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# Magna Carta, the Rule of Law, and the Limits on Government

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## **Abstract**

This paper surveys the legal tradition that links *Magna Carta* with the modern concepts of the rule of law and the limits on government. It documents that the original understanding of the rule of law included substantive commitments to individual freedom and limited government. Then, it attempts at explaining how and why such commitments were lost to a formalist interpretation of the rule of law from 1848 to 1939. The paper concludes by arguing how a revival of the substantive commitments of the rule of law is central in a project of reshaping modern states.

*Keywords:* Rule of Law, Magna Carta, Legal Theory, Limited Government.

*JEL classification numbers:* K10, D78, N43.

Such is the subject matter of legal history in the middle ages where we can follow the rise and progress of law and the rule of law... It was mediaevalists in England, armed with Bracton and the Year Books, who ended Stuart statecraft, and the Constitution of the United States was written by men who had Magna Carta and Coke upon Littleton before their eyes. Could anything be more mediaeval than the idea of due process, or the insertion in an instrument of government of a contract clause? *Pacta sunt servanda*, it seems to say, with the real mediaeval accent.

Theodore Plucknett, *A Concise History of the Common Law*

## 1 Introduction

Reading *Magna Carta* is a disconcerting experience. Instead of an eloquent expression of natural rights, such as the U.S. Declaration of Independence, or a well-organized template for institutional design, such as the U.S. Constitution, *Magna Carta* is an archetypical legal document from the Middle Ages. The language, even when translated from Latin into 21st century English, is unfamiliar. The chapters (the numbering of which was a later introduction to ease reading) cluster without a pattern, more the product of the haste with which this 3,550-word sheet of parchment was drafted than of serene reflection.<sup>1</sup> Most of the chapters, in addition, deal with feudal matters of little relevance to anyone except antiquarians. Other chapters, such as those dealing with the Jews, are offensive to contemporary sensibilities. After this reading, it is difficult not to agree with generations of historians who have conceptualized the Great Charter as a *lieu de mémoire*, an ideological construction that sustains the collective beliefs of the English-speaking peoples in life, liberty, and property, instead of thinking about it as a relevant legal document.

And yet, a perceptive reader cannot but marvel at *Magna Carta*. Beyond the disappointments of looking at the real England of the early 13th century instead of at the Hollywood recreation we have grown accustomed to, one finds in it the foundations of the “rule of law.”

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<sup>1</sup> Vincent (2012) provides a concise, yet insightful treatment of Magna Carta, the coronation charters that preceded it, and Magna Carta’s later role in English history. J. C. Holt’s (1965) *Magna Carta* is, nevertheless, still the classic reference.

As in all permanent texts, the brilliance of *Magna Carta* shines even more brightly thanks to all its shortcomings.

Let us look, for example, at chapter 17:<sup>2</sup>

(17) Ordinary lawsuits shall not follow the royal court around, but shall be held in a fixed place.

This chapter sets up a concise and clear procedural rule: the adjudication of legal disputes cannot occur wherever the King's whim may drive him, but will take place in a predetermined location. What hope of a successful resolution of disputes can we have if we do not even know where they will be adjudicated?

Or what about chapters 30 to 32 and their protection of property rights?

(30) No sheriff, royal official, or other person shall take horses or carts for transport from any free man, without his consent.

(31) Neither we nor any royal official will take wood for our castle, or for any other purpose, without the consent of the owner.

(32) We will not keep the lands of people convicted of felony in our hand for longer than a year and a day, after which they shall be returned to the lords of the 'fees' concerned.

These four chapters are the kernel of legal doctrines of a more general nature. One does not need to be an inventive English barrister to argue that, by analogy with chapter 17, if ordinary lawsuits should be heard in a fixed place, the other rules that govern a judicial process should also be predetermined. For chapter 17 is not defending the supremacy of a concrete physical location (in itself an issue of minor importance), but is an understanding of how an adjudication should proceed according to the principles of natural reason. Indeed, this point is reinforced by chapters 19 and 40 regarding due process and a prompt trial. Similarly, chapters 30 and 31 of *Magna Carta* explicitly mention horses, carts, and wood because they were the most valuable pieces of movable property at the time for a median free man. But the general

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<sup>2</sup> <http://www.bl.uk/magna-carta/articles/magna-carta-english-translation>

principle of respect for property rights, the goal of the Barons in Runnymede, should apply to all movable and immovable property. Historical experience suggests that, once we have ensured the combination of due process and the protection of property rights, the rest of the “rule of law” and, with it, a system of well-ordered liberty, follows.

But what is exactly the “rule of law”? This question is pertinent because, while jurists and politicians nearly unanimously praise this legal principle as a prerequisite for democracy and prosperity, scholars vehemently disagree about the actual content of this rule. As German lawyers love to say, law is full of indeterminate legal concepts (*unbestimmte Rechtsbegriff*). And few concepts seem more indeterminate than the “rule of law.”

## 2 The Interpretations of the Rule of Law

A **thin interpretation** states that the “rule of law” is a technical construction limited to formal conditions without material content. This formalist position is, perhaps, the one held most extensively among contemporary legal scholars (in particular, among those educated in the analytic tradition). Formal requirements (for instance, norms should be clear, prospective, and non-contradictory) are valuable because they allow the law to guide the behavior of the members of society. A lapidary consequence of this view is offered by Raz (1979):

The law may, for example, institute slavery without violating the rule of law.

A **thick interpretation** of the “rule of law” adds to the formal conditions of the thin interpretation a number of substantive commitments, in particular, the respect for individual liberties.<sup>3</sup> As a recent example, in his best-selling book, Bingham (2010) lists the “adequate protection of fundamental human rights” as the fifth of the requirements of the “rule of law” and explicitly rejects the formalist constraints of the thin interpretation.

There are, as well, a full range of **intermediate positions**, such as Lon Fuller’s celebrated eight criteria for legality (Fuller, 1969). Some of those criteria (for instance, the interdiction of

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<sup>3</sup> The **thin vs. thick interpretation** classification is used by Tamanaha (2004) in a summary of the academic literature on the “rule of law.” The taxonomy has become popular among scholars.

unstable legislation) go beyond a minimalist formalism and introduce some limited substantive elements.

In the rest of the paper, I will engage, first, in an archaeology of knowledge to demonstrate that the original understanding of the “rule of law” was the thick interpretation presented above. Second, I will show that there is a clear path linking *Magna Carta* with the modern thick interpretation of the “rule of law.” And third, I will defend the thesis that restoring such an interpretation is key to rebuilding limited government in modern societies.

### 3 On the Origins of the Concept of the Rule of Law

The origins of the expression “rule of law” in English are uncertain.<sup>4</sup> The first recorded use of the expression that the Oxford English Dictionary can find is by John Blount. Around 1500, Blount, a kinsman of William Blount, 4th Baron Mountjoy and a fellow at All Souls College, Oxford, translated into English some selected portions of Nicholas Upton’s *De Studio Militari* (a forgettable 1447 treatise on heraldry and the military). Blount rendered the Latin *Juris regula* as (using the spelling of his time) the *Rewle of lawe*.<sup>5</sup>

Not only did the expression soon become common, but it acquired a role in rhetorical arguments defending the legitimacy (or lack thereof) of an exercise of power. In his *Declaration of August 12, 1642, to All His Loving Subjects*, a few days before raising his standard at Nottingham, the unfortunate Charles I argued that:<sup>6</sup>

The inconveniences and mischiefs which had grown by the long intermission of Parliaments, and by departing too much from the known Rule of Law, to an Arbitrary power.

