

# HISTORICAL AND INTELLECTUAL CONTEXT

## The Conservative Version of the Rule of Law

TODD ZYWICKI\*

### ABSTRACT

*Establishing the rule of law requires two elements. First, an articulation of the concept that there is a higher law above the government from which the government derives its legitimate authority but which also constrains the exercise of that power. Second, an effective institutional structure for citizens to actually enforce the rule of law's limits on government's exercise of its powers in practice.*

*Three theories have been articulated that can meet these requirements of the rule of law: natural law, social contract theory, and a "conservative" version of the rule of law. This essay focuses on the last. Under the conservative version of the rule of law, both the legitimate authority of the government and the constraints upon it are derived from history, tradition, and the particular character of a political community. Rather than the rule of law emerging as a pre-political concept that is then implemented in practice, the conservative version of the rule of law first imposes limits on the government in practice and only later theorizes those limits into principles of constitutionalism. The logic of the conservative version of the rule of law is illustrated through a focus on the ideas of three thinkers: David Hume, Edmund Burke, and Russell Kirk.*

### TABLE OF CONTENTS

|                                                                                     |     |
|-------------------------------------------------------------------------------------|-----|
| I. THE CONCEPT OF THE RULE OF LAW . . . . .                                         | 715 |
| II. DAVID HUME: THE RULE OF LAW AS STRUGGLE AGAINST<br>ARBITRARY AUTHORITY. . . . . | 719 |
| III. EDMUND BURKE AND THE RULE OF LAW AS THE CHARACTER OF A<br>PEOPLE . . . . .     | 723 |
| IV. RUSSELL KIRK: TRADITION AND THE COMMON LAW . . . . .                            | 730 |
| V. CONCLUSION: THE CONSERVATIVE VERSION OF THE RULE OF LAW . . . .                  | 735 |

---

\* George Mason University Foundation Professor of Law, Antonin Scalia Law School. I would like to thank Nelson Lund and David Porter for comments on an earlier draft of this article. © 2026, Todd Zywicki.

The rule of law is fundamental to republican government. As Noel Reynolds has observed, “The rule of law is a solution to a problem, and as the classical tradition has always recognized, the problem is tyranny—the social relationship in which some people can command the lives or property of others at will and in pursuit of discretionary ends.”<sup>1</sup> More generally, the rule of law enables individuals to pursue their own individual ends with minimal friction and maximum ability to plan for the future by being able to predict how others will act. Hence, it can be understood as a constraint not just on state action but also on the actions of other individuals. The rules of a political-legal system defined by the rule of law are analogous to traffic laws—they enable each individual to travel to his desired destination with minimal conflict but do not try to determine what that destination might be.<sup>2</sup> The rule of law can be seen as a fundamental organizing principle of a certain type of society, not a mere instrumentality toward the accomplishment of some social end goal such as greater economic prosperity. Greater wealth is a likely by-product of a society governed by the rule of law, but that is not its central purpose.

Instantiating the rule of law as a governing practice in society requires satisfying two conditions. First, it is necessary to establish the intellectual *concept* of the rule of law as a system that both empowers and constrains the exercise of governmental authority, both procedurally and substantively. Second, it is necessary that the rule of law be applied in practice, through *institutions* that constrain governmental and private actors. Without the ability to actually implement the rule of law in practice, the rule of law is nothing more than a philosophical concept with little application to peoples’ lives or the governance of society. This article will focus on the first element of the establishment of the rule of law—the duality by which the rule of law both empowers and constrains the exercise of legitimate governmental authority. Historically, as the rule of law emerged and evolved in the Western world, three different sources of legitimacy and constraint have been identified: natural law/natural rights, social contract theory, and a society’s unique history and legal development. This article will focus on the third of these sources—history and tradition—which I will refer to as the “conservative” version of the rule of law. This concept of the rule of law has developed the most robustly in the Anglo-American world, which will be of particular interest. The unique interrelationship between England’s history, its mixed constitution (including the development of an independent judiciary), and the common law have combined to create a distinctive idea of the rule of law that is often overlooked, especially by the philosophers who dominate jurisprudential discussions of the rule of law.<sup>3</sup> The analysis will subdivide the inquiry into two elements: First,

---

1. See Noel B. Reynolds, *Grounding the Rule of Law*, 2 *RATIO JURIS* 1, 5 (1989).

2. For a summary of the essential elements of the rule of law, see Todd J. Zywicki, *The Rule of Law, Freedom, and Prosperity*, 10 *SUP. CT. ECON. REV.* 1 (2003).

3. Focusing on the development of the intellectual concept of the conservative version of the rule of law without its historical establishment in practice risks obscuring a subtle and important distinction between the conservative version of the rule of law and alternative theories; namely, the conservative version of the rule of law derives from its emergence as a historical reality in practice first and then only later was generalized into a theory of the rule of law. The alternative theories start in theory and are only then applied in practice.

the role of tradition and history generally in establishing the rule of law in a given society, and second, the unique contribution of the common law in the development of the rule of law in Anglo-America. These two are interrelated and mutually reinforcing, but it is useful to distinguish them for analytical clarity. The thoughts of David Hume, Edmund Burke, and Russell Kirk, will be analyzed in particular detail to unpack the logic of the argument.

### I. THE CONCEPT OF THE RULE OF LAW

The first condition for the rule of law is the recognition of the *concept* of the rule of law. I will define this for working purposes as the idea that there is a “law” that stands above the exercise of power by governmental authority and that requires the government to act according to certain procedural and substantive rules. But I also argue that this same law provides the basis of legitimate authority for the government to act. In other words, these principles define the boundaries of “legitimate” and “illegitimate” authority: they provide the basis for the government to define the scope of and exercise its legitimate authority while at the same time identifying when the government exceeds that authority in an illegitimate manner.

Three basic sources of authority have been identified over time to serve this dual function of empowering and constraining the government via the rule of law. The first two will be discussed briefly here for comparative purposes. The third will be the primary focus of this article.

I should stress an important point at the outset of this discussion—many of these thinkers are a hybrid of several different analytical approaches.<sup>4</sup> For example, Locke is *both* a natural rights and social contract theorist and Blackstone combines Lockean natural rights/natural law-style thinking with common law. For current purposes, however, accurately classifying or categorizing these various thinkers in one category or another is not the point—here, my aim is to identify the various sources of law that can provide a foundation for the “higher” law element of the rule of law, namely that the legitimate government authority both derives from and is constrained by that source. Drawing on elements of the ideas of particular and widely-familiar thinkers is used to provide tangible illustrations of how these concepts can be applied in practice, not as an exercise of classification. Indeed, the fact that many of these thinkers combined various sources of higher law to justify the foundation of a higher law that constrains and empowers the government through a sort of consilience is consistent with the ideas here.

**Natural Law/Natural Rights:** The first source of the rule of law is that of natural law and natural rights.<sup>5</sup> The natural rights approach can be illustrated by the thought of John Locke, who also relied on social contract theory.<sup>6</sup> Locke began

---

4. I would like to thank Nelson Lund for raising this point.

5. Again, for current purposes I am glossing over the important differences between these two approaches to focus on what matters for purposes of the current discussion, namely that they both posit an external source of law that derives from “nature,” divinity, human nature, or some similar source, as compared to a hypothetical social contract or history and tradition.

