

RHETORIC VERSUS REALITY: THE LINK BETWEEN THE RULE OF LAW AND ECONOMIC DEVELOPMENT

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INTRODUCTION

The last two decades have seen a revival of interest in the rule of law and its relationship with economic development.¹ This revival is part of an ongoing effort to find solutions to the economic difficulties facing developing countries.² Cultural, geographical, and institutional factors are among the various reasons offered as explanations for the slow economic growth of some developing countries.³ In recent years, institutional factors have become the prevailing explanation for the poor performance of developing countries.⁴ The absence of basic institutions that support vibrant market economies is now seen as a major reason why developing countries remain poor.⁵ The vitality of markets—a central element for stimulating economic growth in developing countries and lifting them from poverty—depends on “the establishment of an environment in which legal rights, especially property and contractual rights, are enforced and protected.”⁶ Often taken for granted in developed countries, the institutional frameworks necessary to support market economies, especially legal institutions, are usually either lacking or ineffective in developing

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¹ Recent publications on the subject include KENNETH W. DAM, *THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT* (2006); KATHARINA PISTOR & PHILIP WELLONS, *THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT* (1999); LAW, CAPITALISM, AND POWER IN ASIA: *THE RULE OF LAW AND LEGAL INSTITUTIONS* (Kanishka Jarasuriya ed., 1999); *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* (David M. Trubek & Alvaro Santos eds., 2006).

² See generally *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 1.

³ For a discussion of some of these theories, see DAVID S. LANDES, *THE WEALTH AND POVERTY OF NATIONS: WHY SOME ARE SO RICH AND SOME SO POOR* (1998).

⁴ See, e.g., DOUGLASS NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1999); Daron Acemoglu, Simon Johnson & James Robinson, *Institutions as the Fundamental Cause of Long-Run Growth*, in *HANDBOOK OF ECONOMIC GROWTH* 385 (Phillippe Aghion & Steven N. Durlauf eds., 2005); Dani Rodrik, Arvind Subramanian & Francesco Trebbi, *Institutions Rule: The Primacy of Institutions over Integration and Geography in Economic Development*, 9 *J. ECON. GROWTH* 131 (2004).

⁵ See Richard Posner, *Creating a Legal Framework for Economic Development*, 13 *WORLD BANK RES. OBSERVER* 1 (1998).

⁶ *Id.* at 1.

countries.⁷ Therefore, establishing effective institutions is considered an important element of the strategy for promoting economic development in these countries.⁸ As a consequence, the issue of economic growth in these countries has been “reconceived largely as a question of governance.”⁹ This has prompted a heightened emphasis on how reforms, especially legal reforms, in these countries can be used to propel their development.¹⁰

Much of the effort in promoting legal reforms in developing countries has concentrated on implementing rule of law initiatives.¹¹ Studies that appear to show a link between the rule of law and economic development motivate the drive to institutionalize the rule of law in developing countries.¹² Although this professed link remains contested, international aid organizations and foreign governments continue to push the rule of law agenda, often offering as justification not only the inherent benefits of the rule of law in creating a limited government but, principally, its ability to foster economic development.¹³

The World Bank and the International Monetary Fund (“IMF”) have been at the forefront of the latest efforts to implement institutional law reforms in developing countries.¹⁴ Even though these international organizations often do not directly subsidize rule of law initiatives, they promote these initiatives by encouraging member states to adopt best practices anchored by the rule of law and by sometimes conditioning financial assistance to developing countries on

⁷ Legal institutions are especially important institutional frameworks for supporting market economics. For a discussion of the economic consequences of poor quality institutions in developing countries, see Philip Keefer & Stephen Knack, *Why Don't Poor Countries Catch Up? A Cross-National Test of an Institutional Explanation*, 25 *ECON. INQUIRY* 590, 590 (1997).

⁸ See Ronald J. Daniels & Michael Trebilcock, *The Political Economy of Rule of Law Reform in Developing Countries*, 26 *MICH. J. INT'L L.* 99, 102 (2004).

⁹ Kerry Rittich, *The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social*, 26 *MICH. J. INT'L L.* 199, 207 (2004).

¹⁰ See generally HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* 185–87 (1989); THE WORLD BANK, *WORLD DEVELOPMENT REPORT 1997: THE STATE IN A CHANGING WORLD* (1997).

¹¹ See DANIELS & TREBILCOCK, *supra* note 8, at 100 (reviewing the recent experience with rule of law reform initiatives in Latin America, Africa, and Central and Eastern Europe).

¹² See, e.g., Robert J. Barro, *Rule of Law, Democracy and Economic Performance*, in 2000 *INDEX OF ECONOMIC FREEDOM* 31, 33–47 (Gerald P. O'Driscoll, Kim R. Holmes & Melanie Kirkpatrick eds., 2000).

¹³ For a discussion of the World Bank's rule of law initiatives, see Gordon Barron, *The World Bank & Rule of Law Reforms* (Dev. Studies Inst., Working Paper No. 05-70, 2005), available at <http://www.lse.ac.uk/collections/DESTIN/pdf/WP70.pdf>.

¹⁴ See THE WORLD BANK, LEGAL VICE PRESIDENCY, *INITIATIVES IN LEGAL AND JUDICIAL REFORM 2002*, at 1 (2002), available at <http://siteresources.worldbank.org/BRAZILINPOREXTN/Resources/3817166-1185895645304/4044168-1186409169154/18initiativesFinal.pdf>.

their adoption of institutional reforms aimed at enshrining and extending the rule of law.¹⁵ Governmental agencies (such as the aid and development agencies of the European Union and the United States) and non-governmental agencies (such as private foundations) have also played active roles in promoting rule of law initiatives.¹⁶ It has been estimated that from the 1980s to the 1990s, organizations such as the World Bank and the U.S. Agency for International Development (“USAID”) spent more than \$1 billion on rule of law initiatives.¹⁷

Economists have also played a crucial role in the revival of rule of law initiatives as tools for promoting economic growth.¹⁸ There has been a proliferation of economic studies on the relationship between the state of legal institutions and economic growth, both in developed and developing countries.¹⁹ Remarking on recent economic studies on the role of law in development, *The Economist* noted that “in the past ten years the rule of law has become important in economics”; in particular, it “has become the motherhood and apple pie of development economics.”²⁰ *The Economist* further noted that the “rule of law is held to be not only good in itself, because it embodies and encourages a just society, but also a cause of other good

¹⁵ See Olav Stokke, *Aid and Conditionality: Core Issues and State of Art*, in AID AND POLITICAL CONDITIONALITY 14 (Olav Stokke ed., 1995).

¹⁶ On the role of private foundations in promoting the rule of law in developing countries, see Richard Wilson, *Training for Justice: The Global Reach of Clinical Legal Education*, 22 PENN ST. INT’L L. REV. 421, 424–31 (2004).

¹⁷ Frank Upham, *Mythmaking in the Rule of Law Orthodoxy* 8 (Carnegie Endowment for Int’l Peace, Dem. & Rule of Law Project, Working Paper No. 30, 2002); see also Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 31–32 (Thomas Carothers ed., 2006). The U.S. government has included rule of law scores among the criteria it uses to determine eligibility of foreign states to receive foreign aid from its Millennium Challenge Account. See MILLENNIUM CHALLENGE CORP., REPORT ON THE CRITERIA AND METHODOLOGY FOR DETERMINING THE ELIGIBILITY OF CANDIDATE COUNTRIES FOR MILLENNIUM CHALLENGE ACCOUNT ASSISTANCE IN FY 2004 (2004).

¹⁸ See, e.g., ROBERT J. BARRO, DETERMINANTS OF ECONOMIC GROWTH: A CROSS-COUNTRY EMPIRICAL STUDY (1997).

¹⁹ For an overview of the literature, see Frank Cross, *Law and Economic Growth*, 80 TEX. L. REV. 1737 (2002). See also Christopher Clague, Philip Keefer, Stephen Knack & Mancur Olson, *Institutions and Economic Performance: Property Rights and Contract Enforcement*, in INSTITUTIONS AND ECONOMIC DEVELOPMENT: GROWTH AND GOVERNANCE IN LESS-DEVELOPED AND POST-SOCIALIST COUNTRIES 67 (Christopher Clague ed., 1997) (discussing the role of contract enforcement in economic development); Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might be Right*, 30 J. LEGAL STUD. 503 (2001) (discussing evidence that common law countries experience faster economic growth than civil law countries).

²⁰ *Economics and the Rule of Law: Order in the Jungle*, ECONOMIST, Mar. 13, 2008, at 83.

things, notably growth.”²¹ These economic studies have been useful in drawing attention to the relevance of institutional reforms, including legal reforms, to economic development. However, some of the studies have not always demonstrated an appreciation of proper usage of basic legal concepts such as “law,” “rights,” and “property rights.”²² Law and economics scholars, who have also been active in exploring the linkage between institutions and development, have been more careful in their usage of these concepts.²³

This latest interest in the role of legal institutions in economic development, sometimes called the second wave of the law and development movement,²⁴ has resulted in developing countries expending significant resources to reform their legal institutions.²⁵ These resources have been spent on institutional reforms, such as enshrining the rule of law, reforming judiciaries, modernizing administration of justice, and strengthening the enforcement of legal norms.²⁶ Whether these law reform initiatives are a result of local impetuses for change or a product of the pressure exerted on these countries by external agencies and foreign governments, the increased emphasis on rule of law initiatives raises the important question of whether this use of scarce resources is warranted considering the effects of rule of law reforms. This appraisal is especially necessary in view of the range of pressing economic and social problems confronting these countries. For example, money spent on rule of law initiatives is money that could have been spent on the direct alleviation of poverty or on the health care needs of the poor.²⁷ To be worthwhile, the expenditures on rule of law initiatives must be justified by the measurable benefits that accrue to the countries that adopt them. Against the background of the limited resources of developing countries and the severity and immediacy of their economic and social problems, the opportunity cost of the resources they spend on promoting rule of law initiatives is put in sharp relief.²⁸

²¹ *Id.*

²² Cross, *supra* note 19, at 1738.

²³ See Posner, *supra* note 5, at 1 (noting that economic prosperity in developing countries “requires at least a modest legal infrastructure centered on the protection of property and contract rights”).

²⁴ The law and development movement of the 1960s and the 1970s is regarded as the first wave of the movement. See *infra* note 33–37 and accompanying text.

²⁵ Rittich, *supra* note 9, at 213–15.

²⁶ See, e.g., Posner, *supra* note 5, at 3–5.

²⁷ See Rittich, *supra* note 9, at 213–17.

²⁸ See *id.* at 213.

The suggestion here is not that the rule of law should be viewed primarily from an instrumental perspective. After all, it was not for the promotion of economic growth that the concept of the rule of law was initially conceived. Classical rule of law theorists were not concerned primarily with economic development, but with the creation of limited governments in which individual liberties and freedoms could flourish.²⁹ Historically, the creation of a state of liberties and freedoms, not the promotion of economic growth, was the foremost concern of rule of law theories.³⁰ In a liberal state, the rule of law is an end in itself, for only in a state of limited powers can the liberties and freedoms of individuals be free from unrestrained attacks, both from the government and from other citizens.³¹

The rule of law therefore has important moral goals other than the promotion of economic development. These goals are of inherent value and are, in themselves, independent justifications for the entrenchment of the rule of law. However, when rule of law initiatives are advocated and implemented on the ostensible basis of their connection to the stimulation of economic development, it is useful to explore the validity of this professed link and to assess whether the benefits of these initiatives outweigh their opportunity costs, measured in terms of forgone investments in other areas of social need.

Kevin E. Davis and Michael J. Trebilcock have noted that advocates of legal reform as an engine for economic development manifest three levels of optimism: (1) optimism about the causal link between targeted legal reform and economic development; (2) optimism about the possibility of effective legal reform; and (3) optimism about the ability to identify the types of legal reforms that more directly stimulate economic development.³² Knowing whether this optimistic outlook is warranted by the practical experience of those countries that have implemented rule of law reforms is vital to determining if the substantial investments in rule of law reforms would yield

²⁹ In fact, some commentators have argued that wealth maximization ought not to be viewed as a concern of the law. See Ronald Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 191–226 (1980). In contrast, Richard Posner contends that “wealth maximization may be the most direct route to a variety of moral ends,” including liberty and dignity of the human person. RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 382 (1990).

³⁰ See John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457, 461–63 (1977).

³¹ See *id.*

³² Kevin E. Davis & Michael J. Trebilcock, *The Relationship between Law and Development: Optimists Versus Skeptics*, 56 AM. J. COMP. L. 895, 896 (2008).

the professed dividend of economic development in the struggling parts of the world.

The primary objective of this Article is to determine whether there is any validity to the professed link between the rule of law and economic development. This discussion is put in its proper historical context by an examination of the origin and evolution of law and development theories. The paper then analyzes the competing definitions of the rule of law. Understanding the proper usage of the doctrine is vital in this study because the economic implications of the doctrine depend, in part, on which conception of the doctrine is preferred. The paper then evaluates the arguments for and against a connection between the rule of law and economic development. It also considers the effect of the new institutional economics (“NIE”) theory on our understanding of the factors that contribute to economic progress. Finally, drawing on the insight of the NIE theory, it canvasses the limits of formal legal institutions in influencing economic growth.

The basic view that animates this Article is that while the rule of law may be helpful in building the basic framework to support a market economy, legal reforms alone are inadequate to address the problem of economic growth in developing countries. It is only when coupled with other institutional reforms—formal and informal—that the rule of law can have discernible benefits on economic prosperity. The paper suggests that, rather than being viewed primarily as an engine for stimulating economic development in developing countries, rule of law reform should be approached as part of a broader strategy for stimulating economic growth in the large part of the world that has been struggling with the problem of economic deprivation.

I. THE ORIGINS OF THE LAW AND DEVELOPMENT MOVEMENT

Although optimism about the role of legal institutions in promoting development has a long ancestry,³³ the first wave of the law and development movement of the 1960s and the 1970s represented the first concerted campaign to advance the primacy of legal institutions in the campaign for development.³⁴ Spearheaded by a band of liberal American lawyers, the movement brought

³³ For example, Max Weber, in his writings, emphasized the central role of legal institutions as engines for development. See David Trubek, *Max Weber on Law and the Rise of Capitalism*, 3 *Wis. L. REV.* 720, 722–25 (1972).

³⁴ For an overview of this first wave, see Merryman, *supra* note 30, at 461–73.

academic and political attention to the relationship between law and economic development.³⁵ Although the movement was rather short-lived,³⁶ and its focus was limited to a few Latin American and African countries, it succeeded in bringing considerable political and academic attention to the use of legal institutions in promoting economic development in the developing world.³⁷

Modernization theory heavily influenced the work of this movement.³⁸ Advocates of the modernization theory believed the outdated economic, political, social, and cultural structures of developing countries accounted, in large part, for their underdevelopment.³⁹ Drawing from the experience of developed countries whose economic prosperity was characterized by the modernization of their political, social, and cultural structures, modernization theorists believed a similar transition from traditionalism to modernity in institutional structure was essential for the development of the developing world.⁴⁰ To these theorists, the experience of the developed world contained a blueprint of the trajectory of economic development—a blueprint that provided an operational schema for advancing the development agenda.⁴¹ This attitude is encapsulated in the view of Cyril E. Black:

Although the problems raised by generalizations from a rather narrow base [the now modern countries] must be acknowledged, the definition of modernity takes the form of a set of characteristics believed to be generally applicable to all societies. This conception of modernity, when thought of as a model or ideal type, may be used as a yardstick with which to measure any society.⁴²

Influenced by the evolutionary perspective of modernization theory,⁴³ the law and development movement believed that the modernization of the legal

³⁵ For an historical survey of earlier efforts to articulate a link between law and development, see Duncan Kennedy, *Three Globalizations of Legal Thought: 1850–2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 1, at 19.

