

**The rule of law in Latin America:**  
**Structural origins, institutional manifestations**

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In public discourse and academic writing, the words “democracy and the rule of law” appear inextricably linked. Nowhere is this more true than in the literature on Latin American democracies. In recent years, Guillermo O’Donnell has been perhaps the most insistent on the role of the law and a democratic *Rechtsstaat* in supporting democracy. Among other things, he argues that an effective democratic legal order provides the necessary underpinning for elections to be truly free and fair, and thus for democracy to exist at all (O’Donnell 2001: 71, et seq.). Mainwaring, *et al.*, also argue that the rule of law is “intrinsic to democracy” (Mainwaring et al. forthcoming). O’Donnell recently re-emphasized the centrality of the rule of law to the quality of democracy: “What is needed ... is a truly *democratic* rule of law that ensures political rights, civil liberties, and mechanisms of accountability which in turn affirm the political equality of all citizens and constrain potential abuses of state power.” (O’Donnell 2004).

And yet, in the nearly thirty years since the latest wave of democratization swept over Latin America it has become increasingly clear that emerging democracies across the developing world continue to struggle to install a truly democratic rule of law (Schedler et al. 1999; Mainwaring and Welna 2003; Méndez et al. 1999; Foweraker and Krznaric 2002). Indeed, some have argued not only that there has been a decline in levels of democracy that is substantially attributable to deficiencies in the rule of law (Diamond 1996, 1999), but that democratic politics has actually played a role in undermining the rule of law, at least for certain underprivileged groups (Ahnen 2007). Central to the problem is the failure to extend the benefits of crucial democratic rights, and of the law more generally, to the underprivileged (Méndez et al. 1999; Foweraker and Krznaric 2002). The question addressed in this paper strikes at the heart of this democratic dilemma: Why have all the formal legal improvements that are concomitants of 21<sup>st</sup> century democracy – new constitutions, better laws, improved judiciaries, more accountable

security forces – failed in many respects to produce more “democratic rule of law,” especially for the underprivileged?

In this paper, I first offer and defend definitions of rule by law and of a democratic rule of law, in an effort to clarify some of the conceptual confusion around the term and offer new insights to guide research in the area. I then use insights from the economics, socio-legal and political science literatures on the rule of law, to offer an account of this failure. Among other things, I will argue that the search for the indicators and causes of a single, national level, “rule of law” is at least partially misguided, as a country’s legal texture is made up of a wide diversity of normative regimes, within each of which there may be more or less rule of law. Examining the variation across regimes within a particular country can help elucidate the social structures that underlie and the institutional manifestations that maintain the rule of law. I will however, aggregate this more granular account into an explanation for the observed cross-national variation in the rule of law. Finally, I apply this theoretical framework to an overview of the experience with rights and law in Latin America, to illustrate how the theory might apply.

My goal in this paper is not to present a completed project, or even a test of a theory, but to present the theoretical framework that might guide a new research project. This project would look at the causes of the transformation of the legal landscape in recent years in Latin America. In particular, it would seek to account for both cross-national and within-country variation in the effectiveness of rights and laws more generally. It is prompted by the observation that Latin America is no longer – at least not everywhere and for everyone – a place where the oft-quoted Getúlio Vargas aphorism holds: “For my friends everything, for my enemies, the law.” It has become, rather, a place where, in some contexts and for some people, the law effectively guides social interactions, and becomes a source of both rights and responsibilities. The problem,

however, is that this new rule of law regime is poorly distributed, both across countries and within them, across social groups.

### **Defining the rule of law:**

In order to set the conceptual foundations for this discussion, we must first clarify what we mean by the rule of law, and what we hope to achieve by it. The concept is notoriously polysemic: various organizations pin the “rule of law” label on the program of the day, meaning a diversity of things by it and attributing a wide variety of benefits to it. Discussions of this conceptual and definitional confusion are nearly as frequent as discussions of the rule of law itself (see Domingo and Sieder 2001; Kleinfeld 2006; Santos 2006; O'Donnell 2004; Trebilcock and Daniels 2008). I propose a definition that includes more than the effective application of rules – what might be called rule *by* law (Holmes 2003), but that neither incorporates specified substantive requirements or a catalogue of institutional elements that are believed to be necessary for the rule of law to exist. I hope, in this way, to avoid much of the terminological and conceptual debate.

“Thin” definitions of the rule of law have substantial appeal. A minimal and thin conception of the rule of law would include only, in Rawls’ words, “the impartial and regular administration of rules, whatever these are” (Rawls 1971: 235 [quoted in Trebilcock and Daniels 2008: 20]). A more suggestive label for this might be “rule by law” (Barros 2003). A very slight expansion of the thin definition, but one that retains its positivism and substantive agnosticism, would merely require that interactions – especially those between the state and the individual, but also purely private ones – are structured by (that is, predictable according to) preexisting rules that have the status of law within the political system in question. This slightly more expansive version of rule by law would require not only the application of the law by official

instances but substantial compliance with the law in ordinary affairs. Its lack of substantive requirements would allow us to examine various interesting questions, including, for example, whether rule by law, regardless of the content of the law, eventually leads to more democracy, or more justice, or more regard for human rights. In many instances, this may well be the proper definition to use, and in this project I will occasionally use it, although primarily to contrast it to what I will define below as a democratic rule of law.

