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WHY ARE DEVELOPING COUNTRIES SO RESISTANT TO THE  
RULE OF LAW?

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**Abstract**

This paper draws on my new book (North, Wallis, and Weingast 2009) to provide a new explanation for why it is so difficult to transplant institutions, such as markets and democracy, from developed societies into developing ones. This framework divides societies into two different types of social order, natural states (which include most developing countries) and open access orders (which include the developed ones). Missing from traditional approaches is how societies reduce or control the problem of violence. Natural states solve the problem of violence through rent-creation, granting powerful individuals and groups valuable rights and privileges so that they have incentives to cooperate rather than fight. The resulting rents, limits on competition, and limited access to organizations hinder long-term economic development. In contrast, open access orders use competition, open access to organizations, and institutions to control violence and are characterized by rent-erosion and long-term economic growth.

I focus on two aspects of the rule of law: certainty and equality before the law; and that the law must not only hold today but also tomorrow. I show that rule of law requires that the state treat people impersonally in the sense that in a large group of citizens all are treated alike; and that the state is perpetual in the sense that state institutions do not depend on the identity of the current rulers or supporting coalition. The problem is that few natural states are impersonal or perpetual. Therefore they cannot exhibit the rule of law. No matter how attractive are today's institutions or rights, they are no good in the long-term if tomorrow's regime can alter them at will. The absence of impersonality and a perpetual state prevents natural states from creating the rule of law.

**Keywords**

Economic and political development, rule of law, the transition, natural state.



## **Introduction**

Developing countries prove remarkably resistant to the rule of law and, more generally, good governance. This problem is particularly of relevance since the institutional technologies for providing the rule of law – systems of property rights, civil rights, and personal liberties, general incorporation laws, corporate governance structures, contract law, and judicial systems – are relatively well-known. To address this subject, I draw on the new approach developed by North, Wallis, and Weingast (2009) – NWW – to suggest how the rule of law emerged in the West and why the rule of law cannot readily be transplanted into developing countries.

The traditional approach to development in economics, political science, and law sees developing societies as incomplete versions of developed ones; that is, as lacking essential ingredients of mature developed societies. Economists, democrats, and legal scholars all recommend that new institutions and policies be transplanted from developed societies into developing ones – typically capital, technology and competitive markets; parties and elections; and rights, constitutions, and judicial institutions. And yet these reforms rarely succeed in producing long-term economic growth, stable democracy that polices public officials, and rule of law institutions with efficient justice.

The NWW approach provides a new explanation for why it is so difficult to transplant these institutions from developed societies into developing ones. This framework divides today's societies into two different types of social order, arguing that developing countries differ dramatically in their organization from those of developed ones. Missing from traditional approaches is how societies reduce or control the problem of violence. The most common social order throughout history, the limited access order or natural state, solves the problem of violence through rent-creation, granting powerful individuals and groups valuable rights and privileges so that they have incentives to cooperate rather than fight. The resulting rents, limits on competition, and limited access to organizations hinder long-term economic development of these societies. In contrast, open access orders use competition, open access to organizations, and institutions to control violence and are characterized by rent-erosion and long-term economic growth.

I focus on two aspects of the rule of law in this paper: first, the ideas of certainty, equality before the law, and the absence of arbitrary abuse by authority; and second, a dynamic component missing from most treatments that emphasizes that the rule of law must not only hold today, but also tomorrow. The dynamic issue raises the problem of turnover in the ruler or dominant coalition of a state: what binds new political officials to honor existing rules and institutions? This issue is especially problematic in authoritarian regimes but is relevant in all natural states, including nominally democratic ones: the inability to bind successor regimes to today's rules and institutions is a fundamental barrier to establishing the rule of law. No matter how attractive are today's institutions or rights, they are no good in the long-term if tomorrow's regime can alter them at will. This issue is intimately tied to the issue of creating a perpetually lived state, a state whose characteristics and institutions do not depend on the identity of leaders or dominant coalition.

Too often, students of the rule of law focus on the form of rights – for example, the nature and specification of the law – or the form of institutions that should implement and oversee those rights – for example, the nature and specification of judicial institutions. They fail to study how to sustain these institutions and protect them from abuse by political officials. Leaders in natural states typically have the power to undo these institutions when they prove inconvenient, as witnessed by Nazi Germany's Adolf Hitler, Russia's Vladimir Putin, Venezuela's Hugo Chavez, or Zimbabwe's Robert Mugabe. Similarly, many natural states leaders grabbed power by force, and these leaders often directly compromise existing institutions; examples include Chile's Augustin Pinochet and Spain's Francisco Franco. Finally, many natural states fall into civil war, which also ends continuity of institutions, as illustrated by the former Yugoslavia in the early 1990s, Rwanda in 1994, Somalia since the early 1990s. All three forms of instability hinder the natural state's ability to create the rule of law. These examples show that maintaining the first part of the rule of law – equality and the absence of arbitrary abuse – critically depends on the creation of a perpetual state in which the rules and institutions of government do not depend on the identity of political officials.

The paper's main lesson is that natural states cannot create the rule of law by adopting the institutions and governance structures possessed by open access orders. To gain the rule of law, natural states must begin transition to open access orders. Rule of law emerges as part of this transition when the society transforms from one based on personal relations and personal exchange to one based on impersonal relations and impersonal exchange. Part of the transition is institutional. Indeed, creating the rule of law requires two separate institutional changes: institutions to provide for the law; and a set of credible commitments that protect those institutions and ensure that they survive.

This paper proceeds as follows. Section 2 sketches the North, Wallis and Weingast framework. Section 3 defines the aspects of the rule of law used in this study. Section 4 applies this framework to the emergence of rule of law in a historical perspective, showing its intimate connection to the transition and how the societies of the West grappled with these issues as they made the transition from natural states to open access orders. Section 5 explains why the procedures, rights, and institutions of the rule of law cannot be transplanted into developing countries. My conclusions follow.

### **The Conceptual Framework for Interpreting Recorded Human History**

To understand how societies are organized and function, I rely on the conceptual framework developed by North, Wallis, and Weingast (2009) – NWW.<sup>1</sup> The NWW framework distinguishes among *social orders*, distinct patterns of organizing society. Each social order represents a particular pattern of human relationships structured in a way to constrain violence. The method by which a society constrains violence affects the entire society. The concept of a social order provides a framework within which we can understand how the political, economic, and other systems relate to one another. The framework integrates fundamental concepts: violence, institutions, organizations, and beliefs. Central to the framework are the questions of how and whether violence is controlled or contained; how are societies organized and what institutions support them; in particular, how they support organizations and who gets to form organizations; and finally, are interactions based on personal or impersonal relationships?

