1.

The modern conception of democracy differs from the classical conception in virtue of its relation to a type of law that displays three characteristics: modern law is positive, compulsory, and individualistic. Such law consists of norms that are produced by a lawgiver, are sanctioned by the state, and are meant to guarantee individual liberties. According to the liberal view, the democratic self-determination of citizens can be realized only through the medium of such a law, the structural properties of which ensure liberty. Consequently, the idea of a “rule of law,” which in the past was expressed in the idea of human rights, comes on the scene alongside—and together with—that of popular sovereignty as a second source of legitimation. This duality raises the question of how the democratic principle and constitutionalism are related.

According to the classical conception, the laws of a republic express the unrestricted will of the united citizens. Regardless of how the laws reflect the existing ethos of the shared political life, this ethos presents no limitation insofar as it achieves its validity only through the citizens’ own process of will-formation. The principle of the constitutional exercise of power, on the other hand, appears to set limits on the people’s sovereign self-determination. The rule of law requires that democratic will-formation not violate human rights that have been positively enacted as basic rights. The two sources of legitimation also compete with each other in the history of political philosophy. Liberalism and civic republicanism disagree on whether the “liberty of the moderns” or the “liberty of the ancients” should enjoy priority in the order
of justification. Which comes first: the individual liberties of the members of
the modern market society or the rights of democratic citizens to political
participation?

The one side insists that in basic rights, the private autonomy of citizens
assumes a form that—“unchangeable” in its essential content—guarantees
the anonymous rule of law. According to the other side, the political auton-
omy of citizens is embodied in the self-organization of a community that
freely makes its own laws. If the normative justification of constitutional
democracy is to be consistent, then it seems one must rank the two principles,
human rights and popular sovereignty. To be legitimate, laws, including basic
rights, must either agree with human rights (however these in turn are legiti-
mated) or issue from democratic will-formation. On the first alternative, the
democratic lawgiver may decide in a sovereign manner only within the
boundaries of human rights; on the second alternative, the democratic law-
giver can set up any constitution it wants and, as the case may be, violate its
own basic law, thus impairing the idea of the constitutional state.

However, these alternatives contradict a strong intuition. The idea of
human rights that is spelled out in basic rights may neither be imposed on the
sovereign lawgiver as a limitation nor be merely instrumentalized as a func-
tional requisite for legislative purposes. In a certain way, we consider both
principles as equally original. One is not possible without the other, but nei-
ther sets limits on the other. The intuition of “co-originality” can also be
expressed thus: private and public autonomy require each other. The two con-
cepts are interdependent; they are related to each other by material implica-
tion. Citizens can make an appropriate use of their public autonomy, as guar-
anteed by political rights, only if they are sufficiently independent in virtue of
an equally protected private autonomy in their life conduct. But members of
society actually enjoy their equal private autonomy to an equal extent—that
is, equally distributed individual liberties have “equal value” for them—only
if as citizens they make an appropriate use of their political autonomy.

Rousseau and Kant both formulated this intuition in the concept of auton-
omy. The idea that the addressees of the law must also be able to understand
themselves as its authors does not give the united citizens of a democratic pol-
ity a voluntaristic, carte blanche permission to make whatever decisions they
like. The legal guarantee to behave as one pleases within the bounds of the
law is the core of private, not public, autonomy. Rather, on the basis of this
freedom of choice, citizens are accorded autonomy in the sense of a reason-
able will-formation, even if this autonomy can only be enjoined [angesonnen]
and not legally required of them. They should bind their wills
to just those laws they give themselves after achieving a common will
through discourse. Correctly understood, the idea of self-legislation engen-
ders an internal relation between will and reason in such a way that the freedom of everyone—that is, self-legislation—depends on the equal consideration of the individual freedom of each individual to take a yes/no position—that is, self-legislation. Under these conditions, only those laws that lie in the equal interest of each can meet with the reasonable agreement of all.

However, neither Rousseau nor Kant could find an unambiguous way of using the concept of autonomy for the justification of constitutional democracy. Rousseau inscribed the will of the people with reason by binding the democratic process to the abstract and universal form of laws, whereas Kant tried to accomplish this relation to reason by subordinating law to morality. As I will show, however, this internal connection between will and reason can develop only in the dimension of time—as a self-correcting historical process.

