LIBERAL PLURALISM, PUBLIC REASON, AND THE BASIC FREEDOMS*

Pluralismo liberal, razón pública y libertades básicas

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ABSTRACT Taking religious freedom as illustrative, this essay proposes a theory of the basic freedoms that pacifies the conflict among libertarian, egalitarian, and communitarian sects of liberalism. This theory follows John Rawls's suggestion that constitutional courts are exemplars of public reason but rejects his partisan construal of public reason in terms that only an egalitarian liberal would recognize. If, as Rawls argues, liberal pluralism is reasonable and if constitutional courts are guardians of public reason, then an ideal constitutional court will guide itself by the theory of the basic freedoms that reconciles liberal pluralism with the rule of public reason. Such a theory will integrate the plurality of liberal sects into an inclusive liberalism that preserves a distinctive role for each in defining and limiting constitutional rights, while refining them of the errors resulting from their hegemonic ambitions. Liberal pluralism is thus preserved, but liberal fragmentation is overcome. Public reason is sought not through an escape from pluralism but in a logical concord among the denominations of liberalism. The way for courts to execute this concord in constitutional cases is to follow the method of reasoning they have already largely adopted. That method is proportionality review.

Keywords: constitutional rights, liberalism, liberal pluralism, public reason, freedom of religion, proportionality.

1. Constitutional Theory's Flight from Pluralism

What is it about certain freedoms that they warrant special constitutional protection against legal regulation? How do these so-called basic freedoms differ from the general liberty whose regulation by the state draws perfunctory court scrutiny for a valid public purpose? What does the special

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nature of the basic freedoms tell us about the kind of ends that are qualified to limit them and about the measure of respect still owed them when a limit is justified?

Answers to these questions vary with political theories of liberal constitutionalism. Classical, egalitarian, and communitarian liberalism provide different reasons for protecting the freedoms of religion, conscience, expression, and association and for requiring specially qualified ends for their limitation. This might suggest that constitutional adjudication is a field on which these political moralities fight for dominance and that constitutional law is merely the outcome of past battles between their judicial soldiers. That is a view I call rule-of-law scepticism, for it collapses the rule of law into that of the victorious sect. Many hold this view along with the antipathy to judicial review of legislation that flows from it if one believes that contests among political moralities ought to be resolved democratically. As an empirical judgment about how constitutional adjudication actually works, rule-of-law scepticism might be true, but the philosophically interesting question is whether it is true as a description of constitutional necessity. Granted that the reasons for treating certain freedoms as basic are as varied as the political moralities that generate them, does it follow that, unless filtered of these moralities, constitutional adjudication must be indistinguishable from the contest among political parties in the electoral and legislative processes?

An affirmative answer has consequences for both jurisprudential and constitutional theory. In jurisprudence, which asks (*inter alia*) what legal authority is, the politicization of constitutional rights leads to a formal conception of authority that, prescinding from debates about what rights subjects have, contains either no duty to respect rights or a limited duty to observe the procedural constraints of legality identified by Lon Fuller and A. V. Dicey[1]. All matters of juridical substance are left for contestation in the political arena. In constitutional theory, which asks (*inter alia*) where the authority to interpret the constitution ultimately lies, the ideological conception of constitutional rights favours the democratic assembly's interpretive supremacy or, where a written constitution provides for judicial review, ideologically neutral interpretations of the basic freedoms. Of these, four are prominent.

One construes the basic freedoms in accordance with what the written constitution's ratifiers understood them to mean. Michael Perry advocates this so-called originalist method, which he justifies on the ground that the

1. Fuller, 1969 y Dicey, 1897, cap. 4.

ratifiers represented the sovereign people[2]. Another interprets the basic freedoms with a view to ensuring the openness and fairness of the democratic process within which political moralities compete for dominance, while eschewing review of legislation for "rightness", of which political moralities have diverse conceptions. John Hart Ely and Jürgen Habermas offer different versions of this solution[3]. A third seeks an apolitical adjudication in the formal aspects of proportionality review, seeing in means-end rationality, necessity, and cost-benefit proportionality a distinctively legal set of tests for constitutional validity uncommitted to any substantive political morality. Robert Alexy, Aharon Barak, and David Beatty offer variants of this approach, which I'll call constitutional formalism[4]. A fourth seeks an interpretation of the basic freedoms on which free and equal persons would agree if they were ignorant of their commitments to comprehensive political philosophies. This, of course, is John Rawls's solution[5].

All these efforts to avoid rule-of-law scepticism share its basic assumption. Implicitly, all accept the sceptic's claim that there is no rational resolution of liberal pluralism to which ideally reasonable representatives of the rival sects could be persuaded to assent. While denying that rule-of-law scepticism necessarily follows from the fragmentation of liberalism, all accept the theoretical intractability of the break-up. That is why originalist, process, formalist, and Rawlsian theories of constitutional interpretation flee the competition among political moralities into some philosophically neutral refuge.

The reasons for regarding liberalism's fragmentation as intractable might vary. Many might share Rawls's view that liberal pluralism is reasonable —that it is the inevitable and salutary outcome of free thinking under the conditions of moral indeterminacy he calls "the burdens of judgment"[6]. On this view, no one should desire that liberal pluralism be overcome, for that is a desire for a state-enforced uniformity of thought all liberal sects would find common cause in opposing. Or perhaps the reason lies in a darker philosophical pessimism of the sort given memorable expression by Ely[7]. On this view, no one can hope for philosophical agreement on the fundamentals of a liberal polity, because political moralities

2. Perry, 1991, p. 669.
3. Ely, 1980 y Habermas, 1986.
4. Alexy, 1986, Barak, 2012 y Beatty, 2004.
5. Rawls, 1993, VIII.
6. Rawls, 1993, pp. 54-58 <pp. 85-89>.
7. Ely, 1980, p. 58 <p. 80>: "We like Rawls, you like Nozick. We win 6-3. Statute invalidated."

are ultimately objects of non-cognitive belief and emotional preference. Whether enthusiastic or despairing, however, the acceptance of liberalism's fragmentation leads away from constitutional government. More specifically, it leads originalist, procedural, formalist, and Rawlsian strategies of constitutional interpretation to discipline judicial review in ways inimical to constitutionalism. Let me explain.

Constitutionalism may be defined as that species of responsible government under which subjects are ruled, not by natural persons accountable to some part of them for failing to serve the material interests they were installed to serve, but by office-holding representatives of a public reason all human beings could accept as authoritative. By a public reason I mean a purpose universal to human beings for the sake of which a multitude constructively recognize a common authority to govern them —to specify the public reason in rules of interaction and to enforce those rules against miscreants. Historically, we have witnessed three broad types of constitutional regime, each distinguished by the nature of the public reason fundamental to it. For ancient constitutionalism, the public reason for rule and obedience was to perfect man's civic and intellectual nature in the virtues of citizenship and, in doing so, to cultivate a citizenry friendly to philosophy. For the medieval type, it was to cultivate the natural virtues attainable by unaided reason as preparation for receiving the supernatural virtues obtainable only through grace. For modern or liberal constitutionalism, the public reason for rule and obedience is to make the claimed right to individual freedom an institutional reality.

What freedom means, however, varies with each liberal sect. Indeed, it is the plurality of conceptions of freedom that divides liberalism into sects, giving each its separate identity. For classical liberalism, freedom is the right to act pursuant to self-chosen ends with no limit beyond the equal right of others; for egalitarian liberalism, it is the self-rule of equal citizens and their equal opportunity to shape their private lives in accordance with a self-formed conception of the good; for communitarian liberalism, freedom is the room that communities leave for individual agency and moral self-determination to endorse (or not) their ways of life. This variety of conceptions of freedom poses a problem for the possibility of constitutionalism as defined above. The problem is that liberal pluralism entails a plurality of conceptions of public reason such that the exclusive rule of one conception transforms public reason's rule into sectarian domination, thereby subverting constitutionalism.

Now, if the fragmentation of liberalism is considered a fixed reality —something insurmountable— then liberal pluralism will be equated with that fragmentation. Liberal pluralism and liberal sectarianism will be

tangled in a knot. Consequently, in their struggle to avoid sectarianism, theories of constitutional interpretation will flee the plurality of political liberalisms as such, whether into the original understanding, into review for fair democratic procedure, or for cost-benefit proportionality, or for conformity with principles of justice chosen in ignorance of one's philosophical commitments. Yet these attempts at flight will fail. No escape from liberal pluralism will reach non-partisan ground, for the excluded matter will always return in one form or another, its sectarian connotation in tow. Take, for example, originalism. Evidence of what the constitution's many ratifiers understood by, say, freedom of religion is bound to support either a range of possibilities or a single principle of high generality, and there is nothing to prevent sectarian commitments from choosing or specifying the meaning. Thus, originalism is not likely to pacify the rule-of-law sceptic. Or consider review for democratic process. If the fragmentation of liberalism is intractable, then no amount of debate in a legislature equally open to all parties and adhering to Habermasian precepts of communicative rationality will transform factional rule into the rule of public reason; for at the end of the debate, the majority party will impose its fundamental convictions on reasonable dissenters, and the court will approve the result. That, however, is the rule of a sectarian reason.

