MAKING LAW ABOUT POWER

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ABSTRACT

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During the seventeenth and eighteenth centuries, the inhabitants of some parts of Europe and the North American colonies were confronted with *proto*-state institutional arrangements. In certain cases, they responded ambivalently. That ambivalence is at the heart of what I will call the 'limited government tradition'. The tradition's adherents thought that long historical experience, not to mention the events of their own times, provided ample evidence of the corrupting effects of power on those who wield it. Power-holders, left to their own devices, are likely to succumb to the temptations of power by exercising it arbitrarily. Where they are able to do so comprehensively and systematically, the upshot is tyranny. How, then, to ensure that state power is constituted in a manner that is inhospitable to tyranny? The tradition envisaged a range of measures, including a distinctive vision of 'the Rule of Law'. The Rule of Law would both define and enforce certain limits on state power. This study argues that the tradition's hostility to political absolutism is based on moral foundations which apply with equal force to economic power. The tradition ought to examine the modern constitution of economic power to determine whether it is hospitable to arbitrariness and tyranny. If such an examination is undertaken, we learn that modern economic power poses the kind of moral dangers that the tradition's Rule of Law project is designed to combat. However, the tradition assumes that it need not treat economic power as even a *potential* target of the Rule of Law. I will call that assumption the 'Consensus'. This study's first major aim is to explain the origins and stubbornness of the Consensus. Its second major aim is to persuade readers that the Consensus is mistaken: the tradition must regard economic power as, at least, a *potential target* of the Rule of Law.

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1. Familiar questions

During the seventeenth and eighteenth centuries, the inhabitants of some parts of Europe and the North American colonies were confronted with what we would now recognize as *proto*-state institutional arrangements. And in certain cases, they responded ambivalently. That ambivalence is at the heart of what I will call the 'limited government tradition'.[1] It pervades the thought of the tradition's leading early-modern adherents, such as John Locke, James Harrington, Algernon Sidney, and the US Founding Fathers. They believed that institutional power had the potential to secure a state of affairs which

[1] Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press 2009) 145 ('*Freedom*'); Hannah Arendt, *On Revolution* Ch 4 (Penguin Books 1965); Martin Ostwald, *From Popular Sovereignty to the Sovereignty of Law: Law, Society, and Politics in Fifth-Century Athens* (University of California Press 1989); C H McIlwain, *Constitutionalism Ancient & Modern* (Cornell University Press 1947); J W Gough, *Fundamental Law in English Constitutional History* (OUP 1955); L L Jaffe and E G Henderson, 'Judicial Review and the Rule of Law: Historical Origins' (1956) 72 LQR 345; J P Reid, *Rule of Law: The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries* (Northern Illinois University Press 2004); J G A Pocock, *The Ancient Constitution and the Feudal Law* (CUP 1987). Compare Leslie Green, 'The Nature of Limited Government' in R George and J Keown (eds), *Reason, Morality, and the Law: The Jurisprudence of John Finnis* (OUP 2012).

would be preferable to a non-institutional alternative, sometimes conceived as the 'state of nature'.[2]

However, they also thought that long historical experience, not to mention the events of their own times, provided ample evidence of the corrupting effects of great power on those who wield it. Power-holders, left to their own devices, are likely to succumb to the temptations of power by exercising it arbitrarily. Where they are able to do so comprehensively and systematically, the upshot is tyranny.

The tradition's ambivalence regarding great power provided its adherents with the impetus to develop a political morality that would be conducive to people enjoying the benefits of institutional power without suffering its potential excesses. This impetus spurred enquiries and debates that bequeathed to subsequent generations a legacy of concepts, a normative vocabulary, ways of seeing power, institutional desiderata, and assumptions about the available political alternatives (absolutist tyranny *or* limited government). This legacy provided a set of intellectual filters and axioms through which aspects of later conflicts surrounding the state have been fought out (most obviously by the tradition's North American standard-bearers).[3]

Locke, for instance, argued that without his doctrine of limited government, the potential gains of our departure from the state of nature, as his theory would have it, are likely to be thwarted by the arbitrary exercise of institutional power. According to Locke, Thomas Hobbes's failure to accept this generated the absurd implication that '... Men are so foolish that they take care to avoid what Mischiefs may be done them by *Pole-Cats*, or *Foxes*, but are content, nay think it Safety, to be devoured by *Lions*.'[4] The tradition's

[2] Arendt (n 1) 147. Martin Krygier, *Transformations of the Rule of Law: Legal, Liberal, And Neo-*, http://www.kcl.ac.uk/law/research/centres/kjuris/papers/transformations-krygier.pdf
[3] Bernard Bailyn, *The Ideological Origins of the American Revolution* (Harvard University Press 1992) 59, 62, 66-92.
[4] John Locke, *Two Treatises of Government* (CUP 1988) II §93.

adherents believe that it would be folly to give up one's own power to institutions which are not constitutionally inhospitable to arbitrariness and tyranny.

In the traditional idiom, power over others is exercised 'arbitrarily'—*manipulatively*—when its exercise denies *moral equality*. One way to deny moral equality is to coerce others in a manner which fails to give due weight to those of their interests, expectations, and rights which are genuinely worthy of respect (eg, fundamental human rights). When arbitrary rule becomes systematic, 'tyranny' prevails. A person who seeks the cooperation or obedience of another without respecting moral equality seeks, in effect, to reduce the latter to a status equivalent to that of a mere instrument, which can be manipulated at will.

Consider the following by way of illustration. Imagine someone has the effective power to detain somebody else.[5] According to the tradition, that power must not be exercised in ways which would deny the latter's moral equality; among other things, the power-holder must give due weight to the latter's genuine right not to be deprived of personal liberty without reasonable cause. If due weight is so accorded, the person detained is supplied with a good reason to comply.[6] If, however, the person is detained notwithstanding a failure to give due weight to the right to liberty, then the person has a good reason not to comply, and compliance must be secured manipulatively, through illegitimate force or fraud, and therefore *arbitrarily*. Systematic, or widespread, arbitrary detention is regarded as a typical feature of *tyrannical* regimes.

How, then, to ensure that state power is constituted in a manner that is inhospitable to tyranny and ensures respect for moral equality? The tradition's early modern adherents envisaged a range of measures, including the various political mechanisms of accountability which are often referred to as 'responsible government'.

[5] By 'effective power' I mean simply the capacity to cause, either alone or in concert with others, the detention of another against the other's wishes. The term implies nothing about the legitimacy or otherwise of any particular application of the power.
[6] Though there may be countervailing reasons favoring resistance.

The tradition also propounded a distinctive vision of 'the Rule of Law', a mode of governance thought to be the antithesis of the rule of 'men'.[7] The tradition does not always refer to its vision using the term 'the Rule of Law'. A range of others is also used, such as 'empire of laws', 'legality', 'constitutionalism', 'government under law', 'the rule of reason', 'the Law', or simply 'law'. Moreover, on occasion, the substance of its vision is expressed without being communicated under the heading of an omnibus term.

The Rule of Law's *raison d'être* would be both to define and to enforce certain limits on state power. Thomas Jefferson's remarks sum up the animating spirit of the doctrine:

> [I]t would be a dangerous delusion were a confidence in the men of our choice to silence our fears for the safety of our rights: that confidence is everywhere the parent of despotism—free government is founded in jealousy, and not in confidence; it is jealousy and not confidence which prescribes limited constitutions, to bind down those whom we are obliged to trust with power: that our Constitution has accordingly fixed the limits to which, and no further, our confidence may go; … In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution. [8]

This notion of the Rule of Law has found various expressions in the constitutional traditions of the modern period. For example, having provided in Article 30 for the separation of legislative, executive, and judicial powers, the 1779 Massachusetts Declaration of Rights adds that this measure has been chosen 'to the end it may be a government of laws and not of men'. In choosing that formulation, the Declaration's authors were announcing that the community's separation of powers was part of an attempt to effect a *relationship between law, power, and interests, expectations, and rights* that would make powerful institutions safer than they would otherwise be. They were invoking the tradition's conception of the Rule of Law, which combines a theory about

[7] The contrast was appropriated from Aristotle via Livy by, *inter alios*, James Harrington, *The Commonwealth of Oceana* (CUP 1992) 20-21.
[8] Thomas Jefferson in P Kurland and R Lerner (eds), *The Founders' Constitution* (University of Chicago Press 1987) vol 1, ch 8, doc 41.

the nature of state power, a theory about the nature of law, and theories about respect-worthy interests, expectations, and rights, as well as a theory about how state power, law, and respect-worthy things should stand in relation to one another.

The Rule of Law, so understood, is not reducible to any of those parts and is something greater than their sum. It describes a particular mode of governance. It is distinct from the mode of governance contemplated by (what we now call) the 'formal' conception of the Rule of Law, which does not require law to limit power for the sake of genuinely respect-worthy interests, expectations, and rights.[9] It is also distinct from (say) the mode of governance envisioned by Plato in his *Republic,* in which the governing power of the philosopher kings would be wholly unconstrained by law, though it would be constrained by *the good*. Under each of these rival modes of governance, power, law, and good or right would be brought into a distinctive set of relationships with one another.

For the sake of its commitment to moral equality, the tradition holds that there is a moral imperative to establish and maintain a system of law, among other things, in order (i) to identify or create genuinely respect-worthy interests, expectations, and rights (including, especially, what we would now call 'fundamental human rights') and (ii) to hold to account relevant power-holders should they fail to give due weight to those respect-worthy things. In other words, under the Rule of Law, the law is supposed to tell power-holders what is genuinely respect-worthy and to provide ways to encourage compliance should they be inclined to ignore this information. Recall the earlier example concerning the power to detain a person: in a well-constituted state—that is, in a state where the law accurately reflects what is genuinely respect-worthy—*habeas corpus* is the legal mechanism by which a person or agency *claiming* legitimate authority to detain is

[9] Whose most famous contemporary exponent is Joseph Raz, 'The Rule of Law and its Virtue' in *The Authority of Law* (OUP 1979) ('*Authority*').

summoned to show why a particular detention is not the product of manipulative force or fraud—ie, not arbitrary—but instead is reasonably justified.[10]

Among contemporary theorists, Ronald Dworkin's work best exemplifies a relationship between law, power, and rights which reflects the traditional concerns just outlined. Notice how Dworkin employs 'our' in a way which suggests that he is writing for, and from within, a community which is defined in part by its shared traditions of thought and practice:

> Our discussions about law by and large assume, I suggest, that the most abstract and fundamental point of legal practice is to guide and constrain the power of government in the following way. Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified. … This characterization of the concept of law sets out, in suitably airy form, what is sometimes called the "rule" of law.[11]

According to the tradition's vision, unless the state's power over its subjects is constituted in a manner which embodies the Rule of Law, the tradition's adherents have a good reason to withhold their allegiance until such a constitution is achieved: the security of genuinely respect-worthy interests, expectations, and rights depends upon it.

2. Neglected questions

Much has been said, and with justification, about the failures of the limited government tradition to live up to its own professed standards. The Founding Fathers, for instance, insisted on maintaining the institution of chattel slavery at the same time as they

[10] For the tribunal (eg, a judge) that holds the official to account, justification by reference to a valid positive law amounts to a necessary and a sufficient 'reasonable cause'. However, the tradition nonetheless evaluates reasonableness by reference to convention-independent criteria; for the tradition, the Rule of Law is only properly established where positive laws soundly reflect convention-independent moral criteria. As Dworkin expresses the traditional view, it is the 'ideal of rule by an accurate public conception of individual rights', which 'does not distinguish ... between the rule of law and substantive justice': Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) ('*Principle*') 11.

[11] Ronald Dworkin, *Law's Empire* (Hart Publishing 1998) 93 ('*Empire*').

declared, 'We hold these truths to be self-evident, that all men are created equal'.[12] Despite such declarations, and until relatively recently, the tradition by and large failed to interpret 'all men' in a way that included *all* people in *all* contexts.[13] Today, it is generally assumed that adherence to the tradition requires positive rejection of disadvantage according to arbitrary distinctions based on gender, 'race', and religion.[14]

Yet, this critical, revisionist spirit has not been brought to bear in the economic context. Indeed, it has been widely assumed, by the tradition's supporters and by its detractors, that the limited government tradition is synonymous with the protection of the claims of private property owners, including, implicitly or explicitly, their claims to social power. Even when this aspect of the tradition's Lockean inheritance is challenged,[15] it is nonetheless assumed that the power over others conferred by private ownership should not be considered a potential target of the limited government tradition's opposition to arbitrariness and tyranny.

These assumptions have remained largely undisturbed since the time of Locke, in spite of what has been a stubborn and unmistakable feature of social life, both then and now: deep inequality in the ownership of resources engenders relations of economic dependence which are also relations of power. Individuals of modest means, and indeed whole communities, understand that their welfare substantially depends on their complying with the dictates of the wealthy. And preferring to be pliable than penurious, they tend to conform, either as employees or as supplicants seeking to attract investors. The well-endowed few, thanks to their power, can treat the many not as their moral equals, but as though they were mere instruments to be manipulated for the sake of their

[12] Declaration of Independence (US 1776).
[13] Martin Luther King Jr, speech, 10 February 1963 <http://brooklynheightsblog.com/archives/72718> accessed 8 September 2015.
[14] In the US, this has been reflected in the evolving jurisprudence of the Fourteenth Amendment. Opinion remains divided concerning sexuality. Consider the sharp disagreements within and between various branches and levels of government, and among citizens, both before and after *Obergefell v Hodges*, No. 14-556, 2015 U.S. WL 2473451 (June 26, 2015).
[15] See the discussions of Jeremy Waldron and of Justice Stevens in Chapter 4.

self-aggrandizement. And preferring to be masterful than magnanimous, or in obeisance to competitive pressures, they tend to wield their power in this way, so long as they are not forcibly restrained from doing so.

Where relations of this kind have arisen between princes and their subjects, the limited government tradition has been prepared to do more than issue polemics. It has prosecuted wars and revolutions. Today, the tradition's adherents recall the tracts and the battlefields of the seventeenth and eighteenth centuries with reverence. However, when confronted with manipulative relations of power in the economic context, the tradition's leading thinkers have conducted themselves as though the tradition ought to have nothing to say on the matter—no incendiary texts, no militias, no rival structures of power, only virtual silence.

But, as I will show, the tradition's hostility to political absolutism is based on moral foundations which apply with equal force to economic power. The denial of moral equality is no less objectionable when it is effected by the economically powerful. The tradition ought to have examined the modern constitution of economic power to determine whether it is hospitable to arbitrariness and tyranny. If it had effected such an examination, it would have learned that today's princes of property can too readily deny the moral equality of those under their power. The tradition would, in turn, have been compelled, by the force of its moral commitments, to consider depriving the economic princes of the benefits of such a constitution, just as it had once deprived political princes of constitutions conducive to absolutism. This study urges the tradition to ask whether economic power ought no longer to be princely in nature—that is, the prerogative of its owners—but instead ought to be reconstituted in order to make it subject to limited government controls, including, potentially, the controls characteristic of the tradition's particular conception of the Rule of Law.

When it was pitted against princely absolutism, the limited government tradition was a subversive force, at first menacing, and later overturning, entire constitutional orders. Today, the tradition's role seems inevitably conservative, as though it can do no more than safeguard the gains of the seventeenth and eighteenth centuries by preventing the reemergence of political absolutism in new guises. However, as re-imagined in this study, the limited government tradition's ideas might once again contribute to forces driving fundamental social change.

We confront a state whose power far surpasses that of its seventeenth and eighteenth century antecedents. Yet, when we think and argue about the state, many of us continue to draw on the ideas and the idiom of the early limited government thinkers. We might still ask, for example, 'How can the Rule of Law protect the people's rights against the arbitrary exercise of executive power?' There is a thread of continuity connecting our contemporary political language with the limited government vocabulary of the past. This continuity points to the existence of a limited government tradition whose lifetime spans several centuries.

But there is also discontinuity. Today, we face economic institutions which wield power that had no parallel in seventeenth or eighteenth century economic life. And when we think and argue about these institutions, even the limited government tradition's adherents tend not to reach for the ideas or the idiom of their early modern forebears. We rarely ask, for example: 'Might individuals and even whole communities find themselves dependent on the arbitrary power of large corporations? Could these institutions resemble the tyrants whom we fear in the political realm?'

Of course, the phrase 'corporate tyranny' is sometimes emblazoned on a protest banner or shouted through a megaphone.[16] But perhaps this is nothing more than empty rhetoric, superficial posturing that lacks principled roots in the great tradition of political language which it echoes. I will argue that, on the contrary, the use of limited government vocabulary in the economic realm may be meaningful and principled. Just as the tradition's normative vocabulary can be used to indict the 'arbitrary' exercise, or 'tyrannical' constitution, of state power, it may also be employed against the capitalist ways of exercising and constituting economic power.

2.1 Internal and external power

This study focuses on two forms of economic power. Owners of resources exercise those forms of power over persons whose welfare depends upon access to resources of the relevant kind. I call the two forms of power 'internal power' and 'external power', and Chapter 2 provides an outline of each.

Internal power is power wielded by employers over employees. Chapter 3 addresses internal power through an immanent critique of John Locke's characteristically modern way of seeing power, a way of seeing that is shared by the limited government tradition's contemporary adherents. I argue that, on Locke's own descriptive account of internal power, the employment relationship is constitutionally hospitable to arbitrariness.

The criticisms I level at Locke are not dissimilar, in substance, to those which might be raised from a socialist or social democratic perspective. However, what distinguishes my account from its more familiar counterparts is how it is framed according to the underlying principles and in the vernacular of the tradition's Rule of

[16] See, eg, the following by a supporter of Occupy Wall Street: Roberto Lovato, 'The Greatest Threat to Liberty on Its 125th Anniversary: Corporate Tyranny' *Huffington Post* (New York City, 31 December 2011).

Law project. The tradition's adherents are thereby encouraged to think of the employment relationship as a *potential* target of their limited government endeavors, rather than as a field they would only consider in some other capacity (eg, *qua* socialist or *qua* social democrat).

If the tradition were to recognize that the capitalist employment relationship is constitutionally hospitable to arbitrariness, its adherents would have to consider whether the relationship ought to be reconstituted along limited government lines. One possibility, among others, is reconstitution in accordance with the Rule of Law. This would involve using law to ensure that the principle of moral equality comprehensively and systematically informs and constrains the essential character of *all* instances of the exercise of internal power.

External power is wielded by the most important economic institution of our time, namely the *large* business corporation. In Chapter 4, I argue that, according to the criteria governing the use of the relevant limited government terms, corporations (i) are legally constituted to have the outlook of 'tyrants' and (ii) wield external power, and in particular 'penal economic power' (explained in Chapter 2), such that they stand in a 'tyrannical' and 'corrupting' relation to human communities.

Chapter 4 explores how the tradition's adherents, including Locke, Sidney, and their US heirs, understood the Rule of Law partly as a way of legally constituting state institutions to make them safe from 'tyrants', 'tyranny', and 'corruption'. I draw a distinction between this project and the legal measures we describe as 'regulation', which is currently the favored way of curtailing the asocial behavior of non-state actors. The corporate regulatory project reflects a tacit acceptance that the manipulation of economic dependents will be a structural feature of economic life, qualified only by any *ad hoc* limits imposed by individual regulations.

By contrast, when it comes to state power, the tradition insists that state institutions must be legally constituted along anti-manipulative lines, so that they are hostile to tyranny and corruption, *comprehensively* (in respect of every instance of their power) and *systematically* (according to the methodical processes of the legal system). The tradition holds that the Rule of Law is an indispensable way of ensuring that powerful state institutions do not harm human welfare. It implicitly rejects the mere 'regulation' of state power.

Again, familiar criticisms of the modern business corporation are aired. But insofar as those criticisms are articulated by reference to the underlying principles and in the idiom of the limited government tradition's Rule of Law project, the tradition's adherents are impelled to see that great economic institutions must be *potential* targets of that project.

2.2 Economic power as a potential target of the Rule of Law

The arguments advanced in this study are both a tribute to the tradition's Rule of Law project, as well as a critical reflection on its failure to live up to its own promise. That failure is the result of a widespread, mostly unquestioned, yet questionable, assumption. This is the assumption that the tradition need not treat economic power as even a *potential target* of the Rule of Law. I will call this assumption the 'Consensus'. This study's first major aim is to explain the origins and stubbornness of the Consensus. Its second major aim is to persuade readers that the Consensus is mistaken: economic power poses the kind of moral dangers that the Rule of Law is designed to address, and therefore the tradition must regard economic power as, at least, a *potential target* of the Rule of Law.

If the questions raised in this study became the subject of enquiry and debate among the tradition's adherents, the Consensus might be replaced by dissensus: the matters at stake are so important and so contentious (as I explain in Chapter 5) that it is

reasonable to imagine the tradition splitting into rival currents defined respectively by their defence of, and opposition to, the present state of affairs in which economic power is not even considered a *potential* target of the Rule of Law. Alternatively, a new consensus might form on the basis of the conclusion that economic power should be treated as a *potential* target of the Rule of Law. In that case, the tradition would need to engage in enquiry and debate regarding the question whether economic power should become an *actual* target, in the sense that state power is an actual target, of the tradition's Rule of Law project.

What do I mean by 'potential target' and 'actual target'? If the following question is asked, and answered in the affirmative, economic power becomes a *potential* target of the limited government tradition's Rule of Law project:

- Does economic power pose the kind of moral dangers that the tradition's Rule of Law project is designed to combat?

I answer the question in the affirmative: I argue that the present constitutions of internal power and external power are hospitable to the kind of moral dangers that the tradition has sought to address through its Rule of Law project. Those are the dangers the tradition identifies using terms such as 'arbitrariness', 'tyranny', and 'corruption'. As the present constitution of economic power is hospitable to those dangers, it jeopardizes the tradition's underlying principles, namely moral equality for all and freedom for all from manipulative social relations. Therefore, economic power should be treated as a *potential candidate* for reconstitution in accordance with the Rule of Law (which, of course, is but one possible corrective among others).

If the tradition's adherents were persuaded by my argument, they would be prompted to ask a further set of questions, questions which are beyond the scope of this study. Most obviously, they would have to respond to the question whether economic

power should become an *actual* target of the Rule of Law. Economic power would be treated as an *actual* target of the Rule of Law if the tradition's adherents concluded that reconstitution should occur and moved on to consider precisely how it should be implemented. Alternatively, the tradition's adherents might decide that, all things considered, it would be undesirable to make economic power an *actual* target. Such questions would be highly complex and contentious. They would involve an array of competing options, commitments, and goods between which sometimes difficult and controversial choices would need to be made.

The following analogy illuminates the distinction between 'potential target' and 'actual target'. Imagine there is a consensus among supporters of democratic governance that democracy should be confined to promoting 'responsible government' in the political sphere, and that it is obviously not worth considering whether there should be democracy in workplaces.

Preliminary reflection on democratic principles might lead to the intuition that the consensus seems to be mistaken: workplaces should at least be a *potential* target of democratization. Enquiries might then be undertaken by a possessor of that intuition in order to vindicate it: she might first wish to persuade fellow democrats that the workplace is *the kind of setting* in which democrats must ask whether democratic principles are being upheld. She would observe that typical workplaces do not adhere to democratic principles. She might claim that the widespread absence of democracy in workplaces offends democratic principles, and that the offence could, *in principle*, be addressed by a program of democratization. She would have concluded, in other words, that the workplace is a *potential candidate* for democratization. If a democratic movement determined that workplaces should be an *actual* target of democratization, the movement's adherents would consider precisely how democratization *should* be

implemented. Alternatively, the democratic movement might identify good reasons why, all things considered, democratization should not occur at all.

This study does not offer a view on whether economic power should be treated as an *actual* target of the Rule of Law, and so it does not address a range of matters associated with that question. It seeks *neither*:

> (i) to defend the position that we *should* or *must* implement Rule of Law limits to any extent, or on any, or all, forms of economic power; *nor*
>
> (ii) to defend any contention as to what precisely such implementation *could* or *should* involve, except in the very general way suggested by Chapter 4's discussion of the broad differences between the Rule of Law and those legal measures usually called 'regulation'. The thesis therefore does not set out to raise, and still less to answer, questions such as the following:
>
> > (a) should implementation be initiated by the judiciary, by a constitutional congress, by legislation, or by extra-legal action (eg revolution, following the seventeenth and eighteenth century examples of England, North America, and France)?
> >
> > (b) what precisely should be the effects on our economic way of life and the prevailing conceptions of private ownership and of the 'public' and 'private' spheres?
> >
> > (c) what should the new legal and institutional structures look like?

Before the matters described in (i) and (ii) call for resolution, readers must first be persuaded that economic power should be a *potential* target of the Rule of Law. Persuading readers that economic power should be a *potential* target is a formidable task.

This is due to, among other things, the Consensus's potent cultural force (see Section 4.1 below and Chapters 2, 3, 4, 5, and the Epilogue).

This study sets out to provoke enquiry and debate. It is hoped that readers would begin by addressing the question whether economic power should be a *potential* target before moving on to consider whether it should be an *actual* target. Of course, this transition would only occur amongst those convinced that economic power should be considered a *potential* target of the limited government tradition's Rule of Law project. And that proposition is likely to be highly controversial.

2.3 The Rule of Law is but one way, among others, to limit economic power

It is acknowledged that the limited government tradition's Rule of Law project is but one way, among others, of responding to the threat of arbitrary economic power. A thorough consideration of the relative merits, and actual or potential roles, of *other* mechanisms for addressing economic power would require extensive empirical and theoretical work. Such work would be crucial in the context of deliberations concerning the question whether economic power should become an *actual* target of the Rule of Law.

For example, one can readily imagine that, even among those who were inclined to treat economic power as a *potential* target, there would be some who would nonetheless argue that we should continue to prefer regulation to the Rule of Law for the purpose of controlling economic power. Others might contend that arbitrary economic power should be curbed through novel forms of democratic accountability emanating from the workplace, the wider community, or both. A community would have to decide what role, if any, to give to each of these mechanisms, and to other candidate mechanisms. However, as my aim is to address the prior question whether economic power should even be a *potential* target of the Rule of Law, this study does not focus on the relative merits, and respective roles, of the Rule of Law and alternative mechanisms.

Still, given that the regulatory project currently prevails in this field, Chapters 3 and 4 explain to readers why, *seeing the question from a limited government tradition perspective,* we should assume neither that regulation is obviously the *only* way, nor obviously the *best* way, to address economic power. The discussions explain some (but not all) of the relevant ways in which regulation and the limited government tradition's Rule of Law project differ. These differences are highlighted partly for the sake of illuminating the specificity of the limited government tradition's Rule of Law project and partly for the sake of suggesting that the Rule of Law might have *some* advantages over regulation, where such advantages are judged with no criteria in mind but those offered by the tradition's underlying principles, ie, *ceteris paribus*. However, although this study suggests good reasons to be skeptical about regulation's adequacy to the task of controlling economic power, it does not pretend to be the last word on this very difficult matter.

No attempt is made to argue that the Rule of Law is superior*, all things considered,* to other potential mechanisms for controlling power. This study seeks to promote conditions under which it would occur to anyone to engage in such a comparative evaluation in the first place: the Consensus means that the possibility of engaging in such a comparison is not even on the agenda.

3. Previous attempts to question the Consensus

The Consensus has not been universally accepted. A small but notable collection of commentators has cast doubt on its soundness.[17] Philip Selznick, for instance, frames an

[17] Among others, Karl Renner, *The Institutions of Private Law and their Social Functions* (Routledge & Kegan Paul 1949)*;* Adolfe A Berle, 'Constitutional Limitations on Corporate Activity—Protection of Personal Rights From Invasion Through Economic Power' (1952) 100 U Penn LR 933; W Willard Wirtz, 'Government by Private Groups' (1953) 13 Louisiana LR 440; Wolfgang G Friedmann, 'Corporate Power, Government by Private Groups, and the Law' (1957) 57 Columbia LR 155; Lawrence E Blades, 'Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power' (1967) 67 Columbia Law Review 1404; Philip Selznick (with the collaboration of Phillippe Nonet and Howard M Vollmer), *Law, Society, and Industrial Justice* (Russell Sage Foundation 1969); Michael Walzer, *Spheres of Justice* (Basic Books

enquiry in the following terms: 'Our concern', Selznick says, 'is with a special ideal—the rule of law—and its extension to the conditions of employment and industry'.[18] Such attempts to disrupt the Consensus have mostly confined themselves to noticing that there may be an important relationship between the tradition's underlying principles and economic power. However, the nature of that relationship has not been explored, and its importance has been overlooked by mainstream Rule of Law scholarship. The Consensus remains substantially undisturbed.

The relegation of economic power to, or beyond, the margins of the tradition, the incongruity of this relegation, and the preliminary nature of many attempts to question the Consensus, are brought out by an exchange between Ronald Dworkin and Samuel Scheffler, prompted by Dworkin's formulation of a key tenet of his account of the limited government project:

> We must ... insist that though people do have a political right to equal concern and respect on the right conception, they have a more fundamental, because more abstract, right. They have a right to be treated with the attitude that these debates presuppose and reflect—a right to be treated *as* a human being whose dignity fundamentally matters. That more abstract right—the right to an attitude—is the basic human right.[19]

Dworkin then considers whether this allows for, in his words, 'the now popular view that transnational corporations must respect the human rights of their employees or of others

1983); Sir Harry Woolf, 'Public law – private law: why the divide? – a personal view' [1986] Public Law 220; Peter Cane, 'Public Law and Private Law: A Study of the Analysis and Use of a Legal Concept' in Eekelaar and Bell (eds) *Oxford Essays in Jurisprudence: third series* (OUP 1987); Hugh Collins, 'Against Abstentionism in Labour Law' in Eekelaar and Bell (eds) *Oxford Essays in Jurisprudence: third series* (OUP 1987); Gordon Borrie, 'The Control of Public and Private Power' [1989] Public Law 552; Paul Craig, 'Constitutions, property and regulation' [1991] Public Law 538 ('Constitutions'); Lord Woolf, 'Droit public – English style' [1995] Public Law 57; Julia Black, 'Constitutionalising Self-Regulation' (1996) Modern Law Review 24; Sir John Laws, 'Public Law and Employment Law: Abuse of Power' [1997] Public Law 455; Michael Taggart (ed), *The Province of Administrative Law* (Hart Publishing 1997); Dawn Oliver, *Common Values and the Public-Private Divide* (Butterworths 1999); Sir Stephen Sedley, 'Public Power and Private Power' in Forsyth (ed) *Judicial Review and the Constitution* (Hart Publishing 2000); Peter Cane, 'Accountability and the Public/Private Distinction' in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart Publishing 2003); Mark Freedland and Jean-Bernard Auby (eds), *The Public Law/Private Law Divide: une entente assez cordiale?* (Hart Publishing 2006).

[18] Selznick (n 18) 3.

[19] Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 335.

who are affected by their conduct'. To which he responds by saying, 'Yes, but it makes that popular view depend on controversial answers to further open questions. Whether some institution's behavior is correctly interpreted as denying anyone's right to dignity depends on the level of concern it is required to show for him'. He notes that his theory assumes 'that a government has a responsibility of equal concern for all those subject to its dominion', which means that 'if a government's policies cannot be interpreted as enforcing any good faith answer' to questions bearing on the dignity of persons, 'its policies deny the dignity of those who suffer in consequence'. Dworkin acknowledges his contrasting assumption 'that private individuals have no comparable responsibility to strangers'.[20]

He then poses contentious questions:

> Human rights conventions are constructed with the high responsibilities of coercive governments in mind: they assume that government must show all those over whom it exercises power an equal concern. We must therefore approach the question whether people have comparable rights against giant transnational corporations by first fixing the level of concern these organizations owe to those whose lives they affect. Which analogy should we use? Ordinary commercial enterprises do not owe the same concern to customers as to shareholders: they are obliged to seek a profit for the latter by enticing the former. They are subject to the constraints of decency ... but not the much stronger constraints of coercive government. But giant corporations have many powers that strike critics as coercive and it might therefore be right to hold them to the greater level of concern we associate with governments. I have not attempted argument for or against that different analogy, but nothing in my discussion of human rights ... rules it out.[21]

The point of departure for one of this study's central enquiries is the question implied by Dworkin: is there a moral analogy between 'giant transnational corporations' and the

[20] 'I may permissibly exhibit more concern for myself and my family than for you and yours, and my favoritism therefore cannot be interpreted as denying you full human status and dignity. But if my behavior is sufficiently unmindful of your welfare – if I refuse to rescue you when I easily can or if I deliberately harm you – then ... I have violated your rights because I have failed to show your humanity the right respect': Ronald Dworkin, <http://www.justiceforhedgehogs.com/human-rights/> accessed 24 May 2014.

[21] ibid.

state's 'government' according to the limited government tradition's underlying principles?

Preliminary reflection on this question leads readily to the intuition that nothing in the tradition's underlying principles obviously rules out the enlargement of its project to include 'giant transnational corporations' alongside the state. If there is indeed an analogy, or even the intuitive suspicion of one, the tradition must expand its horizons; it cannot continue to overlook the subject.[22]

I have 'attempted argument' that the semblance of the moral analogy between economic power and state power is not misleading. I contend that the basis of the analogy rests in the tradition's underlying principles, whose reach extends beyond the state context. Once the core principle of moral equality is laid bare, a task undertaken in Chapter 1, it is plain that moral equality ought to be respected by all those exercising power over other adults, in every context.

This follows from the nature of moral equality, which assumes: (i) the equal worth of all humans; (ii) the natural liberty of all adult humans; (iii) the equal subordination of all humans to impersonal moral criteria; and (iv) that adult humans possess a faculty of reason which allows them to recognize the requirements of impersonal morality. There is no reason of principle why only the state would be morally obliged to respect these four interrelated axioms, which concern the status common to all adult humans just in virtue of their being adult humans. Nor is there any reason of principle why economic power-holders would be immune from a moral obligation to exercise their power over others in a manner which respects moral equality. There is no good reason to hold, on the one hand, that the manipulative use of power is morally blameworthy on the part of state actors, but, on the other hand, that it is not culpable on

[22] In *A Matter of Principle,* Dworkin remarks, in passing, 'Many citizens are for one reason or another disenfranchised entirely. The economic power of large business guarantees special political power for its managers': (n 10) 27.

the part of economic power-holders. The manipulative use of power deserves to be called *arbitrary* no matter who is its author.

However, it is a separate question how power-holders in any given context should be held to account in respect of their obligation to respect moral equality. In the state context, it is thought appropriate that accountability be promoted through measures including the Rule of Law and 'responsible government'. Determining the suitable mixture of measures in this or that setting is a complex matter, which depends on the precise nature of each case. The combination of accountability measures that is appropriate in one context may not be desirable in another.

In the economic context, there is no good reason why holders of internal or external power should be immune, as a matter of moral principle, from the obligation to respect the moral equality of those under their power. It is a separate question how economic power-holders should be held to account in connection with that obligation. The reconstitution of internal and external power in accordance with the Rule of Law would be one *potential* way, among others, to promote such accountability. Once it is understood that both the capitalist employment relationship and the corporation are constituted in ways that are hospitable to arbitrariness and tyranny, the tradition may no longer ignore the question whether internal and external power should be subjected to limited government measures. It is noteworthy that eminent philosophers, such as Dworkin, have identified similar questions, but then put them to one side.[23]

If 'giant corporations have many powers that strike critics as coercive', then why has the question whether 'it might therefore be right to hold them to the greater level of concern we associate with governments' not been addressed? It is not as though 'giant corporations' are a marginal or trivial feature of the contemporary world. On the

[23] See, also, Nigel Simmonds, 'Justice and Private Law in a Modern State' (2006) 25 University of Queensland LJ 229, 240-241.

contrary, their immense power, and indeed their frequent abuse of this power, is the subject of regular media and public attention. Although much philosophical ink has been spilled concerning the distribution of economic resources (eg, by John Rawls, G A Cohen, and Dworkin), and notwithstanding the central place of 'power' in political theory, there has been virtually no philosophical interest in the distribution and incidents of economic power.

Where commentators have ventured into this field, they have by-passed abstract questions of principle of the kind taken up in this study (and also identified by Dworkin). In general, they have addressed the question whether public law norms might be applicable to economic power, and they have done so in the familiar manner of jurists considering how the reach of some existing body of legal rules and principles might plausibly be extended. In some cases, they have been encouraged by hints that the law might already be advancing in this direction.

Consider for example the remarks of Lord Justice Lloyd in the *Datafin* case,[24] which concerned the public law judicial review of the non-state Panel on Takeovers and Mergers: 'The Panel wields enormous power' and '[i]t has a giant's strength.... It has been said that "it is excellent to have a giant's strength, but it is tyrannous to use it like a giant".'[25] Consider the yet more provocative remarks of Lord Woolf:

> The interests of the public are as capable of being adversely affected by the decisions of large corporations and large associations, be they of employers or employees, and should they not be subject to challenge on *Wednesbury* grounds if that decision relates to activities which can damage the public interest? In limited fields, there is already protection. An employee who is unfairly dismissed, even if there is no breach of contract, has a remedy. There is the Monopolies Commission. There is the Office of Fair Trading. But I am contemplating a much wider power of intervention ... Members of large companies[26] ... delegate to the board of

[24] *R v Panel on Takeovers and Mergers, ex parte Datafin plc* [1987] 1 QB 815.
[25] ibid 845.
[26] The ellipses reflect my excising of references to trade unions. This is not meant to indicate that their economic power is irrelevant to the questions raised here. On the contrary, trade union power raises its own range of complex moral questions. Although these questions partly overlap

> the company ... the power to make decisions which at times not only affect the company ... but the national interest. Should it not be possible for the court to intervene if the decision has been reached without a relevant consideration being taken into account or if the decision has been taken on the basis of some irrelevant consideration in the same way as it does in the case of a public body? Powerful bodies, whether they are public bodies or not, because of their economic muscle may be in a position to take decisions which at the present time are not subject to scrutiny and which could be unfair or adversely affect the public interest.[27]

Unsurprisingly, some commentators have doubted the doctrinal congruity of such thoughts. Julia Black, for instance, argues that:

> At its broadest, the power argument eschews the public/private divide … and argues that … any exercise of power, public or private, by state or companies should be subject to principles of "liberty, fair dealing and good administration".[28] In focusing on power, the argument contains a kernel of appeal, however it does too much: it assimilates all forms of power under one rubric and applies the same principles to them.[29]

Such doubts are to the point if the enquiry is into the likelihood, or desirability, of the extension of public law norms to economic power considered as a proposed course of incremental doctrinal evolution: if the parameters expressed in the present conception of the 'public/private divide' are taken for granted as both immutable and unobjectionable, then a doctrinal proposal which 'eschews' that divide seems both improbable and unappealing.

Even believers in the desirability of a thoroughgoing and robust extension of public law norms might have doubts about the doctrinal evolution school of thought. They might think that it underestimates the profundity of the social transformation that such an extension would involve. Such changes, were they to be truly meaningful—comprehensive, systematic, and rigorous—would be comparable to the constitutional

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with those discussed here, doing justice to their specificity would require lengthy treatment which is beyond the scope of this study.

[27] Woolf (n 18) 224-225.

[28] Borrie (n 18).

[29] Black (n 18) 29.

changes which marked the limited government tradition's victory over political absolutism in the seventeenth and eighteenth centuries.

Consider Black's observation that if Woolf's questions were answered in the affirmative, this would only 'add anything to the current principles of company law' were it to involve 'for example, developing principles of corporate social responsibility'.[30] As argued in Chapter 2, if such principles were to be robust enough to remedy the mischiefs in question, they would have to contemplate a substantial refashioning of the contemporary way of economic life.[31] Among other things, any principles of corporate social responsibility would only be a meaningful alternative were the criterion of profit-maximization given less weight or perhaps discarded altogether.[32] Further, robust principles might also fundamentally transform the present conception of the powers and prerogatives associated with private ownership. Black's observation encourages us to notice that by making *any* aspect of economic power an *actual* target of the Rule of Law, we might open the floodgates, prompting a deluge in which the present capitalist constitution could be swept away. This is one potential consequence of discarding the Consensus.

This study is not concerned with whether the extension of public law norms to economic power is likely, or desirable, as a proposed course of incremental doctrinal evolution. Black's justified caution therefore does not detract from the approach adopted here. The present enquiry asks what changes might be required by the limited government tradition's underlying principles. It is willing to contemplate the possibility

[30] ibid.

[31] Noting that corporate social responsibility schemes, as they are usually conceived, tend to advance schemes that are either so modest as to be derisory, or if more ambitious, incoherent and politically naïve: H J Glasbeek, 'The Corporate Social Responsibility Movement—the Latest in Maginot Lines to Save Capitalism' (1987-1988) 11 Dalhousie Law Journal 363.

[32] Justice Stevens quotes an amicus brief which argues that 'the corporation must engage the electoral process with the aim to enhance the profitability of the company, no matter how persuasive the arguments for a broader or conflicting set of priorities': *Citizens United v Federal Election Commission* 558 US 310, 470 (2010).

of a fundamental transformation of the constitution of economic power, and, in turn, the 'public/private divide', if the relevant principles so require. On this view, given the importance of the tradition's underlying principles, the tradition's adherents would need to be shown compelling reasons why 'the same principles', in Black's words, should not be upheld, if not in respect of 'all forms of power', then at least in respect of economic power. In the case of economic power, the historical record amply demonstrates the tendency of power-holders to hold moral equality in contempt.

Further, it is undeniable that the 'power argument' advanced in this study—which is framed in terms of limited government principle, rather than legal doctrine—'eschews the public/private divide', as Black puts it. But to suggest, without more, that this fact counts against the 'power argument' is to avoid engagement with the substantive questions of moral principle it raises. Whether or not it 'does too much' is a matter of moral principle. It cannot be settled by ascertaining its compatibility with the established conception of the 'public/private divide'. That conception may or may not have a sound basis in moral principle. The designations 'public' and 'private' are not themselves moral principles that can supply premises supporting our moral conclusions. They are rather labels that describe the nature of conclusions which have already been reached about matters of moral principle.

As this study seeks to raise and to address substantive questions of moral principle, it is unconcerned with whether its conclusions do or do not eschew the established 'public/private divide'. The more pressing task is to consider the relationship between economic power and the limited government tradition's underlying principles.

This study sets out to overcome the limitations of previous efforts to unsettle the Consensus. Firstly, it does so by offering an account in Chapters 1, 3, and 4 of the underlying principles which govern the use of the tradition's normative vocabulary, including the terms 'arbitrariness', 'tyranny', 'tyrant', and 'corruption'. Such terms risk

being hollow epithets unless the tradition engages in sustained enquiry and debate aimed at articulating the best available account of the criteria governing their use.

Armed with such an account, we are able to use the tradition's rhetorical idiom in a principled manner as part of our arguments about the merits of rival visions for the constitution of economic power: is the capitalist employment relationship constituted in a manner conducive to the systematic exercise of *arbitrary* power over employees (a question posed in Chapter 3)? Is the corporation constituted according to the standpoint of the archetypal *tyrant* (a question posed in Chapter 4)?

Secondly, Chapter 5 explains that this study's way of attacking the Consensus—which is not the only way—involves an indictment of established property rights. It is my contention that, on the *present conception* of private ownership, property rights effectively conferring *power over others* offend the tradition's underlying principles.[33] The objective of Chapter 5's discussion is to illuminate and to challenge an assumption which contributes to the plausibility and stubbornness of the Consensus: namely, the uncomplicated assumption that *established* property rights are one of the very things that limited government is supposed to protect. The tradition has simply overlooked the fact that certain powers and prerogatives of property ownership are key elements of a system of power in which substantial resource ownership confers sway over others.

If the tradition were to recognize that the present conception of private ownership is conducive to arbitrariness and tyranny, it would need to engage in a searching reconsideration of the proper relationship between the limited government tradition and established property rights. At the very least, the relationship would henceforth be perceived as characterized by a degree of tension rather than straightforward harmony.

[33] The notion of property rights effectively conferring power over others is explained in Chapter 2.

The relevant questions are highly complex and controversial, and this study seeks only to advance a preliminary limited government case against the *present conception* of private ownership. A thorough exploration and evaluation of contending views lies beyond the scope of this study. Moreover, it is plain that a community could not decide whether economic power should be an *actual* target of the Rule of Law without considering, among other things, the merits of rival theories of justice in the distribution of resources, rival economic theories concerning the virtues and vices of market economics, as well as rival theories of ownership, public and private. These fundamental and controversial matters, and others of their kind, belong to a possible later stage of enquiry, one that is beyond the scope of the present study.

4. Neglected contexts

The ideas conveyed by a term like 'the Rule of Law' may have a particular significance for the adherents of one or more traditions of political enquiry and debate. Although the Rule of Law does not belong *exclusively* to one tradition, its significance in the modern age cannot be grasped without appreciating its place in the normative vocabulary and political morality of the modern limited government tradition, whose proponents include both liberals and republicans, and, might one day include socialists (as discussed in the Epilogue).

The tradition's adherents express their ideas in different ways, some of which are recognizably liberal, while others are characteristically republican, and, of course, various traditional thinkers have their own more or less idiosyncratic methods and terminologies. But, in substance, the tradition's adherents—*qua* adherents—share a common vision of how a certain relationship between law, power, and interests, expectations, and rights is indispensable for the maintenance of non-manipulative social relationships in which power-holders are legally obliged to treat those subject to their power as moral equals. In

Chapter 1, I provide a working account of the Rule of Law. *Working*, because it is intended only to provide what is required for the purposes of the critique of the Consensus. Though that critique in turn contributes to an account of the Rule of Law.

4.1 Conceptions of the Rule of Law do not stand 'above the battle'

In its traditional usage, the Rule of Law is a term with evaluative connotations: to say that some power-holder has (or has not) complied with the Rule of Law, is also, under normal conditions,[34] to express approval (or disapproval). Through the study of historical conflicts regarding the use of evaluative terms, it becomes apparent that 'philosophical argument is often deeply intertwined with claims to social power'.[35] Although so-called 'meta' analysis has earned a prominent place in contemporary (analytical) legal-and-political philosophy, it is rare for its practitioners to ask 'meta' questions about the relationship between philosophy and social power. An example would be the question whether and how our projects and commitments in effect make us the allies or the opponents of this or that repository of, or way of ordering, social power. As Quentin Skinner points out:

> the principles governing our moral and political life have generally been disputed in a manner more reminiscent of the battlefield than the seminar room ... and [so] it may be right to view with a certain irony those moral and political philosophers of our own day who present us with overarching visions of justice, freedom and other cherished values in the manner of dispassionate analysts standing above the battle. What the historical record strongly suggests is that no one is above the battle, because the battle is all there is.[36]

We should be wary of reflections on 'cherished values'—including the Rule of Law—which suggest that such reflections are neutral as to *political* contests involving rival claims

[34] On reasons to depart from the Rule of Law under certain abnormal, say wartime, conditions, see, eg, Thomas Jefferson's letter to John B Colvin quoted in Kurland and Lerner (n 8) vol 4, art 2, section 3, doc 8.

[35] Quentin Skinner, *Visions of Politics* (CUP 2002) vol I, 6-7.

[36] ibid 7. If this implies that, because it can never *completely* succeed, the aspiration to undertake dispassionate analysis is of no value, then perhaps it goes too far.

to power. Upon close inspection, it will often become plain that even the most apparently dispassionate texts involve a *prise de position* which is either hospitable or hostile to the claims of great power. In other words, even a text that strives to be, and indeed in large measure *is*, a dispassionate or descriptive analysis may occupy a position on the 'battlefield'.

It is strange that, on the one hand, we tend not to be troubled by efforts to discern the relationship between philosophical positions and social power when such efforts are undertaken in respect of *past* thinkers. But, on the other hand, we tend to disapprove of the equivalent exercise when the object is the philosophy of our own time. So whether or not we are inclined to agree with (say) the content of the speculation Jeremy Waldron undertakes regarding John Locke's political philosophy, we are not disconcerted by the very idea of the exercise: Waldron suggests that Locke's 'intended audience' was probably 'Whig merchants and the wavering rural squirearchy' who were 'unlikely to be convinced by a theory of political revolution if it also threatened to undermine the moral basis of their material wealth and security'.[37] We are shocked neither by the idea that Locke's treatises occupied a position on the battlefields of his age, nor by the notion that the treatises provided men of great property with intellectual reinforcements.

But when such speculation is directed at a contemporary philosophical argument, it is often seen as 'reductive', 'crude', and perhaps insufficiently respectful of the philosopher in question. But although one or more of these characterizations may be just in a particular case, there is nothing in principle reductive, crude, or disrespectful about trying to discern the relationship between philosophical positions and social power. A philosophical argument is not necessarily *reduced* to its relationship with claims to social power simply because it has such a relationship. Further, the attempt to describe the

[37] Jeremy Waldron, *The Right to Private Property* (OUP 1988) 148.

relationship is only crude insofar as the attempt is a poor one, either because the relationship is poorly described or because it seems tenuous or non-existent. Finally, absent any misplaced *ad hominem* aspersions, it is not disrespectful to propose that there is a relationship between a philosopher's *arguments* and social power (even if it is a mutually supportive one); such a description need imply nothing about the philosopher's motives or character.[38]

Nonetheless, many today would probably think it out of order to pose questions of contemporary accounts of the Rule of Law similar to those Waldron answered in his remarks on Locke quoted above: who is the intended audience? What is the account's relationship to social power? Would it be unlikely to convince certain *élite* audiences if it called into question the Consensus?

In Chapters 2-5, and in the Epilogue, I address the first two questions by considering the relationships between social power, liberal public philosophy, and the Consensus. In the Epilogue, I also describe my intended audiences, and throughout I make it clear that I think we should change the relationship between economic power and the contemporary Rule of Law project; the Rule of Law should represent a standing challenge to, and potential constraint on, all forms of social power. Although the final question raised in the previous paragraph is briefly addressed in the Epilogue, it is beyond the scope of this study.

If we assume that we are 'dispassionate analysts standing above the battle', we risk overlooking the fact that what our texts *say* and what they may *do* in a particular

[38] The question of the relationship between power and ideas is of course an old one. See, eg, Plato, 'Apology' in *The Last Days of Socrates* (Hugh Tredennick and Harold Tarrant (trs), Penguin 2003) 31e-32a; Leo Strauss, *Persecution and the Art of Writing* (Chicago University Press 1988). It tends today to be the province of those working within the traditions associated with Karl Marx or Michel Foucault, or specialist 'sociologists of knowledge' following Karl Mannheim, *Ideology and Utopia* (RKP 1936).

context are not the same things.[39] Subscription to the Consensus is usually a matter of omission. In general, nothing is *said* about economic power. Authors of the texts which I take to be supportive of the Consensus might feel, then, that because the words they have chosen say nothing about great economic power, their texts do not play a role on the battlefield where holders of economic power seek to pursue their interests and to overcome opponents. However, the fortunes of the combatants partly depend upon the prevailing normative vocabulary and ways of seeing the world which provide the intellectual cartography through which the battlefield is understood. This means that the texts which help inform the combatants' maps indeed *do* something when the texts refuse to ask whether the cartography unduly favors one camp or another.

Imagine a seventeenth century text on the arbitrary exercise of power which focused exclusively on the dangers of parliament's power, but said nothing about the dangers of monarchs with absolutist pretensions. In the relevant historical context, such a text would not have been 'above the battle' no matter how 'dispassionate' it appears, and it would have stood in a supportive relation to absolutism by helping to shield the latter from scrutiny.

By failing to call economic power to account, contemporary texts which subscribe to the Consensus indirectly give shelter and comfort to great economic power. They also thereby fail to insist upon a basic tenet of the limited government tradition, which is that power must provide an adequate account of its claims, on pain of being presumed illegitimate. Indeed, insofar as Rule of Law texts adhering to the Consensus imply that their *raison d'être* is to ensure that we are safe from the extravagant pretensions of great power, their selective cartography may encourage us to feel safer than we should

[39] On the distinction, see J G A Pocock, *Virtue, Commerce, and History* (CUP 1985) 1-34. Raymond Geuss argues that theories 'represent ways of taking a position in the world' and so to understand politics, we 'have to treat the politics of theorization': *Philosophy and Real Politics* (Princeton University Press 2008) 29.

feel, at the same time as it inadvertently shields from scrutiny the organization of economic power.

4.2 The politics of the Rule of Law

As I explain in Chapters 1 and 2, the tradition's enquiries and debates regarding the Rule of Law are undertaken from the vantage point of moral and political agents wanting to know whether, and on what conditions, to give allegiance to some person or body claiming authority. Adherents of the tradition therefore require a certain kind of understanding of the Rule of Law. They must 'explain its nature'[40] in a way that meets their needs as agents faced with decisions about constitutional allegiance.

In the case of a constitution thought to embody the Rule of Law, the tradition's adherents are not called upon to accept or reject the Rule of Law (or indeed any other single element of the constitution) in isolation.[41] Rather, we are asked to give our allegiance to a whole way of life that *integrates* various elements one with the other, a whole which usually is *already constituted*. Because we are being asked to give our allegiance to an actual or potential way of life, our priority is *not* to identify the virtues of (say) the Rule of Law in abstraction from its social embodiment in any particular way of life (assuming such a task would be feasible in any case).

Rather, as moral and political agents we need to understand and evaluate the Rule of Law in the light of its *character* as one part of a *particular* larger whole. This means considering:

[40] Raz (n 9) 211.

[41] I am using the term 'constitution' in a way that includes, but is broader than, the legal sense of the term: Leo Strauss, *Natural Right & History* (University of Chicago Press 1953) 136-137. Similarly, Selznick (n 18) 31. F A Hayek also invokes a broad sense of 'constitution' in his *Constitution of Liberty* (Routledge 2006). On modern historical roots of this usage, see Bernard Bailyn (n 3) 67-68, and on ancient, see Plato, *Republic* (Penguin Classics 2007); Aristotle, *The Politics* (Dover 2000).

> (i) how in this particular case it is embodied in the practices and cultures of the legal system (knowing that such modes of embodiment may differ from one system to another);
>
> (ii) how it is integrated with other elements of the way of life as a whole (eg democracy and markets, knowing again that such elements may differ from one way of life to another);
>
> (iii) how it is supposed to relate to conceptions of various goods (eg justice, rationality, liberty); and
>
> (iv) how its perceived value and connotations are shaped by the foregoing (eg is it seen as being in tension with democracy, but supportive of markets and liberty?[42]).

We should understand the Rule of Law as an historically embedded, *political* phenomenon. Though not political in the pejorative sense,[43] or for that matter necessarily 'ideological' in the Marxian sense,[44] as some commentators have suggested. Instead, as discussed in Chapter 2 (and below), the Rule of Law is 'political' partly because it has been used as an evaluative term in legitimation stories that seek to ground the allegiance of moral and political agents to a particular way of life.[45] As Bernard Williams explains, such stories are 'supposed to legitimate' the constitutional:

> arrangements to *each* citizen, that is to say, to each person from whom the state expects allegiance; though there may be other people within the state,

[42] Eg, Dworkin, *Principle* (n 10) ch 1.
[43] Eg, Sir Ivor Jennings, *The Law and the Constitution* (University of London Press 1933) 263: '"The rule of law" was always a political doctrine; and it had no validity after the Constitution rejected the concept of public order and developed instead the concept of public service.'
[44] Eg, Morton J Horwitz, 'The Rule of Law: An Unqualified Human Good?' (1977) 86 Yale Law Journal 561, 566; Roberto Unger, *Law in Modern Society* (Free Press 1977).
[45] Eg, 'Give your allegiance to this regime because it upholds the Rule of Law.'

> slaves or captives, who are nakedly the objects of coercion and for whom there is no such legitimation story.[46]

The evaluative terms used in such stories are inevitably subject to instability and substantive controversy:

> it makes little sense to speak of evaluative terms as having accepted denotations that can either be followed or, with varying degrees of disingenuousness, effectively manipulated ... in short, all attempts to legislate about the "correct" use of normative terms must be regarded as equally ideological in character.[47] Whenever such terms are employed, their application will always reflect a wish to impose a particular vision on the workings of the social world.[48]

As argued in Chapters 2-5, texts concerning the Rule of Law that adhere to the Consensus serve to 'impose a particular' and *controversial* 'vision on the workings of the social world' (whether intentionally or not). Simply put, this vision suggests that the dangers posed by state power mean that it must be limited by the Rule of Law, while other forms of power, including economic power, do not pose morally analogous threats and at most need only to be 'regulated'.

This distinction, which is rarely made explicit, is reflected in the prevailing legitimation stories. They do not make the legitimacy of the contemporary way of life turn on the nature of the relationship between law, fundamental rights, and great *economic* power. The leading stories do, by contrast, make legitimacy depend upon a certain relationship between law, fundamental rights, and *state* power.

On the one hand, the legitimacy of state power is said to be assured by how limited government constitutions create a relationship between law and state power which safeguards the fundamental rights *of those subject to state power*. On the other hand, on the classical liberal view, the legitimacy of the present constitution of economic power

[46] Bernard Williams, 'From Freedom to Liberty: the Construction of a Political Value' (2001) 30 Philosophy & Public Affairs 3, 25.
[47] In the Epilogue and in the main text at n 45 above, reference is made to the critical, Marxian sense of the term 'ideological', which is different to the neutral sense Skinner intends here.
[48] Skinner (n 36) 182.

is said to reside in its being an expression of the fundamental rights *of those who hold the power* (which power must be protected from the state by a limited government constitution). The legitimacy of economic power is not said to reside in its being subject to limited government safeguards for the safety of those subject to it.

Not only is the Rule of Law invoked in legitimation stories aimed at vindicating particular ways of life, its norms may also be seen as requiring power-holders to offer, and to comply with, a reasonable (and context-appropriate) interpretation of a more or less official legitimation story when they exercise power. In the light of the arguments advanced in this study, one might come to the view that economic power should be reconstituted so that its holders are required to present each 'object' of their power with a reasonable legitimation story morally equivalent to the one holders of state power are required to offer. This would include explaining, in effect, how the exercise of economic power does not deny the moral equality of affected persons by manipulating them, 'nakedly' as 'objects of coercion', as though they were 'slaves or captives'. Were such an obligation imposed on holders of economic power, any person subject to their claims would stand in relation to them as a moral equal and not as one among other 'objects'.

5. Explaining and challenging the Consensus

The working account of the Rule of Law presented in Chapter 1 is used in subsequent Chapters to ground my argument that, according to the Rule of Law's underlying principles, the Consensus should not stand. My portrait of the Consensus seeks to show that although it forms part of the prevailing conception of the Rule of Law, it is not a necessary part (logically, conceptually, or otherwise). Instead it is the product of choices.

In some instances, such choices would be symptomatic of a standpoint which could only make an insincere and tactical show of allegiance to the Rule of Law for the simple reason that it rejects the common good (or even 'the good') as a relevant criterion

in practical reasoning (eg, the tyrant's standpoint discussed in Chapters 1 and 4). More often, perhaps, the choices underpinning the Consensus would be made sincerely, though on questionable, too often unquestioned, grounds. Some of those grounds may include certain of liberal public philosophy's moral and empirical claims (which I explore in Chapter 2).

To explain the Consensus in this way is simultaneously to call it into question: the implication is that the Consensus should not be treated as axiomatic, but as a set of claims, inextricably connected with the related claims of a public philosophy and a way of life, all of which stand in need of justification. And as the Consensus forms part of the contemporary Rule of Law project, to explain the Consensus in this way is also to offer an explanation of, and a challenge to, one aspect of that project.

5.1 Ways of seeing and a way of life

I do not address directly the question whether economic power should be an *actual* target of the Rule of Law, because all the space available for this study is required simply to challenge the Consensus. Why are such strenuous labours required in order to demonstrate that we should not take the Consensus for granted? In short, because the Consensus has immense cultural force.

The Consensus's cultural force can be illustrated by how it can be relied on to qualify what might otherwise be over-inclusive descriptions of the Rule of Law's project (as it is currently understood). When a US court declared that 'Discretionary power does not carry with it the right to its arbitrary exercise', it plainly did not intend to include non-state economic power, and its audience was unlikely to wonder whether it did.[49] Or take E C S Wade's statement that in A V Dicey's account of the Rule of Law: 'The

[49] *Schachtman v Dulles* 225 F.2d 938, 941 (DC Cir 1955) cited in Arthur Goodhart, 'Rule of Law and Absolute Sovereignty' (1958) 106 U Pa L Rev 943, 956.

emphasis is upon the limitations placed by the law on the exercise of power'; it is taken for granted that the 'power' concerned is state power.[50] But why should such limitations be confined to state power?

And the Consensus may also be relied upon to cure potential ambiguity. For example, when Wade observes that during and after the Second World War there was a 'revival of interest in the rule of law' largely due to the 'contest' arising from 'the controlled use of property where the public interest competes with the wishes of the private owner',[51] it goes without saying that such 'interest' was sparked by a concern to protect the private owner's 'economic field of liberty'[52] not to place Rule of Law 'limitations' on the owner's 'wishes'. But what if the 'economic field of liberty' in question was in fact a potential source of arbitrary power?

