



5-3-2016

# The Virtue of Path Dependence in the Law

Frédéric G. Sourgens

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>

## Recommended Citation

Frédéric G. Sourgens, *The Virtue of Path Dependence in the Law*, 56 SANTA CLARA L. REV. 303 (2016).  
Available at: <http://digitalcommons.law.scu.edu/lawreview/vol56/iss2/3>

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact [sculawlibrarian@gmail.com](mailto:sculawlibrarian@gmail.com).

# THE VIRTUE OF PATH DEPENDENCE IN THE LAW

Frédéric G. Sourgens\*

## TABLE OF CONTENTS

Introduction.....	304
I. Openness.....	311
A. Factual Openness.....	313
B. Normative Openness.....	316
1. Narrow Normative Openness – Rules .....	317
2. Intermediate Normative Openness – Standards.....	319
3. Complete Normative Openness – Principles.....	324
C. Global Openness.....	325
1. Global Implications of Factual and Normative Openness.....	326
2. Substantive Openness.....	328
D. Openness and Evolutionary Path Dependence .....	329
II. Prosperity .....	331
A. Prosperity in the Social Science Development Literature .....	332
B. Prosperity in U.S. Law.....	334
C. Prosperity v. Wealth .....	336
D. Prosperity and Increasing>Returns Path Dependence .....	337
III. Freedom.....	339
A. The Link Between Freedom, Prosperity, and Openness in Social Science Research .....	340
B. Freedom in U.S. Law .....	342
C. Freedom as Non-Domination.....	345
D. Non-Domination and Sequencing Path Dependence .....	350

---

\* Associate Professor of Law, Washburn University School of Law. I would like to thank Oona Hathaway, Ray Diamond and Adeno Addis for their kind words of encouragement. I would also like to thank Greg Shaffer and Diane Desierto for their input and willingness to comment on drafts. Finally, I owe an immense debt of gratitude to Ali Khan and Susannah Pollvogt for long and frequent discussions without which this Article sure would not have come about.

IV. Criticality .....	353
A. Criticality in the Social Sciences .....	354
B. Tradition and Critique in U.S. Jurisprudence.....	356
C. Criticality and Path Dependence.....	359
V. Preference or Parity? The Relationship Between the Four Dimensions of Development .....	362
A. Avoiding the Liberty Preference.....	363
B. Parity and the Quest for Pareto Superiority	365
C. Development and Social Loss .....	367
D. Sequencing Path Dependence and A Place for Political Choice.....	371
Conclusion .....	373

## INTRODUCTION

Law and development are inextricably intertwined. Law, or more precisely the rule of law, facilitates and helps to guide development.<sup>1</sup> Conversely, as Oliver Wendell Holmes notes in opening his *Common Law*, “[t]he law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”<sup>2</sup> The law embodies this story through its rich history of precedent.<sup>3</sup> Or, in the words of the New York Court of Appeals the law follows a “customary incremental common-law development process, rooted in particular fact patterns and keener wisdom acquired through observations of empirical application of a proportioned, less than absolute, rule in future cases.”<sup>4</sup>

As the growing literature on path dependence

---

1. Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 124 (2006) (noting that “[t]he ravages of fascism and communism made clear the need for the rule of law.”); Hassane Cissé, *Empowerment of the Poor: Past, Present, and Future*, THE WORLD BANK LEGAL REVIEW: LEGAL INNOVATIONS AND EMPOWERMENT FOR DEVELOPMENT 17, 32 (Hassane Cissé et al. eds., 2012) (discussing rule of law in the context of the development literature).

2. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

3. *Harris v. Quinn*, 134 S. Ct. 2618, 2651 (2014) (Kagan, J., dissenting) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). On the importance of the narrative aspect of law, see Adeno Addis, *In Defense of Crookedness*, 1992 U. ILL. L. REV. 947, 959 (1992).

4. *Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 92 N.Y.2d 458, 467 (N.Y. 1998).

demonstrates, such development is not without problems.<sup>5</sup> Path dependence is a theory adopted from economics and the social sciences.<sup>6</sup> It submits that once a path is chosen, this choice itself affects possible future action to the point of locking in earlier paths even when this becomes comparatively inefficient.<sup>7</sup> For instance, once Microsoft Windows became the leading personal computer operating system, path dependence would suggest that it would be difficult to displace Windows even with a better product simply because of the decision of earlier consumers to purchase Windows-operated computers.<sup>8</sup>

In the *locus classicus* of the path dependence legal literature, Oona Hathaway showcases that in many instances, legal development similarly enforces imprudent or at least not fully considered policy preferences simply because of the sequence and manner in which decisions were put to the

---

5. Mark Bartholomew & John Tehranian, *An Intersystemic View of Intellectual Property and Free Speech*, 81 GEO. WASH. L. REV. 1, 83-6 (2013) (explaining intellectual property law regimes by reference to path dependence); Yun-Chien Chang & Henry Smith, *An Economic Analysis of Civil Versus Common Law Property*, 88 NOTRE DAME L. REV. 1, 16-20 (2012) (using path dependence to explain both civil and common law of property “styles”); David Freeman Engstrom, *Private Enforcement’s Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1941-43 (2014) (discussing path dependency as a potential means for private litigants to have significant policy impact in the formation of legal rules); Tom Ginsburg, Jonathan S. Masur & Richard H. McAdams, *Libertarian Paternalism, Path Dependence, and Temporary Law*, 81 U. CHI. L. REV. 291, 294 (2014) (applying path dependence to discussions of market failure); Zachary Gubler, *Experimental Rules*, 55 B.C. L. REV. 129, 139-41 (2014) (noting the obstacles path dependence places in the way of legal experimentation); Oona Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001); J.B. Ruhl & James Salzman, *Climate Change Meets Law of the Horse*, 62 DUKE L.J. 975, 982 (2013) (arguing that “[d]ecisions made today about climate change adaptation—whether shaping the course of evolution or sitting back and watching the drama unfold—may become ‘sticky,’ leading to path dependence and making it increasingly difficult to change course if the need becomes apparent.”).

6. See Lars Magnusson & Jan Ottosson, *Path Dependence: Some Introductory Remarks*, in THE EVOLUTION OF PATH DEPENDENCE 1, 1 (Lars Magnusson & Jan Ottosson eds., 2009) (discussing the history of path dependence in the social sciences).

7. *Id.* at 4 (providing alternative definitions of path dependence and concluding that systems are path independent where “the initial conditions will not hamper future development”).

8. Irina D. Manta & David S. Olson, *Hello Barbie: First They Will Monitor You, Then They Will Discriminate Against You. Perfectly*, 67 ALA. L. REV. 135, 161-72 (2015) (discussing the role of path dependence in Microsoft’s pricing decisions and success).

courts.<sup>9</sup> Once a path is chosen, it is extraordinarily difficult for law to change course and self-correct in a manner that, all things considered, may be more appropriate;<sup>10</sup> law and the rule of law,<sup>11</sup> in other words, are “path dependent.”<sup>12</sup>

The legal literature on path dependence so far has not provided a normative defense of path dependence in its own right. Rather, the literature so far has focused on the doctrinal, practical, and strategic consequences of path dependence.<sup>13</sup> This leaves a key aspect of path dependence significantly undertheorized.

Current events lend further urgency to providing a normative defense of path dependence. Recent failures to indict law enforcement officers killing unarmed civilians have led some commentators to lay blame at the feet of the American

---

9. Hathaway, *supra* note 5, at 605. Professor Hathaway’s article has been cited in 186 law review articles since its original publication a little more than a decade ago.

10. Hathaway, *supra* note 5, at 605.

11. See Kevin T. Jackson, *The Normative Logic of Global Economic Governance: In Pursuit of Non-Instrumental Justification for the Rule of Law and Human Rights*, 22 MINN. J. INT’L L. 71, 111 (2013) (linking thin rule of law conceptions to securing “a reasonable degree of certainty and predictability.”); Benjamin Van Rooij & Pip Nicholson, *Inflationary Trends in Law and Development*, 24 DUKE J. COMP. & INT’L L. 297 (2013) (noting that “thin conceptualizations of the rule of law . . . stress[] the predictability . . . of rules . . .”); Joseph Raz, *The Rule of Law and its Virtue*, THE AUTHORITY OF LAW, ESSAYS ON LAW AND MORALITY 210, 213 (Joseph Raz ed., 1979) (“the law must be capable of being obeyed.”).

12. Hathaway, *supra* note 5, at 605.

13. See, e.g., John Bell, *Path Dependence and Legal Development*, 87 TUL. L. REV. 787, 788 (2013) (“This Article not only suggests that path dependence is an important explanation in comparative law but also recognizes that the law does develop by breaking out of the mould cast by the past.”); Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 436–37 (2002) (using path dependence to explain surprising decisions of the Rehnquist Court); Amir N. Licht, *The Mother of All Path Dependencies, Towards a Cross-Cultural Theory of Corporate Governance*, 26 DEL. J. CORP. L. 147, 161–65 (2001) (arguing that corporate governance is culturally path dependent); David A. Weisbach, *Thinking Outside the Little Boxes: A Response to Professor Schlunk*, 80 TEX. L. REV. 893, 896–904 (2002) (discussing path dependence in the tax law context). Lawrence Friedman, *Path Dependence and the External Constraints on Independent State Constitutionalism*, 115 PENN. ST. L. REV. 783, 818–31 (2011) (discussing the impact of path dependence on the interpretation of state constitutions by reference to federal jurisprudence). *But see* Alain Maricano & Elias L. Khalil, *Optimization, Path Dependence and the Law: Can Judges Promote Efficiency?*, 32 INT’L REV. L. & ECON. 72 (2012) (discussing path dependence from the point of view of efficiency).

justice system.<sup>14</sup> The argument made by such advocates similarly draws on path dependence: the American justice system, they submit, yields unjust results because of its habitual ill-treatment of minorities.<sup>15</sup> This claim can draw on at least some of the darker parts of American jurisprudence as proof.<sup>16</sup> Both the state of scholarly literature and current events lead one to ask: why would we even want the rule of law? Can development according to the rule of law assist in making relevant “the stories and sources that traditionally have been excluded from the polity’s conversational table?”<sup>17</sup>

Problematically, the orthodox justification of legal development is unavailing in answering this question. Recent literature argues that legal development protects reliance interests.<sup>18</sup> This explanation certainly can be applied even in the context of wrong decisions.<sup>19</sup> But such a justification begs the question: what if patterns giving rise to socially sanctioned reliance interests themselves are deeply questionable?<sup>20</sup> In such a society, why should we nevertheless trust in the rule of the law as a tool for beneficial development?

This Article proposes to address this normative challenge.<sup>21</sup> It posits that development under the rule of law,

---

14. Albert Burneko, *The American Justice System Is Not Broken*, THE CONCOURSE (March 12, 2014), <http://theconcourse.deadspin.com/the-american-justice-system-is-not-broken-1666445407>.

15. *Id.* (“Policing in America is not broken. The judicial system is not broken. American society is not broken. All are functioning perfectly, doing exactly what they have done since before some of this nation’s most prosperous slave-murdering robber-barons came together to consecrate into statehood the mechanisms of their barbarism.”)

16. See Hon. Shira Scheindlin & Matthew L. Schwartz, *With All Due Deference: Judicial Responsibility in a Time of Crisis*, 32 HOFSTRA L. REV. 795, 841 (2004) (“*Korematsu* is a major embarrassment, trumped only by *Dred Scott v. Sandford*, *Plessy v. Ferguson*, and *Lochner v. New York*.”).

17. Addis, *supra* note 3, at 959.

18. Hillel Levin, *A Reliance Approach to Precedent*, 47 GA. L. REV. 1035 (2013).

19. See Raz, *supra* note 11, at 213, 221 (noting that the rule of law “says nothing about fundamental rights, about equality, or justice” and even “can violate people’s dignity in many ways”).

20. AMARTYA SEN, THE IDEA OF JUSTICE 166–67 (2009) (discussing the prevalence of such biases from a social scientific point of view).

21. On the definition of definition – and its importance – see, e.g., Bruce Markell, *Truth?*, 72 IND. L.J. 1115, 1126–31 (1987) (discussing how to define definitions and the importance of the question for legal discourse); Frederick Schauer, *The Best Laid Plans*, 120 YALE L.J. 586, 617–18 (2010) (discussing anti-essentialism, and its question of definition, in U.S. jurisprudence).

while imperfect and frequently far from good, constitutes a critical backbone for sustainable, self-improving self-government.<sup>22</sup> It demonstrates how path dependence is critical to the ability of law to bring about and sustain such self-improving self-government. It submits that while slow, legal development does include and protect members of marginalized social groups and increases their capability to engage governance processes and broadens their opportunities.<sup>23</sup> This Article identifies the values of legal development along four dimensions: openness,<sup>24</sup> prosperity,<sup>25</sup> freedom,<sup>26</sup> and criticality.<sup>27</sup> It posits further that development must possess each of these dimensions at the same time and that no trade-offs between dimensions are permissible or cognizable.<sup>28</sup>

This Article begins by addressing head on whether the inflexibility identified by path dependence means that law does not value openness.<sup>29</sup> This Article addresses how path dependence treats facts; it shows that path dependence is by nature factually open.<sup>30</sup> This, in turn, entails and explains openness at the normative level.<sup>31</sup> Legal path dependence thus helps to explain how the rule of law can at once exhibit “long periods of stability” and be open.<sup>32</sup> It becomes a constitutive force of the open society and an open social order.<sup>33</sup>

This Article next addresses prosperity.<sup>34</sup> An open society

---

22. This Article uses a thin conception of the rule of law. For a discussion of thin and thick conceptions of the rule of law, *see* citations in footnote 11. To defend path dependence, it is necessary to presuppose a thin rule of law conception because thick rule of law conceptions introduce “justice” as an element of rule of law thus begging the definitional question posed by this Article. *Id.*

23. AMARTYA SEN, DEVELOPMENT AS FREEDOM 17–18 (1999) (explaining the process participation/ opportunity dichotomy).

24. *See* discussion *infra* Part I.

25. *See* discussion *infra* Part II.

26. *See* discussion *infra* Part III.

27. *See* discussion *infra* Part IV.

28. *See* discussion *infra* Part V.

29. *See* discussion *infra* Part I.

30. *See* discussion *infra* Part I.

31. *See* discussion *infra* Part I.B.

32. Hathaway, *supra* note 5, at 614.

33. SEN, *supra* note 23, at 287–88 (“Do democracy and civil rights help to promote the process of development? Rather, the emergence and consolidation of these rights can be seen as being *constitutive* of the process of development.”).

34. *See* discussion *infra* Part II.

requires the material conditions for sustainable growth.<sup>35</sup> This Article explains that path dependence creates the conditions for economic growth by aiming to protect the property rights of as broad of a segment of society as possible.<sup>36</sup>

This Article then engages freedom.<sup>37</sup> Amartya Sen and Martha Nussbaum show that prosperity affects political freedoms from an economic and social theoretical vantage point.<sup>38</sup> Their work suggests that legal development almost by definition reveals a value of social freedom inherent in the form of social organization the law fosters.<sup>39</sup> The value of freedom inherent in American law arises from the deeply humanist republican tradition prevalent at the time of its founding.<sup>40</sup> This tradition views freedom as a paradigm of non-domination.<sup>41</sup> This paradigm of non-domination requires most immediately that decisions affecting any person or group in society be taken by reference to the interests and opinions of that group.<sup>42</sup> By adopting a paradigm of non-domination, law becomes not only a safeguard of an open society, but of an open self-governing society.

This leaves the question of whether and how law fosters social self-reflection.<sup>43</sup> This Article submits that law evolves according to the value of criticality, or critical judgment.<sup>44</sup> Critical engagement of historical precedent distinguishes development from chaotic change.<sup>45</sup> As will become apparent, the roots of American republican constitutionalism remain

---

35. See discussion *infra* Part II.A.

36. See discussion *infra* Part II.A.

37. See discussion *infra* Part II.C.

38. SEN, *supra* note 23 (focusing on the economic link between prosperity and political freedoms); in philosophy by MARTHA C. NUSSBAUM, *CREATING CAPABILITIES, THE HUMAN DEVELOPMENT APPROACH* (2013) (critiquing theories of economic development on the basis of ethical principles of human dignity); MARTHA NUSSBAUM, *POLITICAL EMOTIONS* 115–36 (2013) (discussing the role of the capabilities approach in the context of economic growth).

39. SEN, *supra* note 23, at 287–88.

40. See Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 254 (1989) (“It is now also apparent that a relatively wide range of late eighteenth-century Americans were familiar with some accounts of natural law, with the notion of the ancient constitution, and with civic humanism.”)

41. See discussion *infra* Part III.C.

42. See discussion *infra* Part III.C.

43. See discussion *infra* Part IV.

44. See discussion *infra* Part IV.

45. See discussion *infra* Part IV.

strong within the U.S. jurisprudential paradigm and its engagement of time, tradition, and precedent.<sup>46</sup>

This Article demonstrates how hotly debated issues with regard to *each* dimension can only be resolved by placing it in the context of the other three. This Article explains that law can harness efficiencies only through a combination of the four dimensions of development. Openness engenders prosperity, prosperity freedom, freedom critical thought and vice versa.<sup>47</sup> In economic terms, “development” means an organic pursuit of the law to find Pareto superior configurations of the four dimensions, *i.e.*, configurations that unleash the maximum efficiencies between the four dimensions without loss in support for any one dimension.<sup>48</sup>

This Article concludes that it is possible to justify the rule of law, even the rule of American law, to those whom law currently disadvantages. The very features that made the rule of law appear flawed and oppressive in isolation are the means to extending the benefits of an open, prosperous, self-governing society to an ever-increasing number of people. The path to these benefits may be slow. But each step taken is sustainable. And with each step taken, the law provides its critics with less of a right to complain that law does not cure all social ills. With each step taken, it instead imposes a duty on all, the advantaged, the disadvantaged, and critics alike to take ownership of their own fate and the fate of their community further to secure and improve the commonweal of which they

---

46. See discussion *infra* Part IV.

47. The efficiencies between these dimensions have been discussed in economics by SEN, *supra* note 23 (focusing on the economic link between prosperity and political freedoms); MARTHA C. NUSSBAUM, *CREATING CAPABILITIES, THE HUMAN DEVELOPMENT APPROACH* (2013) (critiquing theories of economic development on the basis of ethical principles of human dignity); J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT, FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1979) (focusing on the importance of critical judgment for the opening up of money-based trading empires in Renaissance Italy and the emergence of republican thought in England and the Americas); J.G.A. POCOCK, *POLITICAL THOUGHT AND HISTORY: ESSAYS ON POLITICAL THOUGHT AND HISTORY, CHIEFLY EIGHTEENTH CENTURY* (1985) (same).

48. See also Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims its Sails and Why*, 127 HARV. L. REV. 1593, 1602 (2014) (using Pareto optimality in the context of neoclassic theory of regulation); John Morley, *The Separation of Funds and Managers: A Theory of Investment Fund Structure and Regulation*, 123 YALE L.J. 1228 (2014) (using Pareto optimality in the context of investment fund management principles).

all form part. Law, in other words, makes members of society the owners of their own development.

