

NOTES

- ¹ Oakeshott, “Rule of Law,” 119 at 164.
- ² Shklar, “Political Theory,” 1.
- ³ See Carothers, “Rule of Law Revival.”
- ⁴ USAID defines a strategic objective as “the most ambitious result that a U.S. Agency for International Development operating unit, such as a country mission, can materially affect, and for which it is willing to be held accountable.” See GAO, “Former Soviet Union,” 3. For examples of rhetoric, see Tamanaha, “Rule of Law for Everyone?”
- ⁵ International Bar Association, “Report on Zimbabwe.”
- ⁶ Remarks by Bakken, “Remarks at the Judicial Symposium Banquet.”
- ⁷ Gorni, “China: Rule of Law, Sometimes.” In addition to citing inequality before the law, the article describes all five senses of the rule of law in turn.
- ⁸ Amnesty International, “Afghanistan,” 1.
- ⁹ In a single extended article, the *Economist* manages to use the rule of law to demonstrate each of these meanings. It begins by stating that in Argentina, “the rule of law has been repeatedly trumped by executive power.” It then repeats the need for the rule of law in its claim that “Argentines are demanding something new from their government: law and order.” The article goes on to quote the deputy foreign minister, who says, “Argentine society is convinced that the impunity of the army’s crimes facilitated corruption and lack of respect for the rule of law,” referring both to the lack of equality under the law and the army’s impunity for human rights abuses. Then the article quotes Roberto Sava of the Association for Civil Rights as saying, “a politician who wants public support has to adhere to an agenda of the rule of law, fighting corruption, and promoting open government and human rights.” *Economist*, “Becoming a Serious Country” and “Crimes Past, Crimes Present.”
- ¹⁰ For a survey of how the term has been used in Germany, France, the United Kingdom, and the United States, see Grote, “Rule of Law, Rechtsstaat and Etat de Droit,” 271. Friedrich Hayek traces the history of the phrase in his book *The Constitution of Liberty*. A. V. Dicey attempts the first modern definition in his book *Introduction to the Study of the Law*. Also see Stephenson, “Rule of Law as a Goal.” Grote concludes that the idea “belongs to the category of open-ended concepts which are subject to permanent debate.”
- ¹¹ *Institution* is a term packed with meaning for international relations scholars and those familiar with the new institutional economics, from whence much rule-of-law building activity sprang. Because this paper is dealing with precisely the misuse of the term by rule-of-law practitioners, this paper uses the terms *institutions* and *institutional attributes* to refer to concrete, material organizations and sets of concretized interactions, such as laws. I will discuss the new institutional economics and its intended use of this terminology, which refers more generally to customs and patterns of interaction, in the section on definitions based on institutional attributes.
- ¹² GAO, “Rule of Law Funding Worldwide.”
- ¹³ There are, of course, dozens of ways to classify definitions of the rule of law, depending on the purpose the definition is meant to serve, or what divisions it is intended to clarify. Brian Tamanaha divides the concept between preliberal and liberal ends (see Tamanaha, “Rule of Law for Everyone?”) Others divide it between formalist and substantivist definitions, or proceduralist and substantivist modes. I have chosen the following means of definition because it best illuminates the dilemmas faced by the rule-of-law building project.
- ¹⁴ The World Bank’s Comprehensive Development Framework states, for example, that

Without the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible. A government must ensure that it has an effective system of property, contract, labor, bankruptcy, commercial codes, personal rights laws and other elements of a comprehensive legal system that is effectively, impartially and cleanly administered by a well-functioning, impartial and honest judicial and legal system. (Wolfensohn, Proposal for a Comprehensive Development Framework.)

USAID, when asked by the GAO for a definition of the rule of law, responded that

The rule of law embodies the basic principles of equal treatment of all people before the law, fairness, and both constitutional and actual guarantees of basic human rights; it is founded on a predictable, transparent legal system with fair and effective judicial institutions to protect citizens against the arbitrary use of state authority and lawless acts of both organizations and individuals. (GAO, “Rule of Law Funding Worldwide,” 13.)

