On the Rule of Law

History, Politics, Theory

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Introduction

Just over a decade ago, following the almost total collapse of communism, it seemed to many observers to be the dawn of a new age, an age in which Western ideas of freedom, democracy, individual rights, and capitalism finally would come to dominate, spreading their beneficent effects to the many blighted parts of the globe that had previously rejected them in the name of Marxism, or traditional values, or anti-Westernism, or some other self-defeating ideal. "The End of History"[1] had arrived. Peace and prosperity were about to reign worldwide.

How quickly have things turned. There has since been a bewildering array of nationalist, ethnic, religious, and political conflict, of genocide and other unthinkable atrocities, of economic crises that have threatened global financial stability, of terrorism and war, all at levels exceeding what occurred during the hottest moments of the half-century-long Cold War. New global fault lines, previously sublimated beneath the overarching confrontation between communist systems and the West, have emerged and deepened, between rich and poor countries, between North and South or East and West, between Islamic and non-Islamic countries, between liberal and non-liberal societies, between mercantilist (state-run) capitalism and free trade capitalism, between dominance by global corporations and the preservation of local autonomy, between US military, economic, political, and cultural influence and the rest of the world, at once bitterly resistant while guiltily complicit. For all but the most sanguine observers, the triumphalist confidence of the 1990s has dissolved.

Amidst this host of new uncertainties there appears to be widespread agreement, traversing all fault lines, on one point, and one point alone: that the "rule of law" is good for everyone. Among Western states this belief is orthodoxy. Listed first in the "Declaration of Democratic Values" issued by the seven heads of state of the major industrial democracies: "We believe in a rule of law which respects and protects without fear or favor the rights and liberties of every citizen and provides the setting in which the human spirit can develop in freedom and diversity."[2] In the words of US President George W. Bush, "America will always stand firm

for the non-negotiable demands of human dignity: the rule of law . . ."[3] It is commonplace wisdom that the defining characteristic of the Western political tradition is "freedom under the rule of law."[4]

Western promotion of the rule of law is not limited solely to the enhancement of liberty. In the early 1990s, the Western-funded World Bank and International Monetary Fund began conditioning the provision of financial assistance on the implementation of the rule of law in recipient countries. This imposition was justified on economic grounds as a means to provide a secure environment for investments, property, contracts, and market transactions.[5] At a training session of World Bank staff members and consultants, "'Rule of law' was probably the most-repeated phrase of the week."[6] Development specialists uniformly agree that absent the rule of law there can be no sustainable economic development.

Support for the rule of law is not exclusive to the West. It has been endorsed by government heads from a range of societies, cultures, and economic and political systems. Russian "President Putin continues to place judicial reform and the full implementation of the principles of the rule of law among the country's highest priorities."[7] China recently signed a UN pact for cooperation and training to develop the rule of law.[8] "Chinese leaders say they . . . support the establishment of the rule of law," a commitment underscored by the highly publicized attendance of President Jiang Zemin at a seminar on the rule of law.[9] His successor as President, Hu Jintao, observed following his selection that "We must build a system based on the rule of law and should not pin our hopes on any particular leader."[10] Robert Mugabe, embattled President of Zimbabwe, previously stated that "Only a government that subjects itself to the rule of law has any moral right to demand of its citizens obedience to the rule of law."[11] Seven months after taking office, Indonesian President Abdurrahman Wahid identified as one of his major achievements: "we are beginning the rule of law."[12] President Mohammed Khatami of Iran has made "repeated remarks about the value of a civil society and the importance of the rule of law."[13] Mexican President Vicente Fox Quesada declared that the lack of the rule of law is "the theme that worries Mexicans most."[14] Even a notorious Afghan warlord, Abdul Rashid Dostum, campaigning for a position in the post-Taliban government, was quoted as saying "Now is the time to defend ourselves not with tanks and armed corps but by the rule of law . . ."[15] These and similar testimonials have come from leaders of a variety of systems, some of which have rejected democracy and individual rights, some of which are avowedly Islamic, some of which reject capitalism, and many of which oppose liberalism and are explicitly anti-Western. The reasons they

articulate for supporting the rule of law might differ, some in the interest of freedom, some in the preservation of order, many in the furtherance of economic development, but all identify it as essential.

This apparent unanimity in support of the rule of law is a feat unparalleled in history. No other single political ideal has ever achieved global endorsement. Never mind, for the moment, an understandable skepticism with respect to the sincerity of some of these avowed commitments to the rule of law. The fact remains that government officials worldwide advocate the rule of law and, equally significantly, that none make a point of defiantly rejecting the rule of law. At the very least, even in the case of cynical paeans on its behalf, the mere fact of its frequent repetition is compelling evidence that adherence to the rule of law is an accepted measure worldwide of government legitimacy.

Notwithstanding its quick and remarkable ascendance as a global ideal, however, the rule of law is an exceedingly elusive notion. Few government leaders who express support for the rule of law, few journalists who record or use the phrase, few dissidents who expose themselves to risk of reprisal in its name, and few of the multitude of citizens throughout the world who believe in it, ever articulate precisely what it means. Explicit or implicit understandings of the phrase suggest that contrasting meanings are held. Some believe that the rule of law includes protection of individual rights. Some believe that democracy is part of the rule of law. Some believe that the rule of law is purely formal in nature, requiring only that laws be set out in advance in general, clear terms, and be applied equally to all. Others assert that the rule of law encompasses the "social, economic, educational, and cultural conditions under which man's legitimate aspirations and dignity may be realized."[16] Dissidents point out that authoritarian governments that claim to abide by the rule of law routinely understand this phrase in oppressive terms. As Chinese law professor Li Shuguang put it: "'Chinese leaders want rule by law, not rule of law' . . . The difference . . . is that under the rule of law, the law is preeminent and can serve as a check against the abuse of power. Under rule by law, the law can serve as a mere tool for a government that suppresses in a legalistic fashion."[17] In view of this rampant divergence of understandings, the rule of law is analogous to the notion of the "good," in the sense that everyone is for it, but have contrasting convictions about what it is.

The theory experts have it no better. Political and legal theorists also often hold vague or sharply contrasting understandings of the rule of law. One theorist remarked that "there are almost as many conceptions of the rule of law as there are people defending it."[18] Many theorists believe that it is "an essentially contested concept,"[19] that is, a notion characterized by disagreement that extends to its core. "It would not be very difficult

to show that the phrase 'the rule of law' has become meaningless thanks to ideological abuse and general over-use."[20]

The rule of law thus stands in the peculiar state of being *the* preeminent legitimating political ideal in the world today, without agreement upon precisely what it means. Bringing greater clarity to this ideal is the primary objective of this book. This ideal is too important to contemporary affairs to be left in confusion. Despite the surrounding uncertainty, it is not the case that any proposed meaning is as good as another. There is a relatively short list of plausible conceptions, each derived from a recognized historical-political context, with relatively clear elements and discernable implications.

This effort is not offered for edification alone. According to an article in *Foreign Affairs*, several decades and hundreds of millions of dollars have been expended on developing the rule of law around the world with minimal positive results.[21] If it is not already firmly in place, the rule of law appears mysteriously difficult to establish. This exploration of the history, politics, and theory surrounding the rule of law will elaborate on the circumstances of its origin and will identify its ingredients. It will not produce a formula that can be replicated in every situation, for owing to the uniqueness of each social-political context that cannot succeed. But learning about how it originated and how it functions will provide useful information for those looking for alternative paths that that might work in local circumstances.

This effort to clarify the rule of law to assist in its realization should not be interpreted as an unreserved promotion of this ideal. I share the view of many that the rule of law is a major achievement deserving of preservation and praise. But it has limitations and carries risks seldom mentioned by its advocates. A striking disjunction exists between the theoretical discourse on the rule of law and the political and public discourse on the rule of law. Theorists have observed the decline of the rule of law in the West for some time some now, beginning with A. V. Dicey over a century ago, renewed by Friedrich Hayek fifty years ago, and widely repeated by legal theorists, especially in the USA, in the past three decades. Therefore, even as politicians and development specialists are actively promoting the spread of the rule of law to the rest of the world, legal theorists concur about the marked deterioration of the rule of law in the West, with some working to accelerate its demise. This decline suggests that problems are being glossed over in its promotion.

Two particular concerns bear mention at the outset. First, some of the most vociferous champions of the rule of law, famously including Hayek, have claimed that it is incompatible with an expansive social welfare state and with the achievement of distributive justice. Theorists often

tie liberalism, unrestrained capitalism, and the rule of law into an all or nothing package. However, many of the non-Western societies that wish to implement the rule of law have no desire to become liberal, and many Western societies with the rule of law are committed to the social welfare state. A host of fundamental social and political issues are thus implicated in the decision to adopt the rule of law ideal. Second, the rule of law carries the ever-present danger of becoming rule by judges and lawyers. Aside from having obvious anti-democratic implications, this raises additional concerns in societies where judges and lawyers are drawn exclusively from the elite, or from some other discrete subgroup. Countries working to develop the rule of law must be cognizant of these and other potential problems.

Equal attention will be allocated in this work to elucidating the weaknesses and strengths of the rule of law, to considering the theoretical and practical arguments for and against it. Like all ideals, there are certain social-cultural contexts for which it is ill suited, and it must be weighed against and sometimes give way to other important social values. Like all ideals, choices must be made in how the ideal is to be formulated and how it is to be implemented, choices that take into consideration immediate context and prevailing preferences.

A telling revelation of this exploration is that the rule of law ideal initially developed in non-liberal societies. This millennia-old ideal survived extraordinary changes in surrounding social, political, and economic circumstances, which led to alterations in how the ideal operated and what it was taken to represent. These changes have generated a few complicated puzzles that were not present at earlier stages. Not only will this exploration disclose how these problems arose, which is relevant to contemporary liberal societies, it will also reveal ways in which modern non-liberal societies can understand the rule of law in a fashion amenable to their situations.

This exploration will proceed chronologically, beginning briefly with Ancient Greece and Rome, then focusing more attention on the Medieval period, then on the modern rise of liberalism, ending up in the present, looking at the rule of law at the national and international levels. History, politics, and theory are interwoven throughout the book, showing up in each chapter, but they also serve as general organizing themes, delivered in sequential order. The first few chapters are thus more historical, the middle chapters more political, and the concluding chapters more theoretical.

Although a number of challenging topics in political and legal theory will be canvassed in the course of this work, an effort has been made to present the ideas and issues surrounding the rule of law in a manner

accessible to readers with no theoretical background. While it is written to be of use to theorists and students, one objective of this book is to expose a general audience to the insights to be gleaned from the historical, political, and theoretical discussion. The rule of law has swept the realm of public political discourse. Given its prominence, it is essential that a thorough understanding of this ideal be available to anyone with an interest and the requisite determination to know.

1 Classical origins

Greek thought

Many accounts of the rule of law identify its origins in classical Greek thought, quoting passages from Plato and Aristotle. Though this is not incorrect, a caveat must be kept in mind. For half of a millennium, known as the Dark Ages, Greek thought was almost entirely lost to the West, until rediscovered and given new life in the high Middle Ages by religious scholars.[1] The rule of law as a continuous tradition took root more than a thousand years after the heyday of Athens. Greek ideas with respect to the rule of law are therefore best understood as exemplary models, inspiration, and authority for later periods. Many of the problems the Greeks, Plato and Aristotle in particular, grappled with so insightfully are timeless problems; hence their timeless relevance and appeal.

