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The Libertarian Conception of the Public

The liberal bill of rights has evolved into an extremely complex document. Compare France's Declaration of the Rights of Man and of the Citizen of 1789 with the South African Bill of Rights of 1996. The former contains seventeen terse articles proclaiming the equality of persons, the political sovereignty of the people, and their right to liberty; the latter comprises thirty-three long sections encompassing such matters as labour relations, the environment, housing, health care, social security, children, education, language, and culture. If we dig beneath this complexity, we find the contours of the original bill of rights, but we do not find them unaltered. For example, the French document declares that the end of political association is the protection of natural rights, whereas the South African Constitution speaks also of 'promoting' and 'fulfilling' these rights. The French right to do whatever the law does not prohibit becomes the German right to the 'free development of personality'. The American guarantee of 'the equal protection of the laws' becomes the guarantee in the Canadian, German, and South African constitutions of the equal protection and 'equal benefit' of the law as well as the right to measures aimed at overcoming the effects of past discrimination.

It is tempting to think that these alterations represent sublimations that absorb whatever was valuable in the original bill of rights into a richer understanding of how to recognize human worth, so that the thinner paradigm, now an empty husk, can remain buried. Indeed, the sublimation of the poorer into the richer is one method of sorting out the permanent from the ephemeral in liberal constitutional law. What is permanent, according to this method, is the scope of a right prescribed by the richer understanding; what is ephemeral is the boundary dictated by the poorer. Thus, to take one example, the right to free speech in the original bill of rights is a right to say or write anything one likes short of libel and incitement to crime, while the right in the more advanced constitution is a right to express even through action (that does not violate the rights of others) contents reflecting considered beliefs and values. Now, if the broader right to 'expression' reflects a better understanding of how to respect human worth than the narrower right to 'speech', one may wonder why it is any longer necessary to bother with the latter taken in isolation. Why not simply immerse the inferior understanding in the superior? Sublimation is an attractive method of sorting principles, because it seems natural to think that whatever is worth preserving in a paradigm based on equal respect for persons will be preserved within one ordered to equal respect *and* concern, for the lesser is surely included in the greater. Nevertheless, I shall argue that sublimation is the wrong method of sifting principles of constitutional law, that something valuable is indeed lost to liberal

constitutionalism if the original paradigm is not taken up *as a conceptual whole* into the more complex bill of rights. In this Part, accordingly, I want to disinter the original paradigm and to propose a method of selecting principles different from the one of sublimation. I shall call this paradigm the constitution of liberty, after the name given it by Friedrich Hayek. Uncovering it will require some introductory remarks about constitutionalism in general as well as some delving into history.

1. CONSTITUTIONALISM AND DESPOTISM

Those who have studied constitutions in the past seem to agree that a constitutional order is a kind of relation between ruler and ruled that stands in contrast to despotism. Aristotle, for example, distinguishes between the despotic rule of the soul over the body and the constitutional rule of the intellect over the passions.[1] A despotic rule, he writes, is the rule of rational principle over a subject that does not itself possess such a principle, like the rule of a master over a natural slave, whereas a constitutional rule is a 'government of freemen and equals'.[2] Locke distinguishes 'political' from despotic power on a somewhat different ground. The former, he says, originates in the subject who transfers it to the ruler for the sole purpose of preserving his property, whereas the latter is an unlimited power imposed on those who, like captives taken in a just war, have forfeited mastery of their lives.[3] Montesquieu too contrasts constitutional rule to despotism but locates the difference elsewhere. For him, a despot directs everything by personal will whereas a constitutional ruler governs according to fixed and established laws.[4]

The difference between these views is not as great as it may seem. For although these writers disagree as to the distinguishing feature of a constitutional order, they agree that such an order is to be understood in contradistinction, not to unjust political rule, but to a kind of rule that does not even qualify as political. An unjust rule, for Aristotle, is rule in the private interests of the ruler; but a despotic rule may be for the benefit of the ruled, as it is when a human being rules a domestic animal, and an unjust rule may be in accordance with constitutional law, as in the case of an elective dictatorship.[5] For Locke, similarly, the victor's despotic rule over the vanquished is just if his cause was just, while the ruler who governs without laws is a despot, according to Montesquieu, even if he rules for the benefit of his subjects.

To determine what a constitutional order is, accordingly, we must begin by asking what distinguishes all shades of constitutional rule, the unjust as well as the just, from despotism. On this question too the disagreement of past thinkers overlays a more

[1] *Politics*, I, 4: 1254b4–5. [2] Ibid., 6: 1255b20; cf. Plato, *Laws*, 713a.

[3] John Locke, *The Second Treatise of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1960), para. 172.

[4] Baron de Montesquieu, *The Spirit of the Laws*, trans. Thomas Nugent (New York: Hafner, 1949), 8–28.

[5] *Politics*, III, 14: 1285a30–5; cf. Plato, *Laws*, 713d.

fundamental agreement. Let us begin with Montesquieu's idea that a constitutional order is a relation between ruler and ruled wherein the ruler rules by pre-established laws rather than by extemporary decree. We begin with this definition because it is minimalist, containing no requirement that the power to make laws be itself derived from law or even that the ruler be subject to law. The Roman emperor, whose will, according to the Roman lawyers, was the source of law and who was himself *legibus solutus*, would satisfy this definition of a constitutional ruler. Impoverished as it may seem, however, Montesquieu's definition is instructive. Let us try to determine what it is about ruling through standing laws that could have led Montesquieu to believe that this is what separates constitutional rule from despotism. And if we find that the reason why rule through law (or legality, as we may also call it) might be thought to mark this separation is not fully satisfied by legality taken alone, then we shall have to refine Montesquieu's understanding of a constitutional order. We shall have to say that, while rule through law meets a basic condition of a constitutional order, it is on its own inadequate to the idea of such an order, bearing at most a trace thereof.

The Claim to Rule and the Authority to Rule

I want to suggest the following explanation for the belief that rule through law marks a divide between a constitutional ruler and a despot. The relation between a despot and his subject is the 'political' analogue of the civil relation between a master and a slave. Neither relationship is held together simply by the threat of violence on one side and fear on the other. Relationships so constituted are purely factual relations wherein one exerts and another succumbs to power. Strictly speaking, they stand apart from relations of ruling and being ruled, for 'rule' connotes a generality not to be found among matters of fact. 'Thugs' exert power from one instant to the next; they do not rule. Like a master, however, a despot rules because and insofar as he exerts power over others under a claim of right to do so. He may base his claim on any of a number of grounds. He may say that he is descended from the first patriarch, that he rules by divine right, or that he alone has demonstrated a capacity for ruling others by virtue of his having shown a capacity to rule himself. Whatever its putative ground, the despot's claim to rule obtains a validation of sorts from the mere fact that the subject acquiesces in the claim through regular obedience to the despot's commands. Of course, not just any kind of obedience will do. It must be an obedience directed toward the claim—an obedience *opinio juris sive necessitas* (as lawyers say) rather than one prompted by fear alone. So qualified, regular acquiescence signifies that the subject to whom the claim is addressed accepts the claim as authorizing the claimant's use of power to enforce his commands.

I said a validation 'of sorts' because confirmation of the despot's claim to rule must come from a subject whose will is independent of the despot's and who can independently endorse the claim, for otherwise acquiescence adds nothing to the despot's unilateral assertion. And yet it is just this independence of will and mind that the despotic form of rule assumes is absent from the subject and that is practically negated

by the despot's ruling through *ad hoc* commands. Under a pure despotism, the subject submits to the free agency of the despot, but there is no reciprocal deference on the despot's part to the subject's agency, for the subject of a despot is considered to be without a will of his own. Like Aristotle's slave or Locke's captive who has forfeited mastery of his life, he presents no moral limit to what the despot may do with him, no more than would a chattel. This is to say that the despot has *no duty* to his subject. Juridically, this is what makes the ruler a despot, that his liberty is untrammelled by duty toward those over whom he rules; he cannot wrong his subjects. So there is a connection between the despot's no-duty and his inability to obtain independent confirmation for his claim to rule. In acknowledging no duty to respect his subject's agency, the despot also condemns his claim to unreality.

The moment, however, that the despot places a general law between his personal will and his subject, he acknowledges an independent agency in the subject from which the confirmation of his claim can issue. This is so for reasons hinted at by Fuller and identified more explicitly by Finnis.[6] In ruling by *ad hoc* commands, the despot allows no room for subjects to do his will by applying his commands to their own conduct. A command ordering a particular action here and now ('Do this!') is self-executing; nothing remains for the addressee but to perform the action, with the result that the initiative for ruling comes only from the ruler; the subject remains a passive instrument. In governing through general laws, by contrast, the ruler makes room for his subjects' independent involvement in executing his commands; for it is they who must decide in the first instance whether the law applies in a particular situation and what they must do to comply with it. Thus compliance is now thoughtful and self-directed. In a minimal sense, the subject participates in rule—not, to be sure, in rule-making, but certainly in rule execution. In following the rule, he executes the rule upon himself. Moreover, in yielding space for self-application to the subject, the ruler attains a more satisfying confirmation of his claim to rule than was possible for the pure despot; for acquiescence in his rule is now the spontaneous compliance of a self-directed agent rather than the mechanical one of a cipher whose actions are directed solely by the ruler.

Now, if this validated claim to rule is what we call authority, then ruling by general laws is a necessary condition of authority because it is a condition of the ruler's obtaining independent confirmation of his claim through the subject's autonomously applying the ruler's commands to himself. Indeed, we could say the same for all the procedural components of legality—publicity, clarity, constancy, and non-retroactivity—for all are conditions of self-directed compliance and hence of an independent confirmation of the ruler's claim to rule. But this means that the ruler who claims a right to rule owes his subjects a reciprocal duty to rule by general and knowable laws as a condition of his valid authority. The duty is complementary to, or constitutive of, his right (i.e. validated claim) to rule. A ruler who acknowledges such a duty is no

[6] Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964), 162–3; John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 272–4.

longer a despot in an unqualified sense, for the defining feature of a despot is that he acknowledges no duty toward his subjects. This is perhaps what Montesquieu saw.

The Stages of Authority

If despotism is characterized by the ruler's having no duty toward his subjects and no valid authority to rule, why is not the ruler who acknowledges a duty to rule through laws and whose subjects independently execute his laws a constitutional ruler as Montesquieu believed? Why is he merely, as I have suggested, a moderate despot? To explain this, I'll introduce the idea of authority's development and indicate in advance the well-delineated stages of progress toward its completion.

Raz draws a distinction between *de facto* and legitimate authority. *De facto* authority, he says, involves a claim to rule coupled with acquiescence in rule, whereas legitimate authority involves a claim to rule that is justified.[7] This distinction is too blunt, however, because the authority of a personal ruler who rules by general and knowable laws is not simply *de facto*, and yet it is not (as we shall see) necessarily legitimate either. Because his claim to rule is acknowledged by a subject whose independence he has reciprocally recognized and who independently executes his rule, that claim obtains independent validation, and a validated claim to rule is (at least) a *de jure* authority. On this view of the matter, the only merely *de facto* authority is that of the despot who rules according to his momentary desires ('Do this, do that!') and whose slaves, while acquiescing in his rule, are unable to deliver objective reality to the despot's claim.

