Note

Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the “Rule of Law” and its Place in Development Theory and Practice

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In spite of the ubiquity of the phrase in contemporary development discourse and policy, there exists no generally, or even substantially, agreed-upon definition of the “rule of law” for the purposes of development. This Note investigates the intellectual and normative tensions created by the conceptual conflict surrounding the rule of law in development theory and practice. Drawing on both moral and economic understandings of human development, I attempt strenuously to identify the obstacles to consensus on the meaning of the rule of law. I conclude that the rule of law must be construed as a means of development rather than one of its fully-fledged ends. I also advocate greater attention to the dynamic character of institutions in the developing world, and theoretical moderation in specifying the normative goals of rule of law.

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INTRODUCTION

In a widely cited essay for *Foreign Affairs*, development expert Thomas Carothers notes the ubiquity of “rule of law” rhetoric in development, foreign affairs, and human rights circles:

One cannot get through a foreign policy debate these days without someone proposing the rule of law as a solution to the world’s troubles. How can U.S. policy on China cut through the conundrum of balancing human rights against economic interests? Promoting the rule of law, some observers argue, advances both principles and profits. What will it take for Russia to move beyond Wild West capitalism to more orderly market economics? Developing the rule of law, many insist, is the key. How can Mexico negotiate its treacherous economic, political, and social transitions? Inside and outside Mexico, many answer: establish once and for all the rule of law. Indeed, whether it’s Bosnia, Rwanda, Haiti, or elsewhere, the cure is the rule of law, of course.\(^1\)

Backing up some of the rhetoric is a considerable sum of money from donor countries—most notably the United States—in the form of grants and loans earmarked for rule of law related projects in the developing world. A quick survey of the work of the largest principals gives a striking impression of the magnitude of wealth pouring into such endeavors.

While the United States Agency for International Development (“USAID”) projected spending just $2.6 million on explicitly identified rule of law initiatives for the fiscal year 2006,\(^2\) this relatively small figure does not include the sizeable sums spent on rule of law reform and development under other rubrics. In an October 2005 report, for instance, the U.S. State Department Embassy in Baghdad estimated that the USAID’s “Transition Initiative” in Iraq would spend $277 million in that fiscal year on some 3,750 different rule of law projects,\(^3\) ranging from the construction of prisons to judicial education to the development of educational curricula aimed at fostering a “culture of lawfulness.”\(^4\) In 2002, one USAID official estimated that his agency spent over $135 million per year “promoting democracy and the rule of law in Latin America,”\(^5\) on initiatives ranging from efforts to “advance communication and build additional legal infrastructure to address key issues in the context of the [Free Trade Area of the Americas],”\(^6\) to anti-corruption programs, the implementation of a

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4. Id. at 56.
5. Steven E. Hendrix, *Current Legal Trends in the Americas: USAID Promoting Democracy and
Criminal Procedure Code in Bolivia, and legal education in Colombia.

It is difficult to attach a precise figure to the United Nations’ (“UN”) net spending on rule of law reform and development initiatives. The UN agency responsible for such programs is the United Nations Development Programme (“UNDP”), whose local country offices make individual decisions about particular programs under rubrics such as democratic governance and social development. Some of these programs can be roughly described as rule of law related. Examples include a UNDP Argentina sponsored project entitled “institutional reinforcement of national politics for the promotion and defense of human rights,” and UNDP Sierra Leone’s civil society programme. Since local offices are given considerable discretion, the UNDP’s budget is not itemized to identify spending on particular classes of initiatives, including rule of law reform and development projects. The UNDP itself had an operating budget of $575.2 million for the biennium 2004-2005, of which roughly 88% went to fund programs. Richard Wilson also notes that private donors such as the Soros Foundation, the Ford Foundation, and the American Bar Association make a substantial contribution to rule of law reform initiatives, notably by funding clinical education programs in the developing world.

Other organizations such as the International Monetary Fund (“IMF”) and the World Bank, which do not directly subsidize rule of law reform, nevertheless actively encourage it, both by conditioning their assistance on certain institutional reforms by recipient countries, and by researching and advocating best practices. Even development organizations such as

the Rule of Law in Latin America and the Caribbean, 9 SW. J. L. & TRADE AM. 277, 279, 281 (2002).
6. Id. at 281.
7. Id. at 284.
8. Id. at 286.
these, which tend to prefer a fairly narrow definition of development as economic growth, have reason to fund some legal reforms on the view that, as Brian Tamanaha puts it, “law is essential to economic development because it provides the elements necessary to the functioning of a market system.”  

I. CONCEPTUAL CONFLICT: MEASURING AND DEFINING THE “RULE OF LAW”

The effectiveness of the sorts of initiatives discussed above, however, has proven extremely difficult to assess. Kevin Davis asserts that, while there has been an “abundance of optimism” about rule of law reform initiatives, the limited available data is largely equivocal. Part of the problem is undoubtedly methodological: like many social scientific phenomena, rule of law entrenchment and reform are measurable in a number of quite different dimensions, none of which has elicited universal

bankruptcy law in Indonesia after that country’s economic crisis; discussing “the tremendous pressure on developing and transitional economies to establish a legal infrastructure that will please investors, trading partners and financial institutions.”). For comments representative of the IMF’s position on development and the rule of law generally, see generally Michael Camdessus, Remarks by Michel Camdessus, Managing Director of the IMF, at the Warsaw School of Economics (Dec. 13, 1999) in M2 PRESSWIRE, Dec. 13, 1999, available in LEXIS, News Group File.

15. Brian Z. Tamanaha, The Lessons of Law-and-Development Studies, 89 AM. J. INT’L L. 470, 473 (1995) (reviewing 2 LAW AND DEVELOPMENT (Anthony Carty, ed., 1992). Evidence of a positive relationship between democracy and economic growth is, however, somewhat equivocal. See, e.g., John F. Helliwell, Empirical Linkages Between Democracy and Economic Growth, 24 BRT. J. POL. SCI. 225, 246 (1994) (finding “a robust positive relation between the level of per capita income and the level of democracy,” but concluding that “the evidence . . . pours cold water on the notion that introducing democracy is likely to accelerate subsequent growth.”); Adam Przeworski & Fernando Limongi, Political Regimes and Economic Growth, 7 J. ECON. PERSP. 51, 65 (1993) (“[T]here are lots of bits and pieces of evidence to the effect that politics in general does affect growth . . . [but] it does not seem to be democracy or authoritarianism per se that makes the difference but something else.”). But see, e.g., Kenneth W. Dam, China as a Test Case: Is the Rule of Law Essential for Economic Growth?, 43-44 (unpublished working paper, on file with author) (“The fact that Chinese leaders and thinkers have expressed an interest in [institutionalist development economist] Douglass North and his work suggests that they know that their institutions are not sufficiently strong for indefinite sustained growth . . . [W]e can still say with considerable confidence that there is little thus far in the Chinese experience to lead to the conclusion that Rule of Law issues are not important in economic development.”); Jing Leng & Michael Trebilcock, The Role of Formal Contract Law and Enforcement in Economic Development, 92 VA. L. REV. 1517, 1519 (2006) (hypothesizing that “at low levels of economic development, informal contract enforcement mechanisms may be reasonably good substitutes for formal contract enforcement mechanisms. At higher levels of development, however, informal contract enforcement may become an increasingly imperfect substitute due to the presence of large, long-lived, highly asset-specific investments, as well as the prevalence of increasingly complex trade in goods and services that often occurs outside of repeated exchange relationships.”).


17. Id. at 143, 148-60.

18. Id. at 145-60.
approval by experts. For instance, the International Country Risk Guide ("ICRG"), the most commonly used index of rule of law entrenchment, is susceptible to criticism for its choice of dependent variables, its weighting of hard-to-code factors such as a country’s “legal heritage,” and its inclusion of non-legal indicators.19

A more intractable problem, however, and the one on which this paper shall focus, is the conceptual anarchy among development theorists, experts, and donor agencies surrounding the very meaning of the expression “rule of law.” Indeed, one fundamental problem with measuring the success of rule of law reform initiatives is that the parties assessing them may have something quite different in mind to those implementing them.