The European Union, in its 1998 Commission Communications to the Council and the European Parliament, makes the greatest attempt to delineate between ends and institutions but suggests that the latter are implied by the former—a

misunderstanding that I will discuss later. They declare that

The primacy of law is a fundamental principle of any democratic system seeking to foster and promote rights, whether civil and political, or economic, social, and cultural. This entails means of recourse enabling individuals to defend their rights... The principle of placing limitations on the power of the State is best served by a representative government drawing its authority from the sovereignty of the people. The principle must shape the structure of the State and the prerogatives of the various powers. It implies, for example:

- a legislature respecting and giving full effect to human rights and fundamental freedoms;
- an independent judiciary;
- effective and accessible means of legal recourse;
- a legal system guaranteeing equality before the law;
- a prison system respecting the human person;
- a police force at the service of the law;
- an effective executive enforcing the law and capable of establishing the social and economic conditions necessary for life in society.

(See European Initiative for Democracy and Human Rights, “Presentation on the Rule of Law”).

- ¹⁵ Compare the USAID definition in note 14 above to the definition used in its *Handbook of Democracy and Government Program Indicators*:

The Rule of Law ensures that individuals are subject to, and treated equally according to the law, and that no one is subject to arbitrary treatment by the state. A rule of law that contributes to the building of sustainable democracy is one that protects basic human rights... It is one in which market based economic activity is enabled, and freely operates. It is one in which the processes and institutions of justice are available to all individuals... A democratic Rule of Law is also one in which the processes and institutions of justice work efficiently and effectively to establish justice and resolve disputes. (USAID, *Handbook of Democracy*.)

- ¹⁶ Tamanaha, “Rule of Law for Everyone?” 11.

- ¹⁷ Aristotle, *Politics*, III, 15, 1286a-16, 1287a.

- ¹⁸ Quoted in Hayek, *Constitution of Liberty*, 164–5.

- ¹⁹ Quoted in Hayek, *Constitution of Liberty*, 168.

- ²⁰ See the English Bill of Rights, 1689.

- ²¹ Brian Tamanaha separates these senses and suggests (1) that a government bound by law must follow the law or change it, and, more robustly, (2) that there are certain actions that even the government cannot make “legal.” I separate these concepts into the end of human rights and the end of a government limited by law, in order to draw the distinction, discussed later, between those who advocate for the “formal” rule of law in which rights are not included, and those who take a substantivist position in which both procedure and content matter. This debate is discussed later in the section on human rights.

- ²² Some strict formalists and certain strands of Rechtstaat theory would posit rule by law as the rule of law—although this substance-less definition is rebutted by substantivists and often by the underlying assumptions of formalists themselves. More on this debate is found when the end goal of human rights is discussed later.

- ²³ Dicey, *Introduction to the Study of Law*.

- ²⁴ Cultural values, in other words, permeate most of the ends we desire out of the rule of law—and not just human rights issues. Montesquieu discusses this idea in depth and saw little hope for success in legislating what were properly cultural and social matters. This realization is important to understanding why legal reform, as pursued under the institutional attributes definition discussed later, has failed to live up to its promise. See Montesquieu, *Spirit of the Laws*.

- ²⁵ See, for example, Hobbes, *Leviathan*, ch. XIII; and Locke, *Two Treatises of Government*, Treatise II, 46–9, for references to the United States, and commentaries for the effects of the English civil war on Hobbes’ thinking, in particular.

- ²⁶ Locke, Treatise II, 123.

- ²⁷ Locke, Treatise II, 131, 353.

- ²⁸ See Narayan, with Patel, Schafft, Rademacher, and Koch-Schulte, *Voices of the Poor*, 183–7, which features thousands of interviews with poor individuals in developing countries; see particularly the case study on the police.

- ²⁹ For U.S. figures, see GAO, “Rule of Law Funding Worldwide,” 8, 11. Although numbers are for Latin America alone, the author’s research into other areas and into EU funding demonstrates similar funding levels. See also GAO, “Foreign Aid.”

