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A Reply to Critics of *Constitutional Goods*

Alan Brudner¹

ABSTRACT

In this article, the author replies to critiques of his book, *Constitutional Goods* (Oxford, 2004) by Professors Trevor Allan, Clare Chambers, John Charvet, Philip Cook, Thomas Poole, and Lorenzo Zucca. These critiques were originally presented at a symposium held in May, 2008 at the London School of Economics and Political Science and were later published together in Vol. XXII (January, 2009) *Canadian Journal of Law and Jurisprudence*.

Let me begin by expressing my gratitude to Thomas Poole for conceiving the idea of a symposium on *Constitutional Goods* (CG)² and for bringing the idea to fruition in the six essays published in the previous issue of *The Canadian Journal of Law and Jurisprudence*.³ Thanks also to the authors of the essays for the compliment they have paid my work in believing that it merited detailed examination and criticism. I'll reply to the authors in an order all can rationally accept: the alphabetical order of their surnames.

1.

Trevor Allan's "In Defence of the Common Law Constitution: Unwritten Rights as Fundamental Law," takes issue with my claim that the rule of Law is best actualized in legal systems with written constitutions. Allan contends that I rely "too much on enacted codes to support what are, on [my] own analysis, necessary elements of the rule of law,

¹ Albert Abel Professor of Law, University of Toronto

² (Oxford: Oxford University Press, 2004).

³ (2009), 22 (1). Henceforth page references to this issue are internal to the text.

intrinsic to liberal constitutionalism and hence binding...whether written or unwritten (189).” In favouring written constitutions, he argues, I depreciate the common-law constitution, equating it with a libertarian constitutional paradigm for which the rule of Law is essentially the rule of private law. Allan himself thinks that everything that a court can do under a written constitution—including a court’s testing rights-infringing laws against a standard of reasonable limits for the sake of constitutional goods—can also be done under an unwritten constitution. In particular, he thinks that the reasoning whereby a judge might invalidate a law under a written constitution can also be employed to interpret a law narrowly so as to screen out its unconstitutional content.

Let me say, first, that if the content of the rule of Law comprised only Fuller-type procedural requirements plus the few substantive additions (injunctions against bills of attainder and against blatantly invidious discrimination) that Allan makes in *Constitutional Justice*⁴, I would agree with him that the common-law constitution is sufficient for judicial enforcement of the rule of Law. However, I take Allan to be saying that the common-law constitution would be sufficient to enforce even the full content of liberal justice against legislative majorities, and here is where we part company.⁵

Before saying why I must disagree, however, let me say what I’ve learned from Professor Allan’s work. First, I’ve learned that there is no reason to equate the common-law constitution with the libertarian constitution, as I admit I have done. The common-law constitution, I now see, can be the full constitution of the inclusive conception of public reason. I have also learned that entrenchment and codification are not the same

⁴ (Oxford: Oxford University Press, 2001).

⁵ Allan sometimes makes the broad claim that liberal justice is enforceable by the common-law constitution, but at other times makes the narrow claim that only the “essential core of legality” is enforceable through the common-law constitution. If Allan wishes to make only the narrow claim, there is no disagreement between us.

thing, although until reading Allan's work I had always assumed they were. But I now grant that the common-law constitution can be entrenched without being codified if judges, in interpreting legislation, hold the empirical intention of Parliament answerable to an objective intention of a reasonable Parliament—that is, if judges say that, no matter what the legislators actually intended and no matter how unambiguously they stated their intention, they, as concretizers of public reason, could not have intended anything incompatible with the rule of Law.

So this much I grant, but now a further question arises. Which form of entrenchment is most adequate to the idea of Law's supremacy: entrenchment through the judicial interpretation of statutes or entrenchment through the codification of the common-law constitution? And I believe the answer is codification for the following reasons.

First, whether or not the common-law constitution is entrenched against legislative majorities must be determined by an interpretation of the common-law constitution itself in its historical development. This is so because there is no reason to think that the *libertarian* constitution is entrenched given that it sees political authority as constituted through a surrender to a sovereign legislator of the subject's freedom to determine just limits on its liberty. By virtue of this surrender, the legislature's authority to interpret the rule of Law becomes untrammelled; Parliament, as Coke saw, becomes legislature and Supreme Court of justice rolled into one. So, even though it is possible, as Allan says, to deduce a body of correct constitutional principles (for example, the freedom of conscience, speech) from the supremacy of the common will, it does not follow that the legislator is accountable before a court for a mistake about what Law's

rule demands within the libertarian paradigm. Indeed, it is *not* accountable, for, given the origins of its authority in an alienation of the subject's practical reason (identified with private reason), the legislator is under no enforceable duty to be correct in its determination of rights within this framework.

It follows, accordingly, that the only way to entrench the libertarian constitution is for a constituent assembly to codify its abstract determinations and to give judges the power to invalidate legislation that in their opinion conflicts with basic rights. Within the libertarian framework, this power cannot be viewed otherwise than as reflecting a transfer of interpretive sovereignty from the elective legislature to the judiciary, with all the well-known problems that entails. Moreover, nothing in the libertarian constitution demands this transfer. Whether or not it occurs will depend on how a political culture weighs the comparative advantages of parliamentary sovereignty and a system of checks and balances as safeguards against tyranny.

Because the libertarian constitution is not inherently entrenched against the legislature's will, whether or not the common-law constitution as a whole is entrenched will depend on whether judges can see in the historical development of, say, the British Constitution, a decisive paradigm shift to an egalitarian constitutional order, in which Law's sovereignty is original rather than created from anarchy through a surrender of individual sovereignty. But of course interpretations of constitutional history are subject to disagreement. As Allan himself says, they are a matter of moral and political argument (189). Allan believes that the common-law constitution is entrenched; Lord Hoffmann believes it is not.⁶ Because no one can be certain about this, disagreement will be

⁶ *R. v. Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, at 131. The U.K. *Human Rights Act* can be interpreted as signifying Britain's refusal to make the shift, for it envisages courts

reasonable. But space for reasonable disagreement about whether Law or the legislator is supreme is incompatible with Law's supremacy. And so as long as the focus is on interpreting the common-law constitution, Law's supremacy will not be truly entrenched against a clear and unmistakable empirical intent of Parliament.

Codification removes the space for reasonable disagreement. With a written constitution containing a supremacy clause and enforced by an independent judiciary, we know, everyone knows, that Law, not Parliament, is juridically supreme. Entrenchment is here explicit, certain, and beyond interpretive disagreement. For that reason, I believe that codification is hands down a better form of entrenchment than common-law entrenchment. Observe, however, that this is a conceptual argument, not a prudential one. Codification is the form of entrenchment most adequate to the idea of Law's supremacy, because the latter idea implies that no reasonable interpretation of the constitution can deny it; and yet as long as entrenchment is only implicit in the common-law constitution, the rule of Law will be vulnerable to ousting by interpretation—by Lord Hoffman, for example. Observe, secondly, that I eschew reliance on a positivist argument to the effect that courts are empowered to nullify acts of Parliament only because the will of a constituent assembly gave them that power. Rather, the argument is that, by virtue of a constituent assembly's having enacted the constitution with a supremacy clause, a judge must conclude that the common-law constitution underwent the reformation from parliamentary supremacy to the supremacy of Law that its natural evolution demands.

declaring a statute to be incompatible with the European Convention on Human Rights and yet applying the statute.

Not only is codification the form of entrenchment most adequate to the idea of entrenchment; it is also required by the rule of Law for the reason that I give in CG. Once it is understood that the legislator can limit basic rights to the extent required by the promotion of constitutional goods, prudential judgment enters into constitutional reasoning. This is so because it is a matter of prudential judgment, not *a priori* correctness, whether a legislative measure limits a right more than is necessary to accomplish the state's legitimate goal. On matters of prudential judgment, however, appointed and tenured judges ought to defer to political representatives who are accountable for their want of sagacity, striking down only obviously overbroad and unnecessarily restrictive legislation. But judges might overstep; they might substitute their prudential judgment for the legislator's, and so the democratically accountable legislator should be able to reassert its jurisdiction against an unconstitutional invalidation by the court. Now, of course, all this could be done without a codified constitution, but not without the possibility of constitutional deadlock, as the following scenario reveals.

Imagine that we are under the common-law constitution. Parliament enacts a law for the common good but limiting a constitutional right. Court interprets the law narrowly, reads it down, because it thinks that the same purpose could be achieved less restrictively, although this is a matter of reasonable disagreement. Indignant at this intrusion, Parliament reenacts the legislation in its original form. Court again reads it down, saying it is applying the entrenched common-law constitution (why should we assume, as Allan does, that the court would be "forced" to back down?). Assuming the Court is overstepping here, the rule of Law requires a legal provision regulating the

interaction between Court and Parliament and allowing Parliament to recover democratic jurisdiction from a Court that has arrogated the power of political judgment to itself. However, such a provision must be codified rather than itself unwritten, because if it were unwritten, the Court, as the interpreter of the common-law constitution, would be judge in its own cause. A written provision could say that Parliament may reenact a law declared invalid by the Court on minimal impairment or proportionality grounds provided that the government gives reasons for its belief that the law meets the constitutional tests of rational connection, minimal impairment of the right, and proportionality, and provided that it re-submits the law periodically to ratification by Parliament. This is not, as Allan argues (197), a backsliding from constitutionalism to majoritarian politics, for at issue here is only a question of prudential judgment, not of right and wrong.

In the foregoing scenario, we assumed that the Court had overstepped. But now suppose the Court did right to strike down the legislation because the law did unreasonably limit the right and obviously so; or perhaps the violation was for an improper purpose—a private purpose or a trivial purpose. Allan argues that in this case, a written provision, such as the Canadian Charter's section 33, allowing Parliament to re-enact the legislation allows it to flout the constitution. And, of course (as he reminds us), the electorate may be all too willing to allow it to do so.