To be sure, conceptual neatness is more of an academic obsession than an achievable standard. Some material disagreement about the precise meaning of fraught terms like “rule of law” is inevitable and, indeed, desirable, as critique and debate open up space for innovation and improvement. However, I consider that deep disagreement about the normative and political implications of the rule of law may become a serious obstacle to development if the parties funding rule of law reform part ways fundamentally with the people designing, operationalizing, and (most importantly) living under such programs. I speculate that there are at least three broad categories of advantages to greater consensus on the meaning of the rule of law.

A. “Benchmarks” and Shared Expertise

All rule of law reform initiatives, if they are to be effective, must establish clear institutional benchmarks: indicators of success applicable to particular legal institutions, such as the judiciary, law enforcement, the legal education system, the prosecutorial system, the penal system, etc. “Benchmark” is simply a term of art that captures the idea that there must be some standard, even if tentative, by which success, failure, and progress are to be measured, and through which accountability can be exercised effectively. Yet conceptual anarchy about the meaning of the rule of law is likely to produce competing and conflicting benchmarks in different states and systems.

This conflict has at least two important consequences. First, conflicting standards may deprive rule of law development programs in different countries of the benefit of a shared experience. Tamanaha argues forcefully that “[l]aw-and-development theorists should be striving to devise ways in which the rule-of-law model can be adapted to local circumstances and nurtured into maturity.”20 Yet if reform programs in different states employ incommensurable benchmarks, it becomes far more difficult to “transplant” successful initiatives from one to another, or, more generally,

19. Id. at 160.
20. Tamanaha, supra note 15, at 476.
to apply lessons learned in one circumstance to another.\textsuperscript{21} As a result, much valuable expertise and experience may be wasted.

Contrast, for example, a judicial reform initiative that aims at fostering judicial accountability in country A, with an initiative that aims at improving judicial independence in country B. Without some broad basis for consensus on the relationship of judicial accountability and independence, it will be difficult for country A and country B to learn systematically from their counterpart’s successes and failures, even though the obstacles and circumstances faced by both countries may be quite comparable.

Second, it may produce flawed or inappropriate initiatives, if conflicting benchmarks produce confusion about the source of a particular initiative’s success or failure. A good example is the reform of local court systems in Africa to ensure improved access and efficiency, a major focus of internationally-funded rule of law programs. In African countries experiencing post-conflict transitions, efficient access to justice is not just desirable; it is essential for the longevity of peace and democracy. As Jennifer Widner claims, “observers too often tend to assume that courts can easily promote peace and democratic change in post-conflict regimes, without looking closely at the grounds for such optimism.”\textsuperscript{22} The commitment to a conception of the rule of law in terms, roughly, of the number of courts \textit{per capita} overlooks the importance of the interaction of state (i.e., “official”) courts with informal fora of dispute resolution, which are long-lived and vital parts of community life. Thus, “local” and “foreign” understandings of the rule of law will give rise to different descriptions and prescriptions for the problems facing judicial reformers in Africa.

African courts may best hope to achieve efficiency, so crucial to obtaining the long-lived trust of the communities they serve, by working in a flexible partnership with parochial courts, rather than in direct competition with them. Indeed, such effective collaboration may actually reduce the time and resource costs of state courts. For instance, in Botswana, the best African performer on indices of judicial efficiency and independence for the past forty years, most “land disputes, differences of opinion about the identity of rightful heirs, stock-theft cases, and petty criminal matters [are] effectively and quickly resolved in neighborhood forums, which are more accessible and less expensive than state courts and whose personnel are better acquainted with local conditions.”\textsuperscript{23} This

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\item \textsuperscript{21} For a critical discussion of legal “transplantation,” see, for example, Jeremy J. Kingsley, \textit{Legal Transplantation: Is This What the Doctor Ordered and are the Blood Types Compatible? The Application of Interdisciplinary Research to Law Reform in the Developing World – A Case Study of Corporate Governance in Indonesia}, 21 ARIZ. J. INT’L & COMP. L. 493, 520-21 (2004) (critiquing the “ethnocentric focus” of many legal transplantation initiatives; advocating “combining the application of traditional legal reasoning and textual study with interdisciplinary research.”).
\item \textsuperscript{22} Jennifer Widner, \textit{Courts and Democracy in Postconflict Transitions: A Social Scientist’s Perspective on the African Case}, 95 AM. J. INT’L L. 64, 64 (2001).
\item \textsuperscript{23} Id. at 65.
\end{itemize}
understanding, however, is conditioned on the general awareness that some compromise on the meaning of the rule of law is necessary to arrive at better solutions. This paper is strongly motivated by precisely that insight.

B. “Palace Wars in the North”: The Past and Future of Law Reform Initiatives

As Bryant Garth notes in his historical survey of law and development theory and practice over the last three decades, a lack of consensus between legal experts and development theorists, practitioners, and agencies on the functional meaning of the rule of law contributed significantly to the failure of the first wave of the law and development movement in the mid-1970s. While Garth observes that, today, “the consensus is far stronger in favor of [legal] reform” and “[l]awyers do not have to fight for their role this time,” it is important to derive some key lessons from the failures of the first wave.

Garth notes that “palace wars in the North,” i.e., acrimonious debates in more developed countries about the nature, meaning, and purpose of the rule of law in relation to development, particularly among development agencies and funding bodies, significantly hampered the first wave of law and development. Conflict between legal reformers and the Nixon and Reagan administrations about the relative advantages of investment in corporate law versus public interest law both at home and abroad reflected “a struggle within the United States, in particular, within the then-liberal establishment, about what role law should play in the state and state reform.” These palace wars led to uneven and poorly sustained efforts to invest in the rule of law.

Garth cautions that:

The struggles for power in the north [i.e., in more developed countries] will lead to more or less investment in law according to factors that have very little to do with what actually happens with that investment. . . . [T]he process is a hegemonic one that focuses the business of exporting and importing on debates and issues that have salience in the north . . . at a particular time and place. We export our own palace wars.

While it is obviously naïve to hope for a nationwide, let alone transnational, consensus on political values, the history of the law and development movement suggests that greater convergence on a definition

25. Id.
26. Id. at 394.
27. Id. at 395-96.
of the rule of law may reduce the effect of counterproductive “palace wars” and help to encourage sustained investment and interest in rule of law initiatives in the developing world. This is perhaps the single greatest advantage of eliminating some of the conceptual anarchy surrounding the meaning of the rule of law.

C. Rule of Law, “Imperialism,” and Local Legitimacy

Perhaps most importantly of all, the citizens of nations experiencing foreign-funded rule of law reforms may become resistant and perhaps even hostile to development initiatives if they feel that the rule of law is being used to smuggle in foreign moral, political, and cultural values under the guise of neutrality. In her scathing critique of rule of law initiatives in post-conflict states, for example, Rosa Ehrenreich Brooks goes so far as to argue that “[i]n an increasing number of places, promoting the rule of law has become a fundamentally imperialist enterprise, in which foreign administrators backed by large armies govern societies that have been pronounced unready to take on the task of governing themselves.”

With less pique, though to much the same point, Katharina Pistor insists that:

[F]or law to be effective and actually change behavior, it must be fully understood and embraced not only by law enforcers, but also by those using the law, i.e., its “customers”. . . . The perfect construction of law by legal experts for wide dissemination can deprive lawmakers and law enforcers in the receiving countries of the knowledge of living law, which is context specific.

It is important, therefore, to be much more attentive to critical viewpoints, including the objections of some early law and development theorists such as Trubek and Galanter against the straightforward imposition of a “legal liberal” model of reform on developing countries.