- ³⁰ Most laws are followed not out of fear of force but out of general acceptance. Where large law-and-order problems prevail, either a society has reached a tipping point where social strictures no longer serve this self-policing function, or large portions of the citizenry do not accept the government's legitimacy in governing them. The former frequently occurs in impoverished areas; the latter in separatist or tribal regions with a strong sense of customary law.
- ³¹ In Panama, for instance, a decade-long effort at police reform has been quite successful in creating a trained, respected corps of police officers, but lagging judicial reform means that criminals simply bribe judges and evade imprisonment.
- ³² In Russia, judges were regularly bribed, and at least one judge was beaten, see Black, Kraakman, and Tarassova, "Russian Privatization," 1755–6. Even in Italy, the famous "clean hands" judges who tried to go after the mafia and connected politicians found their ranks decimated by murders that went unsolved.
- ³³ Black, Kraakman, and Tarassova, "Russian Privatization," 1757.
- ³⁴ Magna Carta, 1215, c1. 40. "To no one will We sell, to no one will We deny or delay, right or justice."
- ³⁵ Penn, *Some Fruits of Solitude*.
- ³⁶ *Bartlett's Familiar Quotations* attributes the quote to Gladstone, but it does not seem to be found in his writings. The first case to cite the idea is *Gohman v. City of St. Bernard*, 111 Ohio St. 726, 737 (1924).
- ³⁷ Obviously, civil settlements that are delayed earn the winner less money, given inflation and the opportunity cost of investment. A better example might be the recent contestation of a local election in the Philippines where the court eventually overturned the results and gave the seat to the plaintiff—on the last day of his term (*Economist*, "Democracy as Showbiz").
- ³⁸ Hayek, *Road to Serfdom*, 80.
- ³⁹ Hayek is participating in a fight between proceduralists and substantivists that is described later in note 78.
- ⁴⁰ Cass, *Rule of Law in America*.
- ⁴¹ Wolosky, "Putin's Plutocrat Problem," *supra* note 39, at 27.
- ⁴² The World Bank has a vested interest in making the rule of law appear technocratic because the organization is caught in a quandary. Their research arm shows that the rule of law and other highly political issues they now term *governance* are crucial to successful development, but their mission precludes them from taking a stand on political systems. Thus, they are trying to approach these sticky governance issues as technocratic problems so that they can address them without overstepping their legal bounds.
- ⁴³ Even though the World Bank has a new and cutting-edge program to consider the problems of insecurity on development, the Legal Department that advises on most rule-of-law reforms is not connected to this line of thinking within the Bank. For the problems that law and order, not efficiency and predictability, have on foreign investment, see Black, Kraakman, and Tarassova, "Russian Privatization," 1758–60.
- ⁴⁴ The story, based on field research and interviews, is contained in the author's unpublished master's thesis, Kleinfeld, "Diplomacy and Development." Parts can also be gleaned from successive European Commission *Progress Reports on Romania, 1999–2002*.
- ⁴⁵ Locke, *Treatise II*, 131.
- ⁴⁶ Dicey, *Introduction to the Study of the Law*, 107–22. Dicey upholds human rights by stressing that the common law is the preeminent means of creating the rule of law, because rights are less easily abrogated when they emerge through precedent, and because rights proclamation comes simultaneously with a means to enforce them. Many commentators confuse this third of his "kindred conceptions," believing that it is about the necessity of the common law, and miss the focus on individual rights. Yet Dicey specifically cites the United States as having the rule of law, despite proclaiming rights constitutionally and in the Bill of Rights rather than solely having them evolve from precedent, because the American system had numerous methods to ensure that rights were realized and enforced. Dicey's point in stressing the common law is that he believes the rule of law requires individual rights to be enforced, not simply proclaimed. He fears that when rights are declared by constitution rather than emerging from precedent, it is more likely that they will become empty statements rather than enforced liberties.
- ⁴⁷ Not any human rights reform would necessarily count as a rule-of-law issue. The idea is not simply the growth of human rights, but the notion that the state should be reined in by the law and that law should have content to it—that is, the state cannot violate intrinsic human rights of individuals. Thus, the rule of law is historically about negative rights, not positive rights or so-called economic and social rights. There is also a strong connotation of physical or property violence to human rights as a rule-of-law issue. A state violates the rule of law when it abducts and extrajudicially executes citizens or appropriates citizens' property; it is not as intuitive that a state violates the rule of law when it places curbs on free speech.