Fifth-century BC Athens, at the height of its glory, took great pride in being a democracy governed directly by its citizens. The overarching orientation of Athenians was toward the *polis*, the political community. Every male citizen over thirty years of age, of whatever class or wealth, was eligible to serve (for pay) on juries that decided legal cases; they also served as magistrates, on the governing Council (with a rotating head), and on legislative assemblies, with positions filled by lot. To insure accountability, magistrates presiding over cases could be charged with violations of the law by complaints from private citizens.[2] Owing to these characteristics, "democracy was synonymous for the Athenians with the 'rule of law.'"[3] Athens did not have a class of legal professionals or state officials who monopolized the production of law or the delivery of legal services. Law was – literally – the product of the activities of its citizens. Equality before the law was an important value in their system. This did not mean that the same legal standards were applied to everyone. The law recognized categories of individuals (for example, women, children, slaves, and non-citizens) with different legal implications. Rather, equality meant that the law would be applied to all in accordance with its terms without regard to whom, whether aristocrat or lowly artisan, stood before it.[4]

The danger in a popular system of this kind is that democracies can be as tyrannical as absolute monarchies.[5] Protecting against a populist tyranny, the law was accorded a status that set it apart, rendering it not easy to modify by the popular courts and legislative assemblies.[6] The role of these courts and assemblies was to respect the law and act as guardians of the law, not to declare the law as they pleased. Seen as the reflection of a transcendent order that stands behind the lived community, law enjoyed a sanctified status. "Greek philosophers and statesmen, like others before and after them, were beguiled by the dream of putting on record some system of basic law which would be so perfectly adapted to the true interests and the actual social conditions of the society for which it was framed as to be venerated as eternal and unalterable."[7] The phrase "the laws of Solon," a reference to the legendary monarch who in the sixth century BC established a body of laws and the popular courts, was used to stamp particular laws as ancient and untouchable. New laws could be passed, and old laws changed, but such enactments were subject to review. Proponents had to demonstrate the inadequacy of existing laws as a condition of passage, and all decrees of the assemblies were examined for consistency with preexisting law.[8] If legislation was found to be in contradiction with preexisting valid laws, the proponents of the legislation could be fined.[9] The result of these various mechanisms and standards was to maintain a democratic system "while subordinating the principle of popular sovereignty to the principle of sovereignty of laws."[10]

Plato was from an aristocratic family. His student Aristotle – a Macedonian, non-citizen resident of Athens – was the son of a physician and later the tutor of Alexander the Great. By the time of Plato and Aristotle, Athens had already declined from its height, having lost the war with neighboring Sparta at the close of the fifth century BC. Its citizenry were thought to have degenerated, lacking in the self-discipline and orientation to the *polis* that had made Athenian democracy so superior. Instead they were overly preoccupied with commerce and excessively indulged in enjoying the fruits obtained from Athens's maritime expansion. Underlining the risks of popular rule, Plato's teacher, Socrates, was condemned to death by Athenian democrats. Under these circumstances, Plato and Aristotle were acutely concerned about the potential for tyranny in a populist democracy; accordingly, they emphasized that the law represented an enduring and unchanging order. Plato's legal code in *The Laws* was intended to be permanent. The faith they expressed in the rule of law was in contemplation of its stability and restraining effect.

Plato insisted that the government should be bound by the law: "Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master

of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state."[11] Aristotle's words on the rule of law still resonate:

> Now, absolute monarchy, or the arbitrary rule of a sovereign over all citizens, in a city which consists of equals, is thought by some to be quite contrary to nature; . . . That is why it is thought to be just that among equals everyone be ruled as well as rule, and therefore that all should have their turn. And the rule of law, it is argued, is preferable to that of any individual. On the same principle, even if it be better for certain individuals to govern, they should be made only guardians and ministers of the law . . . Therefore he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire.[12]

Aristotle raised several themes in the above passage that perennially course through discussions of the rule of law: self-rule in situations of political equality; government officials being subject to law; and the identification of law with reason, serving as protection against the potential for abuse inhering in the power to rule. His final observation, the last two sentences above, has had the most impact. Aristotle's contrast between the rule of law as reason and the rule of man as passion has endured through the ages.[13] "In Aristotle's account the single most important condition for the Rule of Law is the character one must impute to those who make legal judgments . . . It is part of such a character to reason syllogistically and to do so his passions must be silent."[14]

Both Plato and Aristotle asserted that the law should further the good of the community and enhance the development of moral virtue of all citizens. As Plato put it, "we maintain that the laws which are not established for the good of the whole state are bogus law."[15] "Hence what is just will be both what is lawful and what is fair, and what is unjust will be both what is lawless and what is unfair."[16] Law for Plato was the reflection of a divine order, consistent with the Good. Both thinkers recognized the possibility, however, that the law might be co-opted to serve elite interests. For Aristotle, "true forms of government will of necessity have just laws, and perverted forms of government will have unjust laws."[17] He concluded that the "laws, when good, should be supreme."[18]

Several cautions are in order to avoid the temptation of placing too modern of a spin on Plato and Aristotle. Neither advocated rebellion against the law, even against unjust laws. "There is nothing which should be more jealously maintained than the spirit of obedience to law," Aristotle counseled, for even minor transgressions, if allowed to creep in, "at last ruins the state."[19] He saw law as essential to social order and

insisted on general obedience. Neither was a fan of popular democracy,[20] which they viewed as potentially the rule of the mob, uneducated and lacking in talent, susceptible to seduction by a demagogue, with a leveling effect on society.[21] Furthermore, neither was an egalitarian. They believed that people had unequal talents in political capacity, virtues, and excellence – often associated with birth status – and held that those who are superior should rule and deserve more rewards.

Their view was that the best government was the rule by the best man, not rule by law, for law does not speak to all situations, and cannot contemplate all eventualities in advance.[22] "Indeed," observed Plato, "where the good king rules, law is a hindrance standing in the way of justice like 'an obstinate and ignorant man.'"[23] The rule under law that they advocated was a second-best solution, necessitated by human weakness. Plato bid the law rule in *The Laws* as a more realistic alternative to the benevolent (philosophically educated and virtuous) Guardians he proposed to rule in *The Republic*. Aristotle advocated rule under law owing to the risk of corruption and abuse that exists when power is concentrated in single hands.[24]

Significantly, although Plato and Aristotle extolled the supremacy of law, their focus was diametrically opposite to that of the Athenian democrats mentioned at the outset, who also believed in the rule of law.[25] Plato and Aristotle were greatly concerned about restraining popular tyranny. In contrast, the Athenian democrats – the very popular government that incited trepidation in Plato and Aristotle – were predominantly worried about capture of the government by aristocratic oligarchies, which they had suffered during the brief but notorious tenure of the Thirty Tyrants, installed by Sparta following its conquest. One of these usurpers was Critias, Plato's uncle (and also a student of Socrates).[26] For Athenian democrats it was essential – a prerequisite of its supremacy – that the citizens themselves participated directly in giving rise to the law. As we shall see, the tension between these two concerns, law as a restraint on democracy and law as the product of self-government, has not lessened throughout history.

At the height of Athenian governance under the law, citizens had equality before the law; the laws were framed in general terms, not against any individual; the Council, magistrates, and legislative assemblies were bound by the law; and citizens were free to operate as they pleased outside what the law prohibited.[27] Athenians thus achieved a form of liberty under the law. This was not individual liberty in modern terms, which is a notion they did not possess,[28] but rather involved the liberty of self-rule and the liberty to do whatever was not expressly prohibited by the law.

Roman contribution

The Roman contribution to the rule of law tradition was negative as well as positive, with the negative being of much greater consequence. Cicero was the source of the positive. In *The Republic*, written in the first century BC, he condemned the king who does not abide by the law as a despot who "is the foulest and most repellant creature imaginable."[29] "How can anyone be properly called a man who renounces every legal tie, every civilized partnership with his own citizens and indeed with the entire human species."[30] A contemporary of Julius Caesar, Cicero wrote during the dying stage of the Roman Republic, as it was giving way to autocratic rule. "Everyone of standing had realized that the republic's rule of law and order had given place to the rule of the stronger."[31] Cicero's *The Laws* contains the following passage on the rule of law:

> You appreciate, then, that a magistrate's function is to take charge and to issue directives which are right, beneficial, and in accordance with the laws. As magistrates are subject to the laws, the people are subject to the magistrates. In fact it is true to say that a magistrate is a speaking law, and law a silent magistrate.[32]

It is the law that rules, he emphasized, not the individual who happens to be the magistrate. Cicero pointedly contrasted rule under a king with living under "a body of law for a free community."[33]

For Cicero the supreme status of laws hinged upon their consistency with natural law. He believed that natural law was the rule of reason. According to the rule of reason, law should be for the good of the community, should be just, and should preserve the happiness and safety of its citizens. This natural law of reason stands over positive law, indeed over all human conduct, according to Cicero. "Therefore law means drawing a distinction between just and unjust, formulated in accordance with that most ancient and most important of all things – nature."[34] Harmful or unjust rules did not qualify as "law," and hence were not supreme.[35] Cicero did not, however, support disobedience of unjust laws. He placed a premium on order. Moreover, he believed that only the wise could recognize the true law in accordance with reason.

Cicero did not advocate popular democracy, preferring instead a mixed constitution, with power divided among royalty, leading citizens, and to a much lesser extent the masses.[36] To the best citizens – the most educated and the wise – should be allocated the greater power to rule, as they are the ones with the capacity to discern the requirements of the natural law that should govern society.

Although Cicero is often cited as an important natural law theorist, and as an early advocate of the rule of law, most of his writings were lost until

the early Renaissance, with the complete text of *The Republic* not located until the sixteenth century. Thus, as with Plato and Aristotle, he is less a direct ancestor in the rule of law tradition than an authority whose work was consulted and enlisted in the context of later political discussions. A key contribution Cicero made, echoing Plato and Aristotle, but put in more forceful terms, was his insistence that the law must be for the good of the community and comport with natural law. Cicero conditioned the supremacy of law on its consistency with justice.

The negative Roman contributions to the rule of law are to be found in the *Lex Regia* and the *Corpus Iuris Civilis*. A bit of historical background is necessary. The Roman Republic, governed by an aristocratic assembly, had existed since the fifth century BC, until it fell under the rule of emperors, beginning with Augustus, who reigned from 27 BC until 14 AD. In the following several centuries the Roman Empire extended its reach over the entire Mediterranean and much of Europe.

Constantine became Emperor in 306 AD, with fateful consequences for the Empire. He converted from paganism to become the first Christian Emperor, issuing an edict of toleration for Christianity, building basilicas, and, in addition to managing the affairs of state, taking a lead role in religious activities and decision-making. Emperor Constantine was a "self-styled bishop of the Christian Church,"[37] commingling secular and religious leadership in a manner that monarchs would emulate for many centuries. Constantine's other major impact was to move the capital of the Empire eastward, building a new capital in the old city of Byzantium, thereafter called Constantinople (Istanbul today). Rome had already begun its decline. In the following generations it would be overrun by successive invasions of Germanic tribes. Contrary to his desire to maintain a unified Roman Empire, Constantine's move inaugurated the Byzantine Empire, dividing the old Empire into western and eastern halves that took separate courses, never to be one again.