“Institutional” definitions of the rule of law retain this substantive agnosticism but typically specify a set of institutions that must be present for a state to have the rule of law. Raz’s oft-cited definition offers a typical set:

- (1) All laws should be prospective, open and clear.
- (2) Laws should be relatively stable.
- (3) The making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules.
- (4) The independence of the judiciary must be guaranteed.
- (5) The principles of natural justice must be observed.
- (6) The courts should have review powers over the implementation of the other principles.
- (7) The courts should be easily accessible.
- (8) The discretion of the crime-preventing agencies should not be allowed to pervert the law (Trebilcock and Daniels 2006, citing Raz 1979: 211-14)

It is immediately clear that this is not so much a definition but a prescription for what must be done if law is to fulfill its intended social coordination function. While – with the likely exception of principle (5) – they still avoid specifying the substantive commitments the law must include, this and similar definitions assume a causal relationship between various institutional features of a political order and the extent to which the law will structure social interactions. It seems, therefore, a less useful definition than the previous one, especially if the goal is to uncover rather than assume the determinants, institutional and otherwise, of the rule of law.

A truly “thick” definition of the rule of law, meanwhile, specifies at least some of the values that must be protected by the laws. Typically these might include human rights, or

broader notions of substantive justice – thus not only requiring that everyone be granted the same rights, but also specifying some minimal list of rights that must be included in the system of laws (Kleinfeld 2006). Such a definition would rule out *a priori* the possibility of finding an unjust or oppressive rule of law, something I think is entirely likely. I do not wish to go this far, but part of my concern here is with understanding the processes that underlie the establishment of a rule of law that might support what I will call full legal agency within a democratic context. Moreover, my principal region of interest is modern Latin America, which is mostly democratic and at least formally promises most of the human rights but fails to deliver something we might consensually label “rule of law.” For this purpose, then, we need something more than rule by law, but less than a thick, fully informed by human rights, substantive definition of rule of law.

What I am looking for, in this project, are the social and political sources of a *democratic* rule of law, defined as the consistent application, without regard for social position, of formal rules congruent with a democratic political regime, and the effective protection of core democratic rights against incursion or neglect by state or social actors.<sup>1</sup> I distinguish this, occasionally, from rule by law, as defined above: the extent to which social interactions are structured by law, both through compliance and through enforcement. This definition does not rule out the possibility of outcomes that are perfectly legal and democratic but unjust, unfair, or otherwise undesirable by some external standard, so long as they are congruent with a democratic order, that is, they do not impede the exercise of core democratic rights. The definition has a substantive element, as do “thicker” definitions of the rule of law (Trebilcock

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<sup>1</sup> I will mostly avoid the discussion of what is “congruent” or “consistent” with a democratic regime. That is, at bottom, a question for democratic theory to answer, and, within bounds, we may come up with a different answer for different societies. Beyond certain core commitments that are necessary for a regime to be a democracy, what substantive commitments a democratic rule of law requires is a matter for debate and definition through the democratic process itself, given what is achievable for any country in particular.

and Daniels 2008: 16-20), but it avoids, for now, getting into the thorny normative issues these definitions require. It also avoids the detailed listing of institutional arrangements and substantive requirements on which the “institutional” definitions rely (see, e.g., Raz 1979; Fuller 1969). Finally, it avoids the intentional agnosticism of “thin” definitions, in order to focus on the construction of something that is normatively attractive, if less than utopic.<sup>2</sup>

As thus conceived, and as Magaloni (2003) also notes, the rule of law has two dimensions. It must, in the first place, address the Hobbesian dilemma, structuring and empowering a state that can protect us from the depredations of our fellow citizens. The evident failure of many countries to solve this dilemma is at the forefront of citizens’ concerns about the rule of law in Latin America today. Violence, crime, and the lack of effective means for enforcing contractual and other rights vis-à-vis more socially powerful actors have earned legal institutions much of their current disrepute. It is blatantly obvious that there is no rule of law if the state does not in effect exercise near monopoly control over the production of violence. The first crucial task in establishing the rule of law, then, is ensuring that the social production of violence is subject to credible, if not perfect, control by the state. But the protection of rights vis-à-vis fellow citizens goes far beyond controlling violence: employees must enjoy or be able to challenge denials of labor rights, single parents must be able to enforce support obligations, property owners must feel their rights to home, land or factory are secure against unlawful incursion.

Second, the rule of law must solve the Madisonian problem that arises precisely from the solution to the first dilemma. It must restrain this necessarily powerful state from itself preying

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<sup>2</sup> We may question, in any event, whether the supposed “thinness” of many definitions is conceptually sustainable, or whether substantive concerns always enter, unacknowledged, through the back door, through concepts such as equal treatment for equally situated persons (begging the standards that will determine who is equal to whom), or “natural justice” principles (which are no less substantive for being difficult to pin down concretely).

upon citizens and violating their rights. Here again, notorious deficiencies in the ability of law and legal institutions to restrain powerful executives, police the separation of powers, curb state violence, and limit corruption have led to a loss of confidence and legitimacy for legal institutions across the developing world. Arguably, the weakness of courts and other legal institutions in this regard has contributed to the brand of hyper-presidentialist and diminished democracy O'Donnell labeled "delegative democracy" (O'Donnell 1994, 1993; Larkins 1998). In summary, the democratic rule of law, in this conception, includes effective restraints on both the ruler and fellow citizens, ultimately leading to interactions in society that may or may not be law-ordered in a direct way, but that in any event are consistent with democratic citizenship.

