

The Rule of Law, Anonymity, and Elite Incentives

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I. Introduction

In the past two decades, it has become common to assert that establishing the “rule of law” is a precondition both for political and economic development (e.g. Cooter 1997; Carothers 1998). This in turn has spawned a number of efforts to assess empirically to what extent a political system abides by it. Prima facie, the criteria used to assess the strength of the rule of law seem unassailable. Among other things, it is seen as essential for a country to possess independent courts, a professional bureaucracy, and secure property rights.

Davis (2004) criticizes the World Bank rule of law index and others like it for conflating institutional and social features of a polity and for focusing on features not amenable to reform. Even if one ignores the problems Davis describes, however, fundamental issues remain: Each index implicitly assumes a mapping from a particular set of institutions to a desirable set of substantive outcomes. This mapping, however, need not emerge in all political contexts. For example, it is frequently posited that an independent, depoliticized judiciary is the best route to equal justice under law. But as Kornhauser (2002) notes, judicial independence is neither a necessary nor sufficient condition for impartiality.

In this paper, I explore how political scientists might begin to address an even more basic conceptual difficulty with the way that empirical scholars have sought to operationalize the rule of law. The problem stems from an incomplete recognition that the stability of particular

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institutional forms is largely epiphenomenal to the distribution of political power among elites in the countries in which they are adopted.

The two virtues most closely identified with the rule of law are the government's use of laws to foster stable expectations and its impartial application of those laws across distinct categories of citizens. From the perspective of political scientists, the categories most immediately relevant are those individuals in and out of power. To the extent that the rule of law has any normative bite at all, it is in its capacity to induce stable expectations for the *latter* group, and to reduce disparity across both groups in the allocation of costs and benefits associated with government action. Drawing on the "selectorate" model of Bueno de Mesquita et. al. (2002; 2003), I consider how variation in the distribution of political resources can produce incentives to tolerate more or less disparate treatment among citizens.

II. Conceptual Underpinnings the Rule of Law

Inquiry into the nature and desirability of the rule of law date back at least to Plato. A useful starting point for the contemporary study of the concept, however, is the late 19th century legal scholar Albert Venn Dicey. In chapter 4 of his *Introduction to the Study of the Law of the Constitution*, Dicey identifies three desirable properties of political systems that embody or abide by the rule of law:

1. Absolute supremacy or predominance of regular law as opposed to the influence or arbitrary power;
2. Equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; and
3. The general principles of the constitution [emerge as] the result of judicial decisions determining the rights of private persons in particular cases brought before the courts.

Dicey's particular affinity for English political and legal institutions is hinted at in the second criterion, and emerges unabashedly in the third. Taken in the context of his broader condemnation of the French *droit administratif*, his desire to stack the definitional deck in favor of common law jurisprudence is perhaps not especially surprising. Nevertheless, from Dicey's formulation two functional criteria for evaluating the the rule of law do emerge. Critically, these do not assume the inherent superiority of any particular profile of formal governing institutions.

The first of these functional criteria is the creation of *stable expectations*. Individuals should be able to plan their lives with minimal unexpected interference from the state, and without the rules changing "in the middle of the game." This rules out, most obviously, ex post facto laws, but also expropriation or uncompensated takings by the government. The stable expectations formulation of the rule of law is most closely identified with Hayek (1960), and is characterized by an inherent mistrust of the discretionary authority of public officials and case-by-case adjudication.² This mistrust persists even when the use of that discretion is associated with an effort to achieve a substantively just outcome with respect to the particulars of a case.³

² Critics of Hayek respond that state intervention, especially in the form of social insurance programs, often enhances stable expectations.

³ Interestingly, this kind of discretionary, rule-independent adjudication is most closely identified with the legal (as opposed to economic) notion of equity. Later in the book, Dicey (1982 [1885], 250-253) must go through considerable contortions to defend the historical development of the English Chancery Court. He argues that in its application of the law of equity, the Lord Chancellor's authority, intended originally as an extension of the power of the crown, possessed the potential for despotic governance. Nonetheless, its principled application of equity meant that its capacity for arbitrariness diminished with time.