- ⁴⁸ Scalia, "Rule of Law as a Law of Rules," 1179.
- ⁴⁹ Raz, "Rule of Law and Its Virtue," 195. This paper will later argue that even the apparently value-neutral institutional attributes actually carry a liberal Western value set, but this is not generally recognized by the field and not part of the debate between formalists and substantivists.
- ⁵⁰ Empirical work on growing authoritarian tendencies in Russia shows the danger to rule-of-law reformers of not using a substantivist definition of the term that includes a full range of human rights. See Sachs and Pistor, *Rule of Law and Economic Reform*.
- ⁵¹ Aristotle, *Politics*, III, 11, 1282b-III, 12, 1283a and IV, 8, 1294a.
- ⁵² Locke, *Treatise II*, 131, 353.
- ⁵³ A recent news account, for instance, describes how marriage-through-kidnap-and-rape, a traditional practice in Ethiopia, was banned by law but was not enforced because most people were unwilling to protest through the courts, and judges did not believe in the right enough to uphold it. See Wax, "Ethiopian Rape Victim."
- ⁵⁴ Locke, *Treatise II*, 131.
- ⁵⁵ Aristotle, *Nicomachean Ethics* V. 6, 1134a-b; see also Aristotle, *Politics*, III, 11, 1282b.
- ⁵⁶ North, *Structure and Change in Economic History*, 344.
- ⁵⁷ USAID and the EU both imply the distinction in their definitions. USAID declares that the rule of law "embodies" some things and "is founded on" others, whereas the EU notes that the rule of law is "a fundamental principle" and then describes institutions that it "implies." Amnesty International actually captures the distinction best, stating in its report on Afghanistan that, "the institutions essential to implement the rule of law and to protect human rights are weak. The reconstruction of a professional police force, as an important enforcement mechanism for the rule of law across the country, needs urgent attention."
- ⁵⁸ Carothers, "Rule of Law Revival."
- ⁵⁹ A similar problem can be seen in economic development, a field in which identifying the connections among education, infrastructure, governance, environmental health, and economic policy, to name just a few, has been notoriously difficult.
- ⁶⁰ Thomas Carothers coined the term *institution modeling* to describe this process; see Carothers, "Democracy Assistance," 116.
- ⁶¹ Aristotle, *Nicomachean Ethics* V. 6, 1134a-b; see also Aristotle, *Politics*, III, 11, 1282b. Of course, Plato's entire idea of enforcement of social hierarchy through the noble lie is such an example. Brian Tamanaha describes numerous cultural and social strictures that upheld parts of the rule of law during the medieval era, even when rule-of-law institutions did not exist, see Tamanaha, "Rule of Law for Everyone?" 15.
- ⁶² Aristotle, *Politics*, III, 16 1287b.
- ⁶³ Berlin, *Four Essays on Liberty*, 166.
- ⁶⁴ *Economist*, "Crimes Past."
- ⁶⁵ In *The Eumenides*, the third play in Aeschylus' *Oresteia*, Athena creates a court to rule on the case of patricide, taking the right of such decisions away from the ancient Furies, who she then placates in a most political way with a host of other nonlegal powers. The Magna Carta was famously forced on the English King by the growing power of the aristocratic landowners. See Aeschylus, *Eumenides*; and Pollock and Maitland, *History of English Law*.
- ⁶⁶ *Economist*, "The People Come to Court."
- ⁶⁷ Hayek, *Constitution of Liberty*, 172; this problem was also mentioned by Dicey.
- ⁶⁸ Frequent references to the U.S. Supreme Court's "independence" after their intervention in the *Bush v. Gore* electoral battle, comments on the highly political judge-picking strategies in the United States, evidence of police use of torture in New York, and notorious corruption cases in Italy, France, and the United States are often mentioned as asides by legal professionals in developing countries, as if to say, with a wink and a nod, that we all know no state can really practice the rule of law. We would have more credibility if we acknowledged that all of our systems are evolving attempts toward ideals.
- ⁶⁹ All governments now use executive decrees to some extent, and they are quite common in the United States. At issue is the use of executive decrees to evade the parliamentary legislative process for laws that would be unlikely to pass otherwise, or the use of such decrees to unlawfully amass extra powers to the executive.

