The Rule of Law, Freedom, and Prosperity

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After decades of neglect, interest in the nature and consequences of the rule of law has revived in recent years. In the United States, the Supreme Court's decision in Bush v. Gore has triggered renewed interest in the nature of the rule of law in the Anglo-American tradition. Meanwhile, economists have increasingly come to realize the importance of political and legal institutions, especially the presence of the rule of law, in providing the foundation of freedom and prosperity in developing countries. The emerging economies of Eastern Europe and the developing world in Latin America and Africa have thus sought guidance on how to grow the rule of law in these parts of the world that traditionally have lacked its blessings. This essay summarizes the philosophical and historical foundations of the rule of law, why Bush v. Gore can be understood as a validation of the rule of law, and explores

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the consequences of the presence or absence of the rule of law in developing countries.

I. INTRODUCTION

After decades of neglect, the rule of law is much on the minds of legal scholars today. In the United States, the Supreme Court's decision in *Bush v. Gore* has triggered a renewed interest in the Anglo-American tradition of the rule of law.[1] In the emerging democratic capitalist countries of Eastern Europe, societies have struggled to rediscover the rule of law after decades of Communist tyranny.[2] In the developing countries of Latin America, the publication of Hernando de Soto's brilliant book *The Mystery of Capital*[3] has initiated a fervor of scholarly and political interest in the importance and the challenge of nurturing the rule of law. In the dismal, impoverished kleptocracies of Africa, the challenge is even greater and the lack of even embryonic rule of law institutions is stark.

Given the flurry of interest of the rule of law and the growing recognition of its importance to the establishment of a free and prosperous society, it is a propitious time for the papers presented in Volume 10 of *Supreme Court Economic Review*. The papers presented in this volume were presented at a conference on "The Rule of Law, Freedom, and Prosperity," held in November 2001 at George Mason University School of Law and sponsored by the Law and Economics Center at George Mason University School of Law.

This Foreword will provide an overview of the current debate over the rule of law and the themes that unite the papers presented in this symposium issue. Part II will describe the concept of the rule of law that will provide a working definition for the concepts used in this symposium. Part III will discuss the meaning and importance of the rule of law in the wake of *Bush v. Gore*. Part IV will summarize the recent findings of the relationship between the rule of law, freedom, and economic development for purposes of applying the foregoing discussion to developing countries. Part V provides an overview of the papers presented in this symposium to illustrate the organizing themes of this volume of *Supreme Court Economic Review*.

[1] *Bush v. Gore*, 121 S Ct 525 (2000).

[2] The term "democratic capitalism" is taken from Michael Novak's book *The Spirit of Democratic Capitalism* and is meant to refer to a society oriented around free markets, democratic political institutions, freedom of association in the sphere of civil society, and constitutional government. See Michael Novak, *The Spirit of Democratic Capitalism* (Madison Books, 1982) ("Novak, *Spirit*").

[3] Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books, 2000) ("de Soto, *Mystery of Capital*").

II. THE RULE OF LAW

Commentators on the rule of law often insist that it is difficult to define the concept of the rule of law.[4] This is untrue. Although there may be disagreement over the importance or desirability of the rule of law as a virtue, there is a fairly well-understood core understanding of its meaning. Indeed, the fact that the rule of law has spawned so many detractors indicates that its meaning is well-understood among both enthusiasts and detractors.

Since Dicey restated the rule of law in the late Nineteenth Century in application to modern constitutional republics, there has been a general agreement as to the content and meaning of the rule of law.[5] Dicey identified three fundamental characteristics of the rule of law as it emerged in Britain: (1) the supremacy of regular law as opposed to arbitrary power, i.e., the rule of law, not men; (2) equality before the law of all persons and classes, including governmental officials; and (3) the incorporation of constitutional law as a binding part of the ordinary law of the land.[6] Although Dicey spoke primarily to the historical development of the rule of law in Britain, the core understand-

[4] See Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 Colum L Rev 1 (1997) ("The Rule of Law is a historic ideal, and appeals to the Rule of Law remain rhetorically powerful. Yet the precise meaning of the Rule of Law is perhaps less clear than ever before."); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 BU L Rev 781, 781 (1989) ("Although the Rule of Law ideal is central to our legal tradition, it is deeply contested. Among those who affirm the traditional ideal there is no canonical formulation of its meaning. . . .").

[5] Dicey's characterization of the modern content of the rule of law may be distinguished from the ancient "classical" conception of the rule of law, such as found in Aristotle. For a summary of the ancient version of the rule of law and a comparison with the modern rule of law, see Judith Shklar, *Political Theory and the Rule of Law*, in *The Rule of Law: Ideal or Ideology* 1 (Carswell Publishing, 1987). This article will concern itself only with the modern version of the rule of law. Just as the modern understanding of "liberty" is distinguishable from the classical understanding, so too the modern understanding of the rule of law, thus it is not necessary to dwell on the classical understanding of the rule of law here. See Benjamin Constant, *The Liberty of the Ancients Compared with That of the Moderns* (1819), in Benjamin Constant, *Political Writings* 309 (Biancamaria Fontana ed. & trans., Cambridge U Press, 1988). In fact, Constant points to liberty under the rule of law as a defining characteristic of the modern form of liberty. Given the irrelevance of the ancient's understanding of the rule of law to modern debates, any references to the "traditional" or "classical" statement of the rule of law in this essay should be understood to refer to Dicey and the interpretation spawned by him, not Aristotle.

[6] See A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* 107-22 (Liberty Classics Reprint of 8th ed., 1915) ("Dicey, *Study*"); Lawrence B. Solum, *The Law of Rules: A Critique and Reconstruction of Justice Scalia's View of the Rule of Law* (Loyal Law School (Los Angeles) Public Law and Legal Theory, Research Paper No. 2002-5, March 2002), *available in* http://papers.ssrn.com/abstract=303575 (summarizing Dicey's views) ("Solum, *Law of Rules*").

ing of the rule of law that he articulated has remained remarkably stable since he wrote and has been readily generalizable to a universal understanding of the rule of law. There has been some updating and clarification, but he identified many of the values of the rule of law that comprise its core meaning today. Any ambiguity as to the meaning of the rule of law, therefore, perhaps is best understood as not a disagreement over the meaning or importance of the rule of law; rather, this perceived ambiguity arises from the attempts of critics of the rule of law to redefine the core meaning of the rule of law to try to accomplish goals that are simply incompatible with the rule of law.[7]

This core and traditional definition of the rule of law contains three basic values or concepts: (1) constitutionalism; (2) rule-based decision-making; and (3) a commitment to neutral principles, such as federalism, separation of powers, and textualism.[8] Even though each of these three concepts are interrelated, it is useful to distinguish them for purposes of understanding their role in thinking about the rule of law.

A. Constitutionalism

The first value of the rule of law is the notion of constitutionalism, comprising procedural and substantive limitations on the exercise of governmental authority. Constitutionalism in this context refers to the notion that government power is constrained by "the law," an external force to which political decision-making must abide. In particular, the rule of law constrains arbitrary action by political actors that is not taken pursuant to established rules and procedures announced prior to the action. Government under the rule of law preserves individual freedom; government without the rule of law is tyranny, in that it leaves individuals subject to the arbitrary will of rules. As one observer has noted, "The rule of law is a solution to a problem, and as the classical tradition has always recognized, the

[7] See Guri Ademi, *Legal Intimations: Michael Oakeshott and the Rule of Law*, 1993 Wis L Rev 839, 843 (noting tendency of many to confuse rule of law with other values).