Yet we should not be tied to the flawed notwithstanding clause of the Canadian Charter. A proper provision would allow parliamentary re-enactment only in cases where Court struck down the legislation on minimal impairment or proportionality grounds and where Parliament believes Court substituted its prudential judgment for its own. Where Court invalidated legislation as infringing a right for an improper purpose, no re-

enactment would be permitted. Moreover, a proper provision would require Parliament to give reasons for its re-enactment, and Court would have jurisdiction to scrutinize those reasons to ensure that Parliament did not contradict Court on matters within the latter's exclusive purview (whether a right was infringed for a proper purpose) or that it addressed Court's arguments for the limit's being clearly unnecessary or disproportionate (whether or not Court agrees with the rebuttal). So, once we draft the notwithstanding clause appropriate to constitutionalism, I think Trevor Allan need not be concerned about a reinstatement of majoritarian supremacy.

2.

Clare Chambers begins "Inclusivity and the Constitution of the Family" by making some general criticisms of my project as a whole. She then offers more specific criticisms of my arguments in the chapter on sex, family, and self-authorship. Chambers's general criticisms are: I assume but do not demonstrate that it is both possible and desirable to achieve the task I undertake in CG. Second, in giving a veto over the theory only to libertarians, egalitarians, and communitarians, I arbitrarily exclude feminists, Marxists, utilitarians, and liberal theists.

It is not entirely clear what task Chambers thinks I did not show to be capable of achievement. If the task is reconciling the competing constitutional paradigms within an inclusive conception of public reason, then the argument for possibility is surely included in the argument for actuality, which Chambers does not seek to refute.⁷ Since this

⁷ If Chambers means that I provide no reason for thinking that reconciling the liberal sects might be possible apart from the argument for actuality, she is mistaken. In the Introduction (CG, 15-18) I argue that the liberal confidence in the individual's final worth affords the possibility of reconciling the various

answer is too obvious, Chambers must have in mind a different task. Perhaps she means that I have not argued for the possibility of a theory that unifies in some non-trivial way the diverse liberal constitutions that exist in the world. Such a theory, she says, presupposes some purpose of the theorist in light of which she can pick out significant and relevantly common features of the various constitutions (137). And so Chambers argues that before I set about presenting such a theory, I “must show that the theory is significant and relevant (which is to say that it really does pick out principles that are normatively justifiable).” (137).

I must confess that I am at a loss to understand this point. I do say in the Preface that liberal bills of rights aim “to constrain the exercise of power by governmental agencies within limits believed to distinguish the just from the unjust” (CG viii). And on the first page of the Introduction I say that constitutional theory (like political philosophy) seeks “to discover how the power exercised by those who rule others in political societies may be justified and so rendered ‘right’ rather than simply matter of fact.” So that is the purpose in light of which I pick out significant and relevantly common features of liberal constitutions. Do I really have to argue at length that constraining government power within the limits of justice is a significant and worthwhile aim before presenting the theory of constitutional justice that prescribes the limits? And is it not obvious that such a theory is “relevant” to the justification of the state’s coercive power? As for whether the theory picks out “principles that are normatively justifiable,” surely that can be determined only by working out the theory;

liberalisms because they should in principle all be willing to embrace the conception of public reason that satisfactorily grounds and theoretically confirms that confidence.

how could that be argued for in advance of selecting the principles? But these answers are so obvious that they cannot be answers to the question Chambers is really asking.

Perhaps she is asking: how do we know that the theorist's purpose is the one that picks out the features of the object that are truly significant and relevant? "[I]t could be," she writes, "[that] Brudner's inclusive theory pick[s] out the wrong features of those constitutions as significant and...thereby wrongly identif[ies] those features which are central and those which are peripheral." (137) But if the purpose—constraining state power within the limits of justice—is significant, then the features that the theory picks out as necessary to just power will also be significant; and they will be relevant to that purpose. Chambers seems to have anticipated this answer, for she writes: "Brudner's inclusive theory... might be a normative theory that does indeed provide answers to the question of what is justified and what is unjustified in constitutional practice, but it might err in picking out the relevant features of existing liberal constitutions and thus give flawed answers." (137) But how could the features picked out as part of the just constitution be irrelevant to the task of picking out the features of a just constitution? And how could one know they were flawed answers in advance of giving the answers? Chambers is not saying that all the answers *are* flawed; she is saying that they *might* be flawed, and her complaint is that I have not shown that they *can* be correct in advance of showing that they are. But this brings us back to the answer that seemed too obvious to be an answer to the question Chambers is asking: the argument for possibility is included in the argument for actuality.

But I should not attribute such weak objections to Professor Chambers. Perhaps she means to ask how I know that the purpose in my mind is the actual unifying purpose

of the constitutions? It could be that a different purpose unifies them or perhaps there is no unifying purpose and whatever common features they have are ascribable to historical accident. But the answer to this question, I'm afraid, is also obvious. One can show that the interpreter's purpose is the one that unifies and makes the best sense of liberal constitutions only by getting on with the interpretive task. How could one show this in advance of the interpretive work when the interpretive work is itself the demonstration of the theory's power to integrate and illuminate? In the end, one begins to worry that there is no way of construing Chambers's question that makes it a question to which the answer is not obvious.

Regarding the desirability of reconciliation, Chambers says that I don't adequately motivate the project. Why, she asks, should we be motivated to develop a theory that can reconcile the competing liberalisms (138)? Well, I thought I explained the motivation for the project in the Preface and Introduction, where I discuss Rawls's *Political Liberalism*. There I say that the dominant egalitarian account of liberalism fails in its project of publicly justifying state coercion to the citizens of a liberal polity because it is too partisan an account even for liberals and because its partisanship is not cured by making it freestanding of comprehensive philosophic visions. If the criterion of a public justification of political authority to liberals is its acceptability to all liberal sects, then a justification in terms of one particular liberal conception of public reason will not succeed as a public justification. The only justification that will succeed is one founded on a nonpartisan (for a liberal) conception of public reason; and that (as I say on CG, 17) is what the inclusive conception seeks to provide.

But then Chambers asks: “why is public justification so important?” (138) Again, the answer is too obvious to be an answer to the question Chambers is really asking. A public justification is important because it is the only kind of justification of state power that justifies it. It seems the question she is really asking is: why does the liberal confidence in the individual’s final worth entail a commitment to the project of developing a constitutional theory that all liberals could accept (139)? Indeed, Chambers denies any such entailment. “Believing that individuals are of ultimate moral value,” she writes, “is not the same thing as thinking that individuals’ *judgments* about constitutional law are all of equal value, or that *agreement* between individuals’ judgments is the way to reflect the ultimate value of individuals (139).” Here Chambers reads me as saying that empirical agreement is necessary and that everyone’s actual judgments count equally, whatever their quality. But I explicitly say that empirical agreement is not necessary (for example, on CG, 10, 427). What is necessary is rational agreement among the ideally self-consistent representatives of all liberal sects.

A constitutional theorist has a strong motivation to reconcile competing theories of liberal justice, because fragmentation is problematic for the public justification of the state’s coercive authority that can alone validate the state’s authority claim to its subjects. Fragmentation is also problematic for the liberal confidence, because if the individual agent is subject to political coercion for ends it cannot reasonably accept as its own, then it is not the final end it takes itself to be; it is instead a means for others’ ends. This is an answer to Chambers’s puzzling denial that the liberal confidence in the individual’s final worth entails a commitment to developing a theory of political justice that all liberals could accept. Contrary to her stated view, one needs no premise beyond the liberal

confidence to motivate the quest for a public justification of coercive power, because the individual's subjection to a coercive authority representing another's interest contradicts the liberal confidence.

Chambers then asks: who can veto the inclusive conception (139)? None of the possible answers she claims to derive from my book is actually there, although one comes close. The answer is: anyone who provides a comprehensive theoretical account of the liberal confidence gets a veto. Do I arbitrarily exclude feminists, Marxists, utilitarians, and liberal theists? The answer is: I do not exclude them at all. Utilitarians are explicitly offered reasons (CG, 428-9) they could rationally accept for joining the consensus on the inclusive conception. Liberal theists are offered reasons in chapter 10. The Marxist critique of exploitative labour relations is explicitly incorporated on CG, 261, and the right to civil independence guaranteed by the egalitarian constitution (discussed on CG, 265) as well as the internal democratic organization of the corporation responds to this critique. Feminists are addressed and shown why their commitments to equal rights to the conditions of self-authorship and self-rule and to a relational conception of autonomy should lead them to adopt the inclusive conception (CG, 419-20). So all these groups have a philosophical veto provided they can show that their reasonable (that is, nonhegemonic) philosophic commitments are not satisfied by the inclusive conception.

But then Chambers complains: why do only libertarians, egalitarians, and communitarians get their own Parts (140)? Why don't feminists and Marxists, etc. get whole Parts of the book devoted to them? The answer is: I devoted Parts to paradigms of constitutional law based on fundamental conceptions of the public interest. If there is a

specifically feminist conception of the fundamental public interest that is distinct from the egalitarian and communitarian conceptions, then it would indeed require a separate Part; otherwise feminist aspirations are adequately addressed within those paradigms. Marxism cannot order a separate paradigm of constitutional law, because it regards law as an ideological cover for class dictatorship that is destined to wither away along with the individualism and state coercion it is meant to restrain. Utilitarians cannot complain about not constituting their own Part, because I argue (CG, 428-9) that the inclusive conception as a whole is a right-respecting version of Mill's eudaemonism.

Chambers's more specific criticisms target the chapter on sex and the family. She argues that my conclusions with respect to same-sex marriage, polygamy, and incest agree with "prevailing liberal thinking" (141-2) but that my reasoning is flawed, whereas my position on abortion departs from prevailing liberal thinking both in its conclusion and its reasoning. For Chambers, showing my argument's divergence from prevailing liberal thinking as well as from any "position currently lobbying on abortion" (142) is equivalent to showing it to be illiberal simply. Yet even leaving that non-sequitur aside, most of her criticisms are based on distortions of what I wrote—distortions that have persisted unchanged from the symposium to the final draft of her comments.

