

1232 etc. - rationalism

DEMOCRATIC THEORY

by Giovanni Sartori

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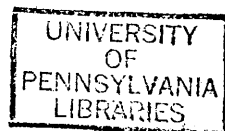
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*It is our way of using the words
"democracy" and "democratic
government" that brings about the
greatest confusion. Unless these
words are clearly defined and their
definition agreed upon, people will
live in an inextricable confusion
of ideas, much to the advantage of
demagogues and despots.*

TOCQUEVILLE

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Chapter XI

Empirical Democracies and Rational Democracies

"While most lasting empires and constitutions have been built without preconceived ideas and over-all plans, structures which have been too consciously designed have lasted just long enough to fall heavily on builders and spectators alike."

—R. Ruyert†

1. Democracy Is a "Historical Product"

SINCE THE discovery of history by the Romantics the sentence, "This is a historical product," has become commonplace. If we take this statement at its face value it is nothing more than a banality, since it is obvious that everything that has existed or does exist in history is a historical product. But the statement can be interpreted so that its meaning is not banal.

In the first place, when we say, for example, that democracy is a historical product, what we actually mean is that a democratic system is possible insofar as history has created the conditions and the prerequisites for its working. This is why we also speak of historical maturity, alluding to the fact that we must take account of the temporal factor, and that an experiment in democracy has little

chance of survival if it is attempted prematurely. It would be more precise to say, in this sense, that democracy is the product of a *certain history*—I mean, of a given historical background. And in this qualification there is already a hint as to why democracy can only be exported with difficulty.

If the sentence, "This is a historical product," is analyzed further, it also takes on another meaning, or rather calls our attention to the *sui generis* nature of our problems. In this sense, when we speak of a historical product we are speaking of something that in the final analysis defies both rational dissection and deliberate, artificial reproduction. Historical products hold secrets that scientific reason cannot penetrate. And this is because, in historical—as opposed to natural—events, imponderable factors which we cannot measure or isolate come into play. When we wish to plan and steer history deliberately, we are confronted with "invisible entries," with factors which we can only glimpse, and to which we can therefore give only vague names, like *ethos*, *Volksgeist* (spirit of the people), custom, cultural pattern, vitality, and so on. We know that these are very important entries in our bookkeeping system and in our calculations, but we do not know how to identify, weigh, and count them, either in regard to their interplay or in regard to their respective coefficients of dynamism.¹

In this sense the sentence, "This is a historical product," warns us of the limits that prevent us from lording over history in the same way as we do over nature. Historical products always contain hidden entries that cannot be expressed in clear and distinct ideas, and therefore confront us with unknowns that a rational animal cannot properly master or create anew. For instance, the *animus* is an imponderable which can hardly be directed and nurtured deliberately. Yet, the bearing of this "symbolic imponderable" on the outcome of our attempts to plan history is decisive. And from this viewpoint we can better understand why, when a democratic form is transplanted to a different historical humus, something unforeseen and uncontrollable always happens.

Rousseau, who looked at the English constitution through the eyes of Montesquieu, sent word to the Anglo-Saxons that even though they thought they were free, they were actually slaves.² But he

based his judgment on those elements of the particular historical product, the evolution of the English constitution, which Montesquieu's rational transcription succeeded in tracing out. And I understand very well why Rousseau did not find this soulless skeleton reassuring. I mean that in a historical vacuum Rousseau's thesis that a people who are limited to electing their representatives are free only at the moment that they vote (for they become slaves again immediately after) is a perfectly plausible thesis. Except that the British were really free enough, for their liberty was based on custom, on common law, and on an unwritten constitutional *praxis*. Thus, what Rousseau should have said, strictly speaking, was that the written constitution that Montesquieu had deduced from English practice was not sufficient to guarantee freedom to people who imported it.³

The sentence "Democracy is a historical product," can have a third meaning. It may also call attention to two different methods of historical fabrication, one of which is spontaneous and the other preconceived and intentional (relatively speaking, of course). In this sense it emphasizes the difference between unplanned and planned history-making, between the man who considers himself the obstetrician rather than the father of history, and the man who regards himself as its *dominus*, if not its creating God. Thus the proposition, "American democracy is a historical product," does not have the same meaning as "Soviet economic planning is a historical product" (even though, in the banal sense of the statement, the Soviet experiment equally belongs in the category of historical facts). Nor does it even have the same meaning as the sentence, "French democracy is a historical product," because the revolution of 1789 was a deliberate break with the past while the Declaration of Independence of 1776 was a claim for the right to advance along the path of the liberties already existing in England.

The difference is that when the statement in question refers to American democracy, we mean that American democracy is an authentic historical product, that is, a historical product in the specific and fullest sense of the expression.⁴ For American democracy grew out of a gradual, uninterrupted process of spontaneous historical endogenesis. "Historical product" in this sense, then, indicates the

genuine mode of historical development i.e., a pattern of behavior which *goes along* with history instead of going against it.

If American democracy is a genuine historical product, this is because it was patiently constructed by a *forma mentis* that seems to be tuned in perfect harmony with the fabric of time. That is to say that American democracy is the fruit of an empirical mental pattern that proceeds cautiously by historical addition, a pattern that is so different from the rationalistic radicalism which characterized the French Revolution that it started a revolution in order to lend strength to historical continuity rather than to break it.⁵ Whereas the rationalist tends to re-build everything *ab imis* and to start with a *tabula rasa*, the empiricist prefers mending what he finds at hand to re-making it anew. What matters for him are not so much principles as precedents. *Stare decisis* is the formula that expresses his legal approach; and to stand by what has already been done, and in this sense to stick close to the facts, is his criterion of historical planning. And this is the secret of the Anglo-American type of democracy.

In this sense, then, calling American democracy an authentic historical product is the same as saying that it is an empirical type of democracy. Whereas saying that a democracy of the French type is not a historical product in the same sense, amounts to asserting that it is a rationalistic democracy built on abstract theory rather than on practice.⁶

2. Rational Mind and Empirical Mind

I am, of course, speaking of empiricism not in the technical sense, but as a mental pattern that has characterized the whole course of English history, and that, in its pragmatic form, now characterizes the American way of life and thought. I assume that it is equally clear that I am not speaking of pragmatism in a technical sense either. When I say that Americans are typically pragmatic, and that their genius consists of a *forma mentis* that is basically practical and instrumentalistic, I am using the terminology of Peirce, James, and Dewey to indicate a *Gestalt* that existed long before these terms were coined. For English empiricism turned into pragmatism at the very moment that it was faced with, and challenged by, a limitless virgin continent to be conquered.⁷

Clearly there is a difference, a considerable difference, between the progenitor and the progeny, between an empirical and a pragmatic mental pattern. Empiricism is well expressed in the cautious, patient Wait-and-see motto, while pragmatism can be better expressed in the adventurous, dynamic Try-and-see formula. However, if we compare these two patterns to the rationalist mentality, the difference between them becomes less significant. So, for brevity, I shall say "empiricism" to indicate both English empiricism and American pragmatism, or, in any case, to indicate their common base.

While the empirical (empirico-pragmatic) mentality stays *in medias res*, close to what can be seen and touched, the rationalist mentality soars to a higher level of abstraction and hence tends to be far removed from facts. While the former is inclined to accept reality, the *raison* tends to reject reality in order to re-make it in its own image; while empiricism tends to be anti-dogmatic and tentative, rationalism tends to be dogmatic and definitive; while the former is eager to learn from experience and to proceed by testing and re-testing, the latter goes ahead even without tests; while the empiricist is not deeply concerned with rigorous coherence and distrusts long chains of demonstration, the rationalist is intransigent about the necessity for deductive consistency—and therefore, in the summing up, while the former prefers to be reasonable rather than rational, the latter puts logical rigor above everything and thus is rational even if it means being unreasonable. While the empirical approach takes the attitude that if a program does not work in practice there must be something wrong about the theory, the rationalist will retort that what is true in theory must also be true in practice—that it is the practice, not the theory, that must be wrong.

Of course, the borderline between the empirical and the rational approach is not clear-cut. They do not express two kinds of logic but different degrees of alertness and sensitivity within the context of a common logic, of the same formal logic. Also, I am not implying that everybody who speaks English is an empiricist, and that everybody who speaks French or German or Italian is a rationalist. Obviously, we are dealing with prevalences, or prevailing tendencies, and it is clear that every culture has its rebellious minorities. There is a rationalistic current in Anglo-American thought, just as we find an

anti-rationalistic line (which is sometimes empirical but, it is interesting to note, more often plainly irrationalistic) in the history of European culture. However, these exceptions and nuances do not alter the basic fact that the difference between empirical and rationalistic cultural patterns is an essential key to understanding the dissimilarity and mutual incomprehensions (in politics as well as in other fields) of the Western world. And that is why it is important to look at the underlying cultural patterns if we want to understand the difference between democracies of the Anglo-American type and, let us say, of the French type.

I shall start with some impressionistic evidence; then I shall examine in detail how the empirico-pragmatic attitude characterizes the Anglo-American definition of democracy, and, subsequently, in what way this definition is inadequate for those who do not receive democracy from history but have to create it out of their own heads.

3. Political Rationalism

It is certainly no accident that democratic regimes in a large part of Continental Europe evolved in the direction of parliamentary, if not assembly, systems, whereas a similar development did not take place either in England (where parliamentary government is an inaccurate name for a cabinet system) or in the United States. And if we take 1830-1831 and 1848 as our reference points for the past, and the post-World War I and II situations for the present, it is striking to see how the difference between French-type and Anglo-American-type democracies has, if anything, increased with regard not only to the written but also to the living constitutions. Why is this? And further how can we explain the fact that the difference has increased in spite of the unwavering admiration for the English model professed by European constitutional theory from Montesquieu on?

The explanation is that neither the good intentions of the constitution-makers nor the unhappy experiences that often accompanied the various "more democratic" rewritings of our constitutions were able to forestall the logical implications springing from the original sin, so to speak, of the European systems. For the democracies of the French type are cerebral: they are created by *la raison* and embraced with rational consistency and out of faith in reason. This means that

this is true, but only for

apriori truths.

they were constructed deductively, with logical rigor, from premise to consequence. Hence, since the major premise—to which everything must lead and from which everything must follow—is that “the *demos* is sovereign,” these systems have really never freed themselves from the chains of Rousseau and remain shackled to the will-of-the-people concept of democracy.⁸

Of course, it is not that the Anglo-American democracies deny that popular sovereignty is the system's point of departure and of reference. However, to see how differently the empirical mind and the rationalist mind work, all we have to do is observe their respective notions of “the people.” For the Italian, the Frenchman, or the German, *il popolo, le peuple, or das Volk* is—semantically and conceptually speaking—a singular entity, and it conveys the idea of a *One* precisely because the concept is carried to the level of abstraction that is congenial to the rational mind. From this it follows that it has always been the tendency of European political theory to speak of the People as an entity spelled with a capital P, and that, while the Anglo-Saxons have never trusted Rousseau's *volonté générale* or the Germans' *Volksseele* and *Volksgeist*, these concepts have enjoyed high esteem on the continent, as shown by the lasting influence of Rousseau, Hegel, and Marx. The difference, then, is that from the very beginning the rationalistic democracies have leaned heavily on a concept of the People which the Anglo-Saxons have instinctively considered to be perilously close to a mythological oversoul, to what they call the organismic fallacy. While the British constitution does not recognize any such entity as “the people” as having a constitutional status, Continental democracies have developed what Herbert Spencer once called a superstitious belief in a kind of divine right of popular sovereignty.

The same difference that we find at the point of departure exists at the point of arrival. Let me just observe that in English-speaking countries it is customary to speak of “government,” while Europeans almost always say “State.” Now, there is the same distance between government and State as between the people (plural) and one People (singular). Once again, it is a difference in the level of abstraction. The rationalist is concerned with the State and not with the govern-

ment, or governments, because (unlike the empiricist) he is ill at ease if he has to deal with things that are too fluid and changing. He wants the essence, something solid, basic, and permanent.⁹ The empiricist, even when he uses the word State, will not forget that behind the entity there are persons—individuals. So let us not delude ourselves. “State” does not mean, in the English and American vocabulary, the same thing that it means to a European, because for the latter the problem of the State is completely separate from the problem of government; it is a problem of juridical form, not of persons.¹⁰

But to grasp the difference between empirical and rationalistic democracies it will be rewarding to follow their respective methods of logical construction step by step. For even if it is true that every democracy is based on the same premise, viz., that “the power belongs to the people,” our conclusions may still differ widely, depending on how they are drawn from the initial premise. The links of the chain of argument can be narrow or wide, tight or loose, rigid or flexible. And rationalism proceeds from premise to conclusion with no flexibility, joining one link of the chain to the next one as tightly and securely as possible.

Assuming, as we read in the first Article (mind you, the first) of the constitution of the Weimar Republic (which, from a rational point of view, was undoubtedly an excellent constitution), that *die Staatsgewalt geht vom Volke aus*, that the power of the State emanates from the People, in a tightly knit system of argument the first consequence of this premise is that the democratic significance of the various possible electoral techniques takes on a preponderant and vital importance,¹¹ so preponderant that it totally obscures the other side of the problem, that is, leadership and efficient government.¹² This is shown by the fact that all the Continental democracies have adopted proportional representation¹³—the implication of this being that the Anglo-Saxons' arguments in defense of the single-member district system have not seemed as convincing on the Continent as they have in England and the United States. And we can see why. When one has to start from the very first step, beginning anew from the literal definition, it follows that the burden of linking an ideal of direct, self-governing democracy to a nation-wide indirect democratic system of

government comes to rest heavily, and entirely, upon electoral foundations and legitimacy so that the problem of "true" and "equal" representation becomes all-important.

The second consequence of the premise, "All the power belongs to the people," is—if we are to be logical—that the principle of a balance of power among equal organs of the State cannot be considered democratic, for a constitution is democratic (the argument runs) to the degree that the body which represents the voice of the people prevails. And the force of this argument is revealed by the fact that democracies of the French type have become, even though in varying degrees, assembly systems.

The implications of this development are far-reaching. To begin with, while the Anglo-Saxons say "the executive" chiefly because it is the traditional and ceremonial term, democrats of the French type often take the expression very seriously and use it literally: if the government is called the executive this means—they claim—that it must be an executor, and only an executor. Thus governmental paralysis has ultimately become a typical and, on the whole, predominant feature of the "well-reasoned" democracies. And the executive is not the only victim of this "demo-cra-tic consistency." The bicameral system, too, has suffered from it, with the upper house becoming more often than not a pure and simple duplicate of the lower house. While the English, for example, are willing to consider the House of Lords a representative body, albeit *sui generis*, this is incomprehensible to a Continental democrat. Similarly, while Americans regard judicial review as a fundamental characteristic of their system, attempts to introduce something like it in democracies of the French type encounter the objection that a judicial power which is permitted to oppose the executive and (worse still) the legislative body contradicts the logic of a system that is based on the people's power. And so judicial control is looked upon with suspicion, as an anti-democratic device aimed at jeopardizing the principle of popular sovereignty.

