

# THE INTERNATIONAL RULE OF LAW AND ECONOMIC DEVELOPMENT

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## ABSTRACT

*The Rule of Law and economic development have long been recognized as being inter-related – a successful society has both. The question is how the two are related. Some scholars argue that common law is more supportive of economic development, while others reject this and argue that the distinctions between common law and civil law have no effect on economic development. This multidisciplinary article approaches the issue from a new contextual perspective that includes economics, philosophy, history, and law. It posits that while the concepts are similar, the common law conception of the Rule of Law (as opposed to the civilian, Rechtsstaat or L'État de Droit) is historically more supportive of economic development for understandable reasons.*

*This article does NOT argue that common law is 'better' than civil law. This article does show, however, that from Henry II to Brexit, the common law has traditionally been based on a different relationship between the individual and government: a non-instrumental relationship focused on problem-solving that encourages entrepreneurship and hence economic development.*

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## INTRODUCTION

While “international” is included in the title, it is something of a misnomer. “International” definitions of the Rule of Law, such as that developed by the World Justice Project, are inaccurate. They may be good descriptions of a functioning legal system, but do not describe the concept of the Rule of Law. The World Bank has recognized a connection between the Rule of Law and economic development, noting that countries remain undeveloped because they lack efficient legal systems. In the 1990’s, the World Bank insisted that countries who wanted to receive its financial support were required to implement Rule of Law programs, by which it meant independent judicial systems. With expenditures of \$850 million and a success rate of 63%, by 2012, the Bank recognized that its program was underperforming and revised it. Its new direction in justice reform is as follows:

The Bank’s Updated GAC Strategy points out that one of the functions of a capable state is to dispense justice, and recognizes that justice institutions (i) assist in countering corruption, (ii) support oversight and monitoring of the executive’s actions, (iii) help ensure that the government is accountable to citizens, and (iv) facilitate constructive engagement between state and non-state actors. The Strategy also notes that the judiciary is among those institutions that not only respond to, but also help create, change, and sustain the ‘rules of the game,’ that is, the institutional environment in which development takes place.<sup>1</sup>

In turning its focus from independent judiciaries to justice institutions, corruption, and accountability, the World Bank is acknowledging that its 1990’s conception of the Rule of Law was insufficient, and that while an independent judiciary is important, governments must be held accountable to their citizens by means of some “institutional environment.”<sup>2</sup>

Similarly, since 2014, the World Justice Project, which measures its conception of the Rule of Law in approximately 111 countries around the world, now provides seed money to support practical “on-the-ground programs addressing discrimination, corruption, violence, and more.”<sup>3</sup> The

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1 BIEBESHEIMER ET AL., THE WORLD BANK: NEW DIRECTIONS IN JUSTICE REFORM 1 (Daniel Adler et al., eds., 2012), <http://documents.worldbank.org/curated/en/928641468338516754/pdf/706400REPLACEM0Justice0Reform0Final.pdf>.

2 *Id.*

3 *Our Approach: Engagement*, WORLD JUST. PROJECT, <https://worldjusticeproject.org/about->

World Justice Project describes the Rule of Law as being comprised of four universal principles:

1. The government as well as private actors are accountable under the law.
2. The laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property and certain core human rights.
3. The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.
4. Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve.<sup>4</sup>

At best, this is a description of an effective legal system, largely described initially by Lon Fuller's King Rex<sup>5</sup> (with the addition of positive rights language). Lon Fuller lists eight characteristics of an effective legal system,<sup>6</sup> but his list is not a definition of the Rule of Law. Terms like "fair" and "ethical" are normative and hence render the World Justice Project's definition somewhat circular. Nevertheless, the World Justice Project's new focus on practicality and effectiveness shows more of a common-law spontaneous order 'do what works' approach, rather than a cookie-cutter 'do it our way' approach. While both NGO's support the Rule of Law and see a connection between it and economic development (or the lack thereof), neither has ever effectively defined the concept nor fully explained it.

#### THE RULE OF LAW

In his beautiful parable about King Rex, Lon Fuller postulated that the law should consist of (1) general rules that are (2) publicly promulgated; (3) prospective; (4) understandable; (5) non-contradictory; (6) possible to comply with; (7) stable; and (8) administered as announced.<sup>7</sup> In addition to listing characteristics of an effective legal system, his explanation, however, relates primarily to legislated law, which has become regarded as primary law in most modern legal systems (particularly those with a civilian

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us/overview/our-approach, (last visited Dec. 21, 2017).

<sup>4</sup> *What is the Rule of Law?*, WORLD JUST. PROJECT, <https://worldjusticeproject.org/about-us/overview/what-rule-law>, (last visited June 30, 2017).

<sup>5</sup> LON L. FULLER, *THE MORALITY OF LAW* 33-44 (Revised Ed. Yale Univ. Press 1969).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 39 (listing eight ways to fail to make law, conversion to positive list by author).

heritage) and is incorporated into the World Justice Project's definition previously discussed. The Rule of Law, however, goes beyond those eight principles, beyond the mechanics of government set forth in a Constitution, and it also goes beyond legislative law.

Regarding law as primarily emanating from legislation and administration is deleterious to economic development. Economist Friedrich Hayek, philosopher Bruno Leoni, and law professor Philip Hamburger all warned that excessive legislation and administrative law are deleterious to the Rule of Law and economic development. Max Weber was concerned that bureaucracy would come to control modern life.<sup>8</sup> Hayek warned that an ever-increasing bureaucracy is dangerous to liberty.<sup>9</sup> Leoni cautioned that while many regard legislation as a "quick, rational, and far-reaching remedy against every kind of evil as compared with, say, judicial decisions" and alternative dispute resolution, people fail to notice that legislative remedies can be "too quick to be efficacious," too unpredictable, and too directly connected with the views and interests of a handful of people such as legislators and lobbyists to provide effective remedies for society's ills.<sup>10</sup> Hamburger reiterates that out-of-control administrative law, i.e. the "deep state," while initially most burdensome on economic development, also intrudes on the full range of American life including political participation and personal decisions.<sup>11</sup> This administrative power was created by a combination of Congress's repeated authorization and acquiescence combined with judicial deference.<sup>12</sup>

The positivist's attempt to reduce law to legislation<sup>13</sup> and the administrative state are products of the desire to base government on a social technology that would control all institutions in society, including the market economy. Hernando de Soto's empirical research shows that Weber

8 Sociologist Max Weber was the first to study bureaucracy and famously argued that it is necessary to maintain order, maximize efficiency, and eliminate favoritism in modern society. *See* MAX WEBER, *ECONOMY & SOCIETY* 1002 (Guenther Roth & Claus Wittich eds., Univ. of Cal. Press 1978). However, Weber also saw unfettered bureaucracy as a threat to individual freedom, potentially trapping individuals in what was effectively an impersonal iron cage of rule-based, rational control. *See* a discussion of Max Weber's thoughts on bureaucracy and its role in society in the definition of bureaucracy provided in RICHARD SWEDBERG & OLA AGEVALL, *THE MAX WEBER DICTIONARY: KEY WORDS AND CENTRAL CONCEPTS* 18-21 (Stanford Univ. Press 2005).

9 FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM: TEXTS AND DOCUMENTS* (Bruce Caldwell ed., Univ. of Chi. Press 10th ed. 2007) (1944) [Hereinafter HAYEK, *SERFDOM*].

10 BRUNO LEONI, *FREEDOM AND THE LAW* 7 (Liberty Fund Expanded 3d ed. 1991).

11 PHILIP HAMBURGER, *THE ADMINISTRATIVE THREAT* 1-2 (2017) ("THREAT"). *See also* PHILIP HAMBURGER, *Introduction, in IS ADMINISTRATIVE LAW UNLAWFUL?* (2014) (describing how, due to judicial deference, administrative power has become absolute, unlawful, and unconstitutional).

12 THREAT, *supra* note 11, at 62.

13 *Id.*

and Hayek's concerns were apt – that an overgrowth of top-down bureaucracy and legislation leads inexorably to decreased economic liberty and corruption in government.<sup>14</sup>

Despite its unacknowledged emphasis on legislation as the source of law, the World Bank's new direction implicitly acknowledges that judicial guarantees form a significant part of the Rule of Law. In fact, however, it was judicial guarantees that in large part created the Rule of Law in England. Parliament originally used legislation only rarely, and only to limit the Crown's power or pass new taxes, as with the *Magna Carta* or the *Statement of Liberties*.<sup>15</sup> In contrast, individuals traditionally had recourse only to the courts, and it was the English King's courts and traditional

14 See generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 106 (Basic Books 2000) [hereinafter "MYSTERY"]. By studying how the U.S. property and business registration systems developed and comparing them with the systems in Peru and elsewhere, de Soto posited that while third world countries don't lack law, the poor inhabitants of these nations lack the process to represent their property and create capital. They have houses but not titles, crops but not deeds, businesses but not statutes of incorporation. It is the unavailability of these essential representations that explains why they cannot produce sufficient capital to make capitalism work. *Id.* at 7. In contrast, in the United States, rather than generating top-down legislation, social contracts born outside the official law in the nineteenth century were acknowledged as a legitimate source of law and ways were found to absorb these contracts. *Id.* at 106. See also HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* 152–187 (Harper & Row 1989) [hereinafter "THE OTHER PATH"]. Chapter five of de Soto's *The Other Path* details the enormous costs of complying with Peruvian bureaucratic requirements whether opening a business or buying land, as well as the costs and waste of operating an informal business (i.e. outside of legal regulations) in Peru.

15 See ARTHUR R. HOGUE, *ORIGINS OF THE COMMON LAW* 71, 206 (Liberty Fund 1986). In order to meet his promise to follow *Magna Carta* and not assess taxes without common assent of the entire kingdom, Edward I (1272-1307) frequently called meetings, known as parliaments, of nobles and commoners from all areas of England. These meetings served several purposes: 1) they informed the nobility, clergy, and shire representative about royal policies, administrative procedures, and matters affecting the safety of the realm, 2) they allowed the king to secure the consent of the community to new legislation, and 3) they secured consent to new taxes. Custom carried the greatest authority in the Middle Ages, but new laws and taxes were entirely different matters, and a parliament or something like it was essential for obtaining a grant of taxes such as the one that enacted the Statute of Westminster, which granted Edward I (1272-1307) a tax on wells, woolfells, and leather. *Id.* at 71. Over time, Parliament acquired the right to approve and give consent to new laws and taxes beyond customary feudal dues and services, though in the thirteenth century, the functions of Parliament, the law courts, and the king's council could not readily be distinguished from one another. *Id.* at 206. Parliament began meeting in 1295. ALFRED L. BROWN, *THE GOVERNANCE OF LATE MEDIEVAL ENGLAND 1272–1461* (Hodder Arnold 1989). Parliament gained legislative supremacy after the Glorious Revolution of 1689. See Anthony Bradley, *The Sovereignty of Parliament: Form or Substance?*, in JEFFREY JOWELL & DAWN OLIVER, *THE CHANGING CONSTITUTION* 28 (Oxford Univ. Press 6 ed. 2007). See also THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 51 (Liberty Fund 1956) (*discussing* Sir Edward Coke's decision in *Dr. Bonham's case* (the foundation of judicial review). "Urged by a presentiment of the coming conflict of Crown and Parliament, he felt the necessity of curbing the rising arrogance of both and looked back upon his country's legal history to find the means. This instinctive appeal to history for guidance was characteristic, and the choice of a legal rather than any other solution was amply justified by the remarkable continuity and stability of English law during the vicissitudes of the seventeenth century." *Id.* "The solution which Coke found was in the idea of a fundamental law which limited Crown and Parliament indifferently." *Id.*

customs that enforced contract, property, and succession law, and created such mechanisms as habeas corpus (among other things) to limit the King's power.<sup>16</sup> Legislation was not used to limit an individual's freedom of action, and in fact the English sense of individualism has been embedded in the culture and English common law since at least the fifteenth century.<sup>17</sup>

In contrast with what constitutes an effective legal system, however, the Rule of Law can properly be more viewed as a meta-norm, a cultural understanding about the legal system and man's relationship to it. Properly construed, it has two components: 1) law and order and 2) limited government.<sup>18</sup> The law and order component predicates that individuals have impliedly consented to obey the rules because it is to their benefit to do so and because they will otherwise be punished. In doing so, it puts individuals first, not a collectivity. Limited government means both equal application of the law and that the government's powers are limited.

While A.V. Dicey popularized the term "Rule of Law,"<sup>19</sup> the distinctive relationship between the English and their law and government developed spontaneously centuries earlier. Hayek and Oakeshott more fully captured a definition of the concept and the kind of legal culture that developed and supports it. Hayek described the Rule of Law as meaning that "government in all its actions is bound by rules fixed and announced beforehand--rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual

16 See CHARLES HOWARD MCILWAIN, *THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY: AN HISTORICAL ESSAY ON THE BOUNDARIES BETWEEN ENGLISH LEGISLATION AND ADJUDICATION IN ENGLAND* 44 (Yale Univ. Press 1910) (quoted in Book Review, 24 Harv. L. Rev. 330, 331 (1911) ("the common law was thus in the main the product of a court, not of a legislature").

17 See ALAN MACFARLANE, *THE ORIGINS OF ENGLISH INDIVIDUALISM 177-78*, 180 (Basil Blackwell 1978). "[W]hen considering the Commonwealth of [sixteenth century] England, one was dealing with a land filled with free men, who had of their own free will agreed to live together. It was an association of equals based on contract, not a kingdom of subjects ruled by a superior monarch . . ." "The major legal differences flowed from the differences between Civil (Roman) law, and English Common Law: the differences in methods of trial, the use of juries, the absence of torture in England, the use of sheriffs in the political process."

18 Nadia E. Nedzel, *The Rule of Law: Its History and Meaning in Common Law, Civil Law, and Latin American Judicial Systems*, 10 RICH. J. GLOBAL L. & BUS. 57, 58-61 (2010). See also HAYEK, *SERFDOM*, *supra* note 9, at 112 (discussing the importance of both formal law and the importance of government being bound by rules fixed and announced beforehand) and Todd J. Zywicki, *The Rule of Law, Freedom, and Prosperity*, 10 SUP. CT. ECON. REV. 1, 4 (2003) (stating that "the Rule of Law contains three basic values or concepts: (1) constitutionalism; (2) rule-based decision-making; and (3) a commitment to neutral principles, such as federalism, separation of powers, and textualism," a definition very much like the author's. In using the term "constitutionalism," Professor Zywicki is referring to limited government, and in the concept of a "commitment to neutral principles," he discusses the importance of Oakeshott's civil association).

19 ALBERT VENN DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* IV (Liberty Classics 1982) (1915).

affairs on the basis of this knowledge.”<sup>20</sup> Hayek further posited that law, like the free market, developed spontaneously.<sup>21</sup> Oakeshott’s insights were consistent with this. He posited that the Rule of Law presupposes a civil association, where the law does not favor any individual or group over any other individual or group.<sup>22</sup> In a secular world of moral pluralism, where people’s views of morality differ, this approach allows for the greatest tolerance and freedom. In other words, the Rule of Law is a-political and non-instrumental, and the law applies equally to all, including those in the government.

Common law rights are ‘negative.’<sup>23</sup> In other words, individuals have a general right to be free from governmental interference, unless they are intruding on another individual’s freedom. These rights are inalienable, and include only “life, liberty, and the pursuit of happiness,” and precede any governmental power.<sup>24</sup> As listed in the U.S. Declaration of Independence, these fundamental rights are drawn almost directly from

20 HAYEK, SERFDOM, *supra* note 9, at 112.

21 See Friedrich Hayek, *The Fatal Conceit: The Errors of Socialism*, in THE COLLECTED WORKS OF F. A. HAYEK (Univ. Chicago Press 1988). In the *Fatal Conceit*, Hayek posited that the extended or spontaneous order of a market economy provides a more efficient allocation of societal resources than any design could achieve and is superior to any order that a human mind could design because the human mind cannot by itself aggregate the necessary data. In a market economy, price is the aggregation of information acquired by individuals, thus allowing those dealing in a commodity to make decisions based on more information than they could acquire personally or from any centralized authority. Thus, the market economy’s inherent efficiency benefits the whole society.

Hayek saw the strength and usefulness of spontaneous order in much more than just economics. See also FRIEDRICH HAYEK, LAW, LEGISLATION, AND LIBERTY 21, 51-52 (Univ. Chicago Press 1973). In Volume 1 of *Law, Legislation, and Liberty*, Hayek posits that what he termed ‘constructivist rationalism’ – i.e. positivism – is a false view of all social institutions, including law. He argues that constructivist rationalism, by which he means the civilian concept that all law can be logically derived from a priori premises and should be a deliberate construction ‘based on empirical knowledge’ of how it will affect the achievement of human purposes (i.e. legislated law; *Id.* at 21.) contrasts with the spontaneous legal rules that developed out of judicial habit for whom law and liberty cannot exist apart from one another. (*Id.* at 51-52.

22 MICHAEL OAKESHOTT, *The Rule of Law*, in ON HISTORY AND OTHER ESSAYS (1986). See also MICHAEL OAKESHOTT, *On the Civil Condition*, in ON HUMAN CONDUCT 108-130 (Clarendon Press 1990) (explaining civil association and how it relates to law).

