

# Legal Scholars, Economists, and the Interdisciplinary Study of Institutions

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## ESSAY

# LEGAL SCHOLARS, ECONOMISTS, AND THE INTERDISCIPLINARY STUDY OF INSTITUTIONS

*Ron Harris*†

### INTRODUCTION

This Essay does not focus on legal theory in law schools, the common core of legal scholarship as practiced in law schools, nor the trend towards interdisciplinary research as reflected in the “law and” movements in law schools. Rather, it looks outside of law schools, law reviews, and internal legal discourse. It examines the role that legal scholars play in interdisciplinary debates on legal issues. Do they attend such debates, and if so, do these scholars offer a unique voice based on legal theory or on other tools or sensitivities provided by the legal discipline?

The last three decades have witnessed an institutional turn in the social sciences. While the turn was manifest in political science, history, and sociology, its strongest hold was in economics. Economists turned their attention from markets to institutions, including legal institutions. The institutional turn, which was mostly due to the influence of Nobel Laureate Douglass North, had historical inclinations. Attention turned to the development of impersonal exchange in pre-state settings, to the rise of states that credibly respect property rights, and to the evolution of market infrastructures. The award of the Nobel Prize in Economics in 2009 to Elinor Ostrom, a political scientist, and to Oliver Williamson, a professor of business, economics, and law, suggests that the institutional turn is still vibrant and challenging traditional disciplinary boundaries.<sup>1</sup> This Essay raises the notion that scholars from other disciplines, particularly economics, have taken the

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† Professor of Law, Faculty of Law; Director, The David Berg Institute for Law and History, Tel Aviv University. I would like to thank Chantal Thomas and the participants at the conference “The Future of Legal Theory” for their advice, assistance, and thoughtful comments. I would also like to thank Hila Ohayon for her excellent research assistance.

<sup>1</sup> See Press Release, Royal Swedish Academy of Sciences, The Prize in Economic Sciences 2009 (Oct. 12, 2009), available at [http://nobelprize.org/nobel\\_prizes/economics/laureates/2009/press.pdf](http://nobelprize.org/nobel_prizes/economics/laureates/2009/press.pdf). The Academy awarded the Prize to Elinor Ostrom “for her analysis of economic governance, especially the commons” and to Oliver Williamson “for his analysis of economic governance, especially the boundaries of the firm.” *Id.*

lead not only in the study of the impact of legal and institutional factors on economic outcomes but also in the study of the development of legal institutions. Is this another manifestation of the imperialistic tendencies of economics to study and explain disciplines? Is this another example of the pragmatism and openness of the discipline of economics, of its willingness to study and borrow from other disciplines? What can we learn from this experience about the future prospects of legal scholarship?

In this Essay, I will discuss three debates that have much in common yet contain sufficiently different characteristics to highlight different types of interplay. All of the debates began with a contribution by leading economists. They all touched on law and on problems that interested legal scholars. They all arose more than a decade ago.<sup>2</sup> In fact, all of the original contributions were published between 1989 and 1998. This provided legal scholars with sufficient time to comprehend the debates and to respond to them as they found them relevant. The articles that sparked these debates were all frequently cited and highly influential. They became canonical works in the field of economics and had a significant impact on other social science disciplines.

The first debate focuses on an article by Avner Greif that deals with the apparent irrelevance of the law in situations in which lawyers would consider the law determinative. The second debate focuses on an article by Douglass North and Barry Weingast that claims that law is important but shows that it can only function together with other institutional factors. The third debate focuses on an article by Andrei Shleifer and his coauthors (collectively known as LLSV) that demonstrates that the law determines economic outcomes. To be clear, institutional economics in general, these three examples, and my claim in this Essay are all confined to positive scholarship.

My own inclination toward historical studies affected the selection of the examples and narrowed the implications inferable from them. I leave to other authors the task of discussing the interplay between the legal discipline and other disciplines with respect to con-

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<sup>2</sup> According to Fred Shapiro, economist Ronald Coase's earlier contribution, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960), is the most frequently cited legal article. See Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 759 (1996). In fact, the number of citations to Coase's article (1741) is almost twice the number of citations to the second most cited legal article. See *id.* at 767. I have discussed elsewhere the twist that Coase's contributions took in the legal discipline, particularly in law and economics, compared to his original agenda in economics. See Ron Harris, *The Encounters of Economic History and Legal History*, 21 LAW & HIST. REV. 297, 300, 300-05 (2003); Ron Harris, *The Uses of History in Law and Economics*, 4 THEORETICAL INQUIRIES L. 659, 663-64 (2003). I did not choose Coase as one of my examples because his contribution is much older than the three I selected and is also less historical. Additionally, I have already discussed it elsewhere.

temporary issues, normative and prescriptive topics, and the research and debates about these issues and topics. This Essay will first present each of the three debates in terms of their content and impact. It will then analyze the legal responses to the debates in the same order. Finally, it will offer some observations about the state of legal scholarship and legal theory as reflected in these debates.

## I

## REPUTATION AND COALITIONS

The first example I consider is Avner Greif's contribution to the study of agency relationship. Greif's first contribution to this field was *Reputation and Coalitions in Early Trade: The Maghribi Traders*, published in 1989.<sup>3</sup> In the five years that followed, he published a series of related articles in leading economics journals.<sup>4</sup> In 2006, he integrated his project into a book.<sup>5</sup> He received a MacArthur Foundation Fellowship (Genius Grant) in 1998 and is currently a professor of economics and the Bowman Family Endowed Professor in Humanities and Sciences at Stanford University.

His contribution in *Reputation and Coalitions* was to show how appropriate informal institutions can solve agency problems between merchants and their overseas agents.<sup>6</sup> This solution worked well despite difficult cultural, geographic, and legal background conditions.<sup>7</sup> Greif specifically noted that the legal system failed to provide a framework to organize and enforce agency relationships and contracts.<sup>8</sup> Initially, there was a significant information asymmetry between the agent who traveled abroad and the principal that remained at home.<sup>9</sup> The functioning of the informal institution was not explained by altruism associated with family, ethnic, or religious affinity.<sup>10</sup> It was also

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<sup>3</sup> Avner Greif, *Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders*, 49 J. ECON. HIST. 857 (1989) [hereinafter Greif, *Reputation and Coalitions*].

<sup>4</sup> Avner Greif, *Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition*, 83 AM. ECON. REV. 525 (1993) [hereinafter Greif, *Contract Enforceability*]; Avner Greif et al., *Coordination, Commitment, and Enforcement: The Case of the Merchant Guild*, 102 J. POL. ECON. 745 (1994); Avner Greif, *Cultural Beliefs and the Organization of Society: A Historical and Theoretical Reflection on Collectivist and Individualist Societies*, 102 J. POL. ECON. 912 (1994) [hereinafter Greif, *Cultural Beliefs*]; Avner Greif, *Institutions and International Trade: Lessons from the Commercial Revolution*, 82 AM. ECON. REV. 128 (1992); Avner Greif, *On the Political Foundations of the Late Medieval Commercial Revolution: Genoa During the Twelfth and Thirteenth Centuries*, 54 J. ECON. HIST. 271 (1994). Greif's canonical articles were reprinted in various collections and were published in adapted versions in political science and sociology journals.

<sup>5</sup> AVNER GREIF, *INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY: LESSONS FROM MEDIEVAL TRADE* (2006).