[8] This list of attributes is similar to that provided by Ronald Cass in his brilliant and comprehensive recent study of the rule of law in America. Cass lists the following four traits of the rule of law: "(1) fidelity to rules, (2) of principled predictability (3) embedded in valid authority (4) that is external to individual government decision makers." Ronald A. Cass, *The Rule of Law in America* 4 (Johns Hopkins U, 2001) ("Cass, *Rule of Law*"). Cass's definition and elaboration is more extensive than the summary description provided in this essay. See also Norman Barry, *The Classical Theory of Law*, 73 Cornell L Rev 283, 287 (1988) ("Justice in classical law is the impartial application of universal rules, rules that do not discriminate and which privilege no person or groups. The point about classical law is that it is 'neutral' with regard to the various outcomes that emerge from a rule-governed process; legality is doing justice to individuals and not about the generating of a particular state of affairs.").

problem is tyranny—the social relationship in which some people can command the lives or property of others at will and in pursuit of discretionary ends."[9] Whereas rule of law critics see government discretion as desirable and necessary to achieve egalitarian social goals, rule of law adherents fear the arbitrary exercise of government discretion and seek to constrain it. In this sense, therefore, the rule of law is consistent with the values of constitutionalism, namely placing limits on government action so as to restrain the discretion of government officials.[10]

The most forceful advocate of the constitutionalism values of the rule of law was F.A. Hayek. Hayek identified several characteristics of the rule of law. First, the rule of law requires that government action be "bound by rules fixed and announced beforehand."[11] Second, rules must be known and certain, so that individuals can conform their behavior to those laws.[12] Third, the rule of law requires equality in the sense that the law applies equally to all persons and does not prejudice some categories of people at the expense of others.[13] The law may discriminate among different categories of people as necessary, but may not do so in such a way as to prejudice some or elevate some groups or individuals to the detriment of others.

The rule of law is therefore inherently a classical liberal concept that presupposes the need and desirability to constrain governmental actors and maximize the sphere of liberty for private ordering, both in economic exchange as well as in the voluntary institutions that comprise civil society.[14] Law is not consciously designed to accomplish some social goal. Instead, law is conceived as a purpose-independent system designed as an input into individuals' decision-making. In Michael Oakeshott's memorable phrase, "The rule of law bakes no bread, it is unable to distribute loaves or fishes (it has none), and it cannot protect itself against external assault, but it remains the most

[9] See Noel B. Reynolds, *Grounding the Rule of Law*, 2 Ratio Juris 1, 5 (1989)

[10] See A.C. Pritchard and Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 NC L Rev 409, 446-51 (1999) (discussing efficiency purposes of constitutions).

[11] Friedrich A. Hayek, *The Road to Serfdom* 72 (U Chicago, 1944).

[12] Friedrich A. Hayek, *The Constitution of Liberty* 208 (U Chicago, 1960) ("Hayek, *Constitution of Liberty*").

[13] Id at 209.

[14] Horwitz characterizes it as a "conservative doctrine," but one supposes that he really means "conservative" in its more generic terminology, rather than to distinguish it from classical liberalism. Morton J. Horwitz, Book Review, *The Rule of Law: An Unqualified Human Good?*, 86 Yale L J 561, 566 (1977). Burke, Maine, Hayek, and Oakeshott were all advocates of the rule of law; all are often characterized as conservatives, although it is not clear that this appellation is always accurate. See Hayek, *Constitution of Liberty* at 397-411 ("Postscript: Why I am Not a Conservative") (cited in note 12).

civilized and least burdensome conception of a state yet to be devised."[15] Law is a means to the accomplishment of individual goals, not an end in itself.[16] Thus, law can only be means for individuals to use to accomplish their individual goals, not a means for society or the state to accomplish their goals, because these entities can have no ends of their own.[17]

The inherent relationship between the rule of law and individual liberty is often misunderstood by those who insist that the rule of law need not be liberty-enhancing. At the same time, many advocates of the rule of law have justified it as a means to the ends of limited government and economic prosperity. But Oakeshott cogently observes, these arguments from both the left and right misunderstand the nature of the rule of law. The rule of law should not be understood as a mere means to a social order predicated on limited government, freedom, and prosperity. Instead, the rule of law an *inherent part* of a free, peaceful, and prosperous society. A society organized under the rule of law is a "liberal" order of private ordering and constitutional limits on government; corellatively, the rule of law can exist only in such an order. Thus, the rule of law and a liberal order are inextricably intertwined: neither can exist without the other. It is worth considering Oakeshott's observations on this point in detail to understand the argument being advanced. Oakeshott observes:

> Many writers who have undertaken to *recommend* this vision of a state [limited government] have sought its virtue in what they present as a consequence, something valuable which may be enjoyed as the outcome of this mode of association [i.e., society organized under the rule of law]. And some have suggested that its virtue is to be instrumental to the achievement of "prosperity" understood as the maximum continuous satisfaction of the wants of the associates. But the more discerning apologists (recognizing the inconsistency of attributing the virtue of a non-instrumental mode of association to its propensity to produce, promote or even encourage a substantive condition of things) have suggested that its virtue is to promote a certain kind of "freedom."[18]

But these "apologists" also miss the point, according to Oakeshott. He argues that these justifications for the rule of law are "mislead-

[15] Michael Oakeshott, *The Rule of Law*, in *On History: And Other Essays* 119, at 164 (Barnes & Noble Books, 1983) ("Oakeshott, *Rule of Law*").

[16] See id at 161; see also Nigel Ashford, *Michael Oakeshott and the Conservative Disposition*, 25 The Intercollegiate Rev, Vol. 2, at 39 (Spring 1990).

[17] See James M. Buchanan, *The Constitutional Way of Thinking*, 10 S Ct Econ Rev (this volume); Kenneth Arrow, *Social Choice and Individual Values* (Wiley, 1951).

[18] Oakeshott, *Rule of Law* at 161 (cited in note 15).

ing," in that they justify the rule of law as a means to a social end, rather than recognizing the rule of law as an inherent element of a certain type of political order. He continues:

> These rules certainly do not themselves prescribe purposes to be pursued or actions to be performed. They do not concern the motives of conduct, and this mode of association is in terms of the recognition of obligations, not their uninterrupted observance; and all this may be said to denote a certain kind of "freedom" which excludes only the freedom to choose one's obligations. But this "freedom" does not follow as a consequence of this mode of association; it is inherent in its character. And this is the case also with other common suggestions: that the virtue of this mode of association is its consequential "peace" (Hobbes) or "order." A certain kind of "peace" and "order" may, perhaps, be said to characterize this mode of association, but not as consequences.[19]

Notwithstanding Oakeshott's admonitions, the rule of law in fact does have the beneficial consequence of producing both individual freedom and economic prosperity.[20] The rule of law enhances individual freedom by permitting individuals to choose and pursue their own ends in life, without improper influence from the state. Because the law speaks only to the means that individuals can use to achieve their personal aspirations, the purpose-independent rules of the rule of law permits a maximum flourishing of individual choice. This includes preservation of the sphere of civil society, so as to allow individuals to form their own families and groups to accomplish their social and moral purposes.[21]

The rule of law places inherent limitations on the size and scope

[19] Id; see also Barry, 73 Cornell L Rev at 39 (cited in note 8) ("Law is intimately connected with freedom in classical law, not just in the trivial sense that a free society is a rule-governed order which diminishes the coercive power that political authorities have over individuals, but also in the theoretical sense than an explanation for liberty can be given which makes freedom and law consistent.").