It is true, of course, that in the Conflict of the Faculties, Kant went beyond the systematic boundaries of this philosophy and raised the French Revolution to the level of a “historical sign” for the possibility of a moral progress of humanity. But in the theory itself we find no trace of the constitutional assemblies of Philadelphia and Paris—at least not the reasonable trace of a great, dual historical event that we can now see in retrospect as an entirely new beginning. With this event began a project that holds together a rational constitutional discourse across the centuries. In what follows, I take a recent study by Frank Michelman as the occasion to argue that the allegedly paradoxical relation between democracy and the rule of law resolves itself in the dimension of historical time, provided one conceives the constitution as a project that makes the founding act into an ongoing process of constitution-making that continues across generations.

2.

Political systems such as the United States and the German Federal Republic have set up an independent institution charged with scrutinizing the constitutionality of parliamentary legislation. In these settings, the function and status of this politically influential branch—the Constitutional Court or Supreme Court—spark debates over the relation between democracy and the rule of law. In the United States, a debate has been going on for some time over the legitimacy of the highest-level judicial review exercised by the Supreme Court. Again and again, civic republicans who are convinced that “all government is by the people” bristle at the elite power of legal experts to void the decisions of a democratically elected legislature, although these
experts themselves are not legitimated by a democratic majority but can only call on their technical competence in constitutional interpretation. Frank Michelman sees this problematic personified in William J. Brennan, a commanding figure in recent American constitutional jurisprudence. As Michelman describes him, Brennan is a liberal who defends individual liberties in strongly moralistic terms; a democrat who radicalizes rights of political participation and wants to give a hearing to the voiceless and marginalized as well as to the deviant and oppositional voices; a social democrat who is highly sensitive to questions of social justice; and, finally, a pluralist who, going beyond the liberal understanding of tolerance, pleads for a politics open to difference and to the recognition of cultural, racial, and religious minorities. In short, by employing the palette of American pragmatism to depict Brennan as a model of contemporary republicanism, Michelman wants to sharpen the question that interests us here: when a convinced democrat with this mentality, in the role of a highly activist Supreme Court judge, has no qualms in making extensive use of the dubious instrument of judicial oversight, then perhaps the jurisprudence he has shaped exposes the secret of how one can combine the principle of popular sovereignty with constitutionalism.

Michelman uses Brennan to exemplify the role of a “responsive judge” who qualifies as democatically above suspicion when it comes to interpreting the Constitution. Brennan qualifies for this trust because he renders his decisions as best he knows how and according to his conscience and only after he has listened as patiently as possible—with an inquisitive hermeneutic sensitivity and a desire to learn—to the tangle of views in the relevant discourses conducted in civil society and the political public sphere. Interaction with the larger public, before which legal experts are held responsible, is supposed to contribute to the democratic legitimation of the decisions of a constitutional judge who has not been democratically legitimated or at least not sufficiently legitimated.

It is a condition of the interpreter’s greater or lesser reliability and of what we can do to bolster it. And one condition that you think contributes greatly to reliability is the constant exposure of the interpreter—the moral reader—to the full blast of the sundry opinions on the questions of rightness of one or another interpretation, freely and uninhibitedly produced by assorted members of society listening to what the others have to say out of their diverse life histories, current situations, and perceptions of interest and need.

Michelman is apparently guided by the intuition that the discursive besiegement of the Court by a mobilized society gives rise to an interaction that has favorable consequences for both sides. For the Court, which as always decides independently, the perspective of the experts is broadened.
along with the base of justifications for its decision. For citizens, whose pro-
vocative public opinions exert an influence on the Court, the legitimacy of the
decision procedure is at least increased. To judge how this model can help
resolve the alleged paradox, one would have to analyze in detail, on one hand,
the cognitive role played by the discursive offensive as a means of broadening
the legal public sphere for the practice of the Court and, on the other, the func-
tional contribution such discourse is supposed to have for the social accep-
tance of the decision. However, I suspect that pragmatic reasons and histori-
cal circumstances are more decisive for determining how the task of judicial
oversight is best established in a given context. These institutional possibili-
ties should certainly be assessed in the light of the principles of popular sov-
ereignty and constitutionalism, but the constellation and interplay of these
principles do not yield pat answers.