<sup>6</sup> Greif, *Reputation and Coalitions*, *supra* note 3, at 858–60.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 865–66.

<sup>9</sup> *Id.* at 864–65.

<sup>10</sup> *Id.* at 859.

not explained by the repeated dealings between principal and agent that typically give rise to reputation-based enforcement.<sup>11</sup>

The solution was the coalition, a self-enforcing institution that aligned the interests of agents and principals.<sup>12</sup> Membership in the coalition required each member to provide, for the benefit of all members, information on market conditions and on all agents and transactions (even transactions conducted by other merchants and their agents).<sup>13</sup> Membership also required inflicting multilateral punishment on agents that cheated other members in the coalition.<sup>14</sup> Though the common social background of members in the coalition facilitated the flow of information, it was not in itself the source of obedience by agents.<sup>15</sup>

Greif's contribution could be relevant to lawyers because it shows the conditions under which the law is irrelevant or redundant. Specifically, without institutions that facilitate an expected flow of information, the law cannot enforce agency contracts because legal institutions alone cannot guarantee an appropriate flow of information. Greif's coalition, however, could impose sufficient sanctions without resorting to the legal system or to the state. Moreover, ostracism from a close-knit society or expulsion from an essential and exclusive marketplace, such as a fair or a port, was not the only available sanction. Crucially, the system did not rely on a third-party verifier or enforcer. It was the first-best solution, not a solution of last resort that replaced a malfunctioning legal system. Table 1 demonstrates the impact of Greif's contribution by showing the number of academic citations to three of Greif's primary articles (*Contract Enforceability and Economic Institutions in Early Trade*; *Coordination, Commitment, and Enforcement*; and *Reputation and Coalitions*) by year and discipline as recorded in the Social Sciences Citation Index (SSCI).<sup>16</sup>

## II

### CONSTITUTIONS AND COMMITMENT

The second example I consider is the contribution of Douglass North and Barry Weingast to research on "credible commitments," be-

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<sup>11</sup> *Id.* at 866–67.

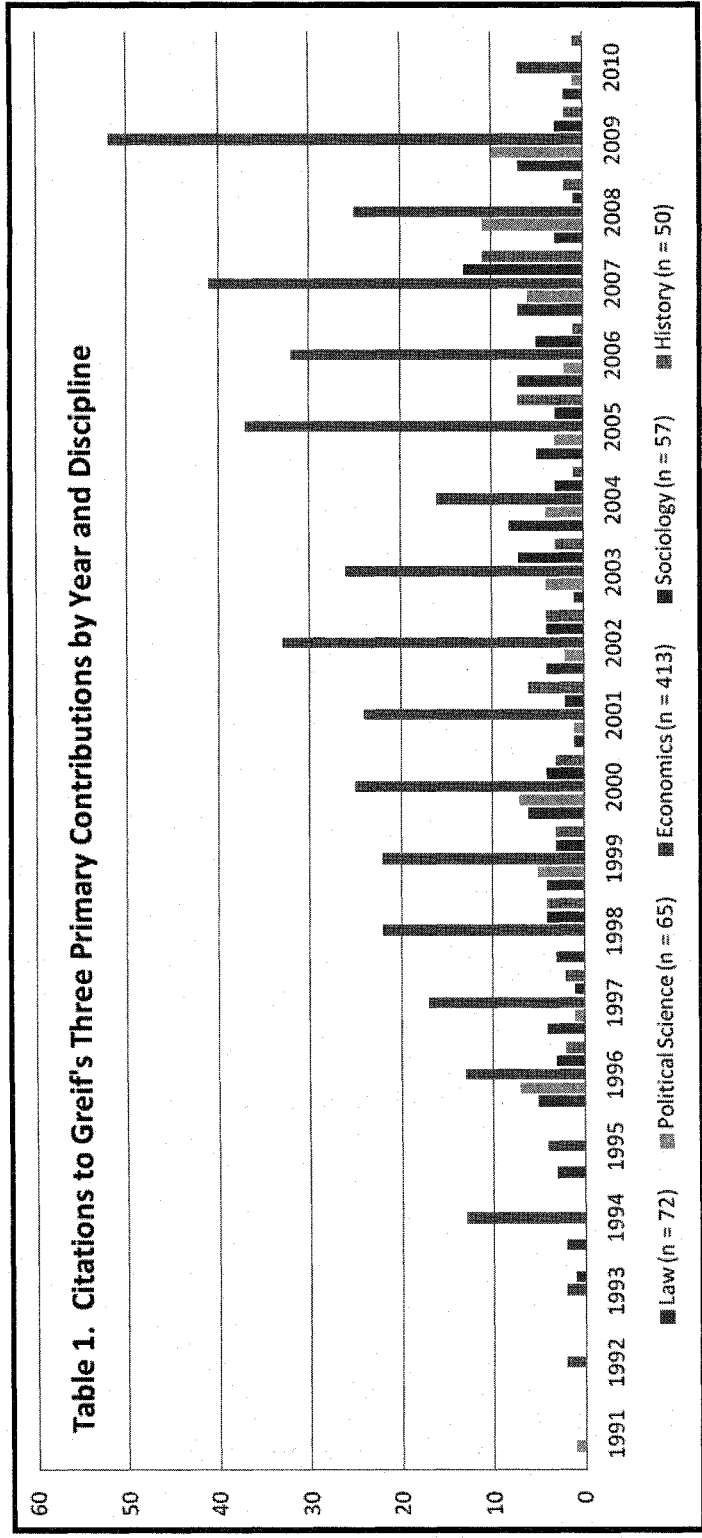
<sup>12</sup> *Id.* at 867–68.

<sup>13</sup> *Id.* at 879–81.

<sup>14</sup> *Id.* at 870.

<sup>15</sup> *Id.* at 867.

<sup>16</sup> See Greif, *Contract Enforceability*, *supra* note 4; Greif, *Cultural Beliefs*, *supra* note 4; Greif, *Reputation and Coalitions*, *supra* note 3. For the purposes of this Table, note that an article that cites all three Greif articles is counted three times in the chart. For information about the coverage and methodology of SSCI, see *Social Sciences Citation Index*, THOMSON REUTERS, [http://thomsonreuters.com/products\\_services/science/science\\_products/a-z/social\\_sciences\\_citation\\_index](http://thomsonreuters.com/products_services/science/science_products/a-z/social_sciences_citation_index) (last visited Mar. 28, 2011).



ginning with the publication of their article *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England* in 1989.<sup>17</sup> When they wrote the article, North was a professor of economics and Weingast was a professor of economics and political economy. They both taught at Washington University in St. Louis. North won the Nobel Prize in Economics four years later; Weingast moved to Stanford, where he is a professor of political science and a Senior Fellow at the Hoover Institute.