³⁶ The reasons for the demise of the first movement have been widely discussed. *See, e.g.*, Brian Tamanaha, *The Lessons of Law and Development Studies*, 89 *AM. J. INT'L L.* 470, 476–77 (1995); Merryman, *supra* note 30, at 483.

³⁷ Merryman, *supra* note 30, at 461–64.

³⁸ For a review of modernization theory, see DAVID APTER, *RETHINKING DEVELOPMENT: MODERNIZATION, DEPENDENCY, AND POSTMODERN POLITICS* (1987).

³⁹ C. E. BLACK, *THE DYNAMICS OF MODERNIZATION: A STUDY IN COMPARATIVE HISTORY* 6 (1966).

⁴⁰ *Id.* at 69–71.

⁴¹ *Id.*

⁴² *Id.* at 53.

⁴³ Walt Rostow, a noted American economic historian, has similarly advocated a theory of development based on evolving stages of economic growth. *See* WALT ROSTOW, *STAGES OF ECONOMIC GROWTH: A NON-COMMUNIST MANIFESTO* (1960).

systems and laws of developing countries along the Western model was vital to the development of these countries.⁴⁴ Adherents of the law and development movement came to view the law as “a force which can be molded and manipulated to alter human behavior and achieve development.”⁴⁵ For the developing world, in their view, the role of the state and lawyers in the legal system was to promote the enactment of legal regimes and legal rules modeled on the Western experience.⁴⁶ These reforms would help to modernize their legal systems, a modernization project that was a “functional prerequisite of an industrial economy.”⁴⁷ This modernization project would require in some cases the direct transplantation of Western rules and institutions.⁴⁸ They believed that these modernized institutions would, similar to the Western experience, provide an impetus for economic development.⁴⁹

The first wave of the law and development movement came into force at a time when active state participation in the economy was considered vital to the economic health of nations.⁵⁰ In many parts of the developing world, state regulation of the economy and, in particular, state support of infant industries were viewed as necessary to stimulate economic growth.⁵¹ In line with this model of economic development, the adherents of the first wave promoted the use of law as an instrument for effective state intervention in the economy.⁵² They viewed the law not primarily as a means of creating a business climate in which private enterprise and initiative could be fostered, but as a means of using state power to regulate the working of the economy to promote desirable social and economic ends.⁵³ In their view, the private sector was “too weak to provide ‘take-off’ to self-sustaining growth.”⁵⁴ Furthermore, they considered

⁴⁴ David M. Trubek, *Toward A Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1, 6 (1972).

⁴⁵ Elliot Burg, *Law and Development: A Review of the Literature and a Critique of “Scholar in Self-Estrangement,”* 25 AM. J. COMP. L. 492, 505 (1977).

⁴⁶ *See id.*

⁴⁷ Trubek, *supra* note 44, at 6.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *See Merryman, supra* note 30, at 461–64.

⁵¹ David M. Trubek & Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 1, at 5.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

import substitution in the internal market as an engine of growth.⁵⁵ According to David M. Trubek, during the first wave, “[t]he basic economic model was one of a regulated market economy in which the state played an active role, not just through various forms of planning and industrial policy but also through state ownership of major industries and utilities.”⁵⁶ Legislation could translate “policy goals into action by channeling economic behavior in accordance with national plans.”⁵⁷

Because of their belief in the instrumental use of law in promoting development, adherents of the first wave of the law and development movement placed much emphasis on the reform of legal education and the legal profession to engineer social reform in developing countries.⁵⁸ The expectation was that lawyers properly tutored in the social use of the law would help close the gap between the law “in the books” and the law “in action.”⁵⁹ Adherents of the first wave of the movement were persuaded that “by training lawyers to think more instrumentally, [law] schools could initiate change that would narrow the gap between the present performance of the legal profession and its developmental possibilities.”⁶⁰ They encouraged law schools to “study and explain the relationship between specific legal rules, doctrines, and procedures on the one hand, and national developmental goals on the other, urging their students to work to reform those laws and institutions that failed to further the goals.”⁶¹

Underpinning the law and development movement was a “tacit set of assumptions” that influenced the work and advocacy of its adherents.⁶² Trubek and Marc Galanter articulated these assumptions in their celebrated 1974 article, which marked the end of the first wave of the movement:

First . . . [t]he state is the primary locus of supra-individual control in society Second, the state exercises its control over the individual through law—bodies of rules that are addressed universally to all individuals similarly situated Third, rules are

⁵⁵ David M. Trubek, *The “Rule of Law” in Development Assistance: Past, Present, and Future*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, *supra* note 1, at 74–75.

⁵⁶ *Id.*

⁵⁷ Trubek & Santos, *supra* note 51, at 5.

⁵⁸ Trubek, *supra* note 55, at 76–77.

⁵⁹ David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1079, 1082 (1974).

⁶⁰ *Id.* at 1075.

⁶¹ *Id.* at 1075–76.

⁶² *Id.* at 1070.

consciously designed to achieve social purposes or effectuate basic social principles Fourth, [these rules] are enforced equally for all citizens, and in a fashion that achieves the purposes for which they were consciously designed Fifth, . . . the courts have the principal responsibility for defining the effect of legal rules and concepts [Sixth,] courts employ . . . adjudication [that] proceeds from and produces authoritative rules and bodies of doctrine; these authoritative rules and doctrines restate social policy, principles, and purposes in an autonomous body of learning⁶³ Finally, the behavior of social actors tends to conform to the rules.

These assumptions, which Trubek and Galanter called “liberal legalism,”⁶⁴ exhibit some of the weaknesses that led to the failure of the first wave of the law and development movement. The first assumption (regarding the state being the primary locus of supranational control in society) ran counter to the practical reality of multiple centers of control in many developing countries.⁶⁵ In addition to the state, these countries had traditional systems of social control.⁶⁶ Familial relations and ethnic and tribal affiliations remained strong in these societies.⁶⁷ The norms and structures that regulated everyday behavior often arose from these interpersonal relationships.⁶⁸ By focusing mainly on the state as the locus of control, the first wave of the law and development movement failed to reckon with the fact many relationships and much social intercourse—business and personal—were often conducted outside the framework of the formal legal processes. They were also frequently unaffected by the modernized rules whose implementation was spearheaded by adherents of the movement as the key to development.⁶⁹

The limitations of the theoretical framework of the first wave of the law and development movement are further illustrated by the seventh assumption to the effect that “behavior of social actors tends to conform to the rules.”⁷⁰ On the contrary, in traditional societies, behavior is often based on informal norms that derive from social interactions mediated by family members and members of the broader ethnic or tribal groups, and not from formal legal

⁶³ *Id.* at 1080–81.

⁶⁴ *Id.* at 1070.

⁶⁵ *Id.* at 1080.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 1080–81.

⁶⁹ *Id.*

⁷⁰ *Id.* at 1072.

norms interpreted by formal courts.⁷¹ Compared to the strong familial and tribal bonds in these societies, the state was often weak and far removed from the daily lives and concerns of citizens.⁷² Moreover, the formal judicial processes were often irrelevant to the everyday lives of citizens in these newly independent countries, partly because of the costs associated with using them, partly because of the unfamiliarity of the citizens with the formal legal process, and partly because there already existed effective informal channels for resolving disputes.⁷³ What is more, the law and development movement did not recognize the salience of customary laws in these societies, a system of law whose norms were less amenable to governmental influence and more closely related to the personal and communal experiences of the people.⁷⁴

Modernization and urbanization have certainly broadened the reach of formal legal norms in developing countries. However, the fact remains that in more traditional societies the role of informal norms is more pronounced than it is in more modern societies.⁷⁵ Consequently, any effort to reform the system of social control in such societies must wrestle with the reality that a substantial part of social organization and interaction remains outside the reach of the formal legal processes. It bears remembering: “The center of gravity in each society rests upon its unique historical, cultural, economic, political and material (population, natural resources, technology base, and so forth) mix.”⁷⁶ This means that it is important always to consider the “derivative nature and secondary influence of the law.”⁷⁷

Another weakness in the theoretical framework of the first wave of the law and development movement was its assumption that rules are “enforced equally for all citizens.”⁷⁸ Newly independent of their colonial masters and burdened with weak political institutions, many developing countries in the 1960s were run by politicians who used the law not as instruments for promoting the general welfare, but more as a tool for advancing personal,

⁷¹ See Kevin Fandl, *The Role of Informal Legal Institutions in Economic Development*, 32 FORDHAM INT'L L.J. 1, 4 (2008).

⁷² *Id.* at 10–12.

⁷³ *Id.*

⁷⁴ *Id.* at 12–13.

⁷⁵ *Id.* at 11.

⁷⁶ Brian Z. Tamanaha, *The Lessons of Law and Development Studies*, 89 AM. J. INT'L L. 470, 484 (1995).

⁷⁷ *Id.* at 484.

⁷⁸ Trubek & Galanter, *supra* note 59, at 1072.

partisan, and ethnic interests.⁷⁹ Legal rules were rarely equally enforced among citizens. Often immune from the reach of the law, the rich and the elites in these societies saw the law as an instrument for promoting their interests.⁸⁰ As Trubek and Galanter realized, “the most serious challenge” of the assumptions of liberal legalism was realizing that the law could be used for anti-development ends, especially when commandeered by elites and channeled towards the consolidation of personal power.⁸¹ Brian Z. Tamanaha shared this insight, noting: “When the state is captured by authoritarian groups, law seen in primarily instrumental terms cannot serve as a restraint. Lacking its own internal values or goals, law will become an instrument of those who control and set the goals of the state.”⁸² Perversely, by emphasizing the instrumental use of the formal legal process (an institution that remained under the control of a powerful few in these newly-independent countries) and by insufficiently emphasizing the democratic aspects of the law, the law and development movement may have inadvertently reinforced the inequalities in these societies and also helped the ruling class to consolidate its hold on state power.

The model of liberal legalism as embodied in the first wave of the law and development movement failed.⁸³ Describing the reasons for the failure of the model of liberal legalism, Trubek and Galanter observed:

Empirically, the model assumes social and political pluralism, while in most of the Third World we find social stratification and class cleavage juxtaposed with authoritarian or totalitarian political systems. The model assumes that state institutions are the primary locus of social control, while in much of the Third World the grip of tribe, clan, and local community is far stronger than that of the nation-state. The model assumes that rules both reflect the interest of the vast majority of citizens and are normally internalized by them, while in many developing countries rules are imposed on the many by the few and are frequently honored more in the breach than in the observance. The model assumes that courts are central actors in social control, and that they are relatively autonomous from political, tribal, religious, or class interests. Yet in many nations courts are neither very independent nor very important.⁸⁴

⁷⁹ *Id.* at 1092–93.

⁸⁰ *Id.* at 1093.

⁸¹ *Id.* at 1083.

⁸² Tamanaha, *supra* note 76, at 474.

⁸³ Trubek & Galanter, *supra* note 59, at 1080.

⁸⁴ *Id.* at 1080–81.

By the end of the 1970s, the major pillars of the law and development movement had collapsed.⁸⁵ The faith of its adherents in the cultural transplantation of Western law into developing countries proved to be misplaced. The practical difficulties of transplanting legal regimes and legal institutions between cultures proved the undoing of the transplantation project. Additionally, their confidence in the centrality of formal legal norms in social interactions was undermined by the reality of the importance of informal norms in developing societies.⁸⁶ Even when the formal legal process was beneficial to the poor, it was often unaffordable or otherwise beyond their reach—a factor that militated against any substantial penetration of the effect of formal legal norms.⁸⁷

By the beginning of the 1980s, another pillar of the first wave of the law and development movement—the conception of the law as a means of promoting active state intervention in the economy—came under attack.⁸⁸ This attack arose from a new economic paradigm (neoliberal economics) that emphasized the importance of free markets, privatization, and limited state intervention in the economy.⁸⁹ Under this new paradigm, “the best way to achieve growth was by getting prices right, promoting fiscal discipline, removing distortions created by state intervention, promoting free trade, and encouraging foreign investment.”⁹⁰ The role of the state in the economy was reconceptualized as that of providing effective institutions to guarantee the smooth operation of private enterprise.⁹¹ This was to be done by the protection of property rights, the enforcement of private contracts, and the limitation of the arbitrary exercise of government power.⁹²

⁸⁵ Trubek, *supra* note 55, at 78.

⁸⁶ *Id.* at 78–81.

⁸⁷ Trubek & Galanter, *supra* note 59, at 1076.

⁸⁸ Kennedy, *supra* note 35, at 129.

⁸⁹ Roberto Unger has defined neoliberalism as:

The program committed to orthodox macroeconomic stabilization, especially through fiscal balance, achieved more by containment of public spending than by increase in the tax take; to liberalization in the form of increasing integration into the world trading system and its establishment rules; to privatization, understood both more narrowly as the withdrawal of government from production and more generally as the adoption of standard Western private law; and to the development of compensatory social policies (‘social-safety nets’) designed to counteract the unequalizing effects of other planks in the orthodox platform.

ROBERTO UNGER, *DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE* 53 (1998).

⁹⁰ Trubek & Santos, *supra* note 51, at 5.

⁹¹ *Id.* at 5–6.

⁹² *Id.*

The foregoing trends ran counter to the theoretical superstructure that undergirded the first wave of the law and development movement. With time, this wave was overtaken by the second wave of the law and development movement.⁹³ The theoretical outlook and framework of this second wave of the law and development movement was more consistent with the emerging neoliberal focus on the promotion of private enterprise and the limitation of state intervention in the market place as the preferred strategies for promoting economic growth.⁹⁴

The shift from active state participation in the economy to the celebration of private enterprise gained widespread acceptance in the late 1970s and 1980s.⁹⁵ The collapse of communism, which had championed central planning and active state intervention in the economy, helped consolidate the consensus that private enterprise, not state-controlled markets, was the appropriate method of promoting economic growth.⁹⁶ Neoliberalism stressed the centrality of markets and emphasized the role of law, not as an instrument for state intervention in the market, but “as the foundation for market relations and as a *limit* on the state.”⁹⁷ Persuaded that “working markets were both necessary and sufficient for growth,”⁹⁸ neoliberals believed “the primary role assigned to legal institutions was one of a foundation for market relations.”⁹⁹ In this regime, the role of the state is less to manage the economy than to provide and support the institutions that maintain the market system.¹⁰⁰

In contrast with the outlook of the adherents of the first wave of the law and development movement, neoliberals were not primarily concerned with legal education, the role of lawyers, or with the gap between law in the books and law in action. Their primary objective was to restrain the exercise of state power in so far as this power inefficiently inhibited private enterprise.¹⁰¹ Therefore, the focus shifted from using the law as a means of social

⁹³ *Id.* at 2.