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<sup>4</sup> There is an alternative, although related, use of the same expression that comes from Roman and Canon Law. In particular, medieval Canon Law incorporated principles of legal interpretation called *Regulae Juris*, or “rules of law” (11 in the Decretals of Gregory IX and 88 in the Liber Sextus Decretalium by Boniface VIII; the latter still has applicability in contemporary Canon Law and is an outstanding read).

<sup>5</sup> The full passage reads: *Lawes And constitucions be ordeyned be cause the noysome Appetit of man maye be kepte vnder the Rewle of lawe by the wiche mankinde ys dewly enformed to lyue honestly*, OED Third Edition, March 2011.

<sup>6</sup> Hart (2003) describes how the English construed their expectations about law and legitimacy during the early Stuart dynasty.

### 3.1 A.V. Dicey

But despite these older uses, the expression “rule of law” only became widely popular after A.V. Dicey (1835-1922) postulated in his classic 1885 treatise, *Introduction to the Study of the Law of the Constitution*, chapter IV, pp. 145-146, that:

Two features have at all times since the Norman Conquest characterised the political institutions of England.

The first of these features is the omnipotence or undisputed supremacy throughout the whole country of the central government...

The second of these features, which is closely connected with the first, is the rule or supremacy of law.

Generations of law students in the English-speaking world studied Dicey’s treatise and became so acquainted with these words that the adherence to the idea of the “rule of law” became a badge of professional competence.<sup>7</sup>

But what was the “rule of law” for Dicey? On page 146, the Oxford scholar explains:

This supremacy of the law, or the security given under the English constitution to the rights of individuals looked at from various points of view, forms the subject of this part of this treatise.

That is, the “rule of law,” by its very definition, was embodied in a number of English liberties. For Dicey, the law in rule of law was the common law and its protection of individual freedoms.

This substantive understanding of the “rule of law” is often forgotten because Dicey himself added later in the very same chapter IV three concrete contents of the “rule of law”: due process, equality under the law, and case law-based protection of liberties (pp. 179-187). While these three interrelated concepts may seem to be, at first sight, procedural mechanisms that push us toward a formalist reading, they must be interpreted instrumentally for several reasons.

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<sup>7</sup> There were, nevertheless, discontents. More famously, John Griffith (1918-2010) and his students at the London School of Economics remained unconvinced. Griffith suspected that, beyond basic formal procedures, the “rule of law” was nothing but a thin veil to hide the inequities of class domination. See Loughlin (2010).

First, because it is otherwise hard to understand the structure of Dicey's treatise. For instance, part II of the book under the rubric "The Rule of Law," groups the chapters on the right to personal freedom or the freedom of discussion. Second, because Dicey was a fervent Whig. The product of several generations of Clapham Sect members and radical publishers, Dicey could barely conceive any other political position except that of a solid Liberal Unionist.<sup>8</sup> A common law without English liberties was no common law for Dicey. Due process, equality, and judges were just the means to defend those freedoms. Third, we have Dicey's rather low regard of French administrative law. French administrative legal regulations were more often than not beautiful examples of well-crafted norms that neatly complied with all formalist requirements: transparent, unequivocal, elegant, the products of a rich tradition of superb civil servants. And yet, Dicey vehemently denied that *droit administratif* could achieve the "rule of law."

But Dicey was not inventing new ideas.<sup>9</sup> Instead, his understanding of the "rule of law" follows a tradition where *Magna Carta* stands as a fundamental milestone. In the next section, I will stop three times in the voyage from *Magna Carta* to Dicey. With only three stations, my description will have more gaps than content. I will forget classical legal thought.<sup>10</sup> I will forget, as well, about the legal tradition outside the English-speaking world (and there they go, with the stroke of a digital pen, from Saint Thomas Aquinas' *Treatise on Law* to Montesquieu's *De l'esprit des lois*, passing through the School of Salamanca and Hugo Grotius).<sup>11</sup> My three

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<sup>8</sup> This point was well understood by John Griffith, whom we introduced in footnote 7. As he put it during the Seventh Chorley Lecture at the London School of Economics, the "rule of law" was "a fantasy invented by Liberals of the old school in the late-19th century and patented by the Tories to throw a protective sanctity around certain legal and political institutions and principles which they wish to preserve at any cost" (Griffith, 1979). One may disagree with Griffith's judgment of the consequences for human welfare of the "rule of law," but he is on the money in terms of recognizing the inherent substantive commitments of Dicey's conception of the "rule of law."

<sup>9</sup> Dicey, for example, mentions W.E. Hearn's 1867 textbook *The Government of England* as a key inspiration for his own work and of the idea of the "rule of law" (see Arndt, 1957). Also, he wrote to his old friend James Bryce (later the British Ambassador to the U.S. and a key actor in laying the foundations of the special relation between the two nations that would shape so much of the 20th century) that his book "contains some things (very few I own) which it were absurd to call original but which I think have been hardly said expressly before" (cited by Cosgrove, 1980, p. 68).

<sup>10</sup> There was a not-so-remote time, before the atrocities committed in the name of modern pedagogy replaced actual knowledge with banal self-indulgence, when a lawyer was supposed to have read Aristotle's *Politics* and Cicero's *On the Laws* or, at the very least, to pretend he had.

<sup>11</sup> Nothing further from my intention than to imply any peculiarities of the English. As Vincent (2012) wittily



stops are selected as illustrations of the argument, even if that means leaving behind some more familiar names such as John Fortescue (c.1394-c.1480) or Michael Oakeshott or notable events such as the *Bill of Rights* of 1689 or *Entick v. Carrington*. The usual flimsy excuse of space constraints can be here vindicated with fairness: it would require an inordinate amount of pages (and an expertise I sorely lack) to deal, even perfunctorily, with the ignored topics.

## 4 From 1215 to 1885: Seven Centuries of Tradition

Since at least Roman times, western jurists have conceived of law as well-ordered reason aimed at the common good. While the details of law could change over time, as circumstances evolved and experience accumulated, the essence of legal systems (the *naturalis ratio* that Gaius talks about at the start of his *Institutes*) was permanent. A norm that does not respect those principles cannot be law and, therefore, there cannot be the “rule of law.” This idea has resurfaced many times.

### 4.1 Henry de Bracton

Our first port of call is Henry de Bracton (c.1210-c.1268), who wrote just a few years after *Magna Carta*. In his famous *On the Laws and Customs of England* (in Latin, *De Legibus et Consuetudinibus Angliae*), Bracton called the great charter *constitutionem libertatis*, the constitution of liberty.<sup>12</sup>

It is hard to exaggerate Bracton’s influence on medieval English law or on the reception of Roman law concepts in Great Britain. Bracton displayed a sophisticated understanding of the “rule of law.” First, he contends that the king is subject directly to the law, for law makes him king, and indirectly to his earls and barons, who check his power:

The king has a superior, namely, God. Also the law by which he is made king. Also his curia, namely, the earls and barons, because if he is without bridle, that is without law, they ought to put the bridle on him.<sup>13</sup>

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remarks about the success of *Magna Carta* under Henry III, “England’s liberties were won from a nine year-old Angevin king, provoked by a French invasion, and confirmed under the seal of an Italian cardinal.”