[20] It may be possible to square Oakeshott's position on the rule of law with a consequentialist justification of the rule of law through the mechanism of group selection. Although this reconciliation goes beyond the scope of this essay, one could argue that societies organized by the rule of law will simply displace other societies through a process similar to Darwinian evolution, thereby combining both the essentialist and consequentialist justifications into an evolutionary justification. This seems to be Hayek's position. See Todd J. Zywicki, *Was Hayek Right About Group Selection After All?*, 13 Rev Austrian Econ 81 (2000). Oakeshott hints at this possible reconciliation through his suggestion that the rule of law is an historical and empirical concept that philosophy can illuminate, not a concept to be created by philosophy. See Oakeshott, *Rule of Law* at 164 (cited in note 15).

[21] See Ernest Gellner, *Conditions of Liberty: Civil Society and Its Rivals* (Penguin, 1996).

of government intrusiveness into the economy and civil society. As both an empirical and *a priori* matter, heavy regulation of the economy is inconsistent with compliance with the rule of law. Heavy regulation also is inherently arbitrary and corrupt regulation. Where there is heavy regulation of economic activity, it is fundamentally impossible to realistically comply with all the regulatory requirements and to still engage in any economic activity. In many countries around the world it is practically impossible to get all of the licenses that are necessary in order to conduct business legally. It can take years, several thousands of dollars, and the satisfaction of multiple bureaucrats before a business can open legally. In these countries, the permit fees and opportunity cost of missing work to shuttle among governmental offices renders it economically unrealistic to be able to satisfy all the requirements. At that point an aspiring entrepreneur has two options: either to operate illegally or to bribe the relevant governmental officials to circumvent the formal processes to illegally qualify the entrepreneur to open the business. If the business operates illegally, of course, this simply means that the business is in constant danger of being shut-down by the executive branch. In order to prevent this, it will often be necessary to bribe enforcement officials to allow the business to continue operating. One investigator concluded that owners of extralegal businesses in Peru paid 10-15% of their gross income in bribes and commissions in order to persuade law enforcement officials not to shut them down.[22] Either way, the sheer weight and intrusiveness of a heavy regulatory scheme leads to corruption and unequal enforcement of the law. It is impossible to satisfy all of the requirements, thus for economic activity to function it becomes necessary for some government officials to decide which requirements must be satisfied, which will be waived, and which applicants will be the beneficiaries of these waivers.[23] Thus, pervasive economic regulation invariably produces corruption in regulatory officials.[24]

Economically unsophisticated commentators have often been confused by the relationship between the rule of law and economic reality. Joseph Raz, for instance, criticizes this reasoning on the ground that even if the policies are economically misguided, that does not

[22] Hernando de Soto, *The Other Path: The Invisible Revolution in the Third World* 154 (Harper & Row, 1989) ("de Soto, *Other Path*").

[23] Hayek observes in a related context, such decisions must "necessarily be discretionary and must consist of *ad hoc* decisions that discriminate between persons on essentially arbitrary grounds." Hayek, *Constitution of Liberty* at 228 (cited in note 12).

[24] See Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer, *The Regulation of Entry*, 117 Q J Econ 1, 26 (2002) (finding statistical correlation between intensity of economic regulation and political corruption); Alejandro A. Chaufen and Eugenio Guzman, *Economic Freedom and Corruption*, in *2000 Index of Economic Freedom* 51 (2000).

make them violative of the rule of law if they are principled and announced beforehand.[25] On the narrow ground of the initial promulgation of the rule of law, Raz may be correct. Moreover, to the extent that ill-advised regulations are constrained in number and scope, then they need not violate the rule of law. But Raz clearly means believes that extensive economic regulation is compatible with the rule of law.

Raz's confidence ignores the fact that economics is subject to its own set of "laws," as in the physical world, and that excessive economic regulation will run afoul of the empirical regularities of economics. As a result, excessive economic regulation simply cannot be applied consistently with the rule of law. The rule of law requires that individuals be able to practically conform their behavior to the laws. As a result, it would be inconsistent with the rule of law to require a person to hold his breath for four days in order to avoid criminal punishment or to require an applicant to stand on one foot for three weeks straight in order to receive a business license. But just as the rule of law implicitly requires conformity with the constraints of the physical world, so too with the economic world.[26] Consider a law that required that in order to receive a business license, one must stand on one foot nonstop for three weeks straight. Such a law would be principled and theoretically possible. But it is a practical impossibility. In order for economic activity to occur, therefore, there will have to be some *ad hoc* waivers of "three-week leg-standing" policy. This would fail the test of the rule of law, Raz observes, because that for the rule of law to prevail "it must be capable of guiding the behaviour of its subjects."[27] But his lack of knowledge about the necessities of economic activity causes him to misunderstand the ways in which economic regulation interferes with the market process and thereby undermines the rule of law.

Hernando de Soto, the President of Peru's Institute for Liberty and Democracy, constructed several teams of researchers to investigate the difficulty of doing business within the law in a variety of societies.[28] His findings were striking and demonstrate the way in which

[25] See Joseph Raz, *The Rule of Law and Its Virtue*, in Joseph Raz, *The Authority of Law* 210, 228 (Oxford U Presss, 1979) ("Raz, *Rule of Law*").

[26] See Lon Fuller, The Morality of Law (Yale U, rev ed 1969) ("Fuller, *Morality of Law*").

[27] Raz, *Rule of Law* at 214 (cited in note 25). Fuller similarly observes that there is a reciprocal understanding between the governors and the governed: "the governed have a duty to obey the law, and those who govern have a duty to provide laws of a sort that can be obeyed." Cass, *Rule of Law* at 11 (cited in note 8) (citing Fuller, *Morality of Law* (cited in note 26)).

[28] De Soto, *Mystery of Capital* at 18-28 (cited in note 3); see also de Soto, *Other Path* at 131-87 (cited in note 22).

pervasive economic regulation is not only economically unwise but also violative of the rule of law in application. De Soto started by trying to open a garment shop in Lima, Peru in compliance with all of the relevant laws.[29] It took de Soto's researchers six hours per day and 289 days to stand in all of the lines and fill out all of the paperwork necessary to open a small business. In other words, in order to start a new business, a prospective entrepreneur would be required to work full-time for almost one year merely shuttling from one office to another and filling out forms. Moreover, the garment shop was geared to operate with only one worker, yet the cost of legal registration was $1,231—thirty-one times the monthly minimum wage. Obtaining legal authorization to build a house on state-owned land took six years and eleven months and required 207 different administrative steps involving fifty-two government offices. Obtaining legal title for the land itself required 728 steps. Such burdens appear to be common throughout much of the world. In the Dominican Republic, for instance, the official cost of legally registering a new business is an astounding 4.6 *times* per capita GDP.[30]

Even if a company is opened legally, it still faces the challenge of remaining legal.[31] Legal businesses in Peru spend $76.70 of every $100 in their operating revenues just complying with legal requirements. Of this amount, only $17.60 goes to pay taxes; the remaining $59.10 is spent on other legal costs, such as filling out paperwork and other administrative and bureaucratic burdens.