Accordingly, I shall distinguish between *de jure* authority and legitimate authority, the former falling between the *de facto* and the legitimate. I shall also distinguish between legitimate and constitutional authority and between constitutional and just (or true) authority. These forms are related, not as disjunctives obviously, but as *genus* and *differentia* in ascending order: *de facto*, *de jure*, legitimate, constitutional, just (true). Each is a specific type of its more generic antecedent, a type in which something incipient in the genus is perfected. Authority's career is a developmental climb, each milestone of which fulfils a potential implicit at the preceding stage while conceiving a new potential. So, *de jure* authority is a type of the *de facto* that completes the idea of acquiescence in a claim and that, in doing so, conceives a germ of reciprocity between ruler and ruled; the legitimate is a type of the *de jure* that achieves full reciprocity and thereby conceives a germ of equality between ruler and ruled; the constitutional is a type of the legitimate that fulfils equality by conceiving the rule of a public reason; the just is a type of the constitutional in which the rule of public reason is fulfilled. The goal of the development, attained at no stage prior to the last, is objectively valid or true authority. Accordingly, if our arguments are successful, the impetus for the movement from the *de facto* to the just will have been shown to lie entirely within authority's idea, so that the dichotomy posited by Fuller between a

[7] Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 26.

procedural morality of law internal to its ordering enterprise and a substantive morality external thereto will have dissolved in an unbroken continuum.[8]

We resume. If the rule through law of a personal ruler is distinguished from pure despotism by the reciprocal deference of ruler and ruled, it falls short of legitimate rule just in the degree to which mere legality falls short of establishing a fully symmetrical reciprocity. The deference paid by the ruler to the subject is unequal to that paid by the subject to the ruler as long as the subject is only a subject and the ruler only a ruler. Moreover, this imbalance in the relationship affects the quality of the confirmation the ruler receives for his claim to rule, for in the end that confirmation can satisfyingly come only from a subject who is fully independent of him, which is to say, from an equal. This has the paradoxical implication that, in order to gain from his subject's voluntary submission a fully satisfying confirmation of his claim to rule, the ruler must reciprocally acknowledge the rulership of his subject, for only then does he preserve the subject's qualification to be the bearer of a perfect validation. A ruler acknowledges the equal rulership of his subject just in case he acknowledges a duty to serve the interest of his subject for the sake of which the subject recognized the ruler's claim to authority. That this is the criterion of legitimate authority is attested to by writers ancient and modern. Thus, Matthew exhorts Christian rulers to depart from the domineering ways of Gentile princes by becoming ministers and servants of their subjects;[9] Locke insists that the ruler whose authority his subjects constitute by the cession of their original powers reciprocally submit to their equal rulership by becoming a humble means to the protection of their respective properties;[10] while Raz argues that authority is legitimate (justified) only as applying reasons that apply to the subject's conduct independently of authority but that authority can effectuate better than individuals acting alone.[11]

The thesis that authority is perfected in a reciprocal relationship between equals (the authority thesis) might seem puzzling, for the more common view, of which Hannah Arendt is a representative (and that Matthew himself takes for granted), is that authority is essentially hierarchical. Indeed, it may seem that a relationship between equals is one in which authority has vanished, having been replaced by 'persuasion', to use Arendt's dichotomy.[12] The intuition here is that authority seems to imply a capacity in someone to bind another to defer to his say-so as a reason for action rather than act on his own deliberation and judgment, and it is difficult to see how this capacity could be mutual as between authority and subject. Yet even Arendt, when compelled to think through the distinction between authority and despotism, has to admit that authority presupposes a freedom in the subject to which authority must defer; and so her model of authority is the Roman Senate, which she sees as

[8] Fuller, *The Morality of Law*, 47, 96–106, 153.

[9] *Matthew*, XX, 25: 'Ye know that the princes of the Gentiles exercise dominion over them, and they that are great exercise authority upon them. But it shall not be so among you: but whosoever will be great among you, let him be your minister; and whosoever will be chief among you, let him be your servant.'

[10] Locke, *Second Treatise*, para. 131.

[11] Raz, *The Morality of Freedom*, 42–57.

[12] Hannah Arendt, *Between Past and Future* (New York: Viking Press, 1968), 93.

ruling like a judiciary through moral suasion rather than through command.[13] Moreover, we must keep in mind that we are engaged in an analysis, not of words in ordinary usage, but of a concept, of which everyday use may have an incomplete understanding because of a tendency to confuse instances with paradigms. It is not unlikely, for example, that the common view of authority takes parental authority as its model, whereas it is of course more sensibly viewed as the authority suitable for a particular stage of moral development. Also, everyday use may blur the distinction between theoretical authority—the authority of the expert, and practical authority—the authority of the ruler, and may take its picture of authority from the undoubtedly hierarchical nature of the former. Theoretical authority is hierarchical in the sense that deference is one way; we resolve to take the expert's opinion as a guide to action without any expectation of reciprocity. But theoretical authority can be hierarchical because it is authority only in a metaphorical sense: we resolve to defer to the expert, but we are not bound to do so; we reserve the liberty to treat his expertise as one consideration among others in our practical deliberations. Since we do not surrender our liberty to act on our own judgment, nothing is required from the authority to ensure that our surrender is compatible with a preserved capacity independently to confirm a claim of right and hence to generate a *duty* to defer. Still, there will no doubt continue to be resistance to the authority thesis, and so I want to show more precisely how authority can exist between equals and how the thesis that it exists perfectly *only* between equals is dimly acknowledged even in the accounts of authority ostensibly most opposed to it.

The Generic Structure of Mutual Recognition

I have argued that, while personal rule in accordance with general and knowable laws mitigates pure despotism, it does not mark a transformation of despotism. If authority signifies a claim to rule that is validated by the recognition of an independent ruled, then its idea involves a reciprocal and equal submission of ruler and subject such that the ruler is also subject and the subject also ruler. This, it turns out, is the condition under which alone the germ of mutual recognition implicit in legality can grow to fruition. Since it is also a condition for the transformation of an asserted claim to rule into an objectively validated authority to rule, we can also say that it is a condition of authority. The authority to rule and the correlative obligation to obey are thus products of this relation of mutual and symmetrical recognition of rulership.

One implication of the authority thesis is that legitimate authority is not defined by 'the consent of the governed' unless the meaning of that general phrase is appropriately specified. If by consent is understood acceptance of a claim to rule, then consensual authority encompasses the entire spectrum of authority from the merely *de facto* to the just. It is thus necessary but not sufficient to legitimate authority. What may be missing from consensual authority is the independence of the subject that

[13] Ibid., 105–6, 122–3.

qualifies it to give an effective validation of the ruler's claim. Now, one might say, an authority relationship is precisely characterized by the subject's having surrendered its independence. To have constituted this relationship, the subject must have renounced its liberty to act solely on its own reasons and must have resolved to accept the ruler's say-so as a pre-emptive reason for acting. By a pre-emptive reason for acting I mean what Raz means by that phrase: a reason that excludes the action-determining force of all other reasons for or against an action. Someone accepts an authority just in case he does what the authority tells him to do or refrains from doing what the authority has forbidden for the sole reason that the authority has issued these directives. Only in that case is the directive a 'command' issued by an 'authority'. Were subjects *en masse* to reassert their independence and reserve a liberty to ignore the ruler's utterances if and when they did not agree with their own best judgment, the ruler's authority would not even be *de facto*.

The question, then, is whether it is possible for the subject to retain its independence in submission to authority and whether an authority can recognize this independence without ceasing to be an authority. Let us distinguish, first of all, between the subject's reasons for acting and its reasons for renouncing the action-determining force of at least some of those reasons. When a subject surrenders to an authority its liberty always to act on its own reasons, it does so for a reason—security, for example. In order to constitute some kind of authority (whether *de facto*, *de jure*, or legitimate), the subject must renounce the exclusive action-determining force of its own reasons, but it need not renounce the action-determining force of its reason for submission. It may resolve to take the authority's say-so as a pre-emptive reason for acting on condition that the authority take the subject's self-interested reason for doing so as its sole reason for rule. It may, in other words, enter into a covenant with authority. True, the subject cannot consistently with authority reserve the liberty to decide unilaterally when the condition has been broken. But neither need it, in order to constitute authority, submit to the latter's unilateral say-so on this point and so lose the independence needed to validate authority. This is because the subject's reason for submission, just because it is a reason, is something whose satisfaction can be judged from the point of view of a reasonable person. Whether, for example, the ruler has ceased to keep the peace for the sake of which subjects submitted to his authority is not itself a question that need be submitted to authority in order that there be one; but neither is it a question that the individual can decide for himself consistently with his submission to authority. It is a question to be decided by the impersonal verdict of events.

We can say, then, that the specific difference of legitimate authority (which is a necessary but not yet sufficient condition of valid authority) is that the authority relationship has the general structure of a covenant. The subject can maintain its independence in accepting the ruler's say-so as a pre-emptive reason for acting only if the ruler defers to the subject's self-interested reason for submission, however this interest is defined. By the ruler's deferring to such a reason I mean his acknowledging a duty to adopt it as the reason for ruling rather than act on his own reasons as a

condition of valid authority. Accordingly, if authority is understood as a pre-emptive reason for acting, then we can see how authority can, without contradiction, lie on both sides of the relationship between ruler (subject) and subject (ruler). The subject can take the ruler's command as a pre-emptive reason for acting on condition that the ruler take the subject's reason for deference as a pre-emptive reason for ruling. Our thesis concerning authority (that it is perfected only in a relationship between equals) may now be restated as follows. The mutual recognition of ruler and subject such that the ruler acknowledges a duty to serve the subject's self-interested purpose for acknowledging the ruler's authority is the generic structure of the relationships that *can* produce valid authority. Many will recognize this structure as the one reflected in the diverse arguments for political obligation put forward by Hobbes, Locke, Kant, and, in our day, by Raz. The variable element in these arguments is the content of the self-interested reasons.

Ideal and Deformed Recognition

Not all authority relationships evincing the generic structure of mutual recognition succeed as relationships of valid authority. Some reproduce despotic authority, while some produce no authority at all. Recall that for a relationship to yield valid authority, the subject must remain free and independent in his submission to the ruler, for otherwise he forfeits his qualification to validate the ruler's authority-claim; for his part, the ruler must remain an authority in his deference to the self-interested reasons for submission of the ruled. Neither condition is easily met. Consider Ulpian's justification for the authority of the Roman emperor: '[T]he will of the emperor has the force of law since by the *lex regia* which regulated his imperium, the people conceded to him and conferred upon him all their authority and power.'[14] Since each Roman's 'authority' was originally that of a master unlimited by duty to wife, children, or household slaves, his cession of this authority to the emperor for the sake of peace (the *pax Romana*) produced a despotism unlimited by any right in the subject. Of course, the same transfer is described by Hobbes to justify modern absolutism. In both accounts, the relationship between authority and subject exhibits the generic structure of mutual recognition between equals: for the sake of his own security, the subject cedes his freedom to do whatever he believes his self-preservation requires to a person thereby authorized to use force against him for the purpose of maintaining peace. The sovereign's will is now a pre-emptive reason for acting; all rights of moral deliberation are consumed in the one moral duty to obey. But equally, peace is a pre-emptive reason for ruling; if the sovereign is no longer able to protect its subjects, political obligation ceases.[15] Nevertheless, the interaction misfires as one generative of valid authority. In the process of constituting the sovereign, the subject alienates his unfettered liberty to a ruler whose authority is then unlimited by any duty to

[14] *The Institutes of Justinian*, trans. J. A. C. Thomas (Amsterdam: North-Holland, 1975), I, II, 6.
[15] Thomas Hobbes, *Leviathan*, ed. Michael Oakeshott (Oxford: Blackwell, 1957), 144.

respect the liberty or independence of the ruled. Since authority is constituted by a covenant of mutual obligation, it is legitimate; but since, once constituted, authority acknowledges no duty to respect the agency of the ruled (for 'the will of the Emperor has the force of law'), it has no enduring partner qualified to validate its claim of authority. Hence it reverts to despotism.

