacture even absent privity of contact; and *Christensen v. Thornby*, 225 N.W. 620 (1977), regarding the value of childbirth in connection with a breach of contract for sterilization. Eisenberg also examines the evolution in contract law away from strict consideration toward promissory estoppel in *Central London Property Trust v. High Trees House*, [1947] KB 130.

¹⁰⁸ EISENBERG, *supra* note 100, at 16–17.

(e.g., donative promises) or one considered within private autonomy (e.g., bargains on allocations of tasks in a marriage), a court refusing to enforce an agreement if that would encourage opportunism (e.g., a fee for premium police protection), and a court applying a presumption of guilt to force someone in control of necessary information to divulge it (e.g., strict product liability).¹⁰⁹ Eisenberg does not examine the extent to which the analytical framework a court might use in applying a policy might itself constitute evidence of a social choice.

The societal sub-system of the sciences creates the last group of propositions Eisenberg sees influencing courts when they make decisions, and he refers to it as “experiential propositions.”¹¹⁰ Eisenberg explains that these propositions “mediate between policies (and to a lesser extent moral norms) . . . and legal rules.” Examples he provides are theories about behavior from psychology and sociology on expected response to incentives and deterrence, and the assumed usages governing behavior in particular industries or commercial activities.¹¹¹ Such propositions are taken directly from the social and hard sciences the society currently respects in order to provide assumptions about behavior and causality in cases tried. Such assumptions about human behavior are of course derived by conscious method in a field like psychology, but some have been known to exist as long as organized society, as evidenced by the behavioral assumptions presented in narratives like *Aesop’s Fables*.

As the common law is composed largely of moral norms and experiential propositions known to the litigants when the actions leading to dispute occur, the problem of retroactive effectiveness of judicially crafted law is significantly reduced.¹¹² Today’s application of previously unwritten common law to an event that happened last year presents no problem of retroactivity because the social propositions that constitute common law enjoyed community support and were thus known to the litigants in the jurisdiction at the time the dispute arose. This is further evidence of the social origin of law. The professional packaging of these social propositions into a judicial decision should, according to Eisenberg, achieve a congruent balance that is objectively universal (in the Kantian sense of the first categorical imperative),¹¹³ obviously reproducible (e.g., by all legal counsel in a jurisdiction advising clients), and responsive to critical comment from the community (particularly legal community).¹¹⁴ Eisenberg presents a model that generally corresponds to the two, interdependent systems seen in Luhmann’s systems theory: the legal system receives its information on the content of law from the social system and then packages that information for generality, consistency, and coherence.

In his major study of world law, Glenn also grounds his theory of law in the history of decisive social conventions, expectations, and usages that shape law. His *Legal Traditions of the World* finds that legal traditions have generally been understood as emerging from a hub of data engaged in self-processing:

¹⁰⁹ *Id.* at 26–29.

¹¹⁰ *Id.* at 37–38.

¹¹¹ *Id.*

¹¹² *Id.* at 10.

¹¹³ “[T]he concept of universality . . . requires the courts to resolve disputes by establishing and applying rules that are applicable not merely to the parties to the immediate dispute but to all those who are similarly situated.” *Id.* at 9.

¹¹⁴ *Id.* at 8–13.

A given tradition emerges as a loose conglomeration of data, organized around a basic theme or themes, and variously described as a 'bundle', a 'tool-box', a 'language', a 'playground', a 'seedbed', a 'ragbag' or a 'bran-tub'. In the language of modern information theory, a tradition will always include a great deal of noise The fate of present information, and its effect on the future course of a tradition, will depend on the working and processes of the tradition itself.¹¹⁵

A Western attempt to escape dependence on this bundle of data enduring from the past was the turn to rationality, to enlightened reason, but Glenn finds "context is the unavoidable companion of all efforts toward free-standing rationality,"¹¹⁶ so that tradition and rationality remain co-dependent. Roughly as found in Luhmann's view of systems, Glenn depicts a two-part model of legal development with roots in a noisy bundle of traditional values and rationality working to hone this tradition into a coherent legal framework: "The information in a tradition . . . is preserved because of its utility . . . [it] is important . . . [yet] the totality of information in the tradition . . . is constantly undergoing a process of review, appreciation and ongoing communication."¹¹⁷ Glenn sees this intersection of inheritance and alteration as the creation of a network: "adherents to a tradition . . . constitute a local area network [LAN] of information . . . and it is a network because the exchange of information is a constant and ongoing process."¹¹⁸

Following this theoretical line, Glenn understands the English common law, in full agreement with other historical and comparative accounts, as "composed of a series of procedural routes (usually referred to as remedies) to get before a jury and state one's case."¹¹⁹ Glenn also finds that the political economy of the social setting in which the common law arose determined both this structure and the remedies it provided. As Glenn remarks, available remedies in the form of "writs . . . reflected, above all, an agrarian, non-commercial, even chthonic society."¹²⁰ The system architecture took shape as Norman kings needed to achieve firm control of England without provoking unmanageable reactions. They therefore focused on the procedural (rather than substantive) nature of law, which left ultimate decisions to the jury, serving to "co-opt the population into their work, so if actual decisions were left to the local folks . . . the judges could just get the right questions asked . . . and be off to another town."¹²¹ This also left the provision of law to follow demand for a rule by directly interested parties,¹²² a 'bottom up' characteristic which would later endear common law to commentators judging law with economic principles.

¹¹⁵ GLENN, LEGAL TRADITIONS *supra* note 31, at 15–16.

¹¹⁶ *Id.* at 20.

¹¹⁷ *Id.* at 22.

¹¹⁸ *Id.* at 21.

¹¹⁹ *Id.* at 243.

¹²⁰ *Id.* at 245.

¹²¹ *Id.* at 239.

¹²² A review of this "bottom up" theory of the common law can be found in Frank B. Cross, *Identifying the Virtues of the Common Law*, 15 SUPREME COURT ECONOMIC REVIEW 21, 25–30 (2007).

As the legal system matured, it went the way of other legal systems, placing more power in the system architects who “appropriated” the authority of social expectations, so that law from institutions of positive power was achieved.¹²³ Existing cases were increasingly restated into general studies allowing principles to be discerned, national territories of law were more clearly defined, and the idea of the legal system as positive source of law was reinforced in scholarship.¹²⁴

From the above discussion of work by Baker, Eisenberg, and Glenn, it is evident that the essential link between the legal system and its social environment is professed not only by sociological systems theorists, but can be found in a broad range of legal scholarship. It should be noted, however, that a similar view is rarely found in economic analysis of law. Economists—even institutional economists—treat law primarily as something clearly decided and written down, even when analyzing case law. While a classic ‘law and economics’ analysis will likely contain much open speculation about the expected behavior of a rational actor, little or no time will be spent on how social expectations shape formulations of justice that become written into the text of law.¹²⁵ What is more, even when looking beyond legal texts to informal social constraints on behavior, economic analysis tends to view the restraints as essentially static.¹²⁶ When examining common law, North sees a text-based interaction between existing written precedent and newly arising cases:

Common law is precedent based . . . Past decisions become embedded in the structure of law, which changes marginally as new cases arise involving new, or at least in terms of past cases unforeseen, issues; when decided these become, in turn, a part of the legal framework. The judicial decisions reflect the subjective processing of information in the context of the historical construction of the legal framework.¹²⁷

¹²³ GLENN, COMMON LAWS *supra* note 32, at 44–45.

¹²⁴ *Id.* at 46–47.

¹²⁵ For example, a prominent article on the efficiency of common law portrays the decisions of litigants and judges as “forces pressing toward efficiency” in a textual field of case law and statutes which survive or are eliminated depending upon their relationship to the efficient flow of those “forces”. While the social interaction between individuals and institutions are not ignored, they are subsumed under the larger ideal of an efficient market for justice: “This paper has argued that individual judges may be irrational, just as individual consumers may be irrational, yet the rules in force, like reactions in the market, may in sum exhibit strong rational characteristics. Economic variables, not psychological attributes of judges, will lead to regularities in the cases that come before judges.” George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 THE JOURNAL OF LEGAL STUDIES 65, 77 (1977).

¹²⁶ Ostrom defines “institutions” as “the sets of working rules that are used to determine who is eligible to make decisions in some arena, what actions are allowed or constrained, what aggregation rules will be used, what procedures must be followed, what information must or must not be provided, and what payoffs will be assigned to individuals dependent on their actions.” ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (POLITICAL ECONOMY OF INSTITUTIONS AND DECISIONS) 50–51 (1990). This neglects consideration of the culture of legal professionals on which Baker—a practicing barrister—can place so much weight.

¹²⁷ DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (POLITICAL ECONOMY OF INSTITUTIONS AND DECISIONS) 96–97 (James Alt & Douglass North eds., 1990). In the quoted passage, the words “issues” and “processing of information” would allow North a window to analyze how social expectations enter into the lawmaking process and shape law, but he does not pursue these topics. *Id.* at 96–97.