⁹⁴ *Id.*

⁹⁵ Kennedy, *supra* note 35, at 129.

⁹⁶ See Charles Gore, *The Rise and Fall of the Washington Consensus as a Paradigm for Developing Countries*, 28 *WORLD DEVELOPMENT* 789, 795 (2000) (discussing the effects of the collapse of communism in further detail).

⁹⁷ Trubek & Santos, *supra* note 51, at 2.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Kennedy, *supra* note 35, at 129.

¹⁰¹ Trubek & Santos, *supra* note 51, at 2.

engineering to using the law as a means of limiting governments, protecting property rights, and enforcing private obligations.¹⁰²

The globalization of the world economy was to further fuel the drive toward privatization and the opening of the markets in developing countries.¹⁰³ With globalization, increased focus came to be placed on the attraction and retention of foreign investment as a means of encouraging economic development in the developing world.¹⁰⁴ To attract foreign investment, these countries were encouraged to open up their markets to foreign competition, to reduce state intervention in the market place, and to enact legal regimes for the protection of foreign private investments.¹⁰⁵

Neoliberalism also stressed the importance of setting up the proper institutional framework for the operation of market economies.¹⁰⁶ Under this new paradigm, “the institutional setting of policymaking, especially the rule of law,” was considered crucial because “if the rules of the game were a mess . . . no amount of tinkering with macroeconomic policy would produce the desired result.”¹⁰⁷

In the second wave of the law and development movement, the rule of law came to be seen as the primary means of accomplishing this dual objective of limiting the ability of the state to arbitrarily interfere with the operation of the market and of setting up the fundamental institutional framework for the operation of market economies:

Respect for the rule of law is a basic requirement for creating the conditions that foster business development. It provides the security that protects individuals’ basic political and human rights. But the rule of law also provides entrepreneurs and small business owners the confidence they need to enter the formal economy and contribute to nationwide economic growth and development. Both these businesspeople and established corporations are more likely to thrive where the laws are clearly defined, known to the public, and applied

¹⁰² Kennedy, *supra* note 35, at 129.

¹⁰³ Gore, *supra* note 96, at 790.

¹⁰⁴ See *id.*, at 789. Under the Washington Consensus, developing countries were encouraged to “open their economies to the rest of the world through trade and capital account liberalization.” *Id.*

¹⁰⁵ See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, CHECKLIST FOR FOREIGN DIRECT INVESTMENT INCENTIVE POLICIES 7–8 (2003), available at <http://www.oecd.org/dataoecd/45/21/2506900.pdf>.

¹⁰⁵ Trubek & Santos, *supra* note 51, at 2.

¹⁰⁶ *Id.*

¹⁰⁷ *Economics and the Rule of Law: Order in the Jungle*, *supra* note 20, at 83.

neutrally and without prejudice across all members and classes of society.¹⁰⁸

The core goal of both the first and second wave of the law and development movement was, of course, the promotion of development.¹⁰⁹ The essential difference was that while adherents of the first wave of the movement believed that development could be achieved through active state intervention and the transplanted Western legal institutions, adherents of the second wave operated on the premise that only through private enterprise and the practice of the free market, anchored by the rule of law, could societies escape poverty.¹¹⁰

Neoliberal ideology, with its emphasis on private enterprise, was at the heart of the second wave of the movement. While it stressed the importance of private enterprise in generating economic growth, it did not accord much attention to the issues of wealth distribution and fairness in the allocation of economic resources.¹¹¹ Its primary objective was the creation, not the redistribution, of economic wealth.¹¹² This lack of concern with redistributive ends has exposed one of the weaknesses of neoliberal economics as an underpinning for law and development theory. Economic growth does not invariably lead to poverty alleviation. A wealthy society may have a substantial percentage of people living in poverty because the wealth created in the society may be concentrated in the hands of the few. This insight has led some scholars to articulate a concept of development whose focus extends beyond economic growth.¹¹³ They suggest that development should be viewed in the context of the pursuit of the broader ends of human development, with a focus on political, social, and legal development.¹¹⁴ While acknowledging the importance of law for the proper functioning of private markets, these scholars also recognize the need for “a limited form of state intervention in markets as well as for protection of human rights.”¹¹⁵ The relevance of this conception of development to our understanding of the role of

¹⁰⁸ ANTONIA STOLPER, MARK WALKER, CHRISTOPHER SABATINI & JASON MARCZAK, *RULE OF LAW, ECONOMIC GROWTH AND PROSPERITY 1* (2007), available at http://www.as-coa.org/files/PDF/pub_562_363.pdf.

¹⁰⁹ Trubek & Santos, *supra* note 51, at 74–75.

¹¹⁰ *See id.* at 74–83.

¹¹¹ *See id.* at 81–83.

¹¹² *See* Kennedy, *supra* note 35, at 146.

¹¹³ Trubek & Santos, *supra* note 51, at 6–7.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 11.

the rule of law in promoting economic development is taken up in the next section.

Against the foregoing background of the historical evolution of the law and development movement, we now turn to an examination of the theories of the rule of law, a doctrine that in its different manifestations has remained at the core of the professed link between law and development. As will be seen in the next section, different conceptions of the rule of law have been propagated, often in support of differing conceptions of the desirable role of law both in society and in the pursuit of human and economic development.

II. CONCEPTIONS OF THE RULE OF LAW

Writing over fifty years ago, Heinz Arndt remarked that the rule of law has meant many different things to many different people.¹¹⁶ More recently, Dani Rodrik was quoted in *The Economist* as asking: “Am I the only economist guilty of using the term [rule of law] without having a good fix on what it really means?”¹¹⁷ His answer: “Well, maybe the first one to confess to it.”¹¹⁸ The reason for this confusion about the precise meaning of the rule of law is that different conceptions of the phrase have been articulated over the years.¹¹⁹ To complicate matters, commentators often speak about the rule of law without making clear which conception they have in mind.¹²⁰

This confusion about the prevailing meaning of the concept is of immediate relevance to the discussion of the role of the rule of law in promoting economic development. This is because, in determining whether the rule of law is a necessary engine of economic growth in modern societies, one must inevitably anchor the analysis on a particular conception of the doctrine. Without clarifying the conception in use, the discussion becomes muddled as it is uncertain which conception—the narrow or the broad one—is being advanced as necessary for stimulating economic growth.¹²¹ Moreover,

¹¹⁶ See Heinz Arndt, *The Origins of Dicey's Concept of the 'Rule of Law,'* 31 AUSTL. L.J. 117, 117 (1957).

¹¹⁷ *Economics and the Rule of Law: Order in the Jungle*, *supra* note 20, at 83 (alteration in original).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 84.

¹²⁰ *See id.*

¹²¹ *See id.* *The Economist* has similarly observed that the “existence of competing definitions of [the rule of law] may seem fatally to undermine its usefulness.” *Id.* It queried, “If you argue that the rule of law is vital to growth, which version do you mean—the one that defends human rights or the one that guarantees property

particular articulations and refinements of the doctrine postulate certain requirements as being at the center of the doctrine. Some of these requirements, which vary depending on the conception in use, are those that are suggested as being vital to the creation of an environment conducive for economic development. It is, therefore, difficult to evaluate the law and development connection without having an appreciation of the different conceptions of the rule of law. Further still, if the rule of law is advocated as essential for development, and if developing countries are to be encouraged to implement rule of law initiatives, the precise meaning and reach of the doctrine ought clearly to be identified. This would make it easier for these countries to concretely implement the desirable version of the doctrine.

There are essentially two major conceptions of the rule of law, often referred to as the narrow, thin, or formal, on the one hand;¹²² and the broad, thick, or substantive, on the other.¹²³ These conceptions reflect differing views of the proper role of the doctrine in society. An understanding of the range of considerations that underpin these two conceptions would help illuminate the possible connections between the rule of law and economic growth.

A. *The Narrow Conception*

The narrow conception of the rule of law primarily focuses on the use of the law as a restraint on the exercise of arbitrary power and as a guide to human behavior.¹²⁴ Adherents of this narrow version trace the origin of the rule of law to the moment the arbitrary powers of monarchs were constrained by the law.¹²⁵ In this regard, the Mosaic Code, which before the Common Era restricted King Solomon's discretion in the exercise of state power, constituted an example of the imposition of the rule of law.¹²⁶ According to S. E. Finer, the Mosaic Code limited some of the powers of the King, who "was merely administrator and judge under it," thereby subjecting the monarch in some respects to the dominion of the law.¹²⁷ Philosophers like Aristotle and

rights?" *Id.* It concluded by noting that the "differing definitions of the rule of law reflect competing explanations of what drives economic growth." *Id.*

¹²² See discussion *infra* Part II.A.

¹²³ See discussion *infra* Part II.B.

¹²⁴ BARRY M. HAGAR, *THE RULE OF LAW: A LEXICON OF POLICY MAKERS* 10 (1999), available at http://www.mansfieldfdn.org/programs/program_pdfs/leghistory.pdf.

¹²⁵ *Id.* at 3.

¹²⁶ Daniel H. Cole, 'An Unqualified Human Good': *E.P. Thompson and the Rule of Law*, 28 *J.L. SOC'Y* 177, 187 (2001).

¹²⁷ S. E. FINER, *THE HISTORY OF GOVERNMENT FROM THE EARLIEST TIMES* 75 (1997).

Montesquieu were also interested in the use of law as a means of restricting the arbitrary exercise of power. Aristotle canvassed the ideal of a society governed not by passion but by reason.¹²⁸ In his view: “[H]e who asks Law to rule is asking God and Intelligence and no others to rule; while he who asks for the rule of a human being is bringing in a wild beast”¹²⁹ Montesquieu envisaged a regime of checks on the exercise of state power—checks that would free individuals from the whims of the King and the unbounded discretion of the legislature.¹³⁰ He was concerned with the implementation of an institutional framework for protecting citizens against the arbitrary exercise of state power.¹³¹

At the core of the classical conception of the rule of law is the idea that there should be properly defined limits on the exercise of discretionary powers by the state.¹³² The rationale for this attitude is that, as A. V. Dicey noted, “wherever there is discretion there is room for arbitrariness, and . . . in a republic no less than under a monarchy discretionary authority on the part of the government must mean insecurity for legal freedom on the part of its subjects.”¹³³

If the primary concern of the narrow concept of justice was the limitation of the exercise of arbitrary power by the state, how was arbitrariness to be constrained? Adherents of the narrow concept highlighted certain requirements as essential to the operation of a state under the rule of law.¹³⁴ Some of these requirements relate to the characteristic features of legal rules, while others relate to the institutional framework necessary for the limitation of arbitrary power.

The first requirement is the supremacy of the law, in contrast to the supremacy of the government or the supremacy of an individual or individuals.¹³⁵ In this regard, Dicey noted that the rule of law requires “the absolute supremacy or predominance of regular law as opposed to the

¹²⁸ See generally ARISTOTLE, *THE POLITICS* 142–45 (T. A. Sinclair trans., Penguin Books 1962) (n.d.).

¹²⁹ *Id.* at 143.

¹³⁰ MONTESQUIEU, *THE SPIRIT OF LAWS* 196–214 (David Wallace Carrithers ed., Univ. of Cal. Press 1977) (1748).

¹³¹ See *id.* at 130.

¹³² See HAGAR, *supra* note 124, at 10.

¹³³ A. V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 110 (Liberty Classics 1982) (1885).

¹³⁴ See *id.* at 120–21.

¹³⁵ *Id.* at 120.

influence of arbitrary power.”¹³⁶ It also “excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.”¹³⁷

To curb arbitrariness, the narrow conception further required that the government be bound to follow pre-announced legal rules and procedures.¹³⁸ If legal rules are not pre-announced, the government could retroactively and arbitrarily enact laws to regulate past conduct.¹³⁹ Conversely, where rules are pre-announced, individuals are able to plan their affairs by reference to the existing legal regime, and governments would not be able arbitrarily to interfere with their private action.¹⁴⁰ To foster this environment that promotes individual planning, Friedrich A. Hayek contended that the rule of law required that “[a] government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge.”¹⁴¹

Another requirement of the rule of law under the narrow conception is that individuals should be equal before the law.¹⁴² Articulating this vision, Dicey noted that the rule of law required “not only that no man is above the law, but (what is a different thing) that . . . every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.”¹⁴³ In this sense of requiring the equal application of rules to all individuals, the distinguished legal historian E. P. Thompson believed that the rule of law was an “unqualified [human] good.”¹⁴⁴ A scholar of the left, Thompson celebrated the effectiveness of the narrow version of the rule of law in requiring the equal application of the law to the powerful and the powerless, the rich and the poor.¹⁴⁵ Although he

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 72 (Univ. of Chi. Press 1965) (1944).

¹³⁹ *Id.* at 72–73.

¹⁴⁰ *Id.* at 74–75.

¹⁴¹ *Id.* at 72.

¹⁴² DICEY, *supra* note 133, at 114.

¹⁴³ *Id.*

¹⁴⁴ E. P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT* 267 (1975).

¹⁴⁵ *Id.* at 268. In his classic dissent from Thompson’s perspective, Morton J. Horwitz stated:

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

acknowledged that the neutral application of the law by a bounded government was not by itself sufficient to create a just society, Thompson nonetheless believed that it was a necessary condition for the creation of a just society because “its opposite—unbridled power—ensures injustice.”¹⁴⁶

Formal or procedural justice is another requirement of the narrow version of the rule of law.¹⁴⁷ Formalism requires that the governing rules and procedures in the administration of justice be deducible from the legal system itself, as opposed to being deduced from extrinsic factors such as religion, politics, or morals.¹⁴⁸ To adherents of the narrow version, it is only in a formal system of law, substantially independent of extrinsic moral and other considerations, that the dominion of the law can be achieved.¹⁴⁹ Formal or procedural justice, not to be confused with substantive justice, requires a system of procedural rules that are pre-announced, fair, and consistently and transparently applied.¹⁵⁰

The foregoing remain the commonly articulated basic requirements of the narrow conception of the rule of law. However, different theorists often include other requirements and refinements—or place particular emphasis on certain requirements—in their conceptions of the narrow version of the doctrine. To John Finnis, for example, the rule of law requires that rules be prospective, possible to comply with, clear, coherent with one another, and stable.¹⁵¹ To Lon Fuller, who articulated his concept of law in the context of a discussion of legal positivism, legal rules should be general, publicly promulgated, prospective, consistently applied, infrequently changeable, and intelligible.¹⁵² He viewed the rule of law as the “internal” morality of law, by which he probably meant that it was essential for the efficacy of any system of

outcomes. By promoting procedural justice it enables the shrewd, 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.

Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 566 (1977) (book review).

¹⁴⁶ Cole, *supra* note 126, at 189.

¹⁴⁷ See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 273 (Clarendon Press 1984) (1980).

