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Law and Economic Development in the United States: Toward a New Paradigm

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LAW AND ECONOMIC DEVELOPMENT IN THE UNITED STATES: TOWARD A NEW PARADIGM

Yong-Shik Lee⁺

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INTRODUCTION

The 2016 election of Donald Trump—a controversial businessman and political outsider—as the forty-fifth President of the United States, was an unexpected event marking both the end of an era known for providing a degree of political and economic predictability and the beginning of a new uncertain one. Despite the overall wealth and economic prosperity of the nation, the deteriorating economic conditions prevailing in many States¹ in the United States²—including the decline of manufacturing industries, the rise of unemployment, and the volume of income losses for large segments of the population—were a primary cause of this dramatic election outcome.³ Notably, this result signaled the need for new approaches to tackling the United States’ economic problems.

However, the new economic policies pronounced by the Trump Administration, such as one based on trade protection, are unlikely to be successful.⁴ The Administration argues that its policies will bring both jobs and increased income in the United States because, by raising the tariffs on imports, sellers will raise the prices of those imported products; domestic products, however, would not be subject to said price increase, thereby rendering domestic products more competitive, and, ultimately, encouraging domestic production.⁵ It sounds plausible on the surface, but a deeper look points to a very different outcome. Even if more manufacturing facilities were to operate in the United

1. Within this Article, the term “State” (with a capital “S”) refers to a constituent State of the United States (e.g., State of California) and “state” (with a lowercase “s”) denotes an independent sovereign country (e.g., the United States).

2. The decline of the manufacturing industries in many regions of the country, signified by the term, “the Rust Belt,” and the resulting loss of employment, income, and population caused substantial social discontent in the United States. See Yong-Shik Lee, *Trans-Pacific Partnership Agreement: A Commentary on Developing/Developed Country Divide and Social Considerations*, 9 TRADE, L. & DEV. 21, 33 (2017).

3. See Trip Gabriel, *How Erie Went Red: The Economy Sank, and Trump Rose*, N.Y. TIMES, Nov. 12, 2016.

4. See John King & Jeremy Diamond, *Trump Team Floats a 10% Tariff on Imports*, CNN NEWS (Dec. 22, 2016), <http://www.cnn.com/2016/12/21/politics/donald-trump-tariffs/> (last visited Jan. 20, 2019).

5. See *id.*

States because of this encouragement,⁶ it is doubtful that this policy will lead to an influx of jobs and income for workers on a permanent basis because automation production technology is developing rapidly, now with the advent of artificial intelligence.⁷ Increasing wages in the United States will only accelerate this trend.⁸ Furthermore, protectionist trade policies will also cause responsive trade protection measures abroad,⁹ thereby reducing exports from the United States and producing associated losses in jobs and income for workers in the United States.¹⁰ Thus, the likely policy outcomes will be contrary to the Trump Administration's claims.

If the policies of the Trump Administration are not a likely solution for the reasons explained above, then what new approaches may be effective? This Article argues that legal and institutional approaches facilitating economic development, targeting economically depressed areas, stimulating economic growth, and reducing income gaps are effective new approaches.¹¹ Economic development refers generally to the process of the structural transformation of an economy from one based mostly on the production of primary products (*i.e.*, a product consumed in its unprocessed state), which generate low levels of income, to another based on modern industries, which generate higher levels of income for the majority of populations.¹² It is a term that has been associated with less developed countries in the Third World ("developing countries") rather than economically advanced countries ("developed countries"), such as the United States.¹³ However, the changing economic conditions in developed

6. See David Shepardson & Roberta Rampton, *Trump Calls for More US Auto Jobs, Factories Ahead of CEO Meeting*, REUTERS (Jan. 24, 2017), <https://www.reuters.com/article/us-trump-autos-idUSL1N1FE42N>. (last visited Jan. 20, 2019).

7. James Furman, *Is This Time Different? The Opportunities and Challenges of Artificial Intelligence*, N.Y.U. (July 7, 2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160707_cea_ai_furman.pdf (last visited Jan. 20, 2019).

8. *Id.*

9. See Shawn Donnan, *China Warns US of Retaliation If Trump Imposes Tariffs*, FINANCIAL TIMES (Jan. 6, 2017), <https://www.ft.com/content/06638c26-d42c-11e6-9341-7393bb2e1b51> (last visited Jan. 20, 2019).

10. Erica York & Kyle Pomerleau, *Tracking the Economic Impact of U.S. Tariffs and Retaliatory Actions*, TAX FOUNDATION (updated Sept. 9, 2018), <https://taxfoundation.org/tracker-economic-impact-tariffs/>.

11. The term "economically depressed areas" is synonymous with "economically distressed areas," but the latter term has a statutory definition under Public Works and Economic Development Act of 1965 (PWEDA). 42 U.S.C. § 3161 (2012).

12. Hla Myint & Anne O. Krueger, *Economic Development*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/economic-development> (last visited Jan. 20, 2019).

13. There are no formal definitions for developing countries and developed ones. See *id.* Developed countries are commonly understood as countries with advanced economies, often demonstrated by high per capita income and advanced industrial capacities. *Id.* Developed countries tend to be the members of the Organisation for Economic Co-operation and Development (although the membership in the two groups may not exactly coincide) and are also classified as the high-income countries designated by the World Bank. *Organisation for Economic Cooperation and Development (OECD)*, REPUBLIC OF SLOVENIA MINISTRY OF FOREIGN AFFAIRS,

countries—for example, the widening income gaps among individual citizens and geographic regions,¹⁴ the stagnant economic growth deepening income gaps, and the institutional incapacity to deal with these issues—go beyond the cyclical economic issues once considered a normality in developed economies; they resemble the chronic economic problems of the developing world.¹⁵

This necessitates the adoption of the legal and institutional approaches that have been adopted by successful developing countries, such as South Korea, to promote economic development.¹⁶ South Korea was among the poorest countries in the early 1960s, suffering from adverse conditions such as a low per-capita income causing “prevalent poverty . . . low levels of technology and entrepreneurship in society, insufficient capital, poor endowment of natural resources, over-population in a relatively small territory, and internal political instability and external threats to its security.”¹⁷ By the end of the millennium, South Korea—within the span of one generation—achieved the most successful economic development in history and became a country with an advanced

http://www.mzz.gov.si/en/economic_and_public_diplomacy/slovenia_member_of_the_oecd/organisation_for_economic_co_operation_and_development_oecd/ (last visited Jan. 20, 2019). As of January 2019, the World Bank defines low-income economies as those with a GNI (gross national income) per capita of \$ 995 USD or less; lower middle-income economies, a GNI per capita between \$ 996 USD and \$ 3,895 USD; upper middle-income economies, a GNI per capita between \$ 3,896 USD and \$ 12,055 USD; high-income economies, a GNI per capita of \$ 12,056 USD or more. World Bank, *Data: Country and Lending Groups*, <http://data.worldbank.org/about/country-and-lending-groups> (last visited Jan. 20, 2019).

14. OECD, *DIVIDED WE STAND: WHY INEQUALITY KEEPS RISING* (2011). The OECD observed increasing wage gaps and household income inequality in a large majority of OECD countries. *See id.* For example, according to the U.S. Census Bureau data from 2016, New Orleans and Detroit are among the most impoverished major cities in the United States with 26.2% and 39.4% of their populations, respectively, living below the poverty line of \$ 24,008 for a family of four. U.S. Census Bureau, *Quick Facts: New Orleans, Louisiana*, <https://www.census.gov/quickfacts/neworleanscitylouisiana> (last visited Jan. 20, 2019); U.S. Census Bureau, *Quick Facts: Detroit, Michigan*, <https://www.census.gov/quickfacts/detroitcitymichigan> (last visited Jan. 17, 2019). Both cities also suffer from high rates of crime. *See The 30 cities with the highest murder rates in the US*, RAPID CITY JOURNAL (Nov. 13, 2017), https://rapidcityjournal.com/news/national/the-cities-with-the-highest-murder-rates-in-the-us/collection_0e7dd367-2f62-5822-b84997f4e9a43e3d.html#29 (last visited Jan. 20, 2019).

15. Mohamed A. El-Erian, *Why Advanced Economies Need to Learn from Developing Nations*, BLOOMBERG VIEW, July 11, 2016. Applied to advanced economies such as the United States, perhaps the definition of economic development could be adjusted to “the process of progressive transformation of an economy leading to higher productivity and increases in income for the majority of populations” without a reference to the structural transformation of an economy from “one based primarily on the production of primary products” because the U.S. economy is not such an economy. In the United States, economic development objectives may include bridging regional economic gaps, stimulating economic growth, and reducing “economic polarization” (worsening income distribution). *Id.*

16. *See Lee, supra note 2.*

17. *Id. See also YONG-SHIK LEE, RECLAIMING DEVELOPMENT IN THE WORLD TRADING SYSTEM* 17–18 (2d ed. 2016).

economy and world-class industries that generated high per-capita income for the majority of its population.¹⁸

The South Korean government adopted a series of effective economic development policies, such as promoting coordination and cooperation between the public and private sectors, granting subsidies and tax exemptions to the growing key industries that generated jobs and income for the South Korean population, and facilitating economic growth through enabling legislation and a range of institutions to support these policies.¹⁹ For example, the government set up the Economic Planning Board (EPB) as a control tower to coordinate development policies, and Korea Trade Promotion Agency (KOTRA) with offices in a number of export markets around the world to offer assistance with export activities of South Korean companies by providing market information and networks.²⁰ This legal and institutional approach could also be adopted—albeit with necessary modifications—for economically depressed areas in the United States to provide focused support to industries and businesses that contribute to economic development and that generate jobs and income.

The new legal and institutional approaches call for the resources of the federal government, which collects the majority of tax revenue²¹ and, therefore, has greater resources than State and local governments, which may not be able to offer subsidies, tax exemptions, or reductions at the level required to facilitate the economic development of their regions.²² In particular, the resource constraints will be an issue for the State and local governments in economically depressed areas with weak tax revenues.²³ This means that the legal and institutional approaches have to be supported by the federal government; however, this could create a conflict with the tradition and practice in the United States whereby the federal government is not directly involved with regional economic issues.²⁴ There is also a question as to whether the federal government

18. Lee, *supra* note 2, at 433.

19. *Id.* at 445–46, 456.

20. *Id.* at 449–50.

21. It has been reported that in 2015, federal revenue comprised 61% of the \$ 5.7 trillion USD total, while States collected about 28%, and local governments brought in about 11%. Tax Policy Center, *What is the breakdown of tax revenues among federal, state, and local governments?*, <http://www.taxpolicycenter.org/briefing-book/what-breakdown-tax-revenues-among-federal-state-and-local-governments> (last visited Jan. 17, 2019).

22. For a discussion on the insufficient State budget, see Lucy Dadayan & Donald J. Boyd, *By The Numbers: 2016: Another Lackluster Year for State Tax Revenue*, *Rockefeller Institute of Government* (May 2017), <https://rockinst.org/wp-content/uploads/2018/02/2017-05-08-By-numbers-brief-no9-1.pdf> (last visited Jan. 20, 2019).

23. *See id.*

24. This tradition and practice is reflected in the Constitutional provision that the federal government has power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes,” which does not specifically include regional economic issues within States. U.S. CONST. art. I, § 8, cl. 3.

has a legal mandate to adopt measures to address regional economic issues.²⁵ The application of the right to development (RTD) may support such mandate; thus, this Article also examines the applicability of RTD in the context of the United States.

This Article is organized as follows: Part I discusses the need to adopt legal and institutional approaches as a means of dealing with regional and structural economic issues in the economy. Part II explains a recently developed general theory of law and development and applies it to explore effective legal and institutional approaches as a potential pathway toward the solution of the economic problems. Part III examines the applicability of the RTD in context of the United States, which may empower and, to some extent, obligate the federal government to address regional and structural economic issues that have adversely affected the majority of the population in the United States for decades. Part IV examines the compatibility of the RTD from the United States' legal perspectives and explores the grounds for recognizing the RTD as a legal right in the United States, in order to enable effective legal and institutional approaches. Part V offers a conclusion.

I. NECESSITY OF THE LEGAL AND INSTITUTIONAL APPROACHES

A. *Regional Economic Disparity*

Regional variance in economic performance and income level is by no means unusual and is readily observed in every country, but when economic gaps are deep and persistent, that variance can divide a country.²⁶ In the United States, such regional economic disparity is evident. In 2016, the median household income ranged from \$ 22,045 USD to \$ 134,609 USD among 3,142 counties, with a national median of \$ 57,671 USD,²⁷ and unemployment rates ranged from 1.7% to 23.6%.²⁸ The following map depicts the large income gaps existing among the various counties, with wealthier counties located in major population centers on the East and West coasts, pockets in the West, and in Texas, while the poorer counties are found in the rural South, Southeast, Southwest, and the Midwest.

25. The question stems from the constitutional provision cited above (the "Commerce Clause"), although the Supreme Court interpreted the legal mandate of the federal government under the Commerce Clause widely. *Wickard v. Roscoe C. Filburn*, 317 U.S. 111 (1942).

26. See generally AMERICA 2050: NEW STRATEGIES FOR REGIONAL ECONOMIC DEVELOPMENT (Petra Todorovich & Yoav Hagler eds., 2009).

27. *Id.*

28. United States Department of Labor, Bureau of Labor Statistics, *Local Area Unemployment Statistics Map*, <https://www.bls.gov/lau/laucnty16.xlsx> (last visited Jan. 17, 2019).

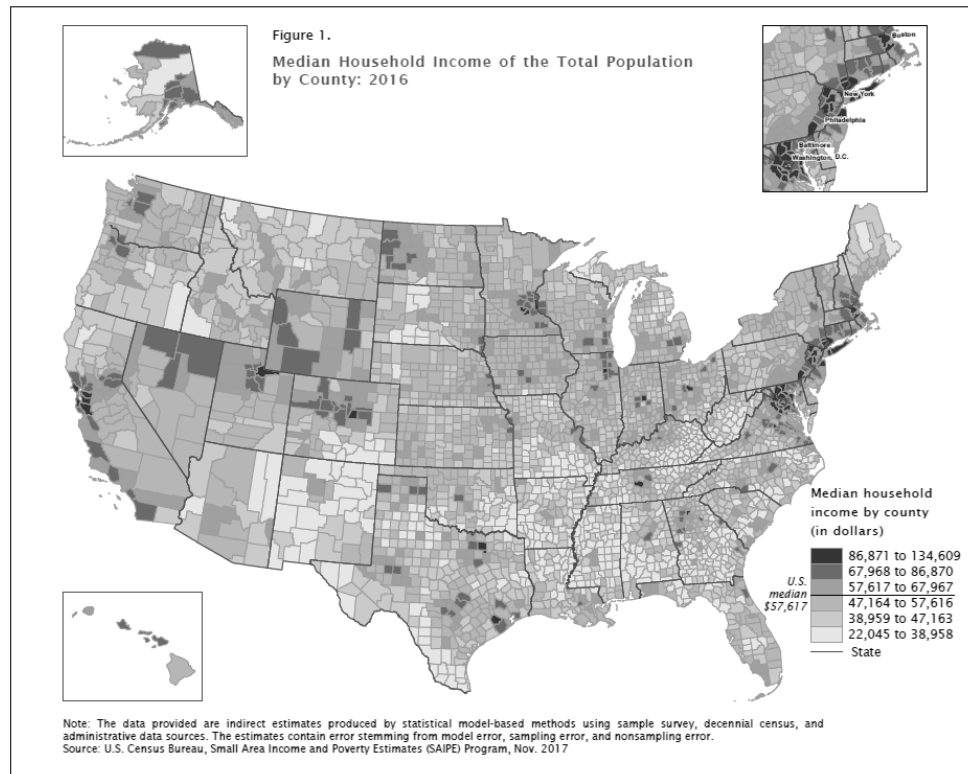


Figure 1: Median Household Income of the United States by County (2016)²⁹

The regional economic disparity measured by the median household income is large. In the highest bracket, the median household income is over 230% of the national median, and in the lowest, it is below the poverty line.³⁰ According to a study by the United States Department of Agriculture (USDA) based on 353 counties, 11.2% of them are “persistently poor.”³¹ These counties have had 20% or more of their populations living in poverty over the last 30 years.³² Poverty in the United States is regionally concentrated; the USDA study notes that

29. U.S. Census Bureau, *Median Household Income of the United States by County: 2016*, <http://www.census.gov/content/dam/Census/library/visualizations/2017/demo/p30-02/fl-mp-16.pdf> (last visited Jan. 20, 2019).

30. *Id.* The “poverty thresholds” identified by the Census for a family of four were \$ 24,424–25,160 USD, depending on the number of children under the age of eighteen, in 2016. U.S. Census Bureau, *Poverty Thresholds for 2016 by Size of Family and Number of Related Children Under 18 Years*, <https://www2.census.gov/programs-surveys/cps/tables/time-series/historical-poverty-thresholds/thresh16.xls> (last visited Jan. 17, 2019).

31. USDA Economic Research Serv., *Geography of Poverty*, <https://perma.cc/N847-9UVR> (last visited Jan. 20, 2019).

32. *Id.*

“people living in poverty tend to be clustered in certain regions, counties, and neighborhoods rather than being spread evenly across the Nation.”³³

The geographical location of the respective wealthier and poorer counties and regions has not significantly changed over the years.³⁴ One notable study concluded that counties consistently underperforming economically are primarily located in seven regions: the Northern Rockies, the Great Plains, the Rio Grande Valley, the Mississippi Delta, the Great Lakes Region, the Appalachian Mountains, and the Deep South.³⁵ Many of the counties marked as exhibiting lower household incomes, on the 2016 map above, are also located in the aforementioned regions and on maps produced in the beginning of the century illustrating the median household income by county.³⁶ The lack of substantial change in the location of wealthier and poorer counties over time demonstrates the persistency of regional economic gaps that accompany unemployment.

The causes of this persistent regional economic disparity include geographical elements such as location (*e.g.*, access to ports and transportation links),³⁷ infrastructure,³⁸ the availability of human capital through educational attainment,³⁹ and natural amenities.⁴⁰ These elements have influenced the location of new industries that generate employment and income in fields such as information technology, biology, finance, and other skilled professions.⁴¹ In

33. *Id.*

34. Yoaf Hagler, *Introduction: Identifying Underperforming Regions*, in *AMERICA 2050: NEW STRATEGIES FOR REGIONAL ECONOMIC DEVELOPMENT* (Petra Todorovich & Yoav Hagler eds., 2009).

35. The study examined population change from 1970 to 2006, employment change from 1970 to 2006, wage change from 1970 to 2006, and average wages in 2006. *See id.* If a county ranked in the bottom third in three out of the four categories, the county was identified as underperforming. *Id.* at 7.

36. *See* U.S. Census Bureau, *Small Area Income and Poverty Estimates*, www.census.gov/content/dam/Census/library/visualizations/2004/demo/2002-statecounty-maps/med-hh-inc2002.pdf (last visited Jan. 20, 2019).

37. Junjie Wu & Munisamy Gopinath, *What Causes Spatial Variations in Economic Development in the United States?*, 90 *AM. J. AGRIC. ECON.* 392, 407 (2008). This study identified geographical isolation as the primary cause of economic disparity within the United States, making the observation that areas that were further away from metropolitan areas showed significantly lower labor demands, wages, housing prices, and demand for land development. *Id.* at 404, 407.

38. *Id.* at 402.

