Chapter 7

Parliament, Crown, and the rule of law in Britain

The North Atlantic rule of law tradition claims deep roots in the British common law as well as in the constraints on royal power expressed in the Magna Carta. At the same time, when we think of the concrete practices associated with rule of law in the modern world, we often think not of parliamentary supremacy and constitutional custom (indeed, as Chapter 5 showed us, the Athenian equivalents to both have been viewed as *threats* to the rule of law), but of something like American constitutional institutions: entrenched primary law, life-tenured judges with the power of judicial review, specific guarantees against bills of attainder, and the like. For that reason, a close look at the British rule of law is essential to a nonparochial understanding of the concept in general, particularly for scholarship produced in the United States. Accordingly, this chapter aims to shed light on two key questions. First, does the United Kingdom actually satisfy, to a reasonable degree, the demands of the rule of law? In the first section, I argue that the question cannot be conclusively answered absent empirical research, but offer an informal model demonstrating that – notwithstanding the doctrine of parliamentary sovereignty and the absence of binding judicial review – British officials could be sufficiently constrained to comport with the rule of law. Second, have egalitarian ideas similar to those I developed in Chapter 1 been available within the British rule of law tradition? In the second section, I argue in the affirmative.

Both sections are motivated by promissory notes issued in previous chapters. In Chapter 1, I argued that the concept of the rule of law should be treated separately from the practices of particular rule of law states. The institutional principles of the rule of law are functional generalizations from those observed practices, but they can be instantiated in different ways in different states.

In support of that *institutional independence claim*, I pointed out that we usually see Britain as a rule of law state, despite its absence of judicial review and its adherence to the doctrine of parliamentary supremacy, because constitutional customs, rather than the formal written constitutional constraints of the United States, sufficiently constrain British officials. Similarly, in Chapter 5, I argued that the supposedly absolute power of the Athenian assembly was not inconsistent with

the rule of law in part by pointing to our standard evaluation of the United Kingdom as a rule of law state and its similarly de jure absolute legislative body.

But both of those arguments presuppose that the United Kingdom actually satisfies at least the weak rule of law – that is, that its officials are reliably constrained to comport with regularity and publicity. And it's not obvious that this is the case. Certainly, in the past, Parliament has itself acted like an unconstrained executive official, inter alia, by enacting acts of attainder and ordering people executed without trial. Perhaps written constitutions and judicial review and the like *are* necessary to reliably constrain officials to comport with the rule of law.

In the first section of this chapter, I will assuage these worries by developing an account of how Britain could have the rule of law despite its institutional structure. I will argue that we can evaluate the extent to which a state comports with the rule of law only through the empirical tools of positive political science, but I will offer an informal model of how the United Kingdom, even without formal legal restrictions on Parliament's behavior, might be so constrained.

The second section responds to the methodological criterion of normative robustness, showing that the legal material with which the early-seventeenth-century parliamentarians struggling for the rule of law worked (particularly the Magna Carta) carried latent egalitarian meaning for the parliamentarians to discover, and that they in fact discovered such meaning in their legal traditions and developed it into an argument with egalitarian overtones resembling the ideas presented in Chapter 1.

I THE BRITISH RULE OF LAW: ILLUSORY?

Many scholars have identified a tension between the rule of law and an absolutely sovereign British Parliament.[1] In the absence of binding judicial review or a written and entrenched constitution, Parliament arguably could retroactively abolish settled legal rights, order citizens imprisoned without trial, expropriate property, and so forth.[2]

Parliamentary supremacy has given way, moreover, to de facto supremacy of one house within Parliament. The House of Commons is effectively the unitary supreme legislative body: the House of Lords has very little formal power to constrain Commons; the judiciary, while independent (an independence that Parliament could revoke at will), has no power of judicial review; and the royal veto is de facto dead. Exacerbating these worries, in ordinary practice the cabinet controls the day-to-day legislative agenda; "backbenchers" have very little power in Commons; in practice, then, not only the legislature but also the executive might have unconstrained power.

It gets worse. The lack of anything like an entrenched codification of individual rights is (on some accounts) essential to the democratic self-conception of both the left and the right in Britain. As Prosser (1996, 481) puts it: "any entrenched system of

rights has been seen in sharp opposition to democracy as limiting the sovereign power of the democratic will." Recall that we have already seen this problem in Athens, in the form of the question of whether radical popular sovereignty can be compatible with the rule of law. Prosser's summary of the ideology of British parliamentary supremacy sounds alarmingly like "It was a terrible thing if someone prevented the people from doing whatever they wished."

Nor can we simply say that the electorate constrains Parliament and the cabinet government, since Parliament controls the procedures of its own election and its term of office.[3] A truly runaway Parliament could, at least arguably, go so far as to abolish its susceptibility to election. Nor is this just an imaginary nightmare: in its history, Parliament has repeatedly changed the composition of the electorate, it has refused to dissolve (the Long Parliament), and it has executed people by attainder.

More recently, too, Parliament may have sent Britain beyond the bounds of the rule of law. Under current British law, the secretary of state is authorized to subject individuals to "terrorism prevention and investigation measures" for up to two years if the Secretary merely "reasonably believes" that the individual is "involved in terrorism-related activity," which can include as little as giving support to someone else who merely encourages terrorism.[4] These measures may include, inter alia, overnight curfews, travel restrictions, quarantines from specific places, restrictions on bank accounts, communications restrictions, employment restrictions, and electronic monitoring – all merely on "reasonable belief" of even indirectly facilitating terrorism-related offenses. This confers a quite extraordinary amount of discretion on executive officials to use the state's power of coercion based on only the thinnest of reasons.[5]

Such suspicion-based coercion violates the principle of publicity even when reviewed by an independent judiciary, since, at a minimum, a citizen about to be subjected to serious and long-term legal disabilities should have an opportunity to show that the conditions given by the law don't apply to her, rather than the much more difficult demonstration that executive officials didn't even have reason to suspect that those conditions applied. From the standpoint of regularity, this law also may confer open-ended threats on officials by virtue of the wide powers it grants and the broad set of citizens and circumstances subject to those powers.

One standard response to this cluster of worries is to claim that acts of attainder, statutes authorizing suspicion-based coercion, and so forth are aberrant measures imposed in times of political crisis, and it would be hasty to conclude from them that Parliament routinely exercises or authorizes executive officials to exercise unconstrained authority.[6] However, even if it's true (as it intuitively is) that British officials do not, in fact, make a habit of doing things like imprisoning people without trial, expropriating property, creating subordinate legal classes, or otherwise offending the rule of law in the sorts of egregious ways that would permit us to easily deny that Britain in fact comports with the three principles, a state does not count as having the rule of law if its officials merely comport with its principles out of the goodness of

their hearts. As I argued in Chapter 1, officials must be reliably constrained, and to the extent we observe even episodic violations, we have reason to worry that no such constraints exist, or those that exist are unreliable.