The final consequence, again very logically, is that the notion of democracy takes on a much more demanding, intransigent meaning within the rationalist framework than it does in the Anglo-Saxon possibilist version. And how could it be otherwise? The further we

take a rigorous rational-deductive line of argument, the less we depart from merely analytic statements. Thus the problem of democracy tends to be expounded touching always the same chord, in a mono-chord key, as if democracy were a monarchy in which the People is the One. So the final consequence is that a rational democracy is bound to be a very strenuous undertaking—an advanced and extreme type in which "true democracy" is regarded as being a political system in which the *demos* is entrusted with power not to avoid being misgoverned, but in order that people themselves should govern.

I am not suggesting—let it be noted—that the rationalist kind of democrat is necessarily a political extremist. My point is, rather, that he is likely to be an intellectual extremist. It is quite true, of course, that the distance between theoretical and active extremism may be slight, as is shown by the fact that political extremism is widespread in democracies of the French type, while it is less frequent in countries where an empirical mental pattern prevails. However, my point is that the rationalist mentality is extreme even when its logical rigor is not carried over into the field of practical politics. Burdeau is a case in point.¹⁴ For when he speaks of a "governing democracy" as if it were a reality, he is supposedly speaking as a detached observer. But in truth his diagnosis springs from a rationalistic tradition in which logical consistency, that always requires the drawing of the ultimate conclusion, overcomes and distorts the facts.

4. Candide in America

In the empirical approach the peculiar and essential features of a democratic system appear to be (i) the existence of more than one party, and (ii) the safeguarding of minorities. That is to say that the standard Anglo-American definition of democracy is: A multi-party system in which the majority which governs respects the rights of minorities. Of course, this definition raises no problems as long as it is addressed to an audience familiar with it. But let us put ourselves in the shoes of one of the many twentieth-century Candidates who land in the United States. His reaction will be very different. Let us suppose, for example, that our Candide comes across the passage from James Burnham which says, "The fundamental characteristic of democracy in the sense in which we use the word (regard-

6. An Appraisal

How should we appraise the two types of democracy in question? Given the fact that they are two subspecies of the same genus, at first sight the difference between the Anglo-American and the French type might seem to be merely the difference between a small-scale and a large-scale approach to the same conception: that is, between a theory concerned with the ways and means of democratic government, and a theory which has to start from ultimate principles. But, as we have seen, this difference also implies a dissimilarity of mental approach. And in this respect the empirical and the rational way of conceiving democracy never coincide. It is important for us all to be aware of this fundamental diversity because, otherwise, Europeans are unable to appreciate the American model, and on the other hand Americans cannot really figure out what is going on in Continental Europe.

There is no doubt (or at least so it seems to me) that the empirical mind is best suited for the requirements of a democratic *modus vivendi*. Its tendency to proceed by trial and error; its flexibility and its adherence to facts; its instinctive concern with the way things work out—all this seems expressly designed for succeeding in spontaneous historical construction, as well as for dealing with the concrete problems of a free society. We can therefore easily understand how it happens that democracy develops successfully in English-speaking countries, while in countries where a rationalistic mental pattern prevails its fragility is only equaled by its ambitiousness. For, as Goethe said, there is nothing more inconsistent than supreme consistency.²⁷ And the fruit of extreme consistency, at least in politics, is that the rationalistic democracies are always in danger of becoming imaginary democracies, far too removed from reality to be able, in the long run, to master the problems arising in the real world.

It would indeed be very useful, then, if European rationalism would develop a keener attitude and ability to face practical problems with a practical logic, remembering that "in social dynamics . . . nothing is easier than being deluded by a rationalistic logic, which abandons itself to foolhardy extrapolations and pays no attention to secondary and composite effects."²⁸ Yet, my criticism of

rationalism should not be interpreted as an unconditional approval of empiricism and pragmatism. For these mental patterns, too, have their limitations and their excesses.

It is difficult to deny that Anglo-American democracy deserves first place as far as accomplishment and historical achievement are concerned. Yet its appeal is not very strong, and is certainly not in proportion to its merits. Rousseau, Hegel, and Marx travel throughout the world, and the last is read (and perhaps understood) even in China; whereas no English or American author has been able to gain any comparable influence outside the borders of his own culture. In short, rationalism travels, and empiricism does not. Why? It is not difficult to answer. In order to be able to circulate, a political doctrine must acquire a universality, a level of abstraction and a theoretical backbone to which the empirical mentality—wrongly, in my opinion—pays too little heed. And this precisely in the cases in which the rational approach is well justified and serves the purpose it is meant to serve.

We have thus arrived at a situation which seems to me paradoxical. While the diffusion and penetration of ideas—at least in their ideological form—increases all over the world, pragmatism makes a point of being able to do without them. And while we are forced to envisage political problems on an ever expanding scale, American thinking narrows its focus, concentrating on smaller and smaller detail, on analyses that are valid only here and now, or there and now—as if this were all.

If the rationalist is not trained to solve practical problems, on the other hand “practicalism” lacks an adequate intellectual grip in terms of rational construction. (These are, of course, very broad generalizations.) American culture, especially if we consider its indigenous roots, is perfectly equipped to train a formidable *homo faber*, but there is the danger of its not being able to live up to its responsibility to educate the *homo sapiens* (in the humanistic sense) who is needed to nourish and complement him. It is my conviction, therefore, that it would be to the advantage of both sides if the rationalistic and empirical approaches could meet halfway. And this is the path I shall attempt to pursue in examining the historical achievements which have produced and sustain modern democracy.

NOTES

- + *L'Utopie et les utopies* (Paris, 1950), p. 85.
1. Cf. G. Sartori, *Questioni di metodo in scienza politica* (Firenze, 1959), pp. 187-195.
2. *Contrat social*, III, 15.
3. In effect, the advice given by Montesquieu to his readers was somewhat naïve. He wrote: “To discover political liberty in a constitution no great labor is requisite. If we are capable of seeing it where it exists, it is soon found, and we need not go far in search of it.” (*L'Esprit des lois*, Bk. XI, Chap. 5.)
4. I point to the United States because it covers an experience that is more characteristically democratic with respect to the English model. It is symptomatic that as late as 1952 a study sponsored by the Hoover Institute revealed that only 50 per cent of the English people regarded the term democracy as a correct name for their political system, whereas 88 per cent of the Americans considered the label democracy as appropriate. Cf. I. De Sola Pool, H. D. Lasswell, and D. Lerner, *Symbols of Democracy* (Stanford 1952).
5. Cf. the sense of “givenness” of which Daniel J. Boorstin speaks with a felicitous expression, *The Genius of American Politics* (Chicago, 1953). Cf. also, for the suspicion about French rationalism, Norman Jacobson, “Political Realism and the Age of Reason: The Anti-Rationalist Heritage in America,” *Review of Politics*, IV (1953).
6. Cf. Chap. III, 4, above.
7. For further elaboration, cf. G. Sartori, “La democrazia americana di ieri e di oggi,” in *Il pensiero americano contemporaneo*, ed. F. Rossi-Landi (Milano, 1957), pp. 299-357, esp. pp. 303-329.
8. Two recent books published in Italy are a good instance of this. Cf. Lelio Basso, *Il Principe senza scettro: Democrazia e sovranità popolare nella costituzione e nella realtà italiana* (Milano, 1958); and Giorgio Fenoaltea, *Il popolo sovrano: Realtà e illusione della sovranità popolare in Italia* (Firenze, 1958).
9. It should be noted in this connection that the universities of Continental Europe teach *Staatslehre*, the theory of the State, and that “government” as an academic denomination is actually untranslatable. This is because it appears inconceivable to look for a theoretic systemization at that low level of abstraction in which the empirical approach proceeds.
10. In fact, as Maitland observed, the reluctance of the English to use the word “State” is correlative to their reluctance to accept the doctrine of the

- juridical personality of the State. Cf. "The Crown as Corporation," in *Collected Papers*, Vol. III (Cambridge, 1911).
11. Cf. G. Sartori, "Electoral Studies and Democratic Theory," *Political Studies*, I (1958), esp. pp. 11-13.
 12. Cf. Chap. VI, 3, above.
 13. To be sure (as has been noted in Chap. VI, note 18 above), proportional representation cannot be charged with all the evils attributed to it by F. Hermens in *Democracy or Anarchy?* However, I would say that Hermens' thesis becomes meaningful if it is placed in the over-all context of a rationalistic approach.
 14. Cf. Chap. V, 4, above.
 15. *The Managerial Revolution* (New York, 1941), p. 162.
 16. *Potere*, p. 217.
 17. Cf. J. Allen Smith, *The Growth and Decadence of Constitutional Government* (New York, 1930), Chap. XIV.
 18. H. Kelsen, *Vom Wesen und Wert der Demokratie*, Chap. I.
 19. One should keep in mind that Rousseau's thesis was not only currently accepted in the years of the Revolution (Robespierre himself distinguished between "representatives of the people," whom he considered inadmissible, and "agents of the people") but also remember that it has profoundly influenced up to the middle of the nineteenth century a large part of the French doctrine, and not only the extreme positions of a Considerant or a Proudhon, but of Ledru-Rollin and a Catholic like Veuillot as well.
 20. *The History of Freedom in Antiquity*. I am quoting from the collection *Essays on Freedom and Power* (New York, 1955), p. 56. Lord Acton was alluding in particular to the problem of religious freedom. His statement nevertheless can be validly generalized.
 21. Cf. Chap. XII, 2, below.
 22. In *Wirtschaft und Gesellschaft, Grundriss der Sozialökonomik* (Tübingen, 1925), Vol. I, Part I, Chap. III, par. 14.
 23. A. L. Lowell, *Public Opinion and Popular Government* (New York, 1930), p. 15.
 24. *Character and Opinion in the United States* (New York, 1955), p. 115.
 25. This rationalistic position has found support in the United States esp. in Willmore Kendall. See his *John Locke and the Doctrine of Majority Rule* (Urbana, 1941), and "Prolegomena to Any Future Work on Majority Rule," *Journal of Politics*, IV (1950), pp. 694-713. Cf. also W. Kendall and J. A. Ranney, "Democracy: Confusion and Agreement," in *Western Political*

- Quarterly*, Sept. 1951, pp. 430-439. On the other extreme we find Calhoun's doctrine of "concurrent majority," which in substance theorizes the minorities' right to veto. Cf. *A Disquisition on Government* (New York, 1953).
26. Cf. Bruno Leoni, who marks the boundary which divides the Anglo-Saxon democracies from the Continental ones precisely on the basis of the tendency to use the majority principle in a temperate or absolute way. "Il pensiero politico e sociale dell' 800-900," *Questioni di storia contemporanea* (Milano, 1952), Vol. II, pp. 1133-1136.
 27. *Maximen und Reflexionen*, 899.
 28. R. Ruyter, *op. cit.*, p. 80.

Chapter XIII

Liberty and Law

"The more corrupt the Republic, the more the laws."

—Facitutt†

1. Freedom and Freedoms

WHEN WE TALK of liberalism people find it difficult to understand exactly what is being discussed; when we speak of democracy they think they do. The notion of popular power is almost tangible, while the idea of liberty is hard to grasp—at least so long as we are free. And whereas "democracy" has a descriptive meaning (although, owing to historical change, a misleading one), liberty or freedom has not. For the word freedom and the sentence "I am free to," can be used whenever we refer to the realm of action and will, and consequently stand for the infinite scope and variety of human life itself.

However, and fortunately, it will be sufficient for us to consider this chameleon-like, all-embracing word from one specific angle: that of political freedom. And for this purpose our main problem is to introduce some order, since the major complications arise because we seldom separate the specific issue of political freedom from general speculations about the nature of true freedom. For instance, Lord Acton introduced his *History of Freedom in Antiquity* with the following remark: "No obstacle has been so constant, or so difficult to overcome, as uncertainty and confusion touching the nature of true liberty. If hostile interests have wrought much injury, false ideas have wrought still more."¹ While I agree very much with

Lord Acton's diagnosis—the harm brought about by uncertain, confused, and false ideas—I wonder whether his therapy is sound. For the problem before us is not to discover "the nature of true liberty" but, on the contrary, to remove all the extraneous incrustations that prevent us from examining the question of political freedom by itself, and as one empirical question among others.²

We must put some order, to begin with, in the contexts out of which we speak of psychological freedom, intellectual freedom, moral freedom, social freedom, economic freedom, legal freedom, political freedom, and other freedoms as well.³ These are related to one another, of course, for they all pertain to a same man. However, we have to distinguish between them because each one is concerned with examining and solving a particular aspect of the over-all question of freedom. Hence the first clarification to be made is that political freedom *is not* of the psychological, intellectual, moral, social, economic, or legal type. It presupposes these freedoms—and it also promotes them—but it is not the same as these.

The second clarification has to do with the level of discourse. In this connection the error is to confuse the political with the philosophical problem of freedom. Philosophers have very often speculated about political freedom, but only rarely have they dealt with it as a practical problem to be approached as such. Aristotle, Hobbes, Locke, and Kant are among the few exceptions, that is, among the small number of philosophers who have not made the mistake of offering a philosophical answer to a practical question. Locke, particularly, had this virtue, and this explains why he has played such an important part in the history of political thought. His treatment of the problem of freedom in the *Essay Concerning Human Understanding* is different from, and unconnected with, the one we find in the second of the *Two Treatises on Government*. In the former he defines liberty as acting under the determination of the self, whereas in the latter he defines it as not being "subject to the inconstant, uncertain, unknown, arbitrary will of another man."⁴

However, most philosophers have not been concerned with the problem this way. As philosophers, they are concerned with True Liberty, or with the Essence of Liberty, meaning by this either the problem of the freedom of the will, or the question of the supreme

form of liberty (conceived variously as self-expression, self-determination, or self-perfection). This is exactly what philosophers are supposed to do, and nobody is reproaching them for having done it. But they should be reproached when they project their metaphysics of liberty into the political sphere and, unlike Locke, do not notice that in this context we are no longer discussing the same problem. And this point is still far from being accepted. In reviewing the relationship between political philosophy and the science of politics, Carl J. Friedrich—after having rightly criticized the mixing of philosophical questions and “the empirical realm of government and politics”—concludes by accepting a relation that I still consider much too close. He asserts: “Any discussion of freedom and of liberalism must, if it takes its argument seriously, confront the issue of ‘freedom of the will.’”⁵ Frankly, I do not see why. Of course any discussion about the freedom cherished by the West is based on a *Weltanschauung*—on a conception of life and values. To be more exact, it presupposes that we somehow believe in the value of individual liberty. But I am reluctant to consider the connection any closer than that.