39. Robert D. Yaro, *Toward a National Reinvestment Strategy for Underperforming Regions*, in *AMERICA 2050: NEW STRATEGIES FOR REGIONAL ECONOMIC DEVELOPMENT* 13, 14 (Petra Todorovich & Yoav Hagler eds., 2009). The age composition of the population is also relevant. *See* Hagler, *supra* note 34, at 7.

40. Wu & Gopinath, *supra* note 37, at 404.

41. Hagler, *supra* note 34, at 8. Thus, these industries are concentrated in the regions with the cited advantages, such as the East and West coast, while isolated rural areas in the Midwest and the South have suffered from a lack of economic opportunities. *See, e.g., id.* The poverty rate in the rural South (non-metro counties) reached 21.3% during 2012–2016. USDA Economic Research Serv., *supra* note 32.

addition, uneven industrial development and the subsequent adaptation by counties have also played a role in creating this disparity. The once-powerful traditional manufacturing industries in the United States—such as the iron and steel industries—failed to adapt to the changing global economic environment, causing the sites of these industries to decline, earning their locales the nickname “the Rust Belt.”⁴²

Regional economic disparity creates a range of socioeconomic issues for the nation, including gaps in education, healthcare, and public safety, the loss of population in poorer regions, and social discontent leading to political unrest.⁴³ Perhaps the most dramatic demonstration of such social discontent was the unexpected outcome of the 2016 U.S. Presidential election. The political outsider, Donald Trump, won the election against the former Secretary of State and Senator for the State of New York, Hillary Clinton, even though the majority of forecasts covering the election outcome predicted a Clinton Presidency.⁴⁴ Trump’s unexpected victory has been attributed to a majority of Americans feeling discontent with the economy and a general mistrust in the political establishment.⁴⁵ There is a notable correlation between the counties that elected Donald Trump and their household median income, as demonstrated by the following map:

42. Hagler, *supra* note 34, at 7. “Rust Belt” refers to the large area from the Great Lakes to the upper Midwest States, including western New York, Pennsylvania, West Virginia, Ohio, Indiana, parts of Michigan, northern Illinois, eastern Iowa, and southeastern Wisconsin. *Rust Belt*, DICTIONARY OF AMERICAN HISTORY: ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/places/united-states-and-canada/miscellaneous-us-geography/rust-belt> (last visited Jan. 17, 2019). The term signifies the economic decline, deindustrialization, population loss, and urban decay caused by the decline of its once-prospered manufacturing sector. See Hagler, *supra* note 34. This region has lost more than 1.2 million manufacturing jobs since 1990 and 2.2 million since 1970. Yaro, *supra* note 39, at 13. However, not all of the traditional manufacturing sites have declined; for example, Chicago, New York, and Los Angeles also lost large numbers of traditional manufacturing jobs (548,185; 376,838; and 330,944, respectively), but these places were able to adapt and replace the declining industries with new ones that generated employment. Hagler, *supra* note 34, at 9. Some other places, such as Detroit and St. Louis, could not. *Id.*

43. See USDA Economic Research Serv., *supra* note 31. According to the USDA research: [T]he poor living in areas where poverty is prevalent face impediments beyond those of their individual circumstances. Concentrated poverty contributes to poor housing and health conditions, higher crime and school dropout rates, as well as employment dislocations. As a result, economic conditions in very poor areas can create limited opportunities for poor residents that become self-perpetuating.

Id.

44. John Slides, *A Comprehensive Average of Election Forecasts Points to a Decisive Clinton Victory*, THE WASH. POST, Nov. 8, 2016.

45. See Gabriel, *supra* note 3.



Figure 2: 2016 U.S. Presidential Election Result by County⁴⁶

This map points to the regional economic disparity reflected in the election outcome. Wealthier counties, such the population centers on the East and West coasts (colored darker on the map), voted for Clinton while the poorer counties, including the South, much of the Southwest and Southeast, and the Midwest, voted for Trump.⁴⁷

46. Snopes, *Did Trump Win 3,084 of 3,141 Counties, Clinton Only 57?*, <http://www.snopes.com/trump-won-3084-of-3141-counties-clinton-won-57/> (last visited Jan. 17, 2019).

47. See Gabriel, *supra* note 3. An anonymous academic lawyer, who was a former senior federal government official, has offered an alternative perspective on the Trump victory. He observed that:

[S]ome of the states he won had lower [unemployment] figures than the national average. He won claiming the U.S. economy was horrible when in fact it was better than almost any developed country. But some Americans are worse off[,] it is true. White males that 40 years ago had 99 percent of the good jobs have lost 45 percent—mainly to women not minorities, but it is easier to blame people with different skin color. And the good factory jobs mainly did not go overseas. They vanished—a factory that had 5000 workers now produces more with 2500. A deeper phenomenon is the declining willingness to move starting in the 1980s. There are lots of rust belt jobs at good pay that are unfilled because people who did the exact same job 2 hours away and were offered the new job would not move. Plus they would not do work viewed as women’s work or colored people’s work...or go back to school because they are in their situation because these are the ones who did not like school.

Personal correspondence on file with the author. The last part of the commentator’s observation is controversial, but the declined mobility has some support. See Derek Thompson, *How America Lost Its Mojo*, THE ATLANTIC, May 27, 2016, <https://www.theatlantic.com/business/archive/2016>

Given this divide, each group of counties and regions can be described as a country within a country with vastly different income levels and economic capacities; the poorer counties and regions analogous to “developing countries” existing alongside developed ones on the world stage. President Trump vowed to improve economic conditions for those in his support base: economically deprived and poor regions.⁴⁸ Thus, the economic improvement or “economic development” of poorer regions in the United States has acquired political tenancy.⁴⁹

B. Structural Issues in the Economy

In addition to the regional economic disparity, there are substantial structural issues in the United States’ economy that necessitate legal and institutional approaches, namely stagnant economic growth and economic polarization.⁵⁰

1. Stagnant Growth

The United States’ economy generally shows a steady decline in economic growth since the 1970s, apart from a brief uptick in the 2000s.⁵¹ The following graph illustrates the downward trend of real GDP⁵² (gross domestic product) growth rates:

/05/how-america-lost-its-mojo/484655/ (last visited Jan. 17, 2019). The article cites higher housing costs in economically prosperous areas as a cause of the declined mobility. *Id.*

48. See Heather Long, *Trump vows 25 million jobs, most of any president*, CNN MONEY, Jan. 20, 2017, <http://money.cnn.com/2017/01/20/news/economy/donald-trump-jobs-wages/> (last visited Jan. 20, 2019).

49. The term, “economic development,” is increasingly used in the context of developed-country economies. (For the adjusted definition, see *supra* note 15). Reflecting this trend, national, regional, and local governments in developed countries have set up offices to promote “economic development.” Examples include the Economic Development Administration (EDA) under the U.S. Department of Commerce, the Department of Economic Development in the State of Georgia, and the Office of Economic Development in the City of New Orleans.

50. Edward Glaeser, *Secular Joblessness*, in *SECULAR STAGNATION: FACTS, CAUSES AND CURES* 69 (Coen Teulings & Richard Baldwin eds., 2014), https://scholar.harvard.edu/files/farhi/files/book_chapter_secular_stagnation_nov_2014_0.pdf (last visited Jan. 20, 2019).

51. *US Real GDP Growth Rate by Year*, <http://www.multpl.com/us-real-gdp-growth-rate/table/by-year> (last visited Jan. 20, 2019).

52. “Real GDP” refers to gross domestic product figures adjusted by inflation (calculated in fixed currency value). Economic indicators in “real” terms, such as “real growth” and “real consumption,” are also adjusted by inflation.

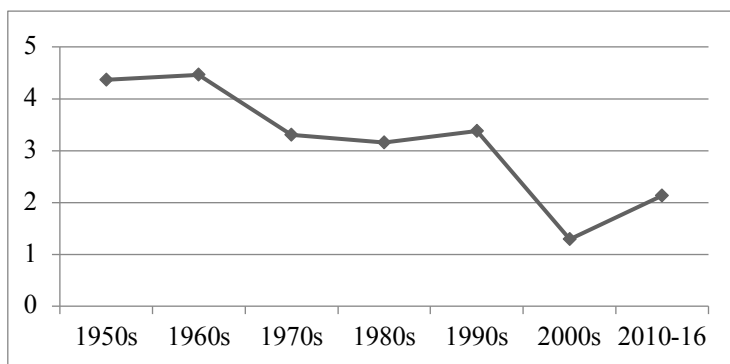


Figure 3: Average Annual Real GDP Growth Rates by Decade (percentage)⁵³

There is a long-term trend of steady decline, and the particularly low average real growth rate in the 2000s was due to the 2007–08 financial crisis, which led to a severe recession in the economy, thereby lowering real GDP growth rates to -2.77% and -0.24% in 2008 and 2009, respectively.⁵⁴ Since then, recovery and growth has been stagnant, with the real GDP growth rate remaining below the 2% range.⁵⁵ Population growth has been 0.7% and 0.8% since 2010, meaning that the growth of real per capita GDP remains less than 2% a year.⁵⁶

The stagnant growth affects employment. The unemployment/population ratio for males aged 25 to 54 has been over 15% since 2010; in the 1970s, however, it was below 10%.⁵⁷ Similarly, the unemployment/population ratio for all persons aged 25 to 54 has risen over 24% since 2009; in 1999–2000, it was 19%.⁵⁸ One study observed that the stability of the labor market in the United States has been weakened.⁵⁹ Until the end of the 1960s, the unemployment rate was relatively steady, averaging approximately 5–8%, depending on the economic cycle.⁶⁰ After 1970, however, unemployment increased sharply during the recession; however, those increases were not fully reversed during recovery.⁶¹ The 2007–08 recession was particularly severe, and prime-aged

53. Compiled from *US Real GDP Growth Rate by Year*, *supra* note 51, a table of annual percentage changes in U.S. Real GDP, chained 2009 dollars (inflation-adjusted).

54. *Id.*

55. *Id.*

56. WORLD BANK, *Population Growth (Annual %)*, https://data.worldbank.org/indicator/SP.POP.GROW?end=2017&locations=US&name_desc=false&start=2010 (last visited Jan. 17, 2019).

57. Glaeser, *supra* note 50, at 74.

58. See Coen Tuelings & Richard Baldwin, *Introduction*, in *SECULAR STAGATION* 8 (Coen Tuelings & Richard Baldwin eds., 2009).

59. *Id.*

60. *Id.* at 74.

61. *Id.*

male unemployment peaked at almost 20%, but was back down to 16.6% by 2014.⁶²

What is the cause of this stagnant growth and ensuing unemployment? An important reason is the relative decline of American industries since the 1970s.⁶³ After the Second World War, United States' industries enjoyed a dominant position in the world.⁶⁴ Ultimately, this dominance was challenged—first by European countries, such as Germany, as those countries regained productive capacity, then by Japan and the newly industrializing countries (NICs), such as Korea and Taiwan, and, most recently by China, which has industrialized rapidly since the 1980s.⁶⁵ Facing competition from producers in these countries, American producers lost many of their overseas and domestic consumers and relocated production facilities overseas, seeking cheaper labor and consumer outlets, which reduced employment opportunities for American workers.⁶⁶ United States producers found strength in some of the new high-tech industries—for example, information technology, biology, and financial services—but are not enjoying the same dominant position they once did with traditional manufacturing industries.⁶⁷ Consistent with the economic stagnation, investment growth, measured by the non-residential fixed investment growth rate and the domestic net fixed investment/GDP ratio, has also been in a downward trend as demonstrated by the following graphs:

62. *Id.*

63. *Id.* at 52–53.

64. See Christopher J. Tassava, *The American Economy during World War II: The U.S.'s Position at the End of the War*, ECON. HISTORY ASS'N, <https://eh.net/encyclopedia/the-american-economy-during-world-war-ii/> (last visited Jan. 17, 2019).

65. WORLD BANK, *supra* note 56.

66. Steven Pearlstein, *Outsourcing: What's the True Impact? Counting Jobs is Only Part of the Answer.*, THE WASH. POST, July 1, 2012, https://www.washingtonpost.com/business/economy/outsourcings-net-effect-on-us-jobs-still-an-open-ended-question/2012/07/01/gJQAs1szGW_story.html?noredirect=on&utm_term=.aca0835050b0 (last visited Jan. 20, 2019).

67. *Id.*

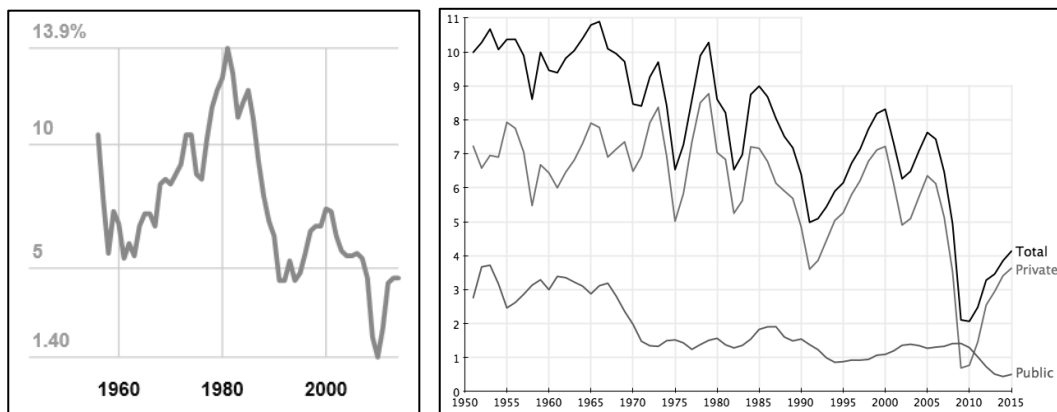


Figure 4 (left): Non-residential Fixed Investment⁶⁸

Figure 5 (right): Domestic Net Growth Rate Fixed Investment (percentage of GDP)⁶⁹

The declining growth in investment adversely affects long-term economic growth.

2. Economic Polarization

Robert Gordon cites the inequality of income distribution as an impediment to the long-term economic growth of the United States.⁷⁰ He observes that the increasing share of the top 10% of income distribution has deprived the middle class of income growth.⁷¹ Since the 1970s, the real incomes of households in the low-to-middle-income groups have stagnated, whereas the real incomes of households in the highest income group have increased sharply.⁷² Thus, the upward mobility in the United States' economy—which had been active from the 1950s until the 1970s—has been declining. Since the turn of this century, polarization has mostly affected lower income households.⁷³ The number of middle-income households was 58% of all households in 1970; in 2014, 47% of

68. Chris Matthews, *America's Investment Crisis is Getting Worse*, FORTUNE FINANCE, Dec. 5, 2015, <http://fortune.com/2015/12/02/corporate-investment-crisis/> (last visited Jan. 20, 2019).

69. AnEconomicSense.org, *How Fast Can GDP Grow?: Not as Fast as Trump Says*, AN ECONOMIC SENSE, Aug. 1, 2017, <https://aneconomicssense.org/2017/08/01/how-fast-can-gdp-grow-not-as-fast-as-trump-says/> (last visited Jan. 20, 2019).

70. Teulings & Baldwin, *supra* note 58, at 4.

71. *Id.*

72. For an explanation of economic indicators in “real terms,” see *supra* note 52.

73. See Ali Alich, Kory Kantenga, & Juan Solé, *Income Polarization in the United States*, 5 (IMF Working Paper, WP/16/121, 2016).

households qualified as middle-income.⁷⁴ Similarly, the income share of the middle-income household decreased from 47% in 1970 to 35% in 2014.⁷⁵

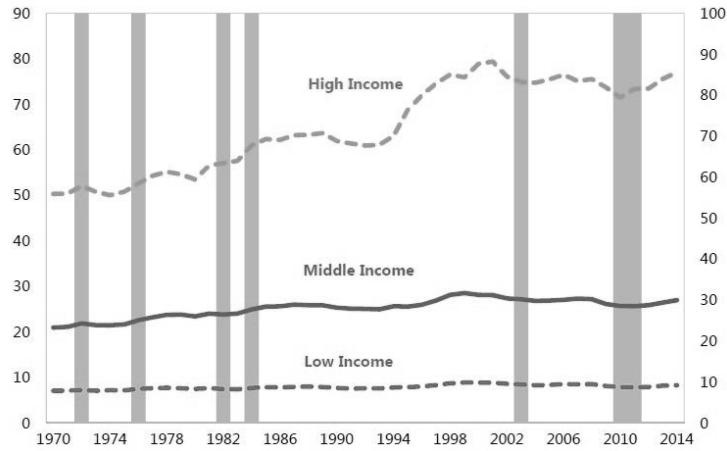


Figure 6: Average Scaled Household Income, 1970–2014 (thousand 2005 USD)⁷⁶

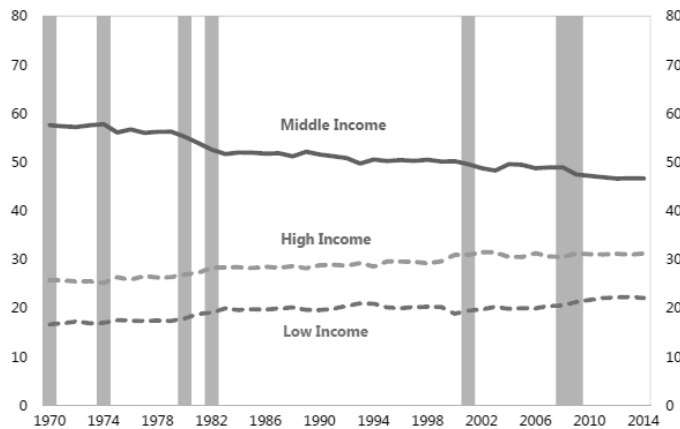


Figure 7: Number of Households by Income Group, 1970–2014 (percentage)⁷⁷

74. *Id.* at 5–8.

75. *Id.*

76. *Id.* at 4. The low-income group is comprised of households with less than 50% of the median income, the middle-income group is comprised of households with 50–150% of median income, and the high-income group, households with more than 150% of median income. Household income is divided by its size using OECD's equivalence scale. *See id.* at 4, n.6.

77. *Id.* at 5.

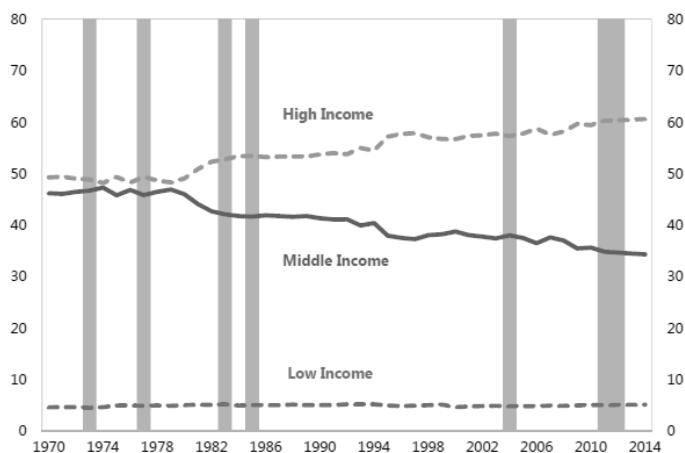


Figure 8: Income Shares by Income Group, 1970–2014 (percent)⁷⁸

The polarization has been in a deteriorating trend; while more of the middle-income households moved into the high-income group rather than the low-income group during 1970–2000, only 0.25% of households have moved up to the high-income group since 2000 compared to 3.25% of the middle-income households who have moved down to the low-income group.⁷⁹ With the stagnation of the income growth for middle and low-income groups, the majority of American households have experienced stagnant income growth since the 1970s.⁸⁰

Economic polarization presents a significant structural problem in the economy because it lowers the level of real consumption for the whole economy, suppressing, in turn, economic growth.⁸¹ This is because low- and middle-income households spend a larger share of their income to meet their cost of living, compared to high-income households (“higher propensity to consume”).⁸² Therefore, the stagnant income growth in these two income groups and the shrinking middle-income households indicates weakened consumption and explains stagnant economic growth over the years.