In Dicey's day, in Wade's, and in our own, Rule of Law opposition to 'the exercise by persons in authority of wide arbitrary or discretionary powers' has almost always been directed at 'wide arbitrary or discretionary' *state* 'powers'.[53] Because of the cultural force exerted by the Consensus, and its 'common sense' status, strenuous labours are necessary simply to have it recognized that the state is *not* the only potential source of arbitrary power, or even tyranny, which today threatens respect-worthy interests, expectations, and rights.

In Chapters 2-5, I will ask how it has come to pass that, in the contemporary constitutional setting, formulations like those surveyed a moment ago do not seem over-inclusive or ambiguous (as the case may be): Why do we, members of contemporary Anglophone societies, read between the lines as we do? What constellation of historical, intellectual, and constitutional factors lend the Consensus its enduring force, not only in

[50] E C S Wade, 'Introduction' in A V Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan & Co Ltd 1961) cxv.
[51] ibid xxix-xxx.
[52] ibid xxvii.
[53] Dicey (n 51) 188.

intellectuals' accounts of the Rule of Law, but also in institutionalized Rule of Law practice?

One aim of this study is to ensure that the Consensus is not seen as a perplexing lacuna. I suggest that the nature, origins, and stubbornness of the Consensus stem from the status of the Consensus as a foundation stone both of (i) the way of life which is broadly shared by contemporary Anglophone societies and (ii) the preferred public philosophy of those societies' cultural *élites*. In particular, the Consensus entails ways of seeing that are partly constitutive of this way of life and this public philosophy, and which are among the features that differentiate them from their rivals, actual and historical.

The limited government tradition's current ways of seeing power distinguish sharply between state power and economic power for a variety of purposes, including for the purposes of the Rule of Law. The prevailing contemporary conception of the Rule of Law is premised on the assumption that although state power's capacity to endanger human welfare requires a certain relationship between law, state power, and interests, expectations, and rights, economic power should be approached via another route. It is hoped that my account will help to explain—and, in the process, to loosen—the Consensus's grip on the imagination of leading contemporary proponents of the Rule of Law.

Chapter 1 seeks to understand the tradition's underlying principles, against which the Consensus must be evaluated. Chapter 2 attempts to illuminate the constitutional context in which the Consensus is at home. Seen against the backdrop provided by this study, the existence and force of the Consensus may seem both perplexing (in the light of the tradition's principles) and, at the same time, not at all perplexing, perhaps even natural (because it is at home within the contexts of the public philosophy and constitution of liberal-capitalism).

5.2 Challenging the ways of seeing associated with the Consensus

The Rule of Law as currently understood by the limited government tradition is part of a family of terms (eg, 'political', 'economic', 'government', 'private', 'public'), each of which is understood in a way that 'presupposes a particular kind of social order'.[54] This is the social order whose idealized self-image is encapsulated in liberal public philosophy's social vision, which partly obscures the questionable features of the 'capitalist constitution' (described in Chapter 2). Quentin Skinner observes that:

> ... as we analyse and reflect on our normative concepts it is easy to become bewitched into believing that the ways of thinking about them bequeathed to us by the mainstream of our intellectual traditions must be *the* ways of thinking about them. Given this situation, one of the contributions that historians can make is to offer a kind of exorcism. If we approach the past with a willingness to listen, ... we can hope to prevent ourselves from becoming too readily bewitched. An understanding of the past can help us to appreciate how far the values embodied in our present way of life, and our present ways of thinking about those values, reflect a series of choices made at different times between different possible worlds. This awareness can help to liberate us from the grip of any one hegemonal account of those values and how they should be interpreted and understood. Equipped with a broader sense of possibility, we can stand back from the intellectual commitments we have inherited and ask ourselves in a new spirit of enquiry what we should think of them.[55]

This study is not a historical work, but it does draw on the past in order to show how our ways of seeing power are partly the product of past choices.

As discussed in Chapters 3 and 5, a particularly important set of choices was made by early modern thinkers in their attempts to develop ways of seeing post-feudal governmental power. The choice in question involved deciding how to 'systematise'—how to *see*—'the facts of power' characteristic of post-feudal society.[56] Early modern political theory homed in on the governmental power now held exclusively by the state, which is referred to in Chapters 3 and 5 as *jurisdictional* power. The governmental power

[54] Alasdair MacIntyre, *A Short History of Ethics* (Routledge 2002) 6 ('*Ethics*').
[55] Skinner (n 36) 6.
[56] S F C Milsom, *Historical Foundations of the Common Law* (Butterworths 1969) 8.

conferred by post-feudal property relations is not theorized, as though, with the passing of the pre-modern connection between ownership and government (feudal *dominium*), ownership could no longer confer governmental power. To recognize that this way of seeing is the product of *choices*—rather than, say, conceptual or natural necessity—is 'to learn from the past ... the distinction between what is necessary and what is contingently the product of our own local arrangements'.[57]

5.3 Challenging conventional vocabulary

If relations of power are partly constituted and sustained by the 'power of our normative language', then we may use language to destabilize (and not only to reinforce) a particular configuration power.[58] With that in mind, this study focuses on a vocabulary and a way of seeing power that are at once evaluative and descriptive. By working with, and working on, those intellectual resources we may contribute to calling into question, and if necessary to modifying, contemporary configurations of power.[59] Here, the relevant intellectual resources comprise the cultural inheritance of the limited government tradition, which has been (selectively) employed in support of regimes that do, and in opposition to regimes that do not, uphold the tradition's underlying principles.

I seek to challenge the Consensus, and thereby to call to account the economic power it shelters from accountability, by insisting that the criteria for applying certain terms are satisfied in a broader variety of circumstances than usually has been noticed.[60] Take, for example, the confinement of the label 'government' to the institutions of the state. This usage is connected with the ways of seeing power propagated by the tradition's contemporary adherents. Recall how Dworkin applied the term to state

[57] Skinner (n 36) 89.
[58] Skinner (n 36) 7, reflecting the acknowledged influence on Skinner of MacIntyre: see, eg, *Ethics* (n 55) 1.
[59] Skinner (n 36) 149.
[60] ibid 167.

power, but not corporate power, in the remarks quoted earlier. By so confining the term 'government', we hide from view the existence of a moral analogy, according to the tradition's underlying principles, between economic power and state power.[61] We therefore refrain from asking limited government questions about economic power.

The point is illustrated by the normative implications of Locke's decision to use the term 'government' in his analysis of paternal power. He declares that, 'The subjection of a Minor places in the Father a temporary Government'.[62] Having adopted this way of seeing paternal power, Locke is impelled, by the force of his own commitment to limited *government*, to pose limited government questions about paternal power.[63] After a lengthy limited government analysis,[64] he concludes that 'the *Paternal* is a natural *Government*', and that its legitimate scope is limited by its proper ends.[65]

For the limited government tradition, the term 'government' has rich normative significance. Where it is attached to a particular form of power over others, the tradition's adherents are impelled to enquire into the dangers posed by the power, and then to ask how it might be made safer by being subjected to limited government measures. One upshot of this study is to present the tradition with sound moral reasons to begin using the term 'government' in connection with certain forms of economic power. By this simple linguistic act, the tradition would be saying that economic power must be conform to limited government principles, on pain of being declared illegitimate.

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[61] Dworkin refrained from using 'government' in connection with corporate power for the reason that he was not yet persuaded that it is 'right to hold' corporations 'to the greater level of concern we associate with governments'.

[62] Locke, *Treatises* (n 4) II §67.

[63] Locke's analyses of various forms of non-state power, including parental power, is partly undertaken for the purpose of showing why state power is uniquely dangerous and partly to deprive Robert Filmer, and other supporters of absolutism, of the argument that '*politick Monarchs*' are a natural outgrowth of '*Fathers of Families*' whose rule may be legitimate without consent: ibid II §76.

[64] ibid II §§58, 65, 67, 71, 170.

[65] ibid II §170.

In Chapter 3, I argue that the term 'arbitrariness' can meaningfully be used in connection with the capitalist employment relationship. In Chapter 4, I argue that the criteria for the application of the terms 'tyrant', 'tyranny', and 'corruption' may warrant their application to the primary institution of contemporary economic life, the large business corporation. What I am suggesting in each case is that insofar as the Consensus entails a failure to consider applying such terms to economic power, it reflects 'social insensitivity or a failure of social awareness'.[66]

It is through linguistic adaptations of this kind that normative vocabularies develop over time, particularly in response to challenges posed by changing circumstances. Pocock observes that:

> Political speech is ... practical and informed by present necessities, but it is none the less constantly engaged in a struggle to discover what the present necessities of practice are.

Some of the users of political speech will be engaged in 'exploring the tension between established linguistic usages and the need to use words in new ways'.[67] They may do this by 'acting upon language so as to induce momentary or lasting change in the ways in which it is used'.[68] For instance, a 'problem or subject normally considered by applying one idiom may be considered by applying another':

> These moves may be rhetorical and implicit ... or they may be explicit and theoretical, explained and justified in some critical language designed to vindicate and elaborate their character...[69]

In the second approach, the author is not simply 'using some language in a new way, but proposing that it be used in a new way and commenting on the language uses of his society'. Here, 'philosophy and practice' are 'coexisting rather than ... separable'.[70]

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[66] Skinner (n 36) 165, and his discussion of a similar rhetorical strategy at 183.
[67] Pocock (n 40) 13.
[68] ibid 6.
[69] ibid 16.
[70] ibid 15-16.

This study adopts the second approach. It addresses the problem of economic power, which is normally considered through the idiom of regulation, by applying the alternative idiom of the limited government tradition's Rule of Law project. It explores the tension between established linguistic usages and the need to use words in new ways. In the light of this need, it uses terms such as 'arbitrariness' and 'tyranny' in relation to economic power. These moves are explicitly proposed, explained, and justified using a critical language designed to vindicate and elaborate their character.

The objective of this strategy is to promote ways of seeing economic power that are more faithful to the tradition's underlying principles than the prevailing ways of seeing. This task involves persuading readers that although the linguistic conventions and 'common sense' of our time make it *seem* implausible to apply the tradition's idiom to economic power, this impression is misplaced. Further reflection suggests that according to the tradition's underlying principles it is in fact strange that we do not think of so applying them. To the extent that readers are persuaded of this, they should come to see economic power 'in a new moral light'.[71]

However, I anticipate that some readers will remain unpersuaded by my efforts to use terms such as 'arbitrariness' and 'tyranny' beyond their familiar political context. Still, my efforts to challenge certain conventions of discourse will not be utterly wasted if they succeed in provoking a response of a certain kind. To adapt Pocock's words, it is unlikely, except where the reader is 'a Stalinist bureaucrat', that a sceptical response will simply reiterate 'the existing conventions of discourse as if I had never challenged them'. It is more probable that the response to my move would entail a countermove, which, even if it is aimed at restoring the conventions, will 'contain and register' an awareness

[71] Skinner (n 36) 182.

that something new has been said and 'will to that extent' include something new of its own:[72]

> To my injection of new wine you will respond by presenting old wine in new bottles. What I "was doing" includes obliging you to do something, and partly determining what that shall be.[73]

That, at the very least, is what I hope I am doing.

[72] Pocock (n 40) 19.
[73] ibid.

1

THE LIMITED GOVERNMENT TRADITION & ITS RULE OF LAW

Introduction

This study aims to overturn the Consensus, that is, the assumption that the limited government tradition's adherents need not treat economic power as even a *potential target* of the Rule of Law. I argue that, by cleaving to the Consensus, the tradition betrays the Rule of Law's underlying moral principles. The merits and the sense of that contention therefore depend upon a proper understanding of those principles. Accordingly, this Chapter presents a working account of the traditional conception of the Rule of Law, which, in subsequent Chapters, is called in aid of my contention that the Consensus should not stand.

The first part of the Chapter sets out the proposed method of enquiry. The second part employs that method in order to give an account of the limited government tradition's Rule of Law project. The account focuses on (i) the project's underlying moral

principles and (ii) the relationship between those principles and the terms 'arbitrariness' and 'tyranny', which are key components of the tradition's normative vocabulary.

1. Method and claims

In order to explain the nature of the Rule of Law, we must find a method of enquiry appropriate to the subject-matter.[1] What would be an appropriate method?[2]

As will become clear, a method that focuses on the *term* 'the Rule of Law' may be misleading in at least two ways. Firstly, we might make the error of thinking that an explanation of the nature of the Rule of Law is to be found in an explication of the meaning of the words which comprise that particular term.

Secondly, we may overlook the importance of sources that do not use the term 'the Rule of Law', a formulation which has only recently acquired preeminence.[3] Some contemporary treatments give the impression that after an enigmatic prehistory associated with Aristotle, intellectual interest in the Rule of Law began in earnest in Victorian Oxford with A V Dicey, but did not really get off the ground until after the

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[1] Joseph Raz describes his account of the Rule of Law as an attempt to 'explain its nature': *The Authority of Law* (OUP 1979) 211 ('*Authority*'). This Chapter shares that goal, but adopts a different method of enquiry and focuses on a tradition which does not share Raz's 'formal' conception of the Rule of Law.

[2] The following has much in common with the method Joseph Raz recommends for 'an explanation of the concept of authority'. He claims, and I agree, that in offering such an explanation, 'there is an interdependence between conceptual and normative argument', not 'a confusion' of the two. 'The philosophical explanation of authority is not an attempt to state the meaning of a word. It is a discussion of a concept which is deeply embedded in the philosophical and political traditions of our culture': *Morality Of Freedom* (OUP 1988) 62-66 ('*Morality*').

[3] An analogous observation would apply in the case of 'constitutionalism'. It is thought to be a nineteenth century term, but 'ideas to the effect that power ought to be exercised within institutionally determined limits' were current among political theorists in the sixteenth century and earlier: Howell Lloyd, 'Constitutionalism' in J Burns (ed), *The Cambridge History of Political Thought 1450-1700* (CUP 1991) 255. C H McIlwain, *Constitutionalism Ancient & Modern* (Cornell University Press 1947).

Second World War, again in Oxford, but this time also in Cambridge, Massachusetts: often, the list of desiderata produced by either Lon L Fuller or Joseph Raz is presumed to be the inevitable point of departure.[4]

These and other errors can be avoided by a correct characterization of the term 'the Rule of Law'. I contend that the *primary significance* of 'the Rule of Law' lies in its belonging to the normative vocabulary of one or more traditions of political morality. The *propositions* to which 'the Rule of Law' and similar terms refer originated in traditional thought. And they assumed their initial cultural and social importance first in the ancient world, and then in successive eras, as a corollary of the influence exerted by the traditions to which they have belonged.[5]

Terms like 'freedom', 'liberty', 'rights', 'tyranny', 'democracy', and 'the Rule of Law' have formed part of 'the variety of idioms' through which 'political argument might be conducted' by 'historical actors, responding to one another in a diversity of linguistic and other political and historical contexts'.[6] The character of such idioms is partly rhetorical: they belong to the discourses through which political agents attempt to

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[4] Lon Fuller, *The Morality of Law* (1969); Raz, *Authority* (n 1).

[5] This connection is usually traced to ancient Athens: Werner Jaeger, 'Praise of Law: The Origin of Legal Philosophy and the Greeks' in Paul Sayre (ed) *Interpretations of Modern Legal Philosophers* (OUP 1947); Werner Jaeger, *Paideia* (Basil Blackwood 1945); V Bradley Lewis, "Reason Striving to Become Law': Nature and Law in Plato's *Laws*' (2009) 54 American Journal of Jurisprudence 67. On the emergent constitutionalism of Classical Athens, see Martin Ostwald, *From Popular Sovereignty to the Sovereignty of Law* (University of California Press 1989). Judith Shklar, 'Political Theory and the Rule of Law' in Allan Hutcheson and Patrick Monahan (eds) *The Rule of Law: Ideal or Ideology* (Carswell 1987).

[6] J G A Pocock, *Virtue, Commerce, and History* (CUP 1985) 2-3.

persuade others to share their constitutional allegiances and antipathies. Further, each idiom 'has taken time to form', which means it 'must display a historical dimension'.[7]

It makes sense, then, to identify the relevant traditions of political morality,[8] and to investigate how leading figures within each have understood the significance of the propositions referred to by 'the Rule of Law' and equivalent terms.[9] The following considerations inform my understanding of these tasks:

> (i) A particular political morality may attain historical significance insofar as it informs the deliberations and arguments of agents which culminate in decisions regarding the terms on which agents are willing to give their allegiance to some actual or would-be set of governing institutions. Whether, and if so, in what ways, governmental institutions do or would embody the principles underlying 'the Rule of Law' may be factors bearing upon the granting or withholding of allegiance.
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> (ii) Insofar as the relevant principles are so embodied, the political morality and its normative vocabulary will form part of a public institutional morality and vocabulary, and also part of a broader public philosophy.[10] They will normally also form part of the 'legitimation story' maintained by the public philosophy. The chief function of such stories is to explain why people subject to the

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[7] ibid 12. Bernard Williams, in seeking to understand 'freedom' makes an analogous point: 'From Freedom to Liberty: the Construction of a Political Value' (2001) 30 Philosophy & Public Affairs 3, 4.

[8] See Raz, *Morality* (n 2) 3 for a relevant account of political morality.

[9] Consider how Isaiah Berlin proceeds: Isaiah Berlin, 'Two Concepts of Liberty' in H Hardy (ed), *Liberty* (OUP 2002) 168-169.

[10] I am using 'public philosophy' in the sense employed in Michael Sandel, *Democracy's Discontent* (Harvard University Press 1998).

institutions' powers enjoy 'legitimate government' and not 'a mere conspiracy of effective coercion'.[11]

(iii) Adherents of a political morality determine their institutional allegiance according to whether and how the relevant institutions embody that morality. Consequently, at least some adherents will engage in efforts to constitute governmental power in a manner that is thought to best express the relevant principles of political morality. And some will treat the governmental arrangements, processes, and practices as open to revision in case it is felt that they could give yet better expression to those principles. Accordingly, the task of realizing the successful institutional embodiment of the relevant principles is likely to be an open-ended one.

(iv) To emphasize something that is implicit in the foregoing: historically significant political moralities are developed by and for political communities, whose identity is partly constituted by the devotion of at least some members to certain fundamental commitments entailed in a political morality. Significant political moralities are, therefore, collective, communal enterprises. Further, in many cases they are enterprises that are handed down from one generation to the next, so that they form part of the cultural inheritance of those who are born into the communities in which they prevail.

In the modern age, the limited government tradition has been a particularly influential and prolific exponent of the Rule of Law (or, more precisely, of its own distinctive set of

[11] Williams (n 7) 25.

accounts of the Rule of Law). So although 'the Rule of Law' and similar terms do not belong *exclusively* to the limited government tradition, one important dimension of their modern significance cannot be understood without appreciating their place in the tradition's normative vocabulary and political morality. My aim is to illuminate the sources of the tradition's conception of the Rule of Law in the moral and political philosophy of leading opponents of seventeenth and eighteenth century absolutism, including John Locke, Algernon Sidney, James Harrington, Immanuel Kant, and the North American 'Founding Fathers'.[12]

An enquiry into the significance of the Rule of Law as a feature of the tradition's political morality can be undertaken from a variety of standpoints. The following two standpoints are particularly relevant for this Chapter's purposes.

1.1 The Standpoint of the Committed Adherent

One standpoint is that of the 'committed adherent' of one of the traditions which have included the Rule of Law within their political morality. That is, the standpoint of an agent who (i) shares the moral commitments constitutive of adherence to the tradition and (ii) supports, at least provisionally, the traditional projects which are typically regarded as reflecting those principles. From this standpoint, the analysis of 'the Rule of Law' is at least partly an attempt to show the tradition's thought and, if possible, related practice, in the best available light, and in turn to demonstrate to oneself and to others

[12] The approach taken here differs from accounts which do not draw a link between contemporary 'substantive' conceptions of the Rule of Law, such as Ronald Dworkin's, and their early modern limited government antecedents: see, eg, Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: an Analytical Framework' [1997] Public Law 467 ('Framework'); Richard H Fallon Jr, '"The Rule of Law" as a Concept in Constitutional Discourse' (1997) 97 Columbia LR 1.

convincing reasons for adherence. This may involve engaging in clarification 'if there is confusion, uncertainty, or disagreement of some kind within the internal conceptualization' of the tradition.[13]

In this Chapter, I offer an account of the limited government tradition's Rule of Law project from the standpoint of a committed adherent. In my case, this involves commitments (i) to the tradition's underlying principles—namely, moral equality for all and freedom for all from manipulative social relations, (ii) to employing the tradition's normative vocabulary—especially 'arbitrariness' and 'tyranny'—for descriptive and evaluative purposes, and (iii) to a Rule of Law project that seeks a relationship between law, state power, and interests, expectations, and rights which is hostile to arbitrariness and tyranny. Determining the extent to which any particular legal system embodies such a project would be a complex matter. It is beyond the scope of this Chapter.

As will become clear from the discussion below, Locke, Sidney, Harrington, Kant, Dworkin, and other leading adherents of the tradition,[14] have each advanced distinctive accounts of the principles and projects associated with the Rule of Law. In what follows, I describe aspects of their accounts in order to illuminate the tradition's underlying principles and normative vocabulary, to which I am committed. However, I do not express a view on the merits of other elements of their *particular* theories. I do not, for instance, endorse a contractarian approach which suggests that we are not born into a community, but instead may choose whether or not to join one.[15]

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[13] Perry, S R 'Hart's Methodological Positivism' in Jules L Coleman (ed), *Hart's Postscript* (OUP 2001) 339, and on Dworkin's method in this connection, 349-350.
[14] An influential Dworkinian proponent of the traditional conception is T R S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2010); *The Sovereignty of Law: Freedom, Constitution and Common Law* (OUP 2013).
[15] Algernon Sidney, *Discourses Concerning Government* (Liberty Fund Inc 1989) ch 3, §33, 511.

It is important to emphasize what is merely implicit in the foregoing discussion: one need not share the *particular* philosophical commitments of Locke, Sidney, Harrington, Kant, Dworkin, or any other leading limited government thinker, in order to be committed to the tradition's Rule of Law project. One must be committed, however, to the principles of moral equality and freedom from manipulative social relationships, as well as to the spirit of the desiderata outlined in Section 7 below. Those principles and desiderata are not uncontroversial, and they do not enjoy universal approbation. Allegiance to them is a political choice, and one which involves choosing to define one's efforts by reference to a particular set of problems, questions, enquiries, principles, axioms, idioms, debates, texts, and interlocutors, at the expense of some one or more others.[16]

1.2 The Standpoint of the Dispassionate Student

An enquiry into the significance of the Rule of Law can also be undertaken from the standpoint of the 'dispassionate student' of historically significant political moralities. Such a student wishes to understand the commitments constitutive of adherence to a tradition. In order to attain an understanding of this sort, it is necessary 'to attempt to supply, in the best terms imaginatively and conceptually available to one ... the kind of account which an adherent would give'.[17] However, such an account could neither engage in revision nor even in clarification. If it is truly to be dispassionate (ie, uncommitted to the tradition under investigation), and if it is to present an accurate

[16] I would like to thank workshop participants at the Boston University School of Law for encouraging me to clarify my position in this respect.
[17] Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Gerald Duckworth & Co Ltd 1988) 11 ('*Justice*').

descriptive account, it must 'mirror the facts of confusion, uncertainty, and disagreement', which are invariably found in any tradition of political morality.[18] A subscriber to this standpoint may or may not go on to evaluate the soundness of the relevant tradition's claims on our allegiance. In other words, analysis from this standpoint strives in the first place to be non-evaluative. And insofar as it does so strive, it attempts to stand aloof from the political conflicts regarding allegiance which give political morality its ultimate *raison d'être* and potential social significance.

2. Traditions and the limited government tradition

What do I mean by the term 'limited government tradition'? In using the term 'tradition', I am adopting the concept of a tradition of moral and political enquiry that 'has within itself at each stage a more or less well-defined problematic, that set of issues, difficulties, and problems which have emerged from its previous achievements in enquiry'.[19] A tradition is 'originally rooted in contingent circumstance, arising out of problems, perplexities, and disagreements in some particular social order'.[20] A key 'contingent circumstance' for the limited government tradition is the substantial accumulation and centralization of power in the modern state, which has a near monopoly of force and carries out activities whose volume, reach, and moral importance are immense.[21]

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[18] Perry (n 13) 339; 328, 344.
[19] Macintyre, *Justice* (n 17) 167; Edward Shils, *Tradition* (University of Chicago Press 1981).
[20] Macintyre, *Justice* (n 17) 327; Quentin Skinner, *The Foundations of Modern Political Thought,* vol 1 (CUP 1978) xi.
[21] Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press 2009) 145 ('*Freedom*') upon whose interpretation of Kant I have relied heavily; Hannah Arendt, *On Revolution* (Penguin Books 1965) ch 4.

A tradition is also 'partially constituted by an argument about the goods the pursuit of which gives to that tradition its particular point and purpose'.[22] For example, although John Locke and Immanuel Kant both belong to the tradition, they differ about how to theorize the tradition's project; among other things, they disagree about the defects of the condition they call the 'state of nature' and, in turn, the precise nature of the goods secured by limited government through law.[23] However, in common with other adherents of the tradition, they agree on the importance of having a political morality that provides criteria and desiderata according to which people can decide whether, and on what grounds, to give their allegiance to a set of actual or would-be political institutions.

In this Chapter's skeletal account of the limited government tradition's Rule of Law project, I focus on the contributions made by John Locke, Algernon Sidney, and Immanuel Kant, while the contributions made by others, such as the US Founding Fathers, remain in the background. As Sidney's name has faded into obscurity, it is necessary to point out that he once exerted substantial influence. For example, Thomas Jefferson wrote that the Declaration of Independence was derived from 'the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, &c.'[24]

The tradition's Rule of Law project is animated by its commitments to:

(i) *moral equality* for all; and

(ii) freedom for all from *manipulative social relationships*.

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[22] Alasdair MacIntyre, *After Virtue* (2nd edn, Gerald Duckworth & Co Ltd 1985) 222 ('*Virtue*').
[23] John Locke*, Two Treatises of Government* (CUP 1988). See the main text and note at note 49 below.
[24] Quoted in Thomas G. West, *Foreword* to Sidney (n 15) xxi.

The negative correlates of these commitments are opposition to:

(iii) *arbitrariness*;[25] and

(iv) *tyranny*.

I explain (i)-(iii) principally in the light of Locke and Kant's thought, and (iv) primarily by reference to Sidney's. While these thinkers differ on many *other* points, and although they employ distinct terminologies, they nonetheless share broadly similar conceptions of how the *arbitrary* exercise of power and *tyranny* entail a manipulative relationship between power-holders and those who are treated as their living tools. In this kind of relationship, the moral equality of the latter is denied.

These thinkers also share the conviction that a certain relationship between law, state power, and interests, expectations, and rights is indispensable. The purpose of this relationship is to ensure that power is constituted so that its holders are legally obliged to give due weight to the respect-worthy interests, expectations, and rights of those subject to their power. Where such respect is afforded, compliance is sought on terms that involve genuinely good reasons for cooperation, and the moral equality of persons is thereby recognized. Where, by contrast, power is constituted so as to permit its arbitrary exercise, the power-holder would be free to secure the compliance of others in a manner that denies their moral equality.

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[25] Recent writings on arbitrariness and the Rule of Law: Timothy Endicott, 'The Reason of the Law' (2003) 48 Am J of Jurisprudence 83; Timothy Endicott, 'Arbitrariness' (2014) 27 Canadian Journal of Law and Jurisprudence 49; Martin Krygier, 'Rule of Law' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012); Gianluigi Palombella, 'The Rule Of Law As An Institutional Ideal' in Morlino and Palombella (eds) *Rule of Law and Democracy* (Brill 2010); Gerald Postema, 'Law's Rule: Reflexivity, Mutual Accountability, and the Rule of law' in M Quinn and X Zhai (eds) *Bentham's Theory of Law & Public Opinion* (CUP 2014).

3. Moral equality and non-manipulative social relationships

A hallmark of the limited government tradition is a way of seeing power that distinguishes between *sheer power*, on the one hand, and *legitimate authority,* on the other. This contrast's sense substantially depends on a distinction between *manipulative* and *non-manipulative social relationships*,[26] whose significance in turn depends on a conception of *moral equality*. One of the tradition's chief preoccupations is *how* powerful institutions may affect the moral condition of those who are subject to their power. The tradition has been particularly concerned to promote a moral condition characterized by respect for moral equality and freedom from manipulative social relationships.

Limited government thinkers take it for granted that the capacity of institutions to wield power effectively depends substantially on people generally ('the People') giving up their own capacities to assert their powers contrary to the norms embedded in a particular constitutional order. Constitutional allegiance involves an ongoing, though defeasible, renunciation by individuals of certain powers.[27]

The tradition's early modern adherents helped to make the questions whether, and on what terms, the people should renounce their powers into central preoccupations of modern political thought. The importance of these questions is twofold. Firstly, they matter because the viability of governmental power depends upon our being willing to renounce certain powers. Secondly, they bear on (a) the moral responsibility and (b) the moral equality of people subject to institutional power. How?

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[26] MacIntyre (n 22) 24.

[27] However, the idea of renunciation is rejected, or, at least, qualified, by some, eg, Alexander Hamilton in *Federalist* No 84.

(a) I must have good reasons for giving my allegiance to a particular way of constituting governmental power, especially if I am going to treat the renunciation of my own powers as defeasible only in very limited circumstances.[28] By seeking to ensure that there are genuinely good reasons for allegiance, I guard against *my complicity* in sustaining an order that does not deserve to be sustained, one that harms fundamental human interests.[29]

(b) I insist that we are all free, rational, moral agents, and that as such my allegiance will be granted or withheld according to whether I have genuinely good reasons to obey. I also insist that we are all subject to impersonal moral criteria which control what should count as good reasons. Whether an institution's claim to wield legitimate power, my own, or anyone else's is justified, is a matter about which I must be convinced on rational grounds. No person, or body, can defensibly claim authority over the content of the relevant moral criteria just because of who they are or the status they have (eg by invoking a certain office, title, or bloodline). What these moral criteria demand is a matter to be understood through rational enquiry and debate; it is not merely to be decided by personal or institutional fiat. We are all subordinate to moral criteria which

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[28] For this idea in the North American context, Bernard Bailyn, *The Ideological Origins of the American Revolution* (Harvard University Press 1992) 58-59 and Declaration of Independence (US 1776) (given 'a long train of abuses and usurpations ... it is their right, it is their duty, to throw off such Government'); Ripstein on Kant and revolution: *Freedom* (n 21) ch 11; Locke on rebellion (n 23) II §240.]

[29] E.g., Andrew Eliot wrote in 1765, 'When tyranny is abroad, "submission" ... "is a crime"': Bailyn (n 28) 93. For Kant, this is also a duty to oneself: Ripstein, *Freedom* (n 21) 222, 'you can only make arrangements for yourself that do not allow others to treat you as a mere means. If you cannot make such arrangements for yourself, no other person could act on your behalf to make them for you' (193).

have authority over us as, rather than the reverse. We are all free, rational, moral agents, and we must treat one another as such.[30]

The previous paragraph provides an outline of *moral equality*, which is central to the limited government tradition's Rule of Law project.[31] It comprises four interrelated axioms concerning the *status* common to all adult humans just in virtue of their being adult humans:

(i) *The equal worth of all humans*,[32] often understood by contrast with the supposed lesser worth of so-called non-rational animals or the inferior status of mere things.

We show *respect* for the equal worth of our fellows, *inter alia*, by treating them as bearers of respect-worthy interests, expectations, and rights. Some such respect-worthy things might be *universal* properties of humans as such, eg human rights.[33] Others might be *particular*, arising by virtue of (say) a transaction or event.[34]

We deny the equal worth of others when we treat them as though they were mere instruments with no respect-worthy interests, expectations, or rights.

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[30] See Kant's ideas of 'humanity', 'freedom', and 'rightful honor': Ripstein, *Freedom* (n 21) 2, 13, 210, 214, 238, 240. For Locke, see Chapter 3.

[31] Larry Siedentop argues that the idea of moral equality predates the thinkers often credited as fountainheads of the tradition: *Inventing the Individual: The Origins of Western Liberalism* (Allen Lane 2014) 151, 155, 172, 213, 216, 219, 243, 244, 295-296, 304, 317, 323.

[32] As early as the fourteenth century, Ockham held that the 'power of rulers was limited by the rights of their subjects' (317): ibid 317; 216.

[33] What H L A Hart called 'general rights: 'Are There Any Natural Rights?' (1955) 64 Philosophical Review 175, 187-188.

[34] What Hart called 'special rights': ibid 183-187.

A failure to give due weight to human rights is an obvious instance of such denial.

(ii) *Adult humans'* natural *state is one of equal liberty,* meaning that we owe no *natural* duties of obedience to any other adult(s). Put differently, there is no natural authority amongst adults. This is often defined by contrast with the natural reciprocal duties of parents and children.[35]

We deny the equal liberty of others when we seek their cooperation or obedience by resorting to whatever means seem effective (such as force or fraud) irrespective of whether there would reasonably seem to be good reasons for compliance. We are obliged to support a request or a demand for cooperation or obedience by providing what reasonably seem to be good reasons to comply.

There is a strong version of this principle, which is espoused by Locke and Kant, among others, *viz*: our freedom does not include the licence to agree to a constitution which would deny axiom (i) (our equal worth). An example of such a relation is slavery, including in the broad sense of subjection to the arbitrary will of another.

How, in the light of axioms (i) and (ii), can an agent wielding power over others demonstrate that its power amounts to legitimate authority? By showing that such power is constituted in a manner that (a) respects *equal worth* and (b) seeks to impose only those

[35] Thanks are due to David B Lyons (Boston University School of Law) for helping me to clarify the 'equal liberty' point. Kant and Locke hold that children enjoy the status described at (i), but not the status described here, at (ii) Sidney (n 15) ch 3, §1, 320. Similarly, Locke (n 23) II §§58, 65, 67, 71, 86, 170. For Kant's views on parents' limited government, Arthur Ripstein, 'Authority and Coercion' (2004) 32 Philosophy and Public Affairs 2, 17-18 ('*Coercion*').

obligations that are reasonable, ie, which a *free person* would have reason to obey (absent reasonable countervailing considerations), say because the obligations in question are consistent with due weight being given to genuinely respect-worthy interests, expectations, and rights. People can be coerced without their moral equality being sacrificed where such coercion (x) addresses their repudiation of demonstrably good reasons for compliance and (y) upholds their equal worth.[36]

(iii) *All humans are equally subordinate to impersonal moral criteria.* In seeking to identify good reasons for obedience, we accept that we are constrained by criteria which have impersonal and objective force.

This principle is denied by someone who considers that objective moral limits do not apply to him or her and insists on the paramountcy of his or her will or preference.

(iv) *No human has privileged access to the fundamental requirements of impersonal morality*. Or, put differently, there is a presumption that most adult humans possess a faculty of *reason* which allows them to recognize, though perhaps not independently to discover, such requirements.

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[36] The tradition's objection is not to actual or threatened coercion *simpliciter*, but to the manipulative variety. The non-manipulative variety can be distinguished from the manipulative, as follows. On the one hand, we have the case where an agent (eg, the state) makes an appeal for cooperation that is supported by genuinely good reasons (eg, the wrongfulness of murder), and also threatens to punish those who refuse to cooperate in spite of those reasons (eg, murderers). On the other hand, we have the case where an agent says, in effect, 'I've told you what unpleasant things will happen to you if you don't cooperate; *that* is your reason to cooperate'. Consider Kant's view that 'threats may be used to protect right': Ripstein, *Coercion* (n 35) 25, 33-35.

> Imagine a philosopher king styled the 'Truth Giver'. The Truth Giver could purport to accept the preceding three axioms but deny her subjects' capacities to identify the fundamental requirements of impersonal morality. The Truth Giver might therefore claim that her subjects cannot soundly judge what would count as good reasons for compliance and so should simply obey the Truth Giver without seeking to evaluate her reasons.

A person who seeks the cooperation or obedience of others but does not respect the four axioms of moral equality seeks to manipulate them, reducing such persons to a status equivalent to that of a mere instrument.

The interconnected ideas of moral equality and manipulation just described play a defining role in the limited government tradition's understanding of its Rule of Law project. Consider Sidney's assertion that, 'Magistrates' do not differ intrinsically from other humans. All that distinguishes them is the contingent fact of their having been granted power over others.[37] He declares that 'unless' god had 'declared by express revelation, or had set some distinguishing marks of dominion and subjection upon men ... and caused some to be born with crowns upon their heads, and all others with saddles upon their backs', then:

> [t]his liberty therefore must continue, till it be either forfeited or willingly resigned. The forfeiture is hardly comprehensible in a multitude that is not entered into any society; for as they are all equal, and *equals can have no right over each other*, no man can forfeit anything to one who can justly demand nothing...[38]

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[37] Sidney (n 15) ch 1, §16, 51-52; ch 3, §1, 319. For Kant, 'none is born either a master or a servant': Ripstein, *Freedom* (n 21) 17, 36-37.
[38] Sidney (n 15) ch 3, §33, 511. Emphasis in original.

The tradition maintains that governmental power is only legitimate (and therefore worthy of the label 'authority'), if power-holders establish and exercise power in a manner which does not deny the moral equality of others.

According to Kant, social relations, including relations of power, must be conducted according to the maxim: '*Act so that you use humanity, as much in your own person as in the person of every other, always at the same time as an end and never merely as a means*'.[39] Power-holders treat others as ends in themselves—as *moral equals*—not only by proposing what are reasonably thought to be genuinely good grounds for obedience. They also treat others as moral equals by proposing reasons on the understanding that people will grant or withhold obedience according to their evaluation of the merits of those reasons. For Kant, the judgement that such reasons are good reasons must be of the kind described above.

Alternatively, power-holders may try to secure obedience by means that are only limited by considerations of effectiveness. In other words, they might seek compliance by any means that promise to work, such as force or fraud. Sidney proposes that the 'princes' of ancient free peoples 'had the authority or credit of persuading, rather than the power of commanding',[40] and that the law provided an important avenue through which to persuade. He stresses that, under the Rule of Law, the law does not rely in the first place on the persuasiveness of its coercive resources (whose efficacy does not alone establish legitimacy), but on the merits of the law's contents:

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[39] Immanuel Kant (A Wood and J Schneewind (trs)), *Groundwork for the Metaphysics of Morals*, (Yale University Press 2002) 47, 45-48. Emphasis in original. See Macintyre, *Virtue* (n 22) 24.
[40] Sidney (n 15) ch 1, §4, 17.

> [F]or the directive power of the law, which is certain, and grounded upon the inherent rectitude that is in it,[41] is that alone which has a power over the conscience, whereas the coercive is merely contingent; and the most just powers commanding the most just things, have so often fallen under the violence of the most unjust men, commanding the most execrable villainies, that if they were therefore to be obeyed, the consciences of men must be regulated by the success of a battle or conspiracy...[42]

Locke suggests that reason, not coercion, should be the *primary* currency of social relationships when he condemns 'Despotical power' as: 'having quitted Reason, which God hath given to be the Rule betwixt Man and Man, ... and so revolting from his own kind to that of Beasts by making Force which is theirs, to be his rule of right.'[43]

If people are simply coerced, or tricked, rather than being offered genuinely good reasons to give their allegiance to a constitutional order, then they are reduced to the status of objects of manipulation, mere means or instruments, to be used according to the convenience of those wielding power. By contrast, where such obedience is reasonable and therefore consistent with freedom (as the tradition understands it), the moral agency of subjects has been preserved and their moral equality has been recognized. Kant, Locke, Sidney, and other leading limited government thinkers, express themselves in different ways. But, in substance, they share a common vision of how a certain relationship between law, power, and interests, expectations, and rights is indispensable to the maintenance of non-manipulative social relationships in which power-holders treat those subject to their power as moral equals.[44]

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[41] This obscures those laws whose content is morally justifiable at least partly contingent grounds (eg, a speeding limit). I thank David Lyons for this point.
[42] Sidney (n 15) ch 3, §11, 381.
[43] Locke (n 23) II §172.
[44] Ripstein, *Freedom* (n 21) 243. See also T R S Allan, 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism (1999) 115 LQR 221, 236 ('Reason'). John Finnis, *Natural Law & Natural Rights* (2nd ed, OUP 2011) 272 (*'Rights'*).

4. Arbitrariness and respect for persons

The foregoing discussion points insistently in the direction of a further element of the limited government account of the Rule of Law, which is its emphasis on the avoidance of the 'arbitrary' exercise of power. The meaning of 'arbitrariness' is notoriously elusive:[45] many authors fail to say precisely what they mean by it, and it seems to mean different things to different authors.[46] Indeed it sometimes may seem to mean different things to the same author.[47]

I would suggest, from the standpoint of a committed adherent,[48] that the primary limited government sense of arbitrariness is captured and perhaps clarified by the following overview. The term 'arbitrariness' is used to express a negative judgement. The essence of the criticism is the charge that, in wielding power over one or more others, a power-holder has disrespected something that ought to have been respected, in particular, an interest, expectation, or right, which is a genuinely 'respect-worthy thing'. What is *genuinely* respect-worthy is a matter to be determined by reference to rationally justified, impersonal moral criteria.[49] The tradition maintains that power is only

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[45] Raz (n 1) 219-220.

[46] For a leading conception of arbitrariness which is intended to reflect republicanism: Philip Pettit, *Republicanism* (OUP 1997).

[47] Eg Locke, who sometimes uses the term in connection with inconstancy of will (Locke (n 23), eg, II §137) and sometimes simply to denote an unguided or unconstrained discretion (eg, II §159 et seq).

[48] The dispassionate student of the tradition should do no more than describe how 'arbitrariness' has in fact been used traditional texts, describing 'confusions, obscurities, and all': Perry (n 13) 328.

[49] For Kant, a 'right is not a tool for advancing or even protecting the interests or effective choices of one person...It is an entitlement to independence of the choice of others under universal law...Each person's rights generate a basic constraint on the ways in which the state may act': Ripstein, *Freedom* (n 21) 217-218. Locke's determination that, say, private property has a certain respect-worthy status, which is independent of positive law, depends on his interpretation of natural law: see note 23 above.

legitimate (and, therefore, properly regarded as *authoritative*) if it is wielded in a manner which gives due weight to, though does not necessarily in all cases protect, the genuinely respect-worthy interests, expectations, and rights of all relevant persons.[50]

If a power-holder failed to give due weight—*respect*—to a genuinely respect-worthy thing, the limits of his or her legitimate power, if any, would thereby have been exceeded. In the idiom of the tradition, such a power-holder acts 'arbitrarily' or 'abuses' his or her power. Arbitrariness may arise whether or not a person's subjective expectations have been frustrated. In some cases, we may fully expect disrespect from power-holders.

At bottom, the failure of respect entailed in arbitrariness involves a denial of moral equality. Where power over others is exercised arbitrarily (because due weight is *not* given to respect-worthy things), the power-holder does not offer genuinely good reasons for compliance. On the contrary, failure to accord due weight to respect-worthy things supplies a reason for non-compliance.[51] A power-holder who insists on compliance by employing coercion in the absence of good reasons denies the moral equality of those whose obedience is sought. By contrast, where power is exercised in a manner which gives due weight to respect-worthy things, moral equality is upheld because such respect supplies a genuinely good reason for moral agents to comply (though there may be reasonable countervailing considerations favoring non-compliance). The rejection of arbitrariness and the recognition of moral equality are two sides of the same coin.

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[50] Sometimes giving due weight to an interest, expectation, or right requires it to be treated as inviolable. For Kant's view, see Ripstein, *Freedom* (n 21) 213-222.

[51] There may be reasons favouring allegiance notwithstanding an instance of arbitrariness: Finnis (n 44) ch XII.

For adherents of the tradition who follow Kant, the foregoing might be expressed thus: where one or more interest, expectation, or right is constitutive of the 'humanity' of persons, then a power-holder respects humanity, and treats persons as ends in themselves—as *moral equals*—when the exercise of power involves due weight being accorded to the relevant interests, expectations, or rights:

> The beings whose existence rests not on our will but on nature nevertheless have, if they are beings without reason, only a relative worth as means, and are called *things*; rational beings, by contrast, are called *persons*, because their nature already marks them out as ends in themselves, i.e., as something that may not be used merely as means, hence to that extent limits all arbitrary choice (and is an object of respect)... Even more distinctly does this conflict with the principle of other human beings meet the eye if one approaches it through examples of attacks on the freedom and property of others. For then it is clearly evident that the one who transgresses the rights of human beings is disposed to make use of the person of others merely as a means, without taking into consideration that as rational beings, these persons ought always to be esteemed at the same time as ends....[52]

'Rational beings', '*persons*', have a status as such which 'limits all arbitrary choice (and is an object of respect)'. A power-holder who transgresses 'the rights of human beings' acts arbitrarily by disrespecting humanity. For Kant, then, 'Fundamental human rights are constitutional ... because they are the conditions of the state constituting itself' as a *legitimate authority* as opposed to a source of *sheer power*.[53] However, the category of respect-worthy things is not confined to 'fundamental human rights'. As mentioned earlier, interests, expectations, and rights, arising by virtue of a transaction or event may also demand respect, if arbitrariness is to be avoided.

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[52] 'Arbitrary' is a translation of *willkürlich,* which seems to have the same connotations in German as the idea of 'arbitrariness' presented here, being associated with 'despotism' *inter alia*: Kant (n 39) 46, 48; Ripstein, *Freedom* (n 21) 206; Stephen Darwall, 'Two Kinds of Respect' (1977) 88 *Ethics* 36.

[53] Ripstein, *Freedom* (n 21) 218.

Not only for Kant, but also for Locke and Sidney, the primary sense of arbitrariness entails more than simply a failure to conform to impersonal rules, standards, or criteria, whatever their merits, which I will call the 'inconstancy' conception of arbitrariness. It is true that the tradition's adherents sometimes speak in a way that suggests the inconstancy conception is at work, especially when terms like 'whim', 'caprice', and 'pleasure' are used. These words conjure up the image of a ruler in the mould of Caligula, someone whose temperament is mercurial and whose decisions are haphazard and sometimes outlandish.

However, the anti-absolutists of the seventeenth and eighteenth centuries did not use 'arbitrariness' exclusively, let alone primarily, with this kind of tyrant in mind. When limited government opponents of the Stuarts alleged that the latter were 'arbitrary', they were not complaining that the Stuarts had failed to act consistently according to some—any—set of standards or criteria. Rather, these critics were saying that would-be absolutists and their apologists preferred the *wrong* standards and criteria, and, if anything, were painfully assiduous in their adherence to them. Power-holders are 'arbitrary' in the primary limited government sense if they fail to submit to a source of impersonal discipline *which genuinely merits obedience*.

The following example illustrates the difference between the inconstancy conception and the traditional conception of arbitrariness. Assume that the power wielded by the archetypal Victorian husband over his wife was exercised systematically according to the then conventional, misconceived sexist criteria. On the inconstancy conception of arbitrariness, the Victorian husband did not wield his power arbitrarily.

By contrast, on the traditional view, one could say that the husband wielded arbitrary power, even though he (and, indeed, most of his peers, but *not* everyone)

thought he was exercising power in a self-disciplined manner, according to impersonal principles concerning the putative natural order of the sexes. Why was the Victorian husband's power arbitrary, despite its consistent conformity with sexist criteria?

For the reason that it involved the husband exercising power over his wife in a manner which failed to give due weight to certain of the wife's *genuinely* respect-worthy interests, expectations, and rights. The rights systematically denied included the right of women not to be subject to their husbands' rule in the first place. The moral equality of wives was denied, *inter alia,* insofar as it was assumed that their subjection was natural. The husband's rule was arbitrary. The traditional sense of arbitrariness would require this conclusion, even if it is assumed that the archetypal Victorian husband attempted in good faith to give due weight to what he sincerely, though erroneously, regarded as the respect-worthy interests, expectations, and rights of his wife.

Consider how the substance of the traditional conception of arbitrariness is conventionally employed in the contexts of anti-discrimination law and US Fourteenth Amendment jurisprudence: when certain distinctions between persons are indicted, they are sometimes called 'arbitrary distinctions', not because they are haphazard *per se* (a defendant could be a scrupulously consistent racist), but because they depart from the relevant source of regularity, namely the truly justifiable moral criteria for the exercise of power over others (say the proper criteria governing hiring or firing).[54]

Returning once again to the seventeenth and eighteenth century struggles against absolutism, if the tradition had not insisted, in effect, that arbitrariness involves deviation

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[54] I thank Chris Cordner and the students of Melbourne Law School's 'Philosophical Foundations of Law' subject, and also Martin Krygier (University of New South Wales) for encouraging me to clarify the point made in the main text.

from convention-independent criteria, and is not avoided simply by consistent conformity with merely conventional standards, it would not have been a powerful rhetorical weapon with which to attack the dominant, conventional wisdom as then expressed by Robert Filmer and other defenders of absolutism.

5. The tyrant's standpoint

We can only fully grasp what is thought to be at stake in the limited government tradition's Rule of Law project by understanding how it is conceived as an indispensable means by which to constitute institutional power in order to marginalize and neutralize would-be tyrants and to avoid tyranny. Similarly, we can only understand tyranny if we appreciate that its defining feature is the systematic rejection of precisely those underlying principles which animate the tradition's Rule of Law project: namely, moral equality for all and freedom for all from manipulative social relations.

For the tradition, the archetypal *tyrant* is the repository of a pure *will to arbitrariness*: the possessor of such a 'will' (a key term in the texts) systematically (i) refuses to acknowledge the moral equality of others and (ii) rejects the proposition that there is a moral obligation to limit his or her *power over others* for the sake of giving due weight to the respect-worthy interests, expectations, and rights of *others*. In other words, the archetypal tyrant rejects the limited government tradition's Rule of Law project.

The archetypal tyrant exercises power over others as though they were *merely* means in the service of the tyrant's ends. Moreover, he or she asserts absolute sovereignty over the selection of ends and of means, subject only to considerations of untrammeled desire and expediency (respectively). This attitude eschews the notion that there are *impersonal* moral criteria which must be recognized as objective limits on such

choices. In John Milton's words, 'neither can any Tyrant require more then that his will or reason, *though not satisfying*, should yet be rested in, and determin all things'.[55]

The limited government tradition treats it as axiomatic that the state's power over others can alone be justified by its potential to promote the public good, which includes the promotion of moral equality for all. Tom Paine describes monarchs as tyrants who seek 'arbitrary power in an individual person; in the exercise of which, *himself*, and not the *res-publica*, is the object'.[56] A hallmark of this standpoint, then, is the disposition to exercise power over others 'with indifference as to whether it will serve the purposes which alone can justify use of that power or with belief that it will not serve them'.[57] I call the outlook of the archetypal tyrant the 'tyrant's standpoint'.

The tradition portrays the tyrant as ambitious, driven, disciplined, industrious, indefatigable, ruthless, self-aggrandizing, and perhaps above all, as someone who seeks *mastery over others*. Through the attainment of such mastery, the tyrant increases the likelihood that his or her ends will be realized. The archetypal tyrant is thereby distinguished from (say) an amoral hedonist who, though just as arbitrary as the tyrant, lacks the potency and vision implied by the combination of qualities just listed. In ascribing these qualities to the tyrant, the limited government tradition conceives of itself as locked in a struggle with a *formidable opponent*. Further, the archetypal tyrant is not merely prone to exercise power arbitrarily, but is also willful about doing so. This latter quality distinguishes the archetypal tyrant from a power-holder who attempts in good faith to give due weight to respect-worthy things, but is mistaken about the relevant

[55] Quoted in Quentin Skinner, *Liberty Before Liberalism* (CUP 1998) 49. Emphasis added. Even a democratic majority might adopt this tyrannical attitude, or so the Founding Fathers thought: Arendt (n 21) 157.
[56] Quoted in Pettit (n 46) 56. Emphasis in original.
[57] This is the way Raz defines arbitrariness: Raz, *Authority* (n 1) 220.

criteria of respect and therefore exercises power arbitrarily (as discussed in the previous Section).

The tyrant is thought to be the tradition's *quintessential opponent* because of the tradition's *and the tyrant's* preoccupation with great power: (i) the tradition is preoccupied with the need to ensure that great power is wielded for the public good, *and* (ii) experience is thought to demonstrate that great power tends to attract, and to produce, tyrants who strive to misappropriate such power for their ends. As Sidney puts it:

> I wish I could say there were few of these; but experience shews that such a proportion of wisdom, moderation of spirit, and justice is requir'd in a supreme magistrate, to render him content with a limited power is seldom found. Man is of an aspiring nature, and apt to put too high a value upon himself; they who are raised above their brethren, tho but a little, desire to go farther; and if they gain the name of king, they think themselves wronged and degraded, when they are not suffer'd to do what they please ... In these things they never want masters; and the nearer they come to a power that is not easily restrained by law the more passionately they desire to abolish all that opposes it: and when their hearts are filled with this fury, they never fail to chuse such ministers as will be subservient to their will...[58]

Some people are born with the tyrant's standpoint and so feel themselves ineluctably drawn towards power. Others have tyrannical tendencies latent within them, which are liable to come to the fore the nearer they come to great power.

Consider John Locke's famous declaration, '*Where-ever Law ends, Tyranny begins*'.[59] For the tradition, the Rule of Law is understood as the rule of *only that kind* of law that enhances rights and liberty, which 'tyrants' (*ex hypothesi,* on the traditional meaning of that term) refuse to offer. In a celebrated rejoinder to Thomas Hobbes, James Harrington declares:

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[58] Sidney (n 15) ch 2, §19, 188.
[59] Locke (n 23) II §202. Emphasis in original.

> [W]hereas the greatest bashaw is a tenant, as well of his head as of his estate, at the will of his lord, the meanest Lucchese that hath land is a freeholder of both, and not to be controlled but by the law; *and that framed by every private man unto no other end ... than to protect the liberty of every private man*, which by that means comes to be the liberty of the commonwealth. But seeing they that make the laws in commonwealths are but men, the main question seems to be how a commonwealth comes to be an empire of laws and not of men?[60]

Harrington's answer is that under an 'empire of laws', law is made in the light of 'a common right, law of nature, or interest of the whole, which is more excellent ... than the right or interest of the parts only', and which must *therefore* (he holds) be 'acknowledged' *as excellent* 'by the agents themselves'.[61] Adherents of the tradition draw on accounts of 'common right, law of nature', and so on (in contemporary language: 'human dignity', 'universal human rights', etc.) in order to advance conceptions of the goods which they believe must be embodied in Rule of Law practices aimed at limiting how power over others is exercised (eg, 'equal protection', 'due process', etc.):

> For a king cannot degenerate into a tyrant by departing from that law, which is only the product of his own will. But if he do degenerate, it must be by departing from that which does not depend upon his will, and is a rule prescribed by a power that is above him. This indeed is the doctrine of Bracton ... "That if he do injustice, he ceases to be king, degenerates into a tyrant, and becomes the viceregent of the Devil".[62]

For the tradition, 'as kings are kings by law, and tyrants are tyrants by overthrowing the law, they are most absurdly joined together'.[63] According to Sidney's formulations, 'law'

[60] James Harrington, *The Commonwealth of Oceana* (CUP 1992) 20-21. Emphasis added.
[61] ibid 21.
[62] Sidney (n 15) ch 3, §15, 399.
[63] ibid ch 3, §16, 403.

means the *right kind of law*, 'kings' are only *kings* insofar as they uphold such law, and 'tyrants' are *tyrants* just insofar as they refuse to be limited by it.[64]

In limited government tradition thought, this way of understanding the Rule of Law is presented as being in competition with another view, one which is rejected for being hospitable to the archetypal tyrant's refusal to acknowledge moral limits on his or her own will. Sidney's account of this rival view is germane: 'He ... who says kings and tyrants are bound to preserve their subjects' lands, liberties, goods and lives, and yet lays for a foundation, that laws are no more than the significations of their pleasure, seeks to delude the world with words which signify nothing.'[65]

On the one hand, the 'empire of laws' is the rule of the *right kind* of law, whose rightness is partly a matter of impersonal criteria which ought to be recognized as binding on law-makers (eg, the 'higher law' referred to in William H Seward's anti-slavery address to the Senate[66]).[67] On the other hand, the rule of tyrants acknowledges no such limits: from the tyrant's standpoint, power (including the power to posit law) is to be exercised according to, and for the sake of, the tyrant's pleasure.

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64 Sidney expressly relies on Aristotle's distinction between kings and tyrants, which turns on, respectively, their acceptance and rejection of the authority of higher law: ibid ch 3, §7, 353-354; Sidney (n 15) ch 2, §1, 79; Locke's approach is similar: Locke (n 23) II, ch XVIII.

65 Sidney (n 15) ch 3, §16, 403.]

66 Robert C Byrd, *The Senate, 1789-1989: Classic Speeches 1830-1993* (USGov Printing Office 1994).

67 I agree with F Michelman that, 'It would be a plain misreading to reduce the American constitutionalist premise of the government of laws to the 'rule of law' or *Rechtsstaat* idea concerned only with the regularity of legal administration and, derivatively, with the form of legislation … [S]urely it will be agreed that in American constitutional rhetoric the notion of 'a government of laws' has also shared the meaning of formulas like 'higher law'": F. Michelman, 'Law's Republic' (1988) 97 Yale LJ 1493, note 28 at 1501; E S Corwin, 'The "Higher Law" Background of American Constitutional Law' (1928) 42 Harvard LR 149; Arendt (n 21) 161.

6. The relationship between the Rule of Law and moral and political philosophy

The working account presented in this Chapter is used in subsequent Chapters to ground my argument that according to the Rule of Law's underlying principles, the Consensus should not stand. In other words, I adopt the limited government tradition's conception of the Rule of Law for the purpose of arguing that economic power ought to be considered a *potential* target of the Rule of Law project. But what if the tradition's conception is misconceived? If this were the case, then there would seem to be little point in posing the question just mentioned. It is therefore worth considering Joseph Raz's influential objection to 'substantive' accounts of the Rule of Law, an objection which would seem particularly relevant to the traditional conception: 'If the rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function.'[68]

Locke and Kant each employ a central case of (positive) law—which we might today call the 'Rule of Law'—that depends for its intelligibility on, *inter alia*, a 'social philosophy' about certain rights held to be fundamental.[69] Take, for example, Locke's conception of the central case of positive law. Positive law only exists for Locke, *ex hypothesi*, once the state of nature has been exited. His central case of positive law entails a set of institutions and processes that make natural law rights and liberties (as Locke

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[68] Raz, *Authority* (n 1) 211.

[69] Whether each relevant philosophy is—indeed just what is—a '*complete*' social philosophy is unclear. The adjective 'complete' is apt to incite the unfounded fear that, unless a 'formal' conception is used, the term 'the Rule of Law' as uttered by any particular person would only be intelligible if we were acquainted with that person's views on everything from polygamy and progressive taxation to states' rights and affirmative action.

conceives them) more secure and expansive than they would be either (i) in the state of nature or, (ii) once it has been exited, under the effective 'state of war'[70] which is constituted by the rule of an 'absolute, arbitrary, despotical power'.[71]

In Raz's terms, Locke and Kant propound a doctrine in which 'the rule of law is the rule of the good law'. For Locke and Kant, the extent to which the Rule of Law is *truly* realized is to be assessed, in part, according to controversial moral criteria belonging to a 'complete social philosophy'. However, it is doubtful whether, in consequence, the term the 'Rule of Law' 'lacks any useful function'. As described earlier, it serves as an omnibus term for a set of propositions about why certain ways of legally constituting power are required in order to ensure that due weight is given to respect-worthy interests, expectations, and rights. Thus employed, the 'Rule of Law' is not, as Raz seems to fear, 'confused' with (say) 'human rights of any kind or respect for persons or for the dignity of man', if by 'confused' Raz means 'mistaken for', 'completely conflated with', or 'equated with'. Even if those *ends* of traditional Rule of Law practice are part of its conception of the Rule of Law, the tradition does not use the 'Rule of Law' as a *synonym* for 'human rights of any kind or respect for persons or for the dignity of man'.[72]

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[70] Locke (n 23) II §24.

[71] ibid II §24. 'Kant follows the natural law tradition in treating the ideal case of a rightful condition law as analytically basic, and all actual cases as defective instances of it': Ripstein (n 21) 200. But he rejects Locke's thesis that 'legal norms or institutions' are indispensable 'instruments for achieving results that can be specified apart from them' (9; 224-225, 181). 'Kant's opposing idea is that each person's entitlement to be his or her own master is only consistent with the entitlements of others if public legal institutions are in place ...' (9). For Kant, *this* is the central case of law, the one that is *obligatory*. In other words, the establishment and maintenance of 'the law', so understood, is a project to which we are duty-bound to give our allegiance: see I Kant, *Naturrecht Feyerabend* quoted in Ripstein (n 21) 147. Similarly, John Finnis, 'Law as Idea, Ideal and Duty' (2010) 1 Jurisprudence 245, 250.