Human history has witnessed three social orders. In the *foraging order*, which reaches back long before recorded human history, people existed in small bands, typically of 25 to 100. The *limited access order*, also called the natural state, emerged with recorded human history about 10,000 years ago and is associated with the first social revolution creating the first civilizations. In this social order, the political system manipulates the economic system to create rents so as to control violence and sustain order. By allocating the rents to those with violence potential, these societies significantly reduce the problem of violence. Finally, the *open access order* relies on competition in the political and economic systems to sustain order. This social order first emerged during the second social revolution, also called the knowledge or industrial revolution.

### **Persons and Personhood**

Relationships in natural states are personal relations; specifically, relationships among members of the dominant coalition are personal: they depend on the identities of the individuals. How the natural state treats an individual – his rights, privileges, rents, and duties – depends on his individual identity, so these rights, privileges, rents, and duties typically differ across individuals. These states build on repeat play interaction among individuals to help build personal knowledge and trust and to enforce exchange. Because everyone and every relationship is different, repeated interaction is necessary to enforce exchange. Cooperation and exchange break down when these relationships are infrequent.

A person has two parts. First, every human possesses a unique corporeal body, including size, appearance, and intelligence. Second, every person has a set of socially ascribed characteristics based on their position, power, privileges, rights, and duties.<sup>2</sup>

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<sup>1</sup>North, Wallis, Webb, and Weingast (2007) elaborate some of the implications of the framework for the problems of economic development.

<sup>2</sup> Moreover, the law may endow non-corporeal persons, such as organizations, with personhood so that they have legal standing under the law. A legal person is an entity capable of bearing rights and duties. Western law since the Romans has recognized legal persons as combinations of both sets of attributes.

A society is dominated by personal relationships when each individual's social persona is unique. In contrast, a society is dominated by impersonal relationships when the social persona of large classes of individuals are the same.

### ***The Natural State***

All states must control the fundamental problem of violence. In natural states, a dominant coalition of the powerful emerges to solve this problem.<sup>3</sup> The coalition grants members privileges, creates rents through limited access to valuable resources and organizations, and then uses the rents to sustain order. Because fighting reduces their rents, coalition members have incentives not to fight so as to maintain their rents. Natural states necessarily limit access to organizations and restrict competition in all systems. Failing to do so dissipates rents and therefore reduces the incentives not to fight.

We call this order the *natural state* because for nearly all of the last 10,000 years of human history – indeed, until just the last two centuries – the natural state was the only solution to the problem of violence that produced a hierarchical society with significant wealth.<sup>4</sup> In comparison with the previous foraging order, natural states produced impressive economic growth, and even today we can see the impressive wealth amassed by many of the early civilizations. In contrast to open access orders, however, natural states have significant, negative consequences for economic growth.

Personal relationships characterize both politics and economics in natural states. Within the dominant coalition, all relationships are personal. More powerful members, for example, gain more valuable privileges. Natural states that fail to distribute benefits in this way risk violence. When the power relationships are out of balance with the distribution of benefits, those with more power than benefits are likely to demand a larger share; and, if it is not forthcoming, they are then tempted to fight for it. Patronage networks typically connect those with less power to those with the most power: anyone without power must be connected to an organization with power in the event that violence breaks out. Personal relationships also characterize most economic relationships. The principal mode of enforcing economic exchange is repeat play. Rule of law institutions, such as courts, only begin to emerge in mature natural state, and these are largely for organizations rather than individuals.

Natural states are stable, but not static. They regularly adjust as circumstances change. Various shocks – dramatic weather events, changes in demographics, changes in relative prices, technological change, or military events – all have implications for the fortunes of coalition members. As some members become more powerful and others weaker, the coalition must adjust the distribution of benefits and rents. Failing to do so risks violence as those members whose rents, privileges, and rights do not match their power threaten violence to gain what they believe is their fair share. Natural states therefore regularly have dramatic adjustments in rights, privileges, and ruling coalitions, often associated with the expropriation of assets and privileges of some elites which are then granted to others.

### ***A Typology of Natural States***

The NWW framework distinguishes among three types of natural states, depending on how they treat organizations and, in parallel, their institutional sophistication. In *fragile natural states*, the only organization supported by the state is the state itself, the dominant coalition. These states have little differentiation and hence little economic specialization and exchange. Fragile natural states are poor and prone to violence, and they have a limited range of institutions and credible commitments. Examples include Chad, Iraq, Mozambique, Somalia, and the Sudan.

*Basic natural states* support a set of organizations, all of which are closely associated with the state. These organizations create considerable specialization, such as tax collection, religious activity, and specialized economic functions, including mineral extraction or long distance trade. Basic natural states have a wider range of institutions to support state organizations, and they are more resilient to

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<sup>3</sup>In this paper, I use the term “power” to refer to those who control organizations capable of exercising coercion and violence.

<sup>4</sup>Some earlier states, such as Ancient Athens and the Roman Republic, had begun the transition, but none completed the transition to an open access order.

shocks than fragile natural states. These states may also have a range of public institutions, such as succession rules for new leaders or rules that regularize taxation rates or the division of spoils from conquest. To the extent that these states have enterprises, they are state-run enterprises. All of these issues hold the potential for violent disputes, and rules that institutionalize decisions about them reduce the chances of violence. Examples of basic natural states include the Aztec Empire, the Medieval Carolingian empire, Iraq under Saddam Hussein, the former Soviet Union, and Egypt.

Finally, *mature natural states* develop sophisticated private organizations that exist apart from the state. Merchant organizations and other private firms may exist independently of the state rather than being state-run enterprises. In parallel with private organizations is a system of private law and contract enforcement that supports these organizations. Nonetheless, mature natural states limit access to private firms as part of the rent-creation process. Only elite members of the dominant coalition have access to private organizations, and this access remains a valuable privilege. Mature natural states are more resilient to changing circumstances than are basic natural states; as with all natural states, however, they too have crises and periodic coalition adjustments of rights and privileges. Examples include 17<sup>th</sup> century England and modern day Argentina, Brazil, Mexico, and India.

Moving across the progression of natural states, from fragile to basic to mature, states become wealthier. This greater wealth occurs for several reasons. First, the range of organizations and the degree of specialization and exchange is richer across this progression. Second, the degree of violence diminishes across the progression. Lower levels of violence have a direct effect and an indirect effect on wealth. Directly, lower levels of violence mean that less wealth is destroyed. Indirectly, lower levels of violence mean that greater numbers of potentially profitable exchanges take place because parties that would lose if violence broke out become willing to make the exchange when the risk of violence diminishes.

Nonetheless, the need of all natural states to use limited access to control violence necessarily limits access to rights, to organizations: these limits, in turn, restrict competition in the economy. These states also limit competition in the polity, in turn reducing the production of new ideas and means of solving various political and other dilemmas that all societies inevitably face.