23 See Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 858-62 (2002) (describing positive rights as (ineffective) rights to health, housing, clothing, etc., as contrasting with the negative rights provided in the United States Constitution, which show a pragmatic understanding of the operation of government). See also John Hasnas, *From Cannibalism to Caesareans: Two Conceptions of Fundamental Rights*, 89 NW. U. L. REV. 900, 901 (1995) (describing classical (i.e. negative) rights as “indefeasible, morally fundamental entities that protect individual autonomy,” and contrasting them with contemporary (i.e. positive) rights as means to the achievement of more fundamental moral interests) and John Hasnas, *The Myth of the Rule of Law*, 1995 WIS. L. REV. 199 (1995).

24 THE DECLARATION OF INDEPENDENCE (U.S. 1776). The four organic laws are the Declaration of Independence, the Articles of Confederation, the Northwest Ordinance, and the United States Constitution. All four are reproduced in full at the front of every copy of the United States Code.



John Locke's conception of natural rights.<sup>25</sup> It is this kind of society, a *civil association* in which government is regarded as subservient to law, which generally fosters strong and continuous entrepreneurship and economic development. Individuals develop respect for the law as separate from those people who dominate the government, they expect and demand that the government obey and apply the law, and they have as a result an implicit belief that not only will the law not interfere unduly with their entrepreneurial efforts, but also that they can rely on that law to protect their economic enterprises.

Oakeshott contrasts *civil association* with the term *enterprise association*, in which a group of people is held together and driven by a common goal.<sup>26</sup> Consequently, according to Oakeshott, anytime a government enacts instrumentalist laws necessary to pursue a goal such as improving society or defeating an enemy, it is inevitably limiting freedom.<sup>27</sup> While all governments at times must become enterprise associations (for example, in times of war), in order to maximize protection for liberty and respect for the individual, government must be limited, and its role circumscribed, thus the Rule of Law involves obligations to subscribe to non-instrumental rules,<sup>28</sup> as opposed to enterprise associations where a state is understood as being in pursuit of a common substantive purpose, directed by an "enlightened" custodian, whose laws are instruments for determining priorities such as who should benefit from a redistribution of taxes.<sup>29</sup> Oakeshott posits that such states are ruled by some kind of sumptuary policy devised and enforced by a bureaucracy, and as a consequence, are inherently self-defeating in their quest for economic prosperity.<sup>30</sup> This does not mean that Hayek and Oakeshott were libertarians or endorsing *laissez faire*: "It is important not to confuse opposition against this kind of planning as a *laissez faire* attitude . . . government must make best possible use of the forces of competition as a means of coordinating human efforts . . ." <sup>31</sup> American Legal Philosopher Lon Fuller also advocated civil association, though he did not use that term:<sup>32</sup> "law furnishes a baseline for self-directed action, not

<sup>25</sup> Hasnas, *Cannibalism*, *supra* note 23, at 911-912. A very similar conception is listed in France's Declaration of the Rights of Man (1789). Unfortunately, as contrasted to the U.S. Declaration of Independence, the French Declaration has never been regarded as a source of law in France.

<sup>26</sup> MICHAEL OAKESHOTT, *ON HUMAN CONDUCT* 111-113 (discussing "civil association"), 114-116 (discussing "enterprise association") (Clarendon Press 1990).

<sup>27</sup> *See id.* at 167.

<sup>28</sup> OAKESHOTT, *The Rule of Law*, *supra* note 22, at 161.

<sup>29</sup> *Id.* at 166-167.

<sup>30</sup> *Id.* at 167.

<sup>31</sup> *See* HAYEK, *SERFDOM*, *supra* note 9, at 85.

<sup>32</sup> *See* LON FULLER, *THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER* 70-

a detailed set of instructions for accomplishing specific objectives.”<sup>33</sup> Thus, in spelling out the formal conditions for the Rule of Law, its “inner morality,” he posited that government, properly conceived, does not advocate for any particular group or mythical whole and that the only reality is the individual. Under the Rule of Law, there is no general will (Rousseau’s term) or common good, though there may be governmental projects, such as bridges and roads, designed to benefit all.

In contrast with the common law concept, the continental version of the Rule of Law, more correctly called by its German name “*Rechtsstaat*,” and more accurately translated as the *legal state* or *Rule Through Law*, regards government both “as the representative of the general will” by means of its enforcement of legislated law, and as having “its own *particular* will (based on the subjective right to command).”<sup>34</sup> As currently envisioned, the civil law conception of government has, as its goal, the development and promotion of human welfare, including such things as housing, health, education, and transportation along with respect for and protection of the dignity of man.<sup>35</sup> *Rechtsstaat* thus provides individuals with positive rights, which are offset by the duties and obligations individuals owe society. Because *Rechtsstaat* holds that government’s role is to improve society, it thus regards government as an enterprise association (in Oakeshottian terms), and de-emphasizes individual freedom.

#### THE ASSOCIATION BETWEEN COMMON LAW AND ECONOMIC DEVELOPMENT

Common law countries tend to have greater economic, business, and labor freedom; greater governmental stability; and more consistent, long-term economic growth than do civil law countries as demonstrated by comparison of the Heritage Fund’s *Economic Freedom of the World* map, Transparency International’s *Corruption Index*, and the World Justice Project’s *Rule of Law Index*.<sup>36</sup> The countries that rated highest on the 2008

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72 (Duke Univ. Press 1981) (describing two principles of association: 1) commitment as shared interests, similar to Oakeshott’s enterprise association, and 2) legal principle or association by reciprocity, similar to Oakeshott’s civil association. See also *id.* at 67, editor’s note stating that Fuller “favored a conception of legislation which views laws as baselines for the self-directed pursuits of citizens, securing only the minimal restraints on conduct necessary for continuing interaction.”

<sup>33</sup> FULLER, *supra* note 5, at 210.

<sup>34</sup> Mireille Hildebrandt, *Justice and Police: Regulatory Offenses and the Criminal Law*, 12 NEW CRIM. L. REV. 43, 59 (2009).

<sup>35</sup> *Id.*

<sup>36</sup> Compare 2013 *Economic Freedom of the World Heat Map*, HERITAGE FUND, <http://www.heritage.org/index/heatmap> (last visited July 1, 2013), with 2011 *Corruption Perceptions Index*, TRANSPARENCY INT’L, <http://www.transparency.org/cpi2011/results> (last visited Apr. 13, 2018). See also Nedzel, *supra* note 18, at 60 (showing composite maps with 2010 data and sources cited

*Rule of Law Index* were also among the richest and most economically free (Canada, Australia, Denmark, Norway, United States).<sup>37</sup> In the 2016 Rule of Law Index, the countries that rated highest again included some Scandinavian countries, but also Canada, Australia, United Kingdom, New Zealand, Germany, and the United States.<sup>38</sup> Sharing the top with scores between .74 (US) and .89 (Denmark) are newcomers Singapore, Hong Kong, Czech Republic, and Estonia (among others).<sup>39</sup> Nevertheless, the percentage of common law countries at the top far exceeds their percentage as type of legal system. Roughly 10% of countries regard themselves as having a primarily common law heritage, but they comprise 7 of the top 18 countries listed in the World Justice Project, or 39% of the top 18 countries. In terms of the 2017 Economic Freedom index, Hong Kong, Singapore, New Zealand, Switzerland, and Australia ranked as free, while “mostly free” included Canada, Ireland, the United States, and the United Kingdom.<sup>40</sup> Thus, common law countries comprised 80% of the economically “free” countries, and 8 out of 34, or 24% of free or mostly free countries.

In addition to having consistently higher listings in the two indices, common law-heritage countries tend to perform better economically over time. Economist Svetozar Pejovich analyzed the development of capitalism, economic freedom, and performance in common law as opposed to other countries in 2008.<sup>41</sup> Pejovich’s analysis and comparison of the Index of Economic Freedom with the Fraser Institute’s Economic Freedom of the World concluded that Anglo-American capitalism was doing better than Continental capitalism, with its greater governmental dependency. Pejovich noted that the two indexes have technical limitations and methodological problems, but because they have been relied on by scholars, investors, and the countries themselves they have some authority and reliability. Both indexes confirmed that the freer a country is, the better its economic performance over a long period of time.<sup>42</sup> In the decade between 1997 and 2006, there was a trend toward more economic freedom, and those countries

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therein). The exact placements vary from year to year, but common law countries stay towards the top.

37 See WORLD JUSTICE PROJECT, WORLD JUSTICE PROJECT RULE OF LAW INDEX 2012-2013 (2013), [https://worldjusticeproject.org/sites/default/files/documents/WJP\\_Index\\_Report\\_2012.pdf](https://worldjusticeproject.org/sites/default/files/documents/WJP_Index_Report_2012.pdf)

38 WORLD JUSTICE PROJECT, WORLD JUSTICE PROJECT RULE OF LAW INDEX 2016, at 5 (2016), [https://worldjusticeproject.org/sites/default/files/documents/RoLI\\_Final-Digital\\_0.pdf](https://worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf).

39 *Id.*

40 2017 *Economic Freedom of the World Heat Map*, HERITAGE FUND, <http://www.heritage.org/index/heatmap> (last visited Dec. 27, 2017).

41 SVETOZAR PEJOVICH, LAW, INFORMAL RULES AND ECONOMIC PERFORMANCE: THE CASE FOR COMMON LAW ix-xi (Edward Elgar 2008).

42 *Id.* at 97.

that increased their economic freedom the most, experienced the highest average economic growth.

Furthermore, Pejovich's study suggested that, relative to civil codes, the incentive effects of common law are more efficiency-friendly. He separated Western capitalist countries into two groups. The first group consisted of countries in which common law is a dominant legal system: the United States, England, Ireland, Australia, Canada, and New Zealand. He excluded Hong Kong and Singapore because it was not clear to him whether they were fully part of Western civilization at that time. The second group of countries included all Western countries that use civil law: Portugal, Spain, France, Luxembourg, Germany, Belgium, Holland, Italy, Switzerland, Austria, Sweden, and Denmark. Pejovich excluded Greece (because it was dominated by the Ottoman Empire for centuries), Finland, which remained between West and East, and Norway, which uses both common law and civil law. The average scores for civil law countries in 2006 remained in the "mostly free" category, while common law countries were firmly in the "free" category. Among the four major capitalist countries (France, Germany, England, and the United States), the results showed an even stronger case for common law: England and the United States' average score improved from 1.94 to 1.79; while France and Germany's average score improved only 2/3 that much, from 2.33 to 2.23.<sup>43</sup> The two indexes changed their method of grading in 2007, and Pejovich has since criticized some of their methodological changes as being less focused on unbiased analysis of economic freedom, but the results have remained generally the same.

Consistent with Pejovich's research, Hernando de Soto's empirical studies demonstrate the propensity of a common law system to adopt simple, practical solutions to real-world problems by formalizing informal social contracts, thereby encouraging economic development.<sup>44</sup> De Soto's research focuses primarily on small entrepreneurs in developing civil law countries and he compares their situations with those of start-up entrepreneurs in the United States.<sup>45</sup> In the 1980s, de Soto compared the amount of time it would take to open legally a one-person seamstress shop or formalize ownership of land, jumping through all bureaucratic hoops. In Peru (his home country), de Soto found that it took 289 six-hour days at a cost of US \$1,231 (thirty-one times the monthly minimum wage) to open a seamstress shop.<sup>46</sup> , De Soto further found that it would take thirteen to

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43 *Id.* at 98-99.

44 MYSTERY, *supra* note 14 at 105-151.

45 *Id.* at 18, 20.

46 *Id.* See also THE OTHER PATH, *supra* note 14 at 134.

twenty-five years and 168 steps to formalize ownership of urban property in the Philippines,<sup>47</sup> six to fourteen years in Egypt,<sup>48</sup> and ten to twelve years to lease government land in Haiti.<sup>49</sup> In contrast, he found that in the U.S., it took a few weeks and less than \$1000 to open a seamstress shop in most states.<sup>50</sup> (It would probably take less than that now, using such online programs as Legal Zoom.) The U.S. formalized ownership of property in the eighteenth and nineteenth century by adopting laws that accepted and recognized preexisting social contracts. For example, squatters' rights were recognized and legally provided for via land script<sup>51</sup>, the Pre-emption Act, and the Homestead Act.<sup>52</sup>

De Soto's main message in *Mystery* was that no nation's market economy can be strong if it does not have an efficient, inexpensive, and simple system for recording property ownership and other economic information.<sup>53</sup> When small entrepreneurs in developing countries cannot easily record ownership of their business or property, they cannot obtain credit or insurance, sell the business or expand; nor can they seek legal redress for business conflicts, and they live in fear of detection by corrupt government officials.<sup>54</sup> The lack of information on income and property ownership also means that that government cannot effectively and efficiently collect taxes on those businesses, nor do they have a database for investment decisions in health care, education, or environmental planning.<sup>55</sup> The exclusion of large numbers of small businesses creates two parallel economies: legal and extra-legal or formal and informal. The elite legal minority enjoys the economic benefits of the law and globalization, while the illegal majority is stuck in poverty because their assets languish as dead capital.<sup>56</sup> The enemy in developing countries is over-grown bureaucracy—flawed legal systems that make it virtually impossible to gain a stake in the market. People in such countries may have talent, enthusiasm, and an

47 MYSTERY, *supra* note 14, at 20.

48 *Id.*

49 *Id.* at 21.

50 *Key Concepts*, POWER OF THE POOR, [www.thepowerofthepoor.com/concepts/c7.php](http://www.thepowerofthepoor.com/concepts/c7.php) (last visited Oct. 11, 2017).

51 Land scrip(t) was the U.S. government's habit of issuing paper redeemable in land. Between 1780 and 1848, Congress provided two million acres of land for soldiers who fought in the Revolution, five million to veterans of the War of 1812, and 13 million for those who fought the war with Mexico. MYSTERY, *supra* note 14, at 125.

52 *See generally* MYSTERY, *supra* note 14, at 106–151 (describing the history of U.S. property law).

53 *See* Hernando de Soto, *The Destruction of Economic Facts*, BLOOMBERG BUSINESSWEEK, May 2, 2011, at 60, 60 (explaining the importance of comprehensive public records).

54 MYSTERY, *supra* note 14 at 155.

55 *Id.* at 196.

56 *Id.* at 6.

astonishing ability to wring a profit out of practically nothing, but they are not able to expand their businesses because they cannot operate within their existing overly-burdensome legal systems.<sup>57</sup>

De Soto has since put more thought into the evils of overgrown bureaucracy. He posits “that bureaucracy and corruption go hand in hand . . . not due to [local] culture but rather to political structure”.<sup>58</sup>

There appears to be a tradition among [Peru’s] lawmakers of using the law to redistribute wealth rather than to help create it... A state which does not realize that wealth and resources can grow and be promoted by an appropriate system of institutions, and that even the humblest members of the population can generate wealth, finds direct redistribution the only acceptable approach.

Tolerance of this kind of systemic political corruption eventually becomes part of the culture.<sup>59</sup>

Thus, in these kinds of systems, businesspeople spend time and money jockeying for position with government leaders, so that their businesses will be favored by laws that eliminate competition or give them government funds, rather than focusing on developing innovations that will serve their customers better and enhance their competitive edge. A legal system whose sole purpose is to redistribute benefits serves neither rich nor poor and only those who have close political ties will remain in the market.<sup>60</sup> Laws in these systems are based primarily on who will benefit and how, not on ethics or marketplace realities. Many governments pass tens of thousands of laws every year, increasing bureaucracy and creating more and more obstacles for those not close to political power. Naturally, bureaucrats want to maintain their positions and object to any change that might erode their influence, and especially in the developing world, they use their positions as toll booths to enrich themselves—the essence of corruption.<sup>61</sup> As corruption grows, both the integrity of the law and prosperity are destroyed. The phenomenon of ever-increasing bureaucracy is not exclusive to the developing world: de Soto points out that many (if not most) Western countries are marching down this same self-destructive path.

De Soto’s work concerns primarily small companies, and while one might think that a country’s economy depends on large companies, this is

<sup>57</sup> *Key Concepts*, *supra* note 50.

<sup>58</sup> *Id.*

<sup>59</sup> See JONATHAN R. MACEY, CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN 35–36 (2008) (explaining the connection between societal norms and business environments in various countries).

<sup>60</sup> See THE OTHER PATH, *supra* note 14 at 189–91 (describing the redistributive tradition in Peru).