In such societies, it is essentially impossible to conduct business in compliance with the law, because the sheer weight of regulations overburdens efforts to try to conduct business in compliance with the law. This means that virtually all small businesses and most medium-sized businesses will have to operate outside the law or not operate at all. Not only does this make the businesses illegal, but it also denies the business the other benefits of legality, such as contract enforcement, the ability to pledge assets as collateral for a loan, and the like. As a result, the entire operation becomes "extra-legal" operating wholly outside the law and reliant purely on informal norms and self-executing contract performance mechanisms for success. Indeed, the extralegal sector eventually replaces the legal sector as the hub of economic and social activity. "The extralegal world is typically viewed as a place where gangsters roam, sinister characters of interest only to police, anthropologists, and missionaries. In fact it is legality that is marginal; extralegality has become the norm."[32]

In fact, the entire process appears to be as pointless as a three-week

[29] De Soto, *Mystery of Capital* at 19-20 (cited in note 3).
[30] Djankov et al, 117 Q J Econ at 4 (cited in note 24).
[31] De Soto, *Other Path* at 148-49 (cited in note 22).
[32] De Soto, *Mystery of Capital* at 30 (cited in note 3).

leg-standing law: de Soto notes with amusement that despite all of these forms, fees, and permits, not a single one of the regulatory officials was even able to detect that the purported business was in fact a sham. Nor was this experience unique. Djankov, et al, find no evidence that increasing the licensing hurdles actually provides any social benefits, whether in terms of reduced pollution, greater health and safety, or any other purported objective of regulation.[33] Instead, it appears that the primary objective of these regulations is to enable regulators to collect bribes from supplicants.[34]

Everyone involved, including business owners, employees, and law enforcement officials wink at the requirements of legality. In short, the law no longer guides individual behavior, and the rule of law is defeated in practice. As de Soto concludes, describing the corrosive effect that the need to conduct illegal business has on the growth of the rule of law in Peru:

> Since 61 percent of the hours worked in Peru are informal, there is obviously a long frontier between the informal sector and the state authorities. Some informal businesses are completely clandestine, but it is inconceivable that 61 percent of all the work done could be carried out illegally without the authorities in some way turning a blind eye. This systematic corruption undermines the principle of authority in the country as a whole.[35]

Moreover, the corruption of the rule of law in such circumstances is obviously not confined to the enforcement level. Rather, it becomes essential for those trying to conduct business to lobby for preferential legislative treatment, such as tax breaks, subsidies, and the like, in order to offset or avoid the costs of governmental rule-making and bribery. This process of rent-seeking invariably riddles the laws with exceptions and preferential treatment, undermining the generality and equal treatment of the law.

B. Rule-Based Decision-Making

The second essential characteristic of the rule of law is the requirement of rule-based decision-making. In Justice Antonin Scalia's terms, this idea is that of "the rule of law as a law of rules."[36] This is related in obvious ways to the characteristic of the rule of law as con-

[33] Djankov, et al, 117 Q J Econ at 23-25 (cited in note 24).

[34] See Andrei Shleifer and Robert W. Vishny, *Corruption*, 108 Q J Econ 599 (1993).

[35] Id at 154. Djankov, et al, provide further evidence for de Soto's observations, finding in a cross-country data set that black market and informal economic activity proliferates where regulation of entry is heavy. See Djankov, et al, 117 Q J Econ at 23 (cited in note 24).

[36] Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U Chi L Rev 1175 (1989).

stitutionalism, in that reliance on rules rather than discretionary standards helps to constrain arbitrary governmental action because it is easier to monitor the government and to determine if it has misbehaved if the scope of governmental activity is circumscribed by bright-line rules rather than fuzzy legal standards. Legal rules operate as a sort of trip-wire, which makes it easier to recognize governmental overreaching or governmental favoritism.[37] Moreover, rules are necessarily more abstract and will apply more equally in future situations, thus they tend to constrain governmental discretion better than the alternatives.[38] Clearly-articulated, previously-announced rules may also make it easier for independent judges to protect constitutional precommitments when encroached upon by political actors. As Justice Scalia observes, "While announcing a firm rule of decision can thus inhibit courts, strangely enough it can embolden them as well. Judges are sometimes called upon to be courageous, because they must sometimes stand up to what is generally supreme in a democracy: the popular will. . . . The chances that frail men and women will stand up to their unpleasant duty are greatly increased if they can stand behind the solid shield of a firm, clear principles enunciated in earlier cases."[39]

Rules also advance the rule of law by distancing rule makers from the merits of individual cases, thereby leading to an abstractness and even-handedness in the operation of rules. Rules speak to categories of activity, rather than unique activities by unique actors. At the same time, it protects individual actors from the arbitrariness inherent in such decisions, increasing the predictability of their interaction with the rules of the state. As Hayek observes, "[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. It is because the lawgiver does not know the particular cases to which his rules will apply, and it is because the judge who applies them has no choice in drawing the conclusions that follow from the existing body of rules and the particular facts of the case, that it can be said that laws and not men rule."[40]

Thus, "the rule of law as a law of rules" also embodies the additional idea that the rule of law aims at providing consistent treatment

[37] See Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J L Econ & Org 1 (1995). Weingast notes that for constitutional limitations on the sovereign to be effective, the citizenry must be able to recognize and resist transgressions against their rights.

[38] Scalia, 56 U Chi L Rev at 1185 (cited in note 36); Hayek, *Constitution of Liberty* at 149-151 (cited in note 12).

[39] Scalia, 56 U Chi L Rev at 1180 (cited in note 36).

[40] Hayek, *Constitution of Liberty* at 153 (cited in note 12).

for similarly-situated actors today, as well as those in the future.[41] In so doing, rules limit governmental discretion to pick and choose how to apply its rules to given situations or particular actors. Indeed, rules also constrain judges themselves from drawing specious distinctions in future cases, thereby furthering the goals of predictability and equality of and predictable legal framework.

The rule of law requires that the regime of rules governing behavior be sufficiently stable so as to allow individuals to form plans and to see them through to completion. The rule of law in this sense is designed to maximize social coordination.[42] The purpose of legal rules, as with all rules of behavior, is to allow individuals to form expectations about the likely behavior of other individuals in society. Rule-bound decision-making tends to be more predictable than other forms of behavior. Thus, bright-line legal rules also tend to the promotion of economic growth. Economic growth depends on the articulation of spheres of individual autonomy within which individuals are free to make use of their local knowledge.[43] The maximum coordination of the division of knowledge in the economy will come about through the clear articulation of these boundaries of individual autonomy. Fuzzy boundaries lead to unnecessary conflicts between individuals over who holds what rights in particular assets. Clear boundaries reduce this conflict and confusion and thereby encourage parties to engage in positive-sum exchange activities. Thus, the clear articulation of legal rules will tend to increase social coordination and economic wealth.[44]

With respect to this function of rule-based decision-making, it is more important that the decisions be predictable then that they abide by the mere form of rule-based decisions. Thus, the common law can

[41] See id; see also Oakeshott, *Rule of Law* at 129 (cited in note 15).

[42] This distinguishes Scalia's views from Solum's characterization of Scalia's views. Solum focuses only on Scalia's argument that the rule of law values constrain judges, but ignores that the purpose of this constraint is to maximize social coordination. Thus, "the problem of social practice" and "the problem of character" that Solum stresses, see Solum, *The Law of Rules* (cited in note 6), is relevant only to a self-referential rule of law as solely concerned with imposing constraints on judges. But the primary value of the rule of law is in providing notice to private actors to enable them to coordinate their affairs; hence, what matters is *not* the judges' private interpretations of laws, but rather the reasonable understanding of laws by the populace at large. Scalia's views on the rule of law as the law of rules must therefore be understood as being related to his views on statutory interpretation and the like.

[43] See F.A. Hayek, *Rules and Order*, 1 *Law, Legislation, and Liberty* (U Chicago, 1973).