C. Call for New Approaches

Regional economic disparity and the structural issues in the United States’ economy, characterized by stagnant growth and economic polarization, impeded

78. *Id.* at 8.

79. *Id.* at 5.

80. *Id.*

81. *Id.* at 2.

82. *Id.* at 35.

the economic wellbeing of the majority of Americans, and the current economic problem was a primary cause of the dramatic upset in the 2016 U.S. Presidential election.⁸³ Economic development is a priority for the new Administration and has acquired political tenancy.

The question the United States faces is how to overturn the current economic stagnation and stimulate economic development.⁸⁴ A rational approach is to identify and tackle the causes of the current economic problem. As discussed in previous Sections, the causes of regional economic disparity, stagnant growth, and economic polarization include: insufficient education and training, particularly for those on the lower end of the economic ladder, lack of infrastructure isolating many areas from the economic centers, income polarization weakening the aggregate demand level, the downward trend for investment growth, stagnant population growth eroding consumer base and the supply of labor for the future,⁸⁵ excessive debts owed by the public suppressing consumption,⁸⁶ and change in technology reducing the need for employment.⁸⁷

These causes are diverse, multifaceted, and interconnected. There are legal and institutional frameworks in place to promote economic development, but they prove to be insufficient. For example, the Public Works and Economic Development Act (PWEDA) authorizes the provision of federal grants, loans, and other types of assistance to support businesses in economically distressed areas for the purpose of job creation and economic growth.⁸⁸ The Economic Development Administration (EDA), established under the authority of PWEDA, is currently the only federal agency focused exclusively on economic

83. See Gabriel, *supra* note 3.

84. In the United State context, economic development objectives may not be limited to economic growth but include reduce regional economic disparity and economic polarization. See *supra* note 15 (for the economic development objectives for the United States).

85. See Robert Gordon, *The Turtle's Progress: Secular Stagnation Meets the Headwinds*, in SECULAR STAGNATION: FACTS, CAUSES AND CURES 47–50 (Coen Teulings & Richard Baldwin eds., 2014), https://scholar.harvard.edu/files/farhi/files/book_chapter_secular_stagnation_nov_2014_0.pdf (last visited Jan. 20, 2019).

86. The United Nations Development Policy and Analysis Division, *Low Growth With Limited Policy Options?: Secular Stagnation—Causes, Consequences and Cures*, DEVELOPMENT ISSUES no. 9, 3 (March 1, 2017), https://www.un.org/development/desa/dpad/wpcontent/uploads/sites/45/publication/dsp_policy_09.pdf (last visited Jan. 20, 2019).

87. Sung-Hee Jwa, *A General Theory of Economic Development: Towards a Capitalist Manifesto—A Critical Review*, 10 L. & DEV. REV. 643, 653–54 (2017).

88. PWEDA, as amended, 42 U.S.C. §§ 3121 *et. seq.* (1965). Sections 3161(a)(1) and 3161(a)(2) of PWEDA provide that an area is economically distressed if it has a per capita income of 80% or less than the national average, or an unemployment rate that is at least 1% greater than the national average unemployment rate for the most recent 24-month period for which that data is available. 42 U.S.C. § 3161(a)(1-3) (2012). An area that does not meet the criteria in sections 3161(a)(1) or 3161(a)(2) of the PWEDA may still be considered economically distressed if the area meets the special need criteria under 3161(a)(3) of PWEDA. *Id.*

development.⁸⁹ The EDA works with local economic development officials and provides grants for relatively small scale development projects, including public works in economically distressed areas, regional innovation strategies, partnership planning, economic and trade adjustment assistance, and research and evaluation programs.⁹⁰

As a small agency under the Department of Commerce, the EDA's mandate is limited and the agency does not have the institutional status, authority, or budget to address the cited causes of the economic problems through effective coordination with other federal, State, and local government departments and agencies, as well as with the private sector, on the scale that is necessary to tackle the causes of the economic problems at the national level.⁹¹ Other federal government departments and agencies, such as the Department of Agriculture and the International Trade Administration under the Department of Commerce, also have programs to assist agricultural and industrial producers, but their jurisdiction is limited to specific areas, without authority to address the causes of the economic problems across the board.⁹²

To address them effectively, there is a need for stronger and more comprehensive institutional and legal frameworks targeting those causes and focusing on economic development. Such frameworks should allow effective cooperation and coordination across different levels of government and between the government and the private sector. The necessity of adopting this new approach falls in the failures of federal, State, and local governments to effectively tackle the causes of economic problems, and in the lack of coordination and cooperation across different levels of government between the

89. *Id. Cf.* at the regional level, the Appalachian Regional Commission is established under the authority of the Appalachian Redevelopment Act of 1965 for the purpose of facilitating economic growth in the economically depressed Appalachian region. 40 U.S.C. §§ 14101 *et. seq.* (1965).

90. EDA, *EDA Fiscal Year 2017 Budget Request At-A-Glance: Supporting 21st Century Economic Development*, https://www.eda.gov/pdf/EDA-FY-2017-Budget-Fact-Sheet_FINAL.pdf (last visited Jan. 20, 2019). In 2016, the per-project grant ranged from \$ 10,000 USD to \$ 4,974,100 USD, and the EDA supported 649 projects for the total grant of \$ 261 million USD, averaging around \$ 400,000 USD per project. EDA, *2016 Annual Report* (2016), <https://www.eda.gov/annual-reports/fy2016/> (last visited Jan. 20, 2019).

91. *Id.* The budget requested for the EDA is \$ 258 million for the fiscal year 2017, which is less than 0.01 percent of the total federal budget. *Id.* By comparison, the USAID, the United States agency charged with assisting international development, has a funding of \$ 22.7 billion USD for accounts from which USAID administers assistance projects, which is nearly 9 times larger than the EDA budget. USAID, *FY 2017 Development and Humanitarian Assistance Budget*, https://www.usaid.gov/sites/default/files/documents/9276/FY2017_USAIDBudgetRequestFactSheet.pdf (last visited Jan. 20, 2019).

92. *See* USDA, *New Farmers*, <https://newfarmers.usda.gov/> (last visited Jan. 20, 2019); Exportgov., *Government Support*, <https://www.export.gov/article?id=Obtaining-Government-Support-for-Service-Exports> (last visited Jan. 20, 2019).

public and private sectors.⁹³ The outcome has been decades of continued regional economic disparity, stagnant growth, and widening economic polarization.⁹⁴

The next Part of this Article draws from the experiences of successful developing countries and discusses the specific nature of the proposed legal and institutional approaches. These developing countries successfully lifted their economies from poverty to prosperity within a single generation, achieving the highest economic growth and the most successful economic development in history. The legal and institutional approaches adopted by these countries, particularly South Korea, present a useful reference model not only for the other developing countries seeking success in economic development, but also for developed ones, such as the United States, experiencing stagnant growth and economic polarization.

II. APPLYING THE LEGAL AND INSTITUTIONAL APPROACHES

A. Cases of Successful Developing Countries

Since the Second World War, very few developing countries have succeeded in developing economically from poverty to prosperity.⁹⁵ The majority of successful developing countries, including South Korea, Taiwan, Hong Kong,⁹⁶ and Singapore, are located in East Asia and have been described as the Newly Industrialized Countries or “NICs.”⁹⁷ NICs have achieved unprecedented

93. For example, the federal effort to establish an efficient trucking network was impeded by individual States’ attempt to impose their own regulations. The federal government tried to strike down varied state regulations and set a uniform standard in the trucking industry by applying Supreme Court decisions. However, State governments continued to impose their own rules by interpreting these decisions narrowly. This conflict continued until Congress subsequently enacted laws governing the trucking industry nationwide. See Thomas W. Hazlett, *Is Federal Preemption Efficient in Cellular Phone Regulation?*, 56 FED. COMM. L.J. 155, 186–187 (2003). In another example, both the federal and State governments endorse fracking, a new technology adopted to extract oil or gas. This technology is reinvigorating manufacturing investment, but this endorsement faces intense opposition from local governments on environmental grounds for causing domestic conflicts and social expense. See David B. Spence, *The Political Economy of Local Vetoes*, 93 TEX. L. REV. 351, 354–357 (2014). Also, real estate developments through the “Public-Private Partnership” model in Minnesota, New Jersey, New York, Pennsylvania, and Washington, D.C. failed due to a lack of well-calculated coordination between public and private interests. See Marc Scribner, *The Limitations of Public-Private Partnerships: Recent Lessons from the Surface Transportation and Real Estate Sectors*, Competitive Enterprise INST., Issue Analysis No. 1, 15-22 (Jan. 2011).

94. See discussion *supra* Section A and B.

95. See *infra* note 98 (for a phenomenal economic growth of the Newly Industrializing Countries).

96. Hong Kong became a territory of China in 1997. See Catherine Schenk, *Economic History of Hong Kong*, EH.NET ENCYCLOPEDIA (Mar. 16, 2008), <http://eh.net/encyclopedia/economic-history-of-hong-kong/> (last visited Jan. 20, 2019).

97. Other developing countries, other than the NICs, have also economically progressed. Chile and Spain have also moved from a state of poverty to that of developed economies after the

economic development sustained for more than three decades. For instance, between 1961 and 1996, South Korea increased its GDP (gross domestic product) by an average of 8.75% per annum, Hong Kong by 7.61%, Taiwan by 8.64%, and Singapore by 8.61%; the world's average annual GDP increase for the corresponding period was 3.85%.⁹⁸ As a result of their successful economic developments, these countries achieved high-income country status, as classified by the World Bank, by the mid-1990s.⁹⁹

The NICs adopted extensive state-led development policies.¹⁰⁰ State-led development refers to the development approach in which a state assumes the key role for economic development by generating economic development plans, relocating surplus, investing key sectors, managing international trade, and controlling foreign capital.¹⁰¹ Although the market and private corporations are also important for this approach, this approach is at odds with the neoliberal prescriptions that do not support active government intervention in the economy.¹⁰² The NICs focused on export promotion to overcome the constraints

Second World War. Countries such as Malaysia, Thailand, and Vietnam have also progressed in recent decades, although they have not yet reached the developed country status. (For criteria for developed countries, see OECD, *supra* note 14). Certain European countries, such as Portugal, several regions of Italy, Greece, Poland, Hungary, Slovakia, Slovenia, and Ireland were also relatively poor (compared to the other Western European countries) and progressed. Despite these progresses, however, the vast majority of developing countries have not yet successfully progressed into developed economies.

98. The GDP growth figures are calculated with real GDP figures at constant 2005 national prices. Robert C. Feenstra, Robert Inklaar, & Marcel P. Timmer, *Penn World Table Version 8.1* (Apr. 13, 2015), <http://www.rug.nl/ggdc/productivity/pwt/pwt-releases/pwt8.1> (last visited Jan. 20, 2019). See also World Bank data, <http://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG> (last visited Jan. 20, 2019).

99. Per capita income is used to classify economies into different groups. See OECD, *supra* note 14.

100. Perhaps an exception among the NICs is Hong Kong, which is known to have adopted a *laissez-faire* economic policy with minimal government involvement. However, Catherine Schenk suggested that this perception was a myth; she argued that the government subsidized the private sector indirectly through public housing, which restrained rises in the cost of living that would have threatened Hong Kong's labor-cost advantage in manufacturing. See Schenk, *supra* note 96.

101. Such state is called a "developmental state." See David Trubek & Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, in *NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPROACH* 8 (David Trubek & Alvaro Santos eds., 2006).

102. The neoliberal prescriptions are well illustrated by the "Washington Consensus," which refers to a set of policies representing the lowest common denominator of policy advice advanced by Washington-based institutions, such as fiscal discipline, a redirection of public expenditure priorities toward areas offering both high economic returns and the potential to improve income distribution (such as primary health care, primary education, and infrastructure), tax reform to lower marginal rates and broadening the tax base, interest rate liberalization, a competitive exchange rate, trade liberalization, liberalization of inflows of foreign direct investment, privatization, deregulation (to abolish barriers to entry and exit), and protection of property rights. See John Williamson, *What Washington Means by Policy Reform*, in *LATIN AMERICAN READJUSTMENT: HOW MUCH HAS HAPPENED* (John Williamson ed., 1989).

of their relatively small domestic markets. Combining state-led, industrial development policies with export promotion, the NICs were very successful in stimulating and sustaining high-rates of economic growth for over three decades, successfully transforming their economies to be highly-productive, manufacturing-based, and innovative.¹⁰³

Among the NICs, South Korea is particularly helpful because it shows not only how a successful developing country maintained a high level of economic growth for over three decades, but also how it was able to break out of a period of stagnation and achieve sustained economic growth. In the early 1960s, South Korea was at the lowest end of the world economy, with a per-capita income of a mere \$ 120 USD in 1962 and stagnant economic growth.¹⁰⁴ Unlike the other NICs, which had some degree of political stability, South Korea went through a period of social and political turmoil in the 1950s and the early 1960s, including the tragic Korean War (1950–1953), periods of civil unrest, revolution (1960), and a military coup (1961).¹⁰⁵ Despite the decrease in aid from the United States that began in the late 1950s, which South Korea heavily relied upon,¹⁰⁶ the country achieved historic unprecedented economic growth¹⁰⁷ and broke out of its period of stagnation.¹⁰⁸ Thus, the study of the legal and institutional dimensions of this transformation may shed light on the legal and institutional approaches that could be adopted to resolve the current economic stagnation, regional economic gaps, and economic polarization in the United States.

Nevertheless, the economic, social, and political circumstances of the United States today and those of South Korea in the early 1960s are very different. Despite decades of economic stagnation, the United States does not suffer from the level of poverty, lack of technology and capital, or insufficient natural resources that South Korea faced in the early 1960s.¹⁰⁹ To the contrary, the

103. See Trubek & Santos, *supra* note 101, at 8.

104. See World Bank, *GNI per capita*, Atlas Method (current USD), http://data.worldbank.org/indicator/NY.GNP.PCAP.CD?end=2014&start=1962&year_low_desc=false (last visited Jan. 20, 2019). With substantial aid from the United States, the South Korean economy recovered from the destructions of the War in the 1950s, but economic stagnation began when the United States started to reduce its aid to South Korea in 1958. South Korea's economic growth rate was 3.49% in 1958, but it was lowered to 1.63% in 1959 and further reduced to mere 1.18% in the following year. Calculated from FRED (Federal Reserve Economic Data). FRED, *Real GDP at Constant National Prices for Republic of Korea* (RGDPNAKRA666NRUG), <https://fred.stlouisfed.org/series/RGDPNAKRA666NRUG> (last visited Jan. 20, 2019). Unemployment rate was estimated as high as 35% as of 1961.

105. See Lee, *supra* note 17, at 17.

106. In the early 1960s, aid from the United States amounted to over 50% of South Korea's annual budget. Lee Wan Bum, *The Planning for the First Five-Year Economic Plan and the Role of the United States: 1960–1965* (Jan. 6, 2006) (in Korean), <http://egloos.zum.com/s2870830/v/6058789> (last visited Jan. 20, 2019).

107. World Bank, *supra* note 98 (between 1961 and 1996, South Korea increased its GDP by an average of 8.75% per annum).

108. Glaeser, *supra* note 50, at 84 (for economic stagnation and high level of unemployment).

109. *Id.* at 58.

United States is the largest economy and trader in the world, has the most advanced technological assets, the largest capital stock, rich natural resources, and the most sophisticated corporate operations.¹¹⁰ The commonality between these two very different countries, however, is in their economic stagnation—South Korea in the late 1950s¹¹¹ and the United States in recent decades.¹¹² This commonality suggests that the legal and institutional approaches that South Korea adopted to break out of economic stagnation and stimulate economic development could provide a reference point for the United States, despite the differences in the economic conditions.¹¹³

B. Applying the General Theory of Law and Development: Regulatory Design

The assessment of South Korea's legal and institutional approaches and their applicability to the United States will be enhanced if conducted under a coherent theoretical framework. I have developed such framework, entitled a "general theory of law and development" (hereinafter "the general theory").¹¹⁴ Law and development refers to an area of study that explores the interrelationship between law and economic development.¹¹⁵ For decades, it has lacked both clear conceptual parameters defining the field and a solid theoretical framework assessing the impact of law, legal frameworks, and institutions on development.¹¹⁶ The general theory attempts to set the conceptual parameters for "law" and "development" in the context of law and development studies and presents the "regulatory impact mechanisms," which are causal mechanisms by which law impacts development.¹¹⁷

There are three categorical elements present in regulatory impact mechanisms: "regulatory design," "regulatory compliance," and "quality of implementation."¹¹⁸ These elements are conceptually separate but interrelated,

110. *Id.* at 69, 71.

111. FRED, *supra* note 104.

112. *See* Figure 3 *supra*.

113. For the "economic development objectives" in the context of the United States, *see* Wu & Gopinath, *supra* note 37, at 407.

114. Yong-Shik Lee, *General Theory of Law and Development*, 50 CORNELL INT'L. L. J. 415, 417–18 (2017).

115. *Id.* at 418.

116. A scholar described law and development as indeterminate and heterogeneous as an area of scholarship. He commented,

It [law and development] does not appear to possess a particular normative armature or notable thematic consistency or much of a unifying logic or set of organizing principles.

The most one can say is that the disciplinary range of L&D is constituted by the aggregate of studies pursued by its self-identifying adherents.

Scott Kennedy, *The Dialectics of Law and Development*, in NEW LAW AND ECONOMIC DEVELOPMENT, *supra* note 101, at 177.

117. Lee, *supra* note 114, at 418.

118. *Id.*

influencing one another. Each of these elements includes sub-elements, as further discussed in this Section. I apply these elements and sub-elements to assess the legal and institutional approaches adopted to stimulate economic development in South Korea before examining their applicability in the United States today.

The first element of the regulatory impact mechanisms is “regulatory design,” which concerns how optimally a law is designed to achieve its regulatory objectives.¹¹⁹ A law with an effective regulatory design is more likely to impact development than one without. The assessment of regulatory design, which is potentially a complex task, is performed by examining three sub-elements: anticipated policy outcome, organization of law, legal frameworks, institutions (LFIs), and adaptation to socioeconomic conditions.¹²⁰ I analyze each of these in sequence to examine regulatory design.

1. Anticipated Policy Outcome

The first sub-element of regulatory design, “anticipated policy outcome,” refers to the policy outcome that law is anticipated to deliver.¹²¹ Law exhibits a policy or policies forming regulatory objectives.¹²² For example, in South Korea in the 1960s and 1970s, several statutes were enacted pursuant to its policies in order to facilitate particular key industries and support export activities.¹²³ These statutes advanced economic development objectives by empowering the government to promote industries and support exports through various means, such as tax incentives, subsidy grants, policy loans and loan guarantees, tariff rebates, and import control.¹²⁴ Despite initial uncertainty, the implementation

119. *Id.* at 419.

120. *Id.*

121. *Id.* at 436.