Constitutional formalism does better, but it too fails to reach a public reason. Its undoubted appeal lies in its ability eclectically to combine, without judging, the various sectarian conceptions of freedom as these are given to judges in a constitutional text. Thus, in line with classical liberalism, proportionality review gives an expansive meaning to the basic freedoms, understanding by the right to exercise them a boundless permission to believe what one pleases, to communicate those beliefs in words, and to associate with like-minded others. But then, in accord with egalitarian and communitarian liberalism, proportionality review allows their public goods (autonomy, communal identity) to limit the expansively defined rights of classical liberalism. Yet it does not thereby side with these sects against classical liberalism, for it admits a limit only if the tests of necessity and proportionality are met, signifying that classical liberalism's liberty right continues to exert constraining force despite yielding to the good in the particular case. In effect, proportionality review permits an egalitarian or communitarian limit on liberty provided that these moralities reciprocally acknowledge a limit to their rule in a right to liberty established independently of them. At the same time, however, proportionality review accepts liberal fragmentation, espousing no view as to whether an integrated theory of freedom exists that might make conceptual sense of its omni-partisan procedure, thereby transforming omni-partisanship into

impartiality. One is reminded of the village rabbi in *Fiddler on the Roof* who, in deciding a dispute between conflicting claims, declares both to be right and then also pronounces right the view that both cannot be right. Eclecticism, however, is not impartiality. Admitting, without resolving the conflict between, opposing conceptions of public reason does not produce public reason. At best, it produces a simulacrum.

The problems with Rawls's strategy have been laid bare in innumerable critiques and need not be dwelt on here. Suffice it to say that the escape from philosophical pluralism represented by the device of a veil of ignorance is illusory, because a particular and controversial conception of the person —aloof from cultural traditions and stripped of natural endowment— is built into the device. As a consequence, an egalitarian conception of "free and equal" is surreptitiously privileged over classical and communitarian conceptions, which it then dominates in the legal system ordered to its principles. Justice as fairness becomes justice as egalitarian liberalism conceives it.

In this essay, I propose an alternative way for courts to deal with liberalism's fragmentation. That way takes seriously Rawls's suggestion that constitutional courts are exemplars of public reason but demurs from his partisan construal of public reason in terms that only an egalitarian liberal would recognize. If liberal pluralism is reasonable and if constitutional courts are guardians of public reason, then an ideal constitutional court will guide itself by the theory of the liberal constitution that reconciles liberal pluralism with the rule of public reason. Such a theory will integrate the plurality of political liberalisms into an inclusive liberalism that preserves a distinctive role for each in defining and limiting constitutional rights, while refining them of the errors resulting from their hegemonic ambitions. Liberal pluralism is thus preserved, but liberal fragmentation and sectarianism are overcome. Public reason is sought not through a flight from pluralism but in a logical concord among the denominations of liberalism. The aim, therefore, is a theory of constitutional rights that *integrates* what proportionality review *combines* and that therefore vindicates proportionality review as the appropriate way for courts to reason in constitutional cases.

In *Constitutional Goods*, I presented such a theory primarily as an outline of a model constitutional law for a liberal-democratic polity[8]. In *The Owl and the Rooster: Hegel's Transformative Political Science*, I developed the same theory within the precincts of jurisprudence, showing

8. Brudner, 2004.

how inclusive liberalism can be derived from the internal morality of legal authority[9]. What follows is a nutshell version of the latter account together with some new remarks on proportionality review as well as on the method for logically integrating the plurality of liberal sects into one political liberalism. Sections 3-6 below draw quite heavily from chapter 6 of the *The Owl and the Rooster*, which contains formulations on which I have so far been unable to improve.

2. A Method for Integrating Political Liberalisms

How does one go about distinguishing what is rationally enduring in a liberal political morality from what is historically contingent and passing? What criterion is available for sifting the truths from the errors in a political morality's theory of constitutional rights? How can one logically collect the truths in each political morality into one coherent theory of liberal constitutionalism? To answer these questions, we will need to deploy two ideas. One is that political authority is the product of an ideal recognition between ruler and ruled; the other is the distinction between an example of ideal recognition and the archetype thereof. To explain the idea of an ideal recognition, I'll need to rehearse what in *Constitutional Goods* I called the stages of authority.

2.1. Pre-constitutional authority

Constitutionalism as defined above is a solution to the problem of authority, which can be set out as follows. To claim practical authority over others is to assert a power, just by commanding, to put those whom one commands under an obligation to obey. Since only a right gives one the power to put others under an obligation, we can say that a claim to practical authority is a claim that one has a right to be obeyed. That in turn is a right-claim that one's command pre-empt all the other reasons for acting that might otherwise figure in the practical reasoning of those whom one purports to command. Still, a claim is just a claim. Unless it is validated, what purports to be a command is really a hypothetical imperative ("if you wish to avoid these consequences, you ought to do X"), which, for the addressee, is only one consideration among many

9. Brudner, 2017, ch. 6.

to weigh in the balance. So, the problem of authority can be stated so: what transforms someone's subjective right-claim to be obeyed into an objectively valid claim such that the subject has a valid obligation to obey what is truly the command of an authority?

A partial answer is given by H. L. A. Hart[10]. It is that the claim of authority must be recognized by at least some of those whom the ruler commands. The ruler must have subjects who accept the ruler's claim of right to rule them by accepting the grounds (for example, military prowess, divine right, or popular election) for that claim and by voluntarily obeying his directives for the reason that he (as they believe) satisfies those grounds. The reason why this is a good answer is that it captures the idea that, for a claim of authority to be valid, it must be spontaneously confirmed by the *other* over whom authority is claimed; otherwise it remains a subjective claim asserted against the other —one lacking objective validation.

Still, the answer is incomplete. The reason for its insufficiency is that subjects might accept a kind of authority that annuls the independence of the subject needed to validate it. They might do this because they accept the ground of the ruler's claim to servile obedience —for instance, that his unbridled authority is conferred by God *propter peccatum*— as punishment for sin. In that case, the ruler could, without wronging them, treat his subjects as instruments of his purposes and use them in any way he chooses. But then the validation given the ruler by his subjects would not come from independent subjects —from subjects recognized as self-actuating agents— and so, notwithstanding voluntary acceptance, there would be no *independent* validation for the ruler's claim of right to obedience. The ruler would receive recognition from subjects under his mastery, and so the recognition would not be validating. Let me call that case despotism.

The case of despotism shows that another desideratum (besides voluntary acceptance) of valid authority is that the subject must retain in its submission to authority the independence *from* authority that qualifies it to give a validating recognition. The subject must accept the ruler's claim of authority to rule without losing the independence it had prior to acceptance. This, however, seems to require a contradiction. Submitting to authority just means giving up the liberty to act on one's independent judgment concerning matters on which authority has spoken. How then can one retain one's independence in submitting to authority? How can an authority acknowledge its subject's independence from authority and remain authoritative?

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10. Hart, 1961, ch. 4.

The contradiction dissolves once we notice a distinction. There is a difference between an authority's permitting its subjects to act on their independent judgment about matters on which it has ruled and its deferring to its subjects' independent reason for submitting unreservedly to its judgment. The former is incompatible with authority, but the latter is not. Accordingly, for an authority to be validated by the subject's voluntary submission, it must acknowledge a reciprocal duty to submit to its subject's independent agency by making the subject's own reason for submission the sole end of its rule. Submission must be mutual as between the parties to authority, who are thus parties to an implicit covenant. Each becomes a means for the other —the subject a means to the ruler's confirmed authority, the ruler a means for the subject's purpose in submitting to authority; but the independence of both is preserved by virtue of the reciprocity of submission. That ruler and ruled be at once end and means for the other is the condition for the subject's submission to the ruler being able to deliver an independent validation to the ruler's authority claim. Let me call this conception of authority the service conception.

The service conception is still an incomplete answer to the problem of authority. This is so because, without further specificity, the service conception could be satisfied by a subject's voluntarily acknowledging a ruler's right to autocratic rule on condition that the ruler dole out as fiefs the power to collect taxes and tolls to those who call him Emperor, Majesty, etc. and generally support his autocracy. Like a courtier in pre-revolutionary France, the subject might trade his independence for patronage and wealth, and the ruler might trade the powers of sovereignty for flattery and martial support. In that case, the reciprocity requirement is satisfied, but the requirement that the subject retain its independence is not; for the subject has alienated its independence for material gain, leaving the ruler free to rule autocratically and capriciously, to imprison or kill extra-legally, to conduct secret or stage-managed trials, and so forth. For his part, the ruler is a means for the ruled in such a way as to dissipate the incidents of sovereignty in spheres of private privilege.

