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An Economy of Violence: Financial Crisis and Whig Constitutional Thought, 1720-1721

Adam Lebovitz*

INTRODUCTION

The South Sea bubble burst suddenly in September 1720, the second in a chain of panics that struck Paris, London, and Amsterdam in quick succession. The crash in London was by far the most severe; within weeks two-thirds of England's nominal wealth had evaporated, public credit had collapsed, and London's most distinguished banking houses tottered on the brink of ruin. Commerce ground to a halt, leaving a forest of half-built ships rotting in city harbors and a thicket of unfinished mansions in London's fashionable districts.¹ One awestruck correspondent compared the event to "*a blazing Comet*, [which] by its sudden and amazing Rise and Progress alarm'd all *Europe*, and now by a more sudden Downfall has greatly affected all the Nation." A second insisted that the "fire of London or the plague ruin'd not the number that are now undone, all ranks of people bewayling their condition in the coffee houses & open streets." A third alluded, succinctly, to "the death of our prosperity."² These anxious

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1. Condensed from JOHN CARSWELL, *THE SOUTH SEA BUBBLE 144-71* (2d ed. 1993). For general historical background see also P.G.M. DICKSON, *THE FINANCIAL REVOLUTION IN ENGLAND 90-157* (1967); JOHN G. SPERLING, *THE SOUTH SEA COMPANY* (1962).

2. AN ESSAY FOR DISCHARGING THE DEBTS OF THE NATION, BY EQUIVALENTS: IN A LETTER TO THE RIGHT HONBLE CHARLES, EARL OF SUNDERLAND. AND THE SOUTH-SEA SCHEME CONSIDER'D, IN A LETTER TO THE RIGHT HONBLE ROBERT WALPOLE 57 (London 1720); Sir John Perceval, *Letter to William Byrd, 15 Oct. 1720*, in 1 *THE CORRESPONDENCE OF THE THREE WILLIAM BYRDS OF WESTOVER, VIRGINIA, 1684-1776* 330 (Marion Tinling ed., 1977; THOMAS GORDON, 1 *CATO'S LETTERS* (II) (Nov. 12, 1720), (Ronald Hamowy, ed., 1995) , 41 [hereafter CL]. Although pages are

assessments were grounded in a mounting sense of social disorder and a flickering faith in the legitimacy of the Hanoverian regime, which had been intimately involved in promoting and profiting from the bubble. George I was forced to organize a new ministry in the face of a corruption scandal that decapitated the Whig party, while London pulsed with rumors of a coming Jacobite *coup d'état*.³ On the Thames, investors mobbed Parliament demanding the annulment of their contracts in South Sea stock, and could be dispersed only by a reading of the Riot Act.⁴ In the boroughs, petitions circulated soliciting the “exemplary Punishment” of the bankers and politicians responsible for the “[d]esolation of their country.”⁵ Philippe Destouches, an attaché with the French embassy in London, wrote in a dispatch to Paris that the scale of popular unrest recalled 1688.⁶ The failure of the South Sea Company precipitated not merely a financial and commercial disaster,⁷ but a political and constitutional crisis that shook the British state to its foundations.⁸

But while the South Sea bubble has been recognized as an epochal event by economic, literary, and cultural historians, it has left only a faint trace on constitutional history. This is particularly surprising given the increasing prominence of the concepts of “emergency” and “reason of state” in legal scholarship, a trend that has been particularly marked since

given in the Hamowy edition, original spellings and emphases have been maintained.

3. Arthur Onslow, in 1720 an MP for Guildford and later the Speaker of the House of Commons, would write that “the rage against the Government was such for having as they thought drawn them into this ruin, that I am almost persuaded, the King being at this time abroad [in Germany], that could the Pretender have then landed at the Tower, he might have rode to St. James’s with very few hands held up against him.” See Arthur Onslow, *An Account of the Onslow Family* [undated], in MANUSCRIPTS OF THE EARL OF BUCKINGHAMSHIRE, THE EARL OF LINDSEY, THE EARL OF ONSLOW., LORD EMLY, THEODORE J. HARE, ESQ., AND JAMES ROUND, ESQ. 504, Historical Manuscripts Commission, Fourteenth Report, Appendix, Part IX (1895). James III did make some limited efforts to exploit the distress, pronouncing rather mildly against the “new set of people, who must at any rate enrich themselves by the spoil of their country” and calling for the election of a “free” Parliament (Anon, A LETTER FROM AN ENGLISH TRAVELLER AT ROME 14 [1721]), but his own financial difficulties, his natural timidity, and his tepid support from the French regency militated against further action.

4. LONDON J., Aug. 12, 1721, at 2.

5. A COLLECTION OF THE SEVERAL PETITIONS OF THE COUNTIES, BOROUGHS, &C. PRESENTED TO THE HOUSE OF COMMONS, COMPLAINING OF THE GREAT MISERIES. . . 17 [Reading], 11 [St. Albans] (1721)

6. EVELINE CRUICKSHANKS & HOWARD ERSKINE-HILL, THE ATTERBURY PLOT 66-67 (2004).

7. See JEREMY BLACK, POLITICS AND FOREIGN POLICY IN THE AGE OF GEORGE I 132 (2014) (“As Bank of England and East India Company stock also fell heavily, there was a danger of widespread financial collapse.”).

8. See [Daniel Defoe], THE COMMENTATOR (London), No. LXVIII, Aug. 26, 1720 (“it has been no doubt such an Attack upon the Government, and upon the Laws and Constitution of *Great-Britain*, as the like was scarce ever known or read of, either in this Government, or in any other Kingdom or Country in *Europe*”); “TRUE LOVER OF HIS COUNTRY”, A LETTER TO THE SUB-GOVERNOR. . . & DIRECTORS OF THE SOUTH SEA COMPANY 2 (1721) (“has done more in One Year towards the Overturning our Constitution, than the late King *James* did in Four”); “Philo Britannus”, Letter XXXVII, 2 A COLLECTION OF MISCELLANY LETTERS, SELECTED OUT OF MIST’S WEEKLY JOURNAL 109 (4 vols.) (1722); cf. CRUICKSHANKS & ERSKINE-HILL, *supra* note 6, at 238 (“a crisis of government comparable to that of 1659-60, if not even more grave”).

September 11. Law professors, often citing classics of legal thought by A.V. Dicey, Carl Schmitt, and Hans Kelsen, have relentlessly explicated and criticized the paradigm of “emergency government,” often in relation to the seemingly unending War on Terror, generating voluminous literatures in legal history, constitutional theory, and human rights law.⁹ The pervasive assumption of this wave of scholarship is that emergency action threatens the underpinnings of republican government, above all by concentrating the power to imprison and kill in an increasingly “monarchical” executive branch.¹⁰ The category of “economic emergency,” the mobilization of extraordinary state powers to contain market panics and solve crises of distribution, has been comparatively neglected. In the words of one recent analyst, nearly a decade after the 2008 financial crisis there is still “little if any focus...on economic rather than security emergency,” despite the plethora of emergency extralegal measures taken across the developed West to contain the chaos of bank runs and debt defaults.¹¹ And the most exacting studies of the concept tend to focus inordinately on two twentieth century cases—Weimar Germany and New Deal America—without considering the possibility of earlier antecedents.

9. See, e.g., Kim Lane Scheppele, *Law in a Time of Emergency*, 6 J. CONST. LAW 5 (May 2004); John Ferejohn & Pasquale Pasquino, *The law of the exception: a typology of emergency powers*, 2 I.CON 210 (2004); Jeremy Waldron, *Security and Liberty: the Image of Balance*, POLITICAL PHILOSOPHY 191 (2003); David Dyzenhaus, *States of Emergency*, in OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 442, (Michael Rosenfeld & Andrés Sajó eds., 2012); Oren Gross & Fionnuala Ní Aoláin, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* (2006); ADRIAN VERMEULE & ERIC POSNER, *THE EXECUTIVE UNBOUND* (2011); Evan J. Criddle & Evan Fox-Decent, *Human Rights, Emergencies, and the Rule of Law*, 34 HUM. RTS. Q. 39 (2012).

10. See, e.g., BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010); CHRIS EDELSON, *EMERGENCY PRESIDENTIAL POWER* (2013); STEPHEN GRIFFIN, *LONG WARS AND THE CONSTITUTION* (2013).

11. Claire Kilpatrick, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts*, OXFORD J. LEG. STUD. 325, 329 (2015). For attempts to demarcate the boundaries of the concept prior to 2008, see William E. Scheuerman, *The Economic State of Emergency*, 21 CARDOZO L. REV. 1869 (2000) (discussing the concept of economic emergency in Weimar legal thought); Sanford M. Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. 699 (2006), 719-35 (*Blaisdell* as a paradigmatic case of emergency power in a constitutional republic); Rebecca M. Kahan, *Constitutional Stretch, Snap-Back, and Sag: Why Blaisdell Was a Harsher Blow to Liberty than Korematsu*, 99 NW. U. L. REV. 1279 (2005) (advancing a libertarian argument against “emergency” economic regulations); and Bernadette Meyler, *Economic Emergency and the Rule of Law*, 56 DE PAUL L. REV. 539 (2007) (articulating a concept of “economic emergency” and tracing its relevance in American constitutional law, with reference to the work of Giorgio Agamben). For attempts to grapple with the concept in the aftermath of 2008, see Eric Posner & Adrian Vermeule, *Crisis Governance and the Administrative State: 9/11 and the Financial Meltdown of 2008*, U. Chi. L. & Econ., Olin Working Paper No. 442 (2009) (drawing parallels between “emergency lawmaking” after 9/11 and after 2008); Slavoj Žižek, *A Permanent Economic Emergency*, 64 NEW LEFT REV. 8 (2010) (Eurozone austerity as an exemplar of “exceptional” politics); Christina Binder & August Reinisch, *Economic Emergency Powers: A Comparative Law Perspective*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, 503, 505 (Stephan W. Schill ed. 2010), (discussing the Argentine crisis of 2001-2, and tracing the concept of economic emergency to the First World War); and PHILIP WALLACH, *TO THE EDGE: LEGALITY, LEGITIMACY, AND THE RESPONSES TO THE 2008 FINANCIAL CRISIS* 52-53, 69-96, 105-7 (2015).

This cramped view of history has in turn underwritten a simplistic narrative about emergency rule as an existential threat to republican order, and as an instrument of elite domination.

The claim of this essay is that the South Sea bubble should be central to our understanding of this tension between the rule of law and the survival of the market economy, which now appears as one of the fundamental problems of our time. It was the South Sea bubble that, for the first time, brought reason of state into the domain of financial markets. In response to an unprecedented destabilization of national commerce, Whig and Tory radicals demanded the nullification of contracts and the trial by Parliament of the South Sea directors, who were widely blamed for looting the nation and casting thousands into penury. And, notably in light of contemporary claims about the “monarchical” valence of emergency power, they pressed these measures in a classically *republican* language that would have been unimaginable in ordinary times. As in England’s serial crises of the seventeenth century, the call to suspend ordinary rules and procedures in the name of “the safety of the people” came primarily from those who *opposed* existing configurations of power and authority. It was the reformists who demanded summary executions, forcible redistributions of property, and ad hoc tribunals; it was the party of order that rallied to the banner of personal liberties and natural rights. This curious inversion may tell us something about the nature of “republican liberty,” a favored category in political theory and the history of political thought since the 1960s. Indeed, it may have something to tell us about the nature of liberty more generally, and in particular the antinomy between collective and individual visions of free republican life that continues to structure our fiercest political debates.

The paper proceeds as follows. Part I offers a brief overview of the South Sea scheme and its cataclysmic failure, and explains why ordinary legal processes seemed insufficient to stem the rising tide of crisis. Part II argues that the concept of “financial reason of state” emerged for the first time in the political literature of 1720-21, as writers began to compare the havoc that could be wrought by market downturns to the devastation of war, plague, and rebellion. For commentators on both sides of the debate, the logical endpoint of these analogies was martial law and temporary dictatorship. Part III establishes that this politics of emergency had a specifically republican tincture, linked indelibly to images of the Roman republic and the English Commonwealth. To act beyond the limits of the law was to conjure the specter, not of royal absolutism, but of popular government, civil war, and regicide. Finally, Part IV addresses the origins of the radical Whig ideology, which would go on to exert a decisive influence on Anglophone political theory in the later eighteenth century. The radical Whigs—preeminently, John Trenchard, Thomas Gordon, and Viscount Molesworth—are remembered today as rigid defenders of

personal liberties in the face of Britain's increasingly powerful fiscal-military state. But it is a striking fact that *Cato's Letters* originated with calls to suspend traditional laws and norms in order to subject the South Sea directors to summary trial and execution, and to divide the property of speculators among the public. Most histories of the radical Whig ideology have understated the violent populism of these writings, leaving us with a sanitized picture of opposition politics in the eighteenth century.

This exercise in historical recovery highlights the remarkable extent to which financial capitalism depended in its formative period on the conceptualization and exercise of extraordinary state power. It calls attention to the inescapably *republican* imprimatur of emergency politics in this period, particularly when applied to state action that targeted elites, confiscated property, or undermined contractual rights. And it offers a new reading of the eighteenth century "commonwealth" tradition that has played such a prominent role in histories of political thought, challenging contemporary efforts to enlist the radical Whigs into the ranks of liberalism, neorepublicanism, and other fashionable modern ideologies.,

It goes without saying that the great questions that consumed English politics in 1721—the accountability of financial and political elites, the fate of civil liberties in times of emergency, and the dangerous instability of global markets—remain urgent concerns of the present. It is my hope that in reconstructing the intellectual history of financial capitalism's first crisis, and in excavating the debate over constitutional limits and emergency powers that helped to define it, we will recover not only a distant mirror for our present troubles, but perhaps also a black mirror with blurry intimations of our future.

I. "THE SHIPWRECK OF THE YEAR TWENTY"¹²

The South Sea bubble was set in motion by two interlocking political forces: the domestic party struggle between Whigs and Tories, and the great power competition between England and France. As England moved from a tacit alliance with France to a belligerent policy of confrontation and encirclement, it keenly felt the need for new modes of financing its growing public debts.¹³ At the same time, the Whig elites who ascended to power on the stepladder of revolution desired new financial institutions that would both enact their preferred economic policies and cement their place atop the new social order.¹⁴ The result of these twin pressures was a new political economy—a "financial revolution"—whose core principle

12. Edward Gibbon, *Autobiography [Memoirs of My Life and Writings]* (1796), in 1 WORKS 10 (John Murray ed. 1907).

13. STEVEN PINCUS, 1688 337-57 (2009); *cf. id.* at 388.

14. *Id.* at 399.

was the stimulation of manufacturing, and whose crown jewels were the Bank of England and the renovated East India Company. These institutions were quickly colonized and staffed by Whigs, becoming both the symbol and the guarantor of their preeminence in the postrevolutionary state.¹⁵

Tories and Jacobites aggressively resisted this transformation, which they correctly understood as a frontal assault on the agrarian and mercantilist policies they favored. Their first counter-stroke was the founding of a Land Bank in 1696; the hope was that this new institution would bolster traditional agrarian elites by tying the price of goods and services to land rather than specie. The project collapsed quickly and ignominiously, after raising only £7,100 of a projected £2.5 million. But the construction of a viable alternative to the Bank of England remained a live preoccupation of the Tory leadership. One of the earliest proponents of the land bank, the Tory MP Robert Harley, would return fifteen years later with a new scheme to challenge the Bank of England's hegemony.¹⁶

Harley's opportunity arrived in 1710, when a combination of court intrigue and public weariness with Whig militarism vaulted him to the head of the government. Immediately he was forced to grapple with an acute credit crisis, driven in part by the metastasizing war debt, and in part by the reluctance of the Bank to lend to a Tory government.¹⁷ Harley surmounted the crisis through a series of deft political maneuvers, extracting a new stopgap loan from the City, winning approval for fresh revenues from Parliament, and deflecting the Tory backbenchers impatient to confront the hated Bank.¹⁸ By the spring of 1711 these temporary expedients had calmed the credit markets, and Harley now turned his attention to achieving a more permanent solution.

Harley's blueprint was a proposal submitted by his advisor, the financier John Blunt, to liquidate a portion of the burgeoning national debt through the formation of a new joint-stock company.¹⁹ In Blunt's vision, nearly

15. See BRUCE G. CARRUTHERS, *CITY OF CAPITAL* 144-51 (1999).

16. See CARL WENNERLIND, *CASUALTIES OF CREDIT* (2011), 121. For Harley's shifting position amidst the ideological flux and party realignments of Williamite England, see B.W. HILL, *ROBERT HARLEY* 34-84 (1988).

17. JAMES MACDONALD, *A FREE NATION DEEP IN DEBT* 176-77 (2003); WENNERLIND, *supra* note 16, at 162-72.

18. See B.W. Hill, *The Change of the Government and the 'Loss of the City', 1710-1711*, 24 *ECON. HIST. REV.* 395 (1971). Also see *id.* at 408 on the so-called "October Club", extreme Tories who threatened to mutiny against Harley for his reluctance to investigate his Whig predecessors and to declare war on the Bank. Harley placated the October Club in part through the selection of one of their own, MP John Aislabie, for a ministerial portfolio.

19. John Blunt to Robert Harley, 5 October 1710, included as the "Appendix" in Hill, *supra* note 18, at 412. Between 1700 and 1708 Blunt founded and then ran the Sword Blade Bank, a private corporation whose purpose was to "cut into the monopoly which the Bank of England had established in public finance." In 1708, the Sword Blade was prohibited from carrying on these activities. See SPERLING, *supra* note 1, at 5.

£10 million of Britain's floating debt would be converted to shares in this enterprise, which would in turn be assigned a monopoly over all future trade with the Spanish colonies of South America. The current owners of this debt would be repaid not from English revenues, but out of the immense profits expected from the South Sea trade.²⁰ The South Sea House would acquire a guaranteed annual source of revenue in government interest payments on the consolidated debt. The government would obtain a markedly lowered interest rate. And the Bank of England would be ejected from its privileged position in state finance.²¹

While Tory pamphleteers extravagantly praised the new arrangement, skeptical Whigs complained from the outset that the project was a fraud.²² One, impersonating a "Merchant from Amsterdam," expressed relief that Britain would waste its capital on the strategically inconsequential ports of South America, rather than attempting to exploit more lucrative markets in Europe.²³ Another noted that one of the Company's earliest backers was William Paterson, the architect of Scotland's disastrous Darien expedition, who now plotted to "bubble the whole Nation with his Chimeras a second time."²⁴ Arthur Maynwaring gave these criticisms a popular form in the satirical ballad *An Excellent New Song, call'd Credit Restor'd*, which went through five editions in 1711.

Thus our Debts being clear'd from the fruitful *South-Seas*,
 In Wealth we shall daily grow stronger
 Tho Stock-Jobbing fails, why dismay'd should we be,
 Since we want to be trusted no longer?²⁵

The stanza proved prescient. Although Spain did eventually assign Britain a contract to carry slaves to the South Atlantic,²⁶ the gains from

20. The conversion of these annuities into South Sea stock was effectively compulsory, in contrast to the voluntary exchange of 1720. See RICHARD DALE, *THE FIRST CRASH* 48 (2004).

21. See LARRY NEAL, *I AM NOT MASTER OF EVENTS* 96 (2012); cf. Carruthers, *supra* note 15, at 154.

22. A comprehensive overview of the 1711 debate can be found at WENNERLIND, *supra* note 16, at 203-34. For highlights of the Tory literature, see: A LETTER TO A MEMBER OF PARLIAMENT, ON THE SETTling A TRADE TO THE SOUTH-SEA OF AMERICA (1711), 4 and 8; HERMAN MOLL, A VIEW OF THE COASTS, COUNTRYs & ISLANDS WITHIN THE LIMITS OF THE SOUTH-SEA COMPANY 231 (2d ed. 1712); [Daniel Defoe?], A TRUE ACCOUNT OF THE DESIGN, AND ADVANTAGES OF THE SOUTH-SEA TRADE (1711), Jonathan Swift, *Examiner* No. XLIV (June 7, 1711), in 3 WORKS OF JONATHAN SWIFT 505 (Sir Walter Scott ed. 1883).

23. A LETTER FROM A MERCHANT IN AMSTERDAM TO A FRIEND IN LONDON ABOUT THE SOUTH SEA TRADE 4-5 (1712).

24. SOME QUERIES, WHICH BEING NICELY ANSWERED MAY TEND VERY MUCH TO THE ENCOURAGEMENT OF THE SOUTH-SEA COMPANY (1711). Paterson had also helped to found the Bank of England, but this went unmentioned.

25. [ARTHUR MAYNWARING], AN EXCELLENT NEW SONG, CALL'D CREDIT RESTOR'D (London, 1711); cf. AN EXCELLENT NEW SONG, CALLED, AN END TO OUR SORROWS (1711).

26. The *Asiento de Negros*, a contract formerly held by France. See DICKSON, *supra* note 1, at 67 ("The company was to deliver annually 4,800 slaves. . ."). Britain made deliveries of slaves in 1716, 1717, and 1718, but far fewer than the promised 4,800, in part due to the deadly incompetence of the South Sea managers (many slaves died en route), and in part due to red tape imposed by the hostile

this trade were limited; the South Sea Company never generated more than £20,000 in annual profits, against its capitalization of £10 million. By 1718 England was once again at war with Spain, and even this limited trade ground to a halt.²⁷ The profits of the South Sea Company remained, in every sense, merely speculative.²⁸

The South Sea Company lost its *raison d'être* at the same moment that John Law's spectacular innovations in debt and public finance threatened to upend the balance of power between France and England.²⁹ Law, a Scottish economist and financier, had long admired the South Sea Company, and wrote a letter to Harley in 1711 in hopes of obtaining a position in his ministry.³⁰ Beginning in 1716 he engaged the French court in a similar project to modernize its fiscal state and liquidate its debts. But Law's version of the South Sea scheme was far more ambitious: he proposed to convert the *entire* French debt of £400 million into equity in a joint-stock company that would control the French colonial trade,³¹ with the paper notes issued by this company replacing specie as the primary medium of exchange in France.³² Law promised to retire this debt at a scarcely believable three percent annual interest rate,³³ predicting that the French economy, now freed from the artificial shackles of metallic currency and paper debts, would grow prodigiously.³⁴ If France succeeded in liberating itself from debt through these maneuvers, it was widely assumed that it would gain a decisive edge in the struggle for commercial and military supremacy. Lord Stair, the ambassador to Versailles, relayed Law's boast "that he will set France higher than ever she was before, and

colonial government.

27. MACDONALD, *supra* note 17, at 208.

28. CARSWELL, *supra* note 1, at 46-47; DALE, *supra* note 20, at 49-51; Peter Temin & Hans-Joachim Voth, *Riding the South Sea Bubble*, AM. ECON. REV. 1654, 1655 (December 2004). HELEN J. PAUL, *THE SOUTH SEA BUBBLE: AN ECONOMIC HISTORY OF ITS ORIGINS AND CONSEQUENCES* 54-65 (2010), argues that the *Asiento* had a reasonable chance of turning a profit, and can thus be considered a legitimate investment opportunity, while Shinsuke Satsuma, *The South Sea Company and its plan for a naval expedition in 1712*, HIST. RES. 410 (2012), underscores its serious (though unrealized) aspirations to expand the frontiers of the British Empire.

29. Under the terms of the Anglo-French alliance of 1716 England and France were officially aligned, but the two great powers continued to regard one another with a mutual wariness. This hostility was intensified once Law, a committed Jacobite, took the reins of state. See CRUICKSHANKS & ERSKINE-HILL, *supra* note 6, at 37-42, 233.

30. CARSWELL, *supra* note 1, at 65. He renewed the request in 1713 through an intermediary; see Neal, *supra* note 21, at 33-34.

31. WENNERLIND, *supra* note 16, at 232.

32. For sophisticated recent treatments of Law's "system", see Antoin E. Murphy, JOHN LAW: ECONOMIC THEORIST AND POLICYMAKER (1997); François R. Velde, *Was John Law's System a bubble? The Mississippi Bubble revisited*, in ORIGINS AND DEVELOPMENT OF FINANCIAL INSTITUTIONS 99-119, ed. Jeremy Atack and Larry Neal (Jeremy Atack and Larry Neal eds., 2009).

33. Compared to the ten percent interest rate at which the Regency borrowed on the open market. See MACDONALD, *supra* note 17, at 198.

34. Law had argued as early as 1705 that the major restraint on economic growth in Europe was its artificially constrained money supply. See John Law, *Money and Trade consider'd* (1705), in 1 ŒUVRES COMPLÈTES 46 (Paul Harsin ed., 1934).

put her in a condition to give the law to all Europe; that he can ruin the trade and credit of England and Holland, whenever he pleases; that he can break our bank, whenever he has a mind.”³⁵ And as speculative capital flooded the rue Quincampoix and the price of shares in Law’s venture tripled almost overnight,³⁶ London began to ask how the apparent success of the French “system” might be replicated.³⁷

35. Lord Stair, *Letter to Secretary Craggs, 9 September 1719*, in 2 MISCELLANEOUS STATE PAPERS, FROM 1501 TO 1726 593 (1778); *see also* “Gentleman of America”, SOME CONSIDERATIONS ON THE CONSEQUENCES OF THE FRENCH SETTLING COLONIES ON THE MISSISSIPPI 2 (1720) ; DANIEL DEFOE, THE CHIMERA: OR, THE FRENCH WAY OF PAYING NATIONAL DEBTS 5-6 (1720); *cf.* the retrospective judgment of Voltaire, *Of Commerce and Luxury* [1738], in COMMERCE, CULTURE, AND LIBERTY 277 (Henry C. Clark trans. and ed. 2003).

36. [Defoe], “Bubble Mania in France”, MIST’S WEEKLY J. (London), Sept. 12, 1719; SOME CONSIDERATIONS, *supra* note 35, at 2.

37. *See* James English, *To the Honourable and Skilful Managers of the South-Sea Stock,* in OBSERVATIONS ON THE NEW SYSTEM OF THE FINANCES OF FRANCE (1720); *cf.* SPERLING, *supra* note 1, at 26 (“politicians and financiers believed that similar measures had to be carried out in England if the island kingdom was not to fall behind in the competition for power”); WENNERLIND, CASUALTIES OF CREDIT, *supra* note 16, at 234; *see also* Genoa, in DAILY POST, May 3, 1720..



Figure 1. “The Fairground of the Action-men, or the pleasure and sorrow of thieving.” Printed in the Netherlands, 1720, and included in the collection *The Great Mirror of Folly* (*Het groote tafereel der dwaasheid*), vol. 1, no. 22. According to a poem that appears below, the figure standing on the chariot vomiting shares (marked “Rotterdam,” “Mississippi,” and “South Sea”) is John Law. The banners flying over the square read “Quincampoix” and “Bombario,” the latter an insulting nickname for the great financier. In the clouds above, Jupiter prepares to banish the stockbrokers to “eternal darkness.”³⁸

38. For additional detail, see 1650. *De Kermis-Kraam*, in *CATALOGUE OF PRINTS AND DRAWINGS IN THE BRITISH MUSEUM, DIVISION I, VOLUME II—JUNE 1689 TO 1733* 489-91 (1873).

Once again it was John Blunt who stepped into the breach. Since the death of Queen Anne and the fall of Harley in 1714, the South Sea House had distanced itself from its Tory roots and cultivated friends in the new Whig-Hanoverian administration.³⁹ Capitalizing on these connections, as well as Law's innovations in public finance, Blunt now proposed that the Company be permitted to purchase the rest of Britain's outstanding national debt—more than £31 million—using new issues of Company stock, with the rate of conversion set by market demand.⁴⁰ In exchange for consolidating its debt, the government would pay the Company an annual six percent interest rate, versus the nine percent it paid on the unconsolidated debt. Blunt gambled that England's ongoing economic boom would bolster the price of South Sea stock, driving down the cost of repurchasing the national debt, and thus generating a large surplus for the Company that could be used to fund new projects and enrich the major stockholders.⁴¹ The Company sought to further inflate the price of its stock by permitting buyers to purchase on margin, by allowing shareholders to pledge existing shares as security for loans, and by secretly buying up its own stock when demand flagged.⁴² In addition, large numbers of shares were gifted to prominent courtiers and political figures, including John Aislabie, the Chancellor of the Exchequer, Stanhope and Sunderland, the dominant figures in the reigning Whig government, and the Duchess of Kendall, the mistress of George I. The King himself was widely reputed to be an investor. Such celebrity investors were part of the Company's

39. See MACDONALD, *supra* note 17, at 208-9; CRUICKSHANKS & ERSKINE-HILL, *supra* note 6, at 57. The Whig essayist and MP Joseph Addison stated in a 1714 letter that the South Sea Company had attempted to bribe him in exchange for supporting its projects. See Joseph Addison, *Letter to Charles Montagu, Earl of Halifax, 30 November 1714*, in LETTERS 307 (1941).