<sup>61</sup> See *Key Concepts*, *supra* note 50.

would be a mistake. In the United States, small businesses (those with less than five hundred employees) account for 99.7% of employer firms, accounted for 66.3% of new jobs created from the third quarter of 1992 until the third quarter of 2013, 48% of total private-sector employees, and 33.6% of known export value.<sup>62</sup> Accordingly, small companies generate a significant portion of the U.S. economy.<sup>63</sup> In real numbers, small businesses with less than five-hundred employees employ about fifty-seven million persons in America.<sup>64</sup> While small businesses shut down each month, approximately 543,000 new businesses are started each month to replace those failed businesses.<sup>65</sup> Seven out of ten “new employer firms survive at least 2 years, half at least 5 years, a third at least 10 years, and a quarter stay in business fifteen years or more.”<sup>66</sup> There were 22.5 million non-employer firms (one-person businesses) in 2011, and fifty-two percent of all small businesses are home-based.<sup>67</sup>

Similarly, in a study of nine countries, the European Union found that ninety-nine percent of its enterprises should be classified as small or medium enterprises or “SMEs” (i.e., employing less than 250 people).<sup>68</sup> As in the U.S., small and medium sized enterprises are important in the European Union both in terms of employment and to a country’s economy, particularly in smaller countries.<sup>69</sup> Nevertheless, the study found that SMEs are important in larger countries, such as Germany, as well, where, specifically in Germany, they account for forty-three percent of gross value added and employ thirty-four percent of the total number of persons employed.<sup>70</sup>

62 U.S. SMALL BUS. ADMIN., FREQUENTLY ASKED QUESTIONS (2016), [https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016\\_WEB.pdf](https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf). For more statistics on small businesses in the U.S., see *2016 Small Business Profiles for the States and Territories*, U.S. SMALL BUS. ADMIN. (Mar. 9, 2016), <https://www.sba.gov/advocacy/small-business-profiles-states-and-territories-2016>.

63 See *Facts & Data on Small Business and Entrepreneurship*, SMALL BUSINESS & ENTREPRENEURSHIP COUNCIL, <http://sbecouncil.org/about-us/facts-and-data/> (last visited Apr. 14, 2018) (Small businesses were responsible for 46% of private nonfarm GDP in 2008—the most recent year for which the source data are available—and 32.9% of known export value in 2015).

64 Jason Nazar, *16 Surprising Statistics About Small Businesses*, FORBES (Sept. 9, 2013, 10:20 AM), <https://www.forbes.com/sites/jasonnazar/2013/09/09/16-surprising-statistics-about-small-businesses/>. See also *Frequently Asked Questions About Small Business*, *supra* note 62 at 1.

65 *Surprising Statistics About Small Business*, *supra* note 64.

66 *Id.*

67 *Id.*

68 *Statistics on Small and Medium Sized Enterprises*, EUROSTAT (Aug. 9, 2017, 11:16 AM), [ec.europa.eu/eurostat/statistics-explained/index.php/Statistics\\_on\\_small\\_and\\_medium-sized\\_enterprises](http://ec.europa.eu/eurostat/statistics-explained/index.php/Statistics_on_small_and_medium-sized_enterprises).

69 *Id.*

70 *Id.*

## CAPITALISM, BUSINESS, AND EMPLOYMENT

The effect of the greater individual freedom provided by common law can be seen not just in greater long-term economic efficiency and economic freedom, but also in the breadth and depth of investors. Capitalist countries, whether common law or civil law, develop a wide variety of business organizations such as corporations, single proprietorships, producers' cooperatives, labor cooperatives, associations, not-for-profit firms, partnerships, limited liability companies, and other forms of business entities. All of them were organized voluntarily, have survived competition from other forms of business organizations, and thus have passed an economic efficiency test.<sup>71</sup>

However, corporate ownership in common law countries—especially of large firms—is very different from that in civil law countries. In the United States, as opposed to other countries, share ownership is separated from managerial control.<sup>72</sup> This means that non-owner managers and directors control corporate assets and are responsible for the corporation's strategies and tactics.<sup>73</sup> The shareholders, a largely separate group, provide most of the risk capital for corporate activities. “The interlocking directorates and the ownership of control blocks of stock by families and corporate groups common in Europe and Asia are largely absent in the United States.”<sup>74</sup>

The unique ownership structure used by U.S. corporations presents opportunities as well as challenges. For example, the ability to raise vast sums of money from widely disparate investors democratizes capital: while some middle-class investors purchase stock directly, they also purchase it through their contributions to insurance premiums, pension funds, and mutual funds, thus raising billions of dollars.<sup>75</sup> The United States would not have both a robust middle class and a large number of powerful, multinational corporations without the separation of share ownership and corporate management.<sup>76</sup>

The U.S. “shareholder culture” remains unique in this way **in other countries, even developed countries like France, Germany, Italy, and Japan, most big companies are controlled by powerful families, other corporations via complex corporate cross-holdings of shares, large banks, and, occasionally, by**

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<sup>71</sup> See PEJOVICH, *supra* note 41, at 9 (defining economic efficiency).

<sup>72</sup> MACEY, *supra* note 59, at 3, 4 (emphasis added).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*



**governments themselves.** Shareholders are generally at the mercy of these powerful interests, and shareholders' interests, not surprisingly, often are mere afterthoughts for the managers of such companies . . . .

. . . .

In the United States, as distinct from other countries, there is broad (though by no means universal) consensus that the corporation is and should be governed for the benefit of shareholders, subject only to the legal and contractual responsibilities of the company to third parties . . . .<sup>77</sup>

. . . .

**In [contrast, in] France, Germany, and Japan[,] most managers think that their primary obligation is to provide job security for workers . . . .**<sup>78</sup>

Because of these differences in regulatory structure, American corporations such as Apple attract large numbers of private investors. Even if some of the private investors are institutions such as TIAA-CREFF, which handles the investments of teachers' retirement funds, such institutional investors are necessarily motivated to maximize economic growth. This requires strong protection of investors' property rights, and also of the freedom of contract.

Freedom of contract reduces the transaction costs of entry and exit from business, while credible property rights protect shareholders' wealth from redistribution in political markets.<sup>79</sup> Together, the two encourage the expansion of trade and technological innovation.<sup>80</sup> Furthermore, strong

<sup>77</sup> MACEY, *supra* note 59, at 4. *See* Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919) (holding that Henry Ford had to operate the Ford Motor Company in the interest of maximizing profit for his shareholders, rather than for the benefit of his employees or customers. It is often cited as affirming the principle of "shareholder primacy" in corporate America).

<sup>78</sup> MACEY, *supra* note 59, at 4 (emphasis added).

<sup>79</sup> *See* PEJOVICH, *supra* note 41, at 86–87 (implying that protection of property rights is vitally important to economic development). *But see* CURTIS J. MILHAUPT & KATHARINA PISTOR, LAW AND CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD 31 (2008) (arguing that property rights are not necessarily tied to economic development).

<sup>80</sup> *See* NICHOLAS CAPALDI & GORDON LLOYD, LIBERTY & EQUALITY IN POLITICAL ECONOMY 10 (Elgar 2016) (arguing that technology proceeds best in a market economy). A market economy requires limited government (limited to providing context for commercial activity such as protection of property), and limited government requires the Rule of Law understood as protecting individual initiative in a civil

protection for investors encourages individuals to become shareholders, and this dispersion of shareholding has many economic benefits. For example, the dispersion of shares means that investors can diversify their portfolios and decrease risk, and thus have incentive to invest in risky ventures because they can offset those risks through diversification. Freedom of contract can also encourage the distribution of risk among a large number of people and thereby minimize both costs and risk. For example, Lloyds of London, founded in a London coffee house, was the first such large-scale business insurance program, and allowed individual investors to spread the risks of the British shipping industry as early as 1686.<sup>81</sup>

The dispersion of shareholding and resulting offsetting of risk then encourages innovation and technological innovation, or the “technological project,”<sup>82</sup> which is the life-blood of a market economy—for example, Apple planned on spending US\$ 10 billion on research and development in 2017.<sup>83</sup> One can further see the American public’s wide-spread interest in innovation demonstrated simply by watching the popular U.S. reality TV show “Shark Tank” in which several professional investors consider the risks and potential rewards of investing in various small developers’ innovations. It is no accident that Apple, Facebook, Amazon, Microsoft, Google, all dominant internet companies, were created in the United States. As Pejovich points out, a large body of literature shows that common law protects shareholders better than does civilian statutory law, and empirical evidence shows that the resulting dispersion of shareholding is much greater in the United States than in Western Europe (or Latin America), where large families, a few large shareholders, and financial institutions such as banks are primary shareholders. A major, well-documented study stated the following:

We show that the origin of a country’s legal system proves to be the most important determinant of investment performance. Companies in countries with a legal system of English origin earn returns on investment that are at least as large as their costs of capital.

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association. *Id.*

<sup>81</sup> See *Corporate History*, LLOYDS.COM, <https://www.lloyds.com/about-lloyds/history/corporate-history> (last visited Feb. 12, 2018). See also Sara Palmer, *Edward Lloyd*, OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (Oxford Univ. Press 2007) (last visited Jan. 2, 2018). The Royal Stock Exchange (now the London Stock Exchange) was founded earlier by financier Thomas Gresham, who patterned it after the Dutch stock exchange. Queen Elizabeth opened that exchange in 1571. See *Heritage*, THE ROYAL EXCHANGE, <http://www.theroyalexchange.co.uk/heritage/> (last visited Apr. 15, 2018).

<sup>82</sup> CAPALDI & LLOYD, *supra* note 80 at 4–7 (discussing the technological project).

<sup>83</sup> Tim Bajarin, *Why Apple Is Spending Crazy Amounts of Money on New Ideas*, TIME (May 18, 2016), [time.com/4339940/apple-rd-research-development/](http://time.com/4339940/apple-rd-research-development/).

Companies in all countries with civil-law systems earn on average returns on investment below their costs of capital. Furthermore, differences in investment performance that are related to a country's legal system dominate differences that are related to ownership structure.<sup>84</sup>

### THE COMMON LAW AND BREXIT

Some legal scholars ignore any distinction between common law and civil law or between the Rule of Law and *Rechtsstaat*,<sup>85</sup> or they argue that *Rechtsstaat* has transcended the traditional “narrow” conception of the Rule of Law,<sup>86</sup> or they argue that the distinction between common law and civil law is irrelevant to economic development.<sup>87</sup> These conclusions are all challenged by the Brexit vote, where citizens of the UK voted to secede from the European Union. Under the European Union, life has become increasingly regulated by legislation issued by Brussels. The EU is “not merely an economic union” but is intended to “ensure social progress and seek the constant improvement of the living and working conditions of their

<sup>84</sup> Klaus Gugler, Dennis C. Mueller & B. Burcin Yurtoglu, *Corporate Governance and the Returns on Investment*, 47 J. L. & ECON. 589 (2004).

<sup>85</sup> See *supra* notes 1–2 and accompanying text. Neither the World Justice Project nor the Index of Economic Freedom distinguish between the two.

<sup>86</sup> See Rainer Grote, *The German Rechtsstaat in a Comparative Perspective*, in THE LEGAL DOCTRINES OF THE RULE OF LAW AND THE LEGAL STATE (RECHTSSTAAT) 193, 197 (2014). See also Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARV. L. REV. 44, 69 (1941) (“The individualistic philosophy of the 18th and 19th centuries proceeded from the idea that the human individual was sovereign, *i.e.*, of the highest value. From this it was concluded that a social order can be binding on the individual only when it is recognized by the individual as binding. From this came the doctrine of the social contract, which still has its exponents; **but today the inclination is rather to a universalistic philosophy of values according to which the community is superior to the individual.**”) (emphasis added). Hans Kelsen inspired post-WWII German constitutionalism, and while he here is discussing law in general, he had been educated in law in Germany, and was the most influential German jurist from the 1930s through post-WWII Germany.

<sup>87</sup> For examples of scholars who do not consider the distinction between common and civil law as predictive of economic development, see MILHAUPT & PISTOR, *supra* note 79 at 21–25 (This work is discussed and critiqued in detail *infra* at text accompanying notes) (Note that in 2008, it was fashionable to see the U.S. financial crisis as predictive of a collapse of capitalism); STEPHEN M. BAINBRIDGE, *CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS* (Oxford Univ. Press 2012) (explaining that Enron’s scandal was caused by people not doing what they were required to do under law in the first place, and arguing that the resulting legislation (the Sarbanes Oxley and Dodd Frank Acts) in both cases was counterproductive); and Nicholas Capaldi, *Reclaiming the Narrative of Liberty in Corporate Governance*, LAW & LIBERTY, (June 18, 2012), <http://www.libertylawsite.org/book-review/reclaiming-the-narrative-of-liberty-in-corporate-governance/> (reviewing STEPHEN M. BAINBRIDGE, *CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS* (Oxford U. Press 2012)) (describing the difference between Lockean and Rousseauian approaches to law and arguing that legislation such as Sarbanes-Oxley that is passed in the heat of a perceived crisis subsequently turns out to be counterproductive).

people,”<sup>88</sup> thus it has encompassed the continental conception of *Rechtsstaat* wherein government is conceived of as an enterprise association.<sup>89</sup> EU legislation is proposed and drafted by the Commission (consisting of EU officials nominated by the Parliament, not elected) and then passed by the EU Council and Parliament. EU legislation comes in two forms: directives and regulations.<sup>90</sup> Directives order a member country or countries to develop and adopt legislation according to certain parameters. Regulations, once passed, are immediately effective without implementing legislation.

Additionally, the treaties that founded the EU provide that a number of positive rights are guaranteed. The European Union’s Guarantee of Freedom of Movement<sup>91</sup> has enabled populations to move from areas of low employment to areas where they are more likely to find employment. For example, unemployment among French youth in October 2017 was 21.9%, and has, for the period from 1983 to 2017 averaged 20.19%.<sup>92</sup> Overall unemployment in the Eurozone averaged nearly 10% (above 9.9%) between 2006 to 2016, reflecting weak economic growth,<sup>93</sup> though it dropped to 8.9% in September, 2017.<sup>94</sup> Youth unemployment in the UK has averaged 15.19% over the same period from 1983 to 2017, and was 12% in September, 2017.<sup>95</sup> Overall unemployment in the UK was 4.3% in October, 2017.<sup>96</sup> The result of England’s comparatively lower unemployment statistics has been an increase in work-seeking immigrants: the net migration in 2017 was 250,000. – an increase from the previous year.<sup>97</sup> The UK has a population of 63.7 million, of which 5.3 million (8%) are non-

88 DEFRENNE v SABENA (1976) CASE 43/75, [https://en.wikipedia.org/wiki/Defrenne\\_v\\_Sabena\\_\(No\\_2\)](https://en.wikipedia.org/wiki/Defrenne_v_Sabena_(No_2)) (last visited Oct. 14, 2017).

89 Discussed in greater detail *infra* at text accompanying notes 148-153.

90 Consolidated Version of the Treaty on the Functioning of the European Union art. 288, Mar. 3, 2010, 2010 O.J. (C 83/01) [hereinafter TFEU].

91 *Id.* art. 45.

92 *France Youth Unemployment Rate*, TRADINGECONOMICS, <https://tradingeconomics.com/france/youth-unemployment-rate> (last visited Apr. 15, 2018).

93 Unemployment Rate in the European Union and the Euro Area from 2007 to 2017, STATISTA.COM, <https://www.statista.com/statistics/267906/unemployment-rate-in-eu-and-euro-area/> (last visited Apr. 15, 2018).

94 *Unemployment Statistics*, EUROSTAT STATISTICS EXPLAINED, [http://ec.europa.eu/eurostat/statistics-explained/index.php/Unemployment\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Unemployment_statistics) (last visited Apr. 15, 2018).

95 *UK Youth Unemployment Rate*, TRADINGECONOMICS, <https://tradingeconomics.com/united-kingdom/youth-unemployment-rate> (last visited Apr. 15, 2018).

96 *UK Unemployment Rate*, TRADINGECONOMICS, <https://tradingeconomics.com/united-kingdom/unemployment-rate> (last visited Apr. 15, 2018).

97 *Immigration to the UK: The Key Facts: Datablog: Facts Are Sacred*, GUARDIAN (Dec. 21, 2017), <https://www.theguardian.com/news/datablog/2010/jun/26/non-eu-immigration-uk-statistics>.

British, and just over half of those - 2.9 million (5%) - are from Europe.<sup>98</sup>

The Brexit vote surprised and even astonished people around the world who could not – and cannot – understand why citizens of the United Kingdom would vote to secede from the European Union. If, however, one understands not just the current problems the British citizenry believe the E.U. has caused them, but also understands the historical cultural and legal disconnect between the U.K. and the continent, that decision becomes much more comprehensible.

Prior to the vote, British philosopher Roger Scruton anticipated three possible reasons U.K. citizens might vote to separate the United Kingdom<sup>99</sup> from the European Union.<sup>100</sup> His first reason was that the English have had a different attitude towards the European Union: unlike the Continent, most of which had been occupied by the Nazis, the English had successfully defended their sovereignty and freedom, so their motives in joining the European Union were entirely different from those of Germany, France, and the other European states.<sup>101</sup> Next, Scruton posited, that sense of sovereignty has been challenged by the European freedom of movement policy because English has become the world's second language.<sup>102</sup> A small country, England is now more densely populated than other European countries by the influx of a large number of immigrants per year, who are able to function because English is their second language, and who compete with the English for jobs and housing.<sup>103</sup> Consequentially, Scruton theorized that many of those who would vote for Brexit believe that the European Union's freedom of movement policy cost England its right to secure its own borders, and thus it was jeopardizing the island nation's sovereignty and harming English citizens' economic welfare and opportunities.<sup>104</sup>

Scruton's third explanation for a potential vote in favor of Brexit rested upon England's unique legal system and its traditional understanding of the

98 *Reality Check: How Many EU Nationals live in the UK?*, BBC NEWS (July 16, 2016), <http://www.bbc.com/news/uk-politics-uk-leaves-the-eu-36745584>.