The second criterion is *anonymity*: laws and the authority of the state to enforce them should be applied equally across individuals without reference to class, status, or position. Although legal equality seems unassailable in practice, no legal system purports to abide by it in an absolute sense, and not even the most ardent defender of the rule of law would insist that it should. Governments, after all, are in the business of making distinctions in the application of laws to citizens, groups, and corporate bodies, whether those distinctions are on the basis of descriptive characteristics (age, place of residence, size of business) or behavior (“acting suspicious,” “good faith efforts to comply”).

The most relevant question concerns the appropriate partition of characteristics and behaviors into those that are deemed the appropriate purview of state-sanctioned distinctions and those that are not. In American jurisprudence, such a partition has been ensconced in standards of judicial review: Suspect classifications such as race should be afforded strict scrutiny by the courts, while others need only be justified by their rational basis. Selective enforcement on the basis of technically irrelevant categories is used as an affirmative defense in regulatory proceedings. To the extent that one can effectively distinguish the technically relevant from the technically irrelevant features of a particular case, it should still be the case that “like cases be treated alike.” Adopting the language of statistics, we can speak of *conditional* anonymity.

Both stable expectations and (conditional) anonymity as guiding principles for a political system rely on two different notions of arbitrariness – the ultimate evil to be avoided in all discussions of the rule of law. One definition of arbitrary given by the OED is, “Derived from mere opinion or preference; not based on the nature of things; hence, capricious, uncertain, varying.” The failure of the government to create stable expectations, for example by institutionalizing property rights, is problematic because it introduces risk into the citizen’s

efforts to live his or her life. Note, however, that the absence of stable expectations is not necessarily a manifestation of any discriminatory motivation on the part of public officials. The danger is that the arbitrary exercise of discretionary authority creates uncertainty or variance.

Another definition of arbitrary, however, is “dependent on will or pleasure.” The failure of a political system to assure conditional anonymity can arise from the preferences of those who rule. It can lead to conditions under which individuals out of power enjoy only a small share of the benefits of state action, while simultaneously shouldering the preponderance of its burdens. To what extent, then, will those who govern tolerate the kind of impartial treatment that the rule of law apparently requires? Under what circumstances will the institutional mechanisms associated with the rule of law prove stable and self-enforcing? Much depends on the incentives of the rulers. Just as self-enforcing constitutionalism requires that individuals in power accede to surrendering it when they lose (Przeworski 1991), any notion of a self-enforcing rule of law must likewise require that those in power accede to a reduction in disparate treatment between themselves and others. This condition must hold even (and especially) when doing so reduces the benefits they can extract from unequal treatment.

III. Anonymity and the Size of Winning Coalitions

We are accustomed to associating the rule of law with democratic systems of government, but consider the following two limiting cases: A kleptocratic, Hobbesian sovereign acquires sufficient power to rule with the consent of no one. The ruler is far from benign, but makes no distinctions among citizens in distributing the heavy burdens of his regime. Further, over time a set of stable expectations emerge, because the sovereign, upon coming to power, saw fit to codify the onerous tax system and has never sought to alter it. To be sure, this system is characterized by unequal treatment. But against the one individual who is able enrich himself at

the expense of the citizens, we have arrayed the multitude of others with stable expectations and coequal status with respect to the state.

In the second case, we have a democracy in which all adult citizens are enfranchised. To acquire power, a leader must assemble and retain a winning coalition of at least 50% plus one. A party succeeds in consolidating power because the opposition is in disarray. Citizens both in and outside of the winning coalition enjoy reasonably stable expectations in most areas of life, and access to the public goods provided by the regime are available to all. Still, membership in the winning coalition does have its privileges. These need not emerge in the sense of direct transfers out of the pockets of the losers and into those of the winners. They may take the form of other perquisites, for example, patronage appointments to official positions, access to no-bid contracts, or the selective reduction of regulatory burdens. Compared with the first example, the absolute distance between the best and worst off members of society is much smaller. But any two citizens drawn from the population are now quite likely to be treated differently by the state.