This is generally the level of law visible to those not active in the legal profession, so that the interaction of written texts as the sum of law operates at the level of network pointed out by Klausner and discussed in Part II. This somewhat static aspect appears even in North's view of "informal constraints," which are defined as "codes of conduct, norms of behavior, and conventions,"¹²⁸ that coexist with and supplement written law but are not understood to dynamically shape it. Using such an analysis, law can be considered as a structured field of concepts with an inherent logic that endures – like Saussure's chess game – regardless of the environment into which it is transplanted. This changes, however, if the legal network is seen as shaped by expectations circulating within the social environment and drawing shape from such expectations.

C. LEGAL SYSTEM INSTITUTIONS AS PLATFORMS TO ACHIEVE COMBINATORIAL INNOVATION

Part II and the preceding sections of this Part III have shown it is possible to model legal systems as a generative social process and a generated system of concepts and institutions. This model sees the legal system nested within the society, receiving information and requests from it, and then autopoietically (i.e., according to its own internal logic) designing solutions. As a product of this process, law is a network of concepts and remedies whose direct contact with social origin is mediated through the logical efforts of the legal profession and the doctrine it creates. These two facets can be conceived in many ways—sides, faces, phases, or aspects—but one remains spontaneous (societal irritation is beyond the legal system's control) while the other is the result of a body of professionally arranged rules, remedies, and procedures. As Luhmann puts it, "[o]nly through complex legal dogmatics can the stabilization and restabilization of law be shifted from the simple ... validity of assigned norms to their *consistency*."¹²⁹ As stable product, law takes on all the traditional network externalities found in a language or other system of standards, and these network benefits increase with scale of adoption and usage. Many analogies have been formulated to describe the manner in which law incorporates social norms. Glenn mentions a number of common implements like "tool-box" and "bran-tub" being used in different cultures, as well as local area "network (LAN)";¹³⁰ Luhmann makes reference to "programming,"¹³¹ and law and economics scholars often refer to "the market."¹³² This Article illustrates the transition from social elements to useful network with a stylized characterization of the legal

¹²⁸ *Id.* at 36. This view, which one could achieve by looking at the volumes of a case reporter building up over the years, contrasts well with Luhmann's more dynamic and informed view of the judicial activity (which resembles Eisenberg's analysis): "[T]he decision is *not determined by the past* (including, of course, laws which were passed, acts which were committed). The decision operates within its own construction, which is only possible in the present. It opens up or closes down possibilities, which would not exist without it." LUHMANN, *supra* note 8, at 283.

¹²⁹ LUHMANN, *supra* note 8, at 257.

¹³⁰ GLENN, LEGAL TRADITIONS, *supra* note 31, at 15–16.

¹³¹ LUHMANN, *supra* note 8, at 118.

¹³² *See, e.g.,* Priest, *supra* note 125, at 77.

system's institutions as a "platform" that receives unstructured content from its environment and packages it for users in that same environment.

In the 2000s, businesses organized as platforms became a dominant market force through the general availability of data, processing power, and transmission via the Internet. Examples of platforms in this sense are Amazon, iTunes, Google Play, Airbnb and Uber.¹³³ Van Alstyne, Parker and Choudary define "platform" as a system that "provides the infrastructure and rules for a marketplace that brings together producers and consumers," where "producers" are the "creators of the platform's offerings (for example, apps on Android)" and "consumers" are the "buyers or users of the offerings."¹³⁴ The value of a platform is its provision of an architecture "facilitating interactions between external producers and consumers," so that "ecosystem governance becomes an essential skill" of the platform provider.¹³⁵ Effective platform governance seeks to maximize "the total value of an expanding ecosystem in a circular, iterative, feedback-driven process."¹³⁶ The keys to a platform's success are:

[D]emand-side economies of scale, also known as network effects [T]he larger the network, the better the matches between supply and demand and the richer the data that can be used to find matches. Greater scale generates more value, which attracts more participants, which creates more value—another virtuous feedback loop.¹³⁷

Platforms thus manage networks that package and distribute information or services within a community of users and such information or services take shape as a network.

It is common to grasp organized securities exchanges as platform-managed networks. Stock exchanges offer both a controlled trading environment (times and places where trading occurs) and rules (applicable to both traders and issuers) to govern trading. The platform vets and bonds traders while also essentially re-packaging obscure and risk laden negotiable instruments into "listed securities" whose value is protected from asymmetric information and fraud by an entire architecture of supervision and transparency.¹³⁸ The network effect generated by this platform architecture is most often referred to as "liquidity."¹³⁹ As Fisman and Sullivan argue, this design is not new and can be seen at least as early as the

¹³³ Amazon networks producers and consumers to create a virtual retail environment; iTunes (formerly) and Google Play network the producers of music, games, and general applications to bring various types of entertainment and services to personal computing devices; Airbnb networks the owners (or lessees) of real estate and those seeking use short-term use; and Uber networks those with automobiles with those seeking one-off transportation. See, e.g., Martin Kenney & John Zysman, *The Rise of the Platform Economy*, 32 ISSUES IN SCI. & TECH. 61, 61–69 (2016).

¹³⁴ Marshall W. Van Alstyne, Geoffrey G. Parker and Sangeet Paul Choudary, *Pipelines, Platforms, and the New Rules of Strategy*, HARV. BUS. REV., Apr. 2016, at 54, 58.

¹³⁵ *Id.* at 57.

¹³⁶ *Id.*

¹³⁷ *Id.* at 58.

¹³⁸ See ROBERT A. SCHWARTZ & RETO FRANCONI, EQUITY MARKETS IN ACTION 292–312 (2004).

¹³⁹ See *supra* note 19 and accompanying text.

Champagne fairs of medieval France,¹⁴⁰ where the rules of a principedom protected property interests in merchandise, sales receipts, and contractual commitments to stimulate use of the market fair by lowering risk of loss and thus transaction costs.¹⁴¹

Yet platforms are more than abstract markets. They perform what McAfee and Brynjolfsson call “combinatorial innovation,” which means “putting together in new ways things that were already there (perhaps with a few generally novel ingredients).”¹⁴² The spare room in your home becomes part of a virtual hotel through the distribution network of Airbnb, just as the family car becomes a temporary taxi through Uber or Lyft. Combinatorial innovation is the key aspect of platforms that should be highlighted when the arrangement is applied analogically to model a legal system. The values expressed in law are derived from and correspond to those expressed in the surrounding society.¹⁴³ As a platform composed of courts, legislatures, law schools, and law firms, the legal system re-packages sometimes nebulous socio-cultural expectations and values into sufficiently sharp concepts of law.¹⁴⁴ Milhaupt and Pistor call courts “the ultimate demand-driven law producers,”¹⁴⁵ as judicial decisions are prompted purely by social demand for remedy. Even in the positivist legal tradition and with reference to legislative action, combinatorial innovation of social content exists, for Hart argues that, “[t]he law of every modern state shows at a thousand points the influence of both the accepted social morality and the wider moral ideals” entering “either abruptly and avowedly through legislation, or silently and piecemeal through the judicial process.”¹⁴⁶

Institutions of the legal system platform weave raw social information into well-ordered law. Courts, their procedures and their institutions, such as judge, jury, and rules of procedure, are designed to process information, which is why a trial court is referred to as a *finder or trier of fact*.¹⁴⁷ Courts hear facts and law as argued by the parties, and have little if any duty or right to explore information not brought to them by the parties in dispute.¹⁴⁸ Information is pushed into the

¹⁴⁰ Ray Fisman & Tim Sullivan, *Everything We Know About Platforms We Learned from Medieval France*, HARV. BUS. REV. (Mar. 24, 2016), <https://hbr.org/2016/03/everything-we-know-about-platforms-we-learned-from-medieval-france>.

¹⁴¹ BAS VAN BAVEL, MANORS AND MARKETS: ECONOMY AND SOCIETY IN THE LOW COUNTRIES 500–1600, 76 (2010).

¹⁴² ANDREW MCAFEE & ERIK BRYNJOLFSSON, MACHINE, PLATFORM, CROWD: HARNESSING OUR DIGITAL FUTURE 138 (2017).

¹⁴³ As observed in Section B, Holmes saw the content of common law as “what is then understood to be convenient.” HOLMES, *supra* note 93, at 2. For Eisenberg, it is that which “substantially satisfies the standards of social congruence and systemic consistency.” EISENBERG, *supra* note 100, at 152. For Baker, it is the interaction of general beliefs and practices that accompany and fill more definite legal texts (written cases and statutes). BAKER, *supra* note 94, at 2. For Pound, common law is “a taught tradition of voluntary subjection of authority and power to reason.” Roscoe Pound, *What is the Common Law?*, 4 U. CHI. L. REV. 176, 181 (1936–1937). For Glenn, inchoate common law is essentially non-assertive because it cannot arise without popular backing: “common law in its origin was a relational floating common law.” GLENN, LEGAL TRADITIONS *supra* note 31, at 27.

