



# 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 to explain 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 that a revival of the substantive commitments of the rule of law is central to reshaping modern states.

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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 3550-word sheet of parchment was drafted than of serene reflection.<sup>2</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*, a cognitive framework 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,<sup>3</sup> one finds in it the foundations of the “rule of law.” 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>4</sup>:

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<sup>1</sup> I want to thank Richard Epstein, Shruti Rajagopalan, and Mario Rizzo for inviting me to the symposium commemorating 800 Years of the Magna Carta at the NYU School of Law and for generous comments. I also thank the participants at the symposium for their feedback and the Hoover Institution for supporting this research. A longer version of this paper (including an appendix with additional discussions) is available at <http://ssrn.com/abstract=2676184>.

<sup>2</sup> Vincent (2012) provides a concise, yet insightful treatment of *Magna Carta*, the coronation charters that preceded it, and its later role in English history. J. C. Holt's (1965) *Magna Carta* is, nevertheless, still the classic reference.

<sup>3</sup> See, for an amusing yet scholarly exploration of this imaginary, Pugh and Aronstein (2012).

<sup>4</sup> <http://www.bl.uk/magna-carta/articles/magna-carta-english-translation>.

(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 at 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 30–32 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* 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 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 exactly is 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

Tamanaha (2004) popularized a taxonomy of the different 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 **thick interpretation** of the "rule of law" adds a number of substantive commitments to the formal conditions of the thin interpretation, in particular, the respect for individual liberties. There are, as well, a full range of **intermediate positions** that go beyond a minimalist formalism and introduce limited substantive elements.

In the rest of the paper, I will engage, first, in an archeology 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 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. 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 noted<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.

### 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 the "rule or supremacy of law" was one of the two fundamental principles of the political institutions of England since the Norman conquest (the other, of course, being the supremacy of Parliament).

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

Dicey embraced a concept of the "rule of law" that was embodied in the English liberties. For Dicey, the law in the 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 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.

The first reason is that otherwise it is 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, 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>

<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.

<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).

<sup>8</sup> This point was well understood by John Griffith, whom we introduced in Footnote 5. 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

Due process, equality, and judges were just the means to defend English freedoms. Third, we have Dicey's rather low regard for 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 outcomes 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 (see Arndt, 1957, or Cosgrove, 1980). Instead, his understanding of the "rule of law" follows a tradition in which *Magna Carta* stands as a fundamental milestone. In the next section, I will stop three times on the voyage from *Magna Carta* to Dicey. With only three stations, my description will have more gaps than content. I will forget about classical legal thought. 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>9</sup> My three 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 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.

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." He contended 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>10</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 pre-dispositions 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>11</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*.

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, as 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>12</sup>

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> Nothing is further from my intention than to imply any peculiarities of the English. As Vincent (2012) wittily 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>10</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>11</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>12</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 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,

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

In that thinking, I have reached the conclusion that, instead of glossing Marshall’s words yet one more time 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. The statute, where one can find many traces of *Magna Carta* and the ideas built around it over the centuries, had a deep impact on colonial thinking and on the ideological constructions to sustain the rebellion against George III. Similar statutes were approved in Maryland (1639) and West New Jersey (1676). In my colony, Pennsylvania, William Penn ordered in 1687 the first printing of the whole text of *Magna Carta* in the Americas.<sup>13</sup>

*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*, is shown 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. Fischer (2004) provides a fascinating record of the visual images of the American founding.

The road from the *Massachusetts Body of Liberties* to the Declaration of Independence, the Constitution, the Bill of Rights, and Marshall’s tenure was long and tortuous, but it was open from the first day English colonists settled in Massachusetts Bay. Marshall did not create judicial review out of thin air. Instead, by declaring section 13 of the Judiciary Act of 1789 unconstitutional, Marshall culminated a long process that had transformed a peace treaty between John of England and his Barons into a constitutional design centered around a thick interpretation of the “rule of law.”