Ironically (given the strategy of her own argument), Chambers accuses me of rejecting the Rawlsian, neutral-grounds approach to the regulation of sexual relationships merely because that approach could accept conclusions inconsistent with prevailing public opinion. Since, however, the alternative approach I offer also yields (as she admits) conclusions inconsistent with prevailing public opinion, we have reason to doubt the fairness of this accusation. What I say (CG, 326) is that we need a philosophic

morality of sex that, while accepting consensual homosexual sex, will disapprove of bestiality, incest, and polygamy and from which one can then derive solutions to controversies (for example, over same-sex marriage) concerning which our considered convictions might be more wavering; and I say that the neutral-grounds approach cannot prohibit bestiality, contracepted incestuous sex between consenting adults, or a combination of polygyny and polyandry. But this is to test the neutral-ground approach, not against public opinion (which, after all, probably disapproves of same-sex marriage and perhaps even of homosexual acts), but against considered convictions. If these convictions were not in some degree independent of the theory, how could one ever test an ethical theory? Chambers replies: perhaps we should not prohibit incest or going through a form of marriage when one is already married (provided there is no inequality and that no harm is done). But I say (CG, 326) that reflective equilibrium is better satisfied by a theory that can prohibit bestiality, consensual incest, and polygamy while permitting consensual homosexual sex than by one that cannot. Chambers may reasonably disagree because her considered convictions differ from mine, but she cannot say that I am wrong or that my reasoning is flawed.

Chambers claims that my argument for a state duty to foster the right sort of intimate relationships involves a non-sequitur. Indeed, her entire criticism of this argument boils down to the repetition of a single refrain: “it simply does not follow.” “It simply does not follow,” she writes, “from the fact that individuals have state-enforced rights and duties toward others that they must have different, stronger state-enforced rights and duties toward others with whom they are in intimate relationships (144).” “[I]t simply does not follow from the fact of state-enforced duties between strangers that any

intimate relationships are common goods that ‘governments have a duty to foster’ (144).”
“It does not follow from the fact that relationships of a certain sort are valuable that the state needs to guide individuals toward those relationships (145).”

Of course, if one represents my argument in that way, the conclusion does not follow from the premise, but Chambers has ignored the argument I actually make—in her final draft no less than at the symposium. The argument I make is that the liberal state’s coercive power is justified solely by its purpose of realizing valid claims of individual worth. For this reason it has a duty to enforce as civil rights and correlative duties (for example, of property, contract) all claims to individual worth that can be objectively validated in a relationship of mutual recognition. But some intimate relationships are also relations of mutual recognition in which claims to individual worth are validated. Therefore, those relationships too ought to be supported and fostered by the liberal state. That seems to be a perfect syllogism.

I never say that it is just because the relationships are valuable that the liberal state should foster them; I say that the liberal state should foster them for the specific reason that they validate the individual worth whose vindication and promotion alone justifies the liberal state.⁸ This may also be taken as a response to Chambers’s repeated complaint that I merely assert and do not explain why love and marriage are common goods to be promoted by the liberal state. The explanation is on CG, 332. Chambers quotes only the conclusion of the argument, suppressing the major premise, and then claims that the now marooned conclusion is a non-sequitur. The passage in the text reads:

⁸ Chambers treats as “another unexplained claim” the claim that sexual unions abstracted from loving relations are insufficient for worth. Why, she asks, must an activity be human to have worth (145)? But the claim is not unexplained; it is just that the explanation is lost on Chambers. The worth referred to is the worth-claim of the self. As far as I know, animals do not make claims of final worth. Worth-claims are not validated in abstract sexual unions, because both parties use the other as a means.

Let us recall why institutions evincing this structure [of mutual recognition] are liberal goods with constitutional status. The liberal constitution guarantees either as civil rights that governments must respect or as public goods they must foster all claims to individual worth that can be objectively validated in a relationship of mutual recognition. Thus, it protects...individual right-claims to speech, property, freedom of contract, and so on, that are capable of being recognized by other free selves; and it counts as political entitlements those affirmative claims to freedom-based goods by which submission to authority is reciprocated by authority's hypothetical submission to the test of self-imposability by worth-claiming subjects. Now, if the liberal constitution counts mutual cold respect between self-supporting strangers and equal moral membership in Law's hypothetical community as relationships begetting valid rights and duties, then *a fortiori* it must count as constitutional goods (that governments have a duty to foster) worth-validating relationships between persons intentionally oriented to them and that are therefore living (and not simply hypothetical) unions. More specifically, it must count unions between erstwhile strangers who, by choice rather than by natural affinity, commit to valuing each other as irreplaceable ends as a common good for which public concern is due; and it must treat also as a common good the stable human associations formed of these persons and their children.

Chambers begins her quote with "Now, if the liberal constitution counts...." and then asserts: "But this argument is a non-sequitur" (144).

The point, then, is that love and marriage are *constitutional* goods for the reason that I give and that Chambers has now chosen to ignore, namely, that they are sources of validated claims to worth by individual selves. Moreover, I don't say that the duties generated by intimate relationships are stronger than those emerging from relationships between strangers. I say that, given that the state enforces claims to worth validated in relationships (for example, of property) in which individuals are not intentionally involved, it has a stronger reason for enforcing those validated in intentional relationships.

The same pattern of ignoring or misrepresenting arguments I actually make is revealed in Chambers's statement that the crux of my argument against polygamy is that it is not monogamy. My argument, stated both in CG and at the symposium, is that polygynous marriages cannot objectively validate worth-claims of the self, not even of the male, because the female is subordinated and because only an equal can deliver an

objective validation for irreplaceable worth (CG, 336-7). That is a reason for discouraging polygyny that will also apply against polygamy for everyone, since in that arrangement no one gets validation for irreplaceable worth. Accordingly, I do not presuppose monogamy in criticizing polygamy; rather, I derive monogamy through an argument about the sort of interpersonal relationship that is alone worth-validating and that a liberal state (whose end is individual worth) should therefore confine itself to supporting.⁹

So now we come to abortion. I'm afraid that Chambers has thoroughly misrepresented my views and arguments here as well, with the result that her criticisms are not criticisms of my arguments. First, she attributes to me the claim that a human foetus developed to the point where it has rights cannot be aborted (148). This is pure invention. I say no such thing and, indeed, I say nothing about the rights or wrongs of aborting late-stage pregnancies. Second, she attributes to me the claim that the status of being a good is one that some foetuses have and others do not (148). This is not what I wrote. I wrote that there are two kinds of moral good that a zygote/embryo may embody

⁹ Chambers also continues to misrepresent my argument for a legal prohibition on incest even between consenting adults. As I pointed out at the symposium, it has nothing to do with unhealthy children (the law does not prohibit sex between people with genetic abnormalities) nor is the argument that incest is necessarily inconsistent with self-authorship. The argument is that incestuous relations are not ones in which claims of individual worth are objectively validated. Validation can come only from someone who begins as a stranger, who is not predisposed to favouring the other by feelings of kinship, whose validation thus comes from an unbiased choice. What about siblings raised separately from birth? That would depend on what psychological studies can tell us about the natural, unconscious affinities between such people. If there were none that distinguished siblings from non-siblings, the prohibition would not apply.

There are other misrepresentations. For example, I don't say that love and marriage are goods with "priority over self-authorship" or that they "override" self-authorship rights. I say that rights of self-authorship are fully rights only within the self-sufficient life, not outside it, and so they must be adjusted to common goods, as goods must be adjusted to them (CG, 351-2). Also, Chambers has me saying that "relationships can be regulated according to the extent to which they express love (145-6)." This is a careless paraphrase of what I actually say: that laws regulating pornography and prostitution can be justified to liberals as encouraging sexual desire to flow from abstract (loveless) sexual unions to marriages based on mutual recognition of worth.

depending on whether it is the product of an abstract sexual union or a committed relationship. One is a good in nature that human reproduction shares with animal reproduction; the other is a good in ethical life that is a distinctively human good (CG, 348-52). Thus all fetuses embody a good of some kind. Third, she attributes to me the claim that a non-right-bearing fetus conceived outside a committed relationship can be aborted “at will.” (148) What I say is that it can be aborted after counselling that directs the woman’s mind to the kind of good this fetus embodies (CG, 350).

Chambers persists in misreading me as saying that the argument for the differential moral status of fetuses applies to all fetuses, even a late-stage one. I would be as horrified by this suggestion as she is. I think I make it abundantly clear (CG, 353) that the argument for unequal moral status applies—and coherently so—only to pre-sentient life, to which it is difficult to attach even nascent personality and hence any rights. Once a fetus conceived outside a committed relationship develops to the point where an interest in survival can be imputed to it, it gains a moral right to exist equal to that of all other fetuses at that stage; for at that point the egalitarian principle denying the significance of ascriptive characteristics for persons extinguishes the inequality based on circumstances of conception. However, I isolate the case involving a conflict between the mother’s right of self-authorship and the moral good (not right) embodied in the pre-sentient zygote-embryo. And I say that this moral good is different depending on whether the embryo is the product of an abstract sexual union or a committed relationship. In the former case, the good it embodies is a good in nature that the right of self-authorship trumps; in the latter case, the good it embodies is part of the life sufficient for dignity, of which the right of self-authorship is another, and so the good and the right must adjust to

each other (which is why I say that the argument against aborting this pregnancy holds only assuming that women's equal opportunity rights are fully protected by human rights legislation).

Chambers asserts that this position is profoundly inequalitarian because "liberal egalitarians [hold that] all humans have equal moral worth (149)." Yet Chambers evidently does not believe that all humans have equal moral worth because she has just told us that a mother can kill her human foetus "for her own reasons" (149) before the foetus acquires rights and that the mother's rights outweigh the late-stage foetus's rights in some circumstances, for example, in the case of rape (149). So either Chambers is not the liberal egalitarian she holds herself out to be or she has misrepresented liberal egalitarianism. I believe the latter is true. Liberal egalitarianism holds that all *persons* must be treated with equal respect and concern, and it is certainly not obvious that the pre-sentient zygote/embryo is a person. Accordingly, if it is not inconsistent with liberal egalitarianism to hold that some humans have less value than others, then nothing in the egalitarianism of liberal egalitarianism stands in the way of ascribing differential value to embryos conceived through abstract sexual unions and those conceived in committed relationships.