Sometimes the process of mutual recognition subverts authority altogether. Consider Raz's account of legitimate authority. For Raz an authority is legitimate—that is, one ought to take its utterances as a pre-emptive reason for acting—only if it does what it is supposed to do. It is supposed to decide on the basis of 'dependent reasons'—that is, reasons that already apply to the conduct of subjects prior to authority.[16] The normal justification for authority, according to Raz, is a reason having to do with the subject's self-interest. It is that subjects are more likely to succeed in complying with the reasons that independently apply to their conduct if they accept the directives of an official as binding on them than if they tried to apply the reasons themselves.[17] This is so partly because of co-ordination problems, partly because of prisoner's dilemmas, and partly because of the superior competence of the body claiming authority to apply dependent reasons wisely. Co-ordination problems arise when everyone has an interest in doing what everyone else does (for example, driving on a particular side of the road) regardless of what they do but no convention has been established. Authority can establish a convention. Prisoner's dilemmas occur when the reasons that independently apply to conduct have force only if most people comply with them and there is no assurance that they will. Authority can provide the assurance. We can see, however, that all the self-interested reasons making up Raz's normal justification are destabilizing reasons. Authority is useful but not necessary for the establishment of a convention, nor would it be necessary among those who, for whatever reason, trusted each other to follow reason on their own. Most subversive, however, is the consideration of competence. If authority's justification is its superior expertise, judgment, and moral strength in applying the reasons that properly govern individual conduct prior to authority, then authority is contingent, as Raz happily concludes, on the particular capacities of individuals to follow reason in particular areas and on their competence correctly to assess their abilities in those areas relative to those of the putative authority. The scope of authority thus varies from one individual to another and from one situation to another.[18] Who will judge whether the normal justification holds in a particular case? It cannot be an authority, since the normal justification must limit its scope as well, and we would then have to ask who decides whether its reason applies, and so on *ad infinitum*. So it is left for the subject to judge whether in any particular case the authority will have authority over it, which is to say that there is no practical authority and no obligation to obey the law.

Because there are cases where mutual recognition dissolves authority or produces a cession of the subject's freedom to (what then becomes) despotic authority, let us call the mutual recognition productive of valid authority ideal recognition and the

[16] Raz, *The Morality of Freedom*, 47. [17] Ibid., 53. [18] Ibid., 73.

defective cases ones of deformed recognition. We can see the deformed cases as images of the ideal but in a disfigured shape. The contrast here is between Caesar in Rome and King John at Runnymede, or rather between Caesar and the King John of national lore. Both rulers depend on their subjects' recognition for their legal authority. Yet Caesar's authority is boundless because constituted by the Romans' alienation to him of all their 'authority and power', while John's is limited (though in myth real) because recognized by the barons in exchange for his recognition of their customary liberties. From St Augustine to Oakeshott, political philosophers have taken deformed recognition as the model of (earthly) authority, because they have taken the picture of atomistic (morally self-sufficient) persons, whose claim to independence is incompatible with authority, that it presupposes as a given. Ideal recognition is then projected to a utopia. Yet if, as I shall later argue, the assumption of atomism turns out to have falsely absolutized an historically situated reality, then the ideal form of recognition may not be utopian. If it is not, then nothing stands in the way of our treating ideal recognition as the model of authority, to which distinction it is certainly entitled as a matter of theory. Its entitlement rests on the following consideration: it is only through ideal recognition that the ruler's claim to rule is validated by a free subject *who remains as independent in his submission as he was before*, so that validation is enduring and the authority thus real.

Rule through Law and Rule of Law

If mutual recognition can fail to generate true authority, what are the conditions of ideal recognition? The full answer, insofar as I can give it, is the burden of the book as a whole. But we can make a beginning by focusing on the 'as independent as before' requirement famously discovered by Rousseau. Rousseau saw that the subject could remain as free in his submission to authority as he was before only if the liberty he surrenders to the ruler is received back in the form of a validated right-claim to independence both against other subjects and the ruler.[19] That is, just as the authority-claim of the ruler is confirmed by the recognition of an independent subject, so is the right-claim to independence asserted by the subject confirmed through its recognition by a valid authority. This gives us an inkling of the nature of the self-interested reason deference to which by authority is compatible with its remaining an authority. Hobbes's sovereign lost its partner because the subject traded its right-claim to independence for felicity and the peace without which felicity is impossible. Here the self-interested reason to which authority deferred was not the one to which it needed to defer in order to preserve a partner qualified to validate it. Raz's authority too dissolved in deference to the self-interested reason, because that reason held authority captive to the variable competence of subjects to rule themselves in diverse situations. For Rousseau, however, the self-interested reason for submission to

[19] Jean-Jacques Rousseau, *The Social Contract*, trans. G. D. H. Cole (London: Dent, 1913), 12–13, 15–16.

authority is the quest for validation through publicly enforceable laws of the subject's right-claim to independence. This is a pre-emptive reason for rule to which authority can defer without self-contradiction, because it now defers to the very attribute of the subject it needs to validate its authority and because the independence claimed is claimed as an essential, not a variable, attribute of the person.

So, a basic condition for ideal recognition is that the subject submit to authority for the sake of its own independence and that authority acknowledge the subject's independence as its reason for ruling. But how can authority give back to the subject the independence it possessed prior to authority without ceasing to be an authority? After all, a right-claim to independence is a claim of right to live one's life as one chooses consistently with the right of others without (as Locke says) 'asking leave or depending upon the Will of any other Man';[20] and so it is a claim against other persons' substituting their choices for one's own as determinants of one's actions. But if authority is a pre-emptive reason for acting, then submitting to it precisely means authorizing the substitution of another's choices for one's own as the determinant of one's actions. Does this mean that authority and independence are ultimately incompatible? Is ideal recognition—and so true authority—utopian after all?

That true authority must reconcile the ruler's authority with the subject's independence does not mean (as we'll see) that true authority is impossible. But it does mean, as Rousseau saw, that no natural person can be a true authority. This is so for the following reason. A subject can remain as independent in submission to authority as he was before only if the validated right-claim to independence he receives back from the ruler includes a recognized right of self-rule. For prior to his submission to authority, the subject ruled himself. It is impossible, however, for someone to accept the authority of a natural person (or persons) and still rule himself. This is true even if the personal ruler takes the subject's self-interested reason for submission as a pre-emptive reason for ruling. For a personal ruler's authority is the authority of its opinions about what the self-interested reason requires, or at any rate, of those opinions it chooses to effectuate through commands. These opinions are subjective in the sense that they are particular to him. They are *his* opinions. The subject may happen to share them, but he cannot *identify* with them without self-obliteration. Since, then, the authority of a personal ruler excludes the subject's self-rule, no personal ruler—no natural human agent or group of such agents—can achieve true practical authority over others.

This does not mean, however, that no authority can be true. Here again we must follow Rousseau. The only ruler whose recognized authority is compatible with authority's recognition of a right of self-rule is the law enjoining respect for independence among all persons; for this is a rule that every independence-loving agent will impose on himself, and it is one to which all human agents are equally subject, so that each is both subject and ruler. This kind of rule is, of course, different from the embryonic constitutionalism of rule through law, where law may be the vehicle of

[20] Locke, *Second Treatise*, para. 4.

personal appetite and where, consequently, legislation is literally law creation (since law proceeds from lawless will) rather than the elaboration of a pre-existing norm. What has now come to sight is the rule *of* law, which is the impersonal rule of an idea and which I will take to be the specific difference of constitutionalism. Its emergence at this point shows that the rule of law is a necessary (but still not sufficient) condition of ideal recognition and hence of true authority. That two or more people may each be subject and ruler is possible only if each submits to the authority of a law that in turn submits for confirmation of its authority to its self-imposability by an independent subject. To distinguish law in this fundamental sense from its specification in various principles and rules, I shall henceforward write it as Law.

Observe that it is only at this point that the idea of authority intersects with the idea of justice. Since *de jure* and even legitimate authority can exist independently of the rule of Law, there is no necessary connection, even in the version of natural law theory I will be defending, of legal and just authority. For reasons already given, the obeyed rule through general and public directives of a personal ruler is legal authority even if the ruler is a tyrant, an oligarchy, or a democratic majority ruling in its particular self-interest. Conversely, the virtuous rule without laws of a philosopher-king or an aristocracy is just rule but merely *de facto* authority. Rule bound by a duty to serve the interests of the ruled is legitimate but not necessarily just, for it is possible to serve the subject's purpose in accepting rule without ruling in the public interest.[21] Nevertheless, the preceding argument has shown that there is indeed a necessary connection between true authority and the impersonal authority of justice; and it has shown what that connection is. True authority is a product of ideal mutual recognition. This means that it requires confirmation from a subject who remains as independently self-ruling after submission as he was before. This is possible only if the ruler acknowledges a reciprocal duty to defer to the self-rule of the subject as its reason for ruling. The only ruler who can defer to the subject's self-rule while remaining an authority is an impersonal Law. But the rule of Law is the rule of a conception of public reason. Thus, only a conception of public reason can have practical authority, and justice can be authoritative only as such a conception.

2. A GENETIC PERSPECTIVE

We followed the idea of mutual recognition germinally present in personal rule through general laws until it took us to the rule of an impersonal Law enjoining respect for the independence of persons. This means that in a fully developed constitutional order, the ruler is a public reason rather than a person, clique, or mass. The natural persons who exercise authority do so as ministers of that reason holding offices independent of them, and their authority—legislative, executive, and

[21] Recall Augustine's watered-down (from Cicero's) definition of a republic as 'an assemblage of reasonable beings bound together by a common agreement as to the objects of their love' (*The City of God*, XIX, 24).

judicial—is circumscribed by the totality of possible determinations of this idea. Yet with all this we have, needless to say, only begun.[22] For, while the impersonal rule of a public reason gives us the bare concept of a constitutional order, there are many conceptions of public reason and thus many diverse constitutions. Are they all equally productive of valid authority? This cannot be, for one lesson we learn from Hobbes is that there are some conceptions of public reason whose rule subverts constitutionalism, and only a constitutional order can produce valid authority. Accordingly, while we may have attained the concept of a constitutional order, we are still very far from grasping the specific liberal conception of public reason whose rule will best satisfy this concept.

It would be unacceptable, to name one difficulty with the result so far attained, if on the one hand constitutional orders were defined as non-despotic and, on the other, a constitutional order governed by a certain conception of public reason turned out to be a despotism of Law. Yet such a result cannot be ruled out by the bare concept of the rule of Law, for Law may denote a public reason juxtaposed to the particular interests and private rationality of concrete individuals. Given that opposition, the rule of Law would indeed be despotic—and so self-contradictory as the rule of Law—if public reason stood to the private interests and rationality of concrete individuals as a master stands to his slave. This would be the case if, as in Plato's *Laws*, those who ruled in Law's name were slaves to the legal minutiae said to be ordained by reason, having little room for individual discretion and judgment;[23] or if, as in revolutionary France, Law's ministers owed no duty to respect the independent pursuit of private interests because this was considered a crime against the people; or if, as in Napoleonic France, civil interactions were regulated by detailed bureaucratic orders leaving no space for spontaneous compliance. Moreover, even if public regulation employed general standards, this would only be the minimal deference shown to Law's subjects that the personal ruler showed to his. And so, to further unfold the conditions of valid authority, we would be required to traverse a new path toward the constitution in which Law's claim to rule is itself validated through its free recognition by subjects whose civil independence is reciprocally recognized as a limit to unilateral rule by Law's officers—which is to say, toward a conception of public reason intermediate between impersonal Law and purely personal (i.e. nonpublic) interests. What this conception is remains to be seen. However, the possibility of Law's despotism shows that, while it is true enough to say that the fully developed constitution involves the rule of a public reason, everything depends upon arriving at a suitable conception of the public.

Conceptions of public reason are manifold and so, therefore, are visions of the ideal constitution. Our object of inquiry is the ideal constitution of liberalism. We shall see, however, that this constitution is really a unity of several constitutions, each of

[22] In his illuminating work, *Constitutional Justice* (Oxford: Oxford University Press, 2001), T. R. S. Allan identifies the rule of Law with the rule of public reason as a concept, prescinding from any specific conception, thus stopping the development here. This position is addressed in the Conclusion below.