The defect in the service conception of authority taken alone brings to sight a further desideratum of valid authority. The covenant between ruler and ruled must have a specific content. In order for the subject to retain its independence in submitting to the ruler and for the ruler to remain an authority in becoming a means for the ruled, the ruler must rule, not in whatever material interest the subject has in submission, but in the interest of the subject's independence itself. In that case, the subject recovers in a secure form the independence it possessed insecurely outside authority, and so it preserves in submission to rule its qualification to give

an objective validation to the ruler's claim of authority. Correlatively, the ruler maintains its authority in becoming a means for the subject, for the ruler's authority is subservient to an ideal rather than an empirical will —to the will that wills independence from the arbitrary will of others. A ruler who rules for the sake of an ideal interest in independence rules under a public reason that all independent subjects could impose on themselves. To this public reason the authoritative ruler is answerable in the sense that any directive of his that is incompatible with the reason is denuded of authority —*ultra vires*. It is the mere demand of a natural person whose authority no independent subject can accept or (therefore) have an unqualified obligation to obey. With this step we have entered the world of liberal constitutionalism.

2.2. The common form of political liberalisms: ideal recognition

Where authority is constitutional rather than personal, the covenant between ruler and ruled is an intellectual one. It need have no historical counterpart. Given its postulated end of independence, the subject *must* submit to a rule of law on condition that the ruler acknowledge a duty reciprocally to submit his commands to the impersonal test of self-imposability by an independent subject. Let me call an intellectual covenant with that content a relationship of ideal recognition. It is ideal in contrast to the imperfect recognition of despotic and autocratic rule because mutual recognition here preserves the subject's independence in submission to the ruler and the authority's independence in being a means for the ruled. Here, then, the product of mutual recognition is a valid authority. Worldly authorities are valid to a lower or higher grade of perfection (and political obligation is qualified or not by a limited permission to disobey for the sake of moving to a higher grade) depending on the conditions necessary and sufficient for valid authority that they satisfy. Authorized despots are authorities of the weakest kind; rulers who rule under a covenant of service to the ruled are stronger authorities than authorized despots, while rulers who rule under a public reason all independent subjects could accept are authorities without qualification. So legal positivists are correct to say that not all legal authority is just authority, but natural lawyers are correct to say that only just authority is absolute authority.

Suppose, however, that the concept of independence is inherently contestable such that there are only competing conceptions of liberal public reason with no rational way of resolving the disagreement. In that case, a non-partisan conception of valid authority would have to be understood

without reference to any particular interpretation of the basic freedoms in which the subject's independence is concretized. It would contain a duty on rulers to respect these freedoms and to treat all persons as equals before the law, but it would leave to political contestation what it means to fulfill these duties. Undoubtedly, independence is a contested concept. But is it a *necessarily* contested concept?

Observe, first of all, that there is a large area of agreement among liberal conceptions of constitutional authority. Their common feature is the structure of an ideal recognition between ruler and ruled. Subjects acknowledge the ruler's authority to rule on condition that the ruler make the subject's independence the sole end of its rule. So, all constrain rule by a public reason identified with, or inclusive of, the subject's independence. Where they differ, as we'll see, is in their understandings of what independence means and of what aspect of the subject —its free will, moral conscience, or individual character— the quality of independence attaches to.

Observe, secondly, that these understandings of independence are not mutually exclusive. Independence of will, of conscience, and of character can be necessary and jointly sufficient elements of a full independence, and the protection of one of these elements can be what is enduringly valuable in a constitutional *Gestalt* ordered to a particular conception of independence. Further, a constraint on rule for the sake of the subject's independence (however understood) is a constitutional right. Because the subject's continuing independence of the ruler qualifies it to validate a claim of authority through acceptance thereof, constitutional rights are complementary to valid political authority and therefore necessary to unqualified political obligation. Because, moreover, independence of will, of conscience, and of character are not mutually exclusive, the constraint on rule that protects one of these aspects of human independence can be part of a full body of constitutional rights, and the political morality that generates the right can be part of an inclusive or comprehensive political liberalism. All that is needed is a logical (as opposed to merely additive) way of connecting the various understandings of independence. That is the subject of the following three sub-sections.

2.3. The common defect: a part posing as the whole

While constitutionalism is rule under public reason, each sect of political liberalism has its own conception of the public reason under which rule is authoritative. For classical liberalism, the public reason for rule and obedience is the impartial determination and enforcement of

the natural law enjoining mutual respect between free wills regarded as independent ends-for-themselves; for egalitarian liberalism, it is the public guarantee to all ends-for-themselves of the legal conditions for authoring their lives in accordance with their consciences and for participating in rule; for communitarian liberalism, it is the mutual recognition as ends of the politically organized cultural community and the individual character whose active commitment to the culture brings its ethos to life. These conceptions of public reason organize distinct constitutional paradigms, each with its own reason for regarding certain freedoms as more basic (hence worthy of heightened protection) than others. But because each paradigm is an instance of ideal recognition, each produces a set of constitutional rights that is necessary for the reconciliation of authority and independence, hence for valid authority and unqualified obligation. The constitutional rights that reflect an ideal recognition between authority and subject are what is enduringly valuable in the paradigm. What is ephemeral are those features of the paradigm that reflect its claim to grasp, not an instance of ideal recognition, but ideal recognition simply —not part of the story about how authority can be reconciled with the subject's independence, but the complete story.

The fragmentation of liberalism is the consequence of each liberal sect's claiming to tell the complete story about valid authority. It is the result of each sect's claiming to identify not only a necessary condition for reconciling authority and independence but a sufficient one. While the claim to grasp a necessary condition is true, the claim to grasp a sufficient condition is not, for the latter claim is challenged (hence relativized) by the existence of other instances of ideal recognition, each containing rights missing from the others. Typically, liberal sects respond to this challenge by denying the force of the rights they lack or by reinterpreting them from the perspective of their own public reason and subsuming them to the rights they have. For example, classical liberalism sees no public duty universally to eliminate dependence on other free wills for subsistence, providing necessities only for those who, on the verge of starvation, would otherwise have no stake in a lawful condition, hence no obligation to obey the law[11]. It also denies a public duty to support ethos communities, giving only indirect aid by protecting the individual's freedom to associate for ends of its choice as well as its occupational mobility against legal barriers erected along racial, religious, and ethnic lines. For its part, egalitarian liberalism denigrates a separate right to liberty as "mere

11. See Kant, 1797, p. 136 [326].

license" and recasts the communitarian's right to the public support of cultural identity as an entitlement to the range of life-plan options that cultures offer and that moral agents need to choose their fundamental ends[12]. Finally, communitarian liberalism disparages the rootless liberty of the "deontological self" and reinterprets the egalitarian's right of self-determination as a vehicle for the free reproduction of ethos[13].

These tactics of denigration and subsumption not only shore up dogmatically each sect's claim to self-sufficiency; they also provoke over-reactions in the opposing sects, which are compelled to reject the others outright instead of just their exaggerated claims, thereby provoking in turn. Yet, given the availability of these tactics as ways for a liberal sect to convince itself of its self-sufficiency, it might seem that there is no method by which to persuade each to give up its claim to self-sufficiency and accept a constituent role instead. But that is not so. There is the method of dialectical reasoning.

2.4. The three phases of integration

As taught to us by Hegel (who credited Plato with its discovery as an objective logic of reality), dialectical reasoning comprises three phases: a negative or critical phase, a positive or reconstructive phase, and a recovery or redemptive phase[14]. I'll call the first phase immanent critique, the second conceptual synthesis, and the third recollection.

As applied to constitutional law, immanent critique first immerses itself in a constitutional paradigm and describes its internal unity —a unity ordered to its conception of public reason. It then criticizes the paradigm, but not by a standard external to it. Rather, it criticizes by a standard recognized by the paradigm itself, showing the latter to be inadequate to its own aspiration. The standard acknowledged by each paradigm is the idea of a public reason for rule and obedience that all independent subjects can accept. Each paradigm is based on a particular conception of that reason. The conception is refuted as the sole public reason for rule and obedience if, in being treated as such (as providing sufficient conditions for reconciling authority with independence), its constitution collapses as a case of ideal recognition, turning into a case of despotism, of the

12. Dworkin, 2000, pp. 175-179; Kymlicka, 1989, pp. 162-181.
13. Sandel, 1982, pp. 7-11, 15-65, 149-54, 179-183.
14. Hegel, 1812, paras. 79-82.

legally unconstrained rule of a person or group. In that case, we say that a conception of public reason, in claiming to be the sole reason for rule and obedience, dissolves into a private reason —or that an instance of ideal recognition, when claiming to be ideal recognition simply, turns into a case of deformed recognition.

The result of immanent critique, however, is not a negative dead-end. Since what is refuted is the claim to rule of a specific conception of public reason, the conception's downfall does not imply rule-of-law scepticism —the denial of the possibility of public reason as such. On the contrary, it points to a revised conception— one that has learned from the experience with the preceding one. In the reconstructive phase, accordingly, a new conception of public reason rises from the ashes of the old—one that integrates into public reason the aspect of subject-independence that the previous conception fatally excluded. The new conception does not, however, eclectically add the excluded element to the idea that excluded it; rather, it synthesizes the two in a novel idea different from both. The synthetic conception unifies intentionally the extremes whose connection was unexpectedly revealed in the previous conception's actualization and downfall. That is the sense in which the new conception learns from the experience with the old.