A statement of purpose for a retrospective “credible commitment” bidecennial conference held in Cambridge in 2010 stated:

Douglass North and Barry Weingast’s seminal article on “credible commitment” has proven the most influential explanation of the economic and financial significance of the Glorious Revolution of 1688/89. They argued that the establishment of parliamentary supremacy over public finance created an environment in which investors could rely upon the state to meet its financial promises. The Financial Revolution, upon which Britain’s rise to great power status was founded, followed from this development.<sup>18</sup>

This statement demonstrates North and Weingast’s contribution that the British solved the credible commitments problem through the Glorious Revolution of 1688 and the measures that followed it. The solution allowed measurable and dramatic changes on several connected levels that included an increase in government borrowing,<sup>19</sup> lowering of interest paid by the government on its debt,<sup>20</sup> an expansion of the government bond market and private capital markets,<sup>21</sup> Britain’s ability to wage prolonged and successful wars,<sup>22</sup> and its

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<sup>17</sup> Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803 (1989). The number of reprints and the titles of the collections in which they were published can serve as a good indication of the canonical status of the article and its disciplinary boundaries. Their article has appeared in the following collections: 1 THE ECONOMICS OF PROPERTY RIGHTS 236–65 (Svetozar Pejovich ed., 2001); EMPIRICAL STUDIES IN INSTITUTIONAL CHANGE 134–65 (Lee J. Alston, Thráinn Eggertsson & Douglass C. North eds., 1996); INSTITUTIONS AND ECONOMIC PERFORMANCE 384–413 (Kevin E. Davis ed., 2010); 1 MONETARY AND FISCAL POLICY 311–43 (Torsten Persson & Guido Tabellini eds., 1994); THE POLITICAL ECONOMY OF INSTITUTIONS 263–92 (Claude Ménard ed., 2004); 4 RATIONAL CHOICE POLITICS 297–325 (Torun Dewan et al. eds., 2009); REGULATION 115–44 (Colin Scott ed., 2003); 1 TRANSACTION COST ECONOMICS 254–83 (Oliver E. Williamson & Scott E. Masten eds., 1995).

<sup>18</sup> D’Maris D. Coffman & Anne L. Murphy, *Background, QUESTIONING ‘CREDIBLE COMMITMENT’: RETHINKING THE GLORIOUS REVOLUTION AND THE RISE OF FINANCIAL CAPITALISM*, <http://www.srcf.ucam.org/~ddc22/credcom2010/background/background.html> (last visited Mar. 28, 2011).

<sup>19</sup> North & Weingast, *supra* note 17, at 805.

<sup>20</sup> *Id.* at 823.

<sup>21</sup> *Id.* at 825.

<sup>22</sup> *Id.* at 823.

ability to form the fiscal-military nexus.<sup>23</sup> The solution marked the beginning of a century and a half of continuous and unprecedented economic growth.<sup>24</sup> Countries such as France, which were unsuccessful in solving the problem, remained muddled.<sup>25</sup>

The implications of the credible commitments framework go beyond the Glorious Revolution and the market for state bonds, which, for North and Weingast, serve only as an important case study. A strong and unconstrained state cannot credibly commit to refrain from expropriating from its creditors. The ability to expropriate is a curse, not a blessing, to a despotic state: it cannot borrow. On a more general level, a predatory state cannot commit to refrain from expropriating property of any sort. The more likely a sovereign is to expropriate, the lower the expected return on its investment and the lower its incentive to invest. The impact of the credible commitments framework beyond the history of the Glorious Revolution is evident in the pattern of its citations as reflected in SSCI.<sup>26</sup> Table 2 shows that, although North and Weingast's article was cited 54 times in history journals, it was also cited 214 times in economics journals, 121 times in political science journals, 21 times in sociology journals, and 49 times in law journals.

Though North and Weingast portray their project as dealing with the political factors underpinning economic growth, they, in fact, place law in the center. The factors are the rules governing economic change, the institutions that enforce the rules, and the institutions that govern the way these rules may be changed. These rules and institutions are legal and constitutional.

The British solved the problem of credible commitments partly by redesigning their constitution to limit the power of the state.<sup>27</sup> Specifically, they weakened the Crown by shifting power to Parliament through the Bill of Rights and by establishing a constitutional monarchy. Additionally, they required parliamentary assent to taxes and loans.<sup>28</sup> Through Acts of Parliament, they ensured loan repayment by earmarking taxes to be used for repayment of specific loans.<sup>29</sup> However, the British constitution was not paramount or entrenched, and the empowered Parliament could still expropriate by way of legislation. The British needed additional shackles, so they formed institutions that would counterbalance Parliament—most notably, the Bank of England. The Bank administered the national debt of Britain, en-

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<sup>23</sup> *Id.* at 830–31.

<sup>24</sup> *Id.* at 828–32.

<sup>25</sup> *Id.*

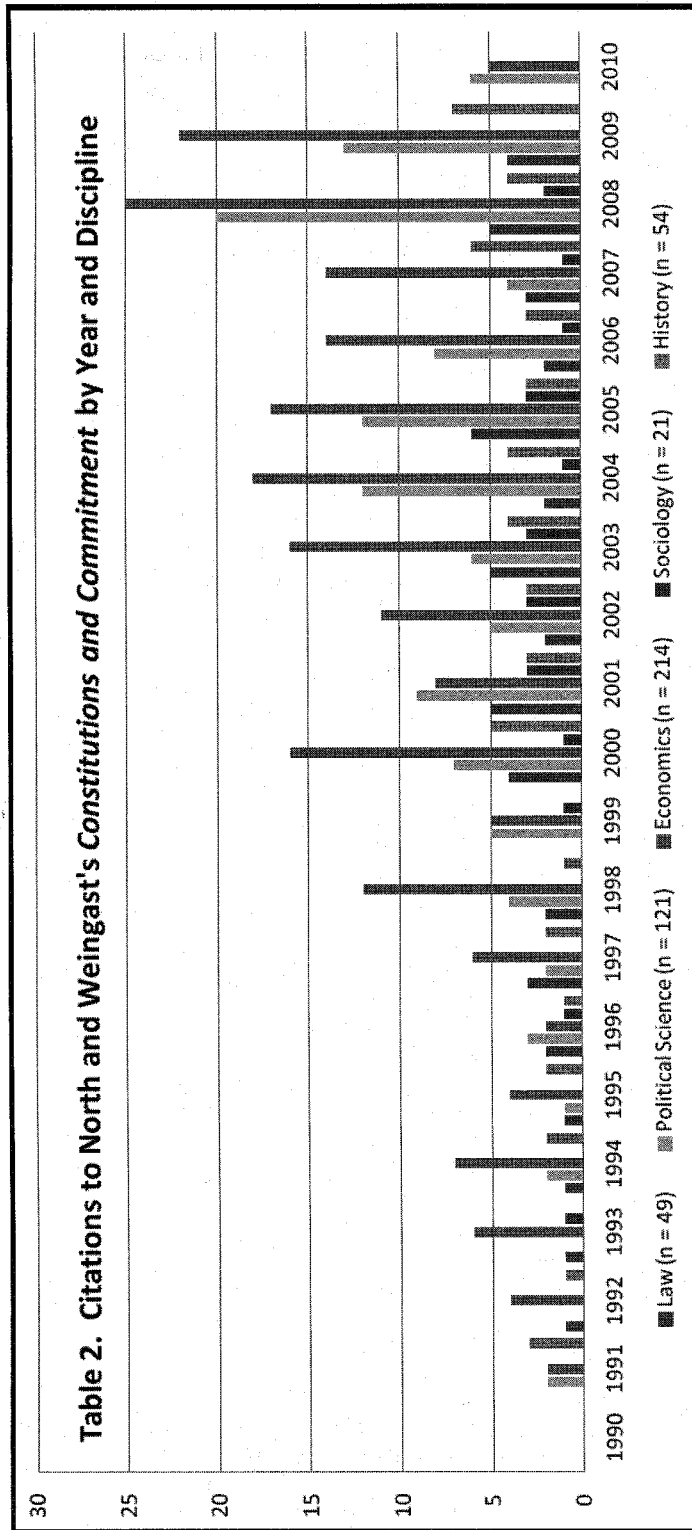
<sup>26</sup> See *Social Sciences Citation Index*, *supra* note 16.