These examples are intended to capture two ideas. The first is that a true commitment to the substantive goals of the rule of law may require recognition that democracy and anonymity may be in conflict. A variety of different political systems might engender different kinds of legal equality. Second, the extent to which policies do or do not create disparate treatment among citizens is largely governed by the political incentives faced by leaders. In the first example, the ruler has no reason to favor some citizens over others in order to stay in power; in the second, the in-party very well may. What is required, then, is a conceptual framework to consider these relationships. I rely on an abbreviated version of the selectorate model of Bueno de Mesquita et. al. (2002, 2003). The model is a highly stylized representation of political reality, abstracting away from specific institutional features of a polity such as the separation of powers and a

professionalized civil service. To the extent that the model offers a way of getting at a bare-bones notion of equal treatment by the state *without* reliance on specific institutional forms, however, it has the potential to offer some insights about what political conditions are more or less likely to produce equitable outcomes.

The model posits that a political system can be characterized as a series of three nested groups. The first of these is the set of residents, labeled N . Residents who are enfranchised, which is to say those who have some possibility of participating in a support coalition of an incumbent, are called the *selectorate*, and labeled S . Finally, from the ranks of the selectorate a leader must draw and retain a winning coalition W . The allocation of the society's resources R is at the discretion of the leader. (For purposes of simplicity, I will assume the resources are fixed.) The leader can spend resources on projects that benefit all members of society, x , or private benefits that accrue only to members of the winning coalition, g . He can also enrich himself by retaining $R-g-x$ for his own use.⁴ To remain in power, the leader must prevent the defection of members of his winning coalition.

In every period of the game, a challenger makes her best possible offer in an effort to peel off members of the incumbent's winning coalition. The challenger's best offer maximizes the single-period utility of members of her winning coalition by spending all of R on private and public goods. (In subsequent periods, she would behave as any other incumbent would.) However, while the challenger can offer sizeable short-term incentives to current winning coalition participants to tempt them to defect, she cannot commit to keeping those individuals in her long term coalition. Her affinity – a preference ranking of selectorate members – is her own private

⁴ Those not comfortable with the notion that all leaders have kleptocratic motives can think of the residual as a kind of budgetary slack.

information and only becomes revealed should she come to power. An individual who defects from the incumbent's winning coalition to the challenger's has only probability W/S of staying in the winning coalition in subsequent periods. To retain his winning coalition, the incumbent need only match the challenger's best offer with his allocation of benefits across society.

I refer the reader to the authors' 2002 piece, which describes the Markov perfect equilibria of the game. Two insights are useful for our purposes here: First, as W increases (holding the other variables fixed), the cost to the incumbent of buying off members of W via private benefits becomes prohibitive, causing the incumbent to reallocate resources toward policies that benefit all members of society. Consequently, the welfare of individuals out of power increases as W increases. Second, as W/S increases, the incumbent leader is able to retain less for himself. Because the probability that a defector would be included in the challenger's winning coalition for the long run increases, the leader must spend more to keep members of the coalition satisfied.

The authors do not explicitly address the issue of equal treatment under law. Still, using the model we can observe how tendencies toward equal treatment vary along with changes in the features of the polity. An appropriate measure of equality of treatment should capture both absolute differences in the welfare of those in and out of power, as well as the relative size of those groups. I employ the Theil entropy index.⁵ In their book, the authors normalize N to one

⁵ This is highly correlated with the Gini coefficient, but easier to derive in the current context.

For the simulation, I use the following primitives and functional forms: Members of W enjoy utility $\sqrt{x} + \sqrt{g}$; all other members of society enjoy \sqrt{x} . $R=0.1$, the marginal cost of the public good is 0.025, and the common discount factor is 0.9. These are substantively similar to those employed in Bueno de Mesquita et. al. 2002. In calculating inequality, I do not include the incumbent leader's personal welfare. Even if the opportunities for personal enrichment are

and vary W and S . For our purposes, it will be more useful to normalize S to one. Then, we vary N from 1 (universal franchise) to 5 (the political elite are 20% of the population) and W from 0 (totalitarianism) to 0.5 (a majority of enfranchised citizens is necessary to govern).