¹⁴⁴ In his analysis of the legal system, Luhmann singles out courts, thinking of legal professionals, and legislative activity for institutional examination. LUHMANN, *supra* note 8, at Chapters 7–9, 274–357.

¹⁴⁵ CURTIS J. MILHAUPT & KATHARINA PISTOR, LAW & CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD 28 (2008).

¹⁴⁶ H.L.A. HART, THE CONCEPT OF LAW 203–04 (3d ed. 2012).

¹⁴⁷ *Trier of Fact*, BLACK’S LAW DICTIONARY, Bryan A. Garner, ed., “trier of fact” (10th ed. 2014).

¹⁴⁸ Neil Andrews, *Civil Procedure*, in ENGLISH PRIVATE LAW 1320, 1325 (Andrew Burrows ed., 3d ed. 2013). The extent to which a court may, on its own initiative produce and consider information not

proceedings through the written pleadings, oral arguments, and evidence presented at trial, and information is also pulled into the proceedings through concepts designed to fine tune law to social expectations (e.g., the “reasonable person”¹⁴⁹) and inevitably to a certain extent through the personal experience that the judge¹⁵⁰ and (when used) the jury¹⁵¹ bring to their deliberations. While statutory law could, in theory, be written by an executive or a single member of legislature isolated from society and relying on his or her private understanding of justice, such instances are rare in modern history. Statutes are more likely assembled by large teams of legislators and their assistants, drawing on information presented by an even larger body of technical staff.¹⁵² The lawmaking activity of legislatures may well be arranged institutionally in committees to receive data from a broad variety of sources, to process that data using varied and powerful tools, and to hammer out draft legislation under the eyes and the comments of many people who can provide a check on power.¹⁵³ Unlike courts, legislatures need not use procedural rituals to filter the presentation of information to the legislative decision-making process. The goal of a legislature is to produce workable rules that are “commensurate with the actual and ideal orders that circumscribe its field of action,” and these orders arise from “the aspirations and tolerances of the people whose lives” will be regulated by the legislation.¹⁵⁴ “Restatements” of the law process case law into rules general enough for legislation, making an efficient bridge between case law and statute.¹⁵⁵ This modern information processing system is not completely unlike that used in reducing opinions of Roman praetor and jurists to the Digest

presented by counsel is an important distinction between systems originating in the English common law and those originating in the Continental European civil law systems, which are sometimes referred to as “inquisitorial.” See, e.g., KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW §18V (Tony Weir trans., 1998); RAOUL C. VAN CAENEGEM, EUROPEAN LAW IN THE PAST AND THE FUTURE 52–53 (2002).

¹⁴⁹ “Jurors can safely be presumed to be familiar with prevailing community values. Beyond that, in consulting community values, the jury would in an important sense be applying the ‘law’ because the common law has designated those values as part of the reasonable person standard.” Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813, 833–834 (2001).

¹⁵⁰ The humanity of judges is understood by different viewpoints to be either a weakness or a strength of the judicial system. Legal Realism opened the social identity of judges up to question. See, e.g., BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 15–17 (2007). Eisenberg introduces the large body of scholarship on fiduciary duties of appointed officers (developed with regard to corporate directors) into the debate, arguing that judges should be understood not primarily as human beings but rather as that aspect of a human being that is a professional persona whose purpose is to fulfil a specific role. EISENBERG, *supra* note 100, at 23–24.

¹⁵¹ The jury’s verdict will be structured through instructions put to it by the judge, which further channels how the information will be processed. See MIKE MCCONVILLE & CHESTER L. MIRSKY, JURY TRIALS AND PLEA BARGAINING: A TRUE HISTORY 139–52 (2005).

¹⁵² EISENBERG, *supra* note 100, at 150.

¹⁵³ GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 71–72 (1982).

¹⁵⁴ See, e.g., IREDELL JENKINS, SOCIAL ORDER AND THE LIMITS OF LAW: A THEORETICAL ESSAY 119 (1980).

¹⁵⁵ Gregory E. Maggs, *Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 GEO. WASH. L. REV. 508, 514 (1998) (The preparation of a restatement, according to the American Law Institute, is “that expert authorities should examine the common law precedents in several areas of the law and reduce them to a clear set of rules that lawyers and judges could follow.”). For a history of the American Law Institute, see Mitchell Franklin, *The Historic Function of the American Law Institute: Restatement as Transitional to Codification*, 47 HARV. L. REV. 1367 (1934).

and Code of Justinian.¹⁵⁶ An unpredictable input of social demands and expectations is filtered, packaged, and offered to the public as a well-ordered network of rights, duties, procedures, and remedies. This network, like any systematic whole, then runs the risk of detaching from its point of origin.

III. WHEN NETWORK EFFECTS DEFEAT SUBSTANTIVE QUALITY

A. HISTORY ENDS AS ONE LEGAL NETWORK GOES GLOBAL

Given the network character of legal systems, globally expanded transmission of information and activity dependent on law (such as commerce and finance) has tended to cause the first-starter jurisdiction to gain network dominance. This occurred for U.S. law (sometimes referred to more inclusively as “Anglo-American,” law, stressing the relationship by history and language with the prior leader in the field¹⁵⁷) during the late twentieth century thanks to the collapse of the Soviet economic model and dramatic growth in international trade, finance, and data transfers marking the latest phase of globalization.¹⁵⁸ The process was often referred to as a “convergence”¹⁵⁹ of laws globally, but it is difficult to find any aspect of U.S. law that changed through adjustment to foreign law during the period,¹⁶⁰ so it would be better characterized as an extraterritorial diffusion of the U.S. (or Anglo-American) network of legal concepts and solutions. Ironically, the economically-oriented legal literature did not understand this trend as a market phenomenon—in which the dominant network took over competing networks—but in an ideal sense as all legal systems moving toward an effective and efficient ideal law and market structure, one which the United States just happened to have reached first.¹⁶¹

¹⁵⁶ WATSON, *supra* note 30, at 32–35 (“The compilers [of the Codex] were given extensive powers to collect [imperial legal rulings], to omit any, in whole or in part, that were obsolete or unnecessary, and to remove contradictions and repetitions.... The [imperial legal rulings] were then to be arranged by subject matter in titles.”).

¹⁵⁷ See Marc T. Moore & Antoine Rebérioux, *Revitalizing the Institutional Roots of Anglo-American Corporate Governance*, 40 *ECONOMY AND SOCIETY* 84, 95–899 (2011).

¹⁵⁸ RICHARD BALDWIN, *THE GREAT CONVERGENCE: INFORMATION TECHNOLOGY AND THE NEW GLOBALIZATION 1* (2016) (“Globalization took a leap forward in the early 1800s, when steam power and global peace lowered the costs of moving goods. Globalization made a second leap in the late twentieth century when ICT radically lowered the cost of moving ideas.”). On the most recent phase of globalization as only the most recent stage of this process, see generally OSTERHAMMEL & PETERSSON, *supra* note 51.

¹⁵⁹ See the overview in Louis F. Del Duca, *Developing Global Transnational Harmonization Procedures for the Twenty-First Century: The Accelerating Pace of Common and Civil Law Convergence*, 42 *TEX. INT'L L.J.* 625 (2007).

¹⁶⁰ Gilson, *supra* note 22, at 331 (explaining that “the corporate governance debate came to turn on arguments about the link between particular national governance institutions and competitiveness the form on which systems would converge differed depending on which national system appeared most successful at the time of the prediction. Before the bursting of the Japanese “bubble economy,” the main bank system represented the future ... the Japanese bubble burst and the American economy boomed ... due to its rapid response to global competition, stock market-centered capital market, and the external monitoring to which stock markets are complementary. The American system then became the apparent end point of corporate governance evolution, a consensus that appears clearly from the IMF and the World Bank’s response to the 1997–1998 East Asian financial crisis.”).

¹⁶¹ This is generally the tenor of Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 *GEO. L. J.* 439, 468 (2001) (“The triumph of the shareholder-oriented model of the corporation over its principal competitors is now assured.”). See also Bernard Black, *The Core Institutions*

This transition to the twenty-first century displayed history's largest confluence of power and available information,¹⁶² and it was flowing out from the U.S. culture, economy and legal systems, not only from Disneyland, McDonalds, and Starbucks,¹⁶³ but also from financial systems based on securities exchanges,¹⁶⁴ and business models chopping and dicing rights and risks through securitization and derivatives-based hedging strategies.¹⁶⁵ It included incentive-based legal solutions ranging from contingent fees to independent directors and stock-option compensation for executives.¹⁶⁶ Principles of economic policy crafted in the U.S. were spread to international organizations,¹⁶⁷ while solutions worked out by U.S. law firms for their clients became the global standards,¹⁶⁸ and naturally these were expressed in English, preferably using the U.S. dollar as the value of reference.¹⁶⁹

that Support Strong Securities Markets, 55 BUS. LAW. 1565 (2000) ("My goal ... to explain the ... strong markets in countries, like the United States ... to offer a guide to reforms that could strengthen securities markets in other countries ... that don't now have them.").

