


RESEARCH ARTICLE

# The religious origins of the rule of law

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## Abstract

The background conditions for the emergence of the rule of law are important but underdeveloped. This paper discusses current theories of the origin of the rule of law, arguing that they are useful but incomplete. In addition to those theories, the Jewish and Christian concept of all human beings as God's image bearers is an important contributor to the rule of law in Western civilization. The formulation of universal human equality is not, however, a sufficient condition for the emergence of the rule of law. The concept has taken centuries of articulation in different institutions and social settings. It only reached full fruition when it was joined with an understanding of appropriate legal and political systems as expressed by political theorists such as Locke, Montesquieu, and Madison.

**Keywords:** Human dignity; culture and institutional change; impersonality in legal systems; rule of law

## 1. Introduction

In any discussion of the beginnings of modern economic growth, the concept of the rule of law plays a crucial role. In *Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History* (2009), North, Wallis and Weingast list the rule of law as one of the substantial differences between the natural state and the open access order. For Acemoglu and Robinson (2012) such a legal framework is an important part of what they call “an inclusive political and economic order.” The lack of such an order is the fundamental cause of the failure of nations.

World Bank research indicates that a one-standard-deviation increase in the rule of law index increases GDP by 300% (Kaufman *et al.*, 2007). Using 2012 and 2013 data, Hodgson (2015: 340) finds that “five rule-of-law variables explain about 80 percent of the variance in nonoil GDP per capita.” And Carothers (2010: 19) asserts, “The degree of apparent international consensus on the value and importance of the rule of law is striking ... almost no leader anywhere is openly against the rule of law or will publicly mount an argument that the rule of law is a bad idea for their society.”

If rule of law is popular and effective one would expect it to be common to most organized societies. Such is not the case. North *et al.* (2009: xii) suggest that only about 15% of the world's population live in what they call open access societies, where the rule of law exists. Weingast (2010) details the absence of rule of law in developing countries.

Despite the general recognition of the importance of the rule of law, there is little agreement about the historical process by which it came into existence. It did become at least a partial institutional reality in certain Western economies in the late 18<sup>th</sup> century, with political philosophers articulating early expressions of rule of law, articulations that were further developed and implemented over the next century.<sup>1</sup>

<sup>1</sup>The rule of law is never completely enforced in any society and some violations such as slavery were only gradually eliminated in what are generally seen as rule of law countries.

In this paper I argue that an important factor in understanding the development of the rule of law was a particular belief structure, a set of norms about universal human dignity. These norms also needed to be codified in formal law and enforced by the coercive power of the state in order for the belief in human equality to have a substantial impact on economic growth (Hodgson, 2015).<sup>2</sup>

The next section describes the existing theories of the origins of the rule of law. It is followed by Section 3, which explains how those theories, while helpful, are incomplete without consideration of ideology. Therefore ideas are important in the evolution of institutions. Section 4 argues for a particular ideology, universal human dignity, as crucial for the rule of law. Section 5 asks why it took so long for this doctrine to be instantiated in law. Section 6 discusses the role of political theory and Section 7 concludes.

## 2. Explanations of the emergence of the rule of law

One explanation relies on difference in governance structures in Western Europe. The UK<sup>3</sup> and the Netherlands led the way in the development of the rule of law in the late 18<sup>th</sup> century and by that point their governments differed substantially from those of Latin Europe, particularly France and Spain.

European history fleshes out this explanation. Throughout the 5<sup>th</sup> century the Western Roman Empire lost strength, and when Emperor Romulus Augustulus was deposed in 476 Germanic tribes replaced Rome as the center of power in Europe. The early Middle Ages saw numerous new polities emerge and those polities developed very different structures of governance and administration over the next millennium (Ertman, 1997).

For several centuries after the decline of the Roman Empire governing structures were localized, but the rise of the Carolingian Empire in 800 created a much more substantial power structure. North *et al.* (2009) provide a useful framework of understanding how solutions to the problem of violence led to a particular type of political and economic structure. They describe in some detail this system, which they call a limited access order, where a “dominant coalition contains members who specialize in a range of military, political, religious, political, and economic activities” (18). The members of the coalition maintain their position by offering benefits to each other. Often the political rulers provide only limited access to particular forms of production. These restrictions produce rents for the economic elites in the form of monopoly profits, and in turn those elites support the political rulers. Religious leaders are an elite that can provide legitimacy to a regime and can gain prestige and power because of their support.

They also use the term the *natural state* to describe this social ordering because it has been the usual form of organization for most of recorded history. It evolved and was relatively stable because it mitigated the problem of violence in many situations. In Europe, the Catholic Church was an important member of the dominant coalition:

We cannot make much sense out of European history from Charlemagne to the Reformation without acknowledging the close interlocking and interdependent nature of ecclesiastical and secular elements of the dominant coalition. (North *et al.*, 2009: 62)

It is also important to note that long-term growth is unlikely in such a system because of the limits on economic opportunity and the lack of clear and enforceable property rights for everyone.

<sup>2</sup>This paper will use the following definition of the rule of law:

The government itself is bound by the law.  
Every person in society is treated equally under the law.  
The human dignity of each individual is recognized and protected by law.  
Justice is accessible to all (World Bank 2003: 1).