6. This very brief discussion is intended to be illustrative of the concept, not to engage in a detailed dissection or analysis of Locke’s philosophy but to briefly illustrate the underlying idea. Of particular

his argument with the imaginary construct of the “state of nature,” which is one of natural liberty. In the state of nature, an individual’s right to liberty is limited only by the constraint that they do not have a right to infringe on the liberty of others. Yet, this liberty can often conflict as individuals interact and fight over scarce resources. As a result, individuals come together to form a society and establish government to enable them to exercise their respective liberties with minimal conflict. In Locke’s view, legitimate governmental authority derives from the promise of the government to protect individuals’ liberty and property from invasion by others. At the same time, this source of power is also the limit on this power—the government is provided authority to protect individual liberty but simultaneously lacks the power to exceed this authority. Locke argues it is illogical (*pace* Hobbes) to suggest that individuals would voluntarily surrender their natural rights to the government in such a manner that would authorize the government to act arbitrarily and to infringe on their liberties. In the state of nature, the individual has the right to protect himself from incursions on his liberty. But once entered into society, the individual surrenders this right to the government, which means that unless government power is limited, he would actually be worse off than before entering into that compact. Locke deems this line of reasoning incoherent and illogical.

As is well known, echoes of Locke’s natural rights theory can be found in the Declaration of Independence, which begins with the ringing assertion that men are born with “unalienable Rights” of “Life, Liberty, and the pursuit of Happiness” and that it is to preserve those rights that governments are instituted. And when government becomes violative rather than protective of those rights, its actions are illegitimate. And where repeated remonstrances for rectification of grievance are made and ignored, citizens are entitled to engage in revolution against that illegitimate authority.

**Social Contract:** A second source of authority for government is social contract theory. On this view, legitimate governmental authority arises from a fictional agreement among those subject to a political authority as to the dividing line between legitimate and illegitimate authority. In its basic form, the elements of this power could be entirely arbitrary as long as it was agreed upon by those to be governed by it.<sup>7</sup> There are a variety of manifestations of this argument, but for illustrative purposes we can focus on the analysis of economist James Buchanan.<sup>8</sup>

Buchanan’s analysis also begins with the assumption of a stateless society populated by autonomous, self-interested individuals. In such a world, property rights, contracts, and personal security are all tenuous. This makes it very difficult for individuals to engage in collective action to provide internal and external

---

note, I do not delve into the tension in Locke’s analysis raised by the ambiguous role of citizen participation in the legislative process.

7. Thus, although Locke was also a social contract theorist, his views were primarily shaped by his view of natural liberty and natural rights in the state of nature which provide an exogenous constraint on the terms of the social contract. Hence, he may be considered a natural law/natural rights theorist rather than a social contract theorist.

8. See JAMES M. BUCHANAN, *THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND LEVIATHAN* (1975).

security and other public goods. Buchanan argues that through a process of political exchange that mirrors that of economic exchange, individuals can establish social and political institutions that are empowered to act on behalf of individuals. Moreover, Buchanan distinguishes between two levels of analysis: the constitutional level and the legislative level. The constitutional level provides the general structure of government. The legislative level provides rules through the processes and is subject to the constraints established at the constitutional level. The government derives its legitimate powers from the constitutional structure established in that contract, which also constrains the legitimate power of that government. At its most fundamental level, social contract theory reflects the philosophy of legal positivism.

Although there are many interpretations of the essence of the Supreme Court's decision in the seminal case of *Marbury v. Madison*, for current shorthand purposes it illustrates the importance of social contract theory in the United States.<sup>9</sup> At bottom, Chief Justice Marshall's opinion arguably rests on the central importance of the Constitution as a *written* document that establishes the legitimate substantive powers of the federal government and the authority of the constituent branches within that government, not to concepts of natural liberty or tradition-established principles under the common law.<sup>10</sup>

**History and Tradition:** A third approach, which will be called the "conservative" version of the rule of law, derives its legitimate authority and limits from history and tradition. The clearest manifestation of the conservative version of the rule of law is the British common law, the long history and gradual development of which is seen as providing the scope of the legitimate authority of the government. But the point is more general—the "constitution" is unique to the historical circumstances of a country and its peoples, and evolves according to those distinct and unique histories. Russell Kirk claims that by their very nature, constitutions cannot be constructed from abstract concepts like natural law or natural rights and cannot arise as an act of will or consent, as posited by social contract theory. As Kirk put it, "When a written constitution endures . . . [t]hat document has been derived successfully from long-established customs, beliefs, statutes, and interests; it has reflected a political order already accepted, tacitly at least, but the dominant element among a people."<sup>11</sup> Therefore, "A constitution without deep roots is no true constitution at all."<sup>12</sup>

As will be seen, although the conservative version of the rule of law finds its roots in historical practices unique to various societies and ratified by longstanding recognition and prudential practice, those constitutions and principles that

---

9. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

10. Again, I recognize this one sentence summary of an extensive debate over the jurisprudential foundations of a case such as *Marbury* is incomplete but is intended to be illustrative of how this source of law has been influential.

11. Russell Kirk, *Burke, Hume, Blackstone, and the Constitution of the United States*, in JOHN M. OLIN LECTURES ON THE BICENTENNIAL OF THE US CONSTITUTION 11 (1987).

12. *Id.*

survive are typically the product of a competitive process of evolutionary selection among competing sets of rules and practices.<sup>13</sup> As a matter of jurisprudential philosophy, the conservative version of the rule of law is consistent with the ideas of the neglected historical school of jurisprudence<sup>14</sup> associated with thinkers such as Carleton Kemp Allen in England,<sup>15</sup> James C. Carter in the United States,<sup>16</sup> and Frederich Karl von Savigny in Germany.<sup>17</sup>

The influence of the conservative version of the rule of law is manifest both in the text and structure of the Constitution itself as well as Supreme Court constitutional jurisprudence. Much of the effective and operative language of the Supreme Court reflects common law terminology and concepts, such as the requirements of “due process,” “unreasonable searches and seizures,” “equal protection,” and the like.<sup>18</sup> In addition, the Supreme Court’s most recent jurisprudence with respect to unenumerated constitutional rights reflects the influence of tradition and common law in its relationship to the rule of law.<sup>19</sup>

The conservative version of the rule of law reflects tradition and history generally and the common law specifically. The legitimacy and operation of natural law and social contract theory have been much discussed over time. The substance and applicability of the conservative version of the rule of law is less appreciated. Or perhaps more specifically, the conservative version of the rule of law was once recognized but has been forgotten in recent times. Moreover, understanding the conservative version of the rule of law also requires rediscovering the insights of the “historical” school of jurisprudence that once served as a third great school of jurisprudence, but has now fallen into neglect and lack of understanding.

To draw an oversimplified contrast, natural law theories see law as reflecting universal and permanent truths about human nature and the nature of society that provide the legitimate source of law and to which conventional legal rules should conform. Social contract theory views law as largely conventional, arising from changing preferences and social desires, and reflecting no underlying permanent principles. Theorists of the conservative version of the rule of law reject the natural law idea that legal conventions reflect certain essential values and also reject

13. See A.C. Pritchard and Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition’s Role in Constitutional Interpretation*, 77 N.C. L. REV. 409 (1999); see also 1 FRIEDRICH A. HAYEK: RULES AND ORDER, app. A (1973).

14. See Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. L. REV. 1551 (2003); see also Todd Zywicki, *The Supreme Court “Pulled a Brodie”:* Swift and Erie in a Commercial Law Perspective, 17 N.Y.U. J. OF L. & LIBERTY 296 (2024).

15. See generally CARLTON KEMP ALLEN, *LAW IN THE MAKING* (7th ed. 1967).

16. See James Bernard Murphy, *James C. Carter’s Natural Law Theory of Custom*, in THE PHILOSOPHY OF COMMON LAW 89 (2014).

