The Rule of Law and Institutional Analysis

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The vast literature on political and economic institutions is characterized by an array of explanations about how institutions emerge, how they are maintained over time and how they change. And these explanations are grounded in an additional set of claims about the effects that these institutions have on political and economic outcomes. In this paper I want to consider one important type of institution whose effects are central to most of these explanations and causal claims. That institution, or rather, as I will argue, that set of institutions, is commonly referred to as "the rule of law." It enters into explanations directly, as in claims like "the rule of law facilitates X", and, more often, indirectly, as the mechanism of implementation and enforcement for claims about the effects of other institutions on political and economic outcomes. In analyzing the role of the rule of law in these various accounts, I aim to show that the prevailing conception is overly simplistic and inadequate for the tasks to which it is commonly applied. The primary implication of this is that explanations of the origins and effects of political and economic institutions that are grounded on this conception of the rule of law are at best incomplete and at worst inaccurate. In either case the use of the rule of law as an explanatory concept is in need of further analysis and research.

I. The role of the rule of law in facilitating good social outcomes.

The rule of law plays several important roles in social-scientific explanations of political and economic institutions. The institutional mechanisms of implementation and enforcement as well as the mechanisms of rule-interpretation and dispute resolution are either explicitly or implicitly invoked in accounts of how political and economic institutions facilitate good social outcomes. And they are, at the very least, implicit in accounts of how these institutions emerge, persist and change.

The direct effects of the rule of law are central to a range of academic debates about the role of government in social life. They are the centerpieces of policy proposals for an array of political and economic reforms around the world. The rule of law is commonly considered a necessary factor for achieving many societal values like social order, good governance and economic development. Everyone, it seems, wants to establish and maintain the rule of law.

Consider the following examples from the policy world. The World Bank attributes an important role for the rule of law in promoting social and economic development: "it is widely believed that well functioning law and justice institutions and the government bound by the rule of law are important to economic, political and social development." (http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20934363~menuPK:1989584~pagePK:210058~piPK:210062~theSitePK:1974062,00.html) "Economic growth, political modernization, the protection of human rights, and other worthy objectives are all believed to hinge, at least in part,

on "the rule of law." Policymakers in developing and transition nations are thus seeking ways to establish or strengthen the rule of law in their countries. Investment rating services, non-governmental organizations, and other students of development are producing indices that try to measure the degree to which a nation enjoys the rule of law."
(http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20763583~menuPK:1989584~pagePK:210058~piPK:210062~theSitePK:1974062~isCURL:Y,00.html)

Similarly, the World Justice Project sees the rule of law as necessary to good governance: "the rule of law is the foundation for communities of opportunity and equity" and "A worldwide rule of law deficit undermines efforts to make societies safe, lift people from poverty and build economic prosperity, reduce corruption, improve public health and enhance education."
(http://worldjusticeproject.org/about/) And the American Bar Foundation relates the rule of law to social order and prosperity: "rule of law promotion is the most effective long-term antidote to the most pressing problems facing the world today, including poverty, conflict, endemic corruption and disregard for human rights … Addressing this global rule of law deficit is not only the most important calling of the world's legal community; it must also become an urgent priority for world leaders, international institutions and citizens committed to making this a just, peaceful and prosperous world." (http://www.abanet.org/rol/about.shtml)

These examples demonstrate that there is a common view among policy analysts that the rule of law can facilitate a number of desirable social outcomes

(e.g., Carothers 2006, Dam 2006, Kaufmann 2005, Treblicock and Daniels 2009). The social science literature is similarly characterized by this dominant perspective. There is a substantial body of research that purports to demonstrate that there is a causal relationship between the rule of law and positive political and economic outcomes (e.g., Acemoglu, Johnson and Robinson 2001, Haggard, McIntyre and Tiede 2008). Most of these studies are conducted at the macro level, assessing the relationship between some operational measure of the rule of law and aggregate measures of phenomena like social order or economic development.

Few of these studies attempt to analyze exactly how the rule of law actually causes these positive effects. That is, what are the underlying causal mechanisms by which the rule of law facilitates beneficial social consequences? Here I have in mind the differences between macro level correlations of aggregate phenomena and more micro level analyses of the effects of the rule of law on the dynamics of social, political and economic relations on the ground. The macro level analyses are clearly an important aspect of the study of the rule of law. They provide the initial demonstration of the direct relationship between law and legal institutions on the one hand and important social consequences on the other. However, they fail to provide an understanding of the micro level causal mechanisms that explain how the rule of law actually works.