¹⁶² BALDWIN, *supra* note 158, at 82 ("For example, the amount of information transmitted by telecommunications during the whole of 1986 could be transmitted in just two-thousandths of a second in 1996. The increase in the volume of information between 2006 and 2007 was vastly greater than the sum of all information transmitted in the previous decade.").

¹⁶³ See, e.g., Reinhold Wagnleitner, *No Commodity Is Quite So Strange As This Thing Called Cultural Exchange: The Foreign Politics of American Pop Culture Hegemony*, 46 AMERIKASTUDIEN/AMERICAN STUDIES 443, 462 (2001) ("This diffusion of the U.S. model is a result of the enormous power of the United States' government, economy, and American media policies. After the breakdown of the Soviet Union, this pattern seems to have been adopted nearly everywhere Based on the comforting hegemonic position of American popular culture industries, their undisputed competitiveness in all areas of communication, and the attractiveness of the entertainment product, the U.S. has consistently insisted, since the Second World War, on the opening of all communication markets and their privatization—resulting in a global erosion of the public space.").

¹⁶⁴ John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J. 1, 3–5 (2001).

¹⁶⁵ Ewald Engelen & Anna Glasmacher, *The Waiting Game: How Securitization Became the Solution for the Growth Problem of the Eurozone*, 22 COMPETITION & CHANGE 165, 177 (2018). ("While the number of SME securitizations in Germany increased sizably between 1998 and 2008, the total stock of German securitizations remained rather subdued given the size of the German economy By contrast, in both the UK and the Netherlands, securitization had by 2008 become a widely used financial technique, predominantly to fund residential mortgages.").

¹⁶⁶ On the global acceptance in various forms of independent directors, see DAN W. PUCHNIAK, HARALD BAUM & LUKE NOTTAGE, *INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND CONTEMPORARY APPROACH* (Dan W. Puchniak et al. eds., 2017).

¹⁶⁷ Perhaps the two most prominent (and rather notorious) of these are the "Washington Consensus" and the philosophy of "shareholder value." On the first, see JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 91 (2002); on the second, see LYNN A. STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* Ch. 2 (2012).

¹⁶⁸ John Flood, *Lawyers as Sanctifiers: The Role of Elite Law Firms in International Business Transactions*, 14 IND. J. GLOBAL LEGAL STUD. 35, 45–54 (2007). At the turn of the century, U.S. and U.K. law firms were expanding dramatically, opening up offices in every major city in the world through mergers with local firms and lateral hires. "The crucial question is to what extent international law firms are merely exporting English or New York law as opposed to engaging in the practice of local law The large law firm's main alliance is with the Anglo-American nexus, which is composed of, among other things, neo-liberal democracy and respect for property rights as exemplified in the Washington Consensus." *Id.* at 54.

¹⁶⁹ ESWAR S. PRASAD, *THE DOLLAR TRAP: HOW THE U.S. DOLLAR TIGHTENED ITS GRIP ON GLOBAL FINANCE* 5 (2014). The network effects of the U.S. dollar present a strong example of the kind of systemic and size-linked strength of networks examined in this Article. Supported by solid institutions and the leading economy coming out of World War II, the U.S. dollar tipped into becoming the world's reserve currency, and challengers like the euro and the renminbi have unsuccessfully challenged its reign. Prasad documents that even when the U.S. sub-prime crisis brought condemnation on "Anglo-American" finance, "[a] wave of money flooded into the U.S. . . . U.S. investors pulled their capital back home from abroad,

Governments around the world strove to increase the dynamism of their economies to emulate the leading power that was the U.S., and one key strategy was to make their own law compatible with the U.S. legal platform standard.¹⁷⁰ The platform that was the U.S. legal system—ranging from constitutionally protected individual rights and property to trust models for securitization—became so powerful that some commentators at the time could see no viable outside, and announced with Hegelian certainty that world history had reached its pinnacle in capitalism and liberal democracy, an end of history.¹⁷¹ This assertion was not without supporting evidence. Solutions, procedures, and conceptual patterns found in U.S. law became industry standards,¹⁷² actively carried forward by U.S. multinationals, industry associations, and international bodies that focused efforts on recommending “best practices” to developing countries and drafting model legislation and treaties incorporating general patterns of U.S. law.¹⁷³ While Chinese children watched Disney films and somewhat older siblings drank Starbucks lattes, their U.S. educated parents gauged the quality of investments using U.S. standards of corporate governance, a belief companies should serve shareholder value, and a conviction in Fama’s efficient market doctrine.¹⁷⁴

while foreign investors in search of a safe haven for their money added to the flows.” Tooze makes a similar observation: “[What occurred] was the opposite of the crisis that had been forecast. Not a dollar glut but an acute dollar-funding shortage. The dollar did not plunge, it rose.” ADAM TOOZE, *CRASHED: HOW A DECADE OF FINANCIAL CRISES CHANGED THE WORLD* 8 (2018). Years after that crisis, sixty-four percent of global foreign exchange reserves still remained in U.S. dollars. ESWAR S. PRASAD, *GAINING CURRENCY* xviii (2017). Commodities such as oil, plastics, gold and base metals have traditionally been priced in U.S. dollars. NEIL C. SCHOFIELD, *COMMODITY DERIVATIVES: MARKETS AND APPLICATIONS* 28, 44, 81, 117 (2007).

¹⁷⁰ The European Union presented a strong example of this. *See, e.g., Implementing the Framework for Financial Markets: Action Plan*, COM (1999) 232 final (May 11, 1999); *see also Final Report of the Committee of Wise Men on the Regulation of European Securities Markets*, (Feb. 15, 2001), <https://spk.gov.tr/Sayfa/Dosya/114>.

¹⁷¹ FUKUYAMA, *supra* note 19, at 338–339.

¹⁷² For example, nearly every aspect of U.S. securities regulation and securities market design became the global norm, from the division of law into primary market and secondary market regulation to the use of central securities depositories for the indirect holding of securities and their transfer on account by book entry. A master agreement governing over-the-counter derivatives transactions was carried forward aggressively by the International Swaps and Derivatives Association (ISDA), insuring that financial institutions could transact on the same terms globally. “[M] any sovereign nations, including the US, UK, France, Germany, Switzerland and Japan, have modified their corporate bankruptcy statutes by adopting ISDA’s ‘model netting act’.” Bruce G. Carruthers, *Diverging Derivatives: Law, Governance and Modern Financial Markets*, 41 J. COMP. ECON. 386, 393 (2013). With respect to ISDA, I thank Katharina Pistor for the observation that some U.S. industries preferred *not* to spread American law, instead favoring their own private solutions, like the ISDA Master Agreement, which gave them additional flexibility and control.

¹⁷³ *See* the discussion of the “Washington Consensus” in STIGLITZ, *supra* note 168, at 91 and the influence on model commercial law in described by Isaak Dore and James DeFranco. Isaak I. Doore & James E. DeFranco, *A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code*, 23 HARV. INT’L L.J. 49, 56–58 (1982).

¹⁷⁴ On U.S. culture in China, *see, e.g.,* Peter Gries *et al.*, *Hollywood in China: How American Popular Culture Shapes Chinese Views of the “Beautiful Imperialist” – An Experimental Analysis*, 224 THE CHINA Q. 1070, 180 (2015). The faith in U.S. ideas on the operation of the free market can be seen in the many works by Chinese scholars that refer to state control of market forces as “financial repression.” For example, *see* Yiping Huang & Xu Wang, *Building an Efficient Financial System in China: A Need for Stronger Market Discipline*, 12 ASIAN ECON. POL’Y R. 188 (2017).

Observers did not examine this ubiquitous acceptance of U.S. law in terms of network dominance.¹⁷⁵ As we have seen, Klausner and others were at the time making such arguments about how Delaware corporate law could dominate the law of, say, New York.¹⁷⁶ But analysis of the global impact of U.S. law took a different approach. Arguments were made that U.S. law was dominant because it was inherently superior in substance, which of course greatly facilitated its acceptance and imitation,¹⁷⁷ kickstarting a network tipping point. The most famous argument of this type was made by a team of economists focusing on corporate and securities laws.¹⁷⁸ Their argument was that common law, originating in Britain and spread through colonization to the U.S., was an important key to economic development.¹⁷⁹ This “legal origin” theory asserted that countries using common law could better protect investors, which was a precondition for healthy capital markets, which were in turn a precondition for economic development.¹⁸⁰ The expectation was in this way created that common law was good for the economy.