<sup>12</sup> Volume 3, p. 35, available at <http://bracton.law.harvard.edu/>

Second, Bracton states that this sovereignty of the law interdicts arbitrariness:

for there is no rex where will rules rather than lex.<sup>14</sup>

Two points are fundamental to interpreting Bracton. First, for Bracton, the sentence at the start of the first quote (*The king has a superior, namely, God*) is not a mere concession to the religious predispositions of his time. An invocation to a deity was a call to natural law, with its rich tapestry of moral and efficacy requisites that territorial rulers were bound to respect.<sup>15</sup> Second, for the jurist in the Middle Ages, law was found, not created. Rules could compile it, clarify it, publish it. Judges could adapt it to new circumstances. Legal scholars could explore its implications. But none of them could create law and, much less, eliminate its moral constraints. The law's "bridle" was, for Bracton, much more a constraint than any of us, educated in a world of hyperactive legislatures and a positivist *Zeitgeist*, can appreciate (this is a point made both by Hayek, 2011, and by Reid, 2004).

## 4.2 Sir Edward Coke

Our second stop on the path from *Magna Carta* to Dicey is Sir Edward Coke (1552-1634). Coke, baptized by Hayek in *The Constitution of Liberty* as "the great fountain of Whig principles," transformed *Magna Carta* into the cornerstone of the reassertion of the power of the English Parliament against the Stuart dynasty. Coke, with little regard for historical accuracy, considered *Magna Carta* an authoritative declaratory document of immemorial English liberties and reinterpreted much of its content. For example, in 1604, Coke found in chapter 39 of the original *Magna Carta* a justification for *habeas corpus*.<sup>16</sup>

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<sup>13</sup> Volume 2, p. 110. I cannot resist quoting the original Latin, which has a poetic rhythm lacking in the translation: *legem per quam factus est rex*.

<sup>14</sup> Volume 2, p. 33

<sup>15</sup> In an erudite work, Helmholz (2015) has documented the importance of natural law from the Middle Ages onward both in the training of lawyers and in the court. See, for example, Lord Mansfield's (1705-1793) reasoning in *Somerset v. Stewart* (1772).

<sup>16</sup> Chapter 39 of the original version of the charter, still in the Statute books of the United Kingdom, lays down a surprisingly contemporary view of due process: "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land."

Coke deftly articulated his idea of the substantive commitments of the “rule of law” in 1610. In the decision of Dr. Bonham’s case, Coke argued:

for when an Act of Parliament is against Common right and reason, or repugnant, or impossible to be performed, the Common Law will control it, and adjudge such Act to be void.

Dr. Bonham’s case is, like the concept of the “rule of law,” often interpreted from a formalist position. The main argument for Coke’s dismissal of the Act of Parliament that empowered the Royal College of Physicians to prosecute Dr. Bonham was the old maxim that *nemo iudex in parte sua*: the College could not be both a judge and a party in deciding the fate of Dr. Bonham.

But the interesting part of Coke’s decision is that he never limits his wording to this formal requirement. Indeed, Coke makes a much stronger claim (which he later repeated in other cases): a statute could satisfy all formal requirements (i.e., been approved by Parliament following procedure) and yet, by violating the principles implied by “common right and reason,” it would be 1) subject to the common law and, thus, 2) void. Even if Coke does not use the expression “rule of law,” his understanding of it was thick. More importantly, generations of lawyers in England and North America learned the substance of this idea (although not the expression) from him.<sup>17</sup>

### 4.3 The American Founding

The last station on our trip is the American Founding. The discussion about how the role of the “rule of law” has shaped our national adventure could fill several volumes. Having been educated in a legal system that separates its Kelsian Constitutional Court from the regular

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<sup>17</sup> Innumerable words have been written about Coke in general and about the Dr. Bonham case in particular. Not all, by far, agree with my interpretation. But the real importance of Dr. Bonham’s case, like that of *Magna Carta*, is less about what Coke meant and more about how generations of thinkers read the case. And there is little doubt that, for centuries, the Dr. Bonham case was a fundamental piece in the construction of the classical liberal understanding of the “rule of law” (Stoner, 1992). For example, George Mason cited the Dr. Bonham case in *Robin et al. v. Hardaway et al.* to defend the freedom of some slaves since: “Now all acts of legislature apparently contrary to natural right and justice, are, in our laws, and must be in the nature of things, considered as void.” John Marshall was familiar with *Robin et al. v. Hardaway et al.* and other cases in colonial Virginia that hinted at the idea of constitutional judicial review.

jurisdiction, I have, for example, spent an inordinate amount of time thinking about *Marbury v. Madison*, the origins of judicial review, its role with the concept of the “rule of law,” and its impact across the world.

In that thinking, I have reached the conclusion that, instead of glossing yet one more time Marshall’s words or fighting another battle about Article III of the Constitution, one can profit much from going to the earlier colonial times that framed the actions of Marshall and his contemporaries.

And right at the start of those colonial times, Nathaniel Ward (1578-1652), a pastor and a former barrister, compiled the *Massachusetts Body of Liberties*, adopted by the Massachusetts General Court in 1641.<sup>18</sup> The document starts with:

The free fruition of such liberties Immunities and priveledges as humanitie, Civilitie, and Christianitie call for as due to every man in his place and proportion without impeachment and Infringement hath ever bene and ever will be the tranquillitie and Stabilitie of Churches and Commonwealths.

It is not an accident that these words remind us of the Fourteenth Amendment. Before its evisceration in the Slaughter-House Cases, the expression “privileges or immunities” had a material content in the public understanding.<sup>19</sup>

The first liberty is a concise rephrasing of clauses 30, 31, and 39 of *Magna Carta*:

No mans life shall be taken away, no mans honour or good name shall be stayned, no mans person shall be arested, restrayned, banished, dismembred, nor any wayes punished, no man shall be deprived of his wife or children, no mans goods or estaite shall be taken away from him, nor any way indammaged under colour of law or Countenance of Authoritie, unlesse it be by vertue or equitie of some expresse law

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<sup>18</sup> Similar statues were approved in Maryland (1639) and West New Jersey (1676). In my own colony, Pennsylvania, William Penn ordered in 1687 the first printing of the whole text of *Magna Carta* in the Americas.

<sup>19</sup> See Lash (2014) for details on the Fourteenth Amendment and Labbe and Lurie (2005) for the Slaughter-House Cases. The use of the idea of the substantive due process to get around the worst implications of the Slaughter-House Cases decision illustrates the tension inherent in a thin interpretation of the “rule of law.” In practice, many supporters of such an interpretation are forced to reintroduce material commitments through fanciful concepts such as substantive due process.

of the Country warranting the same, established by a generall Court and sufficiently published, or in case of the defect of a law in any particuler case by the word of God. And in Capitall cases, or in cases concerning dismembring or banishment according to that word to be judged by the Generall Court.

The second liberty lays out a general principle of equality in front of the law:

Every person within this Jurisdiction, whether Inhabitant or forreiner shall enjoy the same justice and law, that is generall for the plantation, which we constitute and execute one towards another without partialitie or delay.

And the ninth liberty protects economic freedom:

No monopolies shall be granted or allowed amongst us, but of such new Inventions that are profitable to the Countrie, and that for a short time.

Note the words for a “short time,” an idea the *Copyright Term Extension Act* of 1998 has missed.

The road from the *Massachusetts Body of Liberties* to the Declaration of Independence, the Constitution, the Bill of Rights, and Marhsall’s tenure was long and tortuous, but it was open from the first day English colonists settled in Massachusetts Bay. *Magna Carta*, Bracton, and Coke had started it all.<sup>20</sup>

## 5 Rule of Law v. Rule by Norms

An implication of the legal inheritance I just described is the distinction between the “rule of law” and “rule by norms.”<sup>21</sup> “Rule by norm” is an imperative of any modern government, including dictatorships. The sophistication of contemporary life and the complexities of advanced

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<sup>20</sup> The classic reference for the influence of *Magna Carta* in North America is still Dick Howard (1968). See Reid (2004) for the understanding of the “rule of law” in the 17th and 18th centuries in the English-speaking world and Pallitto (2015) for the impact of *Magna Carta* on case law.

