THE HISTORICAL ORIGINS OF THE RULE OF LAW IN THE AMERICAN CONSTITUTIONAL ORDER

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My topic in this essay is the historical foundations of the rule of law in the American constitutional order. Where did the uniquely American commitment to the rule of law come from as an historical matter, and how can we copy it for export to countries like Russia, Afghanistan, or Iraq? This is an enormous subject, which I can only hope to outline in the brief space I have below. I want to begin by discussing the nature of the rule of law and by explaining why it is difficult to speak of an origin of the idea of "the rule of law." I will then discuss some of the many antecedent events and cultural patterns which I believe led the Framers to seek to preserve the rule of law through our written Constitution. Finally, I will conclude by discussing some of the many strategies the Framers incorporated into the Constitution to ensure that that document would secure the rule of law.

First, let us consider the nature of the rule of law. My thesis is that the rule of law is a culture- or tradition-based norm whereby members of a society come to organize their personal behavior and the behavior of their government officials so that it is law-abiding or law-respecting.[1] A culture which favors the rule of law is one in which millions of individuals choose to behave in such a way that their behavior is governed by law. There are many cultures around the world and not all of them place a premium on people behaving in a way that is law-abiding. In some cultures, people don't abide by the tax laws or the laws against corruption or even some of the criminal laws. In my ancestral homeland of Italy, for example, it is commonly

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1. My views on this were first set out more than a decade ago in a short piece co-authored with Gary Lawson. *See* Steven G. Calabresi & Gary Lawson, *Introduction: Prospects for the Rule of Law*, 21 CUMB. L. REV. 427 (1991).

said that there is less of a culture of obeying the tax laws than there is in the United States. Similarly, in Russia, or in parts of Eastern Europe, or in Latin America, norms against governmental corruption may not be as widely followed as they are in the United States. The key point is that the rule of law is a culture or tradition of behaving in a certain way, not a doctrine that can be legislated. Thus when Communism fell in Eastern Europe, one could not simply order that henceforth the rule of law would be followed. It was necessary instead to persuade millions of individual governmental and non-governmental actors to behave in a way that was law-abiding.[2]

One way of better explaining the nature of the rule of law[3] is to analyze it using the framework of Friedrich Hayek, who argued that there are two major and distinct forms of social organization in the world: spontaneous systems of order and planned systems of order.[4] A spontaneous system of order is one that grows up unplanned through the voluntary cooperation of millions of people.[5] Classic examples of spontaneous systems of order are languages, the common law and the free market. No central planner ever set out to plan a language or a system of common law or a free market, yet those systems spontaneously arose because of the undirected actions of millions of individuals. In contrast, a planned system of order is one where a central planner directs and implements a particular plan.[6] Generals, corporate CEOs, heads of families, and government bureaucrats may all preside over planned systems of order. While planned systems of order are a critically important form of social organization, the most complex, information-rich forms of social order are those which are spontaneous systems of order.

The rule of law is, in my view, a spontaneous system of order like a language.[7] It cannot be planned or ordered into existence. It has to spring up as a culture from the independent actions and convictions of millions of people acting together in a certain way. There is thus no single historical origin (or originator) of the ideal of the rule of law that underlies the U.S. Constitution. Rather, our Constitution arose

2. *See id.* at 429.

3. Classic treatments of the rule of law can be found in A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (8th ed. 1915). For a more recent attempt at definition, see Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989).

4. 1 F. A. HAYEK, LAW, LEGISLATION, AND LIBERTY 36–52 (1983).

5. *See id.*

6. *See id.*

7. Calabresi & Lawson, *supra* note 1, at 429.

out of a longstanding culture or tradition that deeply respected the rule of law. Our Constitution, in turn, reinforced and greatly strengthened that tradition and caused that tradition to be passed on to us two centuries after its framing.

If there was no single historical origin or originator of the idea of the rule of law in the American constitutional order, what if anything can we say about the origins of our tradition of members of society, including high government officials, abiding by the law? There are many historical antecedents that were important in giving rise to the rule of law in the United States. At the risk of slighting some important historical antecedents, I will highlight some antecedents that I believe were especially important, most of which are well known.

A first important historical antecedent of the rule of law in the United States was the primacy of Roman civil law throughout Western Europe from the Middle Ages to 1787.[8] Beginning with the rediscovery of Roman civil law in Bologna, Italy circa 1100 A.D., Roman law and in particular the Byzantine Emperor Justinian's Code of Roman Civil Law became the dominant source of private law throughout the areas of Europe that would become France, Germany, Austria-Hungary, the Benelux countries, Italy, Spain, and Portugal. This meant that Roman law rules governed contract law, property law, tort law, and family law throughout Western Europe for a period of some 800 years prior to the writing of the U.S. Constitution.

This primacy of Roman law in Western and Central Europe was incredibly important because it meant that the law was independent of the political and religious authorities in Western Europe and, critically, in some sense superior to them.[9] Because Roman law, as developed by university law professors, became a superior source of authority in private law to either what kings or popes thought the private law should be, those kings, popes and other high government and church officials in the West were subordinate to the law.