40. Blunt's original plan was to assume the *entire* national debt, including that held by the East India Company and the Bank of England, but this proved politically impossible. See SPERLING, *supra* note 1, at 28.

41. Although the South Sea Company conceded many points as it negotiated with Parliament in the spring of 1720, even agreeing to make a one-time payment of £7 million to the Exchequer for the privilege of consolidating the national debt, one principle it steadfastly refused to compromise was a floating rate of exchange between national debt and South Sea stock. This is because, lacking actual revenues from trade, the Company could only pay dividends to investors through the issuance of new stock. DICKSON, *supra* note 1, at 101, explains the scheme concisely: "the ratio of exchange was not defined in advance. If, therefore, prices could be got up to 300, 400, or over, and the government's creditors agreed to an exchange at this level, the amount of the new stock that the company could sell for its own account would steadily increase. For example, if the whole £31m. of subscribable debts were exchanged for only £7.75m. new South Sea stock valued at 400, the company, which would as before be entitled to increase its capital by £31m., could sell the remaining £23.35m. stock in a rising market. Conversely, if the price of South Sea Stock remained too low, the whole scheme would be in danger of foundering. For the government's creditors would not agree to a disadvantageous exchange unless they had the prospect of reselling on a rising market. . . Everything depended, therefore, on the 'rise of the stock.'" Cf. DERINGER, *CALCULATED VALUES* (manuscript in progress), chapter 5.

42. P.H. Kelly, *'Industry and Virtue versus Luxury and Corruption': Berkeley, Walpole, and the South Sea Bubble Crisis*, 7 EIGHTEENTH-CENTURY IRELAND 57, 64 (1994); DICKSON, *supra* note 1, at 144.

advertising campaign.⁴³ The publicity helped to supercharge the economic boom; between February and July the price of South Sea stock soared from £125 to £1050.

Its stratospheric ascent fostered a climate of avarice and speculative expectation; throughout the summer of 1720 advertisements for new ventures in trade and finance littered Exchange Alley.⁴⁴ Fired by rumors of joint ventures with the South Sea House, the market capitalization of the Royal African and East India companies more than doubled. Observers both mocked and marveled at the brave new world in which vast paper fortunes might be made and lost overnight.⁴⁵ The preface to the comic play *Exchange-Alley, or the stock-jobber turned gentleman* (1720) depicted a nation under the spell of an obsession:

*If you Resort to any publick Office, or place of Business, the whole Enquiry is, How are the Stocks? if you are at a Coffee-House, the only conversation turns on the Stocks. . .if you Repair to a Tavern, the edifying Subject (especially to a Philosopher) is the South-Sea Company; if you wait on a Lady of Quality, you'll find her hastening to her House of Intelligence in Exchange-Alley.*⁴⁶

A bemused columnist for *Applebee's Weekly*, the quintessential administration newspaper, lampooned the delirious consumption of parvenus who “buy South Sea Jewels; hire South Sea Maids; take new Country South Sea Houses. . .set up South Sea Coaches, and buy South Sea Estates.”⁴⁷ And Thomas Gordon, writing as the “Humourist” and already precociously anti-clerical, cracked that “there is now-a-days more to be got by the *Alley* than the *Altar*,” and that the only churchmen in England who still preached against the South Sea fever were the bitter few with nothing invested.⁴⁸

This orgy of speculation seemed increasingly unmoored from reality, and at the bubble's apex nothing was more common than predictions of imminent disaster and universal ruin.⁴⁹ Many supposed, with the comic

43. SILKE STRATMANN, MYTHS OF SPECULATION: THE SOUTH SEA BUBBLE AND 18TH-CENTURY ENGLISH LITERATURE 41-42 (2000).

44. 2 WILLIAM ROBERT SCOTT, THE CONSTITUTION AND FINANCE OF ENGLISH, SCOTTISH, AND IRISH JOINT-STOCK COMPANIES (1910), 445 lists twenty-nine new projects advertised in May 1720, and eighty-eight in June at the height of the bubble. DICKSON, *supra* note 1, at 145 adds that while many of these new corporations “were quite blatantly swindles,” many others were legitimate enterprises.

45. Thomas Gordon, *A compleat History of the late Septennial Parliament* (1722), in 2 COLLECTION OF TRACTS BY THE LATE JOHN TRENCHARD AND THOMAS GORDON 56 (1751).

46. ANON, EXCHANGE-ALLEY: OR, THE STOCK-JOBBER TURN'D GENTLEMAN 6 (1720).

47. APPLEBEE'S ORIGINAL WEEKLY JOURNAL (London), Aug. 6, 1720.

48. [Thomas Gordon], *Of the Bubbles* (1720), in 2 THE HUMOURIST: BEING ESSAYS UPON SEVERAL SUBJECTS 16 (1725).

49. See, e.g., THE BUBBLERS MEDLEY, OR A SKETCH OF THE TIMES (1720); THE SOUTH-SEA BALLAD, SET BY A LADY (1720); THE HUBBLE BUBBLES A BALLAD TO THE TUNE OF O'ER THE HILLS

versifier Edward Ward, that its ending would necessarily be catastrophic—and violent.

But should our *South Sea Babel* fall,
What Numbers would be Frowning,
The Losers must then ease their Gall
By Hanging or by Drowning⁵⁰

For a glimpse of their future Britons in the summer of 1720 needed only to glance across the Channel, where Law's vaunted "system" lay in ruins, the victim of its own vaulting ambitions.⁵¹ And yet when the day of reckoning arrived in early autumn, Alexander Pope would claim to have been taken by surprise. "Most people thought the time wou'd come," he wrote to Atterbury, "but no man prepar'd for it; no man consider'd it would come *like a Thief in the night*, exactly as it happens in the case of our death."⁵²

In late August the stock wobbled, and then plunged precipitously. By September shares were trading at fifteen percent of their peak value, the Sword Blade Bank had failed, and a cascading panic produced runs on every bank in the City.⁵³ John Blunt petitioned the ministry for a bodyguard after being shot at in the street by a disappointed speculator.⁵⁴ By October the implosion of credit was the most urgent topic of discussion in the British Isles; Jonathan Swift reported from Dublin that the "Conversation is full of nothing but South-sea, and the Ruin of the Kingdom, and scarcity of money."⁵⁵ In Amsterdam, where South Sea shares had been a fashionable investment, rioters torched a coffeehouse frequented by British traders.⁵⁶ And in England, citizen petitions described shuttered workshops, deepening misery, and popular indignation: "the Cries and Clamours of an injur'd People from all Parts are loud for Justice."⁵⁷

AND FAR A WAY (1720).

50. EDWARD WARD, *THE DELIGHTS OF THE BOTTLE: OR, THE COMPLEAT VINTNER. WITH THE HUMOURS OF BUBBLE UPSTARTS* 58 (1720).

51. For a sensitive analysis of *why* Law's *Système* failed, assigning blame to both political opposition in the French court and Law's own errors, see MURPHY, *supra* note 32, at 230-43.

52. Alexander Pope, Letter to Bishop Atterbury, 23 Sept. 1720, in 2 *CORRESPONDENCE* (1956) 53. *Cf.* *SOME CONSIDERATIONS*, *supra* note 35.

53. *SOME CONSIDERATIONS*, *supra* note 35, at 16.

54. CARSWELL, *supra* note 1, at 150; *cf.* Lady A. Irwin, Letter to [Lord Carlisle], Dec. 24, 1720, in *MANUSCRIPTS OF THE EARL OF CARLISLE*, Historical Manuscripts Commission, Fifteenth Report, Appendix, Part VI (1897), at 26.

55. Jonathan Swift, Letter to Vanessa [Esther van Homrigh], Oct. 26, 1720, in 2 *CORRESPONDENCE* 361 (Harold Williams ed., 1963).

56. CARSWELL, *supra* note 1, at 166.

57. *COLLECTION OF THE SEVERAL PETITIONS* *supra* note 26 [Colchester]; *cf.* Gordon, *Of Stock-Jobbers* (1720), in 2 *THE HUMOURIST*, *supra* note 48, at 20 ("*High Expectations and great Plenty are succeeded by general Diffidence, prevailing Fears, Bankruptcy and Poverty*"); Gordon, 1 *CL* (II), *supra* note 2, at 41 (12 November 1720); Trenchard and Gordon, 1 *CL* (X), *supra* note 2, at 80 (Jan. 3,

As the corrupt dealings between the South Sea Company and Parliament gradually came into focus,⁵⁸ the citizens of Bristol pleaded “[t]hat no man’s greatness, ill-gotten riches, or flight from justice, may screen him from public punishment.”⁵⁹ The outcry for accountability echoed in the halls of Westminster. Joseph Jekyll’s resolution for “punishing the authors” of the crisis passed unanimously, while “[o]thers tooke exception to itt as too tender.”⁶⁰ An investigative Committee was formed, whose membership included radical backbenchers of both parties,⁶¹ and which issued scathing reports at regular intervals.⁶² Every Director of the South Sea Company was imprisoned in the Tower, where they were joined by the partners of the Sword Blade Bank and John Aislabie, the Chancellor of the Exchequer, whose arrest was celebrated with bonfires in London.⁶³ After a humiliating examination on the floor of the Commons, Sunderland, the head of the Whig government, resigned in disgrace.⁶⁴ The South Sea Sufferer’s Bill, passed in May, stripped the ex-directors of varying fractions of their fortunes, and used it to repay the Treasury for the emergency loans keeping the Company and its stockholders afloat.⁶⁵

Edward Gibbon, whose grandfather was among those dispossessed by the Sufferer’s Bill, would later excoriate these “violent and arbitrary

1721); APPLEBEE’S ORIGINAL WEEKLY J. (London), Oct. 29, 1720 (“It has reduc’d thousands of Families, who liv’d tolerably well before, to want Bread; and has fill’d our Streets with Objects of Misery inexpressible”); ANON, FURTHER REASONS OFFER’D. . . FOR MAKING VOID AND ANNULLING FRAUDULENT AND USURIOUS CONTRACTS 1 (1721); Arthur Onslow, Letter to [Hon. John Molesworth], Feb. 4, 1721, in 8 REPORTS ON MANUSCRIPTS IN VARIOUS COLLECTIONS (LINDLEY WOOD; CLEMENTS; UNWIN) 297, Historical Manuscripts Commission (1913) .Some contemporaries doubted the more extreme reports, particularly as the economy rebounded the following year, *see, e.g.*, COMPLEAT SET OF ST. JAMES’S JOURNALS Dec. 12, 1722, Issue 33, 7.

58. It was revealed in the spring of 1721 that the Company had recorded fictitious “sales” of its stock to leading politicians and courtiers, bribes amounting to a total of £574,000. The full entries were locked in the secret “green ledger” of its Treasurer, Robert Knight, who fled to Antwerp. *See* CARSWELL, *supra* note 1, at 100-5; CRUICKSHANKS & ERSKINE-HILL, *supra* note 6, at 58-9.

59. “City of Bristol” (Apr. 1721), in 7 COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND 768 (1811).

60. Thomas Brodrick to Lord Chancellor Middleton, Dec. 10, 1720, in 2 WILLIAM COXE, MEMOIRS OF THE LIFE OF SIR ROBERT WALPOLE 202 (1798); *cf.* Sir William Robinson to [Lord Carlisle], Jan. 12, 1721, in MANUSCRIPTS OF THE EARL OF CARLISLE, *supra* note 54, at 27.

61. Its membership included the leading parliamentary critics of the South Sea scheme: Thomas Brodrick (its chair), Viscount Molesworth, Joseph Jekyll, and Archibald Hutcheson. Eleven of its thirteen members were either Tories or Independent Whigs.

62. *See* REPORTS OF THE COMMITTEE OF SECRECY. . . RELATING TO THE SOUTH-SEA DIRECTORS (1721). That the Committee’s collected reports were reprinted by Trenchard and Gordon as a pamphlet in 1721 should give some idea of their tone.

63. *See* CARSWELL, *supra* note 1, at 187-206, 219-34.

64. Sunderland was narrowly acquitted of wrongdoing in a vote of the Commons. *See* The Commons take into Consideration that Part of the Report which relates to the Earl of Sunderland (Mar. 15, 1721), in 7 COBBETT, *supra* note 59, at 755-56; CARSWELL, *supra* note 1, at 204-6. The Earl of Stanhope, his partner in the administration, died of a stroke before his culpability could be decided. The fall of both men cleared Walpole’s path to the premiership. Sunderland then began an ambiguous flirtation with the Pretender, cut short by his own death in 1722.

65. CARSWELL, *supra* note 1, at 220-21.

proceedings” as “the sport of a lawless majority” and a violation of long-established English liberties:

a bill of pains and penalties was introduced—a retroactive statute to punish the offences which did not exist at the time they were committed. Such a pernicious violation of liberty and law can only be excused by the most imperious necessity; nor could it be defended on this occasion by the plea of impending danger or useful example. . . . Against a bill of pains and penalties it is the common right of every subject to be heard by his counsel at the bar: . . . their prayer was refused, and their oppressors, who required no evidence, would listen to no defence.⁶⁶

As an index of the arbitrary atmosphere prevailing in Parliament, Gibbon pointed to a notorious speech given by “that ardent Whig” Robert Molesworth, urging the accelerated trial and execution of the South Sea directors.⁶⁷

In spite of these apparent victories, the party of vengeance felt continually frustrated by its inability to fully expose and punish the originators of the financial crisis.⁶⁸ The South Sea conspirators were quietly released in the summer of 1721. None would be sentenced to prison. And while Parliament levied financial penalties on nearly all of the Directors, creative accounting of assets allowed most to retain a comfortable living, so that the Duke of Wharton could quip scathingly that they were left with only “*Thirty Thousand Pounds to furnish them with Bread and Water.*”⁶⁹ Saint John Brodrick, nephew of the Secret Committee’s Chair, would lament in a letter of May 1721 that “the directors and their friends” were likely to “slip thro’ [the] fingers” of Parliament, “and that nothing further will be done as to confiscation, hanging, &c.” The Committee’s inquest had been “baffled by a set of men

66. GIBBON, AUTOBIOGRAPHY, *supra* note 12, at 10-12.

67. *Id.* at 10-11 (“The speech of Lord Molesworth, the author of the state of Denmark, may shew the temper, or rather the intemperance, of the House of Commons. . .”).

68. See [Daniel Defoe?], A BRIEF DEBATE UPON THE DISSOLVING OF THE LATE PARLIAMENT 16 (1722) (“That they shewed us the Knavery, but sat still, and let the Knaves escape, That they trac’d the Crime till they found the Criminals were too near them to be touch’d; and, That they let the little Agents sink under the weight of their Resentment, but let the Great Ones slip thro’ their Fingers and escape.”).

69. [Philip, Duke of Wharton], TRUE BRITON (London), July 26, 1723, at 123; *cf.* Gordon, *supra* note 45, at 60 (“. . . as to the Directors Estates, they gave in Inventories so very inferior to their real Fortunes. . .”). SPERLING, *supra* note 1, at 35, estimates total confiscations of £2,400,000. DICKSON, *supra* note 1, at 189, calls the financial penalties “a severe but not fatal blow. In the cases which can be traced they seem to have retained enough to support themselves and help endow their descendants.” Aislabie, for instance, retained £115,000 out of his estate of £150,000. The exception proves the rule: the Whig leadership ensured that John Blunt was left with only scraps of his vast fortune as punishment for his turn as “star witness” in the Committee’s investigations. See CARSWELL, *supra* note 1, at 228.

whom guilt, money, &c. have link't in the closest bond."⁷⁰ He was alluding to Robert Walpole,⁷¹ the new head of government, who labored indefatigably to prop up the damaged credit markets, soften the punishment of the accused, and conceal the deep complicity of the Whig party and the Hanoverian court in their ruinous profiteering.⁷² Although he was unable to derail the inquest entirely, Walpole's mastery of parliamentary tactics and international diplomacy kept sanctions against politicians and bankers to a minimum.⁷³

As public opinion gravitated toward exceptional measures capable of punishing the guilty and relieving the public, the administration and its defenders retreated to the ramparts of due process, the ancient constitution, and the rule of law. For the MP Grey Neville the procedural irregularities of the Sufferer's Bill rendered it a subversion of "our boasted liberty" and "our happy constitution," and amounted to "tearing up parliaments by the roots."⁷⁴ Anthony Hammond, a former *aide-de-camp* to the Duke of Chandos, blended his skeptical appraisal of the South Sea prosecutions with a paean to "our invaluable Constitution," the Magna Charta, and all "those excellent Laws by which the Liberty of our Persons, and the

70. Saint John Brodrick, Letter to Lord Middleton, 24 May 1721, in Coxe, , *supra* note 60, at 216; cf. Viscount Molesworth, Letter to Hon. John Molesworth, May 19, 1721, in REPORTS ON MANUSCRIPTS IN VARIOUS COLLECTIONS, *supra* note 57, at 312; 2 Gordon, *Septennial*, 59.

71. Walpole had been excluded from the Stanhope-Sunderland ministry in 1717 (the so-called "Whig Split"), and was on record against the South Sea Act, making him the obvious choice for party leadership after the crash. On the other hand, like many of his distinguished contemporaries (Newton, Pope, and Viscount Molesworth) Walpole was a substantial *investor* in the scheme.

72. The *cri de cœur* of Gordon, 1 *CL* (XXVIII), *supra* note 2, at 205-6 (May 1721) is characteristic: "Who is it that openly screens open guilt? Who is it that conceals the evidence of guilt? Who is it that browbeats the pursuers of guilt? Who is it that throws obstacles in the Parliament's way? Who is it that lengthens out the process? Who is it that strives to defeat the enquiry?" The gloss of Coxe, *supra* note 60, at 251, his early biographer, is much more flattering: "we have already mentioned his endeavours to stem the torrent of parliamentary vengeance. . . he did not shrink from avowing his sentiments, when any flagrant act of injustice was going to be committed." Walpole's chief motivation was probably to curry favor with the crown by helping to cover up its deep involvement in the scheme.

73. On Walpole's "bailout" of the financial system, finalized on August 10, 1721, see DICKSON, *supra* note 1, at 176; and DALE, *supra* note 20, at 146-47. On Walpole's mobilization of partisan loyalties to block the investigation of Whig dignitaries, see the paraphrase of his speech in the letter of Thomas Brodrick to Lord Middleton, Mar. 16, 1721, in Coxe, *supra* note 60, at 214. On Walpole's efforts to delay the inquiry until the departure of Country Tories for the harvest in autumn 1721 could assure him a floor majority, see the letter of Saint John Brodrick to Lord Middleton, May 24, 1721, in Coxe, *supra* note 60, at 215. Walpole's most audacious maneuver was to orchestrate the flight of Robert Knight, treasurer of the South Sea Company, to the Austrian Netherlands, along with his infamous "green book" of bribes to politicians. Knight was arrested in Antwerp, where the local constitution (theoretically) barred extradition. In public, George I and Walpole demanded Knight's return; in private, through diplomatic backchannels, it was made clear that a refusal to extradite would be received favorably, and might result in English recognition of Hapsburg claims in Italy. The parliamentary opposition suspected a corrupt bargain along these lines, but was unable to establish definite proof. See CARSWELL, *supra* note 1, at 207-18; cf. Defoe, *supra* note 60, at 18; Trenchard & Gordon, *supra* note 2, 1 *CL* (XXII), 159 (Mar. 25, 1721).

74. Mr. Grey Neville's Speech in the House of Commons in favour of Mr. Aislabie (June 26, 1721), in 7 COBBETT, *supra* note 59, at 854-56.

Enjoyment of our Estates are preserv'd."⁷⁵ Hammond insisted that the people were being whipped into a fervor by "the Great Cato" and his confederates, and were in danger of returning to the worst abuses of the Star Chamber in their attempt to hold the accused to account. John Aislabie, defending himself before the House of Lords, declared he was "cut off at one Stroke from the Commonwealth, and stript of the *Birthrights and Privileges of Englishmen*."⁷⁶ He added that the Sufferer's Bill was illegal even under the malleable standards governing attainder, since it omitted a formal recitation of facts, and won passage in the upper chamber only by being joined to a revenue bill.⁷⁷ Even Lord Molesworth's son, though "a great lover of justice," confessed his doubts about its "overeager pursuit" in this case. "We are at a sad pass," he rued, "when our remedy is as much to be feared as the disease."⁷⁸

The emerging constellation of anti-Walpolean thinkers and writers was distinctly unimpressed by these self-pitying evocations of Anglo-Saxon liberty. It was not the allies of reform who had placed the rights and freedoms of the nation in jeopardy, but rather the camarilla of politicians and bankers that Walpole so fiercely protected. Like the son of Aeolus in Montesquieu's *Persian Letters*, they had sold the people bags of wind and left them to reap the whirlwind.⁷⁹ In these circumstances, naïve talk of rights and liberties was highly misleading. "No Man has greater regard for our Laws than myself," averred the unsigned treatise *Considerations on the Present State of the Nation*. But it was now necessary to enjoin those laws in order to repair the ravaged economy and unwind the piratical South Sea scheme. Britain's tangled skein of laws, rules, and precedents had become a façade for plunder and predation. "I think every one will allow, we have been living in a sort of lawless State for some Months. . . We can hardly say we have been acting under a Law, but have rather been in *Hobbes's State of Nature* for some time, and are now returning to the *State of Society*."⁸⁰ In these circumstances the rule of law was *lawless*, and only its temporary suspension could guarantee its eventual return. To understand how English political thought arrived at

75. ANTHONY HAMMOND, A MODEST APOLOGY 7, 16, 8, 12, 35 (1721), The Duke of Chandos was one of the most prominent speculators in the bubble, and lost a significant part of his fortune in 1720.

76. JOHN AISLABIE, SPEECH OF THE RIGHT HONOURABLE. . 18, 20, 21. [July 19] (1721).

77. *Id.* at 3; cf. Sir J. Vanbrugh, Letter to [Lord Carlisle], Apr. 22, 1721, in MANUSCRIPTS OF THE EARL OF CARLISLE, *supra* note 54, at 33 ("the Lords should not have passed it, had it come single").

78. [Richard Molesworth?], Letter to Hon. John Molesworth, Jan. 27, 1721, in REPORTS ON MANUSCRIPTS IN VARIOUS COLLECTIONS, *supra* note 57 at 296.

79. Montesquieu, 2 PERSIAN LETTERS 257-66 (Letter CXXXVI) (John Ozell trans., 1722), (the famous satire of John Law, who appears as the mythical offspring of Aeolus and a Scottish nymph, and sells bags of wind to the inhabitants of Fénelon's pastoral idyll *Betica*). Cf. Dror Wahrman and Jonathan Sheehan, *INVISIBLE HANDS* 94-96 (2015).

80. ANON, CONSIDERATIONS ON THE PRESENT STATE OF THE NATION 61-62 (1720).

this startling terminus, we must return to the Glorious Revolution and the origins of financial *raison d'état*.

II. ECONOMIC REASON OF STATE

A. National Securities

It is now widely accepted that “reason of state” had from its inception an economic as well as a military dimension, and that it was this commercial face of *raison d'état* that would become most prominent in the eighteenth century.⁸¹ As large territorial states began to coalesce in sixteenth century Europe, it became clear that military prowess was intertwined with questions of commerce, population, and agricultural surplus. And so from its first formulation in the work of Giovanni Botero and his contemporaries, reason of state involved “the explicit opening up of politics and statecraft to economic concerns.”⁸² In late Tudor and early Stuart England this involved a close imbrication of reason of state doctrines with fiscal and monetary policy, climaxing in judicial decisions that lashed these financial powers firmly to the royal prerogative.⁸³

But our understanding of this phenomenon remains incomplete. Although historians as diverse as Istvan Hont and Michel Foucault have explored the extension and application of *raison d'état* to matters of trade, debt, and agricultural planning in the mid-eighteenth century, and Michael Sonenscher has established the centrality of public debt to the French Revolution, no one has yet remarked on the earlier penetration of this style of thought into the domain of financial markets, which began in the decade following the 1688 revolution.⁸⁴ While it was only in the panicked atmosphere of 1720 that these ideas cohered into a new theory of the English constitution, its basic components had already been in circulation for more than two decades, reshaping England’s political imagination in ways that have gone largely unnoticed. This set of authors, in particular the novelist and newspaperman Daniel Defoe, was the first to recognize

81. See, e.g., THOMAS POOLE, REASON OF STATE 132-67 (2015) on ideas of global trade in the eighteenth century British Empire.

82. Sophus A. Reinert, *Introduction*, in ANTONIO SERRA, A SHORT TREATISE ON THE WEALTH AND POVERTY OF NATIONS 39 (Jonathan Hunt, trans., Reinert ed., 2011).

83. On coinage see *The Case of mixed Money, Trin. 2 Jacob. 1. 1605*, in A REPORT OF CASES AND MATTERS IN LAW, RESOLVED AND ADJUDGED IN THE KING’S COURTS IN IRELAND 48-77, (Sir John Davies ed, trans., 1762), esp. 50 (citing Bodin) and 60 (citing Rome’s war with Hannibal). For commentary, see CHRISTINE DESAN, MAKING MONEY 267-74 (2014). On revenues, see *Proceedings in the case of Ship-Money, between the King and John Hampden, esq. in the Exchequer, 13 Charles 1. 1637*, in 3 COBBETT’S COMPLETE STATE TRIALS AND PROCEEDINGS 825-1314 (1809).

84. ISTVAN HONT, JEALOUSY OF TRADE 8-15, 325-53 (2005); MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE, 1977-1978 337-40 (Graham Burchell trans., Michel Senellart, ed., 2009); MICHAEL SONENSCHER, BEFORE THE DELUGE 40-41 (2007).

and conceptualize the potentially lethal speed and instability of financial markets, and to propose as a remedy the abrogation of established rights and liberties on grounds of “emergency”; that is to say, they inaugurated a conversation on markets, social acceleration, and constitutional law that would move to the center of British public life during the South Sea catastrophe. In this section I offer a history of financial reason of state in the years before 1720, in order to make legible the political and legal developments that followed.⁸⁵

The Glorious Revolution brought with it an unprecedented surge in incorporation. “In the period 1690-1695,” reports Richard Dale, “there was a boom in company flotations for general subscription . . . by 1695 there were at least 140 companies with a combined capital of £4.5 million.”⁸⁶ This furious development was inseparable from England’s increasingly bellicose foreign policy; many of the new companies were chartered either to supply war *matériel*, or to replace the traffic in French commodities interrupted by hostilities, or to export to overseas markets captured in battle.⁸⁷ Dazzled by this new prosperity, investors flocked to Exchange Alley, a cluster of coffeehouses ranged on a narrow street in central London, to engage in a series of increasingly sophisticated financial transactions.⁸⁸

The new possibilities of finance and investment produced a moral panic, but critics of “stock-jobbing” also registered a more serious complaint: in an age where public debt was bought and sold in international markets, shadowy financiers now held a vast and illegitimate sway over the commonwealth.⁸⁹ “The Wealth of the Nation,” as one observer put it in 1696, was now at “the mercy of some self-interested crafty Knaves.”⁹⁰ Daniel Defoe, in one of his first publications, gave these anxieties full

85. In this section, and indeed throughout the paper, I will refer mostly interchangeably to “reason of state,” “*salus populi*,” “necessity,” and “emergency.” I am aware that these terms come out of different historical traditions (sixteenth century Italy, the Roman republic, the Roman *Codex*, medieval canon law, etc.), and that careful scholarship will enforce these distinctions where possible and appropriate. But the sources I rely on in this paper do not adhere to these definitional boundaries with anything like the rigor we might prefer, tracking freely and fluidly between these different appellations. The exception is “reason of state”, which is rarely used by any source quoted in this paper, and which I sometimes employ here for the sake of linguistic variety. I am comfortable doing this in part because I don’t recognize anything in the “reason of state” tradition, broadly understood, that excludes its application to this material.