Figure 1 displays “iso-equal treatment curves” for different combinations of N and W . Each curve corresponds to combinations with the same Theil value. Maximally unequal treatment occurs when W and N are low. It is not surprising that holding N constant, an increase in W reduces disparity between those in and out of power. This occurs for the reasons stated above: Increasing the size of the winning coalition makes private goods provision to coalition members less cost-effective compared to government activities that benefit all members of the society.

Next, consider that holding W constant, the Theil index decreases with N . In other words, *reducing* the proportion of the population that is enfranchised can actually *increase* equality of treatment. At first glance, this seems peculiar, as a reduction in the franchise is contrary to democratic sensibilities. In fact, it arises quite naturally in the context of the hypothetical kleptocratic sovereign discussed above. Low values of W imply a large proportion of society's resources go to a relatively small group of people, but larger values of N imply an increasingly large majority of individuals are being treated the same (albeit worse than the members of W).

IV. Implications

I have focused on the relationship between macro-level features of a political system and one functional condition of the rule of law: anonymity, or the absence of disparate treatment. The analysis points to the most basic possible measure of anonymity, the extent to which the benefits

enormous, the fact that he is, in the context of the model, a single individual will make any effect on the index very weak.

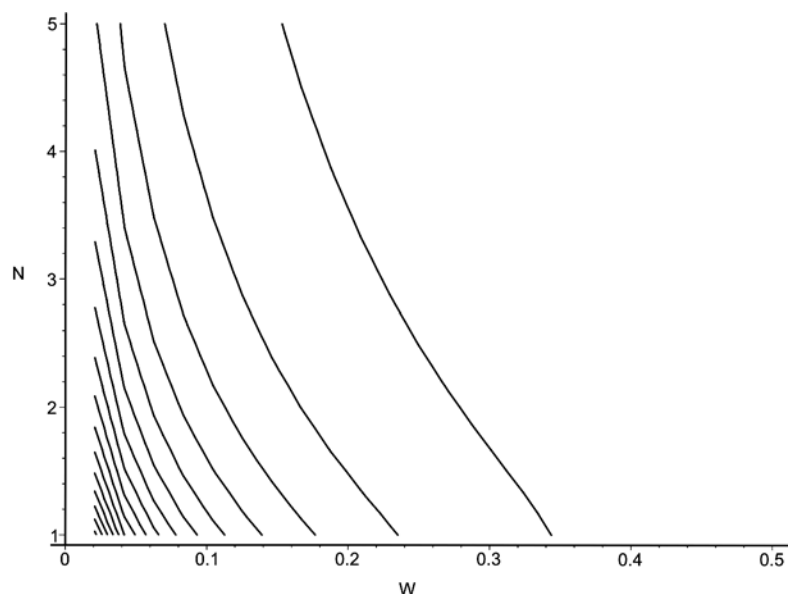


Figure 1 Iso-equal treatment curves. Higher values of W and N correspond to less disparate treatment between the winning coalition and the remainder of society.

one gets from government action depend on whether one does or does not support the polity's leadership. This indicator deliberately abstracts away from specific institutional forms that reformers often suggest are essential for the laws to rule. The model suggests that as the proportion of enfranchised citizens whose support is required by political leaders to retain power increases, the welfare of individuals out of power increases, and the disparity in the treatment of those in and out of power decreases. Second, holding fixed that proportion, decreasing the proportion of the citizenry who are enfranchised decreases overall disparity.

These features point to some interesting implications. When it comes to a political system's capacity to engender the rule of law, there may inherent tradeoffs to citizens out of power between personal welfare, political participation, and equal treatment. If, in aggregate terms, the franchise suddenly increases, but political leadership still requires the same number of people to govern, the result may be a reduction in the benefits the state provides to those individuals out of power. Likewise, we find that a variety of different kinds of political systems can engender equal

treatment by the state, *as long as one excludes direct participation in the political process as an essential criterion of equal treatment*. We may all believe that holding other features of a political system constant, more anonymity is unambiguously good. Given strategic politicians, however, holding one set of features constant while tinkering with others may not be feasible.

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