Chambers claims that it is an implication of my argument that the differential moral status of the two kinds of foetus would persist after birth and even into adulthood, so that "full human persons" (150) would have unequal statuses recognized by the state. This is an inference one could draw only by ignoring most of the book and, in particular, its distinctive thesis: that the conception of public reason informing the liberal constitution is an inclusive conception in which objective morality, equal concern for

autonomy, and equal respect for liberty are constituent principles. The only juridical consequence of the different statuses that the inclusive conception could allow would apply at the stage of pre-sentient life, before personhood is nascent. This is so because the inclusive conception includes the egalitarian principle, which requires “that no person be disadvantaged with respect to life chances because of an ascriptive characteristic... (CG, 353).” Thus, once the foetus becomes a right-bearer, no further legal consequence could flow from the circumstances of its conception. To hold otherwise is to abstract objective morality from the inclusive conception of which it is a part and to exaggerate it into the whole, ignoring the libertarian commitment to the equal dignity of persons and the egalitarian commitment to equal self-authorship together with all the constitutional rights and entitlements to goods these commitments entail. It is to treat one section of chapter nine as the whole book. It is as if Chambers, having decided on reading the Introduction that the book lying before her was neither possible nor desirable, skipped to the chapter on sex.¹⁰

¹⁰ Chambers weakens my argument when she reinterprets it as saying that the foetus’s value consists in it being empirically valued by the spouses as a symbol of the value of the marriage to them. For then she can wonder why a symbol should limit the self-authorship rights of a woman who does not attach much importance to the symbol (150). My argument is that the union of the couple is outwardly embodied in the child and that without the embodiment, the union is incomplete as an objective validation of their worth because it then remains inward and subjective. So the symbol has point independently of the empirical interest of the parents in the symbol. To say that the value of the symbol is identical to the value the parents place on it is just to absolutize the egalitarian right of self-authorship, which, on the theory of CG, is only part of a constitutional whole.

Chambers asks: does an item of matrimonial property have the same *good* status as the child, preventing its legitimate destruction (151)? Here she ignores my argument for the child’s being a uniquely adequate embodiment of the marriage. The child is a spiritual being destined for freedom and self-worth, just as the marriage is a spiritual embodiment of the self-worth of the spouses (CG, 351). Does not the value of the symbol decrease the more symbols one has, Chambers asks? But if the good embodied in the child is not reducible to the empirical interest the parents have in the child, then there is no reason why the value of the child should be subject to the law of diminishing marginal utility. But Chambers cannot (apparently) conceive of a value that is independent of our empirically valuing it. Her critique of my abortion argument presupposes a fundamentalist egalitarian framework that CG precisely challenges as being insufficient to realize the liberal confidence. In chapter nine, I tried to integrate the egalitarian right of self-authorship with an objective morality that is no longer grounded in revelation. Ultimately, it is this objective morality that Chambers is rejecting, but without giving it serious consideration as a challenge to

In “Transitional Problems in Brudner’s Inclusive Conception of Liberalism,” John Charvet thoughtfully engages CG’s core arguments. His critique goes to the heart of the matter because it focuses on the conceptual moves that, I argue, take us from liberal atomism to the self-sufficient community. My argument, after all, is not that the political community informed by the inclusive conception is one that all those who call themselves liberals will find appealing; it is rather that this community is the one whose political authority all those who take the liberal confidence seriously must logically accept.

Charvet begins by expressing a doubt as to whether the liberal confidence as I’ve described it distinguishes liberalism from other positions that are not necessarily liberal. In particular, he doubts whether the liberal confidence distinguishes liberals from non-liberal Christians and Muslims, who believe that in subordinating themselves to a divine will, they “fulfil their divine essence and are of final worth.” (153) My response is that the liberal confidence from which I begin is a belief that the individual self has a worth not inferior to the worth of any other entity or being (CG, 13). Since the non-liberal theists Charvet has in mind believe that the individual is subordinate to a divine being, they do not share the liberal confidence as I describe it. They may believe in the individual’s final worth, but insofar as they seek this worth by alienating their independence of mind to a superior lord, they seek it in a self-contradictory way; for one cannot be a final end in acknowledging a non-reciprocal and unconditional obligation of service, and if the obligation is reciprocal and conditional, then the believer is a liberal,

her views. This is why her vote against my conclusions on sexual morality cannot count as a veto of the inclusive conception.

for his deity is no longer a lord. It is true, however, that the major religions believe in the individual's final worth and hope for a future confirmation of the belief that is contradicted in the present. But since I argue that the political life informed by the inclusive conception of public reason *is* the confirmation of that belief, non-liberal theists too have reason for joining the consensus on the inclusive conception, although (since they do not share the liberal confidence) CG cannot prove this to them.¹¹

Charvet's main criticism of CG is that the dialectical transitions it purports to describe from classical to egalitarian liberalism, from the latter to communitarianism, and from the latter to the self-sufficient community do not work. The self-contradictions that are supposed to impel us forward to a conception of public reason adequate to the concept of a public reason do not, he argues, exist. His arguments vary for the different transitions, so let us take them one by one.

Charvet's first argument is that, though I claim to begin with the atomistic premise of the self-supporting self, my starting-point is not truly atomistic. It is, he says, misleadingly called atomistic because it already contains an implicitly universalist claim to the free agent's worth; and so it is no surprise and no contradiction that this agent turns out to be drawn into a juridical relationship within which free agents recognize in each other the worth they claim for themselves (155). Charvet argues that if we want to be serious about atomism, we must begin with the universal egoism of Hobbes, according to which each agent claims an unlimited liberty for itself and recognizes a similar unlimited

¹¹ I should also say that the alternative formulation of the liberal belief that Charvet proposes—that each person's freedom has worth to himself alone and makes no claim to restrict the freedom of others (156)—is, in my view, not liberal at all, for it affirms a belief that *no* individual is of final worth. Moreover, it is too partisan a conception of the liberal idea. For example, I doubt whether someone who holds a communitarian conception of individual worth could accept a formula according to which social outcomes ought to be based on the choices of individuals who conceive themselves as initially dissociated and who make no claims to the respect of others.

liberty for others. If successful, this objection would mean that, while I claim that the liberal atomist is on board the dialectical train, I've really left him at the station. So let us see whether the objection succeeds.

First of all, I define liberal atomism as the claim that the individual agent's final worth is self-supporting. By this I mean that the individual agent sees its final worth as being independent of anything outside itself—of other individuals, society, community, the state, a deity, or whatever. Now this claim of final worth must be based on some plausible conception of a value that is not simply relative to my likes and dislikes; for I cannot claim a worth that others are obliged to acknowledge on the basis of something that I value but that others do not. I must base my worth-claim on something that all could value—a universal. The universal on the basis of which the liberal atomist claims final worth is his capacity for free choice, which is a plausible conception of a universal value because it is necessarily presupposed in the choice of relative values. Now the fact that the individual agent claims worth on the basis of a universal does not already contradict his atomism (does not make his atomism a pretense), because what makes him an atomist is his claim to be self-supporting, to need nothing or no one outside him to give him worth, to be morally self-sufficient. And it is that claim of moral self-sufficiency that is contradicted when, in order to convert a subjective claim of worth into an objective right to respect for worth, the agent must seek recognition from other free agents.

Accordingly, the fact that the atomist makes a universalizable claim does not make him any less an atomist as long as he claims moral self-sufficiency. Indeed, the alternative formulation of atomism that Charvet puts forward also contains a

universalizable claim. Hobbesian man lays claim to an unlimited freedom based on his capacity for freedom and recognizes a similar unlimited freedom for others.

Charvet argues, however, that my starting-point is not atomistic enough because it is not egoistic enough—that its invoking a universal value already makes the agent a social being, so that there is no contradiction in its becoming actually social. However, the fact that the agent invokes a universal value—the capacity for free choice—as the basis of its worth does not in itself make it a non-egoist, for an agent may lay claim to exclusive worth based on its willingness to identify itself completely with that capacity (by showing its indifference to everything else) and expect everyone else to acknowledge its superiority. Such an agent is even more egoistic than Hobbes's egoist, who at least is a believer in *universal* egoism. Hobbes's and Charvet's egoist claims a right to an unlimited liberty but recognizes the same right in others. The self with whom Hegel begins, by contrast, is someone who says: "I alone have absolute worth because of my uncompromising commitment to freedom and the whole world should bow to me." Hegel begins, in other words, from what Charvet calls a world of megalomaniacs. Charvet thinks that this world would contain no inherent logic toward mutual recognition, since each agent would think itself entitled to subordinate the other. He thus admits that this starting-point is truly asocial. "Only if one introduced something like a need for recognition of that entitlement would there exist the possibility of a transformation of the initial situation," argues Charvet, and that, he says, would be once again to smuggle in a reference to a rational principle (155).

The response, however, is that what drives the logic forward from megalomania to sociality is not an externally introduced need for recognition. It is rather the

contradiction inherent in a *subjective* claim of *absolute* worth. It is that contradiction that *inwardly* generates a need for the recognition of another free being to confirm the end-status the agent claimed in isolation. And the necessary movement to a relation of mutual recognition contradicts the megalomaniac's claim of moral self-sufficiency. In that sense mutual recognition is validated as the structure of valid worth claims out of the mouth of an extreme egoist.

What Charvet is looking for is not solely an atomistic starting-point but a stable one that does not lead beyond itself; and he calls any atomistic starting-point that does move forward misleadingly atomist. Now it may be that Charvet's atomism is stable, but if a "morally free zone" (as he calls it) is stable, then any political society derived from it will also be a morally free zone—no authority, no obligation, no rights, no duties, no wrongs, no punishment, nothing to hold it together but prudential self-interest; in other words, there would be no possibility of transforming the state of nature into a civilized society. But even Hobbes tried to derive political *authority* from the universal egoism of the state of nature; and he did this by postulating a universal—a natural *right* to do whatever one thinks necessary to one's self-preservation.