17. See Robert E. Rodes, *On the Historical School of Jurisprudence*, 49 AM. J. JURIS. 165 (2004).

18. “Kirk argues that the ‘Jeffersonian Bill of Rights amendments were simply a reassertion of common-law principles.’” Daniel Pitt, *Common Law Conservatism*, LAW & LIBERTY (Oct. 29, 2024), <https://lawliberty.org/common-law-conservatism/> [perma.cc/YUE6-XA6W].

19. See generally *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215 (2022); see also Pritchard and Zywicki, *supra* note 13.

the social contract theory's logic that legal rules are essentially arbitrary. The conservative rule of law is *conventional*, but not *arbitrary*. Although different societies' legal and constitutional orders vary in their details, well-functioning legal systems that operate consistent with the rule of law contain essential common elements. In the Anglo-American tradition, the conservative rule of law at the highest level reflects the evolving traditions of those societies as manifested primarily in the common law.

I will develop the ideas of the rule of law through examination of several key thinkers—notably David Hume, Edmund Burke, and Russell Kirk (as well as additional thinkers such as F.A. Hayek and Roger Scruton). Then, I will turn to the distinctive contribution of the British common law to the development of the conservative version of the rule of law.

## II. DAVID HUME: THE RULE OF LAW AS STRUGGLE AGAINST ARBITRARY AUTHORITY

David Hume is a foundational figure in establishing a conservative version of the rule of law. Hume is well known for his critique of the fiction of a “social contract” as the basis for establishing legitimate government. It is also evident that Hume is skeptical of the ideas of natural rights or natural law as established by appeal to human reason. Instead, Hume's notion is that the rule of law emerges through *struggle*—that it is the ability of the governed to impose their will on the sovereign in order to force rulers to accept and obey limits on their powers. Forcing a government to accept limits on its authority is not something that is done without resistance. Imposing such limits thus requires a certain degree of opportunism, taking advantage of temporary weakness to win long-standing liberty and restraints on power. And it requires a certain diligence and attention to institutional detail to maintain those limits. Thus, while there may be certain patterns of successful governance under the rule of law (such as separation of powers), the details of such arrangements will depend substantially on local history and other conditions. History, not abstract reasoning or conscious consent, defines both the foundation of legitimate governmental authority as well as its limits.

Hume's primary target is social contract theory, particularly John Locke's conception. Hume notes the obvious point that there is no historical evidence that any such social contract ever occurred. Even most of the contemporary world rejects the social contract framework of governmental legitimacy. Instead, princes rule in most of the world, “claim[ing] their subjects as their property, and assert their independent right of sovereignty, from conquest or succession.” And in turn, their people acknowledge the authority of their prince simply because they were born into obedience of a certain sovereign. Almost all governments “which exist at present, or of which there remains any record in story,” were founded “either on usurpation or conquest, or both, without any pretense of a fair consent or voluntary subjection of the people.”<sup>20</sup>

---

20. DAVID HUME, *Of the Original Contract*, in *ESSAYS: MORAL, POLITICAL, AND LITERARY* 465, 471 (Liberty Fund Ed., 1987).

How then are the rule of law and limits on the arbitrary actions of government established? Hume argues that there is inherent in every government “a perpetual intestine struggle, open or secret, between AUTHORITY and LIBERTY; and neither of them can ever absolutely prevail in the contest.”<sup>21</sup> Because this tenuous balance is struck through struggle, not abstract reasoning, the precise nature of the balance will vary from one polity to another. The particular issues on which the government will be constrained may vary as well. For example, “The sultan is master of the life and fortune of any individual; but will not be permitted to impose new taxes on his subjects: a French monarch can impose taxes at pleasure; but would find it dangerous to attempt the lives and fortunes of individuals.”<sup>22</sup> Religious beliefs in a given country will also affect the degree of resistance to a civil authority.

More concretely, this view that the establishment of the rule of law arises from struggle within various historical and political contexts implies that the conventional approach to the rule of law is inverted. Philosophical approaches to the rule of law typically begin by positing the recognition of a need among the people for some degree of constraint on the government’s exercise of its authority, which is then followed by more concrete institutional design of how to accomplish this. Hume, however, suggests that this reasoning is exactly backward—instead, to the extent that individuals and groups can succeed in solving collective action problems to resist a ruler, they can force limits upon him.<sup>23</sup> Only then, after the ruler’s arbitrary will has been resisted in practice, do those individuals develop a reasoned justification for the restrictions already imposed on the ruler and identify principles that justify further advancement of their interests at the expense of the ruler.<sup>24</sup>

The rule of law thus emerges as a set of political compromises among different constituencies, beginning with the acceptance of those rules and practices that serve best to address collective action problems. The importance of historical contingency explains why the rule of law emerges at different times in different places, and particularly why it emerged first in the western world. Moreover, this model is largely confirmed by historical analysis of those countries that have successfully developed the rule of law.<sup>25</sup>

The historical development of the Magna Carta in 1215 illustrates this notion. Often identified as the first written “constitution” of sorts, the Magna Carta imposed limits on the arbitrary rule of the King by the barons. But notably, the purpose of the Magna Carta was not to protect ordinary citizens—instead, it was a struggle for power between two sets of elites: the King and those who supported

---

21. DAVID HUME, *Of the Origin of Government*, in *ESSAYS: MORAL, POLITICAL, AND LITERARY* 37, 40 (Liberty Fund Ed., 1987).

22. *Id.* at 40.

23. HUME, *supra* note 20, at 471.

24. See Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 2456 (1997).

25. Ejan Mackaay provides a workable set of necessary conditions for constitutionalism and the rule of law to emerge as a historical reality and then workable philosophical concept. See Ejan Mackaay, *The Emergence of Constitutional Rights*, 8 CONST. POL. ECON. 15 (1997).

him on one side and the barons attempting to protect their traditional powers and prerogatives on the other. Nevertheless, the barons sought to gain political support for their cause among the emerging merchant class against the King by providing in Clause 9 of Magna Carta for the “ancient liberties and free customs” of the city of London and all other cities, boroughs, towns, and ports (as well as the barons of the Cinque Ports).

Shortly after acceding to the Magna Carta, however, King John attempted to repudiate it on the basis that it was signed under duress. He persuaded Pope Innocent III to annul the document, and Innocent threatened with excommunication anyone who sought to enforce it.<sup>26</sup> This reignited the embers of civil war. In response, the barons rebelled and formed an alliance with King Philip II of France, who made plans to invade England. Eventually, Prince Louis entered London and the alliance of the French monarchy and British barons controlled much of England. King John sought to flee but in so doing contracted dysentery and died, leaving the throne to his nine-year-old son, Henry III. Upon King Henry III’s accession to the throne in 1216, Henry reissued the Magna Carta (with a handful of cuts from the original) as a means of trying to regain the loyalty of rebellious barons who were supporting the French King. In 1217, when the King sought more money, the barons insisted on reissuing Magna Carta again with some additional protections for the barons. In 1225, when the King again needed money to mount a defense against another feared French invasion, the King again reissued Magna Carta in exchange for the barons permitting a tax on movable goods. Throughout, political necessity was the primary driver of this decision.

Political realities also may also explain why the Magna Carta was inspired by the barons, structured as a written charter, and imposed at the point of a sword. This was in distinction to the emergence of the rule of law in Europe, which emerged through a different process.