122. *Id.*

123. For industrial promotion, the government enacted several statutes providing direct support for specific industries. These statutes included: the Act on Temporary Measures for Textile Industrial Facilities (1967); the Acts on Promotion of Mechanical Industries (1967), Shipbuilding Industries (1967), Electronic Industries (1969), Petrochemical Industries (1970), and Steel Industries (1970); the Act on Refining Service of Non-Ferrous Metals (1971); and the Act on the Promotion of the Modernization of Textile Industries (1979). These statutes mandated that the government adopt various measures of support for the designated industries, such as tax incentives, policy loans (government-backed loans offering more favorable terms, such as lower interest rates, than the prevailing commercial terms), subsidy grants, tariff rebates, import control, and loan guarantees (particularly for loans offered by overseas banks). *Id.* at 459.

To support trade and exports, the South Korean government enacted statutes, including the Tax Exemption and Reduction Control Act (1965), the Act on Temporary Measures for the Grant of Export Subsidies (1961), and the Export Promotion Act (1962, replaced by the Trade Transactions Act of 1967). These statutes mandated that the government grant tax reductions for the profits generated by exports, ensure timely payment of export subsidies (subsidies contingent upon exports), make priority allocation of scarce foreign reserves to purchase raw material to produce export products, and permit only those traders with export performance to import. *Id.*

124. *Id.*

of economic development policies through the statutory device was successful and delivered the anticipated outcomes: export values increased from \$ 1 billion USD between 1962 and 1966 to \$ 77 billion USD between 1977 and 1981, per capita income (GNI per capita) grew from \$ 110 USD in 1962 to \$ 1,860 USD in 1980 (\$ 13,040 USD in 1996),¹²⁵ and the unemployment rate dropped from the estimated 35% in 1961 down to 5.2% in 1980 (and 2.5% in 1990).¹²⁶

For the United States, the policy objectives will concern the economic problems that have been identified previously: bridging regional economic disparity, stimulating economic growth, and reducing economic polarization. Just as South Korea devised laws that were designed to meet the economic needs of the time (*i.e.*, industrial development and export promotion), the United States may also adopt a similar approach by devising laws targeting the causes of these problems.¹²⁷

For example, prior discussion identified the causes of persistent regional economic disparity, including location (*e.g.*, access to ports and transportation links), infrastructure, the availability of human capital through educational attainment, and natural amenities. To address these causes, the government may adopt statutes that mandate government support to develop necessary infrastructure, improve public education in economically depressed areas, and promote the establishment and expansion of businesses in such areas. PWEDA provides for some of these supports, including facilitation of businesses in economically distressed areas, but its operational scale is inadequately small.¹²⁸ Specific support measures to be provided under the proposed laws may vary, and include subsidy grants, tax incentives, loans, and loan guarantees.¹²⁹

125. Yong-Shik Lee, *Trade and Development: Lessons from South Korea*, 25 KOREAN J. INT'L TRADE AND BUS. L. 51, 52 (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3037956 (last visited Jan. 20, 2019); *see also* Gordon, *supra* note 85.

126. Korea Nat'l Statistical Office, *Statistical Assessment of Changes in Korea's Economy and Society for the Past 60 Years* (Aug. 2008) (in Korean), <http://www.nso.go.kr> (last visited Jan. 20, 2019).

127. *See* Lee, *supra* note 114, at 459 (for examples of development-facilitating statutes).

128. PWEDA, *supra* note 88. An empirical study concluded that the overall magnitude of EDA program effect on changes in income growth rates appears to be insignificant. Randolph Martin & Robert Graham, *The Impact of Economic Development Administration Programs: Some Empirical Evidence*, 62 REV. ECON. & STAT. 52, 62 (1980). Public investment in economically depressed areas or isolated rural areas needs to be increased. Other studies indicated that the employment impacts of public works projects in these areas were relatively large and that federal economic development programs help rural communities to sustain, grow, and create new businesses, diversifying their economies. *See* Richard Barrows & Daniel Bromley, *Employment Impacts of the Economic Development Administration's Public Works Program*, 57 AM. J. AGRIC. ECON. 46, 53 (1975); Anne Berblinger, *Federal Aid for Rural Economic Development*, 529 ANNALS. AM. ACAD. POL. & SOC. SCI. 155, 155 (1993).

129. These were also primary means to support individual industries and promote exports in Korea in the process of its economic development. *See* Lee, *supra* note 114, at 459. PWEDA authorizes grants and loans for development projects. 42 U.S.C. § 3149(a) (2012).

However, consideration should be given to the appropriate level of government at which this task should be undertaken. Given the potentially large budgetary requirement for these types of projects and the limited financial capacity of State and local governments,¹³⁰ the federal government would have to assume primary responsibility.¹³¹ State and local governments, as well as the private sector, should be invited to participate in this process; the primary responsibility of the federal government does not preclude State and local governments from implementing their own laws and institutions to meet their economic development objectives within the bounds of their own resources, provided that there is inter-governmental coordination and cooperation.

Although improvement of regional economic disparity will have a positive impact on overall economic development, the legal and institutional approaches could also be adopted to stimulate economic development at the national level. In South Korea, the government supported the development of specific industries and exports, but, given the technological and financial capacities of American industries, this type of support is unlikely to be necessary in the United States.¹³² Instead, legislative support could focus on identifying and promoting innovations that facilitate technological and operational transformation, thereby enhancing productivity and competition and generating more employment and higher levels of income, particularly in the areas in which private investment is insufficient (*i.e.*, legislation may offer a set of criteria to identify qualified innovations and stipulate the types of government support that can be offered to promote such innovations).¹³³

The justification for government support for development-facilitating innovations is that innovators tend to be consistently undercompensated for their innovations because others may benefit from such innovations through learning and sharing without necessarily paying for their full value (“positive

130. For an account of the insufficient State budget, *see* Dadayan & Boyd, *supra* note 22, at 2.

131. Thus, this is distinguished from the approach adopted by the PWEDA stipulating that “economic development is an inherently local process, the Federal Government should work in partnership . . .” PWEDA, § 3121(a)(4). Economic development is a national, regional, and local process, not just a local process, and the federal government should assume a primary responsibility, particularly when the economy is stagnant across the nation over a long period of time. Support for the active role of the federal government is found in the positive evaluation of the New Deal. *See, e.g.*, WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL (1963); ROBERT D. REISCHAUER, COUNTDOWN TO REFORM (1998); and T. PATTERSON, GRAND EXPECTATIONS (1996).

132. In the 1980s, as the economy was successfully developing, South Korea also shifted legislative focus from promoting specific industries to supporting the then robust private sector as a whole and granted assistance to industries on a more selective basis where there was a need to improve their efficiency by restructuring or reorganization. *See, supra* note 114, at 459.

133. The EDA offers the Regional Innovation Strategies (RIS) Program “to promote economic development projects that spur entrepreneurship and innovation,” but it does not do so at the national level. EDA, *supra* note 90. Consequently, the allocated budget for this program is also modest, \$ 20 million USD in 2017. *Id.*

externalities”).¹³⁴ As this could de-incentivize innovators and hamper continuing innovations, the government has a legitimate interest in supporting and encouraging innovators as part of pursuing economic development. Priority may be given to newer and smaller enterprises that, with government support, could grow to challenge market monopolies and enhance competition. The government may also support or engage in innovative research that may lead to technological transformation for economic development.¹³⁵

Additionally, to promote economic growth, it is necessary to counter consistently falling public and private investments (see figures 5 and 6 above), as they are responsible for declining growth. The legal and institutional approaches are also relevant in this area, and consideration should be given to legislation that requires monitoring of investment level, allocation of resources for key public investments essential for economic development (*e.g.*, transportation, communication, and education infrastructures), and facilitation of private investments by offering appropriate incentives (*e.g.*, tax benefits and subsidies).

Finally, laws that promote certain social development objectives may also be relevant to economic development. For instance, laws that protect gender equality and the rights of minorities in the work place contribute to economic growth by motivating more women and members of minority groups to participate in productive pursuits.¹³⁶ Similarly, laws that facilitate education and training, particularly for those at lower ends of the socio-economic ladder, reduce the large costs borne by the middle class in areas such as healthcare and college education (including debt repayments), and reinforce taxation on the highest income brackets will counter economic polarization and assist with economic development efforts.¹³⁷ Finally, laws that support immigration and

134. See Jwa, *supra* note 87, at 30–34.

135. The National Artificial Intelligence Research and Development Strategic Plan, funded by the federal government, would be this type of research support. See National Science and Technology Council, *The National Artificial Intelligence Research and Development Strategic Plan 3* (October 2016), https://www.nitrd.gov/PUBS/national_ai_rd_strategic_plan.pdf (last visited Jan. 20, 2019). For legislation supporting innovations, there are a number of questions to be addressed before such laws could be devised. What specific activities are qualified as such innovations to be supported by public funds? How can the outcomes of such identified innovation be reliably estimated? What are the most effective means of government support? What measures should be taken to ensure government “support” does not interfere or overlap with the private sector efforts made for their own innovation and avoid waste of public resources? Should all qualified innovators be the beneficiary of government support or should there be limitations? This complex task will potentially require much of the government’s analytical and investigative resources.

136. See European Institute for Gender Equality, *Economic Benefits of Gender Equality in the European Union: Report on the empirical application of the model 3* (2017), http://eige.europa.eu/sites/default/files/documents/mh0217174enn_web.pdf (last visited Jan. 20, 2019); see also Sarah Treuhaft & David Madland, *Prosperity 2050: Is Equity the Superior Growth Model?*, (Center for American Progress, Apr. 2011), https://cdn.americanprogress.org/wp-content/uploads/issues/2011/04/pdf/prosperity_2050.pdf (last visited Jan. 20, 2019).

137. Glaeser, *supra* note 50, at 45. See Gordon, *supra* note 85 and accompanying text.

protect immigrants will also counter the decrease in the population growth rate, which has been cited as a cause of stagnant growth because it erodes the consumer base and the supply of labor for the future.¹³⁸

2. Organization of LFIIs

The second sub-element of regulatory design is organization of LFIIs (law, legal frameworks, and institutions).¹³⁹ Law may not be effective without a suitable legal framework and an effective institutional arrangement. “Legal frameworks” refer to frameworks in which law is organized, including regulatory structures and legal systems,¹⁴⁰ while “institutions” refer to organizations, norms, and practices related to the adoption, implementation, and enforcement of law.¹⁴¹ Inadequate legal frameworks—such as ones that impose stringent requirements for the amendment of statutes—make timely regulatory modifications difficult and reduce their overall regulatory effectiveness on development under changing economic and social conditions.¹⁴² Lack of an effective institutional framework—such as one that offers inadequate institutional support (*e.g.*, enforcement, monitoring, and administration of law)—may diminish the effect of law on development. Synergetic coordination among law, legal frameworks, and institutions is the key to effective legal and institutional approaches.¹⁴³

In South Korea, the development-facilitating laws were supported by institutions.¹⁴⁴ For example, the South Korean government implemented the Economic Planning Board (EPB) within the central government in 1961.¹⁴⁵ The EPB created economic development plans and coordinated and instructed other government departments on a wide range of policy measures related to economic development.¹⁴⁶ The EPB, like Taiwan’s Industrial Development Bureau (IDB) and Japan’s Ministry of International Trade and Industry (MITI), was a control tower for South Korea’s industrial policy and economic development. In addition to the EPB, the South Korean government also implemented a number of other institutions, including KOTRA, as an agency to collect and disseminate

138. *Id.*

139. Lee, *supra* note 114, at 441.

140. *Id.* at 424.

141. *Id.* at 426.

142. *Id.* at 441–42.

143. *Id.* at 423–26.

144. *See, e.g.*, Lee, *supra* note 114, at 458–59 (for examples of development-facilitating laws).

145. *Id.* at 462.

146. *Id.* The head of the EPB, as a deputy prime minister, had a higher status than other ministers with budgetary and personnel authority over other government departments and agencies. The superior status and authority enabled the EPB to coordinate and instruct them effectively in the implementation of economic development policies. The EPB led the economic development of Korea until its merger with the Ministry of Finance in 1994. *Id.*

economic and trade information to assist South Korean businesses engaged in international trade.

Some of these institutional functionaries—such as those that facilitate coordination and cooperation among government departments and offices—could be adopted by the United States. Lack of coordination and cooperation among the different levels of government (*e.g.*, federal, State, and local), and between the public and private sectors, has proven to impede economic development.¹⁴⁷ As discussed previously, the current EDA, as an agency subordinate to the Department of Commerce, does not have the institutional status and authority that the EPB had for inter-governmental coordination, which is necessary to remove the current impediment to economic development at the national level.¹⁴⁸

Thus, an EPB-type center of coordination at the federal government level could be charged with the role of coordination and cooperation with relevant federal, State, and local government departments and agencies in the development and implementation of economic development policies, which would enhance effectiveness in policy development and implementation. This type of central coordination institution, which could provisionally be titled, “Economic Development Council” or “EDC,” may also open itself to participation by the private sector, inviting input from relevant private sector players in the development and implementation of economic development policies.¹⁴⁹ Consideration can also be given to the mandatory appointment of certain private sector personnel (*e.g.*, industry representatives) to ensure that the private sector is consulted in the EDC’s decision making process.

Given the complexity of the economy and the strength of the private sector, it would not be feasible or necessary for the EDC to develop the South Korean-style “economic development plans” with the target growth rates and specific industrial promotion goals.¹⁵⁰ The primary role of the EDC would include the development of long-term economic strategies (*e.g.*, identifying strategic areas for government investments), facilitation of inter-governmental and public-private sector coordination, and identification of the focus areas in which such coordination and cooperation will be essential. The KOTRA-type agency that collects and disseminates business and trade information would also be useful, particularly for businesses with limited resources and information in

147. See Hazlett, Spence, & Scribner, *supra* note 93 (providing examples of coordination failure).

148. See Lee, *supra* note 114, at 458–59 and accompanying text for the status and the authority of the EPB.

149. At the federal level, the EDC should be granted an independent status from the other departments and agencies as well as the mandate to coordinate and cooperate with them, including the Department of Commerce, the Department of Finance, the Department of Agriculture, and the Department of State (for development policies with international ramifications).

150. See Lee, *supra* note 17, at 438, 446.

economically distressed regions. These agencies can also cooperate with the existing State or local offices for economic development.¹⁵¹

3. *Adaptation to Socioeconomic Conditions*

The third and final sub-element of regulatory design is law's adaption to socioeconomic conditions. "Law may not be effective if it does not conform to . . . social, political, economic, and cultural conditions that are essential to the successful operation of law, including social or religious norms."¹⁵² For example, a law that prohibits face covering in public places may not be effective and may cause resistance when it is inconsistent with a religious code or practice observed by a majority population.¹⁵³ In South Korea, the government made significant efforts to ensure the adaptability of law to the changing socioeconomic conditions on the ground by constantly monitoring legislation and making amendments to their laws when necessary.¹⁵⁴

In the United States, the proposal for the new legal and institutional approaches may run counter to some of its socioeconomic conditions, such as ideologies and established practices in the United States, for three reasons. First, those subscribing to the traditional liberal or neoliberal economic stance may disagree that issues such as regional economic disparity, stagnant growth, and economic polarization are the problems that require remedial measures.¹⁵⁵ From this perspective, differences in economic performance and income levels among regions and individuals are natural consequences of competition in a free market economy and not a problem that justifies government intervention. As to the stagnant economic growth, one study concluded that the time for rapid economic

151. These offices include the existing State and local economic development agencies. For an overview of their activities, see Norton Francis, *What Do State Economic Development Agencies Do?*, Economic Development Strategies Information Brief 6, URBAN INSTITUTE (Jul. 2016), <https://www.urban.org/sites/default/files/publication/83141/2000880-What-Do-State-Economic-Development-Agencies-Do.pdf> (last visited Jan. 20, 2019).

152. See Lee, *supra* note 114, at 444.

153. France has enacted a law that bans face covering in public places, including the practice in the Islamic religion to wear a burka and the niqap. LOI 2010-1192: Loi Interdisant La Dissimulation du Visage dans L'espace Public (Law of 2010-1192: Act Prohibiting Concealment of the Face in Public Space).

154. Lee, *supra* note 114, at 463. "[F]rom 1977 to 1979, the government reviewed 2,790 then-existing statutes and made 288 adjustments" and "in the 90s, the government made 604 statutory adjustments." *Id.* This type of "[c]onsistent legislative monitoring and adjustment[,] undertaken" by the separate government ministry devoted to this work (the Ministry of Government Legislation), increased the adaptability of South Korea's laws to its changing socioeconomic conditions and, ultimately, increased their effectiveness for development. *Id.*

155. Trubek & Santos, *supra* note 101, at 1-3, 5-6. This approach is based on neoclassical economics, which emerged in the late nineteenth century and reaffirmed, against Marxism, that the market promotes economic efficiency and fair social distribution. *Id.* Neoliberalism, which became a dominant political-economic ideology in the 1980s, discouraged positive government intervention in the economy and promoted free market approaches, including privatization and trade liberalization. For further discussion of the neoliberal prescriptions, see WILLIAMSON, *supra* note 102.

growth has gone and now the economy faces “secular stagnation,” which refers to a new normal state of low growth in today’s economy.¹⁵⁶

Second, the federal government, which retains the majority of tax revenues and possesses most of the government financial capacity,¹⁵⁷ has traditionally not been engaged in economic issues at State and local levels but, rather, has addressed “national economic emergencies,” such as the Great Depression in the 1930s, the 2007–2008 financial crisis, and economic affairs that concern foreign countries (*e.g.*, international trade).¹⁵⁸ State and local governments are expected to deal with economic issues within their boundaries even though they often lack the resources necessary to address these issues.¹⁵⁹ Thus, establishing comprehensive legal and institutional frameworks that focus on economic development, particularly at the federal level, could be a new concept in light of American political traditions.

Third, there is a deeper cultural characteristic imbedded in the American ethos that may not be consistent with this proposal: in a culture that emphasizes and values individual autonomy, the economic wellbeing of an individual rests primarily on his or her own effort and responsibility; it does not come from government aid in any form, whether it be hard cash or regulatory support.¹⁶⁰ Some Americans expect the government will protect individual political and economic liberties and secure fair market rules (*e.g.*, punishing the dissemination of fraudulent information on the stock market), but will not intervene in the economy and use its regulatory power to meet economic growth targets.¹⁶¹ From this perspective, the establishment of legal and institutional frameworks focusing on economic development might be seen as an unconventional attempt to play a role that is inconsistent with what some view as traditional American expectations of the government.¹⁶²

156. See ROBERT J. GORDON, *THE RISE AND FALL OF AMERICAN GROWTH: THE U.S. STANDARD OF LIVING SINCE THE CIVIL WAR* 2, 641–42 (2016); see also The United Nations Development Policy and Analysis Division, *supra* note 86, at 2–3.

157. For an account of the federal revenue, see Tax Center Policy, *supra* note 21.

158. Thus, the United States Trade Representative (USTR) has actively negotiated trade agreements with a number of countries in an attempt to set terms of trade rules that will favor U.S. businesses. See Lee, *supra* note 114, at 437–38 n.132.

159. See Tax Policy Center, *supra* note 21; see also Dadayan & Boyd, *supra* note 22 (discussing insufficient State resources).

160. See, *e.g.*, RALPH WALDO EMERSON ET AL., *WE ARE THE BUILDERS OF OUR FORTUNES: SUCCESS THROUGH SELF-RELIANCE* (2014).

161. See, *e.g.*, Terry Miller, *Government Intervention: A Threat to Economic Recovery*, *Testimony Government Regulation*, THE HERITAGE FOUNDATION (June 10, 2009), <https://www.heritage.org/testimony/government-intervention-threat-economic-recovery> (last visited Jan. 20, 2019).