The unity of the Roman common law throughout Western and

8. *See generally* JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA (2d ed. 1985) (discussing the unity of Western Europe's legal traditions because of the predominant influence of Roman law); MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS (2d ed. 1994) (mentioning the unity of Western Europe with the Latin language, the Catholic Church, and the Roman law).

9. HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 7–10 (1983), *reprinted in* GLENDON ET AL., *supra* note 8, at 37–41 (discussing importance of primacy of political institutions over religious institutions in western law).

Central Europe became a feature of the general unity of the West, along with the universal Catholic Church and the universally spoken Latin language. Medieval Europe in some sense, thus, had one law, one church, and one language.[10] Even after the Protestant Reformation disrupted the unity of the Church and after native languages and literatures began to supplant Latin, a common Roman law tradition united much of Europe. Any European could always appeal to Roman law as expounded by scholars in any civil law dispute with another European citizen.

A second major source of the American tradition of the rule of law is the great unwritten English constitutional tradition dating back to Magna Carta in 1215.[11] Americans were British citizens until 1776, and they claimed to possess the ancient rights and liberties of Englishmen. The English legal tradition in turn was very oriented toward securing the rule of law even as against the highest government officials. By 1787, it was well established in English constitutional law that the king himself was subordinate to the law. It is worth rehearsing four key attributes of the unwritten English Constitution that caused it by 1787 to guarantee the rule of law.

First, and most famously, is the Magna Carta wrested by the English nobility from the hand of King John in 1215.[12] The Magna Carta limited English royal power in many ways but one of the most dramatic was the *per legum teres* clause, which is the direct ancestor of our Due Process Clauses.[13] This clause said that no freeman could be deprived of liberty or property, except by the law of the land. This meant no sheriff or other executive official could jail a person or seize their property except after a proper trial with a notice and an opportunity to be heard. This outlawing by Magna Carta of certain arbitrary and capricious executive action against private citizens went a long way toward establishing a culture respectful of the rule of law.

Second, there are the early Plantagenet institutions of English Law created between the reigns of William the Conqueror and King Henry VII. These include the creation of the Royal Courts of Justice, the creation of the two representative Houses of Parliament (the House of Lords and the House of Commons), and the recognition of a right to

10. *Id.* at 51.

11. For a discussion of the historical origins of the English constitutional tradition, see GLENDON ET AL., *supra* note 8, at 438–54.

12. *Id.* at 442.

13. ROBERT H. BORK, THE TEMPTING OF AMERICA 32 (1990).

trial by jury with conviction requiring unanimity.[14] All of these institutions helped preserve freedom in England and helped to limit the otherwise arbitrary power of high government officials.

Third, there are the key statutes enacted in England after the Catholic Stuart dynasty was finally overthrown in the Glorious Revolution of 1688.[15] These statutes made clear that English kings were subordinate to Parliament and to the law itself. Among these statutes are the English Bill of Rights, the Habeas Corpus Act, the act providing for life-tenured judges in England (Act of Settlement), and the act regulating the right of succession to the monarchy.

A fourth and final feature of the unwritten English constitutional tradition that helped secure the rule of law there and in America was the development of a full blown system of the separation of powers. By the 18th Century, the King, the Parliament, and the Royal Courts of Justice were all in some sense independent and co-equal powers of government. Montesquieu attributed the flowering of liberty and of the rule of law in England to this celebrated system of separation of powers.[16] Indeed, he predicted that absent such a system of separation of powers true liberty was impossible.

In sum, there are then many critical English antecedents of our American Tradition of respect for the Rule of Law.

In addition to Roman law and English antecedents of the rule of law in the United States, there is one other important set of antecedents we have not yet discussed: the practice in the American colonies and states from 1620 to 1787 of governing themselves according to a rule of law. We often forget that by the time the U.S. Constitution was written, Englishmen in America had been governing themselves under law for roughly 180 years. The patterns of behavior and traditions and customs formed during this time were critical in laying the groundwork for the legal tradition that gave rise to our written Constitution.

One key feature of colonial governance from 1620 to 1787 is that eventually all thirteen of the original colonies had a controlling Royal Charter or Constitution. Indeed, the Pilgrim Colony at Plymouth, Massachusetts was famously governed by the Mayflower Compact drawn up by the settlers before they disembarked their famous ship. After independence came in 1776, eleven of the thirteen newly free

14. GLENDON, *supra* note 8, at 439–46.

15. *Id.* at 446–49.

16. CHARLES DE SECONDAT BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 199–202 (David Wallace Carrithers ed., University of California Press 1977) (1748).

states drew up their own written constitutions and two other states, Connecticut and Rhode Island, continued to function under their royal charters. There was thus in 1787 a deeply ingrained tradition of written constitutionalism in the United States. Following upon John Locke's social contract theory of legitimate governments[17]—which itself was formulated to justify the English Revolution of 1688—Americans had come to believe that it was vitally important to define and limit all the powers of government officials in writing in a Constitution. This emphasis on written constitutionalism was a distinctly American adaptation of the English constitutional tradition.