### I. OPENNESS

The first dimension of development is the openness of law to outside influence.<sup>49</sup> This dimension gives law width and breadth.<sup>50</sup> It determines what can influence or bring about legal change.<sup>51</sup>

In *Path Dependence in the Law*, Oona Hathaway submits that common law exhibits a striking and problematic inflexibility.<sup>52</sup> This inflexibility is the result of “path dependence” in the law.<sup>53</sup> As Professor Hathaway submits, there are three strands of path dependence, all of which are relevant to the development of law:<sup>54</sup> (1) increasing-returns path dependence;<sup>55</sup> (2) evolutionary path dependence,<sup>56</sup> and (3) sequencing path dependence.<sup>57</sup> Her argument insightfully demonstrates that precedent is persuasive in the first sense of path dependence (increasing returns) because of the efficiencies created for the judiciary by following down the path laid out in earlier decisions: there is no need to reinvent the wheel.<sup>58</sup> Precedent governs in the second sense of path dependence (evolutionary path dependence) in the sense that the common law exhibits a period of relative calm “punctuated” by short periods of rapid upheaval brought about by

---

49. Brian Z. Tamanaha, *The Realism of Judges Past and Present*, 57 CLEV. ST. L. REV. 77, 91 (2009) (discussing the openness of law in U.S. legal discourse) [hereinafter *Tamahanah, RHPP*]; Brian Z. Tamanaha, *The Distorting Slant in Quantitative Studies of Judging*, 50 B.C. L. REV. 685, 698 (2009) (discussing the importance of openness of law for legal development); Richard A. Posner, *Realism About Judges*, 105 NW. U. L. REV. 577, 583 (2011) (discussing *Tamahanah, RHPP*); Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1915 (2009) (same).

50. Michael E. Levine, “Law and . . .” in *Theory and Practice: The USC Style and its Influence*, 74 S. CAL. L. REV. 225, 238 (2000) (linking openness to breadth in legal scholarship).

51. *Tamahanah, RHPP*, *supra* note 49, at 91.

52. Hathaway, *supra* note 5, at 605.

53. Hathaway, *supra* note 5, at 605.

54. Hathaway, *supra* note 5, at 606.

55. Hathaway, *supra* note 5, at 606.

56. Hathaway, *supra* note 5, at 607.

57. Hathaway, *supra* note 5, at 608.

58. Hathaway, *supra* note 5, at 626.

technological or social paradigm shifts.<sup>59</sup> Reliance upon precedent also highlights the importance of the sequencing of decisions to achieve desired outcomes as a different order in which issues are brought up for decision influences the ultimate result.<sup>60</sup> Hathaway demonstrates this point by reference to the NAACP's strategy to overturn *Plessy v. Ferguson* culminating in *Brown v. Board of Education*.<sup>61</sup> All three strands of path dependence have the consequence of "lock[ing] in" results rather than opening up legal decision-making processes.<sup>62</sup>

Evolutionary path dependence is most immediately relevant to the openness of the law. It determines how and when law changes in response to the outside world.<sup>63</sup> As discussed below, it is possible to improve upon Professor Hathaway's account of the evolutionary path dependence in three ways. First, rather than address path dependence in general, it is helpful to distinguish between factual openness, or the receptivity of the law to factual differences between the case at bar and precedent, and normative openness, or the receptivity of the law to purely normative concerns regarding the rule announced in precedent.<sup>64</sup> Second, normative openness itself should distinguish between the normative openness of the law with regard to rules, standards, and principles.<sup>65</sup> Third, it is important to determine whether openness of the law is limited only to American society or whether this openness is susceptible to global influences.<sup>66</sup> Only if the law is open to global influences does it support an open society. By drawing these distinctions, it is possible to draw a more accurate picture of evolutionary path dependence.<sup>67</sup> These distinctions further permit a normative

---

59. Hathaway, *supra* note 5, at 641–45.

60. Hathaway, *supra* note 5, at 645–48.

61. Hathaway, *supra* note 5, at 648–50.

62. Hathaway, *supra* note 5, at 650 (“Legal change is unpredictable ex ante and neurotic, and early outcomes may become locked in. The law evolves gradually over time, drawing on an existing stock of precedence, punctuated by periods of rapid adaptation. And ultimate legal outcomes depend significantly on the order in which decisions are made.”).

63. See Hathaway, *supra* note 5, at 607.

64. See discussion *infra* Part I.A.

65. See discussion *infra* Part I.B.

66. See discussion *infra* Part I.C.

67. See discussion *infra* Part I.C.

defense for the inflexibilities identified in *Path Dependence in the Law*: law must exhibit the inflexibilities identified by Professor Hathaway to be accountable to an open society.<sup>68</sup> Differently put, more openness than the law exhibits would tend to lead to arbitrary rule and thus deprive society of a means to remain open to the outside world in a sustainable manner.<sup>69</sup>

#### A. *Factual Openness*

*Path Dependence in the Law* does not fully address whether path dependence applies to the appreciation of facts or to formulation of norms—and how the two overlap. Hathaway notes instead that “[w]hat constitutes precedent in a particular case is a flexible concept that is subject to interpretation, especially when considering cases that are not directly on point.”<sup>70</sup> She concludes that “courts may interpret a prior decision in such a way that it does not appear to be controlling, even though a strong argument might be made that it is relevant and controlling precedent” and that “[c]ourts may also do the opposite, citing precedent as controlling or persuasive precedent when that case is arguably not relevant to the issue at hand.”<sup>71</sup>

One of the basic features of U.S. case law is to distinguish precedent from the case at bar on the basis of factual differences.<sup>72</sup> Courts distinguish precedent both in the context of constitutional interpretation and in the context of common law adjudication.<sup>73</sup> These distinctions can involve factual differences between precedent and the case at bar that have nothing to do with a change in factual circumstances.<sup>74</sup> But frequently, changes in the technological, business, or social

---

68. See discussion *infra* Part I.D.

69. See discussion *infra* Part I.D.

70. Hathaway, *supra* note 5, at 624.

71. Hathaway, *supra* note 5, at 624.

72. Kevin H. Smith, *Practical Jurisprudence: Deconstructing and Synthesizing the Art and Science of Thinking Like a Lawyer*, 29 U. MEM. L. REV. 1, 16 (1998).

73. Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1732 (2013) (discussing the importance of factual distinction in the constitutional context); Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 25–26 (2012) (discussing the common law theory of distinction).

74. Waldron, *supra* note 73, at 25–26.

environment between the time when the precedent was decided and the time the dispute arose will prove the most fruitful areas of distinction.<sup>75</sup>

Drawing such distinctions means that law is factually open. Factual openness in this Article refers to a broad and significant factual engagement and factual sensitivity through an inductive lens in the judicial decision-making process.<sup>76</sup> The law is not made up of absolute pronouncements but rather of problem solutions intended for a very specific set of disputed problems before the court rendering the decision upon which a party relies in a future case.<sup>77</sup> A factually open judicial decision-making process seeks to make sense of the totality of facts in the context of ongoing judicial discourse. As Martha Nussbaum posits, such an approach is far more Aristotelian (and premised in ordinary language philosophy) than Platonist.<sup>78</sup> More relevantly for current purposes, it reflects the creed of some of the greatest American jurists such as Justice Oliver Wendell Holmes.<sup>79</sup>

Importantly, factual openness is not a logical requirement of *all* law. A normative system could require that the society it governs follow the same rules as it did before without consideration to factual change and in fact seek to inhibit such change from occurring.<sup>80</sup> Religious laws can operate in such a fashion.<sup>81</sup> Similarly, early English common law was initially

---

75. Erin O'Hara, *Social Constraint or Implicit Collusion?: Toward a Game Theoretic Analysis of Stare Decisis*, 24 SETON HALL L. REV. 736, 742 (1993) ("social, economic, or technological changes may have rendered the judge's precedent obsolete").

76. See Aditi Bagchi, *The Perspective of Law on Contract*, 88 WASH. L. REV. 1227, 1231 (2013) (citing BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 22–23 (1921); Arthur Corbin, *What is the Common Law?*, 3 AM. L. SCH. REV. 73, 75 (1912)).

77. Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli? Principles and Popular Constitutionalism in the Health Care Cases*, 61 UCLA L. REV. 66, 133 (2013) (explaining that: "Inductive reasoning is the epistemological theory behind the common law's case-by-case system"). For a discussion of such a development in the law of contracts, see E. Allan Farnsworth, *Contract Scholarship in the Age of Anthology*, 85 MICH. L. REV. 1406 (1987).

78. MARTHA NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* 261–63 (2d ed., 2001)

79. HOLMES, *supra* note 2, at 1; see also Smith, *supra* note 72.

80. One community that has captured the popular imagination—if not necessarily accurately—are the Amish. See DONALD B. KRAYBILL ET AL., *THE AMISH* (2013).

81. *Id.*

hampered in its development by the rigid requirement of writ pleadings.<sup>82</sup> It is thus possible to conceive of legal systems that are not factually open but insist upon the application of traditional norms in an unadulterated form.<sup>83</sup> Consequently, factual openness is a particular feature of development in U.S. jurisprudence—if not a particularly surprising feature.

In the context of constitutional interpretation, Fourth Amendment jurisprudence presents a classic example of factual openness.<sup>84</sup> As technology advances, both police and criminals will have new means to detect and commit or conceal crimes.<sup>85</sup> Such advances in technology are habitually taken into account when courts interpret whether police conduct violates the Fourth Amendment rights of the accused.<sup>86</sup> The relevance of such factual change as a potentially dispositive factor for the application of constitutional norms to specific circumstances means that the task of constitutional interpretation upon which the norm application is based is sensitive to change.<sup>87</sup> It is factually open.<sup>88</sup>

In the context of common law adjudication, contract law looks to changes in facts as part of its analysis of good faith and fair dealing.<sup>89</sup> The specific requirements of what constitutes fair dealing is not set as a matter of law.<sup>90</sup> Rather, it looks to the conduct of similarly situated actors in the same business community.<sup>91</sup> A change in the business practices by the

---

82. G. Edward White, *The Intellectual Origins of Torts in America*, 86 YALE L. J. 671, 672 (1977) (discussing the arbitrary consequences of writ pleading leading to its ultimate abandonment).

83. O'Hara, *supra* note 75.

84. Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 485–87 (2011).

85. *Id.*

86. *Id.* at 525–42.

87. *Id.* at 487.

88. *See id.* at 491 (“The principles layer of Fourth Amendment doctrine is sufficiently open-textured to support a wide range of outcomes.”).

89. Robert S. Summers, *The General Duty of Good Faith – Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 818–21 (1982); Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980); Emily Houh, *The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel?*, 2005 UTAH L. REV. 1 (2005); Thomas A. Diamond & Howard Fess, *Proposed Standard for Evaluating When the Covenant of Good Faith and Fair Dealing Has Been Violated: A Framework for Resolving the Mystery*, 47 HASTINGS L.J. 585 (1996).

90. *See* Kerr, *supra* note 84.

91. Alan D. Miller & Ronen Perry, *Good Faith Performance*, 98 IOWA L. REV. 689, 690–95 (2013).

relevant actors can be dispositive of whether a party to a contract acted consistently with the duty of good faith and fair dealing.<sup>92</sup> The relevance of such factual change as a potentially dispositive factor for common law adjudication means that common law adjudication, too, is factually open or sensitive to change.

Factual openness practiced in the context of constitutional interpretation and common law adjudication is the first modality of how U.S. law reacts to change and develops.<sup>93</sup> Such factual openness requires that courts begin with precedent and then consider the factual changes in circumstance between the case at bar and relevant precedent in pronouncing upon the rights of current litigants.<sup>94</sup> This permits jurisprudence to “develop” or change alongside social, economic, or technological changes in civil society at large.

### *B. Normative Openness*

Factual openness is only the first step. Factual openness does not consider directly whether and how legal norms *themselves* are open.<sup>95</sup> In considering legal development, it is particularly relevant to ask whether factual openness entails normative openness. After asking that question, one next needs to inquire whether U.S. law is normatively open above and beyond these implications of factual openness.<sup>96</sup>

Normative openness changes perspectives compared to factual openness. It does not concern the manner of norm application, as such. Rather, normative openness concerns the manner and degree to which the substance of law itself is open to external norm change.<sup>97</sup> As discussed below, such normative

---

92. *Id.*

93. See Hathaway, *supra* note 5, at 659 (“As has been discussed at length, path dependence theory suggests that *stare decisis* can lead to the maintenance of a legal principle that is outdated and inefficient.”) Professor Hathaway does not argue that law is not factually open – rather that it frequently is not open enough.

94. Hathaway, *supra* note 5, at 624–25.

95. Waldron, *supra* note 73 at 25–26.

96. In Professor Hathaway’s terminology, this question addresses the modalities of path-dependence for U.S. law. Hathaway, *supra* note 5, at 623–25.

97. See Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 732 (2009) (“Realism refers to an awareness of the flaws, limitations, and openness of law—an awareness that judges must sometimes make choices, that they can manipulate legal rules and precedents, and that they can be influenced by their political and moral views and by their personal biases (the skeptical

openness theoretically can attach rules, standards, and principles.<sup>98</sup> Normative openness on the rule level is narrowest.<sup>99</sup> Normative openness on the principle level would be complete normative openness.<sup>100</sup> Between narrow and complete normative openness, a legal tradition could be normatively open as to both rules and standards but not principles.<sup>101</sup>

### 1. *Narrow Normative Openness – Rules*

Legal rules are the most immediate form of prescription.<sup>102</sup> Legal rules provide specific instructions for decision-making by inquiring into a narrow class of facts to determine compliance.<sup>103</sup> One typical example of a legal rule is the speed limit.<sup>104</sup> The legal rule that an automobile has to travel at 55 miles per hour or less breaks into cognizable hard elements—is a vehicle a car?<sup>105</sup> Did its speed exceed 55 miles per hour?<sup>106</sup>

Narrow normative openness means that the law is open to a change in rules. Such normative openness is narrow because rules in most instances do not provide their own rationale.<sup>107</sup> Rather, they institute broader policy prescriptions in an immediate, cognizable, and enforceable manner.<sup>108</sup>

Factual openness on its face implies that both constitutional interpretation and constitutional adjudication at least must be narrowly normatively open.<sup>109</sup> On the most

---

aspect).”).

98. See discussion *infra* Part I.B.1-3.

99. See discussion *infra* Part I.B.1.

100. See discussion *infra* Part I.B.2.

101. See discussion *infra* Part I.B.3.

102. Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217, 1228 (1982) (“A ‘rule’ . . . is a very specifically framed guide to conduct that is detailed in its normative content and that the lawmaker believes will directly implement his social or economic goals.”)

103. JACK M. BALKIN, *LIVING ORIGINALISM* 14 (2011) (discussing the age requirement to hold the office of U.S. president as a rule).

104. Harry Surden, *Structural Rights in Privacy*, 60 SMU L. REV. 1605, fn. 91 (2007) (“a speed limit is the paradigm example of a legal rule.”)

105. John O. McGinnis & Steven Wasick, *Law’s Algorithm*, 66 FLA. L. REV. 991, 998 (2014).

106. *Id.*

107. *Id.*

108. *Id.*

109. See Waldron, *supra* note 73, at 25–26 (discussing distinctions on the basis of new facts).

basic level, new facts will have to be added to rules.<sup>110</sup> Factual openness requires the rule itself to change in both precision and scope. In fact, this is what most legal theorists mean when they say that the common law constantly evolves.<sup>111</sup>

In the case of our speed limit example, it may someday be necessary to refine the definition of the speed limit when flying cars are mass produced to account for speed while driving on the highway, as opposed to speed while flying over it (a car flying over a highway at 120 miles an hour could violate the speed limit narrowly conceived but would likely be excused from the rule and subject to a different regulatory environment for airplanes). To be open to the dispositive relevance to changed facts thus implies that at the very least law must be normatively open on the narrow level of legal rules.

Jurisprudence confirms this implication. In the context of Fourth Amendment jurisprudence, factual openness requires the development of new rules on how police must conduct themselves.<sup>112</sup> Thus, the advent of new telephony technology requires a change in how police deal with the search of a smartphone.<sup>113</sup> Prior to the change in technology in question, it was reasonably fair to treat a telephone as “container.”<sup>114</sup> Following this change in technology, this implication no longer can fairly be made.<sup>115</sup> Thus, the rule for search of a mobile telephone or smart phone changed due to a change in facts.

The same change is apparent in the context of common law adjudication. For instance, it was at one point negligent for a driver not to exit his or her vehicle when approaching a railway crossing, look to both sides, confirm that no train was

---

110. See Waldron, *supra* note 73, at 25–26.

111. See, e.g., Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1338–39 (2001) (ascribing unpredictability in the common law to “constantly evolving common law standards”); Frank Patrick Hubbard, *The Nature and Impact of the “Tort Reform” Movement*, 35 HOFSTRA L. REV. 437, 463–64 (2006) (stating as a starting point for judicial reforms of tort law that “tort law as primarily a matter of common law, and like any area of common law, was constantly evolving.”); Amnon Lehavi, *Judicial Review of Judicial Lawmaking*, 96 MINN. L. REV. 520, fn. 35 (2011) (noting the dynamism of common law evolution in England and the United States at the time of the founding of the United States).

112. See Kerr, *supra* note 84, at 525–42.

113. *Riley v. California*, 134 S.Ct. 2473, 2484–85 (2014).

114. *Id.* at 2489 (looking to the “immense storage capacity” with “a standard capacity of 16 gigabytes” as part of its privacy analysis).

115. See *id.* at 2489–91.

approaching the crossing, only then to continue driving.<sup>116</sup> Technological change has made this rule obsolete.<sup>117</sup>

Narrow normative openness is the second modality in how U.S. law reacts to change or develops. It means that courts *change* legal rules in light of changed factual circumstances. In fashioning a new rule, courts will look for a ready logical extension or change of the rule.<sup>118</sup> Courts are frequently assisted in this task by scholarly articles, learned societies, and their sister courts in other jurisdictions who previously encountered related problems.<sup>119</sup>

## 2. *Intermediate Normative Openness – Standards*

Standards are higher order normative prescriptions than rules.<sup>120</sup> Standards can require a balance of various factors to achieve an overall normative purpose.<sup>121</sup> One such example is the reasonable person standard in the context of the tort of negligence.<sup>122</sup> Standards can include a larger cluster of rules that give effect to the higher purpose; one such example is rules governing capacity in the formation of contracts, such as infancy, guardianship, intoxication, and duress.<sup>123</sup>

Intermediate normative openness means that law is open to a change in standards. This openness is broader than narrow rule-based openness because it permits a revision not just of a specific rule but of the rationale for rules or rationales of balancing.<sup>124</sup> It is not complete because it does not permit a revision of the principle from which the standard itself is derived.<sup>125</sup>

---

116. *Baltimore & O.R. Co. v. Goodman*, 275 U.S. 66, 70 (1927).

117. *Pokora v. Wabash Ry. Co.*, 292 U.S. 98, 104 (1934).

118. *Hathaway*, *supra* note 5, at 623–25.

119. For a discussion of such a development in the law of contracts, see E. Allan Farnsworth, *Contract Scholarship in the Age of Anthology*, 85 MICH. L. REV. 1406 (1987).

120. *Baird & Weisberg*, *supra* note 102, at 1227–28.

121. *Id.*

122. Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323 (2012).

123. Douglas Mossman & Amanda N. Shoemaker, *Incompetence to Maintain a Divorce Action: When Breaking Up Is Odd to Do*, 84 ST. JOHN'S L. REV. 117, 185 (2010) (discussing “competence standards pertaining to formation and enforcement of contracts”), RESTATEMENT (SECOND) CONTRACTS §§ 12–16 (1981) (codifying the rules of capacity).

124. See *Baird & Weisberg*, *supra* note 102, at 1228.

125. See discussion *infra* Part I.B.3.

The application of standards can be factually open without being normatively open. The standard to drive at a reasonably safe speed precisely will take into account all facts that are relevant to safety.<sup>126</sup> It will thus impose different speeds for different circumstances.<sup>127</sup> It will do so because these different circumstances impact the balance of whether a speed in a particular vehicle will unreasonably increase the risk of accidents, etc.<sup>128</sup> Factual openness in the application of standards does not imply an openness with regard to the standard itself.<sup>129</sup> Thus, facts do not change what the standard measures (such as, for instance, risk of accidents).<sup>130</sup> It just affects the results of standard application (such as the fact that the presence of new technology may permit the same driver to go at a higher rate of speed safely without increasing accident risk).<sup>131</sup>

For a standard to be normatively open, the standard itself needs to be subject to change due to external influence.<sup>132</sup> For instance, heavy congestion could lead to the application of a driving standard that does not look to the safety of the driving as the relevant measure but the risk of congestion driving practices cause. Congestion then would change what we measure and require drivers to drive unsafely in certain circumstances to reduce the overall risk of congestion brought about by safe driving.