As Tamanaha recounts:


30. See generally Joel M. Ngugi, Policing Neo-Liberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse, 26 U. PA. J. INT’L ECON. L. 513, 516 (2005) (“The rule of law . . . serves the purpose of insulating a particular vision of moral foundation or philosophy of the good of the society from the reach of political debate, consensus, or revision by the participants in a given polity.”); David M. Trubek & Marc Galanter, Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States, 1974 Wis. L. REV. 1062, 1080-1102 (1974) (addressing the crisis in law and development studies occasioned by the failure of various rule of law development projects; critiquing, inter alia, the ethnocentrism of some law and development scholarship; advocating a rigorous and pragmatic reexamination of many of the law and development studies movement’s central ideological assumptions.).
In the late 1970s, Trubek and Galanter identified two ways in which the [legal liberal] model was ethnocentric. First, it sharply contrasted with the reality in developing countries. Instead of political pluralism, they had social stratification, sharp class differences and authoritarian governments. The state was weak in comparison to clan or village. The vast majority of the population had not internalized the legal rules. Often the rules were promulgated in the interests of the economic elite. And the courts were typically weak or irrelevant. Second, Trubek and Galanter argued that it was potentially harmful to export an instrumental view of law. When the state is captured by authoritarian groups, law seen in primarily instrumental terms cannot serve as a restraint. Lacking its own internal values or goals, law will become an instrument of those who control and set the goals of the state.31

Critical attention to the meaning of the rule of law has palpable consequences for its local legitimacy. It should not be assumed that a liberal, ostensibly neutral definition is necessarily uncontroversial. Theoretical attention and sensitivity to the meaning of the rule of law is unlikely to prevent the impression (in some cases, perhaps quite justifiable) that law reform initiatives are imperialistic. Moreover, conceptual neatness does not in any way guarantee a program’s success. However, the above discussion supports the modest hypothesis that greater conceptual clarity may help to at least minimize some unproductive conflict and tension.

As a first, tentative, effort toward such clarity, this paper will begin with a very brief survey of the myriad definitions of the rule of law in contemporary development theory and practice. In an effort to clarify the core meaning of the concept, I then present a broad, synoptic intellectual history of the rule of law. I focus on the central debate in this history: the comparative merits of formal (“thin”) as opposed to substantive (“thick”) conceptions of the rule of law. After a critical discussion of both schools of thought, I conclude by outlining, in very broad terms, some prescriptions for defining the rule of law in a way that allows for consensus among development theorists and practitioners.

Sensitive to the complex relationships between the rule of law, human rights, and development, I will explore how my prescriptions cohere with and support the broad objectives of development, understood both in terms of Amartya Sen’s “capability” approach, and in terms of the New Institutional Economics model of development as economic growth. My prescriptions amount to the following:

An emphasis on the procedural dimension of the rule of law as a means to other development goals rather than as an end in itself;

31. Tamanaha, supra note 15, at 474-75.
An institutional focus, informed by an awareness that institutional
design matters for the success and longevity of development
projects; and

A commitment to theoretical moderation, with the view that a more
modest (but not minimalist) definition of the rule of law has
greater prospects for widespread acceptance and veneration in the
developing world, as well as among international actors and norm
entrepreneurs.

While a better definition is not a tonic for all the problems facing rule
of law initiatives, it is hopefully a way to forestall further
counterproductive “palace wars” among development theorists, donors,
and practitioners from the global “north,” and to help to secure some of the
other valuable advantages discussed above.

II. DEFINITIONAL DIVERSITY:
THE RULE OF LAW IN DEVELOPMENT THEORY AND PRACTICE

As Adam Bouloukos and Scott Dakin note, there is a curious paradox
when international discourse about the rule of law is compared with that
surrounding the notion of universal human rights:

Despite the widely acknowledged . . . principle [of the universality
of human rights] and the existence of a Universal Declaration,
human rights continue to be viewed with suspicion in the
developing world. . . . On the other hand, no such divisive debate has
emerged regarding the international promotion of the rule of law. While
the term “human rights” frequently elicits a negative reaction from
the Chinese government, it is unthinkable that the Chinese would
be so quick to argue that the rule of law is “out of the question” at
this stage in their country’s development.32

In spite of this vague spirit of assent to the rule of law as an abstract
goal of development, however, there exists no consensus on what it
actually means, whether for the purposes of development, or for normative
theory more generally.33 This lack of a consensus perhaps explains the
abundance of candidate definitions in the law and development literature
and in the less specialized political science and philosophy literatures as
well. William Whitford, for instance, notes in his survey of the literature
that the manifold definitions of the rule of law in international normative
theory can mean things as divergent as “accountability of government

32. Adam Bouloukos & Brett Dakin, Toward a Universal Declaration of the Rule of Law:
Implications for Criminal Justice and Sustainable Development, 42 INT’L J. COMP. SOC. 143, 157-58
33. Id. at 146.
decisions,”34 “discretion-free judicial decisionmaking,”35 and “human and property rights.”36

This uncertainty has, in some cases, facilitated the cynical “capture” of rule of law rhetoric by authoritarian and corrupt governments.37 Absent a stronger core definition of the rule of law, the case can be made for any number of meanings, including some which may lend theoretical legitimacy to authoritarian, repressive governments.38 As Hans Thoolen points out, for instance, Suharto’s New Order government of the late 1960s in Indonesia could boast that it “ruled by law,” albeit law made by and for the ruling elite, and brutally enforced.39 Similarly, Joan Mars shows how law enforcement officials in postcolonial Guyana adhered strictly to many of the formal aspects of the English common law tradition even as they engaged in the widespread oppressive use of force.40 Thus, the Guyanese police forces could brag of a symbolic commitment to the “rule of law,” a commitment that helped to disguise and legitimate their brutality, and only constrained rather than advanced the development of political and social freedoms.

For some, such incidents are cause for deep skepticism about the veneration accorded the rule of law by many development experts.41 To others, myself included, such examples suggest that the importance of a well-developed and widely acceptable normative framework for the rule of law is more than just academic: It has tangible consequences for human development and human rights as well.

35. Id. at 727.
36. Id. at 732.
38. This brings to mind a more sinister variation on the oft-quoted discussion between Alice and Humpty Dumpty, which distills Carroll’s own wry view of the relationship between authority and language: “‘When I use a word,’ Humpty Dumpty said, in a rather scornful tone, ‘it means just what I choose it to mean, neither more nor less.’ ‘The question is,’ said Alice, ‘whether you can make words mean so many different things.’ ‘The question is,’ said Humpty Dumpty, ‘which is to be master – that’s all.’” LEWIS CARROLL, THROUGH THE LOOKING-GLASS 190 (Roger L. Green ed., Oxford Univ. Press 1971) (1872) (emphasis added).
41. Brooks, for instance, opines that:

[Rule-of-law promotion efforts are based on a false premise: that formal law produces order and reduces violence and suffering, and that law is therefore the cure for violence and disorder. I have argued that there is in fact little correlation between law, order, and violence, and that law is merely one mechanism that many modern cultures use to establish the moral meaning of different kinds of violence and suffering . . . [I]t is naïve to imagine that changes to formal legal structures will have any necessary impact on the degree and distribution of violence and suffering in a given society.

Brooks, supra note 28, at 2322.
III. AN INTELLECTUAL HISTORY OF THE RULE OF LAW

The “rule of law” conjures up a variety of images, often ones of particular modern societies with efficient, accessible courts, and equitable laws. Given this paper’s goal of greater conceptual clarity, however, it is important to at least try to separate the idea of the rule of law from its instantiations, if only to see if there is anything at all to the idea itself that is coherent and worthwhile. While there are a number of ways to analyze any concept, I favor an intellectual historical analysis of the rule of law as a subject of political and social theory, if only because these are the disciplines in which the very term “rule of law” first arose. 42

As Joseph Raz suggests, the idiom of the “rule of law” is often understood in simple, authoritarian terms: “That people should obey the law and be ruled by it.” 43 As he goes on to point out, “in political and legal theory it has come to be read in a narrower sense, that the government shall be ruled by the law and subject to it . . . . Actions not authorized by law cannot be the actions of the government as a government.” 44

Yet this specification does not add much content or clarity to the definition of the rule of law. Rather, it invites yet more difficult questions. What counts as “law”? What is legitimate “authorization”? What is “government”? In one view, it might seem that the “rule of law” literature actually consists of more or less successful attempts to answer these three questions, which are among the most fundamental and enduring questions of political philosophy. Indeed, it is interesting to note that the political philosophers of the French and English Enlightenments did not treat the rule of law and the nature of government as differentiable topics.