[23] Plato, *Laws*, 714a, 715d.

which is ordered to a different conception of public reason or Law. Each of these conceptions begins its life as the fundamental principle of constitutional order, then falls insofar as it claims to be first, then survives as an instance of a more fundamental conception. Our focus in this Part is on the constitution of liberty. What is the conception of the public interest informing this constitution?

I would like to approach this question historically for the following reason. No one thinks that the constitution of liberty originated all at once as an intentional creation from first principles. Most would agree that it grew slowly from about the sixteenth to the eighteenth centuries, primarily in England, France, and the United States, against a certain backdrop of ideas that had animated an earlier social order. Nevertheless, liberal philosophers have typically sought to justify the end-product by reconstructing it in the light of a conception of justice they regarded as self-sufficient, exhaustive, and fundamental. In this respect, Nozick, Rawls, and Dworkin continue the tradition of Locke, Rousseau, and Kant. In executing this enterprise, however, these philosophers paid little mind to the fact that the conception they took to be self-sufficient had an historical pedigree, that it had been formulated in reaction to an idea that had previously held sway—that had indeed informed a previous constitution—but that had lost its authority to rule. This inattention to origins was perhaps essential to their own project of legitimation. However, the historicity of their conception was its Achilles heel insofar as they offered the conception as the fundamental principle of constitutional order. The conception's historicity was not in itself a flaw; but it became one when the awareness of it was suppressed, and when, consequently, historically conditioned ideas—that is, ideas formed in reaction to antecedents—overreached themselves with claims to exhaustiveness. I say 'overreached themselves' because ideas about fundamental justice formed in reaction to failed ideas reject these ideas overbroadly. From the fact that the previously regnant idea failed as fundamental, the proponents of the new idea conclude that it is a spent force, that it has been discredited as an autonomous principle, so that they need take no further account of it except insofar as it is subsumed in their own. But since this is a *non sequitur*, the new idea is conceived with a hidden flaw at its core. Having equated failure as fundamental with failure as such, the new idea rejects the old one *tout court*. Its formulators claim that it, to the exclusion of its predecessors, is the fundamental end of constitutional order. But they thereby expel from the new idea something it requires as part of a full account of itself, an account in the form of: 'since the failure of x as fundamental is equated with the failure of x simply, y minus x is equated with fundamental justice'. Since the new idea's intelligibility thus depends on the old, the former is not the self-sufficient idea it claims to be; it presupposes its antecedent. And because it is not self-sufficient, it cannot be exhaustive or fundamental either.

I shall call the mistaking of historically conditioned ideas for exhaustive conceptions of fundamental justice false absolutization, with the *caveat* that this refers to a mistake about what fundamental justice is and not to a mistake about its possibility. As a consequence of false absolutization, whatever merit the new idea possesses

becomes intermixed with errors which, to a subsequent ahistorical consciousness, again signifies the failure of the idea as such rather than its failure as fundamental. In this way, the *non sequitur* present at the first idea's birth is incorporated and compounded in the next. To the extent that errors in a constitutional paradigm come from ahistorical thinking, weeding out error becomes a matter of determining which elements of a paradigm reflect an overgeneralized reaction to the shortcomings of a specific antecedent. Identifying overreactions, however, requires a sympathetic perspective on the idea reacted to, one that sees its failure, not as that of a false idea, but as that of an exaggeration determined within a historical context. Accordingly, because an historical consciousness is required to distinguish between what is rationally enduring and what is ephemeral in the constitution of liberty, we begin by observing the background of ideas against which that constitution developed.

The Respublica Christiana

The constitution of liberty cannot be understood except by contrast to the medieval Catholic constitution against whose conception of the public interest it is in every sense a reaction. The ecclesiastical polity of the high Middle Ages was a species of constitutional and not merely of legal order, for in it the authority of the emperor had been displaced by the practical authority of an idea. Though apprehended through simple and child-like images, the conception of the public interest to which the medieval constitution was directed is the richest we shall encounter. It is the vision of an ideal recognition. When recast in the sublime concepts of St Thomas, the images tell a story of a mutual recognition (or 'covenant') between authority and subject such that the subject surrenders its natural liberty to the rule of a providence that in turn takes the 'sanctification' of the subject as its reason for ruling.[24] This is not, however, a relation between a personal ruler and a subject. As St Thomas makes clear, it is a relation between Law and Law's subjects.[25] The ruler of the world is an eternal Law, understood as the divine reason or system of ideal types according to which all beings are created and to whose authority as final ends they are subject. God has a will, but He wills nothing but the Law of his being and that creatures be perfect according to their end.[26] In ancient Israel, according to St Thomas, this Law ruled through positive divine laws as a *de jure* despot over a child-like subject as yet incapable of self-rule.[27] Among the Greeks and Romans, it ruled through the natural law proportionate to human reason over subjects who specified this law and applied it to themselves (and who thus partly participated in Law's rule) but who were incapable because of their composite nature of knowing creation's final end and hence of endorsing this end as their good.[28] But then, as a concept expresses itself in the thinker's conception, and as a conception expresses itself in an unspoken word, so did

[24] I *Thess*. IV, 3.
[25] *Summa Theologica*, I-II, Q. 93, A. 1.
[26] Ibid., I, Q. 19, A. 1, 2.
[27] Ibid., I-II, Q. 91, A. 5. Cf. *Gal*. III, 24–5.
[28] *Summa* I-II, Q. 91, A. 2.

the unspoken word express itself in a speaker, in a fully independent and accidentally individualized personality distinct from, yet equal to Law, and who acknowledges Law's authority for the sake of his own immortality.[29] To this subject's independent reason for submission, the eternal Law defers for the objective confirmation of its authority. Just as Law's utterance is a pre-emptive reason for action, so is the individual's sanctification the exclusive reason for Law's rule; it is the last end of creation, the common good toward which, according to St Thomas, all subordinate law worthy of the name is directed.[30] In this way, Law's authority becomes a means to the absolute worth of *this* individual person, who, in surrendering his natural liberty to Law's rule, receives back his independence (he is seated 'at the right hand of power'[31]) as something necessitated through Law's reason. And the product of this interaction is both a perfected authority for Law and a validated self-worth for the subject.

The richness of this conception inheres in the scope of its embrace. Here Law's authority obtains validation from an independent subject, who is not simply a hypothetically disinterested or generic self-imposer of an abstract Law, but an actual individual who endorses the Law for the sake of the worth of his determinate individuality. Thus, the subject is present in the relationship not as an angel but in the flesh. In conception, therefore, the ruling idea envisages a perfect constitutional order in which authority is finally valid because validated by an independent subject who remains distinct from the Law in endorsing its rule. The ruling conception is not a one-sided Law notionally willed by a formal subject but whose rule is once again despotic in relation to the real subject; it is the relationship formed by the mutual recognition of Law and a real subject.

Of course, this idea does not organize the medieval state directly or immanently; rather, it rules political life from beyond through a mediating end. The medieval constitution is one order, but that order encompasses a duality of 'cities', a heavenly and an earthly city, the latter directed by an emperor to virtue and by a Church to salvation. The justificatory theory of this order is St Thomas's *Treatise on Law*. For Aquinas, the soul's comprehension of the eternal Law is its final end and perfection, that wherein it receives back its body as incorruptible. Ordered to this end is the evangelical law revealed by the Incarnation and administered through the sacraments by a priesthood claiming authority from the apostolic succession. The last end, however, is not of this world; rather, it remains a hope for the next. This is so for two kinds of reasons. One set of reasons appears on the surface of St Thomas's text, and these reasons form the avowed justification of coercive power under the medieval constitution. The other set of reasons underlie the text and explain better what the avowed reasons do not.

On the surface, the last end is unattainable on earth because of what St Thomas sees as the inescapable predicament of man so long as he is flesh. The predicament is twofold. First, as Aristotle taught, man is a composite being, composed of both a

[29] Ibid., I, Q. 27, A. 1; *Matthew*, XXVI, 39, 42, 64.
[30] *Summa*, I-II, Q. 90, A. 2. [31] *Matthew*, XXVI, 64.

spirit and a natural body. As long as he is composite, he will be able to grasp intellectual things—forms, kinds, ends—only as embodied in particular sensible things. He will be unable to grasp incorporeal things, and so he will be unable to comprehend the divine essence directly, having to rest content with seeing it darkly through its sensible effects.[32] But the soul's perfection requires that it know the divine reason itself and all things through it. Thus, even without sin, the embodied soul is capable only of the inferior (pagan) virtues that consist in the proper ordering of the animal to the intellectual soul; the higher (Christian) virtues springing from knowledge of the divine essence are beyond human nature; they flow from a supernatural perfection unattainable by man's own efforts and knowable as a possibility only through an external revelation.[33] The other feature of man's predicament is sin, understood as the rebellion against Law's authority perpetrated by Adam and repeated in all his descendants. By virtue of this rebellion, a law has sprung up in sensuous inclination—the law in 'the fomes of sin'—that resists the passions' natural subjection to rational control for the common good.[34] Since it is only the eternal Law's authority that establishes and sustains the order of ends in nature, man's rebellion against that authority entails the body's partial emancipation from the natural rule of reason, so that man is now torn between the law directing him to his common good and a law urging him to his particular good. This means that, so far from being able to attain his last end in this life, rebellious man can no longer achieve by his unassisted efforts even the end proportionate to his composite nature; for, to fallen nature, this end appears repressive rather than natural. Accordingly, an external help was needed both to heal human nature and to reveal the supernatural end to which nature itself is directed. However, given the composite nature of man and his inability not to sin, this end is achievable only in the beyond.[35]

To St Thomas, the features of compositeness and sin that preclude a this-worldly realization of ideal recognition appear as fixed aspects of the human condition, and their constancy is assumed. Yet the fixity of the twofold predicament is asserted subject to an equivocation. On the one hand, man is said to be composite—an incorruptible soul informing a corruptible body—and his composite nature is said to be an insurmountable obstacle to knowledge of the divine essence. But on the other, the divine individual is said also to have had a human body subject to death—his death is indeed the central image of this system of thought—and the gospel he brings is precisely that the corruptible body is no obstacle to the soul's receiving (being 'resurrected' in) a spiritual body—that is, a determinate individuality somehow nested in a relationship with the eternal Law without taint to Law's universality.[36] Moreover, the inescapable compositeness of man's worldly nature makes sense within an Aristotelian world-view according to which pre-existing matter is contingently given for rational organization toward an end. On this view, the human soul is literally a

[32] *Summa*, I, Q. 12, A. 4–5, 11–12.
[33] Ibid., I-II, Q. 42, A. 1–3; II-II, Q. 1, A. 1; Q. 2., A. 3; Q. 7, A. 2; Q. 8, A. 1.
[34] Ibid., I-II, Q. 91, A. 6.
[35] Ibid., I, Q. 12, A. 11; I-II, Q. 5, A. 3.
[36] *Luke*, XXIV, 36–43.

composite of separate elements and so disproportionate to the simplicity or wholeness of a divine nature as separate from the human soul as the human soul is from matter. But if, as St Thomas believes, matter is created *ex nihilo* for a purpose, why is not the body by nature consubstantial with the soul? Why is man's created nature necessarily composite and his wholeness thus dependent on a new creation?[37]

Perhaps the answer lies in the other side of the human predicament, that of sin. It is, one might think, man's rebellion against Law's authority that sunders what is originally whole into warring parts, thus rendering the whole man composite. But the belief in the necessity of rebellion is also equivocated. Sin is pictured as having arisen in a specific setting, namely, in a primitive, child-like condition of innocence prior to the development of a free mind capable of distinguishing good and evil for itself. It is this free mind, as the serpent says, that constitutes man's likeness to God in whose image he is said to have been created.[38] So, it cannot be the free mind's emergence as such that constitutes the corruption of human nature; on the contrary, it is what makes possible the fulfilment of which human nature is, according to Aquinas, capable on its own—the fulfilment of the man of *prudentia* or practical wisdom.[39] Rather, corruption occurs because the free mind originally asserts itself by disobeying a divine command and hence by rebelling against divine authority. But that it does so is, according to the myth itself, historically specific. Within an order in which the free conscience has not yet dawned and in which, therefore, authority is hierarchical and despotic, what other way for the divine image in man to express itself than by rebelling against authority? But since the eternal Law itself ordains this rebellion (for how else will human nature be perfected?), the necessity of rebellion against Law's hierarchical authority is hardly a necessity of rebellion against its authority as such. Rather, the rebellion against authority is necessary only as long as authority does not recognize the freedom of conscience.