[44] See Todd J. Zywicki, *Epstein and Polanyi on Simple Rules, Complex Systems, and Decentralization*, 9 Const Pol Econ 143 (1998); see also Geoffrey Brennan and James M. Buchanan, *The Reason of Rules*, 10 *The Collected Works of James Buchanan* (Liberty Fund, 1999).

produce predictable and abstract rules, even if they do not have the form of a categorical pronouncement. All that is necessary is for judge-made law to be coherent and predictable.[45]

C. Neutral Principles

Third, advocates of the rule of law have tended to favor the adoption of "neutral principles" for judicial and constitutional decision-making. Herbert Wechsler defined a neutral principle as "one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved."[46] Reliance on neutral principles furthers the rule of law by forcing governmental decision-makers to articulate their decisions on the basis of principles, rather than exercising *ad hoc* discretion. In this context, neutral principles of decision-making include the separation of powers and federalism in constitutional interpretation,[47] and textualism in statutory interpretation.[48] James Buchanan has articulated a similar guiding principle through his insistence on the "generality principle" as a means of restraining arbitrary principle.[49] The "generality principle" requires that any action by the government be generally applicable to all similarly-situated individuals, rather than favoring some subsets of the population at the expense of others. Buchanan's generality principle, therefore, can be seen as a corollary to the concept of "neutral principles" that guide the legal understanding of the rule of law. Hayek also believed that a crucial component of the rule of law was the articulation of rules at an abstract and general level and constraints on the ability of the government to discriminate among subclasses of individuals.[50]

The separation of powers within the government is also an essential element of the rule of law. This follows from the normative principles of the rule of law. The rule of law requires both the promulgation of prospective rules to apply to future cases and to maximize social coordination as well as the equal and general application of

[45] See Cass, *Rule of Law* at 6-10 (cited in note 8).

[46] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv L Rev 1, 19 (1959); see also Cass, *Rule of Law* at 10-11 (cited in note 8).

[47] See Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 294 (Harvard U, 1983).

[48] Antonin Scalia, *Common-Law Court in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation: Federal Courts and the Law* 3 (Princeton U, 1997).

[49] James M. Buchanan & Roger D. Congleton, *Politics By Principle, Not Interest* (Cambridge U, 1998).

[50] Hayek, *Constitution of Liberty* at 205-212 (cited in note 12).

these rules to situations as they arise. This process of *ex ante* promulgation and *ex post* decision-making requires two different bodies tasked for these different purposes. "It would be humanly impossible," Hayek writes, "to separate effectively the laying-down of new general rules and their application to particular cases unless these functions were performed by different persons or bodies. This part at least of the doctrine of separation of powers must therefore be regarded as an integral part of the rule of law."[51] Perhaps most crucial is the existence of an independent judiciary that is insulated from political influence and coercion.[52]

The erosion of the separation of powers through the proliferation of administrative agencies provides exemplifies the way in which compliance with legal formalities and neutral principles furthers the rule of law. The New Deal's innovation of combining legislative, executive, and judicial authority within a single administrative agency has given rise to many of the infringements on the rule of law in the United States. Indeed, it was concerns about the rise of the administrative state in Europe in the Nineteenth Century that animated Dicey to articulate the link between the rule of law and a free society.[53]

In a similar vein, reliance on the implementing the reasonable meaning of the text of statutes rather than open-ended inquiry into subjective "legislative intent" is consistent with the logic of the rule of law. In general, textualism promotes the rule of law by forcing the judge to rely on the language of the statute and to interpret it according to its most reasonable objective reading. To the extent that legislative history may illuminate this objective reasonable understanding of the law, then it may enhance predictability. But an open-ended *ex post* search for subjective legislative intent undermines rule of law values. It is difficult to know how a private party can be expected to anticipate how a judge will interpret conflicting legislative pronouncements in a given case so as to conform their behavior to the law. Moreover, such inquiries invite discretionary decision-making by judges. The process of *ex post* weighing and sifting of legislative intent by judges is fundamentally incompatible with the mandate of the rule of law to provide *ex ante* predictability to parties.[54]

[51] Id at 210.

[52] Id at 210-11; Raz, *Rule of Law* (cited in note 25). Hayek argues that the separation of the legislative power from the executive power is not as crucial, so long as both the legislative and executive actions are both subject to judicial review. Thus, it does not matter whether they are combined in one body or separated into two bodies, so long as they are both subject to review by an independent judiciary.

[53] Dicey, *Study* at 120 (cited in note 6). Dicey's book was published originally in 1885.

[54] See Oakeshott, *Rule of Law* at 146 (cited in note 15).

III. THE RULE OF LAW IN THE WAKE OF *BUSH V. GORE*

For several decades, these voices in defense of the rule of law have provided a minority view on the subject within the legal academy. Many leading scholars have denounced the rule of law as normatively suspect and unworkable as a practical matter.[55] The emergence of critical legal studies and its offspring led many scholars to criticize the rule of law as and its accompanying virtues, such as equality, formality, and rule-based decision-making.[56] It was suggested that these "virtues" were anything but, in that they perpetuated inequality and power imbalances in society. To rectify these deep-seated societal problems required broad judicial discretion and context-based decision-making, not formal equality and rule-bound analysis.

Morton Horwitz's discussion of the rule of law is illustrative of this position. Protesting against a Marxist historian's characterization of the rule of law as "an unqualified human good," Horwitz protests:

> I do not see how a Man of the Left can describe the rule of law as "an unqualified human good"! It undoubtedly restrains power, but it also prevents power's benevolent exercise. It creates formal equality—a not inconsiderable virtue—but it *promotes* substantive inequality by creating a consciousness that radically separates law from politics, means from ends, processes from outcomes. By promoting procedural justice it enables the shrews, the calculating, and the wealthy to manipulate its forms to their own advantage. And it ratifies and legitimates an adversarial, competitive, and atomistic conception of human relations.[57]

Indeed, critics of the rule of law argued that not only was the rule of law normatively suspect, it was a practical impossibility as well.[58] The inherent ambiguity of language[59] and legal conceptualism[60] ren-

[55] Due to the modest scope of this essay, it deals with only a small subset of the critical commentary on the rule of law. A more comprehensive discussion of the virtues of the rule of law would have to deal with the thoughtful criticisms of Jeremy Waldron, among others. See Jeremy Waldron, *The Rule of Law in Contemporary Liberal Theory*, 2 Ratio Juris 79 (1989).

[56] See Roberto M. Unger, *Law in Modern Society* (Free Press, 1976); Roberto M. Unger, *The Critical Legal Studies Movement*, 96 Harv L Rev 561 (1983).

[57] See Horwitz, 86 Yale LJ at 566 (cited in note 14).

[58] See Radin, 69 BU L Rev (cited in note 4).

[59] See Stanley Fish, *Anti-Professionalism*, 7 Cardozo L. Rev. 645 (1986); see also Stanley Fish, *Is There a Text in This Class?* (Harvard U, 1982).