Now to the *Lex Regia*. The shift from Republican rule to rule by emperors was in need of legitimation. The *Lex Regia* provided this service. According to the *Lex Regia*, which purported to be an account of this transformation in rule, the Roman people expressly granted absolute authority to the emperor for the preservation of the state.[38] But the *Lex Regia* was a complete fiction, a myth made up by early Roman jurists – legal experts – to justify the power of the emperor. This fictional status (albeit not known as such) did not hinder its historical importance, however. During the Middle Ages, and later, in a feat of ambidextrous influence, the *Lex Regia* was cited by both democrats and absolutists, the former because it represented the idea of original popular sovereignty,[39]

and the latter because it placed absolute authority in an emperor above the law.

Justinian became Emperor in 527. The accomplishment for which he is most remembered was the codification of Roman law. At his direction, jurists collected and systematized the existing unruly jumble of laws and legal opinions. In a span of about five years, jurists prepared and issued the *Codex*, which contained the body of rules, the *Digest*, a compilation of the writings of jurists analyzing the rules, and the *Institutes*, comprised of extracts from the first two for use in law schools.[40] These three books collectively constituted the *Corpus Iuris Civilis* (the civil code, by contrast to church canon law), more commonly known as the Justinian Code. It largely consisted of existing customs, rules, decisions and commentaries by jurists, reorganized, reconciled, and articulated in coherent, comprehensive form.

Of particular relevance to the rule of law tradition are two declarations contained in the Code: "What has pleased the prince has the force of law;" and "The prince is not bound by the laws."[41] Renowned third-century jurist Ulpian referred to the *Lex Regia* in support of these declarations, later incorporated into the Code. Under existing views there was no question that the emperor possessed law-making power; indeed Justinian issued the Code itself as an exercise of this power. And there was no question that the emperor was above the law, for he made the law. Needless to say, this understanding is the very antithesis the rule of law ideal. The Code, while effective in the Eastern Empire, was generally ignored in the West until its rediscovery and spread commencing in the twelfth century. But the notion of absolute monarchs above the law that it made explicit survived outside of the Code, and would have a continuous influence in the West, bolstered by the Code's rediscovery, throughout the Middle Ages and beyond.

The fuller picture of the emperor's power vis-a-vis the law, however, is more nuanced than these declarations might indicate. Emperors, whose legislation consisted mostly of edicts and decrees prepared by jurists, had minimal participation in actual law-making. A large bulk of the laws restated in the Code were the products of the past writings of jurists.[42] Moreover, it was generally understood that the emperor, when not exercising his law-making power, was subject to the framework of the legal tradition, though he undoubtedly had the power to modify the laws if he desired. Not every act of the emperor was considered a legal act, and irregular activities in violation of the general laws were disapproved of (keeping in mind that the emperor was not accountable to any legal institution). Even when the emperor exercised his power to alter a law, "if, wrote Ulpian in a different context, law which had been regarded as

just for a long time was to be reformed, there had better be good reason for the change."[43] Reflecting this sentiment, a separate provision in the Code asserted: "It is a statement worthy of the majesty of a ruler for the Prince to profess himself bound by the laws."[44]

The reality, then, was not quite unfettered legal absolutism by emperors. The emperor was indeed above the law in theory and by general understanding, but in practice the law still mattered, and imposed constraints on regal conduct.[45] This combination – a reconciliation of law-making power with being law-bound – must be somehow achieved if the rule of law is to work. Modern legal systems have the very same tension, in that the sovereign is both the source of the law and subject to the law. In every successful arrangement there is a prevailing ethic that the good king, the good law-maker, adheres to the law.

2 Medieval roots

The rule of law tradition congealed into existence in a slow, unplanned manner that commenced in the Middle Ages, with no single source or starting point. Three contributing sources will be elaborated upon: the contest between kings and popes for supremacy, Germanic customary law, and the Magna Carta, which epitomized the effort of nobles to use law to impose restraints on sovereigns. Preliminary to considering these sources, a historical context will be laid.[1]

By convention among historians, which is imprecise and by no means unanimous, the Medieval period of the West lasted for 1,000 years, commencing with the fifth-century collapse of the Roman Empire, terminating in the course of the Renaissance of the fifteenth and sixteenth centuries.

The first several centuries of this period are known as the Dark Ages. After Constantine shifted the capital of the Roman Empire to Constantinople, the western half of the Empire entered into a long decline precipitated by waves of invasions by Germanic tribes, who were unlearned barbarians by contrast to the refined Greco-Roman civilization they overran. The fearsome Huns, hitherto unknown Asian warriors originating from the distant east, mounted an invasion that thrust far into Europe in the fourth and early fifth centuries, driving the Germanic tribes (Goths, Visigoths, Ostrogoths, Vandals) before them in to the Roman Empire. Rome, sacked more than once, became a virtual backwater, with a fraction of its former population living amidst the ruins of the once great city. In the seventh and eighth centuries the Saracen followers of Mohammed emerged from Arabia to conquer much of the Middle East, all of North Africa, and the Iberian Peninsula (modern Spain), extending into what is today southern France, thereby shutting down the previously thriving Mediterranean trade. In the nineth and tenth centuries came Norsemen (Vikings) who traveled up navigable European rivers and along the coastlines of the major seas to plunder whatever could be taken away, settling where they pleased. Hungarians (Magyars) threatened from the eastern border of Europe during the tenth century as well.

Encircled and besieged, Medieval society closed in upon itself.[2] Dispersed rural inhabitants engaged in subsistence cultivation, with scant commerce. Towns were sparsely inhabited and small, built adjacent to or within an enclosure of defensive walls erected to stave off roving gangs or sorties by neighboring lords or their errant or ambitious offspring. Towns were the location of the church, the meeting place for occasional assemblies, the abode of artisans, with small markets for exchange. For most people life was brief and lived out within a short radius of the site of their birth. Travel was unsafe owing to the ever-present threat of robbery, roads and bridges lapsed into disrepair, and tolls were exacted at town gates, bridges, docks, and roads at regular intervals, all throwing up barriers to movement, although a few hardy monks and traders did brave the perils. Itinerant merchants and their regional fairs, once common during the Roman Empire, were no more. Coinage – mostly debased silver – was minted and exchanged at a small percentage of its former volume. Feudal law and local customary law intermingled or coexisted with Roman law survivals and ecclesiastical law; local lords or powerful bishops, who presided, respectively, in their own manorial or church courts, were in effective control. There was no professional body of jurists as had existed in Roman times. Outside of the Church there was little learning.

The feudal system formed in the nineth and tenth centuries. With land and labor the only ready resources, but little active market for either, a calcified social order came into being that revolved around a complex of relationships tied to who owned or had rights over the land and who worked the land.[3] Feudal society was constituted by so-called Estates, or social classes: the nobility, clergy, and serfs.[4] Each class was thought to play a distinct and essential role within an organic society. The nobility and their vassals (or knights) possessed substantial land holdings which were divided up and allocated in various ways. Through the practice of sub-infeudation, whereby vassals further divided up the land among subordinate vassals, and so forth, multi-layered networks of relationships were created, the leading noble at the pinnacle, with everyone linked in a descending hierarchy of obligations, in which services (manual labor or military) or tributes (produce or rent) were owed by persons lower in the rung to their immediate superior in exchange for the use or control of the land. Some of the land (demesnes) the lords held themselves, with their own serfs doing the cultivation; other of their land was distributed to vassals who were required to supply, among other things, armed soldiers in times of need. Although lords and their vassals had expansive powers over serfs, they also owed them responsibilities, primarily including defending them from outside attack, presiding over the resolution of

disputes, and providing for them in times of drought or calamity. The clergy, the spiritual leaders of society, were not all of the same cloth. Some were Latin-educated offspring of the aristocracy, who ran estates or monasteries with vast landholdings, including serfs, acquired by accretion through gifts and bequeaths to the Church. Bishops of standing were in effect barons, dominating the spiritual as well as temporal affairs of their cities and towns, their courts exercising a broad jurisdiction.[5] But other clergy, the local parish priests, often were from peasant stock, had halting command of classical Latin (speaking instead the vulgar languages), ran poorly endowed churches, and worked the land alongside their flock to eke out their living. The serfs toiled the land with no freedom to leave, beholden to their feudal masters, owning nothing beyond their movable possessions. In the absence of a significant market, there was no incentive, nor available technology, to produce a surplus beyond what they were obligated to supply and able to consume; there were no means to improve their condition. The feudal social order was hierarchical and fixed. The free town folk, a negligible presence during this period, were the only ones who fell outside these categories.

Kings and princes were feudal lords as well, with their own large land holdings from which they derived their wealth. They had no significant control over territory outside their immediate reaches, and possessed limited power over the nobles, who were rivals as much as subordinates. There was no governmental apparatus to speak of and no unified court system. Charlemagne, crowned Emperor in the West in 800, whose reign ended in 814, was the last great king, his Frankish kingdom disintegrating upon his death. Not until the eleventh and (more so) twelfth centuries would the incipient elements of the state system – erected upon the establishment of courts and the effective collection of taxes, facilitated by the increase of men educated in law who entered into the service of kings – come into being.[6] During the heart of the Middle Ages only the Roman Catholic Church had a semblance of an institutional presence that spanned western Europe.

The eastern Roman Empire, meanwhile, continued as a repository of learning and ancient, though also diminishing, glory, projecting its power across Greece, Serbia, Macedonia, Bulgaria, and parts of Italy and the Middle East, while becoming increasingly isolated from the West. Latin was dropped for Greek. Known to history as Byzantium,[7] the eastern Empire became Hellenized and Oriental, although its Emperors continued for centuries to look longingly westward with dreams of reuniting the Empire under unitary (eastern) rule, which Justinian partially and temporarily achieved. Of more pressing concern to the eastern Empire, however, was resisting incursions from the south from Muslims, at various

times Arabs, Persians, and Turks, to which it finally succumbed after centuries of conflict, from the north and east from Bulgars, Russians, and Mongols, and from the west from their putative Christian allies, the (plundering) Crusaders passing through Constantinople on a mission to recover the Holy Land. Although the Roman popes – as well as the Germanic kings who ruled western Europe – had for centuries acknowledged Byzantine emperors as the titular head of the entire Roman Empire, over time the relationship turned antagonistic, not only because of the threat of conquest Byzantium occasionally posed to Rome, but also because its emperors appointed Patriarchs – the leaders of the eastern church – and asserted authority to decide doctrinal matters, which ran counter to the popes' claimed preeminence. The first break came in the early eighth-century iconoclast controversy, when the Pope refused to accept the Emperor's declaration that Christian icons be destroyed to avoid idolatry; the denouement of this contest over power was the eleventh-century schism, which officially and permanently separated the eastern Orthodox Church from the Roman Catholic Church.

Our concern, however, is primarily with the West, for that is where the rule of law tradition took root. As mentioned earlier, classical ideas – Greek philosophy and codified Roman law – were largely lost to the West during the first half of the Middle Ages, although vestiges of Roman law continued. The rediscovery of Aristotle's works (which had been preserved by the Muslims) and the Justinian Code, in the twelfth and thirteenth centuries, coincided with a substantial rise in the number of educated men – the founding of the University of Bologna (for law) and the University of Paris, the beginnings of Oxford and Cambridge Universities, and others.[8] Students from all over Europe converged on these centers of learning to read and discuss texts, to debate ideas in religion, science, ethics, philosophy (which were not distinct disciplines at the time), and law. Commercial activity showed signs of new-found vitality. These were the initial stages of the West's emergence from its long darkened slumber. This awakening struggled to make headway, however, in an environment steeped in Catholic orthodoxy that denigrated commerce, prohibited the charging of interest on loans (usury), and insisted upon unquestioning obedience to the Church, a conservative institution that extolled faith and viewed reason as a threat.