<sup>27</sup> North & Weingast, *supra* note 17, at 831.

<sup>28</sup> *Id.* at 804.

<sup>29</sup> *Id.* at 821.





sureing that bondholders would be repaid through tax revenues and protected from expropriation.<sup>30</sup> Interest groups of politically powerful investors that organized around the Bank and other financial institutions clustered around Parliament and the Crown, lobbying and restraining them to prevent the State from defaulting and expropriating.<sup>31</sup> Three constraints—constitutional government, banking institutions, and interest groups—prevented the state from expropriating and ultimately made its commitments credible.

### III LAW AND FINANCE

Andrei Shleifer, a professor of economics at Harvard University and formerly a professor of finance at the University of Chicago, along with his coauthors (in most articles a four-author team widely known as LLSV), published a series of articles between 1997 and 2002.<sup>32</sup> The most famous of these articles are *A Survey of Corporate Governance*,<sup>33</sup> *Legal Determinants of External Finance*,<sup>34</sup> *Law and Finance*,<sup>35</sup> and *Legal Origins*.<sup>36</sup> Some of these articles won distinguished prizes shortly after their publication, and *Law and Finance* is ranked third among all articles and papers in IDEAS RePEc (Research Papers in Economics) by the number of citations discounted by citation age.<sup>37</sup> In 1999, the

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Schliefer's coauthors were Robert Vishny, a professor of finance at the Booth Business School; Rafael La Porta, a former professor of economics at Harvard and now a professor at the Tuck School of Business; and Florenico Lopez-de-Silanes, a former professor at the Kennedy School of Government and the Yale School of Management and now a professor of law and economics at the École Normale Supérieure.

<sup>33</sup> Andrei Shleifer & Robert W. Vishny, *A Survey of Corporate Governance*, 52 J. FIN. 737 (1997). Their article appears in the following collections: 1 CORPORATE GOVERNANCE 20–66 (Kevin Keasey et al. eds., 1999); CORPORATE GOVERNANCE AND CORPORATE FINANCE: A EUROPEAN PERSPECTIVE 52–90 (Ruud A.I. van Frederikslust et al. eds., 2008); 1 CORPORATE GOVERNANCE AND FINANCIAL REPORTING 95–141 (Niamh Brennan ed., 2008); LAW AND ECONOMIC DEVELOPMENT 305–51 (Hans-Bernd Schäfer & Angara V. Raja eds., 2006); 2 RECENT DEVELOPMENTS IN CORPORATE FINANCE 135–81 (Jay R. Ritter ed., 2005); 3 RECENT DEVELOPMENTS IN LAW AND ECONOMICS 399–445 (Robert D. Cooter & Francesco Parisi eds., 2009).

<sup>34</sup> Rafael La Porta, Florenico Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997).

<sup>35</sup> Rafael La Porta, Florenico Lopez-de-Silanes, Andrei Shleifer, & Robert W. Vishny, *Law and Finance*, 106 J. POL. ECON. 1113 (1998). Their article appears in the following collections: CORPORATE GOVERNANCE: ESSAYS IN HONOR OF HORST ALBACH 26–68 (Joachim Schwalbach ed., 2001); THE EVOLUTION OF EFFICIENT COMMON LAW 513–555 (Paul H. Rubin ed., 2007); 2 GOVERNANCE: AN INTERNATIONAL PERSPECTIVE 285–327 (Diane K. Denis & J. McConnell eds., 2005); LAW AND ECONOMIC DEVELOPMENT, *supra* note 33, at 193–235.

<sup>36</sup> Edward L. Glaeser & Andrei Shleifer, *Legal Origins*, 117 Q.J. ECON. 1193 (2002).

<sup>37</sup> *Top 1% Research Items*, IDEAS: ECONOMIC AND FINANCE RESEARCH, <http://ideas.repec.org/top/top.item.sdiscount.html> (last visited Mar. 28, 2011). It is ranked in the top ten items in several other categories. The repository includes more than 900,000 papers and articles.

American Economic Association awarded Shleifer the John Bates Clark Medal, the most prestigious award granted to economists under the age of forty. He is currently the most-cited economist, with 11,254 citations.<sup>38</sup>

LLSV developed a system for coding and measuring the legal rules that govern the protection of outside investors in corporations. They then showed that the legal rules that protect investors vary systematically among legal traditions, or legal origins. LLSV found that common law countries provide the most protection, German-based and Scandinavian civil law countries provide a medium level of protection, and French civil law countries provide the least protection.<sup>39</sup> They then correlated these levels of protection with economic outcomes and found that legal origins explained the ownership structure of corporations, firm valuation, extent and liquidity of the stock market, and eventually, economic development.<sup>40</sup> They argued that because the law in most countries was transplanted by colonial powers, its causal direction is not in doubt.<sup>41</sup> Specifically, developed economies did not adopt common law systems; common law countries, on the other hand, developed sophisticated economies due to their legal origins.<sup>42</sup> Through their influential series of articles, LLSV convinced nonlegal scholars that law matters. In fact, the first to pick up this message, as reflected in Table 3 below, were finance scholars, economists, business and management professors, and only more slowly and to a more limited extent, legal scholars.

#### IV

#### LEGAL SCHOLARS AND REPUTATION AND COALITIONS

Most of the references to Greif in the legal literature are in law and economics journals and law and society journals. Economists and sociologists make some of these references, mostly by way of application of Greif's models to nonlegal contexts. This application is to agency relationships and other contracts that operate subject to information asymmetries and show that reputation mechanisms, private or-