A charitable reading of this literature would suggest that there is an implicit model of the rule of law embedded in these macro-level studies. It is a model that is similarly embedded in the studies of political and economic institutions that rely on the indirect effects of legal institutions. These are the studies that rely on formal

mechanisms of enforcement to achieve compliance and thus to produce the substantive effects of political and economic institutions. In addition to the enforcement mechanism, the implicit model includes the legal mechanisms of implementation, interpretation and dispute resolution. A standard example would be the effects of property rights on economic growth and development.

Hadfield and Weingast (2013) accurately characterize how the rule of law is "modeled" in the research that relies on its indirect effects:

> As Dixit (2006, 3) observes, "conventional economic theory… takes the existence of a well functioning institution of state law for granted. It assumes that the state has a monopoly over the use of coercion." Scholars routinely make this presumption without analysis. Compliance with property rules, economic regulation, or contract obligations is presumed to rest on the capacity of centralized state authority to impose coercive penalties for rule violations such as fines, damages, or imprisonment.

Thus, it is fair to say that the rule of law and its requisite institutional mechanisms are commonly treated as an unanalyzed assumption. The substantive rules instantiated in political and economic institutions in our analyses are assumed to be efficiently implemented, interpreted and enforced in the exact form in which they are created. But there is little in the way of an explanation of how the rule of law actually accomplishes these important effects.

II. How does the rule of law contribute to these substantive effects?

In the existing theoretical literature there are various accounts of how the rule of law functions in social and political affairs (e.g., Bingham 2010, Tamanaha 2004). It is helpful to treat these accounts as alternative conceptions of the ways in which the rule of law coordinates and facilitates social relations in various domains.

Most of the theoretical literature focuses on the relationship between citizens and the state. Secondarily, it focuses on relationships among private individuals and organizations. Although there are many ways in which the functions of the rule of law are characterized in this literature, I focus on four characteristics that are most commonly mentioned.

First, the rule of law functions to limit the power of government officials. On this conception the rule of law is intended to protect the people from the arbitrariness of state action (e.g., Bellamy 2006, Epp 1998, Ginsburg 2003, Peruzzotti and Smulovitz 2006, Stromseth, Wippman and Brooks 2006 and Trochev 2004). There are two primary dimensions on which this limitation works. On the one hand, the idea of governmental constraint emphasizes the ways in which government officials are required to abide by existing laws. Here the rule of law influences the ways in which government officials develop and implement existing public policy. On the other hand, the idea emphasizes the ways in which government officials are constrained in making new law. That is, any changes in existing law or creation of new law must be undertaken in accordance with the existing constitutional and statutory procedures for lawmaking.

Second, the rule of law functions to establish and maintain a system of law and government that is characterized by the maxim, "rule of law, not man." While the general sense of this maxim is to emphasize that the decisions of government officials must generally be consistent with existing legal rules (this demonstrates the similarity of this conception to the previous function), this maxim can also be understood to require a constraint on the autonomy of the judiciary. That is, the

idea of the rule of law and not of people reminds us that even judges are subject to the constraints of the law. From this perspective it raises issues about the power of the judiciary, the legitimate influence of unelected judges, the acceptable and unacceptable approaches to judicial decision-making and the corruption of the judiciary (e.g., Burbank and Friedman 2002, Herron and Randazzo 2003, Iaryczower, Spiller and Tommasi 2002, Peabody 2010, Peerenboom 2009, and Ramseyer and Rasmussen 2003).

Third, the rule of law functions to formalize the legal system. On this conception the rule of law is intended not only to structure interactions between individual citizens and the state but also to coordinate interactions among citizens. This third function highlights the fundamental importance of a system of formal rules. Formalization facilitates the stability of social expectations. Stable expectations are central to claims about the value of the rule of law for socially-beneficial political and economic affairs. But the successful establishment of stable expectations requires that the system of formal rules be characterized by several additional qualities that relate to how the formal rules are interpreted and enforced. Among these qualities are publicity, generality, certainty and stability. Taken together, these qualities give the law a sense of predictability. Thus, for the rule of law to function effectively in this way, a set of procedures that will establish and maintain these qualities are a necessary part of the system.