<sup>21</sup> Often, “rule of law” is opposed to “rule by law” (see, for instance, Tamanaha, 2004, p. 92, and also Ginsburg and Moustafa, 2008). I find the latter expression less useful than “rule by norms,” Besides being phonetically easier to distinguish from “rule of law,” one could possibly imagine a society governed by rules that do not satisfy Fuller’s criteria for legality and, yet, can easily be construed as a nation ruled by norms.

technology make it impossible to efficiently run a large organization without norms that satisfy at least several of the formalist requirements of the thin interpretation of the “rule of law” (clarity, non-contradiction, etc.).

An example of my assertion is Franco’s Spain starting in the late 1950s. The pressures of modernization and the need to achieve a modicum of legitimacy through economic growth forced the construction, under the auspices of López Rodó -a well-regarded professor of administrative law- of a technically sharp administrative state.<sup>22</sup> Clear procedures were laid down and followed. Civil servants were selected largely on merit. Norms were public, expertly crafted, prospective, and unambiguous.<sup>23</sup> And yet, nothing vaguely resembling the “rule of law” existed in 1960s Spain.

An example of what happens when formal requirements are not followed is Germany between 1933 and 1945. Historians have documented how dysfunctional the national-socialist state was. Standard administrative rules were replaced by delphic principles such as “working towards the Führer.” By 1938, the German state was a systemless polycracy: party against state, Wehrmacht against SS, ministry against agency (see Broszat, 1981, and Kershaw, 1993). The resulting administrative chaos seriously handicapped Germany’s war performance and accelerated the demise of the regime.<sup>24</sup>

## 6 The Rise of the Thin Interpretation

But i) if the thick interpretation of the rule of law is the product of the illustrious tradition presented in section 4 and ii) we have expressions to deal with the pure formalist content of the “rule of law” such as “rule by norms,” why is the thin interpretation of the “rule of law” so popular nowadays? Two reasons are key.

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<sup>22</sup> The cornerstone of such reform, the Administrative Procedure Act of 1958 (*Ley de 17 de julio de 1958, de Procedimiento Administrativo*) was so influential that small portions of it are still in the Spanish statute books 40 years *after* the end of Franco’s regime.

<sup>23</sup> During the first two decades of the dictatorship, many statutes and regulations were kept secret. Viñas (2014) reports the last secret statute he has been able to track down is from 1957.

<sup>24</sup> See, for example, O’Brien, 2015, for a description of Germany’s mistakes in resources allocation during the war due to mismanagement.

## 6.1 The British Constitution v. the English Constitution

The British constitution of 1776 was not the English constitution of Coke. Instead of the complex system of interlocking checks and balances between the one (the King), the few (the Lords), and the many (the Commons) tempered by the common law, custom, and practices, the Glorious Revolution of 1688 and the subsequent Whig predominance had produced an aggressive and powerful House of Commons. When Sir William Blackstone (1723-1780) insisted on parliamentary sovereignty, he was merely stating a fact, perhaps more forcefully than his predecessors, but not breaking new ground.<sup>25</sup> When *Commentaries on the Laws of England* was published in North America, perceptive colonial lawyers understood that unlimited parliamentary sovereignty was a mortal threat to colonial liberties and self-government (Zweigen, 1990). Even if the problem of sending representatives across the Atlantic Ocean could somehow be managed, the small population of the colonies relative to that of England meant that the British Parliament could rule them without regard to their interests (as it often did with Scotland and Wales, despite the presence in London of members of Parliament from those two nations).

This problem was not theoretical. After 1763, the British Parliament's attempts at asserting its authority in the colonies were met with increasing resistance. Local leaders reacted by claiming their allegiance to the King, as a bulwark against Parliament (a point made by Nelson, 2014, who goes as far as calling the revolt a "royalist revolution"). Constitutionally speaking, no offense was bigger than the Declaratory Act of 1766 (officially, the *American Colonies Act*). It was only after the realization that George III was not the counterbalancing force that colonial elites had hoped for, that independence became an ineluctable choice.<sup>26</sup>

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<sup>25</sup> Sovereignty goes beyond supremacy. While the latter only implies predominance over other powers, the former brings domination over them. Sovereignty is indivisible and, ultimately, unshareable, as the colonials would slowly realize from 1765 to 1776. The move from parliamentary supremacy to parliamentary sovereignty is one of the key steps in the constitutional evolution of the 17th century United Kingdom. Parliamentary sovereignty was defended by the winners of 1688 and opposed both by Tory monarchists such as the Viscount Bolingbroke, who defended the King's traditional prerogatives, and by radicals such as John Wilkes, who feared the unbridled power of an oligarchy-controlled Parliament.

<sup>26</sup> Perhaps this explains the vitriolic denunciation of George III in the Declaration of Independence, clearly out of proportion to any fault of the British king, and the absence of any reference to the Parliament (except an elliptic naming of "others"). Since the colonials did not recognize their links to Westminster, they did not have to "declare the causes which impel them to the separation" with respect it.

But once independence had been achieved and a Congress elected by the people regularly met in Washington, the old concerns about the unrestricted power of a legislature were forgotten. Instead, students of law were attracted to Blackstone's work, undoubtedly the best existing exposition of the common law,<sup>27</sup> or to treatises heavily influenced by it (such as James Kent's 1826 *Commentaries on American Law*). Imperceptibly, the idea of a sovereign legislator, where Westminster was all too easily replaced by Capitol Hill, took hold: the "rule of law" could not be anything more than the rule of statutes approved by Congress, regardless of their material content.<sup>28</sup>

## 6.2 From a Kantian Rechtsstaat to a Positivist Rechtsstaat

The second reason for the popularity of the thin interpretation of the rule of law comes from Germany and its large influence on legal and political thought of the entire western world between 1815 and 1933.

In the German-speaking world, a cousin of the "rule of law" had been born: the *Rechtsstaat*, the "state of law," but more accurately translated as the "constitutional state" (see Heuschling, 2002, for a comparison of the idea of the "rule of law" and of the *Rechtsstaat*, and Barber, 2010, for a defense of the concept within contemporary legal theory). The word *Rechtsstaat* was a neologism coined in 1798 by J.W. Petersen (1758-1815).<sup>29</sup> The term was popularized by Carl Theodor Welcker (1790-1869) and, in particular, by Robert von Mohl (1799-1875) in his 1844 treatise *The Political Science according to the Principles of the Constitutional State* (my translation, in German: *Die Polizei-Wissenschaft nach den Grundsätzen des Rechtsstaates*). For its proponents, the *Rechtsstaat* was a Kantian ideal: a commonwealth of free citizens guided by reason. The respect for fundamental rights and for republican self-government was inherent in the idea of the *Rechtsstaat*. When, in 1883, in a letter to one of his ministers, Otto

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<sup>27</sup> As Abraham Lincoln put it: "[I] never read anything which so profoundly interested and thrilled me." Quoted in Ogden (1932), p. 328.

<sup>28</sup> In the United Kingdom, parliamentary sovereignty was the background behind Jeremy Bentham's and John Austin's development of the view of the law as a command issued by the sovereign regardless of any substantive content. Perhaps this explains why the thin interpretation of the "rule of law" became the dominant one among analytic legal theorists.