Aristotle (a pagan) was made acceptable to the Church by Thomas Aquinas's demonstration of the compatibility of reason and Church doctrine. Aquinas would exercise a substantial influence over subsequent Western views of law, especially of natural law. In his great thirteenth century work *Summa Theologia*, Aquinas echoed Aristotle's observations

that judges should be governed by the law, rather than be left to decide matters as they will: "those who sit in judgment judge of things present, towards which they are affected by love, hatred, or some kind of cupidity; wherefore their judgment is perverted."[9] Like Aristotle, Aquinas asserted that the law is based on reason and must be oriented toward the common good. Aquinas held that an unjust positive law is "no law at all,"[10] thereby situating positive law beneath and subject to Divine Law and Natural Law. Aquinas accepted, however, that it was logically impossible for the sovereign to be limited by the positive law: "The sovereign is said to be exempt from the law; since, properly speaking, no man is coerced by himself, and law has no coercive power save from the authority of the sovereign. Thus then is the sovereign said to be exempt from the law, because none is competent to pass sentence on him, if he acts against the law."[11] Aquinas went on to assert that the sovereign can nevertheless subject himself to the law by his own will, and further that he should so do, because "whatever law a man makes for another, he should keep for himself."[12] Finally, he asserted that the sovereign, while free from the coercive power of the law, is in God's judgment limited by the positive law, and is subject to the Divine Law and Natural Law, with sanctions to be imposed by God.[13]

With this backdrop, three essential Medieval contributions to the rule of law tradition can now be conveyed.

Popes versus kings

Notions of theocratic kingship, first asserted by Constantine, made conflict between popes and kings inevitable. The Gelasian doctrine, formulated in the late fifth century, which established that secular and religious authorities had supremacy in their own respective realms, helped suppress the conflict.[14] But Justinian rejected this doctrine, as would later emperors and kings, claiming authority over the sacred owing to their own divinely ordained status; conversely, popes, from their end, asserted ultimate authority over secular leaders, a logical implication flowing from the primacy of the sacred over the profane.

Emperors performed many religious functions, including the appointment and dismissal of bishops and other church officials, and summoning and participating in ecclesiastical councils to resolve religious issues as well as determine matters of church law and policy. A number of popes were either seated by or had their selection ratified by emperors. Justinian considered himself the supreme temporal power and the supreme spiritual power.[15] "The combination of regal and sacerdotal power . . . was the

hallmark of the emperor's singular position . . . The emperor's laws and decrees and commands were the laws, decrees, and commands of divinity made known through the emperor."[16] The laws were not just the product of the emperor's will, but also of Divine will, which granted them a sacred stamp. Justinian declared that "The laws originate in our divine mouth;" and the law was a "divine precept."[17] Charlemagne stated that he was "lord and father, king and priest, chief and guide of all Christians;"[18] he outlined for Pope Leo III the extent and limits of papal authority, and dictated to the Pope on certain matters of church dogma. Roman absolutism was thus overlaid with a religious cloak that rendered the emperor answerable to no one but God; certainly not to the people. Western kings and princes without the title of emperor also asserted divine authority and regularly exercised powers of appointment and taxation over local dioceses.

Roman popes similarly exerted expansive powers over both realms. Their first task was to consolidate their authority as heads of the entire Church, claiming entitlement to primacy as successors to St. Peter. Popes were also kings in their own right, filling the secular vacuum in Rome, ruling the territories of the papal states. In recognition of their monarchial status, the term *princeps* was used indistinguishably to refer to emperors, kings and popes. Roman law continued to have an influence in Rome itself during the Middle Ages, affecting the canon law of the Church as well as the Church's institutional culture, imbuing popes, many of whom were trained in law, with regal absolutism. The Church took on the "juridical and authoritarian qualities of the Roman imperial culture, with a strict hierarchy that issued binding rulings from the top."[19]

The intrepid popes went beyond mere leadership within the Church, however, to insist upon superiority over emperors, kings, and princes, reasoning that the spiritual realm took precedence over the temporal. *Dictatus Papae*, issued in 1073 by Pope Gregory VII, declared that "papal authority alone was universal and plenary, while all other powers in the world, whether emperors, Kings, or bishops, were particular and dependant."[20] Natural law and divine law, of which popes were the ultimate earthly representatives and interpreters, controlled positive law and applied to kings (by God's design). A more specific foundation for this asserted supremacy was known as the Donation of Constantine, an eighth-century forgery. According to the Donation, Constantine, mortally ill with leprosy, was cured by Pope Sylvester. In gratitude, Constantine made the Bishop of Rome the head of the Church, and he resigned his crown to the Pope before moving the capitol to Constantinople, although the Pope magnanimously returned the crown to Constantine. "The doctrine behind this charming story is a radical one: The pope is supreme over all rulers, even the Roman emperor, who owes his crown to the pope and therefore may be deposed by papal decree."[21]

This arrogation of ultimate power by popes – severely tempered in practice by their limited military strength – was not absurd in the heart of the Middle Ages, when the Holy Roman Empire of the West was united only in being Christian. The Church, it must be appreciated, encompassed everyone in Medieval society, no less emperors and kings, excluding only infidels "Medieval thought in general was saturated in every part with the conceptions of the Christian faith."[22] At the local level the bishops were the ruling authority in many towns. Society was thoroughly Christianized, with no clear boundaries to separate the secular from the religious realm.[23] "In the Middle Ages the demarcation of the sphere of religious thought and that of worldly concerns was nearly obliterated."[24]

The fraudulent Donation played an immediate role in political affairs. Pepin needed legitimation to take over from the Merovingian line that had previously ruled the Frankish kingdom. The Pope obliged Pepin's request for Church approval of his claim to the crown, culminating in Pepin's anointment with holy oil by Boniface, the Pope's representative. Pepin, in return, explicitly acknowledged the Donation "as a true statement of the valid powers of the papacy."[25] It was an arrangement of mutual benefit that reciprocally conferred legitimation.

The situation was different, however, with the coronation of Charlemagne, son of Pepin. Charlemagne was a powerful ruler who had proven his mettle as a conqueror. The reigning pope, Leo III, in contrast, was in a position of weakness, having recently been beaten by a Roman mob. Leo was determined to regain his prestige:

> On Christmas day, 800, as Charlemagne rose from prayer before the tomb of St. Peter, Pope Leo suddenly placed the crown on the king's head, and the well-rehearsed Roman clergy and people shouted, "Charles Augustus, crowned great and peace-giving emperor of the Romans, life and victory!" Charlemagne was so indignant and chagrined that, according to Einhard, "he said he would never have entered the church on that day, although it was a very important religious festival, if he had known the intention of the Pope."[26]

Charlemagne "understood the constitutional implications of papal coronation and had no intention of placing himself in a position of debt or weakness to the bishop of Rome."[27]

Charlemagne's foresight was confirmed by the dramatic Investiture Conflict of the late eleventh century.[28] Henry IV, the most powerful monarch of his time, insisted on his traditional right to appoint leading church personnel within his domain, contrary to the aforementioned

declaration of Pope Gregory VII that popes controlled all church matters. With the tentative support of his own church officials (who he had earlier appointed), Henry challenged Gregory. Gregory promptly deposed Henry, declaring him no longer king, threatening to excommunicate anyone who refused to comply. Although unprecedented, these actions proved effective. With his support crumbling, Henry hastened to make amends, traveling to the Pope. Forced to wait three days before receiving a papal audience, he abased himself before Gregory, promising to thereafter obey papal decrees, whereupon he was reinstated as king. Some time later Henry exacted a measure of vengeance by forcing Gregory into exile where he remained until his death, but the conflict embroiled succeeding kings and popes for decades.

Despite the justified wariness with which monarchs viewed papal claims of authority, oath-taking became an integral aspect of the coronation ceremony, thereby consolidating the understanding that the king was subject to a higher authority and operated within legal restraints. "At the time of the inauguration the ruler, on the face of it, accepted ecclesiastical notions of the nature, purpose and limitation of his kingship in so far as he agreed to undergo the whole procedure."[29] In these ceremonies kings explicitly committed themselves to upholding the ecclesiastical and mundane – customary as well as enacted – laws. "These ceremonies, controlled and performed by the Church hierarchy, incorporated the secular Germanic idea that the king's chief duty was to be guardian of the community's law; in all the rituals the king promised to perform this duty faithfully."[30] From this period onward no monarch ascended to office without taking the oath. Pepin said "Inasmuch as we shall observe law toward everybody, we wish everybody to observe it toward us;" Charles the Bold swore, "I shall keep the law and justice;" Louis the Stammerer asserted "I shall keep the customs and the laws of the nation."[31] Even Louis XIV, the exemplar of absolutist monarchy, stated in an ordinance in 1667, "Let it be not said that the sovereign is not subjected to the laws of his State; the contrary proposition is a truth of natural law . . .; what brings perfect felicity to a kingdom is the fact that the king is obeyed by his subjects and that he himself obeys the law."[32]

The significance of these repeated oaths and voluntary affirmations must not be underestimated. Monarchs thereby confirmed, time and again, that they were bound by the law, whether customary, positive, natural, or divine, not just admitting but endorsing the proposition that fidelity to the law was an appropriate standard against which to evaluate regal conduct. This routine helped render a self-imposed obligation into a settled general expectation.

The complete religious cloak on law and society in Medieval understandings operated in another way to lay the groundwork for the rule of law, as described by Medieval scholar Walter Ullmann:

> What the metaphorical use of soul and body attempted to express was that, because faith in Christ was the cementing bond of the whole Church and the exposition of the faith the business of the clergy, the law itself as the external regulator of society was to be based upon the faith. Faith and law stood to each other in the relation of cause and effect . . . Differently expressed, since every law was to embody the idea of justice, and since justice was an essential ingredient of the Christian faith, the "soul" in this allegory meant the Christian idea of justice. There can be little doubt that this thesis was the medieval idea of the "rule of law," manifested in the idea of the supremacy of law.[33]

Hence society was governed by a law identified with Christian justice; the monarch as a Christian was subject to this law, like everyone else, and made an explicit oath confirming his subjugation to the higher (natural, divine, and customary) law and the positive law. The absolutist monarch mold inherited from Roman law was thereby counteracted and transformed into a monarch explicitly under law.