Fourth, the rule of law functions to promote and instantiate substantive values into the system of law and governance. This fourth claim about substantive values is more controversial than the other conceptions. It gets to the heart of the

question as to whether the rule of law is merely a procedural matter or whether it is, in important ways, a substantive concept. The degree to which this is controversial depends, in part, on the types of values one thinks are necessary for an effective rule of law system. If, on the one hand, this function is related to values that govern the ways in which we treat and use the rules, the ways that we implement, interpret and enforce the rules, then this claim is merely a broader extension of the third function and is thus consistent with most understandings of the rule of law. Here the claim would be that the rule of law requires values such as impartiality, equality of application and procedural fairness (Fuller 1969). If, on the other hand, the claim is that the rule of law must further substantive values as the ultimate goals of legal and political affairs, values such as justice, distributive equality, social efficiency or other dominant community values, then the claim becomes more controversial (McCubbins, Weingast and Rodriguez 2010). And this is not to mention the increased difficulty that it creates for using the rule of law as an explanatory variable distinct from the law-creating aspects of government. Nonetheless, the extent to which the rule of law requires a commitment to particular substantive values remain an open question for analysis.

This review of the functions commonly attributed to the rule of law highlights its fundamental importance for the effectiveness of a society's political and economic institutions. And it suggests that the rule of law is not a single entity but rather a set of interrelated institutional arrangements. The types of institutional components that are often identified in discussions of the rule of law include: (1) an independent and impartial judiciary, (2) separation of powers, (3) independent and

impartial enforcement (police power), (4) a system of participatory rights in both political and economic fora, (5) impartial and uncorrupted administrative apparatus and (6) an effective legal profession that is independent of the state. A comprehensive assessment of the rule of law and its effects on institutional performance would need to take account of the interrelated effects of these different institutional arrangements on issues of implementation, interpretation, enforcement and dispute resolution.

IV. "The Rule of Law" in Institutional Research

The institutional literature often takes account of individual dimensions of these institutional arrangements. However, although the multi-dimensional nature of the rule of law is sometimes noted, the underlying assumption of the existing literature is that these various institutional arrangements work in tandem to efficiently produce the positive benefits attributed to them. Central to this conception of an efficient and effective rule of law system is the assumptions made about the courts and judicial decision-making. There are two dimensions that are especially relevant to institutional research. The first is the assumption of judicial independence: judges have the institutional authority as well as the actual capacity to make decisions that are independent from influence by other political and legal officials. The second is the assumption about judicial decisions: judges actually make decisions that efficiently facilitate the substantive interests and goals that are instantiated in a society's political and economic institutions.

The assumption about judicial independence is fairly straightforward and entails institutional protections that guarantee the independence of judicial decisions. The assumption about judicial decisions is more complex and requires further explication. To do so I want to return to the Hadfield and Weingast (2013) analysis. They offer a nuanced analysis of the attributes of law that commonly characterize the analysis of law and economics and positive political theory. After acknowledging that this literature commonly assumes without question an efficient and effective legal system, Hadfield and Weingast try to demonstrate that the coordination of collective punishment assumed in these accounts can also be achieved through decentralized mechanisms. Here I am going to set that important question aside (an issue that is obviously important to a fully comprehensive account of institutional effects) and use their analysis for a different purpose. Hadfield and Weingast provide us with a clear statement of the implicit model of judicial decision-making that is embedded in the institutional literature. In doing so, it sets out the qualities of judicial decisions that are necessary to sustain the assumption of an efficient rule of law system.

On their account the key to an efficient legal order is the existence of what they call "authoritative stewardship." (2013: 10) This entails "a single identifiable institution whose responsibility is to resolve any ambiguity or uncertainty about" law. In addition, the steward must be able to adapt the law to "changing circumstances" and to do so in a unique and accepted way: "Suppose that the conduct in question is particularly novel or complex, requiring the elaboration of a general principle in the context of previously unseen facts. For the common logic to

continue to perform its role in coordinating punishment, it must be that all agents are known to treat the steward as the authoritative and final means of resolving ambiguity in the logic." (2013: 10)

This concept of "authoritative stewardship" captures the basic idea that courts and judges are the final arbiter of questions of law in the society and that they must have the independence to make their own decisions. In terms of the types of decisions that judges need to make, Hadfield and Weingast posit the following necessary characteristics:

- generality, stability, prospectivity and congruence
- qualified universality
- impersonal, neutral and independent reasoning.