A *Hobbesian sovereignty and the absolute-power coalition*

There is a formal sense in which we can say that all governments are unitary and absolute in the same way that Parliament is. Hobbes argued that sovereignty is ultimately indivisible and absolute. In chapter 19 of *Leviathan*, he explained that even in societies with ostensibly limited rulers, the actual absolute sovereign is the person or group who controls the terms of the nominal sovereign's limitation. And, in the abstract, Hobbes was, I submit, correct: in all states (assuming they are not dominated by foreign hegemons), there is always some possible coalition of citizens and officials that could exercise absolute power if all members had identical goals and were able to coordinate. In an extreme case, in any plausible state a coalition of all citizens but one could exercise absolute power over the outlier.

I will call this hypothetical group the "absolute-power coalition." Thus, in the United States, despite its formal separation of powers, any coalition of legislators amounting to two-thirds of both houses of Congress plus legislative majorities of three-fourths of the states could, in principle, exercise absolute power in virtue of its ability to amend the US Constitution; many other such coalitions are possible. If we assume that ordinary citizens in the United States are sufficiently attentive to their constitutional protections and able to coordinate, then the size of the de facto absolute-power coalition would increase to require the cooperation of a sufficiently large number of citizens to ensure ultimate (electoral, in extremis military) victory over the resistance of their recalcitrant fellows, but the absolute-power coalition still exists, at least in principle.

It just so happens that in the United Kingdom a majority of Commons is a de jure absolute-power coalition. For practical purposes, no de jure absolute-power coalition in the United States is likely to come together for any sustained length of time or large scope of issues, because the US institutional structure fills the offices that make up such coalitions with a large number of individuals with incentives that diverge from one another. The same cannot be said of the United Kingdom.

Those "practical purposes" are just the stuff out of which the rule of law is made. The extent to which official coercion is constrained by law, in any state, no matter its formal legal structure, depends on officials' ability and incentive to coordinate into a coalition sufficiently powerful to unshackle themselves from those constraints – that is, by retroactively revising or ignoring the legal prohibitions on whatever use they wish to make of the state's monopoly of violence. It also depends on the ability of those who would resist such official misbehavior to coordinate to put a stop to it.

This is not an original insight. Ignacio Sanchez-Cuenca has aptly argued that the rule of law does not require that no one have "the power to subvert the law," for such a situation would be impossible: someone, even if only "society as a whole," always has the power to subvert the law.[7] Rather, the relevant question is whether "given the laws and the incentives they create, men have no interest in subverting the institutional order." Admittedly, Sanchez-Cuenca took the claim rather too far: he concluded from it that the rule of law was "precarious" rather than dead altogether in Chile when Pinochet made it clear that he could and would discard legal constraints at whim. This is clearly wrong, and the reason it is wrong is that there is no "institutional order" at all when one person may wield the force of the state at whim without fear of sanction from others.

It follows that our evaluation of the extent to which a state comports with the rule of law is not going to depend, in the first instance, on the details of its formal legal structure, so long as that formal structure does not itself incorporate impermissible features (such as legal castes, rules providing for the retroactive effect of criminal statutes or requiring the law be secret, etc.). Instead, it's going to depend on the underlying distribution of power in that state, which is influenced by the state's formal legal structure, but also by many other properties of the sort that positive political scientists study. Among those properties are, intuitively, the following: (a) the diversity of interests among officials, (b) the size and coordination potential of any possible absolute-power coalitions under existing institutional structures, (c) the extent to which mass and elite actors have the institutional tools to facilitate coordinating to resist illegal official activity, (d) the extent to which subjects and competing officials have internalized the rule of law and are motivated to defend it against violation, and (e) the extent to which the legal rules then in existence are consistent with the interests of those citizens and officials whose cooperation is needed to sanction officials who violate the law.

I cannot consider all of these properties here; several would require extensive quantitative and/or ethnographic empirical research. However, in the British context, one is particularly interesting. It is not obvious to what extent the British people have the institutional tools to coordinate on a common-knowledge set of restrictions on their government, in light of the fact that the British have no written constitution.

B Constraint, coordination, custom, and the constitution

Traditionally, British legal theorists claim that the British government is constrained by constitutional conventions, or constitutional customs. According to Dicey, the ministers who run the day-to-day executive business of British government are constrained by constitutional conventions because violating them will inevitably lead to punishable violations of written law.[8] He gives a example: ministers are obliged to follow the custom by which they step down or dissolve Parliament if they lose a no-confidence vote in Commons, even though no actual law requires it,[9]

because if they fail to do so, sooner or later laws such as appropriations for the army will expire, and they'll be forced into crimes punishable by the judiciary (i.e., misappropriation of public funds) in order to run the government. But Dicey's argument only explains what might constrain a runaway cabinet; it cannot explain what constrains Parliament itself. Chrimes hazarded an attempt, suggesting that, in extremis, the royal prerogative could be revived to exercise the veto and then dissolve a runaway Parliament – but, in a vivid example of the absoluteness of parliamentary sovereignty, Parliament recently abolished the prerogative right to dissolve parliament, and could similarly eliminate the veto.[10]

Yet people still argue about whether an act passed by Parliament is "constitutional."[11] If such arguments are coherent, there must be some body of non-formally binding constitutional custom that nonetheless carries at least normative force in constraining Parliament's actions.

With that, we reach the crux of the matter. There need be no difference, in practical terms, between the constraint generated by written law and that generated by unwritten custom. If a sufficiently powerful group of citizens can credibly commit to sanctioning officials who violate a constitutional custom, the custom will be obeyed just as if it had been written into law, and regardless of whether the officials in question have the nominal power to legislate that custom away.

The chief difference between written and unwritten law for these strategic purposes then becomes that it's reasonably safe to assume reasonably widespread knowledge of the relevant written laws among those citizens potentially making up a coalition to sanction officials (or at least among the elites who coordinate citizen resistance) – an assumption of the Chapter 6 model. It's much less clear what sort of knowledge we can expect citizens to have of unwritten constitutional customs.[12] Something like this seems to have partly been behind the turmoil of the seventeenth century (about which much more later), which began with repeated and fundamental disagreements between Parliament and the Stuarts about the content of the customary constitution with respect to the legislative power of the church, ship money, the authority of the prerogative courts, and so on.[13]

I cannot make any conclusive claims about the effectiveness of unwritten constitutional constraint here. Instead, I suggest some intuitively plausible hypotheses to guide future research into the question of constitutional customs.