However, it does not follow from the superseded conception's dethronement that the conception must drop out entirely or be blended in the new one. Though failing to identify sufficient conditions for reconciling authority and independence, each conception identifies a necessary condition; and that condition can be honoured only if the conception of public reason singling it out maintains its integrity and autonomy within the unified set of all conditions—so no longer as sovereign but as constituent and subordinate, demoted rather than annulled. Were the condition (e.g. the authority's duty to respect its subjects' liberty) simply blended into a richer brew (its duty of concern for their autonomy), its specific necessity would not have been credited. This gives us a glimpse into the nature of the public reason that is truly sovereign. It must be the recollected totality of constituent conceptions of public reason necessary and sufficient for generating constraints on rule that reconcile authority with independence. So, sovereign public reason will organize a constitution encompassing several subsidiary constitutions, each subordinate to the whole and equal with each other. Because only the inclusive constitution fully reconciles authority with the independence of the subject needed to validate authority, it completes the rational development of authority from despotism to constitutionalism. But let me say something more about the public reason that is truly sovereign.

2.5. Ideal recognition: instance and archetype

We said that each liberal conception of public reason orders a constitutional paradigm evincing the structure of an ideal recognition between authority and subject. Yet we cannot make sense of a plurality of instances of ideal recognition without a notion of an archetype of which they are instances. The archetype, however, cannot be another case of ideal recognition alongside the others, for it would then be just another instance rather than an archetype. Nor, therefore, can it be a generic form of mutual recognition juxtaposed to its many constitutional instances; for such a one-sided form would again be something limited and particular in relation to those instances. Of such an abstraction one could reasonably say that it is not an archetype but a distillation —not a comprehensive public reason for rule and obedience within which alone particular public reasons have their valid jurisdiction, but a formal idea lifted inductively from our experience with particulars.

From what an archetype cannot be we learn something about what it must be. First, a genuine archetype of an ideal recognition must embrace its instances as a whole embraces its parts. It must be the ensemble of its instances—the set of necessary and jointly sufficient conditions for a subject's remaining independent in submitting to a ruler and for a ruler's remaining an authority in submitting to the ruled. Second, the archetype must stand to its instances as the comprehensive public reason for rule and obedience stands to partial and constituent public reasons. So, if a partial reason for rule and obedience is to guarantee a necessary condition of the subject's independence, then the comprehensive public reason is to guarantee the totality of conditions necessary and sufficient for the subject's independence. Third, the instances of ideal recognition must be microcosms of an all-embracing ideal recognition between whole and part such that the part, renouncing the claim to hegemony that led to its ruin, recognizes the supreme authority of the whole and the whole recognizes the qualified autonomy of the part. If we call the archetype of an ideal recognition comprehensive political justice and the type partial political justice, then the criterion for sifting can be formulated so: a political morality's constraints on authority (constitutional rights) that reflect an ideal recognition between authority and subject are rationally enduring elements of liberal constitutionalism; those of its features that reflect a claim by one part of political justice to be comprehensive political justice are inherently ephemeral. They are ephemeral because, like the delusions of Plato's cave-dwellers, they result from mistaking examples for the archetype.

In the sections that follow, I set out the conceptions of public reason of classical, egalitarian, and communitarian liberalism and draw out the interpretation of a basic freedom that flows from each conception. I also try to connect these conceptions as parts of a full conception through the dialectical reasoning just described, saving the good in each paradigm and discarding the bad. As I have done this before at greater length, I will take the descriptions of the constitutional paradigms, as well as the transitions from one to the next, from chapter 6 of *The Owl and the Rooster: Hegel's Transformative Political Science.* What is new here is the illustrative case through which the constitutional paradigms are made determinate and their differences brought into focus. There it was the freedom of speech; here it is the freedom of religion.

3. Public Reason as Mutual Respect for Free Will

In the classical liberalism given exemplary expression by Kant, the solitary person is thought to be morally self-sufficient in the sense that its right to respect depends on nothing beyond its innate free will[15]. This is classical liberalism's ontological atomism. Because the human being's end-status reposes sufficiently on its capacity for freedom, no natural teleology moves it into political society. The individual need not *become* in a civic body the dignified end it potentially is, for it is already fully a dignified end by virtue of its capacity freely to posit ends. Its state of nature is thus not a civic state but a state of mutual indifference and dissociation.

The dignity in free will entails that every person is at liberty to act on ends it freely chooses (no one may hinder him from doing so) to the maximum extent consistent with the equal liberty of others. In Kant's famous formula, that action is right which can co-exist with the freedom of all under a universal law[16]. Observe that this so-called axiom of right evinces the structure of an ideal recognition. Each person is bound to suffer another's liberty only to an extent consistent with its remaining an independent end capable of validating the other's right-claim to liberty, hence only on condition that he can reciprocally bind others to suffer his liberty to an equal extent. Accordingly, the axiom of right exhibits the form of ideal recognition in the specific shape of mutual respect between

15. Kant, 1797, p. 63 [237-238].
16. *Ibid.*, p. 56 [230].

self-centred persons. Everyone may act self-interestedly within bounds consistent with the equal liberty and vulnerability of all.

For classical liberalism, coercive authority is justified only as specifying and enforcing this pre-civil axiom of right. In doing so, coercive authority remedies the defect in the axiom's natural authority stemming from the unilateralism of specification and judgment in the pre-civil condition. Because of this flaw, no one can wrong another, and so the person's innate right to be free of another's constraint is merely inchoate. For the sake of the right's realization, human beings must unite under a common authority that, by virtue of its impartial judgment and the assurance it gives of omnilateral obligation, brings a rightful condition into existence. That is classical liberalism's public reason for rule and obedience. It is to perfect both the natural authority of the axiom of right and the person's innate right to respect for its liberty.

The public reason of classical liberalism orders a constitution we may call the constitution of liberty. Because in that constitution, public authority is justified only as actualizing the axiom of right, those commands of the ruler are alone authoritative that specify and enforce the law of mutual respect between persons or that create infrastructural supports for a rightful condition. Those that curtail liberty more than is necessary for equal liberty or that impose non-reciprocal obligations are devoid of authority. Here we see another instance of ideal recognition —this time between ruler and ruled. By the terms of the libertarian covenant, the subject submits to rule under a public reason identified with mutual respect between free and equal persons; and the ruler submits the validity of his commands to a test of acceptability by such persons. In that he has a duty (going with his authority) to conform to that criterion, the ruler wrongs his subjects by failing to do so. However, whether the ruler can be called to account for constitutional wrongs and whether the subject may resist the enforcement of wrongful commands is, for classical liberalism, a further question. I'll return to this.

Classical liberalism's public reason for rule and obedience generates a particular reason for affording the freedom of religion constitutional immunity against legal regulation. That reason has nothing to do with a duty of religious toleration. Christians might have a Christian duty to tolerate non-Christians, and a Catholic state might have good reason to tolerate non-Catholics, but a liberalism indifferent toward fundamental ends has no duty or need to "tolerate" any. Its special reason for protecting the freedom of religion is simply that my freedom to believe what I choose is compatible with the equal freedom of all to believe, say, or do what they please without regulating what people can believe. Having no impact on the

external freedom of others to pursue ends of their choice, choices of what to believe are *inherently* conformable to the axiom of right. It is therefore unnecessary to reconcile my choice with those of others by means of a rule permitting some level of hindrance while prohibiting the excess.

This is just what one cannot say about freedom of action. The freedom to act in the world necessarily brings choices into collision. My choice to stand here prevents anyone else from doing so without interfering with my body. My choice to use my land for my ends must conflict with at least some uses to which you might choose to put yours. Given the necessity that external freedom will bring some choices into collision, the right of equal freedom requires me to suffer your liberty and you to suffer mine within bounds consistent with equal liberty. The role of regulation is to draw these bounds. It is to set the limits within which each may impose on the other consistently with their equality as independent ends. So, where freedom of action is concerned, rights to liberty issue from the mutual accommodation of liberties under a rule. In that sense, they are creatures of regulation.

By contrast, the rights to freedom of religion and speech exist independently of regulation. This is so because, whereas freedom of action cannot exist without some level of mutual hindrance of freedom, the freedom to believe and say what one chooses can. In particular, the freedom of inward belief is so removed from the possibility of external impingements on others' freedom that it needs no limitation whatsoever to allow it to co-exist with the equal freedom of others. No doubt, you might shake my convictions by the skill with which you argue for yours, but you cannot do so without my assenting to this effect, and so you interfere with no freedom of mine to pursue ends of my choice. You might also refuse, from religious scruple, to design a wedding cake for a same-sex couple or to perform an abortion. But that is to put your belief into practice, not merely to hold or affirm the belief, and it is only the freedom to believe that the constitution of liberty immunizes against legal limitation. That freedom requires no regulation to make it compatible with equal freedom. It is compatible with equality prior to regulation.