¹⁴⁸ See *id.* at 277–78.

¹⁴⁹ See *id.* at 270–71.

¹⁵⁰ See *id.*

¹⁵¹ *Id.*

¹⁵² LON FULLER, *THE MORALITY OF LAW* 41 (1964).

laws.¹⁵³ To Joseph Raz, the rule of law requires that laws should be prospective, accessible, clear, and stable; the judiciary must be independent; and lawmaking must be guided by open, stable, clear, and general rules.¹⁵⁴

From the foregoing, it is evident that under the narrow conception the focus is not necessarily on the contents or morality of the laws being administered or on whether the state is democratic or otherwise.¹⁵⁵ Rather, the focus is on: (1) the limitation that law places on the exercise of arbitrary power and (2) the ability of law to regulate human conduct.¹⁵⁶ The goal of the doctrine, in this conception, is a society under law.¹⁵⁷ In the words of Raz, an advocate of the narrow version of the rule of law: “The rule of law means literally what it says: the rule of laws. Taken in its broadest sense this means that people should obey the law and be ruled by it.”¹⁵⁸ From this perspective, the rule of law has dual functions of putting constraints on the exercise of public power and of regulating social interaction through the provision of the rules that govern social interaction. In the context of this latter function, Hayek has noted that the rule of law is a vital instrument of economic production as it enables “people to predict the behavior of those with whom they must collaborate.”¹⁵⁹

¹⁵³ *Id.* at 157. According to Fuller:

The internal morality of the law demands that there be rules, that they be made known, and that they be observed in practice by those charged with their administration. These demands may seem ethically neutral so far as the external aims of law are concerned. Yet, just as law is a precondition for good law, so acting by known rule is a precondition for any meaningful appraisal of the justice of law.

Id.

¹⁵⁴ JOSEPH RAZ, *The Rule of Law and its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210, 214–19 (Clarendon Press 2002) (1979).

¹⁵⁵ HAYEK, *supra* note 138, at 80. In fact, Blandine Kriegel has noted that “the first states under the rule of law gave neither power to the people nor political liberty to the citizen. They were neither democratic nor liberal.” BLANDINE KRIEGEL, *THE STATE AND THE RULE OF LAW* 50 (Mark A. LePain & Jeffrey C. Cohen trans., Princeton Univ. Press 1995) (1989). In addition, Raz has noted that:

This is the basic intuition from which the doctrine of the rule of law derives: the law must be capable of guiding the behaviour of its subjects. It is evident that this conception of the law is a formal one. It says nothing about how the law is to be made: by tyrants, democratic majorities, or any other way. It says nothing about fundamental rights, about equality, or justice.

RAZ, *supra* note 154, at 214.

¹⁵⁶ HAYEK, *supra* note 138, at 80, 82–83.

¹⁵⁷ See RAZ, *supra* note 154, at 212–13.

¹⁵⁸ *Id.* at 212.

¹⁵⁹ HAYEK, *supra* note 138, at 73.

The benefits of the narrow conception of the rule of law include the restraint it places on the exercise of state power; the certainty and predictability it brings to legal relations; the maintenance of social order through the subordination of both the state and individuals to the dominion of the law; the promotion of social interaction through predictable formal norms; and the promotion of procedural justice. As will be discussed in Part III, it is also argued that this conception of the rule of law fosters economic growth by promoting the stability, predictability, and security necessary for economic activity.

It should not be thought that advocates of the narrow version of the rule of law are necessarily indifferent to the moral content of the law. On the contrary, some of its adherents have strong views about the ideal moral content of the law.¹⁶⁰ Some of them are even active in advocating radical reform of the law.¹⁶¹ Nonetheless, they believe that it is useful not to confuse the requirements of the rule of law with the conditions requisite for a just society.¹⁶² To them, the rule of law is “a necessary but insufficient condition for a just society.”¹⁶³ Although narrow, this conception of the rule of law remains a human good, in Thompson’s classic phrase, because of the limits it places on the exercise of state power and because of its promotion of equality before the law.¹⁶⁴ Moreover, “[t]here is nothing inherently contradictory between this minimum conception of the rule of law and a critical, even radical, attitude toward existing legal systems.”¹⁶⁵ Thus, while substantive justice is not inherent in the narrow conception of the rule of law, this conception does not preclude the pursuit of the ends of substantive justice through the legal process.¹⁶⁶

This narrow conception has been critiqued on the basis that “in retreating to the boundary line of minimalism, and accepting only that which is logically (as opposed to morally) necessary to a functional definition of the rule of law,” this conception of the rule of law “may end up surrendering crucial territory—including much of what makes the rule of law an appealing ideal in the first

¹⁶⁰ See Cole, *supra* note 126, at 187.

¹⁶¹ See *id.* at 202.

¹⁶² See *id.*

¹⁶³ *Id.* at 202.

¹⁶⁴ See THOMPSON, *supra* note 144, at 267–68.

¹⁶⁵ Cole, *supra* note 126, at 197.

¹⁶⁶ Cast in this perspective, the narrow conception is freed from that critique of legalism as an “ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules.” JUDITH SHKLAR, *LEGALISM 1* (1964).

place, such as equality before the law and the like treatment of like cases.”¹⁶⁷ This criticism is somewhat misplaced. The historical mission of the rule of law has always been its limitation on the arbitrary exercise of state power.¹⁶⁸ Moreover, far from diminishing formal equality before the law or inhibiting legal consistency, the narrow conception, as demonstrated above, promotes these values by requiring the equal, consistent application of predictable rules. A stronger critique is Horwitz’s view that the narrow conception “promotes substantive inequality by creating a consciousness that radically separates law from politics, means from ends, and processes from outcomes.”¹⁶⁹ Though this critique is strong, it should be recalled that the advocacy of the narrow conception is not inconsistent with a radical attitude toward the reform of the substantive content of the existing legal system. All that the narrow conception requires in this regard is that the pursuit of substantive justice should not be confused with the primary goal of the classical conception of the rule of law: the limitation of the state exercise of arbitrary power.¹⁷⁰

However, it should be noted that this narrow conception of the rule of law is not concerned with the realization of the broad developmental objectives advocated by scholars like Amartya Sen.¹⁷¹ Sen has advocated for the reconceptualization of development to include broader goals extending beyond economic development.¹⁷² He has canvassed a conception of development defined by how much freedom individuals in a country have, because freedom makes possible the range of choices and opportunities that allow individuals to help themselves and others.¹⁷³ He defines freedom as including political freedom and civil rights; economic freedom, including the availability of credit; social opportunities, including availability of health care, education, and social services; and protective security, including unemployment benefits and

¹⁶⁷ Thom Ringer, *Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the ‘Rule of Law’ and its Place in Theory and Practice*, 10 YALE HUM. RTS. & DEV. L.J. 178, 196 (2007).

¹⁶⁸ RAZ, *supra* note 154, at 212–13.

¹⁶⁹ Horwitz, *supra* note 145, at 566.

¹⁷⁰ RAZ, *supra* note 154, at 212–14.

¹⁷¹ See generally AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999). See also Aung San Suu Kyi, *Freedom, Development, and Human Worth*, 6.2 J. DEMOCRACY 11, 19 (1995) (discussing the connections between freedom, dignity, rights, and development).

¹⁷² According to Sen, the enhancement of freedom is both “(1) the *primary end* and (2) the *primary means* of development.” SEN, *supra* note 171, at 36.

¹⁷³ *Id.*

emergency relief.¹⁷⁴ In his view, legal institutions must have as their foundation the “general preeminence of basic political and liberal rights.”¹⁷⁵

Similarly, the World Bank has sought to expand the understanding of the meaning of development to include the broader objectives canvassed by scholars like Sen. This approach is reflected in the World Bank’s Comprehensive Development Framework,¹⁷⁶ which seeks to reconceptualize development “by going beyond its macroeconomic and financial aspects to focus on structural, social, and human concerns.”¹⁷⁷ Along the same line, the Arab Human Development Report defines development as follows:

Human development can be simply defined as the process of enlarging choices. . . .

Human development thus defined represents a simple notion, but one with far-reaching implications. First, human choices are enlarged when people acquire more capabilities and enjoy more opportunities to use those capabilities[.] . . .

Second, as already implied, economic growth needs to be seen as a means, albeit an important one, and not the ultimate goal, of development. Income makes an important contribution to human well-being, broadly conceived, if its benefits are translated into more fulfilled human lives, but the growth of income is not an end in itself.

Third, the human development concept, by concentrating on choices, implies that people must influence the processes that shape their lives. They must participate in various decision making processes, the implementation of those decisions, and their monitoring and adjustment to improve outcomes where necessary.¹⁷⁸

These efforts to reconceptualize the meaning of development have had the laudable result of shedding light on the limitations of focusing on economic development alone as the major objective of state policy.¹⁷⁹ However, the weakness of the narrow conception of the rule of law in not advancing

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 148. Ringer has noted that for a conception of the rule of law to be compatible with Sen’s definition of development, it must, at a minimum, incorporate basic instrumental freedoms such as political freedoms, economic facilities, and transparency guarantees. Ringer, *supra* note 167, at 203.

¹⁷⁶ See Memorandum from James D. Wolfensohn, World Bank President, to Board, Management, and Staff of the World Bank Group, A Proposal for a Comprehensive Development Framework (1999) (on file with author).

¹⁷⁷ Alvaro Santos, *The World Bank’s Uses of the “Rule of Law” Promise in Economic Development*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 1, at 253, 268.

¹⁷⁸ U.N. DEVELOPMENT PROGRAM, *ARAB HUMAN DEVELOPMENT REPORT 2002: CREATING OPPORTUNITIES FOR FUTURE GENERATIONS 15–16* (2002) (internal references omitted).

¹⁷⁹ *Id.*

development in this enlarged sense is outside the scope of this Article. As commendable as this enlargement of the concept of freedom is, the primary focus of this Article is the evaluation of the effectiveness of the rule of law in promoting *economic* development. The point could be made that the advancement of human capacities and freedoms, as advocated by scholars like Sen, would have ultimate economic benefits by unleashing the creative potentials of individuals. However, this paper's limited focus is on whether a doctrine like the rule of law may positively and more immediately influence *economic* development. Additionally, in the next section I suggest why the broadening of the definition of the rule of law to include human rights protection may detract from the philosophical cogency of the doctrine.

Although its origins lie before the rise of political liberalism, the narrow conception of the rule of law has become inherent to the ideal "classical liberal concept that presupposes the need and desirability to constrain government 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."¹⁸⁰ This narrow conception of the doctrine is ideal for creating a stable, predictable environment for economic actors to transact business against the background of defined and consistently-applied legal rules.¹⁸¹ It was for this reason that, under the leadership of Ibrahim Shihata, the World Bank, in its economic development initiatives, operated under a narrow vision of the rule of law as "a system[] based on abstract rules which are actually applied and on functioning institutions which ensure the appropriate application of such rules."¹⁸² In Shihata's view, it was important to have "an appropriate legal system, properly administered and enforced, for creating an environment conducive to business development."¹⁸³

¹⁸⁰ Todd J. Zywicki, *The Rule of Law, Freedom and Prosperity*, 10 SUP. CT. ECON. REV. 1, 5 (2002).

¹⁸¹ See, e.g., FULLER, *supra* note 152, at 41; RAZ, *supra* note 154, at 214–19.

¹⁸² IBRAHIM SHIHATA, *THE WORLD BANK IN A CHANGING WORLD: SELECTED ESSAYS AND LECTURES* 85 (F. Tschofen & A. Parra eds., 1991) (internal emphasis omitted). According to Shihata, the rule of law requires that:

- a) there is a set of rules which are known in advance; b) such rules are actually in force; c) mechanisms exist to ensure the proper application of the rules and to allow for departure from them as needed according to established procedures; d) conflicts in the application of the rules can be resolved through binding decisions of an independent judicial or arbitral body; and e) there are known procedures for amending the rules when they no longer serve their purpose.

Id.

¹⁸³ *Id.* at 88.

B. *The Broad Conception*

This conception is regarded as broad because its vision of the rule of law is more expansive than the narrow conception's dual focus of curbing the exercise of arbitrary power and effectively regulating human behavior.¹⁸⁴ Under this broader conception, the rule of law is viewed as "inextricably linked to liberty and democracy."¹⁸⁵ In addition to the foregoing requirements of the narrow conception, this broader conception adds the importance of guaranteeing and protecting basic freedoms and liberties for individuals and guaranteeing democratic representation.¹⁸⁶ This view is encapsulated in the definition of the rule of law advanced by USAID:

[T]he 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.¹⁸⁷

This broad conception of the rule of law was notably articulated by the International Commission of Jurists at its 1959 conference in New Delhi.¹⁸⁸ In its widely-cited declaration, the conference identified the following three important elements of the rule of law:

[F]irstly, that the individual is possessed of certain rights and freedoms and that he is entitled to protection of these rights and freedoms by the State; secondly, the absolute need for an independent Judiciary and Bar as well as for effective machinery for the protection of fundamental rights and freedoms; and thirdly, the establishment of social, economic and cultural conditions which would permit men to live in dignity and to fulfill their legitimate aspirations.¹⁸⁹

The conference further stated that:

¹⁸⁴ Cf. RAZ, *supra* note 154, at 212–13.

¹⁸⁵ *Economics and the Rule of Law: Order in the Jungle*, *supra* note 20, at 83.

¹⁸⁶ BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 101 (2004).

¹⁸⁷ U.S. GENERAL ACCOUNTING OFFICE, GAO/NSIAD-99-158, RULE OF LAW FUNDING WORLDWIDE FOR FISCAL YEARS 1993–1998, at 13 n.7 (1999).

¹⁸⁸ LUCIAN G. WEERAMANTRY, THE INTERNATIONAL COMMISSION OF JURISTS: THE PIONEERING YEARS 42–43 (2000).

¹⁸⁹ *Id.* at 53.

The function of the legislature in a free society under the Rule of Law is to create and maintain the conditions which will uphold the dignity of man as an individual. This dignity requires not only the recognition of his civil and political rights but also the establishment of the social, economic, educational and cultural conditions which are essential to the full development of his personality.¹⁹⁰

This enlargement of the definition of the rule of law to include human rights and democratic representation marked a major evolution of the doctrine from its narrow concern with the limitation on arbitrary power to an attempt to use the doctrine to promote broader ends of social justice.¹⁹¹ These two conceptions of the rule of law are best understood against the background of the context and social and political concerns of the eras in which they first received strong support. Put differently, an understanding of “rule-of-law ends” requires realizing that they are historically and culturally determined concepts.¹⁹² The classical, narrow conception of the rule of law was dominant in an era in which its adherents’ major concern was how to limit the exercise of arbitrary power by the then absolute monarchs.¹⁹³ With the movement away from absolute monarchy to democratic representation, the issue of human rights and the consolidation of democratic representation became of greater importance, and the rule of law came to be viewed as a powerful rhetorical device for promoting these ends.¹⁹⁴ This increasing concern with democratic issues is evident in the Magna Carta, as argued in the Petition of Grievances of 1610, which asserted the rights of English men

to be guided and governed by the certain rule of law, which giveth to the head and the members that which of right belongeth to them, and not by any uncertain and arbitrary form of government . . . [and that people should not be subject to any punishment] other than such as are ordained by the common laws of this land or the statutes made by their common consent in parliament.¹⁹⁵

¹⁹⁰ International Congress of Jurists, New Delhi, India, Jan. 5–10, 1959, *Conclusions of the Congress, Report of Committee I: The Legislative and the Rule of Law*, cl. I, reprinted in 2 J. INT’L COMMISSION JURISTS 8, 8 (1959).