99 The author understands that the terms United Kingdom, Great Britain, and England refer to different entities and begs the reader's indulgence in using them interchangeably in this discussion. Of the entities that comprise the United Kingdom, England and Wales voted for Brexit, while Scotland and Northern Ireland both voted to remain in the European Union. See Alex Hunt & Brian Wheeler, *Brexit: All You Need to Know About the UK Leaving the EU*, BBC NEWS (Jan. 4, 2018), <http://www.bbc.com/news/uk-politics-32810887>.

100 Roger Scruton, *Brexit: Yes or No?*, YOUTUBE (Nov. 26, 2015), <https://www.youtube.com/watch?v=Bvlg8YK3iSU>.

101 *Id.*

102 *Id.*

103 *Id.*

104 *Id.*

relationship between citizen and government.<sup>105</sup> Scruton pointed out that Britain's legal system was built up from below and is structurally completely different from other European nations.<sup>106</sup> In Britain, individuals traditionally bring disputes to courts, and impartial judges then 'discover' the law (rather than create it). Parliament may thereafter ratify such decisions, but usually does not. This means that British law has two characteristics distinct from civil law systems: law is based primarily on conflict resolution and built up from below by the accumulation of decisions made in individual disputes and is not typically based on legislation.<sup>107</sup>

British judicial decision-based law might be more accurately described as conflict management rather than resolution: the common law manages conflict, it cannot always fully resolve it. The common law historically recognized that the primary remedy a court can grant is money, and that it is not always an effective remedy (in which case, an equitable remedy may be granted).<sup>108</sup> This is true of the U.S. as well, as recognized by James Madison in *Federalist No. 10* where Madison effectively argued that government must work to manage conflict among interest groups because to attempt to eliminate them would destroy liberty and Madison further argued the structure of a compound republic (as opposed to a democracy) can effectuate this conflict management and provide the necessary stability.<sup>109</sup>

Because of this difference in approach (conflict management versus legislation), Scruton posited that E.U.-imposed law inspires rebellion on the

<sup>105</sup> *Id.*

<sup>106</sup> *Accord* FRIEDRICH A. HAYEK, *LAW, LEGISLATION, AND LIBERTY* 84-85 (Routledge, 1982) ("England escaped a wholesale reception of the late Roman law and with it the conception of law as the creation of some ruler; . . . What prevented [the development of a highly centralized absolute monarchy] was the deeply entrenched tradition of a common law that was not conceived as the product of anyone's will but rather as a barrier to all power, including that of the king . . ." British eighteenth century freedom was not originally a product of the separation of powers, but rather a result of the fact that "the law that governed the decisions of the courts was the common law, a law existing independently of anyone's will and at the same time binding upon and developed by the independent courts; a law with which parliament only rarely interfered . . .").

<sup>107</sup> *Id.* ("The only country that . . . built on the medieval 'liberties' the modern conception of liberty under the law was England. This was partly due to the fact that England escaped a wholesale reception of the late Roman law . . . ; but it was probably due more to the circumstances that the common law jurists there developed conceptions somewhat [different from the Continent's]. . . . What prevented [the development of a highly centralized absolute monarchy in England] was the deeply entrenched tradition of a common law that was not conceived as the product of anyone's will but rather as a barrier to all power, including that of the king – a tradition which Edward Coke was to defend . . . . The freedom of the British . . . was thus not . . . originally a product of the separation of powers between legislative and executive, but rather a result of the fact that the law that governed the decisions of the courts was the common law, a law existing independently of anyone's will and at the same time binding upon and developed by the independent courts; a law with which parliament only rarely interfered . . . .")

<sup>108</sup> Samuel L. Bray, *The System of Equitable Remedies*, 63 *UCLA L. REV.* 530, 535-536 (2016).

<sup>109</sup> *THE FEDERALIST* NO. 10 (James Madison).

part of the English who do not accept law that is imposed either from above or from outside their country. Furthermore, legislators who draft European Union regulations do not understand the English legal system and only know how to regulate.<sup>110</sup>

A major British polling company questioned 12,369 voters on the day of the referendum,<sup>111</sup> and found that Scruton was largely correct in that the primary concern of those voting for Brexit was, first, their objection to EU legislation (Scruton's third proposition) and, second, concerns about sovereignty/immigration/economics concern (Scruton's second proposition).<sup>112</sup> **Nearly half (49%) of those voting to leave said the biggest single reason for wanting to leave the European Union was that they believed that legal decisions about the United Kingdom should be taken in the United Kingdom.**<sup>113</sup> A third of those voting to leave the EU indicated that their primary concern was immigration/economic opportunity.<sup>114</sup>

As of this writing, slightly more than one year after the vote, the British government remains committed to Brexit: more than eighty percent of voters backed one of the parties supporting withdrawal.<sup>115</sup> Furthermore, Britain expects that its economy will remain strong post-withdrawal:

The fundamentals of the U.K. economy are strong, providing a solid platform on which to build new trading links. We have reduced the deficit by nearly 75% and cut taxes for millions of working people, and the unemployment rate remains low. The U.K. was the second-fastest-growing economy in the Group of Seven last year. A Pricewaterhouse-Cooper's report from February projects that Britain will hold the G-7 growth title until 2050, outstripping Germany, France, and Italy.

The U.K. has long been one of the best places in the world to invest, with regulatory stability, a strong rule of law, and a low-tax, high-skilled economy.<sup>116</sup>

110 Scruton, *supra* note 100.

111 Lord Ashcroft, *How the United Kingdom Voted on Thursday... and Why*, LORDASHCROFTPOLLS.COM (June 24, 2016), <http://lordashcroftpolls.com/2016/06/how-the-united-kingdom-voted-and-why/>.

112 *Id.*

113 *Id.*

114 *Id.*

115 Liam Fox, Opinion, *Britain is Committed to Brexit & Free Trade*, WALL ST. J. (July 24, 2017), <https://www.wsj.com/articles/britain-is-committed-to-brexit-and-free-trade-1500845407>.

116 *Id.*

As scholars, all too often we refer to “the Western Tradition.” However, this is a scholarly fiction – there is no one Western legal or scholarly tradition. Britain and the rest of the United Kingdom have historically had a different understanding of how law should be created, as well as a different understanding of the relationship between man and government than does the civil-law-based Continent. As it has been described, the Anglo-American [Rule of Law] is a sort of spontaneous growth so closely bound up with the life of a people that we can hardly treat it as a product of human will....”<sup>117</sup> The civil law tradition is similarly connected with its history, which was entirely different.

#### THE CIVILIAN TRADITION AND RECHTSSTAAT

In contrast to David Hume<sup>118</sup> and Adam Smith<sup>119</sup> who viewed the Industrial Revolution positively, Jean Jacques Rousseau disliked the Industrial Revolution and rejected the Scottish Enlightenment’s emphasis on entrepreneurship, believing that it promoted individual greed and exploitation.<sup>120</sup> To remedy the individualism that he perceived of as corrosive to the needs of the community, he developed the conception of the *general will* (*volonté générale*): governmental decisions should be based on what an average citizen would want if he knew what was best for all.<sup>121</sup> The French revolutionaries turned this into a credo of ‘*Liberté, Egalité, and Fraternité*,’ and had only a vague idea of the *Reigne de Droit* or *L’État de Droit*. The French *Declaration of Rights of Man and of the Citizen* (1789) posited inalienable rights, but was not considered to be part of the

117 A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 116 (Liberty Fund, Inc., 8th ed. 2010).

118 Tom Velk & A.R. Riggs, *David Hume’s Practical Economics*, 11 HUME STUDIES 154-165 (Nov. 1985) (citing DAVID HUME, *Of Commerce*, in HUME’S WRITINGS ON ECONOMICS (Eugene Rotwan ed., Univ. Wis. Press 1955)). Hume rejected “the idea that a nation can achieve greatness as an agricultural utopia.” *Id.* at 155. He believed that “industrial development and the advancement of commerce were the springboards to progress and happiness.” *Id.* at 156. And he held that “the apparent immorality of human greed and selfishness, combined with amoral curiosity and an urge to imitate, gives rise to the highly moral outcome of general progress in the arts, widely distributed wealth, economic progress, and an increase in liberty.” *Id.* at 156.

119 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Liberty Fund ed. 1981) (photographic reproduction of Oxford Univ. Press 1976). Using the example of a pin factory (now immortalized on the British twenty-pound note), Smith developed the concept of the division of labor brought about by industrialization and expounded on how rational self-interest, individual autonomy, and competition can lead to diversification of the market, the use of money to facilitate trade, and economic prosperity. *Id.* at 13-30.

120 Jean Jacques Rousseau, *Discours sur l’origine et les fondements de l’inégalité parmi les hommes* [Discourse on the origin and foundation of inequality among men] (1754).

121 Jean Jacques Rousseau, *Du contrat social ou Principes du droit politique* [The Social Contract or Principles of Political Right] (1762).



Constitution (any of the 5 of them), and was therefore regarded as unenforceable.<sup>122</sup> The Germanic conception of a *Rechtsstaat* then picked up where the French left off. Eighteenth century Austrian philosopher Immanuel Kant is generally identified as the spiritual father of *Rechtsstaat*.<sup>123</sup> He defined it as the union of a multitude of men under laws of justice with any lawful state necessarily being a state governed by the law of reason based on and protecting freedom for every member of society, equality, and individual autonomy:<sup>124</sup>

“There is only one innate right,” says Kant, “Freedom (independence from being constrained by another’s choice), insofar as it can coexist with the freedom of every other in accordance with a universal law” (6:237). Kant rejects any other basis for the state, in particular arguing that the welfare of citizens cannot be the basis of state power. He argues that a state cannot legitimately impose any particular conception of happiness upon its citizens (8:290–91). To do so would be for the ruler to treat citizens as children, assuming that they are unable to understand what is truly useful or harmful to themselves.<sup>125</sup>

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122 RAYMOND CARRÉ DE MALBERG, CONTRIBUTION À LA THÉORIE GÉNÉRALE DE L'ÉTAT 228-243 (2004). Carré de Malberg posited that the state was an entity that could act only through law, and could, through the concept of self-limitation, bind itself to its own norms. His theory was that law exists to protect individual rights, and such rights are only partially protected by legislated law. Ultimately, Carré de Malberg, along with other French positivist jurists of his time, maintained that without specific appendage to the Constitution, the 1789 *Declaration* could have no legal effect. *Id.* at 493-500. In contrast, the *U.S. Declaration of Independence*, a similarly pre-constitutional statement of rights not referenced in the U.S. Constitution was cited by the U.S. Supreme Court 212 times by 2011. Nadia E. Nedzel, *Chapter 18: The Rule of Law v. Legal State: Where Have We Come From, Where Are We Going To?*, 38 IUS GENTIUM 289, 295 (2014).

123 Grote, *supra* note 86, at 193-94. *But see* FRIEDRICH HAYEK, THE POLITICAL IDEA OF THE RULE OF LAW 18-27 (Univ. Chi. 1955) (the Cairo Lectures), in which Hayek discusses those German writers who developed the theoretical conception of the *Rechtsstaat* after 1800. The *Rechtsstaat* was designed primarily to curb the arbitrary exercise of power by the expanding bureaucracy. All of continental Europe had developed centralized administrative machinery whose professional administrators had acquired primary power. The two possible ways of limiting that power was to either rely on ordinary courts to decide which administrative acts were lawful and consistent with private liberty; or in line with French practice, establish quasi-judicial bodies within the administrative machinery. Rudolf von Gneist called for the creation of a separate system of courts for administrative actions, arguing that ordinary judges could not be expected to possess the specialized knowledge required. Thereafter, *Rechtsstaat* came to refer to a system of independent administrative courts to police the government, and make sure it was following its own law, rather than a reliance on ordinary courts. EUGENE F. MILLER, HAYEK'S THE CONSTITUTION OF LIBERTY: AN ACCOUNT OF ITS ARGUMENT 118-119 (IEA Pub. 2010). Even under this interpretation; however, *Rechtsstaat* is not designed to protect individuals, but is intended to insure the smooth and uniform operation of government.

124 *Kant's Social & Political Philosophy*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (July 24, 2007, substantially revised on Sept. 1, 2016), <https://plato.stanford.edu/entries/kant-social-political/>.

125 *Id.*

*Rechtsstaat* morphed several times after Kant. It gradually became more focused on equality and the government's duty to balance positive rights against a citizen's obligations towards society, thus absorbing Rousseau's conception of the general will. By the mid nineteenth-century, in place of Kant's negative rights, Von Mohl promoted freedom **through** the state.<sup>126</sup> The lawful state was to measure governmental action against the general objective of promoting an individual's complete development.<sup>127</sup> It was at that point that *Rechtsstaat* became premised on 'positive rights'. This contrasts with the Common law concept that the proper role of government is to prevent interference with liberty and that individuals are in charge of their own development, and it is consistent with the conception of a government as an enterprise association whose goal is to give rights to individuals and promote their complete development – as with the European Union's stated goals.

Jeremy Bentham, the English legal philosopher, lived from 1748-1862, and thus was active during both the American and French revolutions. In 1776, he wrote and published a pamphlet highly critical of Blackstone, a pamphlet still referred to as the beginning of English legal reform.<sup>128</sup> While ultimately influential in England as well, during his lifetime, Bentham's philosophy of law was closer to the French Encyclopedists than to any English school of writers: in fact, because of his correspondence with them, various leaders of the French Revolution so respected his views that they declared Bentham to be an honorary citizen of France in 1792.<sup>129</sup>

As a young man, Bentham believed wholeheartedly "in that form of utilitarianism which places the object of life in the proportion of the 'greatest happiness of the greatest number.'"<sup>130</sup> He believed that European legal institutions needed reforming, and that legislation was the key to those reforms.<sup>131</sup> He further believed that legislation was a science, and that because England's law had grown haphazardly from an accumulation of judicial decisions, it was antiquated, unscientific, and separate from

126 MARTIN LOUGHLIN, FOUNDATIONS OF PUBLIC LAW 319 (Oxford Univ. Press 2012).

127 *Id.*

128 Charles Noble Gregory, *Bentham and the Codifiers*, 13 HARV. L. REV. 344, 344 (1900).

129 See RIGHTS, REPRESENTATION, AND REFORM: NONSENSE UPON STILTS AND OTHER WRITINGS ON THE FRENCH REVOLUTION (THE COLLECTED WORKS OF JEREMY BENTHAM) xvii-xix, 291 n. 1 (Philip Schofield, Catherine Pease-Watkin, & Cyprian Blamires eds., Oxford Univ. Press, 2002) (detailing his interaction with various French philosophes).

130 A. V. DICEY, LECTURES ON THE RELATION BETWEEN LAW & PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY 95 (Richard Vande Wetering ed., Liberty Fund 2008). The title of Dicey's lecture is tellingly entitled *Period of Benthamism or Individualism* – Bentham thought he was fighting for individual liberty and laissez-faire. *Id.* at 106-107.

131 *Id.* at 96.

morality.<sup>132</sup> He argued that legislation deals with whole classes of men, while morality deals with individuals, and the State's function is to promote the happiness or well-being of a large number of persons, not to conjecture about what may constitute the happiness of an individual.<sup>133</sup> Thus, Bentham is regarded as the founder of legal positivism.<sup>134</sup> He also planted the seeds of the codification movement – codification being the hallmark of civil law:

Law, like tinned roast beef, he thought susceptible of export without deterioration and fit for consumption in any clime. “Laws need not be of the wild and spontaneous growth of the country to which they are given,” he wrote; “prejudice and the blindest custom must be humored, but they need not be the sole arbiters and guides.” “Legislators, who, having freed themselves from the shackles of authority, have learned to soar above the mists of prejudice, know as well how to make laws for one country as for another,” — though he admits they required some data as to the circumstances of those for whom they deal.<sup>135</sup>

Bentham vigorously urged that all countries replace their existing laws with complete code of laws, clear, simple, shaped on the principle of utility, and all comprehensive.<sup>136</sup> Bentham furthermore offered his services as codifier to many different countries, including the governors of the colonies of Pennsylvania, Virginia, and New Hampshire, and subsequently President Madison.<sup>137</sup> However, his arguments for codification had the most profound

<sup>132</sup> LOUGHLIN, *supra* note 126 at 320.

<sup>133</sup> *Id.*

<sup>134</sup> *Legal Positivism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Jan. 3, 2003), <https://plato.stanford.edu/entries/legal-positivism/>.

<sup>135</sup> Gregory, *supra* note 128 at 345.

<sup>136</sup> *Id.* at 349.