If follows that any restriction of religious belief violates the axiom of right that classical liberalism's public authority is duty-bound to specify, enforce, and respect. Because it curtails liberty more than is necessary to secure equal liberty, a law restricting belief, whether by compelling conversion or disavowal or by punishing affirmation, is not one to which an independent end could assent. For classical liberalism, accordingly, *any* curtailment of the freedom of religious belief is *ultra vires* the ruler. In this respect, freedom of religion differs from that of speech, which, while it need not impinge on others' freedom, *can* do so (for example, by inciting

crime) and therefore admits of exceptions to its immunity from regulation. By contrast, the immunity of religious belief is absolute. Not only is it unnecessary for freedom of belief to hinder the freedom of others; it is impossible for it to do so. Therein alone lies the reason for the privileged place that freedom of religion enjoys in the constitution of liberty.

Classical liberalism's reason for immunizing religion from regulation applies to belief but not to action expressive of belief. Lying outside the reason for protecting belief, expressive action falls into general liberty, where it is vulnerable to legal regulation for the purpose of equalizing liberty or of preserving equal obligation against the claims of the religious conscience to exemptions from laws indirectly interfering with its ritual practices[17]. Where, moreover, classical liberalism's reason for protecting religion is the sole reason (where its instance of ideal recognition is identified with ideal recognition as such), the legal regulation of religious *action* will require no special public purpose, nor will it attract heightened scrutiny to determine whether the restriction of religious liberty was needed to achieve the legislative objective. Since the action-right is a creature of regulation, there is no right-infringement that needs to be justified by a specially qualified purpose and by necessity. So, carrying a *kirpan*, for example, receives no constitutional protection under the constitution of liberty; nor are exemptions from laws of general application permitted in deference to a religious practice (e. g. ritual circumcision or using a banned narcotic for a ceremonial purpose), not even if the exemption could be granted without prejudice to the law's purpose. Such an exemption would be unconstitutional as limiting liberty unequally, hence creating non-reciprocal obligations.

The constitution of liberty's reason for immunizing conscientious belief from legal regulation is an enduring reason of liberal constitutionalism. This is so because the absolute immunity of inward belief is a necessary condition for reconciling authority with the subject's independence of mind, hence for guaranteeing a subject qualified to validate a claim of authority; and only the constitution of liberty's reason for protecting certain freedoms from regulation (that they can be exercised without the necessity of collisions with the freedom of others) can give belief (which carries no possibility of collision) absolute immunity. As we'll see, the reasons generated by egalitarian and communitarian liberalism will protect the freedom of conscience as a common good, and, without the constitution of

17. *Employment Division, Department of Human Resources (Oregon) v. Smith*, 494 U.S. 872 (1990).

liberty as a constraint, that good will determine the scope of (hence relativize) the individual's right to belief.

If the constitution of liberty's absolute immunity for conscientious belief reflects an ideal recognition between authority and subject, its confinement of protection to belief reflects the false absolutization of its axiom of right as the only public reason for rule. Because classical liberalism equates the good with a medieval conception thereof that collapsed into priestly and monarchical despotism, it rejects the good as such as a reason for rule, leaving the freedom to pursue agent-relative ends as the sole public reason. It is therefore blind to an interpretation of the basic freedoms as goods everyone needs to lead an autonomous life. Such an interpretation rejects the dichotomy between belief and action because action expressing fundamental values is precisely the human good of living autonomously. Therefore, a good-based interpretation of religious freedom would also reject the idea that religious practice is fair game for regulation for ordinary public purposes.

That classical liberalism's axiom of right is a constraint on rule insufficient for reconciling authority and independence can be shown through an immanent critique of its constitution. If persons are thought to be morally self-sufficient, depending on no civic body for their dignity, then their natural condition will be seen as a stateless one. As a consequence, their critical capacity to judge right and wrong will be entangled with their pre-civic right of unilateral judgment as to what constitutes a violation of the axiom of right. And so when, to cure the defect of the pre-civil state, they surrender their right of unilateral judgment to a public authority, they will also give up the possibility of holding the public authority accountable for its constitutional wrongs; for to do so will appear as a revival of anarchy. They will therefore constitute a public authority that is once again unlimited in the sense that it will be unaccountable for breaches of its duty to rule solely for the sake of its subject's independence. It will have and acknowledge such a duty, but calling it to account will engage (or seem to) the very unilateral judgment that the civil condition was meant to overcome. So, while the ruler acknowledges a duty going with its authority to respect the subject's independence, it acknowledges no duty to avoid being judge in its own cause as to whether it has conformed to its duty; it is supreme lawgiver and supreme court in one body. Put otherwise, the supreme commander has no duty to be right in determining whether its commands are consistent with the axiom of right, for it has a monopoly on authoritative judgment. As a consequence, the ruler is once again an unlimited ruler, and the subject has lost its independence in submission to rule. For its part, the public reason under which the supreme

commander rules has collapsed into the private opinion of the commander. Constitutionalism has reverted to despotism[18].

The failure of classical liberal constitutionalism teaches that a further desideratum of an ideal recognition is that rulers be accountable for breaches of the public reason under which they rule. Otherwise, they rule as natural persons, not as officers of public reason. Further, the logic that took us from anarchy to authorized despotism shows what must be rethought if rulers are to be accountable without their subjects' reverting to anarchy. In particular, the rational necessity for entering a civil condition shows that classical liberalism was mistaken to think that individual agents are morally self-sufficient –that they depend on nothing but their free wills for their dignity. Evidently, they require a civic union for their realized dignity. But then it was also a mistake to treat anarchy as humankind's natural condition and to measure rightful rule by whether it conforms to an axiom of right enjoining respect for the greatest possible liberty of atomistic and supposedly self-sufficient persons. The impossibility of rights without a common authority teaches that the normative benchmark is instead an ideal civic union guaranteeing everyone's independence and of which all are equal and self-ruling members. Must we not regard such a union as the state natural to dignified beings rather than view that state as an anarchic condition that natural law precisely enjoins us to quit? If so, the argument for unlimited sovereignty never launches. If the justification of civil authority need not begin from rights to unilateralism in a pre-civil condition, then persons need not alienate their critical reason to an unlimited sovereign in order to establish the rule of law; for the link between critical reason and unilateral judgment (private reason) would be severed. The function of holding rulers accountable to the public reason for their rule could belong to organs of the civic body so structured by law as to be themselves independent organs of public reason.

4. Public Reason as Fair Terms of Social Cooperation

With this arc of thought, we have moved to a new paradigm of constitutional rule. Here the public reason for rule and obedience is not to perfect a pre-civic duty of atomistic persons to respect each other's sphere of liberty. It is rather to enjoy a fair scheme of civic cooperation ordered to everyone's independence. The original position is not anarchy but an imaginary congress of disinterested thinkers charged with elaborating

18. Kant, 1789, pp. 130-133 [319-323].

the principles of justice implicit in already going liberal orders[19]. Here, accordingly, the meaning of independence can be disentangled from its narrow meaning for the atomistic persons of classical liberalism. It is not simply the free will's independence from others' coercive imposition of the ends to which its motion is directed; it is also the economic independence that moral subjects require in order to shape their lives according to a deliberative conception of the good, and it is the political independence they gain through participation in law-making. So, independence now has the richer meanings of private self-determination and democratic self-rule, of which the freedom of choice protected by negative rights is only a precondition.

So understood, independence is a human good, the enjoyment of which is faring well by an objective measure. And because classical liberalism recognized no universal human good promotable by authority, the emergence of such a good requires a new covenant between authority and subject. The ruler's authority is conditional on his being under a positive duty to provide the conditions for all to become self-ruling citizens and self-authoring moral subjects –in other words, to promote the common welfare. Correlatively, subjects are entitled to these goods as a condition of retaining the moral independence that qualifies them to validate authority through obedience.

With the new covenant comes a new axiom of right. It is that rulers have a duty constitutive of their authority to provide their subjects with equal access to the means of self-rule and to show equal concern for their leading lives of their own authorship. Because, moreover, self-rule demands that the ruler be accountable for breaches of the new public reason, the ruler now has a duty to be right where a right answer exists and a duty to be reasonable where it does not. So its commands must now be reviewed by independent judges for consistency with *a priori* determinations of public reason; and they must be reviewed by representatives of the ruled for their reasonableness in implementing the common welfare.

Whereas classical liberalism's constitution was the constitution of liberty, the new one is the constitution of equality. This is so because guaranteeing to everyone the conditions for self-rule and self-authorship requires eliminating the absolute disadvantages some face because of sheer bad luck and which result either in not having enough to sustain life or in having just enough: low endowment, impoverished starting places, and interruption of income. It thus requires public allocations of resources

19. Rawls, 1993, pp. 22-28.

that reject as normative the historical and haphazard allocations resulting from subjects' having the maximum freedom of acquisition consistent with respect for free choice and established holdings. This means that, within the new constitutional order, classical liberalism's axiom of right is superseded. There is no longer a right regardless of its welfare consequences to the maximum liberty consistent with equal liberty, and so the public authority is not constrained by such a right. It may, for example, limit the kind of contract terms to which parties of unequal strength may voluntarily agree; and it may force someone to relinquish his peaceably acquired holdings so that others may have enough to support a life of self-authorship.