162. The enactment of the PWEDA and the establishment of the EDA do not deviate from these traditional expectations in that they only offer small-scaled assistance for economically distressed areas with a modest budget.

However, public trust and confidence in the ethos and traditional policy recommendations of the government have been weakened since the 2007–2008 financial crisis.¹⁶³ Many Americans seem to realize that regional economic disparity, stagnant growth, and economic polarization have created obstacles so that it is no longer possible for most, if not all, individuals to improve their own economic wellbeing solely through their own efforts without systematic assistance from the government.¹⁶⁴ This change of public perception has been demonstrated by the unexpected election victory of Donald Trump, who promised this change.¹⁶⁵ Despite the controversy of the pronounced policies of the new Administration, this dramatic upset has created a momentum to develop a more active role for the federal government to facilitate economic development for the majority of the American population, thereby allowing for the proposed legal and institutional approaches to be addressed in this context.¹⁶⁶

C. Regulatory Compliance and Quality of Implementation

The second and third elements of the regulatory impact mechanisms under the general theory are “regulatory compliance” and “quality of implementation.”¹⁶⁷ This Section applies these additional elements to explain the impact of law in Korea’s development process and examines their applicability in the context of the United States.¹⁶⁸

1. Regulatory Compliance

The second element, “regulatory compliance,” refers to “compliance with law by those who are subject to the application of law.”¹⁶⁹ Without regulatory compliance, law would not be effective for development or for any other regulatory objective. Regulatory compliance “does not mean only the absence of rule violations, but also the knowledge of law and participation in the processes mandated by law.”¹⁷⁰ Regulatory compliance is further “classified into general regulatory compliance, which refers to the general level of regulatory compliance in a given jurisdiction, and specific regulatory compliance, which pertains to a particular law.”¹⁷¹

In South Korea, general regulatory compliance was estimated to be strong throughout its development era (1962–1996) due to its political and cultural

163. See Mauricio Lazzarato, *Neoliberalism, the Financial Crisis and the End of the Liberal State*, 32 *THEORY, CULTURE & SOC’Y* 67 (2015).

164. *Id.*

165. *Id.*

166. *Id.*

167. Lee, *supra* note 114, at 418.

168. For further discussion of these elements, see *id.* at 418–19.

169. *Id.* at 446.

170. *Id.*

171. *Id.*

traditions.¹⁷² In South Korea's Confucian tradition, which has affected Koreans for hundreds of years, a state is considered responsible for the wellbeing of its subjects and the citizens are expected to reciprocate, as a matter of a political and moral duty, by complying with policies and laws of the state.¹⁷³ Additionally, the strict rules of law and severe penalties for any violation, imposed by the colonial government of Japan (1910–1945) and the subsequent authoritarian regimes seeking to control the South Korean population, compelled regulatory compliance, even if it would have been passive compliance to avoid a penalty.¹⁷⁴

The South Korean government was able to turn this passive compliance into active compliance with development policies and laws by gaining public confidence with successful economic development outcomes sustained for decades, which created jobs and income that lifted the majority of the South Korean population from poverty. The initial success encouraged South Koreans to comply actively with laws and policies advanced by the government, participating in the process mandated therein (*e.g.*, the policy encouraging the use of domestically-produced consumer products rather than imported products as a means to promote domestic industries).¹⁷⁵ As to specific regulatory compliance, industrialists and producers complied with the terms of development-facilitating statutes that stipulated the conditions for support, as it was in their interest to receive government support by complying with said regulatory conditions.¹⁷⁶

For the United States—a country that is an ardent advocate of the rule of law around the world—the level of regulatory compliance is generally high, as demonstrated by the high rankings in the rule of law indexes (18th among 113 countries under the Rule of Law Index 2016 by World Justice Report; 92nd percentile under the Rule of Law Indicator 2016 by the World Bank); the rule of law would not be feasible without regulatory compliance.¹⁷⁷

Despite the high level of general regulatory compliance, there is no assurance that Americans would act as South Koreans did during the development era and show active compliance with the laws and policies to be adopted pursuant to the new approaches. As discussed in the previous Section, although a majority of

172. See CONFUCIAN TRADITIONS IN EAST ASIAN MODERNITY (Tu Wei-Ming ed., 1996) for a discussion of the Confucian tradition in East Asia, including South Korea.

173. *Id.*

174. Control was tighter in the political area because the authoritarian regimes tried to prevent direct political challenges. For a relevant discussion, see MARTIN HART-LANDSBERG, THE RUSH TO DEVELOPMENT: ECONOMIC CHANGE AND POLITICAL STRUGGLE IN KOREA 116 (1993).

175. *Id.*

176. See *supra* note 123 and accompanying text for examples of development-facilitating statutes.

177. World Justice Project, *Rule of Law Index 2016*, 21 (2016), https://worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf (last visited Jan. 20, 2019); World Bank, *World Governance Indicators* (2016), <http://info.worldbank.org/governance/wgi/#reports> (last visited Jan. 20, 2019).

Americans appear to have approved the government mandate to change the economy to improve the lives of the majority of working Americans, a substantial number of Americans are likely to remain skeptical, whether for ideological or practical reasons, to the government playing a more active and direct role in economic development. Indeed, the Louisiana Governor's refusal of the State's share in the federal stimulus bill, offered in the aftermath of the 2008 financial crisis, demonstrates this sentiment.¹⁷⁸

The strength of public support and compliance will depend on the initial success of the new approaches; if the proposed approaches yield successful economic growth, innovation, and job creation, show improvement in the economies of economically depressed areas, and reduce economic polarization, then skepticism and objections to the extended role of government in economic development could be turned into active support and compliance, as witnessed in South Korea during its successful development. Given the federal structure of the United States and the traditions of local governance, it is important to have active participation from State and local governments, as well as from the private sector, in the development and implementation of economic development policies and laws.

2. *Quality of Implementation*

The quality of implementation is the final element of the regulatory impact mechanisms, and "refers to the act of a state meeting the requirements of law and undertaking mandates under the terms of law to fulfill its objectives."¹⁷⁹ For example, a law that penalizes a criminal act will not be effective unless the state implements the law with appropriate enforcement, including prosecution of its violators and punishment of the convicted under the law. The quality of implementation, therefore, determines the effectiveness of law.¹⁸⁰ The quality of implementation is measured by the extent to which a state meets the requirements set forth by the terms of law and fulfills the mandates under these terms, including its enforcement and monitoring terms.¹⁸¹

Since it is a state that implements law, "state capacity" and "political will" determine the quality of implementation.¹⁸² State capacity refers to the financial, technological, and administrative capabilities of the state, including internal controls against corruption, to implement laws and fulfill regulatory objectives.¹⁸³ Political will, in the context of implementation, can be defined as

178. See *Jindal Rejects La.'s Stimulus Share*, THE WASH. TIMES, (Feb. 21, 2009), <http://www.washingtontimes.com/news/2009/feb/21/louisiana-gov-rejects-states-stimulus-share/> (last visited Jan. 20, 2019).

179. Lee, *supra* note 114, at 450.

180. *Id.*

181. *Id.*

182. *Id.* at 451.

183. *Id.* at 451–52.

“the commitment and devotion of a country’s political leadership to the implementation of law.”¹⁸⁴

South Korea lacked state capacity in certain areas, particularly financial capability, as reflected in the small government budget and scarce foreign reserves as of the early 1960s.¹⁸⁵ In 1962, after the second amendment, the national budget was 74 billion won, which is equivalent to \$ 290 million USD at the time—less than 20% of the net income of a single American company, General Motors, in the same year.¹⁸⁶ South Korea compensated for its lacking state capacity with well-educated manpower (*e.g.*, a number of qualified administrators ready to serve the government); in 1960, South Korea had over 237,400 government officials in its population of 25 million.¹⁸⁷

Political will was another hallmark of South Korea’s success. President Park Jung Hee, who took power by military coup in 1961 and was criticized for his authoritarian rule, successfully implemented economic development policies and laws for the entire period of his regime (1961–1979).¹⁸⁸ That extraordinary political will is demonstrated by the Extended Meetings for Export Promotion, which was presided over by the President himself and attended by a number of key government officials and private sector players.¹⁸⁹ Those meetings were held every month and continued for fourteen years, from 1965 to 1979, until President Park’s death.¹⁹⁰ The attendees discussed every key issue associated with export promotion, sought solutions, and reminded the nation that the top national priority was the achievement of economic development through the implementation of export-led growth strategies.¹⁹¹ The national focus on the development agenda, sustained for the entire development era, would not have been possible without this extraordinary political will.

Unlike South Korea in the early 1960s, the United States government is at the disposal of the largest state capacity of all nations in terms of financial,

184. *Id.* at 454.

185. EPB, *Government Budget Allocation in 1962*, BA0084326 (National Archives of Korea document call number) (1962) (in Korean).

186. *Id.*

187. The number increased to over 315,000 in 1965. See National Index System, *Annual Public Official Status*, http://www.index.go.kr/potal/main/EachDtlPageDetail.do?idx_cd=1016 (last visited Jan. 17, 2019) (in Korean). Under the Confucian tradition that values service to the government and the state, coupled with the lack of employment opportunities in the private sector, educated and talented individuals were motivated to apply for positions in the government. See CONFUCIAN TRADITIONS IN EAST ASIAN MODERNITY, *supra* note 173.

188. Sudip Chaudhuri, *Government and Economic Development in South Korea, 1961–79*, SOCIAL SCIENTIST, 18 (Nov.–Dec. 1996), <https://www.jstor.org/stable/pdf/3520100.pdf?refreqid=excelsior%3A94ca85b1d8995c304ed6a73315243f96> (last visited Jan. 20, 2019).

189. Lee, *supra* note 17, at 313.

190. Chaudhuri, *supra* note 188, at 20–21.

191. Lee, *supra* note 17, at 313.

technological, and administrative capabilities.¹⁹² The federal government may also draw upon the world's largest pool of private sector experts in most arenas. Significant intellectual, technological, and financial resources may indeed be necessary to advance the economic development policies and laws discussed above.¹⁹³ Their implementation, monitoring, coordination, and enforcement, will also require a substantial amount of resources, which the United States is more capable of meeting than other states.

What could be more of an issue in the United States, however, is political will. As discussed earlier, the proposed legal and institutional approaches would entail extended roles of the federal government in developing, coordinating, and implementing economic development policies. Those who advocate State and local autonomy may not support this extended role of the federal government in the economy.¹⁹⁴ Private sector players, particularly major multinational enterprises (MNEs), may not welcome the government initiative that could be perceived as encroachment of their business sphere (*e.g.*, allocation of public resources as support for other qualified innovators). I have emphasized the necessity of engaging State and local governments, as well as the private sector, in the development and implementation of economic development policies and laws, and it is indeed up to the national political leadership and their political will to overcome potential challenges and turn initial dissenters into supporters.

III. THE RIGHT TO DEVELOPMENT IN THE UNITED STATES CONTEXT

A. *The Right to Development*

The preceding Sections discussed the legal and institutional approaches to achieve economic development objectives (*i.e.*, bridging regional economic gaps, stimulating economic growth, and reducing economic polarization) and emphasized the primary role of the federal government. However, it is not the economic role traditionally played by the federal government, nor is the role clearly stipulated in the United States Constitution.¹⁹⁵ Thus, there is controversy as to whether the federal government, with its limited powers enumerated in the

192. For example, the U.S. government revenue (2018 projection) of \$ 3.3 trillion USD, is the largest national budget in the world. Congressional Budget Office, *Budget*, <https://www.cbo.gov/topics/budget> (last visited Jan. 20, 2019).

193. See *supra* note 135 and accompanying text for the example of potential difficulties.

194. See *supra* note 178 and accompanying text for an example of State resistance to the federal initiative.

195. The Constitution (with a capital "C") or the United States Constitution refers to the Constitution of the United States. The federal government of the United States is a limited government authorized to exercise only those powers stipulated in the Constitution. Unlike many other modern constitutions, the United States Constitution does not expressly authorize the federal government to impose regulations on the economy generally, and most of its authority over the economy is derived from a clause in the Constitution authorizing Congress to regulate interstate commerce. See U.S. CONST. art. I, § 1, cl. 3.

Constitution, has the legal authority to play this role.¹⁹⁶ This Section discusses the right to development (RTD), an internationally-recognized human right, as a potential justification for such mandate.¹⁹⁷

1. Background

In 1986, the United Nations General Assembly adopted the Declaration on the Right to Development (DRD).¹⁹⁸ Article I of the DRD provides:

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.¹⁹⁹

The DRD clarifies the nature of the RTD as an inalienable human right and stipulates the rights and the duties of states for the realization of the RTD.²⁰⁰ The United Nations Commission on Human Rights established the intergovernmental open-ended Working Group on the RTD in 1998 to monitor and review, *inter alia*, progress made in the promotion and implementation of the RTD.²⁰¹ In 2010, the high-level task force, which assisted the Working Group, proposed a set of criteria and corresponding operational sub-criteria for the implementation of the RTD at the request of the Working Group.²⁰²

The background leading up to the DRD is as follows: the idea of promoting development emerged in the post-war era of the 1940s when a number of nations under the colonial rule of the West began to de-colonize and had an interest in pursuing economic and social development.²⁰³ As a consequence, several

196. In the 1930s, the United States Supreme Court declared federal legislation for industrial recovery such as the National Industrial Recovery Act and the Agricultural Adjustment Act unconstitutional, denying the applicability of the commerce clause and the authority of the federal government. *United States v. Butler*, 297 U.S. 1, 128 (1936); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 519, 551 (1935).

197. An internationally-recognized human right does not automatically create a legal mandate for the federal government, but if the United States recognizes it, then the recognition will provide justification for such mandate so that the United States government can fulfill its international obligation associated with the recognition of the right. *See* G.A. Res. 41/128, Declaration on the Right to Development, U.N. Doc. A/RES/41/128 (Dec. 4, 1986) (hereinafter DRD).

198. *Id.*

199. *Id.* art. 1, ¶1. Following the adoption of the DRD, the 1993 Vienna Declaration and Programme of Action affirmed the RTD as “a universal and inalienable right and an integral part of fundamental human rights.” World Conference on Human Rights, *Vienna Declaration and Programme of Action*, Part I, ¶ 10, U.N. Doc. A/CONF.157/23 (1993).

200. G.A. Res. 41/128, *supra* note 197, at art. 1–3.

201. Human Rights Council, U.N. Doc. A/HRC/15/WG.2/TF/2/Add.2, at 2 (Mar. 8, 2010).

202. *Id.* at 9–15.

203. Lan Cao, *Law and Economic Development: A New Beginning?*, 32 TEX. INT’L L.J. 545, 546 (1997). Professor Cao observed “the American law and development movement arose out of the Cold War objectives of the United States to ‘modernize’ developing countries and bring them within the orbit of the West rather than the Soviet bloc.” *Id.*

United Nations (U.N.) devices pronounced the objective of promoting development; for instance, the Charter of the United Nations (1945) includes the concept of development and calls on the U.N. to promote “higher standards of living, full employment, and conditions of economic and social progress and development.”²⁰⁴ The Universal Declaration of Human Rights (1948) also proclaims that “[e]veryone, as a member of society . . . is entitled to the realization . . . of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”²⁰⁵ The International Covenant on Economic, Social and Cultural Rights (1966) also provides that “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”²⁰⁶ Outside the U.N. framework, the African Charter on Human and Peoples’ Rights explicitly recognized the right to development in 1981, five years prior to the adoption of the DRD.²⁰⁷

2. Conceptual Issues

There is a debate as to the precise scope, substance, and constituent elements of the RTD.²⁰⁸ It seems evident, though, that the RTD encompasses economic growth, without which the attainment of the other development objectives may not be feasible, because economic growth provides the economic and financial foundation necessary to pursue other development objectives.²⁰⁹ In line with this position, Justice Keba M’Baye concluded that “there is an inherent correlation between the enjoyment of human rights and economic development. The enjoyment of human rights is not possible without economic development.”²¹⁰

204. U.N. International Economic and Social Co-Operation, art. 55 (1945).

205. U.N. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, art. 22 (1948).

206. U.N., International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), art. I (1966).

207. The preamble of the Charter provides in relevant part:

Convinced that it is henceforth essential to pay a particular attention to *the right to development* and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights

African Charter on Human and People’s Rights, adopted June 27, 1981, 21 I.L.M. 58 (entered into force Oct. 21, 1986) (emphasis added).

208. See Report of the Working Group on the Right to Development on its thirteenth session, Human Rights Council, on Its Twenty-First Session, U.N. Doc. A/HRC/21/19, at 4–10 (May 7–11, 2012).

209. See Lee, *supra* note 114, at 429–30 (explaining that many impoverished, developing countries that fail to achieve economic development also have failed to achieve social goals).

210. Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 WIS. INT’L L.J. 353, 385 (1998). Justice M’Baye also stated that there can be no development without the enjoyment of human rights. *Id.*

There are also divergent views on who holds the RTD. A view has been advanced that the RTD is a right held solely by individuals and that it cannot be held by states.²¹¹ Under this view, the primary responsibility for fulfilling the right to development lies in the states and there is no international responsibility between states with respect to the RTD.²¹² Others argue that the RTD is a “collective” right, which is to be invoked by the state and not a right that is to be held by individuals. In this vein, Lan Cao describes the RTD as “a right ‘emphasizing the struggles of peoples, nations, and [s]tates for the elimination of obstacles which impede development or a collective right of sovereign [s]tates or of peoples fighting for their independence.’”²¹³ Noel Villaroman also defines the RTD as “a right of the people of a state to pursue an independent process of economic development that takes place within the context of international conditions that are favorable to the progressive realization of economic, social and cultural rights within their state.”²¹⁴ This definition, according to Villaroman, identifies the “precise entitlements and obligations on the part of the ‘rights-holder’ and the ‘duty-bearers’[.]”²¹⁵ Yet another argument is that the RTD has a dual nature—it is available to both individuals within a country and, collectively, to a country as a whole.²¹⁶ The dualist approach seems to be the most appropriate for the RTD as a human right because it is difficult to imagine that individuals are not allowed to invoke any human right, including the RTD, but, for the promotion of development, a state should also be able to invoke the RTD on behalf of its own people, as argued by Cao and Villaroman.

In today’s world, where all countries are increasingly influenced by international economic and political arrangements, the realization of the RTD requires international conditions that are favorable to the promotion of economic, social, and cultural development.²¹⁷ This requirement inevitably creates certain obligations and duties for other states and international organizations.²¹⁸ The DRD stipulates states’ duty to create “international conditions [favorable] to the realization of the right to development” and emphasizes the essential nature of effective international cooperation.²¹⁹ Villaroman argues that other states and international organizations must

211. Report of the Working Group on the Right to Development, *supra* note 208, at 7.

212. *Id.*

213. Cao, *supra* note 203, at 557.

214. Noel Villaroman, *The Right to Development: Exploring the Legal Basis of a Supernorm*, 22 FLA. J. INT’L L. 299, 310 (2010).

215. *Id.* at 309.

216. Sara E. Allgood, *United Nations Human Rights ‘Entitlements’: The Right to Development Analyzed Within the Application of the Right to Self-Determination*, 31 G.A. J. INT’L. & COMP. L. 321, 337 (2003).

217. *Id.* at 342–43.