### 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>14</sup> “Rule by norm” is an imperative of any modern government, including dictatorships. The sophistication of contemporary life and the complexities of advanced technology make it impossible to run efficiently a large organization without norms that satisfy at least

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.

<sup>13</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>14</sup> Often, “rule of law” is opposed to “rule by law” (see, for instance, Tamanaha, 2004, p. 92). I find the latter expression less useful than “rule by norms.” Besides being phonetically easier to distinguish from “rule of law,” one could imagine a society governed by rules that do not satisfy Fuller (1969)’s criteria for legality and, yet, can easily be construed as a nation ruled by norms.

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>15</sup> Clear procedures were laid down and followed. Civil servants were selected largely on merit. Norms were public, expertly crafted, prospective, and unambiguous.<sup>16</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; Kershaw, 1993). The resulting administrative chaos seriously handicapped Germany’s war performance and accelerated the demise of the regime.<sup>17</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.

#### 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>18</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

<sup>15</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>16</sup> During the first two decades of the dictatorship, many statutes and regulations were kept secret. Viñas (2015) reports the last secret statute he has been able to track down is from 1957.

<sup>17</sup> See, for example, O’Brien (2015), for a description of Germany’s mistakes in resource allocation during the war due to mismanagement.

<sup>18</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.

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 to assert 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>19</sup>

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>20</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>21</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 the legal and political thought of the 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>22</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 republican self-government was inherent in the idea of the *Rechtsstaat*. When, in 1883, in a letter to one of his ministers, Otto 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 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 a 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 (Kelsen, 1967).<sup>23</sup> There is no more overwhelming evidence of how high the tide of the positivist tradition reached than Hayek's 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 on the Prussian template (Hamburger, 2014). Wilson represented the powerful intellectual force of progressivism and modern social science that facilitated the takeover of 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 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 overreaching expansion of the administrative state and increased uncertainty about regulation 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>24</sup>

Not only has the thin understanding of the “rule of law” not been able to slow down the march of the administrative state, but it is itself at risk of being dissolved by the new institutions it helped unleash in the first half of the 20th century. An administrative state that regulates the minutiae of economic life is a state that cannot

<sup>19</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 elliptical 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 to it.

<sup>20</sup> As Abraham Lincoln put it: “[I] never read anything which so profoundly interested and thrilled me.” Quoted in Ogden (1932), p. 328.

<sup>21</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>22</sup> Petersen wrote under the pseudonym *Placidus* in his 1798 work *Literature on the Theory of State* (*Litteratur der Staatslehre*).

<sup>23</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 and 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.

<sup>24</sup> According to Kleiner and Krueger (2013), 35% of employees in the U.S. are now either licensed or certified by the government. Having lived five 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.

live without arbitrary actions.<sup>25</sup> Legislative bodies lack the time or expertise to act beyond enacting broad guidelines. Judges, not entirely without reason, prefer to take refuge in Chevron deference or similar doctrines that exist in other countries. Even administrative agencies end up overwhelmed by their hubris. The Dodd-Frank Act's creation of the Consumer Financial Protection Bureau is not an accident: it is the unavoidable consequence of the structures laid down for decades. A group of unelected regulators, shielded from Congress and most judicial review, are deciding, based only on vague mandates, the conditions under which I can take out a mortgage. And deferred prosecution agreements make a mockery of centuries-old criminal law principles.

Recovering the original understanding of the “rule of law” is, therefore, not just an axiological commitment (as important as this might be), it is also required to protect self-government and prosperity.

An example of the potential benefits of 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>26</sup>

Perhaps the most renown 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>27</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>28</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>29</sup>

<sup>25</sup> In fact, I would argue that only as time passes by and the old memories of the traditional “rule of law” disappear, would we start suffering the real, long-run consequences of the administrative state.

<sup>26</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>27</sup> The official translation of the Basic Law into English can be found at <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

<sup>28</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>29</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% of income (I am skipping a number of nuances in the decision). A significant choice was to locate the Federal

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>30</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.

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

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 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.

<sup>30</sup> Many 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 Röpké (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).

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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