[60] See John Hasnas, *The Myth of the Rule of Law*, 1995 Wis L Rev 199; Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 Yale L J 1 (1984).

ders judicial decision-making radically indeterminate and unpredictable, thereby undermining the aspiration of the rule of law to provide clear guidance to governed parties and for the accountability of lawmakers to the public. Moreover, given these ambiguities and the lack of effective accountability, judges act so as to indulge their ideological and class interest of judges.[61] Thus, the rule of law not only *should not* constrain; critics argued that it *could not* constrain. Law is an inherently subjective and indeterminate enterprise that contradicted the implicit assumptions that grounded the rule of law. In the words of one critic, the rule of law was a "myth" created not to limit government and maximize individual liberty, but rather to legitimate political power and official incursions on liberty.[62] These critiques left the traditional belief in the rule of law somewhat battered. Gary Minda writes, "There was a loss of belief in a secular and autonomous jurisprudence as the 'Rule of Law' for all rules."[63]

In the wake of *Bush v. Gore*, however, interest in the rule of law has resurfaced in American law schools. Identifying themselves "teachers whose lives have been dedicated to the rule of law," a group of law professors issued a "protest" against the Supreme Court's decision to issue a preliminary injunction of the hand-recount of ballots in Florida.[64] Justice Stevens echoed this protest in his admonishment to the majority opinion in *Bush v. Gore*, stating that "the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."[65]

But this newly-discovered version of rule of law is a dramatically modified version of the traditional conception of the rule of law. Under the traditional understanding of the rule of law, it is evident that the Supreme Court acted properly in *Bush v. Gore*.[66] As noted above, the defining characteristics of the rule of law are such virtues as equality, transparency, and the governance of official action by preexisting rules. By these standards, it is clear that the United States

[61] See Mark Tushnet, *Renormalizing* Bush v. Gore: *An Anticipatory Intellectual History*, 90 Geo L J 113 (2001).

[62] See Hasnas, 1995 Wis L Rev (cited in note 60).

[63] Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York U Press, 1995); see also Francis J. Mootz, III, *Rethinking the Rule of Law: A Demonstration that the Obvious is Plausible*, 61 Tenn L Rev 69 (1993) (summarizing various criticisms of the rule of law).

[64] The text of the letter and the list of signatories can be found at <http://www.the-rule-of-law.com>.

[65] *Bush*, 121 S Ct at 542 (Stevens, J., dissenting).

[66] I express no opinion on the doctrinal merits of the decision, just its consistency with rule of law values. Ronald Cass expresses a similar conclusion that the Supreme Court acted in accordance with rule of law values in his examination of *Bush v. Gore*. See Cass, *Rule of Law* at 92-97 (cited in note 8).

Supreme Court acted properly in reversing the Florida Supreme Court's decisions in the case. Florida law had pre-existing procedures for dealing with challenges to elections. Although mildly confusing and perhaps ill-suited to a presidential election, they nonetheless formed a coherent set of rules that governed the situation. Instead of being bound by these pre-existing rules, however, the Florida Supreme Court implied a right for voters to have their votes discovered and counted.[67] Regardless of what else the rule of law requires, this attempt to change the "rules of the game" in the middle is exactly what is forbidden by the rule of law. Second, the Florida Supreme Court's decision ceded to local officials broad discretion to determine what constituted a legal vote, providing no substantive standards or mechanism for review of these decisions.[68] Again, this sort of "unbounded and unreviewable power" is incompatible with the rule of law.[69] Even Professor Laurence Tribe, in the midst of his criticism of the opinion, pauses to observe, "For the Court the spectacle of perhaps another week of state and local officials holding ballots up to the light, followed by the likely display of unabashed partisanship on Capitol Hill, provided incentive to intervene. Those images . . . were obviously the very antithesis of the rule of law to the *Bush v. Gore* majority."[70] As indeed it was—the sight of men and women holding punchcard ballots up to the lights to try to count votes will be forever emblazoned on the American psyche as one of the most bizarre sights of recent memory. The utter subjectivity, standardless, and partisan nature of this vote-counting provides a strong example of the antithesis of the rule of law. Had the Florida Supreme Court refrained from interfering, the process would have played out in a well-understood process, the rules of which had been established over a century before this dispute arose.[71] Once the Florida Supreme Court interfered in this process so as to change the rule midstream and to unleash partisan and discretionary ballot-counting, the United States Supreme Court had little alternative but to intervene to reinstate the rule of law. Thus, one could criticize the United State Supreme Court's decision in *Bush v. Gore* on other grounds, but its inconsistency with the rule of law is not one of those.

[67] See *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1291 (Fla. 2000) ("We have construed the provisions providing for a timetable as directory in light of what we perceive to be a clear legislative policy of the importance of an elector's right to vote and of having each vote counted.").

[68] Id at 1262.

[69] Joel Edan Friedlander, *The Rule of Law at Century's End*, 5 Tex Rev Law & Pol 317, 338 (2001).

[70] See Laurence H. Tribe, *Comment:* Erog v. Hsub *and Its Disguises: Freeing* Bush v. Gore *from its Hall of Mirrors*, 115 Harv L Rev 170, 290-91 (2001).

[71] See Todd J. Zywicki, *The Law of Presidential Transitions and the 2000 Election*, 2002 BYU L Rev 1573, 1585-90.

Others have professed a rededication to the rule of law, but have really just redefined the concept in a manner so as to turn it on its head. Professor Radin, the primary author of the professors' rule of law letter, had previously criticized the traditional view of the rule of law for its "pre-existing formal rules applied in a value-free manner."[72] She argues that the rule of law be "reinterpreted" so as to "recognize . . . that the law in the statute books is not the real law." Law is a "pragmatic normative practice," and it is only if "we take the pragmatic and hermeneutic view of law" that we can understand the true value of her revised version of the rule of law. Given the ambiguity of this characterization of the "reinterpreted" version of the rule of law, however, it is not clear how Professor Radin could state that the Supreme Court defied the rule of law in *Bush v. Gore*. In fact, Richard Posner has defended *Bush v. Gore* expressly on pragmatic grounds.[73] One could criticize *Bush v. Gore* on grounds of principle or doctrine, but it is difficult to disagree with Posner's pragmatic assessment that the Supreme Court brought valuable finality to an interminable process. Moreover, the logic of the law professors' statement that the Supreme Court defied the rule of law rests on the premise that the "correct" answer could be unambiguously deduced from existing and standard legal principles. It is doubtful that application of a "pragmatic and hermeneutic" of the rule of law would have proved sufficiently determinate to criticize the Supreme Court in the harsh terms advanced by the law professors' letter. A pragmatic view of judicial decision-making supports the Court's decision and a hermeneutic view of law undermines the law professors' belief that the opinion was clearly inconsistent with the law. Thus, the law professors' criticism appears to have implicitly embraced the classical version of the rule of law as application of preexisting principles of law.

Indeed, some notable constitutional law scholars, although critical of *Bush v. Gore*, refused to sign the law professor's letter because of its implication that a determinate "correct" answer was available to the Court and the public.[74] Frank Michelman, for instance, bemoans the paralysis of trying to square his skepticism about the plausibility of the rule of law with his sympathy for the rule of law letter.[75] Others simply swallowed their objections, although later admitting to

[72] See Radin, 69 BU L Rev at 819 (cited in note 4).

[73] *See* Richard A. Posner, *Breaking the Deadlock: The 2000 election, the Constitution, and the Courts* (Princeton U Press, 2001).

[74] See Jack M. Balkin and Sanford Levinson, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of* Bush v. Gore, 90 Georgetown L J 173 (2001).

[75] Frank I. Michelman, *Tushnet's Realism, Tushnet's Liberalism*, 90 Georgetown L J. 199, 213-14 (2001).

discomfort over the letter's implicit adoption of the classical model of the rule of law.[76] Where Professor Radin now stands on the matter of the rule of law is not really clear after *Bush v. Gore*. It is evident, however, that her earlier "reinterpretation" of the rule of law essentially gutted it of its meaning, a meaning accumulated over centuries of historical practice and jurisprudential thought.