To create this list they draw on the work on the rule of law in legal philosophy (Fuller 1964, Raz 1977, Waldron 2008.) Here it is important to note that this move is reflective of the literature on the political-economy of institutions more generally. That literature adopts, as its positive assumption of what judges actually do, the standard normative assumption developed in the legal philosophical literature about what judges ought to do in a legitimate legal system. And it does so, as Dixit notes, without analysis or question.

IV. Is the implicit model plausible?

There is a long tradition in the social sciences of studying courts and judicial decision-making. It addresses an array of questions related to judicial practices, judicial institutions and individual judicial-decisionmaking. All of these factors are

relevant to the account of the rule of law that undergirds the study of social institutions. Yet, it has seldom been employed to assess the plausibility of this account.

Here I will draw on two aspects of this literature to illustrate some of the problematic aspects of this standard account. The first involves the institutional question of judicial independence: do judges have the independence and institutional authority to make the kinds of general and impartial decisions that the institutional literature envisions? The second involves the actual decisions made by judges: are judges motivated to produce decisions that are characterized by the attributes (especially, impartiality, neutrality and generality) envisioned by the institutional literature?

Judicial independence turns out to be a fairly complicated concept to sort out empirically. Studies of judicial independence can focus on two general types of evidence. The first involves measures of formal institutional authority, measures of the opportunity and capacity of the courts to make independent decisions. One such measure is the formal authority granted to the courts by the constitution or relevant founding law, as the final arbiter of legal questions and disputes. Such an approach looks to the institutional constraints on the courts' capacity to make authoritative legal decisions. A second measure involves the questions of who in the government has the authority to control the budget and resources of the courts. The idea of this measure is that the lack of control by the judiciary of its own budget creates an institutional mechanism by which the other branches of government might influence the decisionmaking of the judges. Studies have shown that there is

significant variance across countries in regard to the institutional opportunities and capacity by the courts to make independent decisions.

The second type of evidence consists of a more direct behavioral measure of independence. Here the test of independence involves an analysis of the extent to which the courts actually render decisions that are independent of other government officials. The focus is on cases that involve other government officials as parties to the legal dispute. In these studies the court is considered independent when it renders a decision that runs counter to the interests of the government parties.

There are many existing studies that have found a lack of judicial independence according to the behavioral criterion. (e.g., Burbank and Friedman 2002; Law 2011) But is easy to see that this behavioral measure taken alone provides inadequate evidence of judicial independence. Yes, if courts are independent, then we would expect to see them ruling against the government in some of their cases. But an independent court might often think that the dictates of the law justify a decision in support of government officials. Support for the government will not always constitute a lack of judicial independence. There is a behavioral equivalence problem in assessing the difference between an independent court that sincerely thinks that the law dictates a pro-government decision and a dependent court that is forced into supporting the government when they think that the law dictates otherwise. To make such an assessment on behavioral grounds requires a more nuanced analysis of the nature of the decision itself.

And this gets to the basic question, what motivates judges to make the decisions that they do? And, more precisely for the present question, are judges motivated to make the types of decisions attributed to them by the implicit model in the institutional literature? This question of the determinants of judicial decisionmaking has been at the forefront of the social-scientific study of courts. More than any other issue, it has driven the research on courts over the last half-century. For my purposes here, I can present the relevant findings by characterizing the determinants in terms of three categories of motivation.

Law. Social science research on judicial determinants has long posited the law as the counterfactual against which other determinants are compared. What is commonly referred to as the "legal model" envisions the form of judicial decisiomaking that is closest to the implicit model in the institutional literature. Judges are assumed to be motivated to make decision that reflect the prevailing dictates of the law, including the precedents established by previous decisions. The task is to make the "correct" decision, to have their decisions reflect the substantive content of existing law.

On the simple version of this account, judges are considered primarily interpreters of law as opposed to creators of law. On more nuanced versions, it is acknowledged that judges sometimes create new law, but they do so only in special cases within the narrow parameters of the existing legal system. The underlying logic is that when judges seek merely to make decisions which apply existing law, they are unlikely to violate the basic tenets of impartiality, neutrality and generality.

There is considerable support for this model in a wide variety of cases (Gillman 2001, Hansford and Spriggs 2006). The standard test involves an analysis of judicial decisions over time, assessing whether the content of subsequent decisions track the content of existing law or precedent. Not surprisingly, there is significant correlation between past and present decisions in these analyses. But the level of support for the "legal model" has not been sufficient to rule out alternative determinants of judicial motivation. In fact, those alternative determinants now dominate social-scientific explanations of judicial-decisionmaking.