Germanic customary law

The Germanic customary law proposition that the king is under the law has been widely identified as an independent source of the rule of law in the Medieval period, providing a counterpoise to Roman notions of absolutist monarchs. Germanic customary law influenced broad swaths of Europe beyond the native German-speaking lands, including substantial parts of modern England, France, and Spain, owing to the spread of the expansionary and settling German tribes, though its actual degree of penetration varied, weakest in the Latinate (Romance language) regions. The bulk of law in the Medieval period was customary law, not statutory or positive law. Mostly unwritten, customary law obtained special sanctity by virtue of its claimed ancient pedigree, which during the Medieval period was one of the most powerful forms of legitimation. Moreover, customary law carried strong connotations of consent of the people, in virtue of the fact that it (per definition) enjoyed widespread recognition and compliance. Even legislation, to the limited extent that it existed, was generally understood not as the creation of new law, but rather as the declaration and clarification of existing unwritten customary law. The primacy of customary law did not prohibit legal change; it required only that such change be consented to by those affected. According to Medievalist Frits Kern, Germanic views of the supremacy of law were reconciled

with Romanist views that law is the will of the sovereign through the understanding "that the monarch has absorbed the law into his will."[34]

Kern offered this summary:

In the Germanic State, Law was customary law, "the law of one's fathers," the pre-existing, objective, legal situation, which was a complex of innumerable subjective rights. All well-founded private rights were protected from arbitrary change, as parts of the same objective legal structure as that to which the monarch owed his own authority. The purpose of the State according to Germanic political ideas, was to fix and maintain, to preserve the existing order, the good old law. The Germanic community was, in essence, an organization for the maintenance of law and order.[35]

The monarch and state existed within the law, for the law, and as creatures of the law, oriented toward the interest of the community. A king was a guardian of the law who did not have the power to declare new law by his leave, a view that would have been considered "blasphemous, for the law, like kingship, possessed its own sacrosanct aura."[36] The later permeation of Germanic customary law with Christian understandings solidified the identification of law with justice, as described in the previous section. There was a "fusion of law and morals,"[37] a sense that "that law was in its nature more than a mere command, that it implied justice and a right recognized but not created by it . . ."[38]

The legendary Germanic "right of resistance," according to which any king who breached the law was subject to abandonment by the people, was a stark manifestation of the belief of the supremacy of the law over kings. "The king and his people both stood under a mutual obligation to preserve the law from infringement or corruption and in some cases when the king clearly failed to do his duty we find his subjects taking matters into their own hands and deposing him."[39] The key underlying notion was fealty, in which both ruler and ruled were bound to the law; law imposed reciprocal, albeit unequal, obligations that ran in both directions, including loyalty and allegiance. This notion ran through the gamut of social relations of the feudal system. A ruler who breached this law forfeited the right to obedience of his subjects.[40] Among other obligations, the king was bound to honor feudal obligations, and contracts, and could not lightly seize the property of others.[41] "A man may resist his king and judge when he acts contrary to law and may even help to make war on him . . . Thereby, he does not violate the duty of fealty."[42]

Some Medieval scholars assert that the impact of these customary law views has been exaggerated, and it is impossible to separate the influence of these views from those mentioned in the preceding section, which

commingled and reinforced one another. But even skeptics acknowledge that they mattered. During most of the Medieval period there was a real tradition of the sovereign being limited by law, albeit not always honored in practice. "Most jurists did not conclude that the prince's absolute power transcended natural or divine law, or the normal, established, 'constitutional' order."[43] Deviations from the law required "cause." Keeping in mind that the king could not be brought before a legal institution to answer for violations, the consequence of these views is that the king was not entirely free to disregard the law. Beyond binding kings, princes, and their officers, as indicated, customary law applied to everyone, including local barons and their aristocratic brethren who presided in manorial courts, confirming and solidifying the everyday sense that no one was above the law.

The Magna Carta

No discussion of the Medieval origins of the rule of law would be complete without a mention of the Magna Carta, signed in 1215, ten years before the birth of Aquinas. Although it stands on its own as a historical event with reverberating consequences in the rule of law tradition, the Magna Carta also epitomized a third Medieval root of the rule of the law, the effort of nobles to use law to restrain kings.

There is no disputing the historical significance of this oft-mentioned document, but historians are split over when it acquired this significance and whether it was deserved.[44] Far from embodying the notion of liberty for all for which it has become renowned, the document was the product of concessions forced upon King John by rebellious barons interested in protecting themselves from onerous exaction by the King to finance his losing war effort in France. The document is occupied with details about the privileges of substantial land-holders. Detractors assert, further, that the significance of the document was relatively minor until given a glorified mischaracterization in the seventeenth century by Coke "and made into the symbol of the struggle against arbitrary power."[45] Supporters contend, in response, that the Magna Carta had contemporary and ongoing significance, considering that – notwithstanding almost immediate repudiation by King John – it was confirmed by later monarchs and parliaments numerous times, and was referred to in public discourse over the course of centuries on multiple occasions. Moreover, supporters assert, while acknowledging that the immediate participants were the King and barons, the latter represented the interests of all free men, as stated in the document itself.

For present purposes this debate need not be resolved. Then and now the Magna Carta symbolized the fact that law protected citizens against the king. Clause 39 is the historic provision:

No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land.[46]

This language confirmed that the barons were not subject to the king's justices, who were notorious for doing his bidding, and confirmed that decisions must be based upon ordinary law, not upon the desires of the king. Regular courts were thus identified as the proper preserve of lawful conduct.[47]

A few decades later, influenced by the Magna Carta, Henry of Bracton began writing his treatise *On The Laws and Customs of England*.[48] Therein penned Bracton this famous formulation of the rule of law:[49]

For his is called *rex* not from reigning but from ruling well, since he is a king as long as he rules well but a tyrant when he oppresses by violent domination the people entrusted to his care. Let him, therefore, temper his power by law, which is the bridle of power, that he may live according to the laws, for the law of mankind has decreed that his own laws bind the lawgiver, and elsewhere in the same source, it is a saying worthy of the majesty of a ruler that the prince acknowledge himself bound by the laws. Nothing is more fitting for a sovereign than to live by the laws, nor is there any greater sovereignty than to govern according to law, and he ought properly to yield to the law what the law has bestowed upon him, for the law makes him king.[50]

In addition to subordinating the king to law, the Magna Carta has been credited with promoting the notion of the due process of law, which is significant in US constitutional analysis.[51] Although these words are not actually used in clause 39, the phrase "due process of law" was used in a statute in 1354, and came to be identified with the phrase "the law of the land."[52] Over time it acquired the connotation that at least a minimal degree of legal procedures – those that insure a fair hearing, especially the opportunity to be heard before a neutral decision-maker – must be accorded in the context of the judicial process.

Finally, the Magna Carta has also been identified as the source of constitutionalism – the structuring of the fundamental relationship between a government and its people in legal terms. The English long held a myth about an ancient unwritten constitution based upon customary law and understandings. The Magna Carta added a foundational written piece (which some thought detracted from the ancient one). In the UK, where the notion of parliamentary sovereignty prevails, the Magna Carta does not officially possess a higher legal status, and its terms have been superceded several times by ordinary statute. Still, in a popular sense it

is thought of as a higher form of law, certainly at least clause 39, which is nigh untouchable, and it has been referred to in such terms on many occasions over the centuries.[53]

Much of the Magna Carta's actual influence on the rule of law tradition, it should be emphasized, came after the Medieval period. But it did stand for the rule of law during this period. "Repeated confirmations of Magna Carta, when demanded by the community and granted by the monarchs, reiterated the idea that the king, like his subjects, was under the law."[54] Equally important, it added a concrete institutionalized component within the positive law system – an ordinary court and jury of peers – to the earlier mentioned abstract declarations about natural law and customary law.

The dilemma bequeathed by this medieval legacy

It has been asserted: "The principle foundation on which medieval political theory was built was the principle of the supremacy of law."[55] The foregoing exploration suggests that this came about in several ways – by monarchs taking oaths to abide by the divine, natural, customary, and positive laws; by a pervasively shared understanding that everyone, kings included, operated within a framework of such laws; by Romanic, Germanic, and Christian ideals that the good king abides by the law; by kings entering agreements (voluntarily or under duress) to accord others the protections of ordinary legal processes; by others having an interest in tethering kings (as well as barons) within legal restraints; and by monarchs recognizing that they obtained legitimacy by claiming to be bound by, and by acting consistent with, the law. Although the preceding discussion was organized in terms of separate contributions, in reality they comprised intermingled influences that were anything but separate. Within these roots, however, was also laid a hidden dilemma that would sprout and grow large only when the surrounding Medieval trappings fell away.

With the sixteenth-century Reformation, shattering the hegemonic grip of the Church, and eighteenth-century Enlightenment, hearkening the rise of reason and science, a general social-cultural partitioning of the sacred and temporal came about, in steps at first imperceptible but in hindsight large, unwinding the Medieval intertwining of the two. Divine law and natural law were separated from positive law, the former two losing their authority over affairs of state. With the vast expansion of the state – that accelerated only after the Medieval period – also came an increase in the volume and scope of legislation and a consequent decrease in the proportion and prestige of customary law. Anglo-American views of the common law as an autonomous body of law comprised of custom,

reason and legal principle survived into the late nineteenth century, but also suffered decline. Long-standing conceptions that legislation did not create new law but merely declared preexisting natural law or customary law were superceded entirely, supplanted by the view that law is the product of legislative will to be shaped as desired, known as an "instrumental" view of law.

Troublesome implications for the rule of law resulted from these changes. In the Medieval period monarchs were considered bound by positive law in large part because natural law, divine law and customary law demanded it. These sources of law also set limits upon and controlled positive law. A key characteristic they shared is that all were beyond the reach of monarchs. As these others lost their significance, positive law was left standing on its own legs. "The more law comes to be thought of as merely positive, the command of the law-giver, the more difficult is it to put any restraints upon the action of the legislator, and in cases of monarchial government to avoid tyranny."[56] This changes everything, for if positive law is a matter of will, changeable as desired, it would seem that there can be no true legal restraint on the law-maker. Aquinas said as much.

"How can the rule of law be compatible with sovereign legislative authority?"[57] This is the age-old question of how – or indeed whether – the government can be limited by law when it is the ultimate source of law. The enduring significance of, and possible answers to, this question will become apparent in the course of this work.

Rise of the bourgeois

The transition in Europe from the Middle Ages, through the Renaissance and the Enlightenment, to the modern era, was not the uninterrupted flowering of the rule of law and democratic institutions, culminating in the birth of liberalism. For a time, centered around the seventeenth century, absolutist monarchies prevailed in much of Europe.[58] Their authority was bolstered by the doctrine of the Divine Right of Kings. By asserting appointment directly from God, this doctrine was aimed at freeing the king from the Church. Its implications went further, removing all restraints from the king, including law: "Hence the Prince or the State which he represents is accountable to none but God, and political sovereignty 'is at all times so free as to be in no earthly subjection in all things touching the regality of said power.'"[59] "[K]ings were 'above the law,' because they made the laws and were responsible for their actions only to God."[60] Among other manifestations of their right to unfettered rule, monarchs exercised the royal prerogative to preside over cases of

consequence, and the dispensing power, which entitled them in specific instances to hold the law in abeyance.

The rule of law ideas elaborated earlier in this chapter were not completely squelched, however. Although monarchs acted above the law under compelling circumstances, in many routine respects, despite absolutist declarations, they continued to operate within legal restraints.[61] What helped preserve these restraints, aside from the recognition by monarchs that it was in their interest to be seen to conform to the law, was the increase in numbers and professionalization of lawyers and judges, a process that had begun in the Middle Ages. At least in England, which by the time of royal absolutism had a centuries-old legal tradition, with its own system of education and body of knowledge,[62] courts could withstand or parry attempts at regal interference. This capacity was in evidence in a decision issued by Coke in 1607, which denied King James I the power to decide a case already under the purview of the Court, regardless of his acknowledged ultimate authority over law: "the Judges are sworn to execute justice according the law and custom of England . . . the King cannot take any cause out of any of his Courts, and give judgement upon it himself."[63] Law had become, or was well on the path to becoming, an established, regularized institutional presence substantially shaped by the increasingly autonomous legal profession. Courts were at the center of this institutional complex and judges served as the guardians of and spokesman for the law.