One of the first—and most widely influential—thinkers to distinguish forcefully between law and politics was Jean-Jacques Rousseau, who assumed, as basic to a good political system, the abolition of the monarchy and its replacement with a populist parliamentary system of government. Essential to this system was a set of overriding conventions for the translation of legislative pronouncements into executive action: laws binding on parliamentary government, or what we might latterly call a constitution. Rousseau asserted that only a state predicated on the supremacy of statutory law could assure justice and liberty in the context of delegated authority.

Henceforth, populist democracy became closely associated with the stipulation that law have a certain irrevocable authority (“rule”) over government, an association seized upon by Payne, Hamilton, and Madison.

42. I note here some works which have been influential in my own thinking about the task of conceptual analysis and which may be of interest to the reader: MICHAEL FREEDEN, IDEOLOGIES AND POLITICAL THEORY: A CONCEPTUAL APPROACH (1996); MEANING AND CONTEXT: QUENTIN SKINNER AND HIS CRITICS (James Tully, ed., 1989); QUENTIN SKINNER, 1 VISIONS OF POLITICS (2002); CHARLES TAYLOR, INTERPRETATION AND THE SCIENCES OF MAN, in PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS (1985); Quentin Skinner, Meaning and Understanding in the History of Ideas, in 8 HIST. & THEORY 3 (1969).


44. Id.
and enshrined in the constitutions of post-revolutionary America and France. As Richard Posner points out, the sense of the rule of law important to “the struggle of the English and later the Americans against royal tyranny, is that the officials in a society, the ‘rulers,’ are subject to law, rather than having unfettered discretionary power.”

Rousseau’s widely resonant endorsement of the legal state did much to popularize the idea of government limited by laws. However, the phrase “rule of law” itself is a contribution of Victorian jurist Andrew Venn Dicey, whose seminal *Introduction to the Study of the Law of the Constitution* describes the rule of law as a “feature” of the political institutions of England, one apprehensible in two different ways: “[T]hat no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before ordinary courts of the land;” and “that . . . every man, whatever his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.”

Dicey employed the “rule of law” as a description of England’s distinctive political culture, and did not speculate at much length on its normative implications. Yet the normative import of his theory—that England owes the success of its robust democracy to a set of laws of fair application—would certainly not be overlooked by others.

A. Thick Conceptions of the Rule of Law: A Critical Discussion

Liberals, inspired by the egalitarian and anti-authoritarian properties of the rule of law as articulated by Rousseau, Dicey, and others, have been among the most enthusiastic exponents and innovators of the rule of law concept. The association of the rule of law with democracy and liberty has been given radical interpretations by some. The concept has expanded far beyond Dicey’s use of it to describe England’s distinctive political arrangement. Its present day meaning, as Carothers’ introductory statement shows, is almost entirely aspirational.

Friedrich Hayek, who has done the most to add to the fame of the expression “rule of law,” favors what can be called a “thick” conception of the rule of law: “Thick” because, as Michael Neumann explains, Hayek’s view of the rule of law necessarily comprises certain universal moral principles, inherently liberal in character. He waxes rhapsodic on the moral virtues of the rule of law in relation to freedom, stating (with little in the way of further argumentation) that “[w]ithin the known rules of the game the individual is free to pursue his personal ends and desires, certain

47. *Id.* at 189.
48. *See supra* note 1 and accompanying text.
that the powers of government will not be used deliberately to frustrate his efforts.”

Indeed, his *The Constitution of Liberty* associates the rule of law not only with America’s greatness as one of the first constitutional democracies, but with freedom itself:

> [W]hen we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man’s will and are therefore free. . . . Because the rule is laid down in ignorance of the particular case and no man’s will decides the coercion used to enforce it, the law is not arbitrary.

Even equality, he considers, owes tribute to the rule of law:

> The true contrast to a reign of status is the reign of general and equal laws, of the rules which are the same for all, or, we might say, of the rule of *leges* in the original meaning of the Latin word for laws—*leges*, that is, as opposed to the *privi-leges*.

Of more recent vintage, Cass Sunstein’s conception of the rule of law may also be described as thick. Sunstein concentrates on the inextricability of the rule of a particular kind of constitutional law from his appealing account of deliberative democracy. In Sunstein’s view, not only is the rule of law an inseparable part of the internal morality of deliberative democracy, but this internal morality actually spells out much of the necessary content of the law properly so called:

> Constitutional protection of many individual rights, including the right of free expression, the right to vote, the right to political equality, and even the right to private property, for people cannot be independent citizens if their holdings are subject to unlimited government readjustment.

Many contemporary theorists, however, are highly critical of what Raz calls “the promiscuous use made in recent years of the expression ‘the rule of law’” to mean, as Hayek, Sunstein and others clearly do, a comprehensive political morality. Judith Shklar, for instance, decries the scourge of legalism, by which she means “the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules.” Shklar denounces those in the legal profession in general and conventional legal theorists in

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50. FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 73 (1944).
52. Id. at 154.
54. RAZ, supra note 43, at 211.
55. JUDITH SHKLAR, LEGALISM 1 (1964).
particular who loft up legalism as “the only morality among men,” and
decries its transformation by those groups into what she disdainfully calls
a “grand or total ideolog[y].” While the rule of law is “certainly
compatible with a robust individual rights theory,” it is misguided, she
thinks, to view the law as the source of these values, or as their only
possible guarantor.

Raz, too, is eager to pour some cold water on the more extravagant
claims about the rule of law and its virtue:

The rule of law is a political ideal which a legal system may lack or
may possess to a greater or lesser degree. That much is common
ground. It is also to be insisted that the rule of law is just one of the
virtues which a legal system may possess and by which it is to be
judged. It is not to be confused with democracy, justice, equality
(before the law or otherwise), human rights of any kind or respect
for persons or for the dignity of man. A non-democratic legal
system, based on the denial of human rights, on extensive poverty,
on racial segregation, sexual inequalities, and religious persecution
may, in principle, conform to the requirements of the rule of law
better than any of the legal systems of the more enlightened
Western democracies. This does not mean that it will be better than
those Western democracies. It will be an immeasurably worse legal
system, but it will excel in one respect: in its conformity to the rule
of law.

At bottom, as Paul Craig notes, the most persuasive claim in Raz’s
critique is that “the adoption of a fully substantive conception of the rule of
law has the consequence of robbing the concept of any function which is
independent of the theory of justice which imbues such an account of
law.” In other words, in claiming that the rule of law consists in the rule
of just law, the theoretical burden of explaining what is worthwhile about
the rule of law is simply shifted from the clause “rule of law” to the
qualifier “just” that is, to whatever conception of justice is in play.

The United Nations’ approach to the rule of law is particularly
vulnerable to this line of criticism. Its “Framework for Strengthening of the
Rule of Law,” for instance, brackets all of the following developmental
achievements (and much more) under “rule of law:”

“A strong constitution, which, as the highest law of the land . . .
incorporates internationally recognized human rights and
freedoms, as enumerated in the International Bill of Human Rights

56. Id. at 2.
57. Id. at 4.
58. Id. at 5.
59. Raz, supra note 43, at 211.
60. Paul Craig, Formal and Substantive Conceptions of the Rule of Law: An Analytical
enumerates and limits emergency powers and permissible derogations of human rights and freedoms under states of emergency, “provides for non-discrimination on the basis of . . . national or social origin [or] property . . .