But further, there is not even a right to the maximum liberty consistent with equal self-rule and self-authorship-with the attainment of egalitarian goals. Such a right would imply an independent right to liberty, and yet for the constitution of equality there is no such right[20]. This is because an independent right to liberty is so far enmeshed with the apolitical and egocentric conception of the person that the constitution of equality has surpassed in favour of a civic conception. Not yet free of that conception, the egalitarian constitution equates unreduced liberty with civically non-responsible license, and so it recognizes no right to liberty apart from what fair terms of cooperation define. For it, there is only an equal entitlement to the conditions of self-authorship and self-rule, of which legal rights against interference with liberty are but one. Accordingly, the right to liberty is here mediated by an all-things-considered judgment as to what the common welfare requires; it does not exist separately. If we call classical liberalism's axiom of right axiom_1 and egalitarian liberalism's axiom of right axiom_2, we can say that the public authority is now constrained by a duty to specify and enforce axiom_2 but not axiom_1.

This changes the rationale and scope of the constitutional right to freedom of religion. In particular, the classical liberal reason for protecting freedom of religion against regulation is ousted. If there is no right to the maximum liberty consistent with equal liberty, then there is no pre-legal right to freedom of religion based on the idea that regulating belief limits liberty more than is necessary for equal liberty. Of course, freedom of religion is still protected, but for a different reason. It is that the freedom of conscience (both religious and non-religious) is precisely the freedom to form and live out a self-authored conception of the good toward which the civic union is ordered. Provided it respects the rights of person and property also required for self-authorship, this freedom is protected

20. Dworkin, 1978, ch. 12.

against regulation, because egalitarian liberalism knows no higher good of constitutional stature that could possibly limit its rightful exercise. Self-determination is considered the supreme good, and it is a formal good hospitable to any and every content—to every substantive opinion about what gives life purpose and value.

To be sure, the boundaries of free exercise may be drawn so as to accommodate other basic rights of self-determination (e.g. to non-discrimination in the marketplace), thereby securing the best scheme of rights-protection overall. But adjustments of that sort delineate –they do not limit– the right to free exercise, for final rights issue from the balance among various specifications of the one basic right of self-determination. Only a good other than formal self-determination could limit a *right* to the free exercise of religion; hence only a substantive good could do so. But egalitarian liberalism won't allow a limit on conscientious action for a substantive good, there being (within this paradigm) no public ones. All substantive goods are subjective conceptions of the good, and they are on a par. The ruler's duty of equal concern for self-authorship ($axiom_2$) precludes its treating certain conceptions of the good as inferior in worth to others, even if they have an anti-egalitarian content. Any regulation of free exercise subordinates the believer to another's opinion of the good contrary to $axiom_2$. It turns public reason's rule into party rule.

With this new reason for privileging freedom of religion above general liberty comes a new scope for protected religion. Gone is classical liberalism's dichotomy between belief and action, the former given absolute protection, the latter none. What is now protected is the free *exercise* of religion. This means that religious exemptions from laws of general application are now required, subject to conditions that render them consistent with the egalitarian purpose of the law. So, Sikhs can carry *kirpans* to school, and the Amish can home-school their children[21]. In that sense, the scope of protected religion expands. In another sense, however, it might contract, for whereas libertarian constitutionalism was barred from restricting freedom of contract for social-egalitarian ends, egalitarian constitutionalism must align the right to contractual freedom with the ruler's duty to ensure equal opportunity for leading self-authored lives. Thus, market discrimination on the ground of immutable characteristics is prohibited, and egalitarian liberalism cannot exempt market discrimination from a religious conviction if this would seriously impair the life opportunities of those suffering widespread prejudice. Thus, a hotel owner

21. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

with religious objections to homosexuality might be compelled to let his banquet hall for the celebration of a same-sex marriage if there were a paucity of other alternatives.

If egalitarian liberalism protects right-respecting action in accordance with religious conviction, it nevertheless withholds public *support* for religions even if this could be done even-handedly. This is so because the content-neutrality of freedom of conscience requires the egalitarian ruler to view public support for religions as the subsidization by some of the life-choices of others, contrary to fair terms of cooperation. No doubt, egalitarian liberalism can support endangered cultural structures (e.g. language, self-government) for the sake of self-authorship, for self-authorship requires the array of life-plans that cultural structures provide[22]. But it cannot consistently with content-neutrality support particular systems of belief, which are thus left to flourish or wither as fate decides.

The constitution of equality's protection of religious practice is a rationally enduring feature of liberal constitutionalism. As a product of an ideal recognition between authority and subject, the right to free exercise protects an aspect of the subject's independence —the freedom to act in accordance with a self-formed conception of the good— needed to validate political authority as the subject's own good. However, the egalitarian constitution's ignorance of a good qualified to limit the right to free exercise is a passing feature, for it reflects the false equation of the good with subjective conceptions of the good, itself reflecting a false equation of an objective good with a pre-modern natural law incompatible with freedom. Because of this feature, the constitution of equality has no theoretical resources with which to criticize exercises of religious belief that express hate toward other religious communities[23].

It might be thought that a religious practice denigrating a class of persons can be prohibited under the egalitarian constitution because it violates the constitution's basic norm of equal human worth or because it tends to undermine self-respect —a condition of self-authorship. However, this is not so. The constitution's norm of equal concern for self-determination requires of rulers that they show equal respect for every agent-relative conception of the good, and it requires of subjects that they tolerate conceptions of the good repugnant to their own. That follows from the content-neutrality of the good of self-determination as egalitarian liberalism conceives it. However, there is no requirement that

22. Kymlicka, 1989, pp. 165-178.
23. Dworkin, 1996, pp. 214-226.

private conceptions of the good (as distinct from external actions) fall in line with the public openness to all conceptions; such a requirement would contradict openness, hence violate $axiom_2$. So, subjects are free to practise anti-egalitarian customs in their private lives and communities. Moreover, hate speech can undermine self-respect only in those who allow it to do so, and so there is no necessary link between hate speech and loss of self-respect. Therefore, a law restricting hate speech for the sake of self-respect is not one that all could accept *a priori*. It amounts to subordinating the self-determination of some to that of others contrary to $axiom_2$.

We have now to ask whether, taken by itself, the egalitarian constitution's public reason for rule and obedience produces an ideal recognition between ruler and subject such that the subject remains independent in submission to the ruler and the ruler remains independent in being a means for the ruled. We can see that, like the constitution of liberty, the egalitarian one produces an *instance of* ideal recognition in that it grounds the duty of obedience in the state's reciprocal duty of concern for the subject's independence. But does it produce ideal recognition itself? We can also see that it produces something necessary for an ideal recognition, for it supplies the supremacy of public reason that, in the constitution of liberty, dissolved into the ruler's private reason. But does it produce what is sufficient for an ideal recognition?

To see that it does not, consider what follows from the fact that $axiom_2$ constrains the ruler, but that $axiom_1$ does not. Under the egalitarian constitution, the ruler has a duty of equal concern for everyone's capabilities for self-rule and self-authorship but no duty to respect individual liberty as a separate value. Thus, there is no presumption in favour of liberty —no constitutional wrong in limiting liberty more than is necessary for achieving the ends of civic membership. But the right to liberty is the right of the discrete self —the self that is distinct from the civic body and its members. That self is not necessarily the atomistic free will of classical liberalism's state of anarchy; it might be the specific character in which a common way of life is individuated and who gives the common custom a distinctive interpretation and realization. In treating all entitlements of the subject as those of homogeneous citizens—as rights mediated by civic membership —the egalitarian constitution withholds recognition from the discrete self. But if the individual self is not a discrete end, then the civic body is the only end, to which the discrete self is once again unilaterally subordinated. And a civic body that is juxtaposed to a discrete self it subordinates and treats as right-less is a partisan body in relation to that self —in this case the partisan body of those who, under the constitution of liberty, would lack the means of economic independence.

Accordingly, the egalitarian constitution taken alone produces a despotism of the collective. The representative of that body cannot wrong the subject by limiting liberty more than is necessary for its egalitarian ends, by limiting liberty drastically for the sake of a marginal gain in equality that is small relative to the gain obtainable by a non-invasive option,[24] or by taking private holdings for public ends without compensation. The subject recognizes the civic body as an end, but the civic body does not recognize the discrete person as an end. Yet from such a servile relationship no independent validation of authority can issue.

5. Public Reason as Communal Ethos

The downfall of egalitarian constitutionalism teaches that the public reason for rule and obedience must be to guarantee the independence of the subject considered both as a discrete agent and a civic member. "Both" must be understood here in the sense of "unison" rather than mere "togetherness"; for if human nature is sundered such that, to be a citizen, one must lose one's individuality, and to be for oneself, one must be egocentric, then no possibility exists for a public reason encompassing the independence of both citizen and individual, hence none for a genuine constitutionalism. There can only be an eternal conflict (oscillation, negotiation) between the constitution of liberty and the constitution of equality and between the political moralities and parties that respectively champion them. So, the new conception of public reason must involve a conceptual synthesis of civic member and discrete agent.