As we have seen,¹⁸¹ Norman conquerors used the common law in England to co-opt the subjugated English into making co-pronouncement of the law imposed upon them, rather than risking revolt against the new sovereigns by imposing law from the top. This is strangely paralleled by the 1970s shift of the U.S. government, as explained by Krippner, toward stressing that market forces should decide whether social spending is permissible.¹⁸² This shift removed difficult and delicate decision-making on the allocation of social entitlements from the sovereign’s hand and made it a factor of “neutral” market forces. As a fundamentally procedural system, common law parallels in structure “the market” in which a broad framework should allow opposing forces to compete

¹⁷⁵ Viewed from our current perspective it is clear that Pistor was examining network effects using the terminology of “standardization” and focusing largely on human—rather than conceptual—networks of talent that tend to strength the leading legal system globally. As she observed, “Once a regulatory system has established a head start over others, it benefits from rules that can be interpreted and applied only within that regulatory regime. Superior legal expertise of attorneys and judges is an important asset that is not easily emulated by other jurisdictions.” Pistor, *supra* note 4, at 104.

¹⁷⁶ See Part II.A.

¹⁷⁷ As Grewal explains, the expectations of users play an important role in allowing a dominant network to reach the tipping point in which adopting it becomes inevitable. GREWAL, *supra* note 11, at 25. These expectations are crafted by opinion leaders like leading scholars and international organizations.

¹⁷⁸ This team is usually referred to as LLSV, which stands for Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert W. Vishny.

¹⁷⁹ From a terminological perspective, the “common law” argument was somewhat problematic because LLSV generally gave higher ratings to U.S. law although there is very little U.S. common law. In the area of securities regulation, federal courts do interpret federal statutes, but that type of statutory interpretation is not generally understood as common law. “Common law” arises in the U.S. primarily in the U.S. states, so that we may speak of New York or Delaware common law. Moreover, U.K. common law had its greatest influence over colonies (the U.S. had very few colonies), but colonies were built mainly with statutory law. Thus, the term “common law” was thrown about with only a vague and mostly colloquial understanding of its meaning.

¹⁸⁰ See Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131, 1149 (1997). The connection between financial development and economic development is now seen as much more problematic than it was prior to 2008. See Jean-Louis Arcand, Enrico Berkes & Ugo Panizza, *Too Much Finance?* (IMF, Working Paper No. 12/161, 2012).

¹⁸¹ See GLENN, LEGAL TRADITIONS, *supra* note 31, at 239.

¹⁸² As Krippner explains, “rather than decisions about allocation moving into the strong light of public debate and discussion where a new social consensus could be forged, these decisions drifted ever further into the shadowy realms of the market.” GRETA R. KRIPPNER, CAPITALIZING ON CRISIS 20 (2011).

within it. The assertion of common law's deep superiority in this way buttressed the global spread of a privatized economy in which the market impact of private wealth was given the privilege of setting public policy,¹⁸³ and the assertion of common law's substantive superiority was well-received by both academia and policy-making bodies.¹⁸⁴

The argument for common law's superiority was strengthened because the theory appeared to supply a concrete, scientific explanation for the real and palpable dominance of a U.S. economic and legal model so pervasive that to some it appeared to be the culmination of history. Grewal demonstrates that a shift to market choice and away from governmental control raises network effects over citizen choice within a sovereign body.¹⁸⁵ The embrace of the market domestically and of the common law spirit internationally thus placed network (market) forces above sovereign choice, but the possibility that the belief in common law superiority was essentially a wave of network dominance was never seriously considered.

Given the historical facts, the proclamation of common law superiority contained a deep irony, in that it tacitly proposed that all jurisdictions should stimulate their economies by accepting transplant of a foreign, common-law-origin legal system, which was superior exactly because thirteenth century England had *refused to accept transplant* of the much more sophisticated Roman law legal system. Aside from the truth that the U.S. and the U.K. had done well for themselves, few substantive arguments supporting common law's proclaimed superiority were offered. General assertions were made on the basis of relatively marginal point-by-point comparisons to "civil law, and particularly French civil law," which was said "have both the weakest investor protections and the least developed capital markets, especially as compared to common law countries."¹⁸⁶ LLSV did not raise the potential increase of private power while asserting that common law was flexible, and that this derived from the action of savvy judges.¹⁸⁷ These arguments were given comparative weight by

¹⁸³ "In the Keynesian era, the state's assumption of responsibility for sustaining growth exposed state managers to criticism, but also allowed the state to encourage normative commitments that legitimated economic policies, especially those aimed at securing broad participation in the labor market and a more equal distribution of resources across society. Under neoliberal economic management, in contrast, the state's avoidance of responsibility for economic outcomes may shield policymakers from public scrutiny, but it does not build a foundation for state action. As the state has withdrawn support from the goals of full employment and steadily improving distributional outcomes, the basis of consent is no longer clear." *Id.* at 148.

¹⁸⁴ The World Bank incorporated LLSV findings into its 2004 "Doing Business Report." WORLD BANK, *DOING BUSINESS IN 2004: UNDERSTANDING REGULATION* xiv (2004). ("Common law countries regulate the least. Countries in the French civil law tradition regulate the most [h]eavier regulation brings bad outcomes.")

¹⁸⁵ GREWAL, *supra* note 11, at 247.

¹⁸⁶ La Porta et al., *supra* note 180, at 1131, 1149.

¹⁸⁷ As LLSV remarks: "Legal rules in the common law system are usually made by judges, based on precedents and inspired by general principles such as fiduciary duty or fairness In contrast, laws in civil law systems are made by legislatures, and judges are not supposed to go beyond the statutes and apply 'smell tests' or fairness opinions. As a consequence, a corporate insider who finds a way not explicitly forbidden by the statutes to expropriate outside investors can proceed without fear of an adverse judicial ruling." Rafael La Porta et al., *Legal Investor Protection and Corporate Governance*, 58 J. FIN. ECON. 3, 9 (2000).

insertion in a quantitative index rating investor protection.¹⁸⁸ It is hard to find a substantive assertion about law made by LLSV that has not been refuted.

Perhaps the most interesting thing about the legal origin theory is that it successfully marketed network effects as substantive legal quality. In response to the assertions made by LLSV, leading legal scholars demonstrated the theory's lack of support in the law. Milhaupt and Pistor faulted LLSV for a lack of analytical perspective, use of limited data, and failure to recognize reciprocal influence. They found that when such a theory treats "a legal institution as a black box [it] implies that the core of any legal system, in particular the strategic use of law by key players, is ignored," that LLSV strengthened their arguments by limiting themselves to "recent economic performance—mostly using data from the 1990s," rather than looking at a more comprehensive period, and generally stressed that the causality between good law and economic development is often reciprocal (strong economies may seek strong law).¹⁸⁹ Coffee pointed out that, "[i]ronically, it is the most statutory (and thus civil-law-like) aspects of corporate governance in common law countries whose value the LLS&V research seems to affirm."¹⁹⁰ Indeed, far from being flexible and court-centred, U.S. securities regulation is expressed in hundreds of pages of statutes and thousands of pages of rules,¹⁹¹ with judicial decisions playing a minor role. Coffee also observed that for LLSV, "small and (to lawyers) inconsequential legal differences were assigned great weight and presented as the minority shareholders' shield against exploitation by the majority . . . [so that] at times this inquiry resembled the medieval quest for the philosopher's stone that could turn lead into gold."¹⁹² Armour, Deakin, Lele, and Siems explained that items of law included in LLSV's index of governance were "open to the charge of vagueness."¹⁹³ Roe explained that historical events had made the Anglo-American platform dominant, as the two world wars fought in Continental Europe strongly skewed European development.¹⁹⁴ Following each war, the rebuilding of public and private infrastructure was better financed by banks rather than equity markets,¹⁹⁵ leaving their market bank-centered, and the division of Germany into two countries led West Germany to champion the rights of labor over capital in order not to give East Germany an advantage in courting the working class.¹⁹⁶

¹⁸⁸ "When the coding of LLSV's 'shareholder rights' indices were checked by independent experts, numerous coding errors were revealed, to the extent that the principal results are no longer regarded as being entirely robust, even by members of the LLSV research network." John Armour et al., *How Do Legal Rules Evolve? Evidence from a Cross-Country Comparison of Shareholder, Creditor, and Worker Protection*, 57 AM. J. COMP. L. 579, 585 (2009).

¹⁸⁹ MILHAUPT, *supra* note 145, at 23 and 6.

¹⁹⁰ John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229, 249 (2007).

¹⁹¹ A very compact version of just the Securities Act of 1933 (regulating primary market sales of securities) and the Securities Exchange Act of 1934 (regulating secondary market sales of securities) before the enactment of the Dodd Frank Wall Street Reform Act of 2010 consisted of over 300 pages. The rules written for the '33 and '34 Acts (again prior to adding over 1,000 pages for the Dodd Frank Act rules) consisted of about 2,000 pages of densely packed regulations.

¹⁹² Coffee, *supra* note 190, at 242–43.

¹⁹³ Armour, *supra* note 188, at 604.

¹⁹⁴ Mark J. Roe, *Legal Origins, Politics, and Modern Stock Markets*, 120 HARV. L. REV. 460 (2006).

¹⁹⁵ *Id.* at 502.

¹⁹⁶ *Id.* at 501.