The typical manner in which a standard would be subject to change is for community expectations to have changed drastically since the introduction of the original standard.<sup>133</sup>

---

126. McGinnis & Wasick, *supra* note 105, at 996.

127. McGinnis & Wasick, *supra* note 105, at 996.

128. See McGinnis & Wasick, *supra* note 105, at 996.

129. See McGinnis & Wasick, *supra* note 105, at 996.

130. See McGinnis & Wasick, *supra* note 105, at 996.

131. McGinnis & Wasick, *supra* note 105, at 996. (“[W]e can imagine in the not-too-distant future an app on the dashboard that would take account of relevant factors such as weather condition and traffic—information that is itself gathered by the information technology of networked monitors—and provide a recommended speed limit in real time. The prediction would be based on previous cases about how judges would apply a standard of reasonable speed under those circumstances.”)

132. See Hathaway, *supra* note 5, at 654 (identifying “a factor that courts should take into account as they determine the degree of deference to be granted to prior decisions.”)

133. See, e.g., MELVIN EISENBERG, *THE NATURE OF THE COMMON LAW* 73–74 (1988) (tracking the relationship between rule establishment and relevant community norms in the common law in the context of the example of *McPherson*

In the common law of contracts, a representative standard shift occurred in the middle of the 20<sup>th</sup> century away from the standard of *caveat emptor* towards the standard of reasonable fair dealing.<sup>134</sup>

Common law standard shifts are frequently influenced by non-state actors such as learned societies.<sup>135</sup> For example, the American Law Institute, through its Restatements of Law, frequently brings about standard change in light of perceived community needs.<sup>136</sup> One of the most famous examples of such a standard change is the introduction in the Restatement (Second) of Contracts of Promissory Estoppel in Section 90.<sup>137</sup> Another famous example concerns the introduction and development of the law of third party beneficiaries between the Restatement (First) of Contracts and the Restatement (Second) of Contracts by Arthur Corbin.<sup>138</sup>

In the constitutional context, the normative openness of standards is highly controversial.<sup>139</sup> The very point of originalist constitutional interpretation is to foreclose the

---

*v. Buick Motor Co.*)

134. Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SETON HALL L. REV. 70, 76 (1993) (discussing the trend away from *caveat emptor* towards a precontractual good faith standard); Thomas A. Wiseman Jr., *What Doth the Lord Require of Thee?*, 27 TEX. TECH. L. REV. 1403, 1404 (1996) (“There was a time in the law when we had a doctrine of *caveat emptor*—‘let the buyer beware.’ The law simply said that it was not the place of government to hold the buyer’s hand in the marketplace. The day of *caveat emptor* has been replaced by the age of consumerism and Ralph Nader and his raiders.”).

135. The fairness turn away from *caveat emptor* for instance was heavily influenced by academics such as Karl Llewellyn. Chad DeVeaux, *Trapped in Amber: State Common Law, Employee Rights, and Federal Enclaves*, 77 BROOK L. REV. 499, 499 (2012).

136. See Zechariah Chafee, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor’s Mouth on the Witness Stand?*, 52 YALE L.J. 607, 616 (1943) (noting the “powerful influence of the American Law Institute” in the context of uniform law projects).

137. Marco J. Jimenez, *The Many Faces of Promissory Estoppel: An Empirical Analysis under the Restatement (Second) of Contracts*, 57 UCLA L. REV. 669 (2010) (reviewing the reception of section 90 of Restatement (Second) by the courts).

138. Anthony Jon Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 HARV. L. REV. 1109, 1169–72 (1985) (discussing Corbin’s contribution to the drafting of Restatement (Second) of Contracts and its later influence on jurisprudence).

139. See John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303, 306 (2006); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852–64 (1989).

normative malleability of standards.<sup>140</sup> Originalism maintains that constitutional standards must be normatively faithful to the time of their drafting.<sup>141</sup> Depending upon the originalist author, standards further would have to be read in such a fashion as to limit judicial discretion as much as possible.<sup>142</sup> Other schools of constitutional interpretation vigorously contest both claims.<sup>143</sup>

Ultimately, much of the debate may appear to create a far more impressive obstacle to openness because the application of standards is factually open.<sup>144</sup> How various standards are met and what rules they imply in the context of a given society obviously changes.<sup>145</sup> In other words, it would be humorous to suggest that the Second Amendment protects the right to carry frontloading muskets only rather than updated forms of armament.<sup>146</sup> But in applying the original standard faithfully to new circumstances, new rules that address an unforeseen context will have to be established.<sup>147</sup> Most of the practical controversy centers on the question of whether a specific rule establishment is appropriate—a question that does not have to involve a change in standards at all but could stop at the earlier point of how an existing standard ought to be applied to a particular case.<sup>148</sup>

The purpose of government in accordance with a written constitution—as opposed to an unwritten constitution—precisely seeks to achieve closure with regard to the normative standards of constitutional government themselves.<sup>149</sup>

---

140. See Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 724–28 (2011) (summarizing scholarship of old and new originalists on constitutional standards).

141. *Id.*

142. Keith E. Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL'Y 599, 602 (2004) (“originalism was thought to limit the discretion of the judge”).

143. See *id.*

144. See discussion *supra* Part I.A.

145. See Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852 (2013).

146. *Id.* at 919 (“Conversely, pitching the abstraction too narrowly risks the near-‘frivolous’ argument that only muskets and black powder count as ‘arms,’ or that hanging a gun above the mantle is the only type of ‘keep[ing]’ that counts.”) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008)).

147. See Kerr, *supra* note 84, at 525–42 (discussing this process in the context of Fourth Amendment jurisprudence).

148. See Kerr, *supra* note 84, at 525–42.

149. See Douglas G. Smith, *Fundamental Rights and the Fourteenth Amendment: The Nineteenth Century Understanding of “Higher” Law*, 3 TEX.

Providing a written constitution signifies that a society at its founding seeks to provide a marker for the constitutional standards according to which it seeks to govern itself in the future—or, in the terms of the late John Rawls (the leading liberal political theorist of the 20<sup>th</sup> Century), the very act of social contracting means something.<sup>150</sup> A normative opening of these standards themselves—as distinguished from the application of these standards to new circumstances—is an effective change in the constitutive order of civil society.<sup>151</sup> It is a change to constitutional order rather than application of constitutional order.<sup>152</sup> These changes will have to perform in accordance with the requisite means of constitutional change set out in the document itself or risk effacing the form of constitutional government enshrined in the original document.<sup>153</sup>

This is of course not to say that constitutional law is immune from fundamental shifts in application that would tend to exceed simple rule changes.<sup>154</sup> Rule changes in fact can gain critical mass or aggregate to a tipping point at which a previous understanding of a constitutional standard is simply no longer tenable—the standard and the rules applying it have come to deviate in such a radical manner that the standard requires reinterpretation.<sup>155</sup> Such occurrences are

---

REV. L. & POL. 225, 240–43 (1999) (arguing that the choice of adopting a written constitution was a meaningful one). Many scholars supporting a dynamic reading of the constitution disagree with this assessment both as a matter of the historical accuracy and methodology. *See, e.g.*, AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION 1* (2012) (making the case for an unwritten constitution behind the written one); Todd E. Pettys, *The Myth of the Unwritten Constitution*, 84 NOTRE DAME L. REV. 991, 998–1000 (2009) (discussing both the historical and methodological reasons for a dynamic interpretation).

150. *See* JOHN RAWLS, *A THEORY OF JUSTICE* 120–21 (1972).

151. This form of interpretation falls between “skyscraper originalism” and “framework originalism” because it does not completely lock in meaning at the time of drafting of the constitution. JACK M. BALKIN, *LIVING ORIGINALISM* 22–23 (2011). This Article admits that constitutional standards were intended at the time of the drafting of the constitution to be expanded in a factually open manner. But it does not limit normative cloture to principles and instead applies a stop at the standard level.

152. *See id.*

153. U.S. CONST., art. V.

154. *See* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1051 (2001) (“We are in the middle of a paradigm shift that has changed the way that people write, think, and teach about American constitutional law.”)

155. Adeno Addis, *The Concept of Critical Mass in Legal Discourse*, 29

commonplace in the development of any mature constitutional jurisdiction.<sup>156</sup> The point is that even in this setting, a constitutional standard is never subject to outright replacement.<sup>157</sup> It can only be reinterpreted.<sup>158</sup> Such interpretation is backward looking as much as it is present-concerned.<sup>159</sup> It seeks to interpret historical text and deploys techniques to close the gap between the present day reality and the historicity of text.<sup>160</sup> Such interpretation cannot put aside the historical text and apply a standard that seems more prudent and well-adapted to present circumstances without textual analysis.<sup>161</sup> In fact, it may well be necessary to apply what one deems an inferior standard in those circumstances—a consequence that the common law faced with similar circumstances would cheerfully be able to avoid.

Intermediate normative openness in common law adjudication is the third modality of how U.S. law reacts to change or develops. The choice of a written constitution should entail that constitutional interpretation is not normatively open at the standard level.

### 3. Complete Normative Openness – Principles

Principles are the highest order normative prescriptions in U.S. law.<sup>162</sup> Principles codify the highest order normative abstraction giving cohesion to multiple standards.<sup>163</sup> U.S. law has more than one such principle.<sup>164</sup>

Complete normative openness means that law is open to

---

CARDOZO L. REV. 97 (2007).

156. See Alberto Vespaziani, *Comparison, Translation and the Making of a Common European Constitutional Culture*, 9 GERMAN L.J. 547, 573 (2008) (discussing constitutional paradigm shifts from a European perspective).

157. BALKIN, *supra* note 151, at 15 (“Constitutional doctrines created by courts, and institutions and practices created by the political branches, flesh out and implement the constitutional text and underlying principles. But they are not supposed to replace them.”)

158. BALKIN, *supra* note 151, at 10–11.

159. Francis J. Mootz, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas, and Ricoeur*, 68 B.U. L. REV. 523, 534–39 (1988) (discussing interpretation as fusion of the horizon of the past context of the text with the present context of its reception).

160. *Id.*

161. BALKIN, *supra* note 151, at 10–15.

162. See BALKIN, *supra* note 151, at 6, 14.

163. See BALKIN, *supra* note 151, at 6, 14.

164. BALKIN, *supra* note 151, at 6.

change in principles. Such a change in principles would require a fundamental change in the law at a higher order than even a change in standards.<sup>165</sup>

One might surmise that normative openness of standards implies a normative openness of principles. When standards change due to normative openness, this means that principles governing the area of law in question lose cohesive strength.<sup>166</sup> But shifts in standards may operate by analogy to existing legal principles governing different fact patterns and do not necessarily create new principles.<sup>167</sup> As a general rule therefore, principles, too are factually open and subject to change and adaption.

Principles are not normatively open in either the common law or constitutional adjudication. Constitutional principles have to be fixed for the constitutional document to have any residual meaning.<sup>168</sup> In the context of the common law, a change in principle would upset significant reliance interests on the part of civil society relying upon an application of existing principles rather than the invention of new principles.<sup>169</sup> A change in principle would lack democratic legitimacy given the function of the judiciary in the constitutional structure.<sup>170</sup> A change in principle due to outside influence therefore is to go one step too far.

### C. *Global Openness*

Global openness has two separate elements. One asks whether factual and normative openness operate differently with regard to outside stimuli simply because they are foreign.<sup>171</sup> The second element asks how openness

---

165. BALKIN, *supra* note 151, at 6.

166. See William J. Wagner, *The Contractual Reallocation of Procreative Resources and Parental Rights: The Natural Endowment Critique*, 41 CASE W. RES. L. REV. 1, 148 fn. 656 (1990) (“Theoretically, the principle of individual autonomy also has a corresponding tendency to erode the Lockean natural justice foundation of individual dignity that is implicitly necessary to validate freedom of contract.”).

167. Hathaway, *supra* note 5, at 628.

168. BALKIN, *supra* note 151, at 23.

169. Levin, *supra* note 18, at 1038.

170. Levin, *supra* note 18, at 1038.

171. See Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 709–10 (2005) (discussing four fundamental ways in which use of foreign law is inconsistent with political democracy at least in the context of constitutional adjudication).

substantively engages the world at large—*i.e.*, whether openness is not just a question of how constitutional adjudication and the common law operate but whether openness substantively is one of the goals of constitutional adjudication and the common law.<sup>172</sup>

1. *Global Implications of Factual and Normative Openness*

The distinction between a global and a national openness is ill-considered. Factual openness follows social events and not the other way around.<sup>173</sup> Normative openness similarly does not distinguish between domestic and global sources.<sup>174</sup>

In the context of constitutional interpretation, narrow normative openness can occur by reference to foreign rulemaking efforts involving similar factual problems in the same way as it borrows from other domestic sources.<sup>175</sup> For example, concerns over the criminal punishment of minors are not unique to the United States.<sup>176</sup> Taking into account foreign experiences in their rulemaking to deal with new juvenile crime thus could be instructive to anticipate problems.<sup>177</sup> To exclude such possibilities simply because of the source of factually relevant experience—foreign material as opposed to material from the several states—is shortsighted to the doctrinarian extreme.<sup>178</sup>

In the context of common law adjudication, intermediate

---

172. See Addis, *supra* note 3, at 948 (“[T]he exclusion of some traditions or experiences, in the name of a neutral (read: dominant) tradition, even if, as I shall show later, it is done in the name of either the rational individual agent or the rational community, from the discursive domain leads at best to a partial understanding of reality, and at worst to the transformation of the excluded into the deviant Other to be managed and dominated.”).

173. See discussion *supra* Part I.B.1.

174. Ronald Krotoszynski, *The Heisenberg Uncertainty Principle and the Challenge of Resisting – Or Engaging – Transnational Constitutional Law*, 66 ALA. L. REV. 105, 107 (2014) (“In a modern, globalized society, knowledge is viral, and once caught, cannot be easily shed.”).

175. See Madhavi Sunder, *Enlightened Constitutionalism*, 37 CONN. L. REV. 891, 905 (2005).

176. *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988); see also Po-Jen Yap, *Transnational Constitutionalism in the United States: Toward a Worldwide Use of Interpretive Modes of Comparative Reasoning*, 39 U.S.F.L. REV. 999, 1029-1030 (2005).

177. See Alford, *supra* note 171, at 710.

178. *Thompson v. Oklahoma*, 487 U.S. 815, 859, 868 fn. 4 (Scalia, J., dissenting).

normative openness can easily import foreign standards in the same way as it imports standards from other municipal sources such as the American Law Institute.<sup>179</sup> In fact, there is no cognizable problem for parties to rely upon the UCP principles to govern their dealings in documentary letters of credit—and the experience of adjudication applying the UCP can meaningfully inform the formulation of standards in the context of UCC Article 5.<sup>180</sup>

The distrust of foreign sources appears to be that the use of foreign materials would *per se* import alien principles and as such introduce complete normative openness through the backdoor.<sup>181</sup> This distrust is ill-founded as standards can be imported without importing the source principle to which they belong.<sup>182</sup> The foreign standard can be “translated” in the same sense that any literary text can be translated.<sup>183</sup> While the translation loses part of the meaning of the original—Commedia Dell’Arte in Italian is not Commedia Dell’Arte in English—it still faithfully connects the insight of foreign material to an ongoing domestic discourse—Commedia Dell’Arte in English influenced Shakespeare without transforming Shakespeare into an Italian author.<sup>184</sup> The same translation can and does occur in the field of legal standards.

In short, Justice Scalia’s now-famous conclusion that the development of U.S. constitutional interpretation has to occur without reference to contemporary foreign legal sources

---

179. See Kirsten David Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423, 443–45 (2004) (discussing the reasons for the influence of the ALI’s restatements of law).

180. James E. Byrne, *Contracting out of Revised UCC Article 5 (Letters of Credit)*, 40 LOY. L.A. L. REV. 297 (2006).

181. See *Thompson v. Oklahoma*, 487 U.S. 815, 859, 868 fn. 4 (Scalia, J., dissenting).

182. Gregory Shaffer, *Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of U.S. Privacy Standards*, 25 YALE J. INT’L L. 1, 38 (2000) (“[I]t is misleading simply to segregate the foreign from the domestic, the external from the internal. In importing and exporting goods and services, countries can also import standards and procedures.”).

183. See Cynthia Soohoo & Suzanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 FORDHAM L. REV. 459, 476 (2008) (discussing translation of human rights norms into the domestic context).

184. See Frances K. Barasch, *Hamlet Versus Commedia dell’Arte*, in SHAKESPEARE AND RENAISSANCE LITERARY THEORIES: ANGLO-ITALIAN TRANSACTIONS 105, 107 (Michele Marrapodi ed., 2011) (discussing the influence of the Commedia Dell’Arte on Shakespeare).

overreaches.<sup>185</sup> It is concerned with an inappropriate malleability of *standards* or *principles* occasioned by the use of foreign materials.<sup>186</sup> As foreign materials can be used to inform *rulemaking* consistent with existing constitutional standards, Justice Scalia's criticism simply is not warranted.<sup>187</sup>

## 2. Substantive Openness

This leaves the question whether the openness of constitutional interpretation and common law adjudication serves as a substantive goal above and beyond its role as an operational modality of legal change.<sup>188</sup> In such a case, openness would not just be a modality of legal change.<sup>189</sup> Openness would be a substantive goal in the same way as increasing prosperity of civil society or increasing its political freedoms.<sup>190</sup>

Both factual and normative openness strongly suggest that the openness of U.S. law is not an accident; it is part of its inherent design.<sup>191</sup> Thus, factual openness suggests that law continually seeks to adapt itself to its surroundings rather than forcing surroundings to fit outdated legal commands.<sup>192</sup> Normative openness further suggests a willingness on the part of courts not just to consider factual circumstances in rule application, but to incorporate factual circumstance into norm creation.<sup>193</sup> Both factual and normative openness suggest a positive attitude towards accommodating change in the outside world.

Jurisprudence suggests that both constitutional interpretation and common law adjudication treat inclusion as a goal in its own right. Civil rights jurisprudence over time extends the class of right holders. Cases which refuse to do so, *Dred Scott* and *Korematsu* chief among them, are considered

---

185. Antonin Scalia, *Foreign Legal Authority in Federal Courts*, 98 AM. SOC'Y INT'L L. PROC. 305, 307 (2004).

186. See McGinnis, *supra* note 139, at 306–07.

187. See discussion *supra* Part I.B.1.

188. See W. Michael Reisman, *Myth System and Operational Code*, 3 YALE STUD. W. PUB. ORDER 230 (1977) (discussing the difference between myth systems, operational codes, and the substantive goals of operational codes).

189. *Id.*

190. See discussion *infra* Parts II and III.

191. See discussion *supra* Parts I.A and I.B.

192. See discussion *supra* Part I.A.

193. See discussion *supra* Part I.B.

not just morally objectionable but a result of legal error.<sup>194</sup> In the realm of common law adjudication, doctrinal expansions of quasi-contract similarly extend rights-based regimes to those left without legislative protection for instance in the family law context.<sup>195</sup> In this sense, both constitutional interpretation and common law adjudication insist on expanding outwards through substantive openness rather than retreating into formal shells.<sup>196</sup> Such substantive openness means that U.S. law looks for opportunities to reach out; choosing between two alternatives, one inclusive and one exclusive, U.S. law seeks to be inclusive.