For our main issue, I find the way Michelman arrives at his model of the
“responsive” judge more interesting than the proposal itself. For some time
now, Michelman has debated against essentially three positions (which he
sees represented by Ronald Dworkin, Robert Post, and myself).7 In what fol-
lows, I stylize the arguments and counterarguments in such a way that these
three positions “emerge from one another” in good dialectical fashion.

According to the liberal view, the democratic legislative process requires a
specific form of legal institutionalization if it is to lead to legitimate regula-
tions. A “basic law” is introduced as the necessary and sufficient condition
for the democratic process itself, not for its results: democracy cannot define
democracy. The relationship between democracy as the source of legitima-
tion and a constitutionalism that does not need democratic legitimation poses
no paradox, however. For constitutive rules that first make a democracy pos-
sible cannot constrain democratic practice in the manner of externally
imposed norms. By simply clarifying the concepts, the alleged paradox dis-
appears: enabling conditions should not be confused with constraining
conditions.

The conclusion that the constitution is in some sense inherent in democ-
Racy is certainly plausible. But the argument put forth as justification is inade-
quate because it refers only to part of the basic law, the part immediately con-
stitutive for institutions of opinion- and will-formation—that is, it refers only
to rights of political participation and communication. But liberty rights
make up the core of basic rights—habeas corpus, freedom of religion, prop-
erty rights—in short, all those liberties that guarantee an autonomous life
conduct and the pursuit of happiness. These liberal basic rights evidently pro-
tect goods that also have an intrinsic value. They cannot be reduced to the
instrumental function they can have for the exercise of the political rights of
citizens. Because the classical liberties are not primarily intended to foster the qualification for political citizenship, liberal rights, unlike political rights, cannot be justified by the argument that they make democracy possible.

According to the republican view, the substance of the constitution will not compete with the sovereignty of the people only if the constitution itself emerges from an inclusive process of opinion- and will-formation on the part of citizens. To be sure, we must then conceive democratic self-determination as an uncoerced process of ethical-political self-understanding undertaken by a populace accustomed to freedom. Under these conditions, the rule of law remains unharmed because it gains recognition as an integral component of a democratic ethos. Rooted in the motivations and attitudes of the citizens, constitutional principles are less coercive and more permanent than formal juridical mechanisms that immunize the constitution against changes by tyrannical majorities. However, this reflection is guilty of begging the question; namely, it builds into the history of ideas and political culture of the polity precisely those liberal value orientations that make legal coercion superfluous by replacing it with custom and moral self-control.

3.

The republican conception acquires a different, namely a proceduralist sense when the expectation of reason connected with a self-limiting democratic opinion- and will-formation shifts from a basis in the resources of an existing value consensus to the formal properties of the democratic process. Neo-Aristotelians must bank on the liberal quality and tradition-building force of a democratic form of life; neo-Kantians, by contrast, radicalize the view that the idea of human rights is inherent in the very process of a reasonable will-formation: basic rights are answers that meet the demands of a political communication among strangers and ground the presumption that outcomes are rationally acceptable. The constitution thereby acquires the procedural sense of establishing forms of communication that provide for the public use of reason and a fair balance of interests in a manner consonant with the regulatory need and context-specific issue. Because this ensemble of enabling conditions must be realized in the medium of law, these rights encompass both liberal freedoms and rights of political participation, as we shall see.

It is not without sympathy that Michelman describes the basic assumptions of this conception of deliberative democracy:
first, a belief that only in the wake of democratic debate can anyone hope to arrive at a reliable approximation to true answers to questions of justice of proposed constitutional norms, understood as consisting in their universalizability of everyone’s interests or their hypothetical unanimous acceptability in a democratic discourse; and, second, that only in that way can anyone hope to gain a sufficient grasp of relevant historical conditions to produce for the country in question, in a legally workable form, an apt interpretation of whatever abstract practical norms can pass the justice tests of universalizability and democratic-discursive acceptability.8

However, Michelman does not regard this conception of deliberative democracy as a solution to the supposedly paradoxical relation between democracy and the rule of law. The paradox seems to return when we trace matters back to the act of constitution making and ask whether discourse theory allows us to conceive the opinion- and will-formation of the constitutional convention as an unconstrained democratic process. Elsewhere, I have proposed that we understand the normative bases of constitutional democracy as the result of a deliberative decision-making process that the founders—motivated by whatever historical contingencies—undertook with the intention of creating a voluntary, self-determining association of free and equal citizens.9 The founders sought a reasonable answer to this question: what rights must we mutually accord one another if we want to legitimately regulate our common life by means of positive law?