¹⁹¹ Rachel K. Belton, *Competing Definitions of the Rule of Law: Implications for Practitioners* 8–15 (Carnegie Endowment for Int’l Peace Papers, Working Paper No. 55, 2005), available at <http://www.carnegieendowment.org/files/CP55.Belton.FINAL.pdf>.

¹⁹² *Id.* at 8.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 14.

¹⁹⁵ THE PETITION OF GRIEVANCES OF 1610 (July 7, 1610), reprinted in J. R. TANNER, CONSTITUTIONAL DOCUMENTS OF THE REIGN OF JAMES I A.D. 1603–1625 WITH AN HISTORICAL COMMENTARY 148–56 (1930); see FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 168 (1978) (citing CALENDAR OF STATE PAPERS,

The reference to the “common consent in parliament” is an acknowledgment that the legal system “depends heavily on citizens’ acceptance of laws and on the government’s legitimacy to make laws that bind them.”¹⁹⁶ Consent of the governed, which legitimizes the law, was increasingly considered indispensable in a state under law.¹⁹⁷ Additionally, there was the apprehension that by focusing only on formal, rather than substantive, ends the narrow conception might lead to authoritarian tendencies by government actors.¹⁹⁸ These concerns argued for a broader conception of the rule of law that looks toward more substantive goals like justice, democratic representation, and the protection of human rights.¹⁹⁹ Unlike the narrow conception, “which eschews value judgments, [this broad] approach is driven by a moral vision of the good legal system, and measures the rule of law in terms of how well the system being assessed approximates this ideal.”²⁰⁰

Some liberal scholars have been particularly keen to support this vision of the rule of law that encompasses the ideals of democratic representation and human rights protection.²⁰¹ This is in large part because democracy and the protection of human liberties and freedoms are core liberal concerns.²⁰² To liberals, a system of law would be inadequate if it did not operate to guarantee the liberties of free individuals in a limited government based on consent.²⁰³ Therefore, the broadening of the definition of the rule of law to include these issues meshes well with fundamental liberal aspirations. This explains the attempt by some liberal scholars to insert liberty and democratic representation as ineluctable ends of a rule of law regime.²⁰⁴

However, this attempt to stretch the rule of law to encompass broader liberal aspirations may result in the dilution of the doctrine’s rhetorical power

DOMESTIC SERIES 622 (Mary Anne Everett Green ed., 1857) (noting the filing of the Petition of Grievances on July 7, 1610)).

¹⁹⁶ Belton, *supra* note 191, at 12.

¹⁹⁷ *Id.*

¹⁹⁸ See JEFFERY SACHS & KATHARINA PISTOR, *RULE OF LAW AND ECONOMIC REFORM IN RUSSIA* (1997) (discussing the fear that the narrow conception of the rule of law would give rise to authoritarianism in the context of reform of the Russian economy).

¹⁹⁹ *See id.*

²⁰⁰ Matthew Stephenson, *The Rule of Law as a Goal of Development*, World Bank: Law and Justice Institutions, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20763583~isCURL:Y~menuPK:1989584~pagePK:210058~piPK:210062~theSitePK:1974062,00.html> (last visited Jan. 11, 2010) (citing RONALD DWORIN, *A MATTER OF PRINCIPLE* 11–13 (1985)).

²⁰¹ *See* TAMANAHA, *supra* note 186, at 33–38.

²⁰² *Id.*

²⁰³ L.T. HOBHOUSE, *LIBERALISM* 23–24 (Williams & Norgate 1917) (1911).

²⁰⁴ *See, e.g.*, Belton, *supra* note 191.

and practical resonance. As Raz has correctly observed: “If the rule of law is the rule of good law, then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function.”²⁰⁵ Inflated to the role of articulating a complete social philosophy, the rule of law’s practical utility may be deflated by the reality that social philosophies are radically contested issues, especially when they relate to matters such as the permissible range of freedoms and liberties to which a just society should aspire. To illustrate, in 1959 the International Commission of Jurists, in explaining its conception of the rule of law, stated that the “function of the legislature in a free society under the Rule of Law is to create and maintain conditions which will uphold the dignity of man as an individual.”²⁰⁶ However, there is no general agreement on the range and scope of rights, the enactment and protection of which are necessary to “uphold the dignity of man as an individual.”²⁰⁷ Moreover, to assign this responsibility to the rule of law is to unnecessarily politicize it²⁰⁸ and risk making it less useful in achieving its classic objective of limiting the arbitrary exercise of power.²⁰⁹

In contrast, the narrow version promotes conceptual clarity by isolating the rule of law from those substantive considerations that properly belong to philosophical conceptions of a just society.²¹⁰ By separating the concept of the

²⁰⁵ RAZ, *supra* note 154, at 210–11.

²⁰⁶ International Congress of Jurists, *supra* note 190, cl. I, *reprinted in* 2 J. INT’L COMMISSION JURISTS 8, 8 (1959).

²⁰⁷ For example, not all countries agree with the International Congress of Jurists that the rule of law requires “the establishment of social, economic and cultural conditions [that] would permit men to live in dignity and to fulfill their legitimate aspirations.” *Id.*

²⁰⁸ Belton remarked that:

The problem with human rights as an end, of course, is that different cultures—and different countries, even within the developed world, differ on what they see as human rights. Even when general concepts can be universalizable, particulars, such as the death penalty, social and economic rights, or even the practice of female genital mutilation, are disputed. Some in the United States see a Scandinavian-style system of social and economic rights as undermining property rights through excessive taxation. Europeans see the U.S. death penalty as a human rights violation.

Belton, *supra* note 191, at 15. For a discussion of the political ends to which the broad conception of the rule of law is sometimes deployed, see generally Joel M. Ngugi, *Policing Neo-Liberal Reforms: The Rule of Law as an Enabling and Restrictive Doctrine*, 26 U. PA. J. INT’L ECON. L. 513 (2005).

²⁰⁹ Critiquing the broadening of the concept of the rule of law, Belton has noted that under the broad conception, “[h]uman rights laws that far exceed those of . . . even the United States, are considered essential for legal reform. . . . These reforms may well be very good things but they are not necessarily essential for the rule of law, and by stretching the point they can cast doubt on the more core attributes of the concept.” Belton, *supra* note 191, at 20.

²¹⁰ See RAZ, *supra* note 154, at 212–13.

rule of law from a broader concept of justice, it becomes possible to evaluate the effectiveness of the rule of law in curbing arbitrariness and in regulating human conduct, without having to make value judgments about whether the society in question meets broader, and desirable, goals of social justice. While the protection of certain human rights may provide the conditions necessary for the realization of the ends of the narrow conceptions of the rule of law, the protection of these rights, laudable as it may be, need not be viewed as a requirement of the rule of law.

Separating substantive guarantees of liberty from the rule of law does not entail that states that satisfy the narrow, more formalistic conception should necessarily be celebrated as just societies. As Raz has noted, the rule of law is a virtue, but it is not the only virtue to which a just society should aspire:

The rule of law is a political ideal which a legal system may lack or may possess to a greater or lesser degree. That much is common ground. It is also to be insisted that the rule of law is just one of the virtues which a legal system may possess and by which it is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man.²¹¹

Viewed in this context, the rule of law becomes of more practical use in achieving the realizable and easily defined objective of limiting arbitrary power and regulating social interaction.²¹² This is not an insignificant virtue.

The broad conception of the rule of law has, however, made considerable inroads in the work of international agencies and governments advocating institutional reforms in developing countries.²¹³ In response to concerns that their rule of law initiatives were too narrowly focused on shoring up the foundations of the market system without advancing the goals of social justice, some international agencies have sought to broaden their conception of the doctrine.²¹⁴ For example, a recent publication of the World Bank adopted a definition of the rule of law that is radically different from that advocated by the Bank during Shihata's tenure.²¹⁵ It defined the rule of law as prevailing where:

²¹¹ *Id.* at 196.

²¹² See Jonathan Rose, *The Rule of Law in the Western World: An Overview*, 35 J. SOC. PHIL. 457, 459 (2004).

²¹³ See *supra* notes 187–190 and accompanying text; see also TAMANAHA, *supra* note 186.

²¹⁴ See, e.g., THE WORLD BANK, LEGAL VICE PRESIDENCY, *supra* note 14, at 1–3.

²¹⁵ *Id.* at 2–3. For Shihata's narrow conception of the rule of law, see *supra* note 182.

(1) the government itself is bound by the law; (2) every person in society is treated equally under the law; (3) the human dignity of each individual is recognized and protected by law; and (4) justice is accessible to all. The rule of law requires transparent legislation, fair laws, predictable enforcement, and accountable governments to maintain order, promote private sector growth, and fight poverty, and have legitimacy.²¹⁶

The pursuit of this broader definition may well be consistent with the realization of the definition of development that focuses on human capacity,²¹⁷ but as will be argued in the next section, there is little evidence that this enlarged focus on human rights and dignity is a necessary condition for the promotion of *economic* development.²¹⁸ In exploring the connection between the rule of law and economic development in the next section, we are going to refer to both the narrow and the broad conceptions of the doctrine, although, as argued above, the narrow conception is more historically valid and has more practical and philosophical resonance.²¹⁹

III. EXPLORING THE LINK BETWEEN THE RULE OF LAW AND ECONOMIC DEVELOPMENT

The claim of law's instrumental value in stimulating economic development is at the heart of the drive to make the issue of the rule of law and legal reforms a central part of the strategy for advancing economic development in the developing world. The attempt to link law to economic development has a long pedigree. The English philosopher Thomas Hobbes, for example, was of the view that an effective legal system enables traders to enter into wealth-enhancing exchanges that they would otherwise be reluctant to engage in if the law did not provide the framework for enforcing

²¹⁶ THE WORLD BANK, LEGAL VICE PRESIDENCY, *supra* note 14, at 3. In another of its publications, the World Bank acknowledges the pitfalls of using the broad conception of the rule of law:

But this explicit link between the rule of law and some conception of substantive goodness has drawbacks. First, and most obviously, determining how "just" a particular legal order is requires a subjective—and extremely complex—judgment call. Second, defining the rule of law as a "good" legal system risks making the concept so vague that it is not very useful. Why should we bother talking about whether a society has or doesn't have the "rule of law" when what we really are asking is whether the society is good or not?

Stephenson, *supra* note 200.

²¹⁷ See *supra* text accompanying notes 189–90.

²¹⁸ See *infra* Part III.

²¹⁹ See *supra* Part II.A–B.

agreements.²²⁰ According to him, in a contractual exchange, “he that performeth first has no assurance the other will perform after, because the bonds of words are too weak to bridle men’s ambition, avarice, anger, and other passions, without the fear of some coercive power.”²²¹ He believed the knowledge that the state stands ready to use its coercive powers to enforce certain private obligations encourages private parties to enter into wealth-enhancing exchanges confident of the state’s assistance in compelling, where necessary, the other party’s performance.²²²

The professed link between law and development has become a shibboleth in the law and development movement. In his celebrated book *The Other Path*, Hernando De Soto asserted that the “legal system may be the main explanation for the difference in development that exists between the industrialized countries and those . . . which are not industrialized.”²²³ He added that “development is possible only if efficient legal institutions are available to all citizens.”²²⁴

In approaching the relevance of the rule of law to economic development, it is useful to separate the issue of the importance of reforming particular laws (such as banking, bankruptcy, securities, and investment laws) from the issue of the role of the rule of law (whether in the narrow or the broad sense) in promoting economic development. This is because the rule of law, understood either in the narrow or the broad sense, does not necessarily entail the reform or modernization of particular economic laws. Since the focus of this Article is on the rule of law, emphasis is placed on whether either the narrow or the broad conception of the rule of law is vital to economic development. We put aside the equally important question of whether economic growth requires the reform of particular economic laws and other laws affecting the operation of the economy.

With respect to the rule of law, the claim is that it fosters a market-friendly environment in which economic exchanges and other wealth-creating activities can occur.²²⁵ Emphasis is placed on the effect of the rule of law in promoting stability, predictability, and consistency in the enforcement of the legal rules

²²⁰ See THOMAS HOBBS, *LEVIATHAN* 84 (Edwin Curley ed., Hackett Publishing 1994) (1651).

²²¹ *Id.*

²²² See *id.* at 109.

²²³ DE SOTO, *supra* note 10, at 185.

²²⁴ *Id.* at 186.

²²⁵ *Economics and the Rule of Law: Order in the Jungle*, *supra* note 20, at 83.

affecting the operation of the market.²²⁶ For example, the Americas Society and Council of the Americas Working Group on the Rule of Law recently noted that:

Respect for the rule of law is a basic requirement for creating the conditions that foster business development. It provides the security that protects individuals' basic political and human rights. But the rule of law also provides entrepreneurs and small business owners the confidence they need to enter the formal economy and contribute to nationwide economic growth and development. Both these businesspeople and established corporations are more likely to thrive where the laws are clearly defined, known to the public, and applied neutrally and without prejudice across all members and classes of society.²²⁷

As can be deduced from the above quotation, the argument linking the rule of law to economic development is anchored on several pillars. What follows is an outline, and critique, of these pillars.

The first pillar is the argument that "the rule of law provides . . . the stability and predictability in economic affairs required for agents to engage in entrepreneurial action . . ." ²²⁸ Stability and predictability of market relations are necessary "both in terms of exploring existing opportunities for profit through arbitrage and the discovery of new profit opportunities through innovation."²²⁹ Absent the stability and predictability provided by the rule of law, "economic actors will shorten their time horizon of investment and economic progress will be thwarted."²³⁰ This argument tracks Hobbes' view of the relevance of the coercive power of the state in providing assurance to prospective business parties that their counterparts would perform their obligations.²³¹ Without the security that the government would compel performance of certain private obligations in appropriate cases, economic actors may limit their business interactions and exchanges to those with whom they are already familiar and whom they already trust, such as members of their family, ethnic group, or social organization.²³² Potentially wealth-

²²⁶ See STOLPER ET AL., *supra* note 108, at 1.

²²⁷ *Id.*

²²⁸ Peter Boettke & J. Robert Subrick, *Rule of Law, Development, and Human Capabilities*, 10 SUP. CT. ECON. REV. 109, 111 (2003).

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ See HOBBS, *supra* note 220, at 109.