Ideology. Over the last fifty years, the research on judicial decisionmaking has privileged ideology and policy preferences as the most important determinant of judicial choice. The earliest researchers in the field, led by C. Herman Pritchett, tested the relative explanatory power of the legal model and of political and policy attitudes. The conclusion that they drew from their early studies was that judges were "motivated by their own preferences." (1948, p. xiii) On these accounts, judges were more concerned that the law instantiated their own policy preferences than their decision reflect the law's existing content.

Pritchett's project caught on (see, e.g., Ulmer 1960; Goldman 1966; Schubert 1965; Spaeth 1972), as did his emphasis on policy preferences. Research in this field has consistently demonstrated the explanatory significance of ideology for judicial choice (Segal and Spaeth 2002). The assumption of judges as "single minded seekers of legal policy" (George & Epstein 1992: 325) is—and has been for generations—so firmly ingrained in the literature that the overwhelming majority of

serious theoretical and empirical work on courts in the social sciences proceeds from it.

Researchers have applied the assumption of ideological preferences to a number of aspects of judicial practice. Consider the following examples. (1) Judicial selection is an obvious area in which the ideological preferences of the judges might enter into the process. And this is borne out by the research on appointments to appellate courts in various countries. Political ideology and party membership are the most significant factors in explaining judicial selection. (Moraski and Shipan 1999) (2) Courts vary in the extent to which the judges are in control of their own case dockets. For most courts in which they have significant say over this agenda, political ideology has a very significant role to play in the choice of cases. (Perry 2005; Caldeira and Wright 1988) (3) Legal argument, offered by lawyers through oral argument as well as written briefs, is considered a central feature of what makes law and courts a distinctively deliberative form of governance. However, recent research into when and why judges adopt the arguments of the parties have demonstrated that the arguments most likely to be accepted are those that advocate an ideological value that is held by the relevant judges. (Johnson, Wahlbeck and Spriggs 2006; McAtee and McGuire 2007) (4) There has been a substantial body of research that focuses on the intra-court dynamic among judges on collegial courts. Methods of bargaining and negotiating along ideological lines commonly characterize the deliberations of these courts. (Wahlbeck, Spriggs II, and Maltzman 1998; Meinke and Scott 2007; Epstein, Martin, Quinn, and Segal 2007) (5) One of the most controversial areas of judicial practice that has been the subject of this kind of

analysis involves the effect of public opinion on judicial decisions. Here most of the studies have been on the US Supreme Court. The primary conclusions had been that there is a strong correlation between public opinion and the decisions of the justices. But there is some question as to the causal implications of this correlation. Scholars have disagreed as to whether the causal arrow runs from public opinion to judicial decisions or vice versa. (Mishler and Sheehan 1993; Norpoth and Segal 1994; McGuire and Stimson 2004) (6) Ideological preferences have also played an explanatory role in the analyses of high appellate court interaction with the other branches of government. In several studies the ongoing interactions between high court justices and the officials in the executive and legislative branches involved extensive debate over ideological differences. (Eskridge 1991)

The summary implication of this extensive body of research is that ideological factors are important determinants of judicial decision-making. This runs counter to the implicit model in the institutional literature. Ideological bias undermines the impartial, neutral and general nature of the decisions, attributes that are necessary for an optimal and efficient rule of law system. To the extent that judges are motivated by ideological and political preferences, the institutional literature grounded in the optimal legal model is subject to significant challenge.

Personal factors. In *Economic Analysis of Law* (1972), Posner raised the possibility that "judges, like other people, seek to maximize a utility function that includes monetary and nonmonetary elements (the latter including leisure, prestige, and power). Later, to the question "What Do Judges Maximize?," Posner (1993) had a simple response: "The Same Thing Everybody Else Does"—the judges' own self-

interest, which may include imposing their policy preferences on the law but so much more.

Schauer (2000) picked up on Posner's challenge to the ideology driven research and renewed the call to "engage in critical inquiry into judicial motivation". After all, Schauer wrote, "legislators, executives, and bureaucrats are widely understood…to be motivated by various forms of self-interest, including … the desire for promotion to higher office, the desire to expand their base of power, the desire to maximize future even if not current income" (p. 616). And yet, political scientists don't even bother to "pause to examine the possibility that judicial self-interest, rather than the non-self-interested policy preferences, determines judicial behavior or determines the policy preferences of judges in the first place" (p. 617).