If one really looks at *origin*, the plain history of the U.K. financial system shows that William III of Orange transplanted the (civil law) Dutch financial infrastructure from The Netherlands to Britain after taking the English crown in 1688.¹⁹⁷ Data on the growth of British finance also show that the insular nature of the U.K. stimulated inward capital flows and market development during Continental wars, which consistently led investors to seek out the British market as a safe haven for Continental funds,¹⁹⁸ and this later applied to New York as well.¹⁹⁹ Finally, an empirical analysis undertaken by Armour, Deakin, Mollica, and Siems examining twenty countries during the period studied by LLSV showed insufficient link between investor protection and securities market development to support the LLSV thesis.²⁰⁰

Despite substantive refutation, the legal origin theory is still seriously and uncritically used by some today.²⁰¹ This probably has much to do with the fact that despite leading the world into major corporate and financial crisis in 2001 and 2008, the U.S. legal system continues to present the most pervasively used network.²⁰² As discussed in Part II.B, U.S. firms had spread to every corner of the world, and found it efficient to bring their law with them.²⁰³ As the subsisting center of world power with an enormous military guaranteeing stability, the U.S. and its currency are the obvious choice as safe haven investments in times of political instability.²⁰⁴ The ability of U.S. and English law to serve as raw

¹⁹⁷ See Larry Neal, *The Integration and Efficiency of the London and Amsterdam Stock Markets in the Eighteenth Century*, 47 J. ECON. HIST. 97, 98–99 (1987) (“William brought with him numerous financial advisors and military contractors from Holland. Many were Jews and Huguenots who were eager to apply in a relatively backward England the financial techniques and institutions that had been developed over the past century in Amsterdam.”); See also Eric S. Schubert, *Innovations, Debts, and Bubbles: International Integration of Financial Markets in Western Europe, 1688-1720*, 48 J. ECON. HIST. 299, 300–04 (1988) (“After the Glorious Revolution of 1688 England made important changes in its underdeveloped system of public finance and credit . . . the administration of William III imported Dutch techniques of finance . . . the Bank of England [was founded] in 1694 . . . [and] [t]he modernization of the financial system gave London the opportunity to develop into a major financial center on par with Amsterdam.”).

¹⁹⁸ Such capital flight caused the birth of the London Stock Exchange. See RANALD MICHIE, *THE LONDON STOCK EXCHANGE: A HISTORY* 23–25 (2001); See also Ann M. Carlos & Larry Neal, *Amsterdam and London as Financial Centers in the Eighteenth Century*, 18 FIN. HIST. REV. 21, 37 (2011).

¹⁹⁹ See ERIC HELLEINER, *STATES AND THE REEMERGENCE OF GLOBAL FINANCE: FROM BRETTON WOODS TO THE 1990'S* 39 (1996) (discussing the flow of funds into New York during the Second World War).

²⁰⁰ John Armour et al., *Law and Financial Development: What We are Learning from Time-Series Evidence*, 2009 B.Y.U. L. REV. 1435, 1438 (2009).

²⁰¹ See, e.g., David Yermack, *FinTech in Sub-Saharan Africa: What Has Worked Well, and What Hasn't*, (Nat'l Bureau of Econ. Research, Working Paper No. 25007, 2018), <https://ssrn.com/abstract=3240899> (“I document far greater adoption of social media, digital currency, ride sharing, and other FinTech applications in countries with a common law legal heritage compared to those with a civil law system, suggesting that legal origin plays a critical role in setting the stage for growth through entrepreneurship in the developing world.”).

²⁰² Tooze describes how the U.S. Federal Reserve, despite being at the epicenter of the global financial crisis' cause as a regulator, was viewed and indeed performed as the only globally competent actor able to stem the collapse of the global financial system. Tooze, *supra* note 169, at 205–214.

²⁰³ The reference here is to transactional law, such as concepts of contract and property law. It is well-known that multinational activity intentionally seeks to decrease burdens under local tax, labor and environmental law, among others by regulatory arbitrage. With respect to the history of U.S. multinational firms and the political and legal elements affecting the growth and operation of multinationals; see also PETER T. MUCHLINSKI, *supra* note 67, at 15–26, 33–44.

²⁰⁴ See, e.g., BENJAMIN J. COHEN, *THE GEOGRAPHY OF MONEY* 95 (1998) (“[T]he motivations . . . are easily appreciated . . . economies of scale, or reduced transactions costs, to be gained from

material for the complex financial transactions that favour the wealthiest persons have helped them hold their network dominance today.²⁰⁵ The entire package offered by affiliation with the U.S. legal system thus included the networking qualities of a platform in which one strength feeds back on another, including the systematic benefits of being tied into the strongest country, currency, and economy in the world, all of which affirm the benefits of this network. When making decisions to stimulate social and economic development, it is important to understand that network effects—rather than the asserted inherent greatness of the common law—are foremost in making the U.S. legal system attractive.

B. NETWORK DOMINANCE AND FRUSTRATED DEVELOPMENT

Network externalities display “winner-take-all” properties because a tipping point is reached at which members of smaller networks must join the larger (more liquid) network or be isolated.²⁰⁶ Network logic means each spurt of growth and influence increases the winner’s network externalities, attracting even more users.²⁰⁷ When a legal system dominates due to network effects while offering neither the absolute best nor the best local solutions, costs suffered from network effects go beyond impairing local autonomy and cultural heterogeneity. They include potential frustration of all forward development. As Pistor observed nearly two decades ago, “[t]he standardization of ‘best practices’ or ‘efficient’ law replaces the Schumpeterian process of ‘creative destruction’ with the ideal of the ‘perfect construction’ of law.”²⁰⁸ She and her coauthors, when documenting the “transplant effect,” showed how the adoption of law from a leading network law can introduce legal institutions that remain unused by the developing country due to a lack of demand,²⁰⁹ much like heavy industry and infrastructural “white elephant” projects left behind by ill-conceived industrial development projects.

If a given system of law is valued for its network benefits although the underlying quality of the law has serious flaws in meeting social needs,

concentrating cross-border activities in just one or at most a few currencies with broad transactional networks”); Benjamin J. Cohen, *America’s Interest in Dollarization*, in *MONETARY UNIONS AND HARD PEGS: EFFECTS ON TRADE, FINANCIAL DEVELOPMENT, AND STABILITY* 289–302 (Volbert Alexander, Jacques Mélitz & George M. von Furstenberg eds., 2004). Even when engaged in a trade war with the U.S., China remains compelled to invest in and support the U.S. economy through purchase of treasury bills. See, e.g., Jeff Cox, *China’s ‘Self-Destructive Nuclear Option’ in Trade War: Selling US Treasury Bonds*, CNBC (May 13, 2019), <https://www.cnbc.com/2019/05/13/chinas-self-destructive-nuclear-option-in-trade-war-selling-us-treasury-bonds.html>.

²⁰⁵ KATHARINA PISTOR, *THE CODE OF CAPITAL* 168–69 (2019). Some of the strengths of the common law examined by Pistor are indeed substantive, but she does not assert—and no legal theorist could seriously argue—that common law is inherently superior because it tends to allow the wealthiest and best represented persons to gain meaningful advantages over others of modest means.

²⁰⁶ GREWAL, *supra* note 11, at 36 (“A member of one network faces overwhelming indirect force when . . . opportunity costs [not belonging to the dominant network] mount to such an extent that she is deprived of real opportunities for cooperation in any network except the dominant one”).

²⁰⁷ See the discussion in ERIK BRYNJOLFSSON & ANDREW MCAFEE, *THE SECOND MACHINE AGE: WORK, PROGRESS, AND PROSPERITY IN A TIME OF BRILLIANT TECHNOLOGIES* 149 (2014). See Robert H. Frank & Phillip J. Cook, *Winner-Take-All Markets* (Pol. Econ. Research Group, Paper No. 18, 1991) (an early analysis for winner-take-all markets), http://ir.lib.uwo.ca/economicsperg_ppe.

²⁰⁸ Pistor, *supra* note 4, at 98.

²⁰⁹ Berkowitz et al., *supra* note 14, at 179–187 (discussing unreceptive transplants).

jurisdictions shifting into the dominant network may experience damaging shocks when the underlying flaws erupt, and the cost of such shocks can outweigh the benefits of belonging to the dominant network. The body politic, may, so to speak, gradually decay and degrade internally while the government binges on “fast law.”