[72] 'It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man': Raz, *Authority* (n 1) 211.

Put differently, although it is true that a traditional conception of the Rule of Law depends for its intelligibility on theories of 'human rights', 'respect for persons', and 'the dignity of man', it nonetheless amounts to more than the belief 'that good should triumph', as Raz puts it.[73] On the traditional view, the Rule of Law is more and other than the theories of 'good' by which it is informed. A traditional conception of the Rule of Law combines a theory about the nature of state power, a theory about the nature of law, and a theory about good, as well as a theory about how state power, law, and good should stand in relation to one another. The Rule of Law, so understood, is not reducible to any of these parts and is something greater than their sum. It describes a particular mode of governance, which is distinct from the mode of governance contemplated by its 'formal' rivals, and is also distinct from (say) the mode of governance envisioned by Plato in his *Republic,* in which the governing power of the philosopher kings would be wholly unconstrained by law, though it would be constrained by *the good*. Under each of these rival modes of governance, power, law, and good would be brought into a distinctive set of relationships with one another.

In light of the foregoing, Raz's concern, quoted above,[74] seems misplaced. It is true that the tradition's Rule of Law project envisages 'the rule of the good law', at least in the following sense: it requires its adherents to make law in order to prevent the arbitrary exercise of power over others. It is also true, then, that 'to explain its nature', one must understand the 'social philosophy' by which the relevant understanding of

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[73] ibid. I am grateful to Liam Murphy (NYU School of Law) for encouraging me to better explain and justify my contention that the Rule of Law, on the traditional conception, does indeed add something meaningful to the theory of justice, or rights, etc. by which it is informed: *see* the paragraphs in the main text following this note.

[74] Main text at note 72.

'good law' is informed: namely, moral equality and freedom from manipulative social relationships, as well as any related theory about what are genuinely respect-worthy things (eg, a theory of rights). However, it is *not* true that, as a consequence, 'the term lacks any useful function.' The term refers to a distinctive mode of governance, one which comprises a certain set of relationships between power, law, and good, whose distinctness from 'social philosophy' at large is illustrated by the desiderata outlined in Section 7 below.

Further, the traditional ways of using the 'Rule of Law' need not cause 'confusion' in the senses of 'incomprehension' or 'disorder'. Dysfunctional confusion will not arise in a community which uses the term according to criteria supplied by a broadly shared, or at least, commonly understood, 'social philosophy'.[75] Of course, members of such a community should nonetheless be expected to argue over how best to apply the criteria in certain difficult cases.

7. Summing up the limited government conception of the Rule of Law

Law is seen by the tradition's adherents variously as a *good* way, the *best* way, or more typically as an *indispensable* way,[76] to prevent arbitrariness and tyranny and to promote—though not to ensure single-handedly—non-manipulative social relationships based on

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[75] MacIntyre observes that, 'There was no way to discuss political matters in Cicero's Rome except within a framework supplied by the standard uses of '*respublica*', '*auctoritas*' (originally a technical term in the procedures of the senate), '*dignitas*', '*libertas*', '*imperium*', and the like': MacIntyre, *Justice* (n 17) 373. They were omnibus terms intelligible from within a tradition-bound social philosophy.

[76] Take, eg, the opening sentences of John Finnis's *Natural Law & Natural Rights,* which begins 'There are human goods that can be secured only through the institutions of human law…[etc.]': Finnis (n 44) 1.

moral equality for all. Commitment to the tradition's Rule of Law project involves a self-conscious commitment to establish and to maintain law—that is, to *make law*—which is comprehensively and systematically hostile to the arbitrary and tyrannical exercise of power over others.[77] For the tradition, this requires a certain relationship between law, state power, and interests, expectations, and rights. This relationship is embodied in institutions which are properly constituted.

This makes sense of the motto 'an empire of laws and not of men'.[78] In an empire of 'men', power-holders are not subordinated to the authority of reasonable, impersonal moral criteria. They have license to embrace arbitrariness, if they are so inclined, by wielding power according to their particular desires whatever they may be. In 'an empire of laws', the exercise of power over others is ruled by laws reasonably thought to embody the requirements of impersonal moral criteria. Even though positive law is made by people (and in that sense is 'of men'), 'the directive power of the law', in Sidney's words, depends substantially upon its faithfully embodying moral criteria that are not made by anyone.[79]

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[77] This does not imply that the tradition proposes no other reasons for having law, eg, the resolution of coordination problems.

[78] Harringotn (n 60) 21 quoting Livy.

[79] See quotation in main text at note 41. Kant holds, 'the best constitution is that in which power belongs not to human beings but to the laws': quoted in Risptein, *Freedom* (n 21) 191, who adds, 'a rightful condition can give authority to laws rather than human beings, so that the actions of particular human beings in making, enforcing, and applying laws can be exercises of public rather than private power ... Institutions can do so because they incorporate a distinction between the offices they create and the officials carrying them out'.

In an 'empire of laws', (i) there are legal mechanisms for:

> (a) the systematic recognition or creation of interests, expectations, and rights which are genuinely worthy of systematic respect by those wielding power over others; and
>
> (b) the systematic holding to account of any person who exercises power over others in order to ensure that such respect-worthy things have been accorded due weight.

(ii) Such mechanisms comply with the principles most famously enumerated by Fuller and Raz.

(iii) Legitimate power over others (authority) is typically deemed not to subsist *de facto*, but only *de jure*. In a well constituted order, power designated 'official' and 'authoritative' is *ex hypothesi* legally defined and limited power. This *deeming* is a political claim rather than a statement of historical fact; the origins and foundations of authority are ultimately extra-legal.[80]

(iv) The tradition's commitment to moral equality means that (iii) is subject to the proviso that official power is not legitimate merely in virtue of having been conferred by law; in defining and limiting governmental power, positive law must

[80] Consider, eg, that the Crown's prerogative powers comprise, in some cases, simply what the Crown succeeded in winning and retaining for itself, *de facto*; the courts then asserted the power to 'control the existence and extent' of such power (famously in *Case of Monopolies* (1602) 11 Co Rep 84b and *Prohibitions del Roy* (1607) 12 Co Rep 63), and eventually, 'the manner of its exercise' (*Council of Civil Service Unions* [1985] AC 374): Paul Craig, *Administrative Law* (Sweet & Maxwell 2012) 563-565; Paul Craig, 'Prerogative, Precedent and Power' in C Forsyth and I Hare (eds), *The Golden Metwand and the Crooked Cord, Essays in Honour of Sir William Wade* (OUP 1988).

be guided by a 'higher law'. The tradition holds that, according to higher law, the people are 'endowed with certain unalienable rights', and that it is 'to secure these rights' that 'Governments are instituted among Men'.[81] Consider how Sidney quotes Bracton to the effect that the 'king ... has no power but from the law, *quod recté fuerit definitum* [which shall have been rightly defined]';[82] the qualification is momentous. Sidney also declares that kings reign 'by the particular law of each country; which give to every one so much power, as in the opinion of the givers conduces to the end of their institution, which is the publick good'.[83]

Both (iii) and (iv) are reflected in the axiom that citizens may do whatever is not prohibited, whereas officials may only do what they have been legally permitted to do.[84]

(v) In the event of any dispute regarding the scope or application of authority claimed by an official, the dispute is to be resolved by some repository of authority other than the official in question.

(vi) Authority does not belong, as property may be said to belong, to those who occupy offices from time to time. Defenders of absolutism sometimes asserted that the 'kingdom' was the 'patrimony' of kings.[85] Against this, the tradition's early modern adherents insisted that their political rulers did not have a 'right to

[81] Declaration of Independence (US 1776).
[82] Sidney (n 15) ch 3, §26, 471.
[83] ibid ch 2, §7, 113.
[84] Sir John Laws, 'Public Law and Employment Law: Abuse of Power' [1997] Public Law 455, 466.
[85] Sidney (n 15) ch 3, §43, 562.

the powers they exercised'.[86] Rulers were instead granted powers which were not their property but 'annexed to the office',[87] on condition that their constitution and exercise would be consistent with moral equality for the ruled.

(vii) When officials, in the name of their office, seek to elicit the obedience of others, they must be able to offer reasonable grounds for compliance. Where the positive law provides for due weight to be accorded to genuinely respect-worthy things, an appeal for compliance may reasonably be framed as a call to obey the law.

Each component of the resultant set of processes and mechanisms (whose features are not exhausted by the above list) is legitimately constituted insofar as it is apt to ensure that moral equality is respected by those holding power over others. As explained earlier, this means that power-holders must give due weight to respect-worthy interests, expectations, and rights when they exercise their power over others.[88] Where the exercise of power over others involves such respect, genuinely good reasons for compliance are offered, thereby upholding moral equality and freedom from manipulative social relationships.[89] Sidney puts it this way: institutions 'which are well constituted, place this

[86] ibid ch 3, §5, 346. A contemporary formulation of the idea is offered by Sir John Laws, 'the public decision-maker has no individual rights in his role as such': Laws (n 84) 466.
[87] Sidney (n 15) ch 3, § 29, 497. For Kant on 'offices', Ripstein (n 21) 191.
[88] Bailyn highlights this emphasis on *constituting* institutional power by reference to certain ends in the thought of the American colonists: Bailyn (n 28) 67-68. Regarding Kant, Risptein, *Freedom* (n 21) 210.
[89] For instance, a constitution may recognize or create as respect-worthy a right of freedom of expression. It may also provide one or more avenues by which citizens may allege that it has been disrespected, say by an exercise of legislative power.

power so as it may be beneficial to the people, and set such rules as are hardly to be transgressed'.[90]

As I said earlier, the tradition's adherents generally see law as an *indispensable* way to ensure institutions are constituted to be systematically inhospitable to arbitrariness. It is significant, then, that Locke uses a legal metaphor, namely the trust, to sum up a key aspect of his limited government vision. A trust constitutes a certain relationship between law, power, and interests, expectations, and rights:

> *Political Power* is that Power which every Man, having in the state of Nature, has given up into the hands of the Society, and therein to the Governours, whom the Society hath set over itself, with this express or tacit Trust, That it shall be imployed for their good, and the preservation of their Property.[91]

The idiom of the trust continues to be used to interpret the practices by which the tradition's principles have been embodied in positive law. For example, in discussing the tort of misfeasance in public office, Lord Steyn observes that the 'old cases emphasize that the tort is concerned with the abuse of a power granted for the benefit of and therefore held in trust for the general public'.[92]

Where a proper relationship between law, state power, and interests, expectations, and rights is approximated in practice, the tradition's adherents say that 'the Rule of Law *exists*', which is both a description of a state of affairs and a positive evaluative reflection on it. When the tradition's adherents say that 'the Rule of Law *requires* that such and such be done, or not done, or undone, etc.', they are expressing in

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[90] Sidney (n 15) ch 3, §45, 570.
[91] ibid II §171. Emphasis in original. Even if one rejects, as I do, the contractarian framework adopted by Locke, what matters for present purposes is how Locke's choice of metaphor highlights the tradition's focus on the relationship between law and power.
[92] *Three Rivers District Council & Ors v The Bank of England* [2000] 3 All ER 1, 48.

highly compressed form a complex and voluminous sequence of empirical and evaluative claims culminating in the master conclusion that such and such is morally required as part of *our* (the tradition's) efforts to avoid *arbitrariness* by establishing a certain relationship between law, state power, and interests, expectations, and rights.[93] This sequence will include controversial matters about which members of the tradition may differ.

Among other things, what interests, expectations, and rights are genuinely respect-worthy, how much relative weight they should be accorded in power-holders' deliberations, and what are genuinely good reasons for compliance, are questions to be answered on the embattled terrain of moral and political philosophy.[94] For example, adherents of the tradition who share Locke's devotion to a robust form of private ownership would insist that, for the sake of respecting the moral equality, power-holders should be legally required to give substantial, perhaps overriding, weight to property rights when exercising a power which affects such rights. Adherents of the tradition whose moral and political philosophy is less enamored of private ownership would take a different view. However, despite such disagreements, subscribers to rival moral and political philosophies could nonetheless share a commitment to the limited government tradition's conception of the Rule of Law. The principles of moral equality and freedom from manipulative social relations are sufficiently abstract to accommodate adherents who differ in ways such as those just described.

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[93] Allan (n 14) 41.

[94] A coherent theory of (say) rights is required if the Rule of Law is to be socially embodied in a legal system. Note Paul Craig's observation that the 'substantive conception of the rule of law' is not 'consistent with only *one* theory of justice....It does mean that the substantive conception is not independent of the *particular* theory or theories of justice, which constitute its content at any point in time': 'Constitutional Foundations, the Rule of Law and Supremacy' [2003] Public Law 92, 96-97; Allan, 'Reason' (n 44).

Moreover, *whether* the Rule of Law, or some other set of mechanisms, should be used in a particular field to prevent arbitrariness is a difficult question, and one over which members of the tradition will differ; likewise, in respect of the question *how* law should prevent arbitrariness, in cases where law is to be used. For instance, even among the tradition's adherents, a statement such as 'the Rule of Law *requires* judicial review of legislative action' may require extensive elaboration and justification in order to be intelligible, and even then it may be controversial. This statement is shorthand for the (contestable) conclusion that such review embodies an instance of the kind of relationship between law, state power, and interests, expectations, and rights which is an indispensable way, or the best way, or a good way, of ensuring that respect-worthy interests, expectations, and rights receive the respect they are due.

Conclusion

Lord Steyn asserts that 'in a legal system based on the rule of law', power over others "may be exercised only for the public good' and not for ulterior or improper purposes'.[95] It is important to note, however, that the tradition does not see its Rule of Law project as responsible for securing all aspects of the public good. Rather, the Rule of Law requires that those exercising power respect the moral equality of those over whom power is exercised. This is a very important component of the public good, but it is only one component among others.

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[95] *Three Rivers District Council & Ors v The Bank of England* [2000] 3 All ER 1, 190, (Lord Steyn) quoting *Jones v Swansea CC* [1989] 3 All ER 162, 186. Sidney holds that power over others must be exercised for 'the good of the governed': Sidney (n 15) ch 1, §6, 21. For Kant on rights: Ripstein, *Freedom* (n 21) 217-218.

The tradition's Rule of Law project does not require everything one would want in a decent community. It would not require (say) that the state establish a system for licensing of medical practitioners. However, if the state did create such a system, and insofar as the system involved officials exercising power over doctors—say a power to fine and imprison those who practiced without a license—the Rule of Law, if applicable, would require the officials to wield their power in a manner which did not deny moral equality. For example, an official should not say, 'I will use my effective power to imprison you unless you become my personal physician.' The Rule of Law seeks to uphold the right we all have not to be coerced or persuaded in a manner which is manipulative because it denies our moral equality. Put differently: the Rule of Law protects a basic right to freedom from manipulative social relations.[96]

The working account presented in this Chapter renders the Rule of Law in abstraction (i) from the institutional practices and cultures of the legal systems in which the idea is variously socially embodied (eg practices such as trials and judicial review) and (ii) from the other commitments and constitutional elements with which such practices and cultures are integrated (eg democracy and markets). Chapter 2 suggests that although this kind of abstraction has its place, it should not be the only approach we adopt when seeking to explain the nature of the Rule of Law, especially if we wish to understand the significance of accounts which subscribe to the Consensus.

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[96] I would like to thank David B Lyons (Boston University School of Law) for encouraging me to address this point. The loose allusion to *Dr Bonham's case* is deliberate: 8 Co. Rep. 107a, 113b, 77 Eng Rep 638, 646 (1610).

2

THE LIBERAL CONSTITUTION & ITS RULE OF LAW

Introduction

In this Chapter, I argue that in order to understand and to evaluate the Consensus,[1] we need to adopt an approach that comprehends 'The Politics of the Rule of Law', to borrow the title of Joseph Raz's essay.[2] Raz contrasts an analysis of the Rule of Law '[f]rom a narrow legal point of view' as consisting 'of a number of principles', with a perspective that considers the 'institutional and ethical presuppositions' of 'these principles'.[3] Raz notices that if 'the narrow legal point of view' is eschewed:

> the picture becomes less clear. Both the detailed ways in which the principles are understood and implemented and their actual effects vary from country to country. Therefore their moral justification and political significance vary as well. ... Like many other political doctrines (such as that of democratic government) the rule of law, precisely because it varies in details and thrives in a variety of political and cultural environments, can have different meanings and moral justifications in different countries.[4]

[1] The Consensus, it will be recalled, is the assumption that the tradition's adherents need not treat economic power as even a *potential target* of the Rule of Law.
[2] Joseph Raz, 'The Politics of the Rule of Law' in *Ethics in the Public Domain* (OUP 1994) ('*Ethics*').
[3] ibid 370.
[4] ibid.

Raz's essay is said to be 'about the political significance and the moral justification of the rule of law in one country, Britain'.[5]

This Chapter is 'about the political significance and the moral justification' in Anglophone societies of the Rule of Law as understood according to the Consensus. I seek to provide an account of the Consensus's worldly connections, and in particular its *political* significance in the battle for allegiance between rival ways of life.[6] My account implies that the Consensus is not the product of nature, or of an invariant or universal human condition, or conceptual necessity, or moral self-evidence. Instead, I speculate, it is the product of certain political choices endorsed by what I call 'liberal public philosophy' (an idea I explain below). In this Chapter and those which follow, I show that these choices are based on questionable moral and empirical presuppositions and theses.

In this Chapter, I assume that there is widespread support for liberal public philosophy's social vision among members of the cultural *élite*. I also assume that the relevant segment of that *élite* is chiefly responsible for the articulation of leading conceptions of the Rule of Law. If these assumptions are correct, and if liberal public philosophy's social vision makes the Consensus seem unexceptionable, then a plausible explanation of the Consensus's cultural force suggests itself: it seems reasonable to hypothesize that the influence of the vision might, at least partly, explain *why* limited government accounts of the Rule of Law tend to subscribe to the Consensus.

Consequently, part of the force of this Chapter depends on an assertion which is merely speculative: namely, that some of the tradition's most prominent adherents subscribe to the Consensus *because* they subscribe to something approximating liberal public philosophy's social vision. My attempt to explain the stubbornness of the

[5] ibid.
[6] The sense of 'political' I have in mind is explained from and including the main text at pages 97 et seq. below.

Consensus can only be speculative, thanks to how the Consensus manifests itself in the relevant texts: subscription to the Consensus usually involves omission; in general, Rule of Law texts say nothing about economic power. And because the authors of these texts do not explain the omission, we can only speculate about its causes.

Of course, limited government proponents of the Rule of Law could have reasons for subscribing to the Consensus which differ from those I associate with liberal public philosophy. They might endorse a version of liberalism that distinguishes itself from liberal public philosophy insofar as it is capable of providing relatively more plausible grounds for the Consensus. If such grounds were articulated, it would be a welcome development. Perhaps the Consensus is reasonably justified. This is not unthinkable. However, this study provides good reasons to reach the opposite conclusion.

In any event, such justification needs to be demonstrated not presumed. The Consensus has not earned its axiomatic status. The tradition's adherents are obliged *qua* adherents of the tradition to be vigilant regarding *all* forms of power over others. This obligation arises from the tradition's underlying moral commitments whose application extends, in principle, to all forms of such power. The tradition is right to treat as axiomatic the proposition that power must provide an adequate account of its claims, on pain of being presumed illegitimate (even if it has only insisted on such rigor in the case of state power).

The picture presented by liberal public philosophy's social vision is a beguiling one. But if it is laid transparency-like over the real life of the 'capitalist constitution' (which is outlined below), problems are revealed.[7] Of especial relevance for my purposes are those features of the capitalist constitution that allow some economic actors

[7] I am using the term 'constitution' to denote an idea resembling Leo Strauss's interpretation of *politeia*: '*Politeia* means the way of life of a society rather than its [legal] constitution': *Natural Right and History* (University of Chicago Press 1965) 136-137.

systematically to exercise power *over* others. I set out the 'internal' and 'external' dimensions of such power.

Once these aspects of the capitalist constitution are brought into sharp focus, we have good reasons to qualify, or even to discard, liberal public philosophy's moral and empirical vision. In the chapters which follow, such relations of power are shown to be constituted as manipulative social relationships in which the economically strong are able to disrespect the moral equality of the weak; it is argued that because economic power thus engages the underlying principles of the tradition's Rule of Law project, it should be regarded at least as a *potential* target of that project.

1. The Consensus is at home within a particular constitutional context

The kind of abstraction employed in Chapter 1, though analytically valuable, should not be the only approach we use when seeking to understand key elements of a constitution, such as the Rule of Law, or democracy, or markets, etc. This is especially so where the enquirers are adherents of the limited government tradition. As Chapter 1's discussion highlighted, the tradition stresses the importance of insisting upon our status as moral and political agents who can, and in order to be responsible, must, determine on what conditions to give our allegiance to a constitution.

With that in mind, the Rule of Law, democracy, markets, etc., must also be understood from the perspective of agents of this kind, agents who self-consciously confront the problem of constitutional allegiance. Such agents must understand and evaluate constitutional elements in their role as potential factors in the giving or withholding of allegiance. Among other things, this requires our seeing them in their constitutional context: when we are invited to give our allegiance to a constitutional order—to '[r]enounce' our 'intention to seek right according to' our 'own judgment', as

Kant puts it[8]—normally we are asked to give our allegiance to an already *constituted* whole that *integrates* various elements with various others.

For example, as inhabitants of contemporary Anglophone societies, we are not confronted with the choice whether to give our allegiance to any one of liberalism, capitalism, and democracy in isolation. Instead, we are confronted with a particular way, or limited set of ways,[9] of integrating those elements, such that we must accept or reject liberal-capitalist-democracy.[10]

It is instructive to try to understand the distinctive tendencies and imperatives of liberalism, capitalism, or democracy by studying each in isolation. But single-minded dedication to this enterprise might lead to the mistaken impression that history could offer examples of a way of *political* life (say a democratic one), or of a form of legal order (say the tradition's Rule of Law project), which did not derive certain of its morally important characteristics from the manner of its *integration* with a way of *economic* life (say a capitalist one).[11] Neither political life nor the Rule of Law can exist without economic life. The *value* and *connotations* of each such constitutional element for a particular community will be shaped by their modes of coexistence and interaction.

My point is not that constitutional elements are therefore like bricks. Bricks, it might be thought, should not merely be understood in isolation from one another as independent units, but also as joined together in buildings where they become something

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[8] Quoted in Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press 2009) 147.

[9] Although the present constitution can accommodate classical liberal or welfare-state approaches to the integration of these elements, membership of each such camp implies allegiance to the integration of the three elements just mentioned. On 'exploring the ... perception of possibilities and impossibilities, and the limitations of that perception', see J G A Pocock, *Virtue, Commerce, and History* (CUP 1985) 75.

[10] Plato and Aristotle share an approach to constitutional regimes that combines analysis of individuated elements with the recognition that they will inevitably be integrated, meaning that the evaluation of wholes becomes a crucial moral task.

[11] Indeed, the relevant relations are of mutual influence, such that, eg, a way of *economic* life derives certain of its morally significant characteristics from the manner of its *integration* with a way of *political* life.

greater than their sum. Constitutional elements such as liberalism, capitalism, and democracy, are not like bricks: 'liberal-capitalist-democracy' is not simply a combination of three modules,[12] a public philosophy, a way of economic life, and a way of political life. While there can be bricks without buildings, constitutional elements do not exist apart from their social embodiments in the constitutions of actual ways of life; and constitutional elements are not socially embodied according to a pattern which guarantees that they can be joined together coherently and without conflict; none has a necessary or invariant structure, even if it does have certain characteristic features.

Socially embodied constitutional elements are instead somewhat like different plants growing in the same garden. Although each has its own distinctive tendencies and imperatives, how any one plant develops will also depend to a certain extent on its interaction with one or more others.[13] The plants form parts of a whole, which is 'a garden'. And a garden is more unruly and less rigid than a building. Its components cannot simply be placed like bricks alongside one another, in a once-and-for-all, regular arrangement. They will integrate (and perhaps disintegrate) as part of an open-ended and interactive process of development. The course this development takes will be shaped by the plants' mutual influence, as well as by myriad other influences. Such other factors will include gardeners' attempts consciously to influence and control the process to a greater or lesser extent. But the plants have lives of their own, which will always partly escape conscious control. Social structures, like plants, have lives of their own which, although the products of 'human action', are not ever fully, or even substantially, the products of 'the execution of human design'.[14]

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12 By 'module' I mean independent, self-contained unit.

13 Among other things.

14 I am here quoting Adam Ferguson, *An Essay on the History of Civil Society* (CUP 1995) 119. I would dispute the theory of 'spontaneous order' that F A Hayek associates with Ferguson's idea: F A Hayek, *Law, Legislation and Liberty* (Routledge & Kegan Paul 1982) Volume 1; *The Constitution of Liberty* (Routledge Classics 2006) ('*Constitution*'). For a more persuasive account of the

The tradition's adherents nonetheless insist that, within the limits of our efficacy, we have a right to pursue a vision of what elements a constitution ought to comprise and broadly how they should be integrated. Existing or would-be constitutions are properly to be evaluated according to their conformity to such a vision. And if any such constitution is found to be deficient, there is not merely a right, but a duty, to attempt to engage in its reconstitution. As Sidney puts it:

> Laws and constitutions ought to be weighed, and whilst all due reverence is paid to such as are good, every nation may not only retain in itself a power of changing or abolishing all such as are not so, but ought to exercise that power according to the best of their understanding, and in the place of what was either at first mistaken or afterwards corrupted, to constitute that which is most conducing to the establishment of justice and liberty.[15]

And, says Sidney, '[i]f any man ask, who shall be judge of that rectitude or pravity which either authorises or destroys a law? I answer, that as this consists not in formalities and niceties, but in evident and substantial truths, there is no need of any other tribunal than that of common sense, and the light of nature, to determine the matter...'.[16]

Supporters of a particular constitutional vision might be persuaded that it merits their allegiance thanks to the availability of a seemingly compelling 'legitimation story'.[17] The function of such stories is to persuade people to give their *allegiance* to the constitution of a particular way of life. And to do so on the basis that as inhabitants of such a constitutional order they will enjoy 'legitimate government' and not 'a mere conspiracy of effective coercion'.[18]

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respective roles of 'design' and un-designed 'structures' in social explanation, see Roy Bhaskar, *Reclaiming Reality* (Routledge 2011); *The Possibility of Naturalism* (Routledge 1998).

[15] Algernon Sidney, *Discourses Concerning Government* (Liberty Fund Inc 1989) ch III, §25, 460. Similarly, Justice Brandeis asserted 'the right of Americans to preserve, and to establish from time to time, such institutions, social and economic, as seem to them desirable; and, likewise, to end those which they deem undesirable': *Louis K Liggett Co v Lee* 288 US 517, 578 (1933).

[16] Sidney (n 15) ch III, §25, 461.

[17] Nothing disparaging is intended by the use of the word 'story'. The story could be an account of *sound* reasons to offer one's allegiance to a regime. Bernard Williams, 'From Freedom to Liberty: the Construction of a Political Value' (2001) 30 Philosophy & Public Affairs 3, 25.

[18] ibid.

A legitimation story not only must show that a constitutional whole comprises the key elements of the relevant constitutional vision. It must also explain how the various parts of the whole are soundly integrated (ie, function well, perhaps flourish, cohere with one another). If tensions do exist, a legitimation story must persuade its audience that they are not severe enough to amount to a disintegrative crisis. A major function of a 'public philosophy' is to offer a legitimation story for a would-be or actual constitutional order.

'Liberal public philosophy' *qua* legitimation story performs the tasks described above in respect of (among other things) state, economy, 'the individual', democracy, *and* the Rule of Law. It presents a story of coherence by interpreting various elements of the whole in a way that seeks to show their compatibility with one another as well as how the manner of their integration approximates an overall vision. The interpretation of the Rule of Law according to the Consensus reflects a vision which integrates the tradition's project with the capitalist constitution.

To reprise the garden analogy: for those who believe that liberal public philosophy's vision describes a desirable way of life, the practices giving social embodiment to the Rule of Law are to be pruned, staked, watered, and fertilized according to whether certain of the Rule of Law's tendencies and imperatives require encouragement or suppression for the sake of realizing the garden contemplated by the overall vision. The Consensus is one aspect of an account of the Rule of Law that is *at home* within a particular garden. The Rule of Law so understood is seen as part of what makes the overall way of life not only legitimate and worthy of allegiance, but also eminently desirable. What, then, do I mean by 'liberal public philosophy'?[19]

[19] The assertion of the existence of liberal public philosophy is unverifiable. But there is no way to reflect on 'culture' save through the attempt to make reasonably plausible generalizations based on, *inter alia*, the kind of public sources to which I refer at n 98 below. Yet, there is a prior question: why reflect on 'culture' in this way in an academic study, when legal and political theory conventionally involves the discussion of the 'claims' attributable to particular authors (usually

2. Liberal public philosophy as legitimation story

Plato's *Republic* and his *Laws* could be read not only as constitutional prescriptions, but also as would-be public philosophies and legitimation stories for the relevant constitutional visions. Plato would probably not have baulked at this interpretation, and for reasons that make his thought the antithesis of liberalism, according to some.[20]

Many liberals, by contrast, would be reluctant to accept that a properly *liberal* society could have a *dominant*, *public* philosophy. The strength of liberals' devotion to 'privacy' and 'autonomy' in matters of 'conscience' and the 'good life', might explain the widespread view that liberal societies do in fact live up to these ideals by embracing a plurality of social philosophies and ways of life where none dominates or is even *primus inter pares*.

I assume that this view is misplaced, though I lack the space to say more than the following by way of justification. Firstly, for reasons that are closely connected with the system of economic power under examination in this study, insistent and systematic cultural and material imperatives tend to render deeply improbable the idea of pursuing a way of life and holding a conception of the good life that conflicts with those imperatives. As supporters of liberalism's rival ways of life know, the liberal constitution offers no propitious avenues by which one could pursue, let alone *live*, a republican or socialist way of life, however much either might seem to be the good life. Constitutions are necessarily illiberal to a certain degree because they comprise reasonably determinate and stable communal practices such as those of political or economic life; the liberal constitution is no exception, even if it has been demonstrably more accommodating and flexible than some of its historical rivals.

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professional academics)? Insofar as my reasons are connected with understanding and evaluating the Consensus as a *political* phenomenon, such reasons are explained in the main text.

[20] Eg, Karl Popper, *The Open Society and Its Enemies* (Routledge Classics 2011); Isaiah Berlin, 'Two Concepts of Liberty' in H Hardy (ed), *Liberty* (OUP 2002).

Secondly, liberal philosophy does have a *public* status which its rivals lack: its tenets are generally treated as orthodoxy in the discourses of politics, law, the media, and the academy.[21] Its chief propagators are 'public intellectuals' of various kinds, by which I mean those people, typically cultural *élites*, who participate in *public* discourse bearing on the questions 'What is, and why have, our way of life?', from leader and op-ed writers, to *bien-pensant* talk-show hosts, politicians, and judges.[22]

Liberal public philosophy's cultural force is such that many seem to regard it as a matter of 'common sense, and the light of nature', to recall Sidney's words quoted earlier.[23] The widespread comprehension and endorsement of liberal public philosophy is crucial to the efficacy of rhetoric which employs the idiom and invokes the commitments and presuppositions of that philosophy. The phrase 'defence of the Free World', which until not that long ago mattered a great deal in public discourse, depended for much of its sense and resonance on the audience's acquaintance with liberal public philosophy.[24] The same could be said of these remarks penned by Jeremy Waldron:

> The Rule of Law is one star in a constellation of ideals that dominate our political morality; others include democracy, human rights, and economic freedom. We want societies to be democratic; we want them to respect human rights; we want them to organize their economies around free

[21] A public philosophy need not be the exclusive preserve of professional academics. Although they are both genera of the liberal family, liberal public philosophy is distinguishable from what I term 'high liberalism'. High liberalism is propagated by professional academics. Further, in certain respects, liberal public philosophy may be seriously at odds with high liberalism. Indeed, because high liberalism lacks the unity and unreflective moral certainty of liberal public philosophy, the former is unsuited to fulfill the functions fulfilled by liberal public philosophy, including, especially, the propagation of an uncomplicated, insufficiently critical legitimation story. However, liberal public philosophy makes selective use of certain aspects of high liberalism.

[22] For an example of academic notice being given to the importance of intellectuals outside the academy, see Pocock (n 9) 67.

[23] I return to the question of 'common sense' and the related phenomenon of what I call the 'balance of plausibility' in Chapter 5.

[24] As do the remarks of an estate agent rejecting calls to impose restrictions on property rights in order to redress London's rental shortage: 'Once you end people's right to buy something and do as they please with it you have a police state'. And, 'One of the things people love about this country is its freedom and liberal views. You can't start affecting what people do with their assets. That is sacrosanct.' This is a striking invocation of, and contribution to, liberal public philosophy: Robert Booth, 'Inside "Billionaires Row": London's rotting derelict mansions worth £350m' *The Guardian* (London, 31 January 2014).

> markets and private property; and we want them to be governed in accordance with the Rule of Law.[25]

Similarly, in 'The Rule of Law and its Virtue', Raz suggests that 'we' should give our allegiance to the Rule of Law because its capacity to make 'the law itself a stable and safe basis for individual planning' conduces to 'dignity' and 'autonomy':

> We value the ability to choose styles and forms of life, to fix long-term goals and effectively direct one's life towards them. ... [O]bservance of the rule of law is necessary if the law is to respect human dignity. Respecting human dignity entails treating humans as persons capable of planning and plotting their future. Thus, respecting people's dignity includes respecting their autonomy, their right to control their future.[26]

By using the pronoun 'we', Raz is doing at least one or both of the following things:

> (i) claiming that participants in a certain way of life (of which he is one) cherish the putative ability to which he refers; and
>
> (ii) claiming that this way of life (his) is not only legitimate but positively desirable.

Elements of liberal public philosophy and its vision of a particular way of life loom conspicuously in the background. Indeed if they did not, Raz's statement might appear both ambiguous and arbitrary, an exercise in idle stipulation with no apparent practical, historical significance. But to an audience steeped in, or acquainted with, modern liberal culture, Raz's selection of 'dignity' and 'autonomy' rather than some one or more other goods does not appear arbitrary, and the terms' meanings do not seem too ambiguous to be informative. On the contrary, the selection and the meaning appear relatively obvious. Because a culture permeated by liberal public philosophy helps us to read between the lines, 'we' (or rather the members of what Raz presumes is a liberal audience) know what he means.

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[25] Jeremy Waldron, *The Rule of Law and the Measure of Property* (CUP 2012) 12-13 ('*Measure*').
[26] Joseph Raz, 'The Rule of Law and its Virtue' in *The Authority of Law* (OUP 1979) ('*Authority*') 222.

'Dignity' and 'autonomy' are intelligible only by reference to certain contexts. In the case of the contemporary Anglophone societies addressed by Raz's account, one important context is provided by a philosophy in which (irreducibly *controversial*) accounts of the nature and value of 'dignity' and 'autonomy' are presented (ideally) in the light of: (i) their presuppositions (anthropological, sociological, moral); and (ii) their relationships with other values and commitments.[27] 'Dignity' and 'autonomy' are central to liberal public philosophy, in relation to which Raz's accounts of the Rule of Law seem to stand as both reflection and contribution.

It is plausible to speculate that accounts of the Rule of Law which subscribe to the Consensus are informed by an insufficiently critical acceptance of liberal public philosophy's social vision, and this however much their authors might be adherents of 'high liberalism' in their other work.[28] Perhaps the vision's influence mostly goes unremarked by authors and certain audiences because it forms part of the putative common sense of the age.[29]

J G A Pocock remarks that 'the study of political literature in history has been based on the paradigm of philosophy rather than of rhetoric'; 'we have been accustomed to treat texts as philosophy'.[30] But if there is justice in seeing 'Hobbes or Locke as both philosopher and pamphleteer',[31] as Pocock suggests, we might wonder whether the same might be said of some contemporary legal philosophers (or at least: of some of their texts). Assuming that rhetoric is both an inescapable feature of discourse bearing on constitutional allegiance *and* not necessarily pernicious, wondering whether a text is at

[27] Raz himself offers an account along the lines of (i) and (ii) in his later work, *The Morality of Freedom* (OUP 1988) 154-157; 203-207; ch 14.
[28] For an idea of what I mean by 'high liberalism', see n 21.
[29] See the remarks regarding John Rawls in Raymond Geuss, *Outside Ethics* (Princeton University Press 2005) 22.
[30] Pocock (n 9) 15.
[31] ibid 26.

least partly an exercise in political rhetoric need not imply a search for a hidden, illicit dimension; we may only wish to better *understand* it.

It is my contention that the Rule of Law should be seen as part of the subject-matter of deliberations regarding constitutional allegiance, and therefore *as a political phenomenon*. If this is so, then we cannot 'explain its nature'[32] without understanding how it is integrated with, and has aspects of its *value* and *connotations* defined by, the constitution of a whole way of life. It is the role of a public philosophy to define and imbue such value and connotations, and to weave them into a wider legitimation story.

Leading accounts of the Rule of Law have been informed by, and have themselves informed, liberal public philosophy. That philosophy is committed to particular conceptions of selfhood, autonomy, and rights ('autonomy-and-rights', for convenience), and it claims that the Rule of Law (on its conception) is *indispensable* for the promotion of those goods. Liberal public philosophy thereby seeks to shape perceptions of the Rule of Law's value and connotations. Thanks to its success in doing so, the Rule of Law has taken on a liberal complexion. As a consequence, its ancient variants have been consigned to relative obscurity, and socialists have wrongly assumed that it is *necessarily* at odds with their tradition (as discussed in the Epilogue).

3. Misleading appearances can be illuminating

I would argue that we should give qualified endorsement to what Jeremy Waldron calls the 'separation thesis between the Rule of Law and our other political values...'.[33] Waldron explains the thesis as follows:

> [C]onstellations can deceive us. The juxtaposition of stars in a constellation is not necessarily indicative of their actual proximity to one another. Their apparent proximity may be just an artifact of where they present themselves in our visual field – the sky, as we call it ... So too in

[32] Raz, *Authority* (n 26) 211.
[33] Waldron, *Measure* (n 25) 13.

> the constellation of our ideals. We think of democracy and the Rule of Law or human rights and the Rule of Law as close, even overlapping ideals. But it may be important to maintain a sense of the distance between them.[34]

He adds that his:

> inquiry is about the relation between the Rule of Law and one other star in the constellation – our ideal of economic freedom and, by implication, private property. Are these distinct ideals – relatively distant from one another in the constellation – capturing quite different concerns about the way we run our society?'[35]

We should endorse Waldron's insistence on the 'separation thesis' insofar as we are able to identify certain underlying principles of the Rule of Law as being distinct from the underlying principles of (say) democracy or the market economy. However, we need to qualify our endorsement in the light of the foregoing discussion: we cannot *live by* the Rule of Law save as a member of some community which has integrated it with other socially embodied commitments as part of the constitution of a whole way of life.

Taking Waldron's stars by way of illustration: democracy is integrated with the capitalist employment relationship, in such a way that we have democracy in the state but not democracy in the workplace; human rights are integrated with liberal public philosophy's social vision, in such a way that civil and political rights are widely endorsed, but social and economic claims struggle to be acknowledged or enforced as 'rights'; economic freedom is integrated with democracy, in such a way that 'private' investment decisions are not made through democratic processes; the Rule of Law is integrated with democracy,[36] in such a way that not *all* potentially arbitrary exercises of 'public' power are subject to legal mechanisms of accountability (eg, voting power[37] or, in

[34] ibid 12-13.
[35] ibid 14.
[36] Ronald Dworkin refers to the 'extraordinary amount of talent deployed to reconcile judicial review and democracy': *A Matter of Principle* (Harvard University Press 1985) 57-70.
[37] Timothy Endicott, 'The Reason of the Law' (2003) 101 American Journal of Jurisprudence 83, 89 ('Reason')

some jurisdictions, legislative power[38]); the Rule of Law is integrated with economic freedom, in such a way that the 'freedom' of holders of economic power is subject only to 'regulation' and not to a limited government constitution according to the Rule of Law.

It is also necessary to think again about what lessons to draw from Waldron's observation that how things 'present themselves in our visual field' may mislead us as to 'their actual proximity to one another'. It is indeed the case that the apprehension of 'constellations' 'can deceive us'. For example, in the 'visual field' of some, the Rule of Law may seem to require, or to be obviously compatible with, capitalist 'economic freedom' and the 'paradigm of pure private property';[39] though in my view a more searching inspection reveals that they are *not* required by the Rule of Law's underlying principles and may even be in conflict with them (at least on a limited government view).

But studying *why* 'they present themselves in' the 'visual field' of a community as 'constellations' is crucial to understanding the 'stars'' sublunary human significance. In particular, it may tell us a great deal about: (i) the historically contingent value and connotations of the Rule of Law for a particular community; (ii) its integration with the public philosophy and constitution of a way of life; and (iii) its place in that way of life's legitimation stories. Enquiries regarding these questions might help us to explain the origins and stubbornness of the Consensus, as well as what would be at stake in any deliberations about whether to make economic power an *actual* target of Rule of Law practice.

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[38] See a discussion of the importance of a *democratic* legitimation story to interpretations of the supremacy of Parliament: Paul Craig, 'Public Law, Political Theory and Legal Theory' [2000] Public Law 211.

[39] The phrase the 'paradigm of pure private property' is taken from Paul Craig, 'Constitutions, property and regulation' [1991] Public Law 538, 542. It describes a conception of private property entailing a right of self-seeking exploitation unencumbered by other-regarding obligations.

That capitalist 'economic freedom' and the Rule of Law 'present themselves in' the 'visual field' of liberal public philosophy as 'close' or 'even overlapping ideals' 'may be just an artifact'. However, this artifact should not simply be discounted as a mere source of confusion. It has significance insofar as it is the product of a legitimation story that seeks to present the constitution of the relevant way of life as a well-integrated whole.

On the one hand, liberal public philosophy's 'visual field' *is* misleading insofar as it suggests that the Rule of Law's *underlying principles* are compatible with the existing capitalist constitution. On the other hand, it reflects an important fact. The supposed legitimacy of the present constitutional arrangements partly depends on this misleading appearance being maintained: if the Rule of Law's underlying principles came to be regarded as incompatible with the capitalist constitution, the overall constitution would no longer seem well-integrated. By obscuring this incompatibility, the Consensus makes the contemporary Anglophone way of life appear more worthy of allegiance than it otherwise would.

Part of attempting to understand the Rule of Law should involve trying to grasp the worldly connections and political significance of *this or that account* of the Rule of Law in the contest for allegiance between rival ways of life.[40] Accounts of the Rule of Law contribute to that contest insofar as they explicitly or implicitly comprise a set of views about how the Rule of Law would be integrated into a working and legitimate constitutional whole. Williams's remarks regarding 'freedom as a political value' are apposite:

> [W]e will not understand our own specific relations to that value unless we understand what we want that value to do for us—what we, now, need it

[40] For similar points see Raymond Geuss, *Philosophy and Real Politics* (Princeton University Press 2008) 1-46; Quentin Skinner, *Visions of Politics* (CUP 2002) vol I.

> to be in our shaping our own institutions and practices, in disagreeing with those who want to shape them differently ....[41]

If a community of star-gazers were to think that allegiance to their way of life ought to depend upon the 'best' theory or interpretation of a constellation, any disagreements about which is 'best' should not be understood as *astronomical* disagreements. Astronomy tries to understand stars by establishing the facts of the matter, which are entirely independent of us. Trying *to interpret the bearing of* evaluative ideas on constitutional allegiance is a different kind of enquiry: even if the relevant moral principles are real, there may not be any facts of the matter (or any that are accessible to us) regarding *how they should bear* on such allegiance. Rivalries between such *interpretations* are *political* rivalries, whose nature is distinctive. As *astrological* as our community of star-gazers might seem from the astronomer's perspective, the latter's perspective is unsuited to the task of understanding political contests. As Williams puts it:

> [P]olitical disagreements include disagreements about the interpretation of political values, such as freedom, equality, or justice. These disagreements may involve many different kinds of understanding and political traditions ... It follows that the relation of these values to each other cannot be established on the model of interpreting a constitution ... We and our political opponents—even our opponents in one polity, let alone those in others—are not just trying to read one text .... [P]olitical difference is of the essence of politics, and political difference is a relation of political opposition, rather than, in itself, a relation of intellectual or interpretative disagreement.... We may for various reasons think that our opponents are, among other things, in intellectual error, but the relations of political opposition cannot simply be understood in terms of intellectual error.[42]

We must assume, for the sake of preserving the possibility of *rational* argument, that one could adjudge certain accounts of the Rule of Law better or worse by reference to impersonal criteria that are not in truth mere masks for (say) economic interests. But the history of moral and political argument also amply demonstrates that there are no knockdown arguments regarding certain fundamental questions; rational disagreement is

[41] Williams (n 17) 3-4.
[42] ibid 6-7.

inescapable. Further, even if political argument *at its best* is no mere mask for factional interest, it is not always at its best.[43]

The nature of the object in question means that neither the problem, nor one's perspective on it, resembles the astronomer's: divergences between rival accounts of the Rule of Law are likely, then, to have a *political* character. That is, they may have implications for real contests over the organization of social power—*and* vice-versa—even where the texts in question appear to stand above the battle between rival political visions.[44] In which case, the texts' relationships to certain political or economic visions *and* 'interests', including factional visions and interests, are highly significant facts about them.[45]

It would take a remarkable unworldliness not to notice that the disagreements between A V Dicey[46] and Ivor Jennings,[47] Joseph Raz and F A Hayek,[48] and more recently between Jeremy Waldron and Richard Epstein[49] are each informed: (i) by rival accounts of how best to integrate various elements of the constitution of the modern Anglophone way of life, and in turn, more broadly; (ii) by rival currents of liberalism, each propounding the best overall conditions for the pursuit of liberalism's project of

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43 Note, eg, Warren Buffett's remark, 'There's been class warfare going on for the last 20 years and my class has won': quoted in Joseph Stiglitz, *The Price of Inequality* (W W Norton & Company 2012). Consider A V Dicey's observations in 'Introduction to the Second Edition', *Law & Public Opinion in England* (Macmillan & Co Ltd 1963) lx-lxi.

44 Keith Mason, 'The Rule of Law' in P D Finn (ed) *Essays on Law and Government: Principles and Values* (LBC 1995) 117.

45 That Hayek's work stands in a particular relation to one side in the 'class warfare' referred to by Buffett (n 43) is a significant fact about it: 'At a meeting in 1975, Margaret Thatcher reached in to her briefcase and pulled out a book. According to John Ranelagh in *Thatcher's People,* "she held the book up for all of us to see – 'This,' she said sternly, 'is what we believe', and she banged [the book] down on the table." The book was *The Constitution of Liberty*': Hayek, *Constitution* (n 14) back cover.

46 Dicey distinguishes between a 'first counter-current', which was the 'surviving belief in the policy of *laissez faire*' and a 'second counter-current', which was 'collectivism' or 'socialism': Dicey (n 43) lxxi.

47 W Ivor Jennings, *The Law and the Constitution* (University of London Press 1933) 'Appendix', esp 263.

48 F A Hayek, *The Road to Serfdom* (University of Chicago Press 1944); *Constitution* (n 14); Raz, *Authority* (n 26).

49 Richard A Epstein, *Design for Liberty* (Harvard University Press 2011); Waldron, *Measure* (n 25).

individual autonomy-and-rights. And the relevant accounts commit their authors to positions on the 'battlefield' where holders of economic power seek to pursue their interests and to overcome opponents.[50]

It is true that these disagreements are more than mere reflexes of the historical contest between the claims of the welfare-administrative state on one side, and *laissez-faire* on the other. However, we cannot understand what is at stake in them without seeing that epoch-defining contest in the background, and indeed in the deeper background, the yet more profound conflict between socialism and capitalism. More than twenty years after the collapse of Soviet socialism we forget perhaps too readily how twentieth century political philosophy, including the philosophy of the Rule of Law, undertook its labours in the shadow cast by the contest between rival ways of life, socialist, *laissez-faire* capitalist, and social democratic. Whether or not the relevant authors are explicit about such matters, among *liberal* interpretations of the Rule of Law some are markedly 'liberal'[51] and others *laissez-faire* or 'neo-liberal', standpoints which have clear significance in the context of real *political* battles.

I do not think that the appropriation of the Rule of Law for classical, *laissez-faire* ends is substantially a failure of what some would call intellectual hygiene. Rather, it is a *political* move, which calls for an equivalent response. Pocock observes that, 'What to one investigator looks like the generation of linguistic muddles and misunderstandings may look to another like the generation of rhetoric, literature, and the history of discourse.'[52]

Moreover, even the most dispassionate texts might involve a *prise de position* which is either hospitable or hostile to one or more possible ways of organizing social power.[53] In order to grasp the distinctive nature of a particular account of the Rule of law, and also to understand its relations with its rivals, it is worth asking, 'What is the account's

[50] Skinner (n 40) 7.
[51] In the sense now current in the United States.
[52] Pocock (n 9) 9.
[53] As discussed in Section 4.2 of the Introduction to this study.

relationship to contests over social power?' This too is part of the politics of the Rule of Law.

4. Liberal public philosophy's accommodation with capitalism

Of particular relevance for present purposes is how liberal public philosophy mediates an accommodation between liberalism and capitalism. The moral basis of this accommodation, put simply, is the notion that capitalism is acceptable (or positively desirable) insofar as contributes to a constitutional framework that offers an environment broadly hospitable to liberal conceptions of autonomy-and-rights. The key features of the framework include the concentration of governmental power in the state, and the limitation of its powers by the Rule of Law (among other mechanisms of accountability and constraint) such that a sphere of 'autonomous', rights-bearing 'individuals' may interact securely on terms, and for the sake of ends, chosen by them independently of the will of the state or any other person, provided they respect the legal rights of others.[54]

In this Section, I suggest that liberal public philosophy's vision of contemporary social life presents an idealized account of capitalism, idealized because it overlooks the limited government significance of key elements of what I term the *capitalist constitution*. Once those elements are brought into the picture, we see that the state is not the only source of governmental power. There is also the governmental power conferred by the capitalist system of private ownership. I focus on two forms of such power, which I label *internal power* and *external power*. The present constitution of each of these forms of power is hospitable to arbitrariness.

[54] C B Macpherson's account of 'possessive individualism' in seventeenth century political theory could be read as an interpretation of the philosophical origins of liberal public philosophy: *The Political Theory of Possessive Individualism* (OUP 1962) 3.

4.1 The capitalist constitution

For the purposes of this study, I assume that the capitalist constitution characteristic of the contemporary Anglophone way of life has the following features:

> (i) the substantial approximation in practice of the paradigm of pure private property, and the widespread subscription to the pure ideal by influential participants in public discourse.[55] This ideal includes, among other things, the presumption that private property is legitimately *for* 'self-seeking exploitation';[56]
>
> (ii) most productive wealth is privately owned, including both resources necessary for basic survival as well as those required for the satisfaction of basic needs and culturally conditioned wants and needs;
>
> (iii) private ownership of such resources is highly concentrated;[57]
>
> (iv) the economic way of life is partly conducted through structured relations we call 'markets', which know 'but one general principle, that of obtaining a maximum return from limited resources...';[58]
>
> (v) the combination of (i)-(ii), means that property owners are sometimes 'armed with power over others by virtue of a capacity to dictate the use of the resource'

[55] Sir William Blackstone provides a famous account of this idea of property. See the discussion in A W B Simpson, *Victorian Law and the Industrial Spirit* (Selden Society 1995).
[56] J W Harris, 'Private and non-private property: what is the difference?' (1995) 111 Law Quarterly Review 421, 433.
[57] Oxfam reports that 'the richest 85 people on the globe ... between them control as much wealth as the poorest half of the global population put together': Graeme Wearden, 'Oxfam: 85 Richest People as Wealthy as Poorest Half of the World' *The Guardian* (London, 20 January 2014). See, further, Thomas Piketty, *Capital in the Twenty-First Century* (Harvard University Press 2014); Stiglitz (n 43).
[58] Lon Fuller, *The Morality of Law* (Yale University 1969) 171. Though the claim that ours is a 'free market' economy needs to be qualified in the light of numerous instances of monopoly, oligopoly, and other symptoms of 'market failure': see Avner Offer, 'Self-interest, Sympathy and the Invisible Hand: From Adam Smith to Market Liberalism' (2012) 1 Economic Thought 1.

(which power is augmented when (iii) is added).[59] This power has *internal* and *external* dimensions (as described below).[60]

(vi) economic power is concentrated and *institutionalized* in *large* business corporations.

It should already be apparent, and will become increasingly clear below, that the elements of the capitalist constitution acquire their distinctive significance from the ways in which they combine and interact. For example, J W Harris observes that elements (i)-(ii) arm property owners with power over others (element (v)), accentuated by concentrated ownership (element (iii)). The exercise of such power is often mediated by market relations (eg, the relations of the labour market) premised on profit maximization (element (iv)), which is the only end the most powerful economic institutions can pursue for its own sake (element (vi)).

4.2 Power over others distinguished from power over mere things

The 'classical view of property as a right over things resolves it into component rights such as the *just utendi, just disponendi*, etc.'[61] Ownership of a thing entails a 'legal liberty to use it in certain ways'.[62] But, then, another aspect of *private* ownership 'is always the right to exclude others'.[63] This is one reason why it is often pointed out that the legal relations entailed in ownership are not between an individual and a thing, but rather between individuals.[64] As Waldron puts it, 'legal relations cannot exist between people and

[59] Harris (n 56), 422-423.
[60] Karl Renner observes that in such circumstances, 'the institution of property leads automatically to an organization similar to the state': Karl Renner, *The Institutions of Private Law and their Social Functions* (Routledge and Kegan Paul 1949) 107.
[61] Morris R Cohen, 'Property and Sovereignty' (1927-1928) 13 The Cornell Law Quarterly 8, 12.
[62] Jeremy Waldron, *The Right to Private Property* (OUP 1988) 27 ('*Right*'). I adopt Waldron's definition of 'ownership' at 47.
[63] Cohen (n 61) 12.
[64] ibid; Waldron, *Right* (n 62) 27.

Porsches, because Porsches cannot have rights or duties or be bound by or recognize rules'.[65] Inasmuch as the owner of a motor-car has a right to exclude others from it, and this right is efficaciously superintended by the state, the owner in one sense has power in relation to others. Should you want to drive my Porsche, I have the power to decide whether you may or may not.

Further, insofar as private ownership confers a liberty to use a thing in certain ways, this always affects the distribution of liberty between persons. As G A Cohen points out, 'It is necessarily associated with the liberty of private owners to do as they wish with what they own, but it no less necessarily withdraws liberty from those who do not own it'.[66] My ownership of the Porsche affects your liberty with respect to it. However, the power relations I describe as *internal* and *external* involve something more than the relations of power and liberty between persons ordinarily entailed in ownership of a single motor-car.

The power entailed in the liberty to use, and the right to exclude others from, some thing or collection of things may or may not confer the kind of power over others which is relevant to the limited government tradition's project. On my interpretation, the tradition is concerned with power which effectively allows its holder to govern substantial aspects of the way of life of one or more others by compelling them to acquiesce in the power-holder's say-so, irrespective of their preferences. I will call this 'power over others'. My ownership of the Porsche typically does not confer *power over others*; I will call the power it entails 'power over mere things'.

It is conceivable that under certain circumstances, private ownership would not give rise to power over others at all. However, under the capitalist constitution, private ownership forms part of a set of conditions of dependence which tend effectively to

[65] Waldron, *Right* (n 62) 27.
[66] G A Cohen, 'Freedom, Justice and Capitalism' (1981) 126 New Left Review 4.

confer on some owners more or less substantial power over others. Harris's description of how owners may be 'armed with power over others' captures the relevant idea:

> Property has a dual function, since it governs both the use of things and the allocation of items of social wealth. It is in this duality of function that its controversiality principally resides. It is one thing to say that a society ought to afford to an individual the use of some resource. It is another to say that the individual should be armed with power over others by virtue of a capacity to dictate the use of the resource. "Property" encompasses both.[67]

'Internal power' and 'external power' refer to the power which some owners of resources enjoy over one or more persons whose welfare *depends* on access to resources of the relevant kind. Imagine you need access to resources of the kind I own in order to have a reasonable standard of living. Property law says I decide whether you may access them, and if so, on what terms. In the context of the capitalist constitution, the law *in effect,* not *de jure*, 'confers on me a power, limited but real' to make you 'do what I want'.[68] *Power over mere things* is distinct from *power over others*: the former is not associated with the kind of relations of dependence that allow some people to govern others. The relevant conditions of dependence arise from the combination of certain elements of the capitalist constitution, as described above. And they are *systemic*, in the sense that they are constitutive features of a system that is embedded in the capitalist constitution, which effectively is a system of power.

It is necessary to set aside *non-standard* relations of dependence which may arise due to the peculiarities of certain individuals, even though such relations might also be due in part to elements of the capitalist constitution: that your emotional welfare depends upon spending Sunday afternoons meditating on the roof of my Porsche does not instantiate a characteristic feature of a system of power.

[67] Harris (n 56), 422-423.
[68] Cohen (n 61) 12.

The limited government project is concerned with the *standard* features of systemic power relations, typically those between state and subject. Internal and external economic power concern the systemic relations of dependence associated with access to resources required to satisfy more or less *standard* needs and wants (as contemplated by the phrase I used earlier: 'a reasonable standard of living'). For the purposes of this study, what matters is how the right of an owner to 'exclude others from their *necessities*' tends effectively to confer on *some* owners the kinds of power over others described below as *internal* and *external*.[69]

Throughout this study, all references to economic 'power over others' should be understood as references to 'internal' or 'external' power as I will now define them, and not as references to 'power over mere things'.

4.3 Internal power

Internal economic power refers primarily the range of management powers sometimes collectively referred to as incidents of 'managerial prerogative', as well as to the powers an employer enjoys in connection with 'hiring and firing' (eg, in connection with the specification of terms and conditions of employment). Such power is wielded by any relevantly situated 'manager', whether or not the concern is large or small, incorporated or unincorporated. I describe it as 'internal' because the objects of its exercise are primarily within, or candidates for participation in, an organization subject to managerial power.

Internal power substantially derives its force from the fact that actual or would-be employees (those primarily subject to the power) justifiably feel that their welfare *depends* to a great extent upon their being employed and, in turn, on the security and terms and conditions of their employment. Because of the feeling and reality of

[69] ibid 18.

substantial economic *dependence*, such persons tend to submit to their employers who normally have the greatest say in determining such security and terms and conditions.

Max Weber provides a noteworthy sketch of this dimension of economic power:

> Formally, the market community does not recognize direct coercion on the basis of personal authority. It produces in its stead a special kind of coercive situation ... The sanctions consist in the loss or decrease of economic power and, under certain conditions, in the very loss of one's economic existence. The private enterprise system transforms into objects of "labor market transactions" even those personal and authoritarian-hierarchical relations which actually exist in the capitalistic enterprise. ... The more comprehensive the realm of structures whose existence depends in a specific way on "discipline"—that of capitalist commercial establishments—the more relentlessly can authoritarian constraint be exercised within them, and the smaller will be the circle of those in whose hands the power to use this type of constraint is concentrated and who also hold the power to have such authority guaranteed to them by the legal order.[70]

Further, the distribution of power characteristic of the capitalist employment relationship is simultaneously constituted, legitimized, and partly obscured by how the law treats it as the product of freedom of contract. This fiction continues to prevail as a matter of legal doctrine, notwithstanding widespread scholarly recognition that the legal constitution of internal power amounts to 'a command under the guise of an agreement',[71] as well as the occasional acknowledgment of the same by some of the law's highest officials:

> The power of the employer to withhold bread is a much more effective weapon than the power of the employee to refuse labour. Freedom of contract under such circumstances is surely misnamed; it should rather be called despotism in contract...the worker is in the same position as...a traveler, when he had to give up his money to a highway man for the privilege of life.[72]

One of the aims of this study is to show that the use of limited government concepts, such as 'despotism', is apt in connection with economic power.

F A Hayek, who made a signal contribution to liberal public philosophy, and in particular to its classical or *laissez-faire* genus, realized that critics of the philosophy's

[70] Max Weber, *Economy and Society* (University of California Press 1978) vol 1, 730-731.
[71] Otto Kahn-Freund in Karl Renner, *The Institutions of Private Law and their Social Functions* (Routledge and Kegan Paul 1949) 28.
[72] Justice H B Higgins *FEDFA v BHP Ltd* (1911) 5 CAR 12 (Australia).

vision will highlight the tension between the internal power of employers and the vision's portrait of autonomy-and-rights. Consider Rawls's formulation: 'A moral person is a subject with ends he has chosen, and his fundamental preference is for conditions that enable him to frame a mode of life that expresses his nature as a free and equal rational being as fully as circumstances permit.'[73] How does the systemic power of employers to, in effect, choose the ends of their employees' daily 'mode of life' sit with the liberal conception of autonomy?