In the first place, I do not see what difference it would make in practice if we were to ascertain that man is not a free agent, and that he is not really responsible for his actions. Should we suppress penal legislation? Should we further give up a social order that is regulated by norms accompanied by sanctions? I do not see how we could. The only thing that would change, I am afraid, is the meaning of penalty, which would lose its value as a deterrent and its justification as punishment. The convict would become a martyr of society, paying for offenses that he was not responsible for. But he would still be condemned, since all societies have to remove from circulation murderers, thieves, lunatics, and all others who, being incapable of submitting to rules, constitute a danger to their neighbors.

The second reason for keeping the philosophical problem separate from the others is that, unless we do, we cannot even understand what the philosophers themselves have been saying. Whoever has had philosophical training knows in what sense Spinoza maintained that liberty was perfect rationality, or Leibniz that it was the spontaneity of the intelligence, or Kant that it was autonomy, or Hegel

that it was the acceptance of necessity, or Croce that it was the perennial expansion of life. All these definitions are valid if they are understood in their context. But their validity has to do with a “nuclear meaning,” with the search for a freedom that is essential, final, or as Kant said, transcendental. On the other hand, let it be noted, none of these conceptualizations refer to a “relational” problem of freedom. It follows from this, that if we try to use the aforesaid concepts to deal with the problem of political bondage—which is a relational problem—we distort their meaning without solving our problem. As soon as the ideas on freedom of Spinoza, Leibniz, Kant (as a moral philosopher), Hegel, or Croce are lowered to an empirical level for the purpose of dealing with problems that these conceptualizations did not consider, they become false and dangerous. Even dangerous, because if the question of political freedom has been submerged over and over again in a sea of confusion, it is by virtue of the false witnessing that these philosophers have arbitrarily been called upon to bear. So, the second point I wish to make is that political liberty *is not* a philosophical kind of liberty. It is not the practical solution to a philosophical problem, and even less the philosophical solution to a practical problem.

Finally, we must deal with the question of the stages of the process of freedom. The phrase, “I am free to,” can have three different meanings, or can be broken up into three phases. It can mean I *may*, or I *can*, or I *have the power to*. In the first sense freedom is permission; in the second sense it is ability; and in the third sense it is a substantive condition. The third meaning is the newest, the last of the series, and for the purpose of the present discussion it can be put aside. I shall therefore confine myself to the two primary meanings of freedom: I may, and I can.

Clearly, freedom as permission and freedom as ability are very closely connected, since permission without ability and ability without permission are equally sterile. Yet they should not be confused, because no one type of liberty can by itself fulfill both these functions. Certain kinds of liberty are designed primarily to create the *permissive conditions* of freedom. Political freedom is of this kind, and very often so are juridical freedom and economic freedom (as understood in a market system). In other contexts the emphasis is instead

placed primarily, if not exclusively, on the roots and sources of freedom—on freedom as *ability*. This is notably the case of the philosophical approach to the problem of freedom; and it is also true of the notions of psychological, intellectual, and moral freedom.

The distinction between I may, and I can, corresponds to the difference between the external sphere and the internal sphere of freedom. When we are interested in the externalization of liberty, that is, in free action, it takes the form of permission. When on the other hand there is no problem of external freedom—as in the case of psychological, intellectual and moral freedom—then we are concerned with freedom as *ability*. Thus terms like “independence,” “protection,” and “action” are generally used to indicate *external liberty*, i.e., permission. Whereas the notions of “autonomy,” “self-realization,” and “will” usually refer to the freedom that exists *in interiore hominis*. And this leads us to a third and final clarification: political liberty is not an internal freedom, for it is a permissive, instrumental and relational freedom. In sum, it is a liberty whose purpose is to create a situation of freedom—the conditions for freedom.

2. Political Freedom

Cranston has remarked that “the word liberty has its least ambiguity in political use in times of centralized oppression.”⁶ This is so true that I suggest we should always approach the problem as if we were being oppressed, that is, assuming that we find ourselves subject to tyrannical rule. And my contention is that the concept of political freedom is not at all ambiguous, provided that (i) we eliminate the confusions of the *alienum genere* kind, (ii) we make clear that it raises a practical, not a speculative issue, and (iii) we specify that it aims at the creation of an external situation of liberty.

Actually, what I find striking in the history of the idea of political freedom is not variety of meaning, but rather continuity of meaning. For whenever the aforesaid provisos are complied with, we always meet with this basic connotation of the concept: that political freedom is “absence of opposition,”⁷ absence of external restraint, or exemption from coercion. Whenever man asks, or has asked for political liberty (outside of a small community like the *polis*) he means that he does not like constraint, and specifically the forms of

constraint associated with the exercise of political power.⁸ In other words, political freedom is characteristically freedom *from*, not freedom *to*. People are accustomed to say that it is a “negative” freedom, but since this adjective is often used in a derogatory sense, or at least to present political freedom as an inferior kind of liberty, I prefer to say, more accurately, that it is a defensive or protective freedom.

Critics have repeated to the point of saturation that this idea of freedom comes from an erroneous individualistic philosophy based on the false assumption that the individual is an atom, or a monad. In the first place, I would question the charge that this notion has a philosophical origin, if we mean by this that only a small number of intellectuals are really interested in the individual. If we consider, for instance, the French Revolution (an event that, admittedly, escaped from the control of the *philosophes*), its entire parabola took on the meaning of a vindication of liberty *against* power. During the years 1789-1794, the Third and the Fourth Estate were asking for individual and political liberty in opposition to the State, and not for a social and economic liberty to be achieved by means of the State. The idea that it is a purpose and a concern of the State to promote liberty would have appeared extravagant, to say the least, to the French people of the time. And this not because of their philosophical individualistic beliefs, but for the much simpler reason that they had been crushed for centuries by monarchs, lords, and the meticulous and paralyzing interference of the corporate economic system.

In truth, I think that we need not always call upon monads and the atomistic philosophy of man in order to explain why political freedom tends to be understood at all times—at least when oppression occurs—as freedom *from*, i.e., as a defensive freedom. It is much more important to realize, I believe, that the question of political freedom arises only when we approach the relation between citizen and State *from the point of view of the citizen*. If we consider this relation from the point of view of the State, we are no longer concerned with the problem of political freedom. To say that the State is “free to” is meaningless, unless we wish to introduce the question of arbitrary power. The tyrannical State is free *to* rule at its pleasure, and this means that it deprives its subjects of freedom.⁹

Let this point be very clear: (i) to speak of political freedom is to be concerned with the power of subordinate powers, with the power of the power-addressees, and that (ii) the proper focus to the problem of political freedom is indicated by the question: How can the power of these minor and potentially losing powers be safeguarded? We have political liberty, i.e., a free citizen, so long as conditions are created that make it possible for his lesser power to withstand the greater power which otherwise would—or at any rate could—easily overwhelm him. And this is why the concept of political freedom assumes an adversative meaning. It is freedom *from*, because it is the freedom *of* and *for* the weaker.

Of course, the formula, "absence of external impediments"¹⁰ should not be taken literally, lest it bring to mind an anarchic ideal. The absence of restriction is not the absence of all restriction. What we ask of political freedom is protection against arbitrary and absolute power. By a situation of liberty we mean a situation of protection which permits the governed effectively to oppose abuse of power by the governors. It might be objected that this clarification still does not clarify much. For what is meant by "abuse" of power? Where does the legitimate exercise of power end, and the illegitimate begin? If we review the literature on freedom we shall find considerable disagreement on this point. But we should not fail to perceive that much of the disagreement can be accounted for by the difference in historical situations. The answers to the questions, "Protected from what?" and "Unrestricted to what extent?" depend on what is at stake at any given time and place, and on what is most valued (and how intensely it is valued) in a specific culture. "Coercion" does not apply to every kind and degree of restraint. Nor does "protection" imply defense against everything. In the first place, people must feel that what is involved is worth protecting (the threat of constraint has to be directed against something that they value); and secondly, nobody worries about protecting what is not in danger. Therefore we can be specific only if we examine a specific situation, and know what is being threatened, which threat is feared the most, and which is considered most imminent.

A more difficult issue is raised by the question: Is freedom *from* an adequate concept of freedom? To answer this query we must

refer to a broader picture. Clinton Rossiter has summed up the general idea we have of liberty today as consisting of four notions: independence, privacy, power and opportunity. "*Independence* is a situation in which a man feels himself subject to a minimum of external restraints . . . *Privacy* is a special kind of independence which can be understood as an attempt to secure autonomy . . . if necessary in defiance of all the pressures of modern society." However, says Rossiter, at this point we have only mentioned "one-half of liberty, and the negative half at that. . . . Liberty is also a positive thing . . . and we must therefore think of it in terms of *power* . . . and also in terms of *opportunity*." ¹¹ Perhaps there is one slight imperfection in Rossiter's analysis, in that when he says "power" he seems to mean "ability to," in the sense of capacity. To avoid ambiguity, I will include the concept of capacity in our list, and place the concept of power at the end. Thus complete freedom, as we understand it, implies the following five traits: independence, privacy, capacity, opportunity, and power.

Now we can frame our question more accurately: What is the relation between the first half of liberty (independence and privacy) and the second half (ability, opportunity and power)? The answer seems to me to be clear: it is a relation between condition and conditioned, between means and ends. It is, therefore, also a *procedural relation*. It is no accident that these concepts are generally presented in an order in which the notion of independence (and not that of opportunity, or of power) comes first. Unfortunately, this point is seldom made sufficiently clear. Rossiter is by no means an exception to this rule when, in putting his "pieces back together into a unity," not only does he pass over the fact that it is an ordered unity, or rather, an irreversible succession, but, if anything, he tends to stress the opposite. He concludes: "The emphasis of classical liberalism, to be sure, is on the negative aspects of liberty. Liberty is thought of almost exclusively as a state of independence and privacy. But this is precisely one of those points at which classical liberalism no longer serves, if ever it did serve, as a wholly adequate instrument for describing the place of the free man in the free society." ¹² This statement is not incorrect. It only omits what is essential.

Political freedom is by no means the only kind of freedom. It is

not even the most important kind, if by important we mean the one which ranks highest in the scale of values. It is, however, the primary liberty, as far as procedure goes; that is, it is a preliminary condition, the *sine qua non* of all other liberties. So to speak of "independence from" as an inadequate notion of liberty—as people often tend to do—is very misleading. The other liberties as well, if they are considered singly, are just as inadequate. For adequacy is provided by the whole series, and by the whole series *arranged in a particular order*. It is not sufficient that our minds be free, for instance, if our tongues are not. The ability to direct our own lives is of very little use if we are prevented from doing so. How, then, are the so-called positive liberties adequate if they cannot materialize? It seems to me, therefore, that when we assert that negative liberty is not sufficient we are stating an obvious platitude, while we are not stating what is most important of all; that we need freedom *from* in order to be able to achieve freedom *to*.

It can be argued that political freedom has also a positive aspect (and this might seem to be a reply to those who consider it insufficient and incomplete). Now, there is no doubt that political freedom cannot be inert, that it postulates some activity; in other words that it is not only freedom *from*, but also *participation in*. No one denies this. But we must not overstress this latter aspect, for we must remember that participation is made possible by a state of independence, and not vice versa. Even our subjective rights, as Jhering wrote in his famous pamphlet *Der Kampf um's Recht*, are reduced to nothing if we do not exercise them, if we do not avail ourselves of them. However, it is clearly useless to speak of exercising rights if they do not already exist. And the same holds good for political freedom. It is pointless to speak of "exercise" if there is not already independence. Totalitarian dictatorships require and promote a great deal of activity and of participation. But so what?

My feeling is, therefore, that we ought to resist the temptation to treat political freedom as if it were, in itself, a complete liberty. Those who inflate it by speaking of it as "participation" are disfiguring its basic feature.¹⁴ If we have so often failed in our search for more liberty, the main reason is that we have expected from participation more than it can give. Of course, liberty as non-restraint is not an

end in itself, and political freedom requires action, active resistance,¹⁵ and positive demands. Where there is lifelessness and apathy there cannot be liberty. But we must not forget that the relation of forces between citizens and State is unequal; that in comparison with the State their power is destructible; and therefore that their freedom is typified not by its positive aspects but by the presupposition of defense mechanisms. In relation to the State the citizens are the weaker party, and therefore the political concept of freedom is to be pinpointed as follows: Only if I am not prevented from doing what I wish, can I be said to have the power to do it.¹⁶

There is no reason to be oversensitive when we are told that this conception is incomplete. So it is. Or, rather, it is incomplete in the obvious sense that each specific form of freedom can only amount to a partial freedom, because it concerns only the specific problem which it attempts to solve. Therefore, what really matters is to realize that, despite its incompleteness, political liberty is *preliminary* to the other brands: and this means that it cannot be bypassed. We cannot pass over freedom in the negative sense, if we want to achieve freedom in the positive sense. If we forget for one instant the requirement of not being restrained, our entire edifice of liberties is worthless.

Once we have assessed the question of the procedural importance of political freedom, we may well raise the question of its historical importance to us today. The assertion that political freedom is not enough, meaning that "real freedom" is something else, is totally beside the mark. But the question as to the relation, here and now, between political and other kinds of freedom is, of course, pertinent. Every epoch has its urgencies and particular needs. So we may well maintain, in this context, that since today political freedom is assured, it requires less attention than other liberties—such as economic freedom, or freedom from want, for instance.¹⁷ However, this is a question that can be dealt with only after having reviewed historically the nature of the problems that confront us.¹⁸

3. Liberal Freedom

It will be noted that so far I have spoken of political freedom and not of the liberal conception of freedom. It is true that the two

concepts have become closely linked. However, since the liberal idea of freedom is often considered antiquated nowadays, it is wise to keep the problem of political freedom separate from the liberal solution of it. For it is easy to demonstrate that the freedom of liberalism, being a historical acquisition, is bound to come to an end. But are we prepared to make the same assertion about political freedom? Can we say that even this is a transitory need? If so, let us say so openly, and, what is more difficult, let us try to demonstrate it. Political freedom and liberal freedom cannot be killed with one stone. Rather, it is at the very moment that we reject the liberal solution of the problem of freedom that this problem again demands, more pressing than ever, a solution.

What we ask of political freedom is protection. How can we obtain it? In the final analysis, from the time of Solon to the present day, the solution has always been sought in obeying laws and not masters. As Cicero so well phrased it, *legum servi sumus ut liberi esse possimus*,¹⁹ we are servants of the law in order that we might be free. And the problem of political freedom has always been interwoven with the question of legality, for it goes back to the problem of curbing power by making it impersonal.²⁰

There is, then, a very special connection between political freedom and juridical freedom. But the formula "liberty under law," or by means of law, can be applied in different ways. The idea of protection of the laws has been understood, by and large, in three ways: the Greek way, which is already a legislative interpretation; the Roman way, which approaches the English rule of law;²¹ and the way of liberalism, which is constitutionalism.