<sup>137</sup> The only U.S. state that fully adopted the codification movement was Louisiana, which enacted its Civil Code on March 31, 1808, and its adoption was conceived and developed in accordance with public pressure, not pursuant to any suggestions by Bentham. See John T. Hood, Jr., *The History & Development of the Louisiana Civil Code*, 19 LA. L. REV 18 (1958). While patterned after Napoleon's Draft *Projet* of 1804, Louisiana's first Civil Code was grounded in indigenous Spanish and French law. *Id.* See also LOUIS MOREAU LISLET & JAMES BROWN, LOUISIANA, A DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS WITH ALTERATIONS AND AMENDMENTS ADAPTED TO ITS PRESENT SYSTEM OF GOVERNMENT (New Orleans, 1808) (tracking articles of the *Projet* and tying them to Spanish & French sources). Bentham and New York jurist Edward Livingston maintained a lengthy correspondence, and when Livingston was appointed by Thomas Jefferson to resolve Louisiana's concerns about maintaining indigenous law after the Louisiana Purchase, Livingston appointed attorneys Louis Moreau Lislet and James Brown to write Louisiana's first civil code, using Napoleon's *Projet* as a pattern. See *Jeremy Bentham*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Mar. 17, 2015), <https://plato.stanford.edu/entries/bentham/>. Louisiana's Civil Code was thereafter updated several times, and is now consistently updated by the Louisiana State Law Institute. As such, it has since

influence on Emperor Napoleon's post-Revolutionary France, and from there to the rest of what is now the civil law world:

[T]he "Code Napoleon," or as it is called under the Republic, "Code Civil," [was] promulgated under the authority of the great Emperor between the years 1804 and 1810, and designed to replace the extreme confusion of the "*droit écrit et droit coutume*" of France, where Voltaire had said, with bitter truth, that a traveler had to change laws as often as horses.<sup>138</sup>

Savigny complained of the ignorance and haste with which it was completed, and Austin follows him and points out its defects in definition, but it has continued to dominate France long after the imperial house has fallen, and, having been imposed by conquest or its equivalent, has been adopted and retained in Italy, Holland, Belgium, the Rhenish Provinces, Poland, and Switzerland, and been a model for other countries as Greece. Napoleon's boast, "I shall go down to posterity with my code in my hand," has been justified.

Bentham with just pride pointed out in a letter to the Emperor of Russia that he alone of living men was quoted in the introduction to this code, and his name and doctrines were familiar and powerful in France long before this great work was accomplished.<sup>139</sup>

The civilian legislative state was conceived of as a juristic person and the only rights individuals have are those created through legislation.<sup>140</sup>

incorporated concepts developed by U.S. Common law and commercial law as well as keeping many of its original civilian concepts. The author has had the honor of working with the LSLI's Committee on Lesion Beyond Moiety in 2016-2018. See generally Vernon Valentine Palmer, *The French Connection and the Spanish Perception: Historical Debates and Contemporary Evaluation of French Influence on Louisiana's Civil Law*, 63 LA. L. REV. 1067 (2003).

138 At the time, while Justinian's Code (i.e. the Roman Digest) and Catholic Canon law provided some law used in all parts of France and most of the Continent, each separate area of France had its own written '*coutume*' or customary law, the most comprehensive of which was the *Coutume de Paris*—these sources were subsumed into and replaced by Napoleon's Projet. See JEAN-LOUIS HALPERIN, *LE CODE CIVIL*, (Daloz 2d ed. 2003) & *Le Code Civil ou Code Napoléon: Contexte de la Codification de 1804-2004*, REALISATIONS, [http://www.thucydide.com/realisations/comprendre/code\\_napoleon/code3.htm](http://www.thucydide.com/realisations/comprendre/code_napoleon/code3.htm).

Le Code Civil reprenait des solutions déjà dégagées par la doctrine et la jurisprudence civile de l'Ancien Régime et mettait en œuvre les maximes juridiques de la Révolution. Les législateurs s'étaient inspirés à la fois du droit romain, des anciennes coutumes de France, des ordonnances des rois et des lois formulées par les grandes assemblées de la Révolution.

[The Civil Code replaced the solutions previously developed by doctrine and jurisprudence of the Ancien Régime and put in place juridical maxims of the Revolution. The legislators were influenced by Roman law, the old customary law of France, the king's ordinances, and the laws formulated by the great assemblies of the Revolution] (*trans. Author*).

139 Gregory, *supra* note 128, at 353.

140 LOUGHLIN, *supra* note 126.

Morality is an internal matter, while law is external and should be measured by its utility.<sup>141</sup> This understanding of the relationship between the state and law, as identified by Von Jhering, differs from the common law understanding of a limited government: because there is no power above the state, the state must limit itself.<sup>142</sup> Nineteenth Century *Rechtsstaat* regarded government both as the representative of the general will and as having its own particular will based on the government's subjective right to command in accordance with legislated law.<sup>143</sup> Thus, it was a way to establish the legitimacy and authority of government, not a way to establish rights.

Towards the end of the nineteenth century and through the early part of the twentieth, the term *Rechtsstaat* became so malleable that it was at times regarded as a magic box from which a jurist could obtain any legal principle or claim that was desired. Some jurists did not hesitate to describe Hitler's Third Reich as an exemplary positivistic updated version of *Rechtsstaat*: the implication was hence that if a *Rechtsstaat* is defined as a state based on order, then because Hitler's Third Reich was a legal order, it was thus a *Rechtsstaat*.<sup>144</sup>

Austrian legal philosopher Hans Kelsen reclaimed *Rechtsstaat* somewhat in the twentieth century by incorporating it into his *Pure Theory of Law*. He asserted that the state was not power but law; and the legal system must be hierarchical, with a *Grundnorm* (such as a constitution) at the top.<sup>145</sup> His influence is seen in legal systems, such as those of post-World War II Germany and France, which place the constitution as the foundational document with separate constitutional courts having sole

141 DICEY, *supra* note 130, at 97-98.

142 LOUGHLIN, *supra* note 126 at 320. It is no accident that *Rechtsstaat* theorists posit that there is no power above the state – the Roman Digest (i.e. Justinian's Code) posited that the Emperor IS the law, and Civilian theorists have inherited the belief that government pre-exists the law, in contrast with common law history from the 11th Century that posited that the King must obey the law.

143 *Id.*

144 See Pietro Costa, *The Rule of Law: A Historical Introduction*, in *THE RULE OF LAW: HISTORY, THEORY AND CRITICISM* (Pietro Costa & Danilo Zolo, ed., Springer 2007) 123-125 (Describing how two jurists, Otto Koellreutter and Carl Schmitt both strived for a pre-eminent position in Hitler's regime, that Koellreutter attempted to argue that the Nazi order was still a *Rechtsstaat* because general laws and judicial independence were still independent, though individualism was not, and how Schmitt thought the new principles were an improvement on *Rechtsstaat*), citing C. Schmitt, *Nationalsozialismus und Rechtsstaat*, in *JURISTISCHE WOCHENSCHRIFT* 716 (1934), and O. KOELLREUTTER, *GRUNDRISS DER ALLEGEMEINEN STAATSLAHRE*, 108-108, 255-6 (Tübingen: Mohr 1933). See also HAYEK, *supra* note 9, at 112-20) (discussing how *Rechtsstaat* came to be perversely interpreted by the Nazis, and how that interpretation was accepted by other countries).

145 H. KELSEN, *HAUPTPROBLEME DER STAATSRICHTSLEHRE* (1984). See also Aalen: Scientia-Verla & H. Kelsen, *Staat und Recht*, in *SOZIOLOGISCHE HEFTE* 18-27 (1922) and H. KELSEN, *RECHTSSTAAT UND STAATSRICHT* 36 (1913).

responsibility over constitutional disputes.<sup>146</sup> After World War II, shock at the horrors wrought by the Nazi party led Germany, Continental Europe, and the Western world in general to reject the extreme positivist view that law is separate from morality and wholly the sovereign's command.<sup>147</sup> Germany transformed *Rechtsstaat* "from a merely formal concept focusing on organizational and procedural safeguards into a concept based on a substantive ideal of justice."<sup>148</sup>

Art. 20, para. 1 of the Basic Law explicitly commits the legislative and other authorities of the Federal Republic to the goal of social justice, although it leaves the political bodies a wide discretion in the determination of the economic and social policies which are required to achieve this goal. This constitutes **a major shift away from a narrow concept of liberty [i.e. the common law concept] which focuses on the right of individuals to be left alone by the government to a broader notion of individual freedom that takes into account the economic and social conditions in which this liberty thrives and recognizes a legitimate role for the state in promoting the welfare of its citizens by providing vital public services** in areas like education, health, housing and transportation.

Art. 1, para. 1 of the Basic Law establishes the respect for, and the protection of, the dignity of man as the guiding principle of all state action.<sup>149</sup> (emphasis added)

Incorporated into modern *Rechtsstaat* is the abstract concept of human dignity: "The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority."<sup>150</sup> Art. 1, para. 1 of the Basic Law stipulates that the respect for, and the protection of, the dignity of man as the guiding principle of all state action.<sup>151</sup> **While the government must guarantee and nourish a person's individuality and dignity, this guarantee is tempered by the sense of solidarity and responsibility owed by the individual to society: A person is not to be "an isolated and self-regarding individual," but related to and bound by the community.**<sup>152</sup>

<sup>146</sup> See Bojan Bugaric, *Courts as Policy-Makers: Lessons from Transition*, 42 HARV. INT'L L.J. 247, 255-256 (2001) (discussing the history of constitutional courts and Kelsen's influence on post-war governmental theory).

<sup>147</sup> Grote, *supra* note 86, at 196.

<sup>148</sup> *Id.* at 197.

<sup>149</sup> *Id.*

<sup>150</sup> Edward J. Eberle, *The German Idea of Freedom*, 10 OR. REV. INT'L L. 2, 12-13 (2008) (quoting Article 1(1) of the German Basic Law).

<sup>151</sup> *Id.* at 197.

<sup>152</sup> *Id.* at 13.

Thus, rather than protecting an individual's liberty from interference, the German government has a duty to teach concepts such as "social solidarity," and to enforce specific, listed freedoms. Though the government provides and "guarantees" freedom to individuals, it does so only to a certain extent—individuals must still bow to the general will or "community." This relationship between man and government, originally described by Jean Jacques Rousseau, can thus be accurately described as "Rousseauian"<sup>153</sup>

Consequently, *Rechtsstaat* is founded on the theory that the government gives freedom to individuals who in turn have duties to the community—there is no such thing as freedom without responsibility. It is a theoretical construct, and tasks government with providing education, health care, housing, and other benefits as protection for an individual's "dignity," and it has evolved into a constitutional principle controlling state activities.<sup>154</sup> It includes fundamental organizational principles such as the separation of powers, judicial review by the German Constitutional Court (the *Bundesverfassungsgericht*), and the principles of legality, fair procedure, legal certainty, and the principle of proportionality.<sup>155</sup> There remains a tension between formal liberal protections of the *Rechtsstaat* and the social/instrumentalist values implicit in the *Sozialstaat* or "social state." As a result, some modern jurists interpret *Rechtsstaat* in highly politicized ways, while others jettison it altogether.<sup>156</sup>

#### THE RULE OF LAW & ECONOMIC SUCCESS

Continental European scholars, "notwithstanding their wisdom, their learning, and their admiration for the British political system, from the times of Montesquieu and Voltaire" have misunderstood the proper meaning of the British constitution.<sup>157</sup> Max Weber stated that while England had achieved capitalistic supremacy, it was not because but rather in spite of its judicial system.<sup>158</sup> In saying this, Weber acknowledged that England's legal system was different from that of the continent's civilian tradition, but while there was some connection between that difference and England's "capitalistic" supremacy, he could not see the connection and instead saw

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<sup>153</sup> See generally CAPALDI & LLOYD, *supra* note 80.

<sup>154</sup> Eberle, *supra* note 150, at 1, 3-6, 16-17, 22-24, and 30-31 (describing how the concept of dignity under the German Basic Law has led to various positive rights).

<sup>155</sup> Ricardo Gosalbo-Bono, *The Significance of the Rule of Law and its Implications for the European Union and the United States*, 72 U. PITT. L. REV. 229, 244-245 (2010).

<sup>156</sup> LOUGHLIN, *supra* note 126 at 321.

<sup>157</sup> BRUNO LEONI, *FREEDOM AND THE LAW* 71 (Institute for Humane Studies, Inc., 1972).

<sup>158</sup> WEBER, *ECONOMY & SOCIETY*, *supra* note 8, at 814.

England's legal system as anachronistic and "deviant."<sup>159</sup>

Weber was wrong. England's economic success (and the traditional economic success of other common law jurisdictions like the U.S., Singapore, Hong Kong, Canada, Australia)<sup>160</sup> was because of those differences, not in spite of them. The Rule of Law differs from *Rechtsstaat* and the unique characteristics of the English people, the English legal system, and the history of its development are what support both liberty and the market economy, which developed symbiotically and spontaneously with the Rule of Law.

#### THE RULE OF LAW DIFFERS FROM RECHTSSTAAT

In the *Road to Serfdom*, Hayek cautioned that the modern (civilian) focus on legislation, bureaucratization, and regulation leads inevitably to loss of both liberty and economic vigor. In *The Mystery of Capital* and *The Other Path*, Hernando de Soto proved the latter. Too much regulation leads to rent-seeking and corruption of government as businesses inevitably devote more time and resources to working around the regulations, and it leads to inefficiency when businesses become so stymied by regulations that they function outside the law rather than within it.<sup>161</sup>

Hayek's definition of the English Rule of Law can be reduced to two prongs: 1. The consent of the governed to obey the law, and 2. Limited government. The effects of *Rechtsstaat* and the *Rule of Law* differ in several respects: (1) the Anglo-American tradition emphasizes civil association, not enterprise association as the proper relationship between man and government; (2) the Rule of Law protects individual property rights, not redistribution; (3) the concept of a civil association reflects a culture more hospitable to entrepreneurship; and (4) the Anglo-American tradition supports security of transaction and encourages commerce, but through means other than legislation. It does not hold that law can be reduced to a

<sup>159</sup> *Id.*

<sup>160</sup> See STEVE PEJOVICH & ENRICO COLOMBATTO, LAW, INFORMAL RULES AND ECONOMIC PERFORMANCE: THE CASE FOR COMMON LAW (2008) (explaining that economic development in common law countries is even stronger than indicated in such studies such as the Index of Economic Freedom); 2017 INDEX OF ECONOMIC FREEDOM, <https://www.heritage.org/index/> (last visited Dec. 29, 2017) (listing the top 10 most economically free countries as Hong Kong, Singapore, New Zealand, Switzerland, Australia, Estonia, Canada, United Arab Emirates, Ireland, and Chile).

<sup>161</sup> See e.g., THE OTHER PATH, *supra* note 14 at 153 (an overly burdensome business registration regime forces informal businesses to face costs of avoiding penalties for operating without permits, paying taxes, or applying for legal authorization, it costs them business because they cannot advertise), 155 (informals make a number of unreciprocated transfers to formals, which represent net losses to informals), and 157 (informals may not pay direct taxes or comply with labor laws, but this also means they cannot use any but low technology which causes low productivity). See also Key Concepts, *supra* note 50.



logical system supervised solely by a single constitutional court, and it does not regard rights as given by the state. The two concepts indicate an underlying difference in how one should think about law.

Under Bentham's influence and regarding law as a rational science with a hidden structure that can be uncovered, European civilians at one time believed, "almost as an article of faith," that a single, complete, coherent, and logical system of law to govern all legal relationships is possible and that the human mind is capable of thinking it out."<sup>162</sup> Consistent with Bentham's thought, the Napoleonic authors of the original French Civil Code believed that by replacing all pre-existing laws, their Code (because of its rational content) could govern the legal affairs of all nations at all times.<sup>163</sup> Furthermore, because of its universality, it would enable the broad government control and authoritarianism clearly stated at the onset of the revolutionary legal efforts.<sup>164</sup> In keeping with a focus on teleology and deductive logic (principles derived from their original Greek-influenced Roman law), civilians such as Jhering reasoned that since life is governed by purpose, the science of collective life (i.e. law) should be deductively organized and primarily employ a teleological method.<sup>165</sup> In contrast, the common law mind regards law as empirical and pragmatic as much as rational; thus, common law reasoning is as much inductive as it is deductive and it does not support the concept of a definitive and final statement of the law or a definitive final arbiter of the law.<sup>166</sup>

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<sup>162</sup> Woodfin L. Butte, *Stare Decisis, Doctrine and Jurisprudence in Mexico and Elsewhere*, in *THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS* 311, 315 (Joseph Dainow ed., 1974).

<sup>163</sup> Dante Figueroa, *Twenty-One Theses on the Legal Legacy of the French Revolution in Latin America*, 39 *GA. J. INT'L. & COMP. L.*, 39, 87 (2010-2011).

<sup>164</sup> *Id.* "Thus, the pretense of universality, broad government control, and state authoritarianism were clearly stated at the very onset of the [French] revolutionary legal efforts."

<sup>165</sup> Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 *HARV. L. REV.* 140, 140-41 (1911-1912).

<sup>166</sup> See Jordan T. Cash, *The Court and the Old Dominion: Judicial Review Among the Virginia Jeffersonians*, 35 *LAW & HIST. REV.* 351 (2017) (concluding that Virginian founders disagreed on whether the U.S. Supreme Court would be the final arbiter in disputes between states and the new federal government). Nothing in the Constitution provides that the Supreme Court is the final arbiter of what is constitutional. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) announced that "the federal judiciary is supreme in the exposition of the law of the Constitution" and further that an "interpretation of [the Constitution] enunciated by th[e] Court . . . is the supreme law of the land." However, while the other two branches defer to Supreme Court decisions, they also challenge that premise on occasion. See e.g., *Miranda* & its progeny.