Perhaps in an attempt to pull the rug out from under critics who would point to the overwhelming 'circumstances' of economic power, Hayek concedes ground, a substantial amount for present purposes. The resultant portrait of internal power suggests that liberal public philosophy might be based on flawed sociological premisses. He notes, for instance, that the vision's claims 'were developed in a society which in important respects differed from ours': among other things, the former 'was a society in which a relatively larger part of the people ... were independent in the activities that gave them their livelihood'.[74] Hayek calls such people 'independents', and he acknowledges that in the modern world only a few occupy a 'position of independence and influence through the control of large means'.[75]

He notices that today 'most of us' are 'normally not expected to perform actions which cannot be prescribed or which are not conventional', because we 'work as employed members of large organizations, using resources we do not own and acting largely on the instructions given by others'.[76] On the one hand, the 'independents' 'control' the 'resources' and 'must concern themselves constantly with new arrangements and combinations', taking 'the initiative in the continuous process of re-forming and

[73] Quoted in Michael Sandel, *Democracy's Discontent* (Harvard University Press 1998) 291.
[74] Hayek (n 14) 103.
[75] ibid 108.
[76] ibid 106.

redirecting organizations.[77] On the other hand, the 'employed', as he calls them, 'cannot go beyond' their 'allotted task':[78]

> [F]or the employed, work is largely a matter of fitting himself into a given framework during a certain number of hours, for the independent it is a question of shaping and reshaping a plan of life ...[79]

Through the exercise of such power 'independents', and large business corporations especially, are able to substantially shape the way of life for the 'employed' (and for themselves), in many of its most quotidian details.

Alasdair MacIntyre suggests that this quotidian dimension of a way of life is embodied in the 'structure of normality', which comprises sets of ongoing and *collective* practices, habits, rituals, roles, hierarchies, which enable us to identify, distinguish, and compare reasonably determinate and *shared* ways of life.[80] Hayek's concession that most people experience their 'control' over such aspects of life as negligible seriously qualifies the liberal vision's portrait of individuals who 'choose styles and forms of life, ... fix long-term goals and effectively direct' their lives 'towards them meaningfully', to recall Raz's formulation.[81]

As discussed in the Epilogue, this observation, among others, has led socialist critics to say that liberal public philosophy's vision is 'ideological' in the sense that it seeks to purchase unearned legitimacy and prestige for a system in which the 'control' envisaged in its account of 'autonomy' is a privilege enjoyed by the few who have 'large means', as is the privilege of giving the 'instructions' that 'largely' govern the daily lives of the many, who substantially lack 'control'.

Of course, welfare-state liberals in particular are sufficiently sociologically astute and intellectually honest to accept, in Justice John Marshall Harlan's words, 'that

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[77] ibid 103, 106, 108.
[78] ibid 106.
[79] ibid 108.
[80] Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Gerald Duckworth & Co Ltd 2001) 24-5.
[81] Raz, *Authority* (n 26) 222.

employers and employees' would usually not be 'upon an equal footing, and that the necessities of the latter often' would compel them 'to submit to such exactions as unduly taxed their strength'.[82] Their preferred response is usually to allow the (strictly controlled) exercise of countervailing power through collective bargaining along with some 'regulation' (say of dismissal).

However, where such measures have been effected, the manipulative conception of the employment relationship has not thereby been systematically de-legitimized and eradicated. Instead, particular incidents of that conception have been suspended. These *ad hoc* measures are almost always resisted by powerful opponents and consequently are often ephemeral. One possible limited government alternative would entail the reconstitution of internal economic power so that there is a *comprehensive* legal obligation to exercise it in ways that uphold moral equality for all and freedom for all from manipulative social relationships. Chapters 3 and 4 considers these contrasting approaches.

If certain economic relations resemble familiar political relations insofar as they both entail the exercise of power over others, the former should be evaluated in the light of the same limited government *principles* as the tradition applies to the latter.[83] With this in mind, Chapter 3 focuses on the 'arbitrary' internal power entrenched in the constitution of the capitalist employment relationship.

4.4 External economic power

External economic power is most significantly exercised through the use of what I call 'investment power', one aspect of the so-called 'economic freedom' referred to by Waldron. Investment power is an incident of the prevailing understanding of the liberties

[82] Dissenting in *Lochner v New York* (1905) 198 US 45: Sandel (n 73) 196.
[83] This does not mean, however, that identical limited government *practices* (if any) should apply in each realm.

entailed in *private* property and includes the 'freedom' to invest or not, or to withdraw an investment, or to change its nature. Clearly, investment power overlaps with 'managerial prerogative' and therefore internal economic power. The label *external* economic power focuses our attention on the capacity of investment power to affect significant aspects of a way of life (not only within but also) *beyond* a particular enterprise. It involves a substantial capacity to influence the structure of normality across society through its ability to affect not only what is produced, and where and how, but also the built and natural environments, as well as the tastes, desires, and compulsions which advertising encourages us to experience as second nature.[84]

Investment power may also be exercised in a way that warrants the label 'penal economic power'. *Penal* economic power is deliberately exercised:

> (i) when a private property owner cites investment power in order to *threaten* a community with harm as a means of securing the community's cooperation; or
>
> (ii) when a private property owner exercises such power to *inflict harm* as punishment in default of cooperation.[85]

Penal economic power exploits the relations of *dependence* described above in order to obtain the cooperation of economic dependents in some design conceived by the power-holder. Usually, the harm in question is the diminution in community welfare that results especially from the withdrawal of investment on a large scale. For example: loss of employment, and in turn material and psychological harm for redundant employees and their loved ones, not only in connection with the enterprises controlled by the relevant

[84] See, eg, Stuart Ewen, *Captains of Consciousness: Advertising and the Social Roots of the Consumer Culture* (Basic Books 2001); Sharon Beder, *Selling the Work Ethic: From Puritan Pulpit to Corporate PR* (Zed Books 2001); G A Cohen, *Karl Marx's Theory of History: A Defence* (Princeton University Press 2000) 306.

[85] Penal economic power is to be distinguished from the invocation of investment power in a way not intended as a threat, as explained in n 71 of Chapter 4.

owner(s) but also in dependent businesses; decline in the overall level of demand and economic activity; decline in tax revenue and therefore in funds available for public services, etc.

Any government that had been warned that such consequences would follow the introduction or maintenance of a certain law or policy, might reasonably fear the disapproval of its electors and possibly electoral defeat should it proceed in any case. Because of these factors, among others, holders of great economic power may wield penal economic power in the reasonable expectation of securing community and state compliance with their conceptions of how to solve major public policy problems and, in turn, how to shape socially significant patterns of order.

Although penal economic power is not even a marginal presence in contemporary limited government texts, it is hardly a marginal or obscure presence in modern social life. It is rare that a week goes by without some report of holders of great wealth seeking to employ penal economic power to persuade a state to 'lower costs' (eg, taxes, social charges, wages, environmental and occupational safety measures, unfair termination laws, etc.) or to reduce competition (eg, through regulatory changes or 'protectionism').

A striking recent example involved the not at all decorous public warnings by members of the UK financial services sector that if any new laws were sufficiently antithetical to their perceived interests, they would exercise their investment power to withdraw substantial resources from active investment in the UK economy. These warnings were both anticipated and amplified by public commentators and they became a major topic of media interest.[86] Those issuing the warnings could reasonably have

[86] Eg, James Moore, 'HSBC in new threat to leave the UK over Osborne banking levy' *The Independent* (London, 6 November 2010); Simon Duke, 'Go easy on banks or we could leave UK, threatens HSBC' *Daily Mail* (London, 8 March 2011); Jill Treanor, 'Banks threaten to leave London over measures to prevent another bailout' *The Guardian* (London, 10 April 2011); Rupert

expected them to exert considerable pressure. This is largely because of the significant number of people employed by the UK financial services sector and the size of its share of Gross Domestic Product. The examples could be multiplied.[87]

Chapter 4 discusses how investment power and penal economic power may engender 'tyranny' and 'corruption'.

5. Liberal public philosophy's two layers

Liberal public philosophy *qua* legitimation story must respond to the questions 'What is, and why have, our way of life?' Its social vision provides grounds for allegiance to an existing way of life (rather than a merely hypothetical one) by combining moral and empirical claims in a way that offers a moral vindication of what *is*, with implicit or explicit qualifications pointing towards what might and should be.

I speculate that for the limited government tradition's liberal current, the *value* and *connotations* of the Rule of Law rest substantially on the belief that a certain relationship between law, power, and autonomy-and-rights—ie, a certain conception of the Rule of Law—is *essential* for the realization of liberal public philosophy's social vision.

In other words, the meaning and the meaningfulness of the Rule of Law for supporters of the liberal constitution depend substantially upon its forming an *integrated part* of a vision of how members of a liberal community believe their way of life is (and should be) constituted. The kinds of social practices that do (or would) amount to a fitting a relationship between law, power, and autonomy-and-rights are understood as *being fitting* in the light of, among other things, the vision's moral and empirical presuppositions and theses.

Neate, 'Banks threatened to leave the country if forced to split in half' *The Guardian* (London, 31 October 2012).

87 Eg, Patrick Jenkins, 'IMA head dismisses bank threats to quit UK after "Brexit"' *The Financial Times* (London, 1 December 2014).

Certain ways of embodying the Rule of Law in social practices *fit within* a particular, broader vision of a way of life. The Consensus fits the Rule of Law into a social vision pursuant to which liberal public philosophy forges an accommodation between liberalism and the capitalist constitution. It is helpful to think of the vision as comprising two layers.

5.1 The vision's first layer

The first layer is a simultaneously descriptive and prescriptive assertion of the existence and desirability of 'a (civil) society opposed to a state whose components' are 'formally equal, autonomous individuals as the sole repositories of rights'.[88] This assertion is usually made in opposition to, or anticipation of, putative or potential rival claims of the state, often coupled with a call to impose legal or other limits on certain state powers. Opponents of absolutist pretensions or state-sponsored religious orthodoxy were among the early champions of this assertion in the modern age.

The first layer of the vision combines the following claims, which should be read as empirical claims about how things roughly stand, and also as moral claims endorsing certain states of affairs insofar as they reflect respect for autonomy-and-rights. Individuals, secure in their persons and property, are free to interact among themselves in pursuit of their ends, provided that they respect the persons, property, and rights of one another, under threat of punishment by the state for failure to do so. Subject to this proviso, individuals are also free to choose their own ends, preferences, and plans of life. The state reinforces security of (liberal) private rights and expectations by superintending a framework of private law instruments which it promises to enforce provided certain mostly formal criteria are met. However, the state's own power must also be limited because the state itself is a potential threat to respect-worthy things.

[88] Jean L Cohen and Andrew Arato, *Civil Society and Political Theory* (The MIT Press 1992) 89.

It is significant for present purposes that the existence of *private* property is a deeply embedded presupposition of the vision, so much so that the '[p]rotection of property is commonly conflated with individual autonomy...'.[89] For the purposes of the vision, liberal autonomy-and-rights generally, including private property rights in particular, are either explicitly *natural law* imperatives or have an equivalent unquestionable and indeed seldom questioned status in the event that they are not strictly speaking considered *natural*. Accordingly, they may be regarded as the vision's 'naturalized law'.

Consider Lord Mansfield's declaration that:

> In all mercantile transactions the great object should be certainty ... [I]t is of more consequence that a rule should be certain, than whether the rule is established one way rather than the other.[90]

Taken literally, this is highly improbable. Given a choice between an uncertain law of real property and a certain rule mandating expropriation and redistribution to the landless, it seems clear that those by and large afforded the most valuable proprietary interests under the uncertain law would choose to maintain it, for all of its uncertainty. But, of course, Mansfield expected his readers simply to understand that he implied the qualification, 'within certain parameters'. Namely those parameters which he and they regarded as, or treated as though they were, natural. Indeed, he took for granted, as his readers are expected to, that none of the alternatives between which commercial judges are asked to choose in circumstances of uncertainty would radically undermine the framework upon which commerce depends.[91]

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[89] Offer (n 58) 11.

[90] *Vallejo v Wheeler* (1774) Cowp 143, 153 cited by Waldron, *Measure* (n 25) 15-16.

[91] Max Weber observes that, 'Freedom of contract and all the propositions regarding as legitimate the property derived therefrom obviously belong to the natural law of the groups interested in market transactions, i.e., those interested in the ultimate appropriation of the means of production': (n 70) 871.

The Rule of Law's capacity to protect private property *from* state power is central to its liberal normative rationale. In the *Second Treatise*, Locke stipulates:

> The *Supream Power cannot take* from any Man any part of his *Property* without his own consent. For the preservation of Property being the end of Government, and that for which Men enter into Society, it necessarily supposes and requires, that the People should *have Property*, without which they must be suppos'd to lose that by entering into Society, which was the end for which they entered into it, too gross an absurdity for any Man to own.[92]

Locke uses 'cannot' and 'absurdity' so as to present private property's protection from the state as a natural necessity.

Such is the cultural force of these attributions of value and connotations to the Rule of Law, it is hardly surprising that certain theorists might assume that the Rule of Law *necessarily* requires economic freedom and the paradigm of pure private property.[93] Even theorists who do not share this view, tend to present the value and connotations of the Rule of Law in modern, liberal terms without dwelling on the contingency and contestability of such attributions.

The first layer represents one part of the intellectual background to the Consensus, namely that part which conceives the limited government tradition's Rule of Law project exclusively by reference to the threat to individual autonomy-and-rights posed by state power. Montesquieu, for instance, emphasizes Roman law's differentiation of civil and public law, declaring 'That we should not regulate by the Principles of political Law those Things which depend on the Principles of civil Law', which is 'the Palladium of property'.[94]

Of course, the justified thought that the powers of the state are a proper target of the project does not necessitate or even imply the Consensus. Rather, the Consensus is engendered by the historically contingent combination of this thought with certain liberal

[92] John Locke, *Two Treatises of Government* (CUP 1988) II §138. Emphasis in original.
[93] Or seem to assume, or seem to come close to assuming: Waldron, *Measure* (n 25).
[94] Quoted in ibid 24.

presuppositions and theses about how individuals may enjoy autonomy-and-rights in a range of 'private' settings. The relevant claims about the economic sphere are embodied in the second layer of the vision.

5.2 The vision's second layer

Like the first, the second layer comprises simultaneously descriptive and prescriptive assertions. However, the second layer of the vision is narrower in that it focuses on the existence and desirability of a certain way of organizing *economic* life. The second layer's portrait of economic life emphasizes qualities which are, in a sense, expressions in the *economic realm* of the qualities attributed by the first layer to the structure of society *as a whole*.

The second layer of the vision is perhaps most famously captured by the thinkers of the Scottish Enlightenment, who theorized, and often championed, the growth of capitalist market relations (eg, Adam Smith and Adam Ferguson).[95] Such relations are portrayed as capable of integrating the designs of self-interested economic actors via impersonal mechanisms which conduce to the maximization of (material) utility.[96] In more recent times, this layer of the vision has been forcefully rearticulated or reinforced both at the level of high theory (by so-called 'neo-classical' and 'libertarian' liberals, such as Hayek[97]), as well as in a more popular register[98] (by so-called 'neo-liberals').

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[95] In particular, Smith's 'invisible hand' (by which a person is brought 'to promote an end which was no part of his intention'): *An Inquiry Into the Nature and Causes of the Wealth of Nations* (OUP 1993) bk iv, ch 2, 291-292; and Ferguson's 'empiricist' notion of order, which is 'the result of human action but not the execution of human design' (n 14) 119. See Charles Taylor, *Hegel* (CUP 1977) 431-434 and Cohen and Arato (n 88) 91-116.

[96] '[W]e do not know whether the doctrines of self-interest and market efficiency are true ... It has never been proven that they are always more efficient than other arrangements; it is not even easy to define what such efficiency would consist of. As for self-interest, it is either an *a priori* axiom, or a psychological speculation': Offer (n 58), 8.

[97] Free markets and *laissez-faire* are thought to be critical to ensuring that society possesses the professedly morally valuable qualities of a 'spontaneous order': Hayek, *Law, Legislation and Liberty* (n 14) vol 1, chs 1-2.

Thinkers of this stamp sometimes present the marketplace as the fullest expression of liberal public philosophy's social vision. Milton Friedman presents the marketplace as the venue *par excellence* for the realization of the moral goods promoted by the vision overall.[99] Such approaches tend towards the 'identification (or reduction) ... of civil and economic society'.[100] Apart from appearing to vindicate critics of the vision,[101] this also leads to ambivalence among some of the vision's supporters.

The second layer of the vision would be less culturally important were it the exclusive preserve of proponents of *laissez-faire*. It is therefore significant that some liberals who seem broadly sympathetic to the welfare-administrative state also reach an accommodation with capitalism via the economic layer of the vision. Take, for instance, 'social democrats', 'New Deal' and 'Third Way' liberals, 'Keynesians', etc. I call this loose collection 'welfare-state liberals'.

They characteristically hold that the *laissez-faire* account of the economic layer of the vision is (at least somewhat) idealized; that is what distinguishes welfare-state liberalism from *laissez-faire*.[102] Nonetheless, welfare-state liberals generally share with their *laissez-faire* rivals the belief that, by and large, economic life should be (a) conducted primarily by private owners of resources, (b) mediated primarily by market relations, and therefore (c) independent of the kind of 'public' involvement that would make some sort of non-particularistic agent(s) (most obviously, but not necessarily, the 'state') the most

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98 The vision's second layer is popularized through publications such as *The Economist*, *The Financial Times,* and *The Wall Street Journal*.

99 *Capitalism and Freedom* (University of Chicago Press 2002) in which Friedman argues that economic freedom is a condition of political freedom, and a range of other moral goods, as well as a valuable freedom in its own right: 8. See further, Pocock (n 9) 122.

100 Cohen and Arato (n 88) 90. Occasionally, they suggest that 'economic freedom' is virtually synonymous with 'freedom' *tout court*.

101 Eg, those socialist critics who see the vision as 'ideological'. See also Karl Polanyi, *The Great Transformation* (Beacon Press 2001) ch 6, 71: the market 'subordinate[s] the substance of society itself to the laws of the market'.

102 For instance, they might depart descriptively from classical liberalism's idealized conception of capitalism by giving attention to element (iii) (concentration of wealth), and normatively by seeking a more egalitarian distribution: eg, Piketty (n 57).

important economic agent(s) (instead of 'private' owners) and the most important coordinator(s) of economic relations (instead of the market).[103]

Moreover, welfare-state liberals and their *laissez-faire* compatriots appear to reach their accommodation with the capitalist constitution on the same (liberal) grounds. I haven't the space to provide a survey of the relevant literature, so the following statement by Jeremy Waldron will have to be taken as a representative endorsement of this belief by someone I take to be a welfare-state liberal:

> We demand economic freedom, free markets, and private property because our life-plans are different from one another and because we know that there is no other way to reconcile our varying preferences in a coherent way of life.[104]

An accommodation with the capitalist constitution is thought to be the best practicable way of organizing economic life so as to combine economic prosperity with the protection, and perhaps even the promotion, of liberal autonomy-and-rights.

5.3 Liberal public philosophy and the large corporation

Liberals generally (including welfare-state liberals) tend not to see the limited government significance of the institutional power over others exercised by large corporations (elements (v) and (vi)). One theory presents the corporation as a 'nexus of contracts' between un-coerced human beings.[105] Another view, which recently found favor with the majority of the US Supreme Court in *Citizens United*, sees corporations as 'associations of citizens'.[106] While the Majority opinion notes that limited government constraints are

[103] Dicey, eg, ascribes to *laissez faire* the doctrine that 'government had better in general undertake little else than strictly political duties': Dicey (n 43) xxix. Welfare-state liberals apply less stringent criteria for state involvement.
[104] Waldron, *Measure* (n 25) 110.
[105] R H Coase, 'The Nature of the Firm' in *The Firm, the Market, and the Law* (University of Chicago Press 1988). Brian R Cheffins, *Company Law: Theory, Structure, and Operation* (OUP 1997) 31-46, 83 and ch 2.
[106] *Citizens United v Federal Election Commission* 558 US 310, 313 (2010) ('*Citizens United*').

'[p]remised on mistrust of governmental power',[107] it is dismissive of the dangers of *alleged* (as they put it) 'vast accumulations of unreviewable power in the modern media empires'.[108] Both of these theories are associated with classical liberal perspectives. They effectively preserve the notion that the state is the only source of great institutional power and that society comprises nothing other than human individuals transacting, including by sometimes forming associations with one another.

The normative myopia associated with this view rests on a basic sociological oversight. It is as though liberal public philosophy assumes that the distribution of contemporary social power amounts to the realization of the project envisaged in Hobbes's *Leviathan*, namely: the project of eliminating, or at least neutralizing, any sources of power that might effectively and systematically rival the power over others held by the sovereign.

Hobbes himself was keenly aware of the challenges facing this enterprise. In particular, he worried about private factions or associations, 'leagues of the subjects of one and the same Commonwealth'; they are, he says:

> unnecessary to the maintaining of peace and justice, and, in case the design of them be evil or unknown to the Commonwealth, unlawful. For all uniting of strength by private men is, if for evil intent, unjust; if for intent unknown, dangerous to the public, and unjustly concealed.[109]

He also worried about how the Leviathan's supremacy may be undermined by the 'rich and potent subjects of a kingdom'.[110] Liberal public philosophy is based on a sociology in which this threat is underestimated: the 'uniting of strength' by contemporary 'rich and potent subjects' is 'unjustly concealed', obscuring its potential to be 'dangerous to the public' in ways and on a scale which knew no analogues in Hobbes's day.

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[107] *Citizens United* 558 US 310, 312 (2010).
[108] *Citizens United* 558 US 310, 351 (2010), quoting *Miami Herald Publishing Co v Tornillo* 418 US 241, 250 (1974).
[109] Thomas Hobbes, *Leviathan* (Everyman's Library 1914) 124.
[110] ibid 180.

Of course, some liberals, typically welfare-state liberals, recognize not only that corporations are powerful institutions, but also that they endanger human welfare. They usually call either for better 'regulation' or, more adventurously, for 'corporate social responsibility'. However, as critics on the left and the right have persuasively shown, corporate social responsibility schemes tend to offer proposals that are either so mild as to be negligible, or if more far-reaching, incoherent and politically jejune.[111] In general, they fail to ask whether the problems they identify might equally, and perhaps more fruitfully, be seen as limited government problems, which *potentially* call for limited government remedies.[112]

5.4 Liberal public philosophy's over-accommodation of capitalism

In sum, then, according to the more sanguine (classical) champions of liberal public philosophy's accommodation, liberalism and capitalism stand in a seemingly natural, symbiotic relation. Among its more cautious (welfare-state) proponents, they *may* be brought into a fruitful collaboration provided the economy is thoughtfully 'regulated'.[113] In each case, the accommodation is reached because it is believed that core liberal goods (namely autonomy-and-rights) would be promoted thereby.

By telling a legitimation story which presents a beguiling accommodation between liberalism and capitalism, liberal public philosophy performs a vital function for existing Anglophone constitutions. Without it, the existing constitution might be undermined by radical uncertainty as to whether, or to what extent, liberal commitments are consistent with capitalist commitments. But it is an idealized picture because it

[111] For arguments from the left, and a survey of arguments from the right, see H J Glasbeek, 'The Corporate Social Responsibility Movement—the Latest in Maginot Lines to Save Capitalism' (1987-1988) 11 Dalhousie Law Journal 363.

[112] One exception is Stephen Bottomley, *The Constitutional Corporation* (Ashgate Publishing 2007), which is addressed in Chapter 4 n 141.

[113] Eg, postwar liberals lauded the New Deal partly because they saw it as 'having discovered solutions to the problems of capitalism that required no alteration in the structure of capitalism...': Alan Brinkley quoted in Sandel (n 73) 264.

represents a selective account of the capitalist constitution, selective because it suppresses the *limited government significance* of certain key elements. Due attention to two elements of the capitalist constitution in particular would call into question the soundness of the accommodation liberal public philosophy seeks to broker: *viz.* (v) concentrated economic power over others, which is (vi) substantially exercised by large business corporations. Insofar as the vision is defined, among other things, by its failure to pay adequate attention to these things, it represents a crucial part of the intellectual background to the Consensus.

As I suggest in Chapter 4, the limited government implications of the rise of corporate power are underscored once it is understood that the *institutional* mechanisms for the exercise of such power are legally constituted so as to be hospitable to tyrants and conducive to tyranny and corruption. It is difficult not to be struck by parallels between tyranny (as conceived by the tradition) and the possibility of corporate tyranny (which the tradition is yet to thoroughly theorize).

Conclusion

The axiomatic status of the Consensus in liberal public philosophy reflects its blithe assumption that the Rule of Law project can be straightforwardly integrated with capitalism: by simply ignoring the question whether the project's underlying principles are engaged by the existing constitution of economic power, it creates the impression that they stand in an unproblematic relation to one another. The Consensus is, then, a key incident of the legitimation story told to us by liberal public philosophy in its efforts to persuade us that we should give our allegiance to contemporary Anglophone liberal-capitalist societies. We are in effect given to believe that we can at once be devoted to the limited government tradition *and* to capitalist economic life, without any cost to the

former. However, it is my contention that allegiance to the existing capitalist constitution comes at the expense of the tradition's underlying principles.

Were economic power to be recognized as a *potential* target of the tradition's Rule of Law project, the soundness of this trade-off would be called into question, and liberal public philosophy would be faced with a stark choice. On the one hand, it could revise its legitimation story in order to explain why the trade-off is merited, which would entail an effort to show that the status quo with respect to economic power is reasonably justified (say because the capitalist constitution embodies respect for inviolable private property rights or is indispensable to our material well-being).[114]

The Consensus obscures the political choices which have been made regarding the integration of the Rule of Law with a particular way of economic life. Indeed, insofar the Consensus is upheld by omission—by simply failing to notice the relevance of the Rule of Law to economic power—it tends to deny the existence of such choices altogether. By arguing that economic power should be seen as a *potential* target of the limited government tradition's Rule of Law project, this study seeks to redress those failures. Moreover, it insists that the tradition's adherents must go on to articulate reasons why economic power should or should not be an *actual* target.

On the other hand, liberal public philosophy could accept that economic power should be an *actual* target of the Rule of Law project, a position that would, in my estimation, entail calling for the fundamental reconstitution of the existing constitution of economic life: existing economic government would be presented as illegitimate, if not 'a mere conspiracy of effective coercion'.[115] If this second option were adopted, liberal public philosophy would now be telling a de-legitimation story and would thereby have

[114] As I have confined myself to arguing that economic power should be considered a *potential* target, the evaluation of such considerations is beyond the scope of this study. See Timothy Endicott, 'Reason' (n 37), 85, 89 and 'The Impossibility of the Rule of Law' (1999) 19 Oxford Journal of Legal Studies 1, 11.
[115] Williams (n 17) 25.

reconstituted itself as a dissident philosophy. This alternative should not alarm the tradition's adherents: the tradition began its life as heterodoxy, and its early modern proponents were persecuted for their insistence on calling power to account.[116] It took a century for their ideas to become orthodoxy in the eyes of the American Founding Fathers.[117] It is often said that the limited government tradition is defined by its eternally suspicious attitude towards power. To which we must add: by adopting such an attitude, one is always in a certain sense a dissident.

There is of course a third option. Liberal public philosophy could continue to pretend that there simply is no need to ask whether economic power might be relevant to the limited government tradition's Rule of Law project. But if this approach were adopted—or, rather, maintained—liberal public philosophy would justifiably be seen as little more than an acquiescent source of shelter and comfort for great power.[118] While it would obviously be an error to read Sir Robert Filmer's *Patriarcha* without noticing its relationship to great power, it is equally an error to read today's Rule of Law of texts as though they do not occupy a position on the 'battlefield' where economic power seeks to promote its interests.[119] As discussed in the Introduction, what texts *say* and what they may *do* in a particular context are not the same things.

[116] Sidney was executed for his opposition, as he put it, to 'corrupt principles' and 'arbitrary power': quoted in Thomas G West (ed), 'Foreword' to Sidney (n 15) xxxvi.
[117] ibid xv, xxi.
[118] Or 'ideological' in the Marxian sense of that term: Karl Marx and Friedrich Engels, *The German Ideology* (International Publishers 1977).
[119] Skinner (n 40) 7.

Alasdair MacIntyre suggests that the following 'has become an indispensable moral maxim': 'Always ask about your own social and cultural order what it needs you and others not to know'.[120] Adapting this maxim for the limited government tradition, we might say, 'Always ask about a system of power what it needs you and others not to know'. So adapted, the maxim prompts us to wonder how to interpret the tradition's failure to call economic power to account.

[120] Alasdair MacIntyre, 'Social Structures and their Threats to Moral Agency' (1999) 74 Philosophy 311, 319.

3

THE LIONS & THE GREATEST PART

Introduction

The first aim

This Chapter's first aim is to extend the previous Chapter's enquiry into the origins and obstinacy of the Consensus. I will continue to explore the Consensus's roots in a peculiarly modern way of seeing power. When the world is viewed through the relevant modern filter, the governmental power conferred by private ownership is obscured. The only types of governmental power we tend to see are those that the state has monopolized *de jure*. They are the types of power we would now call 'political' or 'jurisdictional' power, such as the powers to arrest, imprison, seize property, and wage war. Today, the Leviathan fills our field of vision. The influence of this way of seeing—which is a constitutive element of liberal public philosophy—may help to explain the origins and stubbornness of the Consensus: it blinds the tradition not only to the nature of the governmental power wielded by property owners, but to its very existence.

The modern ways of seeing which this Chapter calls into question were developed and disseminated by innumerable thinkers.[1] However, the focus here is on John Locke's contribution, and, in particular, on his treatment of the *internal power* wielded by employers over employees. According to the way of seeing internal power propagated by Locke, there seems to be no reason to wonder whether employers might enjoy 'arbitrary' power over employees, in the limited government sense. In turn, there seems to be no point in asking whether the legitimacy of the employment relationship should depend upon its being legally constituted on the basis of limited government constraints.

By paying special attention to Locke, I am not suggesting that the Consensus stands or falls according to the soundness of his theory. Even if readers are persuaded by my critique of Locke's ways of participating in the Consensus, they may nonetheless be able to defend the Consensus on grounds that are unaffected by my critique. If so, the articulation of such grounds would contribute to the fulfillment of one of this study's aims, which is to encourage further enquiry and debate regarding the Consensus.

Why, then, does Locke warrant special attention at all? Locke offers a particularly influential account of the modern way of seeing power described earlier, so it makes sense to examine his account. Sir Frederick Pollock described Locke's two treatises as 'probably the most important contribution ever made to English constitutional law by an author who was not a lawyer by profession'.[2] Whether or not one agrees that Locke is *the* most important contributor, Pollock's willingness to ascribe this mantle to Locke says something about the latter's influence. Given Locke's eminence within the tradition, his conclusion that its attention should be confined to *state* power is likely to have carried

[1] On the legal dimension: S F C Milsom, *Historical Foundations of the Common Law* (Butterworths 1969). On the capitalist 'differentiation of "spheres", especially the "economic" and the "political"', see E M Wood, *Democracy Against Capitalism* (CUP 1995) ch 1 ('*Democracy*').

[2] Sir Frederick Pollock, *Essays in the Law* (Macmillan and Company 1922) 80. For Locke's influence on US constitutionalism, see Gary L McDowell, *The Language of Law and the Foundations of American Constitutionalism* (CUP 2010) ch 3.

weight among the tradition's adherents. Locke's influence may help to explain the existence and obstinacy of the Consensus.

Further, as discussed in Chapter 5, Locke has played an important part in cultivating the widespread belief that an *indispensable* aim of the tradition's project is the protection of strong private property rights, including those rights that confer power over others. This too lends credibility to the Consensus. In sum, then, Locke's account of the limited government project goes to the heart of this study's major concerns, and this is why his doctrines merit special attention.

However, it is important to reiterate that the relevant way of seeing is not peculiar to Locke. On the contrary, it is a defining feature of the transition from the typically feudal to the typically modern way to 'systematise certain features' of the 'facts of power'.[3] My critique of Locke's way of seeing therefore has implications that extend beyond his theory: the critique is a negative reflection on the prevailing, characteristically modern, way of seeing power.

The second aim

The second aim of this Chapter is to develop my argument that the Consensus is inconsistent with fidelity to the underlying principles of the limited government tradition's Rule of Law project. Fidelity to those principles requires us to recognize that, according to the criteria governing the tradition's use of the term 'arbitrariness', one could meaningfully describe the capitalist employment relationship as a source of 'arbitrary' power. I contend that the relationship is indeed a source of arbitrary power. It offends limited government principles by establishing a set of manipulative social relationships in which employees are the *manipulanda*.

[3] Milsom (n 1) 8.

If this were recognized, the tradition would be obliged to engage in the kind of enquiry and debate with respect to internal power that its early-modern forebears sought to generate in relation to proto-state power. Among other things, it would be obliged to treat internal power as at least a *potential* target of the Rule of Law. This would involve *asking* whether, as a matter of limited government principle, there are sound reasons to call for the employment relationship to be re-constituted, comprehensively and systematically, in accordance with the Rule of Law.

Under a re-fashioned constitution, the applicable limited government constraints might differ from those that the tradition imposes on the state, and for good reason: the two contexts are not identical. But the tradition's underlying principles would demand that, whatever their form, the constraints must be substantively equivalent in moral terms to those which holders of state power are required to accept on pain of illegitimacy.

Liberal public philosophy's portrait of internal power has inherited key features of the Lockean picture, especially the emphasis on juridical equality and freedom of contract. The normative substance of this Chapter's response to those features has much in common with socialist or social democratic critiques of the capitalist employment relationship. Indeed, as I suggest in the Epilogue, although socialism expresses itself using different terminology, it implicitly shares the limited government tradition's commitment to moral equality and its opposition to manipulative social relationships.

However, the argument below differs from its more familiar counterparts insofar as it is presented in the vernacular of the limited government tradition. The tradition's adherents, socialists, and social democrats, are all encouraged to think of the employment relationship as a *potential* target of transformation along limited government lines. The tradition's way of seeing power—which was first developed by Locke, among others—excludes that possibility from the limited government tradition's agenda. It is a way of

seeing that makes the Consensus seem eminently plausible, not only in the employer-employee context, but beyond it as well.

1. Locke's contribution to making law about power

Locke, in common with other notable thinkers of his day, believed that it is illuminating to address questions of political philosophy from the vantage point of 'men'[4] conceived as inhabitants of a hypothetical 'state of nature'. One question in particular was considered fundamental: why should men exit the state of nature in order to establish a jurisdictional power to rule over them?[5] Locke and others suggested that the promise of *freedom under law* provides a compelling reason to exit the state of nature:

> For *Law*, in its true Notion, is not so much the Limitation as *the direction of a free and intelligent Agent* to his proper Interest, and prescribes no farther than is for the general Good of those under that Law … and that ill deserves the Name of Confinement which hedges us in only from Bogs and Precipices. So that, however it may be mistaken, *the end of Law* is not to abolish or restrain, but *to preserve and enlarge Freedom*: … For *Liberty* is to be free from restraint and violence from others which cannot be, where there is no Law: But Freedom is not, as we are told, *A Liberty for every Man to do what he lists*: (For who could be free, when every other Man's Humour might domineer over him?)...[6]

Locke contends that without a jurisdictional power capable of making, adjudicating, and executing positive laws (of the right kind), people would be prone to exercise their powers arbitrarily (according to their 'humour'), without giving due weight to those things which are worthy of respect (eg, the things designated by natural law: their 'lives, liberties, and estates'[7]). Where jurisdictional power is constituted and exercised in

[4] I use 'man' and 'men' and masculine pronouns in my exegesis, but not otherwise, in order to accurately record the idiom employed in the texts, and this as a reminder that the tradition generally failed until recently to insist on the moral equality of women: see Section 5 below.
[5] John Locke, *Two Treatises of Government* (CUP 1988) II §57 ('*Treatises*') II §§34 and 123. For the similar views of Suárez and Vitoria, see Quentin Skinner, *The Foundations of Modern Political Thought,* vol 2 (CUP 1978) 160-161 ('*Foundations*').
[6] Locke, *Treatises* (n 5) II §57. Emphasis in original.
[7] ibid II §123.

accordance with laws of the right kind, thought Locke, the result is a true and expansive freedom, which he understood as freedom in accordance with natural law.

In order to understand Locke's analysis, it is necessary to note four of the relevant connections in which Locke employs the term 'power'.

> (A) Power refers to a man's effective power, that is, simply what he is capable of choosing to do or to refrain from doing. This first sense of power Locke associates with an idea of freedom as the absence of external impediment:[8] '...the *Idea* of *Liberty,* is the *Idea* of a Power in any Agent to do or forbear any particular Action, according to the determination or thought of the mind…'.[9] I call this 'effective power (A)'.
>
> (B) Power refers to what a man may do according to the law of nature, if he is capable, either in the state of nature or under 'supreme civil government'. I call this 'natural law power (B)'. Here Locke advances an alternative idea of liberty.[10] Locke holds that the state of nature is 'a state of liberty', in which men are naturally free; 'yet', he adds, 'it is not a state of licence'. This is because the 'state of nature has a law of nature to govern it, which obliges every one'.[11] Subject to any restrictions imposed by the law of nature, individuals may exercise legitimate power over others in certain contexts.
>
> (C) Power refers to what men may do according to natural law after 'they enter into society'. I call this 'juridical power (C)'. Men must 'give up' a measure of

[8] Which after Isaiah Berlin, we might consider 'negative': 'Two Concepts of Liberty' in H Hardy (ed), *Liberty* (OUP 2002).
[9] John Locke, *An Essay Concerning Human Understanding* (OUP 1975) bk II, ch XXI §8 ('*Essay*').
[10] Some might consider this an instance of 'positive' liberty after Berlin's classification. However, given the difficulties with Berlin's taxonomy, the question how to classify Locke's ideas of freedom lacks an obvious answer: on Berlin, Quentin Skinner, 'A Third Concept of Liberty' *London Review of Books* (London, 4 April 2002).
[11] Locke, *Treatises* (n 5) II §6.

their natural law power (B) 'into the hands of the society',[12] now being obliged 'to assist the executive power of the society, as the law thereof shall require' (ie, as a matter of both positive and natural law).[13] Although juridical power (C) lacks certain components of natural law power (B), Locke argues that it confers freedom in its most expansive form, the 'liberty to dispose, and order as he lists, his person, actions, possessions, and his whole property, within the allowance of those laws under which he is, and therein not to be subject to the arbitrary will of another, but freely follow his own'.[14]

(D) Power refers to the jurisdictional power established over men who have consented to be under it. Such power also is not licence, as it 'can never be supposed to extend farther than the common good'; so 'whoever has the legislative or supreme power of any commonwealth is bound' to respect that end (as a matter of at least natural law).[15] I call this 'political power (D)'.

Power in each of (B), (C), and (D), is an evaluative term. Natural law power (B) and juridical power (C) refer to what an individual, and political power (D) to what the state, may do or refrain from doing according to the law of nature. Effective power (A), by contrast, is not an evaluative term, referring simply to what is capable of being done by any 'Agent',[16] including an individual or an institution.

A chief reason for exiting the state of nature is to align actual instances of the exercise of effective power (A) more consistently and reliably with the law of nature so

12 ibid II §131.
13 ibid II §130.
14 ibid II §57. Compare Kant's claim that 'the human being in a state...has relinquished entirely his wild, lawless freedom in order to find his freedom as such undiminished, in a dependence upon laws, that is, in a rightful condition, since this dependence arises from his own lawgiving will': Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press 2009) 199 ('*Freedom*').
15 ibid II §131.
16 Locke, *Essay* (n 9) bk II, ch XXI §§1-10.

that citizens and holders of jurisdictional power, as the case may be, recognize that only the exercise of juridical power (C) and political power (D), respectively, are permissible. The positive law, enacted, interpreted, and enforced by the state, is seen as indispensable to the achievement of that end:[17] positive law must faithfully reflect the natural law in its application to both individuals and to the state.

The tradition is distinguished in part by two ways in which it seeks to *make law about power*. Firstly, the tradition makes law about power by making its accounts of the very idea of law focus on the question of the proper relationship between positive law, natural law, and power (in one or more of the four senses just described).

Secondly, the tradition makes law about power by holding that, once men are under a 'supreme civil government', a certain relationship between jurisdictional power, positive law, and natural law is necessary. Its rationale is to ensure that the exercise of effective power (A) by state institutions is comprehensively and systematically aligned with the natural law limits inherent in political power (D), limits which protect the 'lives, liberties, and estates' of the governed against arbitrariness. Unless such a relationship is established, says Locke, men would be better off remaining in the state of nature. He contends that we have a moral obligation to establish and to maintain law—that is, to *make law*—for the sake of preventing the arbitrary exercise of governmental power, whose systematic occurrence is a hallmark of *tyranny*.[18] As discussed in Chapter 1, that moral obligation is based on the principles of moral equality for all and freedom for all from manipulative social relationships.

[17] Peter Laslett, 'Introduction' to Locke, *Treatises* (n 5) 118-119.
[18] This is not meant to imply that the tradition proposes no other reasons for having law, eg, the resolution of coordination problems.

2. Ownership and jurisdictional power

The transition from feudal to modern power relations saw jurisdictional power reposed exclusively in the state. One consequence of the transition was the eclipse of *dominium*, which was a formalized way of combining jurisdiction, property ownership, and relations of economic dependence and power.[19] *Dominium* conferred upon lordship not only a measure of political authority (eg, the right to 'hold court and declare law'),[20] but also a *de jure* authority to extract economic resources from the lord's subjects.

The relevant dimensions of the transition are captured by S F C Milsom's way of trying to make *dominium* intelligible to modern readers. During feudalism, '[l]ordship and ownership, government and property, were not ... clearly distinct as they seem to us...':[21]

> [L]and was also government and the structure of society. Today we think of the ownership of a suburban garden, or even of a great agricultural estate, as being something like the ownership of a motor-car. They are just forms of wealth, the objects of legal protection. Lordship, the Latin *dominium*, is to us an ambiguous word, because to us the concepts of ownership and jurisdiction are distinct: to understand this starting-point, we must think away that ambiguity, and not try to resolve it. The rights of a great landowner were not over empty land but over the people who worked the land, or over inferior lords with rights over those people. Lordship was property, the object of legal protection from above, just as it was the source of legal protection for rights below.[22]

It is also important to note Milsom's observation that, 'Feudalism was not a system, or even an ideal, having fixed properties. Such definite ideas as the word connotes are the creation of lawyers and historians seeking to systematise certain features which the facts of power might produce in medieval society'.[23] Although England remained substantially an agrarian economy when Locke wrote the two treatises, the process of

[19] E M Wood, *Democracy* (n 1) ch 1.
[20] Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press 1983) 312.
[21] Milsom (n 1) 8. E M Wood, *From Citizens to Lords: A Social History of Western Political Thought from Antiquity to the Late Middle Ages* (Verso 2008) 22: 'With the rise of feudalism', the 'tension [between *imperium* and *dominium*] was resolved on the side of *dominium,* as the state was virtually dissolved into individual property.'
[22] Milsom (n 1) 88.
[23] ibid 8.

reconceptualization and systematization of post-feudal facts of power was in an advanced stage.[24] By Locke's time, 'the Latin *dominium'*, was already 'an ambiguous word' in the way Milsom notices.

One of Locke's chief aims in the two treatises was to obliterate the vestigial political trappings of the feudal notion of *dominium*. He wanted finally to do away with the notions that 'governmental power, jurisdictional power' is *dominium* and that '[o]ffice is property'.[25] Such views, Locke thought, provided succor to absolutism. Holders of jurisdictional power should not be entitled to treat their offices as property and their power over others as personal prerogatives. Property and government must be seen as distinct, and governmental power should be confined strictly within the limits of political power (D). Such limits would ensure, among other things, that the state's subjects might securely enjoy *their* property (which, in time, would come to be seen as 'private' property).

So, Locke aimed 'to resolve' the 'ambiguity' spoken of by Milsom, and he wanted to do so in a way that would encourage his readers to *see* ownership and governmental power as *obviously* distinct. According to this way of seeing power, the state is synonymous with 'government' and the power over others conferred by private ownership, if it is noticed at all, is not seen as governmental. The people's property must be protected from the state by limited government measures; but the people do not require limited government protection from property. To the extent that Locke's theorization of that new way of seeing has been influential, Locke himself contributed to reconceptualizing and systematizing the transition to modern life.

[24] Neal Wood, *John Locke & Agrarian Capitalism* (University of California Press 1984).
[25] 'Interpretation of Anglo-Saxon Land Books and Charters' in R Schuyler (ed) *Frederic William Maitland: Selections from his Writings* (CUP 1960) 151.

2.1 Permissible and impermissible governmental power

There are tensions between Locke's empirical and normative accounts of the employment relationship. In order to illuminate these, it is useful to begin by considering how he distinguishes (i) between three kinds of *permissible* power over others, as well as (ii) between these kinds of *permissible* power and certain forms of *impermissible* power.[26]

Sets	**Powers over others: set (a)**	**Powers over others: set (b)**	**Powers over others: set (c)**
	eg, jurisdictional power	eg, parental power	eg, just enslavement
	may only be exercised *with consent*	may be exercised *without consent*	may be exercised *without consent*
	conventional (ie, exists by agreement)	*occurs naturally,* and is *justified by natural law*	does *not occur naturally,* but is *justified by natural law*

The elements in column (a) combine with one another to form a set, as do those in each of column (b) and column (c) respectively:

> - Jurisdictional power belongs to set (a): it entails power over others that may only be exercised with their consent, and it is conventional (ie, it exists by agreement rather than by nature). Such consent is necessary if moral equality between persons is to be maintained in the establishment and exercise of jurisdictional power. Locke holds that all adults are moral equals by nature, which

[26] The table is a distillation of the categories Locke employs in *Treatises* (n 5).

implies, among other things, that no adult owes *natural* jurisdictional obligations to anybody else.[27]

- Parental power belongs to set (b): it entails powers over children that may be exercised without consent, it occurs naturally, and it is justified by natural law so long as its proper limits are respected.

- Just enslavement belongs to set (c): it entails powers over others that may be exercised without the slaves' consent, and, although it does not occur naturally, it is justified by the law of nature.[28]

Outside these categories of *permissible* power lie various types of *impermissible* power over others. Unjust enslavement and absolutism are two cases addressed by Locke: they both involve the exercise of powers over others in a manner contrary to the law of nature, and they are conditions to which nobody may validly consent.[29]

2.2 Locke's account of the employment relationship

Does the power exercised by property owners over their economically dependent employees require the *consent* of the latter? Is it *conventional* or is it *natural*? How does such power stand in relation to the categories of permissible and impermissible power just identified?

If, in an attempt to respond to those questions, we carefully study Locke's portrait of the employment relationship, we uncover a range of tensions and contortions.

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[27] Locke, *Treatises* (n 5) II §54. Compare Joshua Cohen, 'Structure, Choice, and Legitimacy: Locke's Theory of the State' in Christopher Morris ed, *The Social Contract Theorists: Critical Essays on Hobbes, Locke, and Rousseau* (Rowman & Littlefield 1999) 147, 149.

[28] James Farr, '"So Vile and Miserable an Estate": The Problem of Slavery in Locke's Political Thought' (1986) 14 Political Theory 263.

[29] Just as sets (a), (b), and (c) could be interpreted as Locke's central cases of legitimate types of power over others, the impermissible types of power over others could be regarded as his central cases of certain 'ills': T A O Endicott, 'The Irony of Law' in John Keown and Robert P George (eds), *Reason, Morality, and Law: The Philosophy of John Finnis* (OUP 2013).

I would argue that the tensions and contortions are revealing: they are the price of seeking, in effect, to reconcile the capitalist employment relationship with a commitment to moral equality. Locke does not set out *explicitly* to achieve such reconciliation. On the contrary, he does not openly acknowledge that, by his own lights, it would make moral sense to evaluate internal power in limited government terms. However, his remarks on the employment relationship do seem to reflect a tacit desire to demonstrate that the relationship does not offend moral equality.

On the one hand, Locke suggests that, in certain respects, the power wielded by any particular employer over any particular employee—for convenience, 'Employee *x*' and 'Employer *y*'—belongs to set (a). The terms and conditions of such power are portrayed as the products not of nature but of a freely established agreement between the parties. Insofar as Employer *y* appears to have secured the voluntary compliance of Employee *x*, the employer's power over the employee does not seem to entail disrespect for equal liberty, or any other aspect of moral equality. The power of Employer *y* is therefore presented, implicitly, as belonging to set (a), one of Locke's categories of permissible power. Textual support for this can be derived from §85 of the *Second Treatise,* in which Locke says that Employee *x* is 'a Free-man' who 'gives the Master but a Temporary Power over him, and no greater than what is contained in the *Contract* between 'em'.[30]

On the other hand, however, on Locke's own empirical account of internal power, the two conditions which define set (a)—namely, consent and conventionality—tell only part of the story of how it has come to pass that Employee *x* is obliged to obey the directions of Employer *y*.

[30] Locke, *Treatises* (n 5) II §85. Emphasis in original.

2.2.1 Consent

Locke observes that the dependent economic status of employees means that employees must always serve at least some *one* employer:

> ...the greatest part of Mankind, who are given up to Labour, and enslaved to the Necessity of their mean Condition; whose Lives are worn out, only in the Provisions for Living....all their whole Time and Pains is laid out, to still the Croaking of their own Bellies, or the Cries of their Children.[31]

Locke appears to be saying that employer and employee are inter-related social categories that one occupies—in the employee's case, independently of one's will—according to whether one is a seller of labor or a buyer, which depends upon one's relationship to concentrated economic power (ie, to economic 'Necessity').[32]

According to Locke, Employee *x* must have *consented* to serve Employer *y*, or else be deemed Employer *y*'s slave. But he also implies that, in reality, Employee *x* lacks the capacity to withhold consent from *all* employers. In the absence of such capacity, from Employee *x*'s perspective, the distinction between service and slavery might feel as though it rested on a thin reed.

If labor market conditions were such that service to Employer *y* represented the only *apparent* source of subsistence, the juridical option of refusing to serve would be experienced as an unreal alternative.[33] If it seemed to Employee *x* that there were no other employers who would purchase Employee *x*'s labor power, then so far as

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[31] Locke, *Essay* (n 9) bk IV, ch XX, §2.

[32] This is analogous to Karl Marx's view that which 'class' one belongs to is determined by one's relationship to the means of production, ie, one's position in what he called the 'realm of necessity': *Capital* Volume III (Penguin Classics 1993).

[33] According to Wood, Locke observed that in his day demand for day-laborers exceeded supply. This may have led Locke to assume that servants *would have a choice* between masters: N Wood (n 24). However, as a matter of limited government principle, this shouldn't be sufficient; protection for moral equality shouldn't be contingent on labor market conditions; a legal obligation to respect moral equality should be constitutive of the relation itself. (A similar point could be made in relation to Locke's exhortation in favor of voluntary charitable giving as a way of relieving the needy state of economic inferiors.) As Locke places the distribution of economic resources 'out of the bounds of society, and without compact', and (reasonably) assumes 'an inequality of private possessions' (Locke, *Treatises* (n 5) II §50), equality of bargaining power is neither a condition nor a feasible consequence of mere juridical equality.

Employee *x* was concerned, it would *necessarily* be Employer *y*. Being subject to 'Necessity', Employee *x* would be compelled to serve Employer *y*, on Locke's own view of compulsion:

> [H]e that forced a promise from me ought presently to restore it, *i.e.*, quit me of the obligation of it; or I may resume it myself, *i.e.*, choose whether I will perform it ... Nor does it alter the case to say, I gave my promise, not more than it excuses the force, and passes the right, when I put my hand in my pocket, and deliver my purse myself to a thief, who demands it with a pistol at my breast.[34]

Compulsion would occur notwithstanding Employee *x*'s possession of a juridical power (C) to refuse to serve Employer *y* (which was not possessed by certain feudal economic inferiors). This is, of course, the distinctive plight of juridically 'free labor' under capitalism, the essence of the wage-relation that characterizes the domination of the working class by the capitalist class, according to Karl Marx:

> [T]he worker, whose sole source of livelihood is the sale of his labour power, cannot leave the *whole class of purchasers, that is, the capitalist class,* without renouncing his existence. He belongs not to this or that capitalist but to the *capitalist class,* and, moreover, it is his business to dispose of himself, that is, to find a purchaser within this class.[35]

On this view, employees labor under an informal but nonetheless potent obligation of necessity that enables their economic subjection by employers:[36] Employee *x* always owes *tribute* to a member of the class of employers. The worker's 'business' is 'to find a purchaser within this class', in satisfaction of what is effectively the worker's *de facto* but not *de jure* economic *obligation* to the 'whole class of purchasers'.

The employers' business, by contrast, is to find employees whose labor power may be purchased. By bringing the labor power of Employee *x* under his control,

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[34] Locke, *Treatises* (n 5) II §186, see also II §176. Compare Justice Higgins *FEDFA v BHP Ltd* (1911) 5 CAR 12 (Australia): see main text at note 72, Chapter 2 herein.
[35] *Wage Labour and Capital* quoted in Shlomo Avineri, *The Social & Political Thought of Karl Marx* (CUP 1968) 164.
[36] See also Max Weber, *Economy and Society* (University of California Press 1978) vol 1, 730-731: see main text at note 70, Chapter 2 herein.

Employer *y* has *in effect* augmented the effective power (A) at his disposal,[37] as Locke himself implies in the following:[38]

> The chief end of trade is riches and power, which beget each other. ... Power consists in numbers of men, and ability to maintain them. Trade conduces to both these [riches and power] by increasing your stock and your people, and they each other.[39]

Here Locke engages with developmental tendencies of certain facts of power in transition: ownership, now *without* the political trappings of *dominium*, more and more becomes an independent source of substantial power over others:[40] the concentration of resource ownership creates the conditions of 'Necessity' under which employees must sell their labor time to employers.[41]

As economic dominance no longer depends upon *de jure* privileges and corresponding obligations, we can intelligibly speak—as some now do—of 'the privileged' in a society without 'privileges'.[42] The transition from feudalism is marked in part by the displacement of *de jure* relations of economic power in favor of the kind of contractual employment relationship described by Locke. But the eclipse of feudal

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[37] Employer *y* directs how the effective power (A) of Employee x is applied: Locke, *Essay* (n 9) bk II, ch XXI §§8. Note that on Ripstein's account, Kant holds that a person's 'powers can be interfered with ... by usurping them... I usurp your powers if I exercise them for my own purposes, or get you to exercise them for my purposes.... I am like the despot who uses his office for a private purpose': Ripstein, *Freedom* (n 14) 43-44.

[38] Consider how F A Hayek finesses this point: *The Constitution of Liberty* (Routledge 2006) 118-119.

[39] Quoted in N Wood (n 24) 32.

[40] E M Wood, *Democracy* (n 1) 208.

[41] Neal Wood convincingly argues that Locke's conception of wage-labour was based on incipient English *agrarian* (not industrial) capitalism of which Locke was a keen observer: N Wood (n 24) generally, especially 44, 85-92. When Locke used the term 'servant' in the *Second Treatise,* he had in mind principally the agricultural 'day labourer' (neither the 'servant in husbandry' (42), nor 'token workers' (42), nor domestic servants, nor the 'great men's menial servants' (41)). As Wood explains, Locke writes about agricultural day labourers who 'were paid by the tenant for his labor power during a fixed period of time' (42). In my view, that Locke principally had in mind the agricultural day labourer when he spoke of 'servants' in the *Second Treatise* is evidenced by (i) the famous Turfs passage (Locke, *Treatises* (n 5) II §28), and (ii) his assumption that servants serve on a fixed term basis (which day labourers did) rather than on an open-ended basis (as domestic servants did). See, further, Joshua Cohen (n 27) note 7, Jeremy Waldron, *The Right to Private Property* (OUP 1988) 144-148, 225-232, James Tully, *A Discourse on Property: John Locke and his adversaries* (CUP 1980), C B Macpherson *The Political Theory of Possessive Individualism* (OUP 1962).

[42] On feudal privilege, Weber (n 36) vol 1 843. Milsom (n 1) 8-11, 89-90.

dominium does not bring about the emancipation of employees from the power of employers.

On the one hand, Locke himself acknowledges that employers typically secure the subordination of employees by exploiting the latter's economic dependence. On the other hand, he obscures that dimension of the employment relationship by advancing a theory that encourages us to see only the parties' juridical equality. Locke's way of seeing the employment relationship anticipated, and perhaps contributed to, the way of seeing characteristic of liberal public philosophy's social vision.[43]

2.2.2 Nature

§85 of the *Second Treatise*, which I quoted earlier, gives the impression that relations between Employee *x* and Employer *y* are a mere matter of agreement, and are therefore not natural, but rather *conventional*. However, elsewhere Locke describes the relations of economic dependence ('Necessity') that generate the power of employers over employees as 'the natural and unalterable State of Things in this World, and the Constitution of humane Affairs'.[44]

Further, at §77 of the *Second Treatise,* Locke seems to place the employment relationship on the same plane as the more plausibly *natural* social relations of 'parents and children', which belong to set (b) (ie, a natural relation that entails powers over persons which may be exercised without their consent):

> God having made Man such a Creature, that, in his own Judgment, it was not good for him to be alone, put him under strong Obligations of Necessity, Convenience, and Inclination to drive him into *Society*, as well as fitted him with Understanding and Language to continue and enjoy it. The *first Society* was between Man and Wife, which gave beginning to that

[43] The reading of Locke just offered contradicts James Tully's. According to Tully's view, Locke ruled out wage-labour on the ground of its ineradicable involuntariness, but held that the employment relationship is legitimate if the employee has the choice not to be an employee at all: Tully (n 41) 136ff. However, as has been pointed out, this appears to misread Locke: N Wood (n 24) 89, 85-92; Joshua Cohen (n 27) fn 7; Waldron (n 41) 144-148, 225-232.
[44] Locke, *Essay* (n 9) bk IV, ch XX, §2.

> between Parents and Children; to which, in time, that between Master and Servant came to be added....[45]

The subordination of employees is seen as 'the natural and unalterable State of Things in this World' partly because Locke's theory of property sees the concentration of economic resources as natural and unalterable.[46] The 'partage of things, in an inequality of private possessions, men have made practicable out of the bounds of society, and without compact' thanks to the advent of money in the state of nature.[47]

2.3 Tensions within Locke's way of seeing the employment relationship

On Locke's account, the law of nature gives all men moral equality with one hand, and deprives them of equal access to resources with the other. That leads to tensions in Locke's way of seeing the employment relationship. Locke holds that no master can claim that Employee *x* is required by nature, or birth, or law, to serve him and therefore has no choice in the matter; such a claim would be inconsistent with Employee *x*'s moral equality. But, despite this, Locke acknowledges that employees are in a state of natural dependence on employers—and therefore in their thrall—by virtue of the 'obligations of necessity' arising from the 'the natural and unalterable' concentration of resources.

So on Locke's own account of the *de-facto* obligations of necessity that bind employees to employers, it appears that relations between employees and employers do not belong easily to either set (a) or to set (b). Recall that under set (a) the terms and conditions of the power are a matter of convention as between the parties (agreement), and their legitimacy depends upon both parties having given their consent; and under set

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[45] Locke, *Treatises* (n 5) II §77. Emphasis in original.

[46] Why natural? Locke holds that the distribution of property and the advent of money, which allows the transcendence of the 'spoilage condition', is 'given out of the bounds of society and without compact': Locke, *Treatises* (n 5) II §50. See further, C B Macpherson (n 41) 208-210; J Cohen (n 27) 162. Why unalterable? Locke holds that the consent of owners would be required before an alteration may legitimately occur, and it is reasonable on Lockean premises to presume that owners would not consent to any far-reaching redistribution.

[47] Locke, *Treatises* (n 5) II §50.

(b) the power occurs naturally, it is justified by natural law so long as its proper limits are respected, and it may be exercised without the consent of those who must obey it.

Although particular employment relationships are allocated by Locke to set (a), his description of how an individual employee stands *vis-à-vis* the class of employers reveals that (absent *ad hoc* countervailing legal or other factors) employees are *de-facto* embedded in systematically manipulative social relationships, in which they are the *manipulanda*. Set (a) envisages consensual relations between persons characterized by a meaningful opportunity to give or withhold consent, which promotes mutual respect for moral equality. If set (a) were used as a filter through which to see the employment relationship, it would mislead us as to the *empirical* nature of internal power.