²³² See *id.* at 106–07.

creating exchanges may thereby be discouraged because of the lack of confidence in the willingness of the other party to perform.²³³ This uncertainty about return performance is particularly heightened in long-term contracts where one party may have to perform long before the performance of the other party is due.²³⁴ The assurance of state intervention to enforce contractual obligations in appropriate cases minimizes this uncertainty, thereby fostering wealth-creating economic activities.²³⁵ As the Commission on Legal Empowerment of the Poor has observed, “[t]he knowledge that legal rights and obligations can be enforced, if necessary, guides people’s everyday actions, and this certainty allows them to pursue economic and other opportunities.”²³⁶

The second pillar is the argument that “[e]conomic policies not in conformity with a rule of law introduce discretionary and *ad hoc* decisions that undermine the predictability and stability in the economic environment.”²³⁷ In contrast, a policy environment “consistent with the rule of law . . . leads to an enhanced ability by economic actors to predict the behavior of others with whom they must coordinate their plans.”²³⁸ Business activity, it is believed, thrives in an environment where the rules governing economic activities are predictable and not subject to the arbitrary discretion of government officials.²³⁹ With a view to this role of the rule of law, Hayek defined the concept as entailing “that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge.”²⁴⁰ Curtailing the arbitrary exercise of power by government officials would minimize the ability of the government to stifle private initiative and innovation through discretionary decision-making.

The third pillar is the argument that the rule of law, where properly enforced, leads to the creation of a stable and orderly society that supports the

²³³ See *id.* at 84–85.

²³⁴ See *id.*

²³⁵ See *id.*

²³⁶ U.N. DEV. PROGRAM, COMM’N ON LEGAL EMPOWERMENT OF THE POOR, REPORT: MAKING THE LAW WORK FOR EVERYONE 21 (2008), available at http://www.undp.org/legalempowerment/report/Making_the_Law_Work_for_Everyone.pdf.

²³⁷ Boettke & Subrick, *supra* note 228, at 111.

²³⁸ *Id.* at 111–12.

²³⁹ See, e.g., Richard E. Messick, *Judicial Reform and Economic Development: A Survey of the Issues*, 14 WORLD BANK RES. OBSERVER 117, 118 (1999) (discussing the types of legal reform that make developing countries and transition economies more market-friendly).

²⁴⁰ HAYEK, *supra* note 138, at 72.

conduct of productive economic activities.²⁴¹ In its narrow conception, the rule of law curbs the arbitrary exercise of government powers and also effectively regulates the behavior of private actors.²⁴² In doing so, an orderly and stable society—a precondition for the conduct of wealth-creating economic activities—is created.²⁴³ Without stability and social order—in a lawless state—business activities are stifled.

As evidenced in the foregoing statement by the Americas Society and the Council of the Americas,²⁴⁴ the broad conception of rule of law that encompasses human rights protection is also said to contribute to economic development.²⁴⁵ An excellent example of this argument is found in Daniel Farber's article *Rights as Signals*.²⁴⁶ Farber wrote the article in response to Richard Posner's suggestion that developing countries may be better off, at least in the short run, by not spending substantial resources in "creating a first-class judiciary or an extensive system of civil liberties."²⁴⁷ In response, Farber argued that the protection of liberties and human rights is an important means of attracting investors, thereby stimulating economic growth.²⁴⁸ In the article, Farber articulated a signaling hypothesis to the effect that investors have an interest in the rule of law because human rights protection signals the commitment of the host state to protect foreign investments.²⁴⁹ Citing Tom Ginsburg,²⁵⁰ Farber hypothesized that investors are attracted by the rule of law and an independent judiciary and suggested that governments "that wish to capitalize on this appeal may find protection of human rights an important signal of their long-term commitment to this strategy."²⁵¹ He summarized his major arguments as follows:

²⁴¹ See Zywicki, *supra* note 180, at 13.

²⁴² *See id.*

²⁴³ *See id.*

²⁴⁴ See STOLPER ET AL., *supra* note 108, at 1.

²⁴⁵ The World Bank has noted that:

The developing countries' transition toward market economies necessitated strategies to encourage domestic and foreign private investment. This goal could not be reached without modifying or overhauling the legal and institutional framework and firmly establishing the rule of law to create the necessary climate of *stability and predictability*.

THE WORLD BANK, LEGAL VICE PRESIDENCY, *supra* note 14, at 2.

²⁴⁶ Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL STUD. 83, 83–85 (2002).

²⁴⁷ *Id.* at 83–85; Posner, *supra* note 5, at 9.

²⁴⁸ Farber, *supra* note 246, at 85.

²⁴⁹ *Id.*

²⁵⁰ *Id.*; Tom Ginsburg, *Does Law Matter for Economic Development? Evidence from East Asia*, 34 LAW & SOC'Y REV. 829, 854 (2000).

²⁵¹ Farber, *supra* note 246, at 85.

[P]rotecting human rights is costly to governments, so the willingness of a government to do so sends a valuable message about its commitments. In particular, by adopting entrenched legal protection for human rights, countries communicate that they are willing to sacrifice short-term advantages to obtain long-term benefits such as economic growth. Investors can infer from this that the government is less likely to pose a threat of opportunistic behavior such as expropriation. Similarly, a strong indication of judicial independence is presented when courts vigorously enforce human rights against their governments. An independent judiciary is valuable to investors who themselves have no interest in human rights whatsoever.²⁵²

If Farber's thesis is correct, the broad conception of the rule of law, by mandating the protection of human rights, would be an important part of the strategy for attracting necessary investments to developing countries. The validity of this claim is explored below.

Essentially, the rule of law is said to promote economic development because it fosters stability in the investment environment, promotes predictability in the application of rules, and signals to investors the extent to which the host country is serious about protecting foreign investments.²⁵³ There is little doubt that a stable society in which the rules for commercial intercourse are clear and predictable, and in which these rules are enforced by the state in appropriate cases, is congenial to wealth-creating commercial activity. Economic freedom (widely interpreted to include the establishment of secure property rights, the freedom of contract, and the enforcement of contractual obligations by the state)²⁵⁴ is commonly considered necessary for economic growth.²⁵⁵ By promoting a stable and predictable legal environment in which individuals are free and able to contract and by providing state support for the enforcement of contractual obligations, the rule of law plays a positive role in fostering economic development. However, the relevance of the rule of law in this respect may well be overstated because there are countervailing considerations that would seem to indicate important limits to the primacy of the doctrine as an engine of economic growth.

²⁵² *Id.* at 98.

²⁵³ Boettke & Subrick, *supra* note 228, at 111–12; *see also* Farber, *supra* note 246, at 87.

²⁵⁴ For the elements of economic freedom, see Steven H. Hanke & Stephen J. K. Walters, *Economic Freedom, Prosperity, and Equality: A Survey*, 17 CATO J. 117, 119–20 (1997), available at <http://www.cato.org/pubs/journal/cj17n2-1.html>.

²⁵⁵ *Id.* at 118.

While the rule of law is often lauded for promoting the idea of a state under the law, it is usually insufficiently emphasized that an economy thrives not only when laws are transparently and predictably enforced, but also when the right sort of laws are enacted and implemented. Laws are not by definition inherently pro economic efficiency.²⁵⁶ Some laws may well compromise economic efficiency by putting unnecessary burdens and restraints on businesses, or by mandating inefficient regulations. It is true that parties may be able to contract around inefficient rules, but such rules are sometimes mandatory. Even where they are non-mandatory, they nonetheless place additional, and often unnecessary, burdens on business transactions. Moreover, a modern market economy not only needs effective legal rules but also adaptable legal rules. However, not all legal systems have the flexibility to adapt the law to the changing realities of the market.²⁵⁷ Nonetheless, there is much to be said for the role of the rule of law in promoting a stable legal system, as the systemic failure of a legal system may stifle economic activity.

Furthermore, in stressing the importance of the rule of law in creating a predictable set of rules to govern business relations, it is often forgotten that business relations are typically regulated by the interaction of formal and informal norms.²⁵⁸ The emphasis on the role of formal norms inflates the role of the state and formal norms in influencing the business environment and unfairly minimizes the importance of informal norms in regulating social intercourse.²⁵⁹ While the state, through its enactment of formal legal norms, institutes the framework of regulatory rules that govern business relations, informal norms often have more direct application in the everyday interaction of people, even business people.²⁶⁰ Of course, this is a basic insight of the

²⁵⁶ See Messick, *supra* note 239, at 117–18.

²⁵⁷ See U.N. DEV. PROGRAM, COMM'N ON LEGAL EMPOWERMENT OF THE POOR, *supra* note 236, at 21.

²⁵⁸ Posner, *supra* note 5, at 2.

²⁵⁹ It is instructive to remember that commercial relations predate formalized law, and that often “[m]arkets, exchanges and rules can develop before government or any other monopolist has defined their rules” because business organizations not infrequently “define their own rules.” MATT RIDLEY, *THE ORIGINS OF VIRTUE* 204 (1996). This does not, however, imply that informal norms are always more efficient than formal norms in regulating commerce. For a discussion of the inefficiency of medieval private customary law, for example, see Avner Greif, *Informal Contract Enforcement: Lessons from Medieval Trade*, in 2 *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* 287–95 (Peter Newman ed., 2004).

²⁶⁰ As Posner has noted:

[T]here are many informal substitutes for the legal enforcement and protection of property and contractual rights. These include arbitration, with or without legal enforcement of the arbitrator’s award; reputation, which may be accompanied by retaliation (such as blacklisting people who default on their contracts) . . . strong-arm tactics, such as those used in illegal markets; and

relational theory of contract, a theory that has illuminated how informal norms affect contractual relationships.²⁶¹ Robert Ellickson developed this perspective by exploring how neighbors in Shasta County use informal, rather than formal, norms in resolving most disputes between them.²⁶² Based on his examination of the social interaction between members of the target community, Ellickson concluded that a large segment of social interaction between members of the community was located and shaped outside the reach of the law.²⁶³ In determining social entitlements, members of the community often looked toward social norms and not toward the law.²⁶⁴ Although stressing the role of informal norms as a system of social interaction in the target community, Ellickson was also careful to underscore the relevance of formal norms:

It is worth stressing that legal policies themselves influence the vitality of informal systems of social control. To achieve order without law, people must have continuing relationships, reliable information about past behavior, and effective countervailing power Legal rules can influence all these attributes of social structure and thereby promote—or impede—informal cooperation.²⁶⁵

The recognition of the limitation of the reach of formal norms, and the nature of their interaction with informal norms, is particularly apposite to the condition in developing countries where the penetration of formal norms is weak. The reach of formal norms in these societies is limited for a variety of reasons, including the cost of litigation, the complexity of the legal process to often unsophisticated business people, and the availability of more familiar informal mechanisms for resolving business disputes.²⁶⁶ For example, in discussing contract enforcement in Senegal, Julie Paquin identified factors that reduce the relevance of formal legal norms to contractual relations in that country.²⁶⁷ These include the fact that “most of the transactions that take place

altruism, which enables many family-owned firms to operate effectively outside a legal framework.

Posner, *supra* note 5, at 2.

²⁶¹ For a discussion of the theory, see Charles Goetz & Robert E. Scott, *Principles of Relational Contract*, 67 VA. L. REV. 1089 (1981).

²⁶² ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 1 (1991).

²⁶³ *Id.* at 4.

²⁶⁴ *Id.* at 141.

²⁶⁵ *Id.* at 284.

²⁶⁶ See, e.g., Julie Paquin, Economic Development and the Enforcement of Contracts: An Empirical View from Senegal 17–18 (2008) (unpublished working paper), available at <http://papers.ssrn.com/abstract=1126342>.

²⁶⁷ *Id.* at 4, 26–27.

in Africa are so small as to be beyond the reach of even very cheap judicial institutions²⁶⁸ and cultural factors that make certain groups reluctant to litigate disputes.²⁶⁹ According to Paquin, this reality challenges the conclusion of Douglass C. North, the renowned institutional economist, that the absence of efficient and low-cost contract enforcement mechanisms is “the most important source of both historical stagnation and contemporary underdevelopment in the Third World.”²⁷⁰

The signaling role of human rights protection in attracting investment may also be overstated. Even if one concedes that foreign investment is a requirement for economic growth, a fact that is not undisputed,²⁷¹ it is not clear that human rights protection is necessarily a major consideration to foreign investors when they make decisions on where to invest. The Chinese example would seem to contradict the basic premise of the signaling hypothesis.²⁷² China continues to attract substantial amounts of foreign investment even though it is beyond dispute that its human rights record leaves a lot to be desired.²⁷³ Farber’s signaling theory would seem to suggest that China’s poor human rights record would bode ill for the country’s ability to attract foreign investment. In fact, the contrary has been the case.²⁷⁴ Of course, one does not know whether a better Chinese human rights record would have led to a greater inflow of foreign investment into the country, but there is little to suggest that this would have occurred. As John Hewko has noted: “The most important factor in attracting [foreign investment] remains the existence of real business opportunities.”²⁷⁵ He added that “[e]ven if a country, under the careful guidance of the development community, were to implement a modern, fair, efficient, and transparent legal system, it would not attract foreign investment in the absence of genuine economic opportunities.”²⁷⁶ He concluded that

²⁶⁸ *Id.* at 5 (citing MARCEL FAFCHAMPS, MARKET INSTITUTIONS IN SUB-SAHARAN AFRICA 10 (2004)).

²⁶⁹ *Id.*

²⁷⁰ Douglass C. North, *Institutions and the Performance of Economies Over Time*, in HANDBOOK OF NEW INSTITUTIONAL ECONOMICS 21, 54 (Claude Ménard & Mary M. Shirley eds., 2005).

²⁷¹ See Thomas Carothers, *The Problem of Knowledge*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE, *supra* note 17, at 15–18. Carothers, for example, has noted that “it is not clear . . . that the economic success of a number of the major Western economies, such as the American and Japanese economies, was based on substantial amounts of inward foreign investment.” *Id.* at 17.

²⁷² See *supra* text accompanying notes 250–52.

²⁷³ Ray Brooks & Steven Barnett, *What’s Driving Investment in China?* 4–21 (Int’l Monetary Fund, Working Paper No. 06/265, 2006), available at <http://ssrn.com/abstract=956728>.

²⁷⁴ *Id.*

²⁷⁵ John Hewko, *Foreign Direct Investment: Does the Rule of Law Matter?* 7 (Carnegie Endowment for Int’l Peace, Working Paper No. 26, 2002), available at <http://www.carnegieendowment.org/files/wp26.pdf>.

²⁷⁶ *Id.*

institutional reforms, such as the promotion of the rule of law, are “generally not a necessary precondition to attract direct investment from large multinational investors,” because the more important considerations are available business opportunities and “the overall visceral perception that foreign investors have of a host country.”²⁷⁷

Farber’s signaling hypothesis was also based on the assumption that foreign investors are interested in judicial independence in the states in which they wish to invest and that “a strong indication of judicial independence is presented when courts vigorously enforce human rights against their governments.”²⁷⁸ Again, this assertion would seem to be contradicted by evidence that investment decisions by foreign investors are not motivated as much by the effectiveness of the local judiciary as by the prospective returns on investment.²⁷⁹ The relationship between judicial reforms and economic development is not as clear-cut as some proponents of the rule of law would make it.²⁸⁰ Moreover, investment disputes between foreign investors and host states are increasingly being resolved by international investment arbitrations that are usually conducted outside the jurisdiction of host states.²⁸¹ From the perspective of the foreign investor, the ability to submit disputes with the host state to arbitration abroad minimizes the importance of the local judiciary as a factor in making investment decisions.²⁸² While the strength of judicial institutions is part of the investment climate of a prospective host state, its importance in investment decision-making may be exaggerated by those who view the rule of law as an important engine of development.²⁸³

A strong argument against the centrality of the rule of law to economic prosperity is the fact that many societies have achieved economic prosperity without having to enact the kind of rule of law initiatives advocated by adherents of the law and development movement.²⁸⁴ A classic example is China, whose economy continues to grow at a very fast pace despite China’s not having implemented many of the rule of law reforms that are heralded as

²⁷⁷ *Id.* at 4.