#### D. Openness and Evolutionary Path Dependence

The normative goal of openness laid out in this section provides a justification for the evolutionary path dependence described by Professor Hathaway.<sup>197</sup> She notes first that legal evolution does not reach “[a]n equilibrium—a single efficient outcome”<sup>198</sup> because even if such an outcome were to exist, “the adaptive rate of historical processes may proceed more slowly than changes in the environment, leading to a perpetual lag and, therefore, to a perpetual disparity between the institution or rule and its environment.”<sup>199</sup> Professor Hathaway further argues that “the evolution of the common law occurs

---

194. Scheindlin & Schwartz, *supra* note 16, at 841; David A. Harris, *On the Contemporary Meaning of Korematsu: “Liberty Lies in the Hearts of Men and Women,”* 76 MO. L. REV. 1, 9-10 (2011) (“For example, Justice Antonin Scalia ranked *Korematsu* among the worst decisions that the Supreme Court ever made, comparing it to the universally despised *Dred Scott* case, which helped plunge the nation into the Civil War. With the other justices opining about the case either in decisions or during their confirmation hearings, eight of the current justices of the Supreme Court have said that courts could not rely on the core principle of *Korematsu* today.”) *But see* Michael Halley, *Breaking the Law in America*, 19 LAW & LITERATURE 471, 477 (2007) (“The judgments in *Dredd Scott*, *Plessy v. Ferguson*, and *Korematsu v. U.S* confirm that yesterday’s best answers are sometimes today’s worst ones. Nor is anyone in a position to say how future generations will evaluate today’s judgments about what is right and what is wrong.”); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 406–11, 422–27 (2011) (recontextualizing both *Dred Scott* and *Korematsu* in then current jurisprudence and noting the cases’ consistency with that jurisprudence).

195. Judy Beckner Sloan, *Quantum Meruit: Residual Equity in Law*, 42 DEPAUL L. REV. 399, 423–24 (1992).

196. *See* *Wood v. Lucy*, 118 N.E. 214 (N.Y. 1917).

197. Hathaway, *supra* note 5, at 635–45.

198. Hathaway, *supra* note 5, at 640.

199. Hathaway, *supra* note 5, at 640.

sporadically” with “[l]ong periods of stasis . . . followed by rapid change . . . or ‘punctuation.’”<sup>200</sup> This “indicates the central importance of the brief but crucial punctuations that open up windows of opportunity for sweeping change.”<sup>201</sup> She further notes that “the periods between punctuations are characterized by gradual change” that is comparatively insignificant.<sup>202</sup> Hathaway raises as the key normative problem that constitutional law in particular is an area with significantly fewer punctuations and that constitutional law in particular is thus (potentially) significantly “out of sync with societal conditions.”<sup>203</sup>

The distinction between normative openness on the standard level and the rule level similarly explains the different rates of evolutionary change noted by Professor Hathaway.<sup>204</sup> There is the day-to-day gradual change of the common law that is accounted for by rule change.<sup>205</sup> But the common law is also subject to much more far-reaching normative shifts coalescing in much shorter periods of time—resembling paradigm shifts in scientific disciplines.<sup>206</sup> This second change occurs when standards shift, meaning that it is a different *kind* of change responding to a different, more fundamental type of normative openness of the common law.<sup>207</sup>

The distinction confirms that legal development *must* lag behind social development.<sup>208</sup> Law changes on the rule level as a result of factual openness.<sup>209</sup> This in turn means that the factual societal change precedes the change in the law.<sup>210</sup> Facts, in other words, are always embedded in a framework that is half a step behind social and economic change. While decisions gradually move this framework, the movement is stopped short of complete overlap because new rules still

---

200. Hathaway, *supra* note 5, at 641.

201. Hathaway, *supra* note 5, at 642.

202. Hathaway, *supra* note 5, at 643.

203. Hathaway, *supra* note 5, at 655–56.

204. Hathaway, *supra* note 5, at 641–45.

205. Hathaway, *supra* note 5, at 641–45.

206. For a discussion of Kuhn’s philosophy of science in the legal context, see Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1447–53 (1990).

207. See discussion *supra* Part I.B.2.

208. See Hathaway, *supra* note 5, at 640.

209. See discussion *supra* Part I.B.1.

210. See discussion *supra* Part I.B.1.

rationalize old standards.<sup>211</sup> Before reaching a social tipping point when either a critical mass of rules falling under a standard are so changed as to make the standard untenable or social change itself has made the standard untenable, law is by definition inefficient.<sup>212</sup> This inefficiency does not present a normative problem precisely because it moves towards a considered and organic integration of new circumstances. To do so in a sustainable and predictable way, law must give its development time to integrate and appropriately digest.

The conclusion that constitutional law is normatively closed at the standard level further confirms that observation that constitutional law has fewer punctuations than the common law.<sup>213</sup> This is desirable precisely because of the meaning of adopting a written constitution.<sup>214</sup> This written constitution freezes standards in order to achieve value other than efficiency or accommodate norms other than intuitive claims of social inequity. These norms are described by the other dimensions of development.

## II. PROSPERITY

The second dimension of development is prosperity. This dimension gives law height.<sup>215</sup> At its core, the second dimension of development posits that law develops in order to protect and foster the prosperity of those whom it governs.<sup>216</sup> Prosperity, in the form of economic growth, is a typical measure of development in the context of social science literature.<sup>217</sup> It is therefore unsurprising that it would be

---

211. See discussion *supra* Part I.B.1–2.

212. Addis, *supra* note 155.

213. See Hathaway, *supra* note 5, at 656.

214. See discussion *supra* Part I.B.2.

215. “Height of prosperity” is a common trope used in legal writing. See, e.g., James E. Clyburn, Developing the Will and the Way to Address Persistent Poverty in America, 51 HARV. J. ON LEGIS. 1, 7 (2014) (“In 2000, we were at the height of a decade of economic prosperity”); Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT’L L. 295, 303 (2013) (“The general prosperity attains a greater height, and is more widely diffused, in proportion to the amount and variety of the personal energies enlisted in promoting it.” (quoting JOHN STEWART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 58 (1861))).

216. Todd J. Zywicki, *The Rule of Law, Freedom, and Prosperity*, 10 SUP. CT. ECON. REV. 1, 22 (2003).

217. See, e.g., ARCHILLES C. COSTALES ET AL., ECONOMICS: PRINCIPLES AND APPLICATION 292 (2000) (“The level of income per person, i.e., gross national

represented in the definition of legal development, as well.

As discussed below, there are important distinctions between purely economic development and development in the legal context. In the legal context, prosperity is a means to an end rather than an end in itself.<sup>218</sup> It fulfills a central function to the sustainability of legal government.<sup>219</sup> This connection between prosperity and governance will be further explored in part III.

The dimension of prosperity provides a normative rationale to anchor increasing-returns path dependence.<sup>220</sup> As Professor Hathaway explains, increasing-return path dependence means that following the path of earlier legal decisions creates increasing returns for the judiciary—there is less effort and more precision in following precedent as compared to re-inventing the wheel to arrive at an original problem solution.<sup>221</sup> By focusing on prosperity as a dimension of legal development, it becomes apparent that increasing return path dependence creates efficiencies not only for the judiciary.<sup>222</sup> It also creates value for society at large by permitting property holders to plan and address risk in a reasonably predictable manner.<sup>223</sup>

#### A. *Prosperity in the Social Science Development Literature*

Social science literature typically defines development by reference to prosperity.<sup>224</sup> Development in the first instance refers to the gross national income per capita of a country.<sup>225</sup> It further looks to the debt level of the country in question in light of the country's gross domestic product.<sup>226</sup> Development

---

product per capita, has traditionally been used to measure the level of development of a particular nation. It suggests that income is a good approximate measure of overall social progress.”); AGNÈS BÉNASSY-QUÉRÉ ET AL., *ECONOMIC POLICY: THEORY AND PRACTICE* 440–41 (2010) (discussing the traditional measure of economic progress and its critics in the social sciences).

218. See discussion *infra* Part II.D.

219. See discussion *infra* Part II.D.

220. Hathaway, *supra* note 5, at 627–45.

221. Hathaway, *supra* note 5, at 627–45.

222. See discussion *infra* Part II.D.

223. See discussion *infra* Part II.D.

224. Addis, *supra* note 155.

225. Addis, *supra* note 155.

226. Punam Chuhan, *Debt and Debt Indicators in the Measurement of Vulnerability*, in *FISCAL SUSTAINABILITY IN THEORY AND PRACTICE: A*

in this context typically further refers to the standard of living enjoyed by the members of the society in question.<sup>227</sup> It further assesses the industrial and technological base of the target economy.<sup>228</sup>

This development measure further looks to technological advances.<sup>229</sup> It needs to measure the increase in living standards brought about through technological change—for instance, it is part of economic growth that it is the norm for U.S. households to own a car today when this was not the norm approximately 60 years ago.<sup>230</sup> Similarly, the increased availability of communications and computing technology provides a significant growth in prosperity by making more goods and services available at cheaper prices to a larger population.<sup>231</sup>

Such prosperity is predominantly an economic measure.<sup>232</sup> It looks to a society's wealth and its ability to produce more wealth.<sup>233</sup> It is not—or at least traditionally was not—predominantly an ethical measure.<sup>234</sup> In part, this economic focus reflects the problem of arriving at a neutral and quantifiable ethical measure with which to assess development.<sup>235</sup> Social science methodology traditionally required such neutral and quantifiable standards.<sup>236</sup> It is thus no surprise that qualitative factors are not at the core of the classic social science development paradigm.<sup>237</sup>

HANDBOOK 81, 94–95 (Craig Burnside ed., 2005).

227. Paul Riggs, *The Standard of Living in Scotland, 1800-1850*, in *LIVING STANDARDS, AND ECONOMIC DEVELOPMENT: ESSAYS IN ANTHROPOMETRIC HISTORY* (John Komlos ed., 1994) (defining standard of living in economics literature).

228. Fran Ansley, *Standing Rusty and Rolling Empty: Law, Poverty, and America's Eroding Industrial Base*, 81 *GEO. L.J.* 1757, 1760 (1993).

229. RICHARD R. NELSON, *THE SOURCES OF ECONOMIC GROWTH* 237–39 (1996) (addressing technological advances from an industry perspective).

230. DAVID E. O'CONNOR, *THE BASICS OF ECONOMICS* 241 (2004).

231. *Sub-Saharan Africa*, in *ACCESS DENIED: THE PRACTICE AND POLICY OF GLOBAL INTERNET FILTERING* 213, 213 (Ronald Deibert et al. eds., 2008)

232. *See supra* note 21.

233. *See supra* note 21.

234. *See* AMARTYA SEN, *COMMODITIES AND CAPABILITIES* 1, 12 (1999) (discussing the lack of coherent definition of “utility” in economics literature)

235. *Id.*

236. *See* Peter Manicas, *The Social Sciences Since World War II: The Rise and Fall of Scientism*, in *THE SAGE HANDBOOK OF SOCIAL SCIENCE METHODOLOGY* 7–24 (William Outhwaite & Stephen Turner eds., 2007) (summarizing the development of social scientific methodology).

237. *Id.*

### B. Prosperity in U.S. Law

Given the predominance of the economic definition of development in the social sciences, it should not be surprising that the definition of development proposed by this Article similarly looks to prosperity. Prosperity is a key component of standard-formation in U.S. law.<sup>238</sup> It had significant purchase in the drafting of the Constitution.<sup>239</sup> Most recently, it has shaped the U.S. legal experience in the second half of the 20<sup>th</sup> century.<sup>240</sup>

One such evidence of the importance of prosperity to U.S. law and legal development is the law and economics movement.<sup>241</sup> First, the very appearance of a law-and-economics movement in the U.S. is of some significance: whereas European economic analysis of law led to significant Marxist engagement of jurisprudence,<sup>242</sup> U.S. law and economics started from a “preference for markets over state command as a mechanism for allocating resources.”<sup>243</sup> Even since these early days, this market-friendly form of law and economics remained a particularly American form of legal engagement.<sup>244</sup> Second, the law and economics approach can

238. Richard A. Posner, *Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers*, 29 J. LEGAL STUD. 1153 (2000); Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829 (2003).

239. Clarence Thomas, *Remarks*, 48 DRAKE L. REV. 231, 231 (2000).

240. See Stephen M. Feldman, *The Supreme Court in a Postmodern World: A Flying Elephant*, 84 MINN. L. REV. 673, 680 (2000) (“Many Americans, including most legal scholars and political theorists, believed throughout the 1950s that the nation was united in a celebration of democracy and the rule of law. Moreover, they were confident that because of American know-how, prosperity, and power, democracy and the rule of law not only could suffice the lives of all Americans but also could beneficially shape the entire world.”).

241. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (7<sup>th</sup> ed., 2007).

242. See RENATE HOLUB, *ANTONIO GRAMSCI: BEYOND MARXISM AND POSTMODERNISM* 43–44 (1992) (discussing Gramsci’s engagement of law through Marxist economics).

243. Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993, 1056–57 (1990).

244. See Thomas S. Ulen, *The Unexpected Guest: Law and Economics, Law and Other Cognate Disciplines, and the Future of Legal Scholarship*, 79 CHI.-KENT L. REV. 403, (2004) (noting that realism is a uniquely American school of jurisprudence and linking it to law and economics); Kristoffel Grechenig & Martin Gelter, *The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism*, 31 HASTINGS INT’L & COMP. L. REV. 295, 297–98 (2008) (noting the alien approach to law taken by law and economics from a European perspective).

make sense of U.S. legal phenomena that are otherwise hard to understand or justify.<sup>245</sup> For example, law and economics has been a uniquely powerful tool in understanding the law of negligence,<sup>246</sup> nuisance,<sup>247</sup> contract law,<sup>248</sup> the intersection between tort and property,<sup>249</sup> and, perhaps less surprisingly, antitrust law.<sup>250</sup> Both the very existence of this uniquely American school of jurisprudence and its ability accurately to describe U.S. law in economic terms showcases just how central prosperity is to the values legal development seeks to foster.

Property protections enshrined in the Constitution further highlight the importance of economic growth to U.S. constitutional design.<sup>251</sup> Takings jurisprudence in particular provides a mechanism that requires in theory that governmental action increases net prosperity rather than decrease it by requiring the payment of compensation to affected property holders for the complete destruction of their property rights—unless the prosperity of the commonwealth itself depends upon *not* making such compensation.<sup>252</sup>

The importance of economic wellbeing to constitutional design is further confirmed by the concerns foremost on the

---

245. Thomas S. Ulen, *Remarks*, 10 LEWIS & CLARK L. REV. 177, 177 (2006) (“advances in legal understanding that flowed from that application were huge”).

246. Richard Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 853 (1988); Richard A. Posner, *Guido Calabresi’s The Cost of Accidents: A Reassessment*, 64 MARYLAND L. REV. 12 (2005).

247. Henry E. Smith, *Exclusion and the Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 966 (2004) (citing R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960)).

248. See *infra* note 238.

249. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089 (1972).

250. William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 937 (1981).

251. Alberto B. Lopez, *Weighing and Reweighing Eminent Domain’s Political Philosophies Post-Kelo*, 41 WAKE FOREST L. REV. 237, 252-3 (2006); Henry A. Span, *Public Choice and the Political Utility of the Takings Clause*, 40 IDAHO L. REV. 11, 81 (2003) (“judicial enforcement of the Takings Clause should aim at creating a sustainable democratic framework for debating, bargaining, and achieving fairness, liberty, prosperity, virtue, human fulfillment, and other values”).

252. *State v. Jacobson*, 157 P. 1108, 1111 (Or. 1916); Keith H. Hirokawa, *Property Pieces in Compensation Statutes: Law’s Eulogy For Oregon’s Measure 37*, 38 ENV’T L. L. 1111, 1133 (2008) (discussing *State v. Jacobson*)

minds of the U.S. founding generation.<sup>253</sup> The American revolution was sparked in significant part by British impairment of American economic interests.<sup>254</sup> The concern to protect economic rights was very much on the minds of the drafters of both the Declaration of Independence and the Constitution.<sup>255</sup>

### C. *Prosperity v. Wealth*

Importantly, prosperity needs to be distinguished from wealth. The difference between both measures is most readily apparent in the context of wealth disparity.<sup>256</sup> A wealth measure does not distinguish how resources are distributed in an economy.<sup>257</sup> A prosperity measure, on the other hand, does take resource distribution into account.<sup>258</sup>

Economic and social scientific development data more and more takes the distinction between prosperity and wealth into account.<sup>259</sup> The distinction thus is not unorthodox from the point of view of the classic development literature.<sup>260</sup> But the prosperity/wealth distinction has a far longer pedigree in the constitutional context than it does in the economic or social scientific context, going as far back as the founding of Athenian democracy.<sup>261</sup>

---

253. THOMAS P. SLAUGHTER, *INDEPENDENCE: THE TANGLED ROOTS OF THE AMERICAN REVOLUTION* 435 (2014).

254. *Id.*

255. Maureen B. Cavanaugh, *Democracy, Equality, and Taxes*, 54 ALA. L. REV. 415, 431–32, 456–57 (2003).

256. Chris Matthews, *Wealth Inequality in America: It's Worse Than You Think*, FORTUNE (Oct. 31, 2014), <http://fortune.com/2014/10/31/inequality-wealth-income-us/>.

257. JACQUELINE BRUX, *ECONOMIC ISSUES AND POLICY* 166 (2007).

258. Sotirios A Barber & James E. Fleming, *The Canon and the Constitution Outside the Courts*, 17 CONST. COMMENT. 267, 268–69 (2000) (noting the middle class, or here pejoratively bourgeois, nature of the aspiration to prosperity); Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1697 (1998) (same); GARY HART, *RESTORATION OF THE REPUBLIC: THE JEFFERSONIAN IDEAL IN 21-ST CENTURY AMERICA* 195–96 (2002) (discussing the republican theory of wealth disparity as a threat to sustainable self-government without domination).

259. *Id.*

260. BRUX, *supra* note 257, at 166.

261. VICTOR DAVIS HANSON, *THE OTHER GREEKS: THE FAMILY FARM AND THE AGRARIAN ROOTS OF WESTERN CIVILIZATION* 43 (1999) (“After all, farmers themselves knew the value of banding together to preserve their own hard-won gains against the wealthy in a no-nonsense pragmatism that in every early timocratic agricultural city-state checked radicalism and, eventually, the

From the point of view of U.S. constitutional design, the distinction has normative importance. Seeking prosperity here does not necessarily mean that law should increase the gross domestic product, or gross national income, but that law must protect the rights and earning opportunities of the citizenry at large.<sup>262</sup> Prosperity looks to maintain, foster, and expand a broad middle class by protecting its property rights.

*Kelo v. City of New London* provides a tangible example of this difference.<sup>263</sup> In *Kelo*, the United States Supreme Court sanctioned the use of eminent domain in order to condemn real property to apparently more efficient use by a developer.<sup>264</sup> This development was quickly decried as legal error.<sup>265</sup> The error here is not that the decision would not prove to use resources more efficiently and thus support wealth creation—the decision did exactly that. Rather, the error was that law could be turned against what prosperity is meant to protect: the property interests of the ordinary citizen.<sup>266</sup>

#### D. Prosperity and Increasing>Returns Path Dependence

The normative goal of prosperity laid out in this section provides a justification for the increasing-returns path dependence described by Professor Hathaway.<sup>267</sup> Increasing return path dependence means that the precedent fixes the

---

excesses of both aristocracy and democracy.”)