The Greeks were the first to perceive the solution, for they well understood that if they did not want to be ruled tyrannically they had to be governed by laws.²² But their idea of law oscillated between the extremes of sacred laws which were too rigid and immutable, and conventional laws which were too uncertain and shifting. In the course of their democratic experience the *nomos* soon ceased to mirror the nature of things (*physis*), and they were unable to stop at the golden mean between immobility and change. As soon as law lost its sacred character, popular sovereignty was placed above the law, and by that very act government by laws was once again con-

fused with government by men. The reason for this is that the legal conception of liberty presupposes the rejection of the Greek *eleutheria*—of a freedom that is turned into the principle, *quod populo placuit legis habet vigorem*, what pleases the people is law. Looking at the Greek system from the vantage point of our knowledge, we see that what their conception of law lacked was precisely the notion of "limitation"—a notion which, as was discovered later, is inseparable from it.

That is the reason why our juridical tradition is Roman, not Greek. The experience of the Greeks is important precisely because it shows us how *not* to proceed if we want liberty under law. The Romans, it is true, posed for themselves a more limited problem. As Wirszubski remarks, "The Roman Republic never was . . . a democracy of the Athenian type; and the *eleutheria*, *isonomia* and *parrhesia* that were its chief expressions, appeared to the Romans as being nearer *licentia* than *libertas*."²³ Actually Roman jurisprudence did not make a direct contribution to the specific problem of political freedom. But it did make an essential indirect contribution by developing the idea of legality whose modern version is the Anglo-Saxon rule of law.

The third juridical solution to the problem of political freedom is that of liberalism—which was developed in English constitutional practice, found its most successful written formulation in the Constitution of the United States, and is expounded in the theory of "constitutional *garantisme*" and, in this sense, of the *Rechtsstaat*, the State based on law.²⁴ What did liberalism specifically contribute to the solution of the problem of political freedom? It was not the originator of the modern idea of individual freedom, although it added something important to it.²⁵ Nor, as we have seen, was it the inventor of the notion of liberty in the law. But it did invent the way to guarantee and institutionalize the dynamic aspect of political freedom.

The originality and value of the approach of classical liberalism can be seen if we compare it with previous attempts to solve the problem. Basically, the legal solution to the problem of freedom can be sought in two very different directions: either in rule by legislators or in the rule of law.²⁶ In the first approach law consists of written

rules which are enacted by legislative bodies; that is, law is legislated law. In the second, law is something to be discovered by judges: it is judicial law. For the former approach, law consists of statutory, systematic law-making; for the latter, it is the result of piecemeal law-finding (*Rechtsfindung*) by means of judicial decisions. From the first viewpoint, law may be conceived as the product of sheer will; from the second it is the product of theoretical inquiry and debate. The danger of the legislative solution is that a point may be reached in which men are tyrannically ruled by other men in spite of laws (as happened in Greece), i.e., in which laws are no longer a protection. On the other hand, the second solution may be inadequate because the rule of law does not, per se, necessarily safeguard the political aspect of freedom (e.g., the Roman rule of law concerned the elaboration of the *jus civile*, not of public law). And while the Greek approach was too dynamic and thereby destroyed the certainty of law, the other is, or may be, too static.

Liberal constitutionalism is, we may say, the technique of retaining the advantages of the earlier solutions while eliminating their respective shortcomings. On the one hand the constitutional solution adopts rule by legislators, but with two limitations: one concerning the method of law-making, which is checked by a severe *iter legis*; and one concerning the range of law-making, which is restricted by a higher law and thereby prevented from interfering with the rights of man, that is, with the fundamental rights affecting the liberty of the citizen. On the other hand, the constitutional solution also sees to it that the rule of law is retained in the system. Even though this latter component part of the constitutional rule has been gradually set aside by the former, it is well to remind ourselves that the framers of the liberal constitutions did not conceive of the State as being a *machine à faire lois*, a law-making machine, but conceived of the role of legislators as being a complementary role according to which parliament was supposed to integrate, not to replace, judicial law-finding. However, an essential feature of the rule-of-law principle is retained: that aspect of the principle of the separation of powers which provides for the independence of the judiciary. (Incidentally, this is actually what the ill-famed principle of the separation of

powers demands. *Pace* Montesquieu, who confused the legislative-executive relationship with the one between the State and the courts, English constitutionalism never separated the exercise of power between parliament and government for in this case what is required is a shared, not a divided exercise of power.)

There are, to be sure, many significant differences among our constitutional systems. If we refer to the origins, the unwritten English constitution was directly implied by, and derived from the rule of law; the American written constitution formalized and rationalized British constitutional practice, thereby still leaning heavily on the rule of law; whereas written constitutions in Europe, for want of common law, were based from the outset on the legislative conception of law. But these initial differences have been gradually reduced, since there is at present a general trend—even in the English-speaking countries—in favor of statutory law. Despite this trend, however, we cannot say as yet that present-day constitutions have lost their *raison d'être* as the solution that combines the pros and obviates the cons of both the rule-of-law and the rule-of-legislators techniques. Even though our constitutions are becoming more and more unbalanced on the side of statutory law-making, so long as they are considered a higher law, so long as we have judicial review, independent judges, and, possibly, the due process of law;²⁷ and so long as a binding procedure establishing the method of law-making remains an effective brake on the bare will-conception of law—so long as these conditions prevail, we are still depending on the liberal-constitutional solution of the problem of political power.

Constitutional systems, both past and present, are therefore, historically speaking, liberal systems. One might say that liberal politics is constitutionalism.²⁸ And constitutionalism is the solution to the problem of *political* freedom in terms of a *dynamic* approach to the juridical conception of freedom. This explains why we cannot speak of political freedom without referring to liberalism—liberalism, I repeat, not democracy. The political freedom which we enjoy today is the freedom of liberalism, the liberal kind of liberty; not the precarious, and, on the whole, vainly sought liberty of the ancient democracies. And this is the reason why, in recalling the typical

guiding principles of the democratic deontology, I have mentioned equality, isocracy, and self-government, but—and perhaps this was noted—never the idea of liberty.

Of course, it is also possible to derive the idea of liberty from the concept of democracy. But not directly. It must be derived indirectly, in the sense that it does not follow from the notion of popular power, but from the concept of isocracy. It is the assertion "We are equal," that can be interpreted as: "Nobody has the right to command me." Thus, it is from the postulate of equality that we can deduce the demand for a "freedom from." However, we should note that this inference is made by modern rather than by ancient thinkers. In the Greek tradition, democracy is much more closely associated with *isonomia* (equal law) than with *eleutheria* (liberty), and the idea of popular power is by far preponderant in the inner logic of development of the Greek system. Moreover, as we have already seen, when the Greeks did speak about liberty it meant something different from what it means today, and they were confronted with a problem of liberty which was the reverse of the modern one.²⁹

Therefore, to avoid a historical falsification which also has a vital practical bearing, we must stress that neither our ideal nor our techniques of liberty pertain, strictly speaking, to the line of development of the democratic idea. It is true that modern liberal democracies have incorporated the ideal of a liberty of Man which includes the liberty of each man. But originally this concept was not democratic; it is an acquisition of democracy, not a product of it—which is very different. And we must keep this fact in mind in order to avoid the mistake of believing that our liberty can be secured by the method that the Greeks tried. For our liberties are assured by a notion of legality that constitutes a *limit* and a *restriction* on pure and simple democratic principles. Kelsen, among others, sees this very clearly when he writes that a democracy "without the self-limitation represented by the principle of legality destroys itself."³⁰ Although modern democracy has incorporated the notions of liberty and legality, these notions, as Bertrand de Jouvenel rightly points out, "are, in terms of good logic, extraneous to it"³¹—and I should like to add, in terms of good historiography as well.

4. The Supremacy of Law in Rousseau

I have mentioned three ways of seeking legal protection for political freedom: the legislative way, the rule-of-law way, and the liberal or constitutional way. But it is held that there is another relationship (which would be the fourth in my list) between liberty and law: "autonomy," i.e., giving ourselves our own laws. And since liberty as autonomy is supposed to have Rousseau's *placet*, many people take for granted that this is the democratic definition of liberty, and contrast, on this basis, a *libertas minor* with a *libertas major*—that is to say, the minor liberty of liberalism (as freedom *from*) to the greater democratic liberty, autonomy. Personally, I question whether those who equate liberty with autonomy are justified in associating this notion with Rousseau. In the second place, which is the supposedly minor liberty: political freedom, or the liberal solution of it? The two are evidently, albeit erroneously, being treated as if they were the same thing. In the third place I wonder whether it is correct to contrast freedom *from* with autonomy, for it is hard to see in what sense autonomy can be conceived of as a political kind of freedom. However these questions deserve attention, and we shall start by ascertaining exactly what Rousseau thought and said.

We can have doubts about Rousseau's solutions, but not about his intentions. The problem of politics, Rousseau affirmed, "which I compare to the squaring of the circle in geometry [is] to place law above man."³² This was for him *the* problem, because—he said—only on this condition may man be free: when he obeys laws, not men.³³ And Rousseau was more sure of this certainty than of any other. "Liberty," he confirmed in *Letters from the Mountain*, "shares the fate of laws; it reigns or perishes with them. There is nothing of which I am surer than this."³⁴ And, as he said in the *Confessions*, the question he constantly asked was: "Which is the form of government which, by its nature, gets closer and remains closer to law?"³⁵

This was a problem that Rousseau had every reason to liken to the squaring of the circle.³⁶ While in *Letters from the Mountain* he observed that when "the administrators of laws become their sole arbiters . . . I do not see what slavery could be worse,"³⁷ in the *Social Contract* his question was: "How can a blind multitude, which

often does not know what it wills, because only rarely does it know what is good for it, carry out for itself so great and difficult an enterprise as a system of legislation?"³⁸ For Rousseau this question had only one answer: to legislate as little as possible.³⁹ He had been coming to this conclusion with more and more conviction for some time, for already in the dedication of his *Discourse on Inequality* he had stressed the fact that the Athenians lost their democracy because everybody proposed laws to satisfy a whim, whereas what gives laws their sacred and venerable character is their age.⁴⁰ And this is precisely the point: that the laws that Rousseau referred to were Laws with a capital L—that is, few, very general, fundamental, ancient, and almost immutable supreme Laws.⁴¹

Rousseau held that the people are the judges and custodians of the Law, not the makers and manipulators of laws. He by no means had in mind the idea of a legislating popular will.⁴² On the contrary, he proposed to liberate man by means of an impersonal government of Laws placed high above the will from which they may emanate: that is, related to a will that acknowledges them rather than creates them; that sustains them rather than disposes of them; that safeguards them rather than modifies them. Whoever appeals to the authority of Rousseau must not forget that his Laws were not at all the laws with a small l which, by virtue of our formal definition of law, are fabricated with ever increasing speed and magnitude by legislative assemblies in the name of popular sovereignty. His Laws were substantive, i.e., laws by reason of their content. As far as their model is concerned, they were very similar to the notion of law expressed in the theory of natural law.⁴³ And to appreciate Rousseau's difficulties we must realize that they sprang from the fact that he tried to make immanent the same concept of law that the school of natural law considered transcendent.

He tried to do this by invoking the *volonté générale*,⁴⁴ a concept that turns out to be less mysterious than it seems—notwithstanding all the fluctuations to which it is subject—if we remember that it is an expression of the crisis of natural law and, at the same time, of the search for an *Ersatz*, for something to take its place. In the shift from Grotius' *ius naturale* to the Law sanctioned and accepted by the general will, the foundations are different, but the new protagonist

(the general will) has the same functions and attributes as the old (nature). Rousseau's general will is not the will of all, that is, it is not "the sum of individual wills";⁴⁵ nor is it a *sui generis* individual will freed of all selfishness and egotism. It is somewhere between the two.⁴⁶ And to better appreciate its mysterious nature, it is worthwhile recalling Diderot's definition in the *Encyclopédie*: "The general will is in each individual a pure act of understanding, reasoning in the silence of the passions."⁴⁷ Rousseau did not accept that definition. Why?

I do not think that what disturbed Rousseau was the rationalistic flavor of Diderot's definition,⁴⁸ i.e., his reducing the general will to "a pure act of understanding, reasoning in the silence of the passions." For, although Rousseau's general will is nourished and strengthened by love and by feelings, it is guided by reason.⁴⁸ That is, it is still a rational will—"will" as it could be conceived before the romantic outburst, certainly not that voluntaristic will of our time which precedes and dominates reason.⁴⁹

No, what he could not accept was Diderot's answer to the question *Où est le dépôt de cette volonté générale?*—where is the general will located? He could not accept the location of the general will "in each individual." And Rousseau could not settle for this approach because he had to rebuild somehow, within society itself, an equivalent of the transcendence that was formerly placed above and outside the realm of human affairs. In other words, the general will had to be the anthropomorphic substitute for the order of nature and for the natural reason that mirrored that order. So much so that in Rousseau the laws were derived from the general will just as they were previously derived from natural law. He wrote: "Whenever it becomes necessary to promulgate new ones [laws], this necessity is perceived universally. He who proposes them only says what all have already felt."⁵⁰ This is like saying that laws are not produced *ex homine*, but are recognized and proclaimed *ex natura*: the general will does not, strictly speaking, make them and want them, but bears them within itself. If it were really a will, when inert it would not exist, and when mute it would not will; while for Rousseau the general will is "always constant, unchangeable, and pure" and cannot be annihilated or corrupted.⁵¹ Which comes back

to saying that it is an entity of reason which does not suffer the vicissitudes of human will, or of particular wills.⁵²

The general will can be compared, as far as the function Rousseau assigned to it is concerned, to the "spirit of the people," to what the historical school of law later called the *Volksgeist*: not because the two concepts are similar, but because they both attempt to fill the void left by natural law. Both these notions were motivated by the need to discover objectivity in subjectivity, something absolute and stable in what is relative and changeable—in short, a fixed point of reference. The romantics sought transcendence within immanence by locating the former in History (with a capital *H*), in the collective, anonymous, and fatal flux of events; Rousseau tried to find transcendence in Man by placing it in a common ego that unites all men. And just as the romantics of the historical school of law contradicted themselves when, in order to insert their transcendent *Volksgeist* in the orbit of immanence, they had to rely on a privileged interpreter,⁵³ in the same way and for the same reason Rousseau contradicted himself (thereby revealing the weak point of his system) when, in his search for a link between the general will and what the citizens want, he allowed the majority to be the interpreter of the *volonté générale*.