As discussed by Nathan Rosenberg and L.E. Birdzell, Jr. in their profound economic history, *How the West Grew Rich*, the emergence of constitutional limits in continental Europe emerged from the fragmented political order of Western Europe in the Middle Ages.<sup>27</sup> This collection of small principalities led to a perpetual state of war and potential conflict among regions, which, in turn, created a perpetual need for funds to sustain their military enterprises. Initially, princes would meet that need simply by requisitioning the resources of their subjects, i.e., confiscating their property without compensation.

This threat created incentives for those who could hold their property in movable and concealable form to do so, and the fragmented political order of Europe into many small principalities and autonomous towns made it easy for merchants

---

26. See Jim Powell, *Getting King John to Sign Magna Carta Was Only Half The Battle*, CATO AT LIBERTY (June 4, 2015), <https://www.cato.org/blog/getting-king-john-sign-magna-carta-was-only-half-battle> [https://perma.cc/LX4X-BVMB].

27. NATHAN ROSENBERG & L.E. BIRDZELL, *HOW THE WEST GREW RICH: THE ECONOMIC TRANSFORMATION OF THE INDUSTRIAL WORLD* (1986); See Desiree Desierto, Jacob Hall, & Mark Koyama, *Magna Carta* (GMU Working Paper in Econ., Working Paper No. 23–34, 2024).

to relocate with their goods to new locations.<sup>28</sup> Rosenberg and Birdzell write, “The practical exercise of political power over the merchant class was circumscribed by physical limits to the ability of officials to suppress smuggling and piracy and by the possibility that sufficiently disgruntled capitalists might move their enterprises and capital to another country.”<sup>29</sup> The development of abstract property such as Bills of Exchange made it even easier to conceal one’s wealth and to transport it in negotiable form throughout Europe. Political rulers soon learned that it would be easier and more profitable in the long run to limit their power to arbitrarily expropriate property through a promise to pay indemnification and to permit judicial processes rather than arbitrary seizure.<sup>30</sup> Even more important, princes came to recognize the value of regularized taxation according to stable rates, which provided security to merchants and encouraged them to engage in greater levels of investment, leading eventually to fixed, immovable capital investments (such as factories).

By contrast, landowners such as the English barons remained susceptible to confiscation or seizure because they held their property in immovable forms—land, stored crops, farm animals, farm buildings, and dwellings.<sup>31</sup> As a result, the option of relocating to a more friendly jurisdiction or simply concealing one’s wealth (such as by holding and hiding Bills of Exchange) was not an option to evade the ruler’s seizure. Instead, they insisted on forcing an agreement upon the King in exchange for the King’s respect for their property rights. As noted, subsequent reissuances of the Magna Carta were insisted upon as a condition for permitting the King to impose new taxes to fund military necessity, thereby reasserting that the King’s legitimate authority derives from and is constrained by the common law English “constitution” that required consent to imposition of taxes.

These developments were driven by the economic realities of the prince’s self-interested need for funds and the countervailing power of merchants and aristocrats to force the King to concede to restraints on his authority to tax instead of seizing property. The establishment of property rights secure from arbitrary government seizure and regularized taxation was a by-product of the constraints imposed on the King, whether by the ability to conceal and abscond with valuable resources or to force the King to respect property rights at the point of sword. Moreover, because seizure historically had been used to punish political rivals, the threat of expropriation chilled the free exercise of political rights such as freedom of speech. Thus, constitutional restraints on property seizure and taxation also protected free speech and other civil liberties. By the seventeenth century, the British mercantile class had amassed sufficient political power as judges, municipal officials, and members of the House of Commons so as to

---

28. *Id.* at 120.

29. *Id.* at 121.

30. DAVID LANDES, *THE UNBOUND PROMETHEUS* 16–17 (1969).

31. See Desierto, Hall, & Koyama, *supra* note 27.

defeat efforts by the Stuart kings to reimpose the Crown's authority to seek funds and impose regulations without the support of Parliament.<sup>32</sup>

As Rosenberg and Birdzell observe, the emergence of property rights and due process restraints that restricted governmental ability to engage in arbitrary exactions were important to the emergence of economic growth as well as constitutional liberties. However, "before the nineteenth century[,] instances where governments adopted such policies as a matter of deliberate choice, as distinguished from having the policies thrust upon them by armed revolt of the burghers, [were] rare."<sup>33</sup> Where such policies were adopted, it was to further the ruler's need to increase revenues. As a result, they conclude, the establishment of such policies was a "lucky accident," not a conscious policy choice to increase individual liberty. This set of political features was unique to Western Europe; however, as the leaders of the great empires of Asia and the Middle East were able to persist in arbitrary seizures of property, thereby not only rendering those regions economically stagnant but also eliminating the necessary political conditions for the emergence of the rule of law and constitutional rights more generally.

### III. EDMUND BURKE AND THE RULE OF LAW AS THE CHARACTER OF A PEOPLE

Edmund Burke is best known, of course, for his forceful and prescient condemnation of the French Revolution.<sup>34</sup> Burke's analysis can be read in a variety of ways. But in the terms of the argument here, the eventual tragic and bloody failure of the French Revolution, and the sequential democratic and autocratic tyranny, illustrate the importance of the rule of law to the maintenance of a free society.

Less appreciated is Burke's analysis of the American Revolution a mere decade earlier.<sup>35</sup> To be sure, the unexpected juxtaposition of his defense of conciliation with the colonies with his hostility toward the French revolutionary government is often remarked. But the details of Burke's analysis of the American Revolution, and what it illustrates about the conservative version of the rule of law, are less examined. A detailed analysis of Burke's approach toward the nature of American liberty is informative about the conservative rule of law.

Burke's speech on conciliation with the colonies addresses the practical question of how the British government should respond to the insubordination of the colonies, particularly with respect to taxation. The crux of the issue is the moral and legal legitimacy, as well as the practical ability, of the Crown's effort to impose taxes on the colonies without their representation in Parliament. In arguing his case to Parliament, however, Burke exemplifies a particular understanding of the nature of constitutions, liberty, and the rule of law.

---

32. JOHN U. NEF, *WAR AND HUMAN PROGRESS* 15 (1950) (quoted in ROSENBERG & BIRDZELL, *supra* note 27, at 122).

33. ROSENBERG AND BIRDZELL, *supra* note 27, at 122.

34. See generally EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* (1790).

35. See Edmund Burke, *Speech Moving His Resolutions for Conciliation with the Colonies* (Mar. 22, 1775), in *THE PAMPHLET DEBATE ON THE AMERICAN QUESTION IN GREAT BRITAIN, 1764-1776: A DIGITAL COLLECTION* (Jack P. Greene ed., 2003).

For Burke, as for Hume, the roots of constitutional government are grounded in a community's unique history, traditions, and character of those who comprise it. Burke contends the foundation of legitimate government is not abstract reason to which a government must conform to be legitimate or a conscious creation of a social contract that defines the government's legitimate scope of substantive authority. Burke sees such reasoning processes as backwards—rather, it is through the shared experience of living together as a community and solving the practical problems in which a community finds itself that provides the first motivation of government. Through this process of practical experimentation and adjustment, communities come to establish practices and expectations of how collective decisions will be made and how individuals are expected to interact with one another.

Only after these practices and expectations are established do the concepts of legitimate and illegitimate behavior take on meaning. The rule of law, then, consists of the government honoring these shared expectations of the community with respect to its procedural actions and substantive authority (and limits on its authority). It is adherence to established practices and expectations that empowers the government to act but also constrains it to act according to those established practices.