262. DAVID J. BEDERMAN, *THE CLASSICAL FOUNDATIONS OF THE AMERICAN CONSTITUTION: PREVAILING WISDOM* 101 (2008) (“The Constitutions thus enshrined some classical notions of property ownership as being a surrogate for the political worth of individuals. It is, as Madison noted in a somewhat unrelated context in *Federalist* 10 that inequality manifests itself in the ‘different and unequal faculties of acquiring property,’ the protection of which is the ‘first object of government.’ While no attempt need be made here to resurrect a purely economic reading of the Constitution as vindicating the interests of the propertied classes in America, there was a manifest understanding among the Framing generation that the maintenance of some forms of property qualifications for voting was a necessary bulwark against the degradation of republican virtues.”)

263. *Kelo v. City of New London*, 545 U.S. 469 (2005).

264. *Id.* at 488–89.

265. Gideon Kanner, *The Public Use Clause: Constitutional Mandate or “Hortatory Fluff”?*, 33 PEPP. L. REV. 335, 336 (2006); Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183, 271 (2007).

266. Gideon Kanner, *Kelo v. New London: Bad Law, Bad Policy, and Bad Judgment*, 38 URB. LAW. 201, 201 (2006).

267. Hathaway, *supra* note 5, at 627–45.

point of departure for legal analysis.<sup>268</sup> This means that early cases first encountering an issue are comparatively more important in fixing the court's jurisprudential approach than later disputes that arise once a path has been chosen.<sup>269</sup> Increasing-returns path dependence "generates significant self-reinforcing or adaptive expectations."<sup>270</sup> Problematically, "even when judges seek to create legal rules to advance their positions in the future, they are unable to predict or control whether their decisions will create precedents that will necessarily lead to particular results in future cases" because they cannot anticipate all future consequences of their current problem solutions enshrined in early case law.<sup>271</sup> The inflexibility brought about by increasing-returns path dependence in short at first blush borders on arbitrariness because it can lock in economic inefficiencies and social inequities until such time as a broader standard shift or reinterpretation is brought about by cumulative circumstance.<sup>272</sup>

Prosperity goes a long way to explaining why such inefficiencies and inequities are valuable. As Professor Hathaway points out, increasing-returns path dependence creates reliance interests.<sup>273</sup> These interests themselves are economically valuable because they protect existing property interests against significant upheaval and permit medium term planning without fear of change in law. Current property interest holders thus are similarly reaping increasing returns from the path dependence of law because of the greater predictability in business environment such increasing returns promise.

Increasing returns also provides a clear roadmap for social mobility. While the path is difficult, it is possible to make investment in self-improvement that will reap comparative long term rewards (such as, for instance, investing in studying for a law degree). While increasing returns create a gap for those who do not yet have the right kind of interests to benefit from this form of path dependence, increasing-returns path

---

268. Hathaway, *supra* note 5, at 624.

269. Hathaway, *supra* note 5, at 630.

270. Hathaway, *supra* note 5, at 628.

271. Hathaway, *supra* note 5, at 629.

272. Hathaway, *supra* note 5, at 630-32.

273. Hathaway, *supra* note 5, at 628.

dependence is of significant value to all others.

Prosperity, in other words, is not a tool to address the quantitatively worst kind of income inequality. Prosperity as a goal assists property-holders.<sup>274</sup> Almost by definition, the poor are not a member of this class.<sup>275</sup> The prosperity dimension of legal development does not immediately speak to their needs or interests.<sup>276</sup> Prosperity looks to increase the group of property-holders through robust property protections and as such indirectly addresses poverty.<sup>277</sup> But this protection does very little to address the intuitive area of greatest concern regarding income inequality—that between richest and poorest.<sup>278</sup> To that group, and their champions in academic political theory, this dimension of legal development, standing alone, would simply seem unjust.<sup>279</sup> As discussed further below, however, it does not stand alone.

### III. FREEDOM

The third dimension of legal development is freedom. Freedom gives law depth.<sup>280</sup> At its core, the third dimension of development posits that law develops in order to protect and foster the freedoms of those whom it governs.<sup>281</sup>

Freedom is becoming a recognized measure of development in the social sciences.<sup>282</sup> Reliance upon a freedom

274. Arthur S. Miller, *Pretense and Our Two Constitutions*, 54 GEO. WASH. L. REV. 375, 384–85 (1986); BEDERMAN, *supra* note 262, at 99.

275. See Susan Ann Silverstein, *What Is Poverty?*, 32-SUM HUM. RTS. 1, 22–23 (2005).

276. See *id.*

277. See Peter Boettke et al., *Takings*, 8 GEO. J. L. & PUB. POL'Y 327, 335 (2010).

278. See GLENN FIREBAUGH, *THE NEW GEOGRAPHY OF GLOBAL INCOME INEQUALITY* 121 (2003).

279. See RAWLS, *supra* note 150, at 75–78 (setting out the difference principle that justice requires that resource distributions always favor the least advantaged in society).

280. Gregory P. Magarian, *Substantive Due Process as a Source of Constitutional Protection for Nonpolitical Speech*, 90 MINN. L. REV. 247, 249 (2005) (noting in the First Amendment context that “[a]n ideal regime of expressive freedom would protect political debate with the depth of the democracy-focused First Amendment paradigm while simultaneously casting a broad enough net to safeguard speech that substantively advances autonomy.”).

281. As discussed below, this dimension is closely linked to principles of self-government, or as Jack Balkin calls it, the principle of democracy. BALKIN, *supra* note 103, at 15.

282. SEN, *supra* note 23, at 3.

dimension of development is thus in keeping with the current state of social scientific research into what development must encompass.<sup>283</sup> The predominant measure of freedom in the social sciences is the capabilities approach developed by Sen and Nussbaum, among others.<sup>284</sup> While their advances are by no means uncontroversial, they indicate a willingness in the social sciences to look beyond economics.<sup>285</sup>

Given the central importance of freedom to the rule of law, legal development intuitively must take freedom into account. It is ubiquitous as a value of development throughout U.S. law.<sup>286</sup> Although the capabilities approach as such is not organic to U.S. law, a republican conception of freedom as non-domination is.<sup>287</sup> This conception of freedom is consistent with the capabilities approach as a metric for freedom developed in the social sciences.<sup>288</sup>

By introducing freedom as a dimension of legal development, it is possible to explain why sequencing path dependence is both good and necessary.<sup>289</sup> Absent sequencing path dependence, fundamental questions of social welfare would be locked in and not subject to change by those whom the law governs.<sup>290</sup> The law itself would become a dominating force.<sup>291</sup> Sequencing path dependence—and legal indeterminacy—thus are relevant and important to maintain law as much in the position of an umpire of social discourse rather than an empire of judicial fiats.<sup>292</sup>

#### A. *The Link Between Freedom, Prosperity, and Openness in Social Science Research*

The link between freedom and prosperity is intuitive: prosperity appears to provide a means to freedom and vice

---

283. James M. Cypher & James L. Dietz, *THE PROCESS OF ECONOMIC DEVELOPMENT* 47 (2d ed. 2004) (discussing the introduction of the Human Development Index).

284. See discussion *infra* Part III.A.

285. John A. Powell, *The Needs of Members in a Legitimate Democratic State*, 44 *SANTA CLARA L. REV.* 969 (2004) (surveying the social scientific literature on Sen and the Human Development Index).

286. See discussion *infra* Part III.B.

287. See discussion *infra* Part III.C.

288. See discussion *infra* Part III.C.

289. See discussion *infra* Part III.D.

290. See discussion *infra* Part III.D.

291. See discussion *infra* Part III.D.

292. See discussion *infra* Part III.D.

versa. Nobel Prize winning economist Sen crisply posits this link between freedom and prosperity in *Development as Freedom*.<sup>293</sup> Sen submits that increasing prosperity is an important element to increasing freedom because it limits income poverty.<sup>294</sup>

The link between freedom and openness is similarly intuitive: an open society provides its members with more potential, more options to choose from and as such increases freedom in a meaningful way. Sen's capabilities approach again provides a helpful tool.<sup>295</sup> A society which is open will increase capabilities simply by removing external obstacles a closed society erects.<sup>296</sup> But again, openness alone does not define capabilities as a person must have the means available to take advantage of openness.

While freedom, openness and prosperity are related, they each measure different things. A person could be prosperous but not free.<sup>297</sup> A person could live in an open society and not be prosperous.<sup>298</sup> Similarly, it is not absurd to consider a person living in makeshift shelter and without any possessions free.<sup>299</sup> But all three are plainly related and compatible.

Sen's and Nussbaum's work has moved the social-science development discourse away from a purely economic model to a capabilities model.<sup>300</sup> As Sen argues, a purely economic model is insufficient to measure development for two reasons. First, income does not alone determine whether a person can participate in self-governing processes. In other words, income does not address the institutions governing society. Second, income does not alone determine what opportunities are in fact going to be open to the respective members of society.<sup>301</sup> In other words, income does not address what kind of lives

---

293. SEN, *supra* note 23, at 14.

294. SEN, *supra* note 23, at 87.

295. SEN, *supra* note 23, at 72–86.

296. SEN, *supra* note 23, at 245–46.

297. See Reed Elizabeth Loder, *Integrity and Epistemic Passion*, 77 NOTRE DAME L. REV. 841, 885 (2002) (discussing “golden handcuffs” in legal practice).

298. Cf. John Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1973 (1998) (noting that “ghetto poor are really removed from open society”).

299. See Kwame Anthony Appiah, *Global Citizenship*, 75 FORDHAM L. REV. 2375, 2375–76 (2007) (relaying the story of the encounter of Diogenes and Alexander).

300. SEN, *supra* note 23, at 74–76.

301. SEN, *supra* note 23, at 74–76.

members of society could actually choose to live.

To address both concerns, Sen and Nussbaum develop an approach that looks to the impact of society on the capabilities of members of society:

The CA [capabilities approach] begins, then, from a very simple question: What are people really able to do and to be? “Capabilities” are the answer to that question: people’s real opportunities for functioning and choice. (Sen calls capabilities “substantive freedoms.”) Proponents of a CA hold that each and every person matters: this is what Nussbaum has called the “principle of each person as end.” In other words, it is not enough to secure capabilities to a region, or a group, or even a family. The approach asks how each and every person is doing, and its goal is the empowerment of each.<sup>302</sup>

As social science research relying upon Sen and Nussbaum has shown, development is not a purely economic measure.<sup>303</sup> To speak of the development impact of law does not look to purely economic indicators.<sup>304</sup> To say that law is inefficient, *i.e.*, that it leads to an economically sub-optimal result, does not mean that the law is detrimental to development.<sup>305</sup> It is not even to say that a different mode of governance would improve development. It simply says that law values a certain kind of inefficiency and provides a metric to determine whether this valuation is normatively defensible by reference to the value of freedom.

### B. Freedom in U.S. Law

Freedom is a central tenet of U.S. jurisprudence both in the context of constitutional interpretation and in the context of common law adjudication.<sup>306</sup> The importance of freedom to U.S. jurisprudence has pedigree. English common law developed as part of the social resistance to regal power—vested in the hands of the King’s appointed Lord Chancellor.<sup>307</sup>

---

302. Rosalind Dixon & Martha Nussbaum, *Children’s Rights and the Capabilities Approach: The Question of Special Priority*, 97 CORNELL L. REV. 549, 557 (2012).

303. *Id.* at 556–57.

304. *See supra* notes 295–97.

305. Hathaway, *supra* note 5.

306. Terry L. Anderson & Lea-Rachel Kosnik, *Sustainable Skepticism and Sustainable Development*, 53 CASE W. RES. L. REV. 439, 442 (2002).

307. THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW

In fact, one of the most well-known writs was developed by the common law courts literally to secure the freedom of the subjects of the realm against legal overreach—the writ of *habeas corpus*.<sup>308</sup>

In the context of U.S. constitutional interpretation, freedom is a central part of the Bill of Rights and later constitutional amendments. The First Amendment enshrines the freedom of speech and religion.<sup>309</sup> The Second Amendment links the right of the people to keep and bear arms to the security of a free state.<sup>310</sup> The Third Amendment secures the freedom of the population against military requisitions.<sup>311</sup> The Fourth Amendment secures the freedom of the person and his possession from unreasonable searches and seizures.<sup>312</sup> The Fifth Amendment protects the freedom from abuse of criminal process and the freedom of property ownership and so on.<sup>313</sup>

Freedom—or more precisely the construction of sustainable government for a free society—is the core purpose of the body of the 1787 Constitution before the addition of the Bill of Rights.<sup>314</sup> The framers purposefully designed the United States Constitution on the model of a “mixed” constitution,<sup>315</sup> or “a constitution containing monarchical, aristocratic, and democratic elements.”<sup>316</sup> The purpose of such a mixed

57–58 (5th ed., 2001).

308. *Id.*

309. Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2301–06 (2014) (setting out the infrastructure of free expression).

310. Robert J. Cottrol & Raymond T. Diamond, *In The Civic Republic: Crime, the Inner City, and the Democracy of Arms-Being a Disquisition on the Revival of the Militia at Large*, 45 CONN. L. REV. 1605, 1605 (2013) (arguing that the “Second Amendment’s notion of a universal militia can be the basis of a new partnership between police and citizens in urban America” that “can, if properly developed, be a useful tool in fighting crime in inner-city communities.”).

311. Thomas L. Avery, *The Third Amendment: The Critical Protections of a Forgotten Amendment*, 53 WASHBURN L.J. 179, 179–80 (2012) (“By prohibiting quartering, the Framers sought to bar the projection of military power into the home during peacetime in order to protect both property and privacy.”).

312. Kerr, *supra* note 84.

313. Ryan C. Williams, *The Paths to Griswold*, 89 NOTRE DAME L. REV. 2155, 2169–72 (2014) (discussing the importance of liberty in jurisprudence construing the Fifth Amendment).

314. Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. 489, 502 (2011).

315. See Gerhard Casper, *Executive-Congressional Separation of Power During the Presidency of Thomas Jefferson*, 47 STAN. L. REV. 473, 476 (1995).

316. See Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution’s Guarantee Clause*, 80 TEX. L. REV., 807, 831–

constitution is to provide the governmental structures necessary to secure the political freedom of society from rule by faction, mob rule, or tyranny.<sup>317</sup> It is in this sense then that the original 1787 Constitution sought to “secure the Blessings of Liberty to ourselves and our Posterity.”<sup>318</sup>

Freedom is central in various branches of the common law.<sup>319</sup> It is axiomatic principle in the common law of contracts,<sup>320</sup> torts,<sup>321</sup> and property.<sup>322</sup> It is a common theme that weaves its way through the entire web of common law jurisprudence.<sup>323</sup>

As central as the concept of “freedom” is, there is no ready single legal definition of what the term means.<sup>324</sup> Freedom can refer to multiple different values that at times appear incompatible.<sup>325</sup> Typically, political theory distinguishes

32 (2002). The idea of a mixed constitution originates with Polybius’ description of the Roman constitution. John Lawrence Hill, *A Third Theory of Liberty: The Evolution of the Conception of Freedom in American Constitutional Thought*, 29 *Hastings Const. L.Q.* 115, 137, fn. 83 (2002). It became popularized in modern times by Renaissance Italian constitutional thought. See LAURO MARTINES, *POWER AND IMAGINATION, CITY STATES IN RENAISSANCE ITALY* 312–14 (1979) (discussing the influence on mixed constitutionalism on the appraisal of Venetian and Florentine republican experiences). This understanding traveled to the United States and informed the drafting of the U.S. Constitution. DAVID J. BEDERMAN, *THE CLASSIC FOUNDATIONS OF THE AMERICAN CONSTITUTION: PREVAILING WISDOM* 75 (2008) (discussing the influence of mixed constitutionalism on Adams).

317. See Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 *CHI.-KEN L. REV.* 987, 1009 (1997) (“The mixed constitution, so perfect in theory for its capacity to control power through the creation of separate and counterbalancing bodies in government, had been subverted in practice by executive undermining of legislative independence.”).

318. U.S. CONST., pmbl; see also Alexander Tsesis, *Maxim Constitutionalism: Liberal Equality for the Common Good*, 91 *TEX. L. REV.* 1609, 1640 (2013) (discussing Hamilton’s explanation of the preambular phrase).

319. See Steven J. Eagle, *Penn Central and its Reluctant Muftis*, 66 *BAYLOR L. REV.* 1, 10 fn. 48 (2014).

320. E. Allan Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 *COLUM. L. REV.* 576, 599–607 (1969) (discussing the role of freedom of contract in modern contract law).

321. Guido Calabresi, *Torts – The Law of the Mixed Society*, 56 *TEX. L. REV.* 519, 521 (1978).

322. UGO MATTEI, *BASIC PRINCIPLES OF PROPERTY LAW: A COMPARATIVE LEGAL AND ECONOMIC INTRODUCTION* 38 (Praeger ed., 2000).

323. See *supra* notes 313–16.

324. See Mark Pettit Jr., *Freedom, Freedom of Contract, and the ‘Rise and Fall’*, 79 *B.U. L. REV.* 263, 267 (1999) (noting the contradictory meanings of freedom in the context of freedom of contract).

325. *Id.*

between negative freedoms (freedom from someone or something) and positive freedom (freedom to do something).<sup>326</sup> These freedoms are largely viewed as incompatible with each other.<sup>327</sup> The question thus remains which form of freedom is inherent in U.S. law and whether this form of freedom is in fact the same kind used in social science research in measuring and defining development.

### *C. Freedom as Non-Domination*

This Article posits that freedom in U.S. law is at the very least consistent with the paradigm of non-domination, or republican freedom.<sup>328</sup> Freedom as non-domination follows the civic humanist tradition.<sup>329</sup> Civic humanism came into its own in 1400s Italian Renaissance thought.<sup>330</sup> It spread quickly to the rest of Europe and England.<sup>331</sup> Civic humanism deeply influenced political thinkers up to and perhaps including Montesquieu.<sup>332</sup>

Contemporary theorists such as Quentin Skinner and Philip Pettit recently re-theorized freedom as non-domination.<sup>333</sup> At core, their theory defines freedom as

---

326. For a full discussion, see Frederic G. Sourgens, *Functions of Freedom*, 48 *VAND. J. TRANSNAT'L L.* 471, 518–28 (2015).

327. *See id.* at 518.

328. *See, e.g.*, Gregory S. Alexander, *Property's Ends: The Publicness of Private Law Values*, 99 *IOWA L. REV.* 1257, 1277–84 (2014) (discussing the importance of non-domination to the law of property); Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 *GEO. L.J.* 1411, 1428–31, 1478–84 (2008) (setting out the theory of non-domination and applying in the context of election law); Glen Staszewski, *Statutory Interpretation as Contestatory Democracy*, 55 *WM. & MARY L. REV.* 221, 240–45 (2013) (applying non-domination theories of freedom to statutory interpretation).

329. ERIC NELSON, *THE GREEK TRADITION IN REPUBLICAN THOUGHT* 8–9 (2004) (discussing the historical study of civic humanism in the modern history of ideas).

330. *See* QUENTIN SKINNER, 1 *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* 70–72 (Cambridge Univ. Press ed., 1978) (discussing the roots of civic humanism and its full emergence in the early 1400s).

331. *See id.* at 193–212.

332. Céline Spector, *Montesquieu: Critique of Republicanism?*, in *REPUBLICANISM: HISTORY, THEORY, AND PRACTICE* 38, 39 (Daniel Weinstock & Christian Nadeau eds., 2004) (outlining the scholarly debate whether Montesquieu remained a humanist or was an enlightenment liberal).

333. *See* PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (Oxford Univ. Press ed., 1997); *see also* QUENTIN SKINNER, *LIBERTY BEFORE LIBERALISM* (Cambridge Univ. Press ed., 1998).

independence of members of a society from arbitrary power.<sup>334</sup> Freedom requires that no one has “the capacity to interfere in their affairs on an arbitrary basis.”<sup>335</sup> This conception of freedom as non-domination overcomes the modern dichotomy between negative and positive freedom.