Charvet continues his theme of disputing the necessity of the transitions from one constitution to another in his discussion of my critique of the egalitarian constitution, which makes equal self-rule and self-authorship its fundamental end. My claim is that, when realized as a constitutional order, egalitarianism undermines the autonomous self it purports to nurture because it juxtaposes an impartial standpoint to a personal one and identifies the impartial standpoint with Law. As a consequence, Law's rule is a one-sided rule of the impartial (reasonable) standpoint, one that, if left to its own momentum, would

completely dominate individual decision-making concerning life choices. Charvet denies that this contradiction exists. While collisions may occur between the impartial and partial standpoints, there is no contradiction between them, he says, because individuals need adopt the impartial standpoint only with respect to fair terms of interaction (second-order impartiality), not with respect to every decision they make for their own lives (first-order impartiality). Charvet suspects that I confuse these two senses of impartiality (157).

My response is that the contradiction I wanted to exhibit is not one *between* the impartial and partial standpoints. It is rather the self-contradiction of the impartial standpoint itself when it alone is equated with Law, as it must be within a paradigm that splits impartial and partial standpoints. The self-contradiction arises in the following way. Because it presupposes the fixed reality of the atomistic individual, egalitarianism equates the standpoint of private rationality with that of atomistic individuals. It therefore engenders a dichotomy between the impartial and partial standpoints; for if the partial standpoint is the private perspective of the atomistic individual, then an impartial standpoint must exclude this. But given the dichotomy between impartial and partial standpoints, egalitarianism must identify the rule of Law with the *one-sided* rule of the *impartial* standpoint (in the inclusive conception, private interests are themselves ethical wholes and Law encompasses both standpoints in mutual recognition). This means that a self-consistent rule of Law through government officials would submerge the standpoint of private rationality. Because, however, this result would contradict the autonomy of individuals that egalitarianism places at the foundation of its constitution, egalitarianism must recoil from a self-consistent rule of Law, accepting *ad hoc* accommodations between impartial and partial standpoints. This too, however, is a self-contradictory

outcome, for the impartial standpoint has now been revealed as partial in relation to the equally essential standpoint of private rationality; and the rule of impartial Law has therewith dissolved into the rule of a governing elite. Accordingly, the contradiction in the egalitarian paradigm is not the opposition between impartial and partial standpoints; it is the self-contradictoriness of a one-sided conception of the impartial.

In CG I criticized luck egalitarianism as an example of the self-contradiction into which the egalitarian constitution falls (CG, 255-8). I argued that luck egalitarianism denies legitimacy to social outcomes resulting from the free play of individual differences even though its fundamental end is the self-determination of the individual human being. Charvet agrees that luck egalitarianism yields results that contradict individual autonomy but sees this as a consequence of its implausible conception of the person as divested of individuating characteristics rather than as a consequence of any inherent contradiction in egalitarianism (159). My response is that luck egalitarianism's abstract conception of the person is itself inherent in egalitarianism, because it is the conception of the person to which one is led if one thinks that equal human worth rests on an equal human potential for self-determination set over against the aimless and contingent causality of nature. Actualizing equal moral worth then requires actualizing the ideal of human self-determination by publicly invalidating distributional outcomes attributable to individuating characteristics over which one has no control, which program contradicts the moral worth of *individuals*. Accordingly, luck egalitarianism's conception of the person flows from the egalitarian ideal of self-determination viewed as militant against its own human condition: that of embroilment in a causality not of its making. In that sense,

luck egalitarianism shows the true face of liberal egalitarianism when the latter's ideal of autonomy is raised to a fundamental end.

Charvet argues that the alternative to luck egalitarianism put forward in CG—an equal right to opportunities for leading a self-valued life—is not a compelling interpretation of the idea of the equal moral worth of autonomous beings (160). While himself attracted to that conception of distributive justice, Charvet denies that humans are equal in moral worth and fears that a compelling interpretation of that principle would yield a much stronger form of egalitarianism—equality of outcomes, for example. A compelling interpretation of equal human worth, he says, would conclude that “it is unfair that those with superior natural talents should enjoy better outcomes or better opportunities than the rest (160).”

My response is that Charvet's interpretation of equal human worth is not literally compelling, because other distributive principles are at least consistent with equal human worth, including the one to which we are both attracted. Nevertheless, Charvet argues that the principle of distributive justice we favour is inferior to the principle of outcome equality as an articulation of equal human worth. But this is doubtful. For how can a principle that denies legitimacy to the distributional impact of individual differences even after everyone has sufficient means to pursue valued ends be even a plausible interpretation of the equal worth of *individual* human beings? By equal worth, presumably, Charvet means something like equal dignity rather than equal worth, high or low. Treating individual endowments solely as a collective asset certainly affirms the equality of human individuals *qua* individuals; but it is an equality of insignificance rather than of dignity.

Finally, Charvet criticizes the final transition in CG—that between undeveloped communitarianism and a developed one that incorporates the libertarian and egalitarian constitutions as constituent elements. Undeveloped communitarianism submerges atomism, I argue, whereas developed communitarianism contains atomism as a subordinate moment. I call this position mediate atomism, and Charvet is unclear as to its meaning. He argues that for Hegel, atomism is a vanishing moment, whereas he is not sure what happens to atomism in my account. He thinks mediate atomism is my idea rather than Hegel's (163).

In my view, mediate atomism is Hegel's idea. The usual, totalitarian reading of Hegel's theory of the state (which Charvet accepts) is, I believe, mistaken. Charvet's characterization of Hegel as positing the standpoint of the self-supporting self only to immerse it in ethical life is an apt characterization of the young Hegel, not of the mature author of the *Philosophy of Right*. The quotations he gives to support his reading occur at the point in the *Philosophy of Right* at which ethical life first appears in its undeveloped form, prior to civil society. Developed ethical life makes room within itself for the standpoint of the self-supporting self and therefore for the institutions of private property, freedom of contract, a free market, and so forth. That is why the legal framework Hegel calls Abstract Right, which is ordered to the self-supporting self, is preserved as a semi-autonomous legal order within fully developed ethical life. Were it true that the standpoint of the self-supporting self is a vanishing moment in Hegel's ethical community, there could not be a permanent framework of Abstract Right in Hegel's political thought—that is, a framework of law independently ordered to the monadic self.

Let us, however, leave exegetical disputes aside. The important questions are what mediate atomism means and whether it makes sense. What it means is that the self-contradiction into which the atomism-denying ethos community falls (CG, 316-18) shows that community logically lacks the atomistic self to confirm its end-status, and so the atomistic self's rational importance is mediated through this lack. In that sense, the modern idea of an evanescent individual's claiming absolute worth on its own is logically generated *from* the ethos community and therefore *within* a larger whole now encompassing both community and individual in their extreme opposition. Because the atomistic self's rational worth is inherently a mediated worth, it too is deficient to itself in its isolation, for its subjective claim of absolute worth lacks the object that validates the claim. So it yearns and it strives. In order to overcome its inner deficiency, the atomistic self enters into relationships of mutual recognition (private property, contract, the market, due process of law) through which its claim to worth is confirmed by another. These relationships, however, also confirm community or mutual recognition as the matrix of valid worth claims, and they do so now (unlike in the ethos community) out of the mouth of community's adversary—the self who claims to be self-supporting. Because relationships ordered to the end-status of the atomistic self are also the necessary means by which the end-status of community is independently confirmed by an adversary, community must recognize the institutional products of the atomistic self, which can therefore reciprocally recognize the end-status of community without self-loss.

Does the idea of mediate atomism make sense? No doubt the idea that the non-embedded self is itself embedded has a paradoxical ring. Still, it is perfectly intelligible. The claim that the self is self-supporting is in one sense false because the self-supporting

self is rationally necessitated through the internal deficiency of the ethos community, and so its worth is a mediated worth; yet the claim is in another sense true because what is rationally necessitated is precisely the self-supporting self; and so all the institutional embodiments of its worth are taken up into the state as individual rights limiting political authority. Religion has its own way of expressing the paradox of mediate atomism. It says that the devil is a fallen angel.

4.

In his excellent essay, “Fairness, Consensus, and the Justification of the Ideal Liberal Constitution,” Philip Cook directs the following criticisms against the argument of CG: a) There are many different philosophic articulations of each liberal constitutional paradigm; given this internal diversity, there is no prospect for a convergence of the paradigms on an inclusive conception of public reason because there are no unified paradigms that could converge. b) Neither the liberal paradigms nor the inclusive conception are comprehensive philosophic views in Rawls’s sense, for they do not include “metaphysical, ontological, or theological commitments (176).” Therefore, the inclusive conception must be freestanding of comprehensive views despite my claims to the contrary. c) Since the inclusive conception of public reason is a political conception freestanding of a comprehensive philosophy, I must provide an account of how this conception addresses the problem of reasonable pluralism among comprehensive views. Either this account will invoke a Rawlsian overlapping consensus or it will, by denying reasonable pluralism or by failing to address non-liberal comprehensive views, fail to produce a stable agreement. d) My solution to the problem of the burdens of judgment is

dialectical reasoning. But dialectical reasoning is too esoteric to count as a public justification of the inclusive conception.¹² e) There can be no genuine convergent consensus on the inclusive conception because the representatives of each paradigm accept the inclusive conception for their own reasons but not for a shared reason. As a consequence, the convergent consensus collapses into a *modus vivendi*. Since the consensus is a *modus vivendi*, it lacks the moral virtues of fairness, publicity, and reciprocity. The representatives of the paradigms accept the inclusive conception for their own selfish reasons but not for reasons all could accept. My responses follow.