The communitarian constitution is ordered to such a conception. Here public reason is the mutual recognition of ruling representatives of a common way of life (ethos) and the individual character who freely makes it a way of *his* life. On the one hand, the community values the free volition and moral self-determination of the discrete subjects through whom the ethos flourishes in a profusion of interpretations; on the other, subjects conscientiously internalize and reproduce the ethos as the common good that ascribes importance to (hence dignifies) their concrete individuality. Whereas, therefore, the egalitarian constitution was ordered

24. For example, the egalitarian constitution subsumes the principle of careers open to talents to that of fair equality of opportunity, allowing the former principle no independent force. As a consequence, it sees no wrong in reverse discrimination programs that abolish the right freely to compete for positions on the basis of qualification alone even when alternative affirmative action methods exist that preserve the freedom; see R. Dworkin, 1985, pp. 293-303 and 2000, ch. 12.

to the formal good of self-authorship, the communitarian one is ordered to the substantive good in living cultures. Cultural membership is good for human beings because cultures are a source of worth for the specific characters needed to enliven and perpetuate them.

In the communitarian constitution taken alone, however, living culture is *the* good. Individual self-determination is valued only as a vehicle for the realization of ethos. Thus, there is no constitutional duty on communitarian rulers to foster selves who author their lives from a position of detachment from everything given. Their duty, rather, is to perpetuate the communal ethos under the constraint that the free agency and self-determination of its adherents be respected. Call that axiom$_3$. What the ethos is, is indeterminate. It may be folk culture, a particular religion, secularism, liberal capitalism, egalitarian liberalism, whatever.

Under the communitarian constitution, the basic freedoms are those necessary for actualizing the ethos. So, freedom of religion, conscience and expression are protected above general liberty because of the role they play in bringing the ethos to life. As in the egalitarian constitution, this reason engenders a distinction between protected expression falling within the reason for protection and unprotected expression lying outside; but whereas the egalitarian core was delimited solely by the conscientiousness of the expression, here it is defined by the nature of the ethos. For example, expression promoting hatred of Jews falls within the protected core if it gives expression to an anti-Semitic communal ethos, but not if it is at odds with an egalitarian ethos. This marks a crucial difference from the constitution of equality. Where egalitarian liberalism is regarded as one ethos among others rather than as public reason itself, the content-neutrality of public reason goes by the board, and with it the indifference of rulers to anti-egalitarian expression. Egalitarianism becomes militant. Expression proclaiming the inferiority of a class of humans may now be outlawed as propagating an ethos incompatible with the ruling, egalitarian one. Religious conviction is no longer a reason to exempt a market seller from anti-discrimination law (as the expression of an opposing ethos, it's an *a fortiori* reason to enforce the law) even if the complainant's alternatives are plentiful; and the state may, through human rights tribunals, intervene aggressively in religious institutions to give remedies against practices opposed to the ethos of gender equality[25].

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25. Here I simplify the discussion in *Constitutional Goods*. There I distinguished between a nation-state ethos that enforces its way of life against minority cultures, on the one hand, and a multi-national state ethos that views all living cultures as equally good, on the other (pp. 306-309). In the latter case, a ruling ethos of egalitarian liberalism embraces the con-

Because the communitarian reason for protecting conscientious expression favours certain contents over others, it also favours the adherent of the ruling ethos over the non-adherent —the insider over the outsider. Where the ethos is a particular religion, only religious expression that actualizes the communal ethos is protected; outsider religions fall into general liberty. In a secular ethos, religious expression as such is vulnerable to limitation if it is perceived as a threat to the dominant culture, and public expressions (for example in clothing) are especially vulnerable. Here, as in the constitution of equality, we see the long shadow cast over constitutionalism by classical liberalism's apolitical self, whose invisible presence is detectable in its opponents' overreactions against it. Because universal human rights are equated with the superseded rights of atomistic agents claiming worth as homogeneous free wills and owing allegiance to a universal republic, the communitarian ruler sees no wrong in treating constitutional rights as the privileges of some.

It would seem from the foregoing paragraph that religion is protected under a communitarian constitution only where there is no need for protection, for the dominant religious group need not fear legal restraints on its own practices. This, however, is not exactly true. After all, to respect the free agency and moral self-determination of subjects for the sake of the ruling ethos is to risk disagreement with that ethos. Accordingly, some non-conforming expression must be tolerated by rulers in order that the dominant ethos might be spontaneously confirmed as authoritative through conformist expression. Here "tolerated" is the right word. Where egalitarianism was public reason itself, anti-egalitarian self-expression had to be tolerated by private persons but condoned by rulers for the sake of equal self-authorship; the content-neutrality of public reason forbade mere toleration by rulers. Where egalitarianism is ethos, however, innocuous forms of anti-egalitarian self-expression must be tolerated by rulers so that egalitarian expression can freely and effectively validate the authority of the ethos. Still, the duty to tolerate does not rule out militancy. There are ways for rulers to meet their obligation to actualize the public ethos while respecting their subjects' freedom to be different. They can outlaw non-conforming expression (the *niqab*, for example) in public spaces, while allowing them in private, or outlaw non-conforming expression in civil servants, while allowing them in the private sector.

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tradiction at its core —that a belief in universal equality is merely one way of life alongside others— and allows non-egalitarian ways to co-exist with it.

The communitarian constitution is a covenant exemplifying the form of an ideal recognition. Subjects acknowledge the authority of ethos-representatives for the sake of the rational importance the ethos ascribes to their free interpretation of the ethos in their individual lives and characters. Reciprocally, ethos-representatives defer to the free genius of their subjects for the sake of the spontaneous and individualized reproduction of ethos. But is this mutuality sufficient for valid authority? Do we have here an ideal recognition such that the public reason for rule and obedience survives deference to the subject and the subject's independence survives submission to the ruler?

The answer is obviously 'no.' In that the way of life toward which the communitarian constitution is ordered is conceptually undetermined, it is opaque to intellect. Ethos is simply the custom that is there and that has been for as long as anyone can remember. As a consequence, the public reason of the communitarian constitution is hostage to a requirement of empirical unanimity. As soon as one subject asserts his difference, the public reason becomes a parochial one. Subjects who identify with the now dominant ethos have an independence-based reason to accept the authority of ethos representatives, but the different do not. Their submission (for whatever reason) entails a loss of independence, for their moral independence is tolerated within limits, not positively valued, and the limits are drawn by what is good for others. Thus, the ethos-ruler is a despot vis-à-vis them. He cannot wrong the different by limiting their conscientious expression for the sake of the customs of the same. But then the ethos-ruler has lost the independent subject required to validate his authority. Because his authority can be validated by some but not by others, constitutional rule has dissolved into ethno-cultural chauvinism.

6. Public Reason as Dialogic Community

The breakdown of communitarian constitutionalism reveals a further desideratum of an ideal recognition between authority and subject. There must somehow be a covenant of mutual recognition between the representatives of a common way of life and the outsider. Outsiders must acknowledge the authority of a way of life that values their outsider status, and the political community must defer to the outsider's independence for the sake of its validation as the individual's natural end. This, however, sounds impossibly paradoxical. What sort of communal way of life can defer to the outsider for confirmation of its natural authority?

6.1. Recollection

The answer lies behind us —along the road already travelled and in the civic orders sojourned in. As before, the way forward is to reflect on the past, but this time on the past conceived as a logically continuous narrative about the solitary self's education to the political ground of its fulfilled independence. The community that engages the outsider as an equal partner comprises in logical sequence all instances of ideal recognition produced by the *apolitical* individual as it journeys from presumed self-sufficiency to the constitution of liberty to the constitution of equality to the ethos constitution to the comprehensive constitution sufficient for independence. Through this *curriculum*, the community ordered by the comprehensive constitution is validated as the worth-seeker's final end by one who initially claims final worth outside community. Reciprocally, that community values the outsider's moral independence as that through which its end-status is confirmed by an independent adversary. Let me call the way of life instituted by the covenant between the political community and the outsider the life of the dialogical community.

This way of life is no longer an indeterminate ethos. It has a specific, intellectual content comprising the three liberal conceptions of public reason connected by dialectical reasoning, along with their respective constitutional paradigms and axioms of right. Together, the three constitutions generate the totality of constraints on rule necessary and sufficient for reconciling authority and independence, hence for valid authority and unqualified obligation. This totality is the full content of constitutional rights for a liberal polity. Its constituent elements are: the classical liberal axiom of right enjoining public respect for the maximum liberty consistent with equal liberty and so recognizing the individual's independent worth as a *free will*; the egalitarian liberal axiom of right, enjoining equal public concern for the individual's self-rule and self-authorship and so recognizing the individual's moral independence as a self-determining *conscience*; and the ethos community's axiom of right, enjoining public support for cultural communities that respect the free individuation of ethos in the life and *character* of each devotee.