The republican conception of liberty is akin to the negative conception in maintaining that what liberty requires is the absence of something, not necessarily the presence. It is akin to the positive conception, however, in holding that that which must be absent has to do with mastery rather than interference. Freedom consists, not in the presence of self-master, and not in the absence of interference by other, but rather in the absence of mastery by others: in the absence, as I prefer to put it, of domination.<sup>336</sup>

There is a strong historical case for republican freedom. Civic humanism—and its republican conception of freedom—predominated in the formative periods of English common law, the English revolution, and American constitutional thought.<sup>337</sup> Concepts of freedom influenced the English revolution.<sup>338</sup> They were similarly influential in the context of the American Revolution<sup>339</sup> and the drafting of the U.S. Constitution.<sup>340</sup> The use of a republican conception of freedom therefore is largely consistent as a historical matter with the original principles upon which the Constitution was based.<sup>341</sup> Non-domination in other words is a conception of freedom that is consistent with the requirements of the partial openness of constitutional interpretation outlined in Part I.<sup>342</sup>

The paradigm of non-domination is further analytically consistent with the contemporary logic of equal protection. Non-domination seeks to extend legal protection to all in equal manner such as to deprive any one person or group of the

---

334. PETTIT, *supra* note 333 at 55 (defining arbitrary power procedurally as interference “without reference to the interests, or the opinions, of those affected”); SKINNER, *supra* note 330, at 70.

335. Philip Pettit, *Republican Freedom and Contestatory Democratization*, in DEMOCRACY’S VALUES 163, 165 (Ian Shapiro et al. eds., 1999).

336. *See id.*

337. *See* POCOCK, *supra* note 47, at 333–551.

338. *See id.* at 361–71.

339. *See id.* at 506.

340. *See id.* at 522–23; BEDERMAN, *supra* note 262, at 1.

341. *See* POCOCK, *supra* note 47, at 522–23.

342. *See* discussion *supra* Part I.B.2.

capacity to dominate others by legal means.<sup>343</sup> Equal protection in republican theory serves as a safeguard against arbitrary interventions.<sup>344</sup> Equal protection as developed in jurisprudence similarly seeks to prohibit “discrimination that is arbitrary or otherwise unjustified,”<sup>345</sup> thus providing a point of overlap with the concern of republican freedom: arbitrary interference.<sup>346</sup>

Equal protection jurisprudence, like republican freedom, uses a procedural definition of arbitrariness.<sup>347</sup> Thus, “for decades, heightened judicial scrutiny has been the holy grail of equal protection advocacy.”<sup>348</sup> One way to achieve heightened scrutiny is proof of reliance by the challenged law upon a suspect or quasi-suspect classification.<sup>349</sup> To determine whether the challenged law relies upon suspect or quasi-suspect classification, the Court consults suspect classification criteria, famously originating in footnote four of *United States v. Carolene Products Co.*<sup>350</sup> “To ‘qualify’ as a suspect classification, the group disfavored under that classification must: (1) be politically powerless; (2) have suffered a history of discrimination; (3) be defined by an immutable trait; and (4) be a discrete and insular minority.”<sup>351</sup> The Court has also looked at a fifth element: the extent to which the trait relates to one’s ability to participate in society, such that the trait is presumptively more or less relevant to legitimate legislative goals.”<sup>352</sup>

Factors one through four look to procedural arbitrariness: they look not to the quality of the reasons provided for the classification.<sup>353</sup> They look instead to the ability of the affected

---

343. Pettit *supra* note 324, at 55 (defining arbitrary power procedurally as interference “without reference to the interests, or the opinions, of those affected”); SKINNER LIBERTY, *supra* note 333, at 70.

344. See, e.g., Note, *A Madisonian Interpretation of the Equal Protection Doctrine*, 91 YALE L.J. 1403–29 (1982).

345. Susannah W. Pollvogt, *Marriage Equality*, *United States v. Windsor, and the Crisis in Equal Protection Jurisprudence*, 42 HOFSTRA L. REV. 1045, 1046–47 (2014).

346. See Pettit, *supra* note 324, at 55.

347. See Pollvogt, *supra* note 345, at 1046–47.

348. *Id.* at 1049.

349. *Id.* at 1050.

350. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

351. See *id.*

352. *Id.* at 1052.

353. See *id.*

group to provide substantive input into—and be heard as part of—the underlying legislative deliberations. Substantive arbitrariness is only then considered at the next stage of the equal protection analysis, but against a higher reasons requirement than if the underlying action had not been procedurally arbitrary.<sup>354</sup>

The paradigm of non-domination also historically and analytically accounts for the development of the common law. The historical influences on constitutional law discussed above similarly had a lasting impact on the development on English and early-American common law.<sup>355</sup> The historical roots therefore would suggest that as a matter of starting point at least non-domination is an important conception of freedom for an understanding of common law development.<sup>356</sup>

This historical hypothesis can be tested against more recent additions to the common law such as the law of unconscionability in the law of contracts. Unconscionability seeks to protect parties against deeply oppressive bargains.<sup>357</sup> To do so, unconscionability looks to procedural and substantive elements.<sup>358</sup> The procedural elements often require an examination of whether there was an absence of “meaningful choice” on the part of the weaker party.<sup>359</sup> Substantive unconscionability then looks to whether the bargain was “unfair.”<sup>360</sup> The ultimate gateway question, as the literature has shown, is whether there is a strong procedural flaw in the bargain that would lead to a situation of domination.<sup>361</sup> Although unconscionability does not give a remedy for purely

---

354. See Susannah W. Pollvogt, *Unconstitutional Animus*, 81 *FORDHAM L. REV.* 887, 892–98 (2012). See also Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 *COLUM. L. REV.* 1459, 1469 (2012) (discussing the importance of non-domination as a background for adoption of the thirteenth amendment and noting that many of the equal protection lawsuits would better fit under this doctrinal umbrella).

355. See *POCOCK*, *supra* note 47, at 333–551.

356. See *id.*

357. Melvin A. Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 *STAN. L. REV.* 211, 212 (1995) (“The principle of unconscionability, developed and elaborated within the last forty years, is similarly rooted in the idea that a party who has bargained unfairly should not be able fully to enforce the resulting contract.”)

358. Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 *B.Y.U. L. REV.* 1, 3 (2013).

359. *Id.*

360. See *id.*

361. See Eisenberg, *supra* note 357, at 212.

procedural arbitrariness (*i.e.*, it requires that the bargain was substantively unfair), the onus of the analysis is to protect the bargaining situation rather than to judicially impose objectively fair terms in bargains disfavored by the bench.<sup>362</sup> The point is to protect contracting parties against domination by private means in the same way as constitutional law seeks to protect citizens from domination by public means.

The paradigm of non-domination overlaps in many regards with the capabilities approach but does not completely coincide with it. Sen argues that “[t]he republican view of freedom . . . adds to the capabilities-based perspective . . . .”<sup>363</sup> Both the republican view and the capabilities approach share source material in the work of Stoic philosophy and the (Roman treatment of) Aristotle.<sup>364</sup> Both also look to potential and what a person could achieve rather than simply at what a person has in fact achieved.<sup>365</sup> Of course, both disagree on the perspective to take.<sup>366</sup> The capabilities approach takes the perspective of the subject of freedom—it asks what a person could accomplish if he or she chose a certain course of action.<sup>367</sup> The republican approach takes the perspective of impediments to freedom; it asks whether freedom is context-dependent upon the arbitrary actions of others.<sup>368</sup> These approaches therefore will, at times, come to different results.<sup>369</sup> Yet, these differences are not the result of deep-seated philosophical differences but rather complementary perspectives that measure the same thing from slightly different vantage points. To borrow from physics, depending upon the manner of looking at it, light appears as a

---

362. Larry A. DiMateo & Bruce L. Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1071 (2006).

363. SEN, *supra* note 23, at 308.

364. See SEN, *supra* note 23, at xxiii-xxiv; MARTHA C. NUSSBAUM, *CREATING CAPABILITIES, THE HUMAN DEVELOPMENT APPROACH* 130 (2013) (noting the Stoic influences of the capabilities approach); ERIC J. OLSEN, *CIVIC REPUBLICANISM AND THE PROPERTIES OF DEMOCRACY: A CASE STUDY OF POST-SOCIALIST POLITICAL THEORY* 140 (2006) (noting the tension between the Aristotelian and the neo-Roman camp of modern republicanism); BERNARD R. BOXILL, *DOMINATION AND SLAVERY*, *IN THE OXFORD HANDBOOK OF THE HISTORY OF POLITICAL PHILOSOPHY* 637, 638 (noting the Stoic Ciceronian influence on Republicanism).

365. See SEN, *supra* note 23, at 306–08.

366. See SEN, *supra* note 23, at 306–08.

367. See SEN, *supra* note 23, at 306–08.

368. See SEN, *supra* note 23, at 306–08.

369. See SEN, *supra* note 23, at 306–08.

wave or as a particle.<sup>370</sup> It is, or currently appears to us to be, both.<sup>371</sup> Freedom similarly can accommodate both of these perspectives because they examine the same ultimate thing: the social conditioning of human flourishing.<sup>372</sup>

#### *D. Non-Domination and Sequencing Path Dependence*

Freedom as non-domination provides a normative justification for the sequencing path dependence described by Professor Hathaway. Sequencing path dependence posits that “where there are three or more choosers and three or more alternative outcomes, the sequence in which alternatives are considered can decisively influence the outcome.”<sup>373</sup>

Sequencing path dependence “draws primarily on rational choice theory,”<sup>374</sup> which submits that “when there are three or more choosers and three or more alternative outcomes, “no method of amalgamating individual judgments can simultaneously satisfy some reasonable conditions of fairness on the method and a condition of logicity on the result,’ if logicity is defined as a complete and transitive ordering of alternatives.”<sup>375</sup> Hathaway demonstrates how sequencing path dependence has been put to good use by advocates such as the NAACP in its litigation strategy culminating in *Brown v. Board of Education* and is habitually used by members of the Supreme Court in making decisions on petitions for *certiorari*.<sup>376</sup>

The key problem sequencing path dependence identifies is

---

370. RUSTY L. MYERS, *THE BASICS OF PHYSICS* 172 (2006).

371. *Id.*

372. Compare MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* 127–29 (2013) (discussing the influence of Aristotle and the Stoics on modern thought and the importance of their views of flourishing on the capabilities approach) with GEOFFREY HINCHLIFFE, *LIBERTY AND EDUCATION: A CIVIC REPUBLICAN APPROACH* 15–17 (2015) (discussing the tension of eudemonia in contemporary republican thought); cf. CICERO, *ON DUTIES* 303 (Walter Miller trans., 1913) (44 BCE) (searching for the highest good). The difference ultimately is that (modern) republicanism appears to instrumentalize human flourishing to create a sustainable republican government whereas the capabilities approach sees human flourishing as an end in itself. *Id.*

373. Hathaway, *supra* note 5, at 107–08.

374. Hathaway, *supra* note 5, at 107.

375. Hathaway, *supra* note 5, at 117 (quoting WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM* 116 (1982)).

376. Hathaway, *supra* note 5, at 147, 148.

that there is no inherent logic in legal outcomes.<sup>377</sup> If the result in *Brown v. Board of Education* depended upon the order in which issues were presented for adjudication to the Court, its celebrated conclusion that “in the field of public education the doctrine of ‘separate but equal’ has no place” is entirely contingent.<sup>378</sup> A dystopian scholar might opine that with a different set of litigation strategies on both sides of the issue, “separate but equal” might still be law of the land today.<sup>379</sup> This is certainly a disquieting thought. And, one might add, a thought which at first blush appears inconsistent with an intuitive idea of freedom.

Despite this disquieting thought, freedom as non-domination requires something like sequencing path dependence of the law. If law is not sequencing path dependent, many fundamental questions of social organization would be determined as a matter of law without directly taking into account the interests and opinions of those affected by the social organization law imposes.<sup>380</sup> In the context of *Brown*, the law would always have to be that “‘separate but equal’ has no place” in public education no matter what the parties submitted.<sup>381</sup> But this in turn would mean that law itself

---

377. See Hathaway, *supra* note 5, at 147 (noting that sequencing path dependence further refines the conclusion that law is nonergodic); see also Johan Deprez, *Risk, Uncertainty, and Nonergodicity in the Determination of Investment-Backed Expectations: A Post Keynesian Alternative to Posnerian Doctrine in the Analysis of Regulatory Takings*, 34 LOY. L.A. L. REV. 1221, 1223–24 (2001) (“An ergodic context is one where there is no structural change, so that the statistical observations of one period coincide with those of another period and those of all periods combined. A nonergodic context is one where there is structural change so that the statistical observations of one period do not coincide with those of other periods and those of all periods combined”).

378. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

379. See Kira Zalan, *The New Separate and Unequal*, U.S. NEWS (May 16, 2014), <http://www.usnews.com/news/articles/2014/05/16/brown-v-board-of-educations-60th-anniversary-stirs-history-reality> (“Despite the historic ruling, decades would pass before integration took root in Southern states, which rebelled furiously against federal policies regarding race. Yet today, while not legally sanctioned, more U.S. students are in segregated schools than a few decades ago. And experts say that these schools now are still as inherently unequal as their legally sanctioned predecessors.”).

380. See Robert Justin Lipkin, *Pragmatism – The Unfinished Revolution: Doctrinaire and Reflective Pragmatism in Rorty’s Social Thought*, 67 TUL. L. REV. 1561, 1625–28 (1993) (discussing the pragmatic response to Dworkin’s one-right-answer thesis).

381. *Brown*, 347 U.S. at 495.

would become procedurally arbitrary.<sup>382</sup> Law would organize society without being sensitive to the actual inputs of those whom law governs.<sup>383</sup> Society would be dominated not by a king—but by the law itself. This result would mean that law could not in fact develop according to a freedom dimension, at all.

Flipping perspectives from the constraints of social conditions imposed upon the agent to that of the capabilities of the agent him or herself, sequence path dependence still is broadly consistent with a view of freedom premised in the capabilities approach.<sup>384</sup> On the most basic level, a model that is not sequence path dependent, *i.e.*, responsive to the communication strategies of members of society over time, deprives persons of the capabilities to engage in the process of self-governance through legal process.<sup>385</sup> A person is the object of legal determinations but never the agent of legal betterment.<sup>386</sup> From the perspective of human flourishing underlying the capabilities approach, such a result is ethically impoverishing.<sup>387</sup>

On a more technical level, the rational choice theorems upon which Professor Hathaway relies are themselves incomplete.<sup>388</sup> The impossibility theorem of rational choice upon which sequence path dependence depends lacks sensitivity to the full informational basis upon which decisions are reached.<sup>389</sup> Most centrally, it is not sensitive to information about both positive and negative freedoms.<sup>390</sup>

In this light, sequence path dependence proves to be a discourse tool.<sup>391</sup> It permits a reasoned engagement that takes into account, piece by piece, the relevant information to reach better decisions over time—or develop—without necessarily

---

382. *See supra* note 328.

383. *See* Ara Lovitt, *Constitutional Confusion*, 50 STAN. L. REV. 565, 573, 576 (1998) (outlining Dworkin's case that a moral reading of the law is not undemocratic but conceding that it is not highly persuasive to those advancing the criticism).

384. *See* AMARTYA SEN, RATIONALITY AND FREEDOM 584 (2004).

385. *See* SEN, *supra* note 23, at 291.

386. *See* SEN, *supra* note 23, at 291.

387. *See* SEN, *supra* note 23, at 291.

388. Hathaway, *supra* note 5, at 107.

389. *See* SEN, *supra* note 23, at 93–94.

390. *See* SEN, *supra* note 23, at 282.

391. *See* SEN, *supra* note 23, at 122.

requiring there to be a right answer that is theoretically attainable.<sup>392</sup> Sequence path dependence thus provides a means of comparison of different potential outcomes with an increasing amount of information provided to the judiciary by those most immediately affected by the rules and standards in question.<sup>393</sup> It is a means by which lawyers and citizens alike can participate in legal governance processes, *i.e.*, communicate with the law, rather than an impediment to freedom.

#### IV. CRITICALITY

Criticality or judgment is the fourth dimension of development. This dimension describes how law relates to time.<sup>394</sup> At core, the fourth dimension of development posits that law develops by means of a process of critical judgment and self-assessment.<sup>395</sup>

Critical judgment is an integral component of the capabilities approach, as well as republican theory.<sup>396</sup> In the social sciences and political theory, critical judgment is needed to explain why drastic change is possible, at all.<sup>397</sup> Social scientific research submits that the social world is constructed out of our own contingent cultural and linguistic traditions.<sup>398</sup> This social construction tends to negate the possibility of “neutral” or transcendental god’s eye view.<sup>399</sup> Critical judgment explains how it is possible to take account of an outsider’s perspective from within a socially constructed linguistic and cultural universe and even break with the traditions inherent in that universe.

Critical judgment is central to understanding how law progresses. Both in the common law and in constitutional interpretation, the courts at various points in history have rejected tradition, *i.e.*, precedent, and adopted a significantly

---

392. See SEN, *supra* note 23, at 103–05.

393. See SEN, *supra* note 23, at 103–05.

394. See Michael S. Moore, *The Dead Hand of Constitutional Tradition*, 19 HARV. J.L. & PUB. POL’Y 263, 272 (1996) (noting the relationship of critical judgment to tradition).

395. SEN, *supra* note 23, at 169–70.

396. SEN, *supra* note 23, at 169–70.; POCKOCK, *supra* note 47, at 54.

397. Hathaway, *supra* note 5, at 386.

398. SEN, *supra* note 23, at 119–121.

399. SEN, *supra* note 23, at 119–121.

different point of view going forward.<sup>400</sup> How is it nevertheless possible to reconcile this departure with legal discourse?<sup>401</sup> In other words, the problem of the possibility of critical judgment already apparent in the context of the social sciences is replicated in the legal context.

Critical judgment is an important corrective to path dependence. It answers why at points of great maturity in legal principles—the point at which increasing-returns path dependence and sequence path dependence have created significant reliance interests—radical evolution nevertheless occurs.<sup>402</sup> Critical judgment distinguishes a system in which there is beneficial path dependence that ultimately increases openness, prosperity, and freedom from a traditionalist system that over time becomes closed, impoverished and unfree.

### A. *Criticality in the Social Sciences*

Social science literature posits that social self-awareness presents one of the key problems for development. Cultural and linguistic context can frequently obscure disparate treatment of different groups in society.<sup>403</sup> Cultural and linguistic structures further provide internally cogent justifications for even severe forms of discrimination of which members of a society are aware.<sup>404</sup> For instance, the difference in treatment of women in societies even escapes women themselves.<sup>405</sup> To the extent they are aware, they may even themselves defend their inferior opportunities by reference to deeply held social beliefs about the place of women in society.<sup>406</sup>

At the very latest, after the end of colonialism, it would be deeply problematic to suggest that the societies in question are inferior, less rational, or otherwise in need of Western aid in even conceiving of their own problems.<sup>407</sup> This would suggest

---

400. Mark S. Kende, *Constitutional Pragmatism, The Supreme Court, and Democratic Revolution*, 89 DENV. U. L. REV. 635, 646–47 (2012) (discussing revolutionary moments in U.S. constitutional jurisprudence).