a) The constitutional paradigms are each organized by a particular conception of freedom regarded as the most fundamental end (public reason) of political society. Each paradigm I describe and take to be a constituent element of ideal constitutional law is the most logically self-consistent working out of its fundamental idea. It is thus an ideal construct that is not necessarily identified with any particular articulation of the paradigm in the history or current literature of political philosophy; and so the fact that there are diverse articulations is not fatal to the unity of the paradigm. Of course, the possibility exists that there is one expression of the paradigm that can be taken as the model because it is the most self-consistent and uncompromising elaboration of the paradigm's idea of public reason. Thus Locke's *Second Treatise* and Kant's *Doctrine of Right* are both expressions of classical liberalism (libertarianism in CG), but I regard Kant as the best representative of that paradigm because his flaws are, for the most part, nothing but the flaws of the paradigm itself. The fact of disagreement within the paradigms does not

¹² Cook also claims that I mischaracterize the burdens of judgment as a problem of indeterminacy rather than as a problem of inconclusiveness (180). However, even if he is right, nothing changes, for dialectical reasoning is also immune from the problem of inconclusiveness. It cannot reasonably be argued that parliamentary absolutism, or the absolutism of the egalitarian principle, or the absolutism of ethos is an adequate realization of government limited by respect for individual worth.

fragment the paradigms and so does not preclude their convergence on the inclusive conception because, given a certain conception of the fundamental public reason of the constitution, one can speak of an ideal working out of that conception by its ideally best representative theorist. We can then think of the convergent consensus on the inclusive conception as a consensus among the ideal theorists of each paradigm.¹³

b) The paradigms do indeed represent comprehensive philosophic views. This is so because each rests on a certain liberal conception of the fundamental end of human association, which is also a conception of what grounds the liberal confidence in the individual's unconditioned worth. The full working out of the implications of that conception for all the most important questions would be a comprehensive philosophy of life. For obvious reasons, I did not develop the philosophic system latent in each conception but tried to work out only its consequences for the constraints on, and proper goals of, state power. Nevertheless, each paradigm rests on a conception of public reason, and every conception of public reason is potentially a comprehensive philosophy of everything. The inclusive conception is therefore itself the germ of a comprehensive philosophy; its full development is Hegel's *Encyclopaedia of the Philosophical Sciences*.

Nevertheless, the inclusive conception of public reason developed in CG is indeed freestanding of *some* comprehensive views, and so it is a political conception in a sense that Hegel's is not. While not freestanding of comprehensive liberal views, the inclusive conception is freestanding of comprehensive views that do not take public reason

¹³ Cook thinks that strict rather than luck egalitarianism is the most self-consistent egalitarianism (174). Perhaps so, but it is not the most self-consistent elaboration of the conception of freedom as self-determination, because it views equality as a freestanding value apart from the end of self-determination. The egalitarian paradigm I describe is the realization of a particular conception of freedom; that is what makes it a paradigm of liberalism. Within this paradigm, egalitarianism is a by-product of realizing human self-determination against the causality of blind luck.

(however specified) as the most fundamental end of human association. That is to say, it is freestanding of comprehensive views based on a supernatural revelation. The inclusive conception of public reason is thus a political conception, not because it is untied to a comprehensive philosophical system (it is so tied), but because its justification addresses a limited audience comprising just those who believe that the human individual's worth is inferior to no other end. That is why the justification of the inclusive conception is a constitutional theory rather than a political philosophy. But the inclusive conception is not freestanding of comprehensive liberal philosophies; on the contrary, it embraces them. I believe Cook has confused these two different senses of a political conception.

c) Since I dispute that the inclusive conception is freestanding and political in Rawls's and Cook's sense, I do not have to address the problem of reasonable pluralism among comprehensive liberal views. More specifically, I need not address the problem of reasonable fragmentation, because I deny that fragmentation within the liberal family is reasonable. The argument leading from libertarian atomism to the inclusive conception is precisely the argument *against* the reasonableness of persistent fragmentation within the family of liberal comprehensive views. However, if by pluralism is meant simply diversity, then the inclusive conception may be said to solve the problem of reasonable pluralism among liberal comprehensive views by incorporating the diverse liberal constitutions within a complex whole and by working out the principles of their mutual adjustment. Accordingly, Cook's argument from the freestandingness of the inclusive conception to the instability of the convergent consensus in the face of reasonable pluralism does not go through. If the argument justifying the inclusive conception works,

fragmentation is not reasonable, while the diversity that is reasonable is incorporated. Therefore, the inclusive conception is not unstable in the face of reasonable pluralism.

Nevertheless, the inclusive conception is faced with the reasonable fragmentation between liberal and religious comprehensive views, for its justifying argument does not explicitly address religion. As I've said, the inclusive conception is a political conception in relation to religion. Does this fact destabilize the consensus on the inclusive conception?

It would do so if no reasons could be offered to religious believers showing why it would be rational for them to join the consensus. However, while the justification of the inclusive conception does not claim to be able to convince believers that the inclusive conception is their fundamental end, it does provide a vision of a liberal constitutional order that should attract believers, and this for two reasons. First, the vision presented is one of a common life sufficient to satisfy the finite individual's aspiration to a timeless dignity qua finite individual, the very end for which believers hope insofar as their beliefs are reasonable rather than superstitious. Second, the constitution ordered to the inclusive conception provides, not only for the free exercise of religious belief, but also for the reasonable accommodation of laws to religious practices not inconsistent with rights to liberty and equality, for even-handed public support for religious communities that honour the egalitarian principle, and even for the integration of religious schools and courts into the public constitutional order. For these reasons, religions need not face the problem Rawls admitted they must confront in joining the overlapping consensus on political liberalism: that of endorsing a constitutional order in which their comprehensive

doctrines, relegated to the private sphere, might not flourish and might even decline.¹⁴ In the constitutional order governed by the inclusive conception, there is every reason to believe that religions will flourish. Hence the reasonable fragmentation between liberal and religious comprehensive views need not destabilize the consensus on the inclusive conception.

d) Cook's complaint that dialectical reasoning is too esoteric to count as a public justification trades on an ambiguity in the meaning of "public". A public justification can mean one that proceeds from a shared conception of what is universally and necessarily true about human beings and that all reasonable minds could therefore accept once they adopted the conception and saw clearly where it leads; or it could mean a justification in terms of shared beliefs about less fundamental things employing everyday modes of practical reasoning. I take it that Rawls's notion of a public justification of the basic principles of a just polity is a justification of the former sort (for it proceeds from two fundamental human capacities), and so too is dialectical reasoning. But a public justification of the former sort can, perhaps must, be esoteric, for it requires adopting a transcendent vantage-point from which to construct or sift the framework of principles within which everyday practical reasoning from shared beliefs in the political forum will operate. Indeed, Rawls's public justification of the basic structure of society is itself an esoteric justification, because the original position from which representatives choose the basic principles of their common life is structured so as to exclude everyday practical reasoning from ends to means in light of all available information. No doubt, the public justification of policies, laws, and judicial decisions must be a justification that is

¹⁴ John Rawls, "The Idea of Public Reason Revisited," in Rawls, *Collected Papers*, ed. Samuel Freeman (Cambridge, MA: Harvard University Press, 1999), p. 590.

empirically and broadly accessible as well as rationally acceptable to all (a judge should not reason to a decision as a philosopher would), but dialectical reasoning is not meant for those contexts; it is meant only for what Rawls calls the constitutional essentials.

e) Cook is mistaken in thinking that there is no shared reason for the convergence of the constitutional paradigms on the inclusive conception. Their shared reason is that the inclusive conception best fulfills the liberal confidence in the individual's final worth that underlies each of the paradigms but that the paradigms cannot separately confirm satisfactorily.¹⁵ Each paradigm is a philosophic interpretation of the liberal confidence, but the full realization of the paradigm contradicts the confidence by collapsing into a form of despotism, pushing the liberal to the inclusive conception as the most adequate interpretation. Since, moreover, the representatives of the paradigms agree on the inclusive conception for a reason that is common to all, the consensus is a true meeting of minds rather than a mere *modus vivendi*; therefore, it does embody the virtues of fairness, publicity, and reciprocity.

5.

Thomas Poole's "The Devil's Account: Of Men, Morals, and Constitutional Goods" reminds me of a cartoon drawing of Leo Strauss that once appeared in the New York Review of Books. Depicting Strauss with pointed ears and two right hands, it accompanied a hostile review of Strauss that one author of a letter to the editor described as bearing the same relation to Strauss's work that the cartoon drawing bore to the man.

¹⁵ Cook misdescribes the liberal confidence when he says that it involves a commitment to the proposition that the human agent's value is "not derived from membership of a group or participation in a culture (166)." That description ostracizes the communitarian from the liberal family. I say that the liberal confidence involves a belief that the individual agent's worth is not inferior to that of the group, culture, society, or state.

Poole's caricatures of CG begin early. He describes the state under the inclusive conception of public reason as "an end in itself—an end, indeed, that is, in a sense, superior to all others" (114).¹⁶ He thus ignores what I say about the liberal confidence that the best liberal state vindicates and by whose full juridical implications its power is constrained. The liberal confidence, I say, is a confidence that the human individual is a bearer of final worth inferior to no other value and that there is thus "no *more* fundamental end to which it may be unilaterally subordinated" (CG, 13). The state under the inclusive conception is indeed an end-in-itself; but it is objectively an end-in-itself only to the extent that its authority is capable of being recognized by a free self as recognizing the self's own *equal* and independent end-status.

Throughout his essay, Poole assumes that the end-status of the state must submerge the individual's, that unless the individual person is the *sole* end-in-itself, it is nothing. This devilish prejudice renders him tone deaf to what he calls CG's "Zarathustra moment"—its climactic argument: that because the state's end-status can be objectively validated only by an independent other, it must await spontaneous validation from the individual self who initially claims to be the sole absolute end (the atomistic self). It is this requirement of deferred gratification, so to speak, that gathers every institutional example of sociality (for example, private property, contract law, a free market) ordered to the atomistic self into the state that is truly an end-in-itself, so that state authority is limited by those institutions. Moreover, since neither the state nor the individual self is more fundamental than the other, the only truly fundamental end is the whole formed of

¹⁶ The qualification, "in a sense," is curious, because Poole never tells us in what sense CG's state is superior to all other ends and in what sense it is not. It is thus not a qualification reflecting subtlety of thought but rather the devilish reservation of someone who is not sure about the truth of what he is saying but who wishes to say it anyway.

their mutual recognition. This whole is the archetypal reciprocity of which property, contract, rights of democracy and natural justice, etc. are types, and this is what I call dialogic community.¹⁷ But all this is lost on Poole, for whom any state regarded as an end must be an authoritarian state.