For Burke, then, the specific content of the rule of law will vary according to era, community, and other factors. But as a general matter, the rule of law can be seen as honoring parties' legitimate expectations (to use Hayek's concept) as to the scope of freedom under the rule of law. Moreover, the practical effectiveness of the political and legal *institutional* structures and constraints that require the government to obey the law are inextricably intertwined with the "higher law" concepts that constrain the government from acting. Without practical means to vindicate the rule of law on behalf of the citizens there is no meaningful notion of the rule of law and without effective means of imposing an overreaching will on the people the government will have no ability to act illegitimately. Thus, it is *through* resolution of the ongoing conflict between the government and the governed and the resolution of private disputes between individuals themselves that the content of the law is formed.

As with Hume, Burke suggests that the rule of law must first be established as a reality to be lived in practice and that only later does this practice become generally understood, articulated, and justified. In this important sense, the conservative version of the rule of law fundamentally differs from natural rights and social contract theories, where the "higher law" foundations of the rule of law are established first and then subsequent legal practice is justified and legitimated by its concordance with those principles.<sup>36</sup> In the conservative version of the rule of law, this process is reversed—actual practice begets subsequent explanation and systemization. Or perhaps more precisely, there is an ongoing iterative process of

---

36. Buchanan and Tullock's seminal work, *The Calculus of Consent*, differentiates the "constitutional" level of bargaining, which establishes the framework for the exercise of government power, from the "legislative" level, which occurs within the constitutional framework and is necessarily second. See generally JAMES M. BUCHANAN AND GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1958).

practice and explanation as evolving principles develop themselves and become more concrete over time through society's lived experiences.<sup>37</sup> As a result, the processes by which the rule of law and constitutionalism emerge will vary among different political communities depending on the variety of their experiences, histories, traditions, and character.

Burke's approach can be illustrated by his argument for conciliation with the colonies. Burke's task in the speech is to explain to his colleagues why they fundamentally have no choice but to try to reach some sort of accord with the colonies. The essence of America's demand in 1775 is for representation in Parliament, "No taxation without representation." Burke's remarks are directed toward fellow members of Parliament who seek to dismiss the colonies' demands out of hand, and particularly toward those who believe that Britain can impose its will on the uppity colonies through military force and more diligent administration. Setting aside the validity of Britain's claims to rule America by fiat, Burke's argument is addressed to the reality that this simply is not possible in practice and that Britain lacks justification for such an approach in the eyes of the colonists. Burke's two major arguments are pragmatic: First, that the population of America is growing too rapidly and expanding west too quickly for Britain to exercise effective control from Britain. Greater control can only occur by reducing population growth, which is both implausible and undesirable from the perspective of the British Empire. Second, he points to the growing economic power of America and Britain's growing dependence on the colonies' commercial development, particularly its agriculture and fisheries. Crushing America's political furor would require crushing its commercial growth as well, thereby defeating the purpose of retaining America as part of the Empire in the first place. Breaking the American political spirit of individualism would be self-defeating for Britain because "it is the spirit that has made the country."

In addition to the realities of population growth and its commerce, Burke attributes his conclusion that Britain will be unable to impose its will on America by force to the "temper and character" of the Americans. "This fierce spirit of liberty is stronger in the English colonies probably than in any other people of the earth; and this from a great variety of powerful causes; which, to understand the true temper of their minds, and the direction which this spirit takes, it will not be amiss to lay open somewhat more largely." Burke lays out those "causes" that have shaped the fierce spirit of liberty and identifies "six capital sources[:] of descent; of form of government; of religion in the northern provinces; of manners in the southern; of education; of the remoteness of situation from the first mover of government; from all these causes a fierce spirit of liberty has grown up."<sup>38</sup> Consider each in turn.

---

37. As one possible example, societies that are located in geographic regions that are more prone to nonzoonotic (person-to-person) disease outbreaks may tend to evolve social norms and political practices that are more deferential toward the exercise of governmental authority than those that are not. See, e.g., Leor Zmigrod, et al., *The Psychological and Socio-Political Consequences of Infectious Diseases: Authoritarianism, Governance, and Nonzoonotic (Human-to-Human) Infection Transmission*, 9 J. OF SOC. & POL. PSYCHOLOGY 456 (2021).

38. Burke, *supra* note 34.

First, of “descent.” Burke’s first observation is that the colonists “are descendants of Englishmen.”<sup>39</sup> Moreover, not only are they Englishmen, those who emigrated to America when the country was being formed left England “when this part of your character was most predominant; and they took this bias and direction the moment they parted from your hands.”<sup>40</sup> As a result, they not only took with them a spirit of liberty, they retained “Liberty according to English ideas and on English principles. *Abstract Liberty, like other mere abstractions, is not to be found.*”<sup>41</sup> The shaping of the meaning of liberty comes from particular historical and cultural context.

This, Burke argues, is why the precise “point” of the dispute between America and Britain took the form of a fight over *taxation*, which Burke notes was the fundamental issue on which Parliament wrested arbitrary authority from the Crown.<sup>42</sup> Thus, the point on which the conflict between British authority and the colonies arose was over such concrete issues as the Tea Tax (that prompted the Boston Tea Party) and the Stamp Tax as well as violations of other common law rights. Burke argues that the character of the disputes over the scope of liberty and the legitimate actions of government will vary in different political communities:

It happened, you know, Sir, that the great contests for freedom in this country were from the earliest times chiefly upon the question of taxing. Most of the contests in the ancient commonwealths turned primarily on the right of election of magistrates; or on the balance among the several orders of the state. The question of money was not with them so immediate. But in England it was otherwise.<sup>43</sup>

Burke then notes that in arguing against the injustice of Britain’s efforts to impose taxation without representation, the colonists were simply using Britain’s own constitutional arguments against it: “Their lover of liberty, as with you, fixed and attached on this specific point of taxing. Liberty might be safe, or might be endangered, in twenty other particulars without their being much pleased or alarmed. Here they felt its pulse; and as they found that beat, they thought themselves sick or sound.”<sup>44</sup> Moreover, while Parliament might protest that those principles do not apply to the case of the American colonies, Burke warns that once a principle is established, it takes on a life of its own and can be turned against those who first established them. “It is not easy indeed to make a monopoly of

---

39. *Id.*

40. *Id.*

41. *Id.*

42. An insight missed by the Supreme Court in its recent decision in *Consumer Financial Protection Bureau v. Community Financial Services Association*, 601 U.S. 416 (2024), where the Supreme Court upheld the power of an Executive Agency to permanently circumvent Congress’s Appropriations power under the Constitution. See Todd Zywicki, *The Supreme Court’s Restoration of Executive Prerogative*, FUSION (May 23, 2024), <https://www.fusionaier.org/post/the-supreme-court-s-restoration-of-executive-prerogative> [https://perma.cc/77DP-4LFF].

43. See Burke, *supra* note 34.

44. See *id.*

theorems and corollaries. The fact is that they [i.e., the Americans] did thus apply those general arguments; and your mode of governing them, whether through lenity or indolence, through wisdom or mistake, confirmed them in the imagination, that they, as well as you, had an interest in these common principles.”

Second, Burke points to the form of government in the colonies. During this period of British neglect of the colonies, they grew populous and prosperous without the need for British authority and support. In this vacuum of authority, highly populist provincial legislative assemblies arose that assumed governance powers and responsibilities that Britain otherwise might have tried to perform. Now that these popular assemblies had become entrenched and proven effective, those who had been empowered by the right of self-governance were reluctant to surrender any authority that subjected the power of those assemblies to some other political power.