Here a brief digression on law and negative spaces, in the artistic sense of the term, is in order. In no society do formal laws directly regulate all social interactions, nor is this a necessary or even desirable condition for the existence of a democratic rule of law. The rule of law, democratic or otherwise, is characterized as much by what it does not do, as by what it does. The rule of law generally may and does open up spaces that are then structured by market forces, or any variety of oppressive and unequal relations of domination. A democratic rule of law, in turn, will leave many relationships unregulated by formal law, but must remain sensitive to the consequences of leaving those relationships unregulated and open up avenues for asserting rights and exercising agency that are denied in the context of unregulated relationships. Thus, the law may preserve a great deal of freedom for individuals to order their intimate relations as they see fit, as in marriage or other domestic arrangements, and it may in addition prevent that space from becoming a place for oppression and domination by empowering women more generally. It may preserve a great deal of contractual freedom, and it may or may not proscribe agreements that are inconsistent with the effective exercise of democratic citizenship.

In evaluating the *democratic* rule of law, therefore, we must pay attention to the negative spaces as much as to the positive rules to see what the system permits in the spaces that are free of direct regulation. A democratic rule of law should empower individuals, so that they can prevent the occupation of these open spaces by alternative normative orders that are incompatible with a democratic regime and with the exercise of legally recognized rights.

This implies that the rule of law goes beyond the purely negative function one could derive from the earlier formulation – protection against the sovereign, protection from each other. The (perennially unrealized) goal of a complete and effective democratic rule of law is to create a context in which citizens acquire what we might label full legal agency: a low probability of being denied one’s rights, a high probability of securing redress when those rights are violated, and the capacity to make effective and proactive use of law and legal processes when and as desired in the pursuit of all legitimate life objectives.<sup>3</sup> Its institutional embodiment – laws, courts, police, legal aid agencies, the legal profession – provides the means by which, as Weber (1978: 666-67) noted, rights become a source of power even for the formerly powerless. Thus the role of the institutions that enforce a democratic rule of law cannot be conceived in purely reactive, passive terms, as a barrier against, or mechanism of redress for, violations of an active nature.

In summary, a political system is characterized by the democratic rule of law if its state consistently applies laws congruent with a democratic political regime, regardless of social differences, and effectively protects core democratic rights against incursion or neglect by state or social actors. These laws will often leave private and public spaces free of government regulation. But they will effectively prevent those spaces from being occupied by alternative

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<sup>3</sup> See O’Donnell (2001) for a discussion of the connection between agency *tout court* (of which what I have called “legal agency” is but one component) and democracy.

orders that are inconsistent with the democratic regime or with the laws themselves – i.e., relationships that in effect deprive some participants of rights guaranteed elsewhere in the law – by empowering the participants to protect their legitimate interests. The goal of the rule of law is to promote legal agency at the individual level: to endow citizens with a full set of rights and capabilities that will permit them to pursue legitimate life objectives without legal hindrance. The next question is, of course, what are the conditions under which a political system will develop something that more closely approximates a democratic rule of law.

### **The argument**

Many of the arguments proposed recently – as does, indeed, my own formulation of the question – assume that each political system, or at least its legal component, demonstrates sufficient internal homogeneity that it could be scored as a unit. The most commonly used rule of law indicators (e.g., Kaufmann et al. 2005) produce a single value for each country. Models of the establishment of the rule of law treat this as something that has a “founding moment” for the system as a whole (Levi and Epperly 2008). Weingast (2008) goes further, arguing that developing countries (or, more precisely, “natural states,” a term that describes the vast majority of all regimes in the world today and historically, including all developing countries) are unable to establish the rule of law. In this view, the rule of law is something that should respond primarily to regime level variables: the existence of “principled principals” at the national level, in Levi and Epperly’s argument, control over the production of violence and various “threshold conditions” in Weingast’s model.

But even casual observation suggests that a country’s legal texture is much more varied than that. Legal agency, as defined above, is an individual level variable, and it can vary significantly within a single political system, in response to other individual level variables such

as access to lawyers, to take a simple example. It can also vary according to group level variables, even in countries in which there is otherwise a fairly high degree of rule of law. Racial minorities in the US experienced this most visibly until at least the mid 1960s, but continue to experience it today in inner cities and criminal justice fora. Pistor, Haldar and Amirapu (2008) show how social norms prevent the bulk of Indian women from exercising legal agency, despite relatively high scores for “rule of law” on the national level. The national level analyses and models detailed above tell us something interesting about necessary or threshold conditions, or about national level variables that make it easier or more difficult for individuals and groups to acquire legal agency. But in using them to explain individual legal agency, we may fall into a version of the ecological fallacy.

My solution is to offer a unified explanation that can account for the observed variation at the individual, group, and national levels. To develop such an explanation, I propose that we examine the constitution of individual normative regimes within the national legal context. I define a regime as the complex of actors, institutions (formal and informal, including laws, norms and other rules), and organizations that structure human activity around a particular social end (similar to the definition of regimes used in international relations theory, e.g., Krasner 1983, Keohane, 1984). I include informal institutions and social forces, for the simple reason that the rule of law cannot rest of state action alone.

**The social bases for the rule of law:** It is true, as judicial and legal reformers assume, that courts and other legal institutions must be efficient and effective vehicles for the assertion of rights and the resolution of disputes, either against the state or against fellow citizens. But citizens must also have the capabilities, in the sense in which Sen (1990) uses that term, to assert rights even in their ordinary interactions with employers, spouses, and neighbors. We may find

that this requires more than courts and predictable rules; it may require material wellbeing, a certain level of education, freedom from hunger and fear. Significantly, it may require a certain level of social and economic equality between those who assert rights and those against whom they are asserted.