- ⁷⁰ See European Commission, “Regular Reports on Romania for 2000, 2001, and 2002.” The overuse of executive decrees to meet conditionality has been recognized by many observers of other countries as well. See Gupta, Kleinfeld, and Salinas, “Legal and Judicial Reform.”
- ⁷¹ de Tocqueville, *Complete Works*, viii, 455–7, quoted in Dicey, *Introduction to the Study of Law*, 109.
- ⁷² Admittedly, much of this self-deception is forced on practitioners by the obvious political difficulty of admitting that they are meddling with the politics and cultures of other countries (for bilateral aid agencies) or by a mission that proscribes such work (for multilateral groups). Nevertheless, it impedes clear thinking.
- ⁷³ Sometimes, regulations are reduced in an effort to reduce corruption; where there are no rules, there are no rule-breakers, and every regulation is an opportunity for corruption. What I am criticizing is not such reasoned efforts, but the ideology that sometimes leads to blind activity without reasoned thought to guide it—an ideology criticized by Joseph Stiglitz in *Globalization and Its Discontents*.
- ⁷⁴ The World Bank is particularly guilty of ascribing to this fallacy. Its Comprehensive Development Framework, for instance, states that “Without the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible.” Fair enough, so far. It then states, “A government must ensure that it has an effective system of property, contract, labor, bankruptcy, commercial codes, personal rights laws and other elements of a comprehensive legal system that is effectively, impartially and cleanly administered by a well-functioning, impartial and honest judicial and legal system.” In practice, this rarely means simply that a country must have rules of the game for commercial life and property, as well as the institutional attributes already agreed upon; instead, it means that a country must have the particular rules preferred by the World Bank and International Monetary Fund.
- ⁷⁵ In part, the confusion between the rule of law and a particular system of law has arisen, particularly in the United States, because Americans misread Dicey, fail to read Hayek, and thus view the rule of law as a particularly Anglo-Saxon concept.
- ⁷⁶ It may be easy to dismiss these beliefs as conspiracy theory—but they affect our success in convincing local elites to support reform. Moreover, they are not wholly off the mark. Many rule-of-law programs are sold on a domestic political level through claims that improving the rule of law abroad will lead to greater market opportunities for the country ponying up money for the reform.
- ⁷⁷ Upham, “Mythmaking.”
- ⁷⁸ In fact, by actually preferring various public policy outcomes over rule-of-law procedures, rule-of-law reformers may unwittingly be stepping into the center of one of the bitterest debates over the rule of law. A current argument is raging over how much discretion judges have to decide cases on public policy grounds. Substantivists such as Dworkin and Tremblay see a large role for judicial discretion: When laws are not “good,” the spirit of justice, they argue, not the written word, should be supreme. Proceduralists, such as Hayek and even Aristotle (see his *Rhetoric* 1354ab), believe that such judicial discretion overturns the rule of law by allowing judges to make, as well as decide upon, law. They believe this situation undermines both equality before the law (because such decisions would require the state to determine how particular individuals should be situated) and the notion that the state must be reined in by law. In their rhetoric, rule-of-law practitioners echo the beliefs of proceduralists, who believe that to uphold the rule of law, the elected legislature must make the rules, and the judges must decide upon them narrowly. If the outcome of a case appears “unjust,” it is a sign for the legislature to rewrite the laws in a general, impartial way, and the judge is not allowed to amend judgment on public policy grounds that would make laws specific to individual circumstances. In practice, however, rule-of-law practitioners are generally happy with having the executive bypass the legislature or judges overstep the limits of the laws, if these abrogations of the rule of law help them achieve their public policy desires.
- ⁷⁹ Although numerous economists have tried to demonstrate these correlations, the facts are still unclear. See Carothers, “Promoting the Rule of Law Abroad.”
- ⁸⁰ See Collier and Hoeffler, “Greed and Grievance in Civil War.” Their findings on the links between poverty and rebellion are upheld by many scholars in this burgeoning field.
- ⁸¹ Kleinfeld, *Diplomacy and Development*.
- ⁸² Carothers cites the “all good things go together” mentality in his book, *Aiding Democracy Abroad*, 56.
- ⁸³ Domingo, “Judicial Independence,” 164; Trubek and Galanter, “Scholars in Self-Estrangement,” 1075–6; and Burg, “Law and Development,” 518.
- ⁸⁴ Some of the backlash against human rights norms in Eastern Europe and the former Soviet Union can be attributed to this problem of pacing: Cultural norms widely accepted before they were implemented have fallen into disfavor as international groups preach human rights and ordinary people feel preyed upon by increased criminality.
- ⁸⁵ Miller and Perito, “Establishing the Rule of Law in Afghanistan.”