Further, given the obligations of necessity under which Employee *x* labours, set (a) is a *morally* misleading way of seeing the particular, bilateral relations between Employee *x* and Employer *y*. As I will argue in Section 2.3 below, the nominal juridical equality of the parties obscures how Employee *x*'s moral equality may be denied systematically in relations with Employer *y*, absent *ad hoc* countervailing legal or other factors. Indeed, in response to bitter experience, especially after the advent of industrial capitalism, socialists and social democrats fought for, and attained, some scope for the exertion of countervailing power through (strictly controlled) collective bargaining and piecemeal legal 'regulation' of aspects of the relationship (eg, dismissal). Although those measures may sometimes substantially ameliorate employees' experience of internal power—and, in such cases, have significant moral value—it is important to recognize their limitations as well as how they differ from Rule of Law measures. I address such matters in more detail elsewhere.[48]

Despite the potentially misleading nature of juridical equality as embodied in the formal, contractual features of relations between Employee *x* and Employer *y,* those

[48] See the discussion in Chapter 2 (Section 4.3) and Chapter 4 (Section 12).

properties of the employment relationship are not simply irrelevant. They are real features of the systematization and reconceptualization of characteristically modern forms of power. A hallmark of the transition from feudalism is the fact that now obligations of necessity arise *de facto* and do not affect the *de jure* equality of the subordinate party. This innovation is partly captured by set (a)'s way of seeing power. It would be obscured if the employment relationship were ascribed to set (b), as would the genuine moral progress entailed in the abolition of the *de jure* economic obligations of feudalism.

Indeed, one might say that Locke's prohibition of slavery and vassaldom represents, in effect, the imposition of a measure of limited government on economic power: he implies that relations between economic superiors and inferiors cannot legitimately be *constituted* so as to confer certain kinds of power on the former. Locke rules out, as contrary to natural law power (B), certain modes of rule over the economically weak that the economically strong might be able to get away with introducing as a matter of their sheer effective power (A).

Finally, the employment relationship cannot fit into set (c), which contemplates 'just' slavery in certain circumstances: the relevant kind of slave may only be enslaved because of some unjust conduct on his part, which would not obviously apply to employees in general.[49]

The sets just described are the filters presented to us by Locke's theory as sound ways of seeing *and* evaluating power.[50] However, once we reflect on the incipient internal power that Locke *himself* describes, it becomes apparent that they are inadequate. Because

[49] A nuance is added by Macpherson: 'If men are by nature equally rational, in the sense of equally capable of looking after themselves [as Locke holds], those who have fallen permanently behind in the pursuit of property can be assumed to have only themselves to blame': C B Macpherson (n 41) 245.

[50] According to Tully, Locke holds 'that our ideas, and so our language, are descriptive and normative and that, with respect to world which men make, our ideas enjoy archetypal priority': Tully (n 41) 23-24.

of this inadequacy, Locke is caught on the horns of a dilemma. Either he maintains, implausibly, that set (a) represents an adequate way of seeing the employment relationship. Or, alternatively, he allocates the relation to set (b) or set (c), which would see employees reduced to the same status as children (whom parents may govern without the children's consent subject to natural law) or to the same status as the justly enslaved (whom masters may govern without the slave's consent because the slave has committed an injustice). But Locke goes out of his way to distinguish employees from children as well as from all kinds of slave.[51] Each such alternative to set (a) is unpalatable for Locke.[52]

The awkwardness in Locke's account arises because of the *particular ways* of seeing power he contrives in order to keep ownership and government apart and thereby break with the feudal concept of *dominium*. Although *dominium* is inadequate to the modern facts of power—empirically and normatively—so too are Locke's ways of seeing power. Why, then, would Locke choose the particular ways of seeing power that he did?

It seems that Locke has two principal reasons for doing so. The first reason is connected with *how* he chooses to make his case *against absolutism*. The second reason stems from Locke's desire to secure protection in favor of property owners (i) *from jurisdictional power* and (ii) *for their economic power over others*. As I show below, Locke combines his attack on political absolutism with his defence of economic power by holding:

> (i) that it *is not* impermissible for employers to exploit the economic dependence of employees in order to secure the obedience of the latter, subject to certain constraints;

[51] Locke, *Treatises* (n 5) I §42, 43; II §§ 24, 77, 85, 86, 87.
[52] Among other things, this is because Locke seeks to present all adults, including servants, as beneficiaries of juridical equality, which is a status not enjoyed by children or slaves.

(ii) that such exploitation does not deny the moral equality of employees; and

(iii) that, by contrast, it *is* impermissible for a pretender to jurisdictional power to exploit the dependence of economic dependents in order to secure the latter's submission; legitimate jurisdictional power must be based on genuine consent.

Why (iii)? Moral equality is disrespected where genuine consent is not forthcoming, where the assent of those under jurisdictional power is secured manipulatively. But then, how (and why) maintain commitment (i)? Where does (i) leave the moral equality of employees in their relations with employers?

3. Moral equality, jurisdictional power, and economic power

In Chapter 1, I argued that the idea of moral equality is central to the limited government tradition's Rule of Law project. In this Section, I suggest that it is a fundamental imperative driving key elements of Locke's theory. In particular, it seems that a chief aim of Locke's conception of limited government is to ensure recognition of moral equality during two phases in the life of the state's jurisdictional power:

(i) in those deliberative relations undertaken for the purposes of establishing jurisdictional power (the 'first phase'); and

(ii) in relations between the individual and established jurisdictional power (the 'second phase').

The strengths and the weaknesses of Locke's conception of limited government can be ascertained by considering the rigor of his insistence on moral equality in the different contexts his theory addresses. In connection with state power, threats to moral

equality are searchingly scrutinized and the sanctity of moral equality is rigorously defended.[53]

By contrast, the conception's weaknesses are revealed in the employment context. Locke's emphasis on the juridical equality embodied in the employment contract implies that the employment relationship reflects mutual respect for moral equality. However, other aspects of his account suggest that the *de-facto* constitution of the relationship permits employers to systematically disrespect the moral equality of their employees.

Locke lays the philosophical foundations of a way of seeing power that applies different moral standards to economic power and to state power respectively. Moreover, his way of seeing economic power makes the very idea of such a comparison seem out of place, just as it obscures the manipulative qualities of the employment relationship. Locke's theory effectively prescinds economic power from the limited government tradition's project. Modern economic power is not perceived as a potential source of 'arbitrary' power, notwithstanding that Locke's own empirical account of internal power, as well as the underlying principles he employs in his attack on absolutism, provide grounds for such a perception.

3.1 Locke's ideas of moral equality and 'freedom'

What is the place of moral equality in Locke's theory? A postulate of Locke's theory is that all men naturally enjoy equal liberty: we owe no *natural* duties of obedience to any other adult. It will be recalled that this is the second axiom of the fourfold idea of moral equality, which is a defining commitment of the limited government tradition.[54] In the

[53] Save to the extent that Locke's theory implies that penal economic power may legitimately be exercised: see note 75 below.
[54] See Chapter 1, Section 3.

state of nature, no man has jurisdictional power over any other *ex hypothesi*.[55] If jurisdictional power were natural, then men would not be naturally free and their consent would be immaterial. However, as jurisdictional power is not natural, it is something made by men, who, on Locke's account, deliberately agree to make it:

> ...Governments must be left again to the old way of being made by contrivance, and the consent of Men . . . making use of their Reason to unite together into Society.[56]

The state of nature is only exited when men establish a binding jurisdictional power. Locke held that the governmental power so established is only legitimate if it rests on the consent of the governed.[57] Locke begins Chapter II of the *Second Treatise* by declaring that:

> To understand Political Power right ... we must consider what State all Men are naturally in, and that is, a *State of perfect Freedom* to order their Actions, and dispose of their Possessions, and Persons as they think fit, within the bounds of the Law of Nature, without asking leave, or depending upon the Will of any other Man. A *State* also *of Equality*, wherein all the Power and Jurisdiction is reciprocal, no one having more than another: there being nothing more evident, than that Creatures of the same species and rank promiscuously born to all the same advantages of Nature, and the use of the same faculties, should also be equal one amongst another without Subordination or Subjection, unless the Lord and Master of them all, should by any manifest Declaration of his Will set one above another, and confer on him by an evident and clear appointment an undoubted Right to Dominion and Sovereignty.[58]

My focus here is on the idea of moral equality Locke employs in connection with certain relations during two phases in the life of jurisdictional power, namely: (i) deliberative relations undertaken for the purposes of establishing jurisdictional power; and (ii) relations between the individual and established jurisdictional power. In these contexts, when Locke uses 'freedom', he refers to what man enjoys in a primitive form when he exercises natural law power (B) in the state of nature, and in a mature form

[55] Locke, *Treatises* (n 5) II §22.
[56] ibid I §6.
[57] *Pace* Filmer: ibid.
[58] ibid II §4. Emphasis in original. And in *The Conduct of the Understanding*, Locke says that 'all men are naturally equal' (1823) III, 283 cited in Tully (n 41) 59.

when he exercises juridical power (C) in the commonwealth. Freedom for these purposes is seen 'as the direction of a free and intelligent agent to his proper interest', as Locke puts it.[59] The 'proper interest' 'of a free and intelligent agent' always includes acting or refraining from acting in all cases in conformity with both natural law and the positive law of a *legitimate* jurisdictional power.

Persons are free if they (i) know their real interests, (ii) possess the opportunity to act in those interests,[60] and (iii) are disposed so to act.[61] It is freedom in this sense that Locke seeks to 'preserve' in its primitive form (natural law power (B)) in the deliberative relations between men during the first phase in the life of jurisdictional power, so that it may eventually 'enlarge' and prosper in its mature form (juridical power (C)) during the second phase.[62]

3.2 Consent and moral equality

I will now focus on how moral equality and freedom animate Locke's account of the natural law obligations of individuals during the first phase in the life of jurisdictional power (which has implications for the second phase). In the following discussion, all references to 'freedom' or 'liberty', and the like, are to freedom in the sense just described.

Locke aims to safeguard moral equality and freedom in the deliberative relations of the first phase by stipulating that the legitimacy of jurisdictional power depends upon

[59] Locke, *Treatises* (n 5) II §57.
[60] In the sense of possessing relevant effective power (A).
[61] Roy Bhaskar, *Reclaiming Reality: A Critical Introduction to Contemporary Philosophy* (Routledge 2010) 89-90. This is the conception of freedom Bhaskar attributes to Karl Marx. Surprisingly, perhaps, it fits well with Locke's conception of positive freedom: Locke, *Treatises* (n 5) II §§ 4,6, 57); *Essay* (n 9) bk IV, ch XX (regarding the importance of knowledge).
[62] Locke, *Treatises* (n 5) II §57.

its having received the unanimous, free, and rational consent of all individuals.[63] Unanimity is required for the sake of upholding equality liberty without exception.

Locke's concept of consent is complex. For a man's consent to be valid, for it to count towards the establishment of *legitimate* jurisdictional power, certain conditions must be satisfied. Locke holds that there are certain things to which men may not validly consent.[64] For instance, 'a man not having the power of his own life cannot by compact, or his own consent, enslave himself to any one, nor put himself under the absolute, arbitrary power of another to take away his life when he pleases'.[65] Locke can claim that men have a natural 'freedom from absolute, arbitrary power', both because of how he limits the scope of valid consent and because of his rejection of the idea of *natural* jurisdictional power.[66]

Further, for apparent consent to be valid it must be recognizable as an expression of freedom: an individual must (i) know his real interests, (ii) possess the opportunity to act in those interests, and (iii) be disposed so to act. And, as mentioned above, an individual's real interests include maintaining his freedom and ensuring that other individuals respect his moral equality in both phases.

Assent will therefore not count as valid *consent* if it is not a true expression of freedom, say because someone purports to consent to slavery, or to its equivalent in connection with state power, which is rule by an 'absolute, arbitrary' jurisdictional power. Such an individual is deemed *not* to know, and to be disposed to act, in his real interests. Further, if someone is relevantly deceived, consent will be vitiated. It will also be vitiated

[63] Locke distinguishes between two senses of rationality. The first entails seeing the law of nature and trying to comply with it. The second involves applying knowledge to the goal of increased efficacy: Charles Taylor, *Sources of the Self* (CUP 1989) 239. For present purposes, the first requires emphasis.
[64] They lack natural law power (B) to do so.
[65] Locke, *Treatises* (n 5) II §23.
[66] ibid II §23.

where economic or physical coercion prevents an individual giving or withholding consent according to his real interests.

'Free consent', then, is not merely untainted by fraud or coercion, it is also 'the direction of a free and intelligent agent to his proper interest', in Locke's words.[67] Just as liberty is not licence due to its being infused with the requirements of natural law, the nature of an individual's 'proper' interests is a matter about which he or she may be mistaken.

The upshot of Locke's doctrine concerning consent is a set of natural law obligations. In the context of deliberative relations undertaken for the purposes of establishing jurisdictional power (the first phase), individuals must conduct themselves insofar as they can in order to ensure that:

(I) their giving or withholding of consent is an expression of their freedom;

(II) they do not disrespect the moral equality of others by effectively depriving them of the opportunity to give or withhold their consent freely.

In the first phase—that is, when a community is deliberating about the shape of the future constitution—it is reasonable to expect a diversity of visions regarding how, and for what ends, jurisdictional power should be constituted. Proponents of particular visions will seek to persuade me to give my consent to their constitutional visions. The implication of obligation (II) is that some forms of persuasion will be morally permissible while others will not. Apart from avoiding fraud and coercion in their efforts to persuade, individuals must propose what are thought to be genuinely good reasons for me to give my consent. They must also do so on the understanding that I will grant or withhold consent according to my evaluation of the merits of those reasons. In my demanding, and others adhering to, this ethics of persuasion, we respect one another's

[67] ibid II §57.

moral equality. Obligation (II) entails a duty to respect moral equality in deliberations aimed at the constitution of jurisdictional power. For Locke, when moral equality is respected, 'freedom' or 'liberty' is promoted.

As indicated in the foregoing discussion, what counts as 'free consent' is informed by axioms (iii) and (iv) of the idea of moral equality: the merits of any reasons potentially grounding consent is a matter controlled, if not wholly determined in every particular,[68] by impersonal moral criteria over which no mortal can reasonably claim privileged (eg, divine or hereditary) moral authority:[69] Recall that even in judging my own interests, I am to seek my 'proper' interest.

Locke emphasizes that absolutists deny the necessity of free consent, and in doing so reveal their belief that the subjects of the powerful 'were made' for their 'uses, as the inferior ranks of Creatures are for ours':

> For Men being all the Workmanship of one Omnipotent, and infinitely wise Maker; ... they are his Property ... made to last during his, not one anothers Pleasure. And being furnished with like Faculties, sharing all in one Community of Nature, there cannot be supposed any such *Subordination* among us, that may Authorize us to destroy one another, *as if we were made for one anothers uses, as the inferior ranks of Creatures are for ours*....[or] unless it be to do Justice on an Offender, take away, or impair the life, or what tends to the Preservation of the Life, the Liberty, Health, Limb or Goods of another.[70]

Insofar my assent is secured as a result of persuasion that violates obligation (II), such assent is not valid *consent*, and my relations with my persuader are manipulative social relationships. My persuader has denied my moral equality by not treating me as a free, rational, moral agent. He has sought to convert me into a mere instrument (one unit in

[68] I am here adapting Thomas Aquinas's notion of *determinatio*: see John Finnis, *Natural Law & Natural Rights* (2nd ed, OUP, 2011) 284.
[69] Nobody, that is, but god, according to Locke: *Treatises* (n 5) II §4.
[70] ibid II §6. Emphasis added.

the summing of individual consents) for the achievement of unanimous consent in favour of his constitutional vision.[71]

3.3 Moral equality and economic power in the employment relationship

Locke observes that a holder of superior economic power could exploit men's economic dependence to the end that they acquiesce in a bid for jurisdictional power. Having noticed that possibility, Locke to take a strong stand against the exploitation of economic power. Such exploitation is condemnable because it does not respect moral equality and it violates freedom.

He makes this point to combat Sir Robert Filmer's suggestion that jurisdictional power is founded on a superior claim to ownership. The latter argues that 'God gave the world and its resources ... not to all men, but to Adam and his line by natural inheritance. Adam's property in the world and all its resources was coupled with ... a grant of absolute dominion over all mankind ...[and] it was for him to lay down the terms on which others lived and died'.[72] As the Stuart line descended from Adam's, according to Filmer, the Stuart monarchy enjoyed Adam's dominion. 'God gave the world originally to ... a particular man as *private* property'.[73]

In combatting Filmer, Locke makes sweeping pronouncements regarding equal liberty and freedom, whose implications would seem to reach beyond the state context. The far-reaching nature of those pronouncements, together with his attack on the exploitation of economic power, place him in a very delicate position. He must finesse *three elements* that threaten to undermine the social vision which his theory promotes. That social vision relevantly entails:

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71 Although they share a conception of moral equality, there are important differences between Kant and Locke on the role of consent: Ripstein, *Freedom* (n 14) ch 7.
72 As summarized by Waldron (n 41) 144.
73 ibid 148.

(i) respect for:

(a) moral equality in the deliberative relations undertaken for the purposes of establishing jurisdictional power (the 'first phase'); and

(b) moral equality in relations between the individual and established jurisdictional power (the 'second phase'); and

(ii) the preservation of the economic power of employers over employees,[74] subject to the constraints imposed by:

(a) the contractual framework and juridical equality; and

(b) the prohibition of unjust slavery and vassaldom.

3.3.1 The first element

Locke must describe and condemn the exploitation of economic power by a pretender to *jurisdictional power*.[75] In the *First Treatise,* Locke describes how a man with substantial property might bend an economic inferior to his will, and also how he might exert the same power over a whole community if it is sufficiently dependent on him:[76]

> ... how will it appear, that *Property* in Land gives a Man Power over the Life of another? Or how will the Possession even of the whole Earth give any one a Soveraign Arbitrary Authority over the Persons of Men? The most specious thing to be said, is, that he that is Proprietor of the whole World, may deny all the rest of Mankind Food, and so at his pleasure starve them, if they will not acknowledge his Soveraignty, and Obey his Will.[77]

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[74] For a related discussion, see C B Macpherson (n 41) 245-246.

[75] Though this commitment is perhaps qualified by how Locke leaves open the possibility of penal economic power. There isn't the space to set out the relevant analysis here. It draws on certain premises in Cohen's argument that Locke's theory contains the grounds required to render legitimate 'a social contract' justifying 'a political order with unequal political rights': (n 27) 146. Compare Macpherson's intuition (n 41) ch V.

[76] Which might include issuing the type of threats I have associated with penal economic power: Chapters 2 and 4.

[77] Locke, *Treatises* (n 5) I §41.

It may at first seem that, according to Locke, natural property rights cannot properly include the power to exploit others' dependence on the resources that one controls, including for the sake of securing the service of Employee *x*.[78] This impression is reinforced by §42 of the *First Treatise*:

> God ... has given no one of his Children such a Property, in his peculiar Portion of the things of this World, but that he has given his needy Brother a right to the Surplusage of his Goods; so that it cannot justly be denyed him, when his pressing Wants call for it. And therefore no Man could ever have a just Power over the Life of another, by Right of property in Land or Possessions ... a Man can no more justly make use of another's necessity, to force him to become his Vassal, ... than he that has more strength can seize upon a weaker, master him to his Obedience, and with a Dagger at his Throat offer him Death or Slavery.[79]

However, it is important to recall Locke's commitments and his objectives. He does *not* say that no man should have so much wealth that they would have the potential to exercise such power: his theory of property rules that out.[80] What he does say is that such power should never be exercised *for the end* of establishing 'Soveraign Arbitrary Authority over the Persons of Men'; that is, never for the end of establishing jurisdictional power.

Locke does *not* say that a man cannot 'justly make use of another's necessity, to force him to become his' *employee*. Locke only prohibits such 'force' in connection with *vassaldom*, a relationship of pre-modern *dominium*. Nor does Locke say that the employment relationship must be *legally constituted* in a manner designed to prevent power being exercised 'arbitrarily' in the limited government sense. By contrast with his stance in respect of jurisdictional power, he does not insist on a relationship between law, internal power, and rights that is systematically conducive to respect for moral equality and therefore promotes freedom (as he understands it).

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[78] Which is Tully's reading: Tully (n 41) 137. For persuasive cases to the contrary, Wood (n 24) 85-92; Waldron, (n 41) 144-148, 225-232; Cohen (n 27) fn 7.
[79] Locke, *Treatises* (n 5) I §42.
[80] ibid II §§46, 48.

3.3.2 The second element

Locke must ensure that his condemnation of economic exploitation by a would-be *jurisdictional power* in §42 does not commit him to a condemnation of the exploitation by employers of employees' dependence. He attempts to do this in §43—with his next breath, so to speak—by *deeming* the relation between Employee *x* and Employer *y* to be characterized by reciprocal respect for equal liberty. The evidence for this, according to Locke, is the fact that the relation is formally treated as a matter of convention (agreement), which confers no more power on the employer than the employee has agreed:

> since the Authority of the Rich Proprietor, and the Subjection of the Needy Beggar, began not from the Possession of the Lord, but the Consent of the poor Man, who preferr'd being his Subject to starving. And the Man he thus submits to, can pretend to no more Power over him, than he has consented to, upon Compact.[81]

Recall §85 of the *Second Treatise*. Locke describes the requirements and incidents of jurisdical equality between employer and employee in strikingly modern terms:[82]

> *Master* and *Servant* are Names as old as History, but given to those of far different condition; for a Free-man makes himself a Servant to another, by selling him for a certain time, the Service he undertakes to do, in exchange for Wages he is to receive: And though this commonly puts him into the Family of his Master, and under the ordinary Discipline thereof; yet it gives the Master but a Temporary Power over him, and no greater than what is contained in the *Contract* between 'em.[83]

But why couldn't an economic superior who purports to found *jurisdictional* power upon the basis of exploitation of economic weakness adopt an equivalent deeming strategy in order to say that it too has not violated equal liberty?[84]

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[81] ibid I §43. That this amounts to a genuine 'compact' is implausible by Locke's own lights, which he sets out when discussing the quality of consent required in respect of *jurisdictional power:* quoted earlier at note 34 above.

[82] This could be seen as another example of Locke's tendency, as observed by Macpherson, to read back into the state of nature conditions of power belonging to the modern world: Macpherson (n 41); Locke, *Treatises* (n 5) II §14.

[83] Locke, *Treatises* (n 5) II § 85. Emphasis in original.

[84] See text quoted at note 34 above (esp 'Nor does it alter the case to say, I gave my promise...').

3.3.3 The third element

In seeking to establish the legitimacy of the employment relationship, Locke is careful to ensure that it is not seen as sharing those features of unjust slavery or vassaldom which he considers condemnable. Locke's attack on *dominium* and, in turn, Filmer's position, commits him to the condemnation of slavery and vassaldom as they too involve a claim to combined ownership and jurisdiction.[85] Locke insists that the employment relationship is distinguished from slavery and vassaldom insofar as Employee *x* may be subject to the power of Employer *y* without the former forfeiting his juridical equality with the latter.

This reading is reinforced by Locke's conception of just slavery (which it will be recalled belongs to set (c): see Section 2.1 above). Locke defines the justly enslaved as:

> another sort of servants, which be a peculiar name we call slaves, who, being captives taken in a just war, are by the right of nature subjected to the absolute dominion and arbitrary power of their employers.[86]

This is in effect a special context in which Locke recognizes that legitimate *jurisdictional* power (as he sees it) (i) may be established without the consent of the ruled and (ii) may then be carried on without the constraints of limited government.[87]

However, just slavery is not established by the exploitation of economic superiority. Locke held that slavery arrived at through such exploitation constitutes an inherently improper relationship because it purports to establish *jurisdictional* powers by exclusive reliance on such exploitation: Locke condemns the exploitation of economic dependence if it is used to establish jurisdictional power.

By contrast, for Locke it is apparently the 'natural and unalterable state of things'[88] that economic superiors will dehumanize *juridically free* employees:

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85 Locke, *Treatises* (n 5) II § 23; Waldron (n 41) 227.
86 Locke, *Treatises* (n 5) II §85.
87 On just enslavement, ibid II §24.
88 Locke quoted in Waldron (n 41) 229.

> It is not to be expected that a man, who drudges on all his life in a laborious trade, should be more knowing in the variety of things done in the world than a packhorse, who is driven constantly forwards and backwards in a narrow lane and dirty road only to market, should be skilled in the geography of the country.[89]

Locke here notices that employees are sometimes treated as though they had the moral status of instruments, or beasts of burden. His reference to 'the Inferior Creatures' in §92 of the *First Treatise*, in his description of the ends of property, is therefore significant:

> Property, whose Original is from the Right a Man has to use any of the Inferior Creatures, for the Subsistence and Comfort of his Life, is for the benefit and sole Advantage of the Proprietor, so that he may even destroy the thing ... but Government being for the Preservation of every Mans Right and Property, ... is for the good of the Governed ... the Sword is not given the Magistrate for his own good alone.[90]

Of course, Locke's prohibition on unjust slavery means that a master cannot use an employee in *just the same way* as 'any of the Inferior Creatures ... so that he may even destroy the thing'.[91]

However, when it comes to the establishment and exercise of the employer's *internal power*, Locke is no longer rigorous in his identification and condemnation of threats to moral equality. He considers it unexceptionable that concentrated 'Property' ownership generates relations of dependence, and that such dependence confers upon employers the power to treat employees' time as morally equivalent to the time belonging to 'Inferior Creatures'. The employee's time may be treated as a mere means 'for the Subsistence and Comfort' of the employer.[92]

Under conditions of severe economic dependence, not only are land, things, and beasts 'for the benefit and sole Advantage of the Proprietor', but so is the labour time of

[89] Locke, *Essay* (n 9) bk IV, ch XX §2; this passage is used to criticize Tully's reading in Waldron (n 41) 229.
[90] Locke, *Treatises* (n 5) I §92.
[91] ibid.
[92] Consider in this light, the remarks of Finnis: 'the reason why the Rule of Law is a virtue of human interaction and community' is that people should not be 'made to live their lives for the convenience of others': Finnis (n 68) 272.

people who have no effective power to refuse to sell it as an instrument to be applied to the buyer's ends:

> I confess, we find among the Jews, as well as other Nations, that Men did sell themselves; but, 'tis plain, this was only to Drudgery, not to Slavery.[93]

While Locke's prohibition on slavery means that a person's *life* cannot be bought and sold, practically all of a employee's life *time* can be bought, to be used up as though *it* were property,[94] like the time of the 'packhorse, who is driven constantly forwards and backwards in a narrow lane and dirty road only to market'.

3.3.4 Summation

In sum, Locke treats the exploitation of economic weakness as morally reprehensible when it is undertaken on the part of *jurisdictional power*. He likens it to a man who 'has more strength' seizing 'upon a weaker' and 'with a Dagger at his Throat' offering him 'Death or Slavery'. He insists that 'a Man can no more justly make use of another's necessity, to force him to become his Vassal'.[95] If a state, having been established in that manner, then drove its people 'constantly forwards and backwards' like packhorses, Locke would readily condemn such treatment as 'arbitrary' and the constitution as 'tyrannical'.

Implicit in such a condemnation would be the claim that the rulers had failed to give due weight to: (i) the basic right of persons not to be confronted with a choice between assent to tyrannical rule or an even worse fate; and (ii) the basic right of persons to have their moral equality respected, which includes having their full worth as humans

[93] Locke, *Treatises* (n 5) II § 24.
[94] Hence the lamentable truth inadvertently conveyed the contemporary notion of 'work-life balance': one's work and life may only be balanced one against the other if one experiences work as separate from one's life, perhaps because the sale of a portion of one's time to another feels like a subtraction of a portion of one's life.
[95] Locke, *Treatises* (n 5) I §42.

recognized by the protection of their 'lives, liberties, and estates' from unreasonable incursions by state power.[96]

However, when Locke turns his attention to the employment context, he claims that 'the Authority of the Rich Proprietor' is *legitimately* derived from 'the Consent of the poor Man, who preferr'd being his Subject to starving'.[97] In the jurisdictional setting, such circumstances would vitiate consent.

Further, Locke assures his readers that the employer 'can pretend to no more Power over' the employee than the latter 'has consented to, upon Compact'.[98] But he also readily accepts that, in reality, such a 'Compact' could consign—and perhaps typically does consign—the employee to 'Drudgery' and to the status of a 'packhorse'. The contents of the employment compact appear to be a matter of what the 'Rich Proprietor' can get away with, and his power is subject to no *a priori*—constitutional—limits.[99]

By contrast, the people, when deliberating in the state of nature, could not validly consent to a 'Compact' which would have them abnegate their equal worth by sinking to the status of packhorses under the whip of *state power*: for Locke, this would be an unacceptable renunciation of their 'lives, liberties, and estates', and they would be better off remaining in the state of nature. The would-be 'Compact' in question would be void at the outset due to its failure to limit government for the sake of the people's respect-worthy interests, expectations, and rights.

The early socialists refused to accept such normative contortions. They appropriated the idiom of slavery (and in turn the rhetorical resonance it had acquired in political thought[100]) in order to condemn the moral inequality embodied in the modern wage-relation. This condemnation is expressed in the concept of 'wage slavery'. 'Wage

[96] ibid II §123.
[97] ibid I §43.
[98] ibid I §43.
[99] Save for those entailed in Locke's prohibition of unjust slavery, and, presumably, save for those imposed by the general law (eg, criminal law).
[100] Quentin Skinner, *Liberty Before Liberalism* (CUP 1998) 39-50; see Chapter 4.

slavery', as a filter for seeing and evaluating power, represents an alternative to Locke's way of seeing the employment relationship. It is presented by socialists as belonging outside the sets of permissible power over others. It is a type of impermissible power over others.

Locke refuses to treat the constitution of the employment relationship as a source of governmental power. In turn, he is not compelled to ask whether the relationship's constitution jeopardizes moral equality by being hospitable to the arbitrary exercise of power. If the tradition were to accept this Chapter's contention that internal power is hospitable to arbitrariness, the idea of wage slavery might obtain a new lease of life.

3.4 The subject-matter of the social contract and the contents of the limited government tradition's agenda

Locke seeks to attack absolutism by insisting that it offends moral equality and that moral equality is ordained by nature. He attempts simultaneously to protect concentrated economic power by making it natural too. He does not envisage it being subject to a deliberative process morally equivalent to the one by which legitimate jurisdictional power is established. By these devices, Locke not only protects concentrated economic power from the jurisdictional power of the state, he also protects concentrated economic power from those persons who would make their consent to jurisdictional power conditional upon:

> (i) the alteration of the 'State of Things in this World' in order to undo the present concentration of economic power in certain 'private' hands; and also
>
> (ii) the constitution of all kinds of economic power over others (not only economic power wielded by a pretender to *jurisdictional* power) so that it is

inhospitable to manipulative social relationships, ie a constitution that is morally equivalent to that which is a condition of:

(a) *valid* consent to the establishment of jurisdictional power (in the first phase); and

(b) the *legitimacy* of the exercise of jurisdictional power (in the second phase).

With one hand, Locke imposes limited government on the state. But with the other, he shelters non-state economic power from limited government scrutiny and control.

Locke places the property system outside 'the subject matter of the social contract', ie, 'as part of its background'.[101] Rousseau, by contrast, treats the property system as 'part of the subject matter of the social contract ... as social and conventional, not as natural'.[102] In Chapter 5, I suggest that the tradition's adherents should follow Rousseau in this respect, rather than Locke. As explained in more detail there, if economic power were to be included within the tradition's project, one possible implication would be a questioning of the present conception of private property.

4. Against Pole-Cats, Foxes, & Lions, but which Lions?

It is my contention, then, that Locke defined the tradition's project too narrowly. And in doing so he misdirected the tradition's adherents, obscuring our moral obligation to grapple with the implications of economic power. Given Locke's immense influence on

[101] Cohen (n 27) 162.

[102] ibid 162-163. Consider Rousseau on the employment relationship: 'as for wealth, no citizen be so very rich that he can buy another, and none so poor that he is compelled to sell himself': Jean-Jacques Rousseau, *The Social Contract and Other Later Political Writings* (CUP 1997) 78. 'The Kantian state must provide for redistribution, ... where it is necessary to prevent one person being entirely dependent upon the generosity of others. The person who is so dependent is a mere means for others... Since nobody could consent to becoming such a means..., nobody could agree to enter a condition in which this was possible': Arthur Ripstein, 'Authority and Coercion' (2004) 32 Philosophy & Public Affairs 2, 33.

the subsequent development of the tradition, it is reasonable to ascribe to Locke a prominent (though by no means exclusive) place in any account of the persistence of this occlusion.

As a result of Locke's virtual silence in the face of the challenge posed by economic power, he leaves himself vulnerable to precisely the kind of objection that was at the heart of his condemnation of the absolutists. Locke contends that without his doctrine of limited government, the potential gains of our departure from the mischiefs of the state of nature are likely to be thwarted by the arbitrary exercise of illegitimate *jurisdictional* power. According to Locke, the absolutists' failure to see this implied that:

> ... Men are so foolish that they take care to avoid what Mischiefs may be done them by *Pole-Cats*, or *Foxes*, but are content, nay think it Safety, to be devoured by *Lions*.[103]

I would argue that Locke's failure to give due attention to economic power is the same kind of oversight. His own observations, firstly about the potency of economic power, and secondly about the moral imperatives underlying the limited government project, make the omission particularly grave. Locke's oversight has been inherited by the modern limited government tradition that he helped to found: it has failed to live up to its own principles by its systematic failure to see the power of economic '*Lions*' as a limited government problem.

In this Chapter, I have argued that a comparison of Locke's treatment of jurisdictional power with his treatment of economic power demonstrates that he does not maintain a consistent commitment to moral equality in both of these contexts. Perhaps Locke failed to recognize that if he is committed to the moral equality of *all persons*, then his way of seeing the employment relationship is inadequate. Perhaps his only mistake was not to realize the need to search for a different way of seeing relations of power in economic life.

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[103] II §93.

Alternatively, perhaps Locke was not in fact committed to moral equality for *all* and freedom for *all* from manipulative social relationships in *all* contexts. Perhaps he believed that economic inferiors are *not* the moral equals of their economic superiors, and that the latter may legitimately manipulate the former. My tentative view is that this is a more plausible interpretation.

It is possible that Locke was committed to moral *in*equality simply because of an overriding (unconscious or merely unproclaimed) solicitude for the extravagant claims of concentrated economic power. However, that interpretation would see Locke as little more than an apologist, which would seem unjust. There is no good reason for thinking that Locke was engaged in anything other than a sincere search for the best ways of seeing the world that he could devise. If contests between rival enterprises *of this kind* are in the end nothing more than disguised proxies for clashes between rival interests, then political theory would be reduced to the status of a mere distraction, at best a form of procrastination or avoidance for those who are reluctant to get on with settling things on the battlefield.[104]

Perhaps the better interpretation is that Locke was the product of a cultural milieu which tended not to insist upon the moral equality of the lower orders, assuming it was admitted at all. His willingness to deprive the lower orders of moral equality means that in the end he was an insufficiently critical product of that milieu.[105] In his *Essay Concerning Human Understanding*, Locke reflects on certain ways of failing to acquire 'Knowledge' that were in his day peculiar to the lower and the privileged orders, respectively. In respect of the latter he says that, although 'they may seem high and great',

[104] 'It is only a very vulgar historical materialism that ... says that ideals are mere material interests in disguise': Berlin (n 8) 167-168.
[105] This kind of oversight was not novel; eg, its equivalent was observed by Thomas More: Skinner, *Foundations* (n 5) vol 1 255-262.

they often 'are *cooped in* close, *by the Laws* of their Countries' and 'confined to narrowness of Thought'.[106]

Obviously, Locke himself did not succumb to the special incuriosity that might afflict the 'high and great', but he did share with them a common culture.[107] In that culture's distinctive ways of seeing the social world, as in any perhaps, there were certain presuppositions about the qualities particular to different social strata. The following remarks from Locke's *The Reasonableness of Christianity* are fairly typical. They provide an insight into how he distinguished between the higher and lower social orders:

> The greatest part of mankind want leisure or capacity for Demonstration; nor can they carry a train of Proofs; which in that way they must always depend upon for Conviction … And you may as soon hope to have all the Day-Labourers and Tradesmen, the Spinsters and Dairy Maids perfect Mathematicians, as to have them perfect in *Ethicks* this way. Hearing plain Commands, is the sure and only course to bring them to Obedience and Practice.[108]

Locke's striking conclusion was that '*The greatest part cannot know, and therefore they must believe*'.[109]

Further, the seventeenth century culture of the 'high and great', like any other, possessed certain presuppositions about what is natural and fixed, on the one hand, and what is conventional and mutable, on the other. Although Locke inhabited a world that had been turned upside down, it was not thought that *everything* about it could change. Locke's assumptions about 'the natural and unalterable State of Things in this World, and the Constitution of humane Affairs'[110] were handed down to him by the *élite* culture in and by which he was formed. They amounted, in effect, to that culture's way of demarcating what lies within and what lies beyond human history, human agency, and

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106 Locke, *Essay* (n 9) bk IV, ch XX, §4.
107 Which cannot simply be assimilated with the culture of the lower orders.
108 John Locke, *The Reasonableness of Christianity* (OUP 2013) 157-158. In a more cynical vein, Julius Caesar declared, 'it is possible to blind the multitude so completely that they fail even to notice the yoke they are placing around their own neck': quoted via Machiavelli by Quentin Skinner, *Visions of Politics* (CUP 2002) vol II, 165.
109 ibid. Emphasis added.
110 Locke, *Essay* (n 9) bk IV, ch XX, §4.

even human comprehension. In that sense, they were like a religious world-view not dissimilar to the 'Religion of the Country' described by Locke in the following:

> This is generally the Case of all those, who like in Places where Care is taken to propagate Truth, without Knowledge; where Men are forced, at a venture, to be of the Religion of the Country; and must therefore swallow down Opinions, as silly People do Empiricks Pills, without knowing what they are made of, or how they will work…[111]

From Locke's vantage point within the culture of the *élite*, there may have seemed to be *natural* limits to one's curiosity. Perhaps liberal public philosophy informs the culture of the contemporary *élite* in a similar way.

Nonetheless, societies often contain rival ways of seeing, rival traditions of moral and political thought and practice, and rival cultures (as well as the remnants of those which are no longer living). And within any one tradition or culture there will often be tensions and outright conflicts. Where such rivalries, remnants, tensions, or conflicts exist, the opportunities for people to criticize the presuppositions, claims, and ways of seeing shared by one tradition or culture, or one or more currents within them, are enlarged. Among other things, a would-be critic can be led to alternative ways of seeing by investigating and seeking to overcome tensions or conflicts within his or her tradition, or by asking whether the enquiries and arguments of other traditions and cultures offer superior evaluative and descriptive resources. The explanation for why one person is motivated to attempt this (eg, More, Mill, or Marx), while another is not (eg, Locke), must remain mysterious.[112]

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[111] ibid bk IV, ch XX, §2. This is the continuation of the passage from §2 quoted immediately above.

[112] See relevant reflections in G A Cohen, *If You're an Egalitarian, How Come You're So Rich?* (Harvard University Press 2001) ch 1. Of course, it must be added that (i) More, Mill, and Marx were not unimpeachable in this regard—who could be? and (ii) Locke did attempt to question certain aspects of the orthodoxy of his day in important ways and with momentous consequences.

5. Elusive principles and rival currents in the law

A defining feature of the modern limited government tradition is its professed commitment to moral equality for *all*. This commitment requires, among other things, power to be constituted so as to ensure that the legitimate interests, expectations, and rights of all are given due weight—*respect*—by those holding governmental power: 'We hold these truths to be self-evident, that all men are created equal'.[113]

As an expression of its commitment to the moral equality of *all persons* in *all circumstances*, and also as a precaution against inadvertent moral incoherence, the tradition ought to consider how it might approach the economic power of employers in the distinctive vernacular of limited government. On the interpretation of the criteria governing the use of 'arbitrary' (which I offered in Chapter 1), and given the persistence of the system of internal power, there is no obvious reason why this term could not meaningfully be applied to the power enjoyed by employers over employees. On the contrary, the arguments advanced in this study so far suggest that the normative vocabulary of the limited government tradition is indeed pertinent to the internal power embodied in the employment relationship.

It would be misleading to give the impression that the failure to explore this question has been uniform. Indeed, certain eminent proponents of the tradition's Rule of Law project have noticed that the 'substantive law of employment, though dressed in the garb of the private law of bargains, in some instances exhibits on analysis underlying features which may be said to belong in the public law world'.[114] Such 'underlying

[113] Declaration of Independence (US 1776).

[114] Sir John Laws, 'Public Law and Employment Law: Abuse of Power' [1997] Public Law 455, 458. Famously described by Otto Kahn-Freund as 'a command under the guise of an agreement': Karl Renner, *The Institutions of Private Law and their Social Functions* (Routledge and Kegan Paul 1949) 28; see further, Paul Davies and Mark Freedland, *Kahn-Freund's Labour and the Law* (3rd edn, Sweet & Maxwell 1983).

features' ground 'arguments of principle for infusing employment in the private sector with public law concepts of the abuse of power'.[115]

For instance, Sir John Laws and Sir Stephen Sedley have attempted to show how certain currents of common law principle represent the embodiment of the tradition's commitments. Of relevance to the present argument are their own contributions, and those of certain participants in a number of employment-related cases they analyze, which indicate that advocates and judges have on occasion been more assiduous in challenging the Consensus than many of their scholarly counterparts within the tradition.

Sedley remarks that, 'By 1970 the need for uniform legal protection of employees against arbitrary dismissal had become so apparent that the House of Lords' in *Malloch v Aberdeen Corporation*[116] 'went as close as it could to introducing a right to natural justice into every contract of employment'. He speculates that, 'But for the legislative intervention' of 1971, 'it is highly likely that the common law would have completed the task itself'.[117]

Laws, interpreting a range of cases dealing with 'private' control over the fulfillment of interests, expectations, or rights which the courts have deemed respect-worthy, posits a 'uniformity of principle', *viz.* that 'the common law will not permit abuse of power'. He argues that the common law:

> proceeds upon a footing which is alike logically anterior to the public power of the legislature and private power of contract. It does not depend on the source of a defendant's or a respondent's authority to affect the lives of others.... But the principle is elusive.... It may be described as the individual's right not to be interfered with, and in that case it is an appeal to the ideal of freedom and is, ultimately, a constitutional right. But it may also be described as the individual's right to equal treatment with his fellows; in that case it looks more like an appeal to a collective value. Again it may be described as a means for the protection of the public

[115] Sir Stephen Sedley, 'Public Law and Contractual Employment' (1994) 23 Industrial Law Journal 201, 208 ('Public Law and Contractual Employment').
[116] [1971] 1 WLR 1578, see, esp. the speech of Lord Wilberforce.
[117] Sir Stephen Sedley, 'Public Power and Private Power' in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing 2000) 305.

> interest, and in that case it looks like an appeal to something beyond the rights of any individual.

If Laws's proposition regarding how the common law 'proceeds' is intended to be a *description* of the employment field, it requires qualification. *At best*, the common law's record has been ambiguous in this context; there has not been a straightforward 'uniformity of principle'.

It is necessary to digress, briefly, in order to note the following. The common law's historical solicitude for the arbitrary power of employers is, *at the very least*, part of the story of how it has proceeded.[118] In the English context,[119] an illustration of the common law's inglorious past is provided by the well-known dictum of Lord Davey in *Allen v Flood*:

> An employer may discharge a workman (with whom he has no contract), or may refuse to employ one from the most mistaken, capricious,

[118] Consider, eg, Malins VC remarks in connection with condemnation of picketing workers, 'The jurisdiction of this Court is to protect property ... to prevent these misguided and misled workmen from committing these acts of intimidation which goes to the destruction of property': quoted in Lord Wedderburn, *The Worker and the Law* (3rd edn, Sweet & Maxwell 1986) and see ch 1 generally; Hugh Collins et al, *Labour Law* (CUP 2012) 664-667 (regarding the historical hostility to strikes); Collins, *Justice in Dismissal* (n 114) 29-34 (regarding the 'ideology of the common law'). Until overridden by legislation, the English common law readily determined that unions and strikes were illegal. Lord Wedderburn of Charlton, 'Industrial Relations and the Courts' (1980) 9(1) Industrial Law Journal 65. Arguably, strikes (a form of economic power over others) are justified where internal power has not been constituted in accordance with the Rule of Law so as to prevent its arbitrary exercise by employers. In such circumstances, there may be no other feasible means to ensure that employers give due weight to the respect-worthy interests, expectations, and rights of employees. Of course, the economic power embodied in strikes may itself be problematic from a limited government perspective: see note 169 of Chapter 4 herein.

[119] Consider the following dictum of a US court, which employs the term 'arbitrariness' without the pejorative connotations it conveys in the context of state power: the 'arbitrary right of the employer to employ or discharge labor, with or without regard to actuating motives' is 'settled beyond peradventure': Lawrence E Blades, 'Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power' (1967) 67 Columbia Law Review 1404, 1416, quoting *Union Labor Hospital Association v Vance Redwood Lumber Co* 158 Cal 551, 555, 112 P 886, 888 (1910). The doctrine of 'at-will employment', while no longer as common in practice, has retained a doctrinal presence in the United States common law: eg, Paul C Weiler, *Governing the Workplace: the future of labor and employment law* (Harvard University Press 1990) ch 2 and for the 'efficiency' justification, 58-60. Blades observes that, on the one hand, the courts have expanded 'the meaning of constitutional provisions in order to protect the individual' (and business corporations: see Chapter 4) 'from governmental oppression'. Whereas, on the other hand, in 'something of a paradox', they have not evinced a 'similar bent for invention and improvisation when it comes to protecting individuals' against 'private establishments', 'particularly in their highly vulnerable status as employees': (1435).

> malicious, or morally reprehensible motives that can be conceived, but the workman has no right of action against him.[120]

During social democracy's post-war ascendancy, Davey's remarks may have seemed to hold merely antiquarian interest, lending credence to Laws's sanguine reflection on the common law: trade unionism and various legislative and general law measures substantially restrained the power of employers to exploit economic weakness. Over the past thirty years, the neoliberal era has been marked by a shift in the economic and political balance of power against trade unionism and social democratic legislation, and employers have reclaimed opportunities for exploitation that had been thought extinct. For instance, Davey's remarks have taken on a renewed relevance with the rise of so-called 'zero hours contracts', which apply to an estimated 1.4 million workers in the UK.[121]

Such developments suggest that neither trade unionism nor social democratic law de-legitimized or abolished the manipulative features of the capitalist employment relationship. The restraints imposed on internal power reflected a change in the balance of forces operating within the capitalist constitution, rather than a transformation of that constitution. Trade unionism and social democracy notwithstanding, there remains an important contrast between how the law constitutes the employer's internal power, on the one hand, and how it constitutes the state's governmental power, on the other.

A political analogy illuminates the distinction: in the seventeenth century, the absolutist conception of royal prerogative was not merely suspended thanks to Parliament's ascendancy over the Stuarts. Instead, executive power was reconstituted in a

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[120][1898] AC 1, 172-173. A US equivalent: 'May I not refuse to trade with any one? May I not forbid my family to trade with any one? May I not dismiss my domestic servant for dealing, or even visiting, when I forbid? And if my domestic, why not my farm-hand, or my mechanic, or teamster?': Blades (n 119) 1416, quoting *Payne v Western & A*RR 81 Tenn 507, 518 (1884).

[121] Zoe Williams, 'Zero-hours jobseekers? Britain's given up on employee rights: We have developed a system where poverty can be actively enforced by brutal employers on their powerless staff' *The Guardian* (London, 7 May 2014).

manner that, in principle, ruled out the exercise of absolutist prerogatives. By contrast, when employers have lost certain opportunities to exploit economic weakness, internal power has not thereby been reconstituted so as to rule out, in principle, its manipulative exercise once and for all. That the difference is *constitutional*, or essential, is brought out by Justice Marshall's remarks:

> [I]t is now firmly established that whether or not a private employer is free to act capriciously or unreasonably with respect to employment practices, at least absent statutory or contractual controls, a government employer is different. The government may only act fairly and reasonably. ... Thus, when an application for public employment is denied or the contract of a government employee is not renewed, the government must say why, for it is only when the reasons underlying government action are known that citizens feel secure and protected against arbitrary government action. ... When something as valuable as the opportunity to work is at stake, the government may not reward some citizens and not others without demonstrating that its actions are fair and equitable. And it is procedural due process that is our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action.[122]

The idea that 'The government may only act fairly and reasonably' is a constitutional proposition, as is the notion that 'a private employer is free to act capriciously or unreasonably with respect to employment practices, at least absent statutory or contractual controls'.

Returning to Laws's proposition: it may be taken to express a desire to awaken (and to extend the reach of) 'concepts of abuse of power or failure to fulfil public obligations', which, in Sedley's view, 'have slept but not died' in the common law (or were overwhelmed by the Victorian *laissez-faire* doctrines of Davey and others).[123]

As Laws implies, such an exercise should involve a search for the criteria which do (or ought to) govern the use of the normative vocabulary of the tradition (and its public law embodiments). Terms such as 'abuse of power', 'arbitrariness', and 'tyranny'

[122] *Board of Regents v Roth* 408 US 564 (1972) (Justice Marshall).
[123] Sir Stephen Sedley, 'Public Law and Contractual Employment' (n 115) 202.

risk being empty slogans, unless the tradition engages in sustained enquiry aimed at articulating the best available interpretation of their governing principles.

This study is intended to contribute to the task of illuminating what Laws considers the 'elusive' nature and (far-reaching) implications of the limited government tradition's principles. Despite the familiarity of the tradition's normative vocabulary, or perhaps because of it, more needs to be done to overcome the elusiveness of its principles (hence this Chapter's return to Locke's seminal account of the tradition's key commitments). And although eminent figures within the contemporary tradition have persuasively demonstrated the connection between this task and skepticism regarding the Consensus, the relevant enquiries have remained at the margins of the tradition's project.

So it would seem that the Consensus is partly explicable by the failure of its subscribers to join in efforts to re-awaken enquiries regarding the nature of the tradition's underlying principles and the content of its project. According to the Consensus, it is *obvious* that the *exclusive* moral point of the tradition's Rule of Law project should be to prevent the tyrannical misappropriation or arbitrary exercise of *state* power. This way of thinking goes hand in hand with a failure to pose questions of principle about economic power that the tradition insists upon posing about state power.

Insofar as contemporary subscribers to the Consensus do not put in question the characteristically modern ways of seeing economic power, they may be taken to tolerate distinctions between persons (or at least between persons in different capacities and circumstances, eg, *qua* owner of land expropriated by the state; *qua* 'private' employee), which, though far less egregious than those maintained by past adherents of the tradition, are nonetheless morally dubious.

As distant as the slave, feudal, early modern, or nineteenth century economies may seem,[124] it may yet be pertinent to ask whether the substantial power (and freedom from necessity) of some (very few) is enjoyed at the price of systematic denial of the moral equality of others (vastly more numerous).

6. Different ways of seeing

In Locke's time, power was in flux, as were ways of seeing power. Perhaps, contrary to my argument, Locke's ways of seeing power as it was in the *seventeenth century*, and in particular concentrated economic power, are justified. Even if that is so, in our time the nature of power is changing again. The increasing domination of social life by large business corporations should prompt us to ask whether the tradition's inherited ways of seeing power are morally sound. It is worth approaching this question via an interpretation of Locke's ways of seeing power. This is because today's ways of seeing economic power are in no small measure Locke's ways. Adherents of the limited government tradition especially tend to see power through Lockean eyes.

If the tradition were to adopt new ways of seeing concentrated economic power, it may later become apparent that this contributed to the direction taken by yet another historical transition no less important than the one in which Locke participated. Indeed, Locke himself knew that different ways of seeing often distinguish one culture from another.[125]

Of course, what lies on the other side of any transition can only be interpreted with the benefit of hindsight; while the facts of power are in flux, it is difficult to predict where the process of change will lead. It is important to note that the course of such

[124] It is important to note that slavery is neither a thing of the past, nor a phenomenon confined to the so-called 'developing world': Mark Anderson, 'Home Office launches ad campaign against modern-day slavery' *The Guardian* (London, 31 July 2014).
[125] See the discussion in Tully (n 41) 28.

transitions is not decided by purely intellectual processes. Locke, his allies, his opponents, and their contemporaries, all knew from experience that systems of power would not be preserved or changed in the realm of thought alone. But they also knew that our ways of seeing systems of power may commit us to changing such systems or to preserving them. In other words, they knew that our ways of seeing power may have an importance that is not purely academic.[126] Insofar as they bear on the granting or withholding of constitutional allegiance, they are *political* in the sense described in the previous Chapter.

What is intended to emerge from this Chapter and those which follow is that the contemporary constitution of economic power—and especially, but not exclusively, the power of large corporations over persons in themselves and persons in community—are *not* adequately captured either by the old concept of *dominium*, or by the ways of seeing governmental power urged by Locke and inherited by liberal public philosophy's social vision. New ways of seeing power are required. And these new ways of seeing, being partly evaluative,[127] need not accept the contemporary systems of economic power as they are.

Conclusion

In this Chapter, I have considered the *internal power* of employers over employees by exploring Locke's contribution to a distinctively modern way of seeing economic power. Central to this way of seeing is a particular manner of separating ownership and jurisdiction, a separation which lends unjustified plausibility to the supposition that only state institutions exercise the kind of *power over others* that should arouse the suspicion of the limited government tradition's adherents.

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[126] Consider the German poet Heine's warning to the French 'not to underestimate the power of ideas': Berlin (n 8) 167; and the similar observations of Edmund Burke, who described the French Revolution as the first 'philosophic revolution': quoted in Leo Strauss, *Natural Right & History* (University of Chicago Press 1965) 302-303.

[127] See note 50 above.

I showed that when Locke's own descriptive portrait of internal power is seen in the light of his account of the tradition's underlying principles, the system of power which he describes seems to offend the principles and therefore call for correction, unless compelling countervailing considerations can be adduced. Despite this, Locke strains to reconcile internal economic power with his limited government vision in a manner which effectively prescinds such power from the tradition's project. These ways of seeing power, and of defining the tradition's project, are broadly shared by liberal public philosophy. They are pivotal to the seeming plausibility of both its accommodation with the capitalist constitution and the Consensus.

There are persuasive limited government reasons for *asking* whether internal power should be *reconstituted* according to the tradition's Rule of Law vision. Such reconstitution would involve the deliberate *redesign* of internal power so that its holders are legally obliged to exercise it in non-arbitrary ways (ways that uphold moral equality for all and freedom for all from manipulative social relationships). Such a legal obligation would not be confined to 'regulating' certain contexts (say the context of dismissal). Instead, it would apply *comprehensively* (in respect of every instance of such power's exercise) and *systematically* (according to the methodical processes of the legal system).

The non-arbitrary exercise of *internal power* would entail the power-holder giving due weight to the respect-worthy interests, expectations, and rights of those subject to his or her power. Where such respect is afforded, compliance is sought on terms that involve genuinely good reasons for cooperation, and the moral equality of persons is thereby recognized. Where, by contrast, internal power is constituted so as to permit its arbitrary exercise, the power-holder would be free to secure the compliance of others in a manner that denies their moral equality.[128]

[128] Speaking of the US context, and citing judicial authority for each example, Lawrence E Blades observes that 'many of the rights and privileges which are considered so important to a free

In the next Chapter, my attention shifts to *external* economic power, which, it will be recalled, is the power to affect significant aspects of the life of a whole community. The focus is on large business corporations, institutions whose power includes external economic power. I challenge the Consensus by arguing that these institutions ought to be criticized using the normative vocabulary which adherents of the limited government tradition employed in their indictments of seventeenth and eighteenth century political absolutism.

society that they are constitutionally protected from governmental encroachment are vulnerable to abuse through an employer's power. As employer might use a threat of discharge, for example, to impair an employee's freedom against self-incrimination, his political free choice or his right to speak out on the issues of the day': Blades (n 119) 1407.

4

PRINCES OF PROPERTY

Introduction

The upshot of my argument in Chapter 3 is that the Consensus is mistaken, at least in respect of internal power. There are compelling limited government reasons for *asking* whether such power should be reconstituted in accordance with the tradition's Rule of Law project. If the tradition's adherents were to ask and to answer the question whether such reconstitution is warranted, they would thereby depart from the Consensus: internal power would be a *potential,* and perhaps eventually an *actual,* target of Rule of Law practice.

This Chapter poses essentially the same question, but now primarily in respect of the phenomenon of *external power*, which, it will be recalled, is the power to affect significant aspects of the life of a whole community. I contend that there are persuasive limited government reasons for asking whether *large* business corporations—the principal economic institutions of our time—should be reconstituted by law in order to ensure that they wield power in ways that respect moral equality.[1]

[1] This Chapter neither criticizes the corporate form/artificial legal personality, as such, nor even the concentration of resources in corporate form. The present constitution of corporations is criticized. It requires corporate power over others to be wielded contrary to the tradition's

In support of this contention, I argue that these institutions ought to be reconsidered in the light of the normative vocabulary which the tradition's adherents have employed in their indictments of political absolutism. In particular, I consider the terms 'tyrant', 'tyranny', 'slavery', 'slavishness', and 'corruption', and I identify the empirical and normative criteria which have guided the tradition's use of these terms. This involves considering, among other things, why the phenomena to which the terms refer are considered ills according to the tradition's underlying principles.

1. Archetypes

It will become clear that each such term refers to an archetype whose characteristics are approximated by actual historical figures, or states of affairs, in various combinations and to different degrees. It is necessary to emphasize that the archetypes' moral force partly depends upon their users being able to make a reasonable claim that the archetypes' characteristics are drawn from the lessons of experience. Limited government arguments often include premises that rest on axioms regarding the anthropology and sociology of power.

> The following assertions offered by Algernon Sidney are typical:
>
> > Men are subject to vices and passions, that they stand in need of some restraint in every condition; but most especially when they are in power. The rage of a private man may be pernicious to one or a few of his neighbours; but the fury of an unlimited prince would drive whole nations into ruin: And those very men who have lived modestly when they had little power have often proved the most savage of all monsters, when they thought nothing able to resist their rage.[2]

The conviction that the existence of such tendencies towards tyranny and corruption constitute genuine lessons of experience is a *sine qua non* both of adherence to the limited government tradition and of devotion to its Rule of Law project: the tradition has

underlying principles. Further, the question of external power arises only in connection with *large* business corporations as small corporations lack such power.

[2] Algernon Sidney, *Discourses Concerning Government* (Liberty Fund Inc 1989) ch III, §13, 390.

understood the Rule of Law partly as a way of legally constituting (state) institutions to make the community safe from tyrants, tyranny, and corruption. The belief that these phenomena are an ever-present menace is also a key source of the tradition's suspicious and pugnacious attitude towards great institutional power and the powerful.

2. From the margins to the mainstream

This Chapter's chief aim is to consider the relevance of these archetypes to the external power of large business corporations. I argue that:

> (i) corporations are legally constituted to promote a peculiarly capitalist expression of the 'tyrant's standpoint' (a term explained in Chapter 1); and
>
> (ii) corporations wield *external power*, and especially 'penal economic power', such that they stand in a tyrannical and corrupting relation to human communities.

I expect that some adherents of the limited government tradition will broadly accept that the phenomena I describe are genuine problems. However, because of the Consensus's powerful grip on the tradition, its adherents have generally failed to recognize that the problems are relevant to its Rule of Law project *and* that they can be reasonably described using its idiom.

I will attempt to demonstrate that according to the criteria governing the use of the tradition's idiom, it was reasonable for Franklin D Roosevelt to attack the 'tyrannical power'[3] of 'economic royalists' whose 'concentration of control of material things' has made them 'the privileged princes of ... new economic dynasties, thirsting for power'.[4] I want to show that such rhetoric may be employed in a *meaningful* and *principled* manner in

[3] Quoted in Michael Sandel, *Democracy's Discontent* (Harvard University Press 1998) 255.
[4] ibid 256.

order to persuade the tradition's adherents that institutional economic power ought to be regarded with the same suspicion as state power.

Although it is largely overlooked today, the notion that great corporate power is a limited government problem was a central and recurrent theme in North American public debates from the Revolution until the middle of the twentieth century.[5] I hope to vindicate and enrich this line of thought by showing how it (i) makes principled use of the possibilities embedded in the tradition's normative vocabulary and (ii) faithfully responds to the moral imperatives implied in the tradition's underlying principles.

3. Corporations are not themselves members of 'We the People'

By obscuring these possibilities and imperatives, the Consensus distorts our understanding of the limited government tradition's Rule of Law project. But not only in the way just described. It also contributes to the plausibility of the view that corporations should be treated as though they were *human beings* deserving limited government protection, a view which is endorsed by certain aspects of legal practice (eg in US First Amendment jurisprudence).