Posner has returned to this agenda recently and offered a sustained defense of the importance of personal motivations for explaining judicial decision-making (Posner 2008; Epstein, Landes & Posner 2012.) While acknowledging the importance of ideological and legal motivations, Posner and his collaborators analyzed the significance of a number of personal motivations for judicial choice. The basic argument is as follows. Because there are only twenty-four hours in a day, judges must decide how to allocate their time among their various activities: judicial practice, non-judicial work and leisure. Given these time constraints judges seek to maximize their preferences over a set of personal factors (most of which also have implications for ideological and legal goals).

Here is a summary of the research on the five types of factors that Posner and his collaborators emphasize. There is now a large and growing body of empirical

literature providing evidence for (or, at the least, consistent with) each of these elements in the judge's personal utility function. Some studies provide direct tests; others examine factors that influence these preferences and, ultimately, affect the choices judges make.

1. Job Satisfaction. Job satisfaction, which is defined as "the internal satisfaction of feeling that one is doing a good job," has been found to be a significant determinant of judicial behavior. Special emphasis has been placed on the importance of the social dimensions of judicial work, such as relations with other judges, clerks, and staffs (Epstein, Landes & Posner 2012; see also, e.g., Baum 1997; Caldeira 1977; Drahozal 1998; Gulati & McCauliff 1998; Klein 2002; Shapiro & Levy 1994).

2. External Satisfactions. Many studies emphasize the external satisfactions that come from being a judge, including "reputation, prestige, power, influence, and celebrity" (e.g., Drahzoal 1998; Georgakopoulos 2000; Miceli & Cosgel 1994; Schauer 2000; Shapiro & Levy 1994; Whitman 2000). Some of these are likely related to the ideological and policy goal. As Schauer (2000: 633) notes, "for some judges, judicial reputation might be an instrumental goal" designed to increase power. When judges brand themselves by certain "substantive or methodological trademarks," they may be attempting to develop a reputation but also to exert greater influence on their court and the law. But the quest for external satisfaction can take more direct forms. Levy (2005) argues that "reputation seeking behavior" is a "human concern" that academics certainly pursue and judges do too. One approach is to develop a reputation as an able judge, that is, as a judge oriented

toward "craft"—or the "well-reasoned application of doctrine to the circumstances of a particular case" (Shapiro & Levy 1994, p. 1053).

3. Leisure. A preference for leisure plays almost no role in the political science literature (but see Klein & Hume 2003) but it comes to the fore in many economic analyses of judging (e.g., Bainbridge & Gulati 2002; Macey 1994; Posner 1993). The basic idea is that judges value leisure and, at some point, the "opportunity cost of foregone leisure exceeds the benefits to the judge of additional time spent making decisions" (Drahzoal 1998 p. 475). If so, we would expect judges to engage in behaviors designed to increase or, at the least, protect their existing leisure time. It has been asserted that this concern for leisure can affect the quality of judicial decisionmaking as well as the willingness of judges to engage in more cases.

4. Salary/Income. All else equal, judges prefer more salary, income, and personal comfort to less. And the empirical literature provides some evidence that they attempt to maximize these goals by acting in ways consistent with the preferences of their "bosses" (Baum 1997)—of which the legislature is certainly one. Because elected representatives control raises, court budgets (and so, for example, can augment or reduce the number of staff), and pension plans, it is not surprising to find some deference to their preferences (e.g., Bergara, Richman & Spiller 2003; Harvey & Friedman 2006; Segal, Westerland & Lindquist 2011). But the mechanism is not always clear. Also consistent with financial ends is the literature on retirement and retention. Political scientists have long suggested that federal judges and justices strategically time their retirements to coincide with presidents who share their party affiliation or ideology. Some empirical studies

provide support for this suggestion (e.g., Spriggs & Wahlbeck 1995) but they also demonstrate the importance of such personal factors as pension eligibility.