Given this way of framing the issue and given a discursive mode of deliberation, two things follow:

- First, only those outcomes can count as legitimate upon which equally entitled participants in the deliberation can freely agree—that is, outcomes that meet with the justified consent of all under conditions of rational discourse.
- Second, given the specific way of framing the question, the participants commit themselves to modern law as the medium for regulating their common life. The mode of legitimation through a general consent under discursive conditions realizes the Kantian concept of political autonomy only in connection with the idea of coercive laws that grant equal individual liberties. For according to the Kantian concept of autonomy, no one is truly free until all citizens enjoy equal liberties under laws that they have given themselves after a reasonable deliberation.

Before I recall the system of rights that emerges from this discourse-theoretic approach, I must deal with the objection Michelman raises against this third, proceduralist attempt at reconciling the idea of human rights with the principle of popular sovereignty. To perceive the force of this interesting objection, one must be clear about the consequences of attempting to explain the form of constitutional democracy in terms of the legal institutionalization of a far-reaching network of discourses. Public discourses must be tempo-
rally, socially, and materially specified in relation to political opinion- and will-formation in arenas of the public sphere or in legislative bodies and in relation to legally correct and materially informed decision-making practices in courts or administrations. Michelman has in view this dimension of legal regulations, beginning with basic rights and voting rights, extending further to the specifications of the organizational part of the constitution, and finally moving to the procedural rights and rules of order of individual governmental bodies.

Depending on the matter in need of regulation and the need for a decision, sometimes the moral and legal aspects of an issue stand in the foreground; at other times the ethical aspects stand out. Sometimes empirical questions are involved that call for expert knowledge; at other times it is a matter of pragmatic questions that require a balancing of interests and, thus, fair negotiations. The legitimation processes themselves move through various levels of communication. Standing in contrast to the “wild” circles of communication in the unorganized public sphere are the formally regulated deliberative and decision-making processes of courts, parliaments, bureaucracies, and the like. The legal procedures and norms that govern institutionalized discourses should not be confused with the cognitive procedures and patterns of argumentation that guide the intrinsic course of discourse itself.

4.

It is this legal dimension of the process of establishing forms of communication that Michelman refers to when he argues that the constitution-making practice cannot be reconstructed on the basis of discourse theory. The reason is that this approach cannot avoid the circularity of legal self-constitution and thus gets trapped in an infinite regress:

A truly democratic process is itself inescapably a legally conditioned and constituted process. It is constituted, for example, by laws regarding political representation and elections, civil associations, families, freedom of speech, property, access to media, and so on. Thus, in order to confer legitimacy on a set of laws issuing from an actual set of discursive institutions and practices in a country, those institutions and practices would themselves have to be legally constituted in the right way. The laws regarding elections, representation, associations, families, speech, property, and so on, would have to be such as to constitute a process of more or less “fair” or “undistorted” democratic political communication, not only in the formal arenas of legislation and adjudication but in civil society at large. The problem is that whether they do or not may itself at any time become a matter of contentious but reasonable disagreement, according to the liberal premise of reasonable interpretative pluralism.10
The procedural legitimacy of the outcome of any given discourse depends on the legitimacy of the rules according to which that type of discourse has been specified and established from temporal, social, and material points of view. If procedural legitimacy is the standard, then the outcome of political elections, the decision of parliaments, or the content of court decisions is in principle subject to the suspicion that it came about in the wrong way, according to deficient rules, and in a deficient institutional framework. This chain of presuppositions of legitimation reaches back even beyond the constitution-making practice. For example, the constitutional assembly cannot itself vouch for the legitimacy of the rules according to which it was constituted. The chain never terminates, and the democratic process is caught in a circular self-constitution that leads to an infinite regress.