401. *See id.*

402. Hathaway, *supra* note 5, at 664.

403. SEN, *supra* note 23, at 166 (discussing the treatment of women in India.).

404. SEN, *supra* note 23, at 167.

405. SEN, *supra* note 23, at 167.

406. SEN, *supra* note 23, at 167.

407. *See* Sourgens, *supra* note 326, at 47 (“Transnational legal process thus can hold without self contradiction that people are free rather than states or peoples.”).

that Western culture had attained some form of unique, true and “transcendental” vantage point to which other societies still aspired.<sup>408</sup> Structuralist anthropology and post-structuralist theory have undermined any such claims to uniqueness from within the Western tradition.<sup>409</sup> In fact, they have gone a good way towards disproving the availability of a god’s eye point of view.<sup>410</sup>

Development literature thus needs a means by which to engage and affect traditionally held value-structures. Development is possible only to the extent that critical judgment is possible. Critical judgment has comparative rather than absolute or “transcendental” focus.<sup>411</sup> It recognizes that there is an inescapable plurality of competing principles.<sup>412</sup> In so doing, critical judgment de-mystifies the internal truth claims of any cultural or linguistic tradition.<sup>413</sup> This in turn requires a constant re-examination of the general principles underlying cultural self-perception against the totality of cultural norms and the totality of circumstances affecting society.<sup>414</sup>

This re-examination takes into account the relative position of cultural self-perception through comparison with and engagement of external cultural points of view.<sup>415</sup> It allows for partial (and temporary) resolution of problems.<sup>416</sup> This process engages value structures on their own terms and encourages reflective adjustment of culturally held values from within rather than by reference to an external reference point.<sup>417</sup>

Critical judgment is a core component of the capabilities

---

408. Sourgens, *supra* note 326, at 47.

409. Jack M. Balkin, *Deconstruction’s Legal Career*, 27 *CARDOZO L. REV.* 719, 719–20 (2005).

410. *Id.* (“Deconstructionists attacked the structuralist assumption that one could identify universal and/or fixed structures of meaning that shaped all human thought. Deconstructionists argued that structures of social meaning are always unstable, indeterminate, impermanent and historically situated, constantly changing over time . . .”).

411. SEN, *supra* note 23, at 106.

412. *Id.*

413. See Balkin, *supra* note 409, at 719–20.

414. SEN, *supra* note 23, at 107.

415. SEN, *supra* note 23, at 108–09.

416. SEN, *supra* note 23, at 107.

417. SEN, *supra* note 23, at 107.

approach.<sup>418</sup> In fact, the early work of Nussbaum provides one of the strongest English language arguments against transcendental truths and for a comparative approach.<sup>419</sup> In this sense, the development literature following the capabilities approach is breaking with deeply held rationalist, enlightenment and liberal preconceptions which precisely posited the existence of a transcendental or absolute vantage point.<sup>420</sup>

This development literature links up again with the pre-enlightenment view of history and critical judgment developed in the humanist tradition.<sup>421</sup> This tradition was premised in a similar form of critical judgment.<sup>422</sup> In fact, such critical judgment was instrumental to the birth of Renaissance thought itself.<sup>423</sup> The humanist mind distinguished itself from the medieval and classical through its understanding of the historical situatedness of the observer and the need to translate insights from other social and historical contexts against the backdrop of their respective social and cultural conditions.<sup>424</sup> It was a rejection of tradition in favor of critique.

### *B. Tradition and Critique in U.S. Jurisprudence*

The fight between tradition and critique is a central feature of U.S. jurisprudence. It runs through both constitutional interpretation and common law adjudication. In both contexts, U.S. jurisprudence is marked by a definite anti-traditionalism fitting of humanist roots of the U.S. constitution.

In the context of constitutional interpretation, the rise of originalism is a principal means of critique of (liberal) tradition.<sup>425</sup> Originalism turns against a traditionalist gloss of

---

418. SEN, *supra* note 23, at 107.

419. NUSSBAUM, *supra* note 78, at 79.

420. Eduardo Mendieta, *From Imperial to Dialogical Cosmopolitanism*, in HUMAN RIGHTS, HUMAN DIGNITY, AND COSMOPOLITAN IDEALS: ESSAYS ON CRITICAL THEORY AND HUMAN RIGHTS 119, 130 (Matthias Lutz-Bachmann & Amos Nascimento eds., 2014).

421. JEAN GRONDIN, SOURCES OF HERMENEUTICS 137 (1995).

422. *Id.*

423. POCOCK, *supra* note 47, at 54–55.

424. POCOCK, *supra* note 47, at 54–55.

425. Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 13 (2009) (discussing the interpretation techniques employed by courts with regards to the Second Amendment).

the Constitution achieved by means of adherence to traditional Supreme Court jurisprudence.<sup>426</sup> Originalism proposes that the meaning of the Constitution is not found in the wisdom of precedent but instead in careful historical analysis.<sup>427</sup> It thus poses that the Court can be—and frequently is—simply wrong in its application of constitutional norms.<sup>428</sup> Constitutional interpretation is not a function of the constitutional role of the United States Supreme Court.<sup>429</sup> Constitutional interpretation is a matter of historical textual interpretation that even the organ charged with its execution can get wrong.<sup>430</sup>

In the context of common law adjudication, the rise of pragmatism rejects that tradition can bring forth formal legal axioms that have validity beyond their specific social and commercial context.<sup>431</sup> Central to Justice Holmes' jurisprudence was that law could precisely not be boiled down to certain metaphysical axioms.<sup>432</sup> Rather, law evolved as a response to specific needs in particular circumstances and needs to adapt to reflect the needs for law in new circumstances.<sup>433</sup> As Karl Llewellyn would come to explain, such adaptation would still look to history and historical precedent—but would do so to translate past policy

---

426. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 925 (1966).

427. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–57 (1989).

428. William Michael Treanor, *Supreme Neglect of Text and History*, 107 MICH. L. REV. 1059, 1068 (2009) (“The Supreme Court has recognized the regulatory-takings doctrine for over one hundred years, but a committed textualist, like a committed originalist, sees this line of precedent as an error.”).

429. *But see* John O. McGinnis & Michael B. Rappaport, *Original Interpretive Principles as Core of Originalism*, 24 CONST. COMMENT. 371, 375 (2007) (“While Balkin assumes that originalism and precedent conflict, that will not be true to the extent that the Constitution incorporates or allows for precedent, which it appears to do in two ways. First, the concept of ‘judicial power’ in Article III may be best understood as requiring the judiciary to decide cases in accordance with some notion of precedent. Second, the Constitution may treat precedent as a matter of federal common law that is modifiable by federal statute—thereby allowing for precedent without compelling it.”)

430. Treanor, *supra* note 428, at 1067–68.

431. Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Thought – A Synthesis and Critique of our Dominant General Theory About Law and its Use*, 66 CORNELL L. REV. 861, 863 (1981).

432. HOLMES, *supra* note 2, at 1.

433. Summers, *supra* note 431, at 863.

prescriptions to current policy needs.<sup>434</sup> Again, the courts entrusted with common law adjudication can be wrong: not wrong in the sense of failing to deduce or apply the correct legal axiom, but wrong in the sense of failing to understand their role in adapting and adopting policy prescriptions fitting the current social problems before them.<sup>435</sup>

Interestingly, the critique of tradition thus is central to both of the most important innovations of U.S. jurisprudence: originalism and pragmatism.<sup>436</sup> Both originalism and pragmatism reject that law evolves simply as a result of institutional design, *i.e.*, the courts are asked to interpret the constitution and adjudicate common law rights, meaning that the courts are by definition the criterion of legal correctness in both realms.<sup>437</sup> Instead, both originalism and pragmatism posit that courts can be wrong because they fail to execute their task with requisite critical judgment.<sup>438</sup> This makes room for a meaningful role of judicial dissents in both constitutional interpretation and common law adjudication.<sup>439</sup> It also makes room for legal critique through scholarly engagement in law review articles and the activities of learned societies such as the American Law Institute.

That both originalism and pragmatism would share a common methodological commitment is both surprising and momentous.<sup>440</sup> It is surprising because the originalism and pragmatism marshal law to support radically opposed policies: conservatism and liberal progressivism.<sup>441</sup> It is momentous

---

434. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 36 (1960).

435. *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917).

436. *See, e.g.*, Greene, *supra* note 425, at 62 (noting that originalism is a uniquely American jurisprudential school); Summers, *supra* note 431, at 863 (noting that pragmatic instrumentalism is a uniquely American contribution to jurisprudence).

437. *See supra* note 430; *supra* note 434.

438. *See supra* note 430; *supra* note 434.

439. Unsurprisingly, both Justice Cardozo and Justice Scalia are near unsurpassed masters in the art of dissenting. *See* Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 264–70 (1998) (juxtaposing Justice Scalia's and Justice Cardozo's theories of dissent).

440. John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 383 (2007) (noting that “originalism and pragmatism are uneasy companions” that can be made “friends”). From a different direction, Jack Balkin arguably attempted a similar project in *Living Originalism*. JACK BALKIN, *LIVING ORIGINALISM* 3 (2011).

441. Keith E. Whittington, *Is Originalism Too Conservative?*, 34 HARV. J.L. &

because it represents a key point of agreement in rejecting simple traditionalism as legal yardstick. Interestingly, originalism follows a republican, humanist approach to critical judgment “as a result of a classicizing attempt to locate all value in a particular period.”<sup>442</sup> Pragmatism follows more in the footsteps of the capabilities approach through constant re-examination of precedent in light of existing policy needs.<sup>443</sup> As discussed above, both perspectives reflect different sides of the same coin thus confirming that U.S. jurisprudence understands itself as “critical” in a meaningfully consistent manner no matter from what ideological vantage point it is approached.

### *C. Criticality and Path Dependence*

Criticality assists in answering a puzzling question about path dependence. Why would there be punctuations in the law leading to fundamental change, at all?<sup>444</sup> Path dependence should exponentially increase stability—and thus foreclose punctuations in evolution or periods of rapid change.<sup>445</sup> Professor Hathaway notes:

The rapid change, or “punctuations,” can be brought about by a number of sources: higher court opinions that overrule or significantly alter existing legal rules; reconsideration of legal rules by the courts in which they were first established; new legislation; introduction of novel legal issues; or, on rare occasions, constitutional amendments.<sup>446</sup>

This observation, while correct, does not answer the fundamental and puzzling question of *why* courts would overrule themselves or reconsider legal rules despite the pull of path dependence in the other direction. As discussed in the context of openness, Hathaway’s observation is correct that legal revolutions do happen.<sup>447</sup> Legal standards do shift

---

PUB. POL’Y 29, 29 (2011) (observing the historical and conceptual link between originalism and conservatism); Summers, *supra* note 431, at 877 (explaining the overlap between the pragmatic and progressive movements).

442. POCOCK, *supra* note 47, at 54–55.

443. Compare LLEWELLYN, *supra* note 434, at 36 (discussing the pragmatic approach to precedent) with SEN, *supra* note 20, at 107–09 (discussing the capabilities approach of comparative judgment).

444. Hathaway, *supra* note 5, at 641.

445. Hathaway, *supra* note 5, at 641.

446. Hathaway, *supra* note 5, at 641.

447. See discussion *supra* Part I.C.

because of the accretion of a critical mass of legal opinion against the existing standard.<sup>448</sup> But how can such a critical mass form? Professor Hathaway's theory should in fact lead to the view of common law evolution she rejects—that the common law evolves continuously, imperceptibly, and gradually rather than that it evolves through periods of stability punctuated by short bursts of upheaval.<sup>449</sup>

Introducing criticality as a dimension of development permits resolution of this puzzle. Legal development is not blindly path dependent. It is deeply critical in the sense that legal development acknowledges its own warts: rather than determine that a solution to a legal problem found the true answer, legal development looks for the best answer.<sup>450</sup> Legal development is possible because common law judges know to take claims of truth and ultimate correctness with a grain of salt.<sup>451</sup> Criticality permits and requires radical change precisely because the mindset of the judiciary is to compare legal rules to the tenability of legal outcomes.<sup>452</sup>

This reflective attitude also explains the apparently punctuated nature of legal change.<sup>453</sup> The attitude of the judiciary is constantly critical.<sup>454</sup> This means that it seeks to test and confirm rules.<sup>455</sup> For critique to result in radical change, there must be a sufficient amount of information that the flaws in the current legal standards are so deep that adjustment of that standard cannot remove the ultimate flaw.<sup>456</sup> As in the sciences, such paradigm shifts appear sudden (we remember Galileo, Newton, and Einstein) but they are the

---

448. See discussion *supra* Part I.C.

449. Hathaway, *supra* note 5, at 137, 141.

450. See discussion *supra* Part IV.B.

451. See discussion *supra* Part IV.B.

452. See discussion *supra* Part IV.B.

453. Hathaway, *supra* note 5, at 141.

454. See discussion *supra* Part IV.B.

455. George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 520 fn. 12 (1972) (drawing a comparison between law and Kuhn's structure of scientific revolutions).

456. Thomas S. Ulen, *A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law*, 2002 U. ILL. L. REV. 875, 884 (2002) (citing Thomas S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 52–53 (3d ed. 1996) (“ . . . Kuhn suggested that there are scientific revolutions that occur because sometimes the anomalies pile up to such an extent that it is almost impossible to adjust the prevailing paradigm in a reasonable manner that takes account of the anomalies.”))

result of a long build up of information that enabled Galileo, Newton, and Einstein to posit their theories—and find acceptance for them.<sup>457</sup>

Criticality is the missing piece that interlocks openness, prosperity, and freedom. Criticality is the flipside of openness. Openness safeguards the notion that new factual and normative material can in fact be considered.<sup>458</sup> Criticality explains *how* this material is considered. Whereas openness is outward looking—it accepts new material—criticality is inward looking.<sup>459</sup> Criticality does not concern what if any outside material should be considered (in fact, criticality can and has operated without significant change in external material simply as a matter of reevaluating existing patrimony) but how the judiciary should relate to itself and the law as part of its decision-making process.<sup>460</sup>

Criticality greatly aids prosperity. Absent criticality, evolutionary development is largely inefficient.<sup>461</sup> Evolution does not have a goal—it occurs as a matter of course.<sup>462</sup> To be goal-oriented, evolution must be guided by purposive reasoning. Criticality permits reflective, purposive reasoning about the efficiency of law.<sup>463</sup> It permits a readjustment of legal standards so as better to serve the economic needs of society.<sup>464</sup> It is the combination of criticality with evolution—rather than simply evolution—that brings about some of the efficiencies in the change of the common law discussed in law and economics scholarship.<sup>465</sup>

Criticality finally is important to freedom. On the technical side, it permits agents strategically to engage sequencing path dependence and bring about the *Brown v. Board of Educations* of the world.<sup>466</sup> More substantively, criticality reduces the risk of domination through law because law is consistently reflective and comparing processes to

---

457. See Ulen, *supra* note 456, at 884.

458. See discussion *supra* Part I.

459. See discussion *supra* Part IV.A.

460. See discussion *supra* Part IV.B.

461. Hathaway, *supra* note 5, at 631–32.

462. Hathaway, *supra* note 5, at 639.

463. See discussion *supra* Part IV.A.

464. See discussion *supra* Part IV.B.

465. Hathaway, *supra* note 5, at 631.

466. See discussion *supra* Part III.D.

outcomes.<sup>467</sup> Criticality permits law to be constantly engaged in an assessment of the law that can make the interests and opinions of those governed by law relevant to the law itself.<sup>468</sup> This constant assessment facilitates and increases the capabilities of members of society to participate in the processes of self-governance.<sup>469</sup>

#### V. PREFERENCE OR PARITY? THE RELATIONSHIP BETWEEN THE FOUR DIMENSIONS OF DEVELOPMENT

So far, this Article has laid out the four dimensions of development. It has not yet addressed whether any of these four dimensions is preferred to the others. It has also not yet addressed whether development permits trade-offs between the different dimensions of development.

This Section rejects the notion that legal development necessarily prefers any one of the dimensions of development to the others.<sup>470</sup> The typical preference expressed in both political and legal theory is that freedom holds a privileged position vis-à-vis other values. As discussed below, such a preference is not a legal necessity.<sup>471</sup> One cannot critique a decision as wrongly decided as matter of law because it did not maximize the value of the freedom dimension.<sup>472</sup> Such a critique remains and must remain a political proposition.<sup>473</sup>

This Section also rejects the notion that legal development refers to an aggregate increase in the sum total of the individual and quantified openness, prosperity, freedom, and critical judgment values.<sup>474</sup> As discussed below, such a position, though tempting, fails because openness, prosperity, freedom, and critical judgment, while related, are not measured according to a single scale.<sup>475</sup> Trade-offs are thus theoretically foreclosed.<sup>476</sup>

This Section then briefly addresses the problem of legal

---

467. See discussion *supra* Part III.D.

468. See discussion *supra* Part III.D.

469. See discussion *supra* Part III.D.

470. See discussion *infra* Part V.A.

471. See discussion *infra* Part V.A.

472. See discussion *infra* Part V.A.

473. See discussion *infra* Part V.D.

474. See discussion *infra* Part V.B.

475. See discussion *infra* Part V.B.

476. See discussion *infra* Part V.B.

development in the face of social and economic recession.<sup>477</sup> There are circumstances in which it will not be possible for reasons outside of social control to increase each of the values represented by the four dimensions of development—as would be the case following a large natural catastrophe.<sup>478</sup> In that setting, it would not be possible to increase the prosperity measure of society through legal evolution simply because the society governed by law was otherwise impoverished.<sup>479</sup> Legal development in this context means that the law chooses the path of least reduction on any one dimension of development.<sup>480</sup>

The Section concludes with a normative explanation for the parity preference of legal development and explains how this parity preference leaves meaningful room for political choice within legal development.<sup>481</sup> The explanation thus seeks to place the concept of development within the context of our every day experience, *i.e.*, that court decisions frequently are political, while providing an explanation how such political choice nevertheless is consistent with truly legal development.<sup>482</sup>

#### A. *Avoiding the Liberty Preference*

Liberal political and legal theorists frequently posit that social choice must follow a liberty preference. John Rawls in *A Theory of Justice* submits that this preference is lexicographic in nature, meaning that any amount of increase in liberty would always be preferred to any increase, no matter how large, in any other value.<sup>483</sup> Other theorists incorporate a weaker form of weighted preference for liberty interests.<sup>484</sup>

It is tempting to posit that legal development similarly follows a form of liberty preference.<sup>485</sup> Such a preference would

---

477. See discussion *infra* Part V.C.

478. See discussion *infra* Part V.C.

479. See discussion *infra* Part V.C.

480. See discussion *infra* Part V.C.

481. See discussion *infra* Part V.D.

482. See discussion *infra* Part V.D.

483. RAWLS, *supra* note 150, at 214.

484. SEN, *supra* note 20, at 299.

485. Nathan Oman, *Unity and Pluralism in Contract Law*, 103 MICH. L. REV. 1483, 1499-1505 (2005) (discussing the priority of liberty in contract law); Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 1019 (1978) (noting the temptation that “priority of liberty and equality of opportunity are implicit in our Constitution . . .”).

have two consequences. First, any evolution of law that does not at first address freedom is not “development”—and as such is an erroneous departure from existing jurisprudence.<sup>486</sup> Second, in a choice between various evolutions of law each of which increase freedom, legal development requires the choice of the evolution that most advances or maximizes freedom no matter the relative increase in the other dimensions.<sup>487</sup> For example, in choosing between options A (increasing freedom by 1, prosperity by 10, openness by 10, and critical judgment by 10, for a total increase of 31), B (increasing freedom by 2, prosperity by 100, openness by 1, and critical judgment by 5, for a total increase of 108), and C (increasing freedom by 3, prosperity by 2, openness by 2, and critical judgment by 2, for a total increase of nine), a liberty preference would choose option C despite the fact that option A has a higher average increase (10) and option B has a higher total increase in value (108).

The hypothesis of a priority of freedom in legal development is not borne out by jurisprudence.<sup>488</sup> Jurisprudence frequently seeks to increase other values such as prosperity over freedom.<sup>489</sup> It is thus not true descriptively that development requires a hard preference for freedom interests.