First, those customs that have been in continuous use for a longer period should, ceteris paribus, be more widely known among the population than more recent customs. Long-standing customs are more likely to have been published and taught to younger generations. Also, the longer a custom has been in operation without objection or alteration, the more reasonable it becomes for any given citizen to believe that fellow citizens endorse it.[14]

Second, the greater the extent of direct popular participation in a custom, the more likely, ceteris paribus, it should be known. Participation also gives citizens an opportunity to signal their acceptance or rejection of it.

Third, citizens might rely on authoritative third parties, such as de facto (if not firmly de jure) independent judges, to define the content of constitutional customs on an ongoing basis. Even if those judges lack the formal power of judicial review, as in the United Kingdom, citizens could coordinate on their signals. If a sufficiently influential group of citizens can credibly commit to resisting laws and executive actions that have been declared unconstitutional by the highest court, they should be able to coordinate to prevent such actions even in the absence of a common-knowledge body of constitutional law.

In the seventeenth century, the Stuarts tried to use judges to serve the inverse function: both James and Charles repeatedly sought, and obtained, rulings from the common-law and prerogative courts that their unusual revenue measures were legal, even while maintaining that their wills were superior to judicial rulings. We can interpret this as an attempt to convince the public that their acts were consistent with constitutional custom, and thus undercut any attempt by their opponents in Parliament to coordinate opposition. Unfortunately for the Stuarts, the credibility of the judges as consensus interpreters of the constitutional constraints on the Crown was impaired by their lack of independence, as both James and Charles had notoriously punished judges for disagreement. Instead, citizens seem to have coordinated on a signal from Parliament that the kings' actions were illegal; thus, parliamentary resistance to royal impositions led to public resistance.[15]

In the contemporary context, the House of Lords can also serve this third-party function in its legislative role. Formerly, the assent of Lords was necessary to enact a law. Now, its refusal to assent merely imposes a one-year delay on enactment.[16] In principle, however, such a refusal could signal to citizens that an act is unconstitutional, such that they could coordinate resistance.[17]

As noted, it is impossible to come to a reliable judgment about whether Britain comports to the rule of law without empirical work. For the purposes of hypothesis generation, however, the discussion thus far suggests an informal model of how its institutional structure plausibly could work to constrain Parliament, despite the doctrine of parliamentary supremacy and the absence of a written constitution.

Should Britain's constitutional traditions, and the rule of law, have sufficient support from the public, the institutional mechanisms discussed thus far have the potential to support coordination. The House of Lords and the judiciary are both insulated from direct electoral control and thus likely to have different interests from the elected officials that make up Commons, and both are deliberative, elite bodies in a good epistemic position to come to an independent judgment on the constitutionality of acts of Commons and the cabinet.[18]

Thus, in the event of unconstitutional action by Commons, the Lords may send a signal to the public at large by delaying the enactment of legislation,[19] and the judiciary may send a similar signal, not by overturning the legislation, but by very openly and clearly narrowly construing it to make it as consistent as possible with preexisting constitutional norms, or by openly criticizing it even while reluctantly

applying it.[20] This hypothesis has observable implications: if these powers of Lords and the judiciary do constrain Commons, we ought to observe Lords refusing to assent to bills that authorize violations of the rule of law (e.g., imprisonment without trial, retroactive criminal punishment, etc.), and we ought to observe the judiciary stating objections to them if enacted over the objections of Lords. Moreover, we ought to observe a growth in public opposition to such enactments after Lords and/or the judiciary act. Ultimately, we ought to observe these laws failing in Commons after the Lords register their objections, or their repeal after the judiciary registers its objections.[21]

This model reflects the self-understanding of participants in the British legal system to some extent. At least one British jurist has suggested that the rule of law relies on political institutions getting information to the public to coordinate opposition:

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.[22]

Moreover, the Human Rights Act, 1998 c. 42, permits judges to issue a "declaration of incompatibility" between Acts of Parliament and the European Convention on Human Rights, which includes numerous rule of law provisions that roughly approximate the principles of regularity and publicity.[23] While such a declaration is formally toothless, it may have some political impact.[24]

There is reason for concern about the extent to which these signals actually coordinate public opposition, and thus lead to an effective constraint on officials: even though the Lords attempted to put a stop to it, the retroactive War Crimes Act 1991 was enacted (McMurtrie 1992), and while the judiciary managed to provoke the repeal of several troubling antiterrorist statutes providing for various sorts of executive coercion of suspected terrorists without an adequate opportunity to defend themselves (about which more in a moment), they were just replaced by almost equally troubling statutes. The most obvious explanation for this is that both were targeted against extremely unpopular groups – terrorists and war criminals. Still, each suggests that even if the British public take the rule of law as generating reasons

for its support, those reasons may not be very strong – at least not strong enough to override considerations such as the fear of terrorists.

However, there is some evidence that Parliament is at least somewhat constrained by these mechanisms. The Anti-Terrorism, Crime and Security Act 2001 provided for indefinite detention for those whom the executive saw as a threat to national security. In 2004, the Law Lords ruled that the act was incompatible with the European Convention on Human Rights.[25] In response, Parliament replaced the ATCSA with the Prevention of Terrorism Act 2005, which replaced indefinite detention with control orders.[26] The courts declared this one incompatible with the European Convention on Human Rights, too.[27]

In response, Parliament again gave way, and enacted the Terrorism Prevention and Investigation Measures Act 2011, which I've already discussed. True, the TPIM Act is still objectionable from the perspective of the rule of law, but it's at least arguably better than the system of control orders it replaced, which was in turn arguably better than the detention rules that gave way to the control orders.