The contradiction lies in the fact that the will of the majority is subjective and merely stems from the will of all, whereas Rousseau's general will is an objective moral will made up of qualitative elements, for it must be "general" in essence, at its origin, and for its objective.⁵⁴ Although Rousseau kept his general will in the orbit of calculable qualities—he even indicated that it is derived from a sum of the differences, i.e., after the pluses and minuses of individual wills are cancelled out⁵⁵—counting can only reveal the general will, it cannot produce its essence.⁵⁶ The popular will is additive, the general will is one and indivisible. Even if we grant that in the process of popular consultations an interplay of compensations eliminates individual passions, in order to achieve the quality of general will we need much more: *bonne volonté* (good will), patriotism, and enlightened popular judgment.⁵⁷ These are demanding conditions, which amount to a very severe limitation on popular sovereignty.⁵⁸

If the general will "is always good and always tends to the

public interest," it does not follow—Rousseau added—"that the deliberations of the people are always right."⁵⁹ He later explains: "The people always desire the good, but do not always see it. The general will is always in the right, but the judgement which guides it is not always enlightened."⁶⁰ The people would like the good, but that does not mean that they recognize it: therefore it is not the general will that resolves itself into popular sovereignty, but, vice versa, the popular will that must resolve itself into the general will. Rousseau did not ask whether the people rejected or accepted a bill, but whether it did or did not express the general will.⁶¹ In substance, his system hangs on a general will that supplants popular power.

Ironically enough, Rousseau was the proponent of a most unadventurous type of immobile democracy which was supposed to legislate as little as possible, and could survive only on condition that it kept its actions to a minimum. He devoted all his ingenuity and the most meticulous attention to controlling the forces that his ideal would have let loose. His democracy was intended to be defensive rather than aggressive, cautious and wary, not Jacobin and omnivorous.⁶² It is no paradox to assert that his democracy was a watchdog democracy, to the same extent that the liberal State of the nineteenth century was nicknamed the watchdog State. He rejected representatives, wanted a direct and, as far as possible, a unanimous democracy, and required that the magistrates should have no will of their own but only the power to impose the general will. The result was, clearly, a static body, a democracy that was supposed to restrict, rather than encourage innovation. It is true that Rousseau spoke of "will," but he did not mean by it a *willing will*; he thought of it as a brake, rather than an accelerator. The general will was not a *dynamis*, but the infallible instinct that permits us to evaluate the laws, and to accept as Law only the Just, the True Law. Rousseau's aim was to free man from his bonds by inventing a system that would obstruct and curb legislation. And this was because he felt that the solution of the problem of securing freedom lay exclusively in the supremacy of law, and, furthermore, in a supremacy of law concerned with avoiding the legislative outcome of the Athenian democracy, that is, the primacy of popular sovereignty over the law.

Rousseau, then, did not present a new conception of freedom. He

enjoyed going against the current and contradicting his contemporaries on many scores, but not on this one point: the legalitarian concept of liberty that had found fresh nourishment and support in the natural rights of the natural law revival of the seventeenth and eighteenth centuries.⁶³ Rousseau never for a minute had the idea of freeing man by means of popular sovereignty, as is maintained by those who have evidently read little of him. The assertion that liberty is founded by law and in law, found in Rousseau, if anything, its most intransigent supporter. Rousseau was so uncompromising about it that he could not even accept the legislative conception of law within a constitutional framework proposed by Montesquieu: for this solution, after all, allowed for changing laws, while Rousseau wanted a basically unchanging Law.

5. Autonomy: A Criticism

It may be asked: did not Rousseau speak of liberty as autonomy at all? Actually we do find in the *Social Contract* this sentence: "Obedience to laws that we have imposed on ourselves is liberty."⁶⁴ But when he declared that everybody is free because in obeying the laws that he himself has made he is submitting to his own will, Rousseau was by no means speaking of the autonomy of which we speak today as if it were his discovery.

In the first place, Rousseau related his idea of autonomy to the Contract, that is, to the hypothesis of an original pact in which ideally each party to the contract submits to norms that he has freely accepted. The fact that Rousseau had in mind a democracy that was not in the least inclined to change its Laws shows how important it was for him to keep this liberty tied to its original legitimacy, and indicates that he did not mean this idea to be used as a basis for mass legislation, which is the way we are using it. There is an essential condition that qualifies Rousseau's formula, namely that the people are free so long as they do not delegate the exercise of their sovereignty to legislative assemblies.⁶⁵ So his conception has very little to do with obedience to laws that are made for us by others.

In the second place, Rousseau's thesis is closely related to the notion of a small democracy in which everybody participates. His State was the city, and he never thought that his democracy could

be applied to large republics.⁶⁶ He had in mind Spartans and Romans, and his projects concerned Geneva. Now it is plausible to maintain that the citizens of a small city who govern themselves directly submit only to the rules that they have accepted, and therefore obey nothing but their own will; but when self-government is no longer possible, when the citizens are dispersed over a vast territory, when they do not participate in the legislative output, does the assertion still make sense? Certainly not for Rousseau.

In the third place, by tracing to Rousseau the concept of liberty as autonomy, we take the premise from which he started and forget the conclusion which he reached. When Rousseau went back to a liberty which is submission to laws which we have prescribed ourselves, his problem was to legitimize Law. If man renounces his natural liberty in order to achieve a superior civil liberty, he does this because the society which he enters subjects him to norms that he has accepted, that is, to just Laws, which liberate, not oppress him. But once Law is legitimized and true Law is established, Rousseau's liberty is liberty under Law. Man is free because, when Laws and not men govern, he gives himself to no one. In other words, he is free because he is not exposed to arbitrary power. This was Rousseau's concept of liberty. And so it was understood by his contemporaries. Even in the Declaration of Rights of 1793, Article Nine stated: "The law must protect public and individual liberty against the oppression of those who govern." This article has a strange ring if we recall that the Terror was under way. Yet, what we have read is Rousseau's definition of liberty.

The truth is that "autonomy" originated from Kant, and that it was Kant who called attention to the concept. Except that for the author of the *Critique of Practical Reason* the notion of autonomy had nothing to do with democratic liberty or any other kind of political or even juridical liberty. Kant distinguished very clearly between "external" and "internal" freedom. And the prescription by ourselves of our own laws is in Kant the definition of moral liberty, that is, of our internal freedom—a completely different matter from the question of external coercion. In the moral sphere we are concerned with the question of whether man is free in the interior forum of his conscience, while in politics we are concerned with ways of

preventing man's exterior subjugation. Thus, if we are interested in the problem of man's political freedom, Kant's ethic is of no use to us. And this explains why the word autonomy rebounded from Kant to Rousseau as soon as it took on a political meaning. But the question is: to which Rousseau? To the real Rousseau, or to the one remodeled by the romantics and subsequently by the idealistic philosophers?

With the assurance that is characteristic of him, Kelsen flatly asserts that "political freedom is autonomy."⁶⁷ But it seems to me that Kelsen, as well as many other scholars, have adopted this thesis too lightly. For the autonomy about which especially German and Italian theory talk so much is a concept of a speculative-dialectical nature which stems from a philosophy that has indeed little to do with liberalism and democracy.⁶⁸ I can understand that many democrats have been fascinated by the idea of autonomy, implying, as it does, a high valuation of the *demos*. But it is a concept that political theory has endowed with the very different function of justifying and legitimizing obedience. This is a perfectly respectable usage, except when we want autonomy for the solution of a problem not its own, namely the problem of safeguarding, maintaining, and defending our liberties.

The truth is that if we may speak of autonomy as a concrete expression of political freedom, this autonomy ended with ancient democracies. The formula of the Greek liberty was—we read in Aristotle—"to govern and to be governed alternately, . . . to be under no command whatsoever to anyone, upon any account, any other-wise than by rotation, and that just as far only as that person is, in turn, under his also."⁶⁹ Now, this self-government can be interpreted as a situation of autonomy—even though somewhat arbitrarily, since in Aristotle's description the problem of a *nomos*, and therefore of a liberty related to law, is not raised. However, if it pleases us to speak of autonomy in this connection, then we come to the conclusion that the supposedly new and most advanced conception of liberty advocated by present-day progressive democrats is none other than the oldest and most obsolete formula of liberty. For clearly only a *micro-polis*, and indeed a very small one, can solve the problem of political freedom by having—I am again citing Aristotle—"all to command

each, and each in its turn all." Certainly our ever growing megalopolis cannot.

Coming back from this very distant past to the present time, we meet with the expression "local autonomy." But let us not delude ourselves: local autonomies result from the distrust of concentrated power and are, therefore, an expression of freedom *from* the centralized State. The liberty connected with administrative decentralization, with the Germans' *Selbstverwaltung*, or with self-government of the Anglo-Saxon type, does not mean what Rousseau or Kelsen had in mind. Situations of local autonomy are in effect "autarchies"⁷⁰ and serve as safeguards of liberty chiefly because they allow a poly-centric distribution of political power.

It may be said that the notion of autonomy in its political application must be interpreted in a looser and more flexible way, and that it is in this sense that it helps to connote the democratic brand of liberty. Norberto Bobbio observes that ". . . the concept of autonomy in philosophy is embarrassing, but . . . in the context of politics the term indicates something easier to understand: it indicates that the norms which regulate the actions of the citizens must conform as far as possible to the desires of the citizens."⁷¹ This is true—but why use the word autonomy? Orders that "conform as far as possible to the desires of the citizens" are assented orders, which means that the problem in question is one of consensus. And it is important to be precise on this matter, since the intrusion of "autonomy" is causing a great deal of confusion nowadays.

Bobbio rightly points out that while a state of liberty in the sense of non-restriction has to do with action, a state of autonomy has to do with will.⁷² This is indeed the point. For the sphere of politics concerns volitions *insofar as they are actions*, and not pure and simple will. In politics what matters is whether I am empowered to do what my will wants. The internal problem of freedom of will is not the political problem of freedom, for the political problem is the external problem of freedom of action. Politics concerns, as Hegel would say, the "objective sphere" in which the will has to externalize itself. Therefore, as long as we interpret liberty as autonomy, we do not cross the threshold of politics; not because autonomy is not essential, but because it is a subjective presupposition of political freedom.

The concept of autonomy is of so little use in the objective sphere, that here an antithesis of it does not exist. We can be coerced and still remain autonomous, that is, inwardly free. And this is the reason why it is said that force can never extinguish in man the spark of liberty. Likewise, we can be safe from any coercion and yet remain sleep-walkers because we are not capable of internal self-determination. Autonomy and coercion are by no means mutually exclusive concepts. My will can remain free (autonomous), even if I am physically imprisoned (coerced) just as it can be inactive and passive (heteronomous) even when I am permitted to do anything I wish (non-coerced). The antithesis of autonomy is heteronomy. And heteronomy stands for passivity, anomie, characterlessness, and the like—all of which are notions that concern not the subject-sovereign relationship but the problem of a responsible self. In short, they are all concepts that have to do with internal, not external liberty, with the power to will, not the power to do; and this goes back to saying that our vocabulary makes it impossible for us to employ the word autonomy in connection with the question of political freedom.

But why should we find it necessary? After all, in politics we are concerned with the practical problem of achieving a state of liberty in which State compulsion be curbed and based on consent. And this is just as much the democratic problem of liberty as it is the liberal problem of liberty. In either case we do not make the laws, but we help to choose the legislators. And that is a very different matter. Furthermore, we are free not because we actually wanted the laws that those legislators enacted, but because we limit and control their power to enact them. If the liberty that we enjoy lay in our personal share in law-making, I fear that we would be left with very few liberties, if any. For, as John Stuart Mill very nicely put it, "The self-government spoken of is not the government of each by himself, but of each by all the rest."⁷³

The reply may be that the formula liberty-autonomy is only an ideal. So we are not actually maintaining that somewhere there are people who are free by virtue of their own law-making, or that some place exists where liberty actually consists in the rule of oneself

by oneself. What we are expressing is only a prescription. It is only in this sense, therefore, that we put forth an ideal of political freedom that is specifically a democratic ideal. Be this as it may, on substantial grounds I am already satisfied with making the point that "liberty from" and "liberty as autonomy" are not alternatives which can be substituted for each other *in actual practice*, even though, in terms of principle, I must confess that I am still not convinced, for I doubt whether the ideal of self-obedience is really adaptable to the democratic creed, and whether it really reinforces it.

The democratic deontology is authentically expressed in the ideal of self-government, not of autonomy. To the extent that the notion of autonomy takes the place of the notion of self-government, it obscures and weakens it. It obscures it because after having been manipulated between Kant, Rousseau, and Hegel, the idea of autonomy can easily be used to demonstrate (in words, of course) that we are free when we are not. Whoever has lived under a dictatorship knows only too well how easily autonomy can be turned into a practice of submission that is justified by high-level explanations about true freedom. And not only does autonomy easily become a self-complacent exercise in obedience: there is more. For in helping people to mistake a nominal self-government for real self-government it ends up by keeping them from actually seeking the latter. I mean that when we speak of self-government, we can ascertain whether it exists and we know what we have to do in order to approach it; whereas when we speak of autonomy empirical verification is bypassed, and we can stay peacefully in bed and think of ourselves as free.

The rationalistic democracies have, then, been ill-advised in adopting an ambiguous philosophical concept that distracts our attention from concrete, what-to-do problems, and that comes dangerously near to being a sham construction behind which lurks the figure of liberty understood as passive conformity and subservience. In the realm of politics, autonomy is an untrustworthy interpretation of liberty, and its revival indicates how seriously the democratic *formamentis* as such lacks political sensitivity. Having reappeared on the stage of history after liberalism, that is, in a situation of established

political freedom, this *forma mentis* reveals, by the very adoption of the notion of autonomy, that it has not actually suffered the trials and lessons that political oppression imposes.

There is, of course, a type of autonomy that could be considered a *libertas major* even in the sphere of politics; but it would be found in a society that functions by spontaneous self-discipline wherein internalized self-imposed rules would take the place of compulsory laws emanating from the State. We can keep this concept in reserve for a time when the State will have withered away; but as long as the State is growing, let us not be duped into believing in a superior democratic liberty conceived of as autonomy. So long as the State grows let us bear in mind that even though I may succeed in governing myself perfectly, this autonomy does not protect me from the possibility of being sent to a concentration camp—and the problem is just that. This amounts to saying that I believe in the notion of autonomy as moral freedom, in the sense indicated by Kant, but certainly not in autonomy as a fourth type of political freedom.

6. The Principle of Diminishing Consequences

I have wanted to discuss the concept of autonomy fully because this notion is a typical example of that verbal overstraining which tends to jeopardize—among other things—the difficult and precarious conquest of political freedom. Many scholars treat the question of liberty as if it were a logical, rather than an empirical problem. That is, they ignore the principle that I call the law of diminishing consequences, or, as we may also say, of the dispersion of effects.