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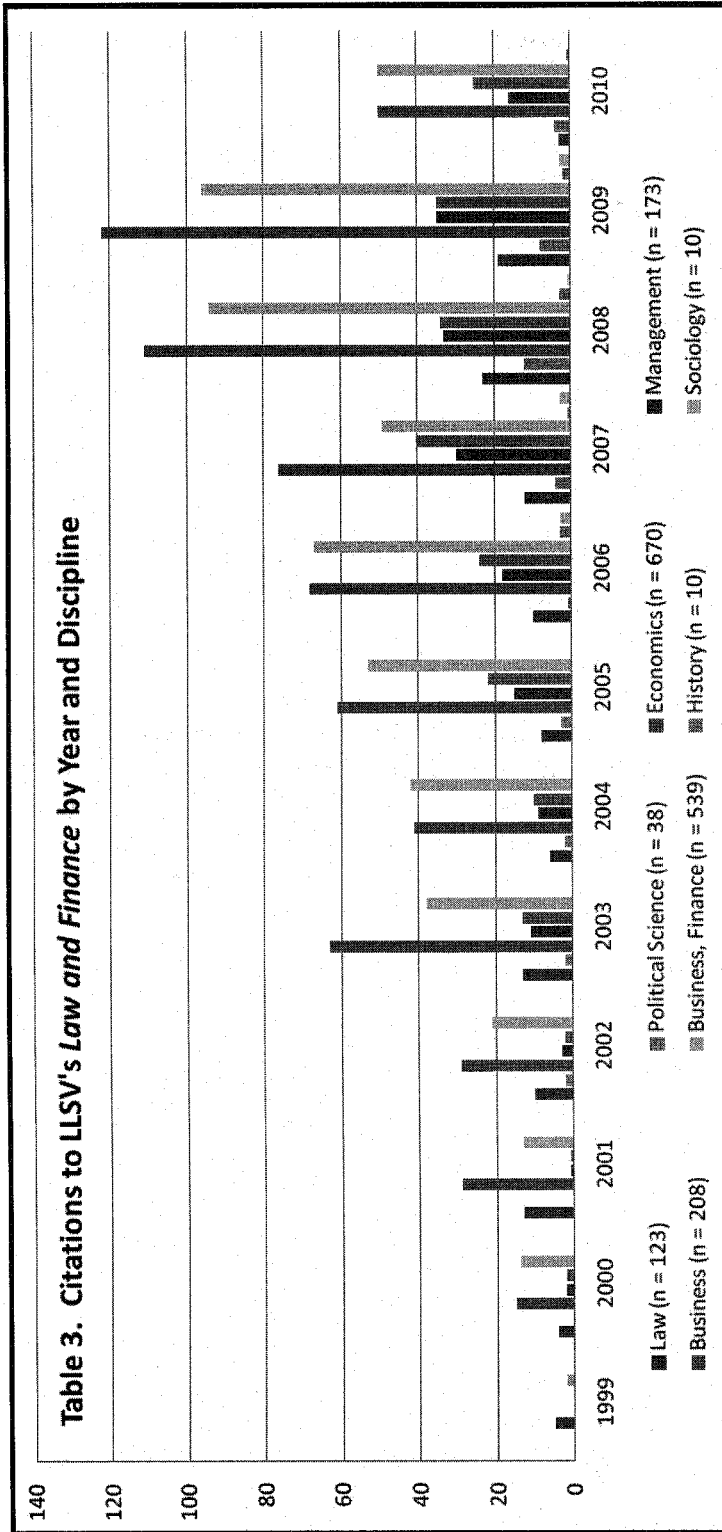
<sup>38</sup> Shleifer is ranked out of twenty-four thousand registered authors. *Economist Rankings at IDEAS*, IDEAS: ECONOMIC AND FINANCE RESEARCH (Feb. 2011), <http://ideas.repec.org/top/top.person.nbcites.html#psh93>. He is ranked second (after Joseph Stiglitz) in average rank score, as calculated based on several rankings. *Id.*

<sup>39</sup> La Porta, Lopez-de-Silanes, Shleifer & Vishny, *supra* note 34, at 1132.

<sup>40</sup> *Id.* at 1132-33.

<sup>41</sup> *Id.* at 1115-16.

<sup>42</sup> *Id.*



dering, social norms, and social networks govern such relationships and enforce breaches.<sup>43</sup>

A notable exception to this trend is Barak Richman.<sup>44</sup> His work on the intersections of legal, institutional, and market enforcement relies on Greif's model and extends it by formulating a positive model that predicts when commercial parties will employ private ordering to enforce their agreements.<sup>45</sup> He identifies factors that determine the use of firms, courts, and reputation-based private ordering to control agency relationships.<sup>46</sup> Richman demonstrates that legal scholars did not utilize Greif's contributions in a sophisticated way in their own disciplinary concern.

In March 2008, Jeremy Edwards and Sheilagh Ogilvie, two Cambridge economists, posted their working paper *Contract Enforcement, Institutions and Social Capital: The Maghribi Traders Reappraised* online.<sup>47</sup> The paper created heated controversy in the economic and legal blogosphere. It argued that the case of the Maghribi traders did not fit Greif's interpretation<sup>48</sup> and that the Maghribis instead used formal legal mechanisms.<sup>49</sup> Edwards and Ogilvie argued that the Geniza documents, the basic primary source Greif used to support his argument, actually reveal that these traders made widespread and voluntary use of the formal legal system by resorting to the Jewish law system and occasionally to the Muslim legal framework.<sup>50</sup> They further argued that there is no evidence for the existence of traders' coalitions.<sup>51</sup> Ultimately, they contended that Greif had not identified a case of informal reputation- and coalition-based enforcement but rather a familiar case of *legal* enforcement.

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<sup>43</sup> See Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 354–58 (2003); John McMillan & Christopher Woodruff, *Private Order Under Dysfunctional Public Order*, 98 MICH. L. REV. 2421, 2426–27, 2433–34, 2456–57 (2000).

<sup>44</sup> Lisa Bernstein is another example. She studied privately drafted commercial codes and arbitration tribunals in the diamond and cotton industries, yet her contributions were initially independent of Greif's. See Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001).

<sup>45</sup> Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328, 2337–51 (2004).

<sup>46</sup> *Id.*

<sup>47</sup> Jeremy Edwards & Sheilagh Ogilvie, *Contract Enforcement, Institutions and Social Capital: The Maghribi Traders Reappraised* (Cambridge Working Papers in Econ., Paper No. 0928, 2009), available at <http://www.econ.cam.ac.uk/dae/repec/cam/pdf/cwpe0928.pdf>. The paper was initially posted on SSRN as a CESifo working paper and later posted online as a Cambridge working paper.

<sup>48</sup> *Id.* at 5.

<sup>49</sup> See, e.g., *id.* at 19.

<sup>50</sup> *Id.* at 21.

<sup>51</sup> *Id.* at 56.

In June 2008, Greif responded in *Contract Enforcement and Institutions Among the Maghribi Traders: Refuting Edwards and Ogilvie* by posting his response along with the original criticism on his Stanford website.<sup>52</sup> He examined Edwards and Ogilvie's evidence that the Maghribis resorted to the legal system and argued that they had misread the Geniza records.<sup>53</sup> They presented nonagency-related matters, nontrade-related matters, and even matters that could only be performed through court orders, such as inheritance and family court orders, as evidence for the resort of agents to the legal system. Greif carefully reexamined all 745 merchant letters in the relevant corpus of the Geniza and found only three documents reflecting disputes involving agency relations and only one that did not involve a non-Maghribi.<sup>54</sup> Several bloggers found Greif's response persuasive and agreed that he had proved that his critics had misinterpreted the evidence.<sup>55</sup>

The main conclusion that I draw from this exchange is that lawyers were clearly absent. Two economists argued that the law mattered—and that was only two decades after Greif's initial contribution. Similarly, doctoral students connected to the Geniza Project at Princeton University have conducted constructive and interesting studies of the interplay between the legal system and informal systems in the era of the Geniza in recent years.<sup>56</sup> Legal historians and legal scholars of private ordering were strikingly absent. They were not involved in the historical line of research and did not take part in the controversy. With the exception of Richman, mentioned above, and possibly a couple of other legal scholars that my survey may have missed, legal scholars did not contribute to the theory, the modeling, or the examination of these case studies. Now, after the outbreak of the controversy and following the recent research by historians, it cannot be argued that this lack of interest resulted from the irrelevancy of the topic to lawyers due to the absence of formal law.