The foregoing example suggests that the British governmental structure can be consistent with the rule of law, just as long as the public in general remains willing to hold its representatives to it, with the help of such institutional signals as are available. It may fall far short of the rule of law in many cases, particularly relating to terrorism, but this is not a product of its unitary governmental structure or unwritten constitution. The United States, despite its extensive formal separation of powers and written constitution, has nonetheless recently claimed the right to hold alleged terrorists without charging them on a naval base in Cuba and assassinate US citizens with flying drones on the decision of the President alone. Ultimately, a state will have the rule of law only if its officials and citizens are willing to defend it, and recent history has shown us that this willingness may be difficult to find in the face of the fear of perceived existential threats, particularly when foreigners, racial and religious minorities, and the like are seen as the source of those threats.[28]

The parallel to Athens is striking. Athens, too, had institutions sufficient to maintain the rule of law under ordinary circumstances, yet succumbed to mass hysteria in wartime, both in the trial of the generals and in the affair of the Herms/Mysteries. In Athens, the United Kingdom, and the United States, we should draw a distinction between ordinary legal and political practice, which generally comports fairly well, more or less, with the rule of law, and moments of extraordinary political crisis, in which public support for the rule of law gives way to perceived exigency. This may be the best we can hope for from our political communities.

C A historical precedent: customary manorial courts

Parliament's absolute power, constrained only by constitutional custom today, bears an intriguing resemblance to the power of lords over their villeins in the thirteenth and

fourteenth centuries. Before the Black Death of 1348–1350, legal protections for villeins steadily eroded.[29] However, the formal legal status of the lowest classes was significantly worse than the rules that were applied to them in practice. For example, if the treatise known as Bracton is to be believed, a lord had an absolute right to seize all property acquired by his villeins.[30] However, in practice, around the time of Bracton, lords respected villeins' customary property rights.[31] Perhaps more puzzlingly, lords appeared to respond inconsistently to economic incentives in managing their lands: before the time of the Black Death, faced with a labor surplus and a land shortage, they preferred to lease land to free tenants at the market rent rather than have the land worked by villeins at a submarket payment.[32] Nonetheless, they ordinarily did not simply expropriate land in the possession of villeins to convert it to more profitable leasehold land – an act within their legal rights as given by Bracton, yet contrary to custom – even though that would have been economically advantageous.[33]

Why did the lords, and their manorial courts, respect villeins' customary property rights, despite theoretically having absolute power over villeins' property and a financial incentive to exercise it? Local customs (which may have varied by region or by lord) would have been widely known, as they concerned the most fundamental aspects of peasants' lives – control over land, inheritance, the labor owed to the lord, and so forth. This licenses the assumption that villeins had common knowledge of the local informal legal rules, and suggests that they may have been able to coordinate to enforce them. Evidence that such coordination was possible on the local level is given by manorial court records showing a number of cases in which villeins stopped work en masse, and occasionally resorted to violence.[34] We can take this case as an application of the analytical framework of the previous chapter and this one. Once customary constraints on official power arise – due to either changing strategic circumstances or moral beliefs – those constraints can be enforced by their beneficiaries, even overriding formal rules to the contrary, if there is institutional support for common knowledge of those constraints and adequate incentives to enforce them. This is true whether the power at issue is baronial power over villeins in thirteenth-century manorial courts or parliamentary power today.

I now turn to the origins of the contemporary constraints on official power.

II THE RULE OF LAW AND EQUAL STATUS IN SEVENTEENTH-CENTURY ENGLAND

There is a strong English tradition of the rule of law, but that tradition seems to be inextricably associated with a conception of liberty. This association begins with the Magna Carta, which speaks of liberties and attaches its most important provisions to the "freeman," the *liber homo*. It continues into the conflict in the seventeenth century between Parliament and the Crown that led to the Petition of Right, the Long Parliament, the civil war, and, ultimately, the Glorious Revolution – a conflict that was influenced by religious division, to be sure, but which featured

near-constant parliamentary appeals to the "liberty of the subject" against royal taxation and imprisonment unauthorized by law. This ideological heritage continued, of course, into the American Revolution.

Recently, Skinner has added some flesh to the seventeenth-century ideology of liberty.[35] On his account, the parliamentary party subscribed to a "neo-Roman" theory of liberty similar to that propounded, in the contemporary literature, by neorepublicans such as Philip Pettit. Skinner's analysis focuses on the political philosophers and parliamentarians writing after the execution of Charles I, and the influence they took from Roman ideas of freedom. But there was another intellectual stream within the parliamentary party, most prominent 20 years earlier in the debates leading up to the Petition of Right.[36] This stream comprised the common lawyers. Those in this line of thought, led by Coke and Selden, drew their inspiration from the legal traditions of England, particularly the Magna Carta, and were at best ambivalent to Roman civil law ideas – ideas from which the royalist party drew in support of absolutism.[37]

The content of and circumstances surrounding the Magna Carta and the parliamentary debates surrounding the Five Knights Case and the Petition of Right suggest that even if the common lawyers, too, may have accepted, or come to accept, something like Skinner's neo-Roman conception of liberty, that conception was closely associated with the equal status of the "freeman," that class of citizens, both commoners and nobility, who were hierarchically above serfdom. Rights to due process were the heritage of the *liber homo*, and in the king's attempt to undermine them the common lawyers saw the threat of a reduction of the ordinary Englishman's status to that of a villein – a drastic loss of political and social position.

The "free" of the *liber homo* and of Coke and his parliamentary confederates was a status term. "Free" status was the status of citizenship, of equal participation in political and economic institutions, and was contrasted with the status of villeinage or serfdom, a subcitizen status associated with a lesser entitlement to respect. Moreover, the parliamentarians held a relative of the hubris idea of Chapter 1: the threat was not that the king would hubristically raise his own status (he was, after all, *the king*: he already held higher status), but that he would lower that of the citizen body and render them subject to contempt. This was interwoven with a relative of the terror idea from Chapter 1: being subject to unconstrained royal power would render ordinary citizens fearful, and it was by virtue of that fear, and the cowardly behavior to which their fear would lead them, that they were subject to contempt.

I begin by offering an egalitarian interpretation of the Magna Carta. I then turn to the words of the seventeenth-century parliamentarians themselves.

A Magna Carta as egalitarian text

The Magna Carta, in the various versions in which it was issued and reissued, consistently refers to the "freeman" (*liber homo*) and his liberties.[38] From chapter 29:

> NO Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.

It's tempting to misunderstand this text as simply affirming something like the liberty thesis – that the protection against punishment or dispossession was intended to protect freedom or liberty. In fact, it also reflects an awareness that legal rights were attached to social and political status.