218. See Villaroman, *supra* note 214, at 310.

219. DRD, *supra* note 198, art. 3, ¶1, art. 4, ¶2. It provides, “[a]s a complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.” *Id.*

“modify, alter, or even discontinue certain activities” in order to respect those rights, which includes international economic or financial arrangements that may be unfavorable to the realization of the right to development.²²⁰ Notably, some scholars have argued that even if a state does not formally accept the right to development, it may nonetheless be bound by its terms because it is considered a *jus cogen* norm as states continue to invoke RTD as international law.²²¹

3. Developed Countries vs. Developing Countries

The aforementioned duties and obligations associated with the RTD also induce certain tension between developed and developing countries.²²² Developed countries, such as the United States, are the primary designers and the implementing force behind the current international economic and financial arrangements. This includes the international trading system under the auspices of the World Trade Organization (WTO), the international monetary system under the International Monetary Fund (IMF), and the system of international development assistance under the International Bank of Reconstruction and Development (World Bank) and other regional development banks.²²³ As a result, the obligations cited in the DRD to keep these arrangements development-supportive fall primarily on developed countries.

It is questionable whether developed countries would be willing to accept such duties and obligations. There is an argument that the current international economic and financial arrangements tend to promote the interests of developed countries at the cost of the development interests of developing countries.²²⁴ If this were the case, developed countries would not support the modifications of the current system against their own economic interests, even if such modifications were deemed necessary to create favorable conditions to the realization of the RTD. This tendency has already been demonstrated by the long delay in the current Doha Round negotiations at the WTO, which began in 2001 as a major initiative to promote a development agenda in international trade.²²⁵

220. Villaroman, *supra* note 214, at 310.

221. Benjamin Manchak, *Comprehensive Economic Sanctions, The Right to Development, and Constitutionally Impermissible Violations of International Law*, 30 B.C. THIRD L.J. 417, 428 (2010).

222. See World Bank, *supra* note 113 (explaining the distinction between developed and developing countries).

223. See Lee, *supra* note 17, at 9, 22–23.

224. *Id.* at 16–18.

225. The Doha Round, the latest round of trade negotiations in the WTO, advances a major development agenda (Doha Development Agenda or “DDA”) to promote the interest of developing countries in the key areas including agriculture, non-agricultural market access, services, intellectual property, trade and development, trade and environment, trade facilitation, WTO rules, and Dispute Settlement Understanding. World Trade Organization, *The Doha Round*, http://www.wto.org/english/tratop_e/dda_e/dda_e.htm#development (last visited Jan. 20, 2019).

The RTD's strong link to a right to self-determination also raises an issue with developed countries.²²⁶ The DRD claims the RTD is a right to promote development *independently* and *freely from* interference from other states or international organizations.²²⁷ However, it is in the interest of developed countries to enable their own business corporations, including MNEs (multinational enterprises), to conduct business and have access to resources, labor, and markets in developing countries with minimum interferences and restrictions from the governments of the host developing countries. Reflecting this interest, the international economic and trading system, such as the regulatory framework for international trade under the WTO, and the conditions attached to the loans from the World Bank and to the financial packages from the IMF, substantially restrict the policy space for developing countries.²²⁸ This is at odds with the principle of self-determination stipulated in the DRD.²²⁹

Ironically, the traditional developed *versus* developing country dichotomy has been blurred by the Trump Administration's promotion of its own economic interests.²³⁰ As discussed in the introduction, President Trump was elected largely by the support of voters in economically depressed areas throughout the United States. He vowed to promote their economic interests by withdrawing from certain international economic and trade arrangements, such as the Trans-Pacific Partnership (TPP) Agreement, which had been an initiative of the United States, but is now viewed as restricting the policy space for the United States.²³¹ The preceding discussion concluded that his economic and trade initiatives are misplaced and are unlikely to succeed, but regardless of the prospect for success, his controversial efforts emphasizing the policy space and self-determination are

The negotiation has continued for over 17 years as of January 2019 due to disagreements on fundamental issues, such as agricultural trade issues between developed and developing countries. See Lee, *supra* note 17 at 283–84 (discussing the Doha Round).

226. Article 1 ¶2 of the DRD provides that “[t]he human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.” DRD, *supra* note 197, art. 1, ¶2.

227. *Id.*

228. See Lee, *supra* note 17, at 338–39.

229. See DRD, *supra* note 197 (stating “[t]he human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources”).

230. Showing this dichotomy, all the countries either voted against the DRD or abstained were developed countries: the United States voted against the DRD, and eight other developed countries, including Denmark, West Germany, Finland, Iceland, Israel, Sweden, Japan, and U.K., abstained. 145 other countries voted for the DRD. Compiled from United Nations at Voting Record – Keyword Search Indexes, UNITED NATIONS, <http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=1J082V2999J79.32085&profile=voting&lang=eng&logout=true&startover=true> (use search keys to locate specific voting information).

231. See Yong-Shik Lee, *Future of Trans-Pacific Partnership Agreement: Just a Dead Trade Initiative or a Meaningful Model for the North-South Economic and Trade Integration?*, 51 J. WORLD TRADE 1, 1–2, 907–08 (2017).

analogous to the efforts of developing countries to preserve their own policy space to promote economic development.²³² Although the RTD may have initially been established to protect the most underprivileged and provide them with basic needs, the change in the United States' position on the economic and trade arrangements, such as the TPP Agreement, has demonstrated that the rationale and justification behind the RTD (*e.g.*, self-determination for development) can also be invoked to promote economic development interests by developed countries and their people.²³³

B. History of Economic Development in the United States and the RTD

The preceding discussion advanced a point that the rationale and justification for the RTD can be invoked by the United States to promote its own development interests, but the United States has not approved the RTD; indeed, it was the only country that voted against the DRD in 1986.²³⁴ Recognition of the RTD by the United States would be important not only for the implementation of the RTD throughout the world, but also for the promotion of economic development objectives within the United States. As further discussed in the following Section, the recognition of the RTD will have significant policy ramifications for the United States, and it will enable, and even obligate, the government to promote economic development objectives.

Given the potential contribution of the RTD to economic development efforts in the United States, it is necessary to examine why the United States refused to recognize the RTD. Some find an answer from the unique experience of the United States in its economic and political development.²³⁵ According to Stephen Marks, “the United States has expressed implicitly and at times openly the idea that the American experience is built on self-reliant, entrepreneurial efforts to create a great country out of the wilderness and that this hard-won success cannot be willed upon others through a Declaration.”²³⁶ This American idea of “development” embraces wide economic liberties and a democratic system structured to support growth of private enterprise.²³⁷ This perspective is still influential in the United States, as demonstrated by conservative voters against government funded programs, including Medicare, on the argument that

232. Jordan Weissmann, *Trump Has One Big Idea to Fix America's Trade Deals. It's Not Very Good*, MONEYBOX (Jan. 30, 2018), http://www.slate.com/blogs/moneybox/2017/02/07/the_big_problem_with_trump_s_trade_strategy.html (last visited Jan. 20, 2019).

233. Shawkat Alam & Saiful Karim, *Linkages of Development and Environment: In Search of an Integrated Approach through Sustainable Development*, 23 GEO. INT'L ENVTL. L. REV. 345, 352 (2011); *see also* Weissmann, *supra* note 232.

234. *See* UNITED NATIONS, *supra* note 230 (compiling the voting record from countries that voted on the Declaration on the Right to Development).

235. *See* Stephen Marks, *The Human Right to Development: Between Rhetoric and Reality*, 17 HARV. HUM. RTS. J. 137, 143–44 (2004).

236. *Id.*

237. *Id.*

the “government should not provide what individuals can provide for themselves.”²³⁸

The process of economic development in the United States in the nineteenth and the twentieth centuries displays the characteristics that support this idea. The initially agrarian economy of the United States began to industrialize rapidly in the second half of the nineteenth century. The development and adoption of new technologies, expansion of production capacity, and increase in domestic commerce and international trade driven by the thriving private sector all contributed to this industrialization.²³⁹ In the preceding era, adventurous settlers moved to newly discovered territories in the American West and built farms, new towns, and commerce routes.²⁴⁰ It was not the government that moved millions of the new settlers, but rather the economic opportunities in the West. The economic progress of the United States, from this perspective, may well be characterized as an embodiment of the private sector ingenuity, entrepreneurship, and industrious effort; *i.e.*, those who seek new opportunities and work hard may reach success.²⁴¹ As such, economic development is not a right, but rather an opportunity to be met by one’s self-reliant efforts.

From this perspective, the government does not have as much of a role in economic development other than to ensure economic liberties and protect private property. This explains, at least in part, why the social welfare system is weaker in the United States than in other developed countries, and the government does not purport to play a plenary role in economic development.²⁴² An optimal combination of uniquely favorable conditions in the United States—such as vast land and abundant natural resources, security from major foreign invasions protected by the Atlantic and Pacific seas on both ends of the country and peaceful borders shared with only two countries (Canada to the north and Mexico to the south), technologies and industrial knowledge imported by settlers from Europe, the relatively advanced political governance and legal systems

238. Kate Zernike, *Paul’s Victory Poses Test for Tea Party on Defining Principles*, N.Y. TIMES, May 19, 2010, <http://www.nytimes.com/2010/05/20/us/politics/20teaparty.html> (last visited Jan. 20, 2019).

239. For accounts of U.S. economic history, see GILBERT C. FITE & JIM E. REESE, AN ECONOMIC HISTORY OF THE UNITED STATES 288 (1959) (discussing the transition into a more industrialized nation); Ronald Seavoy, AN ECONOMIC HISTORY OF THE UNITED STATES: FROM 1607 TO THE PRESENT 91 (2006) (discussing the agrarian economy in the United States); MARK V. SIEGLER, AN ECONOMIC HISTORY OF THE UNITED STATES: CONNECTING THE PRESENT WITH THE PAST 187 (2016) (discussing the discontent with the agrarian economy).

240. FITE & REESE, *supra* note 239, at 289.

241. Jared Bernstein, *The Impact of Inequality on Growth*, CENTER FOR AMERICAN PROGRESS (Dec. 4, 2013), <https://www.americanprogress.org/issues/economy/reports/2013/12/04/72062/the-impact-of-inequality-on-growth/> (last visited Jan. 20, 2019).

242. See § 3121(a)(4). For example, most of the OECD countries offer publicly-funded universal health care which is unavailable in the United States. Although the present “Obamacare,” which provides government-subsidy and compulsory healthcare coverage, reportedly covers about 90% of the American population, its continuing life in the Trump Administration is not certain.

initially developed in Europe, and support of labor and social mobility from continuing immigration—have helped Americans achieve success.

However, a closer look at the economic development process in the United States paints a different picture and raises a question as to the validity of the popular perception advocated by the United States government.²⁴³ The government did not plan the emigration of population to the West *per se*, but with strong regulatory incentives, including full political rights for emigrants, subsidies for building railroads, free land for farmers, land grants for universities and colleges, and support for building key infrastructures such as bridges and dams, the government nevertheless encouraged the move.²⁴⁴ In addition, for much of the nineteenth and the twentieth centuries, the federal government attempted to protect domestic industries and opposed free trade, thereby giving a substantial advantage to domestic industries.²⁴⁵ For example, tariffs on foreign manufactured products increased several times in 1792, 1812, and 1816, and, by 1820, these tariffs on foreign manufactured products had reached an average of approximately 40%.²⁴⁶ The American Civil War was as much about the dispute on trade policies between the industrializing northern States, who demanded trade protection through high tariffs, and the agrarian southern States, who supported liberal trade with lower tariffs, as it was about other social issues, such as slavery.²⁴⁷ The northern States prevailed in the war and, as a result, high tariff rates and trade protection continued throughout the nineteenth century and much of the twentieth century, offering critical support to growing domestic industries.²⁴⁸ It was only after the Second World War that the then economically dominant United States started to liberalize trade.²⁴⁹

The subsequent government policies, particularly at the times of economic crisis, such as the Great Depression of the 1930s and the Financial Crisis of 2007–2008, also displayed the expanded role of the government for economic recovery. The critical economic recession that followed the stock market crash

243. See MARKS, *supra* note 235, at 143–44.

244. These regulatory incentives started as early as 1787 (e.g., Northwest Ordinance). See e.g., JAMES HUSTON, *THE NORTHWEST ORDINANCE OF 1787* 10–12 (1987).

245. See HA-JOON CHANG, *KICKING AWAY THE LADDER* 24–25 (2002).

246. See *id.* Trade protection was advocated for by leading political figures, such as Alexander Hamilton. He argued that, to start new industries in the United States that could soon become internationally competitive, the initial losses of those industries should be guaranteed by government aid, which could take the form of import duties or prohibition of imports altogether. Henry Clay, who was Abraham Lincoln's early mentor, advocated the "American System" of trade protection in opposition to what he called the "British System" of free trade, which, he subsequently argued, was the part of the British imperialist system that consigned the United States to a role of primary product exporter. See *id.* at 25–28.

247. See *id.* at 27.

248. *Id.* at 27–28.

249. *Id.* at 29.

of 1929 caused an unprecedented economic crisis in the United States.²⁵⁰ The limited economic assistance policies adopted by the Hoover Administration were ineffective for the recovery of the economy.²⁵¹ Subsequently, President Franklin D. Roosevelt adopted massive economic recovery programs, popularly known as the “New Deal.”²⁵² These new policies empowered the federal government to implement a wide range of policies to stimulate the economy, including social security, higher taxes on the wealthy, regulatory controls over banks and public utilities, and extensive work relief programs for the unemployed.²⁵³ Many of the New Deal policies, including the expansion of social security, a full-time employment program, anti-discrimination in employment, and public housing and slum clearance projects, continued into the 1940s and 1950s, which led to the recovery and post-war prosperity of the American economy.²⁵⁴ In 2008 and 2009, the federal government once again deployed extensive stimulus packages in response to a financial crisis, including massive bailouts of financial companies undergoing extreme hardship, tax incentives, and extensive infrastructure investment.²⁵⁵

The preceding discussion reveals that industrial development and economic development in the United States have been stimulated by extensive trade protection, such as high tariff rates until the 1940s, and government assistance programs in the 1930s and onward. To the extent that these government policies had a substantial impact on economic actors (*i.e.*, high tariffs benefit domestic producers competing with foreign exporters but disadvantage those importing them), it is not entirely correct to describe the economic development process of the United States as one driven solely by private sector entrepreneurship, ingenuity, and self-reliance. The federal government may not have been engaged in the economy in the same manner as countries such as South Korea (*e.g.*, developing and implementing comprehensive economic development plans), but it nevertheless played a substantial role in the country’s economic development and that role was not limited to ensuring the economic liberties of individuals and protecting private property.

250. RONALD EDSFORTH, *THE NEW DEAL: AMERICA’S RESPONSE TO THE GREAT DEPRESSION* 12–15 (2010).

251. President Hoover expressed his belief in limited government even during the economic crisis stating “that while people must not suffer from hunger and cold, caring for them must be primarily a local and voluntary responsibility.” The White House, *Herbert Hoover*, <https://www.whitehouse.gov/1600/presidents/herberthoover> (last visited Jan. 20, 2019).

252. For a comprehensive account of the New Deal policies, *see* EDSFORTH, *supra* note 250, at 125–29.

253. *See id.*

254. For a discussion of the United States’ economy in the ’50s and the ’60s, *see* SEAVOY, *supra* note 239, at 295–300; SIEGLER, *supra* note 239, at 239, 260, 411; *see also* Gordon, *supra* note 156 at 316–18, 370–73.

255. *See* Economic Stimulus Act of 2008, Pub. L. 110–185, 122 Stat. 613 (2009). *See also* American Recovery and Investment Act of 2009, Pub. L. 111–5, 123 Stat. 115 (2009).

Thus, the unique “American experience” cited in the beginning of this Section does not provide a convincing rationale for rejecting the RTD. While self-reliant effort is an important factor for success, not only in the United States but also elsewhere, it does not lead to the conclusion that the government does not owe its population an obligation to facilitate economic development for their economic wellbeing.²⁵⁶ The economy is always influenced by government policies, as has been shown in the economic development process of the United States. This influence creates an obligation on the part of the government to ensure that their policies provide the majority of its population with a fair economic opportunity as well as a corresponding right of the people to demand development-supportive policies from the government (*i.e.*, the RTD). As discussed earlier, the economic conditions and problems in the United States continued for several decades, in the form of regional economic disparity, stagnant economic growth, and deepening economic polarization, and continue to be systematic issues in the economy. As such, these problems cannot be overcome by “self-reliant” efforts of individuals alone and require affirmative policies on the part of the government for their resolution. These conditions also provide reasons to support the RTD in the United States.

C. Political and Economic Ramifications of the RTD

The recognition of the RTD will have certain political and economic ramifications for the United States with respect to its domestic and international policies, which may have been a determinant factor of its vote against the RTD. This Section discusses each of these ramifications.

1. Domestic Ramifications

The DRD provides in relevant parts:

States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.²⁵⁷

States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, *inter alia*, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income.²⁵⁸

256. The spirit of “self-reliance” was also emphasized as a necessary condition for the economic success of South Korea, even in the policy environment in which strong government interventions in the economy were justified as a means to achieve economic development. *See JWA, supra* note 87, at 30–34.

257. DRD, *supra* note 198, art. 2, ¶3.

258. *Id.* art. 8, ¶1.

The DRD stipulates that states have the duty (and the right) to formulate inclusive national development policies and to adopt measures to provide equitable access to basic necessities as listed above.²⁵⁹ Current American economic policies do not implement either of these provisions at the national level, and their adoption means that the federal government will have to make substantial adjustments to its current policies and practices, as further discussed below.

As to the national development policies, the federal government maintains that economic development is a local process that must be driven by the private sector.²⁶⁰ The federal government provides assistance in partnership, as confirmed by the PWEDA provision stating that “[w]hile economic development is *an inherently local process*, the Federal Government should work in partnership with public and private State, regional, tribal, and local organizations”²⁶¹ As discussed in the preceding Section, the EDA, established under the PWEDA, has limited authority as a small agency under the Department of Commerce and provides relatively small scale support for development projects scattered throughout the country, without a coherent development police framework at the national level.²⁶²

The federal government has not taken leadership in economic development, as demonstrated by the EDA’s limited authority and modest budget.²⁶³ Neoliberalism, which has been prevalent since the 1980s, has also discouraged the government from adopting such a leadership role in economic development.²⁶⁴ As a result, there is not an effective or coherent development policy at the national level, resulting in a lack of coordination among the federal, State, and local governments and between the private and public sectors.²⁶⁵ The adoption of the RTD under the terms of the DRD would mean that this practice will have to change and the federal government will have to assume a more affirmative role in the development and implementation of national development policies (*e.g.*, the legal and institutional approaches advocated in this Article).

As to the equitable access to basic necessities stipulated under Article 8 of the DRD, unlike most other developed countries, the United States has never acknowledged this to be a government responsibility, as reflected in its social welfare provisions, which are more restrictive than those offered by most other

259. *Id.*

260. PWEDA, § 3121 (a)(4).

261. *Id.*

262. *See* EDA, *supra* note 90, at 64–98 (discussing the details of EDA assistance).

263. *Id.* at 1.

264. *See* WILLIAMSON, *supra* note 102, at 7–20, 26–7 (giving an account of the neoclassical approach and neoliberalism).

265. *See* Hazlett, Spence, & Scribner, *supra* note 93 (providing examples of coordination failure).

developed countries for the benefit of their populations.²⁶⁶ Politically, among some Americans, there is significant objection to the government providing social welfare, driven by the cited ideology that the “government should not provide what individuals can provide for themselves.”²⁶⁷ This sentiment is reflected by various challenges to the existing social welfare in the United States, such as the current healthcare system, which, in terms of coverage, is not as comprehensive as universal health care systems adopted by other developed countries.²⁶⁸

There are also ethnic and racial dimensions to this issue. Legal discrimination against racial minorities in the United States has been largely resolved since the civil rights movements of the 1960s, but social prejudice against minorities still exists, and there is a substantial economic disparity, as demonstrated by the following graph.