Robin West, also a signatory of the law professor's statement, calls for the rediscovery of her version of the "ideals of the Rule of Law." She calls for the recognition of "ideals embedded in a Rule of Law that puts law in the service of the community rather than the strong; in an idea of rights that actually empowers rather than starves and deceives those who possess them; in an idea of justice tied to community rather than to the past or to profit; and lastly, to an idea of the Constitution as expressive of democratic urgings for a just and communal happiness, rather than one that is expressive of nothing but regressive constraints imposed by pretenders to the throne of objectivity in the name of preferencing a strong individualism over the will of peoples."[77]

Even if one agrees with Professor West's substantive goals, it is difficult to understand how these goals embody the principles of the rule of law. How, for instance, can the "democratic urgings for a just and communal happiness" be expressed as neutral, purpose-independent rules of conduct that provide the foundation for cooperation and economic activity? How can stability and predictability be furthered by a law that changes according to the desires of the "community"? How can the rule of law be vindicated by tying individuals' rights to own and use property, or to voluntarily exchange property, to their relative wealth or status in society? Indeed, if the rule of law can be exemplified in Henry Sumner Maine's famous observation that the rise of the modern law can be summed up in the movement from "status to contract," Professor West argues for the antithesis—law that defines one's legal entitlements to one's socioeconomic status or some other measure of "justice." Although Professor West professes adherence to the rule of law, it is clear that she actually advances a vision antithetical to the rule of law and its virtues.[78] Hayek observed that the notion of "social justice" is the very antithesis of the rule of law, in that it requires discretionary contextual decision-making, rather

[76] Id at 195. The list of signatories includes among others, Morton Horwitz, whose tepid enthusiasm for the rule of law is quoted at length above. Other signers professing their life-long dedication to the rule of law include a number of critical legal studies, critical race, and other radical scholars

[77] Robin West, *Reconstructing the Rule of Law*, 90 Georgetown L J 215, 220 (2001).

[78] See Oakeshott, *Rule of Law* at 159 (cited in note 15).

than subjecting governance abstract and equally-applied rules.[79] Thus, such laws "are not fully general but single out particular persons or groups and confer upon them special rights and duties."[80] The rule of law "is concerned neither with the motives nor with the intentions of actions," Oakeshott observes.[81] Although West's vision may be normatively desirable on other grounds, it is not a vision that resounds in the themes of the rule of law.[82]

In short, contrary to Justice Stevens's rhetoric, the rule of law stands after *Bush v. Gore*. Indeed, it appears that it is stronger than ever. It is notable that when law professors objected to what they perceived as arbitrary political action by the Supreme Court, they called-upon the traditional model of the rule of law to press their case. It was quickly recognized that the claim that language was ambiguous and that law was all politics offered little to object to official governmental action of which they disapproved. Only a principled commitment to the rule of law and commitment to its application in practice can provide the bulwark for constraining arbitrary governmental action. Although they were incorrect in their application of the rule of law to the situation of *Bush v. Gore*, it is to be hoped that they now recognize the value of the tradition vision of the rule of law and its emphasis on constitutionalism, rule-based decision-making, and neutral principles.

IV. THE RULE OF LAW AND ECONOMIC DEVELOPMENT

In recent years developing countries have discovered the importance of the rule of law in the creation of a free and prosperous society. The emergence of the "New Institutional Economics" school has provided an intellectual framework for understanding the influence of the rule of law and other legal and political institutions on freedom and economic prosperity.[83] For most of the twentieth-century, the link between the rule of law and economic growth was not obvious. The apparent economic successes of the Soviet Union in the first half of the century gave credence to socialist economic planners. In the West,

[79] See F.A. Hayek, *The Mirage of Social Justice*, 2 *Law, Legislation, and Liberty* (1976); see also D.Neil MacCormick, *Spontaneous Order and the Rule of Law: Some Problems*, 2 Ratio Juris 41, 46 (1989).

[80] Hayek, *Constitution of Liberty* at 154 (cited in note 12).

[81] Oakeshott, *Rule of Law* at 148 (cited in note 15).

[82] See id at 136 ("This mode of association may be opprobriously branded 'legalistic' andother modes may be considered more interesting or more profitable, but this I think is what the rule of law must mean.").

[83] See, e.g., Douglass C. North, *Institutions, Institutional Change, and Economic Performance* (Cambridge U Press 1990).

Fascism provided another model of economic planning and in the rest of the West, the Keynesian response to the Great Depression provided justification for intervention and regulation of the economy. Over time the Keynesian model matured and evolved, giving rise to endogenous growth models and other related models. Regardless of the label, however, each of these growth models shared a similar core—a concentration on aggregate economic behavior, rather than the incentives and institutions that conditioned individual economic activity on the ground.

It was thus believed that with the "scientific" models of macroeconomic planning, it was only a matter of time before the economies of undeveloped countries would "converge" on those of the West. Instead, over the past several decades the gap between rich and poor has generally widened rather than narrowed. But this pattern of failure has not proved uniform. Ireland, Botswana, Chile, and the Asian Tigers of Hong Kong, Singapore, Taiwan, have all prospered even as neighboring countries have collapsed into misery.

What distinguishes the success stories from the failures? The evidence is now almost overwhelming that the key distinction is the differing quality of institutions in these various countries.[84] Of particular importance appears to be the rule of law. The link between the rule of law and economic growth derives from the micro-level incentives created by the conditions sustained by the rule of law. By constraining arbitrary governmental activity, the rule of law provides an institutional framework conducive to investment, entrepreneurship, and long-term capital development.

Armed with the insights of the New Institutional Economics, in recent years scholars have begun to try to test the proposition of the relationship between the rule of law and economic growth.[85] These scholars have attempted to construct a number of empirical measures of the rule of law. In general, the rule of law encapsulates such values as stability in legal rules, restraints on arbitrary governmental action, and safety of investment capital. The documented effect of increasing rule of law values on economic growth is robust. Individuals are more willing to invest in economic growth where property rights are stable, contracts are secure, and arbitrary governmental action is restrained. Interestingly, democratic elections are far less important than the rule of law in building economic growth. The reason is straightfor-

[84] Daron Acemoglu, Simon Johnson, and James A. Robinson, *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 Am Econ Rev 1369 (2001).

[85] Robert J. Barro, *Rule of Law, Democracy, and Economic Performance*, in Gerald P. O'Driscoll, Kim R. Holmes, Melanie Kirkpatrick, eds, *2000 Index of Economic Freedom* 31 (Heritage Foundation and Dow Jones & Co., 2000); Robert J. Barro, *Determinants of Economic Growth: A Cross-Country Empirical Study* (MIT Press, 1997).

ward—there is no reason to believe that democracy will tend to produce the types of institutions necessary for economic growth to occur. Indeed, democracies may be prone to redistributive and special interest politics that have the tendency to dampen economic growth. This anomaly explains the economic success of countries such as Chile, Singapore, and Hong Kong which went through periods of rapid economic growth, notwithstanding a complete absence of democratic politics. Democracy was absent, but rule of law values were strong in such countries, providing an environment conducive to economic growth.