This definition also corresponds closely to the concept of rule of law as discussed in Acemoglu and Robinson (2012: 305–306), Mokyr (2009: 376), North *et al.* (2009: 154–158), and Weingast (2016: 195).

<sup>3</sup>The United Kingdom dates from 1707. Later references to England in this paper refer to earlier times.

Starting about 1000, after the fall of the Carolingian empire, new states of Western Europe were formed. Agricultural surpluses in Latin Europe led to increasing aristocratic power and the building of castles on large estates (Ertman, 1997: 51). Those castles and estates became the foundation of local rule. Because of the threat of localized aristocratic power the Church strengthened its governing powers and used its influence to describe and enforce an order with a large role for ecclesiastical authorities (Ertman, 1997: 54). By 1150 the administrative remains of the Carolingian empire, combined with church renewal and economic growth, meant that royal power was revived.

Throughout the 13<sup>th</sup> century there was population and economic growth. In the 14<sup>th</sup> century the Black Death dramatically reduced populations across Europe and, along with the increase in warfare, it put new demands on the revenue-raising capabilities of the state. In response to these revenue needs, new administrative structures developed. Thomas Ertman (1997) provides an analytical model for Europe that focuses on the contrast between Latin Europe and England. In Latin Europe the political regimes became more absolutist, while England's development was more constitutional.<sup>4</sup>

Of particular importance in England was the existence of successful local governments built around the shire. Even under Norman control after 1066 the local Anglo-Saxon governing structure remained intact. The "common law" also developed, which meant a legal regime existed that provided a counterbalance to royal power. In 1215 the Magna Carta provided more limits on royal power. During this time the British parliament also developed. Although royal power often tried to limit parliamentary power, the role of the representative assembly played a much larger role than in Latin Europe. Harris (1975: 33) argues that

the major development from the thirteenth to the fifteenth century was the emergence of a political society containing the middling landowners. Free society had evolved into an elaborately structured elite of earls, barons, knights, esquires and gentlemen, with yeomen and husbandmen below. All ranks of this society came to be involved in the activity of governing.

This structure meant that in England the dominant coalition described in North *et al.* was much broader than that of Latin Europe, in particular in the regions that became France and Spain. The Church, local government, and local landowners along with royalty and parliament provided the English governing structure. Thus the rule of law recognizing the equality of all was a better fit with the governance structure in England than in Latin Europe.

The relationship between parliament and royal power was often contested, however, and the role of parliament was a major factor in the English Civil War (1642–1651). In 1688 the Glorious Revolution strengthened the power of parliament and, in the process, made the arguments for universal human dignity more easily articulated in the political and philosophical arena.

Greif and Rubin (2015) and Rubin (2017) use the framework of the 16<sup>th</sup>- and 17<sup>th</sup>-century English system of governance to argue that the changing role of political legitimacy was an important factor in the instantiation of the rule of law. In the framework of North *et al.* (2009), the make-up of the dominant coalition was substantially reformed with a much increased role for parliament. This expansion of parliament's power also increased the role of the business class. Much of the legitimation came through increased respect for law, which made the possibility of rule of law more salient.

Johnson and Koyoma (2019) present a variant of the Greif and Rubin argument with a focus on religious toleration. The motive force for Johnson and Koyoma's explanation of the change is political and economic interests, particularly in England. As polities relied less on religious legitimation the importance of legislative power rose and commercial interests had more sway, thus increasing the likelihood of the rule of law.

In the Low Counties manorial obligations were eliminated by 1500 and clear title to land was more the rule than the exception. The region was under Spanish rule for several centuries, but the northern

<sup>4</sup>G. L. Harris (1975) also describes in some detail the English development of a parliamentary system and public finance bureaucracy which, by the end of the 14<sup>th</sup> century, contrasted sharply with that of Latin Europe.

provinces combined to form the United Provinces of the Netherlands in 1581. Because of economic and political freedom an influx of foreigners arrived to ply their trades, and the local guilds were not powerful enough to stop them (North and Thomas, 1973: 134). The area grew rapidly in the 16<sup>th</sup> and 17<sup>th</sup> centuries, becoming the commercial leader of northern Europe (Acemoglu and Robinson, 2012: 100–101). In the first part of the 17th century, one-third of Amsterdam's 100,000 residents were newly arrived foreigners (Stark, 2005: 145). The merchant class was an important part of the limited access order and a reasonably efficient economic system evolved.

Roman law was also important in the creation and development of European civilization (Stein, 1999: 66–67). Although it was originally designed to apply just to Roman citizens and never developed an explicit theory of universal dignity, it did provide a uniform legal regime and rights-based law. It also laid out clear theories for the administration of justice. The church was one of the main custodians of the Roman legal tradition and much of Roman legal procedure became a part of church doctrine, particularly from the 11th through the 13<sup>th</sup> century (Stein, 1999: 66). An important concept from Justinian was *quod omnes tangit*, or “that which touches all ought to be supported by all.” The church used this doctrine throughout the Middle Ages to strengthen its position in relation to other parts of government (Post, 1950: 68–70) and it also became the basis for more widely based consent theories.