Thus, from the premise that we all participate (as infinitesimal fraction) in the creation of the legislative body, we boldly evince that it is *as if* we ourselves made the laws. Likewise, and in a more elaborate way, we make the inference that when a person who allegedly represents some tens of thousands contributes (he himself acting as a very small fraction) to the law-making process, then he is making the thousands of people whom he is representing free, because the represented thereby obey norms which they have freely chosen (even though it might well be that even their representative was opposed to those norms). How absurd! Clearly this is nothing

more than mental gymnastics in a frictionless interplanetary space. Coming back to earth, these chains of acrobatic inferences are worthless, and this for the good reason that the driving force of the causes (premises) is exhausted long before it reaches its targets. In empirical terms, from the premise that I know how to swim it may follow that I can cross a river, but not that I can cross the ocean. The “cause,” ability to swim, cannot produce everlasting effects. And the same applies in the empirical realm of politics to the “cause,” participation and elections.

There are at times no limits to the services that we ask of political participation. Yet from the premise that effective, continuous participation of the citizens in the self-government of a small community can produce the “result” liberty (precisely a liberty as autonomy), we cannot draw the conclusion that the same amount of participation will produce the same result in a large community; for in the latter an equally intense participation will entail diminishing consequences.⁷⁴ And a similar warning applies to our way of linking elections with representation. Elections do produce representative results, so to speak; but it is absurd to ask of the “cause,” elections, infinite effects. Bruno Leoni makes the point lucidly when he writes: “The more numerous the people are whom one tries to ‘represent’ through the legislative process and the more numerous the matters in which one tries to represent them, the less the word ‘representation’ has a meaning referable to the actual will of actual people, other than the persons named as their ‘representatives’. . . . The inescapable conclusion is that in order to restore to the word ‘representation’ its original, reasonable meaning, there should be a drastic reduction either in the number of those ‘represented’ or in the number of matters in which they are allegedly represented, or both.”⁷⁵

I do not know whether we can go back to the “drastic reduction” suggested by Leoni. But there is no doubt that if we keep on stretching the elastic (but not infinitely so) cord of political representation beyond a certain limit—in defiance of the law of the dispersion of effects—it will snap. For the more we demand of representation, the less closely are the representatives tied to those they represent. Let us therefore beware of treating representation as another version of the formulae that make us believe (by logical demonstration) that we are

free when we actually are not. The fable that autonomy makes for *the* true political liberty is, per se, sufficiently stupefying.

7. From Rule of Law to Rule of Legislators

There are two reasons for my having made a particular point of the connection between liberty and law. The first one is that I am under the impression that we have gone a little too far in the so-called informal approach. Nowadays, both political scientists and philosophers are very contemptuous of law. The former, because they believe that laws can do very little, or in any case much less than had previously been deemed possible; and the latter because they are usually concerned with a higher liberty that will not be hampered by humble, worldly obstacles.⁷⁶ Benedetto Croce unquestionably shared this attitude. Yet, philosophers also have a store of common sense, and it is highly significant that an anti-juridical thinker such as Croce himself said: "Those who build theories attacking law, can do so with a light heart because they are surrounded by, protected by, and kept alive by laws; but the instant that all laws begin to break down they would instantly lose their taste for theorizing and chattering."⁷⁷ This is indeed a sound warning that should always be kept in mind. After all, if Western man for two and a half millenniums has sought liberty in the law, there must have been a good reason for this. Our forefathers were not more ingenuous than we are. On the contrary.

We must nevertheless admit that the widespread scepticism about the value of the juridical protection of liberty is not unjustified. The reason for this is that our conception of law has changed, and that, as a consequence, law can no longer give us the guarantees that it did in the past. This is no reason for leaving, or creating, a void where law used to be, but it is certainly a reason for staying alert, and not letting ourselves be lulled by the idea that the laws stand guard over us while we sleep twenty-four hours a day. And this is my second motive for paying a great deal of attention to the relationship between law and political liberty.

Montesquieu, who was still relying on the protection of natural law, could very simply assert that we are free because we are subject to "civil laws."⁷⁸ But our problem begins exactly where this state-

ment terminates. For we are obliged to ask the question that Montesquieu (as well as Rousseau) could ignore: namely, which laws are "civil laws"?

To begin with, what is law? In the Roman tradition, *ius* (the Latin term for law) has become inextricably connected with *iustum* (what is just);⁷⁹ and in the course of time the ancient word for law has become the English (and the Italian and French) word for justice. In short, *ius* is both "law" and "right." That is to say that law has not been conceived as any general rule which is enforced by a sovereign (*iussum*), but as that rule which embodies and expresses the community's sense of justice (*iustum*). In other words, law has been thought of not only as any norm that has the "form" of law, but also as a "content," i.e., as that norm which also has the value and the quality of being just.

This has been the general feeling about the nature of law until recently.⁸⁰ Yet, on practical grounds we are confronted with a very serious problem, for law is not given, it has to be made. Only primitive or traditionalistic societies can do without deliberate and overt law-making. Thus we have to answer the questions: Who makes the law? How? And, furthermore, Who interprets the laws? In order for us to be governed by laws, or rather by means of laws, the law-makers themselves must be subject to law. But this is obviously a formidable, strenuous enterprise. The problem has been solved within the constitutional State by arranging the legislative procedure in such a way that the "form of law" also constitutes a guarantee and implies a control of its content.⁸¹ A large number of constitutional devices are, in effect, intended to create the conditions of a law-making process in which the *ius* will remain tied to *iustum*, in which law will remain the right law. For this reason legislation is entrusted to elected bodies that must periodically answer to the electorate. And for the same reason we do not give those who are elected to office *carte blanche*, but we consider them power-holders curbed by and bound to a representative role.

But this solution, or let us say situation, has reacted upon our conception of law. As I have said, we now have a different feeling about the nature of law. For the analytical jurisprudence (that calls up the name of John Austin) on the one hand, and the juridical

positivism (of the Kelsen type) on the other, have ended by giving law a purely formal definition, that is, identifying law with the form of law. This shift is actually a rather obvious consequence of the fact that the existence of the *Rechtsstaat*⁸² appears to eliminate the very possibility of the unjust law, and thereby allows that the problem of law be reduced to a problem of form rather than of content. Unfortunately, however, the formalists completely overlook (but Kelsen more than Austin) this dependence, that is, the fact that the formal definition of law presupposes the constitutional State. Therefore the high level of systematic and technical refinement achieved by this approach cannot save it from the charge of having drawn conclusions without paying attention to the premises, and of having thus erected a structure whose logical perfection is undermined by its lack of foundations.⁸³

The implication of this development, with regard to the political problem that constitutional legality tries to solve, is that Austin, Kelsen, and their numerous following have created, albeit unwittingly, a very unhappy state of affairs. Today we have taken to applying "constitution" to any type of State organization,⁸⁴ and "law" to any State command expressed in the form established by the sovereign himself. Now, if law is no longer a fact that is qualified by a value (a *ius* that is *iustum*), and if the idea of law is on the one hand restricted to the commands that bear the mark of the will of the sovereign, and on the other extended to any order that the sovereign is willing to enforce, then it is clear that a law so defined can no longer solve our problems. According to the purely formal definition, a law without righteousness is nonetheless law. Therefore, legislation can be crudely tyrannical and yet not only be called legal but also be respected as lawful. It follows from this that such a conception of law leaves no room for the idea of law as the safeguard of liberty. In this connection even "law" becomes, or may be used as, a trap word.

If the analytic-positivistic approaches of modern jurisprudence are not reassuring—at least for those who are concerned about political freedom—it must be added that the *de facto* development of our constitutional systems is even less so. What the founding fathers of liberal constitutionalism⁸⁵ had in mind—in relation to the legislative process—was to bring the rule of law into the State itself, that is,

to use Charles H. McIlwain's terms, to extend the sphere of *iurisdictio* to the very realm of *gubernaculum* (government).⁸⁶ English constitutionalism actually originated in this way, since the principles of the English constitution are inductions or generalizations derived from particular decisions pronounced by the courts in relation to the rights of specific individuals. And since English constitutional practice—even if it has always been misunderstood—has constantly inspired the Continental constitutionalists, the theory of *garantisme* as well as of the *Rechtsstaat* (in its first stage) had precisely this in mind: to clothe the *gubernaculum* with a mantle of *iurisdictio*. No matter how much the Anglo-Saxon notion of the rule of law has been misinterpreted,⁸⁷ there is no doubt that liberal constitutionalism looked forward to a government of politicians that would somehow have the same flavor and give the same security as a government of judges. But after a relatively short time had elapsed, constitutionalism changed—although less rapidly and thoroughly in the English-speaking countries—from a system based on the rule of law to a system centered on the rule of legislators. And there is no point in denying the fact that this transformation per se modifies to a considerable extent the nature and concept of law.

Bruno Leoni summarizes this development very clearly:

The fact that in the original codes and constitutions of the nineteenth century the legislature confined itself chiefly to epitomizing non-enacted law was gradually forgotten, or considered as of little significance compared with the fact that both codes and constitutions had been enacted by legislatures, the members of which were the "representatives" of the people. . . . The most important consequence of the new trend was that people on the Continent and to a certain extent also in the English-speaking countries, accustomed themselves more and more to conceiving of the whole of law as *written law*, that is, as a single series of enactments on the part of legislative bodies according to majority rule. . . . Another consequence of this . . . was that the law-making process was no longer regarded as chiefly connected with a theoretical activity on the part of the experts, like judges or lawyers, but rather with the mere will of winning majorities inside the legislative bodies.⁸⁸

It seems to us perfectly normal to identify law with legislation. But at the time when Savigny published his monumental *System of Actual Roman Law* (1840-1849), this identification still was unacceptable to the chief exponent of the historical school of law. And we can appreciate its far-reaching implications today very much more than was possible a century ago. For when law is reduced to State law-making, a "will conception" or a "command theory" of law gradually replaces the common law idea of law, i.e., the idea of a free law-making process derived from custom and defined by judicial decisions.

There are many practical disadvantages, not to mention dangers, in our legislative conception of law. In the first place, the rule of legislators is resulting in a real mania for law-making, a fearful inflation of laws. Leaving aside the question as to how posterity will be able to cope with hundreds of thousands of laws that increase, at times, at the rate of a couple of thousand per legislature, the fact is that the inflation of laws in itself discredits the law. Nor is it only the excessive quantity of laws that lessens the value of law, it is also their bad quality. Our legislators are poor law-makers, and this is because the system was not designed to permit legislators to replace jurists and jurisprudence. In this connection it is well to remember that when the classical theory of constitutionalism entrusted the institutional guarantee of liberty to an assembly of representatives, this assembly was not being assigned so much the task of changing the laws, but rather that of preventing the monarch from changing them unilaterally and arbitrarily. As far as the legislative function is concerned, parliaments were not intended as technical, specialized bodies; and even less as instruments devised for the purpose of speeding up the output of laws.

Furthermore, laws excessive in number and poor in quality not only discredit the law; they also undermine what our ancestors constructed, a relatively stable and spontaneous law of the land, common to all, and based on rules of general application. For, inevitably, "legislative bodies are generally indifferent to, or even ignorant of, the basic forms and consistencies of the legal pattern. They impose their will through muddled rules that cannot be applied in general terms; they seek sectional advantage in special rules that destroy the nature of law itself."⁸⁹ And it is not only a matter of the generality of

the law. Mass fabrication of laws ends by also jeopardizing the other fundamental requisite of law—certainty. Certainty does not consist only in a precise wording of laws, or in their being written down: it is also the long-range certainty that the laws will be lasting. And in this connection the present rhythm of statutory law-making calls to mind what happened in Athens, where "laws were certain (that is, precisely worded in a written formula) but nobody was certain that any law, valid today, could last until tomorrow."⁹⁰

Nor is this all. In practice, the legislative conception of law accustoms those to whom the norms are addressed to accept any and all commands of the State, that is, to accept any *iussum* as *ius*. Legitimacy resolves itself in legality, and in a merely formal legality at that, since the problem of the unjust law is dismissed as meta-juridical.⁹¹ It follows from this that the passage from liberty to slavery can occur quietly, with no break in continuity—almost unnoticed. Once the people are used to the rule of legislators, the *gubernaculum* no longer has to fear the opposition of the *iurisdictio*. The road is cleared for the legal suppression of constitutional legality. Whoever has had the experience of observing, for example, how fascism established itself in power knows how easily the existing juridical order can be manipulated to serve the ends of a dictatorship without the country's being really aware of the break.

I shall not go so far as to say that decay of constitutional government—understood as the habit of considering laws in terms of the State, and not the State in terms of laws—has already deprived us of the substance of juridical protection. But I do wish to stress that we have arrived at a point where such protection depends exclusively on the survival of a system of constitutional guarantees. For our rights are no longer safeguarded by our conception of law. We are no longer protected by the rule of law but (in Mosca's terminology) only by the devices of "juridical defense." And since very few people seem to be fully aware of this fact,⁹² it is important that we call attention to it. Everywhere, but especially in the rational democracies, there is a call for the democratization of constitutions. Now, this demand indicates nothing other than the steady erosion of the techniques of *garantisme*. The ideal of these reformers is to transform law into outright legislation, and legislation into a rule

of legislators freed from the fetters of a system of checks and balances. In short, their ideal is constitutions that are so democratic that they are no longer, properly speaking, constitutions. This means that they, and unfortunately most other people, fail to realize that the more the achievements of liberal constitutionalism are undermined by so-called democratic constitutionalism, the closer we are to the solution at which the Greeks arrived and which proved their downfall: namely, that man was subject to laws so easily changed that they became laws unable to assure the protection of the law.

There are then, as we can see, innumerable reasons for alarm. Whereas law, as it was formerly understood, effectively served as a solid dam against arbitrary power, legislation, as it is now understood, may be, or may become, no guarantee at all. For centuries the firm distinction between *iurisdictio* and *gubernaculum*, between matters of law and matters of State, has made it possible for legal liberty to make up for the absence of political freedom in many respects (even if not all). But nowadays the opposite is true: it is only political freedom that supports the legal protection of individual rights. For we can no longer count on a law that has been reduced to statutory law, to a *ius iussum* that is no longer required to be (according to the formal conception) a *ius iustum*. Or, rather, we can rely on it only insofar as it remains tied to the constitutional State in the liberal and *garantiste* meaning of the term.

Today, as yesterday, liberty and legality are bound together, because the only way that we know to construct a political system that is not oppressive is to depersonalize power by placing the law above men. But this bond has never been as precarious and tenuous as it is at present. When the rule of law resolves itself into the rule of legislators, the way is open, at least in principle, to an oppression "in the name of the law" that has no precedent in the history of mankind. It is open, I repeat, unless we return to the constitutional State with renewed vigor and awareness.