### ***Open Access Orders***

Open access orders sustain open entry to political and economic organizations. As a result, they exhibit political and economic competition, and this competition is central to political order and the prevention of violence. In contrast to the natural state, all citizens in open access orders have the ability to form contractual organizations and to use the state's courts to enforce the organization's contracts. Open access therefore creates and sustains a rich civil society. Competition and open access in the economic system reinforces competition and open access in the political system and vice versa.

Standard views in both economics and political science fail to understand the open access order because they typically focus on one system alone. Economists attempt to understand economic stability by focusing on the equilibrium properties of markets without reference to the political system, ignoring the problem that property rights, the legal system and contract enforcement, and macroeconomic stability are all products of political and democratic choices. Political scientists study the properties of democratic systems in open access orders taking them as given, failing to explain both how democracy sustains competitive markets and how democracy is sustained when it fails in most countries.<sup>5</sup>

Open access orders are sustained in part by a belief system that emphasizes equality and incorporation. In the 19<sup>th</sup> century, these beliefs were embodied by incorporating citizens within the law, markets, and democracy where elites had previously excluded them. In the 20<sup>th</sup> century, these beliefs include impersonal equality before the law so that the rule of law is enforced impartially for all citizens. Further, these beliefs have actualizations in a wide range of policies and public goods that create explicit sharing: public goods (such as education), social insurance (such as health, unemployment, old age, and workers' accident insurance), and the provision of infrastructure (such as

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<sup>5</sup>Most new democracies fail. To the extent that open access orders can sustain stable democracy, something must be different about them. Yet the literature fails to provide a compelling case for why. See Weingast (2006) for details.

access to a wide range of local public goods). Although not all people living within the society's borders need be citizens for open access to be sustained, a large portion must be. Nonetheless, to be an open access order, all citizens must be equal; that is, the state must treat them impersonally.

Equality, incorporation of citizens, and policies for sharing all lower the demand for crippling redistribution that might destroy an open access order. The means by which open access orders share – public goods, social insurance, and infrastructure – all complement competitive markets and have significantly lower costs than pure redistribution (Lindert 2005). This observation parallels the argument that all successful constitutions limit the stakes of power (Weingast 2006). Because powerful groups are less likely to be threatened by incumbent regimes, constitutions that limit the stakes are subject to fewer coups as these groups support coups to protect themselves.

Open access orders sustain political competition in the form of a competitive party system. The success of this competition depends on open access not only to parties but to organizations. Open access to organizations fosters the civil society, allowing citizens to mobilize and defend their interests when threatened. Organizations of all types – benevolence societies, churches, soccer leagues, firms – are potential political tools for mobilizing interests in the face of political threats. Political parties not only organize the electorate, they police one another. The political opposition is central to a successful democracy. Not only does the opposition formulate alternative plans, but the credible threat from the opposition forces incumbents to adapt their own policies in the face of new circumstances. This competition of ideas and policies affords open access orders a degree of adaptive efficiency (North 2005, NWW, ch 4) not possessed by natural states.

Open access orders also sustain competitive markets. These societies therefore produce long-term economic growth. Competitive markets have strong feedback mechanisms that limit the ability of political systems in open access orders to create too many rents. Market competition erodes many rents. Fiscal interests produce incentives in open access states for governments to limit their rent-creation. Massive programs to create rents that impose significant harms on the economy have immediate feedback: a shrinking economy lowers tax revenues to support redistribution and public goods; and a shrinking economy directly harms voters. Both of these effects have historically turned voters against incumbents in stable democracies. Mobile resources and international competition reinforce these effects.

Finally, consider the relationship between open access orders and the growth of government. Following beliefs in equality and inclusion, policies for social insurance have meant substantial increases in government spending to finance these programs. Underlying these programs is the ability of open access orders to provide benefits to impersonal categories of citizens. Because natural states lack the ability to treat citizens impersonally, they face great difficulties in providing public goods. Similarly, inclusion in open access orders leads to the provision of an infrastructure in the form of a wide range of local public goods and services (roads, electricity, telephones, water, sewage, garbage), and public education, all of which require significant expenditures. Open access orders have bigger governments than do natural states in large part because they provide more public goods and services to their citizens (Lindert 2005). More generally, open access orders have larger governments because of trust and reliance - citizens believe the government will provide public goods rather than dissipate expenditures on patronage, so they have a greater willingness to pay for government services than do people in natural states.

### ***Natural states vs. Open Access Orders***

Natural states have many of the same institutions as open access orders, such as parties, elections, markets, and judiciaries. Why do they work differently in open access orders? The answer is that natural states have limited access to organizations, lack competition, and lack a perpetual state.

Limited access to organizations and the creation of privilege hinders markets. While natural states may have some markets, these markets are typically hindered by cumbersome restrictions, far more so than in open access orders. Legal systems in these states typically fail to enforce contracts or mediate disputes among individuals and organizations based on rule of law principles. Indeed, most natural state judiciaries are just another form of corrupt rent-generating organizations. Finally, the absence of a perpetual state means that the state itself hinders markets with arbitrary action. As Haber

et al (2008) illustrates for Mexico, the government regularly grants extensive privileges and monopoly privileges in banking, only to expropriate the banks during times of crises and then repeat the cycle anew. The inability of the state to honor a stable system of property rights greatly compromises markets in natural states.

Similarly, many mature natural states hold elections, some for decades (as in Mexico since 1930 or Chile prior to 1973). But here too, elections differ systematically from those in open access orders. As mentioned, the incumbent regime may compromise the opposition's ability to compete in various ways. Limited access to organizations hinders the civil society, compromising the ability of citizens to express their views. The absence of a judicial system that operates under rule of law fundamentally transforms the legislature in these countries. This absence makes it difficult for the legislature to pass laws controlling the bureaucracy, for there is no way to enforce such laws. This allows executive dominance of the government, greatly diminishing the effectiveness of the separation of powers and the ability of the legislative branch to act as a check on executive power.

Another problem with natural states is the inability to provide benefits on an impersonal basis. This hinders their ability to provide public goods, making it much more difficult to provide the most common policies of open access orders that complement markets: the public goods of social insurance, education, and infrastructure noted above.

Finally consider what Hayek (1960) and North (2005) call "adaptive efficiency," the ability of states to respond to various shocks. All states face problems and crises. How do they respond? First, because open access orders have better means of controlling violence, violence is far less likely to break out when a crisis occurs. Citizens are therefore much less likely to respond by protecting themselves. In contrast, where violence is likely or a possibility, citizens or groups in natural states may well respond quickly to the prospect of violence by protecting themselves so as not to be vulnerable if another group initiates violence. This feedback means the potential for violence makes these societies volatile.

Second, open access orders exhibit competition for ideas. Parties compete for solutions to crises, and the open access to organizations within the civil society means that individuals, groups, and organizations independently produce many new ideas which can be debated throughout the society. Opposition parties and interest groups in particular have strong incentives to monitor, criticize, and provide alternatives to the solutions proposed by incumbents. Open access orders therefore make it far easier than natural states to discard bad or failed ideas.