Third, Burke turns to the religious character of the colonists. The northeastern colonies were founded and populated by religious dissenters. Because of this history, these colonists were filled with a fierce spirit of natural liberty that made them object to any efforts to infringe upon that liberty. As Burke notes, those settled in the Northeast were not just Protestants, a dissenting strand of religion, but the Protestant dissenters from the original Protestants. “The people are protestants; and of that kind which is the most adverse to all implicit submission of mind and opinion. *This is a persuasion not only favourable to liberty, but built upon it.*”<sup>45</sup> In noting that this particular religious spirit made members of these religions skeptical of government infringement on liberty, particularly religious liberty, Burke compares this to Roman Catholicism, in which the church “is at least coeval with most of the governments where it prevails,” received financial support from those governments, and most importantly, served a legitimating function for the government authorities. Likewise, the Church of England from its “cradle” was nurtured by the government.

Of the religions in New England, he remarks, “the dissenting interests have sprung up in direct opposition to all the ordinary powers of the world; and could justify that opposition only on a strong claim to natural liberty. Their very existence depended on the powerful and unremitted assertion of that claim. All Protestantism, even the most cold and passive, is a sort of dissent. But the religion most prevalent in our northern colonies is a refinement on the principle of resistance; *it is the dissidence of dissent, and the Protestantism of the Protestant religion.*”<sup>46</sup>

Moreover, Burke notes that those who emigrated to America left England when the spirit of religious liberty was high “and in the emigrants was the highest of all.” Moreover, while those original immigrants had been followed with many from other countries, those too have largely been dissenters and thus brought with them a similarly feisty attitude toward liberty.

But what of the southern colonies? They belonged predominantly to the Church of England and, indeed, the Church of England was the established religion in the

---

45. *See id.* (emphasis added).

46. *Id.* (emphasis added).

South. Thus, it was not the religious background of the South that accounted for its spirit of liberty. It was instead the presence of slavery, which “makes the spirit of liberty still more high and haughty than those in the North-ward.”<sup>47</sup> Burke argues that where slavery exists, “those who are free, are by far the most proud and jealous of their freedom. Freedom is to them not only an enjoyment, but a kind of rank and privilege.” The constant reminder of servitude, Burke observes, produces a stubbornness in resisting even the slightest infringements on their liberty as assaults on their dignity. Burke hastens to add, “I do not mean, Sir, to commend the superior morality of this sentiment, which has at least as much pride as virtue in it; but I cannot alter the nature of man. The fact is so. . . .”<sup>48</sup> Where slavery is present, “the haughtiness of domination combines with the spirit of freedom, fortifies it, and renders it invincible.”

Fifth, Burke points to the education of the colonists. But not the education gained in schooling. Instead, Burke argues that in the colonies there was a fascination with the study of law: “In no country perhaps in the world is the law so general a study.”<sup>49</sup> And it was not just that there were many lawyers and that the lawyers “take the lead” in political affairs of the colonies and in the Continental Congress. Instead, law was an object of study by almost all who read. Burke observes that according to an “eminent Bookseller” “that in no branch of his business, after tracts of popular devotion, were so many books as those on the law exported to the plantations.” More recently the colonies had started printing their own copies. And he remarks, “I hear that they have sold nearly as many of Blackstone’s Commentaries in America as in England.”<sup>50</sup>

Legal education, Burke argues, makes individuals “stubborn and litigious”—“*Abeunt studia in mores*.”<sup>51</sup> The study of law “renders men acute, inquisitive, dexterous, prompt in attack, ready in defence, full of resources. In other countries, the people, more simple, and of a less mercurial cast, judge of an ill principle in government only by an actual grievance; here they anticipate the evil, and judge of the pressure of the grievance by the badness of the principle. They augur misgovernment at a distance; and snuff the approach of tyranny in every tainted breeze.”

Burke notes the final reality that feeds the “disobedient spirit in the Colonies”—the reality of distance. “Three thousand miles of ocean lie between you and them. No contrivance can prevent the effect of this distance in weakening government.”<sup>52</sup> It was simply not possible for Britain to even govern the colonies, much less control them effectively, from Britain when months might pass between the issuance of an order and its execution.

47. *See id.*

48. *See id.*

49. *See id.*

50. In his speech, Burke refers to a letter from General Gage to Parliament where Gage comments on the legal acumen of the colonists. I have been unable to verify the identity of that letter or to find a copy of it.

51. Translated as “Studies pass into character.”

52. *See* Burke, *supra* note 34.

As a result of these six features that have shaped the character of the American people, Burke argues that Britain needed to accept the reality that it simply could not impose its will on the Americans through the force of arms: “Then, Sir, from these six capital sources; of descent; of form of government; of religion in the northern provinces; of manners in the southern; of education; of the remoteness of situation from the first mover of government; from all these causes a fierce spirit of liberty has grown up. It has grown with the growth of the people in your colonies, and increased with the increase of their wealth; a spirit, that unhappily meeting with an exercise of power in England, which, however lawful, is not reconcilable to any ideas of liberty, much less with theirs, has kindled this flame that is ready to consume us.”<sup>53</sup>

The effort to impose its will on the colonies was also doomed because the colonists were descendants of English settlers and could appeal to notions of English liberty. In fact, England could deny the claims of the colonists only by trying to change the character of the people or denying the value of liberty itself, and in so doing deny Britain’s own legacy. But this would require the English to deny the value of English liberty and denigrate the English character. As Burke observes, “An Englishman is the unfittest person on earth, to argue another Englishman into slavery.”<sup>54</sup>

For Burke it was precisely the home-grown nature of American liberty as rooted in the traditions and character of the American people that imposes limits on England’s authority and ability to suppress the American people. It is not premised in abstract notions of liberty (such as natural rights theory) or “any of the ordinary artificial media of a positive constitution. It was not a manufacture ready formed, and transmitted to them in that condition from England.” The Americans adapted and applied the principles of English constitutionalism developed over centuries of struggle to the unique context of America. Their sharp point of disagreement was on the specific issue of taxation—one that has served as the flashpoint for such disputes throughout English constitutional history, in contrast to other countries that have seen other issues as the point of dispute. In addition, the realities of the emergence of colonial legislatures that solved most local problems and the distance from England (which rendered British authority slow and ineffective) rendered imperial governance both unnecessary and unwanted.

In Burke, then, we see both prongs of the argument for the rule of law. First, an appeal to a higher law (here the established principles of British liberty and constitutionalism as developed over centuries of struggle, especially regarding the power of taxation). And second, a real-world ability to enforce those constraints on the British government through a combination of the stubborn character of the American people, the nature of their education, their growing population, wealth, and dependence of England on the economic production of the colonies, and the realities of distance that rendered it impossible for Britain to rule effectively without

---

53. *Id.*

54. *See id.*

the voluntary cooperation of the colonies. To repeat Burke's admonition, "They are therefore not only devoted to liberty, but to liberty according to English ideas, and on English principles. Abstract liberty, like other mere abstractions, is not to be found."<sup>55</sup>

#### IV. RUSSELL KIRK: TRADITION AND THE COMMON LAW

A contemporary advocate of the conservative version of the rule of law was Russell Kirk. Although a Burkean, Kirk did not in fact engage in the deep historically-contingent style of reasoning of Burke. Instead, Kirk's articulation of the rule of law is somewhat more abstract—Kirk contends that the foundation of the rule of law in the Anglo-American tradition is primarily rooted in the common law and its unique characteristics, and that it was the common law, not abstract philosophical theorizing, that was the primary influence that shaped the United States Constitution.<sup>56</sup> Other recent scholars have pursued a similar line of argument.