No attempt will be made to elaborate on the sources of the transformation from feudalism, through absolutist monarchies, to liberalism, which occurred under various circumstances and timing across Europe, and would take the discussion far beyond the scope of this work.[64] However, one factor – the rise of the merchants, of the bourgeois – will be briefly addressed, because it plays an important part in the emergence of liberalism.[65] As with much of the historical discussion herein, a broad brush will be used to recount these developments, foregoing nuance and bypassing differences.

Commencing in the twelfth century, the rise of towns as the centers of economic activity, an increase in population and commerce, and the consequent accumulation of wealth by merchants, prompted developments that finally broke the stranglehold of the feudal system,[66] which lost its total social dominance by the end of the thirteenth century and finally expired in the West by the seventeenth century. Merchants had no place in the land-based, agrarian, hierarchically fixed feudal order. Left out of feudal categories, they were free. But this exclusion also provided them with limited protections and little political power. The cities, which their activities built, enriched, and enlivened, had no right of self-government.

Merchants increasingly chafed under a feudal system that gave priority, status, and control over the courts to the landed nobility, who applied restrictive, obsolete laws and procedures in a self-interested manner that inhibited the activities of the merchants. Nobles – land rich but money poor – envied, and strove to inhibit or siphon off, the wealth of the merchants. Remember that the medieval Church – its bishops major land owners with economic clout and legal and political power to supplement their religious authority – was also aligned against commerce, disparaging it as an unworthy activity and stultifying the availability of commercial credit through its prohibition of usury.

Monarchs had persistent conflicts of their own with the landed nobility.[67] In addition to being potential rivals, the nobility resisted when called upon for military or financial contributions due to the monarch as feudal overlord (pace the Magna Carta). This resistance rendered tenuous the fiscal condition and military might of monarchs, who derived most of their resources from their feudal holdings. The nobility also was not compliant when asked by monarchs to authorize a tax in support of a war effort. This recalcitrance forced some monarchs to sell off their land holdings to raise necessary revenues, which further undermined their strength.

A common interest – their common opponent – resulted in an unspoken alliance between monarchs and merchants. Monarchs increasingly obtained a greater proportion of their income through the more reliable means of substituting fee-generating state courts for baronial courts, procuring loans from wealthy merchants, and taxing commercial activities (especially customs taxes). Thus it was in the monarch's interest to facilitate the efforts of merchants, who were often also commercial lenders. Monarchs supported the attempts of the cities, led by the merchants, against the opposition of the nobles, to become self-governing corporations or franchises.[68] Owing to the demands of merchants for cheap labor, it became imperative for serfs – multiplying in number – to be available for work. Freedom was conferred upon anyone who resided in a city for more than a year. "City law not only did away with personal servitude and restrictions on land, but also caused the disappearance of the seignorial rights and fiscal claims which interfered with the activity of commerce and industry."[69] "The factor of a changing economic structure operated . . . everywhere including England, where rational procedures of proof were introduced by the royal authority especially in the interests of the merchants."[70] Practices and rules merchants followed in their transactions with one another in the markets or regional fairs, enforced in their own tribunals, were subsequently recognized by courts.

As commerce increased and wealth grew, the accompanying inflation sapped the economic power of the nobility, who were dependent for their income on fixed feudal rents that could not be easily increased. When the basis of wealth shifted from the possession of land to buying and selling goods, the nobility were caught in an economic vise: suffering from a relative decrease in the value of their income, yet required to support the lifestyle and large retinue expected of persons of high social standing. Land came on the market for sale to satisfy the demands of the merchants, for whom land ownership still represented wealth and standing, as well as to meet the financial needs of the nobles. Nobles who would not deign to engage in commercial activities, or to enter marriages with successful merchant families (an arrangement of reciprocal advantage, trading money for prestige), faced decline. As dramatic evidence of their precarious condition, in some locations all of the nobles became indebted to town merchants.[71] Lords actually came to have an interest in freeing their serfs, for this freedom had to be bought; and the change in status allowed lords to effectuate a favorable transition from traditional payment by serfs in services or produce to payment in money of rent (or face eviction); lords in effect were transformed into bare landlords, freed from their preexisting host of responsibilities toward their former serfs.

Once these various factors gathered momentum, the demise of the feudal system in the West was fated. Facilitating the economic activities of the merchants led, over time, to an entirely new society and set of legal institutions, away from a fixed-at-birth status of the feudal social order, toward individual striving and the accumulation of wealth, revolving around the market, commercial credit, financial instruments, property rights, and the enforcement of contracts. The above scenario did not occur everywhere; nor is it the whole story.[72] When merchants viewed the monarch as the greater threat, they allied themselves with the nobility against the monarch; at times monarchs and nobles took on the merchants and lenders; in later periods, protectionist town guilds comprised of groups of artisans engaged in sustained conflicts with external merchants (who were favored by monarchs owing to their economic benefits); workers who rebelled against merchants to improve their conditions and pay were put down by monarchs or nobles who feared disorder; plagues, crop failures, and wars intermittently decimated the population, making labor scarce, dampening demand, disrupting commercial progress. Thus there was no single or straight path. Whatever other factors were involved, the culmination of these developments was the rise of the bourgeois, with a concomitant recognition of their interests in politics and law. This lies at the heart of liberalism.

3 Liberalism

Liberalism was born in the pre-modern period of the late-seventeenth and eighteenth centuries. Like any political theory, there are competing versions of liberalism, ranging from the social welfare liberalism of John Rawls, to the libertarian liberalism of Robert Nozick, to the conservative liberalism of Friedrich Hayek, to the pluralistic liberalism of Isaiah Berlin, to the egalitarian liberalism of Amy Gutman. The picture is further complicated because liberalism consists not just of a political theory and system of government, but also a culture, an economic theory, a psychology, a theory of ethics, and a theory of knowledge.[1] Notwithstanding this variety and complexity, every version of liberalism reserves an essential place for the rule of law. And the rule of law today is thoroughly understood in terms of liberalism.

Above all else liberalism emphasizes individual liberty.[2] Put in classic terms by John Stuart Mill: "The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it."[3]

The liberal social contract tradition, formulated most influentially by John Locke, explains the origins of law and the state in idealized terms. Life without law (in the state of nature) is insecure and prone to disputes; keeping the peace requires laws, and unbiased law enforcers and judges. Autonomous individuals choose to enter a mutually binding covenant to form a government authorized to promulgate and enforce a body of laws in the interest of preserving order, thereby exchanging their natural freedom for living under a legal system, while retaining their basic rights and liberties. What renders the arrangement legitimate is their consent. Consent respects the autonomy of individuals even as they become subject to the dictates of the law.

Equality is a companion of liberty within liberalism by virtue of the moral equivalence accorded to all individuals as autonomous rights-bearing beings. Everyone must be treated with equal respect and dignity, due as human beings with the inherent capacity for reason and moral conduct. Equality within liberalism entails that citizens possess equal

political rights and be entitled to equality before the law. Liberty and equality require that the government remains neutral on the question of the good: "Since the citizens of a society differ in their conceptions, the government does not treat them as equals if it prefers one conception to another, either because the officials believe that one is intrinsically superior, or because one is held by the more numerous or more powerful group."[4]

This chapter will provide an introduction to the main themes in liberalism to supply a background for the ensuing discussion of historical and contemporary theories on the rule of law in liberal systems. An important reminder is necessary to offset this lengthy focus on liberalism: while liberal systems cannot exist without the rule of law (as will be explained), the rule of law can exist outside of liberal systems. None of the accounts of the rule of law discussed in the previous two chapters – Greek, Roman, and Medieval – related to liberal systems. The liberal orientation of the rule of law differs markedly from these pre-liberal sources. In liberalism the rule of law emphasizes the preservation of individual liberty. Not so in the Greek or Medieval understandings of the rule of law, which contain nary a mention of individual liberty. In Greek conceptions liberty meant collective self-rule, and supremacy was accorded to law because it was effectuated by the citizens themselves and reflected and enforced the community morality and tradition. In Medieval understandings the rule of law was oriented to containing rapacious kings, and emphasized that law must be for the good of the community. For both historical sources primacy was accorded to the community, not the individual. In societies oriented toward the community, or in fixed hierarchic societies, restraining the tyranny of the government does not enhance the liberty of individuals to be or do what they wish. Surrounding social and cultural constraints render such liberty irrelevant if not inconceivable. "The sense of privacy itself, of the area of personal relationships as something sacred in its own right, derives from a conception of freedom which, for all its religious roots, is scarcely older, in its developed state, than the Renaissance or the Reformation."[5] Owing to its individualist emphasis, a consistent thrust underlying liberal thought is fear, fear of impositions by others, and especially fear of the state.

Four themes of liberty

The familiar liberal story told above begins by placing individuals in an unenviable predicament: it appears to require that liberty be sacrificed in the interest of personal security and social order. After all, in the absence of law an individual would be absolutely free. Giving up liberty to further

self-preservation is a dubious exchange if the result is to be subject to legal oppression; it is like willingly entering a jail cell for the safety offered behind bars. Liberals counter that if everyone is absolutely free, then no one is truly free, owing to the threat that we pose to one another. Even if this were correct – by no means obvious – to be told that one is free after submitting to law should evoke suspicion. Is it not more candid to admit that under law we are not free, but the benefits that law brings are worth the trade off? Modern liberal democracies offer a fourfold answer to this question.

First, the individual is free to the extent that the laws are created democratically. Citizens have thereby consented to, indeed authored, the rules they are obliged to follow. The individual is at once ruler and ruled. Individuals thus rule themselves. "[O]bedience to a law one prescribes to oneself is freedom,"[6] Rousseau declared. "A people, since it is subject to laws, ought to be the author of them."[7] Moreover, presumably under a democracy citizens would not enact laws to oppress themselves; their power to make law is, accordingly, their own best protection. Self-rule is "*political liberty.*" Representative democracy is the modern manifestation of self-rule in the West. This is akin to the classical Greek understanding of liberty, although importantly different in that theirs was a direct, not representative, democracy. In the contemporary world it lies behind the manifold examples of yearning and agitation for independence from alien rule or from rule by a majority group with a different cultural identity or religion. The realization of political liberty requires the opportunity for real participation in collective decisions with respect to the governing political and legal structure, and it implies the right to vote and eligibility for political office, and the protection of freedom of speech, assembly, and association.

Second, the individual is free to the extent that government officials are required to act in accordance with preexisting law. This requirement promotes liberty by enabling individuals to predict when they will be subject to coercion by the state legal apparatus, allowing them to avoid legal interference in their affairs by not running afoul of the law. Citizens are subject only to the law, not to the arbitrary will or judgment of another who wields coercive government power. This entails that the laws be declared publicly in clear terms in advance, be applied equally, and be interpreted and applied with certainty and reliability. The seminal example of this is the prohibition against criminal punishment in the absence of a preexisting law. This is "*legal liberty.*" Montesquieu framed it best: "Liberty is a right of doing whatever the laws permit[.]"[8] It is the freedom to do whatever the laws do not explicitly proscribe. Legal liberty is the

dominant theoretical understanding of the rule of law in modern liberal democracies, as will be later elaborated.