A strong electoral system . . .

laws for the protection of minorities, women, children and other vulnerable groups . . . [to] outlaw and address the effects of discrimination . . .

A strong civil society, including adequately trained, equipped, financed and organized non-governmental human rights organizations, women’s groups, labour unions, and community organizations.61

This highly aspirational “laundry list” approach to defining the rule of law identifies it with a flourishing welfare state such as we would recognize in few developed countries. It assumes moral and political commitments to multiculturalism, formal gender equality, and egalitarian social democracy. This approach to the rule of law would obviate any meaningful distinction between the rule of law and a comprehensive conception of the just society. Or, to crudely distill Raz’s and Shklar’s concerns as a rhetorical question: If the rule of law means everything, does it still mean anything?

Jeremy Waldron, another critic of the thick model, is skeptical of its proponents’ tendency to treat the courts as the best (and sometimes the only) forum for settling highly divisive questions of moral importance. Waldron warns that this reliance on judicial review is not without noxious consequences for democratic deliberation:

We allow majority voting by judges without regard to their comparative wisdom. What is the justification for denying the benefit of a similar decision procedure to the mass of others who may have thought as honestly and as high-mindedly about the issues as the judges have? . . . A concern for the fairness and integrity of the process [of democratic deliberation] is something that [the free, self-aware but other-respecting] citizen will exhibit along with everything else. He does not need a judge to do it for

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Those who advocate for thick conceptions of the rule of law do more than just invest the law with responsibility for social justice and distributive equality. They also vest lawyers and judges with great power over those same societal objectives. Waldron’s very credible concern is that excluding these matters from the legislature is profoundly undemocratic.

B. Thin Conceptions of the Rule of Law: A Critical Discussion

Against the thick conception of the rule of law problematized above, a number of theorists have embraced a formalistic definition of the rule of law. These advocates of a “thin” conception of the rule of law tend to limit their definition to a few spare, structural features common to virtually all legal systems. On John Rawls’ view, for instance, the rule of law stands merely for the principle that rational people need a predictable system to guide their behavior and organize their lives in a way that minimizes unproductive conflict with other agents.

If that system be predictable but brutal ("Yield to merging traffic or you will be tortured") or predictable but otherwise unfair ("All red-haired persons shall be consigned to a life of hard labor"), so be it. These matters are not germane, on Rawls’ view, to the question of whether or not such a system is a legal system properly so called. For Rawls and other advocates of a thin conception, the rule of law means, and only means, the rule of a system of rationally comprehensible rules bearing some instrumental relationship to the function of social coordination.

Raz’s thin defense of the rule of law puts it into direct contrast with the thick conceptions discussed earlier:

This is the basic intuition from which the doctrine of the rule of law derives: the law must be capable of guiding the behaviour of its subjects. It is evident that this conception of the law is a formal one. It says nothing about how the law is to be made: by tyrants, democratic majorities, or any other way. It says nothing about fundamental rights, about equality, or justice . . . Racial, religious, and all manner of discrimination are not only compatible but often institutionalized by general rules.63

Raz, like Rawls, attempts to distill a definition of the rule of law abstracted from any positive moral content and hence (since purely descriptive) normatively unobjectionable.

Though generally sympathetic towards Raz and Rawls’ penchant for minimalism, Neumann is skeptical of the claim that Raz and Rawls manage

63. RAZ, supra note 43, at 214-16.
to divest the concept of law of all but its most minimal moral content. As Neumann points out, “[w]hat all moralizing conceptions,” thick and thin, “have in common is that they all see the rule of law as stipulating what is ideal in some respect. Thinness is a matter of degree, not kind: thin conceptions specify a less ambitious ideal than thick ones.”

Indeed, on a skeptical view, both Rawls and Raz seem to end up “thickening” their definitions by smuggling in quasi-moral principles. As Neumann points out, for instance, there is really nothing about the social coordinative function of the law that requires it to be fair. That is, while both Rawls and Raz justify the minimum stipulation of an independent, non-bribable judiciary in relation to the minimalist virtue of predictability, “there is really no reason to suppose that fairness and independence add more predictability to the legal system than quite a wide range of unfair and dependent alternatives.”

In the realm of development policy, the thin approach to the rule of law is exemplified by the World Bank. Constrained by a charter that forbids, at least formally, political and legal interference, the Bank has, in Gordon Barron’s opinion, “a vested interest in promoting as formal and technocratic a version of the [rule of law] as possible.” Far from producing an effective focus, however, its tendency towards a highly restrictive conception of the rule of law has, Barron argues, hampered its efforts at reform:

“[T]he need to focus on purely economic legal institutions necessarily imposes on the Bank a very restricted view of the legal system and the [rule of law], and severely limits its ability to "build" the [rule of law].”

Like Raz and Rawls, development policymakers who embrace the thin conception of the rule of law are optimistic that a purely formal, procedural understanding of the rule of law in terms of social coordination stands the best chance of being fair and efficient. This is so because their conception does not prejudge what rights or social results a system of laws must produce. It is fair, then, in the sense that it does not accompany a partisan position on a particular conception of the good. What Neumann points out is that this sort of moral indifference is not the same as predictability. Stripping the law of its moral content does not guarantee efficiency or systematic fairness.

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64. NEUMANN, supra note 49, at 13-14.
65. Id. at 11.
67. Id. at 32.
IV. TOWARDS A THINNER CONCEPTION OF THE RULE OF LAW FOR
DEVELOPMENT THEORY AND PRACTICE

The foregoing discussions of thick and thin conceptions of the rule of law, though dense, manage to identify some problematic tendencies characteristic of such theories in general. Thick conceptions are apt to mistake the rule of law simpliciter with the rule of good law; to mistake the rule of law with respect for individual rights and freedoms; to invest laws and legal institutions with responsibility for the creation and maintenance of a just society; and to charge the courts with settling principled debates in which ordinary citizens might be thought of as having a crucial deliberative stake.

For their part, as we have just seen, thin conceptions are susceptible to two viable criticisms. The first, and most obvious, is that they are not so thin after all, hiding a thicker mantle of moral content under the cover of less controversial concepts such as “justice” and “fairness.” The more subtle but no less troubling criticism is that, in retreating to the boundary line of minimalism, and accepting only that which is logically (as opposed to morally) necessary to a functional definition of the rule of law, thin conception proponents may end up surrendering crucial territory—including much of what makes the rule of law an appealing ideal in the first place, such as equality before the law and the like treatment of like cases.

With no compelling normative basis to prefer either of these alternatives, it is tempting to conceptualize the rule of law in a way that minimizes or altogether avoids normative considerations. Yet, as I argue, development theory cannot ignore the normative implications of the rule of law—and would be worse for doing so. Human development is a normatively driven enterprise. Development theory therefore has every reason to think of the rule of law in normative terms.

The question, then, is how, given what seems like an irresoluble disagreement between exponents of the thick and thin approaches, can we begin to find a common normative understanding of the rule of law for development theory? I propose, as a starting point, the idea of a “thinner” conception of the rule of law, one that begins not with philosophical assumptions, but rather with an inquiry into what development theory and practice requires of the rule of law. This approach is thinner in two relevant senses: It lies between the thick and thin extremes outlined above; and it looks to as broad an understanding of human development as possible, aspiring to be ecumenical with respect to widely divergent understandings of development itself. The thinner understanding I propose below is not a fully worked out conception of the rule of law. Rather, it is, much more modestly, a theoretical perspective intended to facilitate greater consensus about the meaning of the rule of law.
A. On Alternatives to a Normative Approach to the Rule of Law

Before advancing an alternative normative understanding of the rule of law, it is worth asking whether normative approaches are worth pursuing at all. Rather than dwelling interminably on the philosophical dimensions of the rule of law, it may be more fruitful to focus on the institutional competitions and collaborations between courts and other legal actors. One plausible approach, suggested by the pathbreaking work of George Tsebelis, is to focus on the important role played by courts as political actors in the context of a larger game with other “veto players.”