All the above explanations are cogent and complement the arguments of this paper. In all of them, however, religious ideas are either just a background condition or play no role in explaining changes in governance structures.<sup>5</sup> This paper adds belief systems to these explanations of institutional change. The next section details the influence of ideology on institutions.

### 3. Ideas and institutions

The starting point is the argument that ideas influence institutions and that changes in both must be included in any coherent explanation of growth.<sup>6</sup> The best expressions of that starting point are found in Greif and Mokyr (2016, 2017), Langlois (2016), Tabellini (2016), and Weingast (2016). An important argument from that literature is that:

we want to go beyond the generic statement that the world is complex and ideas matter. We also want to identify which ideas and which cultural traits are important for economic development, how they change and how they interact with the economic environment. (Tabellini, 2016: 43)

Numerous authors highlight the role of norms or beliefs in economic interactions. Greif (2006) develops a theory of the relationships between belief structures and institutions in the late medieval world. Acemoglu and Robinson (2016) argue that social norms are important for the development of inclusive institutions. Alston (2017) finds changes in beliefs important for critical transitions, and North (2005) discusses the influence of beliefs on choice. These arguments for the importance of belief structures, however, do not describe in any detail the types of beliefs that are important for a particular institutional structure or economic outcome. Three exceptions stand out.

North *et al.* (2009) highlight the importance of different views on human equality in their distinction between the natural state and the open access order. In the natural state there is “a pervasive sense that not all individuals were created or are equal” (12). In contrast, in the open access order there is “a widely held set of beliefs about the inclusion of and equality for all citizens” (114). The authors do not, however, develop the reasons for the transition in concept from human inequality to human equality.

Greif and Mokyr (2017) expand upon North *et al.*, arguing that a change in cognitive rules is at the heart of “the rise of modern Western-style nation state aimed at improving the welfare of its citizens and relying on an effective legal system” (33).

<sup>5</sup>Rubin (2107) is an example of an important author who argues that ideology was unimportant in institutional evolution in the Middle East and Europe.

<sup>6</sup>Much of the debate about the relationship between ideas and institutions has occurred in this journal. For instance, the March 2016 issue of the *Journal of Institutional Economics* has a vigorous exchange between McCloskey, Greif and Mokyr, Tabellini, and Langlois. Also, see Greif and Mokyr (2017) and Weingast (2016).

Greif and Tabellini (2010, 2017) provide an argument for the importance of belief structures in their discussion of the corporation and the clan in High Medieval Europe and China. They also develop the implications of those beliefs for economic growth. They find that Europe was influenced by a system of generalized morality grounded in Christian doctrine. This belief structure led to institutional innovations that were based on non-kinship relationships, in particular the corporation. In contrast, China had a system of limited morality, where moral obligations did not extend much beyond the extended family. This meant that major economic and social connections were formed through the clan.

This paper builds on the insights of Greif and Mokyr (2017) and Greif and Tabellini (2010), and provides a historical narrative for the North *et al.*'s (2009) argument that a belief in human equality became instantiated in an institutional framework known as the open access order. The narrative also attempts to answer Weingast's question as to "Why 1800?" for the formation of institutions, especially the rule of law, that could sustain liberty and equality (2016: 195).

#### 4. The metaphysical grounding of human equality

Viewed in a broad historical and philosophical context the concept of universal human dignity is unusual. Almost all societies before the beginning of the first millennium operated under the assumption that people were fundamentally different in their moral standing. At the more practical level, almost every organized human group operated with exclusionary principles in terms of any form of rights, privileges, or access to power.

The major exception was ancient Israel. Joshua Berman (2008), a noted Jewish scholar, argues that metaphysical legitimation of the rulers was an essential part of the ordering of almost all Near Eastern societies. In Israel, however,

The hierarchical structure of ancient Near Eastern society was rejected on theological grounds. The equality of the members of the Israelite polity stems from their collective covenantal relationship with God, in which each member is endowed with the status of subordinate king before the sovereign King of Kings. This is the metaphysical basis on which the notion of equality is founded. (2008: 169)

Because of the equality inherent in the creation narrative, that all humans were made in the image of God, universal human dignity had a strong metaphysical grounding. Ancient Israel was the first significant social order of any size to recognize this basic human equality (Berman, 2008: 9–11).

Jewish conceptions of universal moral agency spread outside the nation of Israel by the first century BCE through a substantial Jewish diaspora. This migration affected Greek- and Latin-speaking urban dwellers throughout the Mediterranean region. By the second century CE there was a general understanding that Judaism embodied a unique worldview. "They (philosophers) no longer claimed that Moses and Plato taught the same truth" (Siedentop, 2014: 56). Later thinkers also relied heavily on Jewish conceptions of human dignity in formulating their own conceptions of human rights. David Novak (2010: 55) argues, "Thomas Aquinas considered the Torah to be the best embodiment of the universal and perpetual norms of natural law."