I prefer not to meet this objection by recourse to the transparent objectivity of ultimate moral insights that are supposed to bring the regress to a halt. Rather than appeal to a moral realism that would be hard to defend, I propose that we understand the regress itself as the understandable expression of the future-oriented character, or openness, of the democratic constitution: in my view, a constitution that is democratic—not just in its content but also according to its source of legitimation—is a tradition-building project with a clearly marked beginning in time. All the later generations have the task of actualizing the still-untapped normative substance of the system of rights laid down in the original document of the constitution. According to this dynamic understanding of the constitution, ongoing legislation carries on the system of rights by interpreting and adapting rights for current circumstances (and, to this extent, levels off the threshold between constitutional norms and ordinary law). To be sure, this fallible continuation of the founding event can break out of the circle of a polity’s groundless discursive self-constitution only if this process—which is not immune to contingent interruptions and historical regressions—can be understood in the long run as a self-correcting learning process.

In a country such as the United States, which can look back on more than two hundred years of continuous constitutional history, we find evidence that supports this dynamic interpretation. Bruce Ackerman refers to “hot” periods, such as the New Deal under Roosevelt, that were characterized by the innovative spirit of successful reforms. Such times of productive radical change make possible the rare experience of emancipation and leave behind the memory of an instructive historical example. Contemporaries can see that groups hitherto discriminated against gain their own voice and that hitherto underprivileged classes are put into a position to take their fate into their own hands. Once the interpretive battles have subsided, all parties recognize that the reforms are achievements, although they were at first sharply contested.
In retrospect they agree that with the inclusion of marginalized groups and with the empowerment of deprived classes, the hitherto poorly satisfied presuppositions for the legitimacy of existing democratic procedures are better realized.

Of course, the interpretation of constitutional history as a learning process is predicated on the nontrivial assumption that later generations will start with the same standards as did the founders. Whoever bases her judgment today on the normative expectation of complete inclusion and mutual recognition, as well as on the expectation of equal opportunities for utilizing equal rights, must assume that she can find these standards by reasonably appropriating the constitution and its history of interpretation. The descendents can learn from past mistakes only if they are “in the same boat” as their forebears. They must impute to all the previous generations the same intention of creating and expanding the bases for a voluntary association of citizens who make their own laws. All participants must be able to recognize the project as the same throughout history and to judge it from the same perspective.

Michelman seems to agree:

Constitutional framers can be our framers—their history can be our history, their word can command observance from us now on popular sovereignty grounds—only because and insofar as they, in our eyes now, were already on what we judge to be the track of true constitutional reason. . . . In the production of present-day legal authority, constitutional framers have to be figures of rightness for us before they can be figures of history.11

The unifying bond thus consists of the shared practice to which we have recourse when we endeavor to arrive at a rational understanding of the text of the constitution. It is no accident that the founding constitutional act is experienced as a decisive point in the nation’s history, because with this act the grounds for a world-historically new kind of practice have been established. The performative meaning of this practice—a practice meant to bring forth a self-determining community of free and equal citizens—is simply spelled out in the words of the constitution. This meaning remains dependent on an ongoing explication that is carried out in the course of applying, interpreting, and supplementing constitutional norms.

Thanks to this intuitively available performative meaning, each citizen of a democratic polity can at any time refer to the texts and decisions of the founders and their descendents in a critical fashion, just as one can, conversely, adopt the perspective of the founders and take a critical view of the present to test whether the existing institutions, practices, and procedures of democratic opinion- and will-formation satisfy the necessary conditions for a process that engenders legitimacy. Philosophers and other experts can in their
own way contribute explanations of what it means to pursue the project of realizing a self-determining association of free and equal consociates under law. On this premise, each founding act also creates the possibility of a process of self-correcting attempts to tap the system of rights ever more fully.

5.

Reflection on the historical dimension of realizing the constitutional project can, perhaps, defang the prima facie plausible objection to the discourse-theoretic interpretation of the democratic self-constitution of the constitutional state [Verfassungsstaat]. But one has not thereby shown how the principles of the rule of law found in the constitution are inherent in democracy itself. To demonstrate that democracy and constitutionalism are not paradoxically related, we must explain the sense in which basic rights as a whole, and not merely political rights, are constitutive for the process of self-legislation.