86. DALE, *supra* note 20, at 25-26.

87. Giles Parkinson, *War, Peace and the Rise of the London Stock Market*, in *THE POLITICAL ECONOMY OF EMPIRE IN THE EARLY MODERN WORLD* 131, 134-35 (Sophus Reinert & Pernille Røge eds., 2013).

88. STUART BANNER, *ANGLO-AMERICAN SECURITIES REGULATION* 28-31 (1998); Parkinson, *supra* note 87, at 141.

89. See, e.g., LAURA JEAN ROSENTHAL, *INFAMOUS COMMERCE: PROSTITUTION IN EIGHTEENTH-CENTURY BRITISH LITERATURE* 77-80 (2006); CATHERINE INGRASSIA, *COMMERCE AND GENDER IN EARLY EIGHTEENTH-CENTURY ENGLAND* 17-39 (1998); BANNER, *supra* note 88, at 65-72.

90. POST MAN AND THE HISTORICAL ACCOUNT (London), Oct. 22, 1696.

expression. The people, he wrote,

ought to have a Care of affronting Men, in whose Power it lay so much to check the most essential point of the Cities prosperity, *their Trade*; and to let the Government see too, that they are Men of such Figures and Authority in the Nation, and can at their Pleasure so manage the Cash and Trade of the Town, that they can stop our Credit, break our Goldsmiths, sink our Stocks, embarrass the Bank, and ruine Trade at their Will and Pleasure.⁹¹

We can distinguish two concerns in this critique. First, the state's increasing reliance on private bankers and speculators to fund its public ventures risked corroding the foundations of sovereignty and self-government. Defoe put the point most sharply in his 1719 *Anatomy of Exchange Alley*: "Is this an Advantage fit to be put into the Hand of a Subject? Are the King's Affairs to go up and down as they please, and the Credit of his Majesty's Councils rise and fall as these Men shall please to value them? This would be making them Kings."⁹² Defoe may have had in mind the 1710 "Loss of the City," in which the Bank of England warned Queen Anne that it would refuse to lend to a Tory administration. Harley, then about to be named First Lord of the Treasury, deplored that "private persons. . . should have the presumption to take upon them to direct the sovereign," adding bitterly that "[i]f this be so let us swear allegiance to these [men], and give them a right to our passive obedience."⁹³ But Defoe had in fact foreseen something like this scenario nine years earlier, warning that "Mercenary Brokers and Companies" would inevitably attempt to dictate terms to the government by precipitating an artificial "Scarcity of Money," paralyzing the national commerce and bankrupting the state.⁹⁴ When Defoe raged against royal bankers and "Slavery to Creditors," he was not speaking merely figuratively; the power exercised by those at the center of these new networks of information and exchange seemed terrifyingly unlimited.⁹⁵

Second, this new class of speculators constituted an intrinsic danger to

91. DANIEL DEFOE, *THE VILLAINY OF STOCK-JOBBERS DETECTED* 10 (1701). Defoe was more mild in his earlier *ESSAY UPON PROJECTS* 32 (1697), where stock-jobbing is criticized as "a Modern way of Thieving. . . by which honest men are gull'd", omitting the suggestion of wider social danger.

92. DANIEL DEFOE, *AN ANATOMY OF EXCHANGE ALLEY* 59 (1719); cf. ROGER NORTH, *THE GENTLEMAN ACCOMPTANT* 291-92 (1714).

93. [Robert Harley], Letter to Arthur Moore, June 19, 1710, in *5 MANUSCRIPTS OF HIS GRACE THE DUKE OF PORTLAND* 545 (1891).

94. DEFOE, *supra* note 91, at 9.

95. DANIEL DEFOE, *FAIR PAYMENT NO SPUNGE* 92 (1717); cf. DANIEL DEFOE, *THE CONSOLIDATOR: OR SUNDRY TRANSACTIONS FROM THE WORLD OF THE MOON* 158 (1705). Consider also Trenchard, 1 *CL* (XX) 143, *supra* note 2, Mar. 11, 1721, ("The dregs of the people, and the scum of the Alley, can buy Italian and German sovereigns out of their territories; and their levees have been lately crowded with swarms of dependent princes, like Roman consuls, and Eastern monarchs").

the public safety, whether or not it attempted to seize the levers of government. Thomas Baston offered an extended corporeal metaphor intended to illustrate the folly of devolving responsibility for managing the national fisc to a nebulous network of private interests:

for as the Body Politick may be compar'd to the Body Natural, so the *Coin* of a Kingdom may be compar'd to the *Vital Blood* in the Body of a Man, which if it lodges only in one part, and does not duly circulate throughout the whole, causes *Plurisies*, *Apoplexies*, *Convulsions*; and, in short, endangers, or destroys the Constitution. . .⁹⁶

Often, it was thought, these “*Convulsions*” were deliberately engineered by predatory investors; Defoe accused traders of “Coning false News, this way good, that way bad; whispering imaginary Terrors, Frights, Hopes, Expectations, and then preying upon the Weakness of those, whose Imaginations they have wrought upon.”⁹⁷ Thus the private financial markets on which England depended might easily, through malignancy or incompetence, misallocate credit and stop the wheels of commerce. The Jacobite rebellion of 1715, Defoe reminded his reader, had been accompanied by a run on the Bank, bringing England perilously close to default. Had the Pretender actually landed, the financial panic might have been equivalent to a loss on the battlefield. “Is it not absolutely Necessary then to *Great Britain*,” he queried, “to put it out of the Power of her Enemies to throw her into such FITS?”⁹⁸

The danger was not merely hypothetical; Defoe argued it was ineluctably in the *interests* of financiers to foment panics and runs, since it was precisely in the midst of such pandemonium that they made their greatest windfalls. A foreign invasion—or a second Jacobite uprising—would offer an irresistible temptation to profit from the upheaval and uncertainty of the state.

[W]hen ever any Wickedness is in hand, any Mischief by the worst of the Nations Enemies upon the Wheel, the Stock-Jobbers are naturally made assistant to it, that they become Abettors of Treason, assistant to Rebellion and Invasion. . .we are oblig'd to expose a Sort of Men, who are more dangerous than a whole Nation of Enemies Abroad, an

96. THOMAS BASTON, THOUGHTS ON TRADE, AND A PUBLICK SPIRIT 6 (1716). See also THOMAS HOBBS, LEVIATHAN (1651), ch. XXIV (“the sanguinification of the commonwealth”).

97. DEFOE, *supra* note 92, at 3. Defoe would have had a number of specific examples in mind. His *Review* reported in 1704 that a cabal of “*Exchange-Alley Jockeys*” was suspected of having disseminated a false report that the French had captured St. Helena in order to profit from the ensuing disarray. See D. Foe, “ADVICE from the Scandalous CLUB”, DEFOE’S REVIEW, Aug. 5, 1704, at 191; cf. Thomas Gordon, *An Essay on the Practice of Stock-Jobbing* (1724), in 2 COLLECTION OF TRACTS, *supra* note 45, at 83.

98. DEFOE, *supra* note 95, at 101.

Evil more formidable than the Pestilence, and in their Practise more fatal to the Publick than an Invasion of *Spaniards*.⁹⁹

Capital, in other words, has no country. Thomas Baston arrived at a similar conclusion three years earlier: “these wretched Men thrive best when the Nation is in a Ferment, in times of *War, Rebellion, and publick Calamity*, which they make a Market of.”¹⁰⁰ The critique of stock-jobbing, then, was not merely that it permitted a small coterie of men to exercise an astonishing degree of power over the social and economic life of the nation; this new class of financial projectors also had an incentive to sow discord, spread alarming rumors, and foment crises in order to reap profits.

And yet defenders insisted that no law punished the free trade in securities, and that Magna Charta barred Parliament from acting to suppress the merchants of Exchange Alley.¹⁰¹ For Jonathan Swift, the celebrated poet, novelist, and “country” polemicist, this gap between criminality and illegality posed an insuperable paradox for England’s free government. “When,” he lamented “a Law is made to stop some growing Evil, the Wits of those, whose Interest it is to break it with Secrecy or Impunity, are immediately at Work,” with the result that “a Stock-jobber, and many other *Retailers of Fraud*. . . find out new Inventions, to elude the Force of any Law made against them.” Swift connected the speculator’s skillful evasion of prohibitions on fraud to a more general failing of the rule of law, its inability to grapple with sudden or unexpected events. The parallel he drew to the recent assassination attempt against the Prime Minister underscores the extent to which Swift considered the new financial regime a clear and present danger to national stability:

Nay, what is almost incredible, had *Guiscard* surviv’d his detestable Attempt upon Mr. *Harley*’s Person, all the inflaming Circumstances of the Fact, would not have sufficed, in the Opinion of many Lawyers, to have punish’d him with Death; and the Publick must have lain under this *Dilemma*, either to Condemn him by a Law, *ex post Facto* (which would have been of dangerous Consequence, and from an ignominious Precedent) or undergo the Mortification to see the greatest Villain upon Earth escape unpunished, to the infinite Triumph and Delight of *Popery* and *Faction*. . . From these Defects in our Laws, and the want of some discretionary Power safely lodg’d, to exert upon Emergencies; as well as from the great Acquirements of able Men, to elude the Penalties of those Laws they break, it is no

99. DEFOE, *supra* note 92, at 14-15.

100. BASTON, *supra* note 96, at 8.

101. *Id.* at 15.

wonder, the Injuries done to the Publick, are so seldom redress'd.¹⁰²

Swift diagnosed the pathology, but was unwilling to prescribe the strong medicine it demanded; he dismissed the possibility of *ex post facto* laws or emergency government to correct the slow-motion of criminal law in dealing with fast-evolving forms of financial fraud. He was thus left, rather weakly, to hope that comic "Satyr" and public shame might restrain criminals too crafty or well-connected to be deterred by law. Defoe evinced no such caution. He readily conceded that speculators were not traitors *within the letter of the law*, but the state's jurisdiction was grounded in its inherent right to defend itself, and to prosecute treason.

Will they tell us that running upon the *Bank*, and lowering the Stocks, was no Treason? We know, that litterally speaking, those things are no Treason: But is there not a plain constructive Treason in the Consequences of it? Is not a wilful running down the publick Credit, at a Time when the Nation is threatn'd with an Invasion from Abroad, and Rebellion at Home?¹⁰³

Where there was a violation of the social order, there must be a punishment. And Defoe did not hesitate to enlist the heaviest artillery in the armory of the British constitution against speculators who proved too novel or clever for ordinary laws.

Defoe's invocation of constructive treason breathed new life into a legal idea that had been at the crux of Whig opposition to James II.¹⁰⁴ Throughout the seventeenth century, and particularly in the late Stuart period, judges liberally construed the statutory definition of treason in order to secure convictions against prominent Whig dissenters, from Lord Russell to Algernon Sidney.¹⁰⁵ As a result, "constructive treason" was anathema to the generation of 1688; in the first year of the new regime John Hawles petitioned "to prohibit the Judges to make any other than a literal Construction" of the Treason Statute, while Robert Atkyns stated succinctly that "[t]here ought to be no such thing as Constructive Treason."¹⁰⁶

It is telling that Defoe, a vigorous exponent of the principles of 1688,

102. Jonathan Swift, *THE EXAMINER*, Apr. 26, 1711, at 1.

103. DEFOE, *supra* note 92, at 28; *cf. id.* at 31 (if not "Literal Treason, and within reach of the Statute, yet the Crime is in it self of the same Nature.").

104. *See, e.g.*, Robert Harley, *Speech in Parliament, 18 November 1692*, in *PARLIAMENTARY DIARY OF NARCISSUS LUTTRELL, 1691-1693* 237, (Henry Horwitz ed., 1972); Richard Hampden, *Speech in Parliament, 9 April 1689*, in *GREY'S DEBATES IN THE HOUSE OF COMMONS* 226 (Anchitell Grey ed., 1769).

105. Alexander H. Shapiro, *Political Theory and the Growth of Defensive Safeguards in Criminal Procedure*, *L. & HIST. REV.* 215, 221 (1993).

106. SIR JOHN HAWLES, *A REPLY TO A SHEET OF PAPER* 36 (1689); SIR ROBERT ATKYNS, *A DEFENCE OF THE LATE LORD RUSSEL'S INNOCENCY* 6 (1689)

would flirt with the revival of this doctrine to bring some semblance of order to the lawless frontier of high finance.¹⁰⁷ Indeed, he added that this might already be, *sub rosa*, the official position of the government: in 1707, he reported, the crown had considered taking measures against two wealthy Jacobite sympathizers suspected of organizing a run on the Bank of England. “If things had gone on to extremities”—that is to say, had a Stuart rising actually materialized—“they had doubtless been marked out as persons the government were to take care of.”¹⁰⁸ Defoe’s willingness to revise core tenets of the revolutionary catechism underlines the mounting unease, even among mainstream writers, with the new model of commercial society. And it pinpoints a genuine paradox of economic citizenship: once the state locates its security in the stability of its markets, it can be difficult to distinguish barter and exchange from sabotage and treason.

Thus on the eve of the South Sea bubble many of the elements of a financial *raison d’état* had fallen into place. First, a dynamic economy was now assumed to be critical to fighting wars and repressing rebellions, so that any interruption in the flow of credit was understood as a threat to the national security. Second, the new financial markets were visualized as a space of turbulence and danger, where sudden, unforeseen commotions might require rapid state interventions. And finally, speculators were portrayed as amoral cosmopolitan mercenaries, willing to traffic in the ruin of their country for a modest profit.

We can also discern the outline of a subtler idea: tumults and panics might *themselves* constitute conditions of emergency, given their potential to unleash destitution and spark social unrest. The resulting havoc might reproduce the horrors of armed conflict without the firing of a single shot. In the spring of 1720 it was commonly believed that John Law had launched a concerted attack against the London market, buying and then dumping large volumes of South Sea stock in the hopes of detonating British credit.¹⁰⁹ The prospect of a virtual war between the great powers,

107. The revolutionaries distinguished between constructive treason tried by judges, and constructive treason tried by Parliament; the latter was at least in theory acceptable. See *The Trial of Algernon Sidney* (1683), in 3 COMPLETE COLLECTION OF STATE TRIALS 738, (Salmon ed., 1730). It is not obvious what Defoe has in mind, but his loose usage of highly charged terminology is itself indicative.

108. DEFOE, *supra* note 92, at 28. The bankers in question were Sir Richard Hoare and Sir Francis Child, who were rumored to have hoarded over £100,000 in bank notes, demanding full payment in specie at a moment when an invasion by James III was widely expected.

109. See John Law, *Idée générale du nouveau système des finances* (1720), in 3 *Œuvres*, *supra* note 34, at 90 (“The English and the Dutch, the only commercial rivals of France, are scarcely in a position to oppose the System, and if they had the temerity to try, France would be able to ruin their credit.”); Bishop Atterbury, Letter to James III, May 6, 1720, in 2 HISTORY OF ENGLAND 311, (Lord Mahon ed., 1853) (“They have great sums of money in our stocks, which they may draw out at once, and sink them if they please.”). Regarding the suspicions of the English cabinet that Law planned to do precisely that, see EDGAR FAURE, *LA BANQUEROUTE DE LAW* 400 (1977); Daniel Pulteney to James

conducted by means of high-velocity trades and clandestine purchases, underscored the lethal volatility of the new commercial world. But only in the apocalyptic summer of 1720 did it become decisively clear that economic disorder, generated neither by a foreign power nor in a time of war, but only by the unpredictable gyrations of the market, could devastate the nation.

The new danger was spotted by many, and summarized with particular concision by Erasmus Philips:

It will hardly be credited in future Ages, that *England* Great as it must be in History, was brought almost to the Brink of Ruin, in a few days, without the Calamities either of a Foreign Invasion, or an Intestine War; when they shall read how far our Arms have extended their Conquests, that we held the Balance of Power of *Europe*, that our Credit was so great, that it reached the utmost Limits of the World, when they shall read that *England's* inviolable Faith, brought our Enemies at all times to supply us with Money to carry on the War against themselves; how is it possible they will believe that a few days cou'd put a Period to this Greatness.¹¹⁰

The crash was, in short, a state of emergency, equivalent in magnitude to international or civil war.¹¹¹ And it was a natural next step to conclude that the same unlimited powers that were activated in times of war and rebellion should now be mobilized to contain the rising financial chaos.

"Cato", the pen name shared by John Trenchard and Thomas Gordon, stood at the vanguard. "It is a Jest," they wrote, "for any Man to flatter himself, that any State will not save the whole People, by the Ruin of a Part of the People; when the Ruin of a Part is absolutely necessary to the Preservation of the Whole." If the state refused to sacrifice Exchange Alley through expropriations and extraordinary punishments, it too would

Craggs, Apr. 10, 1720, quoted in Murphy, *supra* note 32, at 240 Law, in turn, suspected that England was behind the December 1719 run on the Banque Royale; see the dispatch of Lord Stair, Dec. 11, 1719, in 2 MISCELLANEOUS STATE PAPERS, *supra* note 35, at 600.

110. ERASMUS PHILIPS, 1 AN APPEAL TO COMMON SENSE; OR, SOME CONSIDERATIONS OFFER'D TO RESTORE PUBLICK CREDIT 3-4 (1720).

111. Cf. Gordon, 1 *CL* (VIII), *supra* note 2, at 67, (Dec. 24, 1720) ("All our losses, pillages, and oppressions, since the Conquest, do not balance the present great calamity."); Gordon, 1 *CL* (II) 40 ("at MARSEILLES. . . [the plague] has destroy'd, we are told, about sixty thousand Lives; ours has done worse, it has rendered a much greater Number of Lives miserable"); Trenchard, 1 *CL* (XVI), *supra* note 2, at 122, (Feb. 11, 1721) ("crimes, which have no less object in view than the ruin of nations, and the destruction of millions"); Trenchard, 1 *CL* (XX), *supra* note 2, at 141 ("...ruin millions, subvert the policy and œconomy of nations, and create general want, and its consequences, discontents, insurrections, and civil wars"); [Daniel Defoe], THE DIRECTOR (London), Oct. 5, 1720 ("These men have murder'd many Thousands. . . they have made the whole City a Place of Rapine and Violence"); *Mist's Weekly Journal, or Saturday's Post* (London), Issue 101, Nov. 5, 1720 ("Fire, Plague, or Civil War"); APPLEBEE'S ORIGINAL WEEKLY J. (London), Jan. 7, 1721, 17 ("every Body are pointing their Weapons at some Body or other").

be consumed in the general conflagration of credit.¹¹² As support they brandished the classical slogan of state necessity, *salus populi suprema lex*.¹¹³ “[T]is a Maxim worth observing,” wrote Gordon,

that the word *Salus* in this Place does not barely signify the Safety, but also the Reputation and flourishing State of the People. It is scarce a Question, surely, Whether our Coin has not been more drain’d, and our Publick Credit more lessen’d by the Contrivances of this Scheme, than by the Force of our Debts, the Weight of Taxes, and the Expence of tedious Wars, all thrown in the Balance against them?¹¹⁴

No written or unwritten law could obstruct the state from taking action when its markets were in jeopardy. This translation of the classical doctrine of state necessity into the sphere of political economy would exert a decisive influence on the political and constitutional debates that followed.

B. Capital punishment

The failure of the South Sea scheme left thousands of British subjects suddenly immiserated, and directed unprecedented public fury toward those thought to be responsible for shattering the national economy.¹¹⁵ This anger quickly found its voice in an outpouring of broadsheets and pamphlets imploring the exemplary punishment of the South Sea directors, their allies in Parliament, and the “money’d men” who had conspired to inflate the price of the stock. A petition circulated in the name of the cities of Warwick and Stafford demanded a full accounting, followed by “the taking exemplary Vengeance on all that are Sharers in the Guilt of it.”¹¹⁶ Jonathan Swift, an outspoken early supporter of the South Sea Company, now captured the public mood in a poem that pictured the directors swinging from the gallows.

Antæus could, by Magick Charms
Recover Strength whene’er he fell;

112. Trenchard & Gordon, 1 *CL* (X), *supra* note 2, at 77; *cf. id.*, 80 (“Are we to save ourselves at the expence of the gentlemen of the Alley? Or are we to perish together with them? The choice is easy. Can they be so weak, as to form a pretended necessity, to bring their country into such unhappy circumstances; and yet not fear that wise and honest men may take advantage of a real necessity, to get out of such unhappy circumstances?”).

113. Gordon, 1 *CL* (XI), *supra* note 2, at 87 (Jan. 7, 1721) (“*Salus populi suprema lex esto: That the benefit and safety of the people constitutes the supreme law, is an universal and everlasting maxim in government; It can never be altered by municipal statutes*”). *Cf.* Gordon, 1 *CL* (XVI), *supra* note 2, at 122.

114. THOMAS GORDON, FRANCIS LORD BACON 58 (1721).

115. *See, e.g.*, Thomas Brodrick, Letter to Lord Middleton, Mar. 7, 1721, in COXE, *supra* note 60, at 209; Gordon, 1 *CL* (XXVIII), *supra* note 2, at 205.

116. SEVERAL PETITIONS, *supra* note 5, at 15 [Warwick and Stafford].

Alcides held him in his Arms,
 And sent him *up* in *Air* to Hell.
Directors thrown into the Sea,
 Recover Strength and Vigour there;
 But may be tam'd another way,
*Suspended for a while in Air*¹¹⁷

The author of *A New-Year's-Gift for the Directors* thought the scaffold too light, urging instead that “the Authors of this Universal Calamity” be skinned alive and then beheaded, their skulls “fix'd upon Poles in *Exchange Alley*” as a *memento mori* for stockbrokers of the future.¹¹⁸ And Rev. Moses Browne, an amateur poet in the pay of Viscount Molesworth, issued an extravagant ode depicting his patron as an angel of death, sent to redeem the rule of law in England through a purge of its state criminals: “The Magistrate that by Tyrannic stealth,/Robs Cities of their Wealth,. . .Let him Impal'd, around the Stake wreath Bloody as his Mind.”¹¹⁹ But it was the Whig pamphleteers Trenchard and Gordon who did the most to quicken the pulse of public debate. Although *Cato's Letters* are often remembered as early monuments of the civil libertarian ideology,¹²⁰ its pages overflow with calls for the summary trial and violent execution of the South Sea conspirators—a group that included not just the Directors and their political enablers, but also the legion of stockbrokers who profited from the bubble.¹²¹ “[T]he People at last,” Gordon exulted, “seem apprized of a merciless Conspiracy, to deceive and plunder a free, believing Nation, to enrich a vile Tribe of Stock-jobbers.”¹²²

Trenchard and Gordon imagined graphic punishment as the justified retribution of a bankrupted public. The Second Letter announces, matter-of-factly, “a thousand *Stock-Jobbers*, well *truss'd up*, beside a diverting Sight, would be a cheap Sacrifice to the *Manes* of Trade.”¹²³ The Twenty-First Letter is written from the perspective of the hangman, busily preparing halters and axes for what he anticipates will be a bloody summer of reprisals.¹²⁴ But it is a passage from the Third Letter that best

117. JONATHAN SWIFT, THE BUBBLE: A POEM 11 (1721); *cf. id.* at 13 (“never shall our Isle have Rest,/Till those devouring Swine run down”).

118. A NEW-YEAR'S-GIFT FOR THE DIRECTORS 28-29 (1721).

119. REV. MOSES BROWNE, THE THRONE OF JUSTICE; A PINDARIC ODE; HUMBLY DEDICATED TO THE RIGHT HONORABLE LORD VISCOUNT MOLESWORTH 4 (1721). The poem's epigraph is taken from Gordon, CL (XXIX), *supra* note 2, at 212-13 (May 13, 1721): “he who screens from the gallows those that deserve it. . .ought to swing in their room.”

120. See Part IV, *infra*.

121. This is made exceptionally clear in Gordon, CL (XXI), *supra* note 2, at 153-55 (Mar. 18, 1721).

122. GORDON, OF STOCK-JOBBERS, *supra* note 97, at 2:22.

123. Gordon, 1 CL (II), *supra* note 2, at 1:41.

124. Gordon, CL (XXI), *supra* note 2, at 1:148-55.

exemplifies the chilling calm with which Cato could contemplate “extraordinary” punishment:

as to the *Class of Ravens*, whose Wealth has cost the Nation its *All . . . no Man can call them his Neighbours*; they are *Rogues of Prey . . . Your Terrour lessens*, when you liken them to *Crocodiles* and *Cannibals*, who feed, for *Hunger*, on humane Bodies. . . Well; but Monsters as they are, what would you do with them? The Answer is short and at hand, *Hang them*; . . . I would have no new Tortures invented, nor any new Death devised. In this, I think, I shew Moderation . . . As to their *Wealth*, as it is the *manifest Plunder* of the People, let it be restored to the *People*, and let the Publick be their Heirs.¹²⁵

This pitiless attitude toward the financial elite instantly made Cato one of Britain’s most celebrated authors, while scandalizing the moderate press.¹²⁶ Anthony Hammond fretted that “Blood and Death are Words very frequent now, among our Pamphleteers; and, from them, among the Scum of the People, where indeed they are dangerous.”¹²⁷ One administration newspaper denounced the “Assassinating Principle” animating the *Letters*, while another sputtered that the logical endpoint of “this Doctrine of the Great *Cato*” was “Neighbours and Fellow Citizens Butchering each other” in the streets.¹²⁸ And a writer calling himself Timothy Telltruth attacked Cato and his confederates in a lengthy satire that presented the trial of the South Sea directors as a circus of extremist rhetoric led by a rabble-

125. Gordon, 1 CL (III), *supra* note 2, at 1:44-5. For similar language, see Gordon, 1 CL (II), at 1:27 (“. . . this Sort of *Vermin*. . .”); Gordon, 1 CL (IV), at 50 (Nov. 26, 1720) 1:50 (“money-leaches”); Gordon, 1 CL (V), at 51 (Dec. 3, 1720) (“the cannibals of credit”); Trenchard and Gordon, 1 CL (X), at 1:78 (“desperate hard-hearted parricides”); Trenchard, 1 CL (XII), at 99 (Jan. 14, 1721) (“. . . the *Murthers* of our Credit”); Trenchard, 1 CL (XX), at 140 (“new kinds of vengeance, new tortures, and new engines of misery ought to be invented”); Gordon, 1 CL (XXI), at 1:149 (“the blood-suckers of the people”); Gordon, 1 CL (XXIX), at 1:213 (“a destroyer-general. a mad dog, with ten thousand mouths, who scatters poison, wounds, and death all around him”).

126. A.B., Letter to Lord Carteret, Aug. 16, 1721, in STATE PAPERS, DOMESTIC, GEORGE I (1981), SP 35/28 ff. 32 (“The general Cry among the common People is of late, Oh! This is a fine Paper”); “Aristarchus”, MIST’S WEEKLY JOURNAL (London), 15 Apr. 1721 (“the unusual Success of [his] Writings”); Daily Journal (London), May 5, 1721, at 89 (“But to pass over a whole herd of Grubstreet-Scribblers. . . how industrious has a certain Hebdomadal Writer been, in spreading his dangerous Notions amongst the People!”); READ’S WEEKLY JOURNAL OR BRITISH GAZETEER (London), May 13, 1721 (“the Prince of *News-Writers*”); APPLEBEE’S ORIGINAL WEEKLY JOURNAL (London), Sept. 2, 1721 (“notwithstanding all the Applauses which are bestow’d on the Great, the Immortal Cato. . .”); “Britannicus”, FLYING POST (London), Dec. 14-16, 1721 (“Cato of late is so full of himself, and so sure of Success, that he seems to think that his *ipse dixit* will go as far now as *Aristotle*’s once did”); PASQUIN (London), Mar. 13, 1723 (“*Cato*’s late Reasonings. . . which in the Case of the *South Sea* Affair were so highly applauded, that they have established his Reputation, and made him a very popular Writer ever since”). Modern estimates put the peak circulation of the *London Journal* at 10,000—see DAVID A. COPELAND, THE IDEA OF A FREE PRESS 100 (2006).