Jewish conceptions of social ordering also made an important contribution to modern politics (Nelson, 2010). Much of this was codified in the detailed attention given to the Hebrew republic by influential writers such as John Selden (1584–1654), James Harrington (1611–1677), and John Locke (1632–1704).

With the advent of Christianity, the concept of human equality became an even more radical challenge to the prevailing philosophical idea that humans are fundamentally unequal. For instance, Aristotle held that "the relation of the male to the female is naturally that of the superior to the inferior – of the ruling to the ruled. It is thus clear that some are by nature free, so others are by nature slaves" (1946: 1254a–1255a). Luc Ferry (2011), the prominent French philosopher, argues:

In direct contradiction [to Greek philosophy], Christianity was to introduce the notion that humanity was fundamentally identical, that men were equal in dignity – an unprecedented idea at that time and one to which our world owes its entire democratic inheritance. But this notion of equality did not come from nowhere. (72)

But with Christianity, the idea of a common humanity acquired a new strength. Based on the equal dignity of all human beings, it was to take on an ethical aspect. As soon as free will becomes the foundation of moral action and virtue is located not in natural, ‘unequal gifts,’ but in the use to which they are put, then it goes without saying that all men are of equal merit. Humanity would never again be able to divide itself (philosophically) according to a natural and aristocratic hierarchy of beings: between superior and inferior, gifted and less gifted, masters and slaves. From then on, according to Christians, we are all ‘brothers’ on the same level as creatures of God and endowed with the same capacity to choose whether to act well or badly. Rich or poor, intelligent or simple: it no longer holds any importance. (76–77)

Ferry does not give strong metaphysical reasons for the development of the concept of universal human dignity, but it is clear that the theological claim of Judaism and Christianity, that all humans are God’s image bearers, is important for developing the concept of human equality.

Siedentop (2014: 62) makes a similar argument, postulating that under Christianity “the identity of individuals is no longer exhausted by the social roles they happen to occupy.” Instead, a common humanity replaced the idea that those outside of the family or the clan did not share attributes with those inside of that social structure (13). Thus impersonality, which, according to Weingast (2016) is so important for the rule of law, was articulated long before it was actually instantiated in a legal order.

Although the fruits of human equality did not ripen for hundreds of years, the concept did have an impact on ideas about social ordering fairly quickly after the beginning of Christianity. The Apostle Paul advocated for human agency and dignity throughout the Mediterranean world. Paul’s three missionary trips and his numerous letters to the churches scattered across Turkey and Greece carried a strong rebuke to the normal assumption of moral inequality, arguing “There is neither Jew nor Greek, there is neither slave nor free, there is no male or female” (Galatians 3:26, ESV) and “Here there is not Greek and Jew, circumcised and uncircumcised, barbarian, Scythian, slave, free” (Colossians 3:11, ESV). According to Siedentop (2014: 60), “Through his conception of Christ, Paul insisted on the moral equality of humans, on a status shared equally by all.”

The theologian Augustine (354–430) made similar arguments about human equality, naturally following from the doctrine of universal sinfulness. If all humans are fallen, or separated from God, then they are morally equal (Siedentop 214, 107). Again this concept represented a break from the Greek philosophers who preceded Augustine.

One of the most significant influences of the idea of universal dignity was with respect to the standing of the poor. Harper (2016: 139–141) argues that there was not even a social category called the “poor” in antiquity. The Christian message of the responsibility to care for the poor led to a radical rethinking of the concept of charity and was also manifested in the institutions of hospitals and orphanages. “Charities ran hospitals, ministered to the poor in numberless ways, gave alms, sheltered travelers, ran leper houses, and cared comprehensively for the destitute and deprived” (Madigan, 2015: 314).

Christian monasteries also embodied a doctrine of human equality that was unusual for societies that were heavily influenced by Greek and Roman understandings of social class. Around 300 CE religious orders open to both men and women sprang up across the Mediterranean world. These organizations represented a radical break from the usual understanding of the importance of social origins, since anyone willing to take the vows of the order could join, regardless of family or class background (Siedentop, 2014: 95, 160).

At times the monasteries got caught up in church politics and became centers of power that various factions competed to control, so they were not always simple advocates of human equality. The

Cluniac reforms of the 10<sup>th</sup> century returned the monks to self-government and renewed care for the poor (Madigan, 2015: 120–121). The establishment of monks in much of rural Europe also meant much previously unproductive land was cultivated. Again, the dignity of work and egalitarian nature of the Christian faith were affirmed by the activities of both the monks and their lay brothers. For instance, the friars at the end of the thirteenth century reiterated the message “that the Christian life was one open to all classes and vocations” (Madigan, 2015: 245).

The concepts of moral agency and human dignity were codified in canon law, which was systematized by the Church between 1050 and 1200. Berman (1983: 200) has called it the “first modern Western legal system.” Although it reflected the influence of centuries of Roman law (Stein, 1999), canon law also “developed around a new theory of justice, a theory resting on the assumption of moral equality” (Siedentop, 2014: 216).