²⁷⁸ Farber, *supra* note 246, at 98.

²⁷⁹ See Santos, *supra* note 177, at 283.

²⁸⁰ See Messick, *supra* note 239, at 120–23 (1999) (arguing that the relationship between judicial reform and development is “better modeled as a series of on-and-off connections”).

²⁸¹ See Susan Franck, *Foreign Direct Investment, Investment Treaty Arbitration and the Rule of Law*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 337, 365–70 (2007).

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ See Carothers, *supra* note 271, at 16–21.

vital to economic development.²⁸⁵ As Thomas Carothers has noted: “Many countries being told that they must have Western style of rule of law before they can achieve significant economic growth look with envy at China’s sustained economic growth of the past twenty years and wonder why the prescription did not apply there.”²⁸⁶ The China enigma has been difficult to reconcile with the rule of law orthodoxy, and some adherents of the rule of law and development movement have had to qualify their theses on the connection between the rule of law and development.²⁸⁷ After analyzing the Chinese situation, Kenneth W. Dam, who believes in a strong nexus between legal institutions and economic progress, drew the conclusion that “considerable development is possible without strong legal institutions but sustainable growth to higher per capita levels requires considerable development of legal institutions.”²⁸⁸ Even a smaller country like Vietnam has also enjoyed increased economic growth, although it has a rather weak rule of law regime.²⁸⁹ In a recent article, John Ohnesorge has concluded, after analyzing the trends in the economic development of Northeast Asian countries, that the rule of law and development orthodoxies do not adequately account for the variety of factors that contributed to the economic growth of the region.²⁹⁰ Similarly, writing about the economies of East Asia, Kanishka Jayasuriya has noted that these economies are characterized by relationships both between business people *inter se* and between business people and the state, with many of these relationships being conducted outside the framework of the formal

²⁸⁵ See generally Brooks & Barnett, *supra* note 273.

²⁸⁶ Carothers, *supra* note 271, at 18.

²⁸⁷ *Id.*

²⁸⁸ Kenneth W. Dam, *China as a Test Case: Is the Rule of Law Essential for Economic Growth?* 46 (Univ. of Chi. Law Sch., John M. Olin Law & Econ. Working Paper Series, Working Paper No. 275, 2006), available at <http://ssrn.com/abstract=880125>.

²⁸⁹ See Dani Rodrik, *Second-Best Institutions*, AM. ECON. REV., May 2008, at 100–01. Rodrik notes that the lesson to be drawn from the fact that the Vietnamese economy continues to thrive in the absence of a decent legal environment is that “even if the formal system of contract enforcement is weak, the contracting environment can still be conducive to high growth in the presence of informal substitutes.” *Id.* Drawing from this experience, he cautions that “the knee-jerk reaction that the apparent weakness of courts in Africa requires an immediate remedy in the form of judicial reform may well be misplaced.” *Id.*

²⁹⁰ John Ohnesorge, *Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience*, 28 U. PA. J. INT’L ECON. L. 219, 220 (2007). In another article, Ohnesorge noted that in its high-growth decades, the economies of Northeast Asia violated the rule of law orthodoxies, noting that “[h]uman rights protections, especially in areas such as labor organization, workplace safety, and the environment were minimal at best, and social safety nets were thin or non-existent.” John Ohnesorge, *On Rule of Law Rhetoric, Economic Development, and Northeast Asia*, 25 WIS. INT’L L.J. 301, 312 (2006). In his view, this reality warrants a healthy bit of skepticism about the professed link between rule of law initiatives and the stimulation of economic development. See *id.*

legal process.²⁹¹ In his view, because of the marginal role played by the formal legal systems in these countries, substantial investment in legal reform may not be warranted.²⁹²

Although it has been suggested that “there is surely a connection between the legal reforms carried out in Central Europe and the Baltics and their fast growth rates,”²⁹³ no concrete connection has been demonstrated between these two things. The broad institutional and economic reforms implemented by these countries also certainly played some part in their increased economic growth, but the contributions of each of these factors have not been isolated. If anything, the example of China and Northeast Asian countries would seem to indicate that the greater explanation for the increased economic growth by Central European countries lie more outside the sphere of rule of law reforms.²⁹⁴ If the rule of law were the key to economic development, India, with its English-modeled rule of law regime, would be outperforming China economically. However, this has not been the case of late.

The reality is no different in the developed world. In this regard, it bears quoting extensively from Upham’s assessment of whether the professed link between the rule of law and development is borne out by the U.S. and Japanese examples:

Two countries commonly heralded for their economic success—the United States and postwar Japan—do not themselves embody the formalist rule of law ideal that is supposedly so essential for growth. The United States clearly violates the requirement—embodied in the mantra “the rule of law, not men”—that the rule of law must be apolitical. It is no secret that U.S. judges are routinely elected or appointed based on their ideological views. . . . Additionally, federalism, the jury and adversary system, and the effects of economic class on access to the law ensure that rules will not be applied or evaluated consistently, marking further deviations from the formalist rule of law ideal.

Far from relying on a formalist rule of law to foster economic growth, the Japanese system kept the formal legal system out of economic policy making. Aggrieved firms, citizens groups, and individuals had little judicial recourse to challenge the policies for the

²⁹¹ Kanishka Jayasuriya, *Introduction: A Framework for the Analysis of Legal Institutions*, in *LAW, CAPITALISM, AND POWER IN ASIA* 7 (Kanishka Jayasuriya ed., 1999).

²⁹² *Id.*

²⁹³ *Economics and the Rule of Law: Order in Jungle*, *supra* note 20, at 85.

²⁹⁴ See Carothers, *supra* note 271, at 17–19.

powerful developmental state. Additionally, the settlement of individual disputes occurred through a broad system of informal mechanisms that kept most disputes out of the court system altogether.²⁹⁵

The lesson of the countries that have experienced remarkable economic growth without implementing significant rule of law initiatives would seem to be that the bases for economic growth lie not just in formal legal institutions, but in a confluence of factors, including: formal and informal institutional reforms, social capital, human capital, and the resources obtainable in a given country.²⁹⁶ These examples teach us that “remarkable economic growth can occur in a system without formalist rule of law but also that societies must develop a mix of formal and informal mechanisms that can produce optimal results given their respective social, political, economic and cultural contexts.”²⁹⁷

Rather than narrowly focusing on the rule of law as the primary engine for economic growth and development, the experiences of these countries teach us to explore more broadly the variety of elements, the law included, that provide a conducive environment for economic growth. We next turn to the institutional explanation for economic growth, a model that has animated recent moves to implement governance reforms in developing countries. The institutional model would be helpful in explaining how the law in general, not just the rule of law, could be a major element of a broader strategy for promoting economic growth and prosperity.

IV. THE INSTITUTIONAL EXPLANATION

The NIE theory²⁹⁸ has been instrumental in illuminating the importance of institutions to economic development.²⁹⁹ Adherents of this theory have made the case that good and functional institutional structures are essential for rapid

²⁹⁵ Upham, *supra* note 17, at 1.

²⁹⁶ See Carothers, *supra* note 271, at 16–19.

²⁹⁷ Upham, *supra* note 17, at 1.

²⁹⁸ For a review of the theory, see Christopher Clague, *The New Institutional Economics and Economic Development*, in INSTITUTIONS AND ECONOMIC DEVELOPMENT: GROWTH AND GOVERNANCE IN LESS-DEVELOPED AND POST-SOCIALIST COUNTRIES, *supra* note 19, at 13.

²⁹⁹ For a discussion of the importance of institutions to economic development, see Dani Rodrik & Arvind Subramanian, *The Primacy of Institutions (and what this does and does not mean)*, FIN. & DEV., June 2003, at 31.

economic growth.³⁰⁰ In so doing, they have brought necessary attention to the relevance of both formal and informal institutions in fostering a pro-development climate. The NIE has been so successful in making the case for the centrality of institutions to economic development that Francis Fukuyama recently argued that institutionalists have won the argument about the primary determinants of economic development.³⁰¹ According to him, “institutions themselves remain the proximate causes of growth, and in many cases they are exogenous to the material conditions under which a given society develops.”³⁰² Through their research, NIE scholars have sought to demonstrate that “institutional capital may be a more important determinant of economic development than financial capital, physical capital, human capital, or technological capital.”³⁰³ In his Nobel Lecture, Douglass North, one of the leading scholars of the NIE, noted that “[i]nstitutions form the incentive structure of a society and the political and economic institutions, in consequence, are the underlying determinant of economic performance.”³⁰⁴ Stressing the dominance of the NIE theory as an explanation of economic growth, Dani Rodrick has observed that the primary issue before policy makers “is no longer ‘do institutions matter?’ but ‘which institutions matter and how does one acquire them?’”³⁰⁵

What precisely are institutions, and why do they matter for economic development? In the context of the NIE, the word institution is not to be confused with organization. Institutions are what North has called “the rules of the game”; they are “the humanly devised constraints that structure human interaction. They are made up of formal constraints (rules, laws, constitutions), informal constraints (norms of behavior, conventions, and self imposed codes of conduct), and their enforcement characteristics.”³⁰⁶ To North, these formal and informal constraints and their enforcement

³⁰⁰ See Stephen Knack & Philip Keefer, *Institutions and Economic Performance: Cross-Country Tests Using Alternative Measures*, 7 *ECON. & POL.* 207, 207–23 (1995).

³⁰¹ Francis Fukuyama, *Development and the Limits of Institutional Design*, in *POLITICAL INSTITUTIONS AND DEVELOPMENT: FAILED EXPECTATIONS AND RENEWED HOPES* 21, 21–22 (Natalia Dinello & Vladimir Popov eds., 2006).

³⁰² *Id.* at 21–22.

³⁰³ Michael Trebilcock, *What Makes Poor Countries Poor? The Role of Institutional Capital in Economic Development*, in *THE LAW AND ECONOMICS OF DEVELOPMENT* 16, 19 (Edgardo Buscaglia, William Ratliff & Robert Cooter eds., 1997).

³⁰⁴ Douglass C. North, Nobel Prize Lecture: Economic Performance Through Time (Dec. 9, 1993) (transcript available at http://nobelprize.org/nobel_prizes/economics/laureates/1993/north-lecture.html).

³⁰⁵ Dani Rodrick, *Institutions for High-Quality Growth: What They Are and How to Acquire Them*, in *INSTITUTIONS, GLOBALISATION AND EMPOWERMENT* 19, 20 (Kartik C. Roy & Jörn Sideras eds., 2006).

³⁰⁶ North, *supra* note 304.

characteristics “define the incentive structure of societies and specifically economies.”³⁰⁷ They provide incentives and disincentives for individuals to conduct their affairs in particular ways, thereby structuring economic, political, and social activity.³⁰⁸ To NIE scholars, “the design and functioning of public sector institutions and private sector organizations that interact with these institutions [are] critical determinants of countries’ development prospects through the incentives they create to engage in either socially productive or socially unproductive activities.”³⁰⁹

With respect to the assessment of the role of the rule of law in economic development, the salience of the NIE paradigm lies in its emphasis of both formal and informal institutions and their enforcement mechanisms as essential to economic growth.³¹⁰ In this framework, the formal legal system alone is insufficient to explain why particular societies and economies prosper. The NIE paradigm suggests that a better appreciation of the engines of prosperity would entail an understanding of the interaction of formal and informal norms in given societies.³¹¹ This demands an understanding of how these norms are created, implemented, modified, and enforced, as well as how they interact with each other to structure human behavior.

This broader perspective requires looking beyond the rule of law in searching for the kinds of reforms that would stimulate economic development. The insight here is not that the rule of law is irrelevant to economic development, but that the doctrine has to be viewed as one of a variety of formal and informal institutions that contribute to economic prosperity.³¹² In discussing the importance of informal institutions, North has observed that “when you go to a third world country and try to improve performance, there is only one of the three elements of institutions that you can alter and that is the formal rules of the game.”³¹³ However, a focus on formal institutions alone would be shortsighted because, as North rightly notes, economic “performance is the result of all three: the formal rules, informal norms and their enforcement

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ Davis & Trebilcock, *supra* note 32, at 902.

³¹⁰ *Id.* at 903–05.

³¹¹ *Id.*

³¹² *See id.* at 932–38 (discussing and refuting informalists’ skepticism about legal reform).

³¹³ Douglass C. North, Gunnar Myrdal Lecture: The Role of Institutions in Economic Development, (Mar. 5, 2003), in U.N. Occasional Paper No. 1, Oct. 2003, at 7.

characteristics.”³¹⁴ Therefore, one of the benefits of the NIE theory is that it “keeps one’s mind on the fact that what counts is not only the written rule but all of the factors that shape the rule’s influence, from enforcement to social norms to corruption.”³¹⁵ Consequently, it helps shift our focus from concentrating only on the role of the rule of law to thinking about the broader range of institutions requisite for stimulating sustainable economic growth in developing countries.

The NIE has highlighted several levels of institutions that are relevant in understanding economic development.³¹⁶ Oliver E. Williamson, another notable NIE scholar, discusses these institutions in his reflections on the NIE movement.³¹⁷ The first two levels of the institutions he outlines are those most directly relevant to our discussion here. The first, which he places at the top of his institutional hierarchy, he calls embeddedness or social/cultural foundations.³¹⁸ This includes informal institutions, customs, traditions, norms, and religion.³¹⁹ In his view, these constitute the basic foundations of a society’s framework, they change very slowly over time, and they “have a lasting grip on the way a society conducts itself.”³²⁰ The second he calls “the institutional environment,” by which he means formal rules such as laws,

³¹⁴ *Id.* Carothers developed this argument in the context of efforts by international institutions to implement rule of law initiatives in developing countries. He questioned whether it made sense to think of the rule of law in terms of formal institutions only:

Clearly law is not just the sum of courts, legislatures, police, prosecutors, and other formal institutions with some direct connection to law. Law is also a normative system that resides in the minds of the citizens of a society. As rule-of-law providers seek to affect the rule of law in a country, it is not clear if they should focus on institution-building or instead try to intervene in ways that would affect how citizens understand, use, and value law. To take a simple example, many rule-of-law programs focus on improving a country’s courts and police on the assumption that this is the most direct route to improve compliance with law in the country. Yet some research shows that compliance with law depends most heavily on the perceived fairness and legitimacy of the laws, characteristics that are not established primarily by the courts but by other means, such as the political process.

Carothers, *supra* note 271, at 20–21.