127. HAMMOND, *supra* note 17, at 17. *cf. id.* at 10.

128. “The Fary-Tatler No. 9”, READ’S WEEKLY JOURNAL OR BRITISH GAZETEER (London), Feb. 3, 1722; FLYING POST (London), Dec. 14-16, 1721.

rousing prosecutor who delivers a speech copied verbatim from Cato's Third Letter.¹²⁹

For Cato's contemporaries, it was obvious that the popularity of the *Letters* was closely connected to their advocacy of extreme measures and their hypnotic mantra of "Necessity" and "imminent danger."¹³⁰ But historians of all stripes and schools have typically refused to take these outbursts seriously, preferring to view the South Sea letters in a splendid isolation from the rest of Cato's work and far away from its core arguments.¹³¹ Closer to the mark are those readings, descended from J.G.A. Pocock, which present Trenchard and Gordon's South Sea writings as the expression of a vengeful Machiavellian tendency, with its concomitant emphasis on spectacular acts of violence and punishment. But Pocock hastens to add that Cato "was not primarily a constitutional theorist, and to the extent that he was not the concept of virtue dictated a politics of personal morality."¹³² The effect is the same in both cases: to bracket Cato's ferocious populism and his avant-garde constitutional claims as peripheral to his political theory of individual civic virtue. But this is sustainable only if we ignore the many other writings that Trenchard and Gordon produced in this period, and only if we detach the *Letters* from their immediate context, a highly fraught constitutional debate over the limits of parliamentary power.

At the core of the argument was the extent of parliament authority to punish South Sea conspirators. Establishment Whigs and Tories argued frequently and confidently that however reckless their behavior, none of the actions of the South Sea conspirators was obviously illegal.¹³³ They set out three major legal claims. First, any prosecution based on a new law would violate the deeply entrenched norm against punishments *ex post facto*.¹³⁴ Second, imprisonment, expulsion from Parliament, or confiscation of property without proper judicial procedures would

129. TIMOTHY TELLTRUTH, MATTERS OF FACT 7-13 (1720). Telltruth offers the following description of "*Clamour*": "Pride, Indignation, Self-Conceit, and Malice, were visible in his Eyes; his Voice was loud as *Stentors*, and which he always exerted to make Noise go down for Reasons, and bold Assertions for Truth and Justice, still breathing nothing but Death and Destruction; whoever he spoke against never met with milder Names than *Rogue, Villain, Miscreant, Traytor, Pick-Pocket, Robber*, and the like."

130. [MATTHEW TINDAL], A DEFENCE OF OUR PRESENT HAPPY ESTABLISHMENT; AND THE ADMINISTRATION VINDICATED 4 (1722).

131. See, e.g., SHELLEY BURTT, VIRTUE TRANSFORMED: POLITICAL ARGUMENT IN ENGLAND 69 (1992).

132. J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT 469-71 (1975).

133. "Somersetshire", APPLEBEE'S ORIGINAL WEEKLY J. (London), Jan. 21 1721.

134. ANON, REMARKS ON THE OCCURRENCES OF THE YEARS 1720 AND 1721 91 (1724). Cf. ANON, SOME OBSERVATIONS ON THE BILL NOW DEPENDING IN PARLIAMENT 3 (1721); ANON, LAWS, EX POST FACTO; OR THE ANNULLING OF LEGAL BARGAINS, INCONSISTENT WITH THE BRITISH CONSTITUTION, AND THE PRIVILEGES OF A FREE PEOPLE (1721); AISLABIE, *supra* note 76, at 18 ("... WHERE IS THE *Law* that I have broken?"); [Daniel Defoe], THE DIRECTOR (London), Jan. 13, 1721.

contravene the sacred guarantees of Magna Charta.¹³⁵ Finally, allowing Parliament to serve as both prosecutor and judge would make a travesty of due process.¹³⁶ John Aislabie, the only notable British politician to be convicted for his role in the South Sea saga, nicely summarized the three arguments in his warning: “Precedents, my Lords, will *advance*, and this Precedent will not *sleep*. The Violence of the Times, and the Rage of Parties is too great to *drop* a Precedent so *useful* as this will be.”¹³⁷

For the radicals, on the other hand, it was intolerable for the conspirators to be screened from justice by legal technicalities.¹³⁸ Britain, thundered Gordon, “will not let a People’s Ruin go unpunish’d, because Frauds and Injuries have been too subtly couch’d for the Statute-Law.”¹³⁹ But even Joseph Jekyll, the distinguished jurist then serving as Master of the Rolls, believed that “where the laws are deficient, the legislative authority may and ought to exert itself . . . he hoped a British parliament would never want a vindictive power to punish national crimes.”¹⁴⁰ Indeed, neither Gordon nor Jekyll could endorse mere mob justice, and they took seriously the warning that “extraordinary measures” might acquire a logic and a momentum of their own. And so they, like and their fellow opposition writers, sought to anchor their program of elite accountability in the depths of the British constitutional tradition. We can separate the radical argument into three main currents.

135. HAMMOND, *supra* note 17, at 16; Aislabie, SPEECH *supra* note 76, at 21 (“ . . . and shake even MAGNA CHARTA itself?”); REMARKS ON THE . . . , *supra* note 134, at 4.

136. AISLABIE, *supra* note 76, at 20.

137. *Id.*; cf. REMARKS ON . . . , *supra* note 134, at 9 ANON, FAIR WARNING TO THE GOOD PEOPLE OF ENGLAND 49 (1721).

138. We can distinguish between two kinds of “technicalities” that the party of vengeance worried would frustrate the ends of justice. First, the conduct in question might have been technically legal: creative criminals will always discover loopholes, since it “is impossible to devise laws sufficient to regulate and manage every occurrence and circumstance of life.” See Gordon, 2 CL (XLII), *supra* note 2, at 290 (Aug. 26, 1721). This is particularly true given the influence of the criminals in Parliament, their ability to obtain generous charters and helpful legislation. See Gordon, 1 CL (III), *supra* note 2, at 45. Second, the flight of Robert Knight (and his green book) to Antwerp meant that the evidence collected against the Directors and their backers, no matter how persuasive, might be too circumstantial to satisfy the burden of proof in an ordinary trial. See [Daniel Defoe?], VINDICATION OF THE HONOUR AND JUSTICE OF PARLIAMENT 16-20 (1721); Trenchard and Gordon, *Sense of the People* (1720), in 2 COLLECTION OF TRACTS, *supra* note 45, at 9 (“ . . . all other Proof neglected and discouraged by the Name of *Hearsay Evidence*”). Hence the resort to “extraordinary” process.

139. GORDON, *supra* note 114, at 57. See also *id.* at 52 (“Must not a Government stand upon a very tottering Foundation, if Villains may make Attempts with Impunity, whenever they can find out a By-way of slipping thro’ the Statute-Law?”); cf. SALUS POPULI SUPREMA LEX; SHEW’D IN THE BEHAVIOUR OF BRITISH PARLIAMENTS TOWARDS PARRICIDES 38 (1721) (“ . . . how many vile Criminals have been acquitted for default of legal Evidence, Errors in their Indictments, &c. though manifestly guilty in the Opinion both of Court and Jury?”); GORDON, 2 CL (XI), *supra* note 2, at 46 (“That they may overturn all Law, and yet escape by not being within the express Words of any particular Law.”).

140. Debate in the Commons on the Motion for Address (Dec. 8, 1720), in 7 COBBETT, *supra* note 59, at 683; cf. SALUS POPULI, *supra* note 139, at 9; PHILIPS, AN APPEAL TO COMMON SENSE. . . PART II 3-4 (1721) (“‘Twoud indeed be a shameful Defect in a Government, if such a Power were not lodg’d somewhere. . . [when there is] no other expedient left to save the Nation”).

One possible source of law for punishing the directors was the *lex naturalis*, and the very particular gloss on it given in Locke's *Second Treatise*. There Locke had posited a right to "punish another for any evil he has done," a right that could be exercised by anyone in the absence of civil society. "[E]very man," he wrote, "hath a right to punish the offender, and be executioner of the law of nature."¹⁴¹ This "very strange doctrine" is restated nearly word for word in *Cato's Letters*,¹⁴² but it is also modified in a number of interesting ways. Cato emphasizes, for instance, that "this primary Law of Nature and Nations" applies not only to individuals in the state of nature, but also to extant governments acting in a legal vacuum:

tho' National Governours should never enact any positive Laws, and never annex particular Penalties to known Offences; yet they would have a *Right*, and it wou'd be their *Duty*, to punish those Offences, according to their best Discretion, and much more so, if the Crimes committed are so great, that no human Wisdom cou'd foresee that any Man cou'd be wicked and desperate enough to commit them.¹⁴³

Similarly, the *Letter to Licinius Stolo* argued that the right to chastise Aislabie and his co-conspirators derived not from municipal laws but from "Reason and Nature." The example given is instructive: there is no question that a man who dammed up or diverted the course of the Thames would be sentenced to death by Parliament, not for breaking some esoteric ordinance, but "in virtue of a Charter from God" to eradicate violent pests.¹⁴⁴ Even where the law is silent Parliament may speak, and it finds its voice in the strict dictates of natural law.¹⁴⁵

In an essay printed the week of the crash, Daniel Defoe took this a step further: natural law might not only *substitute* for legislation but even *supersede* it where the rush of events has rendered existing rules obsolete. Thus, even assuming that the bubble companies were licensed to act as they did by existing statutes, "Laws to do Evil are, *Ipsa Facto*, void in their own Nature." They cannot shield "Robbery and Deceit" from the retribution of natural justice.¹⁴⁶ This was particularly true, Trenchard

141. John Locke, *Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT II § 7-8, 169-71. (1698).

142. See Ronald Hamowy, *Cato's Letters, John Locke, and the Republican Paradigm*, in 9 HIST. POL. THOUGHT 273, 282 (1990) ("Cato argues this view in clearly Lockean terms").

143. Gordon, 1 *CL* (XI), *supra* note 2, at 87-88.

144. A MEMORIAL OF THE CONTRACTANTS WITH MR. AISLABIE, IN A LETTER TO LICINIUS STOLO 55 (1721). For an argument along similar lines, see Gordon, 1 *CL* (XI), *supra* note 2, at 89.

145. Cf. Gordon, 2 *CL* (XLII), *supra* note 2, at 289 ("...the violation of what ought to be a law, is a crime even when there is no law. The essence of right and wrong does not depend upon words and clauses inserted in a code or a statute-book, much less upon the conclusions and explications of lawyers; but upon reason and the nature of things, antecedent to all laws.").

146. Defoe, *supra* note 8.

added, since bubble financiers had helped to draft the very laws under which they now sought shelter. “*Treasons* from the Nature of Things themselves,” he wrote, “antecedent to all Laws that call them so,” remain criminal “tho’ Laws gained by Subornation should call them otherwise.”¹⁴⁷ In an age where privileges and protections were sold to the highest bidder, no statute could be treated as sacrosanct.

Second, radicals cloaked themselves in the mantle of 1688 and the high principle of parliamentary supremacy.¹⁴⁸ Because Parliament is the sole arbiter of the content and limits of the law, they maintained, it is a solecism to call any action taken by Westminster “lawless.” The anonymous author of *Salus Populi Suprema Lex* advanced this proposition most boldly: “This supreme Legislative Power is circumscrib’d by no rules, nor subject to any Law but the eternal laws of Reason: and the fundamental Law of all Government, viz. *Ne quid detrimenti Respublica capiat, To preserve the Commonwealth, is its only Rule.*”¹⁴⁹ As a correspondent for *Mist’s Journal* observed, tauntingly, “Kings have been forced to fly and abdicate for less Offences, for lighter Oppressions; and shall Directors escape?”¹⁵⁰ The ground-norm established by the revolution, after all, was that Parliament could act on its own authority to rescue the state in times of emergency. If Jacobites delivered this argument with a smirk, commonwealthmen were perfectly sincere in identifying extra-legal punishment with revolution principles: “It was not by the Forms of common Justice below, that they declar’d the Throne vacant at the late Glorious Revolution, and King *William* the lawful King . . . no, it depended on this Maxim, That the Parliament of *England* . . . might constitute a Government for the Preservation of the Whole.”¹⁵¹ No one who accepted the revolution settlement could credibly complain of illegality in the suppression of rogue bankers.

Proponents of parliamentary supremacy sought to invest this unbounded discretion in a concrete juridical form: the trial of the South Sea defendants in Parliament, on charges of treason, via the bill of attainder.¹⁵²

147. Trenchard, 1 *CL* (XII), *supra* note 2, at 94. “Subornation” is rendered as “subordination” in the Hamowy edition, likely a mistranscription. Cf. 2 Gordon, *supra* note 45, at 34; Trenchard, 1 *CL* (XVII), *supra* note 2, at 124 (Feb. 18, 1721).

148. H.T. Dickinson locates the “notion that the legislature was sovereign” in an intramural debate between revolution and conservative Whigs. The first faction “had no qualms” with this principle; the latter resisted the idea that Parliament could modify or repeal the Act of Union, the Bill of Rights, or Magna Charta. Not until the Septennial Act of 1716 did a “majority of Whigs explicitly [accept] the sovereign authority of Parliament,” and even then, many continued to resist its full implications. See H.T. DICKINSON, LIBERTY AND PROPERTY 82-83 (1983).

149. SALUS POPULI, *supra* note 139, at 36.

150. “Philo Britannus”, Letter XXXVII, in MISCELLANY, *supra* note 8, at 109. The *Journal* was the leading organ of Jacobite opinion, and Mist himself was convicted of criminal libel in February 1721 for articles insulting German Protestants in the Palatinate.

151. SALUS POPULI, *supra* note 139, at 38.

152. See DEFOE, *supra* note 138, at 7 (“. . . as the whole Power of Government is in the

Advocates of this measure recited a long list of precedents, from the generals condemned for surrendering prematurely during the Hundred Years War, to the proscription of the Earl of Strafford in 1641, to the drawing and quartering of a subject who killed a foreign minister in self-defense in 1370.¹⁵³ Notably, none of these actions fell within the ambit of treason law, as defined by the statute of 25 *Edw.* III, which restricted treason to a number of discrete offenses against the person and dignity of the king.¹⁵⁴ And yet in the 370 years since its passage, Parliament had frequently surpassed these boundaries in order to neutralize threats to the collective.

Now there was nothing in [these cases] to make it Treason by the Statute, nor could such a Procedure be justified by any thing but the Necessity of it. The Publick Faith however, and the Law of Nations requir'd it. . . . 'Tis evident our Parliaments have constantly exerted such a Power, as the Exigency of the Occasion seem'd to require. And we may observe, from the Examples produc'd, that they have not only inflicted the *highest Punishment* for Facts which were not prohibited by an express Law. . .but have, in several Instances, declar'd Crimes to be greater, than by the Laws actually subsisting they were declar'd to be.¹⁵⁵

When Parliament acts in times of exigency it carries the law with it. And its jurisgenerative power extends beyond punishing unknown offenses, to the character and nature of the trial it conducts. Ordinary courts are bound by "the Letter of the Law," by which too often "not only the Guilty will escape Punishment, but even the Innocent may suffer by a scrupulous adhering to Forms."¹⁵⁶ But in the extraordinary instances in which Parliament reconstitutes itself to try high crimes, these restrictive rules of evidence and procedure no longer obtain, and conviction can be secured without satisfying the common law burden of proof. As support, Thomas Gordon recalled the speech of Francis Bacon during his own 1621 impeachment in the House of Lords: "*their Lordships are not simply Judges, but Parliamentary Judges; that they have a further Extent of*

Legislature, it is their undoubted Right to proceed by Attainders in all Cases where it shall be necessary; of which Necessity they are the only proper Judges").

153. GORDON, *supra* note 114, at 54-57; SALUS POPULI, *supra* note 139, at 10-35. During the reign of Richard II a man killed the Genoese ambassador after a quarrel in the street; although it was stipulated that the man had acted in self-defense, he was nevertheless attainted and killed on grounds of state necessity.

154. The Treason Act of 1351 did, however, contemplate that Parliament might judge cases of treason not provided for in the narrow range of the statute. See Trenchard, 1 *CL* (XII), *supra* note 2, at 97.

155. SALUS POPULI, *supra* note 139, at 35-36; cf. JOHN G. BELLAMY, *THE TUDOR LAW OF TREASON* 11 (1979).

156. SALUS POPULI, *supra* note 139, at 37.

Arbitrary Power *than other Courts; and are not tied by ordinary Course of Courts, or Precedents in Points of Strictness and Severity.*¹⁵⁷ Parliamentary attainder, particularly when conducted in conditions of crisis, licensed a radical departure from the substance and process of ordinary criminal trial.¹⁵⁸

The bill of attainder was hardly an obscure feature of English constitutional life; it had been invoked most recently in 1715 against Bolingbroke, at the behest of Walpole and Stanhope, for his dalliance with the Pretender on the death of Queen Anne.¹⁵⁹ Nevertheless, its proposed extension from sedition to financial crime excited furious controversy. Critics argued, first, that the attainder had historically been abused to silence dissenters and to purge unpopular politicians. Aislabie insisted this was the case in its most famous usage, the execution of Strafford in 1641, a quixotic effort to “*appeas[e] the deluded People*” with the busy pageantry of a show trial.¹⁶⁰ Other writers took a more measured line, allowing the legitimacy of attainder in cases of treason, while resisting the “wild and boundless” construction given to it by the patriots.¹⁶¹ Charlewood Lawton, a former agent of William Penn, signaled agreement with the “great Sense and Spirit” of radical arguments *pro punitio*, but cautioned that any attempt to retrofit the bill of attainder would be counterproductive. First, because inordinate punishments would shroud the guilty in a fog of pity and martyrdom, leading the public to forget their heinous crimes. And second, because untethering the bill of attainder from cases of rebellion, assassination, or invasion would risk converting it to a routine weapon of party-political conflict, with each new government sending its predecessor to the scaffold in a revolving reign of terror.¹⁶²

Radicals denied their proposals hollowed out the rule of law and opened a path to despotism. The people, they replied, can easily distinguish between action taken by Parliament in a “true” emergency, to punish “*unheard of Crimes, or. . . unthought of Abuses,*” from the unjustified or

157. GORDON, *supra* note 114, at 53. In context, Bacon is petitioning the Lords to use their substantial discretion to grant him *leniency*. Cf. FRANCIS BACON, TO THE RIGHT HONOURABLE THE LORDS OF PARLIAMENT, IN LETTERS OF S^r FRANCIS BACON 270 (R.S. ed., 1702). See also DEFOE, *supra* note 138, at 8-9

158. Compare these passages with Gordon’s much more equivocal discussion of the bill of attainder in THOMAS GORDON, THE JUSTICE OF PARLIAMENTS 33-37 (1725) following his Damascene conversion to the administration side. See esp. 34 (“ . . . if I am not mistaken, such forcible Objections have been rais’d in Discountenance of [attainder, extraordinary trials], as ought to make every *Ministry* apprehensive how they bring them into Practice”).

159. Indeed, Aislabie had voted for it, as his critics gleefully observed. Cf. Trenchard, 1 *CL* (XX), *supra* note 2, at 142-43 (expressing disappointment that more of the ministers of James II had not been tried for treason, and that Harley and Bolingbroke had not been tried and executed in 1714).

160. AISLABIE, *supra* note 76, at 6.

161. HAMMOND, *supra* note 17, at 9.

162. CHARLEWOOD LAWTON, THREE LETTERS CONCERNING CIVIL COMPREHENSION, &C. 24-25(1721).

self-interested invocations of these same powers. Appropriately, this point was made in the idiom of financial fraud:

To pretend, that because the Publick, upon some new, and unforeseen Emergency, makes a Law with Retrospect for the Punishment of *unheard of Crimes*, or for correcting unthought of Abuses, that therefore People may suspect the Publick will afterwards to so without any just Cause or Pretence, is a way of Reasoning worthy only of those fair Traders, who pretend to demand ten Times the Value of the Thing they sold, because an Innocent Man was induced by the Fraud of a Third Party to promise it.¹⁶³

Another author reassured the public that “such Emergencies will [rarely] happen in a State well govern’d,” comparing Parliament’s temporary arrogation of the executive power to the highly unusual circumstances in which “the General of an Army is now and then to fight with his own Hands, like a common Soldier.”¹⁶⁴ The body that commands the courts can certainly take their place, but we should not fear that this will become an everyday occurrence.

163. A REPLY TO A MODEST PAPER, CALL’D, REASONS FOR MAKING VOID FRAUDULENT AND USURIOUS CONTRACTS I (1721).

164. SALUS POPULI, *supra* note 139, at 44.



Figure 2. "The Bubblers Funeral Ticket for the Directors of the South Sea Company", George Bickham the Elder. Printed in London, February 1721. Adapted from a satirical engraving, published September 1720 by the same author, on the bankruptcy of the Mississippi Company in France. The inscription turns the poster into a ticket to a hanging: "You are desir'd to accompany the whole Body of S.S. Directors from ye Great Bubbling house in the Broadway to ye three Legged Tree near Padington on Fryday the of February 1721 by 11 a Clock in the forenoon exactly. Note there will be a Funeral Sermon being preached there by P.P.P. who has been a noted sufferer by being too busie with Capital Stock."¹⁶⁵

The third radical appeal went even further: paradoxically, Cato and his allies maintained, only extraordinary and uncompromising punishments could guarantee the rule of law. In part this was because official sanctions forestall private retribution and popular justice—the inevitable efforts of "a brave Nation, impatient of Oppression...to redress [its] own Grievances" when the state retreats.¹⁶⁶ But there was a more perceptive

165. For additional detail, see 1708, *The Bubblers Funeral Ticket*, in CATALOGUE OF PRINTS, *supra* note 38, at 574-75.

166. EUSTACE BUDGELL, A LETTER TO A FRIEND IN THE COUNTRY 46 (1721); *cf.* Gordon, 1 CL (III), *supra* note 2, at 46; [THOMAS GORDON], THREE POLITICAL LETTERS TO A NOBLE LORD,

idea at work here as well: upholding the rule of law meant ensuring that it was not circumvented by mere technicalities or lawyer's tricks. Surely, an editorial in *Mist's Journal*¹⁶⁷ reasoned, "the Law cannot be so wholly of this *Cobweb* Texture, as only to intrap feeble *Flies*, and not. . . pernicious *Hornets*."¹⁶⁸ It is this spectacle of unequal justice, in which ordinary highwaymen are condemned while privileged bankers go free, that breeds contempt for the law.¹⁶⁹ Thus "rule of law" may depend, paradoxically, on castigating elites who have struck at the heart of the republic while managing to remain within the bounds of legality.

This vision of a rule of law upheld through extrajudicial proceedings was drawn out at length in Cato's Third Letter:

A man robb'd in his House, or on the Highway, receives from the Law all possible Satisfaction. . . By this salutary Method, Vengeance is at once taken for the Crime committed, and a terrible Example made of its Author, to prevent its Repetition. The *Law* is the great Rule in every Country, at least in every free Country, by which private Property is ascertained, and the Publick Good, which is the great End of all Laws, is secured; and the religious Observance of this Rule, is what alone makes the Difference between good Laws and none. The Terror and Sanctity of the Laws, are shewn by the Execution of them.¹⁷⁰

Law is a capacious concept, and is not exhausted by punctilious adherence to what Gordon derisively termed "the Niceties of Form,"¹⁷¹ nor by the fetishization of catch-words like *ex post facto* or *Magna Charta*.

CONCERNING LIBERTY AND THE CONSTITUTION I.11 (1721)(citing Grotius).

167. Mist's essay is an extended riff on Gordon's *Francis, Lord Bacon*, further evidence of the proximity of Jacobite and Old Whig positions on popular accountability. For the origins of this connection in the disillusionment of radical Whigs with the settlement of 1689, see Mark Goldie, "The Roots of True Whiggism", 9 HIST. POL. THOUGHT 195, 228 (1980). For the interchangeability of Whig and Jacobite arguments during the first phase of the South Sea crisis, see ANON, THE CENSOR CENSUR'D: OR, CATO TURNED CATILINE 2 (1722). To see how the Jacobites and Old Whigs diverged on this same topic, see "Fleta", *Mist's Weekly Journal* (London), Sept. 23, 1721; Trenchard, 1 CL (XVIII), *supra* note 2, at 132 (Feb. 25, 1721). The Jacobites and dissenting Whigs would break decisively over the Atterbury Plot; see Gordon, writing as "Crito", in the BRITISH JOURNAL (London), July 27, 1723.

168. "Philalaethes", Letter L (1722), in MISCELLANY, *supra* note 8, at 154. Cf. SALUS POPULI, *supra* note 139, at 4 ("Shall petty Thefts and Robberies be punished with Death, and yet the Plunderers of the Publick, the Robbers of three Kingdoms, escape it?"); Gordon, 1 CL (XX), *supra* note 2, at 155; Gordon, 2 CL (XXXVI), *supra* note 2, at 258 (July 8, 1721) Gordon, 2 CL (LVII), *supra* note 2, at 388 (Dec. 16, 1721); Gordon, *supra* note 45, at 2; CHARLES JOHNSON [DANIEL DEFOE], A GENERAL HISTORY OF THE ROBBERIES AND MURDERS OF THE MOST NOTORIOUS PYRATES 142-43 (1724).

169. SALUS POPULI, *supra* note 139, at 2 ("Examples of Punishment are such necessary Admonitions, that without them, Law itself, and the Lawgivers, become the general Subject of Contempt. . ."); MIST'S WEEKLY JOURNAL (London), July 14, 1722; Trenchard, 1 CL (XX), *supra* note 2, at 139-40.

170. Gordon, 1 CL (III), *supra* note 2, at 30.

171. Gordon, *supra* note 45, at 42.

The end of a constitution is a just social order, not a compendium of rules to be obeyed for their own sake. And, the radicals hastened to add, it does no honor to law to respect only its outward forms, while disregarding the deeper principles of fairness it was enacted to serve. The response to great and unprecedented crime cannot be lynch law and rule by the rabble. But neither can it be impunity for the powerful and liability for the weak if the social order is to have any legitimacy at all.

These were not airy philosophical arguments; they were among the most urgent questions of social order facing England. In a trial that captivated the nation in 1722, a man named Arundel Coke was arraigned for arranging the assault and disfigurement of his brother-in-law. A blacksmith testified that Coke had solicited his help in committing the attack by arguing that the impunity of “the *South-Sea* Gentlemen” ought to free ordinary citizens, too, from the strictures of law and morality.¹⁷² The fierce populism of Trenchard, Gordon, and their many allies in arguing for “*inflicting extraordinary Punishments on extraordinary Offenders*,”¹⁷³ then, was undergirded by their deep appreciation for the fragile and paradoxical character of law and legitimacy.

Court Whigs paid tribute to this politics of emergency by standing it on its head. It was precisely because the condition of public credit was so fragile, Walpole declaimed in a speech in Parliament, that legal questions of guilt and punishment ought to be indefinitely deferred. The monomaniacal pursuit of justice might be appropriate in ordinary times, but in conditions of emergency it risked distracting Parliament, inducing capital flight, and tipping the nation into a depression. Pragmatism would have to be the order of the day; rule of law cannot trump national survival.

...if the city of London were on fire, they did not doubt but all wise men would be for extinguishing the flames, and preventing the spreading of the conflagration before they inquired into the incendiaries; that in like manner, Public Credit having received a most dangerous wound, and being still in a bleeding condition, they ought to apply a speedy remedy to it; and that afterwards they might inquire into the cause of the present calamity.¹⁷⁴

172. THE TRYAL AND CONDEMNATION OF ARUNDEL COKE ALIAS COOKE ESQ; AND OF JOHN WOODBURNE LABOURER, FOR FELONY 15 (1722) (Testimony of Carter: “said he. . .do you think you could cut five or six Mens Heads off without Scruple of Conscience? I told him, No; it was too much for a Man’s Conscience to bear. Said he. . .There are those above who have done ten times worse. I suppose, Sir, said I, you mean the *South-Sea* Gentlemen. Yes, said he so I do; they have ruined Families, and begger’d Gentlemen: To cut Mens Heads off is but a Trifle to them.”); cf. Gordon, *CL* (XCII), *supra* note 2, at 662 (Sept. 8, 1722) (“Coke of Bury was hanged for attempting one murder: Had he. . .murdered a million, he might have been recorded for a hero”); JOHN DENNIS, VICE AND LUXURY PUBLICK MISCHIEFS 72-73 (1724),

173. SALUS POPULI, *supra* note 139, at 39; cf. Gordon, 1 *CL* (Preface), *supra* note 2, at 11

174. Debate in the Commons on the Motion for Address (Dec. 8, 1720), in 7 COBBETT, *supra*

Cato replied incredulously to this gambit in the pages of the *London Journal*: “What mean some Men by saying, we ought to extinguish the Fire, before we enquire into the Incendiaries? Are they some of them? . . . The Truth is, the House is already burn’d down, many are burn’d to Death, and all are miserably scorch’d. . . All we can now do, is to build the House again, if we can; and hang those that fired it, which are sure we ought.”¹⁷⁵ For all of their mutual antipathy, Cato and Walpole now shared a span of common ground: until the economic crisis subsided, ordinary legal processes would have to be suspended. In this exchange we see the astonishing degree to which necessity now operated as the lingua franca of British politics.