Since nothing in St Thomas's framework proves that rebellion against Law's authority is a necessary feature of the human condition, the way is at least open for an alternative understanding of the medieval constitution along the following lines. Because no known or remembered political constitution had recognized the claim to independence of individual personality, that claim had to be asserted rebelliously—against authority. Consequently, the person's claim to independence is interpreted as a claim to an authority rival to that of Law. But although conditioned by the underdevelopment of constitutional order, this situation appears to St Thomas as the fixed condition of a human soul which, by virtue of its capacity for thought, *must* lay claim to independence and which cannot act without doing so. And because the claim to independence appeared as a claim to rival authority, it followed that Law could be authoritative in the medieval world only as excluding the person's claim to independence and self-rule. This meant, for one thing, that Law could be authoritative only

[37] *Summa*, I, Q. 44, A. 2; Q. 45, A. 1; *Matthew*, XXIV, 35.
[38] *The Logic of Hegel*, trans. William Wallace (Oxford: Oxford University Press, 1892), para. 24.
[39] *Summa*, I-II, Q. 61, A. 2; Aristotle, *Nicomachean Ethics*, VI, 5: 1140a24–1140b30.

as excluding the subject's unassisted insight into the final end of constitutional order. The last end could be known only through a supernatural revelation which, though making room for human reason in elaborating its implications, in no way defers to insight to confirm its authority, for it is said to exceed understanding. Its authority is thus despotic in relation to a reason that must accept it as dogma, hence as excluding its equal participation. Moreover, because the reconciliation of Law and Law's subjects was externally revealed, it presented itself in a way that excluded also the practical participation of the subject in the relationship. That is, it presented itself as the outcome of an historically unique event involving a single individual exclusive of all others—an event in which, therefore, those who accepted its factual truth played no part. Since the bond between Law and subject excluded all but one individual, its institutional embodiment had to be projected into a utopia unrealizable as long as the subject was *this* subject—an individuated person alive in a particular body—and not the subject who was alone a partner to Law. Accordingly, ideal recognition is constructed as otherworldly, not because the natural body is an obstacle thereto (the story says it is not) or because man necessarily thinks for himself (the story says he is obliged to), but because in circumstances under which thinking for oneself is necessarily rebellion, ideal recognition must be pictured as involving an individual not oneself (who thus becomes once again 'Lord'), to the identification with whom having this body is an absolute bar. So the body stands in the way, not of ideal recognition as such, but of merging with the individual whose body is represented as alone standing in the relationship.

Opposed to the imagined order stood a temporal one, defined by the mutual hostility of the polarities reconciled in utopia. The *saeculum* was the place where the eternal Law's rule was imposed upon a subject seen as intractably rebellious, as one whose claim to independence outside of political order manifestly conflicted with Law's authority. Since, having no political home, the individual's claim to self-rule could not be asserted otherwise than anarchically, Law's inherently constitutional rule had to be mediated by that of a subordinate law adapted to man's fallen nature and ruling it despotically. As reinterpreted by St Thomas, natural law is no longer what it was for St Augustine—the law operative in the state of innocence naturally inclining the soul to an unthinking acceptance of the eternal Law's governance. It is rather fallen humanity's thoughtful but imperfect participation in that governance.[40] Participation is imperfect in two senses. First, whereas in utopia, the independence surrendered to Law's authority is received back with glory, in the world, personal independence must be *sacrificed* to an authority that gives back nothing but a hope of reward in the beyond. This sacrifice is what medieval political thought calls virtue, which it sees as the hard discipline of rebellious man preparatory to his ultimate merging through grace with the one whose liberty alone God loves and accepts. Discipline toward grace is the common good proportionate to fallen nature to which the Empire ministers. Second, whereas in utopia, authority and subject are recipro-

[40] *Summa*, I-II, Q. 93, A. 2–3, 6.

cally subordinate, Law's rule subserving the self-interest of an equal, in the world, Law's rule is hierarchical. Since the claim to independence is equated with rebellion against Law's governance for man's sanctification, the pursuit of self-interest is equated with reason's servility to the narrowly self-serving passions of concupiscence and irascibility.[41] Thus Law's authority (mediated by that of natural law) demands the sacrifice of self-interest to the altruistic performance of public duty. It therefore also demands the subordination of a politically excluded and unfree wealth-producing class to a political class in turn ministerial to a priesthood whose charge is the final end to which both acquisition and political authority are subservient. In this way, the Catholic conception of the public interest as an ideal recognition of Law and Law's subjects became one pole of a dual opposition—juxtaposed, on the one hand, to the earthly community of believers, separated from their heart's desire by the very agency they saw vindicated in heaven, and, on the other, to the human enforcement of a natural law viewed as an inferior means to a supernatural perfection.

The constitutional realization of this one-sided conception—the *respublica Christiana*—could not but culminate in a despotism of those who held the keys to utopia. Since the idea claiming authority excluded the subject's participation by thought or action, its rule meant the subject's unilateral surrender of his independence to those claiming authority under the idea. This surrender was twofold corresponding to the individual's dual subjection to the natural and the evangelical law. The latter's rule formed a community of believers whose confidence in their otherworldly merging with the divine individual depended on their alienating all sense of an independent moral conscience to those who administered the means of identification. Thus sacraments are effective regardless of inward disposition, penances are externally prescribed, catechisms and prayers uncomprehendingly recited, interpretative authority over revelation ceded to an infallible Pope who wields an absolute power to excommunicate (and so to withhold the sacraments from) those he deems heretics, and so on. The natural law's rule formed a secular order whose coercive authority, as preparation for grace, was ultimately claimed by the Church as its own, by which to enforce with temporal punishments its view of orthodoxy. Thus, the political history of the late Middle Ages is the well-known story of the progressive humiliation of the secular ruler. Beginning with Gregory's claim of authority to depose an excommunicated king, it ends with Boniface's proclamation of sovereignty in both religious and temporal affairs, reducing the king and his nobles to an executive arm of an absolutist papal monarchy.

This outcome illustrates a logical pattern we will see repeated in various contexts and on which the critical phase of our argument in large part relies. When the public interest is conceived so as to oppose the subject's independence, then the conception's rule entails that there is no duty on those claiming authority under the conception to respect that independence. Consequently, the rule of the conception (i.e. of Law) becomes self-contradictorily the despotism of a personal ruler. Having

[41] Ibid., I, Q. 81, A. 2-3; I-II, Q. 56, A. 4.

no independent subject to whose rational or empirical assent it might submit determinations of Law for approval, authority may lawfully do to the subject whatever its representatives subjectively believe they have authority to do. Once again, the pleasure of the prince has the force of law. If Law's rule has this outcome, then not only has the ruling conception of public reason failed to support the distinction between constitutionalism and despotism; it has more basically failed on its own terms as a conception of public reason (or of Law) when made the fundamental principle of constitutional order. For when realized as fundamental, it has dissolved into the untrammelled personal rule of the one, few, or many exercising power in its name.

The Self-supporting Self

Because a conception of the public as the mutual recognition of Law and Law's subjects had turned to despotism, the constitution of liberty repudiates this conception. Equating it with its supernatural form, early liberal thought rejects *tout court* the idea of the individual's justification as the public basis of constitutionalism, demoting it to an object of private faith. Of course, what is here encapsulated in a sentence took place gradually over centuries, beginning with John of Paris and Marsilius of Padua and ending with Hobbes and Locke. Between those *termini* intervened the religious wars of the sixteenth century making clear that the Christian conception of the common good had itself become so fragmented into rival interpretations that it could no longer serve as the public ground of valid authority. Yet Christianity's fragmentation was perhaps as much result as cause of the delegitimation of its conception as the end of constitutional order. For what seems to have mainly inspired Luther's revolt was the worldly realization of an idea whose independence of human agency (represented as concupiscent) required that it remain otherworldly and without power.[42] Thus, his fundamental thesis—that of justification by faith alone—abolished the subordination not only of the laity to the priesthood in matters concerning salvation but also of the secular order to the gatekeepers of the world to come. Since no works performed under law could bring one closer to justification, and since faith could not be forced, secular authority was no longer justified as disciplinary preparation for, or as ministerial to, grace. Rather, its purpose was simply to restrain from attacks on life and property those who could not be restrained otherwise so that those whose faith made external restraint unnecessary could elaborate their faith through their callings in peace.[43] For Luther, the integrity of the Christian good itself demanded that it be without secular power; and since he identified the individual's justification with an otherworldly good incompatible with power, he (like all early liberals) had to downgrade the aim of secular authority. That aim becomes a 'peace of Babylon' for the sake of which authority is constituted as untrammelled.

[42] Martin Luther, 'Secular Authority', in *Martin Luther*, ed. John Dillenberger (New York: Doubleday, 1961), 383.

[43] Ibid., 369–78.

Accordingly, my argument thus far is that early liberalism deposed outright an idea whose collapse as a basis of constitutionalism was in reality the collapse of a particular, supernaturalist form of the idea. Its assuming this form was in turn caused by an equation of human agency with rebelliousness toward public authority, an equation that assumed the fixity of an historical situation in which no political authority yet existent had recognized the freedom to think for and rule oneself as a condition of its validity. Moreover, in deposing the supernaturalist understanding of man's final end, early liberalism rejected the idea of a human end as such as the public interest grounding constitutional authority. That is, it rejected perfectionism on the basis of a rejection of Christian perfectionism. So, for example, Hobbes denies the existence of a common good on the basis of an identification of final causes with those reified by medieval scholasticism into natures externally given to consciousness; while Locke ruthlessly empties the category of the political of all non-material ends on the basis of an identification of such ends with supernatural ones.[44] With the privatization of the human good, moreover, there goes a domino-like emancipation of the lower from the erstwhile higher, as the downfall of a supernatural perfection as the fundamental end of public order decapitates the medieval hierarchy of ends, which collapses as a consequence. Thus, the religious, philosophic, and moral conscience is emancipated from the rule of priestly dogma, natural law from the primacy of grace, secular from priestly authority, the individual from the law demanding selfless public service (as preparation for grace), and the wealth-producing class from natural subordination to the class of political virtue, there being no longer anything to distinguish them. We are then left with the modern picture of individual persons as naturally dissociated or apolitical, on a level with each other, free to think and believe what they will, and free to order their lives 'without asking leave or depending on the will of any man'. It is a picture of agents who now lay claim to independence as a matter of right rather than predestination to corruption and who, in demanding of authority that it subserve that independence, will, without aiming at it, create the conditions for an ideal recognition on earth.

What is the conception of the public interest suited to the interactions of naturally dissociated, free, and self-interested individuals? It cannot be a human good or ideal of personality, because, as Hobbes tells us, the only goods now known are the subjective values of individuals.[45] Nor can the public ground be sought in an agreement among these values, since individual opinions about the good are manifold, changeable, and often conflicting.[46] Not even such reliably shared interests as those in self-preservation or in the protection of property can serve as common ground, since

[44] Hobbes, *Leviathan*, 27–8; John Locke, *A Letter Concerning Toleration* (Indianapolis: Bobbs-Merrill, 1955), 17–20.