This is especially true because the challenge of establishing the rule of law over a certain territory or for a certain class of social interactions may entail displacing an alternative normative order. The prolonged, enduring absence of the rule of law does not most often imply anomie or chaos – the absence of order – but rather the presence of alternative orders (Brinks 2006; Helmke and Levitsky 2006). Moreover, these alternative orders are very often sustained and backed by their own set of coercive, normative and ideological resources, and are, in all likelihood, deeply congruent with the power relations in which they are embedded. The consequences of this should be clear: a new normative order, that imposes new substantive rules, creates new winners and new losers; it upsets normative expectations; it produces conflict. In the final analysis, therefore, if the state’s legal order is to prevail over an alternative order, citizens must be able to count on sufficient state backing to persuade those who are likely to lose power that they must acquiesce in that order.

And so, as noted, the rule of law ultimately depends on backing legitimate legal claims with the threat of (legitimate) force, even in the context of such apparently benign conflicts as contractual disputes, and even when the law implicitly or explicitly allows for unregulated relationships. But coercion is costly and inefficient, and especially when the state is weak, the opposition strong, and non-compliance is widespread, coercion is unlikely to succeed. Force is, as Holmes (2003: 39) notes, “a scarce resource.” The rule of law depends, to a large extent, on voluntary or, at minimum, quasi-voluntary (Levi 1988) compliance. Ideally this will happen

when the legal order becomes more attractive to all parties to the dispute (Stone Sweet 1999, 2000) either because it is more efficient, leads to normatively preferred outcomes, has greater legitimacy (Tyler 2006) or otherwise has positive attributes superior to the alternative. Coercive enforcement should be a last resort: a permanent credible threat, but one rarely exercised.

**The institutional manifestations of the rule of law:** So what are the elements of a typical legal regime and how do they add up to more rule observance? H.L.A. Hart's (1961) discussion of the concept of law and Ellickson's (1991) discussion of systems of social control can offer some clues to the typical elements of a domestic legal regime. A comprehensive regime should have **rules of recognition** (what Ellickson calls constitutive rules) that define who can make the rules and under what conditions an aspirational statement is a valid rule, **rules of behavior** that specify favored or disfavored behavior, rules defining sanctions (what Ellickson calls **remedial rules**), and **controller selecting rules** that determine which set of controls and controllers will apply to particular behavior. When we want to address specific desirable or undesirable conduct, we often spend a great deal of time worrying about the specifics of the substantive rule – the right to free expression or the laws against torture – without thinking too deeply about the other components of the regime. But equally if not more important to the operation of the regime will be the rules that define the class of subjects (who is bound by the rule), the subset of controllers that will intervene in the event of a violation, and the procedures to be followed in creating, modifying *and* enforcing rules. These are the rules that, implicitly or explicitly, define the set of resources that are helpful in pursuing the social ends in question.

In addition to rules, of course, a regime is defined by its actors and organizations. The actors fall into three categories, and when aggregated into organizations, of course, the same. Regimes define first party actors (these are the actors on whom falls the burden of a duty),

second party actors (those who are meant to enjoy the benefits of that duty, sometimes referred to as rights-bearers, in the human rights context), and third party actors. The third party actors and organizations may be controllers or facilitators. Controllers enforce the rules. Facilitators, in turn, provide support for the first and second party actors in their interactions with controllers. In the legal context they may be lawyers, but even informal institutions often define or permit facilitators. Many regimes will have national-level structures in common – a national police and judiciary, for example – but will have much more specific and discrete, hierarchically arranged subsystems feeding into those.

Critically, in addition to first and second party controls,<sup>4</sup> regimes may include three kinds of third-party controllers: governmental agencies, non-governmental organizations, and unorganized social forces (Ellickson 1991: 130-32). The same rule, say “thou shalt not steal,” may find reflection in laws, social norms, corporate rules, family rules, and religious edicts. Within each system of social control, the regime may define a separate controller – the criminal justice system might prosecute the thief, neighbors and co-workers may shun him, his boss may fire him, parents may discipline their child, and a religious leader may expel her congregant. It may be the case that each system’s controller-selecting rules prescribe that an offender be turned over to another controller (the boss may call the police), or not (the Catholic Church in the US apparently long followed a rule that said that criminal sexual conduct by priests was to be handled internally). The legal regime surrounding the protection of property from theft thus includes a host of interrelated and mutually supportive rules, sanctions, and controllers. The legal regime prohibiting, say, the consumption of alcohol in the United States during Prohibition, on

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<sup>4</sup> First party controls are those internal to the subject – those that manifest in self-restraint, for whatever reason. Second party controls are self-help mechanisms exercised by the person against whom the subject has committed a violation, including, of course, force and coercion, but also moral suasion, economic incentives, withholding promised services or pay, and the like. They do not involve third parties.

the other hand, had few if any supportive non-legal elements, and as a result often could not even count on the cooperation of the formal legal regime.

The rule of law is much more likely, clearly, if substantive norms and organization rules are compatible with laws, because then all the controllers will be cooperating to reward and punish similar types of behavior, and the state will not be solely responsible for monitoring and sanctioning. Moreover, the rule of law is more likely if social and organizational rules prescribe that, if and when informal mechanisms of control fail, enforcement should be coordinated with the state, rather than sweeping the failures under the rug.<sup>5</sup> Finally, note that the various elements of the regime, especially the state-based ones, have a definite territorial dimension, so the elements that are present in a particular territory, and that have an informational advantage, are more likely to set the terms of the regime.