C. Common wealth

Joseph Addison devoted the third issue of *The Spectator*, his tri-weekly magazine of arts and letters, to a fantastical dream about the national bank and public credit. In the dream, Addison finds himself lost inside a great palace.

I saw . . . a beautiful Virgin, seated on a Throne of Gold. Her Name . . . was *Publick Credit*. The Walls . . . were hung with many Acts of Parliament written in Golden Letters . . . the *Magna Charta* . . . the Act of Uniformity . . . the Act of Toleration . . . [and] the Act of Settlement. . . The Lady seemed to set an unspeakable Value upon these several Pieces of Furniture. . .¹⁷⁶

Although Credit sits in seemingly unassailable sovereignty her constitution is in fact highly delicate, subject to “Momentary Consumptions” that wax and wane with the stability of the nation and the market. She is accosted, and temporarily overthrown, by an army of “hideous Phantoms,” headed by the Old Pretender. The frightened queen faints, and instantly her priceless gold reserves are replaced with worthless paper scrip. Only the late arrival of Liberty, Moderation, and other muses of the Glorious Revolution restores her to health and solvency.¹⁷⁷ Addison dreamt of a dynamic commercial society dependent upon the ordered liberty of the British constitution, symbolized by the *Magna Charta*

note 59, at 684; cf. “Le Connu”, Letter to [Hon. John Molesworth], Jan. 3, 1721, in *REPORTS ON MANUSCRIPTS*, *supra* note 57, at 290; APPLEBEE’S ORIGINAL WEEKLY J. (London), Jan. 7, 1721.

175. Gordon, 1 *CL* (VII), *supra* note 2, at 62-3 (Dec. 17, 1720). Cf. Trenchard, 1 *CL* (IX), *supra* note 2, at 70 (Dec. 31, 1720). Cato and Walpole were restaging, with uncanny precision, debates from the previous century over the limits of the royal prerogative, which often turned on whether the common law right to pull down a house on fire established a more general right of emergency action, and if so, to whom it belonged. Compare J. Coke, Speech in the Commons, Mar. 22, 1628, in 2 *COMMONS DEBATES 1628 65*, (ed. Robert C. Johnson 1977); Sir William Jones, “Ship-Money”, in 3 *STATE TRIALS*, *supra* note 83, at 1181.

176. [Joseph Addison], *THE SPECTATOR* (London), Mar. 3, 1711, at 5-6.

177. *Id.*

hanging prominently in Credit's antechamber. Its photographic negative was the continental absolutism of James III, who appears in the parable clutching "a Spunge in his left hand" in place of a crosier, symbolizing the dissolution of contracts and the repudiation of the national debt.¹⁷⁸

Like Addison, Whigs and Tories alike believed England's robust regime of property rights was the linchpin of its thriving free economy. But within a decade of Addison's dream, splinters of both parties began to call loudly not simply for targeted expropriation, but for the voiding of all contracts in South Sea stock and a return to the *status quo ante*. Addison's staunchest admirers could now contemplate, if not quite endorse, the fatal expedient of a "sponge" to wipe the nation's debts: while it was "a heavy necessity, attended with many sorrowful circumstances. . . even a great calamity is eligible, in comparison of a greater."¹⁷⁹ The disintegration of the stock market and the breakdown of social order put new pressure on the old formulas of liberty, property, and Magna Charta, bringing to the stage solutions that had previously seemed *ultra vires*.

The first and most obvious solution was the dispossession of those thought to be responsible for the crash, and the division of their property among injured members of the public. "True Lover of His Country" recommended that every transaction in South Sea stock made by the Directors in their personal capacity be nullified, and any gains from these trades "seized for the Use of the whole Company." This would have the additional virtue of making "void vast Numbers of Contracts and Bargains," no doubt "a considerable Relief" to the many investors who remained mired in debt.¹⁸⁰ The Tory MP Archibald Hutcheson, one of the first to sound the alarm about the South Sea Company's delusional projections, agreed with this policy of punitive confiscation, although he was keen to ensure that not only the Directors, but also the Whig cabinet—"those intrusted with the Administration of the Publick Affairs"—felt its sting.¹⁸¹ The arch-Jacobite Nathaniel Mist, reporting the suicide of the Post-Master General James Craggs, snarled that death was "an *honourable Amends*," but that "for his ill-gotten Goods and Estates they are justly due to his Country, from whom he stole them. If you should want, Gentlemen, some small matter of Form *Ex-post-facto* him."¹⁸² But the authors pressing for punitive expropriations did not concern themselves overly with close questions of legal form; and when they did,

178. Cf. A FULL AND AMPLE EXPLANATION, OF ONE KING JAMES'S DECLARATION (1716) (a satirical poem).

179. Trenchard & Gordon, 1 *CL* (X), *supra* note 2, 77-78.

180. "True Lover of his Country", THE SOUTH-SEA SCHEME, AS IT NOW STANDS, CONSIDER'D 9 (1720).

181. Archibald Hutcheson, SOME FURTHER COMPUTATIONS RELATING TO SOUTH-SEA STOCK 3-4 (1721).

182. "King-Love", MIST'S WEEKLY J., Mar. 25, 1721.

their reliance on precedents from the law of treason spoke volumes.¹⁸³

As plans for emergency intervention proliferated, more imaginative forms of state intervention came into focus, detached from the moral economy of crime and retribution. Thus a petition appeared in the *London Journal* in February 1722 addressed to Lord Molesworth, the *éminence grise* of dissenting Whigs, on behalf of “Thousands of unhappy Englishmen, whom your Lordship will rescue from Death, Despair, Prison, or Banishment.” It pleaded with the Irish peer to sponsor a bill extending full and unconditional bankruptcy protection to all investors who found themselves “*bonâ fide* insolvent” and unable to repay loans or stock purchase agreements contracted during the bubble. The justification for consigning these contracts to oblivion was very plainly the dire state of the nation—the rescue of those caught in the steel incisors of the free market. Surely the quotidian laws of bankruptcy could be set aside in the face of an economic depression.¹⁸⁴

Far more ambitious solutions proliferated in the press, tilting the law of property and contract on its axis.¹⁸⁵ The most common suggestion was the voiding of the Third and Fourth Subscriptions. Investment in the South Sea Company had taken place between April and August 1720 in three rounds of conversion of government debt to stock, and four waves of direct sales to the public. The terms for both converters and purchasers became progressively worse over time; while early investors could purchase shares for £300, by late summer the price had risen to £1100. Meanwhile, at its nadir in December, the stock traded for £124. This imposed serious but perhaps manageable losses on early buyers, while threatening later investors, particularly those who were highly leveraged, with utter ruin.¹⁸⁶ Increasingly it was thought that the Gordian knot of indebtedness might be sliced cleanly by turning back the clock to midsummer and “mak[ing] void all Contracts upon Stock of any kind enter’d into since the taking in of the THIRD SUBSCRIPTION by the SOUTH-SEA DIRECTORS.”¹⁸⁷ The staggering losses sustained by these later

183. See REASONS FOR MAKING VOID FRAUDULENT AND USURIOUS CONTRACTS 3 (1721), (after 1715 “several Acts were also passed, setting aside and annulling all *Settlements* or *Alienations* of Estates. . .in Case the said *Settlements* or *Alienations* were made by any Person who should be convicted or attainted of High Treason”). This was answered sharply in the circular THE PERFORMANCE OF FAIR AND LEGAL CONTRACTS (1721).

184. “To the Right Honourable the Lord MOLESWORTH”, LONDON J., Feb. 10, 1722. At the time many still suspected that Molesworth was behind Cato’s letters, then appearing weekly in the *Journal*; see *infra*, note 215. Cf. [Richard Molesworth?], Letter to Hon. John Molesworth, Jan. 27, 1721, in REPORTS ON MANUSCRIPTS, *supra* note 57., 296.

185. Interestingly, Trenchard and Gordon tended toward skepticism of economic interventions that went beyond punishment of the guilty. See Gordon, 1 *CL* (VI), *supra* note 2, 58

186. See PAUL, *supra* note 28, at 47-50.

187. REPLY TO A MODEST PAPER, *supra* note 163, at 2; cf. RESTITUTION A LAW OF THE LAND, IN RELATION TO THE THIRD AND FOURTH MONEY SUBSCRIPTION 1-2 (1721).

investors made them potential figures of sympathy and solidarity. The same was true for those bewitched by “time bargains”, who now found themselves obligated to purchase South Sea scrip at ten times its current value, having made a losing bet on the stock’s future movement at the height of the frenzy. No one had intentionally misled them about the company’s prospects, but they were in error about “the real Value of the Thing bought,” and ought to be released from their imprudent promise. If every forward contract could not be dissolved in this manner, they could at least be canceled where they had yet to be executed.¹⁸⁸ Eustace Budgell noted that this had been the course of action preferred by the Dutch Republic, which boasted “some of the best Laws for the Security of *Property*” in Europe.¹⁸⁹

In light of the carnival of greed and bribery that made the bubble possible, commentators began to think in terms of general amnesty. *The South-Sea Scheme Detected* outlined a template for future legislation that would “make void all Contracts for Stock Bought and Sold by any Person beyond such a Sum, or above such a Price,” at the discretion of Parliament.¹⁹⁰ And “Justitia”, deigning to appear in the pages of *Mist’s Weekly Journal*, cast aspersions on all of the “*South-Sea Contracts*” as the work of confidence-men and “scandalous Vermine.” Here again, analogies to disease performed crucial analytical work: South Sea stock was a defective and dangerous product, akin to “a Parcel of Goods. . .brought from an infected Place,” and its buyers and sellers were either too vicious to care or too gullible to notice. Every transaction from England’s Plague Year ought to be presumed illegitimate and overturned. “[I]f there be any Contracts so depending with these confederating Bubbler[s],” Lady Justice peremptorily announced, it would be “inconsistent with Justice, Equity and Reason, to believe such Agreements can be deem’d legal and valid.”¹⁹¹

The argument for abolishing contractual rights revolved around the interlinked imperatives of exigency and reason of state. In other words, legal authority derived from the law of necessity:

I shall . . . shew you what this Law is, and it is the Law of Necessity; which Law, inasmuch as it can never be broke, is a tacit Law, and

188. [SIR DAVID DALRYMPLE], TIME BARGAINS TRYED BY THE PRINCIPLES OF EQUITY 12, 28 (1720/1). Cf. HUTCHESON, *supra* note 182, at 9 (urging a one-year reprieve, for reasons of “Compassion”, on all contract suits related to “the *South-Sea Phrenzy*”, quite close to what Walpole and Parliament eventually agreed to). For the intellectual background, connecting to contemporary debates over “intrinsic value,” see DERINGER, *supra* note 41, chapter 5.

189. BUDGELL, *supra* note 166, at 21.

190. “Lover of his Country”, THE SOUTH-SEA SCHEME DETECTED(2d ed. 1720), 21. Cf. “True Lover of his Country”, *The South-Sea Scheme, as it now stands, consider’d* (London: T. Bickerton, 1720), 27

191. “Justitia”, *Mist’s Weekly Journal*, Apr. 1, 1721, Issue 122.

does not want Promulgation, as all other Laws do. . . Nay, this Law of Necessity is a greater Law, and of an higher Nature than [statute law], this Law being irresistible, the other not so, inasmuch as what is commanded may be neglected and unperformed; and what is prohibited, may be committed.¹⁹²

This idea of legal necessity involved three familiar rhetorical moves. First, the safety of the nation compels the exercise of extraordinary governmental powers, because “in cases of extreme Danger, nothing must come in competition with the general Safety,” and the interest of a part can never be an obstacle to “the Preservation of the Whole.”¹⁹³ Second, the situation is so novel that any response will necessarily exceed the boundaries of the statute and common law, such that “to talk of Precedents for a Case allowed to be unprecedented” is an absurdity.¹⁹⁴ Finally, doubts about the legal authority are met with soaring panegyrics to parliamentary supremacy—“The Legislature, Guardian to all, Judges of Right and Wrong in unparallell’d and National Cases.”¹⁹⁵ Much of this is indistinguishable from the political theory of emergency underpinning the movement for “extraordinary” trials.¹⁹⁶

“Necessity” became a device for surmounting ordinary rules and norms in order to rebalance asymmetries of power that had been fixed and sanctified by law. This move was aided by the revivification of an older, medieval idea of “necessity,” derived from the canon law and prominent in sources from Aquinas to Grotius. According to this doctrine, those in extreme need could break positive laws of property where the alternative was hunger and death.¹⁹⁷ Publicists addressing the dispute over contracts transformed this idea from an affirmative defense into a charter for expansive state intervention.

[I]n case of War, every one is commanded to assist, either in Money or Person; but by this Law of Necessity, the poor Man will pay no Money, nor the Cripple serve in person; . . . a poor Man offering his Service, in any Degree, to work; none will employ him; he may take

192. SOUTH SEA SCHEME, *supra* note 181, at 14-15.

193. SOME CONSIDERATIONS, *supra* note 35, at 34. *cf.* SOUTH-SEA SCHEME DETECTED, *supra* note 191, at 26.

194. Anon, *AN ANSWER TO THE REASONS FOR MAKING VOID AND ANNULING FRAUDULENT AND USURIOUS CONTRACTS* 4 (1721).; *see also* REASONS FOR MAKING VOID, *supra* note 184, at 3 (“in this *unprecedented* and *extraordinary* Case”).

195. RESTITUTION, *supra* note 188, at 3; *cf.* SOUTH SEA SCHEME, *supra* note 181, at 27

196. In the MEMORIAL, *supra* note 44, at 57, these threads were elegantly tied together; among the charges it proposes for the Directors is forcing the state to resort to the “fatal ruinous Remedy, of making arbitrary Assignments of Property.” One emergency measure becomes compensation for the other.

197. *See* Siegfried Van Duffel & Dennis Yap, *Distributive Justice Before the Eighteenth Century: The Right of Necessity* 449, 451-53, HIST. POL. THOUGHT (2011).

Meat, &c. just sufficient to sustain Hunger, and he may plead this Case in Bar to the Man from whom he took it. Now to apply this Law to our Purpose. I have before taken notice, that One Hundred for One will be undone [by enforcing the contracts]; by this Law of Necessity, One must suffer to save the Ninety-nine.¹⁹⁸

Here “necessity” functions as a metonym for the needs and desires of the poor majority. This marks a shift in the vocabulary of necessity as it had been framed since the English Civil War.¹⁹⁹ Although its main feature is still intact—the subordination of municipal law and individual interest to the overarching goals of the polity—the connection to interstate competition has been severed. Where ordinary law would permit the multitude to starve, or condemn it to watch impotently as its oppressors elude justice, “necessity” compels its derogation by the state in the name of public safety.

In reply, a chorus protested in unison that the cancellation of these contracts on humanitarian grounds would mean the end of British liberty. One author feared that it would sap “the very Foundations of Property,” while another thought that it would tear “a wide Gap in our Constitution.”²⁰⁰ A third, in a piece titled *Performance of Fair and Legal Contracts*, predicted a vertiginous spiral of measures *ex post facto* once the legal norm was breached:

For if Property is altered by a law *Ex post Facto* upon particular Motives at one time, that one Sort of Men may be reliev'd at the Expence of another; it may, upon the same Motives, be altered another time to relieve the last angered by that very *Law Ex post Facto and so ad infinitum*, till the Fences of all Property are thrown open, to make way for that Anarchy and Confusion which the Enemies of our Happy Constitution wish for.²⁰¹

Against the motto *salus populi suprema lex* they counterposed an alternative, better suited to citizens of a free nation: *est liber qui gubernatur legibus cognitis*. To be governed by known laws was to be a freeman; to be bound by discretionary decretal authority, whether of a prince or a parliament, was to be degraded to the status of a slave, or worse—a Frenchman. “Were we, indeed, in *France*. . . where the Edicts of

198. SOUTH SEA SCHEME, *supra* note 181, at 15-16; *cf.* SOME CONSIDERATIONS, *supra* note 35, at 5 (“poor Underling Wretches. . . must steal, pilfer or plunder, for *Necessity has no Law*”).

199. Consider, for example, the argument of the king’s attorney in *R. v. Hampden*, where the absolute right of the king to make requisitions from his subjects in time of war is defended on the grounds that “Necessity is the Law of the Time and Action, and Things are lawful by Necessity, which otherwise are not.” Littleton, “Ship-Money”, in 3 STATE TRIALS, *supra* note 83, at 926-7.

200. ANON, LAWS EX POST FACTO 1 (1720); ANON, A LETTER TO A MEMBER OF PARLIAMENT 7(1721).

201. FAIR AND LEGAL CONTRACTS, *supra* note 184, at 1.

Law; are no longer a Fence to Property. . . we had something to fear: but we, blessed be God, in *Britain*, in a *free Country*, where every Man's Property has been guarded by the Laws of his Country hitherto."²⁰²

Two features of this debate speak to the distinctive conceptual topography of emergency economic intervention. First, while criminal prosecution would be (in theory) restricted to the guilty, a blanket moratorium on contract enforcement would impoverish many morally and legally blameless citizens. This sat ill with many. The Directors and their abettors should be "Punish'd in the severest Manner," perhaps even with attenuated due process, but it would be monstrous to permit "those who are Innocent of Fraud to suffer" with them, even conceding that "more [will] suffer by those Bargains standing, then otherwise."²⁰³ The second point is closely related. Capital markets are by their very nature fragile chains of paper instruments brought to life by a mysterious alchemy of confidence and credit.²⁰⁴ To interpose the iron hand of the state might dissolve that shared trust and send the market tumbling. Defoe noted that "Credit is the Child of Liberty, she is born Free, is nourish'd by Honesty and Peace, and is protected by Justice and Law." Vacating contracts by parliamentary fiat in the name of rescuing the economy would be, in effect, destroying the credit markets in order to save them.²⁰⁵

Most importantly, the abrogation of South Sea contracts would lay the legal and intellectual groundwork for a similar repudiation of the national debt, the great terror of postrevolutionary England.

Tho' this were true that more suffer by those Bargains standing, . . . yet this at best is but what the *Lawyers* call *Argumentum ab Incommodo* This, indeed, would be an excellent Preparative for paying our publick Debts by a *Spunge*, and, in short, destroying all the Fences of Property. May it not be said, and that with a great deal of Truth, that *Brittain* is burden'd with Debt, and that it would be for the good of the State to be free of Debt; and therefore considering the Number of Creditors to the Publick is but small in Comparison to the whole Nation, the Debt ought to be paid with a Spunge. This would

202. LAWS EX POST FACTO, *supra* note 201, at 1. The contrast of *servus* and *liber homo* is, of course, the hallmark of the "republican" idea of liberty, associated today with the work of Quentin Skinner and Philip Pettit. We will return to this theme in Part IV, *infra*; for now it is enough to note some of the policies this language was being mobilized to support in 1721.

203. *Id.* at 1; *cf.* FAIR AND LEGAL CONTRACTS, *supra* note 184, at 1.

204. See, e.g., ADAM SMITH, 2 AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 86 (1776) (R.H. Campbell and A.S. Skinner eds., 2005).

205. Defoe, THE DIRECTOR (London), Oct. 28, 1720. *Cf.* FAIR AND LEGAL CONTRACTS, *supra* note 184, at 1. Defoe was a leading expositor of the new financial culture. See, e.g., Simon Schaffer, "Defoe, natural philosophy and the worlds of credit", in NATURE TRANSFIGURED: SCIENCE AND LITERATURE, 1700-1900 13, 28-30 (1989). I am grateful to Michael Rosen for the reference.

be by no means such a stretch as overturning of legal Bargains. . .²⁰⁶

If Parliament can repeal the myriad private bargains made in Exchange Alley by citing the precarious national safety, surely it can strike its own debts on the same principles, and by the same prerogatives. But in slipping free of its bondholders Britain would enter a new bondage: an absolutist political economy in which no private property is more than provisional, and every transaction is subject to the surveillance of the central state. The “Fences of Property” would be uprooted, and the power of the government would be boundless.

We might seem to be back in Addison’s fable, where the Sponge is the insignia of Stuart absolutism and Magna Charta is the bulwark of a free and prosperous economy. But we should remember that the army that dethrones Public Credit in the famous allegory is led not only by the Old Pretender but also by “the Genius of a Commonwealth,” while Credit is ultimately restored by the advent of “Liberty, with Monarchy at her right hand.”²⁰⁷ This pairing would prove prophetic.²⁰⁸ In the maelstrom of 1720-21 the suspension of civil liberties, the erection of extraordinary tribunals, and the disruption of property relations would come to be understood as the hallmarks of a specifically republican reason of state.

III. COMMONWEALTH

At a tense meeting of the Commons on December 8, 1720, with the Bank’s proposed rescue of the South Sea Company hanging in the balance, the venerable “revolution Whig” Viscount Molesworth rose to speak. It was premature, he thought, to discuss saving the Company without first deciding on the punishment of its executives. And it was imperative that they not evade proper punishment for formalistic or technical reasons. Molesworth, a distinguished historian and political theorist, punctuated this point with a classical allusion:

in his opinion, they ought, on this occasion, to follow the example of the ancient Romans, who having no law against parricide, because their legislators supposed no son could be so unnaturally wicked, . . . made one to punish so heinous a crime, as soon as it happened to be committed; and adjudged the guilty wretch to be thrown alive, sewed up in a sack, into the Tyber. Concluding, That as he looked upon the contrivers and executers of the villainous South Sea Scheme, as the parricides of their country, he should be satisfied to see them undergo

206. LAWS EX POST FACTO, *supra* note 201, at 1; *cf.* LETTER TO A MEMBER, *supra* note 201, at 8; “Somersetshire”, *supra* note 133.

207. [Joseph Addison], THE SPECTATOR (London), Mar. 3, 1711, at 6.

208. Gordon, 1 *CL* (XXVIII), *supra* note 2, at 202 (“others as plainly prove [Cato] a flaming Jacobite, and an arrant republican”); *cf.* CRUICKSHANKS & ERSKINE-HILL, *supra* note 6, at 83-8.

the same punishment.²⁰⁹

If the Viscount of Swords was only half-serious in urging the revival of this gruesome ritual, he was deadly earnest in demanding extreme, extra-legal punishments for those he judged guilty of triggering the financial panic. And, crucially, he issued his incendiary appeal in the distinctively *republican* lexicon of ancient Rome.

The radical Whigs were not republicans—at least, not in any straightforward sense. Nor did they possess a monopoly on neoclassical ideas of law and government.²¹⁰ But it was accepted on virtually all sides that to espouse extraordinary measures and punishments beyond the law was to sound in the key of commonwealth. Financial reason of state was associated not with Stuart absolutism, but with the popular turbulence of the Roman republic.²¹¹ At a time when the invocation of “emergency powers” is nearly always associated with sublimated royalism, the curtailing of democratic norms, and the targeting of vulnerable populations, it is vital to remember how tightly it has been linked, historically, to populism, republicanism, and the punishment of elites.

Although Molesworth’s speech on parricide has been mocked by generations of historians as parliamentary penny dreadful, it is worth noting its enormous impact on the radical political literature. Only a week after Molesworth’s speech in the Commons, the term “parricide” appeared in *Cato’s Letters* for the first time, where it quickly became a favorite epithet for the directors.²¹² The Eleventh Letter, published in January 1721, copied Molesworth’s speech almost verbatim,²¹³ fueling speculation

209. Debate in the Commons on the Motion for Address (Dec. 8, 1720), in 7 COBBETT, *supra* note 59, at 683. Parricide was not formally interdicted until the *Lex Cornelia De Sicariis* and the *Lex Pompeia de Parricidiis*, both dating from the last half-century of the republic.

210. See REED BROWNING, POLITICAL AND CONSTITUTIONAL IDEAS OF THE COURT WHIGS 210-56 (1982), esp. 219, on the disjuncture between the “Ciceronian” self-image of the Court Whigs and the “Catonian” outlook of the opposition.

211. Cf. Quentin Skinner, “Augustan politics and constitutional thought”, in 2 VISIONS OF POLITICS 344, 357 (2002) on the self-conscious republican revival “in the years surrounding the crisis of the South Sea Bubble,” which included the republication of Neville’s edition of Machiavelli and Ludlow’s *Memoirs*. There was nothing particularly unusual about the left edge of Whig opinion being attacked for “savor[ing] very much of a commonwealth”; see PINCUS, *supra* note 13, at 363. What is noteworthy is that the tag of “republican extremism” was now being applied, not to the defense of liberty, property, and free trade, but to their abrogation in the name of the collective good. For a highly conventional interpretation of the place of Rome in *Cato’s Letters*, emphasizing anti-corruption and the rule of law and neglecting to mention the dictatorship, Catiline, or Machiavelli, see MORTIMER N. SELLERS, AMERICAN REPUBLICANISM: ROMAN IDEOLOGY IN THE UNITED STATES CONSTITUTION 111-17 (1994).

212. Gordon, 1 *CL* (VII), *supra* note 2, at 63; Gordon, 1 *CL* (X) at 78; Trenchard, 1 *CL* (XII) at 94; Gordon, 1 *CL* (XXI) at 155. Cf. Trenchard, 1 *CL* (XII) at 99. The association of treason and parricide was not, of course, unique to Molesworth; indeed, prior to 1720 it was most often used to tar radical Whigs as supporters of the regicide. Predictably, this was turned around after 1688. See, e.g., MERCURIUS PRAGMATICUS, Nov. 21, 1648; LONDON GAZETTE, Sept. 27, 1683; REVIEW OF THE STATE OF THE BRITISH NATION (London), June 28, 1712.

213. Gordon, 1 *CL* (XI), *supra* note 2, at 88-89.

that “Cato” was the Viscount’s own *nom de plume*.²¹⁴ The author of *Considerations on the Present State of the Nation* conceded that England’s parlous situation could not “be remedy’d at all, without breaking in on our present Laws,” but took solace in a comparison with “the Romans, who for many Ages had no Law to Punish *Parricide*; it never entering into the Minds that any could be guilty of so villanous a Crime.”²¹⁵ Likewise, the pamphlet *Salus Populi Suprema Lex* denied “that the Old Romans acted unjustly, in making an Example of the first *Parricide*, by the most extraordinary Punishments, though there was no Law against him.”²¹⁶ Within weeks Molesworth’s provocation had become a standard feature of radical Whig polemic, a vivid illustration of the principle that even a free government might sometimes act beyond the law.

The symbolic field of “parricide,” particularly when evoked with Latin accents, recalled for many of Molesworth’s contemporaries the civil disorders of Catiline, branded a “traitor and parricide” by Cicero in his celebrated orations of 63 BC.²¹⁷ Educated Britons were intimately familiar with the details of Catiline’s attempted *coup*,²¹⁸ and “Catiline” was used as a shorthand for conspiracies against the national constitution, with translations of Cicero and Sallust often serving as commentary on current events.²¹⁹ It is unsurprising, then, that Thomas Gordon published a new

214. Gordon, 1 *CL* (Dedication [1725]), *supra* note 2, at 8 (“It may be proper here to mention another mistake which has generally prevailed; that a noble peer of a neighbouring nation, now dead, had a chief, at least a considerable hand in *Cato’s Letters*”). See also [Daniel Defoe], *THE DIRECTOR* (London), Jan 13, 1721; “Fabricius”, *READ’S WEEKLY JOURNAL OR BRITISH GAZETEER*, Apr. 29, 1721; William Wishart, Letter to Lord [Molesworth], Oct. 13, 1722, in *REPORTS ON MANUSCRIPTS IN VARIOUS COLLECTIONS*, *supra* note 57, at 348; W. [Walter] Molesworth, Letter to Hon. John Molesworth, Nov. 9, 1721, in *id.* at 326; Sir J. Vanbrugh, Letter to [Lord Carlisle], Apr. 22, 1721, in *MANUSCRIPTS OF THE EARL OF CARLISLE*, *supra* note 54, at 33; CHARLES BECHDOLT REALEY, *THE LONDON JOURNAL AND ITS AUTHORS* 241 (1935); APPLEBEE’S WEEKLY J. (London), Sept. 2, 1721; *MIST’S WEEKLY J.* (London), May 20, 1721. *But see* Abel Boyer, *The Political State for June 1721*, in 21 *POLITICAL STATE OF GREAT BRITAIN* 633 (1721) (“the Committee sent for Mr. Gordon, the reputed Author, of *Cato’s Letters*. . .”).