To support his statist reading, Poole quotes (114) a passage from CG that he knows does not refer to the fully developed state within dialogic community but rather to the ethos community that I criticize as being inadequate to dialogic community and that, when absolutized, is certainly illiberal and possibly fascist. I say “he knows” because, having been informed of this at the symposium, he admits a few sentences later that the ethos community is not identical to the fully developed state, which recognizes the independent end-status of the individual self. Apparently unsure of how to reconcile this admission with his statist reading but unwilling to give that reading up, Poole makes a devilish move: first he claims that he is at a loss to understand by what “constitutional alchemy” the reconciliation between state and individual is supposed to come about; then, notwithstanding the argument’s unintelligibility to him, he confidently announces that it changes nothing important from the ethos community (116).

Why does the development change nothing important? Poole says that the final position regarding the state does not repudiate the earlier claim that the state is an end in itself (116). This is true, but the earlier claim was that the state was the *only* end in itself, whereas the final claim is that state and individual are mutually recognizing ends-in-themselves, neither one prior or superior to the other. It is perhaps because this difference

¹⁷ It is this whole which Hegel praises as “an absolute unmoved end-in-itself,” not the state as opposed to the individual, as Poole thinks. Hegel distinguishes between the state “as a political entity” and the state simply, which includes an independent private sector; *Philosophy of Right*, trans. T.M. Knox (Oxford: Oxford University Press, 1967) para. 273.

between domination and equality is opaque to Poole that he believes it to be insignificant. He also says that the developed conception incorporates “most of the essentials of the ‘communitarian narrative’, including progress to a goal of the individual’s identification with communities and sub-communities....” (117). Of course, the inclusive conception would not be inclusive if it did not incorporate the essentials of communitarianism. However, Poole ignores my argument about how the essentials that are preserved are necessary to vindicate the liberal confidence in the individual’s final worth and about how the aspects of communitarianism that are incompatible with that confidence are discarded. More generally, he ignores the sifting procedure that is a central theme of CG—the procedure by which elements of a paradigm instantiating the form of mutual recognition are preserved as fixtures of liberal constitutionalism, whereas those flowing from the claimed hegemony of the paradigm fall by the wayside.

In thinking it sufficient to brand the inclusive conception as illiberal to show its debt to “the communitarian narrative,” Poole reveals another of the prejudices that prevented his authentic engagement with the text: that communitarianism and liberalism are antithetical. Thus, the very fact that I describe communities as sources of individual fulfillment that the state has a duty to foster is supposed to undermine the state’s liberal credentials (117); the fact that I deny an inherent antagonism between state and religion and say that religious communities can, under stringent conditions, be incorporated into the public constitutional order so as to win their allegiance to the liberal state signifies to Poole that the state is “a divine will” superior to all other ends (118). Evidently, Poole brought to the text a preconception, hard as brimstone, of what liberalism is: it is, he thinks, the Humean view that the individual is an end to which the state is a useful means.

But CG argues that liberalism is the confidence in the absolute worth of the individual, and whether that confidence is best realized by an instrumentalist view of the state or by a teleological view is precisely what is at issue in the controversy among liberals. Since he has prejudged the issue, Poole is deaf to my argument that the instrumentalist view of the state ends up contradicting the individual's end-status (for it produces a Leviathan) and that the individual can be an end only if political community and individual are both ends and means for each other. Poole does not address this argument for the reconciliation of communitarianism and liberalism. Instead, he uses his prejudices as a pitchfork.

Poole's prejudices are further on display in his argumentative style. It is throughout rhetorical rather than philosophical. In many cases, rather than engage with an argument of mine or even make one of his own, he is content to restate the various conclusions of the book in a negative tone or to let an assertion of his preferences take the place of an argument. For example, Poole repeatedly complains that CG is "heavy" or "thick" with law (119, 122). On scrutiny, these epithets turn out to mean nothing more than that there is too much law for his liking, that he feels stifled by it, and that he would rather have more politics. Never mind that the law is constitutional law, which limits the power of the state, that the greater liberty he prefers is a greater liberty for the state, whose alleged authoritarianism under the inclusive conception he just finished condemning and now unwittingly contradicts. Apparently, his earlier antipathy toward an all-powerful state was devilishly dissembled. Moreover, he counts it as an argument against corporation-mediated political representation that it is out of step with the prevailing "cult of individualism" or that "I'm not at all sure that I'd like to be politically represented by [my corporate affiliations]" (128). Even a few acid-soaked quotes from

Hegel make their appearance, even though Poole has admitted he does not understand what they mean (116).

Poole claims that the perfectionism of CG's liberalism is illiberal. "[C]an," he asks rhetorically, "a polity that tries to shape individual personality truly be *liberal*, even when its aim is to produce individuals suited...to liberalism (122)?" Choosing the metaphor of shaping is a way of shaping the interlocutor's response—or of devilishly trying to. If by shaping is meant something like the activity of a sculptor on a piece of clay, then of course shaping personality is incompatible with the liberal commitment to individual moral independence that is at CG's centre and that Poole barely mentions. I think a better metaphor than shaping would be wooing. The public education to the life sufficient for individual dignity must itself be compatible with respect for dignity (hence moral independence), and so it will educate by holding up attractive models and signposts but always leaving ways of life to individual choice.

Poole complains that the signpost laws—against incest, polygamy, public prostitution, hate speech—while they purport to be soft-edged, are just as coercive as other criminal laws. He sees "little material difference" between a hate speech law and the UK law against theft, both of which impose terms of imprisonment and recognize exculpatory mental states (123). But he sees a superficial similarity and misses a profound difference. It is not misleading to speak of instructional laws aiming at a good as more soft-edged than laws whose sanctions vindicate rights against violations. The hate speech law I use as an example provides a defence to those whose racially inflammatory speech expresses profoundly held views formed upon reflection in order to protect self-authorship. So, for example, if a geneticist were to publish views based on his

research that a racial group is intellectually inferior to others, his speech would be protected even if it had been inwardly motivated by racial hatred. But this is not true of the law against murder, assault, theft, etc. Even if the thief, upon philosophic reflection, believed that “everything is permitted,” that would not be a defence to theft. The defence of lack of dishonesty (*mens rea*) does not protect the philosophically sincere thief; it negates the element of intention that transforms a tortious taking into a challenge to the public norm of property. Taking something one honestly thinks is one’s own does not challenge the public norm in a way that requires the latter’s vindication through punishment, whereas taking it knowing it belongs to another (and *a fortiori* taking it to prove a philosophical point) does. Here, challenging the norm *is* the crime. But challenging the public norm of racial equality through reasoned speech is not the crime of hate speech. Such speech is protected by the right of free expression, which thus limits the reach of the hate speech law. So, with their exemptions to protect self-authorship, instructional laws really are more soft-edged than those meant to prohibit and punish right-violations.

It is, however, in his comments on the relation between state and religion in CG that Poole’s demons take over completely. These comments are based on a spectacular misreading, which results in a confusion of concepts, which he then attributes to me. In CG 81-2, 384, I distinguish between a constitutional anti-theocratic principle, which forbids the use of state coercion to serve religious ends, and a neutrality principle, which forbids the state from showing a preference (for example, through its spending) for the private choice of religious belief over nonbelief. I argue that the anti-theocratic principle is a fixture of liberal constitutionalism because the political authority of revelation is

incompatible with the independence of mind (freedom of conscience) needed to validate authority as self-imposable. By contrast, the neutrality principle, I argue, is relative to conceptions of public reason that equate the good with subjective opinions of the good because they equate objective morality with faith-based morality. Accordingly, I argue *against* the neutrality principle's being an essential feature of liberal constitutionalism; for once the state is seen as promoting a public liberal good—the common life sufficient for dignity—there is nothing illiberal about the state's evenhandedly supporting religious schools or using non-denominational religious symbols to help guide the young to that good and to win the allegiance of religions to a public end kindred to their own.

Despite their clear distinction in the text, however, Poole equates the anti-theocratic principle with the neutrality principle and, since I endorse the anti-theocratic principle, has me endorsing the neutrality principle as well. He then complains of my lack of clarity in failing to explain how the neutrality principle is to be “trade[d] off” against the state's accommodation of religious communities (124). It is not to be traded off; it is to be discarded. He also complains of my lack of consistency in opposing the justification of coercive laws by religion, on the one hand, and favouring the public support of private belief and the public adoption of religious symbols for secular ends, on the other (124). There is no inconsistency. The first is prohibited by the anti-theocratic principle; the second becomes permissible once the neutrality principle is relativized to superseded conceptions of public reason. Having manufactured a confusion with a careless reading, Poole then congratulates himself on having “identified” a theoretical problem in the text (125).

Matters become even more peculiar, however, when Poole begins to draw out the implications of the phantasm he has created, attributing them all to me. Having got it into his mind that the anti-theocratic principle and the neutrality principle are one and the same, he can wonder why, if I am willing to compromise the anti-theocratic principle in allowing the use of religious symbolism (“In God we trust”) to attract religions and to educate the young to the fundamental public reason of the constitution, I should not also be willing to let rulers justify all coercive laws on religious grounds. “It is certainly possible,” he writes, “to read the text—which, while unclear at this point, certainly lends itself to this interpretation—as saying that all laws may be justified on religious grounds (125).” But the anti-theocratic principle is not violated by the state’s adoption of religious symbols to further a public, secular end, for it prohibits only the use of state coercion to further an end of revealed religion. And the argument for adopting religious symbols for a secular end can hardly support the justification of laws on religious grounds. Indeed, this is so, as I say, even if all citizens espouse the same faith. “That there is a separate freedom-of-conscience reason against the public authority’s subservience to revealed religion means that laws or executive acts whose justification is religious are unconstitutional (simply) even within a community where the religion promoted happens to be one that everyone professes” (CG, 184) Is it possible to read that sentence as saying that all laws may be justified on religious grounds?