The recognition of the need for the rule of law is increasingly being recognized throughout the world. In Eastern Europe, the fall of Communism has presented those countries with the challenge of building an economy, democracy, and constitutional order from the ashes of the old regime. The Communist system was fundamentally antithetical to the rule of law. The rule of law constrains official action by requiring that actions be neutral, prospective, and even-handed. By contrast, the Communist system was grounded in the need to empower officials and the community to exercise their discretion to make individualized determinations of merit and justice.[86] Indeed, the inability to constrain Russian leaders within the confines reaches back to the Czars, whose political power grew in part from undermining the stability of property rights and using the power of the throne to confiscate the property of political opponents.[87]

Latin America confronted similar problems. Latin America inherited a legacy of arbitrary executive power and a weak tradition of the rule of law. In addition, just as Eastern Europe's progress was retarded as a result of the embrace of Communism, Latin America was influenced by a potent brew of socialism and "liberation theology" derived from Catholic and Marxist thought.[88] Like Communism, these influences focused on collectivist notions such as "social justice" and the like, rather than the individual private ordering embedded in the rule of law. The result was economic stagnation, unstable democracy, and political repression. In recent years, however, many Latin American countries have begun taking steps toward growing a rule of law that will constrain governmental meddling in the economy and thereby provide a stable foundation for freedom, democracy, and free markets. As a result, economic indicators have begun to generally move in the desired direction, even as some setbacks (such as in Argentina) have slowed progress in some countries.

[86] See F.A. Hayek, *The Fatal Conceit* (U of Chicago, 1988).
[87] See Richard Pipes, *Property and Freedom* (Knopf, 1999)
[88] See Novak, *Spirit* (cited in note 2).

V. THE RULE OF LAW, FREEDOM, AND PROSPERITY

It is thus an exciting time for those interested in the influence of institutions for economic growth. Moreover, as the foregoing discussion has indicated, the new understanding of economic growth requires an interdisciplinary focus. The problems here are not primarily economic, rather they are legal, constitutional, and political. As Adam Smith observed, if a society provides a stable and sensible legal and political framework, the innate genius of human energy and imagination will allow growth to take care of itself.[89]

George Mason Law School was thus also an appropriate venue to host this conference in November 2001. Since its rebirth in the 1980's under the leadership of Henry Manne and its continuation under Mark Grady, George Mason Law School has dedicated itself to the interdisciplinary analysis of law, focusing especially on the role that economics can play in the positive and normative analysis of law. Under the guidance of Frank Buckley, the Law and Economics Center has flourished in recent years and continues to be on the forefront of judicial education and the sponsorship of cutting-edge academic scholarship such as presented here. Indeed, without the generous sponsorship and intellectual enthusiasm of Professor Buckley and the LEC, this conference would have not been possible.

George Mason Law School also boasts a productive partnership with the Economics Department at George Mason, including the Center for the Study of Public Choice and the James Buchanan Center for the Study of Political Economy. The fruits of this partnership are evident in this symposium, as two of the papers have been supplied by members of the George Mason Economics Department, including Nobel Laureate James Buchanan. Indeed, the earliest genesis of this conference was rooted in a course that I taught with Professor Peter Boettke of the Economics Department in the Fall semester 1999 on "The Legal Foundations of a Free Society." Cross-enrolled between the law school and graduate school of economics, that course provided the initial impetus for the study of the topic presented here. We were fortunate enough to teach the course again during the Fall 2001 semester. Both times the course was sponsored by a generous grant of the Freedom Project of the John Templeton Foundation. I would like to thank the Freedom Project for its sponsorship of the course and the Law School and the Economics Department at George Mason University for accommodating Professor Boettke and myself in exploring the relationship between the rule of law, freedom, and

[89] See Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (U of Chicago, 1976).

prosperity. Without the unique opportunity afforded by the Freedom Project to co-teach the course with Professor Boettke, it is safe to say that the idea for this symposium would have never come into being. Dean Grady and Associate Dean Dan Polsby have enthusiastically supported this project from its inception— financially, intellectually, and logistically.

The *Supreme Court Economic Review* is also an appropriate outlet for the publication of the papers presented here. From its inception, the *Supreme Court Economic Review* has been concerned with the study of the economic consequences of legal rules with a special focus on the United States Supreme Court. As such, part of its implicit focus has been on what has come to be known as the "New Institutional Economics" and the Supreme Court's role in generating the legal rules that guide the economy and society. This issue of the *Supreme Court Economic Review* is consistent with this traditional focus on the economic analysis of the rule of law, while expanding the focus slightly to consider the rule of law in a broader institutional context. As this introductory essay indicates, the rule of law is a concept of critical importance in understanding the decision-making process of the Supreme Court as well as its implications for economic policy. I am grateful to Bruce Kobayashi, Nelson Lund, and Larry Ribstein, my immediate predecessors as editors of the *Supreme Court Economic Review*, for their outstanding efforts in guiding the journal over the past several years and for maintaining the high standards that have characterized the *Supreme Court Economic Review* since its inception.

The papers presented at the symposium build on the themes developed here. The presentation of this symposium issue is divided into four parts comprised of two papers each. The first set of papers looks at the historical and theoretical background of the rule of law and its relationship to economic growth. Economic historian Joel Mokyr examines the question of why the Industrial Revolution occurred in Western Europe, rather than elsewhere in the world. Mokyr focuses on the development and transmission of scientific knowledge and the economic incentives and opportunities to translate underlying scientific principles into applied engineering inventions and further scientific discoveries. Whereas the process of scientific discovery contains many contingencies, Professor Mokyr demonstrates that the conversion of primary scientific knowledge into usable applied knowledge is primarily a function of economic and cultural institutions that provide incentives to exploit this knowledge. Francesco Parisi contributes a paper that further develops his important contributions to the literature on the "anti-commons," an institutional phenomenon that Michael Heller has blamed for many of the difficulties of privatization in the post-Soviet economies.

The second set of papers examines the relationship of the rule of law to other causes and consequences of economic growth, such as social trust and the other "goods" of life. In their earlier work, Stephen Knack and Paul Zak found a robust relationship between social trust and economic growth. The current article builds on this insight to explore the instrumental question of how to build social trust in low-trust countries. Greater social trust enables both greater levels of economic growth as well as more stable and reliable political institutions. As such, social trust performs many of the same functions of the rule of law and thus can be seen as a valuable complement to the rule of law in building healthy societies and economies. Peter Boettke and Bob Subrick explore the other end of the analysis. They explore the way in which the rule of law contributes to the accomplishment of social ends, such as health, quality of life, and other indicia of individual welfare. Responding to the arguments of Amartya Sen and Martha Nussbaum, Boettke and Subrick conclude that the rule of law is a precondition for both economic growth and the achievement of "human capabilities," such as literacy, health, and other amenities of life.

In the third session, Bob Cooter argues for the value of "many" elections in generating a process for the identifying individuals of high character for public office. His provocative thesis has clear implications for the role of certain kinds of democracy in eliminating corruption in developing countries. Nobel Laureate James Buchanan's article "The Constitutional Way of Thinking" provides a timely reminder to lawyers and other institution builders that the rule of law and constitutional government cannot be taken for granted. Instead, they must be nurtured and understood, and Professor Buchanan shows the unique role that lawyers and economics can play in understanding how to design effective institutions.

The final sets of papers explore the challenge of growing a rule of law in countries that have traditionally lacked it. The article by Jeff Bowen and Susan Rose-Ackerman explore a particular structural approach to the challenge of developing stable and accountable government. Analyzing the case of Argentina, and contrasting it with several other countries, Bowen and Rose-Ackerman explore the relationship between government structure and executive branch accountability. The article by Bernie Black and Anna Tarrasova study the challenge of growing the rule of law and effective legal institutions in Russia.

The conclusion of this symposium is simple but important—the rule of law is the underpinning of freedom and prosperity throughout the world. After several decades of neglect, this message is becoming clear again. There are many ways that societies may choose to live, but there are few ways for societies to live well. A society that seeks freedom and prosperity must also seek the rule of law.