All of this is a long prologue to a relatively simple but fundamental point: if, as noted earlier, force is a scarce resource, the state needs to rely on first party, second party and non-state third party controllers to ensure the rule of law. As a result, if we want to understand why a legal regime succeeds or fails, we must pay attention to non-state, non-law elements as well. It may be that there are societal “meta-rules” that specify that people should follow the law [cite to article that argues some societies have certain attributes that make them more likely to be rule observant]. If they exist, they should be helpful across the board, according to this framework. But the variation within countries, across legal regimes, suggests that such meta-rules are less important than the presence of congruent, supportive, state, organizational and societal elements that feed into a particular legal regime. What enables the holders of legal rights to effectively

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<sup>5</sup> Note that this is as true for rule by law as for a democratic rule of law. The only difference between the two in this respect is the content of the rules and the extent to which they foster democratic legal agency (of course, even within a democratic regime there will be many rules that fall short of that ideal).

assert their rights – what gives them legal agency – is a dense network of formal and informal controller and facilitator institutions that support those rights, providing the incentives and capacity for the duty bearers and enforcement agents to comply with the law (I will refer to this as “lateral support”).<sup>6</sup>

**The role of structure:** This lateral support has its roots in social structure. In a nutshell, structure matters for the following reasons, which I will develop in the paragraphs to follow: (a) individual capabilities are tied to structural differences; (b) informal institutions and social forces both reflect and constitute social and economic power, so to the extent they matter they are unlikely to favor the poor and marginalized; (c) the growth of formal institutions, on the other hand, is typically the result of extended and repeated political engagement, as groups respond to the shortcomings and plug the holes in enforcement regimes; but (d) social and economic marginalization is likely to be accompanied by some degree of political marginalization, so state-based institutions also respond to structural variables, albeit imperfectly. As a result, a change in political power that is not accompanied by a change in social and economic power is likely to generate a significant gap between formal rights and effective rights for disfavored groups – a lack of rule of law, as defined above, significantly tied to resource disparities across groups.

We can think of the gap between laws and conduct as the result of a process. The first step in the process is actually a consequence of a favorable change in the law.<sup>7</sup> When groups first acquire the capacity to engage with the state and with lawmakers, they are likely to secure more

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<sup>6</sup> This argument builds on O’Donnell’s insight that horizontal accountability requires a “network of state agencies, culminating in high courts, committed to preserving and eventually enforcing horizontal accountability” (O’Donnell 2003), but expands the argument to the rule of law more generally, and to non-state elements.

<sup>7</sup> In some cases the law has not changed but a group’s capacity and willingness to claim rights under the law has increased and it is the latter increase that makes the gap more visible. The classic example is perhaps the Civil War Amendments to the US Constitution. These amendments declared rights in favor of African Americans that remained dormant for one hundred years until post-War demographic and economic changes increased the political relevance of the beneficiary population. Only when the Civil Rights movement began to claim rights did the gap become truly visible to much of the population.

formal rights, in a first wave of legal reforms. The gap between formal laws and actual outcomes may widen initially, as more formal rights are created, not because conditions got worse, but because the standards got higher. It will only narrow, and that gradually, as (if) those rights acquire a network of ancillary institutions, in a second wave of “effectiveness” reforms. The gap is likely to be more persistent when the political power of the intended beneficiaries (principally, influence on the legislative process) runs ahead of social and economic power. Socially and economically marginalized groups are unlikely to have the capacity to engage in the iterative process required to perfect a state-based or organizational system of lateral support for their substantive rights; and they are unlikely to have the resources to constitute non-state supportive and controller organizations. For the same reason, substantive rights “won” through external pressure or the punctual intervention of a well-meaning third party are likely to produce persistent gaps in the realization of those rights. Deracinated rights – those without roots in an extensive network of support – are unlikely to produce significant change in actual behavior.

Unfortunately, the state finds itself in a sort of catch-22 in the process of developing the roots of rights. In the absence of effective social and organization norms supporting a right, the network of state control must be much more coercive and intrusive, and the monitoring and incentive structure for state controllers more comprehensive. But this is not only expensive, it is also the product of determined and prolonged legislative, executive, and judicial activity. In a democracy, legislatures, executives and judiciaries respond, to one degree or another, to social demands. And if there is no social support for the rule in question, if the rule is not congruent with social and organizational norms, then it is unlikely that its violation will produce widespread social demands for its enforcement. Social change through law is possible, but it is

difficult and gradual, and it is most often pushed by well-organized groups that can bring both legal and political pressure to bear (Gauri and Brinks 2008; Epp 1998) (add pin cite or quote).

**Adding this up to a national level explanation:** The source of legal failure in this model is inequality within each regime, between the first and second party, in access to third party controllers and facilitating institutions, norms and the like. But aggregate economic inequality feeds into the failure of the rule of law in two ways. First, it creates a large class of disadvantaged claimants, who lack the material resources to engage successfully with the system on their own. And secondly, in a democracy, it sets the stage for the “thin” political citizenship that permits gains in formal substantive rights but impedes the development of adequate networks of lateral support. This leads to the particular failure of the rule of law that is visible in Latin American democracies today: a marked improvement in formal rights, with little change in actual practices. The exceptions prove the rule: newly minted rights are effective when potential claimants have the capacity to generate and make use of lateral support. Environmental rights and consumer protection movements, for example, enjoy both international and domestic support and have enjoyed noticeable success in places like Brazil and Argentina, which still struggle to establish basic civil rights for the disadvantaged.