[45] Hobbes, *Leviathan*, 32: 'But whatsoever is the object of any man's appetite or desire, that is it which he for his part calleth good: and the object of his hate and aversion, evil.'

[46] As Kant says, 'As regards happiness, men do have different thoughts about it and each places it where he wants, and hence their wills cannot be brought under any common principle . . .'. ('On the Proverb: That May Be True in Theory, but Is of No Practical Use', *Perpetual Peace and Other Essays*, trans. Ted Humphrey (Indianapolis: Hackett, 1983), 72.)

some, even among the *bourgeoisie*, prefer death to enslavement to a despot who can keep the peace; and the unpropertied cannot be counted upon to support a constitution that would permanently exclude them from the means of subsistence.

Accordingly, to reach public ground from the premise of naturally dissociated and self-interested individuals, early liberalism had to create an opposition of its own. By a movement of abstraction, it distinguished between the subjective interests, inclinations, and ends of the particular individual, on the one hand, and the capacity, common to free agents, to act from principles all such agents could affirm, on the other. Under the old constitution, free will was not conceived by abstraction from the objects of appetite. On the contrary, it was viewed as the 'rational appetite', the purposeful inclination toward something believed to be good, or the 'proximate' (not first) principle by which ends moving the agent from without become deliberatively endorsed or rejected.[47] The claim that the free will is potentially free *from* inclination, that it is a capacity for originating ends rather than one for pursuing under the aspect of an end objects that move it externally (that it is an unmoved mover) would have signified a rebellion against Law's authority by the individual agent, the repression of which was precisely the aim of positive law. When, however, the capacity for choice as one for acting from non-given ends is interpreted morally as a capacity for acting from Law differently understood, it confers a dignity on the agent not deriving from its place in the natural order, yet without implying egoism or arrogance. Thus rehabilitated, free choice's potential as a new public ground of constitutional order was first grasped by Rousseau, but it was Kant who provided the classic arguments showing its suitability for this role.

In order to show that freedom of choice qualifies as a public thing, it was first of all necessary to argue that, in the human agent, choice is not (as it is in the brutes) a reed swaying hither and thither in the service of a desire stimulated by objects, that it is not, as Hobbes taught, 'the last appetite in deliberation', but that it is itself a determinant of action. It was necessary to show, in other words, that human choice is free and causal and not a passive conduit for impulses or inclinations. For Kant, the best available proof of the freedom of choice is the practice of morality. That practice reveals the possibility for the determination of choice solely by the impersonal dictates of practical reason. I can decide to perform my side of a bargain even if the terms are no longer advantageous for me simply for the sake of realizing a principle of promise-keeping that I can conceive all agents as affirming if they affirmed only what each could rationally affirm for himself. Since the human agent *can* act morally in this way, it follows that even when he does not, even when he acts non-morally pursuant to inclination, he acts independently of the causal force of inclination. No doubt his will is influenced by inclination, but it is not determined thereby, for otherwise morality would be impossible, and we see that it is not.[48] And because choice is not

[47] *Summa*, I-II, Q. 6, A. 1–2; Q. 9, A. 4.

[48] Immanuel Kant, *Critique of Practical Reason*, trans. Lewis White Beck (Indianapolis: Bobbs-Merrill, 1956), 28–31.

determined by inclination, it follows that the will is prior to subjective ends as something necessarily common to beings who are capable of morality. Hence it is a public thing upon which to build coercive duties governing external action given that virtue itself is unreliable.

However, to reveal the suitability of choice to ground constitutional order, it was not enough to establish its independence of sensibility. For one might still ask why, even granted its independence, something as vacuous as choice should be taken as the fundamental principle of public life rather than, say, happiness, understood as the maximum satisfaction of subjective ends across individuals. Happiness, after all, is something in which every agent is interested, however differently each may conceive it. No doubt choice is valuable as an ingredient of happiness, for it is almost inconceivable that anyone would consider himself happy if, like the individual plugged into Nozick's experience machine, he had no choice but to accept the satiety offered him. But why should anyone be interested in choice apart from happiness or, indeed, where respecting it would conflict with the greatest possible happiness overall? What is choice if not a choice *of* something *for* the satisfaction it will bring?

Accordingly, to establish abstract choice's credentials as a new principle of public order, it was also necessary to show that, despite its vacuity, it was something worthy of ordering public life on its own. This too Kant famously argued. Freedom of choice qualifies as a fundamental end because it is, according to Kant and the constitution of liberty his thought best articulates, the *only* absolute or 'unconditioned' end—that is, the only end whose worth is not relative to the sensibility of individuals.[49] Freedom is an absolute end because it is universally and necessarily presupposed in action pursuant to subjective ends. Behind every end given by appetite lies the agent whose end it is and who decides whether to accept or reject it as a motive for action. Thus, freedom is also a *final* end, though not in the sense of an excellence or perfection to be achieved or hoped for; rather, its finality consists in its being a formal capacity for purposiveness lying behind all action for specific purposes. As a final end, moreover, the agent's freedom is its dignity or absolute worth, that by virtue of which it commands respect for its liberty so long as its acts respect the equal liberty of others. This dignity, which Kant called the right of humanity in our own person, is inviolable.[50] Because freedom is an unconditioned end raised in dignity above the subjective ends of sensibility, the respect owed it is also unconditional. Thus, freedom of choice commands respect even if respecting it means settling for less happiness overall than could be obtained by curtailing liberty beyond what is required for equal liberty. It may be true that all agents seek happiness; but to hinder an agent's liberty in order to maximize social happiness is unilaterally to subordinate the agent to the satisfaction of *other individuals*, there being no public thing to be found

[49] Immanuel Kant, *Foundations of the Metaphysics of Morals*, trans. Lewis White Beck (Indianapolis: Bobbs-Merrill, 1959), 46–7.

[50] Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1991), 62.

amidst pleasures and pains that could give the agent anything in return for its submission.[51]

Here we should pause to observe that our earlier argument showing why no natural person can achieve valid practical authority also applies to the utilitarian standard even though the latter is impersonal. Since the individual can no more (without self-obliteration as separate) identify his interests with those of an aggregation of persons than with those of identifiable ones, his submission to the utilitarian standard is an unrequited surrender of independence to an external authority. The surrender is unrequited because the utilitarian ruler has no duty to respect the subject's self-rule beyond the one to count his preferences in the cost-benefit arithmetic. The self-ruling hedonist, after all, aims to maximize *his* satisfactions. In submitting to the utilitarian standard, he surrenders the freedom to act in his best interests to the authority of an impersonal calculus that displaces his own and that has no duty to refrain from acting against his interests no matter how important they are to his happiness. But an authority that has no duty to respect the self-interested agency of the subject is one that has lost the independent subject whose submission can alone validate its authority. Thus, the authority of the utilitarian standard is inherently despotic.[52]

The new conception of public reason is freedom of choice. Since the latter's essential feature is its independence from determination by impulse, it is as yet empty of positive determination. For a content it has nothing but the ends given by sensibility from whose rule it initially freed itself. Thus it is best described as the liberty to act or forbear as one pleases.[53] I am calling this conception of public reason the libertarian conception and the constitution it orders the constitution of liberty (or the libertarian constitution). Insofar as the libertarian conception treats the individual agent as an inviolable end, it expresses the liberal confidence that forms the starting-point of our inquiry. Here, however, the liberal confidence rests on a particular, atomistic view of the fundamental end of constitutional order. Specifically, it rests on the claim that the individual self is all by itself that end, that there is no moral order or common good that grounds, validates, or supports the individual's claim of inviolable worth. In other words, the libertarian self is self-supporting. It claims worth immediately rather than mediately through something else. In Kant's doctrine of right, this claim is reflected in the idea that the agent's fundamental right to a liberty consistent with that of others is 'innate', inborn in the capacity for free choice ('belonging to every man by virtue of his humanity'[54]), owing nothing to another and so unconstituted

[51] See Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 32–3.

[52] Nevertheless, utilitarianism has a right against the libertarian claim that choice is the fundamental aim of the constitution and that welfare is subordinate. The inclusive conception must also satisfy the utilitarian by showing how his welfarist concerns are, when purified of subjective preferences, vindicated by it.

[53] Kant, *Metaphysics of Morals*, 42.

[54] Ibid., 63. Rawls expresses the same idea when he calls the person of political liberalism a 'self-authenticating source of valid claims'; *Political Liberalism* (New York: Columbia University Press, 1993), 32.

by duty to a source. Many have criticized this claim, and I shall do so as well. My criticism, however, shall be friendlier than most others, for I shall argue that, while the vindication of the liberal confidence cannot proceed solely from the idea of the self-supporting self, it cannot do without that idea either. While most critics of libertarianism seek to bypass it and to ground the liberal confidence in a different conception of public reason, I shall argue that the liberal confidence can be vindicated only by showing how the libertarian idea of the self-supporting self is itself supported.

3. MUTUAL RECOGNITION AS COLD RESPECT

Having reached the libertarian conception, let us begin our study of its constitution with two critical observations. First, although freedom of choice is said to be the sole end commanding unconditional respect, it is plain that this saying amounts to a claim rather than an objective truth, since choice here appears as an absolute end only in comparison with the subjective ends given by sensibility. Only if no goods existed but those relative to taste and preference could we say without qualification that choice alone is universal and necessary, but libertarianism has identified all goods with preferences on the basis of a limited experience with the collapse of the authority of objective goods supported by revelation. So, the fundamental principle of the libertarian constitution is really a claim that liberty alone has absolute worth. But a merely subjective or *soi-disant* claim to absolute worth is self-contradictory, and so there is a theoretical impetus for the free agent to obtain objective validation for its claim. Under the old constitution, the agent's worth was not a claim that had to be realized. It was an objective reality revealed to the agent by the Author of reality and that it was its simple vocation to accept. To *claim* worth was already to exile oneself from its source. Since, however, worth as externally revealed proved enslaving, the agent, equating worth as objective reality with worth as externally revealed, now rejects the former simply. Final worth now inheres in a subject set over against an objective world emptied of purposes, a world of blind causality or 'matter in motion', in Hobbes's phrase. The only purposiveness is in the agent. But this means that the agent now stands to the objective world of material things as a would-be despot claiming authority over chattels. And, like any claim of authority, this one too requires objective realization in order to become true or valid authority. Accordingly, free agency is now the locus, not only of a claim of final worth, but also of a desire and striving to gain objective confirmation for its claim through an acquisition recognized by other agents as 'property'. Indeed, since liberty's final worth is a public thing only if the *soi-disant* claim receives external validation, this striving, formerly denigrated as concupiscence, is itself a public interest, liberated from the shackles of medieval canon law and claiming status as a 'right', so that any hindrance to free acquisition (and not only takings of things already acquired) is now a wrong.[55] In this

[55] Kant, *Metaphysics of Morals*, 68.

way, the constitution of liberty, having initially identified all goods with subjective preferences, generates a public good of its own derived from freedom. The agent's striving for outward confirmation of its authority-claim over things is the most elementary constitutional good of liberalism. Not only are feudal restraints on alienation, trade, and mobility as well as canon law fetters (for example, usury laws) to acquisition unconstitutional restrictions of this striving (they are invalidated by common-law judges); those who legislate are expected to take positive measures to facilitate it and to create the climate and conditions congenial to it.