Third, by virtue of being able to make credible commitments more readily, open access orders are more likely to create new pacts in the face of crises. Indeed, the history of all open access orders is replete with pacts that solve crises, to name a few: the creation of the French Fifth Republic in 1959, the Compromises of 1820, 1833, 1850, and 1877 in 19<sup>th</sup> century United States, and the various 19<sup>th</sup> century Reform Acts in Great Britain.

The force of this subsection is twofold. First, natural states possess many of the same institutions as open access orders, such as markets, elections, and judiciaries. But these institutions work very differently in natural states because they limit access, lack a perpetual state, and cannot deliver benefits to citizens on an impersonal basis. Second, open access systems are not perfect, and in practice all open access states produce significant rents. But – in comparison to natural states – the open access order's competitive mechanisms work relatively well and provide a far better means for long-term economic growth and resiliency to various problems and crises faced by the society.

### ***The Transition From Limited to Open Access***

The NWW perspective redefines the process of economic and political development as the transition from a limited access order to an open access order. The transition is a difficult process, and only two or two and a half dozen states have successfully completed it. As I use this material only sparingly, I briefly describe the transition (see NWW, chs 5 and 6 for further details).

Because the transition begins with the natural state, the early part of the transition must be consistent with the logic of the natural state. Some natural states move into positions in which a series of changes toward open access can be sustained. Within a natural state, conditions may arise that

enable impersonal relationships to develop among elites. When this occurs, elites may find it in their interests to institutionalize these relationships.

NWW divides the transition process into two parts, the doorstep conditions and the transition proper. There are three doorstep conditions:

**DC 1: Rule of law for elites.** Some mature natural states institutionalize relations among elites so that privileges are regularized in a way that they transform into elite rights; put another way, privileges move from being personal and idiosyncratic to being impersonally applied equally to all elites. As discussed below in greater detail, English medieval land law provides an illustration. In the 11<sup>th</sup> century, rights to land reverted back to the king on the death of the lord. For a negotiated payment – depending on both the value of the land and on the expected relative power of the heir – the heir could purchase the rights to the land. Over time, this process became standardized and impersonalized in fees. Similarly, competition among different court systems in England for revenues led courts to innovate, leading to rules that better served elite interests. Importantly, legal rules emerged granting landowners the right to control how land passed among various heirs when they died, including the ability to grant rights to land on conditions (whereby if the conditions failed, the land reverted to another heir).<sup>6</sup>

**DC 2: The perpetual state.** Almost all natural states are mortal in the sense that, as the dominant coalition and rulers change, so too do fundamental aspects of the state, such as the rules governing political choice. These states have limited ability to make credible commitments to honor various rights and rules that bind successor coalitions and leaders, so that new leaders often make dramatic revisions in the nature of institutions, rights, and policies. The idea of perpetuity is to create aspects of the state that live beyond the lives of the current officeholders so that the institutions do not depend upon the identity of the officials that hold them.

An especially important aspect of perpetuity is the creation of perpetually lived organizations, organizations whose existence extends beyond the lives of the individuals that create them. Partnerships, the dominant form of business organization throughout history until the mid-19th century, require that the organization be dissolved or reorganized on the death or voluntary leaving of one of the partners. Creating corporations with tradable shares and allowing the shareholders to pass their shares to heirs upon their deaths solves this problem, creating perpetually lived organizations. Corporations therefore allow substantial risk-pooling and have much longer time horizons than partnerships.

**DC 3: Consolidated control over violence and the military.** The third doorstep condition is at once the most difficult to understand and to achieve. Without consolidated, political control over the varied sources of violence, including the military, neither of the other doorstep conditions can hold. Neither the rule of law nor credible commitments can exist as long as one faction can use force to bend others to their will. Few discussions of the rule of law mention this problem. And yet, as critical as this condition is, we know too little about how this consolidation takes place (NWW, ch 5).

**The Transition.** The transition proper occurs when sufficient numbers of people become citizens in the sense that the state treats a large category of people impersonally and identically. At the same time, processes must begin that afford citizens access to organizations in both politics and economics, granting them the ability to compete as they wish in either system. In the United States, this process occurred over several generations, spanning the colonial era through the Constitution and well into the 19<sup>th</sup> century. Indeed, the idea of party competition with a legitimate opposition party in politics did not emerge until the middle of the 19<sup>th</sup> century, around the 1840s (Hofstadter 1969; NWW, ch 6). Similarly, general incorporation laws, allowing anyone to form a corporation, also arose first in the 1840s (NWW, ch 6). Events in Great Britain were not far behind the United States; and in France, they occurred by the 1880s.

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<sup>6</sup>These issues are quite complicated, both in terms of the various forms of rights (breaking property into different groups; placing different conditions on different pieces of property); different forms of legal rules; and so on. See NWW (ch 3).

### **Vexing Problems in Creating the Rule of Law**

Scholars use the term rule of law to mean different things in different contexts, and this label is sometimes used to encompass all good things, including good governance, democracy, and human rights. For the purposes of this paper, I emphasize two core aspects of the rule of law; first, the impersonal aspects of law: the certainty or predictability of the law, including the absence of arbitrary actions by the state against individuals; transparency; and the requirement that the state treat individuals as citizens with equality before the law. Second, a dynamic aspect of the rule of law which requires that the state be able to honor these aspects of the rule of law tomorrow even if it experiences turnover in officials.

By this definition, natural states have substantial difficulties creating the rule of law. First, this definition contrasts with the typical natural state dominated by personal relationships. In natural states, people's identity determines how they are treated; in particular, the state treats more powerful individuals and groups differently than weaker ones. For example, the privileges of Duke A differ from those of Dukes B and C – as a matter of *de jure* or *de facto* – and all Dukes are treated differently from knights, let alone from all peasants.

Second, natural states have difficulty creating the predictability necessary for the rule of law. Because these states are built around a dominant coalition, as the needs and power relations of the coalition change, so too do rules, policies, rights, and privileges. Similarly, the absence of perpetuity make it very difficult for natural states to commit to long-term rules, institutions and policies.

Third, natural states often seem to act arbitrarily. This behavior typically reflects the logic of the dominant coalition of the natural state. For example, as the fortunes of the various coalition members rise and fall, the ruler adjusts their rights, privileges, and rents, often redistributing them from some members to others. From the open access perspective, these choices seem arbitrary; policies and rights appear to be too closely associated with choices by the ruler bound not by rules but seemingly by whim. The identity and power characteristics of the individuals and groups are central to this natural state behavior. Reflecting the dynamics of the natural state coalition logic, this behavior is the opposite of the rule of law.