Poole thinks, however, that because I say there is nothing wrong with the state’s using religious symbolism, literature, parable, etc. to educate the young to the inclusive conception and to attract the religious to the public constitutional order, I must also believe there is nothing wrong with atheistic rulers’ invoking religion to justify coercive

laws as a way of “selling” the law to the religious (125). And then, after fixing me with this belief, he declaims at length about how paternalistic and manipulative this is and about how it “undercuts the essential liberal predisposition to deny legitimacy to laws...that invoke supernatural sources of authority (125).” At this point Poole is fighting nothing but the demons of his own mind; he has lost all contact with the text.¹⁸ Had he not conflated the anti-theocratic and neutrality principles, he might have noticed my argument (on CG, 82) for the enduring validity of the anti-theocratic principle; and that argument blocks the kind of deception and manipulation he claims is permitted by my views. The anti-theocratic principle prohibits the justification of coercive laws by religious ends, because such justifications could not be accepted by the free minds rulers need to validate their laws as expressions of public reason. But that rationale for the anti-theocratic principle also forbids manipulating persons to obedience to laws by invoking spurious religious grounds, for such deception is also inconsistent with the rational self-imposition of the law by free minds. However, the principle against disrespect for the free mind does not forbid educating the young through religious stories to the virtues needed to sustain the liberal constitution, because this education does not deceive or manipulate but rather uses the pedagogical vehicle appropriate to a certain stage of mental development. Nor does it deceive or manipulate the religious to attract their loyalty to the state with symbols reflecting the similarity between the object of religious hope and the public life sufficient for dignity, because averring that similarity is telling the truth.

¹⁸ Here, perhaps, we see an expression in action of Poole’s philosophic commitment to a “reduction in the role assigned to reason in the formation of judgement, and a corresponding increase in the role assigned to the imagination (131).”

Poole's devilish technique of distorting the text to suit his polemical purpose is continued in his comments on the model of corporate political representation that I advocate in CG. Thus, he says that in order to "play down" the static quality of the corporate organization of the private sector, Brudner "avoids" using the term "life-long" commitment and "does not deny" that individuals can change their membership of corporations...as their interests and careers change (127)." The impression sought to be created is that I am trying to camouflage without contradicting the rigidity of the model. I did not "avoid" the adjective "life-long"; I simply did not use it. Had it come to mind, I would have rejected it as inappropriate. Corporations are not static; they come and go. And it is devilishly misleading to say that I did not deny that people can change their corporate membership; I affirmed it. Poole even attributes to me the claim that corporate representation is preferable to atomistic representation because it "formalizes existing arrangements—lobbying and the like—which favour the rich and powerful...(128)". One wonders what could have possessed him to write that. What I say (CG, 418) is that "when corporate representation is formalized, it is made transparent and subject to rational criteria of inclusion. All groups possessing the requisite qualifications are equally represented regardless of wealth, numbers, and organizational savvy, and their interactions with Law's agents occur in public."¹⁹

¹⁹ Poole claims that the closest analogy to corporate democracy is shareholder democracy, whose well-known limitations he enumerates (128). But that is the wrong analogy, for shareholders are absentee owners, not members with a life-pervasive commitment to the corporation. A better example is industrial democracy as evinced in German and Swedish "co-determination" systems. Poole also says that "[t]here seems to be nothing in the inclusive principle that would prevent" barriers to employment such as the closed shop or bloodline rules of membership (129). But the inclusive conception includes the principle of careers open to talents, which precludes discrimination based on factors irrelevant to the job. Finally, he argues that tying voting to corporate membership reduces "voice" because corporation members rather than monadic individuals are represented, and it reduces "exit" because individuals who drop out would be disenfranchised. But I argue that corporation membership enhances voice because it gives the individual an ongoing voice for his ethicized particular interests rather than a sporadic voice for his generic will. As for

There is more in this article, but it is more of the same and nothing from which one can learn. It is frankly hostile to principle (131) and proudly committed to a reduction of the role of reason in the formation of judgment (131). The best that can be said of it is that it is aptly titled.

6.

The central point of Lorenzo Zucca's interesting essay is that I do not deal in CG with the most pressing problem facing liberal constitutional orders today: how to integrate secular and religious comprehensive views under one constitutional order and one public reason. "How is it possible," he asks, "to support a truly secular state and society if this means to alienate some religious people? Conversely, how can we integrate religious minorities if they simply reject...our most basic values? (213)." Zucca himself doubts that any political reconciliation between secular and religious standpoints is possible without painful compromises of cherished values (216). However, since I argue that an inclusive conception of public reason is necessary to validate political authority to all liberal sects, my leaving religion out of the consensus on the inclusive conception constitutes, he argues, a serious deficit in the validity of political authority. Authority is validated for liberals; but what about non-liberal theists?

In an important sense, this criticism is well founded. In the Introduction to CG, I say that CG is a work of constitutional theory rather than political philosophy because its argument is directed at a limited audience. Whereas political philosophy addresses all

the disenfranchisement of the unemployed, here Poole is in the details. I did not write an entire electoral law. Of course, provision would have to be made for the unemployed and the retired, perhaps by treating them as members emeritus of their last corporation. Being unemployed does not mean being without a profession.

intelligent minds and makes no unvalidated assumptions, constitutional theory addresses those who subscribe to an underived belief. The fundamental belief CG takes for granted is a belief in the final worth of the individual, a worth that is inferior to nothing (though not necessarily superior to everything). Given that most religions affirm the existence of a Being that is superior in worth to the individual, religious believers are not taken as espousing the liberal confidence. But the argument of CG is meant to show that anyone who takes the liberal confidence seriously must end up in the inclusive conception. Accordingly, inasmuch as religious believers do not share the liberal confidence, they are not offered reasons for joining the consensus—at least not explicitly. This means that the liberal state's coercive authority will not be demonstrably valid for them.

I want to make two points in response to Zucca's criticism. One is that I offer reasons for not engaging religious believers directly that Zucca does not address. The second is that I indirectly offer believers reasons for joining the consensus that Zucca does not sufficiently credit.

In the introduction to CG I explain why I adopt the limited perspective of constitutional theory rather than the universal one of political philosophy. That reason has to do precisely with the contest between religion and secularism. Political philosophy seeks an absolute justification for political authority acceptable to all intelligent minds. This requires that its justification be presuppositionless. But the religious consciousness rejects the very idea of a presuppositionless justification because it rejects the primacy of public reason for the primacy of faith in revelation; and this makes a commitment to the idea of a presuppositionless justification itself a prejudice. Thus, I argue, the goal of political philosophy is unattainable in an historical situation characterized by the

opposition between secularism and religion. I say that this does not necessarily entail the impossibility of political philosophy, because it is an open question whether the opposition between religion and secularism is necessary and fixed or merely relative to our historical situation. I say that we must be agnostic about this question, because *knowledge* that faith and reason are necessarily opposed presupposes the very presuppositionless standpoint that is contested. But whether necessary or historically contingent, the opposition between religion and secularism is our present condition, and in this condition, the goal of an absolute justification of political authority is unattainable. With this conclusion Zucca agrees, and so it is difficult to understand his criticism of my demurring from a task we both think is unachievable.

However, that is not the end of the matter. For while the religious consciousness is not explicitly offered an argument explaining why it must adopt the inclusive conception given its fundamental belief, it is nevertheless offered a picture of liberal constitutionalism that, unlike the libertarian, egalitarian, or communitarian constitutions taken separately, can attract its loyalty on more than instrumentalist grounds. Neither the libertarian nor egalitarian constitutions can do this, because their conceptions of public reason relativize the good and so consign religions to the private sphere, setting up a wall of separation between neutral public right and private conceptions of the good. They thus embody a triumphalist secularism that denies religion entry into the public order, that fails to provide an environment congenial to religion's flourishing, and that therefore appears to religion as a godless and hostile humanism. Neither can the communitarian constitution attract the allegiance of the religious believer unless its communal way of life is religious and the believer is a devotee of the dominant religion. Otherwise, he or

she will be an outsider to the communal ethos and, since the ethos is the source of rights, vulnerable to discrimination or worse.

By contrast, the religious consciousness has a strong reason to join the consensus on the inclusive conception whatever its religious persuasion. This is so because the inclusive conception is a philosophic reinterpretation of the religious idea that the most fundamental reality is a mutual recognition of Law and the concrete, individual subject. Moreover, the political life organized by that idea is a life sufficient to realize the dignity-claim of the contingent, mortal individual, the very end the believer hopes for in the beyond. Because the state under the inclusive conception views faith as a nonphilosophic anticipation of itself, it can integrate religion into the public constitutional order (subject to the constraints of the libertarian and egalitarian constitutional paradigms), grant it reasonable exemptions from general laws, support its schools and institutions, and even enforce the constitutionally permissible judgments of its courts. All this in turn gives the religious believer a reason for pledging loyalty to the constitutional order as one in which faith can thrive. Thus I say in CG, 385-6:

Religions, after all, are cultures of a special kind...In their content...they themselves contain imaginative visions of the self-sufficient community and of the ultimate reconciliation of the universal with the singular individual. This gives the state a double reason for incorporating them. Like all cultural examples of ethical life, they are grounds of individual worth and so part of a life sufficient for dignity; but in addition, as cultures themselves ordered to a vision of the self-sufficient community, they can, to the extent that their practices are not contrary to other parts of the constitution, contribute to educating citizens to the virtues needed to sustain that community...Conversely, in recognizing religious communities for that purpose, the state makes possible their reciprocal recognition of the liberal state as ordered to a goal kindred to their own and so worthy of their allegiance.

So, while I do not offer the religious consciousness an argument showing why, given its beliefs, it must join the consensus on the inclusive conception (as I do for liberal

sects), I nonetheless show it a constitutional order that is friendly to the religious believer and that can thus perhaps win its friendship in return.