In order to make this argument clear, first, we should clarify some concepts. In modern speech, we refer to "liberty" as a unitary sort of thing with some presumptive normative value: liberty is, for example, the state of not being subject to interference with one's choices, or the state of being in control of one's own life. By contrast, there's another, older, use of the word in a plural sense, as "liberties." In that context, it refers to discrete property-like legal rights, which could also be called franchises or (if granted only to a particular class) privileges. "Liberties" in the second sense need not be contributions to "liberty" in the first sense, and need not have any particular normative value.[39] At the time the Magna Carta was granted, it was fairly routine to grant these liberties/franchises/privileges by royal charter, and, I shall argue, the Magna Carta did just that. Moreover, the most unusual fact about the Magna Carta, from the standpoint of its time, was that it granted these liberties on a relatively universal basis (to all those with the status of *liber homo*, about which more in a moment). The point is that while the Magna Carta greatly influenced the seventeenth-century parliamentarians, particularly Coke, we cannot take that fact as an indication that they were solely concerned with liberty in its indivisible, normative sense. The appeal to the Magna Carta must also be understood as an appeal to that document that established the nature of citizenship in the realm, and the "liberties" were what each citizen was entitled to just by virtue of his being a citizen.

"Free" itself referred to a social and economic status. Land could be held in freehold or in villeinage; the latter was both a social status and a tenancy in land.[40] The two could come apart: it was possible for a freeman to hold land under a villein tenancy.[41] Villeins were unfree in the unitary, normative sense in one important way – they did not have the choice to leave the employment of their lord – but the term "free" did not only, or primarily, refer to that lack of individual liberty, but to their status in the manorial system.[42]

Thus, in 1354, a statute of Edward III clarified the scope of chapter 29 of the Magna Carta:

> That no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law.[43]

To be noted here is that this text refers specifically to land tenure and social status. The passage (which followed an explicit confirmation of the Magna Carta) suggests that the live issue as to who would receive the protections of law was the social status of the citizen, and that the limitation to "freemen" in the Magna Carta was directed at specifying the social classes to which legal protection would apply.

Now, consider the term "liberties." Compare the text in chapter 29 to the text in one of the other chapters that is still law today, chapter 9:

> THE City of London shall have all the old Liberties and Customs [which it hath been used to have]. Moreover We will and grant, that all other Cities, Boroughs, Towns, and the Barons of the Five Ports, and all other Ports, shall have all their Liberties and free Customs.

The use of the word "liberties" here clearly refers to the political privileges of the various corporate entities, chief of which was London: at the time, purchasing such privileges, such as the right to hold courts or to appoint local sheriffs, was a common practice for boroughs.[44] Chapter 29 refers to the same sort of liberties: individuals, particularly in the nobility, also routinely purchased privileges from the Crown.[45]

As Holt has pointed out, there was nothing unusual about the specific "liberties" granted in the Magna Carta: they were of a type that had ordinarily been bought and sold and granted by earlier charters.[46] What was unusual was the Magna Carta's "universality, as a grant to all in the land." This is the innovation of the Magna Carta: to convert individual privilege, purchased or granted at the whim of those in power, to an equal right for all – or, at least, all of free status. In this respect, the Magna Carta is fundamentally an egalitarian document, concerned not only with the content of citizens' rights but with their distribution.

The Magna Carta is fundamentally egalitarian in another respect. Milsom has argued that the assize of novel disseisin was instituted as a mechanism to control lords' treatment of freehold tenants, to prevent lords from illegally dispossessing their tenants in the manorial courts by giving tenants a remedy in the royal courts.[47] This leads to another of Milsom's insights: that "when the Charter requires that the king should disseise only by judgment, it seeks to make him treat his own men as the law already makes them treat theirs."[48] In this way, the Magna Carta establishes the king and the barons on a footing of generality: it suggests that if a restriction is appropriate for the operation of manorial overlordship, it's appropriate for the royal overlordship; the difference in identity between king and baron is not a relevant distinction on which differential legal treatment ought to be based, at least when it comes to the legal power to take the property of one's feudal tenants.

Partial equality between the king and barons is similarly suggested by the provision requiring judgment by peers. It is not, as some modern readers have erroneously suggested, an enactment of anything like trial by jury.[49] In fact, however, the meaning of trial by peers is trial by one's social equals[50] – that is, for barons, by the standard royal court composed of the king's tenants in chief, rather than simply

by the king himself; for lower classes of freemen, by the standard manorial courts, also composed of the local lord's free tenants. The best interpretation of this passage, then, represents a concern that justice not be given hierarchically – that the king not rule alone on the cases of his social inferiors, and likewise that lords not rule alone on the cases of their social inferiors.[51] This, in turn, contributes to the coordinated enforcement aspect of publicity: the class that benefited from the new legal rights was given a right to participate in their enforcement, and, consequently, access to information about the extent to which they were being obeyed.

Milsom's insight applies here as well: freemen, when they were being judged in the manorial courts of the barons, were entitled to be tried by their peers; the Magna Carta replicated that structure at the level of the royal courts with respect to the king's treatment of barons: again, the Magna Carta simply demanded that the king treat his vassals as other lords were required to treat theirs. Strikingly, this equality seems to go the other way as well: Henry III actively enforced the Magna Carta by requiring the barons to apply the rights granted therein to their free tenants, a policy that Maddicott interprets as evidence that "the higher nobility were not set apart by the legal privileges of a caste."[52]

Of course, I do not claim that the barons and other freemen (including both lower-level free tenants and churchmen) who imposed the Magna Carta on John did so out of egalitarian motives; the requirement of trial by peers, for example, was most plausibly motivated by strategic considerations, as an attempt to entrench the power of the baronial party against future royal expropriations.[53] But the motivation is not relevant here. What is relevant is the meaning that the Magna Carta could have had for later activists, particularly for Coke and the seventeenth-century parliamentarians. Similarly, I do not mean to claim that the rights granted by the Magna Carta can only be interpreted through an egalitarian lens. They may also be interpreted as grants of liberty in the unitary, normative sense – and such an interpretation does not hinge on whether it was so understood in the thirteenth century, but on the fact that a modern interpreter could easily argue that, for example, the right to not be imprisoned without trial protects one's liberty. I do not mean to exclude liberty-based interpretations of the Magna Carta, but simply to argue that it takes an equality-based interpretation just as well.