5. Promotion. There are a growing number of empirical studies showing that many judges seem motivated by the possibility of promotion to higher status (and paying) jobs, and will make choices based on this motivation. Cohen (1991) demonstrated, and Sisk, Heise & Morris (1998) confirm, that district court judges in the U.S. with a higher chance of promotion were more likely to uphold the politically popular federal sentencing guidelines (see also Taha 2004). In a separate study, Cohen (1992) also found that judges with promotion potential gave higher antitrust fines. Along similar lines, Epstein, Landes & Posner (2012) show that those judges who can reasonably expect that they have an opportunity for promotion do not want to appear soft on crime and thus impose harsher sentences on criminal defendants. Finally, Gaille (1997) found that the number of articles published by court of appeals judges in the U.S. standing some chance of elevation to the Supreme Court dropped "precipitously" after the Bork hearings. He concluded (p. 376): "Rather than the selection process constituting a one-sided choice by the president and Congress, it appears that prospective nominees themselves make important behind-the-scenes decisions that may influence the president's choice and, ultimately, determine the composition of the Court." These are studies of the U.S. federal courts. Promotion (and retention) has also figured into work on courts abroad (see, e.g., Salzberger & Fenn's (1999) work on English judges and Ramseyer & Rasmusen's (1997, 2001) series of papers on the relationship between judicial careers and judicial decisions in Japan.)

Like the ideological motivations, personal motivations complicate the development of a realistic model of judicial decisionmaking. These personal concerns at the very least divert the attention of judges away from the primary social goals of the rule of law institutions. At most the factors of promotion and personal income motivate judges to deviate from the general social goals instantiated in the institutional rules. They direct them instead towards partial and biased decisions that favor particular interest groups.

In sum, the personal motivations offer additional grounds for doubting that a rule of law system will produce legal decisions that are impartial, neutral and general. Judicial decision-making is much more varied than the institutional literature has acknowledged and taken account of. It admits of a great deal of variance on the types of attributes that the rule of law embodies.

V. Implications for Institutional Theory and Research

Social scientific research on judicial independence and judicial decisionmaking supports a much more nuanced conception of the central element of a rule of law institutional system than the implicit model adopted in most institutional research provides. The assumption that institutional rules, once established, will be effectively and efficiently implemented and enforced is open to serious question. It supports explanations of institutional effects that are at best incomplete, requiring a more complete explanation of how the formal enforcement process operates in an optimal and efficient way. When such a supplementary explanation cannot be offered, then the implication is that explanations of

institutional emergence and change as well as those of beneficial institutional effects are open to challenge and reconsideration.

What are the most immediate implications of this for institutional theory and research? The implications vary with the type of research that we are considering. In my joint work with James Johnson (2011), we have drawn on a suggestion by Schelling (1978) to characterize the practice of social and political theory in terms of three interrelated tasks. This characterization is also helpful for understanding the different aspects of institutional theory and research.

The first is *analytical*. It involves a consideration of optimal possibilities. If the problem is one of creating an optimal institution, then the analytical task will involve assessing how the available alternatives would address the problem and delineating the conditions necessary for the institution to effectively facilitate the desired goal. This involves an assessment of how different institutions would work when they are operating under the best possible conditions. For purely analytical purposes we are unconcerned with the question of how or under what conditions any given institutional arrangement might actually emerge. This task merely involves an analysis of what is possible. This is the task that encompasses formal institutional design as well as most of the other studies of the consequences of political and economic institutional choice.

The second task is *explanatory*. It involves both a theoretical and an empirical analysis of the institutions that actually exist in a society. In our pursuit of solutions to questions of institutional choice, we must account for how and why we have the specific set of policies and institutions that we actually do. This will

commonly involve at least two dimensions of analysis. First, identifying the underlying causal mechanisms that explain why we get the institutions that we actually have. And, second, diagnosing the discrepancies between the institutional possibilities that are derived from our analytical analysis and the real-world conditions that tend to undermine the institutional goals that we attribute to them.

The third task, addressing the burden of *normative* justification, involves supporting the claims that we make about why we should make particular institutional choices. The burden follows from the fact that that which is possible is not that which actually exists. This problem commonly manifests itself in the significant discrepancy that exists between how an institution actually emerges and operates in a particular society and the theoretical ideal of how that institution operates that its advocates invoke in the arguments they present on its behalf.

Here it is important to note that, when the problem is one of establishing and maintaining optimal institutions, the normative task entails a process of comparative institutional analysis. And it results in a choice among alternative institutional arrangements. It involves a justification of a particular institutional arrangement as well as a related claim about the necessary conditions for achieving the goals that we have for it. In this way the normative task requires not just a justification of the institution itself but also of the set of conditions necessary for the institution to effectively facilitate optimal outcomes.