We now have a proposed answer to the question, why are some countries characterized by the presence of many failing legal regimes, as many Latin American countries seem to be? In short, countries in which political, social and economic power is aligned are more likely to exhibit rule by law, whether democratic or not. *Democracies* marked by high levels of economic

and social inequality are less likely to exhibit a democratic rule of law, as political power for the poor runs ahead of their social and economic power.<sup>8</sup>

This fairly abstract account of the preconditions for effective rights generates some concrete predictions for the enforcement of particular rights and rights regimes. At the aggregate, system-wide level, there should be lower levels of effectiveness in locations in which inequality creates a large pool of disadvantaged potential claimants, especially when violations of the formal rights in question narrowly target this population. When the materially disadvantaged gain substantial political power, we should see the development of state-based controller and facilitator institutions, and ultimately more effectiveness. When they do not, higher socio-economic inequality should be associated with (a) less lateral institutional development in support of those rights, and therefore with (b) high levels of legal inequality (i.e., legal outcomes that vary dramatically according to the victim's or claimant's resources). In individual cases, we should see evidence of resistance by the first party, buttressed by controller and facilitator institutions, which the second party – victims and those who act on their behalf – cannot overcome. High levels of legal inequality should disappear, however, when a right favors groups that are either privileged or largely representative of the population, so that the second parties are perceived as full-fledged members of society. Under these conditions, we should see lateral support – either from the state or from society – mobilized on behalf of the right in question.

This explanation actually makes sense of the surprisingly underdeveloped literature on the rule of law. Despite the prominence of the problem, theoretical and empirical attention to the

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<sup>8</sup> There are really two questions raised by the cross-national variation in rule of law scores. One is simply a measurement question: why are some countries prone to producing low scores on common rule of law measures? This is not the focus of this paper, but I believe it is partly a product of the informants' focus on contractual enforcement and property protection regimes. I think the most popular numerical indicators of rule of law are by and for investors, and use business people as informants, although I need to look at this in more detail.

determinants of higher or lower levels of rule of law is rare. There are valuable contributions on particular institutional elements that contribute to the rule of law, but rarely a consideration of its more socio-political bases. Judicial independence in particular has received a great deal of attention (Iaryczower et al. 2002; Staats et al. 2005; Caldeira 1986; de Castro 1997; Larkins 1998; Prillaman 2000; Helmke 2002; Brinks 2005). But this literature focuses on apex courts and addresses primarily intra-branch conflicts, not the effectiveness of courts in implementing rights. The argument I make here suggests that much of the discontinuity in the rule of law manifests much further down the legal system, at the level of claimants, police, prosecutors and trial courts, where society meets the state.

Existing studies of equality before the law and the enforcement and protection of civil and human rights at the trial level have not offered a political explanation for the persistence of unequal legal outcomes. Adorno (1995; 1994), for example, merely reports on the extent of legal inequality in São Paulo, attributing it to racism but without addressing its political construction. Several of the contributions in Méndez, O'Donnell, and Pinheiro (1999) examine the reach of the legal systems to the poorest sectors of society from a more political standpoint but do not offer a comparative and systematic look at the political roots of legal inequality. Even those who write on the success or failure of legal, judicial or police reform (Ungar 2001; Domingo and Sieder 2001; Buscaglia et al. 1995; Correa Sutil 1998; Dakolias 1995; Davis and Trebilcock 2001; Frühling 1998; Hammergren 1999; Jarquín and Carrillo Flores 1998; Prillaman 2000; Popkin 2000) have not arrived at a diagnostic or causal consensus (Inter-American Development Bank 2003).

The principal explanations in the literature come from institutional economists who are interested in the relationship between the rule of law (or some aspect of it) and economic

development, and carry out large-N empirical analyses to test that relationship (see, e.g., Barro 2000; Acemoglu et al. 2001; Berkowitz et al. 2003; Acemoglu 2000). Some argue that economic development, channeled primarily through institutional mechanisms, produces more rule of law by allowing wealthier countries to build better legal institutions, while others argue that better institutions (and the rule of law they produce) lead to wealthier countries (Kaufmann et al. 2005: 36). In either case, there should be an empirical association between economic development and wealth on the one hand and rule of law on the other, as well as a relationship between investments in (legal) institutions and the rule of law. The first hypothesis, then, is that economic development, possibly through stronger institutions, produces higher levels of the rule of law. Barro (2000) suggests a second hypothesis, reporting that higher inequality is consistently and robustly associated in empirical analyses with lower levels of the rule of law, but he does not hazard a theoretical explanation for the relationship (his primary concern is explaining economic development, not the rule of law). Given that third wave democracies tend to be both poorer and more unequal than most advanced industrial democracies, these material explanations could account for the weakness of the rule of law in new democracies.

We can infer a third, more political, hypothesis from arguments that governments are more likely to respect and promote the particularly democratic aspects of the rule of law when they are more exposed to democratic pressures (Moreno et al. 2003; Poe and Tate 1994; Ahnen 2007). The failure of the rule of law in new democracies, in this view, can be traced to the shortcomings in electoral competition that are characteristic of imperfect democratic governments. We thus have three broad hypotheses to work from, one that attributes a strong rule of law to better institutions (which go hand in hand with economic development), one that

emphasizes socio-economic inequality rather than aggregate or per capita wealth, and one that focuses on political pluralism and competition.

The theory I have presented here accounts for the association between inequality and lower levels of rule of law that Barro (2000) notices. It also complements the argument that it is the failure of political representation that contributes to the lack of the rule of law (Moreno et al. 2003), but it offers an explanation for the failure that goes beyond institutional design. Economic development, and the consequent state capacity to create effective lateral institutional support, is, in this scheme, only a constraining factor. Development provides the resources to spend on those institutions the polity decides are important, but clearly does not provide incentives to protect the rights of marginalized populations. That must come from concerted and prolonged activity on the part of those who would attain the rights promised in laws and constitutions.