³¹⁵ DAM, *supra* note 1, at 23. Dam also points out that “neoinstitutional economics puts rather more focus on what actually happens on the way from a policy or rule to its application and practical result.” *Id.* In fact, North has gone as far as stating that “[i]n many ways [informal] norms are more important than the formal rules.” North, *supra* note 313, at 2.

³¹⁶ See Oliver E. Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead*, 38 J. ECON. LITERATURE 595 (2000) (developing four levels of social analysis regarding the NIE).

³¹⁷ See *id.*

³¹⁸ *Id.* at 596.

³¹⁹ *Id.*

³²⁰ *Id.* at 597.

property rights, and the constitution.³²¹ An important feature of this second level is the “definition and enforcement of property rights and of contracts laws.”³²² The institutional environment reflects the attributes of a society’s social and cultural foundations, and while it is easier to make changes to the institutional environment than it is to social/cultural foundations, the effectiveness of these changes would depend, in large part, on the social/cultural realities of the society in question.³²³ Applied to the context of the rule of law, Williamson’s thesis is that, while it might be easier to implement rule of law initiatives than it is to change the social/cultural foundations of a society, the effectiveness of these initiatives will invariably depend on the social and cultural conditions of the given society.³²⁴

Under the NIE model, one of the foundational conditions for economic progress is the protection of property rights.³²⁵ Under this model, property rights constitute the basic tool through which a society provides the incentive structure that promotes economic development.³²⁶ In light of the salience of property rights to the NIE model, NIE scholars have directed a lot of research attention to exploring “how property rights emerge, what they mean, how they are enforced, [and] how these rights are limited and adjusted in very different institutional settings.”³²⁷ In this context, the work of Hernando de Soto has been particularly helpful in underscoring the importance of recognizing and protecting the private property rights of the poor as a means of fostering economic growth in developing countries.³²⁸ Although historically more emphasis was placed on the formal protection of property rights through the legal process, the NIE has also stressed the importance of examining the role of informal norms in enhancing property rights.³²⁹

³²¹ *Id.* at 598.

³²² *Id.*

³²³ Paul L. Joskow, *Introduction to New Institutional Economics: A Report Card*, in *NEW INSTITUTIONAL ECONOMICS: A GUIDEBOOK 1, 7–8* (Eric Brousseau & Jean-Michel Glachant eds., 2008).

³²⁴ *Id.* at 12.

³²⁵ *Id.* at 16.

³²⁶ DOUGLASS C. NORTH, *STRUCTURE AND CHANGE IN ECONOMIC HISTORY 7* (1981).

³²⁷ Joskow, *supra* note 323, at 16.

³²⁸ See HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* (2000).

³²⁹ See NORTH, *supra* note 326, at 17–18 (emphasizing the relevance of informal norms to enforcing the protection of private property). In his view, “[t]o the extent that the participants believe the system fair, the costs of enforcing the rules and property rights are enormously reduced by the simple fact that the individuals will not disobey the rules or violate property rights even when a private cost/benefit calculus would make such action worthwhile.” *Id.* at 53. Richard Posner has also pointed out the existence of “many informal substitutes for the legal enforcement and protection of property and contract rights.” Posner, *supra* note 5, at 2.

While underscoring the importance of getting the incentive system right, some NIE scholars also caution against the presumption that there is a development blueprint out there, the implementation of which would solve the economic problems of developing countries.³³⁰ For example, North reminds us that the world is not an “ergodic” world in which there is “a fundamental underlying structure to the system such that all you had to do would be to discover it in order to know how to deal with new problems.”³³¹ While it is important to have institutions that provide the proper incentives to human conduct, it is also vital to have institutions that are able to adapt to new problems and to the changing conditions of the modern world:

To the degree that problems are evolving, we must evolve institutions, political, economic and social, that will solve those problems. Our best chance of doing it is by developing . . . adaptive efficiency. Adaptive efficiency kicks in when there are flexible institutions that provide a maximum of choices at a given moment of time. In a world of uncertainty in which nobody knows the right answer, you need to try out a lot of things and hope you will find one that works. And you must also have laws and rules, such as bankruptcy laws, that eliminate those that do not work. If you have a society that creates such an institutional framework, it obviously has the best chance of being successful with respect to survival and continuous performance.³³²

Therefore, to NIE scholars the key to economic prosperity is not merely the reform of formal rules and the protection of property rights, but also ensuring the adaptability of formal and informal institutions to changing conditions.³³³ Because “[f]ormal institutions are embedded in a matrix of informal norms, values, traditions, and historical path-dependencies,” they are generally ineffectual in promoting economic progress unless they are undergirded by “a supportive political culture.”³³⁴ With the right leadership, judgment, and political will, even a less-than-optimal system of formal institutions can be made to work.³³⁵ This insight has been instrumental in the increased emphasis on good governance as a necessary element of economic development.³³⁶

³³⁰ North, *supra* note 313, at 8.

³³¹ *Id.*

³³² *Id.* at 9.

³³³ *Id.*

³³⁴ Fukuyama, *supra* note 301, at 39.

³³⁵ *Id.*

³³⁶ Rittich, *supra* note 9, at 207.

Good governance has been described as a condition in which the responsibilities of government are “discharged in an effective, transparent, and accountable manner.”³³⁷ This implies the maintenance of efficient and accountable institutions, entrenchment of pro-development principles, respect of the rule of law, and the provision of a mechanism for popular participation in governance and decision-making.³³⁸ Good governance requires the creation of functional governments, an atmosphere that fosters civic participation, and an environment that promotes public accountability of government officials. It also entails the exercise of public authority for the common good.³³⁹ Because of its emphasis on functional and effective public institutions, good governance is now viewed as an essential part of the strategy for building socially and economically successful nations.³⁴⁰

The focus on good governance ought not to detract from the central insight of the NIE: the complementary roles of informal and formal institutions in promoting development.³⁴¹ The NIE movement deserves credit for reiterating the importance of both formal and informal institutions in explaining developmental outcomes. In the following extract, Fukuyama summarizes the relevant insight of the NIE paradigm, an insight that would enable us to draw conclusions on the link between the rule of law and development:

Formal institutions matter; they change incentives, mold preferences, and ideally solve collective action problems. On the other hand, the informal matrix of norms, beliefs, values, traditions and habits which constitute a society are critical for the proper functioning of formal institutions, and a political science which pays attention only to the design of formal institutions and fails to understand the accompanying normative and cultural factors will fail. . . . Therefore

³³⁷ See Kempe Ronald Hope, Sr., Director, Dev. Mgmt. Div., U.N. Econ. Comm’n for Africa, *The UNECA and Good Governance in Africa*, Paper Presented at the Harvard Int’l Dev. Conference 2 (Apr. 4–5, 2003) (transcript available at www.uneca.org/dpmd/Hope_Harvard.doc).

³³⁸ *Id.* at 2–3.

³³⁹ See Daniel Kaufmann, *Myths and Realities of Governance and Corruption*, in *THE GLOBAL COMPETITIVENESS REPORT 2005–2006*, at 81, 82–83 (2005). Kaufmann notes that governance has a political dimension, “the process by which [officials] are selected, monitored, and replaced”; an economic dimension, government capacity for effective economic management and implementation of sound policies; and an institutional dimension, respect for a country’s institutions. *Id.* at 82.

³⁴⁰ See Daniel Kaufmann, Aart Kraay & Pablo Zoido-Lobaton, *Governance Matters 3* (World Bank Policy Res. Working Paper No. 2196, 1999), available at <http://siteresources.worldbank.org/INTWBGOVANTCOR/Resources/govmatrs.pdf>. For a discussion of the importance of good governance to economic development on the African continent, see generally Okezie Chukwumerije, *Peer Review and the Promotion of Good Governance in Africa*, 32 N.C. J. INT’L L. & COM. REG. 49 (2006).

³⁴¹ Fukuyama, *supra* note 301, at 22–24.

we must look to both formal and informal institutions when explaining the difference in development outcomes among different societies, taking each side of the equation seriously, as well as the importance of their interaction.³⁴²

V. OBSERVATIONS AND CONCLUSIONS

What does the NIE scholarship teach us about the place of the rule of law in promoting economic development? Perhaps the foremost lesson is that, as Fukuyama aptly noted above, formal institutions alone cannot provide an adequate account of what propels economic development.³⁴³ If formal institutions taken together are insufficient to account for economic development, this affords a compelling reason for believing that the rule of law alone, whether implemented in the broad or narrow sense, cannot by itself be the primary engine for economic prosperity. This observation is borne out by the China enigma: the reality of the duality of rapid economic growth and relatively weak rule of law institutions in China.³⁴⁴

While there may be a correlation between certain countries that have established rule of law regimes and relative economic *wealth*, it should not be assumed that the rule of law alone accounts for this accumulation of economic wealth over time. As *The Economist* has correctly noted, while a connection between the rule of law and economic wealth may be established, this connection “has been forged over decades, even centuries.”³⁴⁵ Moreover, the explanation for this wealth accumulation often lies more in the quality of the formal and informal institutions in these countries.³⁴⁶

A further insight provided by the NIE paradigm is that rule of law initiatives must take into account the social, political, and historical contexts of the countries in which they are implemented.³⁴⁷ A system of rules does not operate in a vacuum. As tools for regulation of social behavior, rules are affected by and must take into account the social, cultural, and political milieu in which they are implemented.³⁴⁸ Davis and Trebilcock have noted that

³⁴² *Id.* at 24.

³⁴³ *Id.*

³⁴⁴ For an insightful discussion of this issue, see Donald C. Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 AM. J. COMP. L. 89 (2003).

³⁴⁵ *Economics and the Rule of Law: Order in the Jungle*, *supra* note 20, at 85.

³⁴⁶ *Id.*

³⁴⁷ Davis & Trebilcock, *supra* note 32, at 919.

³⁴⁸ *See id.* at 34–45.

“[o]ptimal institutions generally . . . will often be importantly shaped by factors specific to given societies, including history, culture, and long-established political and institutional traditions.”³⁴⁹ This entails “some degree of modesty on the part of the external community in promoting rule of law or other legal reforms in developing countries and correspondingly a larger role for ‘insiders’ with detailed local knowledge.”³⁵⁰

In a sense, the efficacy of formal institutions depends on their reinforcement by informal norms. Because informal institutions are less pliable in the short run than formal institutions, reformers should have modest expectations about what they can accomplish by initiating changes to the formal institutions of a society. While it may be easy for a “group of competent legal scholars with the necessary audacity [to] devise a formal legal system that would work well on paper, making the various assumptions about human behavior, institutional capacity, and incentive structures necessary to implement their worldview,”³⁵¹ such a plan has little chance of success if it does not properly deal with the practical conditions in the recipient country. The relevant conditions in this context would include the interplay between formal and informal mechanisms of social control in the given society.

In implementing rule of law initiatives, it is also desirable to ensure that these reforms mesh well with the existing informal system of norms within the society.³⁵² For example, after reviewing the lessons learned from the implementation of rule of law initiatives in post-conflict societies, Kirsti Samuels notes that:

Existing alternatives to formal legal structures, which may be more effective and less costly such as paralegal programs in South Africa, or community councils or other culturally appropriate dispute resolution mechanism[s], should be considered [in implementing reforms]. One useful step, going forward, would be to develop (and

³⁴⁹ *Id.* at 60.

³⁵⁰ *Id.* Fukuyama has similarly stressed the importance of local knowledge. According to him, “[p]eople without . . . local knowledge often do not understand how even existing institutions actually work, much less how to reform them.” Fukuyama, *supra* note 301, at 39. He notes that “local knowledge is necessary to understand the possibilities available to a given society.” *Id.*

³⁵¹ Upham, *supra* note 17, at 33.

³⁵² For a development of this argument in the context of law reform in Africa, see Hans-Werner Wabnitz, *Reforming Legal Reform in Francophone Africa: World Bank Project Experience* (N.Y. Law Sch. Islamic Law and Law of the Muslim World Research Paper Series 08-12, Feb. 12, 2008), available at <http://ssrn.com/abstract=1093028>.

evaluate) new strategies to take advantage of the informal structures and at the same time encourage appropriate reforms.³⁵³

What is the optimal set of institutions necessary to promote economic development in developing countries? While the centrality of institutions to economic development is now widely acknowledged, there is not much agreement on what an optimum set of institutions necessary to this end should look like. However, there is a respected body of literature suggesting that, with respect to developing countries, second-best institutions might well be sufficient in achieving the desired goal of stimulating economic development, at least in the short term.³⁵⁴ For example, in a recent paper, Rodrik notes that “a focus on best-practice institutions not only creates blind spots, leading us to overlook reforms that might achieve the desired ends at lower cost, it can also backfire.”³⁵⁵ Using the example of the weak judiciary in Africa, he suggests that the tendency has been to think that the solution is to introduce judicial reforms to strengthen the autonomy, independence, and capacity of the judiciary.³⁵⁶ However, he observes that, even in the face of a weak judiciary, the contracting environment in a country may still be conducive to growth if there are effective informal substitutes to formal enforcement of contracts.³⁵⁷ He cites the example of Vietnam, which has enjoyed remarkable economic growth even though it also has a weak judiciary.³⁵⁸ Against this background, Rodrik observes that “[p]erhaps it is more effective to enhance relational contracting—for example by improving information gathering and dissemination about the reputation of firms—than to invest (at the current stage of a country’s development at least) in first-class legal institutions.”³⁵⁹ He concludes by noting that a focus on best-practice institutions poorly serves the ends of development because it narrows rather than expands the menu of institutional choices available to reformers.³⁶⁰

Rodrik’s “second-best institutions” thesis presents a useful framework for evaluating the benefits of implementing rule of law reforms. There are always

³⁵³ Kirsti Samuels, *Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt* (World Bank Soc. Dev. Papers, Working Paper No. 37, 2006), available at http://siteresources.worldbank.org/INTCPR/Resources/WP37_web.pdf.

³⁵⁴ See, e.g., Rodrik, *supra* note 289 (arguing for a “second-best” mindset in dealing with the institutional landscape of developing economies due to the shortcomings of best-practice institutions).

³⁵⁵ *Id.* at 100–01.

³⁵⁶ *Id.* at 101.

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.* at 104.

opportunity costs to the funds expended in implementing rule of law initiatives. In light of the financial and opportunity costs of implementing these initiatives, it bears considering whether it might not be preferable, at least in the short run, to strive for institutions that may not necessarily be as top-notch as those found in the more economically developed parts of the world. Where particular legal reforms are expensive, it might be preferable to implement them incrementally. As Posner cautioned, expensive rule of law initiatives may drain away productive resources from the economy, thereby stifling other necessary legal and economic reforms.³⁶¹ Consequently, “the prudent choice is to defer legal projects that are costly and ambitious and instead to begin modestly.”³⁶²

In conclusion, it is best to view rule of law reforms as part of a broader strategy for promoting economic development. Rule of law initiatives alone do not have any measurable direct effect on stimulating economic growth. However, as the NIE scholarship has demonstrated, when placed in the context of broader formal and informal institutional reforms in stimulating economic development, and when coupled with good governance, the rule of law has a place.

³⁶¹ Posner, *supra* note 5, at 3.

³⁶² *Id.*