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**Reclaiming the public: Hannah Arendt and the political constitution
of the United Kingdom**

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Reclaiming the public

My thesis seeks to reconcile British public law with an entity strangely alien to it, the people themselves. In other words, this is an attempt to re-discover the ‘public’ element of public law. Hannah Arendt, the primary theoretical focus of my work, challenged the people to recognize themselves as part of the problem of ‘modernity’; the problem, that is to say, of political apathy and thus the emergence of forms of government repugnant to the human condition; to consciously reinvent themselves as politically engaged citizens; and to thus reconstitute traditional structures of authority, sovereignty and law. This is an onerous task, most salient in times of revolution, and so it is to the tumultuous climate of 17th century England that I look for evidence of these ideas (albeit briefly) emerging in the English (and, laterally, British) context, before considering the reasons for their failure to establish a firm foothold on the constitutional terrain, and the lessons this might have for the public, and public lawyers, today. For Arendt law was the means by which we ‘belonged’ to a community, and the means by which we ‘promised’ to maintain a public space within that community in order to participate and confer authority to government. It is this underdeveloped aspect of her work which I will first explore, and then put to work in the context of the British constitution.

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(thanks Anne)

Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature _____

Printed name _____

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Introduction: A Republican Revival

In 1978 Patrick McAuslan issued a challenge to the United Kingdom's public lawyers. He was writing, he said, at a time when "insistent" and "fundamental" questions about the relationship between the state, its institutions, civil society, and the citizens which made up that society were being asked: questions which "embrace[d] virtually every aspect of public affairs":

...the role of government and other public authorities in the management and operation of the economy; the extent and nature of control over all public authorities; the balance between confidentiality and security on the one hand and freedom of information and participation in government in the other; whether the state as a whole continues as a unitary state or becomes a federal, quasi-federal or devolved state; our relations with European institutions at one end of the governmental scale, the proper response to urban deprivation, discrimination and violence at the other end of the scale.¹

The problem as McAuslan saw it was that, whilst disciplines such as philosophy (Ronald Dworkin, John Rawls, for example), political science (Maurice Vile, Ralph Milliband, C.B. MacPherson, to name a few), or economics (Fred Hirsch) were engaging with these questions (and with one another in so doing) at a 'deep' theoretical level, the impact of lawyers on the debate had been 'dismal.' Public and administrative lawyers, he said, (with some notable exceptions, such as J.A.G. Griffith and Jeffrey Jowell) had shown themselves "unwilling" (in a profession "suspicious of theory") and/or "unable" (due to the shortcomings of the curricula of the law schools, or the limited avenues for publication of such work in the law journals)² to make any significant contribution to the discussion. What was at stake for McAuslan amid this theoretical lacunae was the ability of lawyers to think beyond the status quo, and to draw on other disciplines to push for *better* government, *better* institutions, a *better* constitution, a *better* legal system, and a *better* society:

By refusing to engage in open and explicit political debate, by refusing to question the assumptions and ideologies of the present

¹ Patrick McAuslan 'Administrative Law and Administrative Theory: The Dismal Performance of Administrative Lawyers' (1978) 9 *Cambrian Law Review* 40, p.40

² McAuslan (1978), pp.41-42

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*administrative law and its creators, by refusing to grapple with and make use of the ideas and theories of other disciplines, we are adopting a highly conservative political position. We are saying, implicitly if not expressly, 'everything is basically all right.'*³

Almost two decades later, in her 1994 piece 'Changing the Mindset: The Place of Theory in English Administrative Law',⁴ Carol Harlow was so underwhelmed by the response to McAuslan's call – "[w]hat," she asked, "are the reasons for the muted response to McAuslan's summons to public lawyers to colonize the field of theory" – that she saw fit to renew the challenge afresh: to spark amongst public lawyers a quest to debate and determine a holistic theoretical account of their discipline; one which would allow them to wade into theoretical debates with historians, sociologists, political scientists, and, in particular at her time of writing economists, who she believed had (in no small part *by* colonizing the theoretical terrain) already acquired an unwelcome dominance in the era of Thatcherism.⁵ In the years which have followed Harlow's renewed challenge, however, there has come to be fought, in the terrain of theory, a battle for the very heart and soul of British public law; for the very heart and soul, indeed, of the constitution.

Neil MacCormick has said of constitutionalism that how we think about it will reveal how we approach the question of 'liberty'. Constitutionalism, he said, is an essential component in man's search for "that ever elusive goal of human freedom."⁶ For MacCormick...