## RULE OF LAW AND THE LOCKEAN NARRATIVE

First described by A.V. Dicey, the English Rule of Law grew from centuries of custom, Anglo-Saxon culture, and practice – not theory, and not political science. The freedom to be let alone is not a “narrow” concept of liberty, it is in fact much broader than *Rechtsstaat*, and is premised on an entirely different relationship between man and government.<sup>167</sup> Under the Rule of Law, law is supreme over government and governmental powers are limited. This concept has been traced back to Tacitus’s writings about limitations on Anglo-Saxon kings’ power.<sup>168</sup> Government’s narrow role is to protect the polity from invasion, protect property rights, and protect individuals from unjustified intrusions into their liberty: “The end of law is, not to abolish or restrain, but to preserve and enlarge freedom . . . where there is no law there is no freedom. For liberty is to be free from restraint and violence from others . . . .”<sup>169</sup> Society is regarded as being composed of individuals, and it is individuals that are important, not communities, and not factions.<sup>170</sup> In contrast to the Rousseauian Narrative,<sup>171</sup> this Anglo-American view of the relationship between man and government has been described as the “Lockean Narrative.”<sup>172</sup> It is the spontaneous development of this relationship that led to England’s protection of individuals and its economic success because it allowed individuals to pursue their own interests and consistently forced limits on governmental power.

Further substantiation is found in the history of the common law itself. For purposes of this article, the focus of the following historical discussion will be on those attributes of common law that have fostered individualism and economic development. This of necessity precludes discussion of much that led to these developments, including the effects of the Norman

167 Nedzel, *supra* note 122; RECHTSSTAAT, in THE LEGAL DOCTRINES OF THE RULE OF LAW AND THE LEGAL STATE (Rechtsstaat), (James R. Silkenat, et al., eds., Springer 2014).

168 GEORGE H. SABINE, A HISTORY OF POLITICAL THEORY 199 (Holt & Co. 1950); SHARON TURNER, THE HISTORY OF THE ANGLO-SAXONS (2007) (1802).

169 See CAPALDI & LLOYD, *supra* note 80 at 9-11 (discussing John Locke’s theory of limited government & quoting Locke’s Second Treatise).

170 See *id.* at 12-14 (discussing the culture of personal autonomy and its importance in the Lockean narrative (i.e. British tradition). See also OAKESHOTT, *supra* note 26 at 36-46 (discussing characteristics of being a ‘free agent’).

171 See CAPALDI & LLOYD, *supra* note 80 at 18-23 (describing the Rousseauian narrative as considering the privatization of property as the source of all evil, the resulting market economy as leading to inequality and conflict, the individual’s obligation to voluntarily submit to the authority of a “General Will” (the ultimate right, or what we would all agree to will if we all really knew and understood the fundamental truths about the human condition), and law that must reflect the General Will and be a fresh product of legislation).

172 See generally *id.* at 2-14 (describing the Lockean Narrative as being focused on liberty and requiring the technological project, a market economy premised on economic liberty, limited government and political liberty, the Rule of Law, and a culture of personal autonomy or individualism).

invasion, Henry II's foundation of the common law and jury system, and the consistent trend towards limitation of governmental power.<sup>173</sup>

ENGLISH PROPERTY OWNERSHIP, TRANSFERS, INHERITANCE, AND  
INDIVIDUALISM

Continental feudal economies operated on a system of scutage, where freemen would agree to serve in a lord's army for a certain number of days in exchange for protection – or alternatively pay someone to serve in the army instead. Serfs, the lowest class of feudal society, were bound to the land. They were required to work the lord's land, mines, forests, or roads in order to be allowed to occupy a plot of the lord's land and receive his protection. While they did not own the land on which they worked, its use was heritable. Other peasants or cottagers might own their land. The central feature of traditional East European serfdom or peasantry, which lasted longest and was studied in detail in the early twentieth century, is that ownership was not individualized.<sup>174</sup> No single individual owned the productive resources exclusively, they belonged instead to the household: Land property was essentially familial; the individual was its temporary manager. Thus, "the individual held no ultimate and exclusive property rights . . . and the group dominated the individual in terms of ownership."<sup>175</sup>

Production in peasant society, apart from that paid in rent, was almost wholly for direct consumption, not for sale or exchange in the market.<sup>176</sup> A peasant family might buy and sell a small piece of land to even out demographic differences in households or in times of crisis, but there were no extensive or open markets in land.<sup>177</sup> This led to a patriarchal society: because subordinate family members lacked geographic mobility, alternative occupations, or private property, the acting head of the household maintained significant power and control over his wife and children.

In contrast with the Continental practices described previously, historians generally agree that the strong link between the family group and the land had disappeared in England by or soon after the Black Death of the Fourteenth Century.<sup>178</sup> Visitors to rural England as early as the thirteenth

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<sup>173</sup> A more thorough history of both the English and Civilian legal systems will be included in a book I am writing on this topic.

<sup>174</sup> MACFARLANE, *supra* note 17, at 18.

<sup>175</sup> *Id.* at 20.

<sup>176</sup> *Id.* at 21.

<sup>177</sup> *Id.* at 23.

<sup>178</sup> *Id.* at 100.

century were surprised at the comparative wealth of the English, their freedom and social mobility, and their individualistic (even arrogant) attitudes.<sup>179</sup> Certainly, empirical studies of property records and disputes show that by the sixteenth century, and likely earlier, English peasant society was much more mobile and hence significantly different from the classic model of continental Europe. Cambridge University anthropologist and historian Alan Macfarlane's study of English tenant lists in the seventeenth century showed that many children left home in their early or middle teens.<sup>180</sup> For example, he matched baptismal records against parish registers, and of twenty male children baptized in one church between 1660 and 1669 and not listed as having been buried, only six remained listed as registered in the parish in 1695.<sup>181</sup>

Macfarlane's examination of wills and court records showed further that land changed ownership frequently, and thus families did not keep ownership of it for several generations. Literary evidence similarly indicated that extended families did not remain in the same household, as was the case in typical feudal societies: young couples were expected to live disciplined, self-governing, independent lives in their own separate household.<sup>182</sup> Macfarlane concluded that England did not exhibit peasant culture and was individualistic very early on: sons were not tied to their father's land holding; people were geographically mobile; labor was hired; individuals practiced saving and thrift, married at a later age, and young adult women moved away from the area.<sup>183</sup> Even as early as the thirteenth century, land sales in England were frequent, and individuals - not collective groups - bought and sold land.<sup>184</sup> Thus, there was little notion of the sanctity

179 *Id.* at 130-164 (citing and quoting work of other historians, especially George C. Homans, *English Villagers of the 13th Century* (Norton 1941), 164-188 (relating the impressions of Continental writers), 166-168 (relating the mid-19th century impressions of de Toqueville with regards to the English peoples' wealth, absence of social barriers, individualism), 168-170 (relating Montesquieu's early 18th century notation of English liberty, independence, individualism, and individual property ownership), 170 (relating Frederick, Duke of Wirtemberg's late 16th century impression of English agricultural wealth, arrogance, and lack of subservience), 171 (relating Emmanuel van Meteren's mid-16th century impression of England's high standard of living and individualism); 176-177 (relating Sir Thomas Smith's mid-16th century perception of England's free men, contract-based society, and easy social mobility); 173 (relating Andrea Trevisano's early 16th century perception of English arrogance and self-confidence and also noting England's meritocratic society and that trade and wealth were widely distributed within the country), 179-83 (relating Sir John Fortesque's late 15th century notation of England's egalitarian and wealthy society which Fortesque attributed to "a combination of natural fertility, limited monarchy, and Common Law"), and 183 (relating Bartholomaeus Anglicus' mid-13th century description of England which stressed its relative wealth and liberty).

180 *Id.* at 73-74.

181 *Id.*

182 *Id.* at 75.

183 *Id.* at 78.

184 *Id.* at 118.

of a family holding in England, as owners sold land to both outsiders and children.

English inheritance laws also differed from those on the Continent: there was no expectation that a child would inherit from his or her parents. In France, to this day, a parent cannot disinherit his children beyond his *disposable portion* – all children have a claim to some share in their parents' property.<sup>185</sup> But under English Common Law, children had no birthright and could be left penniless. As early as the thirteenth century, a landowner had a perfect right to disappoint his expectant heirs by transferring all of his land to someone else before death, and could disinherit them in his will.<sup>186</sup> “The Statute *Quia Emptores* of 1290 stated that ‘from henceforth it shall be lawful for every freeman to sell at his own pleasure his land and tenements’”<sup>187</sup> – and this was well before the Black Death hit England in 1348-1349. It also shows that in this respect, English common law was entirely different from Continental law, where landowners could not alienate land without the consent of their expectant heirs.<sup>188</sup>

Alienation rights were no different when English tenants did not own land straightforwardly in “fee simple.” By the early seventeenth century, 1/3 of all English land was held by copyhold tenures – “at the will of the lord” – meaning in theory that at a person’s death, his heirs had no security.<sup>189</sup> In the thirteenth and early fourteenth century, of a total of 517 land transfers in one area, only 74 were inheritance-related, while 443 were sales.<sup>190</sup> Even if the lord owned the land, he could not stop his tenants from exchanging land as they wished, provided that tenant had fulfilled the duties required on that particular land.<sup>191</sup> But gradually over time, there was no rigid division between free peasant owners in fee simple and those who were holders.<sup>192</sup> Thus, by the latter part of the thirteenth century, there were innumerable licenses to alienate land, sub-leases, short-term leases, and

185 CODE CIVIL [C. CIV.] [CIVIL CODE] arts. 912-913 (Fr.). For an example of a similar policy adopted by a U.S. state, which also shares French heritage, see LA. CIV. CODE ANN. art. 1493-1495 (2003). Note though that Louisiana’s forced heirship is limited to children under 23 or those over 23 who are disabled. France recently provided an exception, allowing foreigners who own property in France to avoid its forced heirship rules, though the forced heirship laws still otherwise apply to French nationals.

186 MACFARLANE, *supra* note 17, at 82.

187 *Id.* at 83 (citing A. W. B. SIMPSON, AN INTRODUCTION TO THE HISTORY OF THE LAND LAW 51 (1961)).

188 *Id.* (quoting 2 FREDERICK POLLOCK & F.W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 309, 313 (2d ed., Cambridge 1968)).

189 MACFARLANE, *supra* note 17, at 106-07.

190 *Id.* at 124.

191 *Id.*

192 *Id.* at 104.

frequent sales indicating a considerable land market in both copyhold and freehold properties.<sup>193</sup>

English jurist Henry de Bracton (1210-1268) provided clear justification for why the British inheritance laws were so flexible, showing that as early as the thirteenth century, long before the Black Death, Britain did not have a peasant society, but was already focused on individual achievement and practical insight into human behavior:<sup>194</sup>

[A] citizen could scarcely be found who would undertake a great enterprise in his lifetime if, at his death, he was compelled against his will to leave his estate to ignorant and extravagant children and undeserving wives. Thus, it is very necessary that freedom of action be given him in this respect, for thereby he will curb misconduct, encourage virtue, and put in the way of both wives and children an occasion for good behavior, which indeed might not come about if they knew without doubt that they would obtain a certain share irrespective of the testators wishes.

By the sixteenth and seventeenth century, English private property rights were highly developed, which led to an enormous amount of litigation in the courts of equity, as well as the making of “a very large number of wills dealing with chattels and real estate”. Neither of these things happened among traditional Continental peasant cultures where no one person had strong property rights.<sup>195</sup> It also was directly connected to the comparative wealth of English peasants, noted by a number of 14-16<sup>th</sup> century writers.<sup>196</sup>

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193 *Id.* at 125.

194 *Id.* at 103.

195 *Id.* at 93.

196 *Id.* at 51.

FROM STATUS TO CONTRACT<sup>197</sup> AND THE ROYAL COURTS

The royal courts founded originally by Henry II in the twelfth century gradually became the preferred forum for all private disputes.<sup>198</sup> Five causes of this popularity include 1) the jury, which was preferred to older modes of trial such as trial by combat; 2) the professional skill of royal judges which was superior to that of biased feudal lords and manorial bailiffs; 3) the incontestable validity of royal records, which was preferable to the fallible memories and poorly-kept records of local courts; 4) the fact that the goal of the royal courts was to maintain the King's Peace – they were not trying to improve or perfect humanity –; and 5) their decisions were enforced by an authority with wealth and power of such a magnitude that it could not be challenged by any English subject.<sup>199</sup>

As discussed previously, Feudal economies typically operated on a system of scutage, where one would agree to serve in a lord's army for a certain number of days in exchange for protection (or pay someone to serve in your stead). During this same period, guilds arose among craftsmen primarily in towns: drawn together into one street or quarter by a similar trade or occupation (e.g. tanners by a river, dockers by a port), they combined to make their own rules and were widespread throughout northern Europe.<sup>200</sup> Their zenith occurred in the thirteenth century.<sup>201</sup> The English

197 See HENRY MAINE, *ANCIENT LAW* (1861) (arguing that individuals in the ancient world were tightly bound by status to traditional groups, while in the modern one, they are free to make contracts and form associations with whomever they choose because they are viewed as autonomous agents). The history of Oakeshott's distinction between civil and enterprise associations (i.e. in Maine's terms, individual as opposed to status) can be traced back to Hobbes, and the civilian rejection of civil association is reflected in the scholarly discussion of the two concepts. After Maine's work, in 1887, Ferdinand Tönnies, in *GEMEINSCHAFT UND GESELLSCHAFT* (generally translated as *COMMUNITY & CIVIL SOCIETY*), recognized the distinction as dating back to the 17th Century British Philosopher Thomas Hobbes, and argued against *Gesellschaft* (i.e. individualistic society, or Oakeshott's civil association). The book sparked a revival of corporatist thinking, including the rise of neo-medievalism, the rise of support for guild socialism, and caused major changes in the field of sociology. PETER F. KLARÉN & THOMAS J. BOSSERT, *PROMISE OF DEVELOPMENT: THEORIES OF CHANGE IN LATIN AMERICA* 221 (Westview Press 1986). Thus, this line of legal philosophy/sociology further demonstrates the underlying individualism of English culture as opposed to the civilian's focus on community.

198 See generally MACFARLANE, *supra* note 17, at 37-72 and FREDERIC W. MAITLAND & FRANCIS C. MONTAGUE, *A SKETCH OF ENGLISH LEGAL HISTORY* 36 (Elibron Classics 2005) (1915) (discussing Henry II).

199 HOGUE, *supra* note 15, at 19.

200 GEORGES RENARD, *GUILDS IN THE MIDDLE AGES 2* (Dorothy Terry trans., Augustus M. Kelley 1968) (1918).

201 *Guild*, *ENCYCLOPAEDIA BRITANNICA*, <https://www.britannica.com/topic/guild-trade-association> (last visited Dec. 31, 2017) ("By the 13th century, merchant guilds in western Europe comprised the wealthiest and most influential citizens in many towns and cities, and, as many urban localities became self-governing in the 12th and 13th centuries, the guilds came to dominate their town councils. The guilds were thus able to pass legislative measures regulating all economic activity in many

Guild system never reached anything like the power or importance that it attained in Flanders, Italy, or Germany.<sup>202</sup> As mercantilism and nation states developed and replaced feudalism, the guild system gradually lost power everywhere in Europe.<sup>203</sup>

Under the guild system, when merchants had disputes, mercantile courts resolved them with flexible informality. By the sixteenth century, with the rise of the Tudors and the British naval power, instead of merely producing wool, England was engaging in the production of wool into fabric to be sold abroad, and it was this conversion from a feudal to a mercantile and money-based economy<sup>204</sup> that drove the development of the common law of contracts as the Royal courts expanded to encompass the increasingly profitable field of private commercial litigation.<sup>205</sup> Over time, the English common Law courts and admiralty courts gained power over commercial conflicts while merchant courts lost.<sup>206</sup> On examining the historical context, it becomes apparent that it was the growth of the markets, manufactured goods, and a money-based economy that drove the creation of the common law of contract.<sup>207</sup> The development of the common law of contract and the

towns.”).

202 G. D. H. Cole, *Introduction*, in *GUILDS IN THE MIDDLE AGES*, at xiii (Dorothy Terry trans., Augustus M. Kelley, 1968) (1918).

203 *See Guild*, *supra* note 201 (“Guilds helped build up the economic organization of Europe, enlarging the base of traders, craftsmen, merchants, artisans, and bankers that Europe needed to make the transition from feudalism to embryonic capitalism. Yet the guilds’ exclusivity, conservatism, monopolistic practices, and selective entrance policies eventually began to erode their economic utility.” (emphasis added)).

204 *See* MURRAY N. ROTHBARD, *ECONOMIC THOUGHT BEFORE ADAM SMITH: AN AUSTRIAN PERSPECTIVE ON THE HISTORY OF ECONOMIC THOUGHT* 221-226 (1995) (describing how technological changes in the wool industry revolutionized rural England).

205 KEVIN M. TEEVEN, *A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT* (Greenwood Press 1990) (ebook) (“Before the Tudor period mercantile cases were not often heard in the common law courts, but by then the staple courts were in decay and common law judges like Coke began actively competing with the remaining mercantile courts for the expanding commercial business.”). *See also* ROTHBARD, *supra* note 204 at 283-84 (discussing Sir Edward Coke’s interest in acquiring jurisdiction over some contracts and limiting the King’s monopoly powers).