In this Chapter, I advance the converse position. My contention that large economic institutions are potentially tyrannical and corrupting means that they are *therefore* the *very kind of thing* from which we, the People, require limited government protection. In *Citizens United,* Justice Stevens reminded his readers that corporations 'are not themselves members of "We the People" by whom and for whom our [the US] Constitution was established'.[6]

Notwithstanding the empirical accuracy and normative appeal of Stevens's remarks, they were offered in dissent. Today, they are heterodox. And to many, they may

[5] For substantial evidence supporting this proposition, see ibid throughout.
[6] *Citizens United v Federal Election Commission* 558 US 310, 466 (2010) ('*Citizens United*').

seem eccentric, perhaps even disreputable, thanks in part to the success of liberal public philosophy's legitimation story, according to which corporations (and the capitalist constitution of which they are a key plank) are respectable and indispensable features of our way of life. As Justice Brandeis remarked in 1932 (in another dissenting opinion):

> The prevalence of the corporation in America has led men of this generation to act, at times, as if the privilege of doing business in corporate form were inherent in the citizen; and has led them to accept the evils attendant upon the free and unrestricted use of the corporate mechanism as if these evils were the inescapable price of civilized life and, hence, to be borne with resignation. Throughout the greater part of our history a different view prevailed.[7]

The 'different view' which Brandeis invokes is exemplified by a New York *Tribune* editorial from the turn of his century:

> A corporation is not a citizen with a right to vote or take a hand in politics. It is an artificial creation, brought into existence by favor of the State solely to perform the function allowed by its charter. Interference by it with the State and attempts by it to exercise rights of citizenship are fundamentally a perversion of its power.[8]

In the light of Michael Sandel's account of public discourse at the time when Brandeis wrote,[9] it seems that the mentality which Brandeis criticized is yet more deeply entrenched in the legal and *élite* discourse of our time than it was in the minds of 'men' of his 'generation'. The 'different view' to which he refers is something the tradition is obliged to recover.

4. The Rule of Law, the goods of excellence, and the tyrant's standpoint

It will be recalled that the *tyrant's standpoint* is the outlook of the archetypal tyrant. As explained in Chapter 1, the archetypal *tyrant* possesses an untrammeled *will to arbitrariness*

[7] *Louis K Liggett Co v Lee* 288 US 517, 548 (1932).
[8] Quoted in Jill Lepore, 'The Crooked and the Dead: Does the Constitution Protect Corruption?' *The New Yorker* (New York, 25 August 2014).
[9] Sandel (n 3).

and, therefore, systematically (i) refuses to recognise the moral equality of others and (ii) rejects the notion that there is a moral obligation to limit his or her *power over others* for the sake of giving due weight to the respect-worthy interests, expectations, and rights of *others*. The contrast between the tyrant's standpoint, on the one hand, and the outlook of one devoted to the Rule of Law, on the other, may be illuminated by a consideration of their respective relationships to 'the goods of excellence'.[10] Practical reasoning that aims at excellence (*arete*) seeks to achieve the goods of excellence.

Excellence is assessed by reference to the standards applicable to a form of 'systematic activity'.[11] Firstly, there are the activities people participate in as occupants of a role of one kind or another (eg, teacher, parent, first violin, etc.), each of which has its own internal standards of excellence by which its participants are adjudged good or bad *at* performing the particular role. Secondly, there is the 'higher-order, integrative form of activity' constituted by the political community (*polis*), the end (*telos*) of which was the attainment of a 'structured communal life within which the goods of the other forms of activity were ordered, so that the particular *telos* of the *polis* was not this or that good, but *the good and the best* as such'.[12]

The virtues are seen as dispositions which are required to achieve not only the goods internal to a specific activity, but 'the overall good of the *polis*, the good and the best, so ... practical reasoning [also] becomes ordered to the overall good of the *polis*, the good and the best'. [13]

So allegiance to the goods of excellence, both as they apply to this or that activity and to the community as a whole, involves adherence to a particular form of practical rationality which enables the agent to see that 'the soundness of a particular practical argument, framed in terms of the goods of excellence, is independent of its force for any

[10] Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Duckworth 1988) ch III ('*Justice*').
[11] ibid 30.
[12] ibid 44.
[13] ibid 44.

particular person'.[14] Because this notion implies an obligation to be bound by impersonal limits, it is the antithesis of the tyrant's standpoint. The Classical Athenian Rule of Law project treated law as part of a larger educational enterprise (*paideia*) aimed, among other things, at shaping the souls of citizens in order to instill allegiance to the goods of excellence, including an idea of the good and the best (as described a moment ago).[15]

The archetypal tyrant is a pure expression of *pleonexia*, the drive to take more and more without end. And the cause of both tyranny in the *polis* and in the soul is *pleonexia*, which leads one element in the soul or in the city to enjoy excessive power over the others. This is associated with the idea of bodily health as *isomoiria*, which arises when the elements of the body are equally balanced; disease occurs when there is an excess of one element which dominates the others.[16]

4.1 The modern Rule of Law project and the goods of excellence

The modern limited government tradition inherited aspects of the ancient concern with the goods of excellence and with *pleonexia*.[17] However, many modern thinkers have had an ambivalent attitude to the ancient project of soulcraft. On the one hand, as Sandel demonstrates in his study of the North American context, certain US Founding Fathers emphasized 'civic virtue'.[18] James Madison, for instance, held that:

> [T]he aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effective precautions for keeping them virtuous whilst they continue to hold their public trust.[19]

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[14] ibid 45.
[15] Werner Jaeger, 'Praise of Law: The Origin of Legal Philosophy and the Greeks' in Paul Sayre (ed.) *Interpretations of Modern Legal Philosophers* (OUP 1947) ('*Praise*'); and Werner Jaeger, *Paideia*, (Basil Blackwood 1945) vol 3, 224 and following.
[16] Jaeger, *Praise* (n 15) 358-359.
[17] Sandel observes that the liberal current of the limited government tradition tends to eschew soulcraft: (n 3) 322; MacIntyre, *Justice* (n 10) 36.
[18] Sandel (n 3) 136, 143. See further, Philip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP 1999).
[19] Quoted in Pettit (n 18) 221.

Members of a self-governing body of citizens, and those who hold state office (Madison's priority), ought to have virtues associated with the higher-order, integrative form of activity described above, qualities which are conducive to the good of the political community as a whole.

On the other hand, there was also pessimism concerning the chances that virtue would flourish in the teeth of the temptations of great power. For example, in the *Federalist* no. 51, Madison departed from the spirit of the remarks just quoted by arguing that:[20]

> Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.[21]

Madison's vision (after Montesquieu's) contains an echo of the ancient idea of balance (*isomoiria*). But, now, the aim of limited government measures, including the Rule of Law, is to achieve balance primarily, or even exclusively, in the *constitution of the state*, rather than in the *constitution of the soul*. A well-designed state constitution will seek to ensure that whatever the condition of the *souls* of those in power, the relevant requirements of the goods of excellence will be promoted by being given systematic embodiment in the legally-enshrined norms, structures, processes of the state's *institutions*.

Even if they are rarely thought of in this fashion, various modern Rule of Law practices can be interpreted as ways of *institutionalizing* the goods of excellence in the norms, structures, and processes related to the exercise of state power: excellence in the exercise of power over others is promoted by the Rule of Law's mechanisms for

[20] Sandel (n 3) 130.
[21] Quoted in ibid.

systematic recognition and accountability designed to ensure that power-holders give due weight to respect-worthy things.

Consider the following by way of illustration. The constitutional entrenchment of rights is based on the view that excellence in the exercise of legislative power entails respect for the limits implied by such rights. The legal norms of administrative law reflect a conception of what would count as excellence in executive decision-making: an excellent decision and decision-making process involve natural justice, the absence of bias and bad faith, having regard to relevant considerations (not irrelevant ones), actuation by proper purposes, etc. The norms applicable to judicial method can be similarly analyzed; Ronald Dworkin's work, for instance, could be read as an elucidation of the norms conducive to excellence in adjudication.

In limited government terms, each of these practices is *excellent* insofar as it ensures that the exercise of power is consistent with moral equality for all and freedom for all from manipulative social relationships: these principles (and associated 'rights', 'immunities', etc.) supply the limited government *criteria of excellence* relevant to the exercise of power over others; and the tradition holds that institutional power is vulnerable to those with the tyrant's standpoint unless its norms, structures, and processes are constituted by law, in a manner conducive to these aspects of 'the good of the governed'.[22]

4.2 Corporations and the goods of excellence

The legal design of the corporation means that its power over others *must not* be exercised according to a conception of the goods of excellence that would satisfy the tradition's underlying principles. The law provides that the corporation's powers,

[22] Sidney (n 2) ch 1, §6, 21. For Kant on rights: Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press 2009) 217-218 ('*Freedom*').

including its *power over others*, are 'constituted for the pleasure, greatness or profit'[23] (strictly speaking *profit*) of its owners, and the law requires them to be exercised accordingly. It therefore resembles a *state* whose power over others is 'constituted for the pleasure, greatness or profit of one man',[24] which, according to Sidney, is the form of constitution to which the tyrant's standpoint aspires; it is the constitution of the archetypal *tyranny*. The corporate constitution's exclusive preoccupation with the end of unlimited wealth accumulation means that it is a peculiarly capitalist expression of the tyrant's standpoint, and, indeed, of *pleonexia*.

Of course, the tradition does not hold that there are *no* endeavours which can legitimately be undertaken for the pleasure, greatness or profit of one or more persons: its principles do not entail that the pursuit of pleasure, greatness or profit are necessarily objectionable. Nor do the tradition's principles imply that the distribution of such goods to some people but not to others is necessarily objectionable in all circumstances. The tradition is concerned with the constitution of *power* over others, which may or may not bear on the distribution of pleasure, greatness or profit; such distribution is at most incidental to the tradition's project. The objection, then, is to *power over others* being constituted such that, in its exercise, the pleasure, greatness or profit of some can be systematically pursued with *indifference* to the *moral equality* of others.

The law obliges corporate officers and servants to exercise their power over others exclusively in service of profit-maximization for some. This is the paramount (perhaps sole[25]) criterion of 'excellence' governing their use of power. However,

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[23] ibid.

[24] ibid.

[25] In Australia, there is authority refuting the proposition that 'directors' duties are concerned with any general obligation owed by directors at large to conduct the affairs of the company in accordance with law...': *ASIC v Maxwell* (2006) 59 ACSR 373, 399 [104] (Justice Brereton). If directors permit or cause their company to breach the law, they do not 'automatically' breach their duties: Abe Herzberg and Helen Anderson, 'Stepping Stones – From Corporate Fault to Directors' Personal Civil Liability' (2012) 40 Federal Law Review 181, 185. Whether a breach of directors' duties has occurred turns on whether (say) it was negligent to cause 'jeopardy to the

according to the underlying principles of the tradition, this is an inappropriate conception of what counts as excellence in the exercise of power over others. Why?

Because it renders respect for moral equality *irrelevant* to the exercise of power over others. Moreover, it not only licenses, but also *encourages*, a manipulative attitude towards human beings. The corporation's legal constitution not only allows, but effectively *requires*, that the people over whom corporate power is exercised are to be regarded *merely* as potential instruments or means in the service of profit-maximization. The law of directors' duties, which is the corporate equivalent of public administrative law, provides for the judicial review of directors' decision-making, among other things, to ensure that they *do not* treat humans as ends in themselves.[26]

This aspect of the corporate constitution is illustrated in the leading English case on the subject, *Parke v The Daily News*.[27] In that case, whose immediate concern was *internal* power, it was held that directors may exercise power in a manner which *in effect* enhances the welfare of affected humans (who are not shareholders), if and only if this result springs *not* from a concern for human welfare as such, but can be shown to be conducive to profit-maximization.

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interests of the company ... in the actual or potential exposure of the company to ... penalties or other liability': *ASIC v Maxwell* (2006) 59 ACSR 373, 399 [104]. And whether it was negligent will turn on, among other things, whether a director authorized 'a course which attracts the risk of that exposure, at least if the risk is clear *and the countervailing potential benefits insignificant*': ibid. Emphasis added.

[26] S.172 of the Companies Act 2006 (UK) does not alter this analysis. As Robin Hollington QC puts it, the 'duty to act in the interests of shareholders remains the primary duty of directors, so that the duty to have regard to the listed factors, which are not obviously consistent with the interests of shareholders, is subordinate to and in aid of that primary and overriding duty' at 7: 'Directors' Duties Under the Companies Act 2006' (22 April 2008) <http://www.newsquarechambers.co.uk/files/Publications/Directors%20duties%20under%20the%20Companies%20Act%202006%20(Robin%20Hollington%20QC).pdf> accessed 31 December 2014.

[27] *Parke v Daily News Ltd* [1962] Ch 927. Brian Cheffins notes that the provision enacted to overturn *Parke* 'provides only scant protection for workers' because it requires shareholder approval 'before a company can make payments' of the kind impugned in *Parke*, and shareholders 'are unlikely' to give their approval: *Company Law: Theory, Structure, and Operation* (OUP 1997) 254.

The directors of Daily News Ltd breached their legal duties because they appeared to harbour a genuine,[28] but illicit, 'desire to treat ... employees generously'[29] not in service of the pleasure, greatness or profit of shareholders, but simply for the sake of the employees' own good. This desire was said to have been betrayed in correspondence between the chief protagonists in the sale of Daily News Ltd to Associated Newspapers Ltd. For instance, Laurence J Cadbury (the Chairman of Daily News Ltd) wrote to Lord Rothermere (of Associated Newspapers Ltd):

> We feel it would be wrong to continue to dissipate our newspaper assets with the prospect that, after a further period, they would be so much lessened that we should not be able adequately to safeguard our pensioners nor give reasonable compensation to members of the staff upon termination of their employment.[30]

The board, which comprised the majority shareholders, decided to use some of the sale proceeds to make '*ex gratia*' payments to 'relieve hardship' suffered by redundant workers who 'did not get another post'.[31] An aggrieved minority shareholder challenged this decision. The shareholder argued that *the company* itself lacked the power to make such a payment; even if a resolution of the shareholders had purported to 'make a present of this vast sum of money', 'the company, in general meeting' has 'no such power'.[32] Justice Plowman held that:

> The view that directors, in having regard to the question what is in the best interests of their company, are entitled to take into account the interests of the employees, irrespective of any consequential benefit to the

[28] Justice Plowman indicates in passing that the appearance might have been contrived 'for public relations reasons', but he does not dwell on this possibility. However, as a matter of company law, if the directors' show of fellow-feeling was in fact just such a pretence, and justified by the goal of promoting the company's financial interests, company law ought to have exonerated the directors: *Parke v Daily News Ltd* [1962] Ch 927, 933.

[29] *Parke v Daily News Ltd* [1962] Ch 927, 943, 950-951, 962 applying Lord Justice Bowen in *Hutton v West Cork Railway Co* (1883) 23 Ch D 654, esp 671.

[30] *Parke v Daily News Ltd* [1962] Ch 927, 933.

[31] *Parke v Daily News Ltd* [1962] Ch 927, 933.

[32] *Parke v Daily News Ltd* [1962] Ch 927, 943. Justice Plowman says that 'the proposal to pay compensation is one which a majority of shareholders is not entitled to ratify': 963. A 'payment of a company's money which, quoad the recipients, is a voluntary payment, has to be justified' according to the wealth maximization principle: 960. He does not say whether an otherwise ultra vires gift could be validly ratified by all shareholders: 958-959.

> company, is one which may be widely held... But no authority to support that proposition as a proposition of law was cited to me; I know of none, and in my judgment such is not the law.....[33]

In other words, Lord Rothermere's assertion that 'consideration for the staff concerned and the reduction of hardship must be the first priority'[34] is misguided as a matter of company law; the reduction of hardship could only ever be, at most, a side-effect of treating shareholder wealth-maximization as the first priority.

The employees of Daily News Ltd were relevant to the directors' exercise of power exclusively as *mere means* to the end of profitability. The directors breached their legal duty because they seemed to treat the employees as fellow human beings, moral equals who were worthy of respect as such. The directors had apparently forgotten that, *so far as the company was concerned*, the employees were to be considered merely as 'living tools'.[35] Employees might be treated in a manner befitting human beings, but only where that would be to the company's profit, say by making them more contented *and therefore* harder-working tools.

5. For whose good should power over others be exercised?

I have sought to base the foregoing remarks on orthodox propositions of company law. Assuming I have understood the law correctly, my account is only novel, and potentially controversial, insofar as I have attempted to illuminate the significance of the corporate constitution in the light of the limited government tradition's underlying principles and idiom: the corporate constitution requires the corporation's officers and servants to wield *power over others* according to the tyrant's standpoint, and therefore with indifference to

[33] *Parke v Daily News Ltd* [1962] Ch 927, Justice Plowman continues: 'In my judgment, therefore, the defendants were prompted by motives which, however laudable, and however enlightened from the point of view of industrial relations, were such as the law does not recognise as a sufficient justification.'

[34] *Parke v Daily News Ltd* [1962] Ch 927, 934.

[35] As slaves are described in Book 1 of the *Digest*, after Aristotle: see Quentin Skinner, *Liberty Before Liberalism* (CUP 1998) 40.

moral equality, a key aspect of 'the good of the governed'.[36] Of course, by using the tradition's idiom in this way I am applying certain terms (eg, 'tyranny', 'the good of the governed') beyond the context in which they were originally at home. This is only reasonable if the criteria governing the use of the relevant terms permit such an extension.

It is my contention that it is indeed reasonable to use the rhetoric of 'tyranny' (and connected terms) in this new context, because such novel applications have discernible roots in the moral impulses of traditional thought. The tradition rejects any vision which would constitute the *institutional* power of the *state* 'as if nations were created by or for the glory or pleasure of magistrates'.[37] 'Magistrates are [*only*] distinguished from other men, by the power with which the law invests them for the publick good'.[38] As explained in Chapter 1, the tradition does not see its Rule of Law project as responsible for securing all aspects of the public good. The Rule of Law requires that power-holders respect the moral equality of those over whom power is exercised, which is but one element of the public good, among others. The Rule of Law's task is to ensure that the governed are not treated as though they were *manipulanda* who exist merely for the 'glory or pleasure' of a few.

As a matter of moral principle, the tradition's commitment to moral equality cannot plausibly be confined to only one context in which *power over others* is exercised. It must be upheld in all spheres, including in connection with *economic* power *over others*: all power *over others* must be exercised in a way that respects moral equality. Otherwise, the power in question is liable to be 'tyrannical and unjust ... as tending more to the interest or profit' of its holders.[39] How could it be thought legitimate *in any context* to exercise power as though other people were mere instruments to be manipulated for the 'interest

[36] Sidney (n 2) ch 1, §6, 21.
[37] ibid ch 2, §32, 314.
[38] ibid ch 1, §16, 51-52.
[39] ibid.

or profit' of those holding power? The following precepts are regarded as axiomatic. Note that they are expressed to apply to power *simpliciter*:

> [t]hat ... no power ought to be admitted which is not just; that none can be just which is not good, profitable *to the people*, and conducing to the ends for which it is constituted...[40]

So, in every context, the tradition's adherents must ask and answer the following question, or else betray the tradition's underlying moral commitments: what are the various ways in which this form of power could be constituted, or perhaps reconstituted, in order to ensure that power-holders can be held to account in respect of their obligation to respect moral equality?

Of course, in any given context, moral equality will not be the only value at stake. The tradition's adherents must aim to ensure that, to the extent possible, their community harmonizes the various ways it goes about promoting the diverse components of the public good, including the measures it decides to adopt for the sake of moral equality. In certain cases, such considerations will inform the tradition's views about how a particular form of power ought to be constituted, including its views concerning the desirability of adopting the Rule of Law in the relevant context.[41]

6. Corporations as vehicles for prosperity and property

In view of such complexities, defenders of the capitalist constitution might respond to this Chapter's critique by arguing that the tradition's commitment to moral equality should not blind it to the demands of other aspects of the public good. Some might argue that although the corporate constitution obliges the corporation's officers and

[40] ibid ch 3, §23, 454. Emphasis added.

[41] The tradition's early modern adherents generally prescinded parental power from its Rule of Law project on the ground that 'it is presumed' that parents 'cannot abuse' their power, because they have 'a law in their bowels, obliging them more strictly to seek' the 'good' of their offspring 'than all those that can be laid upon them by another power': Sidney (n 2) ch 3, §1, 320. Similarly, John Locke *Two Treatises of Government* (CUP 1988) II §§58, 65, 67, 71, 86, 170. For Kant's views, see Arthur Ripstein, 'Authority and Coercion' (2004) 32 Philosophy & Public Affairs 2, 17-18 ('Authority').

servants to wield power with indifference to moral equality, this obligation *in effect* promotes other aspects of the public good. Either or both of the following considerations might be used to justify this assertion:

> (i) corporations operate within markets, and the price signal's invisible hand means that indifference to the public good unintentionally promotes the public good,[42] because it maximizes the wealth available to trickle from the corporation and its owners to other members of the community;[43]
>
> (ii) corporations are best understood as vehicles through which property-owners express their property rights,[44] and the enjoyment of such rights is a crucial component of the public good.[45]

There are sound *limited government reasons* to reject both such attempts to reconcile the existing corporate constitution with the public good.

Firstly, assume for the sake of argument that *current levels* of economic prosperity and growth cannot be maintained without sacrificing moral equality.[46] In order to give the tradition's adherents pause, it would not be enough for the corporation's defenders

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42 Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (OUP 1993) bk IV, ch II, §IX.

43 'Unlike other interest groups, business corporations have been effectively delegated responsibility for ensuring society's economic welfare; they inescapably structure the life of every citizen'. Internal quotation marks omitted. *Citizens United* 558 US 310, 465 (2010) (Justice Stevens).

44 Until the defeat of the so-called 'concession theory', it was plausible to hold that incorporation would be granted on condition of there being a demonstrable *public* need or benefit. Now it is difficult not to see any particular corporation as being, in the first place, a *private* undertaking, which need not confer identifiable *public* benefits. On the concession theory, see *Louis K Liggett Co v Lee* 288 US 517, 549 (1932) (Justice Brandeis): 'There was a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations. So, at first, the corporate privilege was granted sparingly; and only when the grant seemed necessary in order to procure for the community some specific benefit otherwise unattainable'.

45 '[T]he public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modeled by the municipal law': William Blackstone, quoted in A W B Simpson, *Victorian Law and the Industrial Spirit* (Selden Society 1995).

46 Which is a large assumption. And we must also assume what is demonstrably (though apparently not *undeniably*) *untrue*, which is that they are in any case ecologically sustainable.

to demonstrate that the economy would contract if moral equality were no longer sacrificed. They would need to convincingly demonstrate that, instead of enjoying a reasonable standard of living, the community would have to accept ongoing economic hardship. In the absence of such a drastic prospect, it is arguable that the tradition's adherents would not face a truly tragic dilemma. Such a dilemma would arise if they were forced to choose between moral equality and economic misery. But such a dilemma seems farfetched. It is reasonable to think that we could envisage a way of economic life in which a perfectly reasonable level of economic prosperity could be attained without sacrificing the tradition's principles.

Secondly, the notion that by promoting the wealth and glory of very few members of society we indirectly enhance the wealth and glory of all (albeit *much* more modestly) should be regarded with suspicion by the tradition's adherents: essentially the same notion was often heard in the mouths of pretenders to political absolutism and other apologists for unjustified historical privileges. I return to this subject below.

For now, we might simply ask: was Bonapartism only objectionable from the moment of Napoleon's defeat, when his subjects could no longer bask in his reflected glory? Or to use a contemporary case: would the self-aggrandizement and absolutism of the Chinese Communist Party only become odious were it no longer able to deliver greater affluence to its subjects from one year to the next?[47] Could the corporate constitution only become undesirable were the corporation no longer to offer a spring from which wealth could trickle down from the few to the many? From a limited government perspective, each of these constitutional regimes is illegitimate insofar as it gives systematic expression to the tyrant's standpoint, whatever else may be said in its favour.

[47] James Ball 'China's princelings storing riches in Caribbean offshore haven' *The Guardian* (London, 21 January 2014); Tania Branigan and James Ball, 'China blocks foreign news sites that revealed elites offshore holdings' *The Guardian* (London, 23 January 2014).

Thirdly, as explained in Chapter 5, one could defend the *present conception* of property rights conferring *power over mere things* (say a motor-car) without being committed to maintaining that conception in respect of property rights effectively conferring *power over others*. If the former can be preserved without threatening the tradition's principles regarding the exercise of power over others, which would seem to be the case, they do not pose a limited government problem. And perhaps private property affording power over mere things is a component of the public good, though of course this is a separate question.

But if preserving property rights effectively conferring *power over others* must come at the price of the tradition's principles, it is not obvious that there are any good reasons for preserving them. The tradition's adherents should ask: is it possible, notwithstanding the arguments advanced in this study, to reconcile the present conception of property rights in relation to power over others with the tradition's underlying principles?[48] I argue that they cannot be reconciled, and that property rights should not be allowed to trump moral equality. I return to this subject in Chapter 5.

For the time being, it is worth bearing in mind that defenders of absolutism once asserted that the 'kingdom' was the 'patrimony' of kings.[49] Against this, the tradition's early modern adherents insisted that their (political) rulers did not have a 'right to the powers they exercised'.[50] Rulers were instead *granted* those powers (which were not their property but 'annexed to the office'[51]) on condition that their constitution and exercise would be consistent with moral equality for the ruled.

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48 As this question falls outside the scope of this study, I do not consider whether it could plausibly be answered in the affirmative. Although it is doubtful, perhaps such a reconciliation could be achieved by a Hegelian property theory: Jeremy Waldron, *The Right to Private Property* (OUP 1988) ('*Right*') 4, and generally, ch 10.

49 Sidney (n 2) ch 3, §43, 562.

50 ibid ch 3, §5, 346. A contemporary formulation of the idea is offered by Sir John Laws, 'the public decision-maker has no individual rights in his role as such': Sir John Laws, 'Public Law and Employment Law: Abuse of Power' [1997] Public Law 455, 466.

51 Sidney (n 2) ch 3, § 29, 497. For Kant on 'offices', see Ripstein, *Freedom* (n 22) 191.

A thorough response to these questions is beyond the scope of this study, whose chief purpose is simply to persuade readers that the tradition's underlying principles require its adherents to address these, and other, questions associated with internal and external economic power. As Chapter 5 emphasizes, if economic power were recognized as a *potential* target of the Rule of Law, the tradition's adherents as well as defenders of great economic power would be impelled to tackle a range of complex and controversial matters, including those just raised. The resolution of such questions would have implications not only for the *corporate* constitution, but also for other elements of the *capitalist* constitution.[52]

7. The corporation as a vehicle for tyrants

The law of corporations creates institutions (upon which it confers *personality*) whose stance to flesh and blood persons is a more reliable and complete reflection of the *archetypal* tyrant's standpoint than we could reasonably expect to find in any actual human being. Of course, because corporations are in truth impersonal institutions, they 'have no consciences, no beliefs, no feelings, no thoughts, no desires'.[53] They cannot possess the human impulses of 'pride, avarice, ambition, lust', which, according to Sidney, feed 'the desire of gaining the power, riches and splendor that accompanies a crown'[54]—or, we should say, that accompanies economic domination.

Though just as *political* institutions can be *vehicles* for the more effective pursuit by some persons of those uniquely human drives, so too *economic* institutions.[55] The artificial persons of political *or* economic life may be constituted to act comprehensively and systematically according to the tyrant's standpoint and in the service of would-be human

[52] Elements (iv)-(iv) (as set out in Chapter 2).
[53] *Citizens United* 558 US 310, 466 (2010) (Justice Stevens).
[54] Sidney (n 2) ch 1, §15 45.
[55] 'Corporations help structure and facilitate the activities of human beings': *Citizens United* 558 US 310, 466 (2010) (Justice Stevens).

tyrants.[56] Friedrich Nietzsche recognizes that although some legal institutions may be constituted to hinder tyrants' designs, others might augment their strength:

> A legal organization, conceived as a sovereign and universal, not as a weapon in a fight of complexes of power, but as a weapon *against* fighting, generally something after the style of Dühring's communistic model of treating every will as equal with every other will, would be a principle *hostile to life,* a destroyer and dissolver of man, an outrage on the future of man, a symptom of fatigue, a secret cut to Nothingness. –[57]

So:

> ...conditions of legality can only be *exceptional conditions,* in that they are partial restrictions of the real life-will, which makes for power, and in that they are subordinated to the life-will as general and as particular means, that is, as means for creating *larger* units of strength.[58]

And so if institutions are thus constituted—as means for creating *larger* units of strength—it is essential to ask, *cui bono?* This is because such institutions are likely (at least partly) to serve as conduits for the 'pride, avarice, ambition, lust' of at least one or more of their chief human controllers and beneficiaries.

Who, then, are the *human tyrants* behind the corporate form? To whose 'real life-will' are they 'subordinated' as 'means'? The nature of the corporation makes this a difficult question to answer: one of its important features is that it allows those shareholders who wish to be passive, or to look the other way, to outsource the tyrant's standpoint to the corporation's officers and servants.[59] Indeed, particular shareholders might not possess 'pride, avarice, ambition, lust' in anything like the measures attributed to the archetypal tyrant, but they are nonetheless designated as the beneficiaries of the

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[56] Further, although corporations are non-human and so cannot be ambitious, driven, disciplined, industrious, indefatigable, etc., when they are large and well-resourced, they can simulate these qualities with a potency more effective than a single, tyrannical individual or cabal could muster.
[57] Friedrich Nietzsche, *The Genealogy of Morals* (Dover Publications 2003) 50.
[58] ibid 49.
[59] Consider the Grégoire family depicted in Emile Zola's *Germinal* who had 'a profound gratitude for a valuable investment which had kept the family in comfort and idleness for a century. From father to son it had lasted. ... At the heart of their worship was a superstitious terror that the million of their denier might suddenly dissolve if they withdrew it and placed it in a drawer. They felt it was safer to keep it buried underground, where a whole population of miners, starving generation after starving generation, could dig it up a little for them every day, according to their needs': (OUP 1993) 80.

corporation's expression of the tyrant's standpoint. And officers and servants can, for their part, claim that they merely possess what could be called the 'bureaucratic standpoint': the possessor of the bureaucratic standpoint regards the ends chosen by his or her master as given, whatever his or her purportedly *private* and *genuine* normative commitments.[60] A particular officer or servant might sincerely claim to abhor avarice and even profit, but they *must* nonetheless serve these ends *qua* corporate bureaucrat.[61]

In other words, corporations share with all *institutions* the tendency to subordinate the character of particular individuals to the character of the organization, and this in a way which potentially yields a cleavage between what a participant in that institution thinks and feels and what they are nonetheless complicit in. This tendency may be reinforced and rendered more systematic where the character of the organization is given legal backing, as it is in the case of both the state and the corporation. As Alasdair MacIntyre observes, modern social structures, including modern institutions, tend to encourage the 'compartmentalization' of the human personality.[62] He offers as an example a survey of certain 'power company executives' who:

> tended to a significant degree to answer what were substantially the same questions somewhat differently, depending on whether they took themselves to be responding *qua* power company executive or *qua* parent and head of house-hold or *qua* concerned citizen. That is to say, their attitudes varied with their social roles and they seemed quite unaware of this.

In particular, the executives:

> were unable even to entertain, as a serious policy alternative, reduction in the overall levels of power consumption, so long as they thought and spoke from within their sphere of activity as power company executives,

[60] In considering corporate political campaigning, Justice Stevens says of corporate officers who 'make the decision to place the ad', it is 'entirely possible that the corporation's electoral message will *conflict* with their personal convictions': *Citizens United* 558 US 310, 467 (2010).

[61] Though as Adolf A Berle and Gardiner C Means, and many others since, have pointed out, leading corporate officers often succeed in wielding corporate power for their own benefit rather than strictly in service of shareholders: *The Modern Corporation and Private Property* (Macmillan Co 1932).

[62] Alasdair MacIntyre, 'Social Structures and their Threats to Moral Agency' (1999) 74 Philosophy 311, 321-322.

> but they did not suffer from the same inability when thinking and speaking as consumers or concerned citizens.[63]

However, institutions may also exert an *overwhelming* influence on the characters of those who would, or do, participate in them, or are dependent on them; the upshot of this kind of influence is not a cleavage and tension between different compartments, but instead the substantial formation of the human character in the institution's image. Where the institution is properly constituted, this influence may be salutary. But where the character of the relevant institution is tyrannical, both compartmentalization and more extensive character formation may yield 'slavishness' and 'corruption' in the limited government senses of those terms (discussed below).

As just intimated, the modern limited government tradition recognizes that these institutional tendencies can be harnessed for good or for ill. And so it seeks to harness them in order to promote its underlying principles: its Rule of Law project aims to constitute *institutional* power in accordance with the tradition's principles in order to (i) exert a salutary influence on the characters of the institution's officers and servants,[64] or (ii) at the very least, to render those of the institution's officers and servants who lack fidelity to those principles *less dangerous* than they would otherwise be. As Sidney puts it:

> If virtue may in any respect be said to outlive the person, it can only be when good men frame such laws and constitutions as by favouring it preserve themselves. This has never been done otherwise, than by balancing the powers in such a manner, that the corruption which one or a few men might fall into, should not be suffer'd to spread the contagion to the ruin of the whole.[65]

The suggestion is that virtue can be greater than, and also 'outlive', particular individuals, where institutions are *properly constituted*, ie, legally constituted to be conducive to virtue.

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[63] ibid 322.

[64] And perhaps, of citizens generally.

[65] Sidney (n 2) ch 1, §43, 559. Kant holds that the 'distinction between an official's acting within his or her mandate and outside it does not depend on the official's attitude...': Ripstein, *Freedom* (n 22) 193.

The tradition supposes that an equivalent relationship holds in the case of vice: the tyrant's standpoint may be greater than, and also outlive, particular individuals, where institutions are legally constituted to promote it. *Poorly constituted* institutions *allow* born tyrants to prosper *qua* tyrants, and they may also *encourage* the emergence of the latent tyranny in others.

8. The constitution of tyranny

The archetypal tyrant wishes to stand at the summit of powerful institutions whose reach may extend across substantial aspects, or even the entire range, of social life. Where a tyrant succeeds in this enterprise, the limited government tradition would typically describe the relevant institutional power as a *tyranny*. As the *archetypal tyranny* holds sway over an entire community, it is appropriate to consider it in connection with *external* economic power.

As explained in Chapter 2, external economic power may be exercised through the use of 'investment power'. Investment power is an incident of the rights entailed in *private* property, as it is currently conceived. These rights include the freedom to dictate the use of' a 'resource',[66] and therefore, to invest or not, or to withdraw an investment, or to change its nature. This Section addresses *penal economic power*, which, *under the capitalist constitution*, is one possible application of investment power.[67]

[66] J W Harris, 'Private and non-private property: what is the difference?' (1995) 111 Law Quarterly Review 421, 422-423.

[67] A right to exercise penal economic power of the kind which resource-controllers currently enjoy is not a *necessary* concomitant of investment power. Arguably, were investment power properly constituted, nobody would have a legal right to threaten to use, or actually to use, investment power to punish a community.

8.1 Economic power over others and the capitalist constitution

The conditions for the *existence* of economic power over others (including investment power and penal economic power), and the *disposition* to exercise such power for the aggrandizement of the owners of great wealth, are both functions of the combination of *all* of the elements of the capitalist constitution described in Chapter 2.

A. Where an agent has the power to 'dictate the use of' a 'resource', and where the welfare of others *depends* significantly upon how that power is exercised, the former is 'armed with power over' the latter:[68] element (v).

B. The relationship of *dependence* just described is augmented by elements (ii) and (iii) of the capitalist constitution: most productive wealth is privately owned *and* such ownership is highly concentrated, such that the welfare of *most* members of the community is contingent upon access to resources controlled by very few.

C. Further, because such control is a function of *private* ownership, the power to 'dictate the use of' a 'resource' may be exercised in the service of 'self-seeking exploitation':[69] element (i).

D. Element (iv) of the capitalist constitution systematically cultivates the *disposition* to exercise economic power over others with indifference to the good of the governed: capitalism's economic way of life is partly conducted through 'markets', which know 'but one general principle, that of obtaining a maximum return from limited resources'.[70]

[68] Harris (n 66) 422-423.
[69] ibid 433.
[70] Lon Fuller, *The Morality of Law* (Yale University Press 1969) 171.

E. As described in Section 7 above, the sway of this one general principle is sharpened by its *institutionalization* in the corporate constitution, and economic power is *concentrated* in large business corporations: element (vi). The chief human controllers of corporations are *legally required* to exercise economic power over others in order to pursue 'maximum return' exclusively for the sake of the shareholders.

As corporations are constituted after the fashion of the tyrant's standpoint, they wield investment power in general, and penal economic power in particular, with indifference to the *moral obligations* entailed in any reasonable conception of the goods of excellence pertaining to the decisions to invest or not, to withdraw an investment, or to change its nature. In order to be faithful to the tradition's underlying principles, the relevant goods of excellence would require that such powers be exercised consistently with moral equality for all and freedom for all from manipulative social relationships. But the corporate constitution, indeed the capitalist constitution, renders these concerns not merely *immaterial* to, but *subversive* of, the 'one general principle' of corporate excellence: profit maximization for the corporation's owners.

The legal design of the corporation, and the capitalist constitution as a whole, *require* investment power be exercised without giving due weight to relevant respect-worthy things. It is, therefore, a form of *arbitrary* power. Further, the capitalist constitution arms large corporations with a mode of applying investment power that is particularly conducive to the tyrant's goal of ascending the summit of manipulative social relations, namely *penal economic power*. Penal economic power affects substantial aspects of community life, not only when it is actually exercised, but simply by its mere existence.

8.2 Penal economic power and corporations

Penal economic power is deliberately exercised (i) when a private property owner invokes investment power in order to *threaten* a community with harm as a way of securing the community's compliance or (ii) when a private property owner exercises investment power to actually *inflict harm* as punishment for failure to comply.[71] Penal economic power exploits the relations of *dependence* described above in order to obtain the cooperation of economic dependents in some design conceived by the power-holder.[72] Under contemporary capitalism, penal economic power is typically wielded to advance public policy agendas tending to promote the pleasure, greatness or profit of the chief human controllers and beneficiaries of large corporations.

Imagine the following typical scenario, versions of which are often reported in the media: the directors of a company (eg, one manufacturing motor vehicles) threaten to 'take production offshore' unless the state lowers one or more costs (eg, taxes, social charges, wages, environmental and occupational safety measures, unfair termination laws, etc.), and/or increases certain benefits (eg, direct or indirect subsidies, tariff barriers, etc.).

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[71] A decision to withdraw an investment following a community's failure to comply with a threat may be sufficiently justified by business reasons other than any interest in the deterrence value of making good on one's threats. In other words, not every withdrawal of investment following a threat will be exclusively or even partly penal in *intent,* though it may nonetheless be penal in effect, insofar as its consequence is to deter future non-compliance.

[72] I agree with Robert Hale's arguments in favor of the conclusion that 'it seems better, in using the word "coercion", to use it in a sense which involves no moral judgment' nor any legal judgment'. I agree with his definition which sees coercion as yielding 'conduct ... motivated, not by any desire to do the act in question, but by a desire to escape a more disagreeable alternative'. Penal economic power is coercive to the extent that it can yield such conduct. I also agree with the following distinction: 'If I plan to do an act or to leave something undone for no other purpose than to induce payment, that might be conceded to be a "threat." But if I plan to do a perfectly lawful act for my own good, or to abstain from working for another because I prefer to do something else with my time, then if I take payment for changing my course of conduct in either respect, it would not be called a threat'. Penal economic power is therefore to be distinguished from the invocation of investment power in a way not intended as a threat. Finally, I agree with Hale's analysis of the distinction between 'threats' and 'promises': see Robert L Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38 Political Science Quarterly 470, 470-477.

Or imagine another scenario, one which has often arisen in connection with the candidacy of social democratic, or parliamentary socialist, parties or politicians (eg, François Mitterand and the Parti socialiste after 1981): certain powerful corporations announce that they will withdraw their investment from a community should political 'party *s*' win or retain office; the corporations' controllers think that party *s*'s policies are not conducive to profit-maximization.[73] Fear of the harm that such withdrawal would induce might intimidate one or more voters; they may exercise their civil liberty to vote in accordance with the corporations' wishes and contrary to how they would have exercised it had the corporation not made its threat. Likewise, the same fear, or perhaps only the fear of losing the election, might intimidate members of party *s* to adopt policies which conform to the corporations' wishes.[74]

The threat in each case is menacing because of the harm that can be expected to follow if it is carried out. Such harm would typically include loss of employment, and in turn economic and psychological harm for dismissed employees and those close to them, not only in connection with the businesses controlled by the relevant owner(s) but also in dependent enterprises; diminution of the aggregate levels of demand and economic activity; lower tax revenue and in turn less funds available for public services, etc.

Corporate controllers often say, in effect, 'We've told you that *unless you do what we say* is necessary to make our shareholders wealthier, we have the power to make your community poorer; *that* is your reason to cooperate'. Or, more diplomatically, 'If you do what we say, you will be better off than you would be should you refuse'. The *manipulative*

[73] Justice Stevens cites an amicus brief to the effect that '[C]orporate participation in elections, any business executive will tell you, is more transactional than ideological': *Citizens United* 558 US 310, 468 (2010). Internal quotation marks omitted.

[74] Locke declares that, 'He *acts* also *contrary to his Trust*, when he either imploys the Force, Treasure, and Offices of the Society, to corrupt the *Representatives*, and gain them to his purposes: or openly pre-ingages the *Electors*, and prescribes to their choice, such, whom he has by Sollicitations, Threats, Promises, or otherwise won to his designs', etc: Locke (n 41) II §222. In *Citizens United*, Justice Stevens implies that a politician may 'owe a political debt to a corporation, seek to curry favour with a corporation, or fear the corporation's retaliation': 558 US 310, 433 (2010).

use of a lawful discretion or prerogative in order to threaten or cause harm has often been a powerful weapon in the hands of state tyrannies.[75] Penal economic power as wielded by large corporations provides a peculiarly capitalist, 'private', example of the use of manipulative threats for the sake of 'the pleasure, greatness or profit' of those who wish to be at the summit of manipulative social relations.[76]

9. The road to slavery

Early modern accounts of the tradition's Rule of Law project were animated by distinctive conceptions of *liberty* and what was thought to be its antithesis, *slavery*. As a collection of eminent authors has shown, the neo-roman idea of liberty has progressively been obscured by its late modern, 'negative' counterpart, which is one part of the story of liberal public philosophy's victory over its rivals.[77] These same scholars attach the label 'republican' to the early modern proponents of the neo-roman notions of liberty and slavery. However, I am reluctant to use that label here as it might prompt distracting questions concerning how to classify various limited government thinkers: eg, although Locke and Kant both used the neo-roman concepts, they are regarded by many of the limited government tradition's adherents as founders of liberalism (and not as 'republicans').[78] What matters for present purposes are not the labels 'liberal' and 'republican', but the normative implications of the concepts themselves, as well as the fact that they have been employed by the key limited government thinkers addressed in this study.

[75] The objection is not to threats as such, but to the manipulative variety: see note 36 in Chapter 1.
[76] Sidney (n 2) ch 1, §6, 21.
[77] Most notably, Pettit (n 18) 298-299; Sandel (n 3); Skinner (n 35).
[78] Further, not all liberals adhere to a narrow, 'negative' conception of liberty.

For the tradition's early modern adherents, liberty could be predicated of whole communities as well as of individuals.[79] And so 'what it means for an individual citizen to possess or lose their liberty must be embedded within an account of what it means for a civil association to be free'.[80] Freedom is associated with the capacities of individuals and of a community to enjoy a certain form of self-government, an association touched on by Sidney:

> [W]e have no other way of distinguishing between free nations and such as are not so, than that the free are governed by their own laws and magistrates according to their own mind, and that the others either have willingly subjected themselves, or are by force brought under the power of one or more men, to be ruled according to his or their pleasure. The same distinction holds in relation to particular persons. He is a free man who lives as best pleases himself, under laws made by his own consent.[81]

These remarks are also typical insofar as freedom is understood by reference to its opposite: *dependence* on the *arbitrary* will, or 'pleasure', of those with the capacity to exercise power over others, including the power to harm them. Sidney continues, 'I ... esteem myself free, because I depend upon the will of no man'.[82]

In order to describe and to indict this dependent condition, the tradition's early modern adherents often use the term *slavery*, as 'nothing denotes a slave but dependence on the will of another'.[83] In the traditional vernacular, the criteria governing the use of 'slavery' do not confine its application to the juridical category of chattel slavery. They are broad enough to encompass *any* arbitrary and therefore potentially manipulative relations of dependence, political *or* economic. Indeed, the notion of slavery is particularly useful for present purposes, insofar as it provides a way of seeing power that does not encourage arbitrary distinctions to be drawn between political and economic

[79] ibid 24. See also Pettit (n 18) 125.
[80] ibid 23.
[81] Sidney (n 2) ch 3, §21, 440.
[82] ibid.
[83] ibid ch 3, §16, 402.

power; this is because it does not conform to the modern, and obfuscatory, way of seeing governmental power which was discussed in Chapter 3.

In the seventeenth century struggle against absolutism, the term was appropriated to indict the *political* relations which obtain between a tyrant and those whose welfare depends on the tyrant's will. In the nineteenth century, the early socialists coined the neologism 'wage slavery', which was an innovative adaptation of the idiom to condemn the *economic* relations of dependence between master and servant.[84] It is not farfetched, then, to consider using the term 'slavery' to describe the condition of a community whose fortunes depend upon the arbitrary will of those wielding penal economic power.[85] I return to this possibility in a moment.

9.1 Two paths by which freedom can be undermined

According to the English 'neo-roman' writers of the seventeenth century, a distinction is to be drawn between two paths by which the freedom of individuals or of communities can be undermined.[86] I will argue that both paths are relevant to penal economic power.

9.1.1 Deliberate coercion

Via the first path, the liberty of an individual or of a community is infringed if either is coerced 'into performing (or forbearing from performing) any action neither enjoined nor forbidden by law':[87] 'a body politic, like a natural body, will be rendered unfree if it is forcibly deprived of its ability to act at will in pursuit of its chosen ends'.[88] The experience of historical tyrannies suggests that where tyrants think it expedient to do so,

[84] Until the twentieth century, those using the idiom explored here assumed that the employment relationship involved an oppressive condition of dependence. Abraham Lincoln, eg, thought that 'those who spend their entire lives as wage laborers are comparable to slaves. He held that both forms of work wrongly subordinate labor to capital': Sandel (n 3) 182.
[85] And, indeed, investment power generally.
[86] Skinner (n 35) 68.

they will seek to coerce others through threats and punishments, which are meted out *arbitrarily*, with *impunity*, and more or less systematically, for the sake of their own self-aggrandizement.[89]

When large corporations *deliberately* wield penal economic power by making threats or inflicting punishments, they are following the first path. The capitalist constitution: (i) provides the conditions of economic dependence which lend potency to penal economic power; and (ii) it in effect confers this power on large corporations, whose legal design *requires* them to exercise all their powers, including penal economic power, for the sake of the 'one general principle' of 'maximum return', with indifference to the good of the governed.[90]

Liberal public philosophy tends to dignify this state of affairs by assimilating it to the putative ideal of 'economic freedom'. However, as suggested by the automobile manufacture and election scenarios described earlier, this aspect of the 'economic freedom' of large corporations can be employed deliberately to coerce individuals and communities such that their freedom to enjoy certain civil liberties is undermined. The community that is coerced into refashioning its public policies, the individual who is pressured to change his or her voting intentions: each loses an opportunity for self-government as a result of the coercive threats which are *permitted* and *encouraged* by the capitalist constitution.

9.1.2 Dependence on arbitrary power as slavery

As mentioned earlier, the tradition's early modern adherents held that merely inhabiting a state of *dependence* on the *arbitrary* will of another interferes with freedom. Even if the

87 ibid 68.
88 ibid 47.
89 ibid 47.
90 Fuller (n 70) 171.

superior party to a relationship of dependence *elects* never to exploit that dependence *against* the inferior party, the welfare of the inferior is precarious because it depends upon the *goodwill* of the superior.[91] The condition of being at the mercy of someone else's arbitrary will is *slavery*, the antithesis of freedom. This is the second path by which the freedom of individuals or of communities can be undermined.

Recall Harrington's remarks.[92] Harrington holds that to be under the power of the sultan is to have less freedom than a citizen of Lucca, because one's freedom in Constantinople, *however permissive the sultan may be*, depends entirely on the goodwill of the sultan.[93] As Skinner describes this second path, once 'you recognize that you are living in such a condition, this will serve in itself to constrain you from exercising a number of your civil rights'.[94] The constraint arises through a *self-imposed* counsel of prudence which dictates that you conduct yourself to please, or to avoid displeasing, those upon whose arbitrary will you depend. Any individual or community that is in such a predicament is *enslaved*. The archetypal tyranny obtains when this state of affairs is given *institutional* embodiment such that institutions function *systematically* according to the tyrant's standpoint.

As Skinner points out, it may seem surprising that the term 'slavery' is used by some Roman and neo-roman writers to capture the second path to unfreedom, and not only the first.[95] But, for this current of thought, the essence of the slave's plight lies in being in perpetual *danger* of suffering injury as a result of an arbitrary exercise of power, irrespective of whether that injury is ever inflicted.[96]

In the seventeenth century, the second path to unfreedom was often associated with discretionary or prerogative powers that were thought capable of being exercised

[91] Skinner (n 35) 86. For similar notions in Kant's thought, see Ripstein, *Freedom* (n 22) 14-15.
[92] In the main text at n 13.
[93] I am paraphrasing Skinner's account (n 35) 86.
[94] ibid 84.
[95] ibid 39.
[96] ibid 72.

arbitrarily.[97] Charles I's assertion of a veto power (or 'negative voice') over legislation placed before him by parliament drew particular ire. In *Eikonoklastes,* Milton criticizes the veto as part of a more general attack on arbitrary discretions in general:

> Every Common-wealth is in general defin'd, a societie sufficient of it self, in all things conducible to well being and commodious life. Any of which requisit things if it cannot have without the gift and favour of a single person, it cannot be thought sufficient of it self, and by consequence no Common-wealth, nor free.[98]

Milton explains that a free community will determine the conditions of its 'well being' through 'the joynt voice and efficacy of a whole Parliament'.[99] A community is unfree, however, if parliament's decisions can 'at any time be rejected by the sole judgment of one man'.[100] Skinner points out that 'Milton is objecting not to the exercise but to the very existence of the royal veto'.[101]

It is telling to consider investment power in the light of Milton's remarks. The capitalist constitution concentrates the 'requisit things' 'conducible to well being and commodious life' in large corporations, which have arbitrary investment power: that is, a largely uncontrolled discretion to invest or not, or to withdraw an investment, or to change its nature. Whether and on what terms members of the community can access 'requisit things' depends on how corporations exercise their investment power. This means that a community living under the capitalist constitution is not 'sufficient of it self', but is instead dependent on 'the gift and favour' of large corporations.[102]

Given this condition of dependence, penal economic power represents a particularly potent 'negative voice', which corporations can exercise at their pleasure to coerce a community that tries to assert its *independence* (say by designing public policy *for*

[97] ibid 51, 72-76.
[98] Quoted in ibid 51.
[99] Quoted in ibid 52.
[100] Quoted in ibid.
[101] ibid.
[102] The capitalist constitution of investment power in general, and not only penal economic power, would seem objectionable on the foregoing basis. But my focus is on penal economic power.

the 'Common-wealth'), foolishly or bravely, *as though* it were 'sufficient of it self'. But even if corporations don't exercise their veto, the mere existence of penal economic power may nonetheless cow a community. As Milton puts it:

> Grant him this, and the Parliament hath no more freedom than if it sate in his Noose, which when he pleases to draw together with one twitch of his Negative, shall throttle a whole Nation.[103]

A community which knows that penal economic power exists might think it wise to shape public policy so as to foster 'business confidence' (meaning corporations' confidence that they will get what they want) by creating 'favourable conditions for investment' (meaning conditions favoured by corporations). Above all, it would seem advisable to avoid measures likely to provoke the drawing together of the noose, which, depending on the corporation and the nation in question, may plausibly 'throttle a whole Nation'.

10. Slavishness and corruption

Dependence on arbitrary power may affect not only what communities and individuals do, but also their *character*. Those who inhabit a slavish *condition* are at risk of becoming *slavish* or *corrupt*. Although the following account is framed in terms of the harm suffered by an individual, it could equally refer, *mutatis mutandis*, to the condition of any *community* which is dependent for its welfare on an arbitrary will.

Firstly, the knowledge that important aspects of my welfare depend systematically on the arbitrary power of another renders my *condition* slavish insofar as I am subjected to a certain kind of indignity. My condition is undignified because I cannot be assured of the *respect* entailed in being treated as a moral equal: dignified relations between moral equals depend upon each being able *effectively* and *systematically* to insist upon being *respected*

[103] Quoted in Skinner (n 35) 52.

by the other in morally important ways.[104] Where my welfare depends upon the arbitrary power of another, we both know that I cannot *effectively insist* upon such respect in all cases; I might fear that I would place my welfare in jeopardy were I to attempt to insist upon being respected systematically. Even if the power-holder acts in a manner that is *consistent* with what genuine respect would demand, this is not really respectful unless respect is recognized as obligatory: it is not really evidence of respect if it is bestowed merely as a favour.

Secondly, knowledge of being the subordinate in such a state of affairs will tend to corrode my *character*. It will encourage me to behave in an undignified and slavish manner and to develop a *slavish* disposition.[105] Unless I am exceptionally courageous, or simply foolhardy, fear will seem prudent, and I will be *fearful*. I will hope to 'avoid the effects of his rage', in Sidney's words, by allowing myself to be treated with contempt instead of insisting upon respect.[106] I should not even raise my voice against this; nobody can 'speak truth to power if everyone is obliged to cultivate the flattering arts required to appease a ruler on whose favour everyone depends'.[107]

Eventually, it may not even occur to me, or to many in the subject community, that there is a choice between compliance or defiance; the culture may simply take it for granted that defiance doesn't even bear thinking about. In such circumstances, fear and resignation would be less significant factors in any explanation of the community's acquiescence. Force of habit and education might make efforts to please and appease the tyrant seem to be a matter of 'common sense'. This impression would be reinforced

[104] Ripstein, *Freedom* (n 22) 37. See, further, Stephen Darwall, 'Two Kinds of Respect' (1977) 88 Ethics 36.
[105] See, e.g., Sidney (n 2) ch 3, §19, 434-435.
[106] ibid ch 2, §28, 271.
[107] Skinner (n 35) 90; Sandel (n 3) 215.

insofar as these efforts became part of the community's 'structures of normality',[108] just as offerings to volatile and vengeful gods might be part of a society's daily routine.[109]

'Respectable' and 'responsible' public intellectuals may explain to the rest of the community why such efforts at the behest of the tyrant are in fact conducive to the public good, and such explanations would become part of the community's public philosophy and its legitimation story: not only the community's material prosperity, but also its freedom, it might be said, are promoted insofar as the privileges and prerogatives of those with great power are preserved.

The loss of a community's liberty, then, may not only come about where its 'ability to act at will in pursuit of its chosen ends' is overborne by outright coercion.[110] It may also arise where its members are placed in a slavish *condition* and so tend to acquire slavish *characters*. In the grip of fear, and in the face of the seeming futility of self-assertion, the community may at first suppress, and progressively simply lose, the will *even to assert* its ability to pursue its chosen ends in the first place.[111]

In some, slavishness may manifest itself in the self-abasement and self-abnegation I have just been describing. Others, however, may show themselves no less slavish by choosing to 'make themselves subservient to the lusts of a man who may nourish' their 'vices'; such personalities 'abhor the dominion of the law, because it curbs'

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[108] See the discussion in Chapter 2.

[109] The mentality of resignation just described might be reflected in the outlook of party *s*. Indeed, it arguably sums up a key aspect of the dominant outlook of many social democratic parties today, including the British Labour Party under New Labour and increasingly the French Parti socialiste.

[110] Skinner (n 35) 47.

[111] By way of illustration, recall the fictitious party *s* which was part of the election scenario described earlier. Party *s* could be any of the social democratic parties of Western Europe. The decisions of these parties to relinquish programs aimed at reducing their communities' dependence on arbitrary investment power is *partly* explained by their having experienced or observed the force of penal economic power. Consider, for example, the *volte-face* of the Parti socialiste after the 'capital strikes' against the policies of the early Mitterand years. Or the British Labour Party's decision to amend Clause IV of its Constitution to render itself 'electable'. Whether penal economic power is eventually wielded against the Labour Party under Jeremy Corbyn remains to be seen, though it seems probable.

them.[112] They show themselves not only to be *slavish*, but to have been readily *corruptible* and *corrupted*; 'slavishness' and 'corruption' sometimes share a common referent.[113]

Montesquieu asserts that 'avarice' is likely to fill the vacuum left by the exhaustion of public-spirited community engagement with the workings of great power:

> The misfortune of a republic is when intrigues are at an end; which happens when the people are gained by bribery and corruption: in this case they grow indifferent to public affairs, and avarice becomes their predominant passion. Unconcerned about the government and everything belonging to it, they quietly wait for their hire.[114]

For the avariciously corrupt, the option of serving the power-holder may seem a ready path to rewards. '[F]latter his humour' and so 'be accounted' one of 'his friends',[115] in the hope of crumbs from his table, or perhaps even feasts in the case of his most valued servants: 'They who were corrupted in their minds, desired to put all the power and riches into his hands, that he might distribute them to such as served him. And he who was nothing less than covetous in his own nature, desired riches, that he might gain followers'.[116]

Sidney argues that the success of tyrants depends in part on how effective they are in taking advantage of the fact that '[m]en are naturally propense to corruption'. He suggests that they typically seek to do so by using the resources of 'power, honors, riches' concentrated in their hands, and disposable according to their arbitrary discretion, as 'the baits by which men are drawn to prefer a personal interest before the publick good',[117]

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[112] Sidney (n 2) ch 2, §19, 191. On the repudiation of the restraints of law by persons of this type, see ch 2, §20, 193.
[113] David Hume recognized the overlap, or intimate connection, between slavish dependence and corruption: Zephyr Teachout *Corruption in America* (Harvard University Press 2014) 53. Lawrence Lessig makes the two words into a compound term, 'dependence corruption': *Republic, Lost* (Hachette 2011).
[114] Quoted in Teachout (n 113) 52.
[115] Sidney (n 2) ch 3, §19, 435.
[116] ibid ch 3, §6, 350. Sidney posits a mutually-reinforcing cycle of corrupting influence between patron and client: ch 2, §27, 266; ch 2, §28, 274; ch 3, §19, 434.
[117] ibid ch 3, §6, 350.

which is the essence of *corruption*.[118] And 'the number of those who covet them is so great, that he who abounds in them will be able to gain so many to his service as shall be sufficient to subdue the rest'. He continues:

> 'Tis hard to find a tyranny in the world that has not been introduced this way; for no man by his own strength could ever subdue a multitude; none could ever bring many to be subservient to his ill designs, but by the rewards they received or hoped.[119]

According to Sidney the lesson of these experiences 'obliges' those who 'think fit to have kings, yet desire to preserve their liberty ... to set limits to the glory, power and riches of their kings'. Power-holders must not be 'furnished with the means' to corrupt others, namely arbitrary control of vast inducements.[120]

Some of his strongest criticism is reserved for the obsequious, though grasping, spirit who would seek rewards by 'rendering himself subservient':[121]

> Those who are ignorant of all good, careless or enemies to it ... slide into a blind dependence upon one who has wealth and power; and desiring only to know his will, care not what injustice they do, if they may be rewarded. They worship what they find in the temple, tho it be the vilest of idols ...[122]

We can only properly understand the traditional conception of the Rule of Law by appreciating how it is conceived as a way of constituting power in order to marginalize and neutralize tyrants, to avoid tyranny, and, *in turn to minimize slavishness and corruption*. And unless we appreciate why these ills were considered so loathsome, we cannot understand what drove the limited government tradition's adherents to spill so much ink and blood in pursuit of their vision. Most importantly for present purposes, we need to identify the *substance* of the defects against which the tradition has set its face, so that we may be alive to their emergence in *new forms*.

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[118] See, generally, J G A Pocock, *Virtue, Commerce, and History* (CUP 1985); Teachout (n 113).
[119] Sidney (n 2) ch 3, §6, 350.
[120] ibid ch 3, §6, 350.
[121] ibid ch 2, §27, 266.
[122] ibid ch 3, §19, 435.

10.1 Corporate power, slavishness, and corruption

In the previous sub-section, I presented a traditional portrait of slavishness and corruption, which reach their apotheoses when both are normalized.[123] In the light of this portrait, we might examine our own culture for evidence of how the community's dependence on arbitrary *economic* power is connected with slavishness, corruption, and their normalization.