*...[t]he real question is not whether these concepts are involved in the issue of political freedom, but what conceptions of them we should propose as defining a favoured ideal of liberty in community.*⁷

As if to reaffirm MacCormick's view, the dynamic which has driven this theoretical renaissance (and as we shall see, despite McAuslan and Harlow's fears for the absence of lawyers from the terrain of theory at particular moments, renaissance is the correct description: for what has come

³ McAuslan (1978), p.44

⁴ Carol Harlow 'Changing the Mindset: The Place of Theory in English Administrative Law' (1994) 14(3) *Oxford Journal of Legal Studies* 419

⁵ Harlow (1994), p.433

⁶ Neil MacCormick 'Unrepentant Gradualism', Owen Dudley Edwards (ed.) *A Claim of Right for Scotland* (Edinburgh, Polygon, 1989), p.99

⁷ MacCormick, in Edwards (ed.) (1989), p.99

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about has been the revival at the surface of theoretical debates which have been present yet obscured at least since the 17th century, when English government was (albeit temporarily) turned on its head) has been an exchange about the ways by which we (ought to) conceptualize, institutionalize, protect and enhance *liberty*. Before sketching the parameters of this thesis, however, let us first anatomize the concepts of liberty in which that debate is grounded.

The anatomy of liberty was – as we shall see, influentially but not originally – drawn by the French novelist, politician, and political theorist, Benjamin Constant, in his famous address, ‘The Liberty of the Ancients compared with that of the Moderns’, which he delivered to an audience at the Athénée Royal, Paris in 1819.⁸ The distinction, “still rather new” at that time,⁹ was one drawn between *ancient* freedom as the freedom to engage in politics on the one hand, and the *modern* freedom from politics on the other. It was, at first (and this is an important qualification, for reasons I will come to make clear), Constant’s thesis that ancient freedom was just that, ancient. It belonged inescapably to the ancient world of Athens, of Sparta, of Rome, but was no longer relevant in the modern world. Ancient liberty, he said, was the freedom actively to participate, “collectively, but directly,” in the affairs of the republic: deliberating in the public square questions of war and peace, forming alliances with foreign governments, voting on laws, calling those who occupied public office to account for their deeds and misdeeds, pronouncing judgments and so on. Whilst, however, in these ancient constitutions Constant saw the individual as being “almost always sovereign in public affairs,”¹⁰ the price which the citizen paid for that political freedom was his privacy. The free citizen of the free states of antiquity, he said, was no more than “a slave in all [of] his private relations:”

All private actions were submitted to a severe surveillance. No importance was given to individual independence, neither in relation to opinions, nor to labour, nor above all, to religion...In the domains which seem to us [moderns] the most useful, the

⁸ Benjamin Constant ‘The Liberty of the Ancients compared with that of the Moderns’ (1819), in Biancamara Fontana (ed.) *Benjamin Constant: Political Writings* (Cambridge, Cambridge University Press, 1988), p.307

⁹ Constant (1819), p.309. “Rather new,” perhaps, but certainly not – as he seemed to recognise – novel in Constant’s work: the debate between Adam Ferguson and Adam Smith being drawn on similar lines over more than a generation before (see, for example, Fania Oz-Salzberger ‘The Political Theory of the Scottish Enlightenment’, in Alexander Broadie (ed.) *The Cambridge Companion to the Scottish Enlightenment* (Cambridge, Cambridge University Press, 2003), Ch.8).

¹⁰ Constant (1819), p.311

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*authority of the social body interposed itself and obstructed the will of the individuals.*¹¹

In so far as Benjamin Constant understood it, the freedom of the ancients *to* participate in the public realm meant, consequently, no freedom *from* the burdens and the scrutiny of life in the public realm. As Bernard Crick has said, the “place of politics as the most important and glorious object of human activity,” was the assumption which underpinned the classic republics of antiquity.¹²

By way of contrast Constant saw that for the moderns not the sharing of social and political power with one’s equals but rather “the enjoyment of security in private pleasures” was the aim: and so, “they call[ed] liberty the guarantees accorded by institutions to these pleasures.”¹³ This was to say that the freedoms cherished by the moderns were those which protected the individual in his peaceful, private enjoyment from the intrusions of government:

*...the right to be subjected only to the laws, and to be neither arrested, detained, put to death or maltreated in any way by the arbitrary will of one or more individuals. It is the right of everyone to express their opinion, choose a profession and practice it, to dispose of property, and even to abuse it; to come and go without permission, and without having to account for their motives and undertakings. It is everyone’s right to associate with other individuals, either to discuss their interests, or to profess the religion which they and their associates prefer, or even simply to occupy their days or hours in a way which is most compatible with their inclinations or whims. Finally, it is everyone’s right to exercise some influence on the administration of the government, either by electing all or particular officials, or through representations, petitions, demands to which the authorities are more or less compelled to pay heed.*¹⁴

Whereas the influence of the ancients was direct, through their participation in government, for the moderns their influence was only minimally felt, “at fixed and rare intervals,” and even then