Third, the individual is free in so far as the government is restricted from infringing upon an inviolable realm of personal autonomy. Often the protections are known as civil rights or liberties, and are contained in bills of rights or human rights declarations. These restrictions may be substantive (strictly prohibiting government incursion within the protected sphere), or only procedural (the government must satisfy a high burden, like demonstrating compelling necessity, before interference is allowed). This is "*personal liberty.*" Personal liberty constitutes the minimum degree of autonomy individuals retain even after they consent to live under law. It consists of the protections necessary to allow the achievement of Mill's "freedom to pursue our own good in our own way." This is what prohibits the liberal state from imposing on everyone in society a particular version of the good. Personal liberty, when recognized, is uncertain in scope and variable in content. Routinely there is disagreement with respect to the contours of the protected sphere, as well as with regard to how those contours should be determined. It usually includes the freedom of religion and conscience, freedom of speech and political belief, freedom from torture or cruel punishment, and freedom to determine one's life pursuits and values. Robust versions are phrased in terms of an expansive zone of privacy or dignity. The US Supreme Court phrased it thus: "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[9] The essential underlying idea is that individuals are entitled to integrity of body and mind free from government interference. This notion is "the standard view of freedom in the liberal tradition."[10]

Finally, freedom is enhanced when the powers of the government are divided into separate compartments – typically legislative, executive, and judicial (horizontal division), and sometimes municipal, state or regional, and national (vertical division) – with the application of law entrusted to an independent judiciary. This division promotes liberty by preventing the accumulation of total power in any single institution, setting up a form of competitive interdependence within the government. The separation of the judicial apparatus from other government institutions has particular significance. Allocating the application of law to an independent judiciary insures that a consummately legal institution is available to check the legality of governmental action. This is the "*institutionalized preservation of liberty.*" It entails institutional structures and processes that have been devised to enhance prospects for the realization of the liberty of citizens through the effective division of government power. This is qualitatively

different from the previous three, in that it is a structural arrangement for enhancing liberty rather than a type of liberty itself.

Each of the first three forms of liberty, in their own way, vindicates a different shade of self-determination. Political liberty allows individuals to determine (collectively) the rules under which they live. Legal liberty allows individuals to do whatever they wish with knowledge of, and consistent with, these rules. Personal liberty insures individuals the minimum degree of autonomy they require to be who they want to be. None of these liberties, however, is absolute. The first entails the participation and cooperation of others; the limits of the second are set by the proscriptions of standing laws; the scope of autonomy provided by the third is bounded by the equivalent autonomy of other individuals as well as by the necessities of the state. A separate set of limits is imposed on persons thought incapable of self-determination, as with children, mental incompetents, and criminals, and, in previous times, women, slaves, and colonized subjects. To exercise the liberty of self-determination people must have the capacity for self-determination. Measures like mandatory education, for this reason, can be imposed on youth without offending their liberty.

Modern liberal democracies answer the skeptical question posed earlier – how is an individual under law still free? – by offering a tight combination of these four themes. In a democracy citizens create the laws under which they live (political liberty); government officials take actions against citizens in accordance with these laws (legal liberty). In the first respect they rule themselves; in the second they are ruled by the laws which they set for themselves. Citizens, therefore, are at no point subject to the rule of another individual. Moreover, citizens possess a specially protected realm of individual autonomy that restricts the reach of law (personal liberty). Liberal democracies typically carry out this combination by utilizing some form of separation of powers, in particular with an independent judiciary (institutionalized preservation of liberty). Almost without exception (the UK being a prominent partial exception), this arrangement is set out in a written constitution, binding on government officials and citizens and enforced by independent courts. As is evident, this liberal construction is thoroughly legalistic. Law is the skeleton that holds the liberal system upright and gives it form and stability.

Tensions among the liberties

Although these four answers are often found together, that is neither required nor an easy matter. Legal liberty, personal liberty, and institutionalized preservation of liberty, may all coexist without political

liberty, for example, in a system in which laws are established by a nondemocratic (philosophical or scientific) elite, as utopian political philosophers have dreamed. Indeed sound arguments can be made that an elite-designed system is more likely to maximize legal liberty and personal liberty than a democratic system. The unease this suggestion generates – even if the potential for corruption of the elite guardians could somehow be eliminated – demonstrates the significance attached to political liberty. Self-rule is widely preferred even if that means being ruled poorly.

Legal theorists have often made the point that legal liberty (as the rule of law) may exist without political liberty (democracy). "The mere commitments to generality and autonomy in law and to the distinction among legislation, administration and adjudication have no inherent democratic significance."[11] "A nondemocratic legal system . . . may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies."[12] Some theorists have further argued that, owing to a growing assertiveness on the part of judges, "the Rule of Law has functioned as a clear check on the actual impact and expansion of a rigorous democracy."[13] The relationship between the rule of law and democracy is asymmetrical: the rule of law can exist without democracy, but democracy needs the rule of law, for otherwise democratically established laws may be eviscerated at the stage of application by not being followed.

Legal liberty may easily exist without personal liberty. Non-liberal regimes with the rule of law demonstrate this. To say that a citizen is free within the open spaces allowed by the law says nothing about how wide (or narrow) those open spaces must be. Legal liberty is not offended by severe restrictions on individuals, for it requires only that government actions be consistent with laws declared in advance, imposing no strictures on the content of the laws. Benjamin Constant remarked two centuries ago, pointing out the inadequacy of Montesquieu's account of liberty: "No doubt there is no liberty when people cannot do all that the laws allow them to do, but laws could forbid so many things as to abolish liberty altogether."[14] A regime with oppressive laws can satisfy legal liberty by meticulously complying with those laws. In such systems, the more legal liberty is honored the worse for personal liberty. The relationship is again asymmetrical: personal liberty cannot exist without the rule of law, at least when the former is framed in terms of legally enforceable rights.

Perhaps the most formidable problem in the combination of liberties is the potential conflict between personal liberty and political liberty. As Isaiah Berlin observed, "there is no necessary connexion between individual liberty and democratic rule. The answer to the question 'Who governs me?' is logically distinct from the question 'How far does government

interfere with me?'"[15] The goal of personal liberty is to curb the application of governmental authority against individuals, whereas the goal of political liberty is to seize control of power to exercise that authority.[16] The concern of the former is tyranny against the individual, which is no less tyrannical when the product of democracy. The concern of the latter is to determine who gets to shape the social and political community through legislation, an objective that is inhibited by the limits set by personal liberty. Drawn in the sharpest terms, this conflict represents the battle between two contesting ideologies: collective self-rule in the interest of the community versus the desire of individuals to be left alone. "These are not two different interpretations of a single concept, but two profoundly divergent and irreconcilable attitudes to the ends of life . . . These claims cannot both be fully satisfied."[17]

Liberals have traditionally held liberty of the individual as preeminent whenever it has come into conflict with democracy. Most early liberals were against popular democracy – not widely instituted until the twentieth century – which they viewed with trepidation as leading to rule by the ignorant masses, a threat to the property of the elite, an invitation to disorder. Even apparently strong pro-democratic sentiments expressed by liberals, like Kant's assertion that a citizen has a "lawful freedom to obey no law other than the one to which he has given his consent," are usually less generous than they might appear; for Kant disqualified from voting all "passive" citizens, which included apprentices, servants, all women, sharecroppers, and more generally all "persons under the orders or protections of other individuals."[18] Some prominent modern liberal theorists have argued that the gravest threat to personal liberty is posed by representative democracy.[19] "Inasmuch as poor voters always and everywhere outnumber rich ones, in theory there are no limits to the democratic state's ability to ride roughshod over the rights of private property."[20] Not surprisingly, considering these fears, when liberal theorists (like Kant) insisted on consent to law, what they often meant was not actual consent but rather a form of hypothetical consent – what people would consent to if they were exercising proper reason.[21]

These tensions among the four liberties are unavoidable but not intractable. Every liberal democracy mediates them in various ways. Another fundamental tension within liberalism is the tension between liberty and equality. Whenever an unequal distribution of assets (including wealth and talent) exists, liberty may have to yield to some degree to insure greater equality. Reconciling the tension between these two liberal values, which is the great burden of liberal social welfare states, will be addressed in later chapters, for it is featured in the claimed Western decline of the rule of law.

Socio-cultural context of liberalism

Liberalism cannot be fully grasped without taking into consideration the cluster of ideas that revolved around the eighteenth-century Enlightenment.[22] The primary creed of the Enlightenment was the application of reason and science to banish ignorance and superstition.[23] Isaac Newton's physics, which produced a few laws that could predict the location and motion of all matter on earth and in the heavens, demonstrated the extraordinary power of science to expose the previously opaque mysteries of nature. After this grand achievement everything was thought accessible to human understanding. The Enlightenment *Philosophes'* distinctive contribution was to extend the application of reason and science to the social, political, legal, economic, and moral realms. They believed that a science of man could be developed which would allow government and society to be designed to give rise to a more just, rational existence. For the most ambitious and optimistic, the ultimate goal was nothing less than the creation of a perfect society. Custom, tradition, and the teachings of the Church, which hitherto had been the leading sources of authority, henceforth were subjected to critical scrutiny. Government and law, and every other social institution, had to be rationally justified, or discarded. The concrete satisfaction of individual and social interests in the here and now took center stage, displacing God and promises about rewards in the hereafter.

The internecine battles among Christians wrought by the sixteenth-century Reformation helped pave the way for the coming Enlightenment and liberalism. It openly challenged Church orthodoxy, which had enjoyed 1,000 years of dominance. Protestantism promoted a kind of individualism in its assertion of a personal relationship with God, unmediated by the Church. The clashes between Protestants and Catholics culminated in slaughters and mutual exhaustion, ultimately forcing a truce based upon tolerance.[24] The very fact of the dispute evidenced the insecure foundation for knowledge provided by religion. Since Medieval Christianity constituted a total world-view, encompassing politics, law, morality, economics, as well as natural phenomena, doubt thrown upon Church teachings could not be sequestered from seeping into a more general questioning of all aspects of existence.

The most consequential casualty of this total questioning, a bedeviling legacy that continues to the present, was the destruction of moral certainty. In the Medieval view, moral right and natural law could be discerned from Biblical revelation (as interpreted by the Church), or through the application of reason implanted in man by God. Enlightenment philosophers were confident that a new secular grounding for moral

right and natural law could be found through the application of reason to the study of human nature, which they believed to be universal. This effort ran aground for a combination of reasons.

The exploration of the non-Western world that occurred contemporaneously with the Enlightenment revealed an unexpected variety of customs and moral systems. If commonality was lacking, then some values and traditions must be right and others wrong, but there was no evident standard by which to adjudge one moral system superior to another. Many philosophers assumed the superiority of Western civilization, while others idealized "primitive" systems as a lost, purer state of human existence. Some insisted that a common core of moral beliefs existed beneath the apparent variation among cultures. But David Hume's monumental philosophical argument separating the *is* from the *ought* – to the effect that normative propositions are statements of a qualitatively different kind that cannot be deduced from descriptive propositions – ruined the attempt to derive moral norms based upon shared customs or morality. The fact that a moral norm is widely followed does not, of itself, mean that it should be followed. The practical wisdom of this philosophical point can be seen in the fact that slavery was commonly practiced by cultures, and the subordination of women is still widespread. Hume's argument, furthermore, appeared to disqualify any moral system grounded exclusively in human nature, for that builds upon the *is*, upon descriptive propositions of who we are as humans, to say how we *ought* to act. Another formidable problem was that humans do much that is evil (apparently by nature), so an examination of human nature alone could not establish what was proper moral conduct. A minimalist natural law, built around the conditions necessary for survival in a human community, is a more viable strategy, but it would lack any higher aspirations, hardly deserving of the name morality. A more ambitious natural law focused on human flourishing must first determine what human flourishing means, and must identify a way to select from among or rank the possible alternative versions, for which no uncontroversial answers could be given.