For example, adoption of a common law “trust” in civil law China to facilitate the securitization and sale of claims on mortgages led to significant confusion on the distinction between property and contract rights held by various parties in Chinese transactions.²¹⁰ The Chinese adoption of a well-known U.K.-style mandatory bid rule, which had to be applied in a way to accommodate multi-class share structures, made the provision useless.²¹¹ The use of each of the foregoing ‘solutions’ might have obviated or impeded the development of a mechanism appropriately designed to meet local needs. Law from a dominant network can also be rendered inactive by local interpretations or lack of use, which is what happened to the U.K.-style code to regulate hostile takeovers adopted in Hong Kong in 1992. It has never been applied in the contemplated manner because no hostile takeover has taken place.²¹² The network demands of the international investment industry forced Germany to adopt an “audit committee” in its code of corporate governance although the German two-tier board structure meant that each stock corporation already had a powerful and independent body charged with vetting the company’s financial disclosure.²¹³

While examples of poor local fit for transplanted law are abundant, there is also good evidence that today’s global model, U.S. law creates instability through its emphasis on private action and fundamental reliance on the incentive of self-enrichment driving market forces. The “dot.com” bubble and its collapse was largely a function of U.S. accounting and compensation practices.²¹⁴ The “global financial crisis” was largely a function of liberal U.S.-led securitization of the credit markets and unregulated use of derivatives as a primary form of risk management.²¹⁵ Incentives leading up to both crises were fed by the U.S. model of excessive performance-based compensation paid to senior executives.²¹⁶ Most recently, the U.S. practice of direct democracy through the media (as opposed to parliamentary, managed democracy by dour professionals)

²¹⁰ See Lyu Kai, *Re-Clarifying China’s Trust Law: Characteristics and New Conceptual Basis*, 36 LOY. L.A. INT’L. & COMP. L. REV. 447, 452–470 (2014).

²¹¹ See WANG CHAO, SHAREHOLDER PROTECTION LAW IN TAKEOVER OF CHINESE LISTED COMPANIES: COMPARATIVE AND EMPIRICAL PERSPECTIVES Chapter IV (2019) (doctoral dissertation on file with author and the Graduate School of The Chinese University of Hong Kong.).

²¹² See David C. Donald, *Evolutionary Development in Hong Kong of Transplanted UK-Origin Takeover Rules*, COMPARATIVE TAKEOVER REGULATION: GLOBAL AND ASIAN PERSPECTIVES (Umakanth Varottil & Wai Yee Wan eds., Cambridge Univ. Press 2017).

²¹³ See ANDREAS CAHN & DAVID C. DONALD, COMPARATIVE COMPANY LAW: TEXTS AND CASES ON THE LAWS GOVERNING CORPORATIONS IN GERMANY, THE UK AND THE USA 540–542 (2d ed. 2018).

²¹⁴ See, e.g., John C. Coffee, Jr., *Understanding Enron: “It’s About the Gatekeepers, Stupid”*, 57 BUS. L. 1403 (2002).

²¹⁵ See, e.g., EMILIOS AVGOULEAS, GOVERNANCE OF GLOBAL FINANCIAL MARKETS: THE LAW, THE ECONOMICS, THE POLITICS 89–106 (2012).

²¹⁶ See, e.g., David F. Larcker, *Follow the Money: Compensation, Risk, and the Financial Crisis*, ROCK CENTER FOR CORPORATE GOVERNANCE STANFORD CLOSER LOOK SERIES, 1-3 (Sept. 2014), available at <http://ssrn.com/abstract=2493398>.

has allowed data analytics combined with social networking to create serious challenges to self-government.²¹⁷

When substantive flaws in a leading legal system cannot be effectively raised because network effects are strong and continuing, it becomes very difficult to find the way forward.²¹⁸ The dilemma is even more grave for a developing country adopting new law, if this law is judged primarily on its network effects. Law with strong international network benefits could potentially remain in place even though unresponsive to social needs. Although such arrangements have been effective in some primitive regimes,²¹⁹ colonial rule,²²⁰ and modern authoritarian governments,²²¹ they present serious disadvantages. A legal system that does not co-develop with its society presents problems of legitimacy. As Dworkin observes:

[T]he best defense of political legitimacy—the right of a political community to treat its members as having obligations in virtue of collective community decisions—is to be found not in the hard terrain of contracts or duties of justice or obligations of fair play that might hold among strangers . . . but in the more fertile ground of fraternity, community, and their attendant obligations.²²²

The word “community” entails that a group enjoys mutual communication of shared values, which corresponds to Luhmann’s view that a society’s trust in the power of government can exist “mainly because this trust has foundation in the chances for effective communication” about specific rules triggering state power.²²³ Valcke also posits engaging communication as the foundation of law in her own and others’ legal theories.²²⁴ For Rawls, the values underlying such a legal community have an assumed “publicity,” as citizens “suppose that

²¹⁷ Nathaniel Persily, *The 2016 U.S. Election: Can Democracy Survive the Internet?*, 28 J. OF DEMOCRACY 63 (2017).

²¹⁸ It also becomes much easier to retain biases of local superiority against foreign—particularly developing country—law. This is famously present in the relationship between the U.S. (and many other Western observers) and China. See, e.g., Thomas Coendet, *Critical Legal Orientalism: Rethinking the Comparative Discourse on Chinese Law*, 67 AM. J. COMP. L. 775 (2020).

²¹⁹ Plaintiffs in early Norman England essentially purchased summary writs from the king, and these were an order to do whatever the plaintiff requested without provision for trial. Van Caenegem remarks that such “writs based on one-sided complaints led to contradiction and injustice and to the very disorder which they were supposed to combat.” VAN CAENEGEM, *supra* note 33, at 38–39.

²²⁰ Although some forms of colonial rule did incorporate elements of local law existing when a territory is subjugated, that would have been the exception. On the imposition of English law on Chinese Hong Kong, see DONALD, *supra* note 54, at 23–32.

²²¹ In North Korea, for example, the relationship of government to the public and their preferences can be characterized as “control”, “conditioning” and “regimentation” rather than responsiveness. See, e.g., Marcus Noland, *Why North Korea Will Muddle Through*, 76 FOREIGN AFF. 105, 110 (1997) (“North Koreans have been conditioned by nearly two generations of extreme regimentation”).

²²² RONALD DWORIN, *LAW’S EMPIRE* 206 (1986).

²²³ NIKLAS LUHMANN, *VERTRAUEN: EIN MECHANISMUS DER REDUKTION SOZIALER KOMPLEXITÄT* 73 (5th ed. 2014) (author’s translation).

²²⁴ “[L]aw is . . . an argumentative social practice that both reflects and constitutes a community’s commitment to governing itself in accordance with certain ideals.” VALCKE, *supra* note 1, at 18 (citing Dworkin, Kelsen, Fuller, McCormick, Postema, Simmonds, and Waldron).

everyone will know about these principles all that he would know.”²²⁵ This is the point Eisenberg uses to overcome the problem of retroactivity in case law. The community sharing a legal system is privy to the information flows in that system regarding both input notions of justice from society and output legal rules from professionals, so they essentially know what judgment will be reached. As Calabresi puts it, “the legal fabric, and the principles that form it, are good approximations of one aspect of popular will, of what a majority in some sense desires.”²²⁶ While the legal theorists cited in this paragraph are not all making identical points, each of them refers to a back-and-forth relationship in which law and community communicate. In a jurisdiction with a socially legitimate legal system, lawmaking will reflect those values generally held by residents as it responds to their demand for judgments or enactments. However, in a jurisdiction that adopts law taken from the dominant network, the “liquidity” of individual concepts and principles used in such network may be seen to outweigh legitimate reflection of values. An economic analysis may create the plausible impression that the adopted network is ideal because it is understood to be the best solution for a posited economic goal of society, but – even assuming the aim of a given society could be reduced to economic principles – the synthetic transplantation of that law into a new context does not reflect what we know about the origin, systematic constitution and legitimacy of legal systems.

Without the mutual flow of information containing community expectations and the reaction of the platform’s network managers, law would lose both its ability for spontaneous renewal in reaction to local social needs and much of its legitimacy. If, with Luhmann, we see “society as a comprehensive system of all communication in an environment . . . the legal system also is a system which is part of society and which performs in society . . . [and the] legal system simply requires communication to work.”²²⁷ The institutional platform of the legal system consists, in substance, of this information (at various stages of processing) and the methods used to process and apply it. Network efficiency evaluations of a legal system do not examine the correspondence of social and legal content, but rather the coordination advantages (“liquidity”) of the legal elements used to coordinate actors’ behavior.²²⁸ These network benefits are linguistic in that they participate in the dominant coordination system, and a focus on this structural quality makes the systemic social content of law seem less relevant.²²⁹ Put in market rather than linguistic terms, one does not think about possible merchandise a trader might buy with the dollar or euro she is trading, but only the systemic value of the dollar or euro within the market network. The underlying substance remains secondary to the value of currency in the market.

²²⁵ JOHN RAWLS, A THEORY OF JUSTICE 133 (1971), discussed in DWORKIN, *supra* note 222, at 192, also noting that the “publicity condition is clearly implicit in Kant’s doctrine of the categorical imperative.”

²²⁶ CALABRESI, *supra* note 153, at 96–97.

²²⁷ LUHMANN, *supra* note 8, at 89–90.

²²⁸ As the World Economic Forum notes: “Economic agents will not invest if they fear they will need to spend excessive amounts of time and money on protecting their property and monitoring the fulfilment of contractual obligations. Their expectations depend on the levels of trust in society.” KLAUS SCHWAB, WORLD ECONOMIC FORUM, THE GLOBAL COMPETITIVENESS REPORT 2018 13 (2018).