Other elements of the English constitutional tradition that were present in England but lacking in the U.S. were the requirement of life-tenured judges and the right not to be taxed without being represented in the taxing legislature. These rights were lacking in America prior to 1776 but the Framers' insistence on their importance in the Declaration of Independence made them fundamental rights of Americans by 1787.

Between 1776 and 1787, while eleven states drafted written constitutions, the federal government drafted, ratified, and lived under its own constitution: the Articles of Confederation. The spirit of the American Revolution of 1776 heavily influenced these early American experiments with written constitutionalism. These constitutions all had weak executives, because of the experience with King George III.[18] The federal Articles of Confederation created a very weak national government because of the experience with English imperial power. Finally, these documents all provided little protection for property or liberty rights because their drafters just assumed that having a democratically elected legislature instead of the English monarch would protect key rights of property and liberty.

The Framers discovered, however, that the initial state and federal constitutions they had drafted were not adequate to secure the rule of law. They found that the executive branches they had created were too weak and the legislatures too strong.[19] They found that they had given too much power to the states and not enough to the national government. Finally, some among them came to believe that democracies need to be bound by a Bill of Rights that protects

17. JOHN LOCKE, TWO TREATISES ON GOVERNMENT (Peter Laslett ed., Cambridge University Press 1988) (1690).

18. CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY 1775-1789, at 25–34 (1923).

19. *Id.* at 49–52, 74–75.

property and liberty every bit as much as a monarchy needs to be so bound. In short, they discovered that in 1776 they had overreacted and weakened executive and national power too much because of their recent experience with the imperial, royal government of King George III.

This brings us to our third and final topic: what did the Framers do in designing the U.S. Constitution to secure, anchor, and promote the rule of law tradition they had inherited from their Roman law, English, and colonial ancestors? The answer is that they tried to develop a document that reproduced the best features of the English Constitution without the features they had found abusive in 1776. They wrote a Constitution that had a stronger executive than did the Articles of Confederation but not as strong an executive as was George III and Lord North. They wrote a constitution that created a more powerful national government than did the Articles of Confederation but not as powerful a government as that they had suffered under as lackeys in the British Empire. Finally, they assented in 1791 to the creation of a Bill of Rights to protect liberty and property from democratic legislatures because they had discovered that democratic legislatures could threaten rule of law values just as much as English kings could.

In sum, our rule-of-law-securing Constitution of 1787 gestated over an eleven year period from 1776 to 1787 and emerged as a compromise between the English colonial regime and the decentralized regime of the Articles of Confederation. The critical balance between order and freedom which was struck in our Constitution was driven by two nightmares that have haunted Americans ever since. The first nightmare, associated with 1776, is the nightmare of the distant imperial tyranny with an all powerful executive. The second nightmare, associated with 1787, is the nightmare of the local or village tyrant and of the all powerful rights-invading democratic legislature. Our Constitution of 1787 sought to secure and promote the rule of law by protecting against both of the nightmares. That the Framers succeeded so brilliantly suggests that the eleven year gestation period of our Constitution may have been crucial to striking the right balance between order and freedom.

How does our Constitution maintain that delicate balance and preserve the rule of law? Through the vertical and horizontal division of power we know as federalism and the separation of powers, coupled with a strong Bill of Rights. Ultimately, this system of checks and balances the Framers created has kept us free and has secured the

rule of law for 214 years.

I hope this exegesis makes it clear why it is so hard to export our system of constitutionalism and of respect for the rule of law into Russia,[20] Afghanistan, Iraq, or any other emerging new democracy. The particular and highly unique constellation of events that gave rise to the U.S. Constitution and to our tradition of respect for the rule of law happened spontaneously as the result of many fortuitous and combined historical forces. One cannot give rise to such a tradition just by imposing a document or an ideal from above. It has to spring spontaneously from the desires and lived experience of millions of people. We can and should be an example and an inspiration to newly emerging democracies everywhere, and sometimes the best one can start with is an imposed constitution of the kind we wrote for Japan and West Germany after World War II. There is always the hope that an imposed Constitution will grow and take root, albeit in distinctly native ways, in alien soil. But, the process of creating a respect for the rule of law where it has long been absent is a daunting one that is not easily accomplished. Somehow we must find a way by example to spread our respect for the rule of law to cultures where law has not yet been separate from or supreme over religious edicts or over the orders of government officials.[21]

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20. For a good symposium on the difficulties of spreading the rule of law and democracy to Eastern Europe after the fall of communism, see Symposium, *Approaching Democracy: A New Legal Order for Eastern Europe*, 58 U. CHI. L. REV. 439 (1991).

21. Margaret Thatcher has spoken of the importance of an effective rule of law as an "essential underpinning of democracy." Margaret Thatcher, Speech to the Aspen Institute ("Shaping a New Global Community") (Aug. 5, 1990), *available at* http://www.margaretthatcher.org/Speeches/displaydocument.asp?docid=108174&doctype=1 (last visited Nov. 12, 2004).