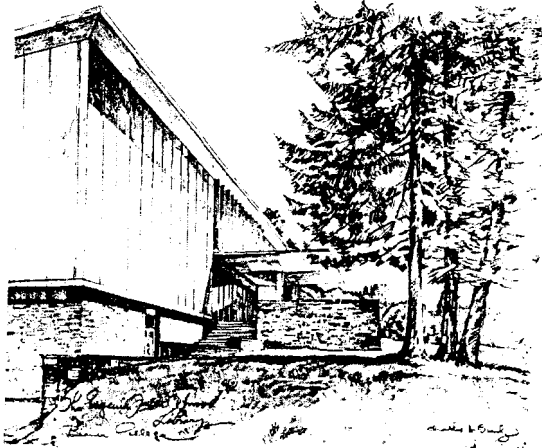


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Liberty and Law

Giovanni Sartori

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*Civil Law
vs.
The Rule of Law*

Studies in Law No. 5



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The Italian scholar, Giovanni Sartori, holds doctoral degrees in political and social science. He has served as Dean of the Faculty of Political Science and Director of the Institute of Political Science at the University of Florence, as Director of the Center of Comparative Politics in Florence, and as visiting professor at Harvard and Yale universities. In 1976 he was appointed professor of political science at Stanford University.

Since 1971 Professor Sartori has been editor of the quarterly, *Rivista Italiana di Scienza Politica*. He also serves on the boards of the *American Political Science Review*, *Comparative Politics*, *Comparative Political Studies*, *Government and Opposition*, and *Political Theory*. His publications include nine books and numerous articles in European and American scholarly journals.

This essay received the Monks Memorial Award for 1975. It is a slightly revised version of chapter 13 of the author's book, *Democratic Theory* (1962), and is reprinted by permission.

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Liberty and Law

The more corrupt the Republic, the more the laws.

—Tacitus†

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 declaration “I am free to,” can be used whenever we refer to the realm of action and will, and consequently can stand for the infinite scope and variety of human life itself.

However, and fortunately, it will be sufficient for us to consider this chameleonlike, all-embracing word from one specific angle: political freedom. 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 refers 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: 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. It would have appeared that way to them 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 (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 that 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 that 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 That 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 that 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.¹³ 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 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 nonrestraint 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 that 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. However, this is a question that can be dealt with only after having reviewed historically the nature of the problems that confront us.¹⁷

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. 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 pressingly 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*,¹⁸ 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.¹⁹

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;²⁰ 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.²¹ 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 confused 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 that, 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 *parresia* that were its chief expressions, appeared to the Romans as being nearer *licentia* than *libertas*."²² 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.²³ 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.²⁴ 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 a balance between government by men and government by laws.

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.²⁵ In the first approach, law consists of written rules that 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 lawmaking; 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 lawmaking, which is checked by a severe *iter legis*; and one concerning the range of lawmaking, 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 lawmaking 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, English constitutionalism separated the power to rule from the power to ascertain and declare the law, but 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 largely built upon, and safeguarded by, 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 lawmaking, 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;²⁶ and so long as a binding procedure establishing the method of lawmaking 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.²⁷ And constitutionalism is the solution to the problem of *political* freedom in terms of a *dynamic* approach to the legal conception of freedom. This explains why we cannot speak of political freedom without referring to liberalism—liberalism, I repeat, not

democracy. The political freedom that 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: "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 that was the reverse of the modern one.

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."²⁸ 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"²⁹—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*) with 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."³⁰ This was for him *the* problem, because—he said—only on this condition may man be free: when he obeys laws, not men.³¹ 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."³² 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?"³³

This was a problem that Rousseau had every reason to liken to the squaring of the circle.³⁴ 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,"³⁵ 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?"³⁶ For Rousseau this question had only one answer: to legislate as little as possible.³⁷ 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.³⁸ And this is precisely the point: The laws that Rousseau referred to were Laws with a capital L—that is, few, very general, fundamental, ancient, and almost immutable supreme Laws.³⁹

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.⁴⁰ 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, sustains them rather than disposes of them, 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.⁴¹ 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*,⁴² 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's *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";⁴³ nor is it a *sui generis* individual will freed of all selfishness and egotism. It is somewhere between the two.⁴⁴ 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."⁴⁵ Rousseau did not accept that definition. Why?