And there is nothing legalistic in this thesis. I believe in law as an essential instrument of political freedom, but only to the extent that political freedom is the foundation and condition of everything else. In other words, what protects our liberties today are "rights," and not the law-as-form on which so many jurists seem to rely. And

our rights are the institutionalization of a freedom *from*, the juridical garb of a liberty conceived of as absence of restraint.⁸³ It is in this sense, and strictly under these conditions, that I have stressed that only liberty under law (not liberty as autonomy), only a constitutional system as an impersonal regulating instrument (not popular power as such), have been, and still are, the guardians of free societies.

We asked at the beginning what place in the scale of historical priorities the principle of political freedom has for us today. If my diagnosis is correct, the answer is: to the extent that *iurisdictio* becomes *gubernaculum* and legality supplants legitimacy, to the same extent political liberty becomes paramount and the need for freedom *from* again becomes a primary concern. Only a few decades ago it might have seemed that the political and liberal notions of liberty had become obsolete. But now it is important to realize that the new freedoms about which we were so keen not long ago are becoming old freedoms, in the sense that the political freedom which we have been taking for granted is the very liberty for which we must again take thought. The pendulum of history goes back and forth. Accordingly, those who are still advocating a greater democratic liberty at the expense of the despised liberal liberty, are no longer in the forefront of progress. They resemble much more a rear-guard which is still fighting the previous war than a vanguard which is facing the new enemy and present-day threats.

By this I do not mean in the least that the question of freedom is exhausted by the liberal solution of the political problem of liberty, or that it is not important to supplement a liberty envisaged as non-restriction by adding a freedom *to* and a substantive power *to*. But it is equally important to call attention again to the proper focus of the problem of political freedom: for it is freedom *from* and not freedom *to* that marks the boundary between political freedom and political oppression. When we define liberty as "power *to*," then the power *to* be free (of the citizens) and the power *to* coerce (of the State) are easily intermingled. And this is because so-called positive liberty can be used in all directions and for any goal whatsoever.

Therefore the so-called democratic, social, and economic freedoms presuppose the liberal technique of handling the problem of power.

And I wish to stress *liberal* because it has become important not to confuse the liberal notion of liberty—which is perfectly clear—with the manifold and obscure notions that can be drawn from the much-abused formula “democratic freedoms.” It is true that democratic ideals put pressure on the liberty of liberalism, in that they expand a “possibility to” into a “power to,” adding to the right of being equal the conditions of equality. But no matter how much democracy permeates liberalism and molds it to its goals, I do not see how we can distinguish and enucleate from the need of liberty as non-restriction a second form of *sui generis* political freedom. To the question as to whether we can oppose to the freedom *from* other and more tangible forms of liberty, I would answer: other freedoms, Yes, of course—but another kind of *political* freedom, No, since it does not exist.

NOTES

† *Annals*, III, 27.

1. *Essays on Freedom and Power*, p. 53.
2. On the problem of freedom in general, Mortimer J. Adler's work, *The Idea of Freedom* (Garden City, 1958), is a precious mine of information (cf. also the bibliography, pp. 623-663). I disagree, however, both with the classification and the method, which he calls “dialectical.” The concepts of each author are treated in a historical vacuum, independently of the circumstances and motives which prompted them. Thus in Adler's presentation one misses both the fact that different theses were held for the same reason, and that many differences are due to the fact that the same thing is being said under different circumstances. For further reference to the general problem consult esp. the following collections containing excellent contributions: *Freedom, Its Meaning*, ed., R. N. Anshen; and *Freedom and Authority in Our Time*, eds. Bryson, Finkelstein, MacIver, and McKeon (New York, 1953).
3. I do not use the current labels of freedom from fear, from want, from need, or the formula “freedom as self-expression,” since it is seldom clear in what context they belong. With the exception of freedom from need (which is clearly economic), freedom from fear and from insecurity can be understood as instances of psychological freedom, but also as related to political freedom. Still worse, freedom as self-expression can be just as much a psychological freedom as a moral and/or intellectual one.
4. Cf. *Essay Concerning Human Understanding*, esp. Vol. I, Bk. II, Chap. 21 *passim*; and *Two Treatises of Government*, Bk. II, Chap. 4, Sect. 22.

5. Cf. *Approaches to the Study of Politics*, ed. R. Young, pp. 174 and 184.
6. Cf. *Freedom*, p. 11.
7. This is Hobbes' well-known definition in Chap. XXI of *Leviathan*, which reads in full: “Liberty, or freedom, signifieth, properly, the absence of opposition; by opposition I mean external impediments of motion.” This definition was—according to Hobbes himself—the “proper, and generally received meaning of the word” in England. (For the sake of exactness the definition is placed by Hobbes in the context of “natural liberty”: but it overlaps also into the context of civil liberty, of the “liberty of subjects.”) I assume that even Adler would agree with my statement about the basic continuity of the concept of political freedom, since he writes in his Conclusion: “In the course of identifying political liberty . . . we found that *exemption from* the arbitrary will of another was commonly present in the understanding of all freedoms” (*The Idea of Freedom*, pp. 611-612).
8. Of course, economic and religious as well as social constraints (as the Tocquevillian type of tyranny of the majority) may also be a concern of public authorities, but they are not necessarily an aspect of political liberty.
9. It does not seem to me, therefore, as H. J. Morgenthau maintains, that political freedom is confronted with a dilemma: freedom for the holder, or for the subject of political power? The concept of political freedom is associated with the latter problem, not with freedom of domination. I agree very much with Morgenthau's conclusions, but I would not say, as he suggests, that there is a case of unfreedom when a power holder is not allowed unrestricted power. Cf. “The Dilemmas of Freedom,” in *American Political Science Review*, III (1957), p. 714 ff.
10. This is Hobbes's shorthand. Cf. *Leviathan*, Chap. XIV.
11. Cf. “The Pattern of Liberty,” in *Liberty*, eds. M. R. Konvitz and C. Rossiter (Ithaca, 1958), pp. 16-18.
12. *Ibid.*
13. Thus Jhering reminds us that “law is not a logical concept but an energetic and active one.” (*Der Kampf um's Recht*, 1st ed. 1873, Chap. I.) Compare with note 15 below.
14. Or otherwise they are following the formula of ancient liberty discussed in Chap. XII, 3, 5, and 6, above; and again in this chap., sections 5, 6.
15. “Les libertés sont des résistances” (liberties are resistances), Royer-Collard, the doctrinaire of the French Restoration, used to say. It is symptomatic how in an author so far removed as Laski one should find a connotation so closely related. Cf. Harold J. Laski, *Liberty in the Modern State* (New York, 1949), p. 172: “Liberty cannot help being a courage to resist the demands of power at some point that is deemed decisive.”

16. It should be clear that in the expression "political liberty" I include also the so-called "civil liberties" (freedom of speech, of press, of assembly, etc.). Civil liberties too are liberties that come under the category of freedom *from*, since they delimit the sphere of action of the State and mark the boundary between the use and abuse of political power. Our political rights stem from civil liberties both as their prosecution and above all as their concrete guaranty. That is to say that political rights are civil liberties which have been extended and protected, and civil liberties are the *raison d'être* (even if not the only one) for the existence of political rights.
17. This issue will be examined in Chaps. XIV, 6, and XVI, 4, 6, below.
18. See below section 7.
19. *Oratio pro Cluentio*, 53.
20. The exceptions are not probatory, for, as M. J. Adler has aptly noted, although there are "(i) authors who maintain that freedom consists in exemption from legal regulations or restrictions and (ii) authors who maintain that freedom consists in obedience to law . . . they are not talking about the same freedom. Though they may appear to be giving opposite answers to the question 'How is law related to liberty?' they are really not taking that question in the same sense." (p. 619). Cf. below, note 76.
21. The similarity of development between Roman and English constitutionalism was perceived by Rudolf von Jhering in his *Geist des römischen Rechts*, and also by Bryce in his *Studies in History and Jurisprudence*.
22. Cf. e.g. Aristotle: "Men should not think it slavery to live according to the rule of the constitution; for it is their salvation" (*Politics* 1310a).
23. Ch. Wirszubski, *Libertas*, etc. (Cambridge, 1950), p. 13.
24. However, I prefer to say "constitutional *garantisme*" instead of state based on law (*Rechtsstaat*) because the latter can also be understood in a restrictive sense as a mere system of administrative justice. In fact the administrative notion of *Rechtsstaat* has prevailed upon the constitutional notion (at least in the Italian and German juridic doctrine). Cf. the pertinent remarks of Giuseppino Treves, "Considerazioni sullo stato di diritto," in *Studi in onore di E. Crosa* (Milano, 1960), Vol. II, pp. 1591-1594.
25. Notably the externalization and generalization of the principle that every man has the right to live according to his own conscience and principles.
26. Dicey's *The Law of the Constitution* (1885), Part II, still remains the classic exposition of the rule of law theory. For the precedents which escaped Dicey, and in particular the contribution of the Italian communes to the elaboration of the principle of the rule of law, cf. the detailed study of Ugo Niccolini, *Il principio di legalità nelle democrazie italiane* (Padova, 2nd ed. 1955).

27. I say possibly because the "due process of law" as understood in the United States has no equivalent in Europe, and in substance considerably surpasses not only the *lex terrae* of the old English law, but the English interpretation of the rule of law as well.
28. Duverger reminds us that "when Laboulaye gave the title *Cours de politique constitutionnelle* to a collection of Benjamin Constant's works, he meant to say in substance *Course in liberal politics*. 'Constitutional' regimes are liberal regimes." Cf. M. Duverger, *Droit constitutionnel et institutions politiques* (Paris, 1955), p. 3. To be precise Constant himself had collected those writings in 1818-19, saying that "they constitute a sort of course in constitutional politics. . . ."
29. Cf. Chap. XII, 5 above.
30. *Vom Wesen und Wert der Demokratie*, Chap. VII.
31. B. de Jouvenel, *Du pouvoir*, p. 290.
32. He added: "[Otherwise] you can be sure that it will not be the law that will rule, but men." (*Considérations sur le gouvernement de la Pologne*, Chap. 1).
33. It is the constant thesis in all of Rousseau's writings. In the *Discours sur l'économie politique* compiled probably in 1754 for the *Encyclopédie*, he wrote: "Law is the only thing to which man owes his freedom and the justice he receives." In the dedicatory letter to the *Discours on Quelle est l'origine de l'inégalité parmi les hommes* he wrote: "No one of you is so little enlightened as not to realize that where the vigor of the law and the authority of its defenders end, there can be no safety or freedom for anyone." In the first draft of the *Contrat social* (1756), law was described as "the most sublime of all human institutions." In the "brief and faithful" condensation of his *Contrat social* in the *Lettres écrites de la montagne* Rousseau repeated: "When men are placed above the law . . . you have left only slaves and masters." (Pt. I, No. 5.)
34. Pt. II, No. 8. Rousseau had said before: "There is . . . no freedom without laws, nor where there is anyone who is above the law. . . . A free nation obeys the law, and the law only; and it is through the power of the law that it does not obey men. . . . People are free . . . when they see in whoever governs them not a man, but an organ of the law" (*ibid.*). And in Pt. II, No. 9 he writes: "All that the citizen wants is the law and the obedience thereof. Every individual . . . knows very well that any exceptions will not be to his favor. This is why everyone fears exceptions; and those who fear exceptions love the law."
35. *Les Confessions*, Bk. IX. It is a rephrasing of this question: "What is the nature of a government under which its people can become the most virtuous, most enlightened, most wise, in short the best that can be expected?"

36. Rousseau enjoys this comparison, which is also found in a letter to Mirabeau dated 26 July 1767.
37. Pt. II, No. 9.
38. *Contrat social*, II, 6.
39. Cf. B. de Jouvenel in the *Essai sur la politique de Rousseau* which introduces his ed. of the *Contrat social* (Genève, 1947), pp. 123-126. Cf. also *Du pouvoir*, pp. 295-304.
40. The criticism against the legislative fickleness of the Athenians is resumed in the *Contrat social*, II, 4. Cf. also III, 11, *ibid.*
41. The state, says Rousseau, "needs but a few laws" (*Contrat social*, IV, 1). And let us remember that his model was Sparta, that is, the static constitution by antonomasia. Addressing the citizens of his favored Geneva he wrote: "You have good and wise laws, both for themselves, and for the simple reason that they are laws. . . . Since the constitution of your government has reached a definite and stable form, your function as legislators has terminated: to assure the safety of this building it is necessary that you now find as many obstacles to keep it standing as you found aids in building it. . . . The building is finished, now the task is to keep it as it is." (*Lettres écrites de la montagne*, Pt. II, No. 9). The exhortation to "maintain and reestablish the ancient ways" is found also throughout the *Considérations sur le gouvernement de la Pologne* (cf. Chap. III). One must also keep in mind that Rousseau's concept of law is based on custom, which he judges as the most important aspect of law (cf. *Contrat social*, II, 12).
42. In the dedicatory letter to the *Discours on L'inégalité parmi les hommes* Rousseau states that the republic he would have chosen is the one in which "individuals are happy to accept the laws." In the *Considérations sur le gouvernement de la Pologne* (Chap. II) Rousseau distinguishes between the common "law makers" and the "Legislator," laments the absence of the latter, and recalls as examples Moses, Lycurgus and Numa Pompilius. Cf. also *Contrat social*, II, 7, where he invokes the Legislator, "an extraordinary man in the state" who must perform "a particular and superior function which has nothing in common with the human race," for "it would take gods to make laws for human beings."
43. The relationship between Rousseau and natural law is studied in detail by R. Derathé, *Jean-Jacques Rousseau et la science politique de son temps* (Paris, 1950).
44. The wording is not Rousseau's, in fact the expression was common enough. Cf. the careful and intelligent reconstruction of the concept in Jouvenel's *Essai sur la politique de Rousseau*, pp. 105-120, 127-132.
45. *Contrat social*, II, 3.