#### **Some non-systematic evidence in support of the theory**

As noted above, the argument, in its simplest form, is that a naked legal right is unlikely to be effective if not supported by a network of ancillary institutions that support claimants and impose costs on potential violators. Moreover, unequal democracies may grant just enough power to the economically marginalized to create new substantive rules but not enough to develop lateral support. In some ways, then, the prediction is that “thin” democratization, particularly in unequal societies, should produce less, not more, rule of law, as standards improve ahead of behavior. Assuming Kaufmann et al’s indicators measure something like what I have in mind, we should be able to test this with a cross-national database. In fact, a simple regression with the rule of law indicator as the dependent variable, democracy, and democracy squared and cubed as the independent variable, controlling for the log of per capita GDP produces an N-curve as predicted. In deeply authoritarian countries, rule of law increases slightly with slight increases

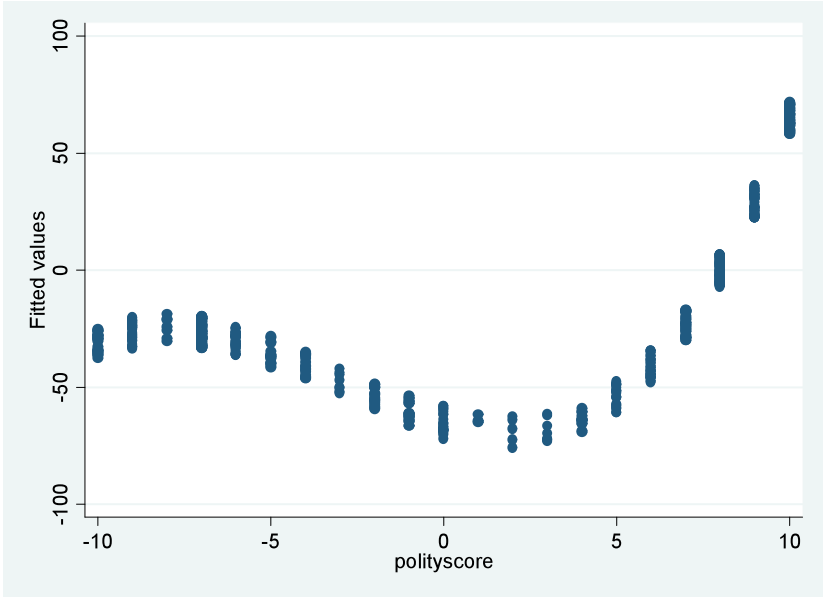
in political freedom, signaling a move away from arbitrary power as people gain more freedom (at this level increases in Polity scores may be measuring no more than increases in rule observance by the regime). But the rule of law drops significantly with further increases in the Polity score and does not begin to rise until a country's Polity scores approach 5 – a middling democratic score. See table 1 and figure 1:

Table 1: Regression results

Number of obs = 1389  
 F( 4, 1384) = 428.36  
 Prob > F = 0.0000  
 R-squared = 0.5532  
 Adj R-squared = 0.5519  
 Root MSE = 61.773

rolest	Coef.	Std. Err.	t	P> t
LNpcGDP	27.95099	1.709126	16.35	0.000
polityscore	-4.216529	.7182789	-5.87	0.000
polityscore^2	.8156528	.0660289	12.35	0.000
polityscore^3	.0905413	.0100745	8.99	0.000
_cons	-435.3874	21.16237	-20.57	0.000

Figure 1: Predicted values of rule of law, by Polity score (democracy minus autocracy), for countries with mid-range per capita GDP



Much more would need to be done to present this as evidence in support of the theory. In particular, I must add data on inequality, which I have not yet done, to test the impact of aggregate inequality on rule of law. But my initial results are at least consistent with the account provided above, and Barro, as we have seen, has consistently noted an association between inequality and rule of law.

**An overview of the region:** The same can be said of an initial overview of legal developments in Latin America. Since the early 1980s, the movement toward greater democracy and political participation in the region brought greater formal recognition to the set of substantive rights typically associated with liberal democracy, as well as rights for various disadvantaged groups like the indigenous, or women. But democratizers have so far failed to carry out the much more arduous work of creating and populating the ancillary institutions that would be required to make these rights effective. The lack of rule of law in Latin America, then, is not primarily a matter of inadequate substantive legislation, but of the failure to comply with an increasingly well-developed legal framework. The gap is at in large part attributable to raising the bar, not to lowering performance.

As noted above, in the late 1970s and early 1980s most of the region underwent a dramatic period of (re)democratization, including not only regime change but also the political inclusion of previously marginalized social groups. Notably, the wave of democratization triggered the adoption of human rights language and international human rights instruments into domestic legislation and constitutions. Thus, we have the 1988 Constitution of Brazil, which incorporates a great variety of rights into the formal laws of Brazil; the 1994 reform to Argentina's constitution, which gives human rights treaties quasi-constitutional status;

Colombia's 1991 Constitution which highlighted social and economic rights and added a new mechanism for enforcing them.

This process of legal democratization goes far beyond new constitutions. In addition, many Latin American countries have enacted laws addressing torture, racial discrimination, indigenous rights, children's rights, prison conditions, and more. All the countries of the region have now ratified the Convention on the Elimination of All Forms of Discrimination against Women<sup>9</sup> and have made various other legal changes to benefit women in politics, the workplace and the home. Across Latin America, indigenous movements using the tools of democracy have pushed countries to add cultural and land rights to their constitution (Van Cott 2005; Yashar 2005, 1999).<sup>10</sup> Criminal procedure reforms have consistently increased due process protections for criminal defendants, and judicial reform has paid considerable attention to access to justice issues (Domingo and Sieder 2001). Twenty years of democracy have had a noticeably democratizing, progressive impact on the written laws and constitutions of Latin America, yet the *de facto* world of discrimination and rights violations continues to outdistance the *de jure* world of equal rights for all.