As James Gibson and Gregory Caldeira note:

The paradox is that though courts have fewer formal powers than most other political institutions—possessing the power of neither the purse nor the sword—some courts seem to have an uncommon ability to get people to abide by disagreeable rulings. This is precisely the power of a veto player—an institution that can go against what is popular (especially in a democracy) and do so effectively, making its decisions stick.

At the extreme end of this spectrum of “veto player” conceptions lies Alec Stone Sweet’s “judicialization of politics” model, according to which courts in the twenty-first century are behaving ever more unambiguously as political actors.

Descriptive models like the one offered by Stone Sweet are provocative and valuable, particularly insofar as they can help to inform constructive research methodologies for the study of extant and emerging democracies. Yet these approaches do not require or even recommend abandoning all normative questions about the rule of law. Rather, I insist that a functional model of the rule of law must be normatively motivated, and not merely a description of institutional behavior across a number of case studies. In particular, this is because my objective in this paper is to help to establish a definition of the rule of law that coheres with the goals of development, a normatively driven project par excellence. A definition of the rule of law for development can scarcely be indifferent towards the values inherent in development.

While it is indeed possible to articulate a model of development which is uninterested in normative questions, I am not alone in considering such approaches severely deficient, if not downright dangerous. One of the major intellectual and, I think, moral victories of contemporary development theory is its willingness, perhaps best exemplified in the magnificent work of Amartya Sen, to see development as a deeply ethical

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enterprise—a project concerned (or which ought to be concerned) with human beings and the lives they lead. One could, of course, arrive at a development theory account of the rule of law that did not consider its normative dimensions, but this, I think, would be a step backwards and not forwards.

B. Towards a Thinner Conception of the Rule of Law

Instead, I favor what might be called a “thinner” normative conception of the rule of law, a nomenclature intended to demarcate my model from both alternative extremes of thick and thin. As suggested by my critical discussion thus far, a thinner model should see the rule of law as both a set of ideals and an institutional framework. My model will thus comprise elements of both what Robert Summers calls “formal” and “substantive” theories of the rule of law.\(^{71}\) It is formal to the extent that it is preoccupied with conceptual, institutional, and axiological components. That is, it is concerned first and foremost with both the conceptual soundness and institutional protection of “rules . . . interpretive and applicational methodologies, and . . . processes of judicial and other enforcement,”\(^{72}\) with the axiological purpose of providing such functions as social and economic coordination, “certainty and predictability of governmental action . . . private autonomy . . . [and] actual equality of legal treatment at the hands of the government. . . .”\(^{73}\)

The emphasis on optimal institutional arrangements reveals my formalistic sympathies. Yet it is also substantive to the extent that it incorporates “rules securing minimum social welfare . . . rules securing some variety of the market economy, rules protecting at least some basic human rights, and rules institutionalizing democratic governance.”\(^{74}\) Indeed, it is hard to imagine a conception of the rule of law for the purposes of development of democratic capitalism without some attention to those substantive issues at the heart of the development studies movement, for example, capability-building\(^{75}\) (according to Nobel laureate Amartya Sen) and human dignity and worth\(^{76}\) (according to another Nobel laureate, Aung San Suu Kyi). As I have already mentioned, an overly thick definition of the rule of law risks treating it as a complete blueprint for a just society. Conversely, however, an excessively thin definition of the rule of law ignores the fact that institutions, and their quality, matter for development.

\(^{72}\) Id. at 129.
\(^{73}\) Id. at 131.
\(^{74}\) Id. at 135.
\(^{75}\) For a foundational discussion of development as capability-building, see AMARTYA SEN, DEVELOPMENT AS FREEDOM 74-86 (2001).
It must also be observed that Summers’ rather strict taxonomy of “formal” and “substantive” theories of the rule of law is not normatively benign. He himself unambiguously favors a formal theory, with clear and persuasive reasons for his preference:

The more the theory of the rule of law is “de-substantivized” to embrace only those institutional forms that as such serve values associated with a formal rule of law, the more likely it is that the formal rule of law will receive its due. On such a politically neutral conception, far more people from all segments of the political spectrum can be enlisted to support the rule of law and to criticize departures from it. On the other hand, if the rule of law is taken in general discourse within the society to mean not just governance through rules (and facilitative institutional features) but also capitalism (or socialism), a Bill of Rights (or no Bill of Rights), general democracy (or limited democracy), etc., then the formal rule of law is not so likely to command the range of neutral support that it merits (and requires), for then the rule of law cannot be so readily seen to be a set of institutionalized forms and values worthy of the support of all officials and citizens, regardless of political allegiances.77

Though sensitive to his argument, I do not share Summers’ skepticism about the prospects of a somewhat substantive conception of the rule of law for broad popular support. Nor do I agree with Summers’ purely speculative counterfactual, viz., that in politically pluralistic contexts (e.g., those found in many developing nations), a completely formal, minimalist theory is any less likely to be polarizing and controversial. Brooks, for instance, considers that there is “little evidence” for the assumption that the establishment of the formal dimensions of the rule of law “will lead reliably and predictably to the emergence of a robust societal commitment to the more substantive aspects of the rule of law.”78 If nothing else, it seems plausible that interested parties are at least as likely to be aggrieved by what is left out by a formalistic approach as by what is brought in by a more substantive one.

As Herman Schwartz’s research on courts in post-communist Europe suggests, there is reason to think that the real “trade-off” for legal systems in developing countries is not between commitments to form and substance, but between their moral authority on the one hand, and, on the other, their effectiveness at instituting important and sometimes unpopular reforms both swiftly and decisively.79

This is a trade-off on which competing commitments to form and

77. Summers, supra note 71, at 136.
78. Brooks, supra note 28, at 2284
substance may have a bearing, but one in which they are by no means the only relevant factors. As Barry Weingast observes, “[t]o survive, the rule of law requires that limits on political officials be self-enforcing. . . . [S]elf-enforcement of limits depends on the complementary combinations of attitudes and reactions of citizens as well as institutional restrictions.”

Similarly, Brooks argues that, when it comes to promoting the rule of law in developing nations, recognition of these two basic features (particularly the latter) is the beginning of wisdom, as ignoring the challenge of popular legitimacy invites rule of law reform projects, and their institutions, to be seen as yet another pernicious form of imperialism.

V. PRESCRIPTIONS FOR A SHARED UNDERSTANDING OF THE RULE OF LAW

Having made the case for a robust and normatively driven common understanding of the rule of law for development theory and practice, I wish to draw development itself into the heart of the discussion. The question this Section proposes is straightforward: What does development tell us about how we need to define the rule of law? As the critical scholars of law and development surveyed earlier noted, too often the question has been asked in reverse. As the subsequent discussion hopes to show, however, there are many important insights to be derived from starting with development.

Rather than employing a single, grand, and overarching theory of development, I wish for the time being only to show how at least two divergent and, at times, conflicting conceptions of development (the New Institutionalist theory, exemplified by Douglass North; and the capabilities approach, advocated by Sen) can both provide the basis for some important prescriptions for future attempts to define the rule of law. The conclusion of my analysis is a set of prescriptions: key guidelines which any program needs to pay close attention to in order to establish a shared understanding of the rule of law. The next stage, of course, is to find the definition itself; what is attempted here is far more modest, but, I consider, no less fundamental.

A. The Perspective of Development as Capability-Building

The capability-building approach to development is championed by economist Amartya Sen who identifies the expansion of freedom as both “(1) the primary end and (2) the principal means of development.”