Second, although the theoretical impetus toward acquisition is acknowledged in libertarian thought, its implications for the libertarian conception of the public are not. Libertarianism identified the fundamental end of constitutional order with abstract choice because it identified all goods with subjective preferences. Its identification of the fundamental end with choice is, as we'll see, the basis of its core constitutional doctrines: the restriction of coercive duties to negative ones of noninterference with liberty and the concomitant refusal to acknowledge any human interests capable of overriding rights of liberty. But libertarianism then claims that liberty's final worth gives it a right, not only against coercive restraint, but also *to* unlimited dominion over things, so that a law making something incapable of being owned violates rights.[56] Dominion over things is not, however, analytically contained in the right to liberty; it is not a right innate in the capacity for free choice. If dominion is nonetheless to be joined to the liberty right, there is needed the idea that liberty would lack something essential to its end-status if the agent did not have authority to use for its ends the things he has physically possessed so as rightfully to exclude others even when not physically holding them. But something that satisfies a lack is desired as a good, and so ownership is so desired. Yet ownership, evidently, is not good relative to individual preference; rather, it is good simply, for it is essential to the validation of liberty's final worth. So libertarianism has generated a public good that contradicts its original equation of goods with preferences on the basis of which it identified public reason with abstract choice. Does it then revise its conception of public reason in the light of this development? No. It holds fast to its conception and equivocates on the public irrelevance of goods.[57]

[56] Kant, *Metaphysics of Morals*, 68.

[57] We see this equivocation at work in Kant's doctrine of right. Kant argues that the sphere in which justice is relevant is that of external action wherein the free choice of one agent might have an impact on another's. Moreover, he says, what is salient for justice is just the relation between choice to choice and how they can be reconciled under a law giving equal scope to each. Neither the wishes of the agents nor their needs or motives are significant for justice, for no one can rightly be forced to serve another's biological needs or preferences. That is a matter of voluntary beneficence. This, of course, makes sense, but notice that Kant has equated justice with the outward reconciliation of choice to choice because he has equated all material ends with the idiosyncratic motives one may have in acquiring a thing or in entering into a contract. Yet, soon after, this equation is silently revoked. For in explaining why the agent has a right, on the basis of empirical possession, to exclude others from objects no longer in its empirical possession, Kant says:

> . . . an object of my choice is something that I have the physical power to use. If it were nevertheless absolutely not within my rightful power to make use of it, . . . then freedom would be depriving itself

Let us, however, leave critical thoughts to one side for now and examine more sympathetically the libertarian conception of public reason. The agent's claim that choice alone has unconditioned worth is a claim of right both against enslaving appropriations of its agency and against hindrances to the free exercise of its agency unwarranted by the requirements of equal liberty. These two kinds of claim are specified at the levels of mind, body, and things. At the level of mind, the agent's claim to end-status is a claim of right against coerced renunciations or professions of belief as well as against any hindrances to its liberty to think, believe, speak, and write as it pleases. At the level of the body, worth is asserted through a claim of exclusive control over the biological life essential to the exercise of free choice and, in particular, as a claim of right against another person's destruction or injuring of its life, against unconsented-to contact with its body, against forcible appropriations of its body to the service of another's ends, as well as against impediments to its liberty to move about as it chooses in the pursuit of its own ends. At the level of things, agency's claim of worth is asserted as a claim against hindrance to acquisition and against interference with its exclusive control over the unfree entities it has subdued to its worth by first possession and use, or that it has acquired through consensual transfers.

In all of these specifications, agency's claim of worth is asserted *against* the world. Yet, as we have seen, worth is a public thing only if the subjective claim receives objective validation from another. Now, the conditions of this validation exactly parallel those we identified earlier as necessary to the validation of a claim to authority. This is so because the isolated individual agent is now claiming the authority over others that was previously claimed by the representatives of natural and supernatural ends. It claims this authority insofar as it claims a right to bind other agents to recognize its end-status by respecting its liberty and original acquisitions. For in purporting to bind others to curtail their freedom of action, the agent claims that its end-status is a pre-emptive reason for others to forbear from interfering with its liberty or from

> of the use of its choice with regard to an object of choice, by putting usable objects beyond any possibility of being used . . . this would be a contradiction of outer freedom with itself (*Metaphysics of Morals*, 68–9).

Now, freedom of choice is certainly contradicted by choice's determination by impulse. It is also contradicted by coercion. But freedom of choice as Kant understands it, namely, as the 'independence from the constraint of another's will', is not contradicted by a thing's being *res nullius*—that is, incapable of being owned. What is contradicted by a thing's being *res nullius* is rather the 'rightful power' or authority of free choice over objects, the authority of an agent to use them for its ends. That authority turns out to be a need of freedom, that without which freedom would be 'depriving itself' of something it needs for its self-coherence as a final end; for if it could not rightfully use objects for its ends, then objects would be rightfully independent of human agency. So here a need has emerged that is not a matter of preference or biological necessity but that was not taken into account in the original identification of justice with the reconciliation of formal liberties (indeed, that seems to be why Kant has to add it as a 'postulate of practical reason'). Nevertheless, the original conception is allowed to stand, while action just for the sake of actualizing freedom's practical authority is shunted to the sphere of private, self-regarding virtue. Initially, therefore, ends are banished from the public sphere because they are equated with preferences; then a public end is tacitly acknowledged but relegated to private morality so as not to disturb the original nomination of abstract choice as the public basis of coercive duties. We will see similar equivocations in the jurisprudence elaborated by courts under the libertarian constitution.

taking its acquisitions, however persuasively other considerations might argue in favour of their doing so.

We have seen that a claim to authority can be validated only by the free recognition thereof of a subject whose independence is reciprocally recognized by the claimant. This, we said, is the structure of an ideal recognition—that is, of one genuinely productive of authority and obligation. Only if the subject who submits can see his independent agency reciprocally submitted to for confirmation of the other's claim does he retain the independence that qualifies him to deliver an objective validation. In the present context, this means that the agent's authority to bind another to respect its liberty is fulfilled only if, in an ideal transaction, each freely accepts the other's end-status as a pre-emptive reason for forbearance on condition that the other do likewise, so that each agent's liberty is limited within bounds consistent with the equal liberty of the other. This ideal transaction is then a model by which to determine whether any empirical interaction is productive of genuine authority and obligation. If an empirical interaction is such that it objectively mirrors the mutual respect between the parties in the ideal one (i.e. is such that it can be represented as an interaction of the ideal parties), then we say that each party to the empirical interaction has a right to that action and the other a correlative obligation to forbear from hindering. The parties to the empirical interaction need not act out of respect for each other's end-status; it is enough that their interaction is one that the ideal parties could engage in.

We can now define the various species of a right from the libertarian standpoint as follows. A *moral* right is a claim of final worth by a free person manifested in an external action (for example, in an act of taking possession, use, risk-imposition, or of demanding compensation for a broken promise) capable of being recognized (i.e. validated) by another person without loss to its equal end-status. A *civil* right is the legal certificate bestowed on all such claims, saying that the claim is suitable (because inherently valid) for objective realization against other persons through public power. A *constitutional* right is the same certificate saying that the claim is owed respect by public power in the sense that transgressions are justified only if necessary better to sustain the claim. All civil rights are constitutional rights but (as we'll see) not all constitutional rights are civil ones.

We can see, then, that the reciprocal submission requirement for a valid right can be translated into Kant's famous formula: 'Any action is right if it can co-exist with everyone's freedom under a universal law.'[58] The libertarian conception of public reason turns out to be, not the free choice of the singular agent, but the Law under which the free choice of one agent is rendered compatible with the free choice of others. Some perspective on this conception can be gained by comparing it with the previous one. Under the pre-modern constitution, public reason was the mutual recognition of Law and Law's subjects that brought into existence a political community, a *respublica Christiana*; under the libertarian constitution, public reason is

[58] Kant, *Metaphysics of Morals*, 56.

the mutual recognition of dissociated agents in Law. The political relation between Law and subject is here not part of the conception. Under the previous constitution, the law governing the secular order was a natural law directing agents to a political virtue preparatory to their final good in heaven; under the libertarian constitution, Law regulates the interactions of self-supporting atoms. Hence the rule of Law is essentially the rule of private Law, and the libertarian constitution is largely the pre-political (or common-) law of property, contract, tort, and crime.

Now for two more unsettling thoughts. Their common theme is that there exists a tension between the libertarian conception that has now emerged and another idea essential to the libertarian constitution. First, the libertarian conception is now richer than the idea of the self-supporting self from which libertarianism begins. The public thing is now an ideal legal relationship within which one agent's liberty is reconciled with another's. In this relationship, the agents are interdependent; each gives and receives validation to and from the other. Yet the intersubjective matrix of publicly valid worth-claims contradicts the atomistic presupposition on which the matrix is built. The libertarian premise is that the individual possesses final worth in isolation, solely by virtue of its own agency. The agent is self-supporting, needing no other for the constitution of its worth. Because of this premise, ideal recognition manifests itself in the constitution of liberty in the specific shape of what I'll call mutual cold respect. In this relation, each agent establishes its sovereignty over a particular domain unilaterally, and each then respects the boundaries thus separately defined. For example, each agent claims sovereignty over its body just in virtue of agency's inseparability from its body, but this claim matures into a right only when, for reasons of self-consistency, each respects the same claim by others. Or each claims a property in a thing by virtue of first possession and then respects whatever boundaries emerge from the series of voluntary exchanges proceeding from that initial acquisition. In cold respect, therefore, the relational fruition of the agent's right-claim to a sphere of free choice is subsequent to its unilateral definition of the sphere's boundary. The scope of the right is not itself mediated by the reconciliation of worth-claims. Property, as lawyers say, is prior to liability rather than a conclusion from a rule of liability seeking to accommodate competing interests.

This asocial feature of libertarian rights is a notoriously mixed blessing. Because of it, a person's right against unwanted contact with his or her body is absolute vis-à-vis others; it does not issue from a reconciliation of competing needs (for organs, for example), from Pareto optimality (allowing for welfare-augmenting invasions subject to compensation), from the general welfare, or anything of the sort. No one can be forced to serve another's ends. But this feature will also permit someone to appropriate all the land around the square metre on which his neighbour is standing and demand an exorbitant rent for a right of way. Thus, the asocial demarcation of rights seems to be at once essential to the individual's inviolability and potentially subversive of its independence.[59] This dilemma poses the following problem for a theory of

[59] To be sure, not all libertarian rights are like this. User rights are mediated by a standard of socially ordinary use; rights against accidental injury are mediated by an idea of fault understood as the imposition

liberal justice. Because the framework of cold respect potentially subverts the person's independence, libertarianism will have to yield to a reconceived liberalism that emphasizes the interdependence of agents revealed by the libertarian conception itself. Yet because the framework of cold respect is also essential to individual inviolability, that framework will somehow have to be preserved, even though it rests on an idea of the self-supporting self that its own conception of public reason contradicts. The challenge is to reconcile these demands within a unified theory of the liberal constitution.

The second point of tension within libertarianism is this. Public reason has been identified with the Law that reconciles the liberty of agents conceived as dissociated or as acting in a pre-political and anarchical condition. The political relation between Law as authority and the agent as subject of this authority is so far outside this conception. Yet the complete validation of the agent's worth-claim in Law requires that Law have authority, for otherwise each person's right is dependent on another's opinion of his own, which dependence contradicts the worth-claim inherently validated in Law. So the same momentum that drove the self-supporting self into civil relations of mutual recognition also leads it into a political relation exhibiting the same structure as the civil one. For the sake of its self-worth, the agent recognizes the authority of Law, which reciprocally submits for confirmation of its authority to the self-imposability of its determinations by worth-claiming subjects. This means, however, that the agent's worth-claim is finally actualized in a relationship of mutual recognition between Law and Law's subjects that was not taken into account in the libertarian identification of public reason with Law as a civil relation between agents. In the political relationship, agents are conceived, not as dissociated, self-supporting, and mutually indifferent, nor are all their conceptions of the good viewed as subjective opinions; rather, they are conceived as citizens who obey self-imposed laws, and the autonomy they achieve in doing so is a good in public reason because (as it turns out) it is a good logically developed from the worth-claim they originally asserted. Accordingly, if the libertarian conception of public reason is richer than the conception of the agent from which it stems, it is also poorer than the conception of public reason to which its own actualization points. Whereas the latter conception makes normative a vision of self-ruling citizens, the libertarian one envisages apolitical agents for whom Law is an external model for their private transactions. A distinction thus emerges within the constitution of liberty between an explicit conception of the public and a tacit one, the dissemblance of which becomes necessary to the paradigm's maintaining an appearance of self-completeness.

of socially extraordinary risk. Indeed, even first possession pays tribute to intersubjectivity in the requirement that enforceable possession be 'open and notorious'. However, these phenomena are, I believe, best understood as progressively clearer manifestations of intersubjectivity within a paradigm otherwise ordered to the final worth of the self-supporting self. They are mitigations of cold respect rather than transformations.