- ⁸⁶ Their line of thinking is generally inspired by Hernando de Soto, whose ground-breaking book, *The Other Path*, demonstrated how a lack of legal title, overregulation, and inaccessible justice kept small businesses from growing and the poor from gaining credit. See de Soto, *The Other Path*.
- ⁸⁷ See the indicators used for the Millennium Challenge Account, or those now advanced by the World Bank in Kaufman, Kraay, and Mastruzzi, *Governance Matters III*. The World Bank indicators actually do measure a number of the dimensions of the rule of law that I am talking about, but they obscure the fact by placing them under different subheadings of governance, all of which are made to sound technocratic. Human rights indicators slip in under political stability and voice and accountability. The predictability of law is sandwiched into regulatory quality. Law and order is placed under the rule of law criteria but also emerges under political stability and lack of violence. Thus, the requisite points are measured, but not as elements of the rule of law, in such a way that obscures all of the gains to be made from recognizing the different types of desired ends and the tensions between them.
- ⁸⁸ For an appraisal of Russia's standing on a variety of rule-of-law measures and appraisals of judicial corruption, see Pistor, Raiser, and Gelfer, "Law and Finance"; and Hertzfeld, "Russian Corporate Governance," 6–7.
- ⁸⁹ For more on how liberal societies hold opposing or equally valued goods in tension, see Berlin, *Four Essays on Liberty*.
- ⁹⁰ Dicey, *Introduction to the Study of Law*, 110.
- ⁹¹ There is no easy start date for rule-of-law reform activities. Developed countries have affected reforms of weaker states since the era of Rome, or even ancient Greece. The law and development movement of the 1960s heralded some of the first modern efforts at rule-of-law reform in countries that were not colonized or occupied. Rule-of-law reform started incrementally in Latin America with various legal reform programs in the 1980s and then grew rapidly with the end of the Soviet Union and the need to move states from communism to market-oriented democracies in the 1990s.
- ⁹² Jeffrey Sachs and Katharina Pistor make the important distinction between the rule *of* law and rule *through* law, in which law functions as an administrative device, not as a set of rules binding on state officials. The rule through law can entrench autocracy in law. See Sachs and Pistor, *Rule of Law and Economic Reform*, 24. Because reformers tend to favor technocratic reforms that improve efficiency and judicial functioning, this is precisely the problem many "successful" reforms risk. See Domingo, "Judicial Independence," 164.