The extension of land rights, especially collective land rights, offers an interesting example. The indigenous and afro-descendants have made great strides in transforming formal legal regimes to incorporate their demands, only to find even their constitutionally and legally recognized rights unrealized in practice. Over the last two or three decades, many Latin American countries have granted these rights, including Argentina, Brazil, Colombia, Ecuador, Nicaragua, Mexico, and others. They have formally recognized the rights of the indigenous and

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<sup>9</sup> See the list of states parties to the Convention, at <http://www.un.org/womenwatch/daw/cedaw/states.htm>.

<sup>10</sup> See also Assies et al. (2000) for a discussion of the multiplicity of pressures that led to these constitutional transformations.

afro-descendant groups in constitutions and laws, through adoption of ILO Convention No.169, through modification of land tenure regimes and more (Sieder 2002). Nevertheless, these groups continue to experience the *de facto* denial of rights, even longstanding ones like the right to land (Davis 1999; Rapoport Center for Human Rights and Justice 2007, 2008). And nearly everywhere, indigenous groups have fared better than afro-descendants in this regard (Rapoport Center for Human Rights and Justice 2007) as afro-descendants struggle with smaller population sizes and less political organization and mobilization around collective rights (Hooker 2005). Where they but up against other, more powerful interests, they lose, sometimes through violence (Rapoport Center for Human Rights and Justice 2007). I suspect, and intend to examine, that this is less true in Bolivia, where the indigenous have gained access to considerably more political power and state backing.

Police violence is another of the places where the reality does not live up to the promise of democracy. Countries have become political democracies but continue to violate individual rights. Many no longer target political opponents, but their police continue to torture and kill on a large scale in the interest of social order. From 1990 to the end of 2000, for example, the police in the state of São Paulo killed more than 7,500 people in the name of public safety. In 1992 alone, 1,428 people are known to have died at the hands of police officers in São Paulo.<sup>11</sup> While São Paulo's vast population produces truly striking numbers of victims, this city is not alone in relying on deadly violence as a means of crime control. The per capita rate in Salvador da Bahia in the mid-nineties, over 6 per hundred thousand, was nearly three times higher than the three worst years of that decade in São Paulo. Buenos Aires, in the second half of the decade, averaged a per capita rate of police homicides (almost 2 per hundred thousand) that was just as high as São

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<sup>11</sup> The source for this information is São Paulo's police ombudsman, the Ouvidoria da Polícia. Tables available at <http://www.ouvidoria-policia.sp.gov.br/pages/tabelas.htm> (last visited August 17, 2007)

Paulo's for that same period (Brinks 2008). As shown in that book, the level of impunity for these violations is as striking as their number.

In contrast, even in countries that are traditionally considered to have very low levels of rule of law, some regimes have proven to be remarkably effective. Litigation under the right to health for access to medications is surprisingly effective and widespread; it is also dominated by middle class concerns (Hoffmann and Bentes 2008). My impression is that consumer rights in places like Argentina are significantly stronger now than at any previous time in history, aided and abetted not only by changes in the law, but also by the creation of non-governmental organizations, ombudsman organizations, and more. Environmental rights are finally finding enforcement in Brazil, under the zealous eye of the Ministério Público, as the political prominence of the issue rises. In short, the greatest shortcomings are found in groups that have managed to secure formal rights, but whose social circumstances have not changed all that much. The police target the poor, unemployed shantytown residents. Indigenous groups in Mexico and elsewhere have failed to secure their rights. On the other hand, there are many legal regimes that are much more effective, including those protecting health, consumer and environmental rights, at least in some countries. These regimes seem to have the support of more affluent groups, and to have developed a denser support structure, in line with the predictions of the model.

### **Conclusion**

As is evident across Latin America, a shift to democracy from an oligarchic or authoritarian regime, or even a move toward broader political participation within an existing democracy, implies a re-allocation of influence on the lawmaking process. This, in theory, severs the link between social and economic advantage and the content of laws, and could, in theory, lead to a more redistributive legal order, and maybe a more democratic rule of law. This is

precisely the presupposition upon which T.H. Marshall (1950) built his argument about the progression from civil to political to social rights. To some extent, my own argument turns Marshall's account on its head. Civil and political rights in a context of inequality and marginalization do not lead to social and economic rights. Prosperity plus political rights, on the other hand, can lead to full legal agency. The focus is on structural impediments to the full exercise of civil and political rights, which leads to a deficient institutional and social context for the exercise of legal rights gained through sporadic involvement in the political process.

This argument suggests that even the best institutions require (some more than others, depending not so much on their quality as on their design) a personal investment on the part of the claimant, sufficient to overcome the resistance of the respondent. Some basic capability on the part of the claimant is a precondition for the effective exercise of rights. Secondly, institutions are the result of political struggles that also require the investment of substantial personal resources, sufficient to overcome the resistance of those who can anticipate their consequences and would be adversely affected by them. Both the development and the operation of institutions, therefore, respond to the core inequalities present in society. Until those inequalities are addressed, it is unlikely that a fully democratic rule of law will take hold.

Does this mean institutional differences ultimately do not matter and all the focus on judicial and legal reform is misguided? Clearly not. In fact, judicial and legal reform is precisely the process by which lateral support is created. But it does mean that silver-bullet style reforms, that only change the substantive rule, are likely to fail at least in the short to medium term. Any reform, to be successful, must set about creating a system of lateral support that addresses the particular disparities between the first and second actors. One important area for future research is identifying more precisely the kinds of institutions that are most effective at shoring up rights.

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