Finally and perhaps most importantly, the rule of law involves the dynamic component, for the issue of the certainty of the law concerns not only what the law is today, but what it will be tomorrow. We take this feature of the rule of law for granted in open access orders, but those living in natural states cannot.<sup>7</sup> The dynamic issue raises several concerns. First, from an economic and political standpoint, consider expropriation. Investors of all kinds care not just what the rules are today – property rights and tax rates, for example – but what they will be tomorrow. Investments profitable under today's rules may not be under tomorrow's, particularly if the government acts opportunistically by using these policies to expropriate the value of the investment. Farmers in Ghana, for example, fear that their long-term investment in coffee trees profitable under today's tax rates will be expropriated if the government raises the tax rate as the trees mature and start bearing fruit.

Second, a political complication concerns the problem of changes in the dominant coalition and ruler: natural states have too few institutions that bind new coalitions and their leaders to today's rules. This is especially problematic in authoritarian regimes. As discussed in the next section, this problem is intimately tied to the issue of creating a perpetually lived state.

The concept of credible commitment provides the answer to both of these problems. States cannot simply announce impersonal rules and rights, for their rulers – or those rulers successors – may alter them tomorrow. Creating a state that honors rules today and tomorrow requires institutions with two characteristics. First, these institutions must commit the state – political officials, judges, bureaucrats – to honor these rules and rights. Second, they must commit all major players in society to respect the constitutional rules. In particular, anyone with access to violence and the ability to overturn the regime must have incentives to refrain from doing so. Similarly, those in power must have incentives to respect the rules, including the rights of the opposition, and, if a democratic society, to

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<sup>7</sup>This dynamic component is not always assured in open access orders. The Bush Administration's handling of suspected terrorists demonstrates that, at the margin, these rules can be compromised when open access orders face difficult circumstances.

give up power if they lose elections. These incentives are intimately connected with creating the credible commitments necessary for a perpetual state and the dynamic aspects of the rule of law. Unfortunately, this type of credible commitment eludes most natural states and typically occurs only for those that begin the transition.

### **Historic Emergence of the Rule of Law in the West**

The emergence of the rule of law coincides with the transition from the natural state to the open access order. Natural states have only a limited ability to provide the rule of law; they cannot make either extensive credible commitments to institutions and rules that provide for certainty expectations or impersonal rules that treat a wide class of citizens equally. Whereas the rule of law requires that the state treats citizens impersonally, natural states treat people personally and hence differentially. Natural states also emphasize power; and as power shifts, not only does the membership in the dominant coalition adjust, so too do privileges, rents, institutions, and policies. These adjustments can be seen in the coalition changes in 17<sup>th</sup> England, as the Stuart Kings redistributed power and rents from one faction to another, but also in modern natural states, such as Russia under President Putin and Venezuela under Hugo Chavez.

A natural state cannot sustain impersonal rights of a large group of citizens who are equal under the law. Nor can today's natural state bind a successor regime. Rights and reforms in a natural state fail when the ruler needs to adjust the coalition in response to changing circumstances. Thus, even if today's regime in a natural state institutes the appropriate reform, it cannot commit itself or its successors to maintain these reforms.

Natural states entering the transition, however, change as they begin to assume the doorstep conditions. All three of the doorstep conditions are central to the emergence of the rule of law. The first doorstep condition is rule of law for elites, in which various forms of elite privileges are transformed into elite rights. Consider early English medieval history.<sup>8</sup> Immediately following William the Conqueror's invasion in 1066, the King dispersed rights to land to his followers from Normandy. These holdings did not displace existing landlords, but instead forced existing landlords to pay tribute to and share rents with the newcomers. At the death of these men, the rights to the land reverted to the king who might return land rights to the original holder's heir, typically for a payment. But the king might instead redistribute rights to the land. If, for example, the fortunes of the original holder had fallen (say the heir was seen as a weak leader) while those of another had risen (say had done favors for the king and deserved a reward), the king might grant the land to the other instead of the heir. In this way, the logic of maintaining the dominant coalition in the natural state dictated the allocation of rights to land, which worked as a system of privilege to the powerful rather than as a set of rights. England at the time was a fragile natural state; it had few organizations outside of the state.

Over time, as relationships stabilized, new institutions and organizations associated with the state grew. Although the king sought to retain his flexibility with respect to rights to use the land, the great lords had a collective interest in stabilizing the rules. Moreover, wealth would rise if rights could be made more secure; everyone, the king included, could be made better off, if rights were made more secure. And so, over a considerable period of time, rights to inherit the land became more secure.

This same scenario played out with respect to a wide variety of aspects of rights associated with land. As another example, consider the ability to devise property by will. Although heirs could inherit land in medieval England, the law did not allow the owner flexibility in terms of dividing land among many heirs or granting land under particular conditions such that, if unmet, the land reverts to another heir. Here too the evolution of secure, flexible elite rights to devise property by will took several centuries. In the end, rights to land became secure slowly over many centuries, and were considerably secure as England became a mature natural state in the 17<sup>th</sup> century and then began the doorstep conditions.

As a final example, consider the emergence of rights to sell and trade corporation shares. Originally, corporate shares emerged as a privilege associated with a unique corporation created to capture rents associated with a particular opportunity, such as the East India Company or the Bank of

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<sup>8</sup>This discussion of English medieval land rights draws on NWW (ch 3).

England. But once a corporation was created, holders of its shares had an incentive to foster the right to trade these shares and to extend the right to own them to a substantially larger group of people: doing so would enhance the value of their shares. In other words, although these corporations began as personal, natural state creations, they provided incentives to create impersonal securities markets to enhance the value of the firms and to increase the liquidity of the owners' capital.

Each of these cases illustrates the transformation of elite privileges into elite rights. Each also involves the transformation of the state so that it creates a system that enforces these rights and hence attains the aspect of rule of law for elites.

The second doorstep condition, perpetually lived states and organizations, is also central to the rule of law. Unfortunately, this critical aspect of the rule of law is largely neglected in literature in part because the literature fails to study the problem of maintaining the rule of law over time.

Put simply, *the absence of a perpetual state allows future natural state officials to dishonor the rules, laws, and institutions devised by today's state*. As natural states adjust to changing circumstances, they violate the basic features of the rule of law. Perpetuity is therefore an obvious condition necessary for states to maintain the rule of law. Indeed, many of the classic figures in the rule of law have articulated sentiments that fit with this logic. When Aristotle (1988:90-91) condemns rule by people rather than rule by law in *Politics* he seems to be referring to the absence of perpetuity. Similarly, John Locke (1980[1690],17), in his *Second Treatise*, says, "Freedom of men under government is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it . . . and not to be subject to the inconstant, uncertain, arbitrary will of another man." These ideas depend on the certainty of law, itself dependent on the perpetuity of the state.