In this vein, Holt argues that the universal liberties granted by the Magna Carta "contributed to the emergence of the *communitas regni* both as a concept and [as] a political phenomenon."[54] This makes sense in the context of the egalitarian interpretation of the Magna Carta that I'm offering. If what matters about the Magna Carta is that it defined the entitlements of *all Englishmen*, or, at least, all Englishmen with the status of *liber homo* that was to develop into citizenship, as opposed to previous charters that had merely defined the entitlements of some Englishmen, then we can understand that the Magna Carta was defining just what it meant to *be* an Englishman. On this interpretation, the Magna Carta served the function that Waldron attributes to law in general: by converting privileges into

rights, it makes universal the high status previously enjoyed only by the nobility, and, we can add to Waldron, defines membership in the political community (status as *liber homo*) as possession of those rights.[55]

Having offered an egalitarian interpretation of the Magna Carta, I now turn to the seventeenth century and its high point in British legal culture, to suggest that Coke and the parliamentarians could also have seen that what was special about the Magna Carta was that it gave rights to *all*[56] that had previously only been granted to *some*, and could have been influenced by the idea of equal citizenship as expressed in the Magna Carta. Their appeals to the "liberty of the subject" were appeals to the rights constituting the status of citizen, equal with all other citizens and a full member of the political community. Just as in Athens, the evidence is consistent with Coke and the parliamentarians seeing the royal threat to undermine the liberties of the Magna Carta as an attempt to undermine the political community itself, and its members' collective status as English citizens.

B *The parliamentary debates of* 1628

Starting in 1626, under increasing financial pressure from military needs, Charles I extracted forced loans from a variety of citizens.[57] In 1627, a number of citizens were committed to prison on royal orders for not giving the forced loans, and in the Five Knights Case, Lord Chief Justice Hyde refused the writ of habeas corpus. In response, Parliament, led by Coke, Selden, and others, began debating the alleged royal power to imprison citizens without trial, debates that ultimately led to the Petition of Right.[58] Often these debates appealed to the Magna Carta.[59] In this section, I review those debates to show how the parliamentary party appealed to egalitarian ideals underlying the rule of law to explain their resistance to the Crown's abuses.

In the debates following the Five Knights Case, I find three major themes that are relevant to the equality thesis.

The first is the claim that by imprisoning citizens and refusing to give the reasons or subject his actions to judicial control, the king reduces ordinary Englishmen to the status of villeins.

Second, and closely related, is an appeal to honor and dignity, both of the king and of ordinary citizens. Various parliamentarians suggest that to be subjected to imprisonment for no greater reason than the will of the king is a dishonor or indignity, and to actually bow to the royal demand for money under such threat is a worse dishonor still, and contemptible. This second claim appears with the claim that the king's unconstrained power reduces citizens to fearful, and hence dishonorable, behavior – a notion that tracks the idea of terror in Chapter 1, in which I argued that unconstrained officials force citizens to behave subserviently out of fear, and thereby lower their own status. Moreover, the parliamentarians suggest that the

king's own dignity and honor are reduced along with the dignity and honor of his citizens, that it's a demotion for a king to rule over a nation of less than Englishmen.

These first two categories of claims add up to a variation on the hubris idea. By imprisoning citizens for no reason other than his own unconstrained will, the king did not quite express his own superiority (which was a given), but rather expressed the inferiority of ordinary citizens. Imprisonment at will deprives those subject to it of membership in the political community, membership in which entitles one to status and respect as an equal citizen.

Third, the parliamentarians often raise considerations of political liberty, rather than individual liberty in the contemporary liberal sense. This is consistent with Skinner's neo-Roman interpretation of the content of the parliamentary party's liberty motivation. Two things are important here for my purposes. First is the connection to *membership*: just as the legal entitlements granted by the Magna Carta were constitutive of the status of equal citizenship, so was parliamentary representation. To say that the king's abuse of power was a threat to Parliament itself was just to say that it was a threat to the status of those who could vote for Parliament and be elected to Parliament as full-fledged members of the political community. Second is the connection to *coordinated enforcement*: a threat to parliamentary representation and power, or the intimidation of Parliament by an unconstrained royal power to imprison, would also undermine the ability of the people to hold the Crown to the law in the future, just as, according to Andocides, Alcibiades' impunity undermined the power of the demos to use the jury to resist oligarchy.

Before moving into the details of the debates, note that all of this was transpiring during a period in which the common lawyers in general were beginning to follow Cicero in seeing the law as a countervailing force to traditional class distinctions. Brooks finds this trend in several legal treatises, and attributes it to the idea that "political society was founded to protect the weak from the strong."[60] Judson similarly suggests that the English of the period in general saw the law as "a binding, cohesive force in their polity" and "impartial – serving well both the king and the subject."[61] Even Bacon, royalist though he was, attested that the laws are "the equallest in the world between the Prince and People."[62] The debates in Parliament amply reflected this.

It is also important to note that the most salient event that provoked this controversy was, as the name suggests, a case about knights. A knight was within the top 5 or 10 percent of the population, in terms of social status, in the sixteenth century, although this number seems to have increased at some point in the seventeenth.[63] As the attack was against members of the gentry, the issue of the status consequences of arbitrary royal power over those attacked would have been particularly salient (recall that Coke himself was a knight). Moreover, as England at the time appears to have been experiencing what in modern times we would call "the disappearance of the middle class" (relative increase in the numbers of both the rich and high status and

the poor and low status), we can expect status anxiety to have been high among the lower ranks of the elite, such as those who would hold seats in the House of Commons.[64] Furthermore, as wealth was required to maintain status, financial exactions could have been seen as a direct threat to status.[65]

1 Villeins and status

On April 3, 1628, Coke appealed directly to the hierarchical status relationship that the unconstrained royal power to imprison implies:

> [A]n imprisoned man upon will and pleasure, is 1. A bond-man. 2. Worse than bond-man. 3. Not so much as a man; for *mortuus homo non est homo*; a prisoner is a dead man. 1. No man can be imprisoned upon the will and pleasure of any, but he that is a bond-man and villain; for that imprisonment and bondage are *propria quarto modo* to villains: now *propria quarto modo*, and the Species, are convertible; whosoever is a bond-man may be imprisoned, upon will and pleasure; and whosoever may be imprisoned, upon will and pleasure, is a bond-man. 2. If Freemen of England might be imprisoned at the will and pleasure of the king, or his commandment, then were they in worse case than bond-men or villains; for the lord of a villain cannot command another to imprison his villain without cause, as of disobedience, or refusing, to serve, as it is agreed in the Year-Books.[66]

In that passage we see the direct relationship between at-will imprisonment and status: to allow a freeman to be imprisoned without cause is to render him even lower in status than a serf. In fact, Coke had made the comparison to villeinage even earlier, in discussing not the imprisonments, but the forced loans that led to them:

> Loans against the will of the subject are against reason and the franchises of the land, and they desire restitution. What a word is that "franchise." Villeins *in native habendo*, their lord may tax them high or low, but this is against the franchise of the land for freemen. "Franchise" is a French word, and in Latin it is liberty. In Magna Carta, *nullus imprisonetur* nor put out of his liberty or franchise … The Magna Carta is called *carta libertates et franchisae* and to overthrow it makes slaves.[67]