206 William Searle Holdsworth, *The Development of the Law Merchant and its Courts*, in *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY VOL. 1* (Boston: Little, Brown, and Company, 1907). In many medieval jurisdictions, merchants had special courts separate from the rest of the community, belonging to the merchant guild, and often excluding foreign merchants from trade. The English government started limiting their power to exclude foreign merchants as early as 1303 and, as international seagoing trade increased in importance, first admiralty courts and then common law courts took over jurisdiction concerning both local and international trade. Although craft guild control over trade was formally abolished in England in 1835, internal trade had ceased to be ruled by special guild courts as early as the 16th century. In England, companies of merchants and craft guilds possessed no jurisdiction of their own and were governed by the common law. In contrast, in France, Italy, and Germany, merchants had separate law and separate courts which they themselves administered.

207 *See* TEEVEN, *supra* note 205 (“The success of the mercantile courts was a part of the reason that the competitive King’s Bench allowed the action of Assumpsit to grow during the sixteenth century in order to claim some of the expanding commercial business for itself”).



resultant growth of judicial protection for private, individual enterprise is an interesting story

With Henry II's foundation of the common law system, the only way an individual could bring a lawsuit in the court of Common Pleas was if he obtained a writ. An original writ was "a mandatory letter issuing from the court of chancery under the great seal, and in the king's name, directed to the sheriff of the county where the injury was alleged to have occurred, containing a summary statement of the cause of complaint, and requiring the sheriff in most cases to command the defendant to satisfy the claim or else appear in court to account for not satisfying it."<sup>208</sup> If the individual's complaint did not fit one of the pre-established writs, if he was even able to bring a claim under equity, the process was much slower.

The initial kinds of cases heard in Henry II's courts were limited to property ownership and crimes.<sup>209</sup> By the middle of the thirteenth century, the number of writs (the filed document that established a lawsuit) had expanded to encompass new kinds of actions.<sup>210</sup> The British barons were angered by this expansion of the royal courts' jurisdiction because it eroded their own judicial power.<sup>211</sup> Consequently, in 1258, an early Parliament of barons forced Henry III to sign the Provisions of Oxford which limited the number and kind of writs that could be issued in exchange for giving him financial support.<sup>212</sup> Furthermore, by the time of his son, Edward I's reign, the King's courts could hear only actions over forty shillings.<sup>213</sup> From the time of the Provisions of Oxford, any growth of the royal courts had to be within the existing writ system; if there was no writ, then there was no right to pursue action in a royal court.<sup>214</sup> Consequently, most informal contractual promises (i.e. promises not formalized under seal) could only be heard in local courts.<sup>215</sup> Before 1602 A.D., one could pursue a contract action only where one had a covenant under seal or under a writ of debt (*debitatus assumpsit*) where the complaining party had performed and the other party had breached, there was no remedy for executory contracts or

208 *Original Writ*, BLACK'S LAW DICTIONARY (10th ed. 2014).

209 See Michael David Knowles, *Henry II, King of England*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Henry-II-king-of-England> (last visited Jan. 1, 2018) (discussing the Assize of Clarendon and possessory assizes).

210 TEEVEN, *supra* note 205, loc. 122 (ebook).

211 *Id.* loc.125.

212 *Id.*

213 FREDERICK POLLOCK & FREDERIC MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 553-54* (2d ed. Cambridge 1909).

214 TEEVEN, *supra* note 205, loc. 125 (ebook).

215 See *Id.* loc. 123 (stating that entry to the royal court could only be gained with a writ issued by the Chancellor).

other money and credit-based exchanges,<sup>216</sup> which were becoming common as early as the mid fourteenth century.<sup>217</sup>

The royal courts became popular with plaintiffs because their processes were consistent, their enforcement of judgments was stringent, the courts avoided the corruption and internal politics of local (barons') courts, and the defendant (in addition to facing a possible fine) could be forced to go to Westminster to defend himself.<sup>218</sup> Thus, plaintiffs put pressure on the royal court system to recognize "informal" contractual promises by falsely claiming a crime had been committed.<sup>219</sup>

By the fifteenth century, feudalism was in serious decline all over Europe, and nation-states' interest in international trade and mercantilism was rising.<sup>220</sup> Consequently, as countries focused on obtaining access to commodities, shipping became increasingly important, and nation-states, including England, focused on restricting access to their ports from competing nations.<sup>221</sup> The increased supply of silver that resulted from England's foreign trade meant that prices skyrocketed six-fold during the Tudor Century, creating a new merchant class based on the sale of wool abroad and causing land to be further commercialized because it was needed for the grazing of the sheep that provided the wool.<sup>222</sup> This also meant that there were many disputes involving transactions of more than forty shillings.<sup>223</sup> This further increased the desirability of the King's courts in plaintiffs' eyes, and their enforcement of contract law further weakened the English guild system. The reasons the King's Bench and Common Pleas would find it desirable to recognize such informal promises were several, and probably included economic interests such as court fees as well as sargents'-at-law and barristers' fees, and intellectual competition between Common Plea courts (who normally represented the status quo) and the

<sup>216</sup> See PLUCKNETT, *supra* note 14, at 634-645.

<sup>217</sup> TEEVEN *supra* note 205, loc. 249 (ebook) ("By the mid-fourteenth century, there was a growing realization that the common law personal actions of Covenant and Debt were ineffective remedies for the money-credit economy beginning to replace feudalism").

<sup>218</sup> *Id.* at loc. 299-303.

<sup>219</sup> *Id.* at loc. 303-310. (describing how plaintiffs, keen on royal jurisdiction, found that royal courts would accept contractual wrongs if a fictitious crime (*contra pacem* and *vi et armis*) was alleged, for example they would claim that a surgeon committed battery (rather than malpractice), or a smithy killed the plaintiff's horse with force and arms).

<sup>220</sup> Laura LaHaye, *Mercantilism*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS AND LIBERTY, <http://www.econlib.org/library/Enc/Mercantilism.html> (last visited Apr. 15, 2018).

<sup>221</sup> *Id.*

<sup>222</sup> TEEVEN, *supra* note 205, loc. 487 (ebook).

<sup>223</sup> See *id.* loc. 796 (relating that another reason for increased use of Common Pleas in connection with contract claims was the fact that due to the fall in value of money, the 40 shilling rule had been forcing everyday agreements, formerly heard in the local courts, into the royal courts.").

King's Bench (which was the activist court ready to change archaic Debt rules).<sup>224</sup>

By the sixteenth century, wool producers and merchants wanted their informal promises to be enforced. Prior to a money-based economy, there had been no pressing need for remedies for informal transactions, and courts were more oriented to hearing cases based on property disputes.<sup>225</sup> In *Slade v. Morley* (1602), however, a joint decision between the Court of Common Pleas and the King's Bench, the royal courts created remedies for wool producers and merchants who were parties to "informal" (i.e. unsealed) contracts.<sup>226</sup> The case involved an executory contract between a farmer who sold his crops and a buyer who failed to pay in advance as promised.<sup>227</sup> The court eventually held, in favor of the plaintiff farmer, that a promise might be implicit. It also allowed Slade to demand expectation damages, the value of performance and future profits.<sup>228</sup> The case was a watershed in contract law development, recognizing informal promises and the rising merchant class,<sup>229</sup> and acting as a bridge between medieval and modern law. Thus, contrary to Weber's theory that English courts were a drag on the development of a merchant class, history shows that their recognition of informal promises further enabled its development because merchants and prospective merchants could rely on the assumption that a royal court would enforce contractual promises.

Once courts recognized informal executory promises, the floodgates of litigation were opened. The preexisting doctrine of consideration -- only bargained-for exchanges were serious enough to be enforced by a court -- helped courts eliminate some litigation involving informal promises.<sup>230</sup> However, courts --and especially Parliament -- then became concerned that juries might believe unscrupulous plaintiffs asserting executory promises based solely on oral testimony.<sup>231</sup> This concern led to the creation of the Statute of Frauds, which limited certain kinds of cases involving hard-to-prove or valuable claims.<sup>232</sup> Thus, in 1677, Parliament required certain kinds

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<sup>224</sup> *Id.* loc. 799-806.

<sup>225</sup> *Id.* loc. 513.

<sup>226</sup> *Id.* loc. 803.

<sup>227</sup> *Id.* loc. 808.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *See id.* loc. 688-692 (discussing the origin of the doctrine of consideration in the fifteenth century and its acceptance by Common Pleas after Slade's Case); *id.* loc. 408 (ebook) (once Slade's case allowed the writ of assumpsit to include executory contracts, assumpsit and its required consideration supplanted both Covenant and Debt).

<sup>231</sup> *Id.* loc. 1499-1506.

<sup>232</sup> *Id.* loc.1438, 1479-1486.

of contracts to be written rather than oral in form.<sup>233</sup> Once the writing requirement of the Statute of Frauds was in place, disputes arose concerning the requirements for a document to constitute a writing. These disputes led to the development of the parole evidence rule, which states that, if there is a writing, then neither oral nor other extraneous evidence should be allowed to negate or vary the contents of the writing.<sup>234</sup>

Thus, the change from feudalism to mercantilism to capitalism drove the development of common law of contract as tradesmen demanded more consistent remedies for broken promises and the courts found it profitable to hear them. Over time, the British royal courts considered increasingly complex contractual and financial issues, including the collectability of interest in a country increasingly dependent on the availability of credit.

In response to the growing importance of the banking and insurance industries, the Glorious Revolution (which stabilized the British government), the industrial revolution, and buttressed by courts that supported commerce and contracts, between 1689 and 1789, England became the most dynamic capitalist economy in the world.<sup>235</sup> By 1624, Coke (off the bench and now in Parliament), believing that free trade was beneficial to the nation state, drafted the Statute of Monopolies that curbed the king's power to grant monopolies.<sup>236</sup> William and Mary were installed to the Crown in the Glorious Revolution of 1688.<sup>237</sup> The subsequent commercial upsurge meant stability, and the barons of Parliament, inspired by the successes of the Dutch republic, demanded support for trade and industry, as demonstrated in part by their passage of both the Statute of

<sup>233</sup> *Id.* loc. 1483.

<sup>234</sup> *Id.* loc.1505-1509.

<sup>235</sup> See WILLIAM D. RUBINSTEIN, CAPITALISM, CULTURE, AND DECLINE IN BRITAIN: 1750-1990 1-2 (Routledge 1993) (describing Britain as the preeminent industrial and manufacturing power of the eighteenth century, but explaining that Britain's decline began when it started to reject free-market economics). See also *Becoming American: The British Atlantic Colonies 1690-1763*, NATIONAL HUMANITIES CENTER, <http://nationalhumanitiescenter.org/pds/becomingamer/economies/text1/text1read.htm> (last visited Apr. 15, 2018) ("With the Glorious Revolution, the 1707 union of England and Scotland, and victory in the intercolonial wars (creating a massive national debt), the "United Kingdom of Great Britain" became a first-class power. Militarily, its navy dominated the seas. Economically, its banks and financiers replaced the Dutch as the source of capital working money. Commerce became the "soul of the kingdom . . . .").

<sup>236</sup> Steven G. Calabresi & Larissa C. Liebowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J. L. & PUB. POL'Y 983, 998-999 (2013). See also *id.* at 992 (Coke's report on *Darcy v. Allen* as early as 1602 describes the common law court's rationale as a "strong statement about the importance of open and free trade. It states that the court struck down the royal monopoly because allowing people to work in their respective trades was not only beneficial for them, but was also necessary for the well-being of the whole country.").

<sup>237</sup> Kevin L. Teeven, *A History of Legislative Reform of the Common Law of Contract*, 26 U. TOL. L. REV. 35, 58-59 (1994).

Monopolies and the Statute of Frauds.<sup>238</sup> By the mid eighteenth century, Lockean views of unrestricted property rights and faith in reason led to changes in commercial law needed by the burgeoning economy, and common law courts became the exclusive forum for adjudication of commercial transactions<sup>239</sup> England was the first nation to industrialize, and became the greatest trading nation of the eighteenth century. Though whether its power came more through industrialization or through trade and banking innovations is now being questioned by historians.<sup>240</sup> These developments were accompanied and supported by its legal system, which supported freedom of contract, free transfer of property, limited government, and a culture focused on individualism – in other words, the Rule of Law.

#### LAW AND CAPITALISM

Law professors Curtis Milhaupt and Katharina Pistor, who share a mutual interest in the role of law in economic development, wanted to explore the relation between legal institutions and market-oriented economic institutions, and decided to do so by combining theoretical and empirical studies of the topic with “in-depth analyses of contemporary events in countries in different stages of economic development.”<sup>241</sup> After a short discussion of Weber and Hayek, they characterize what they term the prevailing argument for common law being more supportive of a market economy as insufficient in light of the rapid growth of the Asian Tigers at the end of the twentieth century.<sup>242</sup>

Milhaupt and Pistor take issue with what they term the Hayekian description, arguing that it has been taken for granted in economics, literature, and policy discussions, which encourages countries to (wrongfully) re-create features of the United States legal system thought to account in some way for the comparative robustness of U.S. economic institutions.<sup>243</sup> They describe the ‘prevailing’ view as a simple argument that law fosters economic activity (exclusively) by protecting property rights, and that a legal system that clearly allocates and protects property rights (i.e. one that has adopted the Rule of Law) precedes economic

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238 TEEVEN, *supra* note 205, loc. 1929 (ebook).

239 *Id.* at loc. 1929-1932.

240 See generally RUBINSTEIN, *supra* note 235.

241 MILHAUPT & PISTOR, *supra* note 79, at *Preface*.

242 *Id.* at 1-5.

243 *Id.* at 1-2.

development and is a precondition to economic success.<sup>244</sup> “Once such a system is in place, it constitutes a fixed and politically neutral institutional endowment – an unchanging foundation for economic activity.”<sup>245</sup> Furthermore, Milhaupt and Pistor argue that this view “depicts law as a kind of technology that can be inserted in the proper places – and imported from abroad when necessary – to accomplish an important task. . . . [T]he fullest achievement [of the rule-of-law ideal] is associated with the maturation of capitalism into laissez-faire competition under conditions of political stability.”<sup>246</sup>

Based largely on their analysis of how six different legal systems dealt with scandals involving large, publicly-traded companies,<sup>247</sup> Milhaupt and Pistor conclude that the ‘Hayekian’ view of the Anglo-American Rule of Law rests on a number of inaccurate assumptions: (1) that Law is an unchanging precursor of a market system instead of there being an highly iterative relationship between law and markets, and (2) that the distinction between civil and common law is not a good predictor of whether a country’s economy is likely to be successful.<sup>248</sup> From their analysis of the six corporate crises along with a summary examination of data on rate or economic growth in the twentieth century,<sup>249</sup> they conclude that there is no single “Rule of Law” that leads to real-world economic success, and that instead focus should be put on (1) the organization (centralization or decentralization) of the legal system, (2) the function that law plays in support of a market activity, and (3) the political economy for law production and enforcement.<sup>250</sup>

Milhaupt and Pistor state that they are sensitive to the limitations of their analysis, and do not claim to have definitive answers to the questions they have raised.<sup>251</sup> While I disagree with many of their conclusions and their factors, some of their insights are intriguing and consistent with my thesis. With regard to the first factor that they find indicative of economic success, i.e. the organization of the legal system of a particular nation, Milhaupt and Pistor distinguish between centralized systems that vest law-making powers in the legislative branch, and which prefer centralized law enforcement

<sup>244</sup> *Id.* at 18.

<sup>245</sup> *Id.* at 4.

<sup>246</sup> *Id.* at 5.

<sup>247</sup> The scandals studied by Milhaupt and Pistor included the U.S. Enron Scandal (*id.* at 47-67), Germany’s Mannesmann Executive Compensation Trial (*id.* 69-86); Japan’s Livedoor Bid and Hostile Takeovers (*id.* 87-107); Korea’s SK Episode (*id.* 109-124), China’s Aviation Oil Episode (*id.* 125-148), and Russia’s re-nationalization of Yukos (*id.* at 149-169).

<sup>248</sup> *Id.* at 4.

<sup>249</sup> *Id.* at 23-24.

<sup>250</sup> *Id.* at 6-8.

<sup>251</sup> *Id.* at 3.

mechanisms (i.e. bureaucratic enforcement) over private litigation and decentralized systems that allocate law-making and enforcement activities to multiple agents.<sup>252</sup> The latter systems, they argue, are more adaptive but far more complex, and thus less predictable and less able to engineer foster broader social change.<sup>253</sup> Because most civil law countries would be characterized as ‘centralized,’ and most common law countries would be regarded as ‘decentralized’, contrary to their assertions, Milhaupt and Pistor’s view does not rebut the common law/civil law traditional dichotomy. Their study never defines Rule of Law or economic development with great precision, nor does it reflect an in-depth, long-term study of legal history, legal anthropology, or economics, or a deep understanding of Hayek’s and similar scholars’ analyses. Their statement about engineering social change indicates their presumption that a government’s duty includes engineering social change – a position that is part of the civilian tradition, but antithetical to traditional common law as described by Hayek and Oakeshott.