Tierney (1997: 57–72) and Siedentop (2014: 213–214) discuss the substantial influence of Gratian (12<sup>th</sup> century) and his codification of canon law in *Decretum*. Gratian developed more fully the importance of the concept of human dignity and Witte (2007: 25–27) details the influence of canon law innovations on the Magna Carta. By 1234 canon law had evolved substantially and a new compilation was issued (Siedentop, 2014: 214). By 1300 there were cogent defenses of rights to property, rights of consent to be governed, and the right of self-defense (Tierney, 1997: 69–70). Thus canon law became an important source of the embodiment of the concept of impersonality within the law. Impersonality represented a substantial break with the Roman law tradition, where status played an important role.<sup>7</sup>

These developments in Christian philosophy provided a strong foundation for the doctrine of natural rights. Several centuries later, natural rights became an important part of the contribution of Enlightenment philosophers, such as Hobbes and Locke, to the rule of law (Tierney, 1997).

The Protestant Reformation in 1517 provided substantial revisions of certain church doctrines, but the Reformation leaders built rather straightforwardly on earlier church writings in their formulation of rights, using previously developed doctrines of natural law and natural rights.<sup>8</sup> Martin Luther, in *Freedom of a Christian* (1520), did not develop a complete concept of political rights, but his case for the fundamental freedom of conscience became an important component in later formulations of rule of law arguments (Witte, 2006: 55–58). Even though rights doctrines were not brand new formulations in Reformation thinking, the political upheaval across Europe after 1517 gave numerous opportunities for the Reformers to make their arguments about human equality in public forums.

John Calvin (1509–1564) articulated a more complete concept of human liberty based on human dignity. He extended the arguments for human liberty to other realms of life beyond religious belief, including commerce and civil law, hence widening the application of the concept of universal human dignity (Witte, 2010: 135–137). One of his followers, Theodore Beza (1519–1605), articulated an even more comprehensive expression of the importance of an appropriate political order that protected religious and economic liberty. His arguments did not represent a substantial break with early concepts of human rights in that he “called on five decades of Protestant and five centuries of Catholic teachings on law, politics, and society as well as the whole arsenal of classical and patristic sources” (Witte, 2007: 89).

The Netherlands in the 16<sup>th</sup> century was a place of economic, political and intellectual turmoil (Witte, 2007). Calvinist theology also played an important role in the Dutch debates over political ordering, and the fact that it represented an alternative to Lutheranism and Catholicism provided pressure for a political ordering that was not religiously monolithic.

Dutch reformers such as Johannes Althusius (1557–1638) drew heavily upon the concept of universal human dignity to argue for a much stronger set of limits on sovereign power and the instantiation of human rights in legal institutions (Witte, 2007: 182). In 1603 Althusius published *Politics*,

<sup>7</sup>As discussed earlier, the concept of *quod omnes tangit* provided the basis for an expanded theory of consent.

<sup>8</sup>Jared Rubin (2017) makes the important point that the invention of the printing press around 1450 was crucial to the spread of Reformation ideas.

which set out a clear theory of political and legal order. The Dutch economy became one of the most open of the time, with a large immigrant population, commercial interests influential in politics, and independent cities. These conditions made for a much more decentralized society than in much of Latin Europe. Therefore the idea of universal human dignity was not as threatening to the existing power structure as in other parts of Europe. As a result the concept of human equality was more readily accepted in Dutch society than in many other countries.

The arguments of Althusius and other Reformed thinkers were influential in the writings of later Enlightenment thinkers, particularly Montesquieu, Rousseau, Hobbes, and Locke. Because of the strong doctrine of sin in Reformed thinking, the necessity of limits on the sovereign was a precursor to Montesquieu's concept of separation of powers.<sup>9</sup> The social contract theory of Althusius was eventually championed by Jean-Jacques Rousseau (Witte, 2007: 204). Hobbes's concept of a new political entity flowing out of a political covenant had deep roots in Dutch arguments about the process of ensuring the legitimacy of government (Grabill, 2006: 127). Locke spent five years in the Netherlands, from 1683 to 1689, and much of his time was with radical Protestant reformers. His *Two Treatises of Government* were probably written during this time, and his arguments about the potential tyrannical nature of government reflected Reformed (Puritan) thinking.

In the 17<sup>th</sup> century, England was also going through great political ferment and again arguments based upon equality before the law were an important part of the discussion.<sup>10</sup> More than 22,000 pamphlets and sermons were published from 1640 to 1680, and much of the controversy was focused on the limits and powers of government, particularly of the Crown (Witte, 2007: 213). John Milton (1608–1674) was one of the most important intellectual figures, arguing that the Christian concept of human dignity “is a universal norm, intended for all persons, not just a local rule directed to the instruction of a single people” (Witte, 2007: 229). Again, the universality of legal rules was an important part of the evolving arguments about the application of law. And, as argued earlier, the differences in the make-up of the dominant coalition between England and Latin Europe created a hospitable framework for the rule of law in England.

The strong Puritan (Reformed) presence, as an alternative to Catholicism and the English Anglican church, made a strong case for religious toleration. The arguments of Milton and other Puritan authors were precursors of many of the ideas later articulated by prominent Enlightenment thinkers. In 1695, parliament refused to renew the censorship law and this made public discussion even more possible (Ertman, 1997: 211).