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<sup>52</sup> Avner Greif, *Contract Enforcement and Institutions Among the Maghribi Traders: Refuting Edwards and Ogilvie* (June 20, 2008) (unpublished manuscript), available at [http://www.stanford.edu/~avner/Greif\\_Papers/SSRNAUG202008.pdf](http://www.stanford.edu/~avner/Greif_Papers/SSRNAUG202008.pdf).

<sup>53</sup> See *id.* at 2.

<sup>54</sup> See *id.* at 5. Because it is not relevant to this Essay, I will not discuss Greif's response regarding the existence of coalitions and the evidence for the existence of multilateral reputation-based enforcement within these coalitions.

<sup>55</sup> See Henry Farrell, *Greif v. Edwards and Ogilvie, THE MONKEY CAGE* (June 9, 2008, 4:29 PM), [http://www.themonkeycage.org/2008/07/greif\\_v\\_edwards\\_and\\_ogilvie.html](http://www.themonkeycage.org/2008/07/greif_v_edwards_and_ogilvie.html).

<sup>56</sup> See Phillip Isaac Ackerman-Lieberman, *A Partnership Culture: Jewish Economic and Social Life Seen Through the Legal Documents of the Cairo Geniza, 12–74* (Nov. 2007) (unpublished PhD dissertation, Princeton University), ProQuest, Doc. ID 1417804981; Jessica Goldberg, *Geographies of Trade and Traders in the Eleventh-Century Mediterranean: A Study Based on Documents from the Cairo Geniza, 200–08* (2005) (unpublished PhD dissertation, Columbia University), ProQuest, Doc. ID 1059994911.

## V

## LEGAL SCHOLARS AND CONSTITUTIONS AND COMMITMENT

Turning to North and Weingast's scholarship on credible commitments, lawyers should be interested in this work because it provides a new understanding of a significant event in Anglo-American constitutional history: the Glorious Revolution. Lawyers should be interested in it because it offers a new framework for understanding the role of constitutions as credible commitment devices and their effect on markets, interest rates, and eventually economic development. Moreover, they should be interested in it because it demonstrates how legal and constitutional factors combine with institutional and political factors with meanings that cannot be understood when divorced from these factors.

Legal scholars, however, do not exhibit this interest. Legal scholarship frequently mentions the phrase "credible commitments" without explicit reference to North and Weingast's articles and without awareness of the specifics of their analytical framework or case study.<sup>57</sup> Legal scholars often only take the general notion that sovereigns encounter a credible commitments problem. They do not examine whether sovereigns apply the full set of tools identified by North and Weingast, a combination of constitutional, institutional, and political tools.<sup>58</sup> It is no coincidence that only one lawyer (myself) presented at the recent four-day conference that revisited the credible commitments thesis.<sup>59</sup>

A notable exception is a 2006 book by Kenneth Dam entitled *The Law-Growth Nexus: The Rule of Law and Economic Development*.<sup>60</sup> Dam is a professor emeritus of law at the University of Chicago, a former Deputy Secretary of State, a former Deputy Secretary of the Treasury, and a Senior Fellow at the Brookings Institute. In *The Law-Growth Nexus*, he explicitly acknowledged the influence that new institutional economics, and North in particular, had on his book and policy recommendations.<sup>61</sup> Much in line with North and Weingast, he devoted a chapter to the legal and constitutional evolution that enabled the Glorious Revolution and the impact of that revolution on economic

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<sup>57</sup> By my own count, there are 133 references to the article on LexisNexis and 89 on Westlaw. The term "credible commitments" appears 891 times in LexisNexis and 558 times in Westlaw.

<sup>58</sup> See, e.g., Terry L. Anderson & Dominic P. Parker, *Sovereignty, Credible Commitments, and Economic Prosperity on American Indian Reservations*, 51 J.L. & ECON. 641, 641-42 (2008); Robert K. Fleck & F. Andrew Hanssen, *The Origins of Democracy: A Model with Application to Ancient Greece*, 49 J.L. & ECON. 115, 117-18 (2006); Neil Fligstein & Jennifer Choo, *Law and Corporate Governance*, 1 ANN. REV. L. & SOC. SCI. 61, 74-76 (2005).

<sup>59</sup> For the conference site, see Coffman & Murphy, *supra* note 18.

<sup>60</sup> See KENNETH W. DAM, *THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT* (2006).

<sup>61</sup> See *id.* at 2.

growth.<sup>62</sup> Interestingly, he also included a lengthy discussion on the legal origins literature and some reference to Greif's contribution.<sup>63</sup> A recent review of this book, coauthored by a law professor and a business school professor, and published in a leading economics journal, epitomizes the growing interdisciplinary discourse.<sup>64</sup>

## VI

### LEGAL SCHOLARS AND LAW AND FINANCE

In *The Economic Consequences of Legal Origins*, published in 2008 in the *Journal of Economic Literature*, La Porta, Lopez-de-Silanes, and Shleifer (without Vishny) consolidated their main findings, offered an overall interpretation of these findings, and addressed the objections raised over the previous decade to their legal origins thesis.<sup>65</sup> As this Essay does not aim to evaluate the validity of their thesis, I will not examine the substance of their response. Instead, I will use it to uncover which of the objections came from legal scholars and whether these scholars used a theory or a perspective that is peculiarly legal. LLS's references include quite a few legal scholars.<sup>66</sup> These are divisible into two groups. The first group of references is to the literature that predated their project. It includes exclusively comparative law scholars. This observation suggests that comparative law scholars did not respond to LLSV or at least did not respond in a manner that LLSV found relevant. I will get to them below. The second group includes scholars that responded to the LLSV project. It primarily includes corporate law scholars from the law and economics branch. Legal scholars can be found throughout the survey and are mixed with economists and finance scholars. This suggests that legal scholars launched criticisms of various types, indistinguishable from criticism coming from other disciplines.

Some argued that external nonlegal underlying factors, rather than legal origins, might explain LLSV's modern legal outcome. For example, Mark Roe claims that the destruction inflicted by World War II can explain continental political radicalization that in turn led to hostility to financial markets and weak legal protection for investors.<sup>67</sup> Daniel Klerman and his collaborators conclude that the different out-

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<sup>62</sup> See *id.* at 70–90.

<sup>63</sup> See *id.* at 26–55.

<sup>64</sup> See Mark J. Roe & Jordan I. Siegel, *Finance and Politics: A Review Essay Based on Kenneth Dam's Analysis of Legal Traditions in The Law-Growth Nexus*, 47 J. ECON. LIT. 781 (2009).

<sup>65</sup> Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285 (2008).

<sup>66</sup> See *id.* at 327–32.

<sup>67</sup> See Mark J. Roe, *Legal Origins, Politics, and Modern Stock Markets*, 120 HARV. L. REV. 460, 513–15 (2006).



comes can be explained by colonial origins at least as well as by legal origins. They assert that the apparent common law advantage LLSV uncovered may result either from the full colonial package implemented by British rulers in their colonies, including governance, infrastructure, and education, or from the fact that the British, as the most powerful colonial power, picked up territories that, due to their natural endowments, size, or position, ended up performing better economically.<sup>68</sup> Amir Licht and his collaborators conclude that differences in culture better explain the differences in law than legal origins.<sup>69</sup> In fact, all of these legal scholars say that the law does not matter at all.