I do not think that what disturbed Rousseau was the rationalistic flavor of Diderot's definition, 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.⁴⁶ 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.⁴⁷

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," 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."⁴⁸ 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.⁴⁹ Which comes back to saying that it is an entity of reason that does not suffer the vicissitudes of human will, or of particular wills.⁵⁰

The general will can be compared, as far as the function Rousseau assigned to it, to the "spirit of the people," to what this 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,⁵¹ 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 majority's will 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.⁵² 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 will are canceled out⁵³—counting can only reveal the general will, it cannot produce its essence.⁵⁴ 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.⁵⁵ These are demanding conditions which amount to a very severe limitation on popular sovereignty.⁵⁶

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."⁵⁷ 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."⁵⁸ 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.⁵⁹ 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.⁶⁰ 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.⁶¹ 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."⁶² 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.⁶³ 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.⁶⁴ 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 that he reached. When Rousseau went back to a liberty that is submission to laws 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 so because the society he enters subjects him to norms 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."⁶⁵ But it seems to me that Kelsen, as well as many other scholars, has 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.⁶⁶ 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 otherwise than by rotation, and that just as far only as that person is, in turn, under his also."⁶⁷ 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 *micropolis*, 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"⁶⁸ and serve as safeguards of liberty chiefly because they allow a polycentric 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."⁶⁹ 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 nonrestriction has to do with action, a state of autonomy has to do with will.⁷⁰ 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 subject-

tive 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 sleepwalkers 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 (noncoerced). 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 lawmaking, 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."⁷¹

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 lawmaking, 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 that 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.

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 among 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 *forma mentis* 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. It 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 (as infinitesimal fractions) participate in the creation of the legislative body, we boldly evince that it is *as if* we ourselves made the laws.

Leoni: legislator & representation

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 lawmaking process, then he is making the thousands of people whom he is representing free, because the represented thereby obey norms that 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. 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 made the point lucidly when he wrote: "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."⁷²

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 formulas 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.⁷³ Benedetto Croce unquestionably shared this attitude. Yet, philosophers also have a store of common sense, and it is highly significant that an anti-judicial 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."⁷⁴ This is indeed a sound warning that should always be kept in mind. After all, if Western man for two and a half millennia 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."⁷⁵ But our problem begins exactly where this statement terminates. For we are obliged to ask the question that Montesquieu (as well as Rousseau) could ignore: Which laws are "civil laws"?

To begin with, what is law? In the Roman tradition, *ius* (the Latin word for law) has become inextricably connected with *iustum* (what is just);⁷⁶ 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, 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.

That has been the general feeling about the nature of law until recently.⁷⁷ 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 lawmaking. 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 lawmakers themselves

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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.⁷⁸ A large number of constitutional devices are, in effect, intended to create the conditions of a lawmaking 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*⁷⁹ 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 formalistic school of jurisprudence completely overlooks 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.⁸⁰

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,⁸¹ 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 (an *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 constitutionalism⁸² 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).⁸³ English constitutionalism actually originated in this way, since the *garantiste* principles of the English constitution are 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,⁸⁴ 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 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.⁸⁵

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 lawmaking 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 lawmaking, a fearful inflation of laws. Leaving aside the question as to how posterity will be able to cope with

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.⁹⁰ 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 constitu-