“Capability,” in turn, is a type of freedom, viz., “the freedom to achieve various lifestyles” which a person may value. A person’s capabilities may

82. SEN, supra note 75, at 36.
83. Id. at 75.
be understood as either her realized functions (what she is actually able to do) or the set of alternatives she has (her “real opportunities”). The capability view of freedom emphasizes that freedom consists in both pursuing what one has chosen, as well as in the simple fact of having a choice to do or not do a number of things, and from those choices, to construct one’s way of life. By taking a capability view, as Sen points out, “[i]t is possible to attach importance to having opportunities that are not taken up,” and hence to take a more holistic view of freedom.

One of the attractions of a capability perspective is its intrinsic pluralism. By emphasizing freedom as opposed to the adduction of specific qualities (wealth; education; health) as the goal of development, the capability perspective is able to circumvent disagreements about particular qualities and their contestable normative valuations and act as a neutral basis for collaboration. The principle is disarmingly simple: as long as it can be agreed upon that freedom matters to any conception of the good life, we might just be persuaded to collaborate in a program of development that takes the maximization of freedom as its principal end.

Moreover, the capability perspective’s pluralism extends to means as well as ends. Since there are many ways of expanding freedom, and since freedom must be, to a certain extent, understood contextually, no one set of limited instruments will be suitable to its maximization in all contexts. Rather than seeing low income as the sole dimension of poverty, for instance, the capability approach views poverty as “capability deprivation.” An “impoverished life” is one bereft of choice and the ability to make choices, not just financial resources. The capability approach treats low income as “instrumentally significant,” insofar as “lowness of income” is one—but not the only—influence on capability deprivation. By displacing wealth as the sole object of equalization, the capability approach pulls into focus a variety of other qualities relevant to freedom. It also grounds some cautious optimism about the possibility of improving the lives of people in places where there is no immediate solution to the reality of low income, while encouraging resourceful policy thinking outside of the constraining paradigm of income redistribution.

A further attraction of the capability perspective is its ability to “uncouple” resources from capabilities, and to recognize that one of the major constraints on people’s freedom is their inability to convert income and other tangible resources into capabilities. For example, as Sen illustrates, “an older, or more disabled, or more seriously ill person” may need more resources to access the same range of choices as a youthful counterpart in good health. Gender inequality and other systematic forms

84. Id.
85. Id. at 76.
86. Id. at 87.
87. Id.
88. Id.
89. Id.
90. Id. at 88.
91. Id.
of discrimination in public and private life are also putative impediments to effective conversion of resources into capabilities.\textsuperscript{92}

What does such a vision of freedom require of legal institutions? At a minimum, Sen suggests, the “general preeminence of basic political and liberal rights.”\textsuperscript{93} Political and liberal rights correlate to development as capability-building in three different ways, in terms of:

1) their \textit{direct} importance in human living associated with basic capabilities (including that of political and social participation);

2) their \textit{instrumental} role in enhancing the hearing that people get in expressing and supporting their claims to political attention . . . .

3) their \textit{constructive} role in the conceptualization of “needs” (including the understanding of “economic needs” in a social context).\textsuperscript{94}

The basic function of a legal system suggested by the capability approach is to secure those elementary civil and political rights conducive to basic capabilities, and even to their economic preconditions. The capabilities approach rejects the view of rights as, in Michael Ignatieff’s turn of phrase, “lapidary bourgeois luxur[ies]”\textsuperscript{95} secondary to economic development, and emphasizes instead the interconnectedness of rights and prosperity as different facets of freedom.

Ignatieff, in his own discussion of Sen, speaks approvingly of this understanding of the relationship between development as freedom and civil and political rights:

The Great Leap Forward in China, in which between twenty-three and thirty million people perished as a result of irrational government policies implacably pursued in the face of their obvious failure, would never have been allowed to take place in a country with the self-correcting mechanisms of a free press and political opposition. So much for the argument so often heard in Asia that a people’s “right to development,” to economic progress, should come before their right to free speech and democratic government. Such civil and political rights are both an essential motor of economic development in themselves and also a critical guarantee against coercive government schemes and projects.\textsuperscript{96}

It is important at this juncture to emphasize that Sen’s vision of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{92} Id. at 89.
\item \textsuperscript{93} Id. at 148.
\item \textsuperscript{94} Id.
\item \textsuperscript{95} Michael Ignatieff, \textit{Human Rights as Idolatry}, in \textit{HUMAN RIGHTS AS POLITICS AND IDOLATRY} 90 (Amy Gutmann ed., 2001).
\item \textsuperscript{96} Id. (citation omitted).
\end{itemize}
\end{footnotesize}
development presupposes no particular legal system. While preoccupied with the veneration of certain rights, nowhere does Sen argue, for instance, that these rights must take the form of a constitutionally enshrined bill under the purview of a supreme court, as is the case in many extant and emerging democracies. He does, however, accord civil and political rights a high degree of importance and priority over other principles of government. Though I am extrapolating here from Sen, who is mostly silent on this particular subject, it seems that a judicial and prosecutorial arrangement unconstrained by consideration for civil and political rights is a serious detriment to the project of capability building.

Thus, at a minimum, a conception of the rule of law compatible with the capability approach to development as advocated by Sen must accord intrinsic respect to at least the most basic “instrumental freedoms: (1) political freedoms” (“opportunities of political dialogue, dissent and critique as well as voting rights and participatory selection of legislators and executives”);97 “(2) economic facilities” (“the opportunities that individuals respectively enjoy to utilize economic resources for the purpose of consumption, or production, or exchange”98 in other words, some measure of market freedom); and “(3) transparency guarantees” (“the freedom to deal with one another under guarantees of disclosure and lucidity.”).99 The precise ways in which these instrumental freedoms cash out in particular circumstances will vary. However, it would seem that a rule of law framework which does not, in most of its institutional structures, accord these freedoms at least prima facie consideration, will not be compatible with the capability approach to development.

B. The Perspective of Development as Economic Institution Reform

Another school of scholars, the New Institutional Economists (NIE), construes development in economic terms. They argue that the hallmarks of developed modern economies, such as “formal contracts, bonding of participants, guarantees, brand names, elaborate monitoring systems, and effective enforcement mechanisms,”100 are in fact corollaries of “well-specified and well-enforced property rights”—rights that developing economies lack. The establishment and entrenchment of such a set of rights, argues Douglass North, are “only possible as the result, first, of the development of a third party to exchanges, namely government, which specifies property rights and enforces contracts; and second of the existence of norms of behavior to constrain the parties in interaction . . .

97. Sen, supra note 75, at 38.
98. Id. at 38-39.
99. Id. at 39.
101. Id.
102. Id.
The expansion of government, however, can mean “unequal distribution of coercive power,”\textsuperscript{103} as individuals of superior power tend to gain the ability to “enforce the rules to their advantage, regardless of their effects on efficiency,”\textsuperscript{104} thus reducing the extent to which everyone benefits from economic growth and the complex interdependence facilitated by a structure of property rights in the first place. Poorly designed and monitored institutions can lead to economic stagnation and decline, as selective enforcement and other forms of corruption reduce investor confidence, raise the transaction costs of conducting trade, and discourage people from engaging in the forms of bargaining which are constitutive of commerce. As Nabli and Nugent summarize:

[B]y affecting transaction costs and coordination possibilities, institutions can have the effect of either facilitating or retarding economic growth. The choice of appropriate political institutions, rules and policies enhances economic growth. Moreover, by affecting resource mobility and the incentives for innovation and accumulation, institutions may induce or hinder economic efficiency in the allocation of resources and growth. Institutions affect growth also through their effects on expectations, social norms and preferences.\textsuperscript{105}

On a NIE view, the function of the rule of law is to craft optimal institutions for the clarification and enforcement of property rights. Cognizant that the institutional needs of economies change as different norms become habituated and the appearance of new transactional behaviors necessitates new mechanisms of enforcement, NIE’s proponents emphasize the importance of managed change. “[S]ince a basic and valuable characteristic of institutions is predictability and the preservation of expectations,” argue Nabli and Nugent, “if such transitions are either too rapid or too frequent, they can undermine predictability and thereby impose social losses.”\textsuperscript{106}

Extrapolating from the conclusions of NIE, there are some helpful abstractions about the rule of law. First of all, NIE underscores the social coordinative function of institutions, including legal ones, flowing from their ability to create and manage expectations and the conditions of predictability. The rule of law over institutions, on an NIE view, \textit{should consist in norms of rule-making and rule-implementation subordinate to the principle of stabilized change}, thus avoiding abrupt institutional changes which threaten to disrupt social coordination, and the predictability on which it depends.