The second factor that Milhaupt and Pistor find determinative of economic development is “the function that law plays in support of a market activity.” They posit that law can perform multiple functions in support of market-oriented economic activity and that the protection of property rights – which they claim is the exclusive focus of the prevailing view – is only one possible function.<sup>254</sup> They argue that in some legal systems the protective function is dominant, but in others residual rights of control are allocated to multiple agents, forcing them to bargain over legal outcomes.<sup>255</sup> As such, in these systems, the law performs a coordinating function rather than a protective one.<sup>256</sup> Centralized systems tend to be coordinating, whereas decentralize systems tend to be protective.<sup>257</sup> In addition to its coordinating or protective roles, Milhaupt and Pistor find that law may also be used to lend credibility to government policies, enhancing their effectiveness.<sup>258</sup>

To the extent that Milhaupt and Pistor assert that law and government must be studied in context with the society in which it has developed, I agree completely –this is one of the main reasons for a multidisciplinary approach. However, this ‘factor’ is not in any way predictive of which kind of law or

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<sup>252</sup> *Id.* at 6-7.

<sup>253</sup> *Id.* at 6.

<sup>254</sup> *Id.* at 6-7.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 7.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

kind of government is most supportive of economic development. Furthermore, to the extent that they imply that economic growth is independent of a legal system or that a legal system in and of itself cannot or does not predicate economic development, I would again agree. Consistent with Hayek, Oakeshott, and Tamanaha, instrumental law is likely to be ineffective or lead to unintended consequences, whether it is intended to break down class structure (as in the French Revolution) or prevent corrupt accounting (Sarbanes Oxley).

When Milhaupt and Pistor refer to ‘coordinating’ functions, they seem to be referring to the political process through which some of the corporate scandals studied were resolved. For example, in Korea’s SK Scandal, a foreign investor (Dubai-based Sovereign Global) tried to purchase SK Corporation, Korea’s largest chaebol, which had suffered massive losses due to its executives’ undisclosed investments in derivatives, mismanagement, and fraud.<sup>259</sup> Nevertheless, Sovereign Global was squeezed out under Korean corporate law by SK’s controlling shareholder families through a tangled web of share ownership, which created enormous potential for exploitation of minority investors or “shareholder tunneling.”<sup>260</sup> That squeeze-out was affirmed by Seoul’s High Court.<sup>261</sup> In that case, Korean law was used by the actors to coordinate and secure their positions – this is the opposite of the common law conception of the Rule of Law. Korea subsequently chose to retool its corporate law more in line with U.S. investor protection, though its investor protection still remains “somewhat underdeveloped.”<sup>262</sup>

Similarly, Putin rather blatantly used Russian tax and bankruptcy law to “renationalize” Yukos, Russia’s most successful oil company, which had begun to pay dividends to its shareholders, used American accounting standards to report its financial status, and was hailed as the best-governed and most transparent Russian firm.<sup>263</sup> As they describe it “law was not used to constrain those in power, to create and protect rights, or to provide outsiders with access to economic and political markets.”<sup>264</sup> As in Korea, the law was used by those in power to retain or expand their power – this is the opposite of what (under any definition) constitutes the Rule of Law. It can only homologate the economic power of those already in power, it does not democratize economic development.

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259 *Id.* at 109-111.

260 *Id.* at 114-115.

261 *Id.* at 113.

262 *Id.* at 123.

263 *Id.* at 149-165.

264 *Id.* at 165.



In contrast with what happened in Korea and Russia, as Milhaupt and Pistor relate, Singapore used its tough securities laws to force China to discipline Chinese executives who (like the Korean Chaebol family) had mismanaged CAO, an oil company traded on the Singaporean stock exchange but controlled by a mainland Chinese holding company with close ties to the state.<sup>265</sup> Faced with bankruptcy and looking for a bailout after CAO sustained massive losses from speculating in oil, Chen Jiulin, CAO's managing director, forged documents in a scheme to defraud Deutsche Bank and violated Singaporean insider trading laws.<sup>266</sup> Singaporean authorities investigated, and its regulators and criminal enforcement agents moved swiftly against some of CAO's executives (Chen served four years in Chinese prison, a Singaporean court required three others to pay substantial fines).<sup>267</sup> Milhaupt and Pistor conclude that in order to be allowed to list its companies, the Chinese government was willing to play by Singapore's rules to a certain extent.<sup>268</sup> Nevertheless, they downplay the depiction of Singapore as an emerging common-law country with strong investor protection and effective financial regulation, stating that individual investors have only limited ability to enforce their rights in court, and Singapore relies heavily on centralized administrative mechanisms other than law because the resolution of the CAO crisis depended on the intervention and support of a Singaporean governmental entity, Temesek.<sup>269</sup>

Milhaupt and Pistor's "coordinating function" analysis is somewhat confusing both in that it does not address any connection between law and economic development, and in that it mixes together two very different concepts about how societies work. In the Korea and Russia examples, law was used by powerful entities with the specific aim of homologating their power. This is the very opposite of what is generally contemplated as the Rule of Law, under which law applies equally to everyone and is intended to limit power. In contrast, Singapore applied its law. The fact that a government entity, Temesek, may have helped negotiate a settlement between two sovereign governments in a tricky diplomatic situation does not negate that fact, nor does it indicate that Singapore is not patterning itself after common law countries: one of governmental agencies' traditional functions is to negotiate solutions to disputes, whether in common law or civil law jurisdictions.

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<sup>265</sup> *Id.* at 125.

<sup>266</sup> *Id.* at 128.

<sup>267</sup> *Id.* at 132-134.

<sup>268</sup> *Id.* at 135.

<sup>269</sup> *Id.* at 145.

As their final criteria concerning the relationship between law and economy, Milhaupt and Pistor question what they perceive as the prevailing view that legal systems that are conducive to economic activity are politically neutral: they argue that this claim is false because “[l]aw, a product of human interaction, obviously does not function independently of the political system.”<sup>270</sup> Furthermore, Milhaupt and Pistor argue that “the political economy determines whether law is contestable” – where Milhaupt and Pistor define “contestable” as “the extent to which law is subject to a process of creative destruction by the participation of private, social, and governmental actors as opposed to being exclusively an instrument of political actors . . . .”<sup>271</sup> The first statement, that law cannot be politically neutral, like their earlier implication that law should be used to engineer social change, is consistent with the civilian *Rechtsstaat* view of the relationship between the individual and government: that the purpose of government is to change society, and that law is the instrument by which it does this. It is inconsistent with the traditional common law concept that law should be (as Oakeshott describes) *adverbial*. In other words, law should set the rules by which we play the game – whether that game is cricket or selling securities on a stock market – but it should not stipulate who actually will win the game. In other words, that law should be politically neutral.

In contrast with the first statement, the second – that concerning the ‘process of creative destruction’ – Milhaupt and Pistor touch on an important concept. As de Soto and Hayek point out, good law (i.e. functional law) is a formalization of existing habit, and while those habits are originally developed by private and social actors, they are eventually formalized by the government by means of the political process.

While Milhaupt and Pistor’s study is certainly very interesting, and it is accurate in that they find that law is not separable from the culture in which it develops;<sup>272</sup> nevertheless, (as they themselves acknowledge) their analysis is limited.<sup>273</sup> To begin with, they reject Hayek’s description of the relationship between the Rule of Law and economic development without an in-depth understanding of it. Their list of references includes the *Road to Serfdom* and the first volume of *Law, Legislation, and Liberty*, and they refer to Hayek’s spontaneous order, but their work contains little discussion of Hayek’s thoughts and none on Fuller, Oakeshott, or the empirical studies of economists de Soto or Pejovich who have addressed the topic directly.

<sup>270</sup> *Id.* at 7.

<sup>271</sup> *Id.*

<sup>272</sup> *See id.* at 210-211.

<sup>273</sup> *See supra* discussion at text accompanying note 242.

Milhaupt and Pistor never define the Rule of Law or discuss it in its cultural context, but instead refer to it as if it is merely a synonym for legal positivism instead of a particular kind of relationship between citizen and government. Their conclusion that different legal systems may use the same legal concepts very differently is entirely correct – comparative lawyers have consistently noted that legal transplants are often ineffective or used in ways not intended – but Milhaupt and Pistor do not analyze whether the different uses can or do lead to greater economic growth. Instead, as all six of the countries considered in their study are large economies, their underlying conclusion is quite obvious: different countries deal with legal issues and scandals that involve large companies differently. Their argument would have been stronger had they considered the history of how these economies grew and whether legal changes helped or hampered that growth. Furthermore, though their book begins with some statistical data concerning growth in GDP during the twentieth century, because the major portion of the book is devoted to their “Institutional Autopsies” (the study of the six corporate scandals), the reader is necessarily left with the impression that the authors assume the mere presence of large corporations is part and parcel of a country’s economic development, when, in fact, large companies typically account for fifty percent or less of a country’s economy and a much smaller percentage of its businesses.<sup>274</sup> They also ignored the history of economic development.

The question is not whether a country can develop economically over a short period of time (as have the Asian Tigers), but whether it can maintain that development over a very period of time longer than a mere portion of one century. A simple study of the history of English property and contract law in context with its economic growth provides insight into why and how England became the first capitalist powerhouse. History further shows that common law countries that have adopted the common law conception of the Rule of Law, like the United States, Canada, Australia, and the UK, demonstrate sustained, long-term growth that is supported by innovation and entrepreneurship. Professor Pejovich used data developed by complex studies of the Rule of Law and economic freedom to show that this is still the case, and Hayek’s and de Soto’s studies explain why and how civilian bureaucracy-based systems tend to stifle economic growth.

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<sup>274</sup> See *supra* text accompanying notes 62-70.

## CONCLUSION

There are two different conceptions of the Rule of Law: the original Anglo-American conception identified by A.V. Dicey and further explained by Friedrich Hayek and Michael Oakeshott, and the Continental conception. It is the former concept, which developed out of the Anglo-American legal tradition, that more strongly supports consistent, long-term economic development, though it is not the only necessary institution. In addition to the Rule of Law, a society must have a market economy, the technological project (a culture that values innovation and entrepreneurship), and a culture of autonomy in order to achieve consistent economic development.<sup>275</sup> (Notice that democracy is NOT included as a requirement – but that is a discussion for another article (or book)).

Milhaupt and Pistor ostensibly reject the distinction between common law and civil law and also reject any notion of a necessary relationship between the Rule of Law and economic development,<sup>276</sup> due to a thin understanding of the cultural differences of the two traditions or ‘narratives.’ They focus instead on centralized versus decentralized systems, the protective versus coordinating function of law, and power struggles among elites (“political economy”), though they ultimately conclude that most countries that are developing economically have moved to incorporate law that is more protective of property and contractual rights (and patterned after U.S. law).<sup>277</sup> Comparative legal scholars agree that legal transplants generally do not work, and Milhaupt are correct in concluding that such adopted law is generally interpreted differently, due to cultural differences.<sup>278</sup> Because the scope of their study was necessarily small, Milhaupt and Pistor did not see any instances where a country (other than the United States) recently developed its own law to address a perceived problem or institutional weakness.<sup>279</sup> A case in contrast, however, is Chile, which has successfully designed and implemented new criminal, labor, and family courts based on models of its own design which incorporate elements of both common law and civil law.<sup>280</sup>

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275 CAPALDI & LLOYD, *supra* note 80 at 4–14 (discussing the importance of the technological project, a market economy, and limited government to a strong economy).

276 MILHAUPT & PISTOR, *supra* note 79.

277 *See id.* at 192-93.

278 *Id.* at 103, 175.

279 *Id.* at 207.

280 *See* Nedzel, *supra* note 18, at 99-108 (this article and the sources cited therein describe how Chile designed and implemented changes in its criminal court system and contrasts Chile’s successes in that effort with Venezuela’s failures in maintaining an independent judiciary).

Sadly, the dominant American legal philosophy since the mid-twentieth century is that developed by Dworkin and Rawls, both of whom argue that the *grundnorm* underlying law in the Western tradition is equality, not limited government, and not equality in application of the law.<sup>281</sup> Legal positivism has become widely accepted in both civil and common-law countries, and with it, ever-increasing legislation and bureaucracy. Because positivism and the civilian *Rechtsstaat* encourages governmental instrumentalism and increased regulation, they discourage the entrepreneurship necessary for economic development. As Hayek discussed in *Road to Serfdom* and Hernando de Soto demonstrated in *The Mystery of Capital*, over-regulation stifles individual entrepreneurship and hence a country's economic development. It is the accumulation of the efforts of small entrepreneurs that creates sustained growth, not primarily the growth of large entities. The effect of increased regulation between 2008 and 2017 (i.e. Sarbanes Oxley) has been a decrease in the growth of small enterprises and the lower status given to the United States<sup>282</sup> in the Index of Economic Freedom.<sup>283</sup>

Perhaps because of an effort to be seen as diplomatic, comparative legal scholars typically avoid stating that one system is more effective than another. Nevertheless, if some characteristics are more effective than others, stating that factual truth may enable positive change, while such misplaced diplomacy disables it. Furthermore, as lawyers, we tend to conceptualize solutions to problems in terms of legislation and regulation. Analogously, the person with a hammer sees everything as a nail; surgeons think all medical issues require surgery, etc. However, in order to understand the interaction between the Rule of Law and economic development and develop more effective solutions, we as lawyers must learn to look at the role of law in its cultural context, including other disciplines such as philosophy, history, and, of course, economics. And we

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281 See e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, xii (Harvard University Press 1978). (describing Dworkin's and Rawls's theory of legislative rights that the most fundamental of all rights is a distinct conception of the right to equality, which Dworkin calls the "right to equal concern and respect"); *Id.* at 150 (describing Rawls's A Theory of Justice as showing that if men and women are rational, they will choose his two principles of justice which provide that every person must have the largest political liberty compatible with a like liberty for all, and that "inequalities in power, wealth, income, and other resources must not exist except in so far as they work to the absolute benefit of the worst-off members of society.")

282 See generally BAINBRIDGE, *supra* note 87 (discussing the counterproductive effects of Sarbanes-Oxley).

283 Compare the 2008 *Index of Economic Freedom*, THE HERITAGE FOUNDATION (2008), [https://www.heritage.org/index/pdf/2008/index2008\\_executivesummary.pdf](https://www.heritage.org/index/pdf/2008/index2008_executivesummary.pdf) (ranking the United States as #5) to the 2017 *Index of Economic Freedom*, THE HERITAGE FOUNDATION (2017), <https://www.heritage.org/index/> (ranking the United States as #17).

must recognize that the proper role of law is to manage conflict. Instrumental law is likely to be not merely ineffective, but even destructive.<sup>284</sup>

A society based on consent among equals of necessity recognizes individuals rather than classifying people based solely on their social status. The individualism of English culture was demonstrated first in its property and inheritance habits and laws, and then in its development of contract law. Though the Rule of Law had not yet been named as such, it was already central to a seventeenth or eighteenth-century Englishman's expectations of his government. The English cultural focus on the individual as the 'unit' of society – rather than any conception of the general will – allowed England and her progeny to become economic powerhouses. The Rule of Law -- as opposed to *Rechtsstaat* -- encourages entrepreneurship and individual investment on a massive scale while it discourages governmental corruption and politicization of the law.

Hayek thought that some of the strength of common law lay in its deeply entrenched tradition that was "not conceived as the product of anyone's will but rather as a barrier to all power, including that of the king."<sup>285</sup> He further posited that some of its effectiveness was due to its emphasis on inductive thought and practical problem solving, in order to preserve peace.<sup>286</sup> His positing that the most effective law grows spontaneously out of practice is illustrated by de Soto's study of the history of property law in the United States.<sup>287</sup> Treating law and legal institutions deductively, Hayek argues, is destructive of liberty and false in both factual and normative conclusions because social institutions --including legal systems -- can never be entirely the product of design.<sup>288</sup> Such theories restrict the utilization of available knowledge and they are false because they conceive of the human mind as being able to stand outside of itself. As most comparative lawyers point out, and as Milhaupt and Pistor themselves noted, adoption of the same laws in a different country leads to unanticipated and often ineffective results. While the French and other civil codes were based on a deductive system of law and Enlightenment values, including positive rights protection, they

<sup>284</sup> See generally BRIAN TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* (Cambridge Univ. 2006).

<sup>285</sup> See *LAW, LEGISLATION, AND LIBERTY*, *supra* note 21, at 85.

<sup>286</sup> See *id.* at 86 (discussing the inductive process by which common law judges derive general principles from precedents) and 98 (discussing the aim of preserving peace).

<sup>287</sup> See *id.* at 74-88 (cited in MILHAUPT & PISTOR at 11). See also ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (Harvard Univ. Press 1991) (study describing how fence-in/fence-out customs developed in the Western United States territories in the absence of legal entities to resolve cattle/sheep herder disputes).

<sup>288</sup> *LAW, LEGISLATION, AND LIBERTY*, *supra* note 21, at 5, 11, and 21.

also include the principle that all law must be legislated. The deleterious effect of this system is that it is not predicated on an integrated system of checks and balances (as developed organically in the common law), and it prohibits interpretation by inductive reasoning, making the civil law less flexible and hence more centralized than common law. As a result, civilian theory-based, top-down legal systems have been at a disadvantage when it comes to protecting individual liberty and economic freedom.

Consistent with Roger Scruton's predictions, England ultimately voted for Brexit because voters were dissatisfied with the disadvantages that have come from following Brussels's dictates: a lack of sovereignty and insults to what they traditionally viewed as their Rule of Law.

The rule of law bakes no bread, it is unable to distribute loaves or fishes (it has none), and it cannot protect itself against external assault, but it remains the most civilized and least burdensome conception of a state yet to be devised.<sup>289</sup>

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289 OAKESHOTT, *supra* note 22, at 178.