A severe blow to the Enlightenment utopian project was delivered by the Romantics, who challenged the very coherence and desirability of universality, and (with Hume's help) the scope of reason, advocating in their place particularity, will, creativity, and passion. They glorified cultures as wholes unto themselves, each with its own unique and incommensurable life world and values. "But if we are to have as many types of perfection as there are types of culture, each with its ideal constellation of virtues, then the very notion of the possibility of a single perfect society is logically incoherent."[25]

With the failure of the Enlightenment attempt to establish absolute or universal moral principles, many philosophers turned away from the classical search for the ultimate good, rejecting the view that any such single good exists, or at least that it could be identified with certainty. One outcome of this logic was the recognition of moral pluralism, which when taken to the extreme slides to moral skepticism (an extreme that many Enlightenment thinkers abhorred).[26] Another response to this logic was the nineteenth-century rise of utilitarian moral theory, grounded on the notion that the good is whatever people desire or take pleasure in; accordingly, society and its institutions should be designed to maximize the total aggregate quantity of pleasure (minus pain) of individuals within society. Yet another response was the shift to an emphasis on procedures: given that the content of moral principles elude certainty, perhaps there can instead be agreement on fair procedures to be followed when making decisions affecting society. Liberalism, as will become clear in following chapters, is substantially procedural in bent.

The liberty central to liberalism can now be better understood. As indicated, it is the liberty to pursue one's own vision of the good. Whether this is understood as the best way in which to maximize aggregate pleasure, or as a default position forced upon us by the failure to identify universal moral principles, or as the right position to take given the conclusion that there are many alternative forms of the good attached to different cultures or forms of life,[27] the result is the same: liberalism is constructed in a manner that accommodates moral pluralism.[28]

Moral pluralism can function within liberalism in two alternative forms, which can also exist together. The primary Western form involves a pluralism of moral views among the individuals within a liberal (individualist) culture; a secondary form exists when more than one distinct community or culture (liberal or non-liberal) coexists within the ambit of a single system. In either case the liberal state purports to be neutral with respect to the alternative circulating visions of the good. That is, it cannot adopt and promote as the state sanctioned good or religion one vision over others, with the important caveat that it may prohibit or sanction those that perpetuate violence on others or threaten the survival of the liberal state. Competing visions of the good are left to exist – thrive, develop, change, or wither – in the marketplace of cultural ideas. Liberal tenets are not offended, at least not in most versions of liberalism, when the state utilizes subsidies or education to encourage certain social goods, like art and music, or actively promotes or inculcates in youth liberal values like tolerance and individual autonomy, but the state may not apply coercion on behalf of any particular set of values.

This explicitly neutral stance does not mean that liberal systems are completely neutral – in two important respects they are not. Western liberal regimes take the position that neutrality is the *right* principle upon which to construct a government and system of laws.[29] Repeal of this neutrality by those who wield government power cannot be allowed. Were this not the case, liberalism might fail to reproduce itself, which would occur if an anti-liberal, anti-tolerant group prevailed in a democratic election and proceeded to institute a non-liberal regime. Liberal systems are not neutral in the further respect that the primacy accorded to individual rights sets limits upon the extent to which a community-first-and-foremost orientation can be implemented. Owing to these reasons, illiberal sub-communities that exist within overarching liberal structures may see themselves in conflict with the overarching liberal system, and fear it to be corrosive of their community values.

Liberal neutrality, it must be emphasized, represents a radical shift from prior views of the state and the law. Under classical Greek views the state and law were seen as properly oriented to the promotion of the (aristocratic, warrior) virtues and community life; under the Medieval view their role was thought to be the creation and perpetuation of a Christian life and community on earth. In both cases the law was seen as reflecting a substantive vision of the good and a common way of life with a common end. Under the liberal view, it is not necessary that there be a common way of life beyond agreement that individuals are better off if they leave each other alone to pursue whatever ends they desire. Rather than a community integrated by shared values, it amounts to an aggregation of individuals held together by a mutual non-interference pact.

Communitarianism compared with liberalism

Another way to understand liberalism is by way of contrast to communitarianism – presented here in simplified terms – which is commonly identified in political theory as its antithesis.[30] The starting point of communitarianism is the community, not the individual. Communities preexist and survive the births and deaths of individual members. Communities have a presence or being of their own which constitutes more than just the agglomeration of individuals. Communities have an interest of their own – survival of the community way of life – which is more than and different from the aggregated interests of each individual. The culture, language, and history of the community are the cradle within which individuals are reared. The identities of individuals are shaped and determined by their place within the community. Notions of the good are generated by the community and its shared way of life. Life meaning for individuals is provided by their role in perpetuating or contributing to the common life of the community, not from self-realization as an autonomous self-creating individual. Indeed individuals are neither autonomous nor self-determining, but rather are creatures of the communities that bear, nurture, and envelop them throughout life. The choices they make are from among socially generated alternatives and are based upon socially derived values. Primacy in the communitarian understanding is thus accorded in various ways to the community rather than the individual.

In a communitarian system law is a reflection of shared community values and interests. Legislation is a matter of discovering or declaring those values and interests immanent in the life and culture of the community.[31] The law is emphatically not neutral but conforms to and enforces the community way of life and interests. In the presence of pervasively shared values and customary law, legislation need not be as prominent or voluminous. Adjudication of conflict is not so much rule-oriented as it is oriented to achieving an outcome that furthers the community interest. Significantly, in contrast to the driving liberal obsession of fear of government 'tyranny, it is not essential in a communitarian system that there be restraints on government power. The state is not set against individuals but instead is an extension of community that should not be hobbled in the collective achievement of the common good.

Liberalism and capitalism

Liberalism has been called a "bourgeois" political theory for reasons of its origins and its content. Its articulation by Locke followed upon and coincided with the newly found prominence of the merchant class in the towns and cities of England.[32] As described in the previous chapter, the bourgeois engaged in a long struggle against the privileges of the nobility, fighting laws that inhibited their activities and accorded them no status. An individualist political theory that champions liberty and the protection of rights, especially the rights of contract and property, including the right to sell one's own labor, as Locke's theory did, mirrored the interests of the bourgeois.[33] The right of property promoted and protected their accumulation of capital; the right to work for wages undercut feudal restrictions that held back the supply of labor; freedom of contract restrained government interference in merchants' contractual arrangements with workers and with one another; enforcement of contracts provided security for their

transactions.[34] Above all else, merchants required predictability and reliability in the enforcement of contractual and property rights as a means to calculate the anticipated benefits of commercial transactions and to secure the fruits of their enterprise.[35]

Scientific support for economic liberalism was provided by Adam Smith, who argued that individuals pursuing their own interests in a market allowing free exchanges and price and wage competition would (as if by an invisible hand) lead to a situation beneficial for all. Individuals benefit because they engage in the type and level of productive and consumptive activities consistent with their desires and abilities. Society benefits because wealth is maximized: only goods that promise a profit are produced, in the desired amounts, at the ideal combination of cost, price and quality, and are distributed to those who value them the most (as measured by their willingness to pay). Whatever does not satisfy these strictures will suffer the natural corrective sanction of failure. This system of "natural liberty" would be vastly superior to planning by the government, which would be inefficient if not impossible, and would impinge upon the natural rights of property and contract of individuals.[36] The key flaw of planning is that the government lacks the capacity to know the multitude of different desires of individuals; whereas the market, through innumerable voluntary individual exchanges, operates as a mechanism for registering such desires. Accordingly, the government should supply a framework of laws that protect property and contract, it should establish a sound monetary system and assure competition and a free market, and for the rest stay out of the way. "The appeal this doctrine made to its generation hardly requires any emphasis. It told the business man that he was a public benefactor; and it urged that the less he was restrained in the pursuit of his wealth, the greater the benefit he could confer on his fellows."[37] These economic arguments offer another way of encouraging everyone to pursue their own good, now in the interest of all, and to structure a government and laws that facilitate this pursuit.

The connection between liberalism and capitalism, so described, is direct and intimate. Liberalism is about freedom; capitalism is an economic system built upon freely made economic exchanges. The liberty advocated by political liberalism implies an unspecified but considerable degree of economic liberalism. Individuals in society are routinely occupied with social, political and economic activities that cannot be sharply separated from one another. Inventing, producing, buying, selling, accumulating, consuming, are among the primary goods pursued by people in capitalist societies while exercising their liberty. Hence the liberty championed by liberalism is substantially played out in the economic arena.

Liberalism, it is fair to conclude, expresses "a view of politics that is required by and legitimates capitalist market practices."[38]

To forestall a common misconception, it should be emphasized that political liberalism is not necessarily committed to a laissez faire (non-interference) view of government.[39] Hayek, one the twentieth century's foremost champions of classical liberalism, stated this unequivocally: "Probably nothing has done so much harm to the liberal cause as the wooden insistence of some liberals on certain rough rules of thumb, above all the principle of laissez faire."[40] Hayek argued that, in addition to establishing a background legal framework for the market, government participation and regulation is necessary when competition and pricing mechanisms do not suffice in the provision of public goods and infrastructure, as in the building of roads, and dealing with deforestation or pollution.[41] He asserted, further, that "there can be no doubt that some minimum of food, shelter, and clothing, sufficient to preserve health and the capacity to work, can be assured to everybody."[42] And he advocated a state-sponsored system of social insurance to protect individuals against calamities.[43] Contemporary conservatives who advocate little or no regulation forget what Hayek well understood, that the liberal state preserves a substantial role for law.

A concluding caution

A libertarian, a person who accords freedom the utmost value, might be dismayed by the liberal portrayal that law serves as the great preserver of liberty. Libertarians see law largely as an imposition on liberty. Jeremy Bentham – not himself a libertarian, but an unfailing advocate of taking a clear-eyed view of the law – insisted that liberty "is not anything produced by positive Law. It exists without Law, and not be means of Law."[44] Libertarians believe law should establish the minimum conditions necessary for social order, an allowance that distinguishes them from anarchists. Nothing more. Liberty exists when the law is *silent*.[45] Less law means greater freedom. From this standpoint, legislation, regardless of democratic origins, is always a threat; the rule of law serves legislation; and individual rights are too minimalist to offer much protection.

Modern social theorists have reported an increasing "juridification" of liberal societies – an unprecedented penetration of social life by state law, extending ever deeper into the affairs of individuals.[46] If this phenomenon is indeed taking place, it might be argued that there is less liberty in liberal societies, regardless of their vaunted legal protections, than in many absolutist regimes of the past, in which legislation was scarce and the legal apparatus mostly inactive or weak. This charge can be rebuffed, at least

initially, by recognizing that it is inapt to compare modern capitalist, mass society with the vastly simpler conditions of bygone days. But the point merits serious contemplation. It carries, moreover, an implicit warning: do not be beguiled by legitimating theoretical accounts that might distract one from perceiving the situation in a less idealized, more realistic way.