In this emphasis on social coordination, the NIE-based conception of

\textsuperscript{103} Id. at 1321.
\textsuperscript{104} Id.
\textsuperscript{106} Id. at 1343.
the rule of law hearkens back to the thin tradition discussed earlier, but with one important difference: An NIE-based rule of law model attaches normative priority to a conception of justice as property rights. Unlike a Rawlsian approach which conceptualizes the rule of law in terms of mere social coordination, the NIE-based view has an a priori conception of the social good: economic growth, seen in terms of the evolution, habituation and longevity of those mature hallmarks of developed Western economies discussed above.

C. Development Theory’s Prescriptions for Defining the Rule of Law

In selecting for my analysis two radically divergent theories of development, I have hoped to extrapolate a cluster of features which a definition of the rule of law, minimally compatible with at least two broad schools of development theory, must to a certain extent reflect. That is, given the different teleological (ends-oriented) objectives of these conceptions of development, I have sought to discern some prescriptions for a program to define the rule of law in a way that is fully responsive to the concerns of development theory, while also deeply informed by the intellectual and cultural heritage of the concept of the rule of law itself.

In conclusion, I present three broad prescriptions suggested by an attempt to understand the “rule of law” for the purposes of development, and which, I contend, should guide future multi-stakeholder efforts to better define and establish consensus on the rule of law.

1. An Institutional Focus

Both Sen and the New Institutional Economists emphasize that rule of law efforts must pay as close attention to the interactions of legal institutions as to the internal operations of the institutions themselves. A signal contribution of the NIE approach to development is its emphasis on the dynamic character of institutional arrangements. Similarly, Sen emphasizes the interconnectedness of such things as political arrangements and economic facilities. The capabilities and NIE approaches are legion in pointing out that attempting to simplify the picture by isolating the rule of law “problem” ignores some important lessons of development theory and practice. So, too, does any effort to define the rule of law in a way that sidelines or minimizes these complex dynamics.

As Barron observes of the World Bank’s approach to theorizing the rule of law:

[T]he need to focus on purely economic legal institutions necessarily imposes on the Bank a very restricted view of the legal system and the [rule of law], and severely limits its ability to “build” the [rule of law] . . . The problem, in other words, is that whereas the [rule of law] is a system-wide concept, reliant on the
functioning of many different aspects and institutions of the legal system, the Bank’s approach to building the [rule of law] is necessarily a sectoral one.107

Barron’s critique of the deficiency of the World Bank’s rule of law theory speaks powerfully to the need for what I have termed an “institutional focus.” The assumption of the Bank’s approach, notes Barron, “appears to be along the lines of ‘all good things go together’: that reforming those laws and legal institutions which affect the economy can somehow gather momentum and parlay into a broader, social and political acceptance of the principles of the [rule of law].”108 Yet the Bank seems to have devoted relatively little attention to the matter of theorizing how this is supposed to happen. A definition of the rule of law informed by an understanding of, or at least a sensitivity to, the dynamic nature of institutional interactions needs to be the centerpiece of any such theory.

2. A Procedural Approach

Neither Sen’s capabilities approach nor the economic growth model advanced by NIE prescribe any particular model of the just society. Rather, both approaches emphasize the importance of a few justiciable rights and a structure of economic facilities necessary for even the thinnest possible conception of development. Similarly, the rule of law “commandments” extrapolated from both models are procedural in nature, viz., those values which contribute to development understood as broadly as possible.

I call this aspect of the rule of law “procedural” because it sees the rule of law as integral to the process of development, rather than as part and parcel of some comprehensive ideal to which all development projects should aspire. This is not to say that development should not aspire to ideals; it is just to emphasize my conviction that the rule of law is part of development’s means rather than simply one of its fully-fledged ends.

This recommendation is neither as trivial nor as easy to adopt as it may seem on its face. To the contrary, if major rule of law efforts thus far are representative, the question of how the rule of law should correlate with other objectives of development remains deeply controversial, and in need of more robust theoretical explanation. Whereas USAID clearly identifies the reform of legal institutions as a prerequisite of a flourishing civil society and of an accountable executive and legislature,109 the World Bank seems content to see institutional reform as coterminous with development. Yet

107. Barron, supra note 66, at 32 (emphasis added).
108. Id.
109. See, e.g., USAID, Strengthening the Rule of Law & Respect for Human Rights, available at http://www.usaid.gov/our_work/democracy_and_governance/technical_areas/rule_of_law (last visited Apr. 12, 2007) (“Weak legal institutions endanger democratic reform and sustainable development in developing countries. Without the rule of law, the executive and legislative branches of government operate without checks and balances, free and fair elections are not possible, and civil society cannot flourish.”).
both approaches are similar in that they construe the rule of law as a stage (whether an initial or a terminal one) rather than as a dynamic process affected by the same complex modalities as other facets of development.

Reflecting on the observations of Sen and the NIE theorists, the best justification for construing the rule of law as a means to development is also the simplest: The ends of development shift over time, as developing societies begin to define their own goals for themselves. Change in goals over time is a central assumption of the NIE approach to development, while the capabilities approach’s distinctive emphasis on autonomy urges us to pay close attention to the goals that developing societies and their citizens set for themselves as they attain the material conditions of meaningful choice.

3. Theoretical Moderation

The attempt to apply some central observations of development theory to the problem of defining the rule of law suggests a further conclusion. Both the capabilities and NIE approaches seem to require that development theory and practice move beyond a merely thin conception in recognizing that the law’s functions are related to other objectives (i.e., development as freedom and economic coordination) instead of emphasizing the law’s own internal logic or some vague, content-free notion of “social coordination.” Some thickness is thus not just inevitable but desirable.

Yet the same philosophical criticisms of thick conceptions of the rule of law glossed earlier are still troubling. Furthermore, an overly specific “laundry list” approach to the rule of law may seriously hamper the two previous prescriptions by limiting the rule of law reform apparatus’ ability to respond to dynamic change in developing societies (as goals and norms evolve, for instance) and in the relations between their nascent institutions. Or, as was observed earlier of the U.N.’s approach, it may simply burden the rule of law with responsibility for all the accoutrements of a highly developed society, in which case any useful distinction between the rule of law and development itself is effectively erased—in which case Carothers’ scene-setting quip about the use of the rule of law as a “cure” for all “the world’s troubles” seems all the more apt.

“Theoretical moderation,” therefore, reflects the idea that thick and thin impulses must be held in dynamic equilibrium, and that constant attention to the forces pulling development efforts in one direction or the other is crucial. I believe an attitude of theoretical moderation best reflects the conclusion that neither a retreat to a minimalist, anemic conception of the rule of law nor a bold advance to a utopian conception of the rule of law as pansocietal development is desirable.

110. See Report of the Secretary-General, supra note 61.
111. Carothers, supra note 1, at 95.
CONCLUSION

As must be emphasized, this program for consensus-building on the meaning of the rule of law is neither maximally conducive to development according to any conception thereof, nor indifferent to the substantive demands of development. In advising development theorists and practitioners to steer a middle course, I invite the obvious criticisms that this approach is either too thin or too thick. I am left to argue that I have anticipated them to the extent possible, taken them seriously, and hoped to edge closer to tentative ontology of a concept which has always attracted, and will no doubt continue to attract, a great deal of definitional controversy.