The influence of William Blackstone on the Framers was unquestionably immense. As noted by Burke, Blackstone's *Commentaries on The Laws of England* were widely read in the colonies and their total sales in America nearly equaled those in Britain, despite the disparity in population. Blackstone was cited 115 times by the Founders in the debates during the ratification debates over the Constitution, more frequently than any other individual writer except Montesquieu.<sup>57</sup> This is not surprising in light of the number of lawyers in attendance at the convention.

Moreover, unlike the abstract aspirational principles of the Declaration of Independence, the Constitution is grounded in common law concepts and verbiage. Well-established principles of English common law provide much of the backbone of the document as well as the Bill of Rights: Bills of attainder, due process, trial by jury, the prohibition on "unreasonable" search and seizure, and onward. Kirk's view is that such grounding in the common law is a necessary condition for the implementation of the rule of law as abstract theorizing is inadequate to provide resolution to particular issues of law and inadequate to constrain arbitrary governmental power under law.

Kirk argues that true constitutions—those that define the legitimate powers of the government and structure the relationship between individuals and the government—are written in the history and character of a country and its people, not some sort of social contract or conscious choice:

Constitutions are something more than lines written upon parchment. When a written constitution endures—and most written constitutions have not been long

---

55. *Id.*

56. See Kirk, *supra* note 11.

57. See *Political Writers and the Founders*, CENTER FOR THE STUDY OF THE AMERICAN CONSTITUTION (May 3, 2023) <https://csac.history.wisc.edu/2023/05/03/political-writers-and-the-founders/#:~:text=List%20of%20Political%20Writers%20Cited,John%20Adams> [https://perma.cc/3L47-B62C] (based on a review of the index to the *Documentary History of the Ratification of the Constitution and the Bill of Rights*).

for this world—that document has been derived successfully from long-established customs, beliefs, statutes, and interests; it has reflected a political order already accepted, tacitly at least by the dominant element among a people.

True constitutions are not invented: they grow. The Constitution of the United States has endured for two centuries because it arose from the healthy roots of more than a century of colonial experience and several centuries of British experience. For the most part, the Constitution of 1798 expressed formally what already was accepted, practiced, and believed in by the people of the new republic. A constitution without deep roots is no true constitution at all.<sup>58</sup>

According to Kirk, it is precisely because the American Constitution retained its organic continuity with the history of the unwritten British constitution that it has persevered.<sup>59</sup> This unarticulated shared sense of “justice” among the people of a community is pre-constitutional and remains a vibrant extra-constitutional source of authority and constraint over time. However, while these traditional beliefs shape the constitutional order, the constitutional order over time also shapes the people’s understanding of the rule of law in an ongoing dialogue.

Kirk roots his theory of conservative constitutionalism in the English common law. Kirk was not trained as a lawyer and his articulation of the importance of the common law to the development of the rule of law is not well-developed. Moreover, Kirk’s obsessive need to try to tie the Framers directly to the influence of Burke is strained and distracting from the root of his argument, which is that the rule of law is largely rooted in unarticulated and unwritten norms, traditions, practices, and the shared expectations of a political community, rather than in abstract theories of natural law or fictional, rationalistic social contracts.<sup>60</sup> The most extensive discussion of Kirk’s views on the relevance of the common law to understanding constitutionalism is his essay “The Supremacy of Law” in the volume *America’s British Culture*.<sup>61</sup>

Kirk’s argument regarding the relationship of the common law to the rule of law tracks the argument developed here. Kirk emphasizes that the fundamental premise of the English constitution is the supremacy of law; that the governing authorities (notably the King) are both empowered and constrained by “law.” He writes, “The common law is founded upon the assertion of the supremacy of law; that is, as Bracton and other medieval scholars in the law expressed it, even the King himself was ‘under the law.’”<sup>62</sup> Kirk then quotes legal historian Arthur Hogue, who identifies this tradition as embodying rule of law values: “The supremacy of law implies that all agencies of government must act upon established

---

58. Kirk, *supra* note 11, at 1–2.

59. See Russell Kirk, *Edmund Burke and the Constitution*, THE IMAGINATIVE CONSERVATIVE (May 22, 2012) <https://theimaginativeconservative.org/2012/05/russell-kirk-edmund-burke-and-constitution.html> [<https://perma.cc/E8TP-W6PV>]. See also Pritchard and Zywicki, *supra* note 13, at 466.

60. As Kirk acknowledges, Burke’s name is not found in the records of the debates at the Constitutional Convention nor is it mentioned in *The Federalist*. There also is no record of Burke having extensively discussed the American Constitution. See Kirk, *supra* note 11.

61. See RUSSELL KIRK, *The Supremacy of Law*, in AMERICA’S BRITISH CULTURE 29 (1994).

62. *Id.* at 31.

principles; even the highest bodies and officials are not permitted to act upon arbitrary will or caprice.”<sup>63</sup> Kirk notes that acceptance of the concept of equality under the law found particularly fertile soil in America, from which kings, peers, and bishops were remote abstractions.

Kirk draws on the great English theorist A.V. Dicey to elaborate the principles of the common law version of the rule of law. First, Dicey notes that no man can be punished or have his liberty or property seized by the executive without authorization of an ordinary court of the land.<sup>64</sup> Dicey stresses the uniqueness of this principle within the Anglo-American common law, being “*peculiar to England*, or to those countries which, like the United States of America, have inherited English traditions” whereas other places, including Western Europe permit great executive discretionary authority to infringe on individual liberty and property.<sup>65</sup> Second, every individual is subject to the same generally applicable laws of the land and there are not different systems of law for different individuals based on status or other characteristic.<sup>66</sup>

Third, and most important for the current discussion, Kirk points to the unwritten, evolutionary, tradition-based roots of the common law as the source of the rule of law. He writes:

The third conception or attribute of the rule of law is that both the “unwritten” British constitution and the written American constitution grew out of old custom, usage, and political tradition, and from judges’ common-law decisions. In other words, the rule of law was not ordained in the formal constitution; rather, the constitution itself is an outgrowth of the rule of law. In the American constitution, as in the British, one finds “[an] absence of those declarations or definitions of rights so dear to foreign constitutionalists.” Mere constitutional declarations of rights are worthless unless founded upon “provision of adequate remedies by which the rights they proclaimed might be enforced.” . . . *To flourish, the rule of law requires deep roots; mere parchment constitutions are a snare and a delusion.*<sup>67</sup>

Hayek makes similar observations about the foundations of the rule of law in *The Constitution of Liberty*. Hayek argues that the rule of law fundamentally is rooted in extra-constitutional norms and beliefs, not in a written constitution:

Constitutional provisions may make infringements of the rule of law more difficult. They may help to prevent inadvertent infringements by routine legislation. But the ultimate legislator can never limit his own powers by law,

---

63. ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 190 (1985). Hogue elaborates further components of the substance of the rule of the law, such as a requirement that decisions must be “guided by generally accepted principles and sound reason,” which I have elsewhere characterized as requiring decision-making according to “neutral principles.” See Zywicki, *supra* note 14.

64. See Kirk, *supra* note 11, at 43.

65. *Id.* at 43 (quoting A.V. Dicey).

66. *Id.* at 43–44.