²²⁹ A transcendent value, whether specified by philosophical or economic analysis, posits an absolute measure that can ignore the contextual value of law. See VALCKE, *supra* note 1, at 73.

By contrast, an analysis of law using Luhmann's concept of the "structural coupling" would make it possible to isolate the specific points at which social pressure necessitates creation of a legal concept or group of concepts. An analysis of a law's quality that evaluates the efficiency of structural couplings could help a developing country ensure that the law it adopts meets local needs. This type of activity is exercised by socially sensitive members of the judiciary, such as the British Law Lord, Baron Tom Denning, who introduced or promoted concepts like "fraud on the minority"²³⁰ and "promissory estoppel"²³¹ to meet social needs.

The hypothesis that law in the development context is more often judged by network effects could be tested against the current evolution of reduced respect for U.S. law and legal solutions.²³² U.S. prestige should logically have been reduced by the governance and financial crises mentioned above together with related losses of geopolitical authority from unprovoked war,²³³ questionable positions on human rights, and abdication of global leadership on issues like climate change,²³⁴ as well as the lack of readiness and response of the federal government in the Covid-19 crisis.²³⁵ If the popularity of the U.S. rests mainly on network effects (as opposed to substantive quality), U.S. law and legal solutions should become less valuable for foreign and domestic users as economic and geopolitical events diminish the strength of its combinatorial network elements, even if the substantive quality of U.S. law remains unchanged.²³⁶ If at the anecdotal level there appears to be a drop in use of U.S. law corresponding to a loss of platform prestige despite no degradation of substantive quality in U.S. law, the matter would merit quantitative study to attempt a more precise evaluation.²³⁷

²³⁰ This concept helped overcome the "proper plaintiff" rule in *Foss v Harbottle* (1843) 67 Eng. Rep. 189, 2 Hare 461, paving the way for the modern derivative action. See the decision of Denning, J. (as he then was) in *Wallersteiner v. Moir* (No 2) [1975] QB 373 at 390 (CA).

²³¹ This concept softened the strict application of consideration to allow promises to be enforced where the behavior of the parties made such enforcement equitable. See the decision of Denning, J. (as he then was) in *Central London Property Trust v. High Trees House* [1947] KB 130. Although it can be argued that Denning, J. took this concept from German and U.S. law, there is a difference between borrowing a solution because it meets local needs and adopting a concept because it has currency in the market for law.

²³² See, e.g., Joseph S. Nye, *American Soft Power in the Age of Trump*, PROJECT SYNDICATE (May 6, 2019), <https://www.project-syndicate.org/commentary/american-soft-power-decline-under-trump-by-joseph-s-nye-2019-05?barrier=accesspaylog>.

²³³ "In 1956, a fading British Empire destroyed its prestige by attacking Egypt's Suez Canal. And in 2001 and 2003, the United States occupied Afghanistan and invaded Iraq, creating client regimes that were soon battered by resurgent Islamic rebels." MCCOY, *supra* note 62, at Kindle Locations 5082–84. See also RICHARD HAASS, *A WORLD IN DISARRAY: AMERICAN FOREIGN POLICY AND THE CRISIS OF THE OLD ORDER* (2017).

²³⁴ See, e.g., MCCOY, *supra* note 62, at Kindle Locations 4859–70. See also EDWARD LUCE, *THE RETREAT OF WESTERN LIBERALISM* (2017).

²³⁵ Jeffrey Sachs, *Why America has the World's Most Confirmed Covid-19 Cases* CNN (March 27, 2020).

²³⁶ A workable method to assess this could be to measure similarity to U.S. law or outright U.S. influence found in major projects of model law, treaties, or conventions underway at international organizations since 2000 as compared to similar projects between 1990 and 2000.

²³⁷ In a different context and with a different conceptual framework, Kahan and Klausner attempted such a measurement to discern how network benefits might cause incorporators to deviate from optimal contracting when setting up and governing a stock corporation. See Kahan & Klausner, *supra* note 47, at 760–67.

CONCLUSION

This paper has shown that, in the international development context, law can be assessed both by its responsiveness to social needs and by the strength of its conceptual network, but the two approaches can yield conflicting results. This application of network theory to law's perceived value in an international context is new. Klausner has applied the approach to jurisdictional competition within the U.S., but his theory was not used in the international development context. When focusing on international development, Pistor has examined the interaction of local needs and standardized, "best practices" in great detail, implicitly recognizing network value while not attempting to isolate network effects. Grewal extensively explores network power, but does not apply his findings to the diffusion of law. Responsiveness of law to societal expectations is shown to be a characteristic of law's substantive quality in the systems theory of Luhmann. This Article shows that similar analyses with different theoretical approaches are undertaken by Baker, Eisenberg, and Glenn.

The combination of these angles of analysis shows legal systems to have two interactive facets, with the first facet consisting of a process in which societal needs are registered and answered dynamically by the legal profession's ordering of concepts and remedies, and the second being a textual structure of such legal concepts and remedies having network effects for the user's interaction with the world. Because these concepts and remedies exist as a network, their value increases with an expanding mass of persons who understand and use them. They tend to become more valuable as the network's user base grows – even if underlying quality measured by responsiveness to social needs were to decrease.

The two facets of the legal system can thus exhibit opposing tendencies, with structural network value increasing as relational value to social needs decreases. Interaction of these two tendencies creates a serious risk that increasing focus on growing network effects will eventually eclipse concern for a decreasing underlying connection to social needs. This is because connection to social needs will nag for constant adjustment and renovation of the legal system, but network effects will grow with the number of users and recorded uses in a system that over time remains largely stable and unchanged. Looking at network growth in time, rather than space, this relationship will be obvious to most: old, well-settled law is respected by many, but can be 'out of touch'. Perhaps that is why Thomas Jefferson's famous 1816 prescription for the U.S. Constitution both rings true and has never been heeded except in circumstances where networks have completely broken down in civil war, social or economic crisis:

And, lastly, let us provide in our constitution for its revision at stated periods Each generation is as independent of the one preceding, as that was of all which had gone before. It has, then, like them, a right to choose for itself the form of government it believes most promotive of its own happiness; consequently, to accommodate to the circumstances in which it finds itself, that received from its predecessors: and it is for the peace and good of mankind, that a solemn opportunity of doing this every

nineteen or twenty years, should be provided by the constitution.²³⁸

Many instances of legal system network expansion and contraction can be found in history. A fresh example is the recent “end of history” as the U.S. economic structure and legal system were understood to have reached the pinnacle of human aspirations at the close of the twentieth century. Like a language or a currency, a legal system will replace others once its network power (the “liquidity” of its constitutive concepts and procedures) reaches sufficient scale. As the U.S. legal system was intertwined with a dominant economy, a dominant currency, a dominant language, and a dominant military power, with legal concepts facilitating an increase in private autonomy for the wealthiest, it attracted an increasing number of users among world leaders. The network incentives connected with adoption of concepts found in U.S. law explain why the law of many jurisdictions could be seen to “converge” on the U.S. model at the end of the twentieth century as minor networks were absorbed by the leader. Membership—achieved by adopting legal solutions similar to those found in U.S. law—not only allowed users to transact with the platform’s native members but also gave them the connectivity and reputational standing that comes with being a part of the leading network. As the network grew, each new member strengthened its position and alternatives outside of it became less viable.

The U.S. legal system’s strength at the turn of the century was assisted by an *Aeneid*-like fable that the U.S. securities markets traced their strength back to the Plantagenet King, Henry II, and the legal system of common law he founded. This story offered by scholars from the world’s most prominent universities was then adopted by the world’s leading development institution. Belief in the supremacy of legal origin for development was not initially weakened by its lack of support in either history or the technical substance of common law and securities regulation. Refutations of the origin fable by leading legal scholars included observations on the weaknesses of the legal origin supremacy theory’s data, definitions, understanding of law, and causal links to development. Nevertheless, even after the common law origin supremacy argument was in substance refuted, it continued to be popular during the period that the U.S. legal and economic systems remained preeminent. This appears to be due to network effects, and invites further analysis.

Going forward, developing countries, development agencies, and legal experts should be keenly aware of the value of the underlying complementarity of law and social needs as well as the utility of using legal solutions that are readily recognized and understood by the largest number of users. Especially because social needs will tend to present a periodic, unsatisfied “irritant” to an aging or imported legal system enjoying network prestige, any lawmaker should keep the two sides of law, and their tendency to diverge, firmly in mind. “Fast

²³⁸ National Historical Publications and Records Commission, *Proposal to Revise the Virginia Constitution: I. Thomas Jefferson to “Henry Tompkinson” (Samuel Kercheval), 12 July 1816*, 10 Retirement Series 222, 222–28 (2013) <https://founders.archives.gov/documents/Jefferson/03-10-02-0128-0002>.

law” may be cheap and popular, but it could have detrimental long-term consequences for the body politic.