215. *SOME CONSIDERATIONS*, *supra* note 35, at 58.

216. *SALUS POPULI*, *supra* note 139, at 36.

217. *See, e.g.*, Cicero, *In Catilinam* 1.14, 1.7 (64 BC) (C. Macdonald trans. 1976).

218. Gordon ascribed the English enthusiasm for Sallust to its status as “a School-Book: Boys learn him together with the *Latin Tongue*.” See THOMAS GORDON, *THE WORKS OF SALLUST, TRANSLATED INTO ENGLISH* vii (1744).

219. In 1611 Ben Jonson’s play *Catiline His Conspiracy* was performed for the first time; it contained numerous allusions to the recent Gunpowder Plot. In 1683 a translation of Sallust’s *Catilinarian Conspiracy* appeared in English as *PATRIAE PARRICIDA: OR THE HISTORY OF CATILINE AGAINST THE COMMON-WEALTH OF ROME* (Caleb Calle trans., 1683). The Epistle Dedicatory denounced the “Plots and Conspiracies” of extremist Whigs, “of which *Catiline* is but the Model.” Similarly, the Jacobite rising of 1715 prompted the publication of *CICERO’S SECOND ORATION AGAINST CATILINE, APPLIED TO THE PRESENT TIMES* (1715), as well as *THE ROMAN CONDUCT IN QUASHING CATILINE’S CONSPIRACY, TAKEN FROM THE ORIGINAL LATIN OF SALLUST* (J. Fergusson trans., 1715). In 1722 Benjamin Hoadly would make eager use of the exemplum in his “Britannicus” letters advocating the suspension of habeas corpus; see “Britannicus”, London J., November 3, 1722 (“The *Parliament of Rome* immediately, without any One *Dissent* or *Protest*. . .pass’d an *Act*. . .suspending the *Roman Habeas-Corpus-Act*. . .”) and November 10, 1722 (“the *Senate*, immediately and unanimously, gave extraordinary Powers to the *Consuls*; particularly to confine

history of Catiline's conspiracy in 1720,²²⁰ and discussed it in his later essay, *Francis, Lord Bacon*: "This Conspiracy. . . resembles It in its Consequences: nay, is bigger, we may say, of Mischeif than *That of Catiline*, by as much as the Ruin of a whole Country is a more pernicious Piece of Villany, than the Burning of any single City."²²¹ At a pivotal moment in Gordon's narrative, Catiline (like Sunderland) is narrowly acquitted on charges of extortion, and the provincials he despoiled fall into despair: "they saw these *triumphant Robbers*, laughing at Justice, and shining in Gold and Purple, spurning and insulting the People whose Wealth they were drest in." This was, quite plainly, South Sea Britain in Roman costume.²²²

The principle lesson of Cataline's story, as laid out in a 1716 article in the *Flying Post*, was that "the most polite Nations, have in extraordinary Cases, thought themselves oblig'd to act with unrelenting Justice against Traytors."²²³ It was, in other words, a primer on emergency government for a free people. In the course of suppressing the conspiracy, Cicero and the Senate engaged in a flurry of extralegal measures, including the execution of several distinguished citizens without formal trial or right of appeal. When Caesar expressed discomfort with these actions, it was Cato who insisted that they were necessitated by the unprecedented facts of the conspiracy, dismissing solicitude for the rule of law as softhearted naïveté. Gordon's depiction of the episode made his sympathies clear:

[Caesar's] palliating Speech contain'd Reasons for sparing the Conspirators, upon pretence that the Laws had provided no Punishments for such Crimes as theirs; . . . and that tho' the Greatness of their Crimes had exceeded all Imagination, yet he would have them punish'd no otherwise than as the Laws had provided. . . . CATO perceiv'd the Cunning and Design of this Harangue, and answer'd it by a fine Oration . . . [giving] Reasons from the Nature of their Crimes, as well as for the Safety of the Commonwealth, why they should every Man be cut off.²²⁴

A decade earlier Addison had portrayed Cato as a principled defender of

Persons, and to prepare an *Army*; exactly answering to what has been just now agreed to in the *present Parliament*"). For a fuller survey, see Rob Hardy, *A Mirror of the Times: the Catilinarian Conspiracy in Eighteenth-Century British and American Political Thought*, Int. 14 J. CLASSICAL TRAD. 431 (2007).

220. [THOMAS GORDON], *THE CONSPIRATORS; OR, THE CASE OF CATILINE* (5th ed. 1721) (2 vols.).

221. Gordon, *LORD BACON*, *supra* note 114, at v; *cf.* Gordon, 1 *CATILINE*, *supra* note 221, at x.

222. Gordon, 1 *CATILINE*, *supra* note 221, at 56-57. Compare Gordon, 1 *CL* (III), *supra* note 2, at 46 ("mean sharpers, that swagger in the plunder of their country"); Trenchard, 3 *CL* (LXIX) (Mar. 10, 1721), *supra* note 2, at 502.

223. *FLYING POST* (London), Jan. 26, 1716.

224. Gordon, 2 *CATILINE*, *supra* note 221, at 22. Compare Sallust, *THE WAR WITH CATILINE* 52 (42 BC) (J.C. Rolfe and John T. Ramsey eds., 2013).

individual liberty, rhapsodizing the *mos maiorum* and pointedly rejecting torture as illegal: “Meanwhile we’ll sacrifice to liberty./Remember, O my friends, the laws, the rights,/The generous plan of power delivered down,/From age to age, by your renowned forefathers.”²²⁵ But Gordon’s Cato, no less historically accurate, was in tune with the tenor of the times.

Gordon was hardly the only commentator to press this connection. In the midst of a tirade against the Company, a columnist for *Read’s Weekly Journal* reproduced a Latin excerpt of Cicero’s *In Catilinam*, and rendered a rather free translation:

For as the great Orator *Cicero* says a little further of *Catiline* the notorious Conspirator, *Ad mortem te, Catilina, duci, jussa consulis, jam pridem oportebat; in te pestem istam, quam tu in nos omnes jamdiu machinaris*. Which I thus render, with a little Variation. Long since, ye *South Sea Villains*, ye should have been led by the Consul’s Order to Execution; upon your own Heads should have been turn’d that Destruction, which ye have been so long contriving against us.²²⁶

Others expressed similar sentiments. When the Post-Master General committed suicide after being implicated in the spreading scandal, *Mist’s Weekly Journal* hoped to see the Treasury “resuming the Estate of so desperate a *Catiline* to our Isle.”²²⁷ “Britannicus”, writing in the same venue, expressed his admiration for “a most popular Pamphlet called *Catiline, or the Case of the Conspirators*,” but added that the analogy to modern times was even more apt than its author realized: *Catiline’s* rampage would have been impossible without the silent backing of Marcus Crassus, an unscrupulous financier who exploited his high public office to build an immense private fortune.²²⁸

In an age where “liberty” was still defined with reference to the Roman *Codex*,²²⁹ the extra-judicial killing of the *Catilinarians* was a reminder of emergency government’s distinguished pedigree. Radical pamphleteers did not hesitate to conscript Cicero and Cato into their campaign for a populist politics of necessity.

The *Romans*, who of all other Nations, both understood Liberty the

225. Joseph Addison, *CATO, A TRAGEDY* III.5.71-74 (1713).

226. *READ’S WEEKLY JOURNAL OR BRITISH GAZETEER* (London), Feb. 18, 1721 .

227. “King-Love”, *supra* note 183 . His South Sea gains were, indeed, confiscated after his death under the terms of the Sufferer’s Bill.

228. “Britannicus”, *MIST’S WEEKLY JOURNAL* (London), May 27, 1721. Discrediting the Whig administration (and not just the Tory directors) perfectly suited the Jacobite program, though many radical Whigs were typically just as willing (at least, before the Atterbury Plot) to look behind the South Sea Company to its political masters. See, e.g., Gordon, 1 *CL* (V), *supra* note 2, at 52 (“others have directed the directors”).

229. See, e.g., Gordon, 3 *CL* (LXXI) (Mar. 31, 1722), *supra* note 2, at 517, speaking of Rome: “The spirit of the people, like that of their state, breathed nothing but liberty.”

best, and liked it the most, reckoned that sort of Justice was never to be departed from; but that their Laws might be superseded, to punish uncommon Offenders. . . In *Catiline's* Conspiracy, when the Senate consulted what to do with *Cethegus*, and the other Conspirators. . . it was resolved to break the *Porcian* Law, and put them to death, before the Assembly rose. This *Porcian* Law had secur'd all the *Roman* Citizens from capital Punishments; yet a few years after it had past [it was broken]. . . This was the Behaviour of a People, who were not naturally cruel or savage; but, on the contrary, who taught the rest of the World Humanity: And, doubtless, the Necessity of the State made an Apology for those rigorous Proceedings.²³⁰

If fundamental Roman law could be set aside in times of turmoil, why not the basic laws of England? Whatever the voices of reaction might say, the defeat of Catiline was proof that the temporary suspension of constitutional norms did not necessarily augur a freefall into despotism.²³¹

The same idea lay behind Cato's repeated exhortation to kill the sons of Brutus. Throughout the *Discorsi* Machiavelli stresses the importance of restraining oligarchic conspirators against liberty with lethal force; he names this policy "killing the sons of Brutus," after the famous incident in Livy's *History of Rome* in which the consul Lucius Junius Brutus supervises the execution of his own sons for plotting with the exiled Tarquin kings. When faced with an intransigent class of proud aristocrats, Machiavelli instructs, expanding on Livy's laconic text, "there is no remedy more powerful, nor more valid, more secure, and more necessary, than to kill the sons of Brutus"—that is, to visit exemplary punishment on them following a political trial.²³²

The message was evidently received by Thomas Gordon, who presents the annihilation of the South Sea party as a characteristically Machiavellian *ritorno al principio*:

Machiavel tells us, that no government can long subsist, but by recurring often to its first principles . . . He tells us, that as a tyranny cannot be established but by destroying Brutus; so a free government is not to be preserved but by destroying Brutus's sons. Let us therefore put on a resolution equal to the mighty occasion: Let us

230. SALUS POPULI, *supra* note 139, at 38.

231. Whether this is a faithful reading of the history of the late republic is, of course, a separate matter. Sallust hints strongly that the opportunistic lawbreaking of 63 BC played a decisive role in the constitutional breakdown that followed.

232. MACHIAVELLI, DISCOURSES ON LIVY I.16.4 (Harvey C. Mansfield & Nathan Tarcov trans, 1996); *cf. id.* at III.1.3 ("Notable among such executions. . . were the death of the sons of Brutus. . ."), III.3 ("That it is Necessary to Kill the Sons of Brutus if One Wishes to Maintain a Newly Acquired Freedom"). For commentary, see JOHN P. MCCORMICK, MACHIAVELLIAN DEMOCRACY 126-27 (2011).

exert a spirit worthy of Britons, worthy of freemen who deserve liberty. Let us take advantage of the opportunity, while men's resentments boil high, whilst lesser animosities seem to be laid aside, and most men are sick of party and party-leaders; and let us, by all proper methods, exemplarily punish the parricides, and avowed enemies of all mankind.²³³

Trenchard revisited this theme one month later in a coruscating essay recommending exemplary punishment to strike fear into the hearts of usurping elites who would defraud the public, lest their crimes be imitated and compounded until the state is bankrupted and its misery permanent. For support he conjured the indomitable spirit of Rome's revolutionary generation, mediated by Machiavelli: "Valerius Maximus calls severity the sure preserver and avenger of liberty. . . . After the death of the sons of Brutus, executed by the command of their own father, and in his presence, we hear no more of any conspirators in Rome to restore the Tarquins."²³⁴ Mercy for great crimes guarantees their repetition. And only a periodic bloodletting of optimates recalls a state to the purity of its revolutionary principles.²³⁵

Roman models of emergency government also informed radical defenses of unbounded state power and dictatorship. Cato's Eleventh Letter, detailing the killing of Spurius Maelius by the dictator L. Quincius Cincinnatus, makes this clear. Maelius might seem a curious target for Cato's ire; his crime was not plundering the public, but rather distributing grain to the plebeians in a famine. But a long tradition in Rome ascribed this liberality to his hidden ambition to overturn the republic and have himself declared king. The consuls, in Livy's narrative, wished to act, but found themselves "restrained by the right of appeal" [*constricti legibus de provocatione*], which made it almost impossible to secure the conviction of popular demagogues. They needed a man who was "not just powerful, but free to act and unbound from the strictures of law" [*libero exolutoque legum vinclis*]. And therefore, per Gordon, they "created a dictator, an officer with power, for a time, to suspend laws, and make laws." Gordon's narrative betrays his presentist concerns:

[Maelius] knew that his villainies were out of the reach of the law, and he did not dream of an extraordinary method of punishing them by the Roman parliament. But he was deceived; and the dictator tells the people, that being a sort of an outlaw, he was not to be proceeded with as a citizen of Rome. . . . Nor was his blood alone, says the wise

233. Gordon, 1 *CL* (XVI), *supra* note 2, at 121.

234. Trenchard, 1 *CL* (XX), *supra* note 2, at 142.

235. *See, e.g., id.* at 143,

dictator, sufficient to expiate his guilt, unless we also. . .confiscate to the publick use his estate and his treasures, the price and means of the publick ruin.

Cincinnatus, in other words, enacted the full panoply of reprisals that Trenchard and Gordon were now energetically agitating for in print. And although its own constitution made no provision for a special magistrate, England too might act by what Cato called “a power that was not ordinary.” Parliament, Cato assured his countrymen, “has reserved this power to itself, and has an undoubted right to exercise it; and has often done so upon extraordinary occasions.”²³⁶

The cruel efficiency of the Roman dictatorship understandably appealed to Whig reformers, but the radical literature also reflected the mixed legacy of dictatorship in the commonwealth tradition.²³⁷ Just as Defoe had protested that stock market speculators were, in an age of mobile capital, the uncrowned kings of Europe, Gordon denounced “our *Dictators in Stock*, and *absolute Monarchs* of the *ALLEY*” who had wrested the reins of state from the people.²³⁸ He also wagered that you could “load all the Gallows’s (in *England*) with *DICTATORS* and *Stock-Jobbers*” without a murmur of dissension from the nation.²³⁹ Like most of what appeared in the *London Journal*, this juxtaposition quickly became a commonplace of the opposition press. The *New Year’s Gift for the Directors* lambasted those who had “tyranniz’d more absolutely over the Properties of others, than those *Roman Dictators*, who assum’d a Power of doing any thing without the *Senate’s* Authority.”²⁴⁰ But this ambivalence about the historical role of the dictatorship did not imply second thoughts about the populist push for extraordinary powers. Rather, it spotlighted a third modality of emergency politics in ancient Rome that might be adapted for

236. Gordon, 1 *CL* (XI) (Jan. 7, 1721), *supra* note 2, at 89-93; Livy, *History of Rome* 4.13-16 (9 BC) (B.O. Foster trans., 1919) *cf.* Gordon, 4 *CL* (CXVIII) (Mar. 2, 1722), *supra* note 2, at 822. For the influence of this account, see *SALUS POPULI*, *supra* note 139, at 40-43 as well as the tortured rejoinder given in [Defoe], *THE DIRECTOR* (London), Jan. 13, 1721 (Maelius was not punished *ex post facto* for his conspiracy against the state, but only for his armed resistance to the dictator’s summons). On the *exemplum* of Spurius Maelius in Roman political thought, and what it reveals about the classical “state of exception,” see Michèle Lowrie, *Spurius Maelius: Dictatorship and the Homo Sacer*, in *CITIZENS OF DISCORD: ROME AND ITS CIVIL WARS* 171 (Brian Breed et al. eds., 2010).

237. See, e.g., Trenchard, 4 *CL* (CXV) (Feb. 9, 1722), *supra* note 2, at 807; Trenchard, 1 *The Independent Whig* (XII) 90 (Apr., 6 1720) (7th ed. 1743).

238. Thomas Gordon, Letter No. VII, in *A COLLECTION OF ALL THE HUMOROUS LETTERS IN THE LONDON JOURNAL* 25, 26 (2nd ed. 1721).

239. [Thomas Gordon], “Letter No. VI, *id.* at 27. In the 1725 edition, this line is changed without explanation to “directors and stock-jobbers.” It may be that, in the aftermath of the controversy with Dr. Prideaux (to which we will return shortly), references to killing “dictators” flew too close to regicide.

240. *NEW-YEAR’S-GIFT*, *supra* note 118, at 28. *Cf.* Anon, *The Secret History of the South-Sea Scheme*, in *I A COLLECTION OF SEVERAL PIECES OF MR. JOHN TOLAND* 404, 412 (1726) (“Not unlike to Appius. . .and the Decemviri of old, who being appointed with a Dictatorial power. . .almost overturned the Commonwealth”).

contemporary use—the right of tyrannicide.

Historians have puzzled over the decision of Trenchard and Gordon to ignite a polemical firestorm in December 1721 with their two-part defense of the killing of Julius Caesar.²⁴¹ As Ian Higgins notes, the “assassination of usurping tyrants” was a pet Jacobite theme, and after 1715 literary evocations of the Ides of March were often lightly disguised incitements to regicide. “In this context,” Higgins comments, “the defense of Caesar’s assassination in *Cato’s Letters* was extraordinary.”²⁴² Gordon, obviously pained by the charge of disloyalty, spent several pages of the 1725 Preface defending the two letters and pledging his fealty to the Hanoverian succession. “In answer to those deep politicians, who have been puzzled to know who were meant by Cicero and Brutus,” he parried, “I assure them, that Cicero and Brutus were meant.”²⁴³ But this self-serving interpretation has failed to satisfy most scholars; Higgins is typical in reading the letters on Brutus as a thrust at the High Church clerisy and the Stuart Pretender.²⁴⁴

Nevertheless, an alternative interpretation is available. In the second of *Cato’s Letters*—and the first to address the bubble—retribution against the Directors is said to share “the spirit of jealousy and revenge” that led the Roman Senate to turn on Julius Caesar, as it ought to have turned on earlier usurpers:

Caesar thought that he might do what he had seen Marius and Sulla do before him, and so enslaved his country: Whereas, had they been hanged, he would, perhaps, never have attempted it. . . . As never nation was more abused than ours has been of late by the dirty race of money-changers; so never nation could with a better grace. . . take its full vengeance.²⁴⁵

The conceptual frame of tyrannicide must have seemed particularly apt since the South Sea inquiry extended to the highest reaches of the British

241. Gordon, 2 *CL* (LV) (Dec. 2, 1721), *supra* note 2, at 367-76; Gordon, 2 *CL* (LVI) (Dec. 9, 1721), at 376-88; *cf.* Gordon, 1 *CL* (XXX) (May 20, 1721) at 214-20 (introducing and translating a letter from Brutus to Atticus).

242. Ian Higgins, “Remarks on *Cato’s Letters*”, in *CULTURES OF WHIGGISM* 128-47 (David Womersley ed., 2005), esp. 139. The most arresting of these texts is ANON, *CATO’S GHOST* (1715), in which the old republican returns from Elysium to seek the killing of George and the restoration of James III. For a contemporary accusation that Cato’s essays on Brutus were invitations to regicide, see TINDAL, *supra* note 130, at 28.

243. Gordon, 1 *CL* (1724 Preface), *supra* note 2, at 13-17. For examples of this criticism from mainline Whigs, see [MATTHEW TINDAL], *THE JUDGMENT OF DR. PRIDEAUX* (1721); JOHN DENNIS, *JULIUS CAESAR ACQUITTED, AND HIS MURDERERS CONDEMN’D* (1722); *FAIR WARNING*, *supra* note 137, at 74-75; [J. GAYNAM], *CATO’S PRINCIPLES OF SELF-PRESERVATION AND PUBLIC LIBERTY* (1722).

244. Higgins, *supra* note 243, at 141. *But see* CRUICKSHANKS & ERSKINE-HILL, *supra* note 6, at 83 (letter from Chammorel, Secretary to the French embassy in London, optimistically describing Gordon’s translation of Brutus’s letter to Atticus as a Jacobite incitement against George I).

245. Gordon, 1 *CL* (II), *supra* note 2, at 41-42.

state—the Lord of the Treasury, the two Secretaries of State, and the Chancellor the Exchequer—as well as the inner sanctums of the royal palace. It was not always clear that those at the center of this network of graft and subornation had broken the law, but then those laws had been extorted from a supine Parliament, just as “the Senate was awed, and the tribunes and people were bribed” into ratifying the acts of Caesar.²⁴⁶ “As to legal process against Caesar,” Cato added, “there could be none; *omnia Caesar erat!*”²⁴⁷ But the empty forms of legality finally proved a hollow shield against popular vengeance. And the Senate, once aroused from its stupor, finally redeemed itself by reaffirming the fundamentals of its constitution and proscribing the enemies of its liberty.²⁴⁸ One needn’t strain to see the resemblance to the radical program of 1721.

The neo-roman theory of exceptional punishment horrified Whig loyalists, who replied along three axes. First, the classical republics were frequently lawless and authoritarian, and placed little value on the personal liberties of their citizens. It would be an act of folly to exchange the orderly constitutional freedoms of Britain for the anarchic and arbitrary proceedings of the ancient world. Here “Fabricius”, appearing in *Read’s Weekly Journal*, was exemplary:

[I]f new Forms of Government very frequent, if cutting one anothers Throats every Day for Prerogative, if Laws made and abrogated as the governing Consul pleases, if People must pinch their Guts to oblige a penurious Coxcomb in Power, if . . . the Mob must be made Judges, are the Blessings which our *English Cato* admire in the Commonwealth of *Rome*, what (in the Name of God) must his Curses be? If these are the Blessings of a Commonwealth, Heavens grant I may always be under the Protection of a King. . .²⁴⁹

For wary moderates Rome was a nightmare of civil discord and legal caprice, a burlesque of the ordered liberty England now enjoyed.²⁵⁰ Defoe, for instance, expressed amazement that anyone might want to resuscitate the Roman dictatorship, reminding his readers that the “Temporary Tyrant, was converted into a successive constant Tyrant, and the dictator chang’d into Emperor.”²⁵¹ And Charlewood Lawton wondered whether

246. Gordon, 2 *CL* (XLII) *supra* note 2, at 290.

247. Gordon, 2 *CL* (LV) *supra* note 2, at 372.

248. Gordon, 2 *CL* (LVI) (Dec. 9, 1721), *supra* note 2, at 381, 384.

249. Fabricius, *WEEKLY J. OR BRITISH GAZETEER*, Apr. 29, 1721; *cf.* *FAIR WARNING*, *supra* note 137, at 19.

250. This had once been the opinion of Trenchard himself. See TRENCHARD [AND WALTER MOYLE], ARGUMENT, SHEWING THAT A STANDING ARMY IS INCONSISTENT WITH A FREE GOVERNMENT 2 (1697) (“No Man can be imprisoned, unless he has transgressed a Law of his own making. . . so that we enjoy a Liberty scarce known to the antient *Greeks* and *Romans*”).

251. [Defoe], *THE DIRECTOR* (London), No. XXIX, Jan. 13, 1721. *Cf.* *FAIR WARNING*, *supra* note 137, at 48 (“These Gentlemen might have learnt a better Lesson from their justly-admir’d *Play* of

the same publicists who wished to retrieve constitutional curiosities from the pages of Plutarch would also recreate the bizarre sexual and educational practices of Athens and Sparta—their naked gymnastics and pagan mating rituals.²⁵² The studied imitation of Roman “liberty” would lead to absurdity, where it did not unleash disaster.

The model for that disaster was ready to hand: the Interregnum. Although Trenchard and Gordon trumpeted their loyalty to the 1688 settlement and disclaimed any association with the Commonwealth,²⁵³ their antagonists continued to suspect that behind the placid mask of a revolution Whig was the wild rictus of a republican. Cato and his auxiliaries seemed to be inciting not just reform but insurrection.²⁵⁴ In the apocalyptic vision of the penman “T.R.,” the propaganda of Cato was theme music for an English *jacquerie*.

To insinuate to [the people], that . . . [those] from whom they can only expect Justice, were Contrivers of their Ruin, . . . is to make them desperate, and give them to understand, that they are left without any Hopes of Relief, but what results from breaking the *Constitution*, . . . and this is what common People . . . must take this Author’s Meaning to be, viz. That . . . if they do not like the Method of proceeding, may take their own, . . . and then a *Jack Cade*, a *Wat Tyler*, or a *Massenelio*, with 100000 of the Rabble at their Heels, may be our Infallible Guides, to reform Abuses.

Once they have been persuaded that rights and liberties are a smokescreen for corruption and class domination, the *demos* will not be content with a change of parties, or a set of narrow reforms, or a promise of limited redistribution. They will want to annex the state itself. For much of the previous century, “breaking the *Constitution*” had been associated with the excesses of Stuart absolutism; now it had become synonymous with the rising up of the landless and dispossessed. This, concluded “T.R.,” “is the Blessed Doctrine of our *Cato*, but if he is so fond of a Roman Name, I think a Cataline Suits him better.”²⁵⁵

Cato, as to the [lenient, legalistic] Punishment of the most notorious Offenders.”)

252. LAWTON, THREE LETTERS, *supra* note 162, at 26; cf. [Defoe], DIRECTOR (London), No. XXIX *supra* note 252.

253. Cromwell, for instance, is generally a figure of opprobrium in the *Letters*, though it is not always clear whether this is grounded on an objection to the English Commonwealth as such. For a characteristically ambiguous reference, see GORDON, 3 CL (LXXVI) (May 12, 1722), *supra* note 2, at 558 (“Cromwell was once heartily in the principles of liberty, and afterwards more heartily in those of tyranny”).

254. See, e.g., [MATTHEW TINDAL], AN ENQUIRY INTO THE CAUSES OF THE PRESENT DISAFFECTION 26 (1723).

255. “T.R.,” WEEKLY J. OR BRIT. GAZETEER, Apr. 15, 1721; cf. FAIR WARNING, *supra* note 137, at 67–68 (“the Infallible Mob must undoubtedly be the Judges; for *Wat. Tyler* and his Council were rare Arbitrators in these Matters; who are above Kings”); GAYNAM, CATO’S PRINCIPLES, *supra* note 244, at 15 (“‘tis no wonder, that our Modern *Cato* should be such a Champion for *Brutus*, who dares in

Although the peasant insurgencies of Jack Cade and Wat Tyler had long haunted the ruling class, most observers traced the new populism to the regicide republic of 1649.²⁵⁶ “Do’s not their *Cruelty* and *Thirst of Blood*, and evn’ their voting their Fellow-Creatures to Die in the most exquisite Torments . . . smell Rank of the Old Republicans?,” asked one broadside.²⁵⁷ *Applebee’s* cryptically remarked that “England has seen enough of these Things in former Days.”²⁵⁸ Indeed, events seemed to be following an eerily similar trajectory: puritanical denunciations of royal and ministerial corruption, joined to the “extraordinary” trial of state criminals to bypass their immunity from legal process. Here the *Fair Warning* lived up to its name:

Now, is not this as like the Addresses of the Old Rebels and Agitators, for bringing the GRAND Delinquent to Justice, (I believe they call’d him *Criminal* too) as one Commonwealth’s-man and Traytor is to another? . . . Nay, that they abhorr’d ‘em as much as their Forefathers, who made some of the same Outcryes against the Court in King *Charles* the First’s time.²⁵⁹

The beheading of Charles Stuart was the unspoken precedent for the state of emergency to which radicals now aspired—not only in a general sense, but in all of its grisly particulars.