Other authors have provided evidence for the impact of the idea of universal human dignity and moral agency on Western Europe. Fukuyama (2011) argues:

[T]he religion (Christianity) preached a doctrine of universal equality that ran counter to the hierarchy of an honor-based tribal society. (255)

The introduction of Christianity into Europe produced the first major discontinuity in the evolution of law as it emerged from tribal custom ... The church itself understood that it was not simply ratifying customary law. (256)

McCloskey (2016) provides copious details on the ways in which the concept of human equality affected all levels of society and transformed attitudes and social practices, particularly in England and the Netherlands. McCloskey's argument differs, however, in two ways from this paper. First, she sees the move to human equality as occurring over a relatively brief period, 1517–1789. I posit that it was a much longer process. Second, for her the change was just in belief structures, not in

<sup>9</sup>Although Reformed doctrine places a strong emphasis on predestination it does not deny the importance of free will in moral action. Thus Luc Ferry's argument for the role of free will in establishing human equality is consistent with Reformed theology.

<sup>10</sup>The discussion was aided by the fact the state censorship of the media ended in 1688 (Acemoglu and Robinson 2012: 309).



institutions. In contrast I argue that beliefs affect institutions, and, in particular, beliefs about human equality were crucial to the rule of law.<sup>11</sup>

### 5. Why so long for the rule of law?

One of the important questions raised with respect to the rule of law is the timing issue. Weingast (2016) has asked “Why 1800?” And, in view of the arguments herein, that question becomes even more relevant. If the concept of universal human dignity was articulated in early Jewish and Christian societies and then instantiated in various small-scale institutional orders over many centuries, and if influential Christian thinkers articulated and developed the concept into a coherent theory of human rights, why did it take until the late 18<sup>th</sup> or early 19<sup>th</sup> century for those ideas to create a workable rule of law?

The answer is found in the particular ways that Christian doctrine was involved with social ordering over the centuries. Earlier I argued that the North *et al.* (2009) framework of the natural state, or the limited access order, is helpful for understanding European history. The changing role of the Church in the dominant coalition after the Protestant Reformation also provides insights into the length of time for the doctrine of universal equality to have a significant impact on political thought.

In the first three centuries of the Common Era Christians were a disenfranchised minority in the population, so they were not a part of the dominant coalition. When Constantine (272–337) became the Roman Emperor he was one of the first rulers to institute a regime of religious toleration. The Edict of Milan, in 313, gave people the choice to follow the religion of their choice, thus restricting the use of political power to enforce religious belief. A form of toleration was also maintained for a period of time after Constantine’s death, and such toleration reduced the power of religion as a part of the dominant coalition.

Religious toleration changed, however, as the expanse of the Roman Empire was reduced dramatically in the fourth century. In the West, where the formal relations between the Empire and Christianity remained, there was an increased entanglement of the state and the Church. When Theodosius became emperor in 379, Christianity became the official religion of the empire. This meant that “paganism” became illegal and the coercive power of the state could be used against it (Madigan, 2015: 20).

Once the Christian church became the state religion of Rome, the church lost a measure of its ability to be an independent influence on society, and it also meant the levers of power were accessible to church officials. In a very real sense the church became a part of the dominant coalition in a natural state.

Membership in the dominant coalition meant the church’s ability to advocate for universal equality was compromised, since it was inequality of access to positions of power that maintained stability in these natural states. There were still powerful religious arguments for human equality because of the understanding of universal humanity. The church also was responsible for important institutional innovations that instantiated this concept. On the other hand, the church, as part of the powerful elite structure of society, was often wont to use its power to treat people very unequally depending upon their particular beliefs.

The fact that political and religious authority was often intermingled makes it difficult to sort out what were strictly political acts and what was a use of state power by the church for its ends. In 782 Charlemagne executed 4,500 Saxons, using their pagan beliefs and refusal to convert as justification for his actions. The use of armed militias to enforce church doctrine occurred under Pope Leo IV (r. 847–855), and spiritual incentives were offered to soldiers under Pope John VIII (r. 872–882) (Madigan, 2015: 107).

After the Investiture Crisis of 1077, political figures lost some of their power over the papacy, but coercive power continued to be used by the church to further its purposes. The Crusades, lasting from

<sup>11</sup>Hodgson (2015: 37, footnote 7) explains well the fact that McCloskey’s discussion does involve institutions. He says: “her detailed argument is all about institutions: the growth of equality under the law, the removal of tariffs and other restrictions on trade, the failing grip of conservative institutions, and so on.”

1096 to 1291, often had geo-political objectives, particularly regaining control of Jerusalem and other regions of the Middle East, but they were essentially religious wars that had church sanction. The Christian church was heavily involved in providing spiritual justification and resources for military activity.

The various inquisitions also involved a complicated relationship between religious authorities and various states and state agencies. Inquisitors were usually Dominican friars sent out to villages in groups of two to root out heretical beliefs (Madigan 2015: 203). Although modern concepts of due process were not observed, many inquisitions were relatively benign in the beginning. In 1252, however, frustrated by the slow pace of confessions, the Pope granted inquisitors the right to torture suspects (Madigan, 2015: 205). From that point on inquisitions became increasingly bloody and they grew even more brutal when inquisition became an office of the government in 1474 under Isabella and Ferdinand. Burning at the stake was considered appropriate punishment for heresy and thousands of victims suffered that fate (Madigan, 2015: 209).