<sup>29</sup> Petersen wrote under the pseudonym *Placidus* in his 1798 work *Literature on the Theory of State* (*Litteratur der Staatslehre*).



von Bismarck disparaged the whole idea of the *Rechtsstaat*, the Iron Chancellor understood what he was dealing with (Heuschling, 2002, p. 6).

But Bismarck could have saved his energy. Mirroring the declining fortunes of the rest of German classical liberalism after 1848 (when, as A.J.P. Taylor, 1945, famously said, “German history reached its turning-point and failed to turn”), the original conception of the *Rechtsstaat* began to mutate into a formalistic essence. The process started with Friedrich Julius Stahl (1802-1861) and continued with Otto Bähr (1817-1895), Otto Mayer (1846-1924), and Georg Jellinek (1851-1911). The metamorphosis was completed with the research agenda of the pure theory of law (*Reine Rechtslehre*) of Hans Kelsen (1881-1973). For this generation of German jurists, the *Rechtsstaat* was just well-organized administrative law. Kelsen argued that any substantive commitment of the rule of law was a fanciful chimera, for “just as everything King Midas touched turned into gold, everything to which law refers becomes law...” (Kelsen 1967, p. 161).<sup>30</sup> There is no more overwhelming evidence of how high the tide of the positivist tradition reached than Hayek’s endorsement of a formalist understanding of the “rule of law” in part II of the *The Constitution of Liberty*.

### 6.3 The Progressive Movement, Wilson, and the Rule of Law

Woodrow Wilson forcefully combined these two intellectual developments: the sovereignty of the legislature and administrative law as the only content of the “rule of law.” Before becoming the 28th president, Wilson wrote *Congressional Government* (1885), a book that praised British parliamentary sovereignty as a superior alternative to the checks and balances of our Constitution. In other words, Wilson wanted to abandon the ideas behind the English constitution of the 17th century for which the Revolutionary war had been fought in favor of the ideas of the British constitution of the 18th century, which had been defeated at Yorktown. Simultaneously, Wilson pushed for the construction of an administrative state explicitly based

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<sup>30</sup> This strict formalism reached sub-realistic tones with expressions such as the “national-socialist German constitutional state” (*Nationalsozialistischer deutscher Rechtsstaat*) or the “German constitutional state Adolf Hitler” (*deutsche Rechtsstaat Adolf Hitlers*) used between 1933-1945 by jurists such as Hans Frank and Carl Schmitt. Once the substantive commitments of the *Rechtsstaat* were eliminated, Frank and Schmitt did not find it particularly troublesome to eliminate the formal commitments, as well. All that was left was adherence to the desires of the leader.

on the Prussian template (Hamburger, 2014). Wilson represented the powerful intellectual force of progressivism and modern social science that facilitated the takeover of the the “rule of law” by thin interpretations.

And those thin interpretations helped to open the doors to the modern administrative state and to the constitutional revolution of 1937. Starting in the 1920s and culminating with the New Deal, basic economic freedoms were severely curtailed even while formal requirements (such as due process) were largely still enforced (Ernst, 2014).

## 7 Rebuilding the Limits to Government

The experience of the U.S. and Western Europe over the last century teaches us that the restoration of limited government in the 21st century demands a recovery of our original understanding of the “rule of law.” Milder versions of the rule of law are not sufficient for the task of controlling government. For instance, without full property rights and liberty of contracts, government will increasingly meddle with the economy and endanger our prosperity.

The poor performance of advanced economies in terms of productivity growth over the last 15 years is a warning that economic growth is not automatic. Any economist would recognize that many factors are behind this poor performance, from aging of the population to misguided fiscal and monetary policies. However, the increased uncertainty about regulation and the overreaching expansion of the administrative state are a considerable dragging force. As a revealing anecdote, the Minnesota state government has decided, in its infinite wisdom, that interior decorators need a license.<sup>31</sup>

An example of the potential benefits from restoring this thick understanding comes, paradoxically, from Germany, the intellectual source of many of our current problems. After the trauma of 1945, the Basic Law for the Federal Republic of Germany (*Grundgesetz*) and its Federal Constitutional Court (*Bundesverfassungsgericht*) embraced a much thicker concept of the “rule of law.”<sup>32</sup>

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<sup>31</sup> According to Kleiner and Krueger (2013), 35 percent of employees in the U.S. are now either licensed or certified by the government. Having lived 5 years in Minneapolis, I can testify that civilized decorating trends have made only minor inroads in the Upper Midwest. I fail, however, to see why it should be the role of the government to protect sturdy Minnesotans from poor color pairings in their living rooms.

Perhaps the most renowned part of that understanding is Article 79(3) of the *Grundgesetz*, which establishes an eternity clause (*Ewigkeitsklausel*) limiting the substantive content of the changes to the norm:<sup>33</sup>

Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

For our exposition, the relevant words are the eternal protection of the principles of Article 1 (human dignity, human rights, and the legally binding force of basic rights) and Article 20 (democracy, the federal structure of the state, people's sovereignty, right of resistance, and the protection of the natural foundations of life and animals).<sup>34</sup> This eternity clause was created to avoid paths to dictatorship that respected the formal requirements of the "rule of law," an event that Germany had witnessed with the passing of the Enabling Act (*Ermächtigungsgesetz*) on March 24, 1933.

But despite the fame of Article 79(3), I have always been more intrigued by Article 80 of the Basic Law and the tight controls it imposes on the regulatory activity of the administrative state and by a number of decisions vigorously defending the property rights protected by Article 14(1) against excessive taxation.<sup>35</sup>

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<sup>32</sup> See Collins (2015). After the end of the war, there was a parallel renewal of interest in Natural Law among German jurists and a rejection, by many, of the strict positivist positions of Kelsen and his followers. The conversion of Gustav Radbruch (1878-1949) from the Weimar Republic's positivism to the Federal Republic's iusnaturalism is a transparent example (see Radbruch, 2003). The analysis of this renewal is, unfortunately, beyond the scope of this paper.

<sup>33</sup> The official translation of the Basic Law into English can be found at <https://www.btg-bestellservice.de/pdf/80201000.pdf>

<sup>34</sup> The Federal Constitutional Court, in its decisions, has added mentions of justice and moral law (see Kommers and Miller, 2012, loc. 1500). Article 146 of the *Grundgesetz* establishes, nevertheless, that the Basic Law, which despite its nearly 70 years of life was conceived as a transitory text never approved by a plebiscite, "shall cease to apply on the day on which a constitution freely adopted by the German people takes effect." Could this new constitution eliminate the eternity clause or the principles protected by it?

<sup>35</sup> See, for example, the decision of June 22, 1995, BVerfG-Beschl(2 BvL 37/91) BStBl. 1995 II S. 655, limiting the total amount of taxation that a person could endure from an income and a wealth tax to 50 percent of income (I am skipping a number of nuances in the decision). A significant choice was to locate the Federal Constitutional Court in Karlsruhe, a mid-size town in Baden-Württemberg, far away from the centers of political and economic power in Germany. One has the suspicion that our own Supreme Court is unduly influenced by Washington's life. I often wonder whether a Supreme Court Justice located in Omaha or Des Moines would not be interested more in constitutional matters and less in the opinion pages of the *New York Times* or in keeping a good standing in the cocktail party circuit of Georgetown.

Furthermore, the ideas of ordoliberalism, a movement that integrated jurists and economists, became mainstream in Germany. Ordoliberalism emphasizes rules and the importance of following constitutional arrangements, both in law and in economic policy.<sup>36</sup> Even the whole European Union project, with its view of integrating economies through law and rules but always respecting fundamental rights, is a peculiar proof of this renewed thick interpretation.