Because natural state rulers, representing the dominant coalition, face relatively fewer credible commitments than rulers in open access orders, they can remove or undo laws and institutions that they find inconvenient. Former President Vladimir Putin systematically did this in Russia, transforming a mature natural state with many organizations independent of the state back toward a basic one where survival requires that organizations have close ties to the state. A wide range of once independent private organizations have lost their independence. Similarly, a range of political institutions that once stood as moderate checks and balances on former Russian President, Boris Yeltsin, either no longer exist or are much weaker, including the Russian Duma, the governors, the press, and the civil society. The absence of these checks has allowed Putin to remove his political opponents and take undisputed control over Russia, even as he has nominally stepped down from the presidency and allowed a successor, Dmitry Medvedev, to be elected to the presidency. Because these institutions lacked perpetuity, they could be dismantled. President Hugo Chavez of Venezuela has overseen a similar if less thorough transformation in Venezuela, as has President Robert Mugabe of Zimbabwe. In the 1930s, Adolf Hitler engineered a similar if far more sinister transformation of the Weimar regime, a mature natural state, into Nazi Germany, a basic natural state. These leaders accomplish their goals in response to changing circumstances, such as a depression or a significant increase in state revenue,<sup>9</sup> that allow them to consolidate their position by eliminating privileges of other coalition members whose support is no longer needed to survive.

Creating perpetuity requires establishing various credible commitments by which the ruler and dominant coalition have incentives to honor institutions and rights. The incentives created by the credible commitments imply that the institutions and rights do not depend on the identity of political officials or members of the dominant coalition. As the rulers, political officials, or coalitions change, state institutions and citizen rights nonetheless survive and elements of the rule of law can be sustained.

As perpetuity is the most novel aspect of the rule of law, I give several illustrations of this concept. First, consider the creation of the second doorstep conditions, a perpetual state, among one of the first movers, England, in the Glorious Revolution of 1688-89. This revolution was not only a coup removing one king and inviting in another, but also a constitutional revision by which the erstwhile

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<sup>9</sup>The set of such circumstances is large – what North (1981) refers to as “changes in relative prices”: demographic shifts, natural disasters, the outbreak of war, and the invention of new technologies.

divided English elite settled many of their differences over which they had fought for much of this century (including a bitter Civil War in the 1640s, the beheading of the King in 1649, the formation of a parliamentary republic that failed, followed by the restoration of the monarchy in 1660). The divided elite settled many of their differences in a way that placed bounds on the powers that the king, as head of the dominant coalition, could exercise. In particular, the status of laws of Parliament and Parliament's control over taxation – both contested issues during the previous century – became sacrosanct. The portion of the Glorious Revolution known as the Revenue Settlement announced that any king who ignored a law of Parliament risked a coup (Jones 1972, p. 318, North and Weingast 1989). The new consensus created the credible commitment binding the king to the new rules.

Backed by a threat of an elite united against the crown, the Revolution Settlement created a central aspect of a perpetual state. Laws of Parliament now bound the current king as head of the natural state coalition. Importantly, the settlement also bound all future kings (Weingast 1997).

The parliamentarians negotiating the Revolution Settlement were backward-looking, attempting to solve the problems of the previous century. But by endowing the state with perpetuity, the institutional changes had immense forward-looking effects.

The effects of perpetuity are readily seen in three important illustrations. First consider the issue of sovereign debt. Prior to the Glorious Revolution, sovereign debt represented a natural state personal exchange between the king and the lenders. Being the sovereign and above the law, the king chose whether to pay back creditors. If he wanted to lower the interest rate, delay payment, or default on the loan altogether, it was at his personal discretion. As a consequence, the king was credit-rated; creditors would lend only limited funds. After the Glorious Revolution, new debt issues became laws of Parliament. Legally, this meant that altering the terms of debt required a new law of Parliament. If the king unilaterally sought to alter the debt terms, such as default on an interest payment, he would violate a law of Parliament. The new arrangements greatly raised the cost to the king of altering the debt terms: disregarding a law of Parliament threatened a coup. The new arrangements therefore provided the king with strong incentives to honor them; loan repayment was therefore more credible. As a consequence of the increased credibility to repay, the credit available to the government went up enormously. Debt rose by nearly an order of magnitude in a few short years (1689-97), from roughly five percent of estimated GNP to roughly forty percent (North and Weingast 1989). This debt allowed England to hold off France in the war that began with the Glorious Revolution, preventing (among other things) France from restoring the deposed King.

Second and perhaps most central for the rule of law, consider the independent judiciary. This independence is one of the most difficult institutions for today's natural states to accomplish. Although many developing countries announce independent judiciaries in their constitutions, few can sustain them, and most developing countries compromise their independence when it proves inconvenient.<sup>10</sup> Indeed, the 17<sup>th</sup> century Stuart kings had long openly fired judges for ruling against them – famously, Chief Justices Coke (1616-7) and Crew (1627) (see Hirst 1986). The crown was personally responsible for the day-to-day operation of the government, so it paid the judges. As they served at the crown's pleasure, the Stuart kings used their power to influence the judges' decisions. In the end, this threat of being fired produced compliant judges. Following the Glorious Revolution, judges became more independent of the crown. In 1701, Parliament passed the Act of Settlement, granting judges official independence of the crown. Here too perpetuity protected judicial independence. Parliament, as representatives of the dominant coalition, sought to protect judges by passing a law officially recognizing the independence of judges from the crown. Royal manipulation of judges now risked violating a law of Parliament and hence the threat of a coup, making judges far more independent. Using event-study methods, Klermen and Mahoney (2005) provide statistical evidence demonstrating the importance of this Act.

Third, an important implication of a perpetual state is that it can create perpetually lived organizations. These organizations greatly increase the amount of wealth that the society can generate. For example, perpetuity allows insurance companies to pool vast quantities of risk and thus

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<sup>10</sup>Manipulating the judiciary is common in the natural state of today's developing world, including Chavez in Venezuela, former President Carlos Menem of Argentina, former President Pervez Musharraf of Pakistan, former President Indira Gandhi of India, and Putin in Russia.

substantially reduce risk to individuals and firms. It allows corporations to pool capital and create organizations that make long-term investments that live beyond the lives of the existing partners. Because partnerships that must be renegotiated on the death of any partner, they become very cumbersome as they begin to pool large amounts of capital from a large number of investors.

More generally, perpetuity is central to the process of creating a long-term time horizon for a society. As is well-known, short-term time horizons lead to decisions by state leaders with bad economic consequences (North 1981, ch 3, Bates 1983, Olson 1993). The absence of long-term horizons greatly hinders the ability to make long-term investments, which are critical to long-term economic development. Put simply, investors cannot have long time horizons and make long-term investments if the state is not perpetual and has a short time horizon. The absence of a perpetually lived state therefore implies the absence of perpetually lived organizations.

Creating perpetuity is therefore a central feature of the rule of law. It is a necessary component of creating a state that moves beyond the personal rule of individuals, where the institutions and policies of the natural states depend upon the identity of the dominant coalition and who runs the state. Creating perpetuity requires credible commitments that institutionalize political and social mechanisms that create incentives for both political officials and citizens to honor the rules so that not only do today's officials honor the rules but so too will tomorrow's. This is clearly part of the essence of satisfying the two conditions of the definition of the rule of law articulated in section 3.