The Protestant Reformation of 1517 was instrumental in breaking apart the existing dominant coalitions in Western Europe over the next three hundred years. This disintegration led to the instantiation of the concept of human equality in the legal order, particularly in England and the Netherlands. Martin Luther's original efforts at reformation were designed to produce change in the Catholic Church, but his failure to secure such change meant that an alternative to the Church's role in the social ordering rapidly emerged. Religion had been a powerful legitimating source, but the existence of an alternative to the Catholic Church meant there was competition for a role in the dominant coalition (Rubin, 2017). This competition reduced the power of religion in the coalition. If religious authorities demanded too large a role, the other elites could turn from the Catholic Church to the Protestant groups or *vice versa*.

Since the Holy Roman Empire was made up of semi-independent princes, some of those secular rulers exploited the ideological shock to the church and used the Reformation to advance their own interests. Competition between Catholicism and Protestantism was formalized in the principle of *cuius region, eius religio* (whose realm, his religion) with the Peace of Augsburg in 1555 (Eirie, 2016). Europe was divided into Protestant (Lutheran) and Catholic areas, with the faith of the ruler in a particular region determining the official religion of that area.<sup>12</sup> The loss of religious monopoly power reduced the power to legitimize the political order for both Catholics and Protestants. Rubin (2017: 206) argues:

In Protestant England and the Dutch Republic, the Reformation undermined the capacity of the Church to legitimize rule. As a response, rulers turned to Parliaments comprised mostly of economic elites to propagate their rule and to provide tax revenue. The economic elite thus gained a seat at the bargaining table, which they used to enact policies that benefited their interests.

Of course the question still remains: Why didn't these economic elites simply use the decreased power of religion to consolidate their power in the natural state? Throughout the centuries, economic elites saw the natural state as an important mechanism for limiting competition and for generating rents for themselves. The transfer of power from religious interests to economic interests, however, was not clean and neat. Parliaments took over the legitimating function that had previously been served by religion, but these bodies were much more open to debate about rights and the proper role of government. As discussed previously, the Reformation, with its widespread discussion of the role of religion in society, created an opportunity for vigorous discussion of individual rights (Witte, 2007). And the long course of arguments for universal human dignity could not be ignored.

<sup>12</sup>The practice of *cuius region, eius religio* is evidence that the Catholic Church was not alone in wanting to use the state to enforce beliefs. If a resident disagreed with the religion of his or her ruler such a belief was considered heresy and was punishable by death. The agreement did allow dissenters to leave (with their possessions) a territory where their religion was not legal.

McCloskey's (2016) discussion of the rise of egalitarian sentiments during this period captures well a substantial limit on the ability of a dominant coalition to ignore rights-based arguments.

Other events made it even more evident that the political structure needed substantial reforms if human rights were to be protected. The European Wars of Religion (1524–1648) meant that all across central, northern, and western Europe Protestants and Catholics were quite willing to use the force of arms against others who were, under their theology, God's image bearers. The Peace of Westphalia in 1648 ended those wars and gave formal expression to the principle of religious pluralism (Iyigun, 2008).

The reduced role of religion in various dominant coalitions and the increase in arguments for religious toleration did not, however, create an immediate formulation of the rule of law. According to Weingast (2016: 196),

In the mid-seventeenth century, no one understood how to create a stable alternative to an authoritarian regime. Yet, by the end of the eighteenth century, early modern political theorists had produced a modern "science of politics" explaining how such a regime could be sustained in theory.

## 6. The political development of limits on authority

I now turn to the development of this "science of politics" that embodied the concept of equal human dignity in the legal order. This move from belief, or normative claims, to formal expression in legal systems was necessary for the argument of universal equality to have a substantial effect on the productive potential of West European economies (Hodgson, 2015).

Over the next 150 years, from 1650 to 1800, there was a vast outpouring of writings that analyzed political institutions. These writings developed, bit by bit, a framework for "inclusive institutions" (Acemoglu and Robinson, 2012), or what North *et al.* (2009) call an "open access order" with a robust rule of law. Again, however, an important contributor to this debate was the long development of the concept of human equality.

The first major step in political theory was a strengthening of the argument for religious toleration.<sup>13</sup> As long as religious bodies were a part of the dominant coalition, it was almost impossible for the powers of the state not to be used against what was thought to be heresy.<sup>14</sup> Voltaire, Montesquieu, Hobbes, and Locke made strong arguments for some sort of separation of church and state. Some of the arguments were decidedly anti-religious, but others were an attempt to accommodate different religions in a governance system that allowed for non-violent relations between adherents of different faith traditions.