Perhaps these factors explain why, among all major continental European countries, Germany is still the most market-friendly economy, why Germany has defended (although often more in words than in deeds) the strong adherence to rules as the only way forward in managing the euro crisis, and why the Federal Constitutional Court has been the only entity in the whole of Europe that has dared to ask where the Union is going in terms of the “rule of law.”

None of the previous observations are motives for undue celebration: limited government is on retreat all over Europe. Even stating that rules may be better than discretion while conducting monetary policy has become a sign of eccentricity (if done under the guise of respectable academic language) or pure madness (if more direct words are preferred). But they are, at least, a sign that the “rule of law” can work, even in a country with such a troubled history as Germany.

## 8 Concluding Remarks

I started this paper quoting Theodore Plucknett. It seems a proper Wagnerian leitmotif to return to the English historian for our conclusion:

the mediaeval man was above all a man of action, and out of the night of the dark ages he began to build the fabric of law. To him the rule of law was not only a worthy achievement of the spirit, but also a great active crusade, and the greatest of all the crusades, because it alone survived its defeats.

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<sup>36</sup> Many of first-generation ordoliberals, such as Franz Böhm (1895-1977), Walter Eucken (1891-1950), and Ludwig Erhard (1897-1977). were associated with the Freiburg School. Others, such as Wilhelm Röpke (1899-1966) and Alexander Rüstow (1885-1963), were more independent. There are deep affinities between ordoliberals and James Buchanan’s project of constitutional economics. See Buchanan (1986).

Nowadays, it is fashionable to write monographs exploring the rise of the West versus the rest. The list of theories accounting for the great divergence is large: from imperialism and the plundering of natural resources (from one side of the aisle) to superior institutions (on the other side). However, even among those defending the role of institutions, there is little appreciation of the pivotal role played by law in European development.

Ningzong, the Chinese emperor in 1215, was secure in his large kingdom and had ample sources of revenue. He had numerous counselors and he regularly asked for their advice, but he would never need to call representatives of his realm and request their approval to raise taxes or engage in war. Simply put: he would have not even understood what a charter such as *Magna Carta* was. In comparison, John of England and the other European territorial rulers had to deal with parliaments, lawyers, the Catholic Church, the nobility, and self-governing cities. And as the success of *Magna Carta* shows, these counterbalancing powers often won. In China, there was never anything remotely similar to parliaments, law was not conceptualized as an autonomous area, there was no independent and organized religious organization (the Buddhist temples were far from being a coordinated source of power), the nobility had been largely replaced by a cadre of civil servants selected by an examination system, and cities existed only to the extent that the emperor found it advisable.

*Magna Carta* and its influence on the history of the English-speaking nations is overwhelming evidence that Europe was different. As Plucknett reminds us, the Middle Ages changed the course of European history and Europe's offshoots in North America and Oceania forever. The supremacy of the law was the secret weapon of Europeans.

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## 9 Appendix

This appendix expands some collateral discussions in the paper that I find of interest, but that space constraints preclude me from incorporating into the main text.

### 9.1 Examples of Different Interpretations of the Rule of Law

In the main text, I briefly quoted a famous essay by Joseph Raz (1979). It is worthwhile to quote him more extensively to fully understand the nuances of his formalist interpretation of the “rule of law.”

First, Raz describes how, in his view, the “rule of law” is a formal requirement:

This is the basic intuition from which the doctrine of the rule of law derives: the law must be capable of guiding the behaviour of its subjects. It is evident that this conception of the rule of law is a formal one.

Second, he highlights the absence of substantive requirements, either regarding how laws are created or their content:

It says nothing about how the law is to be made: by tyrants, democratic majorities, or any other way. It says nothing about fundamental rights, about equality, or justice.

Third, Raz argues that these formal requirements are, nevertheless, fundamental:

The rule of law is essentially a negative value. The law inevitably creates a great danger of arbitrary power; the rule of law is designed to minimize the danger created by the law itself. Similarly, the law may be unstable, obscure, retrospective, etc., and thus infringe people’s freedom and dignity. The rule of law is designed to prevent this danger as well. Thus the rule of law is a negative virtue in two senses: conformity to it does not cause good except through avoiding evil and the evil which is avoided is evil which could only have been caused by the law itself.

Finally, Raz defends his separation between the “rule of law” as a technical set of conditions and other values allows the use of the law to achieve other social goals:

In considering the relation between the rule of law and other values the law should serve, it is of particular importance to remember that the rule of law is essentially a negative value. It is merely designed to minimize the harm to freedom and dignity which the law may cause in its pursuit of its goals however laudable these may be. Finally, regarding the rule of law as the inherent excellence of the law means that it fulfils essentially a subservient role. Conformity to it makes the law a good instrument for achieving certain goals, but conformity to the rule of law is not itself an ultimate goal. This subservient role of the doctrine shows both its power and its limitations. On the one hand, if the pursuit of certain goals is entirely incompatible with the rule of law, then these goals should not be pursued by legal means. But on the other hand one should be wary of disqualifying the legal pursuit of major social goals in the name of the rule of law. After all, the rule of law is meant to enable the law to promote social good, and should not be lightly used to show that it should not do so. Sacrificing too many social goals on the altar of the rule of law may make the law barren and empty.

As I explain in section 6 of the main text, the “legal pursuit of major social goals” is a treacherous activity, which often shows itself to be ultimately incompatible with even the formalist requirements of the thin interpretation.

I picked Raz as an example of a scholar defending the thin interpretation of the “rule of law” not only for the clarity of his exposition but also because he is the dean of modern positivism. But formalist views of the “rule of law” are common even among those with strict iusnaturalist inclinations. For example, in his celebrated *Natural Law and Natural Rights*, John Finnis lists eight procedural conditions as the only requirements that a legal system has to satisfy to be in good “rule of law” standing (Finnis, 2011, pp. 270-271). Among those requirements, Finnis includes the prospectivity of laws, the clarity and consistency of norms, and accountability in the compliance with rules.<sup>37</sup> In fact, he explains how:

conspirators against the common good will regularly seek to gain and hold power

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<sup>37</sup> Finnis (2011), p. 274. Finnis’ position is tempered by his belief that the formal conditions he outlines are, by themselves, sufficiently powerful to reduce the worst excesses of dictatorships.

through an adherence to constitutional and legal forms which is not the less ‘scrupulous’ for being tactically motivated, insincere, and temporary.

Among those defending a thick interpretation of the “rule of law,” we find the *World Justice Project*, a non-partisan organization that has done much in recent years to defend and measure the “rule of law” across the world. The *World Justice Project* includes in its definition of the “rule of law”:<sup>38</sup>

The laws ... protect fundamental rights, including the security of persons and property.

Finally, there are thinkers such as T.R.S. Allan who reject “any rigid distinction between procedure and substance, as artificial and unworkable” and who prefer to think about the “rule of law” as “a set of closely interrelated principles that together make up the core of the doctrine of the theory of constitutionalism” (Allan, 2001). Dealing with Allan’s subtle ideas about the construction of constitutional orders would require a paper of its own.

## 9.2 Miscellanea Notes on A.V. Dicey

### 9.2.1 On the Success of the “Rule of Law” Expression

Several reasons account for the tremendous success of Dicey’s use of the expression “rule of law.” First, he was the Vinerian Professor of Law at Oxford. Even if the Chair had lost much of its intellectual luster after Blackstone retired, Dicey got it at the right moment: Oxford Law school was rejuvenating itself to become one of the prominent legal educational institutions (Lawson, 1968). The Vinerian professorship gave him an extraordinary platform from which to leverage his ideas. Second, the *Introduction to the Study of the Law of the Constitution* is eminently readable. Third, the treatise perfectly connected with the moderate Whig consensus prevailing among the intellectual class in England at the time.