¹¹ Constant (1819), p.311

¹² See Crick’s excellent introduction to Machiavelli’s *Discourses*: Niccolò Machiavelli (with an introduction by Bernard Crick) *Discourses* (London, Penguin Books, 2003), intro. p.15, p.46

¹³ Constant (1819), p.317

¹⁴ Constant (1819), pp.310-311

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always only immediately to “renounce it,” by way of delegation to a public official through election.¹⁵ Accounting for the difference between ancient and modern *worlds*, the Frenchman pointed to the sheer size of modern states (both in terms of territory and population) compared to the ancient city states, which made the direct participation of all impractical;¹⁶ to the absence of slavery, an institution upon which the freedom of the classic republics had been built;¹⁷ and, displaying his roots in the Scottish tradition of Hume and Smith,¹⁸ to the growth of private spheres of industry and commerce which, he said, “inspires in men a vivid love of individual independence...[which]...supplies their needs, satisfies their desires, without the intervention of the authorities.”¹⁹

The point of Constant’s lecture then, at least *at first*, was that whilst there was in his view, in a time long since past, in an ancient world, a political condition in which man was, as Aristotle said, a “political animal” above all else,²⁰ the condition of modern man, industrial man,

¹⁵ Constant (1819), p.312

¹⁶ As John Selden famously put it, representation was the primary form of political participation for the simple reason that “the room will not hold all.” (see John Selden (David Wilkins, ed.) *The Works of John Selden, in three volumes* (vol.1) (Clark, New Jersey, The Lawbook Exchange Ltd., 2006), p.1747)

¹⁷ If his claim was dubious at the time – he held up the U.S. as an exemplar of the modern world, at a time when the decline of slavery in the northern states led to a ‘second wave’ of slave trading from north to south, where they were put to work on massive cotton, rice and tobacco plantations (see, for example, James Oliver Horton and Lois E. Horton *Slavery and the Making of America* (Oxford, Oxford University Press, 2005) – there is little to suggest that the abolition of slavery (at least, as Constant understood it) has led to anything like the emancipation which he describes. James Tully, for example, has argued that dominant, even hegemonic understandings of constitutionalism obscure from view the full plurality of culturally diverse movements, who seek not only degrees of self-rule, but also a common ground into which that very diversity can be recognised. (James Tully *Strange Multiplicity: Constitutionalism in an age of diversity* (Cambridge, Cambridge University Press, 1995). With a particular focus on American aboriginal peoples, Tully sees in the struggle for recognition “one of the most dangerous and pressing problems of the present age” (Ch.1, pp.14-15). More still, whilst old political classes seek the (self-interested) preservation of their exalted status in the face of democratic challenge (Peter Osborne *The Triumph of the Political Class* (London, Simon & Schuster Ltd., 2007), we can see that the expansion of private interests has presented new sites of exploitation and slavery on a global scale. A recent report by the Hong Kong Christian Industrial Committee, for example, found that “Western sports shoe companies have been relocating factories or seeking sub-contractors in Asia,” not only “where wages are lower,” but also because “systematic repression of labour movements promises a ‘docile’ workforce.” (see Jack Eaton *Comparative Employment Relations: An Introduction* (Cambridge, Polity Press, 2000), Ch.11, p.167)

¹⁸ At the age of 15, Constant was admitted to the University of Edinburgh where he had been exposed to the coal face of enlightenment thinking, describing the period as the most pleasant of his life (William W. Holdheim *Benjamin Constant* (London, Bowes & Bowes, 1961), Ch.1, p.13)

¹⁹ Constant (1819), p.315

²⁰ Aristotle *Politics* 1252 b30 – 1253 a3 (my own reference to Aristotle was made through Aristotle (with an introduction by H.W.C. Davies) *Politics* (New York, Cosimo, Inc., 2005)). It should not be forgotten, however, that even that participation was the privilege of the few. Given that best guesses put the population of ancient Athens at around 250,000, the positive freedom of that city-state in fact amounted to a tyranny of the minority. The twenty-

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commercial man, a man of private enterprise, had consigned the collective concern for public affairs to that past: public freedom at best an anachronistic curiosity, and, with Rousseau, Robespierre and the spectre of *la Terreur* fresh in his mind, at worst a dangerous threat to the freedom of the individual.²¹ What makes Constant's anatomy of freedom so relevant today, and in particular to the constitutional debate to which I will turn my attention, is two-fold. First, its enduring influence; and secondly, the remarkable turn which Constant himself made, in the very same address, *back* to the liberty of ancients as the *remedy* for the ills of the modern individualism.