Other legal scholars have argued that strong investor protection in common law countries is a recent phenomenon. For example, Brian Cheffins argues that Britain still had weak protection for investors in the early twentieth century after it experienced its prolonged and unprecedented economic growth.<sup>70</sup> Additionally, Daniel Klerman and Paul Mahoney examined the historical evidence and claim that common law courts were just as centralized as the French courts and that common law judges were not more independent until the eighteenth century.<sup>71</sup> Thus, the differences in the legal system that LLSV view as explaining the divergent economic outcomes were not present at the origins. This type of criticism is in fact more historical than legal. It challenges LLSV's argument by pointing to its static and ahistorical approach.

Several legal scholars offered criticism from a more legal perspective. Several legal scholars have argued that by their methodological need to code and quantify legal rules for comparative purposes, LLSV ended up focusing on the clear rules found in statutes and neglected or mistreated the complications, nuances, and contradictions of judge-made rules.<sup>72</sup>

Roe has argued, to the contrary, that corporate law and securities regulation in common law countries were mostly statutory rather than judge made.<sup>73</sup> Furthermore, Roe asserted that the jury, one of the unique features of common law, which for LLSV explained the diver-

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<sup>68</sup> Daniel Klerman et al., *Legal Origin and Economic Growth* 23–28 (Apr. 30, 2009) (unpublished manuscript) (on file with author).

<sup>69</sup> Amir N. Licht et al., *Culture, Law, and Corporate Governance*, 25 INT'L REV. L. & ECON. 229, 240 (2005); Amir N. Licht et al., *Culture Rules: The Foundations of the Rule of Law and Other Norms of Governance*, 35 J. COMP. ECON. 659, 668 (2007).

<sup>70</sup> Brian R. Cheffins, *Does Law Matter? The Separation of Ownership and Control in the United Kingdom*, 30 J. LEGAL STUD. 459, 483–84 (2001).

<sup>71</sup> Daniel Klerman & Paul Mahoney, *Legal Origin?*, 35 J. COMP. ECON. 278, 279–80 (2007).

<sup>72</sup> See *id.* at 290–91, 310.

<sup>73</sup> Mark J. Roe, *Juries and the Political Economy of Legal Origin*, 35 J. COMP. ECON. 294, 295–96 (2007).

gence, was irrelevant in most corporate law litigation.<sup>74</sup> Thus, corporate law was not part of the common law core of the legal system and not an outcome of its legal origins.

Another strand of criticism, suggested by Howell E. Jackson and Roe, as well as by John Coffee, holds that the level of enforcement of the rules, rather than the rules' content, can explain differences in economic outcomes. This enforcement is measured by budget and staffing levels, which presumably have nothing to do with legal origins.<sup>75</sup>

Beth Ahlering and Simon Deakin argue that LLSV's analysis of the effects of corporate law in isolation is misconceived.<sup>76</sup> They argue that in continental Europe, more liberal and contractual labor law developed earlier than in common law countries. This law was complementary to corporate law, and the combined effect of the law that governed capital and the law that governed labor was more similar than the apparent effect of corporate law when examined in isolation.

Similarly, Nuno Garoupa and his coauthor argue that LLSV's methodology "cherry-picked" a few corporate law doctrines for the econometric analysis without any good theoretical justification. Garoupa argues that contract law and property law are more fundamental to any legal system; the hypothesis that rules in these fields of law impact economic growth is equally conceivable.<sup>77</sup>

Katharina Pistor and her coauthors call attention to the legal transplant effect.<sup>78</sup> They find that the mode of transplantation better explains economic outcome than the legal origins of the current legal system. Internally developed law provides better economic outcomes than law received from other countries. A law that was voluntarily received by an independent state provides better outcomes than a law that was imposed by a colonial power. A law that was carried by immigrants that were already familiar with it provides a better outcome. Pistor argues that the transplantation process has better explanatory

<sup>74</sup> *Id.* at 299–301; Roe, *supra* note 67, at 479.

<sup>75</sup> John C. Coffee, *Law and the Market: The Impact of Enforcement* 36–37 (Ctr. for Law & Econ. Studies, Working Paper No. 304, 2007); Howell E. Jackson & Mark J. Roe, *Public and Private Enforcement of Securities Laws: Resource-Based Evidence* 8 (Harvard Univ. Law Sch. Pub. Law & Legal Theory Research Paper Series, Working Paper No. 0-28, 2009; John M. Olin Ctr. for Law and Bus., Working Paper No. 638, 2009).

<sup>76</sup> Beth Ahlering & Simon Deakin, *Labor Regulation, Corporate Governance, and Legal Origin: A Case of Institutional Complementarity?*, 41 *LAW & SOC'Y REV.* 865, 866–69 (2007).

<sup>77</sup> Nuno Garoupa & Carlos Gomez Liguerra, *The Syndrome of the Efficiency of the Common Law*, 29 *B.U. INT'L L.J.* (forthcoming Summer 2011) (manuscript at 22–23), available at <http://ssrn.com/abstract=1674170>.

<sup>78</sup> Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *Economic Development, Legality, and the Transplant Effect*, 47 *EUR. ECON. REV.* 165, 166–68 (2003); Katharina Pistor et al., *Evolution of Corporate Law and the Transplant Effect: Lessons from Six Countries*, 18 *WORLD BANK RES. OBSERVER* 89, 90–92 (2003).

power because it reflects the level on which the legal rules are understood, internalized, and implemented.

As mentioned above, LLS, in their 2008 article *The Economic Consequences of Legal Origins*, referenced the comparative law literature only as the basis upon which they built their own law and finance analysis. Significantly, they did not identify any criticism worth mentioning by comparative law scholars on that analysis. Indeed, for a decade, comparative law scholars totally ignored and rejected the law and finance literature.<sup>79</sup> Ironically, comparative law scholars ignored LLSV, even though LLSV had repeatedly and visibly called attention to comparative law, a subdiscipline in search of a methodology and an audience.<sup>80</sup> Recently, this disregard ended.

In 2009, the *American Journal of Comparative Law*, the most prominent comparative law journal in the United States, broke the silence with a theme issue featuring six articles on the intersections of comparative law and legal origins. In the article that opened the theme issue, Ralf Michaels noted that the silence has three negative consequences.<sup>81</sup> First, economists will continue to ignore comparative lawyers in the sense that from the comparative literature, they will selectively pick some basic stylized facts but will not engage in dialogue. Second, comparative lawyers will miss the opportunity to assess the progress of their field and the promises and shortcomings of an interdisciplinary focus. Third, silence means that comparative law as a field remains (or increasingly becomes) irrelevant for political projects because others better positioned to influence policymaking on the national and transnational levels discuss more and more of its themes.

The *University of Toronto Law Journal* also devoted an issue to a similar theme in 2009. Its title was "Focus: Economics and Comparative Law." The editor was Catherine Valcke, and four contributions followed her introduction.<sup>82</sup> This is another indication of the poten-

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<sup>79</sup> See, e.g., Mathias M. Siems, *Comparative Law: Who Is the Elephant in the Room?*, 12 EDINBURGH L. REV. 334, 335–36 (2008) (reviewing *COMPARATIVE LAW: A HANDBOOK* (Esin Örüçü & David Nelken eds., 2007)). In this short book review, Siems calls attention to the fact that *Comparative Law: A Handbook*, as well another handbook and an encyclopedia that were both published in 2007, ignored Rafael La Porta (a proxy for LLSV), the most frequently cited comparativist.