Here we see a blending of liberty-talk and status-talk, according to which the right to be free from unauthorized taxes is a "franchise" attached to free status – a property right (one of the liberties in the plural sense) that Coke seems here to want to interpret as constitutive of liberty in the unitary sense.[68]

On March 27, Cresheld argued that even villeins were free from imprisonment at will, though not from expropriation of property, in the following terms: "the common law did favor the liberties not only of freemen but even of the persons of bondmen and villeins."[69] Here again, we see "liberties" in the plural sense – a bondman had the liberty of safety from physical imprisonment, but not the liberty of private property rights. Selden, by contrast, actually excluded villeins even from the protection against imprisonment at will:[70]

> The question is whether any subject and freeman that is committed to prison, and the cause not shown in the warrant, he ought not to be bailed and delivered. I think confidently it belongs to every subject that is not a villein, that he ought to be bailed or delivered.
>
> * * *
>
> All admit we are *liberi homines*, but do not consider the difference of villeins and freemen, and I know no difference in their persons, but only the one cannot be imprisoned as the other may: whosoever can say I can imprison him, I will say he is my villein. It is the body and sole distinction of freemen that they cannot be imprisoned at pleasure. In old time none but Jews and villeins could be imprisoned and confined. The Jews were as the demesne villeins of the King.[71]

Immunity from imprisonment appears here as a pure mark of status, the "sole distinction" of the *liber homo*. Here, the remark about the Jews is particularly telling, since there's no reason to believe that Jews were seen as unfree in the sense of not possessing or being entitled to liberty in the unitary normative sense, and not necessarily even in the sense of being unentitled to hold land in freehold tenancy, but they were certainly seen as of lower status, and were counted as nonmembers of the political community.[72]

Finally, the shortest but perhaps the most telling reference comes on March 22, when Wentworth described the king's actions as follows: "these illegal ways are punishments and marks of indignation." I take it that the claim here isn't that the king is indignant (why would he be?), but rather that the imprisonings, forced loans, and the like are indignities – status injuries – inflicted on the populace.[73]

2 Dishonor, fear, and contempt

On March 22, Seymour captures the essence of terror:

> Fear takes away freedom and the judgment that belongs to faithful counsel. We cannot speak our judgment while we retain our fears; nor know we how to give [money to the Crown] until we know whether we have to give or no, and no man can say that he hath to give if it may be taken away at pleasure. To prove this we may instance the billeting of soldiers and the imprisoning of those men that denied the loan; but if they had yielded through base fear, they had been as faulty as those that first broached these gauds.[74]

That passage begins with something resembling the chilling effects argument of Chapter 4, and then moves into a condemnation of those who would fear the king and pay the forced loans – an odd juxtaposition of claims: that fear of unconstrained royal power makes one unfree, but nonetheless that one ought to defy unconstrained royal power. One plausible reading of this passage that reconciles the two claims is that fear is the possession of the "base" – that is, of the dishonorable, of those having

low status. Base citizens succumb to the fear of royal power and surrender their freedom; noble, honorable citizens resist it. To surrender to one's fear is to become base, dishonorable. But the king's terror tactics have the power to make citizens base by inflicting that fear on otherwise upstanding citizens. This is a close relative of the idea of terror presented in Chapter 1, in which the fear of unconstrained power gives citizens reason to behave in a subservient manner. Seymour just adds the gloss that such behavior is contemptible and blamable.

In the debates on March 22, Digges made repeated use of the claim that to be subject to forced loans and imprisonment without explicit legal authorization is to be reduced in status. First he remarks, "That king that is not tied to the laws is a king of slaves."[75]

Later that same day, Digges says the following: "I am afraid (and I have too great cause to fear) that our King is told he is no great king unless he be told so, but I believe his greatness lies in the observance of his laws. The king that is not limited rules slaves that cannot serve him." He goes so far as to suggest that the terror induced by unconstrained power makes worse soldiers out of people, echoing Seymour's suggestion that this fear makes those subject to it in some sense less virtuous than free Englishmen: "The Muscovites are so cowed with these arbitrary commands that I know the time when a few English and Scots have beaten I know not how many thousand of their best horsemen out of the field." He goes on to say, "The King cannot lose more than by degenerating us."[76] To impose forced loans and imprisonments without legal warrant or constraint is to reduce the status of ("degenerating") the ordinary citizens in part by reducing them to dishonorable cowards, like the Muscovites.

In a different version (from different notes) of the same debate, Digges reportedly says, "The monarch that doth not maintain the rights of the subjects is a monarch of none but slaves and vassals."[77] Here, the term "vassals" is telling. Vassalage, in a feudal sense, does not mean unfreedom; a lord could have free vassals, and, indeed, the highest nobles in the land were vassals of the king (even King John became a vassal to the Pope during the political troubles that led to the Magna Carta).[78] But vassalage did always imply lower rank in a hierarchy: a vassal was the subordinate of a lord. The usage "slaves and vassals" thus suggests that the feature of slavery that was being pointed to was not its unfreedom but its inequality.

On April 3, Coke follows his argument that royal at-will imprisonment would reduce ordinary Englishmen to the status of villeins by arguing that for the king to have such power would be "very dangerous for the king and kingdom" because "[i]t would be no honour to a king or kingdom, to be a king of bondmen or slaves; the end of this would be both *dedecus & damnum*, both to king and kingdom, that in former times hath been so renowned."[79] That is, by reducing the status of all his subjects to that of slaves, the king's status too is reduced, for it is lower to rule over a kingdom of slaves than over one of full citizens.[80]

3 Political liberty and coordination

Again, I begin with Coke:

> I shall produce therefore some reasons, first from the universality of the persons whom this concerns. *Commentaries*, 236, it is maxim that the common law hath so admeasured the King's prerogative that in no cause it can prejudice the inheritance of the subject, and how doth this absolute authority that is pretended concern not only the commonalty but the lords and all spiritual persons and all officers? For if he be committed and be called on for his office, his office is forfeited. It concerns all men and women, and therefore it deserves to be spoken of in Parliament. This may dissolve this House, for we may be all thus committed.
>
> 31 Hen.6. *rot.* 27, *rot. parl.*, no member of the Parliament can be arrested but for felony, treason, or the peace, and all here may be committed, and then where is the Parliament? Sure the Lords will be glad of this; it concerns them as well as us.[81]

This passage reveals two elements of Coke's thinking. First, he is concerned with the effect of the unconstrained power to imprison on the ability of Parliament to function: this power may be used to evade the restriction on interfering with the persons of members of Parliament. Second, the principle at stake is important enough to warrant parliamentary consideration in virtue of its universal effect – the king was threatening the rights of "all men and women." This fits nicely into my interpretation of the rights given by the Magna Carta, which Coke was endeavoring to defend, as universal among citizens and constitutive of their status *as* citizens. (This latter appears to also be a political argument: because it was universal, it affected the Lords, too, so they should join the fight.)