Reestablishing the Republic, the assumed secret design of every dissident,²⁶⁰ would necessarily mean replaying the Passion of 1649. Thus the “Anticatonist” predicted that Cato’s philippic against official corruption was “but a Preludium to that of assassinating. . . monarchy itself, as has been once already the case.” Whatever his pretensions to an agenda of parliamentary reform and restricted prerogative, “the Doctrine of KING-KILLING is at the Bottom of it all.”²⁶¹ If the top-traitors behind the financial crisis—still secure in their perches at Westminster, Whitehall,

a Monarchical Government commend the Insurrections of *Wat Tyler* and *Jack Straw*.”).

256. “Regicide” was a standard charge made by Tories against mainstream Whigs in election campaigns between 1688 and 1715. Part of what is notable here is its redeployment by mainstream Whigs against the Whig dissent. See Nicholas Phillipson, *Politeness and politics in the reigns of Anne and the early Hanoverians*, in *THE VARIETIES OF BRITISH POLITICAL THOUGHT, 1500-1800* 211, 213 (J.G.A. Pocock ed., 1993).

257. *FAIR WARNING*, *supra* note 137, at 47.

258. “Somersetshire”, *APPLEBEE’S ORIGINAL WEEKLY J.* (London), *supra* note 133.

259. *FAIR WARNING*, *supra* note 137, at 68-69. The full title, not incidentally, is *What has been may be: fair warning to the good people of England, against the Common-wealth principles industriously propagated by the London Journal*; cf. Trenchard & Gordon, 1 CL (XII), *supra* note 2, at 81.

260. GAYNAM, *CATO’S PRINCIPLES* *supra* note 244, at 33 (“I have plainly shewn, that all the choice Means, and expedients used heretofore by the *Rump* to destroy the Monarchy and Church, are exactly transcrib’d by the Author of *Cato’s* Letters; and then judge ye, how fit such an one is to be a Dictator.”); cf. *DAILY J.* (London), May 5, 1721.

261. Anticatonist, *APPLEBEE’S ORIGINAL WEEKLY J.*, Dec. 16, 1721; cf. TINDAL, *ENQUIRY*, *supra* note 255, at 16; *APPLEBEE’S ORIGINAL WEEKLY J.*, Jan. 7, 1721.

and Exchange Alley—could not be brought to book by ordinary means, any self-styled patriot would be justified in taking revenge on behalf of an outraged nation. And they might strike first at the crown, the keystone of the now discredited constitutional order.²⁶² In the shadow of these fears, Cato's letters on Brutus and Caesar now seemed like a brazen confession of intent. The Long Parliament had taken for granted that the king could only be killed by the public executioner following a formal trial; now Trenchard and Gordon seemed prepared to jettison even this minimal safeguard under the aegis of an all-consuming reason of state.

Partisans of the status quo were equally aghast at the “republican” turn in private property. Radical pleas to sequester the property of politicians and bankers, revoke contracts in stock, and compensate those ruined by the crash reawakened memories of the confiscations carried out by Cromwell and his adjutants. The *Fair Warning* revisited this black chapter of English history, and winked maliciously at Cato.

Then as to their Rapacity and Corruption, it was Universal: . . . ‘Tis notorious that the Church-Lands and the Crown-Lands were swallowed by them, and almost unnumber’d Millions besides . . . and yet their *Bel and Dragon* still remain’d as voracious and unsatiable as ever. These Dictators were as perfectly *Liberi, exolutique Legum vinclis*, absolutely free from all Restraints of Law, as their own Lusts cou’d wish, or as their Successors cou’d for themselves desire.²⁶³

Once liberated from the supervision of “*Magna-Charta*, and the *Petition of Right*,” the lupine Republic had eagerly devoured the worldly goods of its subjects. “These,” scoffed “Fabricius,” “were the blessed Times of Liberty and Property” under the Commonwealth, the halcyon days when “Men could not truly call any thing their own.”²⁶⁴

And now the nation was again redrawing the lines of private property to suit the whims of the mob and its masters. “Somersetshire”, a pseudonymous contributor to *Applebee’s*, railed against the proposal to cancel all transactions in South Sea stock, what it disdainfully named a “Spunge” for capital markets. Although the plan masqueraded as natural equity and poor relief, Somersetshire was confident that it would only exacerbate the “general Desolation” of the economy by deranging settled expectations of property and law. It could only have been devised by those Levellers “who were for pulling Men to Pieces, because they had more

262. See TINDAL, *supra* note 130, at 30 (“he represents the Commons as screening those Top-Criminals he wou’d have assassinated.”); FLYING POST (London), Dec. 14-16; 1721 APPLEBEE’S ORIGINAL WEEKLY J., Dec. 30, 1720.

263. FAIR WARNING, *supra* note 137, at 36-37.

264. Fabricius, WEEKLY J. OR BRITISH GAZETEER (London), May 6, 1721.

than themselves.”²⁶⁵

These suspicions were confirmed when Cato took up the cause of agrarian laws in the summer of 1721. Political liberty, Gordon stressed, borrowing from James Harrington, cannot survive without a baseline of economic equality.²⁶⁶ For his opponents it was a revealing moment. “What could be the meaning of insisting so often upon the great Benefit of the Agrarian Law among the Romans,” *Applebee’s* inquired, “but to inspire the People with the Spirit of Levelling?”²⁶⁷ It was an agenda that was anathema to the Anglo-Saxon constitutional order, and that evoked the extraordinary powers available to republics—the Roman *fascēs* and the Parliamentary mace.

Although they drew on an array of republican sources and philosophies, Trenchard and Gordon consistently preserved a space for an enlightened monarchy, stripped of its corrupt appendages and reduced to its proper limits. And they abjured any intention to “turn all the possessions of England topsy-turvy, and throw them into average.”²⁶⁸ The terms of debate that they initiated are nevertheless telling: in a nation that had only recently concluded a century of debilitating argument over the royal prerogative, extra-legal measures were now universally thought to carry the seal and signature of the commonwealth. The rights of Englishmen had become the fortress of reaction,²⁶⁹ while a state of exception modeled on the Roman dictatorship now seemed like the matrix of a free and egalitarian future.

IV. VIOLENT WHIGS

The Cato Institute in Washington, D.C. is not named after the legendarily incorruptible Roman Senator who resisted Caesar’s rise to power. Rather, its website helpfully explains, “Cato owes its name to Cato’s Letters, a series of essays published in 18th-century England that presented a vision of society free from excessive government power.”²⁷⁰ The Cato Institute is hardly alone in depicting the *Letters* as the font of a

265. “Somersetshire”, APPLEBEE’S ORIGINAL WEEKLY J. (London), *supra* note 133. It is worth noting that this view of the Levellers, widespread throughout the eighteenth century, is at odds with the actual Leveller program. See Tim Harris, *The Leveller Legacy: from the Restoration to the Exclusion Debates*, in THE PUTNEY DEBATES OF 1647 232, (Michael Mendle ed., 2001).

266. Gordon, 2 CL (XXXV), July 1, 1721, 253-54; cf. Trenchard, 3 CL (XCI), Aug. 25, 1722, 648. For Cato on the agrarian law, see ERIC NELSON, THE GREEK TRADITION IN REPUBLICAN THOUGHT (2004), 140-4. On Thomas Gordon’s later musings on the agrarian law in his translations of Sallust and Tacitus, see EDWARD G. ANDREW, IMPERIAL REPUBLICS 61-62 (2011).

267. APPLEBEE’S ORIGINAL WEEKLY J. (London), Sept. 2, 1721.

268. Trenchard, 3 CL (LXXXV), July 14, 1722, 614; cf. [Thomas Gordon], *A Sermon preached before the Learned Society of Lincoln’s-Inn on Jan. 30 1732*, in 3 THE INDEPENDENT WHIG 361-74 (2d ed. 1741). See also BLAIR WORDEN, ROUNDHEAD REPUTATIONS (2002), 152.

269. See, e.g., [Daniel Defoe], THE DIRECTOR (London), Jan. 13, 1721, (“Liberties of Englishmen”); FAIR WARNING, *supra* note 137, at 49; see also HAMMOND, *supra* note 17, at 16.

270. *About Cato*, CATO INSTITUTE, <http://cato.org/about> (last visited Mar. 25, 2017).

libertarian tradition, or as an advertisement for a minimalist government that aggressively protects the rights of its citizens.²⁷¹ For Ronald Hamowy, the *Letters* are a celebration of “natural law, inalienable rights, and the natural limits of government.”²⁷² For Michael Zuckert, their core concern is the preservation of individual liberty and property by means of a Lockean social contract.²⁷³ Bernard Bailyn takes perhaps the strongest position, grouping Molesworth, Trenchard, and Gordon together in a tradition of “extreme libertarianism” that helped to kindle the American Revolution.²⁷⁴ For the radical Whigs, following this line of scholarship, every incursion on property rights and due process had to be resisted tenaciously, lest it become a precedent for further encroachments.

There is no question that the works of Trenchard, Gordon, and Molesworth are thick with encomiums to “that precious Jewel *Liberty*,” typically juxtaposed against the misery, deprivation, and slavery of oriental and continental monarchies.²⁷⁵ The texts they published between 1689 and 1720 contain stirring tributes to freedom of the press,²⁷⁶ religious toleration,²⁷⁷ and habeas corpus,²⁷⁸ as well as the impassioned opposition to standing armies that made Trenchard’s reputation.²⁷⁹ *Cato’s Letters* is often viewed as the apotheosis of this tradition.

But the history reviewed in Part II complicates the reflexive identification of Whig dissenters with individual rights. Throughout *Cato’s Letters* ringing endorsements of constitutional liberties and civic privileges rest uneasily alongside agitation for treason trials and

271. Consider, for example, 2 MURRAY N. ROTHBARD, CONCEIVED IN LIBERTY 690 (2011), http://mises.org/system/tdf/Conceived%20in%20Liberty_Vol2_2.pdf?file=1&type=document (“The great significance of *Cato’s Letters* is that in them the wealthy John Trenchard and his young protégé Thomas Gordon greatly radicalized the impact of Locke’s libertarian creed. . . . Cato’ proceeded to argue with great force that government is always and everywhere the potential or actual aggressor against the rights and liberties of the people”); David L. Jacobson, *Introduction, in THE ENGLISH LIBERTARIAN HERITAGE: FROM THE WRITINGS OF JOHN TRENCHARD AND THOMAS GORDON IN ‘THE INDEPENDENT WHIG’ AND ‘CATO’S LETTERS’* xxxiii-xxlvii (David Jacobson ed., 1965).

272. Hamowy, *supra* note 142, at 291.

273. MICHAEL ZUCKERT, NATURAL RIGHTS AND THE NEW REPUBLICANISM 297-319 (1994).

274. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 35, 47, 77 and *passim* (2d ed. 1992). Cf. ISAAC KRAMNICK, BOLINGBROKE AND HIS CIRCLE 251 (1968) (“Here in *Cato’s Letters* is a fully developed constitutional theory emphasizing fixed and definite constitutional limitations on government and its leaders.”).

275. ROBERT MOLESWORTH, AN ACCOUNT OF DENMARK, AS IT WAS IN THE YEAR 1692 (1694) The phrase is repeated in TRENCHARD & MOYLE, STANDING ARMY, *supra* note 251, at 4.

276. Gordon, 2 Independent Whig 31 (2nd ed. 1741) (No. XXXV) (Sept. 14 1720).

277. Gordon, 2 Independent Whig 34 (No. XXXVII), (Sept. 21 1720), *id.* at 34. For the Erastianism undergirding this toleration, see Trenchard, 1 Independent Whig (XXIII), Apr. 20, 1720, ; *supra* note 238, at 100. Cf. Robert Molesworth, *Preface to the Second Edition of François Hotman, Franco-Gallia* (1721), in AN ACCOUNT OF DENMARK, WITH FRANCO-GALLIA 188 (Justin Champion ed., 2011). The preface was included in the third volume of *The memoirs of John Ker* in 1726, and reprinted in 1775 under the title *The principles of a real Whig*.

278. [JOHN TRENCHARD], A SHORT HISTORY OF STANDING ARMIES IN ENGLAND 5 (1698).

279. TRENCHARD & MOYLE, STANDING ARMY, *supra* note 251, *passim*.

exemplary punishments. And as we have seen, during the same period that they wrote the *Letters*, Trenchard and Gordon authored an additional half-dozen pamphlets and essays making the case for an indefinite suspension of the law, while viciously mocking civil-libertarian appeals as alibis for graft and plunder. A survey of modern scholarship on radical Whig thought suggests four possibilities for making sense of these seemingly discordant motifs.

One strategy, typified by the libertarian historian Ronald Hamowy, is to flatly deny any contradiction. Cato's vociferous campaign against the South Sea scheme was a natural extension of his Lockean liberalism—a complaint against excessive state intrusion in free trade, set in motion by corrupt insiders seeking to exploit their connections for financial gain.²⁸⁰ Their unwary victims were, essentially, robbed. The punishment of those responsible is best understood not as “vengeance against those who wronged the republic but justice in the name of the individuals who have been injured”—that is to say, as a vindication of the individual right to property!²⁸¹ This is clever but ultimately untenable. The question is how a purportedly “extreme libertarian” could so easily endorse the override of Magna Charta and the infliction of punishments *ex post facto* in his zeal to repress financial criminals; answering with talk about the injured property rights of the victim is little better than a sleight of hand. It is telling that Hamowy remains silent on the avowedly *extralegal* character of the punishments contemplated by the radical Whigs, and makes no reference to the voluminous writings of Thomas Gordon elaborating on the concept of constitutional necessity. Reframing the “extraordinary” circumvention of due process as a deduction from the axioms of classical liberalism is a non-starter.

A second and more common strategy is to bracket the South Sea writings as marginal within the overall scheme of the work.²⁸² But this

280. Hamowy, “Introduction”, in 1 *CL*, *supra* note 2, at xxxi-ii. Hamowy goes much too far when he argues that radical Whigs objected on principle to any involvement of the state in banking and trade. See, e.g., [JOHN TRENCHARD], A COMPARISON BETWEEN THE PROPOSALS OF THE BANK AND THE SOUTH-SEA COMPANY (1720); [JOHN TRENCHARD], A LETTER OF THANKS FROM THE AUTHOR OF THE COMPARISON BETWEEN THE PROPOSALS OF THE BANK AND THE SOUTH-SEA 16 (, 1720). The notion that they objected to market activity only when it was improperly mixed with state power is equally fanciful; see 2 GORDON, STOCK-JOBGING, *supra* note 97, at 83-85.

281. Hamowy, “Cato’s Letters”, *supra* note 142, at 281-82.

282. See ANNIE MITCHELL, THE CHARACTER OF AN INDEPENDENT WHIG 34 (2002) (unpublished Ph.D. dissertation, University College London) (“Although the South Sea scandal provided the impetus for the *Letters*, Trenchard and Gordon swiftly moved on to the wider issue of civil and religious liberty. . .”); SRINIVAS ARAVAMUDAN, TROPICOPOLITANS: COLONIALISM AND AGENCY, 1688-1804 134 (1999) (“. . . after the writers’ fury is vented on the South Sea Bubble, they theorize in a more removed fashion”); Jacobson, *supra* note 272, at xxv (“Although the letters from ‘Cato’ began with questions of immediate concern such as the fate of Gibraltar or the South Sea Bubble, they rapidly passed on to such broad issues as the nature of virtue, the value of liberty, and the justice of tyrannicide.”).

distinction is nearly as unworkable as Hamowy's classical liberal acrobatics. Cato's contemporaries understood the South Sea writings as central to the overall project, satirizing what they took to be the *Letters'* ludicrous monomania:

If you talk to him of the happy Administration in the Beginning of his Majesty's Reign, and the suppressing of a horrid and desperate Rebellion; He cries out, *South-Sea!* Tell him of the glorious Expedition to the *Streights*, the preserving the Balance of *Europe*, and the securing to us the Trade of the *Mediterranean*; he has *South-Sea* for you again. Mention to him the *Quadruple Alliance* . . . to maintain our *Protestant Succession*; and he bawls out *South-Sea*. Name the several wise and happy Expeditions into the *North*, to keep the Balance there, and prevent Insults on our Commerce, and perhaps our Coasts; *South-Sea* is his Word still.²⁸³

Indeed, the crash haunts the entire run of the *Letters*, both on its surfaces and in its depths. The Seventieth Letter, published in March 1722, finds Gordon railing against "the late execrable South-Sea conspiracy," and expressing incredulity that his fellow citizens have not yet insisted on the proscription of "all those who headed and abetted that destructive scheme, or endeavoured to protect those who did."²⁸⁴ The Ninety-First and Ninety-Second Letters are devoted to the unique perils of monopoly corporations, and feature a multi-page rant by Trenchard against "the ravages brought upon us by the South-Sea project" and its imitators.²⁸⁵ And the One Hundred Seventh Letter, "Of publick credit and stocks," laments that the people of England "have been delivered into the ravenous and polluted jaws of vultures and tigers" by the nation's continuing tolerance for jobbing and stock manipulation.²⁸⁶ Far from backing away from the bold position staked out in 1721, Cato trumpets his earlier advocacy, claiming to be vindicated by subsequent events.²⁸⁷

Moreover, the financial crisis was not the only moment in Georgian politics where radical Whig theorists demonstrated their readiness to hold civil liberties in abeyance. *Cato's Letters* conclude with a series of dispatches on the Atterbury Plot, a Jacobite conspiracy that was revealed

283. CATO TURNED CATILINE, *supra* note 168, at 2.

284. Gordon, 3 *CL* (LXX) (Mar. 17, 1722), *supra* note 2, at 511.

285. Trenchard, 3 *CL* (XCI), *supra* note 2, at 650-51; Trenchard, 3 *CL* (XCII) (Sept. 1, 1722), *supra* note 2, at 653-61.

286. Trenchard, 4 *CL* (CVII) (Dec. 15 1722), *supra* note 2, at 757; *cf.* Trenchard, 3 *CL* (XCVIII)(Oct. 13 1722), *supra* note 2, at 702.

287. Gordon, 4 *CL* (CXXV), (Apr. 20 1723), *supra* note 2, at 868 ("The tender and slow prosecution of the execrable managers, the gentle punishment inflicted upon them, and the obvious difficulties thrown in the way of any punishment at all, were fresh provocations to a plundered and abused nation, and fresh stimulations to the [Atterbury] conspirators."). *Cf.* Trenchard, 3 *CL* (XCVII) (Oct. 6 1722), *supra* note 2, at 696.

and quickly quashed in the spring of 1722. A tide of repressive measures followed, targeting non-jurors, Catholics and suspected Jacobites. Satirists and ballad-writers were arrested. A special “supply” tax was levied on England’s Catholic citizens. Atterbury, Bishop of Rochester, supposedly the conspiracy’s mastermind, was tried and convicted in Parliament on a bill of pains and penalties when the evidence against him proved too circumstantial to survive in the courts. And onerous new regulations were passed against poachers, thought to be covertly allied with the Pretender.²⁸⁸

Each of these measures was backed enthusiastically by Thomas Gordon. He inveighed against “treasonable Ballads, publicly sung in the Streets,” and approved the prosecution of Tory pamphleteers who libelled the administration and the Hanoverian dynasty.²⁸⁹ He sought a purge of ideologically unreliable faculty and students from the universities.²⁹⁰ And he professed to be utterly untroubled by the yearlong suspension of habeas corpus initiated in October 1722.²⁹¹ When those swept up in this dragnet claimed a “Breach of the liberty of the subject,” Gordon replied that the penalties meted out to them were almost scandalously mild, and that “had they been guilty of libelling a Government anywhere amongst our Neighbours,” they would have been locked away and forgotten in the corner of a dark “*Bastile*.”²⁹² Gordon argued that Catholics and Jacobites had no right to appeal to the “liberty of the subject,” because their ultimate aim was an absolutist monarchy where such rights did not exist. The bad faith invocation of personal freedoms by a group committed to their extirpation is a species of nonsense—“turning liberty upon herself”—and can be decisively rejected without damaging the ideal of a free society.²⁹³

288. See CRUICKSHANKS & ERSKINE-HILL, *supra* note 6, at 153-70 (describing a series of “arbitrary measures” taken against suspected Jacobites), 167 (“a tax of £100,000 on Catholics to pay for an increase in the army”), 204 (Atterbury: “For whose Liberty is safe, if the H[ouse] of C[ommons] may accuse any one, even when they *own* they have no *Legal Proof* against him?”), 211 (“the trial was a show-trial”), 233 (“Walpole’s brutal repression”).

289. GORDON, 2 A SHORT VIEW OF THE CONSPIRACY 137, 139 (1723).

290. Gordon, 4 CL (CXXVII) (May 4, 1723), *supra* note 2, at 878-79.

291. Gordon, 4 CL (CXXV), *supra* note 2, at 868. Recall in this context Trenchard, 1 CL (XX), 142-43, advocating treason trials for Bolingbroke and Harley for allegedly conspiring with the Pretender. On the 1722 suspension of Habeas Corpus, see [Various debates in the Lords and Commons between 11 October and 26 October 1722], 8 COBBETT’S PARLIAMENTARY HISTORY 27-46 (1811). See in particular the speech given in opposition by leading Tories in the House of Lords on October 11 at 29 (“...this Bill did, in effect, vest the ministers with an authority almost as arbitrary and extensive as that of a Roman Dictator...”). The Tory alternative was a six-month suspension; the Habeas Corpus Act had never before been suspended more than nine months at a time.

292. GORDON, *supra* note 290, at 139. *Cf. id.* at 159.

293. Gordon, 4 CL (CXXIX) (May 18, 1723), *supra* note 2, at 89; *cf.* Gordon, 4 CL (CXXV), *supra* note 2, at 866-68 (“By their eternal designs and attacks upon us, they force us upon the next means of self-preservation; and then complain of oppression, because we will not suffer them to oppress and destroy us.”); Trenchard, 4 CL (CXXX), *supra* note 2, at 901; *see also* “Britannicus” [Benjamin Hoadly], *reprinted in* 8 COBBETT, *supra* note 292, at 29-36, 30 (“Otherwise, they always argued, there must soon be an end of our establishment, and all our liberties; and that without this, the

It is obvious, then, that Trenchard and Gordon's vehement writings on the South Sea bubble cannot be dismissed as an anomaly. The dialectic of civil liberty and reason of state, which structures so much of the Italian-Atlantic republican tradition, confronts us with a genuine puzzle.

A third strategy acknowledges the dilemma and charges the Whig dissenters with inconsistency, perhaps even hypocrisy, for their selective oscillation between civil libertarian and authoritarian registers. This was the conclusion of several of their contemporaries at the height of the South Sea crisis, who professed to be baffled that self-professed Whigs could so easily endorse the abrogation of essential rights and liberties. A writer for *Applebee's* made precisely this point in a January 1721 editorial:

I remember when the Whigs were . . . the Patrons of Liberty, always claiming that no Man should suffer the Loss of Life and Limb but by legal Prosecution, and by Sentence of the Law: But now . . . how are they for sentencing Men to the Scaffold, and to the Gibbet, as they find their own Resentments give Cause, not as the Laws of the Land, or as the Nature of the Crime, direct?²⁹⁴

Readers accustomed to ranging the Old Whigs in a tradition of civil libertarianism and antistatism will be sympathetic to this assessment; surely when these authors allowed for "extraordinary" action in contravention of the written laws they were deforming the tenets of their faith under the pressure of events.

In their pseudonymous 1721 essay *The Sense of the People*, Trenchard and Gordon stood the charge on its head: the true betrayal of Whig liberty would be *not* insisting on the punishment those responsible for the financial crisis. Whig principles dictated retribution above all: "*Whiggism* carries in it the very Notion of Liberty, and Love to our Country; and . . . the Punishment of public Horse-leeches, Parricides, must be the only Way to settle *Whiggism*, and to lay a Foundation for the Happiness of future Times." John Trenchard elaborated in the Thirteenth of *Cato's Letters* that the foremost "principle of a *Whig*" was the imperative of surveilling and punishing those who would plot against popular liberties. "Some will tell us," Trenchard sneered, "that this is setting up the mob for statesmen, and for the censurers of states. The word *mob* does not at all move me."²⁹⁵

Habeas Corpus Act itself must be much worse than mere dirty parchment or waste paper: for it must be itself the very instrument and immediate occasion of that ruin, and loss of liberty, it was designed to prevent."). There are deep resonances here with what is usually thought to be a distinctively twentieth century phenomenon—so-called "militant democracy." Consider Karl Loewenstein, *Militant Democracy and Fundamental Rights*, 1, 31 AM. POL. SCI. REV. 417, 423-24 (1937).

294. APPLEBEE'S ORIGINAL WEEKLY J. (London), Jan. 7, 1721. For an example of radical Whig rhetoric along these lines, consider JOHN TOLAND, THE STATE-ANATOMY OF GREAT BRITAIN 12 (7th ed. 1717), 12 ("nothing is more consistent than Law and Liberty; nay, there cannot be any political Liberty without Law").

295. Trenchard & Gordon, *supra* note 138, at 8; Trenchard, 1 *CL* (XIII) (Jan. 21, 1721), *supra*

This rather striking definition of Whig “liberty”—popular accountability for socioeconomic elites—was not an opportunistic invention of the moment; it was a prominent leitmotif of radical political theory. Consider, in this context, the comments of the dissenting Whig preacher Richard West on the bloody repression of the 1715 Jacobite rising:

it is Nonsense to talk of Laws and Constitution, if any Man may commit what is notoriously most prejudicial to his Country, and yet escape with Impunity by screening himself behind Formalities. Such an evasive Transgression of the Law, instead of justifying the Criminal, should, by all the Rules of common Sense, enhance his Guilt; since it necessarily implies him to be conscious, that what he did was illegal and unwarrantable. In short, all Forms of Law, and I may add [sic] *Statutes*, relating to the Adjudication or Trial of *Treasons*, were intended as *Barriers* to the *Liberties of the People* against the Incroachments of the Crown, and not to protect corrupt Ministers from the Prosecutions of Parliament.²⁹⁶

One author who found this pattern of reasoning highly congenial was John Trenchard, who cited West’s pamphlet in the twelfth of *Cato’s Letters* as justification for Parliament to act “upon extraordinary occasions” to suppress those he called “the publick enemies of our liberty and prosperity.”²⁹⁷ Radical Whig luminaries recognized no tension between their spirited eulogies to the English freedom and their enthusiasm for extralegal reprisals against its enemies.

Given the inadequacies of these classical liberal accounts we might turn, finally, to the framework of republican liberty, unearthed from the history of political thought by Quentin Skinner and expanded into a systematic philosophy by Philip Pettit. Rather than mere freedom from interference, the keyword of republican liberty is *independence*, that is, freedom from subjection to the arbitrary will of another. A variety of liberal-authoritarian regimes might plausibly realize the “negative liberty” prized by classical liberalism, but only active citizens in a well-constituted republic possess a stable guarantee against the sudden and arbitrary

note 2, at 103-4 (“In truth, every private subject has a right to watch the steps of those who would betray their country. . . This is the principle of a *Whig*, this the doctrine of liberty; and ‘tis as much knavery to deny this doctrine, as it is folly to ridicule it. Some will tell us, that this is setting up the mob for statesmen, and for the censurers of states. The word *mob* does not at all move me. . . Blessed be God, and thanks to our sovereign, who has given us a ministry that makes all these cautions unnecessary. . . by being foremost to pursue the guilty.”). Of course, to say that Trenchard and Gordon believed in Whig *principles* is not at all to say that they always believed in the Whig *party*; for their advocacy of an alliance with “Country” Tories that would destabilize the existing party structure, see Trenchard, 3 *CL* (LXXX), *supra* note 2, at 583-87 (“one party for liberty”); Gordon, 3 *CL* (XCVI), Sept. 29, 1722, 687-93.

296. RICHARD WEST, A DISCOURSE CONCERNING TREASON, AND BILLS OF ATTAINDER 3 (1716).

297. Trenchard, 1 *CL* (XII), *supra* note 2, at 98.

revocation of those freedoms.²⁹⁸ Without this ultimate security, the rights enjoyed by individuals hang on the gossamer thread of sovereign indulgence. Notably, for both Skinner and Pettit *Cato's Letters* represent a crucial text in the development of this civic ideology.²⁹⁹ And so it is worth asking whether their account, with its deēmp̄h̄asis on individual rights and its close attention to forms of government,³⁰⁰ better reflects the prismatic political theory of the radical Whigs.