If religious arguments for human dignity were an important part of the intellectual framework, it might seem that there was a clear conflict between those ideas and the anti-religious arguments of many Enlightenment thinkers. There are, however, two reasons the concept of human equality survived. First, even though some of the Enlightenment did embody strong arguments for replacing all religious claims with arguments based solely on reason, there were other Enlightenment authors who argued for a substantial role for religion. In the words of Gertrude Himmelfarb (2004: 19),

The driving force of the British Enlightenment was not reason but the "social virtues" or "social affections." In America, the driving force was political liberty, the motive for the Revolution and the basis for the Republic. For the British moral philosophers, and for the American founders,

<sup>13</sup>The idea of religious toleration did not originate with Enlightenment thinkers, but, after the Religious Wars of the 16th and 17th centuries, it became incumbent to provide a political philosophy that would allow different faith traditions to live together peacefully.

<sup>14</sup>The arguments of Johnson and Koyoma (2019) are discussed earlier. Their explanation of the rise of religious toleration, while useful, omits any discussion of the role of ideology. The argument presented here does not disagree with their thesis, but adds an important explanatory force.

reason was an instrument for the attainment of the larger social end, not the end it itself. And, for both, religion was an ally, not an enemy.

Second, the rights arguments based on human equality had gained enough intellectual traction for most Enlightenment thinkers, who downplayed or rejected the importance of religious sentiments, to integrate some concept of universal dignity into their thinking. There were arguments against the philosophical foundations of religious thinking, but there were no strong arguments against human dignity. Thus the Enlightenment philosophers were egalitarians in spirit, even if they didn't use religious arguments to support their egalitarianism.

Thomas Hobbes (1588–1679) was one of the first to wrestle seriously with the issue of how to order a society to maintain peace and order. He relied upon a materialistic metaphysics, but also argued for the fundamental equality of all humans (Berkowitz, 1999). Hobbes's *Leviathan*, a powerful state with few limits, was not based on the moral good of absolute power, but rather it was his answer to the problem of ongoing violence. Written in the middle of the English Civil War, Hobbes was convinced that only a state with unlimited power could maintain peace and order.

Although not an orthodox Christian, John Locke (1632–1704) used Christian anthropology as the basis for his ideal political order. Like Hobbes, his experience with the English Civil Wars was formative in his understanding of the appropriate institutional mechanisms for dealing with disorder (Forster, 2008: 142–144). England's constitutional crisis of the 1680s furthered his concept of a state based upon a rights theory, a concept fundamental to the rule of law. For Locke, the idea of religious toleration was founded on his belief that civil rules of justice and equity should apply to all people equally. His articulation of the right to hold property, to revolt, and to constitute a government based upon the consent of the people formulated a way in which Jewish and Christian ideas of universal human dignity could be represented in a political order.

Montesquieu (1689–1755) made a major contribution to limits on arbitrary power through his development of the concept of separation of powers. In Book 11, Chapter 6, he writes:

When legislative power is united with the executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically. Nor is there liberty if the power of judging is not separate from legislative power and from executive power. (1989)

Montesquieu also argued for human equality, even though he allowed it to be violated under certain conditions. He expressed his strong disagreement with Aristotle's argument for natural inequality:

Aristotle wants to prove that there are slaves by nature, and what he says scarcely proves it.

But as all men are born equal one must say that slavery is against nature, although in certain countries it may be found on a natural reason, and these countries must be distinguished from those in which even natural reasons reject it, as in the countries of Europe where it has so fortunately been abolished. (Book 15, Chapter 7)

Adam Smith was another important contributor to the "science of politics." He developed more fully the necessity of the rule of law in his understanding of the feudal economy and his explication of how justice needed general rules that applied equally to all (Weingast, 2018).

Finally, the American founding fathers articulated even more fully the idea of limited government based upon mutual consent and constrained by principles that would apply to all citizens. The Declaration of Independence made Lockean natural rights claims about human equality and also argued for the right of revolution when rights were violated. The Federalist Papers, particularly those authored by Madison, made powerful arguments for a government of law rather than one of men. The Constitution provided for a clear separation of powers and also put in place numerous constraints on the use of power (Anderson and Hill, 1980).

## 7. Conclusion

Substantive rule of law, a political order that uses coercive power to enforce human rights and applies that enforcement to all people equally, took a very long time to develop. There were numerous forces in Europe that were powerful influences on the development of the rule of law. Explanations based on these forces lack, however, a significant role for the influence of ideas. The fundamental ideology that is the foundation of the rule of law, namely universal human dignity, was formulated in Jewish and Christian thinking. Over hundreds of years human equality influenced the formation of numerous institutions and theorists presented strong arguments for the importance of the principle of universal human equality in institutional ordering.

The role of the state in preserving order and preventing violence, however, meant that religion was often a part of a dominant coalition that had a monopoly on the use of coercion. Therefore the power of the state was often used to violate the very principles of universal human dignity and human agency. Only after religious conflict reached a point where it became necessary to develop a new political order did human equality, through the writings of numerous political theorists, find expression in a workable legal order.

Political theorists formulated institutional forms of governance based upon the concept of human equality and limits on the arbitrary use of power. The rule of law became a reality in the Netherlands and England in the late 18th century. North America followed. Other countries instituted the rule of law, and, where it was put in place, it became an important way of encouraging economic growth and maintaining fundamental human rights.

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