A strict liberty preference therefore is a political proposition, not a legal requirement. It makes the normative point that law *ought to* develop in a certain way rather the descriptive point that law *does* develop in that way.<sup>490</sup> It is a

---

486. RAWLS, *supra* note 150, at 214.

487. RAWLS, *supra* note 150, at 214.

488. One such example is the current United States Supreme Court jurisprudence invalidating state attempts to curtail certain forms of arbitration of consumer disputes. *See* *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (requiring arbitration of disputes arising out of consumer contracts deemed usurious under Florida law); *AT&T Mobility LLC v. Conception*, 131 S.Ct. 1740, 1753 (2011) (Federal Arbitration Act preempts California state law deeming class arbitration waivers in consumer contracts unconscionable); *see also* Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Conception and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323, 325–26 (2011) (discussing the effect of the recent line of cases).

489. Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 471–81 (2011) (discussing the business concern regarding class actions as driving factor to adopt consumer arbitration clauses).

490. *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103

permissible and possible way that law could develop—just not the way that it must develop.

*B. Parity and the Quest for Pareto Superiority*

It would also be possible to posit that legal development refers to the net increase in the aggregate value of all four dimensions.<sup>491</sup> In our example above of a choice between options A, B, and C, such a view of development would require choosing option B because it has the highest total value increase.<sup>492</sup>

A view that law “develops” if the aggregate value of all four dimensions is increased simply errs because the four dimensions of legal development are incommensurate.<sup>493</sup> For the parity position to have much purchase, it must be established that the various values of increase in openness, prosperity, freedom, and critical judgment can in fact be measured according to a single scale.<sup>494</sup> If they cannot be measured according to a single scale, it is simply not meaningful to add up the various scores.<sup>495</sup>

The discussion above makes clear that the four dimensions of development measure very different values. Openness measures the receptivity of judicial decisions to new factual and normative concerns; it can do so for instance by quantifying the diversity of input in the legal decision-making process.<sup>496</sup> Prosperity measures property protection; it can do so by quantifying income and income distribution within society.<sup>497</sup> Freedom measures civic participation in legal decision-making processes; it can do so by relying on various new development measures designed by social scientists in response to the capabilities approach.<sup>498</sup> Criticality measures

---

HARV. L. REV. 405, 435 (1989) (drawing a similar distinction in the context of statutory construction).

491. See SEN, *supra* note 234, at 12–16 (discussing reduction of choice to a utility function in economics literature).

492. See discussion *supra* Part V.A.

493. See Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 796 (1994) (incommensurability “occurs when the relevant goods cannot be aligned along a single metric without doing violence to our considered judgments about how these goods are best characterized”).

494. See *id.*

495. See *id.*

496. See discussion *supra* Part I.

497. See discussion *supra* Part II.

498. See discussion *supra* Part III.

the reflection exercised in decision-making; it can do so by quantifying the rate of adaptation of legal rules to the current socio-economic environment.<sup>499</sup>

Development therefore must refer to something other than an aggregate increase of the four dimensions in question; it refers to an increase in each of the four dimensions. It requires that an option reducing one of the dimensions is not permissible no matter how much it increases one of the other dimensions.<sup>500</sup> A radical increase in freedom is not acceptable at the cost of a small reduction in prosperity etc.<sup>501</sup> In other words, legal development treats the current balance between the four dimensions as a floor.<sup>502</sup> Legal developments cannot have the consequence of dropping any one dimension below the floor achieved. Such an evolution would—over the long term—be deemed in legal error.<sup>503</sup> The assessment that law developed, as distinguished from the descriptive statement that law changed, thus refers to an increase of some or all of the four dimensions without reduction in any of the others. It refers to a completely (rather than a net) beneficial change in legal prescriptions.

Expressed in economic terms, legal development supposes that the four dimensions of legal development create efficiencies.<sup>504</sup> An increase in one dimension not purchased at the price of an immediate reduction in another is deemed to increase all dimensions over time.<sup>505</sup> Thus, an increase in openness over the long term will increase prosperity, freedom, and critical judgment, and vice versa. This supposition means that there typically are options available that increase all dimensions of development because of these efficiencies. Economics suggests that there is an outside limit to these efficiencies—called optimality or Pareto optimality.<sup>506</sup> When this limit is reached, and only when this limit is reached, one value can only increase at a net cost to the others. But before

---

499. See discussion *supra* Part IV.

500. It thus grants similar priority to all four dimensions and accords each of them the liberty priority in Rawlsian justice. See RAWLS, *supra* note 150, at 291.

501. See Sunstein, *supra* note 493, at 805.

502. See Sunstein, *supra* note 493, at 796.

503. See Sunstein, *supra* note 493, at 796.

504. See Paul Rogers, *The Limited Case for an Efficiency Defense in Horizontal Mergers*, 58 TUL. L. REV. 503, 504 n.9 (1983) (discussing Pareto optimality).

505. See *id.*

506. See *id.*

that point, it is possible to leverage the interests of each dimension to achieve common gains.

### *C. Development and Social Loss*

So far, the assumption was that social conditions do not change drastically for the worse. On the basis of this assumption, it is physically possible for the law to improve the law measured on all four dimensions of legal development. This assumption is obviously not realistic. Natural catastrophes, economic crises, and war can and frequently do have a material impact on what the law can achieve.<sup>507</sup> And most times, the consequence of such events is net social loss no matter how well the legal system is set up.

The question thus arises how law “develops” on our four dimensions in the face of such social loss. As discussed above, the general rule is that development refers to an increase along all four dimensions.<sup>508</sup> Thus, when social loss occurs, it would not be possible for law to “develop” by increasing all four dimensions of openness, prosperity, freedom, and criticality. Rather, it stagnates along with social order in general.

This answer is hardly satisfactory. Part of the point of law is to set up a form of guarantee of order precisely in times social and economic loss.<sup>509</sup> A statement that law can only develop in good times thus would tend to get something intuitively wrong about the point of law.<sup>510</sup> This still leaves the question—how do we measure development in such a loss-making environment?

Sen again provides a very helpful clue as to the answer to this question. As discussed in the context of criticality, he notes that development takes a comparative view and not a transcendental, absolute view.<sup>511</sup> Thus, while an absolute view

---

507. See Mark Duffield, *Globalization and War Economies: Promoting Order or the Return of History?*, 23 FLETCHER F. WORLD AFF. 21, 32 (1999) (discussing the high social costs of war); *Tax Relief & Hurricane Katrina*, 25 ANN. REV. BANKING & FIN. L. 166, 167 (2006) (noting the “enormous cost of Katrina”).

508. See discussion *supra* Part V.B.

509. See David P. Fidler, *War, Law & Liberal Thought: The Use of Force in the Reagan Years*, 11 ARIZ. J. INT'L & COMP. L. 45, 55 (1994) (noting the classical position that “law is the best safeguard against war, destruction, and chaos”).

510. See Saikrishna Bangalore Prakash, *The Imbecilic Executive*, 99 VA. L. REV. 1361, 1380 (2013) (“The Act’s preamble carried an important constitutional lesson, for it reaffirmed what was implicit in the Bill of Rights. The executive could not, as a legal matter, create, modify, or suspend laws, in a domestic crisis, even when doing so was for the public good in time of crisis”).

511. See SEN, *supra* note 20, at 106–13.

of development would consider that movement in the “wrong” direction would not be development at all, a comparative view would not need to take such a stark view. Rather, a comparative perspective would posit that even between facially bad choices, it is possible to identify a choice that is better (or at the very least, a choice that is worse).<sup>512</sup>

Applying the lesson from this Article so far, the method to compare and choose between choices is to look at the overall impact on the four dimensions of development brought about a downturn. There are two reasonable alternative methods to do so: one backward looking and one forward looking. *First*, it is possible to take stock of the net reduction a crisis has caused for each of the four dimensions of development. It is possible that a crisis would have a far greater impact on one of the four dimensions than the other three.<sup>513</sup> In that circumstance, the first method would be to seek to re-establish the pre-crisis balance by preferring the hardest hit dimension of legal development.<sup>514</sup>

*Second*, it is possible to look forward rather than backwards. In that instance, one would seek to choose the option that does the least harm going forward. The choice then is to pick the option that reduces any one dimension of development the least amount possible.<sup>515</sup> This would

---

512. See SEN, *supra* note 20, at 399–401.

513. For instance, the 9/11 attacks appear to have disproportionately diminished freedom. See Lee Epstein et al. *The Supreme Court During Crisis: How War Affects only Non-War Cases*, 80 N.Y.U. L. REV. 1, 1 (2005) (“our analyses demonstrate that when crises threaten the nation’s security, the justices are substantially more likely to curtail rights and liberties than when peace prevails.”). The 2008 financial crisis appears to have disproportionately affected prosperity. See Jake Grovum, *2008 Financial Crisis Impact Still Hurting States*, USA TODAY (Sept. 15, 2013), <http://www.usatoday.com/story/money/business/2013/09/14/impact-on-states-of-2008-financial-crisis/2812691/> (“By one Federal Reserve estimate, the country lost almost an entire year’s worth of economic activity – nearly \$14 trillion – during the recession from 2007 to 2009.”).

514. Llewellyn’s early sociology of law appears to have taken such a view. See Michael Ansaldi, *The German Llewellyn*, 58 BROOK. L. REV. 705, 761 (1992) (“The nature of large institutions is such that they contain homeostatic forces working to integrate molecular changes into their existing shape, trying to make the new elements fit into the prior structure without upsetting the internal dynamics among the institution’s other component parts, to reestablish a balance along the lines of what has gone before.”).

515. This choice is consistent with the analogy to the lexicographical ordering of all four dimensions of development as equally important. RAWLS, *supra* note

distribute future, post-crash social loss as evenly as possible between all four dimensions.

This Article favors the second approach. Pragmatically, it is not always possible to assess which area of development is hardest hit with any kind of immediacy.<sup>516</sup> Attempting to develop the law by reference to an earlier equilibrium between the four dimensions of development therefore would be a difficult task to fulfill.<sup>517</sup> A forward-looking approach to development is far easier to implement and as such practically preferable.

The second, forward-looking approach is also more consistent with the four dimensions of development themselves. Factual openness requires that legal development take into account the new factual circumstances postdating a crisis.<sup>518</sup> This factual openness in turn entails narrow normative openness; new factual circumstances likely will require rule changes that are adapted to the new factual circumstances.<sup>519</sup> Depending upon the severity of the crisis, the necessary rule changes may themselves reach a tipping point and affect common law standards.<sup>520</sup> A backward-looking model of legal development is inconsistent with such factual and normative openness because it would downplay the importance of new factual circumstances for the benefit of recreating past equilibria that are no longer factually tenable.<sup>521</sup>

Prosperity similarly is not served by a backward-looking approach. In the context of financial crises such as the 2007-08 U.S. financial crisis, the brunt of financial impact can be felt by middle class property owners.<sup>522</sup> This in turn would lead to

---

150, at 291.

516. See Roger C. Altman, *The Fall and Rise of the West, Why America and Europe Will Emerge Stronger from the Financial Crisis*, FOREIGN AFF. (Jan./ Feb. 2013), <http://www.foreignaffairs.com/articles/138463/roger-c-altman/the-fall-and-rise-of-the-west> (predicting that America will emerge financially stronger from the 2008 financial crisis).

517. See *id.*

518. See discussion *supra* Part I.A.

519. See discussion *supra* Part I.B.1.

520. See discussion *supra* Part I.B.2.

521. See discussion *supra* Part I.A.

522. See Tracie R. Porter, *Pawns for a Higher Greed: The Banking and Financial Services Industry's Capture of Federal Homeownership Policy and the Impact on Citizen Homeowners*, 37 HAMLIN L. REV. 139, 143-45 (2014) (discussing the impact of the 2008 financial crisis on homeowners and proposing

a significant and disproportionate drop in the prosperity dimension of development.<sup>523</sup> A backward-looking approach would advocate the use of legal developments to address this disproportionate drop immediately either through regulatory or common law reform.<sup>524</sup> Such a reaction is likely to undermine long-term financial recovery and thus hurt the prosperity dimension of development in an attempt to bolster it.<sup>525</sup> Prosperity depends upon the stability of the financial infrastructure.<sup>526</sup> This infrastructure was badly hurt by financial crises such as the 2007-08 U.S. financial crisis.<sup>527</sup> Reform attempts that further impair the ability of that infrastructure to stabilize will have after effects in the “real” economy.<sup>528</sup> Reform attempts that follow the current path to bolster infrastructure first on the other hand are likely to yield significant long-term growth permitting prosperity to increase in over time.<sup>529</sup>

Freedom is also best effectuated by a forward-looking approach. A critical component of freedom is that decisions are made by reference to the opinions or interests of those governed or affected by governmental action.<sup>530</sup> The weaker the reference to the interests and opinions of those governed, the lesser the freedom of society.<sup>531</sup> A backward-looking approach assumes that the opinions and interests of those governed in fact seek and are best served by an approximate restoration of an earlier equilibrium. Unless actually tested, this assumption is itself arbitrary. To test it, it is necessary to adopt a forward looking approach rather than a backward-

---

backward looking reforms).

523. See discussion *supra* Part II.D.

524. See Porter, *supra* note 522, at 188–204 (advocating tort law and regulatory remedies).

525. See Tom C.W. Lin, *The New Financial Industry*, 65 ALA. L. REV. 567, 585–88 (2014) (discussing the rationales behind “too big to fail” and “too linked to fail”).

526. See Hilary J. Allen, *What is “Financial Stability”? The Need For Some Common Language in International Financial Regulation*, 45 GEO. J. INT’L L. 929, 931–32 (2014) (discussing the link between economic prosperity and financial stability).

527. See Eric Rosengren, *Financial Intermediaries: Lessons and Continuing Challenges*, Fed. Res. Bank of Boston (Oct. 19, 2011), <http://www.bostonfed.org/news/speeches/rosengren/2011/101911/>.

528. See *id.*

529. See Altman, *supra* note 516.

530. See discussion *supra* Part III.C.

531. See discussion *supra* Part III.C.

looking approach.

Criticality by definition is forward looking. Its goal is precisely to test the adequacy of any traditional path—including a prior equilibrium—against current circumstances.<sup>532</sup> A backward-looking approach would suspend criticality because it would assume that the old equilibrium not only was in accord with the opinions and interests of those governed but that it also presented the most appropriate problem-solution when those opinions and interests were more fully scrutinized.<sup>533</sup> Both of these assumptions may well prove correct—but they would need to be proved. A forward looking approach is the best manner of doing so.

#### *D. Sequencing Path Dependence and A Place for Political Choice*

Government that follows the rule of law must leave significant room for political choice.<sup>534</sup> Legal development cannot be an automaton that would run society on behalf of its citizens.<sup>535</sup> It instead must provide the means for citizens to govern themselves.

The political choice left open by legal development is which dimension to increase. The requirement of Pareto superiority that no dimension be decreased does not end up in a single ideal solution of how all dimensions must be increased.<sup>536</sup> Pareto optimality provides a limit of optimal solutions.<sup>537</sup> But Pareto optimality permits a rather large number of possible optimal solutions each of which have a different combination of ultimate values.<sup>538</sup> The question of which of these optimal solutions to seek out—which cluster of superior arrangements to adopt over a period of time—is a political choice made within the confines of the legal process.<sup>539</sup> It is a political choice that further significantly affects the society constituted under the

---

532. See discussion *supra* Part IV.

533. See discussion *supra* Part IV.

534. See discussion *supra* Part III.

535. See discussion *supra* Part III.D.

536. See Jeffrey L. Harrison, *Piercing Pareto Superiority: Real People and the Obligations of Legal Theory*, 39 ARIZ. L. REV. 1, 2–3 (1997).

537. See *id.* at fn.12.

538. See *id.* at 2.

539. See Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CAL. L. REV. 1319, 1344 (2010).

law in question—no one self-governing republican society is going to be alike to any other or take the same path as another.

Even within the different dimensions, different policies could achieve similar net increases on each of the axioms in question in different ways. There is more than one way to increase prosperity or freedom, more than one way to be open or judge critically. This in turn means that the manner of increasing the measure of any one dimension of legal development also leaves room for political choice; it provides procedurally neutral strictures for substantive political engagement.<sup>540</sup>

This place for politics in law and legal decision-making accounts for our everyday understanding of judicial behavior. Popular culture understands, for instance, that the Supreme Court renders political decisions.<sup>541</sup> Nor is this understanding new—it in fact was well-observed as early as the 1830s.<sup>542</sup>

But other than some commentators suggest, there remain truly legal strictures for judicial choice.<sup>543</sup> This Article has highlighted both the values legal development must serve and how it must serve them. Legal discourse differs from politics because it has a different process of decision-making that serves a narrower ingrained value structure than political discourse would.

In other words, it is possible to determine when legal decisions have strayed too far from the current equilibrium of political self-governance by looking to the metrics of legal

---

540. *Id.* at 1343 (“[A]ny given controversy can be given legal form when we wish to act as if we had reached agreement about the meaning and implementation of a relevant social principle. Yet any discrete legal principle can also reassume political form whenever we discover that our putative agreement is chimerical and that we wish to create a valorized space for further disagreement.”).

541. Nan Aron, *The Supreme Court: Just Politics by Other Means*, HUFFINGTON POST (June 26, 2012), [http://www.huffingtonpost.com/nan-aron/supreme-court-political-bias\\_b\\_1627458.html](http://www.huffingtonpost.com/nan-aron/supreme-court-political-bias_b_1627458.html) (“Increasing numbers of people are concerned that the Supreme Court has become overtly political. Now, where could anyone get that crazy idea?”).

542. See Harry Kalven, Jr., *Foreword: Even When a Nation Is at War*, 85 HARV. L. REV. 1, 16 (1971) (“The vigorous reassertion of its place on center stage of American life tempts one to go again to de Tocqueville’s oft cited observation, made a century and a half ago, that ‘[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.’”).

543. See Elie Mystal, *Judging Is Just Politics By Other Means*, ABOVE THE LAW (May 10, 2011), <http://abovethelaw.com/2011/05/judging-is-just-politics-by-other-means/>.

development. Decisions that have strayed too far afield are thus cognizably wrong as a matter of law because they have overstepped the political space created for the judiciary in the rule of law. Future decisions overturning the earlier ones are certainly political. But they are political with a legal purpose. The state of affairs required judicial activism in the same way that a bacterial infection may require a fever: while a fever is a deviation from an ordinary body temperature, it is a healthy response to the intrusion of a noxious foreign organism. As with a bacterial infection and fever, it would be the absence of judicial activism that should be more alarming.

#### CONCLUSION

Robert Post notes that:

[C]ourts face a dilemma. If they do not act to protect essential values, the contestation of politics might spin out of control and undermine both the stability of the polity and the rule of law. Agonism might degenerate into antagonism. But if courts act too aggressively, they can suppress the very possibility of disagreement that defines politics itself. This dilemma is insoluble if it is believed, as some do, that legal judgments “foreclose” the possibility of politics. But if, as I have suggested, the boundary between law and politics is essentially contested, then judicial judgments engage but do not pre-empt politics.<sup>544</sup>

Path dependence of the law provides part of the answer to Dean Post’s dilemma. It provides courts with a safety net of past decisions as legitimation for their actions. But path dependence alone obscured the underlying values of legal development. It did not provide a sufficient reason that the relative caution of the courts was normatively wise or when and how departure from a current path is legitimate. This Article enriched the theory of path dependence with a fuller normative account of the underlying grammar of legal development and its links with political discourse and sustainable self-governance.

This account permits a glimpse at another, related question: what is the value of the rule of law? This Article suggests that this value is the slow but sustainable increase of openness, prosperity, freedom, and criticality in a self-

---

544. Post, *supra* note 539, at 1346–47.

governing society. It has showcased how this form of development is more than simply evolution—it is an ethically desirable condition ever expanding and securing the reaches of human capabilities and human flourishing.