<sup>80</sup> See, e.g., Hiram E. Chodosh, *Comparing Comparisons: In Search of Methodology*, 84 IOWA L. REV. 1025 (1999); O. Kahn-Freund, *Comparative Law as an Academic Subject*, 82 LAW Q. REV. 40 (1966); Basil Markesinis, *Comparative Law—A Subject in Search of an Audience*, 53 MOD. L. REV. 1 (1990). But see Mathias Siems, *The End of Comparative Law*, 2 J. COMP. L. 133, 143–44 (2007).

<sup>81</sup> See Ralf Michaels, *Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law*, 57 AM. J. COMP. L. 765 (2009).

<sup>82</sup> Catherine Valcke, *Introduction to Focus: Economics and Comparative Law*, 59 U. TORONTO L.J. 179 (2009). The contributors to this special "Focus Feature" included John Reitz, Ralf Michaels, Pierre Legrand, and Gillian Hadfield.

tial relevance of the legal origins literature to legal scholars and for the late response to the challenge by comparative lawyers.

#### CONCLUSION

Economists might conclude, based on the three examples discussed in this Essay, that economists took the lead in the positive study of legal institutions, their development, and function and that other disciplines, the legal discipline included, only utilize and apply the innovations offered by economists. Legal scholars, on the other hand, might conclude that these three examples demonstrate that economists make contributions that are irrelevant to legal scholarship. They might find that the economists' contributions are based on unrealistic assumptions, simplistic data gathering, or historical research, and thus, are too superficial. They might find them too historical or too positive. They might find the theoretical basis and the policy implications as too promarket. They might find that the economists' contributions are inclined towards favoring Anglo-American solutions and the common law model, or they might simply find them too mathematical, formal, and incomprehensible.

These three examples might be unrepresentative. Indeed, the Coase Theorem provides a striking counterexample, but it is over fifty years old.<sup>83</sup> I could not think of a later example of such a massive resort of economists to legal issues or of legal scholars to economics. I am not in search of examples of contributions in economics, such as game theory or behavioral economics, that are not particularly related to law and that made their way into economic analysis of the law as an addition to its set of analytical tools. I believe that the three examples in this Essay represent a wider trend. I tend to view the examples as a demonstration of the development of sites of interdisciplinary and cross-disciplinary discourse.

The intensity and value of the discourse varies among the examples. The first two examples—Greif's *Reputation and Coalitions* and North and Weingast's *Constitution and Commitment*—demonstrate the development of sites within the social sciences in which sociologists, political scientists, and historians converse with economists. Legal scholars, though making courteous reference to these canonical articles, have so far missed most of the potential for engaging with these contributions and with the social scientists who debate and apply them. The third example—LLSV's *Legal Origins*—is particularly intriguing. Legal scholars are well represented in this debate in two ways. One way is through contributions that are not uniquely legal but are highly relevant and well received. This means that they take

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<sup>83</sup> See Coase, *supra* note 2.

part in the discourse on equal terms, even econometrically, with economists and finance and management scholars. Another way is through contributions with a uniquely legal voice. These contributions bring into the debate the details of the rules, the enforcement procedures, the interaction with other fields of law, the effects of legal institutions, the knowledge of legal history, and the dynamics of legal change. They do not bring a coherent body of legal theory but instead bring perspectives, knowledge, and sensitivities.

For the contribution of the legal discipline to these emerging interdisciplinary sites of debates to be both viable and meaningful, more legal scholars have to be aware of them, be willing to take an active part in them, and bring to these sites a willingness to engage with other disciplines on their own terms, addressing the concerns and interests of those disciplines. Legal scholars should resist the temptation for expecting *quid pro quo*. They should not condition their willingness to engage with the contributions of economists on the willingness of economists to resort to legal scholarship. Rather than viewing economists as imperialistic, they should celebrate the fact that economists and finance scholars finally realized that the law matters and recognized its significance by awarding the Nobel Prize to institutional economists that take the law seriously. At the same time, to maintain their relevance and their ability to contribute, legal scholars have to bring to these new interdisciplinary debates a unique legal voice, not necessarily a legal theory, but definitely legal perspectives, sensitivities, and knowledge. A major challenge for positive legal scholars in the near future will be to find ways of reconciling these seemingly contradictory challenges.

## APPENDIX

I extracted the data for Tables 1–3 from the Social Sciences Citation Index® (SSCI). SSCI is a multidisciplinary index to the journal literature of the social sciences. It fully indexes over 1,950 journals across 50 social sciences disciplines. It also indexes individually selected, relevant items from over 3,300 of the world's leading scientific and technical journals.

I produced the data in the tables using ISI WEB OF KNOWLEDGE. I clicked “all databases,” searched for the applicable article, clicked the article's name, clicked the option “view all citing articles,” and clicked the option “analyze results.” I also selected “analyze by subject area.” From this procedure, I obtained a list of the articles that cited the original article and sorted it by subject area. I then clicked the disciplines I wished to present in my tables (for example “economics”) and then selected “analyze the results for that discipline by publication year.” I performed these searches in May 2010.

The main categories I analyzed in this Essay are defined as follows at [http://science.thomsonreuters.com/mjl/scope/scope\\_ssci/](http://science.thomsonreuters.com/mjl/scope/scope_ssci/).

*Category Name:* Business

*Category Description:* This category covers resources concerned with all aspects of business and the business world. These may include marketing and advertising, forecasting, planning, administration, organizational studies, compensation, strategy, retailing, consumer research, and management. Also covered are resources relating to business history and business ethics.

*Category Name:* Business, Finance

*Category Description:* Business, Finance covers resources primarily concerned with financial and economic correlations, accounting, financial management, investment strategies, the international monetary system, insurance, taxation, and banking.

*Category Name:* Economics

*Category Description:* Economics covers resources on all aspects, both theoretical and applied, of the production, distribution, and consumption of goods and services. These include generalist as well as specialist resources, such as political economy, agricultural economics, macroeconomics, microeconomics, econometrics, trade, and planning.

*Category Name:* History

*Category Description:* The History category in Social Science covers resources that are primarily concerned with political, social, and eco-

conomic history. This category also includes history resources that focus on a particular group, country or geographic area.

*Category Name:* Law

*Category Description:* Law covers resources from both general and specialized areas of national and international law, including comparative law, criminology, business law, banking, corporate and tax law, constitutional law, civil rights, copyright and intellectual property law, environmental law, family law, medicine and the law as well as psychology and the law.

*Category Name:* Political Science

*Category Description:* Political Science covers resources concerned with political studies, military studies, the electoral and legislative processes, political theory, history of political science, comparative studies of political systems, and the interaction of politics and other areas of science and social science.

*Category Name:* Social Sciences, Interdisciplinary

*Category Description:* Social Sciences, Interdisciplinary includes resources with an interdisciplinary approach to the field such as studies on social sciences and computers, time and society, evaluation practice, black studies, information science and society, homosexuality studies, childhood studies, and death studies.

*Category Name:* Sociology

*Category Description:* Sociology covers resources that focus on the study of human society, social structures, and social change as well as human behavior as it is shaped by social forces. Areas covered in this category include community studies, socio-ethnic problems, rural sociology, sociobiology, social deviance, gender studies, the sociology of law, the sociology of religion, and comparative sociology.