Consider, as possible evidence, how we speak casually either with approval or resignation not only of the *need* to 'please' and 'appease' 'the markets', but also of the 'race to the bottom' which occurs when different communities sacrifice human goods in order to compete for the 'gift and favour' of large corporations, to use Sidney's phrase.

Our freedom, it is often said, includes 'economic freedom', the cause of which is advanced by the enlargement of *corporations'* freedom. Sidney once pointed out the 'extravagance' in Sir Robert Filmer's 'assertion, that *the greatest liberty in the world is for a people to live under a monarch*' who 'is endowed with an unlimited power of doing what he pleaseth, and can be restrained by no law. If it be liberty to live under such a government, I desire to know what is slavery',[124] for:

> there is no such thing in nature as a slave, if those men or nations are not slaves, who have no other title to what they enjoy, than the grace of the prince, which he may revoke whensoever he pleaseth.[125]

It is frequently repeated that *our prosperity* depends on treating *corporations'* prosperity as *our* first priority. Such assertions are plausible, on the assumption that we maintain the relationship of dependence enshrined in the capitalist constitution. Echoes

[123] Benjamin Franklin pessimistically held that the new constitution was 'likely to be well administered for a course of years, and can only end in despotism, as other forms have done before it, when the people shall become so corrupted as to need despotic government, being incapable of any other': quoted in Teachout (n 113) 15-16.
[124] Sidney (n 2) ch 1, §5, 17. Emphasis in original. Bertrand Russell declaimed: 'Advocates of capitalism are very apt to appeal to the sacred principles of liberty, which are embodied in the maxim: The fortunate must not be restrained in the exercise of tyranny over the unfortunate': 'Freedom in Society', *Harper's Magazine* (April 1926).
[125] ibid ch 1, §5, 17.

of Menenius Agrippa's adaptation of Aesop's fable of *The Belly and the Members* can often be heard in the mouths of today's cultural *elites*, complete with the fable's misleading suggestion that the social order follows the natural one.[126] Opponents of political absolutism once confronted a similar set of claims, which Sidney attributed to Filmer, whose vocation was to defend them:

> [T]hose who will have a king, are bound to allow him royal maintenance, by providing revenues for the crown; since it is for the honour, profit and safety of the people to have their king glorious, powerful, and abounding in riches.[127]

Prominent among the most prized vocations in our time are those promising the 'baits' of 'power, honors, riches, and the pleasures that attend them'.[128] These inducements are concentrated in the hands of large corporations, which are thereby 'furnished with the means' to exploit our natural 'propense to corruption', to recall Sidney's words.[129] What is taken to be excellence in such fields is assiduousness in 'desiring only to know' the 'will' of large corporations.[130] Those most suited to such pursuits 'care not what injustice they do' but 'worship what they find in the temple'.[131] Others must simulate 'worship' by the 'compartmentalization' described earlier. From the tyrant's standpoint as housed in the corporation, it doesn't matter which mode obtains, provided that the corporation's goal is served: a 'survey of thirty-four directors of US Fortune 200 companies' reported that 'thirty-one of them would cut down a mature forest or release a dangerous unregulated toxin into the environment to increase corporate earnings'.[132]

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126 Think of the strand of liberal public philosophy which claims a quasi-natural status for the capitalist constitution: Chapter 2. For the fable and its Roman adaptation, Sir Roger L'Estrange, *Fables of Aesop* (Dover 1967) 21.
127 Sidney (n 2) ch 3, §6, 348.
128 Corporate ('investment') banking, corporate consultancy, corporate law, corporate board membership.
129 Sidney (n 2) ch 3, §6, 350.
130 Sidney (n 2) ch 3, §19, 435.
131 ibid.
132 Cited in Colin Mayer, *Firm Commitment* (OUP 2013) 27.

The archetypal tyrant is regarded by the modern limited government tradition as a *political* power-holder. It is telling, then, that today we often think of our *political* leaders as seriously constrained by how their public policy and electoral prospects depend upon maintaining the goodwill of *economic* power-holders.[133] Party *s* which featured in the election scenario described earlier is a recognizable *contemporary* type.[134]

Noting that '[b]usiness corporations must engage the political process in instrumental terms if they are to maximize shareholder value',[135] Justice Stevens of the US Supreme Court observes that '[i]f a corporation's goal is to induce officeholders to do its bidding, the corporation would do well to cultivate stable, long-term relationships of dependency'.[136] Notice how these remarks reflect the traditional ideas of dependence and slavery.

The enslaving influence exerted by large corporations on the processes of representative government is by no means new.[137] Consider Woodrow Wilson's complaint regarding the constraints imposed by great economic power. Whether he was conscious of its provenance or not, he too alluded to the idea of slavishness I have been exploring:

> Have we come to a time when the President of the United States or any man who wishes to be the President must doff his cap in the presence of this high finance, and say, "You are our inevitable master, but we will see how we can make the best of it"?[138]

One thing that has changed is the rhetoric of today's cultural and political *elites*. The great power of corporations was once widely portrayed as alarming and *mutable* by notables

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[133] President Clinton remarked on this problem, colorfully: see Bob Woodward, *The Agenda* (Simon & Schuster 2005); Woodward adds, 'The administration would have to come up with a credible plan it could sell, Clinton said', to the bond markets: 73-74.
[134] See discussion of contemporary social democracy at notes 109 and 111 above.
[135] *Citizens United* 558 US 310, 454 (2010).
[136] *Citizens United* 558 US 310, 462 (2010).
[137] Though they may have been accentuated by the rise of 'neo-liberalism' and the purported necessities of 'globalization'.
[138] Quoted in Sandel (n 3) 215.

such as Wilson.[139] It tends now to be presented as one of the facts of life, something about which it is futile and unsophisticated to be alarmed: we *have* 'come to a time when' they *are* the 'inevitable master', it is often implied, so all that can be done is to 'see how we can make the best of it'.

The pervasive grip of this mentality, even among some who are uncomfortable with our 'inevitable master', means that the idea of considering the *reconstitution* of economic power is usually ruled out in advance. Many contemporary critics of corporate impropriety set out, in effect, to 'see how we can make the best of it' by seeking to curb the 'worst excesses' of corporations: elaborate 'regulatory' schemes are proposed, some emphasizing the threat of punishment, others 'reputational' incentives.[140] Although all such schemes envisage ameliorating the tyrant's conduct to a greater or lesser extent, none would overturn the relations of economic dependence which place the community at the mercy of arbitrary investment power. For this reason, they reflect the kind of accommodation with the capitalist constitution which I associated with 'welfare-state liberals' in Chapter 2. One function of this accommodating approach is to render the schemes 'relevant', and their authors 'respectable' and 'responsible', because 'realistic' or 'practical' in their aims.[141] All of which may be thought to increase the chances of the proposals being 'taken seriously' in the 'corridors of power'.

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139 L Friedman in *The History of American Law* records that before corporations had acquired their present appearance of being almost as natural as 'natural persons', it was widely 'feared' that they 'could concentrate the worst urges of whole groups of men': *A History of American Law* quoted in *Citizens United* 558 US 310, 427 (2010) (Justice Stevens).

140 For a discussion of different models, see Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (OUP 2002) intro, ch 1.

141 Stephen Bottomley in *The Constitutional Corporation* (Ashgate Publishing 2007) asks whether certain aspects of political constitutionalism should be applied to corporations. But he 'does not challenge the pivotal role of shareholder primacy in corporate law', because challenging it 'would depart too dramatically from the prevailing mindset of corporate managers and officers': Angus Corbett and Peta Spender, 'Review Essay: Corporate Constitutionalism' (2009) 31 Sydney Law Review 147, 151. Imagine if the same weight had been given to the entrenchment of a certain mindset in the managers and officers who served monarchs harboring absolutist pretensions. For a powerful critique of the *genre,* see Steve Tombs, 'Crisis, What Crisis? Regulation and the Academic Orthodoxy' (2015) 54 *Howard Journal of Criminal Justice* 57.

As a corrective to this outlook, adherents of the limited government tradition should recall that the tradition is defined by its refusal to say of tyrants, 'You are our inevitable master, but we will see how we can make the best of it'. Indeed, in their day the tradition's early adherents were derided by the sophisticated *habitués* of the corridors of power. The scorn with which Sidney and others were treated did not signify a failure to take them seriously. To the contrary, it was a mark of just how seriously they were taken.

The tradition's adherents, for their part, did not care whether or not they were *taken* seriously in the corridors of power. More than being given a hearing by the powerful, or reaching an accommodation with them, what mattered was to evaluate institutions that exercise power over others and to insist that they comprehensively and systematically serve the good of the governed. Recall Sidney's remarks, which I quoted in Chapter 2.[142]

The tradition could not have advanced as far as it did in the seventeenth and eighteenth centuries had its adherents adopted criteria of 'relevance' and 'respectability' that conceded as much to the powerful as those which seem to guide much contemporary criticism of economic power.

10.2 The Consensus

The Consensus which prescinds economic power from the Rule of Law project is another symptom of the normalization of great economic power. Although today we are in many ways much freer than Harrington, Milton, or Sidney were, the Consensus reflects one way in which we are *not*: they may have lived under a tyranny and therefore been enslaved, but they were not themselves *slavish*. How so? Because they saw clearly the defects in the great institutions of their age and they had a compelling vision for how

[142] See main text at note 15, Chapter 2: Sidney (n 2) ch III, §25, 460.

those institutions ought to be reconstituted, as well as the will to execute it. The victory of their vision over its rival, and its subsequent evolution in practice, partly explain those ways in which we *are* indeed freer than our forebears.

The present constitutions of investment power in general, and of penal economic power in particular, are defects in the major *economic* institutions of our time—defects, that is, according to the limited government tradition's underlying principles. And the tradition's Rule of Law project offers at least part of a vision for how to reconstitute them. Following the example of our early modern ancestors, who sought to substitute an 'empire of laws' for dependence on the arbitrary power of *political* tyranny,[143] we should now consider *whether*, and if so *how*, we must attempt the equivalent in respect of the *economic* tyranny of our day.

At present, the law places investment power outside the Rule of Law's mechanisms of systematic recognition, creation, and accountability designed to ensure that power-holders give due weight to respect-worthy things. In the absence of mechanisms *legally obliging* holders of investment power to give due weight to the interests, expectations, and rights of the community, penal economic power may be exercised *arbitrarily* and with impunity, according to the tyrant's standpoint.[144] As a result of being so dependent on an arbitrary will, individuals and communities suffer a loss of freedom which affects not only what they do, but also tends to shrivel their characters.

11. Corporations and the corruption of the Rule of Law project

In this Section, I supplement the traditional conception of corruption by suggesting that tyrannies tend to have a corrupting influence on ideas or ideals which enjoy widespread

[143] On Livy, Harrington, Sidney and the 'empire of laws', see Skinner (n 35) 70-75. For republicans, the Rule of Law is indispensable for this task: Pettit (n 18) 21, 36, 65, 101, 107, 122, 304.

[144] So too investment power in general.

allegiance in the relevant culture, and especially those which bear on the tyrant's power. The essence of this form of corruption is the propagation of an interpretation of an ideal that allows the tyrant to misappropriate the ideal for the tyrant's ends. Here, I explore how this form of corruption has affected the Rule of Law ideal.[145]

11.1 Whose Rule of Law?

Jeremy Waldron observes that large corporations are willing 'to pay substantial amounts' for access to the World Bank's so-called Rule of Law index. Robert Barro explains the index's function:

> The general idea of these indexes is to gauge the attractiveness of a country's investment climate by considering the effectiveness of law enforcement, the sanctity of contracts, and the state of other influences on the security of property rights.[146]

Waldron notices that it is as though corporations have succeeded in creating the impression that the Rule of Law exists primarily for their benefit:

> Not everyone supports the Rule of Law or cares about it; but is it really supposed to be biased in exactly this way? We normally think of the Rule of Law as something to be upheld in the interests of the subjects of the legal system in question, ... not as something to be upheld primarily in the interest of outsiders. Outsiders may be concerned about the Rule of Law in a given country, but that is an outside concern about how insiders are ruled, not an outside concern about how outsiders can profit.[147]

The 'outsiders' to which Waldron refers are foreign investors. But the category of 'outsiders' must include all corporations, wherever incorporated: corporations lack 'the essential principle of a man', which is a *sine qua non* of being inside a *human* community.[148]

Waldron implies that 'hard-nosed World Bank types', as he calls them, have attempted to misappropriate the Rule of Law as a serviceable rhetorical 'means' to

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[145] Another example is the misappropriation of 'freedom' for corporate ends as in 'economic freedom'. See the remarks earlier in the main text.
[146] Quoted in Jeremy Waldron, *The Rule of Law and the Measure of Property* (CUP 2012) 11 ('*Measure*').
[147] ibid 12.
[148] Sidney (n 2) ch 3, §40, 545. Emphasis added.

promote their constituents' 'real interest' which 'is in getting governments to respect property rights, investor concerns, and the principle of free markets':[149]

> A lot of people want a connection between private property and the Rule of Law that can stand as a major plank in state-building so that foreign investors can have some advance assurance of the amount of wealth they can extract from a developing economy. But no such certainty is available in any other realm of economic activity, and honest jurists working with the notion of the Rule of Law should have nothing to do with cynical uses of the ideal that are designed to do nothing more than underwrite the investor-profits of predatory and extractive enterprises.[150]

As I argued in Chapter 2, I agree with Waldron that it is important to oppose these attempts to misappropriate the Rule of Law.

The effectiveness of our opposition depends in part on our seeing such attempts not as failures of intellectual hygiene, but as symptoms of the *corrupting* influence of poorly constituted powerful institutions. The substance of Waldron's description of the nature, causes, and functions of the misappropriation of the Rule of Law could be summed up in the language used in this Chapter. The embodiment of the tyrant's standpoint in the corporate constitution, and its corrupting influence on ideals, are reflected in the developments Waldron describes.

11.2 Corporations misappropriate protections intended for 'the People'

The sense of corruption I wish to propose is further illustrated by the US Supreme Court's decision in *Citizens United*.[151] This decision, and the others which share its underlying assumptions, reflect the increasingly successful misappropriation by corporations of the tradition's Rule of Law project, and in particular, its embodiment in the US Constitution's First Amendment right to freedom of expression.

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[149] Waldron, *Measure* (n 146) 49.
[150] ibid 73.
[151] *Citizens United* 558 US 310 (2010).

Although corporations are by nature non-human, legal persons, and although they may be owned by non-citizens, either foreign natural persons, or other corporations, domestic or foreign, the Majority in *Citizens United* was persuaded that corporations deserve the protection that the US Constitution affords to citizens 'engaging in political speech'.[152]

For the Majority, it is as though the Constitution were made for corporations as much as for humans. By contrast, Justice Stevens's dissenting opinion reminds readers that corporations 'are not themselves members of "We the People" by whom and for whom our Constitution was established':[153]

> One fundamental concern of the First Amendment is to "protec[t] the individual's interest in self-expression." Freedom of speech helps "make men free to develop their faculties," it respects their "dignity and choice," and it facilitates the value of "individual self-realization".[154] Corporate speech, however, is derivative speech, speech by proxy.

He concludes, 'Take away [from corporations] the ability to use general treasury funds for some of those ads, and no one's autonomy, dignity, or political equality has been impinged upon in the least':[155]

> In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters.[156]

By misappropriating the idea of limited government, an idea conceived in order to fulfill the distinctive needs of *human* communities, corporations effect a significant form of corruption.

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[152] *Citizens United* 558 US 310, 313 (2010).
[153] *Citizens United* 558 US 310, 466 (2010).
[154]M Redish, 'The Value of Free Speech' 130 (1982) U Pa L Rev 591, 594. All other internal quotations are from US Supreme Court decisions. Citations in *Citizens United* 558 US 310, 466 (2010).
[155] *Citizens United* 558 US 310, 467 (2010).
[156] *Citizens United* 558 US 310, 394 (2010).

12. Regulation and reconstitution: constitutions should protect 'the People' from economic power, not vice-versa

Stevens's opinion observes that large corporations have both the *means* and the *disposition* to stand in a corrupting relation to human communities. He suggests that 'the People' need protection from the corrupting influence of corporations:

> The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process. Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.[157]

Stevens describes the Majority's decision as 'a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding'.[158]

What kind of measures would be best suited to this task? Stevens assumes that the legal measures often described as 'regulation' are adequate. However, his own account of the corporation suggests that there might be limited government reasons for *asking* whether it would be preferable to reconstitute, rather than merely regulate, the large economic institutions of our day:

> (i) corporations are *institutions*, not human beings;
>
> (ii) they have 'come to wield' 'enormous power', 'with the accompanying threat' of 'corruption';[159]

[157] *Citizens United* 558 US 310, 394 (2010).
[158] *Citizens United* 558 US 310, 478 (2010). And: 'When they brought our constitutional order into being, the Framers had their minds trained on a threat to republican self-government that this Court has lost sight of.'
[159] *Citizens United* 558 US 310, 433 (2010).

(iii) this threat is acute because of their 'instrumental orientation'[160] designed to 'maximize shareholder value';[161]

(iv) a corporation might wish 'to induce officeholders to do its bidding' by cultivating 'stable, long-term relationships of dependency'.[162]

Despite noticing these things, Stevens does not portray the threat posed by corporations as the kind of thing from which we, the People, require *limited government* protection.

This is of a piece with the tradition's failure to consider the possibility that, in addition to, or instead of, 'regulatory' legal 'measures', the community might seek to 'guard' itself against economic power through limited government means. In assuming that corporations should be regulated, rather than reconstituted, the tradition's contemporary adherents have overlooked one of the tradition's own central insights:

(i) humans cannot be designed and made, and therefore they cannot be *made* constitutionally averse to the attractions of holding or serving tyrannical power;

(ii) humans can only be *educated* and *regulated*;

(iii) by contrast, the *institutions* which exercise power over others can be designed and made (*constituted* or *reconstituted*) with a view to ensuring that they are *comprehensively* and *systematically* inhospitable to tyranny and corruption.

Implicit in the foregoing is the view that we ought to recognize important differences between, on the one hand, the tradition's Rule of Law project and, on the other hand, the project embodied in the legal measures designed to regulate

[160] *Citizens United* 558 US 310, 394 (2010).
[161] *Citizens United* 558 US 310, 454 (2010).
[162] *Citizens United* 558 US 310, 462 (2010).

corporations. On my account, the Rule of Law and corporate regulation have fundamentally different ambitions.

The Rule of Law seeks to constitute power so that it is inhospitable to tyranny, arbitrariness, and corruption. All other things being equal,[163] it requires that this goal be pursued *comprehensively* (in respect of every instance of power exercised by the relevant source, eg, the state) and *systematically* (according to the methodical processes of the legal system).

By seeking comprehensively and systematically to ensure that the principle of moral equality informs and limits the essential character of *all* of the calculations of holders of state power, the Rule of Law aims to rule out manipulative social relationships between citizen and state *tout court*. In other words, unless *all* relations between citizen and state are non-manipulative, the Rule of Law's project is incomplete. These objectives are reflected in how modern public law has sought, among other things, to extend its reach to hitherto substantially unlimited areas (eg, the vestigial Crown prerogatives), and has endeavored to support new ways to promote non-manipulative social relationships (eg, the giving of written reasons for executive decisions[164]).

The corporate regulatory project, by contrast, seeks neither to *eradicate*, nor even to *de-legitimize* as such, manipulative (non-state) social relations by reconstituting them along non-manipulative lines. Its fragmentary application reflects a tacit acceptance that

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163 The principles of the tradition are not always promoted through the Rule of Law project. The Rule of Law is not the only way to identify respect-worthy things, to limit government, and to hold power to account; eg, democratic mechanisms, an independent media, or education of power-holders and citizens may also promote these ends. The tradition's adherents will sometimes hold that in a certain context the Rule of Law should be eschewed: eg, public law accepts that some exercises of power should not be justiciable. This need not involve trading off moral equality or the anti-manipulative principle, which should be inviolable. Rather, there may be good reasons for them to be safeguarded by other means. US Supreme Court Chief Justice Waite notes that the 'For protection against abuses by legislatures the people must resort to the polls, not to the courts': *Munn v Illinois* 94 US 113, 134 (1877). See also Timothy Endicott, 'The Reason of the Law' (2003) 101 American Journal of Jurisprudence 83; J Finnis, *Natural Law & Natural Rights* (2nd ed, OUP 2011) X.5.

164 Giving such reasons may also promote ends, such as administrative efficiency, whose rationale does not lie in *limited* government.

the exploitation of economic weakness will be an organizing principle of economic life subject *only* to the *ad hoc* limits imposed by individual regulations (if any). It envisages that in *certain* contexts, as determined from time to time and on a case-by-case basis, the law will impose limits to prevent 'excesses'.[165]

So the project of regulation accepts, for example, that 'private economic activity knows *but one general principle*, that of obtaining a maximum return from limited resources',[166] even where the resources are human. Far from prohibiting manipulative social relationships, the exclusive pursuit of this principle positively encourages them. And, as Lon Fuller points out, the principle remains in force and is not fundamentally de-legitimized:

> even when the restraints surrounding economic calculation are expanded to include, let us say, the obligation to pay a minimum wage, to provide some form of job security, and to submit discharges to arbitration. Obligations like these serve simply to shrink the framework within which economic calculation takes place; they do not change the essential nature of that calculation.[167]

If this contrast between the Rule of Law and regulation is brought into sharp focus, we (the tradition's adherents) face a telling question: given that we would *not* regard the regulatory project just described as an appropriate way to ensure the non-manipulative exercise of *state* power, should we continue to rely primarily on that project in our attempts to curtail the asocial potential of great economic institutions? This question should seem more troubling once it is recognized that contemporary economic institutions have been legally designed to *ensure* that their power is exercised according to

[165] In the case of private subjects, it is a principle of law that everything that is not prohibited is permitted. But this is not the case for public officials. This distinction is referred to with approval by Sir John Laws (n 50) 466. However, from a limited government perspective, the principle is not obviously sound in the case of private *institutional* power over others, say of the kind exercised by large corporations. Where the power in question is power *over others,* it is doubtful whether it is sound even in the case of 'private' natural persons.

[166] Fuller (n 70) 171. Emphasis added.

[167] ibid.

the tyrant's standpoint. Tyrants resent being limited and today's economic tyrants are armed with power to resist:

> The rise of the modern corporation has brought a concentration of economic power which can compete on equal terms with the modern state - economic power versus political power, each strong in its own field. The state seeks in some aspects to regulate the corporation, while the corporation, steadily becoming more powerful, makes every effort to avoid such regulation...[168]

So when some regulation is adopted despite the opposition of concentrated economic power, only one battle has been won, and it is almost certain that there will be more battles in which potential, and past, advances may be thwarted.[169] Indeed, advocates of this or that regulation are sometimes so uncertain of their strength relative to great economic power that their proposed regulatory schemes may seem like supplications. The interaction between the regulatory state and institutional economic power calls to mind one of the grievances aired in the Declaration of Independence:

> In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.[170]

On the one hand, Stevens's own account of the great economic institutions of our time offers grounds for *asking* whether they should be reconstituted in accordance with the tradition's Rule of Law project. On the other hand, he, and other leading figures in the tradition, take it for granted that, like humans, corporations should only be regulated. The tension is illustrated by Stevens's decision to quote Thomas Jefferson, apparently with approval, but seemingly without facing up to what Jefferson was actually

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168 Berle and Means (n 61) 357.

169 An alternative is countervailing power (eg, trade unions). Insofar as the idea of countervailing power seeks to make the employment relationship a fairer fight, so to speak, it legitimizes the reduction of social relations to a trial of strength, which is contrary to the tradition's underlying principles.

170 Declaration of Independence (US 1776). One goal of the Rule of Law is to ensure that the quality of social relationships in general (between citizen and state, and citizen and citizen) is characterized, in the first instance, by respectful persuasion between moral equals. Only exceptionally, if someone rejects the ethics of respectful persuasion, should the relative *might* of people and institutions be decisive: Locke (n 41) II §16.

saying. This approach shares with the Consensus a spirit of selective curiosity regarding the tradition's teachings:

> I hope we shall … crush in [its] birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country.[171]

Heard today, especially in the calm of the courtroom or the seminar room, such language might seem jarringly combative. The gradual disappearance of such rhetoric from limited government discourse is a mark of what has been gained since Jefferson's time, but also, perhaps, of what has been lost. Some of the tradition's gains might seem so well entrenched that we no longer feel the need to speak as though there were a risk that tyranny could still gain the upper hand. What seems to have been lost, however, is the conviction that this risk is always there: the tyrant's standpoint is a constant threat, and one that is likely to find new and promising avenues by which to express itself, especially as obstacles are placed along more familiar ones.

Further, we tend to convert our early modern predecessors from subversives to conservatives by, on the one hand, praising their efforts to found what are now well-established institutions, and, on the other hand, passing in silent embarrassment over their inflammatory insistence that we should reserve the right to overturn *any* defective institutions we may encounter, even widely accepted ones. Locke, Sidney, and their North American followers considered this right inalienable.

Moreover, while the language of dispassionate theory has its place, the tradition's *raison d'être* is to change defective constitutional arrangements, not only to interpret them; this means that there is also a place for the kind of rhetoric which moves people to see what is at stake and to act. This study attempts to understand the principles behind the tradition's rhetorical idiom in order that we may (i) see clearly how contemporary

[171] Quoted in Justice Stevens *Citizens United* 558 US 310, 427 (2010) (footnote 54 therein).

economic power engages those principles and (ii) respond by making principled use of the tradition's rhetoric.

The tradition holds that institutions which exercise power *over people* are *illegitimate,* and poorly constituted, if they are disposed to wield power according to the tyrant's standpoint. Institutions which are not properly constituted ought to be reconstituted. If the corporation was reconstituted in accordance with the tradition's Rule of Law project, the relationship between law and great *economic* institutions would be treated as morally analogous to the existing relationship between law, *state* power, and genuinely respect-worthy interests, expectations, and rights. The law would (i) recognize or create genuinely respect-worthy interests, expectations, and rights (in ways that would erode the morally incoherent distinction between 'civil and political' and 'social and economic' rights[172]) and (ii) hold to account power-holders where they are alleged to have repudiated moral equality by failing to give due weight to respect-worthy things. If the tradition's adherents were to ask and to answer the question whether external power should be reconstituted according to that vision, they would thereby depart from the Consensus. External economic power would be a *potential,* and perhaps in turn an *actual,* target of Rule of Law practice.

Conclusion

Many have recognized that *economic* dependence on an arbitrary will is just as likely a path to slavery or subservience as *political* dependence.[173] From Harrington,[174] Milton,[175] and

[172] For a discussion of the moral incoherence of the distinction, which is similar to this study's discussion of the moral incoherence of the Consensus, see Katharine G Young, *Constituting Economic and Social Rights* (OUP 2012).
[173] Pettit (n 18) 29, 32-33, 39, 48.
[174] 'The man that cannot live upon his own must be a servant; but he that can live upon his own may be a freeman': James Harrington, *The Commonwealth of Oceana* (CUP 1992) 269. See further Pocock (n 118) 107.

Sidney in the seventeenth century, to the rebellious North American colonists[176] and Founding Fathers in the eighteenth,[177] Jackson and Lincoln in the nineteenth,[178] and Wilson and F D Roosevelt in the twentieth.[179]

For many of these thinkers and politicians, the favored route to independence from arbitrary economic power lay in the promotion of *small* economic units, an ideal which finds concrete expression in ways of life such as those of the smallholder or the self-employed artisan or shopkeeper.[180] Lincoln's portrait is typical:

> Men, with their families—wives, sons and daughters—work for themselves, on their farms, in their houses and in their shops, taking the whole product to themselves, and asking no favors of capital on the one hand, nor of hirelings or slaves on the other.[181]

And it is significant that the 'meanest Lucchese' who, according to Harrington, is freer than the 'greatest bashaw' in Constantinople is the meanest Lucchese '*that hath land*'.[182] In Harrington's day, it might have been difficult to imagine the kind of economic power that Woodrow Wilson lamented two hundred and fifty years later:

> Corporations have come to cover greater areas than states ... have [exceeded] states in their budgets and loomed bigger than whole commonwealths in their influence over the lives and fortunes of entire communities of men.... What we have got to do is to disentangle this colossal "community of interest".[183]

F D Roosevelt argued that his country should:

> reverse that process of concentration of power which has made most American citizens, once traditionally independent owners of their own businesses, helplessly dependent for their daily bread upon the favor of a very few, who, by devices such as holding companies, have taken for

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175 According to Milton, one is 'under tyranny and servitude' if one is 'wanting that power, which is the root and sourse of all liberty, to dispose and *oeconomize* in the Land...': quoted in Skinner (n 35) 75.
176 Some argued for domestic economic development as a bulwark against 'economic dependence [on foreign economies] tantamount to slavery': Sandel (n 3) 143.
177 ibid ch 5.
178 ibid 156-160 (Jackson), 177-185 (Lincoln).
179 ibid 211-258.
180 Consider Thomas Jefferson's letter to John Jay: ibid 144.
181 Quoted in ibid 182.
182 Harrington (n 174) 20-21. Emphasis added.
183 Quoted in Sandel (n 3) 214.

> themselves unwarranted economic power. I am against private socialism of concentrated private power as thoroughly as I am against governmental socialism. The one is equally as dangerous as the other.[184]

But why '*reverse* that process of concentration of power'?

Instead of assuming that only *small* (or much smaller) economic units are compatible with the tradition's underlying principles, the tradition might consider how *large* economic institutions could be maintained but reconstituted by the Rule of Law. Although an answer to this question is beyond the scope of this study, one possible response would be a vision based on dignified economic *interdependence*.

In this Chapter, I have argued that insofar as (i) corporations have not been constituted in conformity with the tradition's principles, and (ii) great power has been put at their disposal, the tradition confronts an opponent just as formidable as the political tyrants with which it once did battle. Sidney's remarks regarding the tyrants of his day are strikingly apposite to the threat posed by the embodiment of the tyrant's standpoint in the so-called legal person of the corporation:

> 'Tis good to use supplications, advices and remonstrances; but those who have no regard to justice, and will not hearken to counsel, must be constrained. 'Tis folly to deal otherwise with a man who will not be guided by reason, and a magistrate who despises the law: *or rather, to think him a man, who rejects the essential principle of a man* ... Nero's madness was not to be cured, nor the mischievous effects of it any otherwise to be suppressed than by his death.[185]

Corporations are constituted to be insensible to, and indeed to resist, all appeals to the genuinely *human* goods of excellence that ought to guide the exercise of power over others. They are constituted to reject 'the essential principle of a man', and they exert a *corrupting* influence, among other things, by inducing humans to share in their rejection of that principle. In a moral inversion of the kind the tradition perceived in absolutism,

[184] Quoted in ibid 255.
[185] Sidney (n 2) ch 3, §40, 545. Emphasis added.

these artificial legal persons *enslave* and render *slavish* their human creators, the beings corporate law calls 'natural persons'.

The tradition is defined by its adherents' belief that we cannot put a lasting end to tyranny and corruption simply by subscribing to the motto of the Commonwealth of Virginia, *sic semper tyrannis*. Tyranny and corruption can only be systematically averted if power is constituted in a way that is inhospitable to the tyrant's standpoint. This means that, although it is undoubtedly important to identify the *human tyrants* behind the corporate form, it is yet more important to deprive them of the institutions which they need in order to realize their ambitions. Without the institutions of absolutism, Charles I could not impose his designs on the community.

Where the tradition faced institutions that were constituted to be hospitable to the tyrant's standpoint, it insisted on their *reconstitution*. Should the tradition's contemporary adherents insist on the reconstitution of the corporation? One aim of this Chapter is to encourage the tradition's adherents to get to the bottom of this question, a pressing task, which has been obscured as a result of the Consensus.

Another aim is to force a response from those who would respond in the negative; it remains to be seen whether they can propose a case which amounts to more than a mere apology for great power. If they cannot, we might echo the words that Sidney used in order to criticize Sir Robert Filmer, a leading apologist for seventeenth century absolutism:

> [W]ith all his wit and learning he could not give a reason why those who did the same things that rendered the ancient tyrants detestable, should not also be in our days.[186]

Just as Sidney sought to appropriate the normative vocabulary of the ancients in order to evaluate the great power of his time, we might stand on his shoulders and undertake the equivalent task in our own age.

[186] ibid ch 2 §30, 288.

5

BUT WHO IS CAESAR?

Introduction

In this Chapter, I expand on a suggestion advanced in previous Chapters. I argue that one could endorse the present conception of private property affording *power over mere things* without necessarily being committed to ownership effectively conferring *power over others*.[1] As the tradition's principles concern power over others, property rights affording power over mere things fall outside the scope of the tradition's project. I have suggested that private property conferring power over others conflicts with the tradition's principles. Why shouldn't this conflict be resolved in favour of those principles? If the Consensus is discarded, this question cannot be avoided. It is only a few steps from rejection of the Consensus to a confrontation with established property rights. But they are large steps, among other things, because the putative 'common sense' of our time presumes that established property rights are legitimate.

[1] This distinction is explained in Chapter 2.

1. Tyranny is the exercise of power beyond right

In Chapters 3 and 4, I argued that although the tradition uses terms such as 'arbitrariness' and 'tyranny' exclusively in the political context, there is no reason in principle why those terms should not also be applied in the economic context. I argued that according to the criteria governing the use of the terms, it would be possible, for example, to speak of the 'arbitrariness' of managerial prerogative or of the 'tyranny' of penal economic power.

As I mentioned in Chapter 4, this way of thinking is likely to face a range of plausible objections. One objection in particular will carry great weight, not only because of its deep cultural roots, but also because of the sheer economic and political power of those whose interests it effectively protects. The objection puts in question my view that some private property rights may have to yield to the tradition's principles.

Imagine the objection is expressed as follows by a figure I will call the 'person of property':

- I concede that when I exercise economic power over others, I exploit relations of dependence. For example, I say to the person who apparently lacks sufficient resources and so wants access to some of mine, 'Work *for me* on terms that suit me today, and I will allow you access for so long as those terms suit me'.

- Similarly, I say to the community that wants to enjoy benefits from an investment I have made, 'I could take my resources away from your community *whenever* I like, so if you want to keep me here, you'll have to change your policies and laws so that they please me.' I might threaten to leave unless the community cuts red tape, for example, or curbs its appetite to confiscate my property by taxing it.

- The things I say might sound high-handed, but you have to remember that we are negotiating over such things because you need what is *mine*. When you

complain that I have *threatened* to withdraw 'the resources' you say you need, you seem to have forgotten that just as I insist on the right to control what is *mine*, I presume you would insist on the same control over what is *yours*; think of *your* suburban garden, for example. The things I would withdraw are not merely 'the resources', still less 'the community's resources': they are *my* resources.[2]

- What do you propose instead? Would you *take* my *property* and give it to others in order to eliminate the relations of dependence upon which my power depends? Or would you take away those of my rights and liberties which allow me to *exploit* the relations of dependence in order to exert power over others?[3] You could call the latter 'regulation', but if regulation goes too far, it is no better than *taking* by another name.[4]

- You say you are complaining in the name of limited government. But you are turning limited government on its head. Have you forgotten that *private* property is one of the very things limited government is meant to protect? Limited government protects *established rights* from the ever-changing preferences of the community, even where those preferences are well intentioned.

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[2] For Locke, a 'man who has mixed his labour with a piece of land, or acquired it legitimately from someone else, has an interest in ownership which the government must respect; but a man who has done neither of these things, but would simply *rather like* to own something, has no such constraining interest': Jeremy Waldron, *The Right to Private Property* (OUP 1988) 4.

[3] Consider, eg, how early in the twentieth century the US Supreme Court held that 'the employer's absolute right of discharge' amounted 'to a constitutionally protected property right. Due process was held to be violated by any law which interfered with "the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it".': Lawrence E Blades, 'Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power' (1967) 67 Columbia Law Review 1404, 1416-1417.

[4] See *Pennsylvania Coal Co v Mahon* 260 US 393, 415 (1922): 'When this seemingly absolute protection [in the Fourteenth Amendment] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States. The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'

- You call me a tyrant, but you are ignoring an essential ingredient of the tradition's concept of tyranny. John Locke says that 'Tyranny is the exercise of Power beyond Right'.[5] If that is so, then I am no tyrant: the powers I exercise are not beyond right. On the contrary, and by your own admission, they are *within* the property rights I have by law. You have fundamentally misunderstood what you call the 'criteria governing the use of the term'.

So, according to the person of property, even if a community is dependent on the will of the person of property, and even if the person of property exploits this dependence by manipulating the community, any moral concerns thereby raised are trumped by the invocation of *established* rights.

However, it is the person of property who misunderstands the criteria governing the use of the term 'tyrant'. The criteria are more demanding than the person of property claims. In particular, the criteria do not allow a person who exercises manipulative power over others to hide behind the claim that they do so legitimately because established convention says that they may. As I have explained in previous Chapters, the tradition is committed to supporting moral equality above everything else, including any established claims of right which demonstrably undermine moral equality. *To the extent that* established rights and liberties underpin manipulative social relationships, they must *in that measure* forfeit their official respect-worthy status.

This does not mean that a certain set of private property rights could no longer be one of the things that the limited government tradition seeks to protect. Their respect-worthy status would only be denied for certain purposes. This is a familiar thought, and a widely accepted one, including by particularly devoted champions of private property rights: 'my property rights in my knife allows me to leave it where I will,

[5] John Locke, *Two Treatises of Government* (CUP 1988) II §199.

but not in your chest'.[6] Ownership is not an all or nothing proposition. Each of 'the legal relations' entailed in ownership:

> is not only distinct, but in principle separable, from each of the others ... Because they are distinct and separable, the component relations may be taken apart and reconstituted in different combinations, so that we may get smaller bundles of the rights that were involved originally in this large bundle we called ownership.[7]

Whatever its flaws in principle, there is immense cultural weight behind the person of property's assumption that an appeal to established rights is sufficient to dispense with the charge of tyranny. Indeed, the presumption that established property rights are legitimate is so deeply entrenched, it is difficult to imagine the person of property facing the charge in the first place. It is worth briefly considering two sources which have made important contributions to the seeming plausibility of this presumption.

2. John Locke and the sword of property

The first source is John Locke, a major influence on the limited government tradition and on liberal public philosophy. Locke sought to establish, against the orthodoxy of his day, a sharp distinction between two forms of appropriation. Today, this distinction is no longer subversive, and its common sense status is of substantial assistance to the person of property:

> Property, whose Original is from the Right a Man has to use any of the Inferior Creatures, for the Subsistence and Comfort of his Life, is for the benefit and sole Advantage of the Proprietor, so that he may even destroy

[6] Robert Nozick, *Anarchy, State and Utopia* (Basic Books 1974) 171: 'The central core of the notion of a property right in *X*, relative to which other parts of the notion are to be explained, is the right to determine what shall be done with *X*; the right to choose which of the *constrained set of options* concerning *X* shall be realized or attempted. The constraints are set by other principles or laws operating in the society; *in our theory*, by the Lockean rights people possess (under the minimal state) ... I may choose *which of the acceptable options* involving the knife is to be realized.' Emphasis added, because the 'constraints' and 'acceptable options involving the knife' may be otherwise conceived. For an argument that private property cannot mean absolute liberty as to use, see Waldron (n 2) 5.

[7] Waldron (n 2) 28.

> the thing ... but Government being for the Preservation of every Mans Right and Property, ... is for the good of the Governed ... the Sword is not given the Magistrate for his own good alone.[8]

The 'preservation of property' is presented by Locke as part of the rationale for limited government.[9] And his visions of private property, on the one hand, and limited government, on the other, are presented in contradistinction to one another. Whereas government office imposes upon the magistrate burdens of duty, private ownership permits virtually untrammeled self-seeking exploitation and accumulation.

Locke's theory of private property aims to show that the unlimited appropriation of material resources in compliance with the norms he stipulates does *not* amount to misappropriation, contrary to long-standing natural law doctrine:

> Locke's followers in later generations no longer believed that they needed "the phraseology of the law of nature" [to justify unlimited accumulation] because they took for granted what Locke did not take for granted: Locke still thought that he had to prove that the unlimited acquisition of wealth is not unjust or morally wrong. It was indeed easy for Locke to see a problem where later men saw only an occasion for applauding progress or themselves, since in his age most people still adhered to the older view according to which the unlimited acquisition of wealth is unjust or morally wrong. ... [This is reflected in his] occasionally mentioning and apparently approving the older view.[10]

By contrast, Locke set out to show that absolutism amounts to the appropriation of jurisdictional power contrary to the limited government norms he identifies.[11] For Locke, it is a misappropriation of the power that rightfully *belongs* to people in the state of nature unless they freely relinquish it (ie, it is part of their natural '*Property*').[12] The first

[8] Locke (n 5) I §92.
[9] ibid II §138.
[10] Leo Strauss 'On Locke's Doctrine of Natural Right' (1952) 61 The Philosophical Review 475, 498.
[11] See discussion in Chapter 3.
[12] Locke sometimes uses 'property' to refer to external possessions alone. On other occasions, he calls 'Lives, Liberties and Estates' 'by the general name, *Property*': see Locke (n 5) II §123 and the 'Introduction' thereto by Peter Laslett at 102-103; C B Macpherson, *The Political Theory of Possessive Individualism* (OUP 1962) 198.

sentence of Locke's chapter on tyranny begins, 'As Usurpation is the exercise of Power, which another hath a Right to...'.[13]

Whatever historical authority Locke and other anti-absolutists cited in support of their political project, the 'Right' which they invoked was not one that was regarded at the time as established. On the contrary, its *assertion* was plausibly regarded by its detractors as a subversive act, that is, an attempt to exercise power beyond right. The dictates of 'Right' were the very things in dispute between the defenders of absolutism and their opponents. It was therefore clear to the anti-absolutists that if the requirements of 'Right' were simply a matter of what was established, the defenders of the king would have plausible arguments at their disposal; it was necessary, then, to appeal to grounds whose force was independent of mere convention.

Analogous reasoning can be used against the person of property's argument from established 'Right'. The person of property implies that '*given* a distribution of property', individual owners have a right 'that their holdings should be respected'.[14] However, '[t]he right to property, understood in this way, does not provide any sort of argument for the existence' of the relevant rights.[15] The person of property begs the question as to whether established rights can be justified on convention-independent grounds.

Locke's natural rights theory is one way, among others, of trying to vindicate established holdings. The person of property may be persuaded by Locke's contention that whereas holders of jurisdictional power possess it on trust, owners of private property have virtually *absolute* natural rights to its fruits and to engage in unlimited accumulation. But, as explained in Chapter 3, a difficulty with Locke's account of this distinction is that it obscures how concentrated ownership of resources confers manipulative power over others: under conditions of economic dependence, 'Property'

[13] Locke (n 5) II §199.
[14] Waldron (n 2) 18.
[15] ibid.

effectively confers upon employers a power to treat employees' time as morally equivalent to the time belonging to 'Inferior Creatures', ie, something to 'use' as a mere means 'for the Subsistence and Comfort' of the employer.

Provided these manipulative relations are overlooked, Locke's sharp distinction between *legitimate* self-seeking exploitation of *property* rights, on the one hand, and *illegitimate* self-seeking exploitation of *state* power, on the other, lends plausibility to the outlook of the person of property. It is an outlook which tolerates extravagant claims on behalf of 'private' economic power that it would never accept on the part of 'public' power. It is my contention that this way of seeing power should be seen as *implausible* according to the tradition's underlying principles, at least insofar as the 'private' power in question is *power over others*. Once it is recognized that the capitalist constitution places a *sword* in the hands of the person of property, we are forced to see in a new light Locke's declaration that 'the Sword is not given the Magistrate for his own good alone'.

I am not claiming that Locke's is the only theory which may be called in support of the person of property.[16] However, for at least two reasons, it merits special attention. Firstly, the cultural resonance and credibility of the appeal to established right is in part due to Locke's theory having a prominent and respected place among various justifications for established property rights.

Secondly, Locke has had a significant influence on how the limited government tradition has been understood, both by its adherents and by others. Among other things, Locke's conception of limited government supports the person of property's indignant insistence that '*private* property is one of the very things limited government is meant to protect'. Indeed, it is significant that Locke transforms an element of *property law*—the trust—into a metaphor for his doctrine of limited government. Equally remarkable is

[16] Law and economics efficiency-based arguments may provide another source of support: see, eg, Daniel H Cole, 'The law and economics approach to property' (2014) 3 Property Law Review 212. Thanks are due to Paul Craig for this reference.

how he describes the terms of the trust: the point of limited government is to ensure that society is governed for the sake of its beneficial *owners*, who, Locke believed, were the persons of property.[17]

3. The common law and Mr Pickles, man of property

The second source of the person of property's outlook is the English common law, which makes its contribution by holding that established property rights may justify ways of exercising power over others that it would condemn were they emulated by the state. This is illustrated by a renowned Victorian case, *The Mayor, Aldermen and Burgesses of the Borough of Bradford v Edward Pickles*.[18]

The case involved a power struggle between the English city of Bradford and a person of property named Mr Pickles. Nineteenth century Bradford was a major industrial town whose prosperity depended on its reservoir enjoying a ready supply of water. Mr Pickles's land was so connected with the reservoir's principal water source that he could gradually deprive the reservoir of perhaps all of its water by carrying out certain excavation works. He decided to threaten to deprive the city of water, and to indicate that he would carry out the threat unless Bradford bought his land at a price substantially above the ordinary market rate. Mr Pickles realized that the control afforded by his private property rights and the situation of his land potentially 'armed' him 'with power over others by virtue of a capacity to dictate the use of the resource'.[19]

[17] On the privileged status afforded to the propertied in Locke's theory, see: Joshua Cohen, 'Structure, Choice, and Legitimacy: Locke's Theory of the State' in Christopher Morris ed, *The Social Contract Theorists: Critical Essays on Hobbes, Locke, and Rousseau* (Rowman & Littlefield 1999); Macpherson (n 12).
[18] [1895] AC 587.
[19] J W Harris, 'Private and non-private property: what is the difference?' (1995) 111 Law Quarterly Review 421, 422-423.

Counsel for Mr Pickles did not concede that his client was acting in 'bad faith' 'in order to force' Bradford 'to make terms with him', as his opponent put it.[20] Still, he argued that even if Mr Pickles had sought to extort Bradford, this power could be exercised lawfully, because it had its source in a constellation of legal and other factors which the law permits or creates: 'Every man has a right to make what use he pleases of his own land ... and if the situation of the land gives him a special advantage he has a right to the benefit of it'.[21] The *limited government questions* are: whether private ownership should confer any power *over others*; and, if so, whether such power should be capable of being exercised according to the same criteria as any other 'advantage' of private ownership.

The House of Lords answered the question whether Mr Pickles committed a legal wrong by threatening to cut off Bradford's water as punishment for its failure to pay the price he nominated for his land. At each level in the court hierarchy, the judges answered this question in the negative. The trial judge held that whatever the position under Roman law,[22] English law does not prohibit conduct of the kind Mr Pickles engaged in even where its motivation 'is the purpose of levying blackmail upon the neighbour'.[23] Lord Justice Lindley in the Court of Appeal held that Mr Pickles:

> ... simply wants to force the Plaintiffs to buy his land ... at his own price, regardless of the interests of other people who will be seriously inconvenienced if the Defendant cuts off the supply ... The only question a Court of Law or Equity can consider is whether the Defendant has a right to do what he threatens and intends to do. If he has he cannot be interfered with, however selfish, vexatious, or even malicious his conduct

[20] *Bradford v Pickles* [1895] 1 Ch 145, 150 ('*Bradford*').
[21] *Bradford* [1895] 1 Ch 145, 149. *Bradford* [1895] AC 587, 599-600 (Lord Macnaghten).
[22] Dig Lib 39, tit 3, art, s 12, citation given by Lord Watson: *Bradford* [1895] AC 587, 597. Where the doctrine of 'abuse of rights' has been maintained, the notion of a 'right' would have different connotations: see, eg, J B Ames, 'How Far an Act May be a Tort Because of the Wrongful Motive of the Actor' (1905) 18 Harv LR 411; H C Gutteridge, 'Abuse of Rights' (1933) 5 Cambridge LJ 22; J Finnis, 'Intention in Tort Law' in D G Owen (ed), *The Philosophical Foundations of Tort Law* (OUP 1997); Michael Taggart, *Private Property and Abuse of Rights in Victorian England* (OUP 2002) ('*Property*'); J Getzler, *A History of Water Rights at Common Law* (OUP 2006).
[23] *Bradford* [1894] 3 Ch 53, 68 (Justice North).

> may be. This is not one of those cases in which an improper object or motive makes an otherwise lawful act actionable.[24]

Lord Macnaghten in the House of Lords held that:

> it may be taken that his real object was to shew that he was master of the situation, and to force the corporation to buy him out at a price satisfactory to himself .... He prefers his own interests to the public good. He may be churlish, selfish, and grasping. His conduct may seem shocking to a moral philosopher.[25]

Nevertheless, in Lord Ashbourne's words, 'Mr Pickles has acted within his legal rights throughout ... If his motives are selfish and mercenary, that is no reason why his rights should be confiscated when his actions are legal'.[26]

It is difficult to imagine adherents of the limited government tradition condoning an exercise of power by a *public* authority of the kind the House of Lords condoned on the part of Mr Pickles, a *private* citizen. Although the tradition's commitments have been embodied in various common law principles affecting state power, when it comes to economic power, the law has tended to subscribe to the Consensus. Michael Taggart captures the tension well:

> ...if the tables had been turned in *Pickles* and the Corporation owned the uphill land and threatened to divert the water in order to coerce Pickles into doing something he was not minded to do, would the courts have allowed the Corporation to be "master of the situation" in the same way?

As Taggart notes, there are good reasons for thinking the answer must be 'no'. The 'same Lord Macnaghten who seemingly so admired the enterprise of Edward Pickles',[27] declared in another case that:

> It is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its power. It must keep within the limits of the authority committed to it. It must act in good faith. It must act reasonably. The last proposition is involved in the second, if not in the first.[28]

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[24] *Bradford* [1894] 1 Ch 145, 158-159.
[25] *Bradford* [1895] AC 587, 600-601.
[26] *Bradford* [1895] AC 587, 598-599.
[27] Taggart, *Property* (n 22) 199.
[28] *Westminster Corporation v London & North Western Railway* [1905] AC 426, 430 quoted in Taggart, *Property* (n 22) 199.

The *Three Rivers case*,[29] which concerned the tort of misfeasance in *public* office, distinguished *Bradford v Pickles*: while an intention to harm one or more others is insufficient to render unlawful an otherwise lawful exercise of 'private' power, it may be sufficient in the case of a 'public' power.[30] As Lord Steyn describes it, the:

> rationale of the tort is that *in a legal system based on the rule of law* executive or administrative power "may be exercised only for the public good" and not for ulterior or improper purposes.[31]

For the first limb of the tort, the Rule of Law is understood as implying more than mere legality: it 'is immaterial ... whether the official exceeds his powers or acts according to the letter of the power'.[32] Lord Millett observes that 'the rationale underlying the first limb' is that '[e]very power granted to a public official is granted for a public purpose' (an example of the *comprehensiveness* of the Rule of Law discussed in Chapter 4); for the official 'to exercise it for his own private purposes ... is an abuse of the power' (a misappropriation or usurpation).[33]

The tort impugns 'a conscious disregard for the interests of those who will be affected by' an exercise of power,[34] where such interests are 'legally protected',[35] effectively offering protection to certain persons affected by the exercise of a power.[36] Its elements imply an obligation on the part of officials to see such persons as bearers of

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[29] *Three Rivers DC & v Bank of England (No 3)* [2003] 2 AC 1 ('*Three Rivers*'). See Paul Craig, *Administrative Law* (7th ed, Sweet & Maxwell 2012) 30-024 to 30-028.

[30] Where the elements of the tort are made out: *Three Rivers* [2003] 2 AC 1, 190.

[31] Lord Steyn at 190 is quoting *Jones v Swansea CC* [1989] 3 All ER 162, 186. Emphasis added.

[32] Lord Millett notes that 'the core concept is abuse of power', and that '*excess* of power is not the same as *abuse* of power'. *Three Rivers* [2003] 2 AC 1, 235. However, in the case of the second limb, where an excess of power *is* required, an inference of insufficient respect for (legally protected) respect-worthy considerations 'cannot be rebutted by showing that the official acted not for his own personal purposes but for the benefit of other members of the public. An official must not knowingly exceed his powers in order to promote some public benefit at the expense of the plaintiff': *Three Rivers* [2003] 2 AC 1, 236.

[33] *Three Rivers* [2003] 2 AC 1, 236.

[34] Blanchard J in *Garrett v AG* [1997] 2 NZLR 332, 350: quoted with approval by Lord Millett *Three Rivers* [2003] 2 AC 1, 236. This formulation may sum up the wrong underlying *both* limbs, though it is cited in Lord Millett's discussion of the second limb.

[35] *Three Rivers* [2003] 2 AC 1, 237.

[36] 'The tort is historically an action on the case. It is not generally actionable by any member of the public': *Three Rivers* [2003] 2 AC 1, 231 (Lord Hobhouse).

respect-worthy interests, which must be given due weight. The tort is one part of English law's broader Rule of Law project aimed at ensuring that individuals are not denied moral equality by those wielding *state* power.

It is tempting to read *Bradford v Pickles* as a mere curiosity: it concerns one man, who, thanks to an unusual combination of factors, could attempt to enrich himself by 'levying blackmail' on one town. However, if we recall Chapter 4's discussion of penal economic power, it becomes apparent that Mr Pickles's strategy closely resembles the strategy of corporations which seek to show that they are the 'master of the situation' by exercising penal economic power. Recall Algernon Sidney's remarks:

> The rage of a private man may be pernicious to one or a few of his neighbours; but the fury of an unlimited prince would drive whole nations into ruin.[37]

Penal economic power as wielded by large corporations is no curiosity: they often wield the sword of property to levy blackmail on whole nations. It is one of the most potent forms of power known to our age, and it may 'drive whole nations into ruin'. Yet, and *this is curious*, penal economic power has received little attention from the tradition's adherents.

The limited government reasons for being concerned about penal economic power—and economic power over others generally—are compelling. It is, therefore, not enough to say that such power is nonetheless legitimate *just because* of our *present conceptions* of certain legal 'rights' or 'economic freedom'. Fidelity to the tradition's underlying principles obliges us to hold that, to the extent that private property rights underpin manipulative social relationships, such rights must *in that measure* forfeit their respect-worthy status. Or to appropriate Lord Asbourne's words, to the extent that private property rights permit economic power over others to be exercised in a 'selfish and

[37] Algernon Sidney, *Discourses Concerning Government* (Liberty Fund Inc 1989) ch III, §13, 390; see further, Chapter 4.

mercenary' fashion *against* a community, then the tradition's underlying principles provide a 'good reason why' such 'rights should be confiscated'.[38]

Bradford v Pickles lends the dignity of legal authority to the person of property's attempt to justify manipulative power by an appeal to established right. But from the tradition's perspective, established rights do not merit respect simply because they are established: whether or not they deserve respect is to be evaluated according to the tradition's underlying principles whose authority transcends the pronouncements of conventional authority, which has no dignity as such.

As I said earlier, the tradition's early adherents recognized that their cause would be lost were they to defer to established right. What mattered, they asserted, were the moral implications of any claimed rights. Sidney sought to show that Sir Robert Filmer's invocation of established right amounted to giving the subject the 'choice' of 'acting or suffering, that is':

> doing what is commanded, or lying down to have his throat cut, or to see his family and country made desolate. This he calls giving to Caesar that which is Caesar's; whereas he ought to have considered that the question is not whether that which is Caesar's should be rendered to him, for that is to be done to all men; but who is Caesar, and what doth of right belong to him, which he no way indicates to us: so that the question remains entire, as if he had never mentioned it, unless we do in a compendious way take his word for the whole.[39]

We might equally say that the person of property's objection does not say truly 'what doth of right belong to him', 'so that the question remains entire'.

4. Removing the sword from the person of property

How we respond to the objection advanced by the person of property will depend on our beliefs regarding the proper claims of property, which is a large and controversial

[38] *Pace* Lord Ashbourne: *Bradford* [1895] AC 587, 598-599.
[39] Sidney (n 37) ch 1, §3, 16.

subject. For the purposes of this study's objectives, the following preliminary remarks are sufficient.

4.1 Rousseau rather than Locke

To begin with, we should reject Locke's attempt to place the property system outside 'the subject matter' of constitutional deliberations, 'as part of its background'.[40] Locke's naturalization not only of private property, but also of severe inequality of holdings, and of the presumption that resources are simply *there* to be *privately* appropriated for exclusive 'self-seeking exploitation'[41] is contestable.[42] The identity of owners, as well as the distribution and incidents (powers, ends, limits) of ownership are not truly natural and therefore can be changed by deliberate decision. This means that the merits of any scheme (including an historically inherited one) is a matter for a community to debate and determine according to its members' conceptions of the requirements of the public good. If these propositions are accepted, a wide range of possibilities open up.

Paul Craig has unearthed a 'largely forgotten' jurisprudence which he traces to Lord Chief Justice Hale,[43] according to which 'private' property may be found to be 'clothed with a public interest when' it may 'affect the community at large' and be 'used in a manner to make it of public consequence':[44]

> Hale provides the foundations for regarding certain aggregations of property which are held in nominally private hands as nonetheless subject to constraints in the way that they are used. ... [T]he rights, duties, powers and immunities which comprise the concept of property in this instance may well be different from the paradigm of pure private property.[45]

Craig explains that this line of authority has '*constitutional* implications':

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[40] Cohen (n 17) 162.
[41] Harris (n 19) 433.
[42] For a persuasive critique of Locke's property theory, see Waldron (n 2) ch 6.
[43] Paul Craig, 'Constitutions, property and regulation' [1991] Public Law 538, 538 ('*Property*').
[44] *Munn v Illinois* 94 US 113, 126 (1877) (Waite CJ) citing Hale in his treatise *De Portibus Maris*.
[45] Craig, 'Property' (n 43) 542.

> A legal system has to decide how to treat property rights. It has to determine what rights, immunities, powers and duties flow from the notion of property; and it has to decide what degree of protection to accord to property thus defined. It is common to afford property rights some measure of protection in the list of rights recognised by a written constitution. How much protection may well be contentious, but some measure is commonly found, if only to prevent the state from expropriating such rights without limit or without compensation. In determining whether the state has infringed such constitutional protections, some view must be taken of what the rights, immunities, powers and duties of property holders actually are.[46]

Of course, the question how a legal system has from time to time *decided* what property rights 'actually are' must be resolved by an interpretation of the relevant legal authorities; the existence of a line of authority which identifies the potential role of a *jus publicum* is instructive in that respect. However, as moral and political agents who must determine the proper terms of constitutional allegiance, we should be unconstrained both by the historically inherited 'paradigm of pure private property',[47] as well as by legal authority.[48] For present purposes, the jurisprudence on *jus publicum* is a reminder that the contemporary paradigm of pure private property is the product of human decisions, which we may overturn should they be demonstrably unsound. In other words, the tradition must insist on a debate at the level of the moral principles relevant to the justification of rival property *régimes*, and it must also insist that the onus is on those who would argue that great economic power should not be a target of the Rule of Law.

We should, then, follow Rousseau in considering any property system, including our own, 'as social and conventional, not as natural': 'all features of the social order are subject to public deliberation among equals concerning the requirements of the common

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[46] ibid. Emphasis in original.

[47] ibid 542.

[48] And even if the tradition formed a consensus that economic power should be an actual target of Rule of Law practice, it is an open question whether the line of authority on *jus publicum* should be followed. Is it right to confine the relevant constraints to holders of monopolistic power? See, further, the concerns raised by Stone J: *Tyson & Brother—United Theatre Ticket Offices, Inc v Banton, District Attorney et al* 273 US 418, 451 (1926). Moreover, it is an open question whether existing or historical conceptions of how to constrain private power are sound. See further Paul Craig, 'Public Law and Control over Private Power' in Michael Taggart (ed), *The Province of Administrative Law* (Hart Publishing 1997).

good...'.[49] As part of such deliberations, we might adapt for the economic context a set of propositions which the anti-absolutists tellingly advanced in the political context:

- All people enjoy a natural equality in respect of the accumulated economic resources of the world.