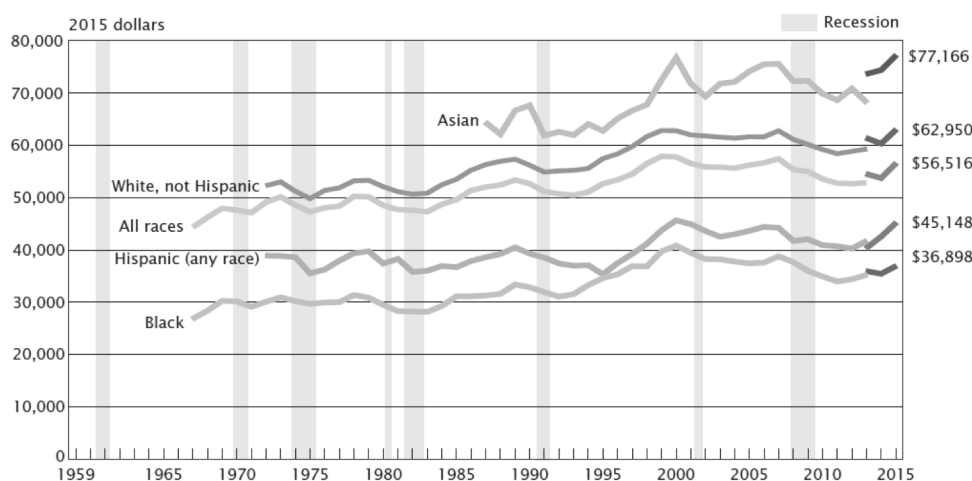


Figure 9: Real Median Household Income by Race and Hispanic Origin²⁶⁹

The median household income of racial minorities, except Asians, is substantially lower than that of the white majority, by 28.3% (Hispanics) and 41.4% (blacks). Consequently, the poverty rate of blacks and Hispanics is 22% and 20%, respectively, which is much higher than the 9% poverty rate of the

266. See DRD, *supra* note 198, art. 8, ¶1; see, e.g., discussion *supra* note 242 (e.g., lack of a universal healthcare system).

267. Zernike, *supra* note 238, at 2.

268. *Id.* at 1–2. The objected healthcare provisions include Medicare for people who are 65 or over. *Id.*

269. Bernadette D. Proctor, Jessica L. Semega, & Melissa A. Kollar, U.S. Census Bureau, *Income and Poverty in the United States: 2015*, P60-256(RV) 5, fig. 1, <https://www.census.gov/library/publications/2016/demo/p60-256.html> (last visited Jan. 17, 2019).

white majority.²⁷⁰ Thus, the expansion of social welfare pursuant to the DRD, which will benefit those in poverty the most, can be seen as benefiting minorities disproportionately. In a racially divided society, this could instigate a hostile political response.²⁷¹ Despite this perception, expanded social welfare under the terms of the RTD—such as the adoption of a universal health care system—is expected to benefit the American middle-class, as well as lower economic classes, by reducing healthcare costs.²⁷²

2. *International Policy Ramifications*

The DRD stipulates that states have the duty to “create international conditions favorable to the realization of the right to development” and to “take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.”²⁷³ Under the terms of the DRD, states and international organizations will have the duty to modify international arrangements to the extent that the current international economic or financial arrangements are deemed not favorable to the realization of the RTD or, discontinue, arguably if such modification is not feasible, in order to respect the RTD.²⁷⁴

This raises substantial international policy ramifications for the United States; the United States was the primary architect of the postwar international economic and financial systems.²⁷⁵ As the largest economy and trader in the world, the United States has an interest in ensuring that the system affords the maximum latitude for its exporters and investors with minimum interference from host countries, including developing ones.²⁷⁶ For example, the rules of international trade under the auspices of the WTO do not allow its member states

270. Kaiser Family Foundation, *Poverty Rate by Race/Ethnicity* (2016), <https://www.kff.org/other/state-indicator/poverty-rate-by-raceethnicity/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (last visited Jan. 20, 2019).

271. The racial divide was clear in the 2016 presidential election. The Republican candidate, Donald Trump, received 58% of the white majority votes, but only 8% of the African-American votes and 29% of the Hispanic votes. By contrast, the Democrat candidate, Hillary Clinton, received 88% of the African-American votes, 65% of Hispanic votes, and 37% of the white majority votes. This bipolar outcome shows the division of the society along the race line. See Cornell University, Poper Center for Public Opinion Research, *How Groups Voted 2016*, <https://ropercent.er.cornell.edu/polls/us-elections/how-groups-voted/groups-voted-2016/> (last visited Jan. 17, 2019).

272. See STEGLER, *supra* note 239, at 417–18.

273. DRD, *supra* note 198, art. 3, ¶1., art. 4, ¶1.

274. Villaroman, *supra* note 214, at 310. For an argument that international agreements are not favorable, see Lee, *supra* note 17, at 270.

275. It includes the monetary system under the IMF, the trading system now under the WTO, and the system of international development assistance under the World Bank.

276. *Id.*

to erect trade barriers, such as higher tariffs, on a discretionary basis.²⁷⁷ This may have an effect of promoting international trade but it also reduces domestic policy space, including the policy space necessary for implementing development-facilitating measures.²⁷⁸ The conditions that attach to loans from the World Bank and to the financial packages from the IMF, such as requirements to adjust domestic governance practices and economic policies, may not be consistent with the realization of the RTD on the self-determination principle.²⁷⁹ The provisions of the current economic and financial arrangements that are inconsistent with the realization of the RTD based on the right to self-determination would have to be revised under the terms of the DRD.

This scenario, involving potential revision of the current economic and financial arrangements of which the United States was the architect, may not be in its own economic and political interests. It is for this reason that the United States raised a jurisdictional objection, asserting that the Commission on Human Rights lacks jurisdiction “over matters of trade, international lending and financial policy, activities of transnational corporations, and other aspects of globalization.”²⁸⁰ By raising this jurisdictional issue, the United States intends to keep the human rights issues, including the RTD, out of the current economic and financial arrangements, as well as any future negotiations it may hold bilaterally or multilaterally with other countries or international organizations.²⁸¹

As discussed above, it is ironic, and somewhat inconsistent with the stance traditionally taken by the United States, that the Trump Administration withdrew from the Trans-Pacific Partnership Agreement (TPP) and demanded renegotiations of economic and financial arrangements, such as the North America Free Trade Agreement (NAFTA), previously designed and driven by the United States, citing that these arrangements unfairly reduce the policy space necessary to protect American economic interests.²⁸² This shift in position could also justify change in the United States’ position on the RTD; if these instruments reduce the necessary policy space for the United States to the point that it has to withdraw or modify, then they would certainly have the policy space issue for other countries, particularly developing countries with economic

277. *General Agreement on Tariffs and Trade 1994*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153, art. 2 § 3(a) (1994).

278. *Agreement on Subsidies and Countervailing Measures*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14., art. 3. Such measures include the application of subsidies to facilitate exports for the purpose of promoting economic development, which is currently prohibited by WTO rules. *See also* Lee, *supra* note 17, ch. 3.

279. DRD, *supra* note 198, art. 1, ¶2.

280. Marks, *supra* note 235, at 149.

281. *Id.*

282. Justifying withdrawal from the TPP, President Trump stated that “[w]e do not need to enter into another massive international agreement that *ties us up and binds us down.*” Weissman, *supra* note 232 (emphasis added).

and financial vulnerability. By approving the RTD under the terms of the DRD, all countries, both developed and developing, including the United States, will have an opportunity to review the current economic and financial arrangements and make modifications to secure appropriate policy space for them.

IV. RECOGNIZING THE RTD FROM UNITED STATES LEGAL PERSPECTIVES

A. *Compatibility from U.S. Legal Perspectives*

If approving the RTD would be in the United States' interest, then would such approval be legally compatible from American legal perspectives? The United States Constitution, unlike many other constitutions in modern times, does not expressly recognize any economic or welfare entitlement or socioeconomic rights, including equitable access to the necessities listed under the DRD, such as education, health services, food, housing, employment and the fair distribution of income. In fact, the Supreme Court has consistently rejected recognizing such economic or welfare entitlements.²⁸³ For example, in *Fleming v. Nestor*, the Supreme Court ruled that workers have no legally binding rights to their Social Security benefits, and the latter can be reduced or even eliminated at any time.²⁸⁴

Where welfare support is provided, the government has substantial latitude to determine the manner in which it is provided. In *Dandridge v. Williams*, the Supreme Court upheld a Maryland law that provided a maximum of \$ 250 USD per family in welfare benefits, regardless of the number of children in the family and their actual need.²⁸⁵ The Court found that the law was rationally related to the government interest in "encouraging gainful employment, in maintaining an equitable balance in economic status as between welfare families and those supported by a wage-earner, in providing incentives for family planning, and in allocating available public funds"²⁸⁶

Neither the absence of an express constitutional provision nor the discretion retained by the government in the welfare provision necessarily means that the RTD is incompatible from American legal perspectives. As Ann Park stated, the United States Constitution does not recognize a welfare right partly because it is written in terms of what the government *cannot* do: "[w]hat the Constitution fails to do is recognize that government has certain *positive obligations* to its

283. Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 521 (1992).

284. *Fleming v. Nestor*, 363 U.S. 603, 617 (1960). However, the Supreme Court subsequently imposed a procedural requirement for the removal of welfare benefits; it held that the Due Process Clause of the Fourteenth Amendment requires an evidentiary hearing before a State can deprive a recipient of certain government welfare benefits. *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970).

285. *Dandridge v. Williams*, 397 U.S. 471, 474, 487 (1970).

286. *Id.* at 483–84.

citizenry with respect to the social and economic sphere.”²⁸⁷ Such obligations are likely to create substantial financial implications and political controversy for the government, so the government is resistant to recognizing a right that accompanies costly obligations on its part.²⁸⁸ Park also notes,

Because of the negative and restricted character of individuals’ rights vis-à-vis the state in America, the law is extremely resistant to the principle that individuals have rights of a constitutional magnitude to the fulfillment of basic needs, and that government has a corresponding duty to guarantee such rights.²⁸⁹

This point is also illustrated by a statement made by Judge Posner: “[t]he men who wrote the Bill of Rights were not concerned that the federal government might do too little for the people, but that it might do *too much* to them.”²⁹⁰

It is doubtful that this restrictive approach is still justifiable under the changed economic and social conditions of the modern time. When the Constitution and the Bill of Rights were drafted, the notion of social and economic rights was unknown; it was not known until the late nineteenth century, when the early system of social welfare was conceived and social welfare policies began to be implemented in Europe, largely in response to the threat of communism.²⁹¹ The drafters of the Constitution and the Bill of Rights, who lived in different times, would not have known this concept and were mainly concerned with restricting the powers of the federal government to prevent their abusive use.²⁹² This restrictive approach may have been legitimate in the world during the late eighteenth century, where oppressive monarchies and undemocratic aristocracies were prevalent, but this could not be taken to mean that the Constitution prevents recognition of the rights that respond to the needs of the time. In line with this point, the Ninth Amendment to the Constitution stipulates, “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage *others retained by the people*.”²⁹³

While a restrictive approach was adopted at the federal level, many States have acted more progressively and recognized socioeconomic rights. For example, the West Virginia Supreme Court held that education is a fundamental

287. Ann I. Park, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 UCLA L. REV. 1195, 1203 (1987) (emphasis in original).

288. *Id.* at 1205–07.

289. *Id.* at 1204.

290. Glendon, *supra* note 283, at 525 (emphasis added).

291. Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an “Entirely New Strategy”*, 44 HASTINGS L. J. 79, 88–92 (1992).

292. *Id.* at 92–94.

293. U.S. CONST. amend. IX (emphasis added). The examples of such fundamental rights not enumerated in the Constitution include the right to a fair trial, the right to vote, the right to marriage, the right to privacy, and the right to travel. The Supreme Court has confirmed these rights. *See, e.g.*, *Buchalter v. New York*, 319 U.S. 427, 429 (1943); *Lisenba v. California*, 314 U.S. 219, 236 (1941); *Snyder v. Massachusetts*, 291 U.S. 97, 116–17 (1934) (confirming the right to a fair trial).

right pursuant to its own State constitution.²⁹⁴ In *Pauley v. Kelly*, the West Virginia Supreme Court found that “a state is not constrained by the federal constitutional standard, but must examine its own constitution to determine its education responsibilities [W]e may interpret our own Constitution to require higher standards of protection than afforded by comparable federal constitutional standards.”²⁹⁵ Similarly, in *Boehm v. Superior Court*, a California Court of Appeal referred to the Universal Declaration of Human Rights to determine minimum basic needs as including rights to clothing, healthcare, necessary social services, food, and shelter.²⁹⁶ The court opined that “[s]uch allowances are essential and necessary to ‘encourage [self-respect and] self-reliance’ . . . in a ‘humane’ manner consistent with modern standards.”²⁹⁷

Stephen Loffredo and Helen Herschkoff observe that almost every State constitution refers to socioeconomic rights, such as rights to income support, education, and housing, as well as collective rights, such as achieving the goal of a healthy environment.²⁹⁸ The decision to include socioeconomic provisions in a State constitution has reduced the scope of political discretion, which the recognition of the RTD by the United States will do at the federal level. However, neither the federal executive branch nor the Supreme Court has recognized socioeconomic rights, and Park asserted that recognition of the RTD by the United States in a manner that parallels the right to basic needs may need to grow from the State level before change is implemented in the federal judiciary and executive branches.²⁹⁹ However, as discussed above, States with insufficient economic resources may not be in a position to implement the RTD fully or, because States are not sovereign national governments, to undertake the international obligations associated with the RTD; thus, it is necessary to recognize and implement the RTD at the federal level.³⁰⁰

The preceding examination confirms two points. First, the provisions of State constitutions expressly confirming socioeconomic rights have been adopted and implemented without conflicting with the federal constitution. Likewise, the recognition of the RTD at the federal level, which will incorporate these socioeconomic rights as an integral part, will not raise a conflict with the provisions of the United States Constitution.³⁰¹ Second, the prevalence of socioeconomic provisions in State constitutions means that there is a fertile jurisprudential ground to find support for the RTD in the United States. Both points indicate that the RTD will be compatible from American legal

294. Park, *supra* note 287, at 1259.

295. *Pauley v. Kelly*, 255 S.E.2d 859, 864 (W.Va. 1979).

296. *Boehm v. Superior Court*, 223 Cal. Rptr. 716, 721 (1986).

297. *Id.* (brackets and ellipses in original).

298. Stephen Loffredo & Helen Herschkoff, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN ST. L. REV. 923, 928–29 (2011).

299. Park, *supra* note 287, at 1256–62.

300. See Dadayan & Boyd, *supra* note 22 (explaining the insufficient Stage budget).

301. DRD, *supra* note 198, art. 1, ¶2.

perspectives. The next Section explores further constitutional grounds and legal theories that would provide support for the adoption of the RTD at the federal level.

B. Consideration of the RTD under the Equal Protection of the Laws

The Fourteenth Amendment to the Constitution, initially adopted to validate the equality provisions in the Civil Rights Act of 1866, prohibits States from denying “the equal protection of the laws” to any person within their jurisdictions.³⁰² It provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction *the equal protection of the laws*.³⁰³

In the presence of racial and ethnic prejudice, gender-based discrimination, and other forms of discrimination in society, the Fourteenth Amendment has been used to challenge and invalidate discriminatory measures by States such as school systems segregated by races,³⁰⁴ gender-based discriminatory measures,³⁰⁵ and other discriminatory classifications absent a rational basis.³⁰⁶ The Fourteenth Amendment is applied to States, not the federal government, but the equal protection requirement is also imposed on the federal government through the due process clause of the Fifth Amendment.³⁰⁷

The relevance of the equal protection clause, which is designed to prohibit certain types of discriminatory measures by the government, to the RTD is as follows: the recognition of the RTD and the measures to promote it, such as increased welfare coverage like healthcare, could be justified under the equal protection clause if a case could be made that the laws currently impose a disproportionate economic burden on different income classes.

302. U.S. CONST. amend. XIV.

303. *Id.* (emphasis added).

304. *See generally* *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (using the Equal Protection Clause to overrule the separate but equal theory in public schools).

305. *See generally* *Craig v. Boren*, 429 U.S. 190 (1976) (using the Equal Protection Clause to hold that gender-based discrimination must satisfy intermediate scrutiny).

306. *See generally* *Romer v. Evans*, 517 U.S. 620 (1996) (using the Equal Protection Clause to find unconstitutional a Colorado amendment prohibiting laws protecting the rights of homosexuals).

307. *Bolling v. Sharpe*, 347 U.S. 497, 498–99 (1954). The Fifth Amendment provides: No person shall be [...] deprived of life, liberty, or property, without due process of law [...]. The Supreme Court found that the concepts of equal protection and due process are not mutually exclusive and held that school segregation was unconstitutional under the due process clause of the Fifth Amendment.

Id.

There is an argument that the United States tax code does not impose a proportionate tax burden on different income classes. Income tax rates for the high-income brackets have been substantially reduced since the 1960s, while the rates for middle and lower-income brackets have not seen similar reductions.³⁰⁸ In 1955, top rates on federal income tax, capital gains, and corporate tax were 91%, 25%, and 52%, respectively.³⁰⁹ In 2015, they were 39.6%, 25%, and 35%, respectively.³¹⁰ The following graphs depict these changes:



Figure 10: Top Marginal Tax Rates³¹¹

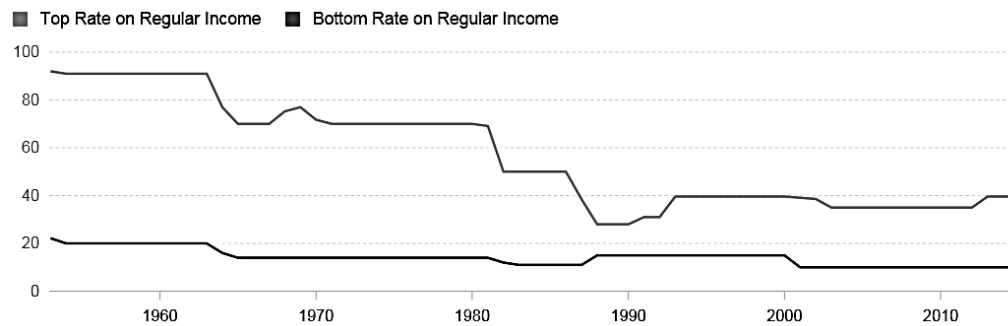


Figure 11: Top/Bottom Regular Income Tax Rates³¹²

In addition to the regular income tax rates that have been substantially reduced for the top income brackets, the capital gains tax rates also favor the upper-class, as capital gains are a primary income source for those in the highest income brackets, as illustrated below; its top rate is currently capped at 25%, which is substantially lower than the top rate applicable to salaries and wages.