tional 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 that 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 that is still fighting the previous war than a vanguard that 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 nonrestriction 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 nonrestriction a second from 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 (see 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 that 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. In *Approaches to the Study of Politics*, ed. R. Young, pp. 174 and 184.
 6. In *Freedom*, cit., p. 11.
 7. This is Hobbes's 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. See "The Dilemmas of Freedom," in *American Political Science Review*, III (1957), p. 714 ff.
 10. This is Hobbes's shorthand. See *Leviathan*, Chap. XIV.
 11. See "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 sections 5 and 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, political rights are civil liberties that 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. See below section 7.
18. *Oratio pro Cluentio*, 53.
19. 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 73.
20. 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*.
21. See 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).
22. Wirszubski, *Libertas* (Cambridge, 1950), p. 13.
23. 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). See 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.
24. Notably the externalization and generalization of the principle that every man has the right to live according to his own conscience and principles.
25. Dicey's *The Law of the Constitution* (1885), Part II, still remains the classic exposition of the rule of law theory. For the precedents that escaped Dicey, and in particular the contribution of the Italian communes to the elaboration of the principle of the rule of law, see the detailed study of Ugo Nicolini, *Il principio di legalità nelle democrazie italiane* (Padova, 2nd ed. 1955).
26. I say "possibly" because "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.
27. 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." See 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. . . ."
28. *Vom Wesen und Wert der Demokratie*, Chap. VII.
29. B. de Jouvenel, *Du pouvoir*, p. 290.
30. 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).
31. 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).
32. 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 wrote: "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."
33. *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?"
34. Rousseau enjoys this comparison, which is also found in a letter to Mirabeau dated 26 July 1767.
35. Pt. II, No. 9.
36. *Contrat social*, II, 6.
37. 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. See also *Du pouvoir*, pp. 295-304.
38. The criticism against the legislative fickleness of the Athenians is resumed in the *Contrat social*, II, 4. See also III, 11, ibid.
39. 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* (see 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 (see *Contrat social*, II, 12).
40. 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. See 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."
 41. 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).
 42. The wording is not Rousseau's, in fact the expression was common enough. See the careful and intelligent reconstruction of the concept in Jouvenel's *Essai sur la politique de Rousseau*, pp. 105-120, 127-132.
 43. *Contrat social*, II, 3.
 44. We should not look at Rousseau's general will through romantic glasses or 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).
 45. *Encyclopédie*, "Droit naturel," Sect. 9.
 46. 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).
 47. See in this connection A. Cobban's *Rousseau and the Modern State* (London, 1934) and Derathé's *Le Rationalisme de Rousseau et 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, *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 *Emile* (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 *Emile* Rousseau educates man "according to nature," in the *Contrat* he "denatures" him into a citizen. As Rousseau himself points out in *Emile* (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 *Emile*, 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 that helps in the production of a society that acts according to reason; and the general will is the very *deus ex machina* of a purely logical construction.
48. *Contrat social*, IV, 1.
 49. *Ibid.*
 50. It is true that in Rousseau there is also a "subjective" position through which the will can decide about the laws (see *Contrat*, II, 12); but that admission is always accompanied by the position that reason discovers their "objective" necessity (see *Contrat*, II, 11).
 51. The analogy holds true even in this respect: because for Rousseau too the legislator is a "revealer," as Groethuyse has pointed out in his work *Jean-Jacques Rousseau* (Paris, 1949), p. 103.
 52. See esp. *Contrat*, II, 4 and 6.
 53. *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.
 54. 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).
 55. 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).
 56. 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 *cursum 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."
 57. *Contrat*, II, 3.
 58. *Ibid.*, II, 6.
 59. *Ibid.*, IV, 2.
 60. Rousseau not only did not have a revolutionary temperament, he was not even a political reformer. See Groethuyse'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. 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).
61. 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.
 62. *Contrat social*, I, 8. See also *ibid.*, I, 6.
 63. *Ibid.*, III, 15.
 64. 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 see *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).
 65. *General Theory of Law and State* (New Haven, 1945), Part II, Chap. IV, B. a2.
 66. 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 (see pp. 230-253 and pp. 372-374, Italian ed.).
 67. *Politics*, 1317 b (W. Ellis trans.).
 68. For the difference between self-government, *Selbstverwaltung* (which German scholarship wrongly equated with self-government) and autarchy, see Giuseppino Treves, "Autarchia, autogoverno, autonomia," in *Studi in onore di G. M. De Francesco* (Milano, 1957), Vol. II, pp. 579-594.
 69. N. Bobbio, *Politica e cultura*, p. 176.
 70. *Politica e cultura*, pp. 173, 272.
 71. *On Liberty* (Oxford, 1947), pp. 67-68.
 72. 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.
 73. 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). See note 19 above.
 74. *Filosofia della pratica* (Bari, 1909, 4th ed. 1932), p. 333.
 75. See *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."
 76. The Greek had no real equivalent of the Latin *ius*. The Greek *diké* and *dikaosúne* render the moral but not the legal idea of justice; this means they are not equivalent to the *iustum* (just) that 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), see 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 *iubeo* (to order), *iuvo* (to benefit), *iungo* (to link), and *iustum* (just) all appear at a relatively late stage. See G. Devoto, "Ius—Di là dalla grammatica," *Rivista italiana per le scienze giuridiche* (1948), pp. 414-418.
 77. That is of course a very broad generalization. For a more detailed but swift historical analysis, see the survey of C. J. Friedrich, *The Philosophy of Law in Historical Perspective* (Chicago, 1958).
 78. 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 that conceives constitutional law—as Mirkin-Guetzévitch said—as a "technique of freedom" (see *Nouvelles tendances du droit constitutionnel* [Paris, 1931], pp. 81 ff.) 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 81 below.
 79. I am of course referring to the original meaning: *Rechtsstaat* as a synonym of constitutional *garantisme* (see note 23 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).

80. It is well known that to 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 that brings about an “order” that cannot be regarded as anything but juridical. See his *General Theory of Law and State*, *passim*.
81. That is, simply to designate any “political form,” or better any way of “giving form” to any State whatever. This loose meaning of constitution is not unprecedented (for example, the translators of Aristotle erroneously render *politeia* by “constitution,” since *politeia* 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 Government Process*, p. 149). I have taken it (see “Constitutionalism: A Preliminary Discussion,” *American Political Science Review*, Dec., 1962) that the all-embracing and purely formal use of “constitution” is an unwarranted misuse of the concept.
82. I say “liberal constitutionalism” where American authors are inclined to say “democratic constitutionalism” on account of the peculiar meaning that “liberal” has acquired in the United States. 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.
83. See Charles H. McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca, 1940), Chap. IV. *Iurisdictio* and *gubernaculum* was the terminology used by Bracton toward the middle of the thirteenth century.
84. This misunderstanding has been well singled out by Bruno Leoni, *Freedom and the Law*, esp. Chap. III.
85. *Freedom and the Law*, pp. 147-149.
86. See T. R. Adam in *Aspects of Human Equality*, p. 176.
87. B. Leoni, *op. cit.*, p. 79.
88. See A. Passerin d’Entrèves, *Dottrina dello stato* (Torino, 1959), pp. 170-171.
89. Among the few notable exceptions see *The Public Philosophy* of Walter Lippmann (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, see also Giuseppe Maranini, *Miti e realtà della democrazia*.
90. See 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 subject of law unrelated to the needs of personality” (*A Grammar of Politics*, p. 142).

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