Unfortunately, the improvement over classical liberal accounts is only marginal, because both Skinner and Pettit typically insist that republican liberty necessarily incorporates the rule of law and a robust sphere of protection for individual freedoms, equal (at least) to those available under a regime of negative liberty. “The state,” notes Skinner, “has a duty not merely to liberate its citizens from . . . personal exploitation and dependence, but to prevent its own agents, dressed in a little brief authority, from behaving arbitrarily in the course of imposing the rules that govern our common life.”³⁰¹ The claim here is that negative liberty is necessary but not sufficient to constitute a free political life, since in the absence of a free state those liberties will remain provisional and precarious. The republican concept of liberty, as Skinner articulates it, is designed to integrate and guarantee the classical ideals of negative liberty.³⁰²

Pettit perceives more readily than Skinner that interference with personal liberties can sometimes occur in the absence of domination—that is to say, that in certain political configurations “negative liberty” and “republican liberty” might enter into conflict. Thus in a 2002 essay Pettit

298. Quentin Skinner, *The idea of negative liberty*, in VISIONS OF POLITICS, *supra* note 212, at 186-212; SKINNER, LIBERTY BEFORE LIBERALISM 68-99 (1998); Skinner, *Freedom as the Absence of Arbitrary Power*, in REPUBLICANISM AND POLITICAL THEORY 83-110 (Cecile Laborde and John Maynor, eds., 2008); Philip Pettit, *Negative Liberty, Liberal and Republican*, 1 EUROPEAN J. PHIL. 15 (1993); PETTIT, REPUBLICANISM 51-79 ; Pettit, *Keeping Republican Freedom Simple*, 30 POL. THEORY 339 (2002); PETTIT, ON THE PEOPLE'S TERMS 92-107 (2012).

299. Pettit, *Negative Liberty*, *supra* note 298, at 33 (“Consider, for example, this comment on liberty from the eighteenth century republican tract which was published as *Cato's Letters*. . .”); Pettit, REPUBLICANISM, *supra* note 299, at 20, 29, 33; Skinner, LIBERTY BEFORE LIBERALISM *supra* note 299, at ix; Skinner, *Arbitrary Power* *supra* note 299, at 85, 91; cf. Gordon, 2 CL (LXII), *supra* note 2, at 430 (“Liberty is to live on one’s own terms; slavery is, to live at the mere mercy of another”).

300. See, e.g., Skinner, *supra* note 211, at 211 (“the essence of [Machiavelli’s] theory [of republican liberty] could be expressed by saying that the attainment of social freedom cannot be a matter of securing personal rights”); PETTIT, REPUBLICANISM *supra* note 299, at 303-4 (“republicans have no reason to think of rights—however richly reconceived—as the only resources whereby people can be protected and assured of their non-domination”). But see MAURIZIO VIROLI, REPUBLICANISM 6 (2001) (“The truth is that liberal political theory has inherited a number of ideas from classical republicanism, beginning with the fundamental principle that sovereign power must always be limited by constitutional and legal norms. . . [and] that the main goal of political society is to protect the individual, his or her life, liberty, and property.”).

301. SKINNER, LIBERTY BEFORE LIBERALISM *supra* note 299, at 119.

302. See also VIROLI, REPUBLICANISM *supra* note 300, at 61 (“republicanism is a liberal theory that is more radical and consistent than classical liberalism”).

gently rebukes Skinner for failing to grasp the relative *priority* of non-domination over non-interference, that is, failing to appreciate that a republican ought to prefer a scenario of “interference without domination” to one of “domination without interference.”³⁰³ Some forms of coercion—paradigmatically for Pettit, the regulation of corporations and private fortunes—may be perfectly compatible with a free society, particularly where those concentrations of wealth threatens to overwhelm the civic equality on which republican life depends.³⁰⁴ Pettit thus gets closer to accounting for the sharp swerves of eighteenth-century radical Whig thought, but adds the crucial caveat that such coercion is legitimate only where it is *non-arbitrary*, meaning where it proceeds according to fixed rules, and remains subject to robust constitutional safeguards and counter-majoritarian checks.³⁰⁵ This insistence on the “fair rule of law”³⁰⁶ blunts the potentially radical edge of Pettit’s theory of civic freedom, ensuring that it remains a variant on ordinary liberal constitutionalism.³⁰⁷

And so despite its potential, the account of “republican liberty” given by its leading expositors cannot speak with any confidence to the paradoxical character of radical Whig thought during the South Sea bubble: the whiplash between unlimited panegyrics to individual and civic freedom, and severe repression of enemies of the state.³⁰⁸ Gordon’s 1722 *Short*

303. Pettit, *Keeping Republican Freedom Simple* *supra* note 299, at 344-45; *cf.* PETTIT, REPUBLICANISM *supra* note 299, at 22-23. Skinner has more or less accepted this criticism; see Skinner, *Arbitrary Power* *supra* note 299, at 84; *cf.* VIROLI, REPUBLICANISM *supra* note 300, at 47-52.

304. Pettit, *Negative Liberty*, *supra* note 299, at 34; PETTIT, REPUBLICANISM *supra* note 299, at 117, 140-3; PETTIT, ON THE PEOPLE’S TERMS *supra* note 299, at 91.

305. See Pettit, *Negative Liberty* *supra* note 299, at 29, 32, 37 ff. 39 (“the law constitutes what it is to be free”); PETTIT, REPUBLICANISM *supra* note 299, at 31 (“If the conventional theory leads to an ideally perfect democracy—a state in which all that the majority wishes to be law, and nothing else, is law—then it leads to a form of government under which the arbitrary exercise of power is most certainly possible”); *id.* at 173 (“The first condition is, in James Harrington’s phrase, that the system should constitute an ‘empire of laws and not of men’; the second, that it should disperse legal powers among different parties; and the third, that it should make law relatively resistant to majority will.”); *id.* at 184 (“Will it help if we . . . stipulate that any public decision that attracts majority support, or that is in accord with a policy that attracts such support, is non-arbitrary? Surely not.”); PETTIT, ON THE PEOPLE’S TERMS *supra* note 299, at 221 (“The constitutional constraints require that government should operate in accordance with due process, not ruling by ad hoc decree but via public, general and prospective regulations. . . different powers should be shared out amongst different, mutually checking agents”).

306. Pettit, *Keeping Republican Freedom Simple*, *supra* note 299, at 349.

307. *Cf.* Francis Cheneval, *Multilateral Dimensions of Republican Thought*, in LEGAL REPUBLICANISM: NATIONAL AND INTERNATIONAL PERSPECTIVES 240 (Samantha Besson and José Luis Martí eds., 2009) (“The republican principle of non-domination is not substantively different from claims of political freedom and political rights of participation expressed in the name of political liberalism. Political liberalism does not deny legitimate and rule-based interference by the State. . .”).

308. In writing about the English Civil War, Skinner rightly treats *salus populi* as the ubiquitous shadow of republican liberty, recognizing that for neo-roman parliamentarians like Henry Parker it was often *precisely* the settled rule of law that fostered conditions of unjust and arbitrary domination. But, rather curiously, the insight that the realization of republican liberty may sometimes require the suspension of the legal order and the destruction of liberal rights and privileges does not figure in the political theory of “republicanism” as elaborated in either his or Pettit’s signature texts. See 2 SKINNER, VISIONS OF POLITICS, *supra* note 211, at 308-43. On the centrality of “reason of state” to

View of the Conspiracy underscores the distance between this outlook and Pettit's rule-of-law constitutionalism:

to arm your Mind with Resentment against Traitors, remember that . . . a *British* Soul ought never to forgive an Attempt to ruin his Country. 'Tis not our Cause only, but the glorious Cause of LIBERTY that we fight. . . . But I need not dwell any longer upon this Subject, to one who knows the Value of it so very well, whose Birth and Principles have long since inculcated that old *Roman* Maxim in him, That Slavery is worse than Death, and that to live is to be free.³⁰⁹

Gordon signed this pamphlet "CATO", and with good reason; he had expressed nearly identical thoughts in the Twenty-Second Letter regarding the South Sea ringleaders: "Whether the directors and their masters shall be punished or no, is to me one and the same question, as to ask, whether you will preserve your constitution or no; or, whether you will have any constitution at all." The failure to liquidate these rapacious elites, he warned, would sound the death knell of "old English liberty."³¹⁰

This worldview is not in any sense alien to the history of republicanism; it has been rightly dubbed Machiavellian,³¹¹ and both Trenchard and Gordon displayed an impressive familiarity with the Florentine thinker.³¹²

English republican thought, see also VICTORIA KAHN, *WAYWARD CONTRACTS: THE CRISIS OF POLITICAL OBLIGATION IN ENGLAND, 1641-1674* 91-105, 257-78 (2004); RICHARD TUCK, *PHILOSOPHY AND GOVERNMENT, 1572-1651* 222-32 (1993).

309. Gordon, *supra* note 290, at 157-58.

310. Trenchard & Gordon, 1 *CL* (XXII), *supra* note 2, at 158. *Cf.* the sharp critique of Pettit on elite accountability in MCCORMICK, *MACHIAVELLIAN DEMOCRACY*, *supra* note 232, at 150, and Pettit's response in PETTIT, *ON THE PEOPLE'S TERMS* *supra* note 299, at 217 ff. 34.

311. See POCOCK, *MACHIAVELLIAN MOMENT* *supra* note 132, at 469-72; VICKIE B. SULLIVAN, *MACHIAVELLI, HOBBS, AND THE FORMATION OF A LIBERAL REPUBLICANISM IN ENGLAND* 245, 254 (2004); KRAMNICK, *BOLINGBROKE* *supra* note 274, at 245, 248. *Cf.* John P. McCormick, *Machiavellian Democracy: Controlling Elites With Ferocious Populism*, 95 *AM. POL. SCI. REV.* 297 (2001); MCCORMICK, *MACHIAVELLIAN DEMOCRACY*, *supra* note 232, at 114-40.

312. See, e.g., Gordon, 1 *CL* (XVI), *supra* note 2, at 121 ("Machiavel tells us, that no government can long subsist, but by recurring often to its first principles"); Trenchard & Gordon, 1 *CL* (XXII), at 156 ("The people. . . are apt frankly to correct their own faults. Of which candour in them Machiavel has given several instances. . ."); Gordon, 1 *CL* (XXIV) (Apr. 8, 1721), at 174-79 ("The people have no bias to be knaves; the security of their persons and property is their highest aim. . . The same can rarely be said of great men, who, to gratify private passion, often bring down publick ruin."); Gordon, 1 *CL* (XXXII), at 229 ("Machiavel says, Calumny is pernicious, but accusation beneficial to a state; and he shews instances where states have suffered or perished for not having, or for neglecting, the power to accuse great men who were criminals") and 230 ("Machiavel. . . proves that a multitude is wiser and more constant than a prince"); Trenchard, 2 *CL* (LX) (Jan. 6, 1722), at 416 ("The appetites. . . of great men, are carefully to be observed and stayed"); Gordon, 3 *CL* (LXX), at 504 ("by this struggle liberty is preserved, as water is kept sweet with motion"); Gordon, 3 *CL* (LXXII), at 529 (extract from *Discourses* II.29, the vices of a people come from their prince); Trenchard, 3 *CL* (LXXX), at 583 ("Machiavel tells us. . ."); Gordon, 4 *CL* (CXIX) (Mar. 9, 1722), at 828 ("Arbitrary princes cannot, dare not, be grateful to elevated merit"); GORDON, *supra* note 166, at III.28 ("the *Roman* People. . . [determined] that no one should be Consul two years together. . . And this Conduct *Machiavel* commends. . ."); Gordon, *supra* note 221, at xi-ii (" . . your Lordship is conversant with *Machiavel*. . . I shall therefore take the Liberty to produce a Remark of that *discerning* Man, in a Circumstance very much resembling our present Case. In a City, he says, where the People happen to

But perhaps the best schema for understanding the opposition thought of Hanoverian Britain is sketched by Mark Goldie, who points to a “divergence within whiggism” between two competing theories of the Glorious Revolution. The first emphasized the ancient constitution and the myriad rights and privileges of Englishmen, from Magna Charta forward, sanctified by their long historical provenance and inviolable by the state. The second view relied on “the more ambitious notion that the principle of *salus populi* liberated the community to refashion its community as it thought fit.” The Whigs who subscribed to this second theory were far more interested in establishing a free Protestant state than in closely accommodating the rights and liberties of English citizens, and indeed following the expulsion of James II they demanded the proscription of a host of former Stuart collaborators suspected of disloyalty to the new regime.³¹³ The political vision they upheld was not at all authoritarian; their ideal was a free state with a vibrant public sphere, accommodating the free thought, free economic activity, and free worship of nearly all its citizens. But it was also a self-consciously revolutionary regime that recognized no contradiction between its aspirations to liberty and the urgent imperative to surveil and subdue its internal enemies, inside the law if possible, outside the law if necessary.³¹⁴ And their definition of “enemies” proved remarkably elastic, encompassing not only Jacobites and Catholics but also corrupt politicians and reckless financiers.

It is not enough to say, with Skinner and Pettit, that the republican idea

be divided, one part having injur'd the rest, there remain but two Expedients. . . The One, is by putting the *Ringleaders to Death*; the Other, is by forcing them to be Friends. . . The Last of these Methods he seems not to approve of. . .”; Trenchard, 1 *Independent Whig* (XII) (Apr. 6, 1720), *supra* note 238, at 90 (“Machiavel advises anyone, who would change the Constitution of a State. . .”).

313. Goldie, *True Whiggism supra* note 167, at 209-10, 222. Cf. Gordon, *supra* note 166, at III.23 (“*Summum Imperium*, is still in the People”).

314. That the ground-norm of the “real Whigs” was securing the revolutionary regime of 1688 against its enemies can be seen in a little-noted passage from Molesworth’s 1721 preface to *Franco-Gallia*, *supra* note 278, at 193-94: “A Whig is against the raising or keeping up a Standing Army in Time of Peace: but with this Distinction, that if at any time an Army (though even in a Time of Peace) should be necessary to the Support of this very Maxim, a Whig is not for being too hasty to destroy that which is to be the Defender of his Liberty. I desire to be well understood. Suppose then, that persons, whose known Principle and Practice it has been (during the Attempts for arbitrary Government) to plead for and promote such an Army in Time of Peace, as would be subservient to the Will of a Tyrant, and contribute towards the enslaving of the Nation; should, under a legal Government. . . cry down a Standing Army in Time of Peace: I should shrewdly suspect, that either they like not the Hands that Army is in, or the Cause which it espouses; and look upon it as an Obstruction to another Sort of Army, which they should like even in Time of Peace. I say then, that although the Maxim in general be certainly true, yet a Whig (without the just imputation of having deserted his Principles) may be for the keeping up such a Standing Army even in Time of Peace, till the Nation have recover'd its Wits again, and chuses Representatives who are against Tyranny in any Hands whatsoever; till the Enemies of our Liberties want the Power of raising another Army of quite different Sentiments: for till that time, a Whiggish Army is the Guardian of our Liberties. . .” No commitment of the Old Whigs was more basic than their opposition to peacetime standing armies, and yet Molesworth was prepared to defer its realization until the revolution had become sufficiently established, the dangers from abroad muted, and the people properly instructed in the principles of liberty.

of freedom gestures *beyond* the cramped ideals of negative liberty. The radical Whigs aimed at something *higher* than those ideals, and remained perpetually willing to dispense with individual rights and the rule of law in order to check conspiracies against liberty and bridle predatory elites. And if we consider the full sweep of the republican tradition and its avatars³¹⁵—from Cicero’s violent invective against *hostes rei publicae*, to Machiavelli’s adamant severity against “the sons of Brutus,” to Henry Parker’s imprecations against “a dangerous, and desperate faction” that must be repressed with the full measure of Parliamentary power—we might ask whether unsparing vigilance against public enemies is in fact the red thread that binds it together, the marrow of the tradition, the second face of republican liberty.³¹⁶

CONCLUSION

“Nowadays a man must work within the law; it’s just as much fun!” These words are spoken with a malevolent twinkle by the gangster Macheath in Bertolt Brecht’s 1934 *Threepenny Novel*; having nominally put his criminal past behind him, Mackie now operates a giant commercial firm, where he employs the same cutthroat tactics he perfected in the demimonde against his workers and business rivals. The joke is not that Macheath habitually violates English law in the course of his corrupt dealings, but rather that, as a friend, collaborator, and director of the politicians who make and enforce legislation, he so rarely feels the need.³¹⁷

Brecht’s contemporaries saw his caustic attack on the rule of law as an obvious commentary on the failed Weimar Republic; Walter Benjamin praised its thorough demystification of “bourgeois legality,” while Carl Schmitt thought it “an uncanny illustration of my thesis on the distinction

315. Following, e.g., PETTIT, ON THE PEOPLE’S TERMS *supra* note 299, at 2 (“Familiar from its instantiation in classical Rome, the idea was reignited in medieval and Renaissance Italy; spread throughout Europe in the modern era, sparking the English Civil War and the French Revolution. . .”).

316. CICERO, PHILIPPICS 2.1, 5.21 (43 BC) (D.R. Shackleton Bailey and John T. Ramsey trans. and ed., 2010); MACHIAVELLI, *supra* note 233, at I.16, III.1, and III.3; HENRY PARKER, A LETTER OF DUE CENSURE. . . TO LIEUT. COLL. JOHN LILBURN 12 (1650). On the Jacobin republic as the highest expression of classical republican ideals, see Keith Michael Baker, “Transformations of Classical Republicanism in Eighteenth-Century France”, 73 J. MOD. HIST. 32 (2001). For evidence that this is how *Cato’s Letters* were understood by the heirs of the French Revolution, see MARIA ALETTA HULSHOFF, PEACE-REPUBLICANS’ MANUAL 85-105 (1817), a compilation of eighteenth century radical republican sources, juxtaposing extracts from *Cato’s Letters* with a pamphlet from Babeuf praising Robespierre.

317. BERTOLT BRECHT, THREEPENNY NOVEL 247 (Desmond Vesey & Christopher Isherwood trans., 1957). Just above, Mackie outlines one of his recent schemes: “I sold a house which didn’t belong to me. . . Childishness! That was really immoral because it was taking unnecessary advantage of illegal ways and means. That can be done just as easily by putting up a row of jerry-built houses, selling them on the instalment plan and waiting until the purchasers run out of money! . . . all that without the police having any excuse to interfere!”

between legality and legitimacy.³¹⁸ But much of this characteristically “Brechtian” cynicism is in fact highly indebted to its original source: *The Beggar’s Opera*, John Gay’s merciless satire of England after the South Sea bubble. Gay sustained severe losses in the crash of 1720, and wrote despondently of “The *South Sea Rocks and Shelves* where Thousands drown’d./When Credit sunk, and Commerce gasping lay.”³¹⁹ He took his revenge in the *Opera*, which gleefully depicts the ruling Whigs as an unscrupulous band of robbers manipulating laws and markets to enrich themselves with impunity. The *Opera* was an enormous success; its sequel was banned from the London stage on the personal orders of Robert Walpole.³²⁰

Throughout the *Beggar’s Opera*, as in Brecht’s adaptation, the concept of “legality” is repeatedly undermined, not only by the unequal application of justice between rich and poor, but also by the deliberate conflation of political and financial power with the criminal underworld.³²¹ Brecht’s political critique of the market state, then, traces its lineage to the first financial crisis of the modern world, what one scholar has aptly named “the big bang of financial capitalism.”³²² And if it is true that Brecht is the poet laureate of our present age of precarity, *sauve qui peut*, and elite lawlessness,³²³ this is another clue that we are still living in a world shaped by the tumult of 1720.

The major task of this essay has been historical and empirical: to recover the theory of liberty and emergency that developed in this time of tumult, conspiracy, and populist rage. The paroxysm of 1720 was as much constitutional as economic, and it inaugurated a sophisticated and sustained debate on public power. But this event, and the political literature that followed in its wake, may also prompt us to revisit and rethink several entrenched ideas in the history of political thought.

This article suggests, first, a new interpretation of *Cato’s Letters*, a text

318. WALTER BENJAMIN, UNDERSTANDING BRECHT 82-83 (Anna Bostock trans., 1998); Carl Schmitt, *5.5.50*, in GLOSSARIUM, AUFZEICHNUNGEN DER JAHRE 1947-1951, at 300-301 (Eberhard Freiherr von Medem ed., 1991).

319. John Gay, *A Panegyric Epistle to Mr. Thomas Snow*, in POETRY AND PROSE 280 (Vinton A. Dearing & Charles E. Beckwith eds., 1974).

320. See JOHN O’BRIEN, HARLEQUIN BRITAIN 103 (2004); DAVID NOKES, JOHN GAY: A PROFESSION OF FRIENDSHIP 433-44, 453-7 (1995); J.A. Downie, *Gay’s Politics*, in JOHN GAY AND THE SCRIBBLERIAN 44-61, 59 (Peter Lewis & Nigel Wood, eds., 1989); Dianne Dugaw, “DEEP PLAY”: JOHN GAY AND THE INVENTION OF MODERNITY 34-35 (2001); Anna-Christina Giovanopoulos, *Robert Walpole und Jonathan Wild*, in JOHN GAY’S *THE BEGGAR’S OPERA*, 1728-2004, at 147-67 (Uwe Böker, Ines Detmers, & Anna-Christina Giovanopoulos eds., 2006).

321. See, e.g., JOHN GAY, *THE BEGGAR’S OPERA*, AS IT IS ACTED AT THE THEATRE-ROYAL II.1 (1728) (*Jem*. Why are the laws levell’d at us? are we more dishonest than the rest of mankind?).

322. See Larry Neal, *The Microstructure of the First Emerging Markets in Europe in the Eighteenth Century*, in THE MANUFACTURING OF MARKETS 295-314 (Eric Brousseau & Jean-Michel Glachant, eds., 2014).

323. See, e.g., Moira Herbst, *Brechtomania*, AL JAZEERA ONLINE (Aug. 31, 2014, 6:00 AM), <http://america.aljazeera.com/opinions/2014/8/brechtomania.html>.

whose centrality to Anglo-American political theory is so often taken for granted. According to the dominant narrative, the *Letters* exemplify the civil libertarian tendencies of radical Whig thought; other schools follow Pocock in depicting them as precociously anti-capitalist, preoccupied above all with the preservation of “civic virtue.” Neither account places sufficient emphasis on their most striking feature: the repeated invocation of extra-legal violence against the bankers and politicians responsible for the spoliation of their country. Trenchard and Gordon were not democrats; nevertheless, they thought it vital that great citizens who conspired to bankrupt or betray the public be eradicated without pity, regardless of whether “they can find out a By-way of slipping thro’ the Statute-Law.”³²⁴ Today, when Cato’s writings on this topic attract any comment at all, they are typically dismissed as newspaper bombast. A close reading of the *Letters*, alongside the plethora of texts produced by Trenchard and Gordon in the same period, underscores how serious they were, and how closely connected this stance was to the circumvolutions of radical Whig thought after 1688.

It presents, second, a missing chapter in the history of *raison d’état*. Over the past three decades, scholars have highlighted the economic dimensions of reason of state, revealing the extent to which the management of trade, manufactures, and public debt gradually came to be assimilated to this pattern of thought and government. This paper proposes that the same was true of financial markets: they were viewed by jurists and publicists as spaces of immense potential promise, as well as threat and danger. In response, a style of thinking emerged that we might call “financial *raison d’état*”—the belief that oligarchic traders and bankers could be best brought to heel through aggressive surveillance and “extraordinary” forms of punishment. Daniel Defoe first articulated this new outlook in the two decades prior to 1720, but it only took its final form after the crash, when the exigency of the times made it possible to contemplate bold new permutations of parliamentary power. Every significant contribution to the debate experimented with this new dialect of state necessity, and many, such as the anonymous pamphlet *Salus Populi Suprema Lex*, emblazoned it on their title page like a coat of arms.

It offers, third, a new perspective on contemporary debates in public law. Although scholars typically assume that appeals to “economic emergency” are an artifact of the early twentieth century and the bureaucratic state, this article establishes its deep lineage in early modern Europe. From the first appearance of financial markets they have been understood as both a potent source of hegemonic power, and as a destabilizing element that might call on new forms of public authority to

324. GORDON, LORD BACON, *supra* note 114, at 53.

contain their destructive effects. The assertions of broad presidential power that public law scholars have observed in the Gold Clause Cases and the extralegal maneuvers of the Federal Reserve in 2008 find an important antecedent in the Parliamentary debate that followed the first financial crisis. And here the lesson of history may be unsettling: the writers and politicians most closely associated with individual liberty at the birth of financial markets saw no contradiction in suspending constitutional guarantees when necessary to suppress and punish market tumult.

Finally, this essay challenges a dominant interpretation of republican history, elucidated most forcefully and famously by Philip Pettit and Quentin Skinner. According to these eminent scholars, the nucleus of republicanism was a “neo-roman understanding of civil liberty,”³²⁵ that is, the belief that individual liberty can only be secured by a free state of active citizens, governed by stable and reliable laws of their own making. The radical Whig opposition of the eighteenth century is routinely cited as a prime vector of this civic ideology. And yet, where republican histories and ideas surface in *Cato’s Letters* it is almost always as a symbol of unbounded, extraordinary power and as evidence that even, perhaps especially, in a free state, the imperative of public safety stands above the rights of citizens and the ordinary rule of law. And while Trenchard, Molesworth, and Gordon could wax eloquently on free speech and the evils of standing armies, their primary commitment was always to the preservation of the postrevolutionary regime, and the vigilant repression of its enemies at home and abroad. It is entirely correct to say that the radical Whigs were fixated on public liberty and the avoidance of “domination.” What is still an open question is whether the historical idea of non-domination that flourished between 1350 and 1800 is compatible with the late twentieth century orthodoxies it is now taken to represent.

The United States housing bubble burst suddenly in September 2008, precipitated by the sudden collapse of the Lehman Brothers investment bank. The ensuing panic threatened the survival of every major American financial institution, along with several of its largest industrial firms. Public enmity against the finance sector, already running high in the face of a deepening recession, was further provoked when the American International Group, the recipient of hundreds of billions of dollars in emergency public loans, announced it would pay \$165 million in bonuses to its notoriously reckless financial products division. In response the House of Representatives passed, by an overwhelming margin, a ninety percent tax on all bonuses paid at companies that accepted financial

325. SKINNER, LIBERTY BEFORE LIBERALISM *supra* note 299, at ix.

support under TARP.³²⁶ The measure received an indifferent reception in the White House, and quickly died in the Senate, but not before one prominent critic of the new administration had his say. The tax was not merely unwise policy or unconstitutional overreach, he maintained, but a grievous affront to the most basic principles of a free government.

The rule of law requires that like people be treated alike and that people know what the law is so that they can plan their lives in accord with the law. In this case, a law is being passed to impose taxes on a particular, politically unpopular group. That is a tyrannical abuse of Congress's powers. And in addition, it is retroactive legislation, changing the law upon which AIG and its employees had relied. . . Selective taxation is tyranny. Ex post facto legislation violates the spirit of the liberal order, even if a particular piece of legislation can be "structured" to pass constitutional muster.

The author, inevitably, was David Boaz, Executive Vice President of the Cato Institute.³²⁷

326. Edmund L. Andrews & Peter Baker, *A.I.G. Planning Huge Bonuses After \$170 Billion Bailout*, N. Y. TIMES (Mar. 14, 2009), <http://nytimes.com/2009/03/15/business/15AIG.html>; Carl Hulse & David M. Herszenhorn, *House Approves 90% Tax on Bonuses After Bailouts*, N. Y. TIMES (Mar. 19, 2009), <http://nytimes.com/2009/03/20/business/20bailout.html> ("rattling Wall Street as lawmakers rushed to respond to populist anger").

327. David Boaz, *Selective Taxation is Tyranny*, CATO INSTITUTE: CATO AT LIBERTY (Mar. 19, 2009, 6:19 PM), <http://cato.org/blog/selective-taxation-tyranny>.