308. See Figures 10 and 11.

309. Graphiq, *InsideGov*, <http://federal-tax-rates.insidegov.com/l/40/1955> (last visited Jan. 30, 2018).

310. *Id.*

311. *Id.*

312. *Id.*

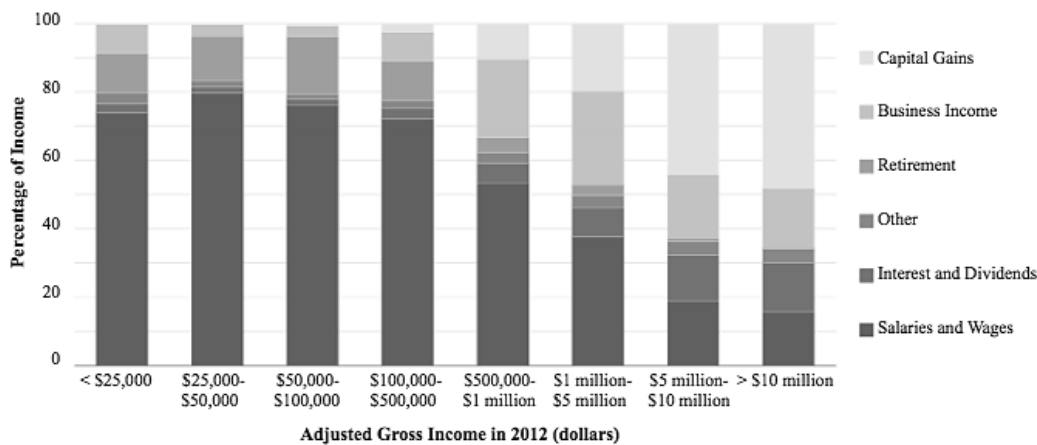


Figure 12: Composition of Income Reported on 2012 Tax Returns³¹³

There is a counter-argument that, despite reduced tax rates for the highest income brackets, the share of the federal income tax paid by this group is higher than the portion of income earned.³¹⁴ According to one study, the top 1% of income earners made 15% of all income in 2011, but paid 24% of all federal taxes, while the bottom 40% of income earners made the same 15% but paid only 4% of all federal taxes.³¹⁵ There are also differences in the overall rates at which different income classes pay their taxes. According to another report in 2015, the estimated average federal tax rate for the median household income of \$ 55,775 USD was 15.2%, 26.8% for income between \$ 200,000 and \$ 500,000 USD, 31.5% for income between \$ 500,000 and \$ 1 million USD, and 33.1% for income over \$ 1 million USD.³¹⁶

It is questionable whether the current differences in the federal tax rates are reasonably proportionate to income. It is a question of judgment rather than a precise science, but the following example provides a reference point. After the deduction of the federal taxes, the household of a median income (\$ 55,775 USD) will retain \$ 47,292 USD, which, per month comes to less than \$ 4,000 USD. State and local taxes (where applicable), as well as indirect taxes, such as

313. Lydia Austin & Robertson Williams, *Composition of Income Reported On Tax Returns in 2012*, Tax Policy Center (Mar. 4, 2015), <http://www.taxpolicycenter.org/publications/composition-income-reported-tax-returns-2012> (last visited Jan. 20, 2019).

314. Curtis Dubay, *How Much Do the Top 1 Percent Pay of All Taxes?*, THE DAILY SIGNAL (Apr. 15, 2015), <https://www.dailysignal.com/2015/04/15/how-much-do-the-top-1-percent-pay-of-all-taxes/> (last visited Jan. 17, 2019).

315. *Id.*

316. Andrew Lundeen, *How Much Do People Pay in Taxes?*, TAX FOUNDATION (Apr. 14, 2015), <https://taxfoundation.org/how-much-do-people-pay-taxes/> (last visited Jan. 20, 2019).

federal excise tax on gasoline, will be further deducted from this amount. Combined together, tax burden is considerable for this median income household where the costs of certain necessities, such as healthcare costs including health insurance premiums and the cost of college education, are among the highest in the world.³¹⁷ By contrast, those who earn \$ 300,000 USD per year—the top 10% of household incomes—will retain \$ 219,600 USD after paying federal taxes, which is around \$ 18,000 USD per month, and those who earn \$ 1.3 million USD—the top 1% of household incomes—will retain \$ 870,000 USD, approximately \$ 72,000 USD per month. Due to the lower capital gains tax rates, taxes are even lower for those in the high income brackets who draw the majority of income from investments. Various loopholes in the tax code may also reduce taxes for high income earners.³¹⁸ One poll suggests that the majority of the public does not consider the current tax liability to be proportionate to income.³¹⁹

To the extent that the tax code imposes an economic burden on the majority of the population that is not proportionate to income, the law arguably creates a discriminatory classification. Such undue classification raises a claim under the equal protection clause.³²⁰ An applicable remedy would be an adjustment of tax burdens for the adversely affected income classes; the adjustment may include offering increased tax credits for necessary but high cost items, such as healthcare costs (including health insurance premiums) and the cost of college education.³²¹ To reduce disproportionality, additional measures such as income support, housing, food, and clothing support for the low income group could also be expanded. Such provision is an integral part of the RTD; thus, the recognition

317. See Rabah Kamal & Cynthia Cox, *How do healthcare prices and use in the U.S. compare to other countries?*, PETERSON-KAISER HEALTH SYSTEM TRACKER (May 8, 2018), <https://www.healthsystemtracker.org/chart-collection/how-do-healthcare-prices-and-use-in-the-u-s-compare-to-other-countries/#item-start> (last visited Jan. 20, 2019); Amanda Ripley, *Why Is College in America So Expensive? - The outrageous price of a U.S. degree is unique in the world*, THE ATLANTIC (September 11, 2018), <https://www.theatlantic.com/education/archive/2018/09/why-is-college-so-expensive-in-america/569884/> (last visited Jan. 20, 2019).

318. See, e.g., DIANE KENNEDY, LOOPHOLES OF THE RICH: HOW THE RICH LEGALLY MAKE MORE MONEY AND PAY LESS TAX (2004).

319. In the 2012 CNN/ORC survey, 68% of respondents stated that the current tax system benefits the rich and is unfair to ordinary workers. CNN, *CNN/ORC poll: Most Americans say tax system favors wealthy*, CNN Politics (Apr. 17, 2012), <http://politicalticker.blogs.cnn.com/2012/04/17/cnnorc-poll-most-americans-say-tax-system-favors-wealthy/> (last visited Jan. 20, 2019).

320. Nonetheless, should a constitutional challenge be brought against the current tax code, the outcome would not likely be successful. It is not because there is absolutely no claim under the equal protection clause, but for policy reasons, the court applies the low level of scrutiny in cases, such as the tax code issue, not involving fundamental rights (as recognized by the Supreme Court), racial or ethnic discrimination, or gender-based discrimination; the court applies the least scrutiny called “the rational basis test,” and the law passes this scrutiny if it is *reasonably related to a legitimate government interest*, which is a low threshold that favors the government. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

321. Tax credits are already offered for some of these costs, but the credit could be increased in amounts to reduce the disproportionality.

of the RTD and the measures to promote it, including the suggested provisions, will be justifiable under the spirit and rationale of the equal protection of the laws.³²²

C. Recognition of the RTD under Social Contract Theory

Social contract theory refers to a body of theoretical frameworks that “seek[s] [to] legitim[ize] civil authority by appealing to notion of rational agreement.”³²³ The “agreement” or “social contract” represents a rational exchange of the condition of unregulated freedom (“the state of nature”) for the security and the order “of a civil society governed by a just, binding rule of law.”³²⁴ Under this theory, the relationship between a state and its people is governed by the terms of their social contract. Social contract theory was advanced by prominent philosophers, such as Thomas Hobbes (1588–1679), John Locke (1632–1704), Jean-Jacques Rousseau (1712–1778), John Rawls (1921–2002), and David Gauthier (1932–).³²⁵ According to social contract theory, civil authority, including laws, regulations, and the rights associated with them (legal rights), is a result of voluntary agreement.³²⁶

Social contract theory is deeply entrenched in the American jurisprudence and legal system.³²⁷ Some scholars also argue that social contract theory directly influenced the founding of the United States itself, including its Constitution and the War of Independence against Britain.³²⁸ Since then, social contract theory has continued to influence the development of American case law, and judges have cited social contract theory to justify their reasoning and to set new rules in varied areas, including the issues of sovereignty, slavery, alienage, the negligence rule, criminal incarceration, Congressional non-delegation, land use, the law of finds, public health, self-incrimination, civil forfeiture, debt collection, and the right to privacy.³²⁹ In the first American case to recognize a right to privacy, the court determined the existence of the right from natural law and social contractarian grounds.³³⁰

322. See DRD, *supra* note 198, art. 8, ¶1.

323. Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1, 2 (1999).

324. *Id.*

325. See, e.g., THOMAS HOBBS, LEVIATHAN (K. R. Minogue ed., J. M. Dent & Sons LTD 1975) (1651); JOHN LOCKE, *An Essay Concerning the True, Original, Extent and End of Civil Government*, in SOCIAL CONTRACT (1962) (1690); JEAN-JACQUES ROUSSEAU, *On the Social Contract*, in BASIC POLITICAL WRITINGS (Donald A. Cress ed. & trans., Hackett Publishing Company 1987) (1762); see generally JOHN RAWLS, A THEORY OF JUSTICE (1971).; and DAVID GAUTHIER, MORALS BY AGREEMENT (1987).

326. See Allen *supra*, note 323, at 2.

327. *Id.* at 3–4.

328. *Id.* at 2–3.

329. *Id.* at 6–7.

330. *Id.* at 7; Pavesich v. New England Life Ins. Co., 50 S.E. 68, 69–70 (Ga. 1905).

I examine whether social contract theory offers justification for the RTD. For this assessment, it is necessary to identify the terms of the social contract applicable between the government and the people in the United States. The terms of the applicable social contract have been changed over time; at the time of independence, when Americans sought to break out of unwanted British rule, the guarantee of civil and political liberties by the government was the term that the people had agreed on for the social contract that created the United States. The Constitution, including its amendments, was the embodiment of this agreement.

Since the late nineteenth century, fundamental changes in the social and economic environments have occurred. These changes include industrialization, the Great Depression in the 1930s, two World Wars, globalization, economic, political, and military domination post the Second World War, and economic problems (*i.e.*, regional economic disparity, stagnant economic growth, and economic polarization) that began in the 1970s and that we continue to see today. These changes have created a new set of socioeconomic conditions that present considerable difficulties for a majority of individuals seeking to improve their own economic wellbeing through self-reliant efforts. As discussed earlier, this difficulty and frustration felt by a majority of Americans was a reason for the unexpected outcome of the 2016 presidential election.

The challenge calls for a more affirmative economic role and assistance by the government. I argue that the changes in the socioeconomic conditions present new terms for the social contract that require the government to provide economic assistance for individuals by expanding welfare coverage, and by developing national policies focusing on economic development that would facilitate economic improvement for the majority of the population. This change is in exchange for and justified by the considerable economic burden assumed by citizens, including the tax payments discussed in the preceding Section, which did not exist when the Constitution was drafted (*i.e.*, when the initial social contract was made). The implementation of the new terms cannot be left to political discretion but should be legalized and institutionalized. For this reason, the recognition of the RTD is an appropriate step.

The following comparative analysis also confirms the social contract theory ground for the RTD. Most other industrialized countries today have recognized socioeconomic rights and the RTD, offering significantly more welfare coverage to their own populations than the U.S. government does, including universal healthcare coverage, free or affordable college education, and more extensive social security benefits.³³¹ Assuming that social contract theory also applies to explain the state-people relationships in other countries, it is inconceivable that the social contract in the United States does not include these benefits for people

331. See G.A. Res. 41/128, *supra* note 197, at art. 1–3. The United States is the only major industrialized country that has not ratified the International Covenant on Economic, Social and Cultural Rights as of January 2019 and the only objector of the DRD. For the voting record, see *supra* note 230 and the accompanying text.

available in most other industrialized countries because Americans somehow do not want them. The welfare benefits in the United States are not only more restricted than those offered by the Western and Northern European countries that are known to impose heavier tax burdens on individuals and corporations than the United States, but are also weaker than other developed countries with comparable tax rates (such as those in East Asia—South Korea, Japan, Taiwan, and Singapore).³³² These countries also offer more extensive welfare benefits than the United States does (*e.g.*, universal healthcare coverage and access to affordable college education), and adopt development strategies at the national level for the economic benefit of their majority populations.³³³ From this comparison, the terms of social contract in the United States can be described as more disadvantageous to the people than those in other developed countries, and this provides justification for the adoption of the RTD by the United States, which will support a mandate for the government to increase the level of economic assistance.

As previously discussed, State governments have recognized socioeconomic rights and implemented them. Some scholars have argued that the recognition and implementation of socioeconomic rights and the RTD could be delegated to State governments.³³⁴ This may appear consistent with traditional federalism: the RTD should be recognized and implemented by States, not by the federal government, which should remain a limited government. However, this would be difficult for financial reasons as most tax and other revenues owed to the government are retained by the federal government, leaving most State and local governments with only limited economic and financial resources.³³⁵ Thus, with its substantially greater resources, the federal government is in a better position to recognize and implement the RTD, with close coordination and cooperation from State and local governments.

V. CONCLUSION

This Article advocates legal and institutional approaches to address the economic problems in the United States, namely regional economic disparity, stagnant economic growth, and economic polarization. The concept of law and development, which explores the interrelationship between law and development and examines the impact of law, legal frameworks, and institutions on development, forms the analytical basis for these approaches.

The approaches advocated here may seem unusual for the following reasons. First, law and development is an area of study or practice concerning developing

332. See generally Kamimura Yasuhiro, *Welfare State Development in East Asia: A Cross-Continental Comparison*, HARVARD-YENCHING INST. WORKING PAPER SERIES (2014).

333. *Id.*

334. See, *e.g.*, Stark, *supra* note 291, at 103–04, 130 n.108.

335. See Tax Policy Center, *supra* note 21; see Dadayan & Boyd, *supra* note 22 for relevant statistics.

countries, rather than developed ones, and the concept of economic development, which is a key concept in these approaches, has also been associated with developing countries.³³⁶ Thus, one may find the suggestion to adopt these approaches to address the economic problems of the largest and the most advanced economy unusual—odd, as they were initially devised to assist developing countries.

This Article advances a point that the concept of economic development is also applicable to economic problems in developed countries such as the United States, and has demonstrated, with specific proposals and examples that the suggested legal and institutional approaches may validly apply to address the economic problems in the United States. For this exercise, this Article introduces and applies my own theory in law and development (“general theory of law and development”).³³⁷ This theory attempts to clarify the causal mechanisms by which law impacts development and provides a theoretical framework under which the legal and institutional approaches could be applied with coherence and consistency.

Second, the advocated legal and institutional frameworks originate in the South Korean model, adopted during its rapid development period (1962–1996).³³⁸ Although South Korea was extremely successful in economic development, lifting its impoverished economy to one of the most advanced in the world within one generation, these frameworks were nevertheless adopted in a vulnerable developing country, the economic and industrial conditions of which cannot be compared to those prevalent in the United States today. For this reason, the suggestion to apply the past South Korean model to solve the economic problems in the United States may seem misplaced.³³⁹

The suggested application accounts for the apparent differences in the economic and industrial conditions; applying the South Korean example, no suggestion is made that the United States adopt the South Korean-style economic development plans with macroeconomic benchmarks and industrial performance targets or attempt to develop specific industries by offering regulatory incentives. Given the sophistication of the United States’ economy and the strength of the private sector, such approach, which had been used in the early stages of economic development in South Korea (*i.e.*, in the ’60s and the

336. It is at least the case in academia, but the federal, State, and local agencies use this term. *See supra* note 49 for examples.

337. Lee, *supra* note 114, at 417–418.

338. Seong Min Hong, Ph. D., *Modernization and Economic Development in the Korean Economy*, KOREA INSTITUTE OF THE MIDEAST ECONOMIES (Mar. 16, 2001), <http://hopia.net/hong/file/english/modern.htm#3> (last visited Jan. 20, 2019).

339. South Korea’s industry-facilitating statutes enacted in the ’60s and the ’70s, and some of the key development institutions, such as the EPB, were repealed or merged with other institutions in the ’80s and the ’90s in response to the changes in political and economic environment. Three years after the merger of the EPB with the Ministry of Finance in 1994, however, South Korea faced a financial crisis, and since then, South Korea has never recovered to the rate of economic growth that it had enjoyed for over three decades. Lee, *supra* note 114, at 462.

'70s), would be neither feasible nor necessary. Rather, the lessons to draw from the South Korean example are the strength of institutional focus that the government created and sustained for economic development with political leadership devoted to this cause and the mechanisms of institutional coordination and cooperation (such as the EPB) between the public and private sectors and among various government departments and agencies that are often falling in unproductive inter-agency rivalry. The current legal and institutional frameworks in place, such as the EDA, are insufficient in status, mandate, and operational scale to tackle the causes of the economic problems to bridge regional economic gaps, stimulate economic growth, and reduce economic polarization throughout the country.

Lastly, the suggested approach stresses the need for the federal government to take up a plenary leadership role to address the economic problems, a role that is traditionally left to State and local governments. There is a traditional sentiment among some members of the public that the federal government should remain a limited government and should not intervene in regional economic issues that should be left to State and local governments.³⁴⁰ Despite this sentiment, the limited economic and financial resources at the disposal of State and local governments necessitate the federal government playing a more active role in economic development. There is also an institutional need for a control tower at the central government to coordinate and cooperate with public and private sector players in the process of economic development.

This Article also advocates for the United States' recognition and implementation of the RTD. For over three decades, the United States remains the only dissenter of the DRD, isolating itself from the clear international consensus; 145 other countries voted to adopt it. This Article has examined the political and economic ramifications of the RTD for the United States and concluded that its recognition will be consistent with its interest to promote its own economic development and will also be compatible from American legal perspectives. This Article also finds justification for recognizing the RTD under the equal protection clause and the influential social contract theory.

The unexpected outcome of the 2016 presidential election represents a call for changes to facilitate economic development for the majority of Americans, which necessitates new approaches. Ironically, these new approaches resemble the United States' demand to South Korea during the 1950s; South Korea was then undergoing economic stagnation, and the Eisenhower Administration demanded, as a condition for continued aid from the United States, on which South Korea relied, that the South Korean government develop new economic strategies, such as long-term economic development plans, to break out of economic stagnation and stimulate economic development.³⁴¹ The first South Korean president, who was then in power on an anti-communist stance, did not

340. See Miller, *supra* note 161.

341. Lee, *supra* note 106.

favor the idea of economic development plans, believing that such direct government involvement in the economy would be a Stalin-style communist approach.³⁴²

After the military coup in 1961, the new South Korean president did develop and implement economic development plans, as suggested by the United States, and ultimately achieved the most successful economic development in history.³⁴³ It was a different time then—before the emergence of neoliberalism in the United States, and development economists such as Walt Rostow (1916–2003), who would support a state-led development strategy, worked for the United States government and offered recommendations to developing countries such as South Korea.³⁴⁴ After decades of economic stagnation and no breakthrough in sight, perhaps the time has come for the United States to consider its own new approaches, as South Korea did in the early 1960s. I hope that this Article offers a modest contribution to finding a way forward.

342. *Id.*

343. See Syngman Rhee, *Coup Brought Park Chunfi Hee to Power in 1961*, N.Y. TIMES (Oct. 27, 1979), <https://www.nytimes.com/1979/10/27/archives/coup-brought-park-chung-hee-to-power-in-1961.html> (last visited Jan. 20, 2019); *The Miracle with a Dark Side: Korean Economic Development Under Park Chung-hee*, Inst. For Int'l Econs., 14–16 (2003).

344. See Jonathan Stevenson, *The Cold Warrior Who Never Apologized*, N.Y. TIMES (Sept. 8, 2017), <https://www.nytimes.com/2017/09/08/opinion/vietnam-walt-rostow.html> (last visited Jan. 20, 2019).