Eliot, on March 22, discussing the importance of the principle at stake, also referred to political liberty:

> But this reflects on all that we call ours, those rights that made our fathers free men, and they render our posterity less free. This gives leave to annihilate acts of Parliament, and Parliaments themselves.[82]

Here, Eliot seems to be suggesting that a free man is just someone who is entitled to parliamentary representation. Here, we see the conjunction between *liber homo* status and citizenship.[83] Note also, in the context of Chapter 6, that the abolition of Parliament meant the abolition of the power of the people to coordinate to resist the Crown: this reveals again the reciprocal relationship between the rule of law and nonofficial collective power that also appeared in the context of the Athenian strength *topos* (and, less directly, in the Fullerian conception of reciprocity discussed at the end of Chapter 4): compare it to Aeschines' warning that the scofflaw threatens to become "stronger than the courts."

4 Reviewing the evidence

The speeches in Parliament following the Five Knights Case and preceding the Petition of Right do not perfectly track the details of the egalitarian argument I offered in Chapter 1. For all the egalitarian innovations from the Magna Carta onward, the king was still of undoubtedly hierarchically superior status relative to everyone else in the realm; he could not be accused of hubris in the standard sense – that is, of illegitimately attempting to lay claim to that higher status. Nobody thought that the king ought to be fully equal to an ordinary citizen, although the Magna Carta did impose equality on him in a limited fashion.

However, the historical record reveals an approximation to the egalitarian argument of Chapter 1 in the worry, not that the king would aggrandize himself, but that he would degrade everyone else from their high status as *liberi homines*, members of the political community. Had the king the power to imprison at will, the parliamentarians claimed, the ordinary Englishman would be reduced to the status of, most often, a villein, but they also referred to slaves, vassals, Jews, and cowardly Muscovites – all markedly low-status groups. The mirror image of the hubris argument actually appeared in this context: were the king to become a ruler of citizens thus degraded, the king's high status too would be reduced. A version of the terror argument also appeared, in the claim that were the king to have the power to imprison at will, he would create cowardly, base, submissive citizens.

Moreover, in the same period that Parliament and the Crown were bickering over ship money and forced loans, the Puritans of the Massachusetts Bay Colony were building a thriving legal system. And the Puritans, too, had a *liber homo*: the "freeman" was a defined political status that carried with it voting rights and required membership in the church.[84] It was, essentially, *citizenship*, not mere nonslavery, and not exclusive possession of the liberal liberties.[85] "Freeman" in Massachusetts seems to have meant something much like "citizen" in Athens, and the term appeared as early as the 1629 charter of the Massachusetts Bay Colony, in which it referred to the members of the corporation.[86] The *liber homo* of the Magna Carta, Coke, and the Puritans, was, fundamentally, a full-fledged member, and this full-fledged membership is what the illegal exactions and imprisonments of the Stuarts threatened.

I conclude that the English case supports the robustness of the egalitarian account of the rule of law. I do not propose to dispute the claim of the traditional account that the British struggle for the rule of law was (also) rooted in a conception of liberty. Instead, I propose to add to it. I have offered evidence that considerations of terror and (a version of) hubris were on the minds of the parliamentarians in the seventeenth century. I have also offered evidence that the idea that protections against unconstrained royal power were the inheritance of equal members of the polis was within their political culture, and was immanent in the innovations of the Magna Carta. From this, we can see that the British case is consistent with the claim that the

argument for the egalitarian conception of the rule of law is normatively robust: offering the argument in Chapter 1 would not have been objectionable to Coke and the other parliamentarians, and would have responded to concerns that they actually had.

III CIVIC TRUST AND THE BRITISH RULE OF LAW IN LATER YEARS

We can also see the strategic account of Chapter 6 making a critical appearance in the eighteenth century. In a groundbreaking paper, Margaret Somers argues that the working-class residents of "pastoral" regions of eighteenth-century England – rural regions with poor soil, and thus little interest from noble landlords, that developed an industrial textile industry – understood the ideal of the rule of law as grounding their claim to social, economic, and political equality on the basis of their identity as *liberi homines*, but the working-class residents of "arable" regions – good agricultural land dominated by the gentry – did not.[87]

Somers's explanation for this phenomenon is highly informative. Industrial production (i.e., the activity carried out in the pastoral regions) was regulated by ordinary local courts, which were themselves highly participatory, and whose officials were accountable to the public. Thus, I understand Somers to suggest, workers in pastoral areas both understood the law as a tool that could be put to use to protect their interests (rather than an instrument of top-down oppression) and had genuine access to institutions that could deploy the law to hold the powerful to account. Second, a combination of partible inheritance (primarily implemented in pastoral rather than arable regions) and apprenticeship concentrated economic and associational life into networks reinforced by kinship ties, promoting a higher degree of social capital. This, of course, implies a higher degree of trust among members of the working class, and thus a greater potential capacity to engage in coordinated action. In Somers's words: "[T]he greater solidarity and autonomy of villages in the pastoral areas were institutional preconditions for their greater capacity for association and participation and hence their ability to appropriate and convert regulatory laws into citizenship rights."[88] As a result, the claims of the working class in pastoral communities, on Somers's argument, became cast in the language of law, and particularly of rights associated with English citizenship.

Thus, interpreting Somers's argument in light of the points developed thus far, we can conclude that the residents of pastoral communities developed participatory institutions that allowed them to deploy collective sanctions against the powerful. Because they could do so, they could in fact (strategically) uphold the rule of law in support of their claims to equal status, and they began to understand (normatively) the law as expressing those claims. The strategic capacity to use the law to demand reasons from the powerful, that is, allowed the working class to see the normative power of the ideal of equal law.

From that further period in the development of the English rule of law, we can see that the strategic and the normative faces of the rule of law and its relationship to equality are interdependent and bidirectional. The strategic capacity to use law to call the powerful to account can develop the normative ideal of equality under law; as the next chapter will argue, the normative ideal of equality underlying the rule of law can also facilitate the strategic capacity to make use of it.