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<sup>38</sup> <http://worldjusticeproject.org/what-rule-law>

### 9.2.2 A.V. Dicey and the U.S.

Often, Dicey's visit to the U.S. in 1870 and the influence of his constitutional thinking are not discussed in sufficient detail: not only did Dicey experience first hand the constitutional arrangements of North America, but he befriended American jurists such as Oliver W. Holmes. Furthermore, there is a clear parallelism between Dicey and von Mohl (the popularizer of the idea of the constitutional state; see subsection 9.7 below): both were exposed early in their careers to the U.S. experiment on constitutional government and theorized about what was already established practice in North America.

### 9.2.3 On the Relation between Parliamentary Sovereignty and the Rule of Law

Dicey's relation between his two stated principles of the British constitution, parliamentary sovereignty and the "rule of Law," deserves a more nuanced elaboration, which I can only sketch even in an appendix.

The key component of such an investigation is chapter XIII of the *Introduction to the Study of the Law of the Constitution*, aptly called "Relation between Parliamentary Sovereignty and the Rule of Law." The chapter starts, appropriately, by recognizing the potential conflict between Parliament and the "rule of law."

Dicey was, politically, a strong supporter of parliamentary sovereignty and, methodologically, of John Austin's positivist program. These two considerations led him to believe that Westminster could pass an act with little regard to morality. However, Dicey thought this course of action was unlikely. The structural features of the British political system (the counterbalancing forces of the Crown, the House of Lords, and the House of Commons and the lack of direct executive power) were such that, far from contradicting the "rule of law," they actually reinforced it. The House of Commons, for example, was always reluctant to limit individual freedoms that could be used against their members' constituencies and the peers of the House of Lords were jealous guardians of property rights.

Nevertheless, Dicey did not fully deny the tension existing between the two principles (a tension that, as I discuss in subsection 9.5 below, has its origins in the desire of the 17th century Whigs to defend the achievements of 1688 against royal encroachments). The Vinerian professor was concerned that continental European assemblies did not share the same structural

features as the British parliament and, having come to power in very different historical circumstances, were also less inclined to protect individual liberties. Even in the United Kingdom, Dicey witnessed the showdown between the House of Lords and Lloyd George's 1911 People's Budget, which ended with the resounding defeat of the peers of the realm by the cunning Welsh politician.

A more modern argument is to think about the "rule of law" as a contingent choice of a sovereign British parliament. Parliament could choose to abolish it, but it does not do so (and Dicey would have defended it was proper from a moral, but not necessarily legal, stance). Thus, as long as Parliament continued such a policy, the "rule of law" reigned in the United Kingdom and he had to include it as a principle of the constitution.

### 9.3 The Rule of Law and the American Founding

In the main text, I spend some time discussing earlier colonial times. I avoided further discussion of later documents, such as the Declaration of Independence, as they involve topics, such as natural rights, that sit somewhat uneasily with the tradition of the common law, Bracton, and Coke that I highlight in the main text.

But many other instances would deserve more elaboration if space was available. For example, James Otis, in his 1764 pamphlet *The Rights of the British Colonies Asserted and Proved*, claimed -echoing Coke's views on Dr. Bonham's case- that:

Parliaments are in all cases to declare what is good for the whole; but it is not the declaration of parliament that makes it so. There must be in every instance a higher authority-God. Should an act of parliament be against any of His natural laws, which are immutably true, their declaration would be contrary to eternal truth, equity and justice, and consequently void.

One could argue, even, that the Declaration of Independence shows, by presenting a theory of the origins and goal of government, a thick understanding of the "rule of Law." Quoting the second paragraph:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life,

Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, —That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

It is worthwhile to re-read these well-known words. The first sentence tells us that, for our Founding Fathers, the existence of rights for all persons was “self-evident.” The second sentence tells us that legal systems (“Governments”) are legitimate only when they respect individual rights. The third sentence is the most radical: when “any Form of Government” becomes incompatible with these rights, it is the right of “the People” to create a new legal system. In other words, the American Founding conceived the rule of law as the supremacy of norms that allow “Life, Liberty and the pursuit of Happiness.”

## 9.4 A Note on Hitler’s Polycracy

Broszat’s 1981 monograph that I cite in the main text demolished the older view, common in the English-speaking world, of a monolithic national-socialist state. This image was more the product of Joseph Goebbels’ success as an evil propagandist than of thorough historiographic study (although acute contemporaries, such as Neumann, 2009, had already observed this pattern by the early 1940s).

Hitler created this polycracy partly because his capricious nature lacked any interest in daily managerial activities (the last meeting of his cabinet was on February 4, 1938!), partly as a way to make his subordinates fight each other. This struggle played a triple purpose.

First, by pitting the national-socialist leaders against one another, Hitler precluded the rise any of them as an effective rival. Second, because of his social Darwinian *Weltanschauung*, he believed that the person who could survive bureaucratic infights was the kind of leader Germany required. Third, because it isolated Hitler from unpopular policies undertaken by his associates.

Ian Kershaw, the most celebrated of Broszat’s student, called historians’ attention to the expression “working towards the Führer” used by Wener Willikens, the State Secretary in

the Prussian Ministry of Agriculture (Kershaw, 1993). “Working towards the Führer” meant that civil servants should take the initiative in acting in ways Hitler “intends to realise sooner or later” and be sure that they would realize “sudden legal confirmation of his work.” This principle created, nevertheless, a dynamic regime with an inherent tendency toward increased radicalization, as civil servants struggled to outdo each other in guessing the Führer’s preferences toward an evermore aggressive policy.

## 9.5 A Note on Parliamentary Sovereignty and the Colonies

In the main text, I discuss how the key issue behind American independence was the extent of parliamentary power in the American colonies. The colonial elites understood that parliamentary sovereignty would, sooner or later, encroach on their liberties. On the other hand, the British leaders were adamant about the need to assert parliamentary sovereignty, not only among the moderate Lord North’s supporters but also, but even more so, among the opposition Rockingham Whigs (see Reid, 1991, for a careful documentation). A set of rich and growing American colonies directly linked to the Crown without passing through Westminster was a potential source of revenue and power for the King, who could use these resources to undo the conquests of the Glorious Revolution. This was not a paranoid thought: George III used the revenue and positions from Ireland (which, at the time, still had its own parliament) precisely for that purpose.<sup>39</sup> Also, the Whigs had witnessed with horror the reassertion of royal power in Sweden in 1772 against the Riksdag of the Estates. At the end of the day, the British elites decided they would rather lose the colonies than engender a revival of the monarchy’s prerogatives.

Both Reid (1991) and Shain (2015) have defended that one can interpret the American Revolution as a “backward movement”: a desire of the colonials to go back to the ancient English constitution in opposition to 17th century developments. In that sense, one could argue that *Magna Carta* lives more in the current constitutional order of the United States

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<sup>39</sup> One could even imagine a British king moving the court to Philadelphia if the American colonies, after a few additional decades of population growth and prosperity, had become the dominant force in the Empire. This is not an outrageous possibility: the Portuguese prince regent moved to Rio de Janeiro in 1808. Even if João VI was reacting to the Napoleonic invasion, another conflict or confluence of events may have induced a later Hanoverian king to move the court of St. James.



than in the United Kingdom, despite the nationalistic overtones of the celebrations on the east side of the Atlantic Ocean. Reid’s and Shain’s interpretation, however, downplays some of the more radical implications of colonial thought and of the dynamism of the language of natural rights that became widespread among many writers in the new United States.<sup>40</sup> For this alternative, more radical tradition, see Yirush (2011).