Similar to its social-contract predecessors, discourse theory simulates an original condition: an arbitrary number of persons freely enter into a constitution-making practice. The fiction of freedom satisfies the important condition of an original equality of the participating parties, whose “yes” and “no” count equally. The participants must satisfy three further conditions. First, they are united by a common resolution to legitimately regulate their future life together by means of positive law. Second, they are ready and able to take part in rational discourses and thus to satisfy the demanding, pragmatic presuppositions of a practice of argumentation. Unlike the tradition of modern natural law, this supposition of rationality is not limited to purposive rationality; moreover, in contrast to Rousseau and Kant, it does not just extend to morality but makes communicative reason a condition. Finally, entrance into the practice of constitution making is bound up with the readiness to make the meaning of this practice an explicit topic (i.e., to make the resources of the performance a topic of discussion). That is, to begin with the practice amounts to nothing more than reflecting on and conceptually explicating the specific meaning of the intended enterprise the participants have gotten themselves into with their very practice of constitution making. This reflection attends to a series of constructive tasks that must be completed before the work of constitution making can actually begin—the next stage.

The first thing the participants realize is that because they want to realize their intention through the medium of law, they must create a system of statuses to ensure that every future member of the association counts as a bearer of individual rights. A system of positive and compulsory law with such an individualistic quality can come about only if three categories of rights are
concomitantly introduced. If we consider that the capacity for general consent is a requirement of legitimacy, these categories are as follows:

i. basic rights (whatever their concrete content) that result from the autonomous elaboration of the right to the greatest possible measure of equal individual freedom of action for each person;

ii. basic rights (whatever their concrete content) that result from the autonomous elaboration of the status of a member in a voluntary association of legal consociates;

iii. basic rights (whatever their concrete content) that result from the autonomous elaboration of each individual’s right to equal protection under law, that is, that result from the actionability of individual rights.

These three categories of rights are the necessary basis for an association of citizens that has definite social boundaries and whose members mutually recognize one another as bearers of actionable individual rights.

In respect to the three above categories, however, participants anticipate only that they will be future users and addressees of the law. Because they want to ground an association of citizens who make their own laws, it next occurs to them that they need a fourth category of rights so that they can mutually recognize one another also as the authors of these rights as well as of the law in general. If they want to hold fast to the most important aspect of their practice, its self-determining character, not only now but also in the future, then they must empower themselves as political lawgivers by introducing basic political rights. Without the first three categories of basic rights, something like law cannot exist; but without a political elaboration of these categories, the law could not acquire any concrete contents. For the latter, an additional (and also initially empty) category of rights is necessary:

iv. basic rights (whatever their concrete content) that emerge from the autonomous elaboration of the right to an equal opportunity to participate in political law-giving.

It is important to keep in mind that this scenario has recapitulated a thought process carried out in mente, so to speak—even if the process is supposed to have taken shape in the course of a deliberative practice. Thus far, nothing has actually happened. Nothing could happen: before the participants conclude their first act of lawmaking, they must achieve clarity regarding the enterprise they have resolved upon with their entrance into a practice of constitution making. However, after they have made explicit their intuitive knowledge of the performative meaning of this practice, they know they must create the four above categories of basic rights in a single stroke, so to speak. Of course, they cannot produce basic rights in abstracto but only particular basic rights with a concrete content. For this reason, the participants who thus
far were engaged in inward reflection, focused on a kind of philosophical clarification, must step out from behind the veil of empirical ignorance and perceive what in general must be regulated under the given historical circumstances and which rights are necessary for dealing with these matters in need of regulation.

Only when they are confronted, we say, with the intolerable consequences of the use of physical violence do they recognize the necessity of elementary rights to bodily integrity or to freedom of movement. The constitutional assembly can reach decisions only when it sees the risks that make a specific need for security into a matter it must address. Only the introduction of new information technologies leads to problems that make some kind of data protection necessary. Only when the relevant features of the environment shed light on our own interests does it become clear that we need rights that protect the conduct of our personal and political life—such familiar rights as the right to conclude contracts and acquire property, to form associations and publicly express our opinions, to join and practice a religion, and so on.

We must, therefore, carefully distinguish two stages. The first stage involves the conceptual explication of the language of individual rights in which the shared practice of a self-determining association of free and equal citizens can express itself—rights, thus, in which alone the principle of popular sovereignty can be embodied. The second stage involves the realization of this principle through the exercise, the actual carrying out, of this practice. Because the practice of civic self-determination is conceived as a long-run process of realizing and progressively elaborating the system of fundamental rights, the principle of popular sovereignty comes into its own as part and parcel of the idea of government by law.