46. We should not look at Rousseau's general will through romantic glasses, and for how it has reached us after the idealistic mediation. Also because, as Derathé points out, "the general will is essentially a juridic notion which can be understood only through the theory of the moral personality which had been formulated by Hobbes and Pufendorf" (*J. J. Rousseau*, etc., pp. 407-410).
 47. *Encyclopédie*, "Droit naturel," Sect. 9.
 48. Rousseau is just as much a rationalist when, e.g., he declares that in the civil society man must "consult his reason before listening to his inclinations" (*Contrat social*, I, 8), and that to submit to the civil society means to be subject to a "law dictated by reason" (*ibid.*, II, 4). Consider also the following passage in the *Contrat*, II, 6: "Private citizens see the good which they repudiate; the public wants the good which it does not see. . . . It is necessary to compel the first to make *their will conform with their reason*; one must teach the other to *know what it wants*" (my italics).
 49. See in this connection A. Cobban's *Rousseau and the Modern State* (London, 1934) and Derathé's *Le Rationalisme de Rousseau* and *Jean-Jacques Rousseau et la science politique de son temps*. Cassirer goes as far as maintaining that "Rousseau's ethics is not an ethics of sentiment, but it is the purest and most definite ethics of the law ever formulated before Kant." ("Das Problem Jean Jacques Rousseau," Italian transl., p. 84). Which is going too far. My deviation from Masson's thesis does not imply that I disregard his fundamental work, i.e., his classic book on *La Religion de J. J. Rousseau* (Paris, 1916, 3 vols.); nor do I wish to deny that Rousseau's political thought is a continuation of his ethics. But I do not see how one can pile together *Émile* (and along with it the *Discours*, the *Confessions*, the *Réveries*, or even the *Nouvelle Héloïse*) with Rousseau's political writings. Whether Rousseau's sentiment has a romantic character or not, the point is that the "ethics of the sentiment" and the "ethics of politics" belong to radically different contexts: in *Émile* Rousseau educates man "according to nature," in the *Contrat* he "denatures" him into a citizen. As Rousseau himself points out in *Émile* (I), "Whoever wants to preserve in a society the priority of the natural sentiments does not know what he wants."
- This is to say that Rousseau considers two hypotheses. When society is too large and corrupt only the individual can be saved. Therefore in *Émile* Rousseau proposes to abolish even the words "country" and "citizen," and exalts love for one's self. In this hypothesis man must devote his attention entirely to himself. But when the city and society are small and still patriarchal—this is the second hypothesis—then one must save the community: this is the problem of the *Contrat*. In the latter case the citizen must cancel the man, the patriot must collectivize his love for himself, and the individual must give his self to the whole; he dies as a "particular" and is reborn as a moral member of the collective body. Rousseau is coherent, but

his hypotheses are discontinuous, or better alternative. In the "nature man" the sentiment dominates, but in the "denatured" one (the citizen) passion and love become a catalyst which helps in the production of a society which acts according to reason; and the general will is the very *deus ex machina* of a purely logical construction.

50. *Contrat social*, IV, 1.

51. *Ibid.*

52. It is true that in Rousseau there is also a "subjective" position through which the will can decide about the laws (cf. *Contrat*, II, 12); but that admission is always accompanied by the position that reason discovers their "objective" necessity (cf. *Contrat*, II, 11).

53. The analogy holds true even in this respect: because for Rousseau too the legislator is a "revealer," as Groethuysen has pointed out in his work *Jean-Jacques Rousseau* (Paris, 1949), p. 103.

54. Cf. esp. *Contrat*, II, 4 and 6.

55. *Contrat*, II, 3. Here one can perceive the distance between Rousseau and Hegel, between the philosopher of the eighteenth century and the romantics. In Rousseau's conceptualization we do not find, for there could not be, any of those ingredients used by the romantics for building their organismic, collective entities, we do not find the "soul" or the "spirit" of the people. For this reason Rousseau had to keep his general will proximate to something numerical and computable.

56. In fact Rousseau hastens to specify: "Often there is quite a difference between the will of all (*la volonté de tous*) and the general will" (*Contrat*, II, 3). That "often" reveals Rousseau's difficulties and oscillations. On the one hand he was concerned to find a passage between Law and Sovereign, but on the other hand Rousseau was not at all resigned to accept this consequence: that "a people is always free to change its laws, even the best ones: for if it wants to harm itself, who has the right to stop it?" (*ibid.*, II, 12).

57. B. de Jouvenel has rendered the distinction very well. He states: "The will of all can bind everyone juridically. That is one thing. But it is quite another thing to say that it is good. . . . Therefore, to this will of all which has only a juridic value he counterposes the general will which is always correct and always tends toward public welfare" (*Essai sur la politique de Rousseau*, p. 109).

58. Note in passing that Rousseau's "people" is completely different from the *populace*. The people consists of the "citizens" and the "patriots" only. Both in the project of the Constitution of Poland as in the one of Corsica, Rousseau foresees a meticulous *cursus honorum* which amounts to a qualification for sovereignty. And from the *Lettres écrites de la montagne* one can see very

clearly that equality for Rousseau is an intermediate condition between the beggar and the millionaire represented by the bourgeoisie. Between the rich and the poor, between the rulers and the *populace*, Rousseau's "people" is not far removed from Hegel's "general class."

59. *Contrat*, II, 3.

60. *Ibid.*, II, 6.

61. *Ibid.*, IV, 2.

62. Rousseau not only did not have a revolutionary temperament, he was not even a political reformer. Cf. Groethuysen's concise statement: "Rousseau's ideas were revolutionary; he himself was not" (*J. J. Rousseau*, p. 206). In his second *Discours* Rousseau declares: "I would have liked to have been born under a democratic government, wisely tempered" (Dedicatory letter). In the third *Dialogue* he stresses that he "had always insisted on the preservation of existing institutions." In 1765 he wrote to Buttafoco: "I have always held and shall always follow as an inviolable maxim the principle of having the highest respect for the government under which I live, and to make no attempts . . . to reform it in any way whatever." The project on the reform of Poland is throughout a reminder of the use of prudence in carrying out reforms, and one of the most sarcastic refutations of revolutionary medicines is found in this text: "I laugh at those people . . . who imagine that in order to be free all they have to do is to be rebels" (*Considérations sur le gouvernement de la Pologne*, Chap. VI). Only Corsica, Rousseau believed, could be reformed through legislation alone, for in his judgment it was the only state young enough to gain by it (*Contrat*, II, 10). For the rest he warned, "After customs are established and prejudices become deeply set, it is a vain and dangerous enterprise to change them" (*ibid.*, II, 8). And referring to changes of regime he admonished that "those changes are always dangerous . . . and one should never touch a government that is established except when it becomes incompatible with the common weal" (*ibid.*, III, 18).

63. One must discern at least three phases in the evolution of the idea of natural law. Until the Stoics the law of nature was not a juridic notion, but a term of comparison which denoted the uniformity and the normality of what is natural. With the Stoics, and the Romans above all, one can already speak of a theory of natural law. But the Roman conceptualization did not contain the idea of "personal rights" which is at the base of our idea of constitutional legality and which belongs to the third phase. (Cf. Chap. XIV, note 16 below.)

64. *Contrat social*, I, 8. Cf. also *ibid.*, I, 6.

65. *Ibid.*, III, 15.

66. One could quote at length, for this is a very firm point in Rousseau. Even

in the *Considérations sur le gouvernement de la Pologne*, that is to say in a context in which Rousseau has to soften and adjust his conception to a large State, he maintains that the "grandeur of nations, the extension of states" is the "first and principal source of human woes. . . . Almost all small states, whether republics or monarchies, prosper for the very reason that they are small, that all the citizens know each other. . . . All the large nations, crushed by their own masses, suffer whether . . . under a monarchy or under oppressors" (Chap. V). Also cf. *Contrat social*: "The larger a state becomes, the less freedom there is" (III, 1); "the larger the population, the greater the repressive forces" (III, 2).

67. *General Theory of Law and State* (New Haven, 1945), Part II, Chap. IV, B. a 2.
68. Hegelian idealism, to be precise. These infiltrations have been so deep that De Ruggiero's *Storia del liberalismo europeo* (trans. Collingwood, *History of European Liberalism* [London, 1927]) raises Hegel to the central figure of liberal thought and following the Kant-Hegel line reaches the conclusion, that "the State, the organ of compulsion par excellence, has become the highest expression of freedom" (p. 374, Italian ed.); this being, according to De Ruggiero, a typically liberal position, in fact the essential conquest of liberalism (cf. pp. 230-253 and pp. 372-374, Italian ed.). The reasons for my disagreement will be given in Chap. XV, below.
69. *Politics*, 1317 b (W. Ellis trans.).
70. For the difference between self-government, *Selbstverwaltung* (which German scholarship wrongly equated with self-government) and autarchy, cf. Giuseppino Treves, "Autarchia, autogoverno, autonomia," in *Studi in onore di G. M. De Francesco* (Milano, 1957), Vol. II pp. 579-594.
71. N. Bobbio, *Politica e cultura*, p. 176.
72. *Politica e cultura*, pp. 173, 272.
73. *On Liberty* (Oxford, 1947), pp. 67-68.
74. Cf. Chap. IV, 3, above.
75. Bruno Leoni, *Freedom and the Law* (New York, 1961), pp. 18, 19. Professor Leoni was kind enough to allow me to consult in advance the text of his lectures, and I am indebted to him for many of the issues discussed in the ff. Sect. 7.
76. There are also philosophers who maintain that freedom and law are mutually exclusive. This thesis does not apply, however, to the political problem of liberty, but to freedom understood as self-realization or self-perfection. I would go as far as saying that no author who has clearly isolated the problem of political freedom holds the view of "liberty against law," provided that some qualifications are made about what is meant by law. The thesis that

- law infringes on individual liberty, held, e.g., by Hobbes, Bentham, and Mill, does not really contradict Locke's statement that "where there is no law there is no freedom." (*Two Treatises of Government*, Chap. VI, Sect. 27.) It is different either because they envisaged a different problem, or because they referred to the case of the unjust law (but in such a case that denial completes the sense of the thesis of liberty under law). Cf. note 20 above.
77. *Filosofia della pratica* (Bari, 1909, 4th ed. 1932), p. 333.
 78. Cf. *L'Esprit des lois*, Bk. XXVI, Chap. XX: "Freedom consists above all in not being compelled to do something which is not prescribed by law; and we are in this situation only as we are governed by civil laws. Therefore we are free because we live under civil laws."
 79. The Greek had no real equivalent of the Latin *ius*. The Greek *diké* and *dikaíosune* render the moral but not the legal idea of justice: which means that they are not equivalent to the *iustum* (just) which derives from *ius*. On the meanings and etymology of *ius* as well as of the later term *directum* (from which come the Italian *diritto*, the French *droit*, the Spanish *derecho*, etc., which are not the same as the English "right," since the latter is concrete and/or appreciative whereas the former concepts are abstract and neutral nouns indicating the legal system as a whole), cf. Felice Battaglia, "Alcune osservazioni sulla struttura e sulla funzione del diritto" in *Rivista di diritto civile*, III (1955), esp. pp. 509-513; and W. Cesarini Sforza, "Ius" e "directum," *Note sull'origine storica dell'idea di diritto* (Bologna, 1930). From a strictly glottological point of view the origin of *ius* is not too clear. Let us just note that the associations of *ius* with *inbeo* (to order), *iuvō* (to benefit), *iungo* (to link), and *iustum* (just) all appear at a relatively late stage. Cf. G. Devoto, "Ius—Di là dalla grammatica," *Rivista italiana per le scienze giuridiche* (1948), pp. 414-418.
 80. This is of course a very broad generalization. For a more detailed but swift historical analysis, cf. the survey of C. J. Friedrich, *The Philosophy of Law in Historical Perspective* (Chicago, 1958).
 81. As can be easily gathered from the whole context of the book, I use "constitution" in the light of its political *telos* and *raison d'être*, and therefore in the perspective which conceives constitutional law—as Mirkine-Guetzévitch said—as a "technique of freedom" (cf. *Nouvelles tendances du droit constitutionnel* [Paris, 1931], pp. 81 f.) and defines a constitution as "the process by which governmental action is effectively restrained" (C. J. Friedrich, *Constitutional Government and Democracy*, p. 131). For the other loose meaning of constitution (but hardly of "constitutionalism" as a body of doctrine related to the constitutional function) see note 84, below.
 82. I am of course referring to the original meaning: *Rechtsstaat* as a synonym of constitutional *garantisme* (cf. note 24 above). If the notion of state based on law is conceived in strictly formal terms it becomes—as Renato Treves has

rightly observed—purely tautologic: "If we start with the preconception that our point of view must be exclusively juridic, on what other basis could the State based on law be founded except on law? What else could the State realize except law? And what is the significance of saying that the State must find its limits in law, given the fact that law is in itself always a limit and a position of rights and duties which are reciprocally corresponding?" (R. Treves, "Stato di diritto e stati totalitari," in *Studi in onore di G. M. De Francesco* [Milano, 1957], p. 61).

83. As it is well known, for Kelsen any State is by definition a *Rechtsstaat*, since according to the "pure doctrine of law" all State activity is by definition a juridical activity which brings about an "order" which cannot be regarded as anything but juridical. Cf. his *General Theory of Law and State*, *passim*.
84. That is, simply to designate any "political form," or better any way of "giving form" to any State whatever. It is true that this loose meaning of constitution is not unprecedented (for example, the translators of Aristotle render *politéia* by "constitution"; erroneously to be sure, since *politéia* is the ethico-political system as a whole, not its higher law). However, today it has found a technical justification in the formal definition of law, which consecrates, willy-nilly, the existence of what Loewenstein calls "semantic constitutions," so called because their "reality is nothing but the formalization of the existing location of political power for the exclusive benefit of the actual power holders" (*Political Power and Governmental Process*, p. 149). Cf. Chap. XVII, note 57, below. As I have made clear in note 81 above, I never use "constitution" in this all-embracing sense, but to qualify a specific type of State.
85. I say "liberal constitutionalism" where American authors are inclined to say "democratic constitutionalism" on account of the peculiar meaning which "liberal" has acquired in the United States. (This question will be looked into in Chap. XV, 2 below.) The latter label, however, has two disadvantages: one is that it is historically incorrect, for it is difficult to understand in what sense English constitutionalism belongs in the orbit of the development of the idea of democracy; the other is that it is confusing in terms of the present-day constitutional debate as well, since the democratic component of our systems tends nowadays to erode liberal constitutions (as I shall point out in Chap. XV, 5, below).
86. Cf. Charles H. McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca, 1940), Chap. IV. *Iurisdictio* and *gubernaculum* was the terminology used by Bracton towards the middle of the thirteenth century.
87. This misunderstanding has been well singled out by Bruno Leoni, *Freedom and the Law*, esp. Chap. III.
88. *Freedom and the Law*, pp. 147-149.
89. Cf. T. R. Adam in *Aspects of Human Equality*, p. 176.

90. B. Leoni, *op. cit.*, p. 79.
91. Cf. A. Passerin d'Entrèves, *Dottrina dello stato* (Torino, 1959), pp. 170-171.
92. Among the few notable exceptions see *The Public Philosophy* of Walter Lipmann (Boston, 1955), p. 179; and Charles Howard McIlwain, *Constitutionalism: Ancient and Modern*, which concludes with this pertinent appeal: "If the history of our constitutional past teaches anything, it seems to indicate that the mutual suspicions of reformers and constitutionalists . . . must be ended" (p. 148). In the same line of thinking, that is, in defense of the arguments for a *garantiste* constitutionalism, cf. also Giuseppe Maranini, *Miti e realtà della democrazia*.
93. Cf. Harold Laski, who was right in repeating an ancient but by no means antiquated truth: "Liberty . . . is a product of rights. . . . Without rights there cannot be liberty, because, without rights, men are the subjects of law unrelated to the needs of personality." (*A Grammar of Politics*, p. 142).