The third doorstep condition, consolidated control over the military, is another obvious precondition for the rule of law. Indeed, as NWW (ch 5) argue, the other two doorstep conditions cannot be sustained if this condition is not firmly in place. The absence of consolidated control over the military allows those with access to military resources to grab what they like, if not always when they like, at least when circumstances are propitious. As long as this type of military intervention remains possible, the rule of law cannot hold. Strongmen with access to violence have the ability to evade the law, so the rule of law necessarily remains incomplete. Although perhaps the most important of the three conditions, we know least about this doorstep condition.

### ***Implications***

The emergence of the rule of law is intimately connected with the transition from natural state to open access order. Each of the three doorstep conditions, which represent the beginning of the transition, is necessary to achieve the rule of law. Natural states have great difficulties establishing and maintaining institutions capable of sustaining the rule of law. They cannot deliver benefits on an impersonal basis. The absence of perpetuity means that they cannot commit to long-term policies, so that these states witness great transformations in institutions and policies, whether following dramatic coups, such as Chile (1973), the severe financial crises of Argentina (2001) and Thailand (1997), or the more subtle and prolonged transformations of present day Russia, Zimbabwe, Venezuela, Kenya, and South Africa. Each of these natural state transformations reflects the absence of perpetuity, allowing leaders to adjust institutions, policies, rents, and privileges as the needs of the dominant coalition change in order to maintain political stability (or, sometimes, a mere modicum of political stability in the face of threats of more severe disorder). Frequently accompanied by dramatic policy reversals, these shifts wreak havoc with investment and the economy; they may also end freedoms overnight, such as democracy. All too frequently, the institutions designed to promote the rule of law are a casualty.

### **Why the Rules, Rights, and Institutions Supporting the Rule of Law in the Developed (Open Access) World Cannot be Transplanted into the Developing (Natural State) World**

Natural state systems of privilege and rent-creation do not arise simply because people are greedy, malevolent, or corrupt. Instead, privilege and rent-creation arise because they are the solution to the problem of violence. Rents grant powerful individuals and groups with access to violence incentives to cooperate with other members of the dominant coalition. In comparison with disorder, all members of the society benefit from the peace that follows.

Into this world come reformers with the best of intentions – economists promoting economic reform, democrats promoting elections and democracy, and lawyers promoting legal reform and the specification of citizen rights. These reformers argue that their proposed reforms will make citizens better off. But they are wrong. The reason is that their reforms are institutions and policies from the world of open access orders. In pursuing their programs, reformers seek to transplant a subset of open access institutions into natural states without understanding why natural states systematically differ from open access orders, in particular, why natural states fail to be open access orders.

These reforms virtually always fail for two reasons: violence and the absence of perpetuity. I consider these problems in turn.

### ***Reform Efforts Typically Fail to Understand the Role of Violence in Structuring the Natural State***

Reform efforts almost always ignore the problem of violence that the natural state political and economic systems solve. The systems of privileges, rents, and limited access are not arbitrary; they serve a valuable and necessary – if costly – purpose; they are the means of controlling the problem of violence. Transplanting open access order institutions – such as markets, elections, and legal systems – cannot create an open access order. This type of reform has been tried hundreds of times, and it does not succeed. The problem is that these reforms seek to dismantle the natural state systems of privilege and limited access; they therefore threaten violence and disorder. Rather than making everyone better off, as the reformers intend, these reforms threaten to make everyone worse off.

Consider the problem of market reform. Existing market privileges are part of the larger system of privileges and limited access granting elites incentives to refrain from violence. Market reform that removes these restrictions eliminates these rents; reforms that promote open entry into markets erode these rents. Both types of market reform remove the incentives that sustain elite cooperation. The likelihood of violence rises, particularly in times of crisis. Similar effects arise from electoral reform that increases political competition and legal reform, again threatening to undo many of the privileges that hold the society together.

Because these reforms threaten a society with violence, people in these societies resist them. The paradox is that not only will those who benefit directly from the rents fight reform; so too will those who are exploited by the natural state privileges. The reason is that being exploited in a peaceful society is far better than living under disorder. For this reason, none of the major open access institutions – markets, democracy, or legal systems – can be transplanted directly into developing countries qua natural states. This is also why, despite hundreds of billions of dollars, the best intentions, and the best development advice, the World Bank, the IMF, and USAID have relatively few success stories.<sup>11</sup>

Democracy and elections serve as a major check on government in open access orders. Although many mature natural states sustain elections for significant periods – including Argentina, Brazil, Chile, India, Russia, and Venezuela – elections in these states do not seem to curb corruption, serve as a check on government abuse, protect citizen rights, or more generally foster the rule of law. Indeed, these states frequently constrain the opposition's ability to compete, such as limits on freedom of the press, constraints on open access to organizations so that groups cannot organize in support of opposition parties or candidates they favor, or candidates that are directly hindered from competing (sometimes they are jailed).

Students of democracy are only beginning to learn what makes democracy work in open access orders. Most new democracies fail, and we have only a few clues about what makes some democracies succeed while most do not. One condition, however, is that all successful democracies seem to reduce the stakes of political conflict. The reason can be seen in Chile in 1973, Spain in 1936, or Kenya in 2007-08. When the stakes are too high, powerful groups whose interests are threatened by legitimately elected governments provide support for coups or violent movements that destroy democracy. Democratic constitutions that limit the stakes therefore make democracy more likely to survive because they make coups and violence less likely (Weingast 2006).

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<sup>11</sup>Easterly (2001) provides a sobering assessment of aid programs and their systematic lack of success.

This same principle applies in another way, sometimes called “tragic brilliance” (Diaz, Magaloni, and Weingast 2008), in which natural states engineer the delivery of highly valued local public goods, such as water, so that they depend on whether citizens in a locality support the government. Failing to support the government leads it to cut off these citizens’ water. In this case, citizens nominally possess the freedom to participate in elections, but they cannot exercise full freedom of choice because of the government’s credible threat to punish them if they support the opposition. In a study of Mexican municipalities in the mid-1990s, which received on average 80 percent of their budgets from higher governments, the localities that failed to vote for the incumbent Institutional Revolutionary Party, known by its Spanish acronym, the PRI, received one-quarter less funds (Diaz, Magaloni, and Weingast 2008). The PRI used this technique to manipulate voters to support it during its long-term dominance of Mexican politics (1930-2000). Similarly, Rodriguez (1995) and Ward (1995) showed that when the first two Mexican municipalities elected opposition mayors in 1983, they experienced a budget drop in the order of 50 percent. This system is at once tragic and brilliant because it forces citizens who prefer the opposition to support a corrupt, incumbent regime.