Accordingly, the dialogical community is the one sufficient for reconciling authority with the independence of the *whole* subject —the subject clothed with all logically possible layers of concreteness: from extreme generality (free will) to partial determinacy (autonomous conscience) to extreme determinacy (specific character). This means that no logically possible construal of subject-independence is left unrecognized by the public reason of the constitution. Having for that reason an intellectual

content endorsable by all liberal denominations, the dialogical community is the inclusive community —philosophically diverse, yet unified. Neither a politically assertive cultural community nor a borderless thought-entity abstracted from cultures, it is the rational community sufficient for human dignity —one that embraces and constrains the many cultures within its borders in which specific characters obtain rational importance.

In the dialogical community, all superseded conceptions of public reason are recovered (re-collected), albeit demoted from sovereign conceptions to constituent ones. All are thought-stages in the apolitical self's education to the ground of its independent worth in the dialogical community and, correlatively, in the validation of that community as the final end of the worth-seeking self. As the subject learns by stages the full meaning of independence, political authority gains the fully independent subject it requires as a validating partner. Concomitantly, the subject gains a polity that acknowledges an obligation to guarantee all ingredients of its independence as a duty constitutive of fully valid authority. As stages of thought equally necessary to the subject's education to independence, the three conceptions of public reason are included as equal phases of one development, but also as equal examples of the one encompassing archetype of ideal recognition between whole and phase, the whole respecting the phase's integrity as a constitutional *Gestalt*, the phase acknowledging itself as a phase of the whole. Accordingly, the public reason alone absolutely entitled to that name is the developmental process itself, understood in its logical integrity. It is the ensemble of fallen conceptions of public reason connected by the logic by which the whole came to sight and by which the fallen are raised to required stages in learning what public reason is. What public lawyers call the sovereignty of law is finally the sovereignty of public reason specified in this way.

All this implies that the political moralities of liberalism are now intellectually constrained to interact on the basis of equality and mutual respect. No longer mistaking its constitutional paradigm for the archetype of valid authority, each respects the other's paradigm as an equal instance of the true archetype, in which all are contained. So, no political morality denigrates the rights that others protect or subsumes them to its hegemonic public reason. In that sense, liberal pluralism is preserved, but within a differentiated whole wherein the mutual accommodation of the paradigms is a demand —not a compromise— of principle. We thus have pluralism without fragmentation, sectarianism, or eclecticism.

6.2. Vindicating proportionality review

The juridical expression of the requirement that liberal political moralities interact on a footing of mutual respect is the method of deciding constitutional cases called proportionality review. Although adopted by western courts as a formalist escape from the fragmentation of political liberalism, proportionality review turns out to be the method of constitutional reasoning required by an internally differentiated political liberalism. That method erects a series of hurdles that a right-infringing measure must overleap to be justified. First, the legislative purpose must be qualified by its public importance to limit a constitutionally protected right; second, the right-infringing measure must further the legislative purpose and be carefully tailored to it so as not to prohibit rightful activity overbroadly; third, it must be the case that no non-infringing means could achieve the objective just as well; fourth, the deleterious effect of the right-infringement must not be out of proportion to the law's expected public benefit[26].

In *Constitutional Goods*, I read out the fourth hurdle because I took it to require a court to weigh the harm produced by the right-infringement against the magnitude of the benefit to be gained from it. The best deontological sense I could make of such a test was that it imposed a requirement that the infringement not strike so directly at the core of human dignity as to destroy the publicness of the end that justified it in the first place —a requirement encapsulated in Albert Camus' saying that the end justifies the means only if the means justify (do not corrupt) the end[27]. This doctrine, while true, has nothing to do with proportionality. I have since learned from Aharon Barak's work, however, that the fourth hurdle need not involve weighing benefits against harms[28]. When understood as requiring that the *marginal* benefit of a right-infringing over a right-respecting measure not be insignificant, a proportionality test can make deontological sense. Provided we have a right-respecting account of how some goods can coherently trump rights, applying such a test is part of what it means to take the right seriously. I'll illustrate proportionality review, continuing with the example of freedom of religion.

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26. *R. v. Oakes* [1986] 1 SCR 103.
27. Camus, 1956, p. 292.
28. Barak, 2012, pp. 350-361. See also Jacob Weinrib, 2016, pp. 215-234. However, both Barak and Weinrib err, I believe, in supposing that rights have magnitudes such that a quantity of marginal public benefit can be compared to a quantity of right-infringement.

In the dialogical community, all three reasons for protecting the freedom of religion are in play. Thus, religious belief is absolutely immune from regulation because belief needs no regulation to make it compatible with equal liberty. So, compelling conversion or punishing the affirmation of religious belief violates a right to freedom of religion, and no good of self-authorship can possibly justify it, nor can one community's ethos be supported on the back of another's. Thus, a law coercing people because of their beliefs would be unconstitutional, all relevant things considered.

However, in the dialogical community, the classical liberal axiom of right is not the only constraint on valid political authority. Authorities have a duty going with their authority to promote their subjects' independence of conscience, for only an independent conscience can validate civic authority as its good; and they have a duty to respect and support the belief-systems of non-coercive religious communities for the sake of the worth they give to specific characters. The duty to respect religious communities rules out coercively imposing gender equality on such communities and requires that non-coercive religious practices be protected through circumscribed exemptions from laws that would otherwise interfere with them. The duty to support is a duty even-handedly to help the belief-systems of non-coercive religious communities to thrive through, for example, public funding for religious schools that teach prescribed secular subjects and meet quality standards.

Under the inclusive conception of public reason, however, content-neutral protection for religious liberty no longer holds because there is now a good qualified to limit religious expression. That good is the well-ordered integration of constitutional goods into a life sufficient for independence. Under the inclusive conception, constitutional rulers have a duty to instruct citizens in this good under the constraint of respect for self-authorship. So, religious expression inciting contempt for the devotees of another religion must be outlawed for the purpose of publicly teaching the integration of cultural membership into a total life sufficient for independence, unless non-coercive means of instruction would work nearly as well. Moreover, public support for a religious community must be limited, and be made conditional on, the community's acknowledging the inclusive conception of public reason that generates this entitlement to support. This means two things. First, the duty to support cannot extend to banning free expression that satirizes a community's beliefs, for that would be to limit the free thought required for confirming the dialogical community's authority for the sake of an ethos community whose entitlement to public recognition depends on that authority's confirmation through prejudice-free critical insight. Second, support for a

religious community ought to depend on the community's reforming its beliefs and practices in accordance with egalitarian norms. While inclusive liberalism's state may not force a religious community to treat men and women as equals or to stop discriminating against homosexuals, it need not support those that do not[29].

7. Conclusion

As the juridical expression of the requirement that subsidiary constitutions interact on the basis of mutual respect, proportionality review is the method of judicial reasoning appropriate to liberal constitutionalism in its fullness. Indeed, proportionality review makes conceptual sense only within the comprehensive constitution, wherein alone constitutional goods are qualified to limit independent and persistent liberty rights. Where no external, good-based limit to rights is known, the proportionality questions never arise; for then, the issue for a court is not whether the *infringement* of a *right* is justified but whether colliding basic freedoms have been mutually adjusted so as to obtain the widest possible scope for equal liberty or a "fully adequate" scheme of equal basic liberties[30]. If not, a right has been infringed, and (short of a national emergency) there can be no justification for it. On the other hand, where rights are subsumed to the good of self-authorship or to the good in living cultures, there is no sense to a requirement that a good-promoting law infringe the right as little as possible or that it do so proportionately; for there is then no right independent of the good to which deference could be shown.

That said, judges need not make explicit reference to the theory of liberal constitutionalism that vindicates their proportionality review to insight. Indeed, it is better that they do not, for the constitution's public reason can survive the transition from general theory to application to

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29. See *Dayton Cristian Schools, Inc. v. Ohio Civil Rights Commission*, 766F2d 932 (1985).
30. Rawls, 1993, p. 291. Take, for example, a contest between the right to free speech and the right to a fair trial. Under the libertarian constitution taken alone, speech that jeopardizes a fair trial falls outside the rationale for protecting speech, and so there is no pre-law right to it. Therefore, a publication ban involves no right-infringement that needs justification, though the right to free speech requires that the exception be drawn as narrowly as possible. Under the egalitarian constitution, the right to free speech and the right to a fair trial are both specifications of the basic right of self-determination. So, a carefully tailored publication ban delineates both rights; it does not infringe a right. The requirement that free speech be limited only to the extent needed to ensure a fair trial should not be confused with proportionality review, which applies to right-*infringements*.

particulars only if judges avoid the philosophically esoteric and adopt a discourse easily comprehensible to those whose fates they decide. Nonetheless, they ought to be guided in the quiet of their chambers by the inclusive theory of political liberalism; for otherwise their minds will be defenceless against doubts concerning the intellectual rigour of an adjudicative method the rabbi of Anatevka would wholeheartedly endorse. Worried that proportionality review might involve an unprincipled negotiation among political moralities, judges might be vulnerable to the seductions of "definitional balancing" –the undeniably principled derivation of rights from what is best for the public weal all things considered. They need not worry. Proportionality review is only superficially a pragmatic coping with sectarian liberalism; inherently, it is the principled expression of inclusive liberalism.

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