67. *Id.* at 44 (emphasis added).

because he can always abrogate any law he has made. The rule of law is therefore not a rule of the law, but a rule concerning what the law ought to be, a meta-legal doctrine or a political ideal. It will be effective only in so far as the legislator feels bound by it. In a democracy this means that it will not prevail unless it forms part of the moral tradition of the community, a common ideal shared and unquestioningly accepted by the majority.<sup>68</sup>

Hayek develops the idea still further in *Law, Legislation, and Liberty*, in his radical reconceptualization of the rule of law as grounded in law that is derived from principles of spontaneous order, as is the common law, and not made through conscious effort of a sovereign. In contrasting his preferred legal order with that of legal positivism, he writes:

To appreciate the significance of this it is necessary to free ourselves wholly from the erroneous conception that there can be first a society which then gives itself laws. . . . It is only as a result of individual observing certain common rules that a group of men can live together in those orderly relations which we call a society. It would therefore probably be nearer the truth if we inverted the plausible and widely held idea that law derives from authority and rather thought of all authority as deriving from law—not in the sense that the law appoints authority, but in the sense that authority commands obedience because (and so long as) it enforces a law presumed to exist independently of it and resting on a diffused opinion of what is right.<sup>69</sup> Not all law can therefore be the product of legislation; but power to legislate presupposes the recognition of some common rules; and such rules which underlie the power to legislate may also limit that power.<sup>70</sup>

More recently, British philosopher Roger Scruton has illuminated the dual nature of common law conservatism as both empowering and constraining legitimate exercise of governmental authority.<sup>71</sup> Scruton argues that the distinguishing characteristic of English common law is that judges claim to be *discovering* the law in the reasoning and history of the common law, not to be *creating* new law as in a civil law system or under a positivist view of common law judging. Scruton argues, “And although the sovereign must enforce the law, it is not the sovereign who dictates it. On the contrary, it has been a principle here [i.e., in England] since the earliest Middle Ages that in it is the law that appoints the sovereign and not the sovereign who makes the law. The oath sworn by our sovereigns is an oath of obedience, an undertaking to honour and uphold the law by which they rule.”<sup>72</sup> True law in the English sense is neither a “command issued

---

68. F.A. HAYEK, THE CONSTITUTION OF LIBERTY 310–11 (1960).

69. See JOSEPH DE MAISTRE, ESSAY ON THE GENERATIVE PRINCIPLE OF POLITICAL CONSTITUTIONS (1847).

70. F.A. HAYEK, RULES AND ORDER 95 (1972).

71. See Pitt, *supra* note 18 (discussing Scruton and Kirk).

72. Roger Scruton, *The Law of the Land—the Temple Church Sermon. 3 Oct 18*, THE ROGER SCRUTON ESTATE, <https://www.roger-scruton.com/articles/548-the-law-of-the-land-the-temple-church-sermon-3-oct-18> [<https://perma.cc/PRX5-2V6T>].

by God” or “the commands issued by a sovereign authority” such as the Queen in Parliament, but “the description of a historical bequest.”<sup>73</sup> “Our law,” Scruton writes, “is the voice of a territorial jurisdiction.”<sup>74</sup>

Analysis by Donald Lutz of the non-Biblical thinkers most cited by the Framers provides empirical support for the influence of Blackstone (and Hume) on the American Constitution.<sup>75</sup> Lutz found that Montesquieu was the most-cited thinker with John Locke third. However, Blackstone ranked a close second to Montesquieu and Hume was fourth just behind Locke.<sup>76</sup> Moreover, the frequency of citations to Montesquieu peaked in the 1780s and declined thereafter, while Locke was cited most often in the Revolutionary period beginning in the 1760s but by the 1780s was cited minimally. By contrast, Blackstone’s citations rose dramatically over the period, becoming by far the most-cited author by the Founders during the post-Revolutionary constitutional period in the 1790s and even more from 1800-1805. Sir Edward Coke was the third most-cited thinker of the 1760s, declining in popularity, before being rediscovered in the 1800-05 period, just behind Hume and Pufendorf. And Hume, who was also rarely cited before the 1790s was the second-most cited author in the 1790s (behind Blackstone) and tied for second from 1800-1805.

One must be careful not to draw extravagant conclusions from this data, as the numbers are small throughout. However, they are generally consistent with Kirk’s suggestion that when the Founders moved from the goal of justifying revolution against the government to the actual concrete task of subjecting the new government to the rule of law, they turned to those thinkers that stressed prudence, experience, and tradition as the sources of the rule of law, rather than philosophical abstractions such as natural law. But they also appealed to established tradition and common law, not mere contemporary agreement. Even then, however, the soaring principles of the Declaration were buttressed by a long recitation of unresolved concrete grievances against the English government.

One omission from my discussion of conservative rule of law thinkers is probably surprising—Michael Oakeshott. Although Oakeshott is undoubtedly a political conservative, jurisprudentially he is a legal positivist.<sup>77</sup> For example, Oakeshott embraces the idea of legislative supremacy as essential to the rule of law, a concept that Hayek expressly rejects. And unlike Kirk and Hayek, who trace their conceptions of the rule of law to theorists such as Hume, Burke, and Blackstone, Oakeshott roots his conception of law and the state in the philosophy of Thomas Hobbes. Thus,

---

73. “Both those fundamentalisms [i.e., natural law and positivism] are threats to the true rule of law, since both fail to recognize law as an independent force in human affairs, and one that stands in judgment over all of us, the sovereign included.” *Id.*

74. *Id.*

75. See Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189 (1984).

76. See *id.* at 193, Table 2.

77. See MICHAEL OAKESHOTT, ON HUMAN CONDUCT (1975). For an analysis of the legal positivism that underlies Oakeshott’s theory, see Stephen Turner, *Oakeshott on the Rule of Law: A Defense*, 1 COSMOS + TAXIS 72 (2014).

while Oakeshott is properly recognized as one of the leading figures in conservative political thought in the Twentieth Century, his conception of the rule of law owes more to rationalist and positivist social contract theory than the evolutionary theories of Kirk and Hayek.<sup>78</sup>

#### V. CONCLUSION: THE CONSERVATIVE VERSION OF THE RULE OF LAW

A theory of the rule of law requires establishing a source of legal authority that simultaneously empowers and constrains the exercise of legitimate governmental authority. For the past century, legal philosophers have focused on two possible bases for the rule of law: natural law and legal positivism. But this approach ignores a third vision of the rule of law—what can be called a “conservative” version of the rule of law.<sup>79</sup> Under this view, government draws its legitimizing authority from tradition and the common law. While natural law and positivism have both been influential on the understanding of constitutionalism and the rule of law in the American tradition, the conservative version of the rule of law has been equally influential. Moreover, after decades of vacillation between natural law theorizing (the implicit intellectual foundation of “living Constitution” thought) and legal positivism (strict originalism as exemplified by thinkers such as Robert Bork). To be sure, the Supreme Court in *Dobbs* looked to tradition as a source to discern the likely meaning of a written text, not in the manner contemplated by the conservative version of the rule of law.<sup>80</sup> Examination of the writings of thinkers such as David Hume, Edmund Burke, Russell Kirk, and F.A. Hayek, may provide a foundation for understanding the role that a coherent theory of the relationship between tradition and the rule of law can play in future legal developments.

---

78. A distinct but related issue is the destruction of the common law over the past several decades under the influence of legal positivism, which has emptied the common law of much of its traditional value as a restraint on arbitrary government power and in many instances converted it into a quasi-legislative vehicle for the assertion of governmental power. For an extensive discussion, see Zywicki, *supra* note 14.

79. *See id.*

80. I would like to thank Nelson Lund for reminding me of this important distinction between these two different possible uses of tradition, which I have explored elsewhere. *See* Pritchard and Zywicki, *supra* note 13.