This two-stage scenario of the conceptual genesis of basic rights clearly shows that the preparatory conceptual steps explicate necessary requirements for a legally established democratic self-legislation. They express this practice itself and are not constraints to which the practice would be subjected. Only together with the idea of government by law can the democratic principle be realized. The two principles stand in a reciprocal relationship of material implication.

6.

Because autonomy must not be confused with arbitrary freedom of choice, the rule of law neither precedes the will of the sovereign nor issues from that will. Rather, the rule of law is inscribed in political self-legislation, just as the categorical imperative—the idea that only universalizable max-
ims, maxims capable of universal consent, are legitimate and reasonable in the sense of showing equal respect for each person—is inscribed in moral self-legislation. However, whereas the morally acting individual binds her will to the idea of justice, the reasonable self-binding of the political sovereign means that the latter binds itself to legitimate law. The practical reason that is articulated in the rule of law is—as legally exercised rulership—bound up with the constitutive features of modern law. This explains why the coimplication of popular sovereignty and constitutionalism is reflected in the relation between the autonomy of the citizen and the autonomy of the private individual: one cannot be realized without the other.

Like morality, so also legitimate law protects the equal autonomy of each person: no individual is free so long as all persons do not enjoy an equal freedom. But the positivity of law necessitates an interesting split in autonomy to which there is nothing analogous in the moral sphere. The binding character of legal norms stems not just from the insight into what is equally good for all but from the collectively binding decisions of authorities who make and apply the law. This results in the conceptually necessary division of roles between authors who make and apply the law, on one hand, and addressees who are subject to valid law, on the other. The autonomy that in the moral sphere springs from a single source, as it were, appears in the legal sphere in the dual form of private and public autonomy.

Modern compulsory law can demand only that its addressees behave in a legal manner: that regardless of one’s motivation, one behave in conformity with law. Because the law may not require legal obedience “out of respect for the law,” private autonomy can be guaranteed only in the form of individual liberties that entitle one to an autonomous life conduct and enable the moral consideration of others but do not obligate one to do anything beyond what is compatible with the equal freedom of everyone else. Private autonomy thus takes on the form of a legally guaranteed freedom of choice. At the same time, in the role of persons who act morally, legal persons must also be able to follow the law out of respect for the law. For this reason, valid (in the sense of existing) law must also be legitimate. And the law can satisfy this condition only if it has come about in a legitimate way, namely, according to the procedures of democratic opinion- and will-formation that justify the presumption that outcomes are rationally acceptable. The entitlement to political participation is bound up with the expectation of a public use of reason: as democratic colegislators, citizens may not ignore the informal demand [Ansinnen] to orient themselves toward the common good.

The foregoing makes it appear as if practical reason has its place only in the exercise of a political autonomy that allows the addressees of law to understand themselves at the same time as its authors. In fact, practical reason
is realized in the form of private autonomy no less than it is in that of political autonomy. That is, both are as much means for the other as they are ends in themselves. The demand to orient oneself to the common good, which is connected with political autonomy, is also a rational expectation insofar as only the democratic process guarantees that private individuals will achieve an equal enjoyment of their equal individual liberties. Conversely, only when the private autonomy of individuals is secure are citizens in a position to make correct use of their political autonomy. The interdependence of constitutionalism and democracy comes to light in this complementary relationship between private and civic autonomy: each side is fed by resources it has from the other.

—Translated by William Rehg

NOTES

1. [Habermas uses a number of terms to express the idea of the rule of law or constitutionalism (taken as equivalent for the purposes of this essay). The most literal is Herrschaft der Gesetze, which I always translate as “rule of law.” Rechtsstaat, the literal meaning of which is “law state,” may be rendered either as “constitutional state” or “rule of law.” To distinguish Rechtsstaatlichkeit, I translate it as “constitutionalism” or “government by law.” Note, by the way, that the German word for “constitution” is Verfassung.—Translator]


3. I. Maus, Zur Aufklärung der Demokratietheorie (Frankfurt am Main, Germany, 1992).


9. See Habermas, Between Facts and Norms.


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