- Accordingly, no economic obligations should be acknowledged, *save* for those that are consistent with moral equality for all and freedom for all from manipulative social relationships:[50] 'There being no such thing ... according to the law of nature, as an hereditary right to the dominion of the world, or any part of it'.[51]

Any constitution of economic power which generates *de jure* or *de facto* obligations that are inconsistent with these propositions would amount to a misappropriation, or usurpation, of moral interests which are the true birth-right of persons (unlike the often inherited claims to economic power by which that true birth-right is taken away). As Morris Cohen notes, 'History is full of examples of valuable property privileges abolished without any compensation, eg the immunity of nobles from taxation, their rights to hunt over other people's lands, etc.'[52]

'[S]ocial inequalities are not in themselves a problem as long as they are justified, that is, "founded only upon common utility," as article I of the 1789 Declaration of the Rights of Man and the Citizen proclaims'.[53] However, the tradition ought to take care to reject any definition of 'utility' that would allow manipulative social relationships to be an

[49] Joshua Cohen (n 17) 162-163.
[50] This would run in parallel with the assertion that people enjoy a natural jurisdictional equality, such that there are no jurisdictional obligations, save for those obligations that are consistent with moral equality of all and the freedom of all from manipulative social relationships: see Chapter 3.
[51] Sidney (n 37) ch 1, §18, 57.
[52] Morris R Cohen, 'Property and Sovereignty' (1927-1928) 13 The Cornell Law Quarterly 8, 26.
[53] Thomas Piketty, *Capital in the Twenty-First Century* (Harvard University Press 2014) 31.

acceptable price of (say) material prosperity.[54] That would reflect a degraded conception of 'common utility' since it would imply that moral equality is alienable at a price.

Locke seems to have adopted this way of thinking, but only in relation to *economic* life and, in particular, the lot of economic dependents. Leo Strauss suggests that, according to Locke:

> The day laborer in England has no natural right even to complain about the loss of his natural right to appropriate land and other things by his labor: the exercise of all the rights and privileges of the state of nature would give him less wealth than he gets by receiving "subsistence" wages for his work. Far from being straitened by the emancipation of acquisitiveness, the poor are enriched by it. For the emancipation of acquisitiveness is not merely compatible with general plenty, but is the cause of it. Unlimited appropriation without concern for the need of others is true charity.[55]

The spirit of this way of thinking has ancient origins.

Consider how Aesop's fable of *The Belly and the Members* was appropriated by Menenius Agrippa to convince the Roman plebs to end their secession aimed against the Senate. In the fable, the belly faces a rebellion when other parts of the body decide that the belly was reaping most of the rewards of their work but contributing very little itself. The hands, mouth, and teeth struck, but they soon discovered that they were becoming unwell. They realized that unless they cooperated with the belly, they would die with the whole body. Agrippa argued that although the Senate was indeed well-fed by the plebs, the Senate returned the favour by infusing the republic's blood with nutrients needed for the survival of all. The organic metaphor performs the crucial function of giving the

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[54] In any case, Piketty argues that 'Historical experience shows ... that such immense inequalities of wealth have little to do with the entrepreneurial spirit and are of no use in promoting growth. Nor are they of any "common utility" ...': ibid 572.

[55] Strauss (n 10) 495. In addition to the advent of money in the state of nature (eg Locke (n 5) II §50), Locke seems to rely, in substance, on what we would now call the 'trickle down theory' to overcome the natural law limitations of his famous 'enough and as good' or 'sufficiency' proviso: II §37; II §41. Discussed in Macpherson (n 12) 197-221. Consider Richard Posner's remarks, 'Only the fanatic refuses to trade off lives for property…': *The Economics of Justice* (Harvard University Press 1983) 83-84. But whose lives? For whose property? How to ensure that those with the power to determine risk allocation do not deny the moral equality of those who would endure the risks? On benefits and burdens and Kant, see Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press 2009) 5.

impression that a body politic which disproportionately favours an *élite* is like the human body: natural and therefore immutable.[56]

Early proponents of the limited government project had to reject similar arguments suggesting a 'common utility' in unlimited government. The purported utility in that case depended for its force upon taking for granted conditions which consigned some to weakness and allowed others to exploit it, conditions which were in fact mutable. Consider for instance the following characterization of 'common utility': I have riches and men at arms; I can offer you protection according to my terms; without my protection your properties and persons will be vulnerable; all I ask in return is that you offer me an appropriate tribute and do not attempt to interfere with my prerogatives; but fear not, so long as I am secure in my position, you will be in yours too.

In our day, a parallel case is often made in defence of the claims of great economic power. Recall the reasoning advanced by the person of property: I have riches to which I may permit you access according to my terms; without such access, you will be poor and vulnerable; it would be in your interests, then, to agree to my terms; all I ask in return is that you offer me an appropriate tribute in the forms of your labor and custom and that you do not attempt to interfere with my economic freedom. The terms of this compact seem plausible provided it is thought legitimate that anyone should be dependent on the arbitrary economic power of another in the first place.

4.2 Quantity and quality. Things and people.

I should underscore a key intuition underlying the argument from the claimed analogy between state power and economic power: namely, that there must be an important moral difference between, on the one hand, the power over mere things entailed in the

[56] Sir Roger L'Estrange, *Fables of Aesop* (Dover 1967) 21.

ownership of a suburban garden or a motor-car, and on the other hand, the holdings of (say) the Walton family in the United States, who own Wal-Mart.[57]

The aggregate wealth of the six heirs to the Wal-Mart business 'is greater than the combined wealth of the bottom 42 percent of the entire American population'.[58] Recall S F C Milsom's observation that during feudalism, '[l]ordship and ownership, government and property, were not ... clearly distinct as they seem to us...':[59]

> Today we think of the ownership of a suburban garden, or even of a great agricultural estate, as being something like the ownership of a motor-car. They are just forms of wealth, the objects of legal protection.[60]

The Consensus partly reflects the tradition's adoption of the modern way of seeing governmental power, which was discussed in Chapter 3. For the purposes of the tradition's understanding of its project, the ownership of Wal-Mart is treated as equivalent to ownership of a suburban garden or a motor-car: both are treated as equally *irrelevant*, because neither is seen as a source of governmental power.

But an estate equal to the combined wealth of the bottom 42 percent of the entire American population does not simply allow its possessors to have more and better gardens and motor-cars. Property in Wal-Mart confers vast internal and external power over substantial aspects the ways of life of individuals and whole communities. And this power is substantially within the private prerogative of its owners, subject to the *ad hoc* limits imposed by regulation. It is an immense power for good or for ill.[61] Moreover, it is important to recall that according to the tyrant's standpoint which guides corporations (if

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[57] The Kantian prohibition on using others as mere means 'is explained in terms of the classic distinction, from Roman law, between persons and things': Ripstein (n 55) 36-37.

[58] Robert Reich, Reich R, 'Freedom Summer II' (31 May 2014) <http://robertreich.org/post/87431048120> a calculation checked by <www.politifact.com> both accessed 21 August 2014; Joseph Stiglitz, 'The 1 Percent's Problem' *Vanity Fair* (New York, 31 May 2012).

[59] S F C Milsom, *Historical Foundations of the Common Law* (Butterworths 1969) 8.

[60] ibid 88.

[61] On both sides of the ledger, see Colin Mayer, *Firm Commitment* (OUP 2013) 41.

not their chief human beneficiaries), the notions of 'good' and 'ill' are immaterial.[62] Any good or ill a company's activities bring to the community are purely incidental to its pursuit of profit maximization.

In his dissenting opinion in *Louis K Liggett Co v Lee*, Justice Brandeis remarks that:

> Through size, corporations, [have] such concentration of economic power that [they] are sometimes able to dominate the State. ... [leading] ... scholars to compare the evolving "corporate system" with the feudal system; and to lead other men of insight and experience to assert that this "master institution of civilised life" is committing it to the rule of a plutocracy.[63]

Both the quantity of property owned by the so-called 'one percent', and what is owned, affect the quality of the relations between persons in ways that should attract the tradition's attention. The rights entailed in ownership of a single motor-car confer no *governmental* power. The rights entailed in ownership of resources upon which the welfare of a community depends do confer such power.

Contrary to liberal public philosophy's social vision, the economic sphere is not simply a venue for the horizontal interaction of human individuals, but is also the location of a vertical system of power at whose summit stand large institutions which act on behalf of human beneficiaries.[64] As Karl Renner argues, although the 'norms' of private property may have remained largely 'unchanged' for more than a century, 'their social function' has nevertheless undergone 'a profound transformation'.[65] Private property of *this* kind functions as a source of governmental power over persons in themselves and persons in community. When the dominant institutions in such a system of power are not constituted according to the Rule of Law, and *a fortiori* when they are

[62] And to the extent that their market power does not liberate them from the market, the 'price system knows neither limits nor morality': Piketty (n 53) 6.
[63] 288 US 517-586, 565.
[64] As argued in Chapter 3.
[65] O Kahn-Freund, 'Introduction' to Karl Renner, *The Institutions of Private Law and Their Social Functions* (Routledge & Kegan Paul 1976) 1.

driven by the tyrant's standpoint, the relationships between such institutions and those under their power will tend to take on a manipulative, even tyrannical quality.

It is therefore a mistake in the context of a debate over the merits of the Consensus to talk as though what is at stake is private property *simpliciter*. I may without contradiction hold:

(i) firstly, that one of the tradition's *raisons d'être* is to ensure that the state respects the claim that *my* suburban garden and motor-car are for *my* exclusive 'Subsistence and Comfort', because such power over mere things is properly *private* and therefore 'for the benefit and sole Advantage of the Proprietor';[66]

and

(ii) secondly:

(a) that identical respect is *not* owed to a proprietary estate equal to the holdings of the bottom 42 percent of US society whose owners enjoy substantial power not only over the terms of their own 'Subsistence and Comfort', but also internal power over many aspects of the daily lives of 1.4 million employees and their loved ones, as well as external power over substantial parts of the broader life of a whole nation;

(b) that, on the contrary, the tradition ought to consider that its *raison d'être* includes *asking* whether such concentrated economic power (assuming it is to exist at all) should no longer be regarded by the tradition in the same way as property affording power over mere things, but instead as a source of

[66] It is worth noting that today, as was the case 'a century ago', the 'poorest half of the population still owns nothing', though 'there is now a patrimonial middle class that owns between a quarter and a third of total wealth': Piketty (n 53) 377. For Kant, 'Freedom requires that you be able to have usable things [though not people] fully at your disposal, to use as you see fit, and so to decide which purposes you will pursue with them...': Ripstein (n 55) 19 and 242.

> governmental power that threatens the community with tyranny unless it is brought into a relationship with law and with interests, expectations, and rights which is inhospitable to manipulative social relationships.

Even if the tradition were to respond affirmatively to the very far-reaching question posed at (b) (which could be framed more modestly), what is at stake is not the institution of private property in suburban gardens and motor-cars. Rather, the question is aimed at private property effectively conferring internal and external power over others, which in many cases today is institutional power (ie, power housed in a supra-individual, impersonal corporate form).

Of course, as the person of property pointed out, the reconstitution of economic power over others might involve the effective confiscation of certain established property rights. In the event that the relevant wealth is not inherited,[67] its reconstitution would give no weight to its owners' efforts to accumulate wealth and power or to their good fortune in having done so. If some adherents of the tradition are troubled by this, they ought to recognize that the tradition could not have advanced very far in its opposition to absolutism had it been solicitous of the equivalent claims of *hereditary* monarchs: indeed, in defence of their interests, kings would point not only to immemorial custom, law, property, inheritance, and perhaps good fortune, but also to god and nature. And at least in respect of the first five things they were on firm ground.[68]

It is worth recalling that although he rejected Filmer's attempt to found absolute jurisdictional power in property, Locke crafted his attack in terms that would not

[67] On the relationship between inheritance and great wealth, see Piketty (n 53).
[68] J G A Pocock, *The Ancient Constitution and the Feudal Law* (CUP 1987) 17: 'The constitutionalists were ... always being driven to argue that the laws were of a practically infinite antiquity, immemorial in the sense of earlier than the earliest king known. It could happen in this that historical criticism became one of the sharpest weapons of monarchy, while the constitutionalists were forced into a kind of historical obscurantism—compelled to attribute their liberties to more and more remote and mythical period in the effort to prove them independent of the will of the king.'

jeopardize private property in general. There is no reason why the tradition's adherents should not consider an analogous approach today: the tradition could focus on the great economic power of large business corporations and their chief human beneficiaries, and not on private ownership of suburban gardens and motor-cars.

However, it is equally important to recall the critique of Locke's account of the employment relationship which I advanced in Chapter 3: the tradition has good reason to include the internal power wielded by employers over employees within its project, even if many employers are not large corporations or incorporated at all.

The prevailing modern way of seeing power misleads us regarding the nature of contemporary economic power. It misleads us because it encourages us to see the sword in the hands of the magistrate, but not the sword in the hands of owners of great wealth. The modern way of seeing property encourages us to see in the ownership of a suburban garden, the ownership of a motor-car, *and* the corporate holdings of (say) the Walton family in the United States *morally* equivalent forms of wealth. All are simply examples of the 'objects of legal protection' characteristic of 'property'.[69] We are encouraged to treat great economic institutions like 'private individuals' rather than like 'government' for the purposes of Ronald Dworkin's principle 'that private individuals have no ... responsibility to strangers' which is 'comparable' to that of government'.[70]

5. Ways of seeing power: shifts in the balance of plausibility

Now that immense economic power is embodied in large corporations, it seems particularly untenable to ignore the important moral difference, in limited government terms, between property conferring power over others and property over mere things. Why? Because corporations are institutions not humans, and as such, they more closely

[69] Milsom (n 59) 88.
[70] Ronald Dworkin <http://www.justiceforhedgehogs.com/human-rights/> accessed 24 May 2014.

resemble the state institutional power that has been the tradition's exclusive focus. This resemblance, accentuated today, was already evident when Adolf A Berle and Gardiner C Means published *The Modern Corporation and Private Property* in 1932:

> The economic power in the hands of the few persons who control a giant corporation is a tremendous force which can harm or benefit a multitude of individuals, affect whole districts, shift the currents of trade, bring ruin to one community and prosperity to another. The organizations which they control have passed far beyond the realm of private enterprise—they have become more nearly social institutions. Such is the character of the corporate system—dynamic, constantly building itself into greater aggregates, and thereby changing the basic conditions which the thinking of the past has assumed.[71]

Berle and Means recognised that with great 'property in flux',[72] the old ways of seeing the relationship between property and power had become implausible to some, and they sought to devise new ways of seeing that would seem more appropriate to the changing conditions. But their forceful rhetoric suggests they believed that at least some of their readers might have had a different sense of what is plausible. Such forceful rhetoric is necessary in order to challenge the putative 'common sense' of an age. According to the common sense of their (and our) time, Berle and Means's position *seems* implausible, and their characterization of the 'corporate system' is likely to be met with scepticism. Then, as now, the balance of apparent plausibility, so to speak, casts the onus on those who would say that economic power may be governmental power, and who, in turn, would call into question the legitimacy of its present constitution.

However, according to the tradition's principles, the onus should fall on the defenders of great power. The tradition is defined by its suspicion of power, not by a presumption that it is safe until proven otherwise. In order to place the onus where it belongs, it is necessary to shift the 'balance of plausibility', as I will call it, so that it comes to seem implausible that great economic power would *not* be an object of the

[71] (Macmillan Co 1932) 46.
[72] ibid ch III's title is 'Property in Flux'.

limited government project. But, as I explain below, shifting the balance in this way succeeds only in establishing that economic power should be considered a *potential* target of Rule of Law thought and practice. Whether it should become an *actual* target of such thought and practice is a separate question.

It is important to notice that the *apparent* relative plausibility of different ways of seeing power may change over time, and that such change may occur when a particular way of seeing is revealed as inadequate in descriptive and evaluative terms. This is important because, from the vantage point of liberal public philosophy's social vision, the questions posed and the arguments advanced in this study seem profoundly implausible. Indeed, it is partly on this basis that I have sought to explain the Consensus: the empirical and moral world-view encapsulated in the vision makes the Consensus seem natural and the approach presented here seem bizarre.

A primary objective of this study is to push enquiry and debate beyond the constraints imposed by our inherited ways of seeing power, ways of seeing that in my view have made the morally implausible *seem* plausible and vice-versa.

5.1 The modern reception of an ancient occlusion in political thought

Why does the balance of plausibility tell so decisively in favour of the Consensus? In Chapter 2, I focused on the role played by liberal public philosophy, and, earlier in this Chapter, I considered the apparent dignity of established property rights. But these factors only partly explain the immense cultural weight reinforcing the seeming plausibility of the Consensus.

Ways of seeing power that effectively withhold moral equality from the *de facto* or *de jure* subjects of the economically powerful have been a persistent feature of political thought from its known origins in the West. In Classical Athenian thought, although

consideration was given to how concentrated wealth might pose problems for *polis* life,[73] the domination of *economic* inferiors by their economic superiors was otherwise generally considered proper, and it was presumed not to be a subject for political thought:[74]

> What all Greek philosophers, no matter how opposed to *polis* life, took for granted is that freedom is exclusively located in the political realm, that necessity is primarily a prepolitical phenomenon, characteristic of the private household organization, and that force and violence are justified in this sphere because they are the only means to master necessity—for instance, by ruling over slaves—and to become free.[75]

On this way of seeing power, it is permissible for some to exercise manipulative mastery over others in order to secure freedom from necessity. Those whose labor-power provides such freedom are not the moral equals of their masters. Therefore the questions of political thought that the masters pose for their own sakes (what is: justice? rationality? freedom? respect? dignity?) need not be posed in respect of their economic (and moral) inferiors. There is no question of a so-called 'slave by nature' intelligibly complaining about the *arbitrary* exercise of power by the slave's master, since the slave cannot properly assert moral equality with the master. The slave does not possess in his or her own right any *independent* respect-worthy interest, expectation, or right.[76]

A slave deemed a slave by nature was said to lack humanity, and so did not need to be persuaded, but could be manipulated as an *instrumentum vocale,*[77] his or her cooperation secured by any serviceable means including force and fraud. Where the law did come, eventually, to impose restrictions on how the head of the household exercised power over his slaves (or family members), this was not for the sake of the slaves'

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[73] Plato, *Republic* (Penguin 2007) pt IV bk III 416d-417b, pt IV bk IV 421d-423a, pt IX bk VIII 550d-555b (on oligarchy and the oligarchic personality); Aristotle, *The Politics* (Dover 2000) bk II 1273a-1273b, bk IV 1293a-1293b; Martin Ostwald, *Oligarchia: The Development of a Constitutional Form in Ancient Greece* (Franz Steiner Verlag 2000).

[74] On this theme in the context of the ancient world, see E M Wood, *Peasant-Citizen and Slave: the Foundations of Athenian Democracy* (Verso 1989). For its corollary in the marginalization of popular (in favour of *élite*) conceptions of 'democracy', see E M Wood, *From Citizens to Lords: A Social History of Western Political Thought from Antiquity to the Late Middle Ages* (Verso 2008) ('*Citizens*').

[75] Hannah Arendt, *The Human Condition* (2nd edition, University of Chicago Press 1999) 31.

[76] ibid 26-27.

[77] ibid 121.

humanity (which they *ex hypothesi* lacked) but for the sake of the (masters') city or each particular master's sense of self-respect.[78]

By various intellectual rationalizations, economic power (not to mention patriarchal and 'racial' power) has long been prescinded from the mainstream concerns of political thought, including legal thought and practice. As Wallon puts it of the ancient world, '[t]he law, for a very long time, ... abstained from penetrating the family, where it recognized the empire of another law'.[79]

Although they distinguish themselves from their pre-modern forebears by condemning slavery and vassaldom,[80] modern political thinkers have largely continued to avoid a searching engagement with the subject of economic power. Sidney, for example, inherited the ancient view which acknowledged the existence of economic power, but held that since those subject to it could not be political agents, such power belongs outside the political realm: 'no man, whilst he is a servant, can be a member of a commonwealth; for he that is not in his own power, cannot have a part in the government of others'.[81] Accordingly, 'a kingdom or city ... is composed of freemen and equals: Servants may be in it, but are not members of it'.[82]

In the light of this ancient occlusion in political thought it is hardly surprising that the Consensus has taken on the status of common sense. The canon systematically relegates the problem of economic power to, or beyond, its margins. By recognizing this,

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78 ibid 34, note 27. Wood, *Citizens* (n 74) 99; Max Weber, *Economy and Society* (University of California Press 1978) vol 1, 808, note 64.

79 Quoted in Arendt (n 75) 34.

80 Note, however, that William of Ockham, as far back as the fourteenth century, attempted to adjust the established 'use of dominium to the new assumption of moral equality': Larry Siedentop, *Inventing the Individual: The Origins of Western Liberalism* (Allen Lane 2014) 295-296 (2014).

81 Sidney (n 37) ch 2, §5, 103.

82 ibid ch 2, §2, 89. Consider also how Sidney draws an analogy between virtually absolute employer power (which he supports), on the one hand, and that which the members of the commonwealth ought to enjoy over 'the servants we employ in our publick affairs': ch 3, §44, 564.

we appreciate that shifting the balance of plausibility against the Consensus is a large task. What does that task involve?

5.2 Plausibility, common sense, and their relevance to political thought

Our *sense* of what is and what isn't plausible is an ineradicable and profoundly useful intellectual faculty.[83] We could not think ourselves into a vantage point from which everything seemed equally plausible or implausible. Nor would we want to: our judgements about plausibility enable us to discriminate between rival plans, propositions, and interpretations efficiently and relatively confidently. This is useful not only because of how it enables us to navigate the relatively benign terrain of daily life avoiding, as if by second nature, trivial mishaps and misunderstandings. Some of our most significant decisions must be substantially guided by discriminating between what *seems* plausible and what does not: a juror might reasonably feel that in the end there is no better way to discriminate between the case theories put forward by prosecution and defence than by reference to their apparent relative plausibility; the presence or absence of 'reasonable doubt' may come down to a judgement about where the balance of plausibility lies.

Our sense of plausibility also plays a large role in political thought. For example, the tradition's interpretation of historical experience has led its adherents to think it a deeply implausible proposition that one person or faction would safely wield state power without the limits imposed by the Rule of Law. We may come to treat this thought as axiomatic: the Rule of Law quite simply seems more *plausible* than its alternatives. So is (reliable and not merely apparent) plausibility just a matter of 'common sense'? Yes and no.

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[83] Adam Sandel, *The Place of Prejudice: A Case for Reasoning within the World* (Harvard University Press 2014).

Yes, insofar as our sense of what is plausible reflects ways of seeing that are not just the product of our own individual life experience, but which are the received wisdom (sense) of our (common) cultures and traditions. No, because the common ways of seeing do not always reflect good sense. Our sense of plausibility will not always help us to make a reasonable judgement. What *seems* plausible may not in fact be reasonable.

The jurors in the trial of Tom Robinson may have thought it deeply implausible that Mayella Ewell would be attracted to an African American, and this may have guided them to their mistaken conclusion with a high degree of misplaced confidence, despite the efforts of Atticus Finch, who did not share their common sense.[84]

5.3 Plausibility and state power

Equally, it would have seemed wildly implausible (absurd, not merely unlikely)—and this at best—to James I and the coterie with whom he shared a common culture that his inherited divine right to power, and his subjects' natural obligation to obey, might be replaced by a limited government constitutionalism in which nobody has by birth a greater right to rule than anyone else, and therefore no natural jurisdictional obligations.[85]

Consider the way of seeing power that informed James I's instructions to Parliament in 1609:

> I would wish you to be carefull to avoide three things in the matter of *Grievances*: First, that you doe not meddle with the maine points of Government; that is my craft: *tractent fabrilia fabri;* to meddle with that, were to lessen me. ... I must not be taught my Office. ... Secondly, I would not have you meddle with such ancient Rights of mine, as I have received from my Predecessors, possessing them, *More Majorum*: ... All novelties are dangerous as well in a politique as in a naturall Body: And therefore I would be loth to be quarrelled in my ancient Rights and possessions: for that were to judge mee unworthy of that which my Predecessors had, and left me. And lastly, I pray you beware to exhibite for *Grievance* any thing that is established by a settled Law, and whereunto (as you have already

[84] Harper Lee, *To Kill a Mockingbird* (William Heinemann 1960).
[85] This goal has not yet been achieved in the United Kingdom: Robert Booth, 'Secret papers show extent of senior royals' veto over bills' *The Guardian* (London, 15 January 2013).

> had a proofe) you know I will never give a plausible answere; For it is an undutifull part in Subjects to presse their King, wherein they know beforehand he will refuse them.[86]

Seen through our limited government eyes, James I's portrait of kingly power as a matter of divine, and therefore unquestionable, right seems thoroughly alien.

That we *disagree* with his principles is a true statement, but it does not capture the nature of the gulf between us and him. Because we see jurisdictional power through limited government eyes, we cannot even take his 'principles' seriously (hence the quotation marks). We assume that they are wrong, and we assume that we have no need to satisfy ourselves or anyone else that this assumption is well-founded. Today, they seem too implausible to be worth refuting let alone defending. This is a matter of tacit *consensus*. Of course, in the seventeenth century this was far from the case, as illustrated by the later dispute between Filmer, on the one side, and Locke and Sidney, on the other.

At the level of thought, the battle between absolutism and limited government was in substantial part a clash between rival ways of seeing the proper relationship between law, power, and interests, expectations, and rights.[87] Each side hoped its ways of seeing would not only seem rationally open to a reasonable person, but would become part of common sense so that rival perspectives would seem absurd. That this goal seemed attainable to *both* sides suggests that ways of seeing power appeared to be in flux and up for grabs.

From the vantage point of an age in which its common sense status seems secure, we risk forgetting that the path taken by the limited government idea from eccentricity to apparent plausibility, and then to orthodoxy, was neither short nor easily broken. It is therefore worth recalling that when Filmer published *Patriarcha* in 1680*,* the theory of absolutism remained respectable, if not universally endorsed, within a certain

[86] Neil Rhodes and others, *King James VI and I: Selected Writings* (Ashgate 2003) 336-337.
[87] J W Gough, *Fundamental Law in English Constitutional History* (OUP 1955); Pocock (n 68).

bien pensant milieu. This meant that Filmer's contempt for the idea that authority originates from the people, and therefore that rulers must be 'subject to the censures and deprivations of their subjects', would still have *seemed* plausible to some.[88]

But Filmer recognized the growing resonance of the limited government case, whose gradual success in transforming people's ways of seeing power was beginning to shift the balance of plausibility against the earlier orthodoxy. Filmer worried aloud that a 'new, *plausible* and dangerous opinion' was abroad.[89]

The epoch-making achievement of Locke, Sidney, and other critics of absolutism, can be measured in part by their success in decisively and enduringly shifting the balance of plausibility. Ways of seeing power that were once deeply unorthodox—at best eccentric and speculative, at worst unnatural, unthinkable, and dangerous—were a century later the common sense axioms of Founding Fathers.

5.4 Plausibility and economic power

How do these observations relate to the present study? Our own inherited ways of seeing power mean that common sense tells against the thought that economic power should form part of the limited government tradition's project. On the one hand, thanks to the tradition's comprehensive victory over its rivals, a present day holder of jurisdictional power could not assert claims of the kind articulated by James I without those claims seeming implausible. On the other hand, the tradition's ways of seeing *do not* make equivalent claims seem implausible in the mouth of the person of property.

Owners of great wealth (or their representatives) are frequently heard to insist: do not meddle in my *private* affairs; not only do I know them better (for they are 'my craft'); but I have superior claims over them because of the (more or less) 'ancient rights of

[88] Quoted in Quentin Skinner, *The Foundations of Modern Political Thought* (CUP 1978) vol 2, 114.
[89] Quoted in ibid. Emphasis added.

mine as I have received them from my predecessors, possessing them *more majorum*' as 'established by settled law'; 'whereunto ... you know I will never give a plausible answer', for it is not for you to 'press' me regarding the choice of ends, as by right of property this choice is my *prerogative*; 'know beforehand' I 'will refuse' you.

What is more, although holders of economic power typically do not exercise the distinctively jurisdictional capacity to detain people at their pleasure, in violation of *habeas corpus* and *nulla poena sine lege*,[90] they do enjoy the capacity (contrary to the spirit of *nulla poena sine lege*) to threaten and actually to punish communities through the use of penal economic power. And this latter power is routinely used with impunity (indeed lawfully) by holders of great economic power, in order to bend governments and whole communities to their will.

Of course, the mere similarity between the kinds of claim made by James I and those often made today on behalf of great economic power does not tell us anything about the merits of the latter. Upon reflection, we might conclude that such claims are justified and that James I's are not. But I have argued that there is more to the similarity than mere happenstance: not only the state, but also economic power may threaten the moral equality of those under its sway.

One lesson that we can draw from the dramatic shift in the balance of plausibility described in Section 5.3 is that we should not take for granted our present common sense of what seems plausible. Not merely because it is liable to be overtaken and transformed by events. But more importantly because it might lead us to rush to judgement when we should pause to reconsider.

5.5 Possibilities for shifting the balance of plausibility

[90] Jerome Hall, 'Nulla Poena Sine Lege' (1937) 47 Yale law Journal 165.

The observations that ways of seeing change as part of long and complex historical processes, and that our sense of what seems plausible changes with them, does not mean that we are hostages to fortune, with no way of calling into question the guidance offered by our sense of plausibility, and no hope of affecting the common sense of our time. Societies are often home to rival ways of seeing, rival traditions, and rival cultures (as well as their remnants, where their vitality has been lost), and these may provide alternative insights. Moreover, no one way of seeing the world, and no legitimation story, is ever flawless and hermetic; there are always strains, tensions, and perhaps even contradictions. These may provide the cracks through which new light gets in.

Consider, for example, the tensions in James I's accession speech to Parliament in 1603, wherein he acknowledges the threat of misappropriation, but maintains that the people are his 'natural vassals and subjects' and so are obliged to trust him:

> I do acknowledge, that the special and greatest point of difference that is between a rightful king and an usurping tyrant is in this: That whereas the proud and ambitious tyrant does think his kingdom and people are only ordained for satisfaction of his desires and unreasonable appetites; The righteous and just king does by the contrary acknowledge himself to be ordained for the procuring of the wealth and prosperity of his people ... that I am a servant it is most true, that as I am Head and Governor of all the people in my Dominion who are my natural vassals and subjects...[91]

Further, it is important to notice that the early modern opponents of absolutism were developing and extending (not inventing) a way of seeing power which was in conflict with absolutism,[92] though absolutists felt obliged to pay homage to it. Here, the tradition's adherents found a crack in the absolutists' legitimation story:

> In the first original of kings, whereof some had their beginning by conquest, and some by election of the people, their wills at that time served for law; Yet how soon kingdoms began to be settled in civility and policy, then did kings set down their minds by laws ... And I am sure to go to my grave with that reputation and comfort, that never king was in all

[91] <http://www.royal.gov.uk/pdf/jamesi.pdf> accessed 28 May 2014. Quoted with approval by Locke (n 5) II §200.

[92] *In conflict* because James I would deny the kind of systematic subordination of his power to the Rule of Law which we have come to recognize is necessary for the community-oriented principles he espouses to be truly safeguarded.

> his time more careful to have his laws duly observed, and himself to govern thereafter, than I. I conclude then this point touching the power of kings, with this axiom of divinity, that as to dispute what God may do, is blasphemy ... so is it sedition in subjects, to dispute what a king may do in the height of his power: ... I will not be content that my power be disputed upon: but I shall ever be willing to make the reason appear of all my doings, and rule my actions according to my laws ...[93]

In Chapter 3, I attempted to reveal the cracks in Locke's way of seeing the employment relationship, an exercise that was not merely of antiquarian interest: those fissures are still with us, now wider, now narrower, according to the shifting balance of forces between champions of the capitalist employment relationship and those who would temper it. In Chapters 2 and 4, I tried to illuminate the cracks in familiar ways of seeing contemporary economic life.

Insofar as received ways of seeing have informed our sense of plausibility, our recognition that they are inadequate should shift the balance of plausibility against the present constitution of economic power. We should come to regard as implausible what we once saw as unexceptionable, perhaps even natural.

5.6 Overcoming skepticism is the beginning: larger challenges lie beyond

In making my case, I have adopted some of the rhetorical strategies used by Harrington, Locke, Milton, Sidney, and other critics of orthodoxy, who were forced to argue with the balance of plausibility against them. In Chapter 3, for instance, I drew attention to Locke's contention that without his doctrine of limited government, the potential gains of our departure from the state of nature are likely to be thwarted by the arbitrary exercise of institutional power. According to Locke, the absolutists' failure to accept this generated the *absurd*, that is, intolerably implausible, implication that:

[93] Speech to Parliament, 21 March 1609 on the divine right of kings: <http://www.royal.gov.uk/pdf/jamesi.pdf> accessed 28 May 2014.

> ... Men are so foolish that they take care to avoid what Mischiefs may be done them by *Pole-Cats*, or *Foxes*, but are content, nay think it Safety, to be devoured by *Lions*.[94]

I then suggested that the tradition's failure to give due attention to *economic* power seems equally implausible, on a more searching interpretation of the tradition's own commitments. In particular, I argued that there is something incredible about the tradition's believing, on the one hand, that without the Rule of Law to bridle them, the 'Lions' of *state* would almost certainly misappropriate power, but, on the other hand, that the Rule of Law obviously has no place constraining the *economic* 'Lions' in our midst.[95]

Such is the force of putative common sense, that potent rhetoric is necessary in order to encourage readers to cross a threshold that must be crossed if debate and enquiry is to begin in earnest. In this case, the threshold separates common sense skepticism (based on the seeming implausibility of the arguments advanced in this study) from the terrain where the tradition would ask the following question: what, if anything, could, and should, the Rule of Law do about economic power? And that question would be posed with the onus now properly cast *against* power.

In the trial of Tom Robinson, it would not have been enough for Atticus Finch to overcome the jurors' racial prejudices, which formed part of their common sense. Finch would still have had the task of raising a reasonable doubt as to Robinson's guilt. In order to dispel a common sense prejudice—the Consensus—which holds that economic power should obviously be excluded from the tradition's project, this study has raised reasonable doubts about the safety of economic power. Such doubts ground a

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[94] Locke (n 5) II §93.

[95] Lord Justice Sedley employs the same rhetorical device: '... the rule of law, if it is to mean anything, has to embrace state, corporation and individual alike; that the law's chief concern about the use of power is not who is exercising it but what the power is and whom it affects; and that the control of abuses of power, whether in private or in public hands, is probably the most important of all the tasks which will be facing the courts in a twenty-first century democracy. The sea in which, as citizens, we all have to swim is inhabited not only by Leviathan – an alarmingly big but often benign creature – but by Jaws; and the law needs to be on the watch for both': Lord Justice Sedley, 'Public Power and Private Power' in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing 2000) 306.

case for the proposition that economic power ought to be, at the least, a *potential* target of the tradition's project.

In particular, I have considered the nature of internal and external power in the light of the tradition's commitments to moral equality and non-manipulative social relationships with a view to showing that: it is wrong to assume *a priori* that economic power and state power are not morally analogous according to the tradition's underlying principles.

All of this is aimed (only) at demonstrating that economic power should be considered a *potential* target of the Rule of Law. The Consensus, which assumes that economic power is not a limited government problem, must be seen for what it is: a deeply implausible assumption.

EPILOGUE

This study contends that the Consensus amounts to a failure to live up to the limited government tradition's underlying principles. I have attempted to put in question the tradition's ways of seeing power and the established usages of its normative vocabulary. In doing so, I have invited the tradition's adherents to consider 'whether their use of the prevailing vocabulary of appraisal' associated with power 'may not be socially insensitive'.[1] I have also attempted to reveal the latent potential of the tradition's rhetorical idiom; I have argued that the terms 'arbitrariness', 'tyranny', 'tyrant', and 'corruption' may be applied in a *meaningful* and *principled* manner not only to state power, but also to economic power. The reasons I offered in support of that proposition also ground my contention that economic power should be a *potential* target of the Rule of Law.

Limited government rhetoric must adapt in order to move people (i) to see what is at stake in the emergence of capitalist economic power and also (ii) to challenge its pretensions from a limited government perspective:

> The more we succeed in persuading people that a given evaluative term applies in circumstances in which they may never have thought of applying it, the more broadly and inclusively we shall persuade them to employ the given term in the appraisal of social and political life. The change that will eventually result is that the underlying concept will acquire a new prominence and a new salience in the moral arguments of the society concerned.[2]

[1] Quentin Skinner, *Visions of Politics* (CUP 2002) vol I, 153.
[2] ibid 186.

Many societies are currently engaged in heated moral arguments about economic power, particularly corporate power. But those who are troubled by such power have seldom thought of the limited government tradition as a likely ally. I have tried to show that the tradition contains rich resources for anyone who believes that all governmental power, including economic power, should be exercised non-manipulatively, and for the good of the governed.

I am not suggesting that we should simply see the tradition as a trove of culturally resonant terms which we can extract from the tradition without owing it anything in return. Where the idiom is employed in a principled manner—that is, in accordance with the criteria governing the relevant terms—its use involves important claims about what the tradition's underlying principles require of individuals, of institutions, and of communities. If we use the tradition's rhetoric in this way, we give our allegiance to a set of traditional commitments regarding the proper constitution of governmental power. This requires emphasis because I hope to reach not only the tradition's adherents, but also those who stand outside the tradition.

In what follows, I identify the potential significance of this study for the liberal and civic republican traditions, as well as for the socialist tradition, which has largely remained aloof from the limited government tradition.

1. Socialism and limited government: parallel traditions

Socialism presents itself as the solution to the problems caused or exacerbated by capitalism. However, socialists have tended to see the Rule of Law as part of the problem and not potentially part of the solution. Adherents of the socialist tradition have tended, like liberals, to take for granted that the Rule of Law is about controlling state, not

economic, power.[3] As Paul Craig observes, Roberto Unger's 'vision of the rule of law is not markedly different from that espoused by Raz and Dicey'.[4]

Socialists generally believe that the Rule of Law is an exclusively liberal and (therefore) essentially ideological and capitalist idea:[5] it is, irretrievably, a component of the cultural illusions that sustain injustice; 'it ratifies and legitimates an adversarial, competitive, and atomistic conception of human relations', according to Morton Horwitz's formulation.[6] So long as capitalism exists, the Rule of Law will tend to thwart social democratic reforms aimed at combating economic power and social inequity: 'It undoubtedly restrains power, but it also prevents power's benevolent exercise', says Horwitz.[7] If anything, then, the Rule of Law functions as the friend not foe of capitalist economic power.

Or so socialists have thought. This study should lead socialists to recognize that the limited government tradition and the socialist tradition have important concerns in common, and that the Rule of Law might be part of a socialist future rather than being consigned to a capitalist past.

1.1 Against manipulative social relationships. For moral equality

Although the socialist tradition expresses itself in a different idiom, it shares the limited government tradition's opposition to manipulative social relationships. Today, both traditions are underpinned (implicitly if not explicitly) by commitments to the moral

[3] See, eg, Roberto Unger, *Law in Modern Society* (Free Press 1977). References to 'socialism' in this Section are to its revolutionary (or so-called 'extra-parliamentary') current, not to its social democratic (or 'parliamentary') current.

[4] Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: an Analytical Framework' [1997] Public Law 467, 474.

[5] E P Thompson is a famous exception to the socialist tendency to dismiss the Rule of Law: see *Whigs and Hunters: The Origin of the Black Act* (Pantheon Books 1975), esp. the postscript entitled 'The Rule of Law'.

[6] Morton J Horwitz, 'The Rule of Law: An Unqualified Human Good?' (1977) 86 Yale Law Journal 561, 566. Compare Christine Sypnowich, *The Concept of Socialist Law* (OUP 1990).

[7] Horwitz (n 6) 566.

equality of all persons.[8] But unlike the limited government tradition, the socialist has tended to see both state power *and* economic power as potential threats to moral equality.

As mentioned in Chapters 3 and 4, the socialist way of seeing internal power is captured by the term 'wage slavery', which is used to describe and indict (i) the denial of the employee's moral equality as well as (ii) the misleading appeal to juridical equality entailed in the labour 'contract'. By presenting the socialist idea of wage slavery through a limited government filter, I want to suggest that socialists could develop a limited government perspective on economic power, one which provides resources not only for *opposing* arbitrary and tyrannical economic power, but also for *reconstituting* economic (and political) power along non-manipulative lines. Although socialism possesses a powerful critique of capitalism, it has so far failed to develop resources which foster an underlying moral unity between the tasks of opposition and reconstitution. The limited government tradition has the potential to provide resources for both.

According to the socialist critique of capitalism, concentrated economic power occludes the fulfillment of the Enlightenment's promise of universal moral equality, a promise which infused the limited government tradition's rhetoric. 'We hold these truths to be self-evident, that all men are created equal...',[9] declares one of the limited government tradition's most venerated texts. But then why, the socialist asks, does one class of people receive a hiding to further the aggrandizement of another class?

As discussed in Chapter 2, liberal public philosophy's social vision has not dispensed with the conceit that the juridical equality of the employment contract is synonymous with the maintenance of the moral equality of the parties. However, as the

[8] The words 'of all persons' do add something because it is possible to be committed to moral equality between only certain persons, say 'whites', or men, or economic or cultural *élites*. I argued in Chapters 3 and 5 that some of the greats of political thought were not committed to universal moral equality, but only to moral equality between certain *élites*.
[9] Declaration of Independence (US 1776).

socialist critique persuasively shows, this assumption is unfounded. And save where regulation or trade unionism have provided limited sanctuaries, the embodiment of the assumption in modern law means that employees can be treated as though they were morally inferior (like a beast whose hide was to be sold at market) without being able to complain so long as their juridical equality has been upheld.

Further, just as the limited government tradition's critique of absolutism alleges the misappropriation of the forces of jurisdictional power, the socialist critique of class society alleges the misappropriation of the forces of production. And both do so on the ground that the usurper denies the moral equality of those who are unjustly subordinated:

> He, who before was the money-owner, now strides in front as capitalist; the possessor of labour-power follows as his labourer. The one with an air of importance, smirking, intent on business; the other, timid and holding back, like one who is bringing his own hide to market and has nothing to expect but—a hiding.[10]

Distinctively capitalist misappropriation is effected not only by the undirected structures of the market (which I have not examined in this study), but also by the consciously directed powers of the capitalist (which I have considered in their internal and external forms).

1.2 The path to socialism via unlimited government

It has often been remarked that socialist thought and practice have suffered from the absence of a moral and political philosophy that is either commensurate with socialism's ambition to transform moral and political life, or comparable in its power and scope to Karl Marx's social and economic theory. Especially prior to 1956, socialists were characterized by their seemingly boundless optimism, which among other things led many to overlook the need for limited government in a future socialist society. The

[10] Karl Marx, *Capital* (Penguin Classics 1992) vol I, ch VI.

experience of socialism in power made it plain that this optimism was disastrous: inattention to '*what* one is trying to achieve, to the problem of socialist design' amounts to 'criminal inattention', as G A Cohen puts it.[11]

So-called 'actually-existing socialism' seemed to lack the resources of thought and practice required to ensure that the socialist tradition's underlying opposition to manipulative social relationships could be embodied in its institutions and culture. Although they maintained a pretence to law, socialist societies were distinguished by a relationship between law, power, and interests, expectations, and rights that lacked the qualities required by the limited government tradition's Rule of Law project.

Perhaps this provides part of the explanation why socialism in power presented a particularly crude example of unabashed manipulation. Its governmental institutions[12] were misappropriated by subscribers to a Nietzschean master morality (eg Josef Stalin), who secured the cooperation of institutional subordinates through fear as well as by cultivating devotion to a bureaucratic outlook (eg Andrei Vyshinsky, 'the bearer and guardian of lawfulness', as he called himself[13]).

The upshot was a travesty of Friedrich Engels's hope that 'the government of persons' would be 'replaced by the administration of things'.[14] Not only did the state fail to wither away, its power expanded, and it was now less limited—more arbitrary and tyrannical—than ever before. Moreover, economic power was expropriated with one hand only to be misappropriated with the other. Economic manipulation was not abolished so much as refashioned.

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11 G A Cohen, *If You're an Egalitarian, How Come You're So Rich?* (Harvard University Press 2001) 77.

12 Which of course comprised monopolies of both jurisdictional and economic power.

13 Quoted in Arnold Beichman, 'The Devil's Mouthpiece' *The New York Times* (New York, 7 July 1991).

14 Friedrich Engels, *Socialism, Utopian and Scientific* in R Tucker (ed), *Marx-Engels Reader* (2nd edn, W W Norton 1978) 713.

As Alasdair MacIntyre observes:

> if the moral impoverishment of advanced capitalism is what so many Marxists agree that it is, whence are [the] resources for the future to be derived? It is not surprising that at this point Marxism tends to produce its own versions of the *Übermensch* ... When Marxism does not become Weberian social democracy or crude tyranny, it tends to become Nietzschean fantasy.[15]

Socialists have good reasons for thinking that the limited government tradition might contain some of the 'resources for the future', which were previously lacking.

1.3 A path to socialism via limited government?

Early socialists tended to see history as offering a choice between a 'leap into untrammeled freedom', on the one hand, or the persistence of degrading domination, on the other.[16] Although latter-day socialists are more circumspect, they have tended to overlook the alternative represented by the kind of non-manipulative government which is the goal of the limited government tradition's Rule of Law project. In place of the 'magic transformation into a realm free of determination', as imagined by both utopian and so-called 'scientific' socialists', what socialism requires are resources of thought and practice conducive to a 'transition from unneeded, unwanted and oppressive to needed, wanted and empowering sources of determination'.[17]

Given the nature of the socialist vision, this transition would occur both in economic and in political life. For instance, Marx saw large corporations as harbingers of socialized production, which should be reconstituted to serve the needs of the community:[18]

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[15] Alasdair MacIntyre, *After Virtue* (2nd edn, Gerald Duckworth & Co Ltd 1985) 262.
[16] Charles Taylor, *Hegel* (CUP 1977) 554.
[17] Roy Bhaskar, *Reclaiming Reality: A Critical Introduction to Contemporary Philosophy* (Routledge 2010) 6.
[18] Unlike many adherents of the limited government tradition, socialists typically have not been opposed to *large* economic units. They believe that large-scale production offers distinctive opportunities for many-sided self-development, for enriching fellowship, and for technical innovation and material prosperity.

> This result of the ultimate development of capitalist production is a necessary transitional phase towards the reconversion of capital into the property of producers, although no longer as the private property of the individual producers, but rather as the property of associated producers, as outright social property. [T]he stock company is a transition toward the conversion of all functions in the reproduction process which still remain linked with capitalist property, into mere functions of associated producers, into social function....[19]

It is inconceivable that even socialist economic institutions could function without some persons wielding executive power over others. And such power brings with it the risk of manipulation, which is inconsistent with socialist principles. Although aspects of contemporary Rule of Law practice are particularly well-suited to the prevention of manipulation, socialists have tended to disregard its necessary role in securing socialism.[20]

What is necessary, more precisely, is not the Rule of Law as conceived from a bureaucratic perspective, which sees law yet another instrument for social control (which resembles what was achieved by actually-existing socialism), but, rather, the Rule of Law as understood by the limited government tradition. Max Weber's diagnosis is pertinent:

> The rise of Socialism at first meant the growing dominance of substantive natural law doctrines in the minds of the masses and even more in the minds of their theorists from among the intelligentsia. These substantive natural law doctrines could not, however, achieve practical influence over the administration of justice, simply because, before they had achieved a position to do so, they were already being disintegrated by the rapidly growing positivistic and relativistic-evolutionistic skepticism of the very same intellectual strata. Under the influence of this anti-metaphysical radicalism, the eschatological expectations of the masses sought support in prophecies rather than in postulates. Hence in the domain of the revolutionary theories of law, natural law doctrine was destroyed by the evolutionary dogmatism of Marxism, while from the side of 'official' learning it was annihilated partly by the Comtean evolutionary scheme and partly by the historicist theories of organic growth. A final contribution in the same direction was made by *Realpolitik* which, under the impact of modern power politics, had come to affect the treatment of public law.[21]

The limited government account of the Rule of Law points socialists in the direction of resources that would improve the tradition's chances of learning from and moving

[19] Quoted in Shlomo Avineri, *The Social & Political Thought of Karl Marx* (CUP 1968) 178.
[20] One might expect a very substantial role to be played by democratic mechanisms of oversight and accountability.
[21] Max Weber, *Economy and Society* (University of California Press 1978) vol 1, 873-874.

beyond the failures of the past. A socialist Rule of Law discourse might provide socialists with something they have hitherto lacked: a normative vocabulary which may be simultaneously hostile to the capitalist constitution and hostile to tyranny in socialist garb. It is telling, perhaps, that many socialists who felt morally obliged to oppose Stalinism believed that they had no choice but to turn their backs on socialism altogether. Perhaps they felt the need to look to other traditions for a moral vocabulary with which to describe how great power should and should not be constituted.

As argued in Chapter 2, and contrary to the received wisdom amongst many socialists and liberals, the limited government tradition's Rule of Law project is not obviously in harmony with the liberal-capitalist way of life. Indeed, if economic power were to become a potential target of Rule of Law practice, the presumption of *straightforward* compatibility would be discarded.

If socialism is to develop the resources of thought and practice it needs in order to make good on its opposition to manipulative social relationships, it must engage with the limited government tradition's Rule of Law project. Unless it does so, any assertion that socialism will not repeat the calamities of the past should be met with incredulity. Socialists ought to recognize that there are good reasons why they should participate, *as socialists*, in the enquiries and debates urged by this study.

2. Civic republicans

Until the mid-twentieth century, notable public figures, especially in the US, distinguished themselves by their insistence that limited government principles mandate caution with respect to *all* forms of great power. An illustration of this catholic interpretation of the limited government tradition's project is provided by Senator John Sherman's assertion that great economic power amounts to:

> a kingly prerogative, inconsistent with our form of government, and should be subject to the strong resistance of the State and national authorities.... If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life.[22]

Later, Franklin D Roosevelt and Louis Brandeis, among others, drove a resurgence of this current. Roosevelt argued that '[g]reat accumulations of wealth ... amount to the perpetuation of great and undesirable concentration of control in a relatively few individuals over the employment and welfare of many, many others',[23] which is a 'tyrannical power'.[24]

After its efflorescence during the New Deal, this current of 'civic republican'[25] thought was overwhelmed by two sets of opponents. The first is liberal public philosophy, whose success saw it become the *de-facto* public philosophy of the cultural *élite* in the United States. The marginalization of civic republicanism amongst *élites* is evident in the decisions of the Supreme Court cited in this study. The opinions of Justices Brandeis and Stevens, which echoed traditional concerns, were both offered in dissent.

Civic republicanism's second set of opponents comprises economic power itself, which, especially since the late 1970s, has not only become greater absolutely and relatively, but has become more secure in its economic and political ascendancy.[26] The successful *revanchisme* of such interests was aided by, and itself contributed to, the all but total defeat of civic republicanism and of socialism and social democracy at home and abroad.

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[22] Quoted in Michael Sandel, *Democracy's Discontent* (Harvard University Press 1998) 232.
[23] ibid 256.
[24] ibid 255.
[25] The term is taken from Michael Sandel: ibid.
[26] Paul Krugman and Robin Wells, 'Getting away with it' *New York Review of Books* (New York, 12 July 2012).

Recently, there have been attempts to revitalize certain republican perspectives on economic life.[27] The leading figures in this revival are less sanguine about economic power than their liberal rivals. However, they do not squarely address the thought that economic power might be a *potential* target of the Rule of Law. For that reason, they arguably subscribe to the Consensus. This study therefore speaks to their work, just as it speaks to the work of anyone who subscribes to the Consensus. Should the republican revival continue, those driving its re-animation ought to jettison the Consensus and take up the enquiries urged by this study.

3. Liberals

Liberalism has in general been too reluctant to wonder whether the spirit of some of its most eloquent indictments of state power might apply to economic power. For instance, Isaiah Berlin's memorable allusion to the mentality of the self-proclaimed 'vanguardist' or 'philosopher king' also captures the hero-creator self-image of modern entrepreneurs who seek to shape and re-shape modern lives, sacrificing many to drudgery, injury, disease, or death for the sake of their visions:[28]

> I may conceive myself as an inspired artist, who moulds men into patterns in the light of his unique vision, as painters combine colours or composers sounds; humanity is the raw material upon which I impose my creative will; even though men suffer and die in the process, they are lifted by it to

[27] Sandel (n 22). Philip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP 1999). Although his *Republicanism* connects in very general ways with the matters raised in this study, I do not delve into Pettit's detailed and complex public policy agenda for the application of republican ideas to contemporary conditions. That agenda is not directly relevant to the more general questions raised in this study, nor to the question whether economic power should be a *potential* target of the Rule of Law. However, Pettit's proposals would be of interest were the tradition to regard economic power as an *actual* target of the Rule of Law; it would be interesting to compare the proposals' merits with the merits of specific Rule of Law measures, as well as others. Further, instead of addressing contemporary academic debates, this study seeks to build its case by returning to the limited government tradition's leading early-modern thinkers and its notable political standard-bearers. They are the tradition's fountainheads and have canonical status within the tradition. It makes sense to explore their works in order to pursue this study's two major aims: (i) to explain the origins and stubbornness of the Consensus; and (ii) to persuade readers that the Consensus is mistaken according to its centuries-old principles.

[28] And wealth, power, etc.

> a height which they could never have risen without my coercive – but creative – violation of their lives.[29]

The following remarks of J S Mill are a reminder that adherence to liberalism should entail a commitment to a relentless questioning of social thought and practice in order to root out elements that are in fact contrary to the liberal project. I will quote from Mill at length because he is generally regarding as a founder of liberalism, and his reflections on the defects of capitalism and the merits of socialism are often overlooked:

> [Where] there is no further progress to make in the department of purely political rights, is it possible that the less fortunate classes among the "adult males" should not ask themselves whether progress ought to stop there? ... No longer enslaved or made dependent by force of law, the great majority are so by force of poverty; they are still chained to a place, to an occupation, and to conformity with the will of an employer, and debarred by the accident of birth both from the enjoyments, and from the mental and moral advantages, which others inherit without exertion and independently of desert. ... Is it a necessary evil? They are told so by those who do not feel it—by those who have gained the prizes in the lottery of life. But it was also said that slavery, that despotism, that all the privileges of oligarchy were necessary. All the successive steps that have been made by the poorer classes, ... had the strongest prejudices opposed to them beforehand; ... Considering that the opinions of mankind have been found so wonderfully flexible, have always tended to consecrate existing facts, and to declare what did not yet exist, either pernicious or impracticable, what assurance have those classes that the distinction of rich and poor is grounded on a more imperative necessity than those other ancient and long-established facts, which, having been abolished, are now condemned even by those who formerly profited by them?[30]

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[29] Isaiah Berlin, 'Two Concepts of Liberty' in H Hardy (ed), *Liberty* (OUP 2002) 183. Consider the following illustrations selected from a range of similar examples during a period of only one month: (i) the implementation of archetypal hero-entrepreneur Steve Jobs's vision for the future; and (ii) the drive for spectacular 'development', 'entertainment' and 'grandeur' reminiscent of both the games of ancient Rome and the dam-building atrocities of Stalin's Russia. (i) J Garside and C Arthur, 'Workers' rights "flouted" at Apple iPhone factory in China' *The Guardian* (London, 5 September 2013); J Kiss, 'The real price of an iPhone 5' *The Guardian* (London, 13 September 2013); G Monbiot, 'The paragon of modern tech risks losing its shine' *The Guardian* (London, 23 September 2013). (ii) P Pattison, 'Revealed: Qatar's World Cup "slaves"' *The Guardian* (London, 25 September 2013); R Booth, 'Qatar World Cup construction "will leave 4,000 migrant workers dead"' *The Guardian* (London, 26 September 2013); R Booth, 'Qatar 2022: 70 Nepalese workers die on building sites' *The Guardian* (London, 1 October 2013).

[30] J S Mill, 'Chapters on Socialism' in Stefan Collini (ed), *On Liberty and other writings* (CUP 1989) 227 ('Socialism').

There is no reason to think that when Mill criticized capitalism he did not do so on liberal grounds.

The underlying thrust of Mill's reflections is particularly apropos for two reasons. Firstly, it overlaps with key themes of Chapter 3's account of Locke's ways of seeing economic power in the employment relationship. Secondly, given the tendency of contemporary liberals to take such things for granted, it is worth stressing that neither the Consensus, nor liberalism's accommodation with capitalism—still less corporate power—would seem *in themselves* to be essential liberal commitments. Their uncontroversial status is more plausibly a consequence of contentious *interpretations* of such commitments, or of questionable judgements about what economic arrangements are required by those commitments.

An atypical liberal vision of economic life is offered by Mill in his *Autobiography*. There he raised the possibility of a *liberal* future based on 'common ownership'. He suggested that the question how to achieve this was a key problem for the coming age: 'how to unite the greatest individual liberty of action, with a common ownership in the raw material of the globe, and an equal participation of all in the benefits of combined labour'.[31]

In the light of liberalism's commitment to respect for persons as moral equals, liberals, *as liberals,* must ask and answer the question whether the Consensus is truly justified. Unless the liberal current of the limited government tradition confronts this challenge, it is liable to face the rebuke that its silence is 'ideological' (in the technical Marxian sense of the term). Mill effectively implies as much in the continuation of the remarks just quoted:[32]

[31] J S Mill. 'Autobiography' in J M Robson (ed) *Collected Works of John Stuart Mill* (University of Toronto Press 1981) vol 1, 238-239.
[32] Mill, 'Socialism' (n 30) 227-228.

> [T]he whole field of social institutions should be re-examined, and every question considered as if it now arose for the first time; with the idea constantly in view that the persons who are to be convinced are not those who owe their ease and importance to the present system, but persons who have no other interest in the matter than abstract justice and the general good of the community. It should be the object to ascertain what institutions of property would be established by an unprejudiced legislator, absolutely impartial between the possessors of property and the non-possessors; and to defend and justify them by the reasons which would really influence such a legislator, and not by such as have the appearance of being got up to make out a case for what already exists. Such rights or privileges of property as will not stand this test will, sooner or later, have to be given up. An impartial hearing ought, moreover, to be given to all objections against property itself. All evils and inconveniences attaching to the institution in its best form ought to be frankly admitted, and the best remedies or palliatives applied which human intelligence is able to devise.[33]

Liberalism makes a powerful case as to why state power should be the object of careful scrutiny and control. But liberals have tended not to insist on equivalent measures with respect to the 'private' agents who wield economic power of an immensity and importance morally comparable to the power of the state. This oversight is incongruous, as Mill would probably recognize, and it risks being seen as an indefensible apology by omission.

Indeed, today, the reluctance of liberal legal thought to address the question of economic power seems especially off-key: various aspects of 'private' economic power are the subjects of vigorous public debate, and for good reason. Holders of economic power nakedly wield it in various asocial ways. Among other things, large corporations have opposed policies aimed at avoiding a further global financial collapse as well as measures designed to mitigate the coming ecological crisis. Under these circumstances, a

[33] ibid 227-228. In *Political Liberalism*, J Rawls echoes the spirit of Mill's sentiments, but largely confines his remarks on power to the realm of 'the political': 'our exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational. This is the liberal principle of legitimacy. And since the exercise of political power itself must be legitimate, the ideal of citizenship imposes a moral, not a legal, duty—the duty of civility—to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason': (Columbia University Press 1993) 217.

question posed by Sidney in respect of political rulers has taken on a new significance and urgency:

> [T]he matter is easily decided, as if the question had been asked in the time of Nero or Domitian, Whether they should be left at liberty to destroy the best part of the world, as they endeavoured to do, or it should be rescued by their destruction?[34]

So long as liberalism does not possess an account of economic power to match its account of state power,[35] it places inadequate obstacles in the way of a threefold misappropriation:

(i) the misappropriation of liberalism by economic tyrants. Liberal public philosophy is too congenial to economic tyrants who would cynically and selectively appeal to the public philosophy of a human community when it suits them;

(ii) the systematic misappropriation of great economic power by tyrants. Liberalism does not treat economic power as even a *potential* target of the limited government tradition's Rule of Law project; and

(iii) the misappropriation of the limited government tradition by economic tyrants. Liberal public philosophy renders plausible the proposition that large corporations should be treated as though they were members of 'We the People'. Recall the discussion of *Citizens United* in Chapter 4.[36]

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[34] Algernon Sidney, *Discourses Concerning Government* (Liberty Fund Inc 1989) ch 2, §32, 316.

[35] Consider, eg, John Rawls's argument that liberalism requires that we 'keep political parties independent of large concentrations of private economic and social power'. But do the reasons why that seems necessary point to problems with those 'large concentrations' which might make them unsafe in other contexts as well? Rawls tends to construe the moral implications of economic power narrowly, overlooking its effects beyond the sphere of electoral politics. The instance of 'nonpublic power' most often cited by Rawls is the 'authority of churches', not the power of large business corporations: (n 33) 328.

[36] *Citizens United v. Federal Election Commission* 558 US 310 (2010).

Liberal public philosophy is the preferred philosophy of today's cultural *élite*. It also appears to be the preferred philosophy of today's economic *élite*. It seems likely to retain the latter, dubious, honor so long as liberalism lacks a critique of economic power. In the absence of such a critique, it does not seem implausible to call oneself a liberal *and* to be committed to remaining at the summit of manipulative social relationships. For more thoughtful liberals, that should be troubling.

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