In contrast, open access orders provide local public goods impersonally on the basis of citizenship, not on the basis of political support. The impersonal delivery of services at once lowers the stakes of power and prevents the incumbent regime from manipulating citizens by threatening to cut off valuable public goods and services. Elections in natural states therefore do not work in the same way as those in open access orders, and they often fall far short of the democratic ideal.

### ***The Absence of Perpetuity***

Central to creating the rule of law is creating a perpetual state whose institutions, rules, and policies do not depend on the identity of current officials or dominant coalition. The problem with natural states in the developing world is that almost none have perpetual states. Consider the most institutionalized and sophisticated natural state, ones that in the NWW framework are mature natural states. A great many mature natural states have constitutions that specify separation of power systems with elections, legislatures, presidents, and independent judiciaries. The problem is that these institutions fail to work as specified in the constitution or as they do in open access orders. Nearly all of the mature natural states – for example, Argentina, Brazil, Chile, India, Mexico, Russia, and Venezuela – have experienced constitutional breakdowns or subversion of constitutional institutions in the last three decades. The absence of open access to organizations means an absence of a civil society to help police political officials. Legislatures cannot effectively police the executive without a working judiciary – no institution exists to enforce legislative restrictions on the executive – so the corrupt judiciaries of natural states hinder the separation of powers system.

The absence of perpetuity reflects the absence of credible commitments that bind political officials to honor political institutions and the rights they protect. When these institutions or rights become inconvenient, political officials ignore, abuse, or rescind these rights. I have already mentioned Russia under Putin. In recent years, a host of Latin American countries – including Chavez in Venezuela and President Carlos Menem in Argentina – have defied their supreme courts, either by directly ignoring rulings; or, in parallel with the Stuart Kings, firing judges who fail to give favorable rulings; or by simply packing the supreme court with compliant judges so as to obtain desired rulings. India’s President Indira Gandhi did so in the 1970s. So too have many Africa leaders.

Along with the absence of the other doorstep conditions, the absence of perpetuity in most natural states helps explain why the long history of reform over the past four decades of attempts to transplant markets, elections, and judicial institutions into a great many natural states has failed to produce thriving markets, vibrant democracies, and independent judiciaries throughout the developing world. These reforms may last for a few years, but they cannot be sustained. When the natural state reaches a crisis, they typically go by the wayside.

Let me illustrate this point with the failure of democracy; for example, when incumbents refuse to abide by election results (or commit fraud to remain in office) or opponents take power by force. In each of these instances, the rule of law fails as fundamental rules of the society are set aside.

Examples abound: the fall of the Second Spanish Republic in 1936 into Civil War, the dramatic Chilean coup of 1973, and the PRI's electoral fraud in the 1988 election.

The recent events Kenya illustrate this point. Many observers had thought Kenya had turned a corner, moving from the brutal dictatorship of Daniel arap Moi to democracy in a series of steps from the early 1990s through the early 2000s. New organizations and a civil society flourished. A range of economic reforms and economic growth followed so that by 2007 Kenya seemed a symbol of hope for sub-Saharan Africa. And yet much of this progress fell apart following the elections at the end of 2007. In part because the stakes were too high, the incumbent party resorted to electoral fraud, refusing to cede power. The result was widespread violence.

Kenya's progress followed by relapse illustrates the dynamic problem of the rule of law emphasized in this paper. Natural states may exhibit periods of reform, democracy, and economic growth; but the absence of perpetuity means that, when the situation becomes difficult, incumbents or outsiders with access to violence break the rules as a means of furthering their own interests in the face of large threats. Maintaining the rule of law is not simply about what the rules are today, but whether perpetuity and credible commitments exist so that these rules can be sustained in the future.

### ***How Natural States Today Differ from the Historic Transitions***

The existence of open access orders in today's world transforms the problem of development and creation of the rule of law. Most obviously, the existence and wealth of open access orders provides an understanding of what can be achieved in ways that were missing during the historic transitions of the first movers. More subtly - and paradoxically - the existence of open access orders combines with globalization to reduce the demand in many of today's natural states for rule of law. The reason is that elites and the middle-class can out-source the credible commitments to open access orders by holding assets in open access order banks rather than those at home and by partnering with multinational companies that, as an enticement to invest domestically, are given special privileges that protect their investments (North, Wallis, Webb, and Weingast 2007).

### **Conclusions**

The central feature of the rule of law – creating certainty and equality of the law with an absence of arbitrary abuse – requires not only the supremacy of the law as traditional arguments emphasize but a dynamic component by which the law holds not only today but also in the future. Sustaining the rule of law therefore involves creating perpetuity. To sustain the rule of law over time, the state must become perpetually lived; that is, state institutions must survive beyond those who create them so that the identities of political officials do not matter. To have this ability requires the appropriate form of credible commitments that provide political officials with the incentives to honor these institutions and the rights they protect so that turnover in officials does not result in major alterations of institutions and rights.

This perspective shows why it is so difficult to transplant the rule of law into developing countries; and, further, why developing countries often actively resist attempts to secure the rule of law. Natural states solve the problem of violence by granting powerful members privileges and rents. These states adjust to changing circumstances by adjusting the distribution of privileges. Big changes in circumstances, for example, following crises, often require big adjustments in privileges, institutions, and policies. These adjustments are often accompanied by violence or threats of violence. Governments fall, coups occur, rights are altered, assets expropriated, constitutions are arbitrarily changed or ignored, and policies altered. Natural states also lack a perpetual state. The absence of perpetuity means that these states do not have the necessary credible commitments to provide political actors with incentives to honor the constitutional rules, making it difficult for these states to sustain many rights and institutions.

Even when natural states adopt all the right constitutional provisions of democracy, separation of powers, and the specification of individual rights, they cannot create a perpetual state so they cannot sustain these provisions over the long-term. The problem with most reforms is that they attempt to transplant the rules, rights, and institutions from open access orders directly into natural states. These attempts nearly always fail because they cannot alter the basic structure and incentives of the natural

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state. When natural states face crises, they inevitably go through dramatic transformations that revise institutions, rules, and policies, making it difficult to sustain the rule of law.

To gain the rule of law, natural states must enter the transition from limited access order to an open access order.<sup>12</sup> This means the fragile natural states must first become basic ones; basic natural states become mature ones; and mature natural states begin the transition with the doorstep conditions. Only at this stage of development are states capable of beginning to create the institutional and organizational basis for the rule of law.

The tenor of this paper is thus a pessimistic one. It suggests that creating the rule of law involves the transition from limited to open access order which has proven quite difficult. Natural states have dominated history and represent the vast majority of states in existence today. Although natural states have existed for 10,000 years, only a little over two dozen states have succeeded in this transformation, with most clustered in Europe.

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<sup>12</sup>These ideas are further developed in North, Wallis, Webb, and Weingast (2007).

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