## 9.6 A Note on Magna Carta and American Pageantry

*Magna Carta* also prominently appears in colonial pageantry. In a popular but not too subtle engraving from 1768, John Dickinson, author of *Letters from a Farmer in Pennsylvania*, appears holding a manuscript of his book while resting on a volume entitled *Magna Carta*. In an even less subtle reference, the 1775 seal of the colony of Massachusetts displays a free citizen holding a copy of *Magna Carta* in one hand and a sword in the other. Fisher (2004) provides a fascinating record of the visual images of the American founding.

## 9.7 A Note on the History of the Rechtsstaat

As I explained in the main text, the word *Rechtsstaat* was invented in 1798 by J.W. Petersen (1758-1815). Petersen, in a stroke of rhetorical genius, opposed the defenders of a constitutional state (*Rechts-Staats-Lehrer*) with the defenders of the law of the state (*Staats-Rechts-Lehrer*). This was a transparent differentiation between what I have called in the main text the “rule by norms” and the “rule of law.”

A concise yet penetrating exposition of the idea of the *Rechtsstaat* and its historical evolution appears in Böckenförde (1991).<sup>41</sup> In this history, it is interesting to remember that von Mohl, the great popularizer of the term *Rechtsstaat*, published the first learned commentary on the U.S. constitution in Germany (Mohl 1824). Mohl was also familiar with Joseph Story’s and James Kent’s work and commented on them for the German public. The influence between

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<sup>40</sup> Although one could argue that the use of the natural rights language was the only option available once the defense of the “liberties of the English” was rhetorically impossible after the Declaration of Independence.

<sup>41</sup> Both as a legal philosopher and as a former judge of the Federal Constitutional Court of Germany, Ernst-Wolfgang Böckenförde has made fundamental contributions to the idea of the “rule of law” and limited government. Böckenförde’s insights are sadly underappreciated in the U.S.

U.S. and German legal thought is a two-way street.

In the main text, I summarized how the original idea of the *Rechtsstaat* was devoid of material content by legal theorists from around 1848 to 1914. During the interwar years and, in particular, after World War II, a reaction in Germany aimed to add back not only the traditional liberal contents, but also democratic (i.e., political rights) and social considerations (i.e., the welfare state). For example, in Article 28(1), the *Grundgesetz* requires the basic laws of the Länder to create republican, democratic, and social constitutional states (*Die verfassungsmäßige Ordnung in den Ländern muß den Grundsätzen des republikanischen, demokratischen und sozialen Rechtsstaates*).<sup>42</sup> One could think about the democratic and social constitutional state as the **thickest interpretation** of the “rule of law.”

Interestingly enough, this was the only time the original text of the *Grundgesetz* explicitly used the expression *Rechtsstaat* as a principle of the Federation. Two later amendments added references to *rechtsstaatliche* (the actual existence of “rule of law” or of a constitutional state).<sup>43</sup> In 1992, Article 22 was modified to include the constitutional state as part of the European Union goals under which the Federal Republic could participate in the integration project. In 2009, Article 16 was changed to allow the extradition of a German citizen to another European Union country or to an international court as long as the “rule of law” is satisfied.

The memory of 1933-1945 also explains why Germany insists on calling the former Democratic Republic an *Unrechtsstaat*, an “unconstitutional state,” without any legitimacy and without any real base of support beyond the soviet ballonets.

## 9.8 Rechtsstaat v. the “Rule of Law”

*Rechtsstaat* is translated into the romance languages as some variation of “state of law” (*Civitas in legibus posita* in Latin, *l’Etat de droit* in French, *Estado de derecho* in Spanish, *Stato di diritto* in Italian). In the French legal tradition, there is a useful distinction due to Carré de Malberg (1861-1935) between *l’Etat légal* (the legal state) and the *l’Etat de droit* (the constitutional

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<sup>42</sup> The terminology *social constitutional state* is due to Hermann Heller (1891-1933); see Heller (1930).

<sup>43</sup> This expression also encompasses content such as the German equivalent of the U.S. Supreme Court’s strict scrutiny, the principle of proportionality, and the application of equity principles in cases of hardship. See Sobota (1997) for details

state), which makes clear the difference between a formalist and a substantive interpretation of the “rule of law.”

An interesting case happened in South Africa: after the fall of apartheid, the first provisional constitution talked about the constitutional state, but the final constitution switched to the “rule of law.” The switch raised a number of interesting questions of interpretation (see Venter, 2012).

Even if in my native Spanish, “Estado de derecho” (or “Estado social y democrático de derecho” as proclaimed in Article 1 of the 1978 Spanish constitution) is the default expression, I have always been fonder of the “rule of law.” The English formulation (*imperio de la ley* in Spanish) captures better the idea of law as the foundation of well-ordered liberty, independently of whether the law is created by a government or is the product of a spontaneous order. Roman law triumphed in medieval Europe without the support (and often against the opposition) of territorial sovereigns (Berman, 1983). The idea of the *Rechtsstaat* cannot handle these phenomena.

## 9.9 Hayek and the Rule of Law

As I mentioned in the main text, Hayek hold a formalist view of the “rule of law” in his early work. However, Bruno Leoni’s influence on Hayek’s view on what law is and how it evolves was so deep that there are few traces left of this formalism in Hayek’s later work (compare Leoni, 1991, with Hayek, 2012). In Hayek’s defense, he stated in *The Constitution of Liberty* his belief that the procedural requirements embodied in the “rule of law” went a long way to ensure freedom.

## 9.10 A Note on the Enabling Act and the Weimar’s Republic Constitution

The Enabling Act of March 24, 1933 was officially known as the Law to Remedy the Distress of the People and the Reich (*Gesetz zur Behebung der Not von Volk und Reich*). For all practical purposes, it gave unlimited power to the German Chancellor and it avoided the need to formally scrap the Weimar Republic’s Constitution, which was still theoretically on the statute books in

1945.

While it is often argued that the Enabling Act shows that the legal path toward a dictatorship is open within democracies, the actual facts are more nuanced. The elections of March 5, 1933, had occurred under widespread, state-sanctioned violence and terror against left-wing parties (Ernst Thämann and the rest of the KPD leadership had been arrested, the leadership of the SPD was in exile in Prague, and on the day of the election, SS, SA, and Stahlhelm members menacingly monitored the voting stations as auxiliary police to “nudge” voters in the national direction). Despite these unacceptable conditions, the socialist and communist parties managed to elect 201 seats, only 15 short of the seats required to block the Enabling Act even without the support of any of the centrist parties. Given the results of the previous election, held under much fairer conditions on November 6, 1932, there is little doubt that the left-wing parties would have obtained enough votes to prevent the passing of the Enabling Act if the March election had been held even with a modicum of impartiality.

More interesting, from the perspective of the “rule of law,” is Article 48 of the Weimar Constitution, which allowed the president to pass emergency decrees authorizing the use of force and the suspension of fundamental rights without the approval of the *Reichstag*. Carl Schmitt (2004), with his disturbing legal prowess, used Article 48 to probe the limits of the concepts of sovereignty and rights more deeply than nearly all other thinkers of the 20th century. See also Vinx (2015) for Carl Schmitt’s debate with Hans Kelsen about the limits of constitutional law and presidential dictatorship.

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