4. CRITICAL AND REDEMPTIVE PERSPECTIVES

With so many sources of instability in libertarianism's conception of public reason, one may wonder how it can be coherently preserved as a distinctive ordering conception so as to salvage the guarantees it contributes to the individual's inviolability. This section makes a start at an explanation.

The principles of the constitution of liberty together with their specification in judicial doctrine flow from a conception of public reason as the mutual cold respect for freedom of choice between otherwise dissociated and self-supporting agents. Following tradition, I'll call this conception of public reason (or of Law) the common will, leaving the terms common welfare and common good to designate the richer conceptions of the public that will come forward later. The common will is the reasonable will of the self-supporting person. The reasonable will asserts through action only those claims to worth that another agent could recognize without loss to the equal worth that qualifies it to give a validating recognition. Hence it wills the body of civil laws under which liberties are mutually adjusted and reconciled. Enforcement of these laws is an exercise of valid authority because, themselves embodying an ideal recognition, the laws are recognizable as binding by the subject without loss to its independence. They are capable of being self-imposed by self-respecting agents. Thus the subject is also ruler. Moreover, laws instantiating mutual cold respect limit the scope of public power, whose trustees have authority in executing these laws but never (within the libertarian constitution) in contravening them. Thus the ruler is also subject. Commands of the ruler that, for the sake of a particular interest, infringe rights embodying mutual respect are invalid as law, since here the subject's submission would be one-sided. In recognizing such a command as binding on him, the subject would alienate the independence that qualifies him to give objective confirmation to the ruler's claim to bind. The first principle of the constitution of liberty is thus the sovereignty of the common will.

One might think that the common will's sovereignty entails the supremacy in the hierarchy of positive legal norms of a written instrument specifying the constraints that the common will's sovereignty imposes on government. On this view, libertarian constitutionalism is fulfilled when a constituent assembly ratifies a bill of rights under which an independent judiciary reviews the actions of the legislature and executive and invalidates as norm-creating those actions inconsistent with rights. This, however, is not the case. The sovereignty of the common will is one thing, and the method of enforcing that sovereignty another. In the movement from anarchy to the authoritative rule of Law, individual agents are pictured as surrendering their liberty to determine and execute Law for themselves to common rulers who exercise the legislative, executive, and judicial powers inherent in Law's (here the common will's) sovereignty and who now have a monopoly on interpreting Law's demands. Since the ruler's interpretative authority has, by virtue of this transfer, become absolute (i.e. untrammelled by a duty of correctness), there is no such thing

within the libertarian constitution as the securing of moral rights against the erroneous decisions of rulers by means of their entrenchment in a supreme positive law guarded by a judiciary accountable to a standard of correctness. The only question is: in whose untethered hands are moral rights safest? Whose interpretative authority shall be final? Nothing in the idea of the common will's sovereignty, however, determines an answer to this question. The parties to the social contract might allocate their original powers to a supreme legislature for delegation to subordinate agencies, or they might parcel out their powers to co-ordinate branches of government so that absolute authority will lie in no single set of hands. They might trust the legislature to safeguard the common will's authority, relying perhaps on a mechanism for holding it accountable to electors chosen on a narrow property qualification; or they might fear a legislature whose composition they cannot ultimately control and prefer to repose their confidence in an independent and non-elected judiciary drawn from the patriciate. All this is a matter of political prudence rather than theoretical necessity. Within the libertarian paradigm, therefore, entrenchment of the unwritten constitution in a supreme positive law placed beyond the reach of the legislature and interpreted by an independent judiciary is an option.[60] Nevertheless, because its entrenchment in the first ten amendments to the United States Constitution has produced a wealth of jurisprudential material from which to sift nuggets of ideal constitutional law, I shall assume that the libertarian constitution is entrenched.[61]

Part of our task in the next two chapters is to derive the principles and (selected) judicial doctrines of the constitution of liberty from the idea that the common will is sovereign. In this way we exhibit this constitution as a coherent paradigm of political justice resting on a particular conception of public reason. This is the descriptive part of our enterprise. There is also, however, a critical part. Critical power flows from two sources, one wholly internal to the libertarian paradigm, the other on its perimeter. From the internal standpoint, we can criticize some judicial doctrines either as failing to protect the common will's sovereignty against factional (including majoritarian) usurpation or as amounting themselves to a judicial usurpation. A doctrine will fail to protect the common will's sovereignty (will be overly deferential to the law-maker) if it permits legislative infringements of rights validated in an ideal recognition for reasons of partisan benefit.[62] Because such doctrines could not reflect *any* conception of public reason, they are excluded not only from the constitution of liberty but from

[60] We will see that the situation is otherwise under the egalitarian paradigm.

[61] This is not to say that legal systems with unwritten constitutions are poor in this respect. Obviously, entrenchment is unnecessary to the judiciary's authority to enforce the libertarian constitution against the executive acting without express legislative authorization; see, for example, *Entick* v. *Carrington* (1765) 19 Howell's State Trials 1029; *Roncarelli* v. *Duplessis* [1959] SCR 121.

[62] For example, when a doctrine allows incursions on the freedom of conscience in order to enforce the patriotic sentiments of the majority or allows limitations on free speech based on offence to majority sensibilities; see *Minersville School District* v. *Board of Education* 310 US 586 (1940), *Roth* v. *U.S.* 354 US 476 (1957).

liberal constitutionalism as such. A doctrine will signify a judicial usurpation of the common will's authority (will be overly activist) if it justifies striking down a law that the common will could enact, for in that case, the doctrine reflects a policy preference of judges externally imposed on subjects whose representatives legislated otherwise. The 'substantive due process' doctrine of *Lochner* v. *New York* is widely thought to be an example of this.

However, our critical leverage is more powerful than this. While the constitution of liberty generates some principles and doctrines that are enduring features of liberal constitutionalism, it also produces some that the ideal constitution will reject. Thus, doctrines that are required by the libertarian paradigm taken on its own may be mistakes from the point of view of the liberal constitution in its full development; and, conversely, principles that the libertarian paradigm (taken on its own) would exclude might be permitted or required by the ideal. Because we also occupy a normative standpoint outside the libertarian paradigm, we are in a position to sort out the enduring legal content of this paradigm from the ephemeral one.

We do this in the following way. Although the principles of the libertarian constitution are derived from the normative supremacy of the common will, they cannot find their ultimate justification in that idea, for the common will is (as we've seen) an unstable conception of public reason and so an unstable conception of fundamental justice. Rather, those principles will find their ultimate justification, if at all, in an inclusive conception of public reason *of which the common will is a particular instance and constituent element*. The inclusive conception (to which the partial ones lead) will turn out to be an ideal recognition between Law and Law's subjects, the meaning of Law in this relation to be determined later. This means that we can draw a distinction between two kinds of principles and doctrines belonging to the libertarian paradigm: those that are consistent with the paradigm's status as a constituent part of liberal justice and those that involve mistaking the part for the whole. Those consistent with the paradigm's constituent status reflect claims of individual worth that are confirmable as rights through the process of mutual recognition. All such claims—that to a content-indifferent right to free speech, for example—are permanent elements of liberal constitutional law, because they are manifestations of the structure of ideal recognition in which claims to bind others to acknowledge one's worth are validated. The principles reflecting an absolutization of the part reveal themselves in three ways: first, they are the principles that, though involving a rejection of objective goods based on the collapse of revelation-based goods, nevertheless assert an absolute and exclusive validity; second, they are the principles whose claim to exclusive validity dissembles a tacit acknowledgement of the objective goods they exclude; third, they are the principles whose exclusive validity turns the constitution of liberty into a new form of despotism negating its own claim of inviolable individual worth.

Accordingly, because we can see the libertarian constitution from the vantage-point of the inclusive conception, we have an expanded idea of what doctrines of

constitutional law amount to judicial overreachings. From this standpoint, a doctrine represents a judicial ouster of the sovereignty of the inclusive conception when it expresses a claim to sovereignty of a constituent conception. In that case the doctrine reflects a partisan assertion of ideological hegemony that cannot be part of liberal constitutional law. We shall see that much of the United States Supreme Court's First Amendment and equality jurisprudence can be understood in this light. It is also the real import of *Lochner* v. *New York*.

While, however, our critique of libertarian doctrine presupposes a normative standpoint beyond the libertarian constitution, it is not external in a way that would rob it of force for a libertarian. This is so because, unless I err, the external standpoint is never appealed to or begged in criticism of doctrine; only standards recognized by the paradigm are invoked. Thus, in criticizing libertarian doctrine, we rely only on equivocations uttered within the libertarian paradigm itself, deploy a distinction between constitutionalism (or the rule of Law) and despotism that the libertarian paradigm itself acknowledges and is sensitive to, and measure the libertarian constitution against the liberal confidence this constitution itself claims to vindicate. In that sense, our critique is internal to the libertarian constitution and thus has purchase vis-à-vis its representative theorists.

Our having a perspective on the libertarian framework from a standpoint beyond it will not only give us critical distance from that framework; it will also enable us to redeem its valuable features from their connection with the framework's unstable ones. Just as libertarianism rejects objective goods absolutely because of the delegitimation of supernatural goods, so will subsequent theories of justice reject absolutely the rights autonomously engendered by mutual cold respect simply because of the common will's delegitimation as a conception of *fundamental* justice. In doing so, they will compromise the inviolability of the individual that is the object of the liberal confidence. Thus, by winnowing the content of the libertarian paradigm that instantiates ideal recognition from that which reflects the false absolutization of cold respect, we rescue the valuable elements of libertarianism from the latter's instability as a complete theory of justice. In this way, our outside perspective yields redemptive as well as critical power.

A final word before we enter upon a discussion of specific constitutional rights. Although we sift the gold from the ore in the libertarian mine, we do not do so thinking that we can abandon the mine and carry away the gold. As we'll see, the valuable elements of the libertarian paradigm come only with that paradigm; one cannot subsume the framework under one ordered to a better conception of public reason and still salvage the value it generates. By contrast, it will be possible to discard impurities and save the mine (along with the gold), because the impurities are connected not to the framework's *autonomy*, but to its *false absolutization*. Of course, this is not a complete answer to the question posed at the beginning of this section. We may still be perplexed at how we can coherently—that is, without falling into a disconnected plurality of paradigms—preserve even as a part of liberal justice a framework ordered

to an impoverished conception of public reason destined to be surpassed. The full answer must await the inclusive conception.[63]

[63] But we perhaps have enough to obtain a glimpse of it. If Law is understood as the structure of an ideal recognition productive of valid authority, then Law's authority—the authority of that structure as a ground of valid authority-claims—must itself be validated through an ideal recognition. This means that Law must submit to the spontaneous production of relationships evincing its structure by independent agents seeking their own worth. The requirement that Law submit for confirmation of its authority to the spontaneous recognition of the independent subject redeems each instance of ideal recognition (together with all of its doctrinal offshoots) produced by that subject. The fact that the instance fails as a complete account of liberal justice is just more proof that the mutual recognition of Law and Law's subjects is that account.