With this characterization in mind, I can briefly assess the varying implications of this analysis of the rule of law for institutional research. In regard to the analytical work on the consequences of institutional choice, the primary

implication involves the robustness of the institutional claims. If we make an assumption of optimal enforcement, then this assumption will serve as a restriction on the status and robustness of the possibility claim. Like any other assumption that we might make in constructing the optimality argument, it sets the conditions under which optimal performance will be achieved. As with any other assumption, as the reality deviates from the theoretical construct, the persuasiveness of the optimality claim weakens. Therefore, when we employ an optimal assumption about the rule of law, we should take care to properly state the implications of any deviations from the assumption. As long as we do that, there is in principle no problem with adopting the standard implicit model. At the same time, the research on the rule of law provides an important justification for new research on the optimality conditions for rule of law institutions.

The implications are much more significant for the explanatory task of institutional analysis. Here the use of the implicit model leads to incomplete and inaccurate explanations. The unrealistic assumption of an efficient and effective legal system undermines the persuasiveness of the explanations.

Let me briefly mention two types of examples. First, inefficiencies in rule of law institutions can affect the process by which political and economic institutions emerge and change. In Knight (1992, 1995) I proposed an approach to explaining institutional creation and change that emphasized the importance of distributive conflict. I contrasted this account with the dominant accounts that focused on social efficiency and the other collectively beneficial consequences of institutional choice. I

distinguished the conditions under which the different accounts would do the best job of explaining the actual trajectory of institutional emergence and change.

The key element of a persuasive explanation in terms of social efficiency is the context in which the social interactions that produce the institutions occur. Socially efficient institutions are most likely to emerge when the conditions of competition and selection are in place. These conditions serve, among other things, to constrain the influence of social asymmetries on the institutional process, asymmetries that can distort the process towards other institutional forms that provide a greater distributional advantage to particular social groups. Inefficient rule of law institutions are less likely to produce a context of efficient competition and more likely to exacerbate the relevant asymmetries in a society. Therefore, theories that rely on competition in their explanations of institutional emergence and change lose support and are rendered less persuasive when we accept a more realistic conception of the rule of law.

Second, inefficiencies in the rule of law institutions will undermine the substantive effects of political and economic institutions. One potential problem involves the lack of general enforcement of institutional rules that can follow from biased and partial judicial decisionmaking. Lack of enforcement diminishes the incentives for compliance, thus undermining the capacity of the institutions to facilitate the socially desirable outcomes. A second problem involves the lack of impartiality in the interpretation in the dictates of the institutional rules. Partial and biased decisions can skew the substantive effects of the institutional rules, away from the socially efficient outcomes and towards other outcomes that provide

greater distributional advantage to powerful subsets of the societies. In addition to the direct effect that they have on the effectiveness of political and economic institutions, such biased judicial decisions can further expand the social asymmetries that make the facilitation of socially beneficial outcomes more difficult.

Overall, these types of distorting effects caused by inefficient rule of law institutions will not be captured by explanatory accounts that rely on the standard implicit model of courts. To the extent that these legal inefficiencies are substantial, the plausibility of the explanations we provide about political and economic institutions with the implicit model is significantly undermined. From this it follows that our explanatory accounts need to be reconsidered to account for the complexity of a realistic conception of the rule of law.

The implications for normative work in the area of institutional policy and reform relates to the gap between analytical results about optimal institutional performance and the actual performance of institutions in every day life. Whenever we make a claim of the form "we should adopt this particular type of institution because it will have the following beneficial effects", we are confronted by the burden of accounting for the difference between our analytical claims about optimal performance and the realities of institutional effectiveness on the ground. Too often both scholars and policy advocates fail to account for this discrepancy, choosing rather to confuse the normative debate over actual policy with the analytical debate over optimal possibilities (Knight and Johnson 2011.)

An obvious implication of this discussion of a more realistic conception of the rule of law is that the burden of justification in the normative policy debates

becomes even more difficult. Greater realism about the rule of law creates even greater deviation between analytical results and explanatory results. Therefore, policy justifications about institutional choice grounded in analytical results based on the standard implicit model bear a greater burden than previously envisioned.

The final implication for institutional theory and research is that there is a significant need for additional analysis on the set of institutional arrangements that together constitute a rule of law system. It should be grounded in a more realistic approach to courts and judicial decisionmaking. And it should embrace both the analytical task of understanding the conditions under which legal institutions will perform effectively and the explanatory task of understanding how they actually operate on the ground. It is only with a better understanding of these things that we can effectively engage in the policy debates over institutional choice.

References