As far as influence goes, whilst he may not have been entirely original in his thesis – Constant surely owed a debt of gratitude to the Enlightenment giants who so inspired him during his education in Edinburgh - in modern literature it is very much Constant who forms the reference point for those who seek to work within, beyond or against that division of ancient (political/public) and modern (private) liberty. Above all, Isaiah Berlin has described Constant as being no less than “the most eloquent of all defenders of freedom and privacy.”²² Berlin's famous distinction between *negative* liberty (I am free “to the degree to which no human being interferes with my activity”)²³ and *positive* liberty (which, in the words of Charles Taylor, “involves essentially the exercise of control over one's life”)²⁴ clearly echoes not only the *distinction* drawn by Constant (ancient/positive; modern/negative) but also (at least, at first glance) the view that of the two it is negative freedom, freedom *from* interference, that is most suited to the condition of modern man. Just as Constant invoked the spectre of *la Terreur* to discredit an ancient conception of (positive) liberty “no longer valid,” yet “made fashionable” by philosophers such as Rousseau,²⁵ so too Berlin, who made additions born of his own time and experience, Marx as well as Jean-Jacques, Communist-era totalitarianism²⁶ as well as the French

thousand free citizens (by Constant's own reckoning (p.314)) debating and deciding over public affairs accounting for just 8% of the (estimated) population.

²¹ Constant (1819), pp.318-319

²² Isaiah Berlin *Two Concepts of Liberty: An Inaugural Lecture delivered before the University of Oxford on 31st October 1958* (Oxford, Clarendon Press, 1958), p.11

²³ Berlin (1958), p.7

²⁴ Charles Taylor ‘What's Wrong with Negative Liberty?’, in David Miller (ed.) *Liberty* (Oxford, Oxford University Press, 1991), p.141, p.144

²⁵ Constant (1819), pp.318-319

²⁶ Berlin himself was born in Riga, when the now capital city of Latvia was part of the Russian Empire, and lived to see that state's occupation by, and absorption into the USSR. On this, see Andrejs Plakans *Experiencing Totalitarianism: The Invasion and Occupation of Latvia by the USSR and Nazi Germany, 1939-1991* (Bloomington,

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Revolution. Moreover, whilst the distinction has come under serious and sustained attack in the field of philosophy,²⁷ it is undoubtedly the case that it continues to shape the terrain upon which contemporary battles about liberty, and its constitutional safeguards, are fought. James Tully, for example, has called Constant, for his disassociation of the modern world from ancient, positive, political liberty, the “most successful exemplar” of that genre of political thinker who upholds the virtues of ‘modern’ constitutionalism, for precisely that reason: for Tully even its critics have been “taken in” by the underlying assumptions about modernity which puts modern/negative liberty on a pedestal: a criticism which brings us to the third concept of liberty relevant to this thesis.²⁸

It is fair to say that over the course of the past decade or so, the concurrent work of Philip Pettit and Quentin Skinner has brought about a revival, indeed something of a reinvigoration, of republican ideas somewhere near the mainstream of political thought, historical inquiry, philosophy, and – the subject of this thesis - legal and constitutional thought. The force of this revival has sparked real and meaningful debate on at least two fronts. First, the interpretation of republicanism drawn by Pettit and Skinner has presented an internal challenge to republicans themselves. The tradition which Pettit defends, he tells us, “is not the sort of tradition – ultimately, the populist tradition – that hails the democratic participation of the people as one of the highest forms of good,” nor does it wax lyrical (as Pettit himself puts it) “about the desirability of the close, homogenous society that popular participation is often taken to presuppose.”²⁹ In this respect, Pettit seeks to recover the republican tradition from those, such as

AuthorHouse, 2007). Jukka Rislakki’s *The Case for Latvia: Disinformation Campaigns Against A Small Nation* (Amsterdam and New York, Rodopi, 2008) provides an excellent analysis of that country’s coming out of occupation, and of the disinformation pertaining to Latvians’ involvement in Soviet atrocities.

²⁷ See, for example, Gerald MacCallum ‘Positive and Negative Freedom’, in Miller (ed.) (1991), p.100, for whom the simplicity of the ancient/positive, modern/negative dichotomy is misleading. For MacCallum, freedom is “always *of* something (an agent or agents), *from* something, to do, not to do, become or not become something; it is a triadic relationship” (p.100). Thus, MacCallum says, the freedom of an agent to act, for certain ends, opposed by certain constraints cannot be preconceived in the binary fashion of the straightforwardly negative or positive. Rather, negative or positive freedom can “serve only to emphasise one or the other of two features of *every* case of the freedom of agents” (p.106). For a consideration of some of the political implications of such a critique, see my discussion of the parallels between Arendt and J.A.G. Griffith in Part III.

²⁸ Tully (1995), Ch.3, p.63

²⁹ Philip Pettit *Republicanism: A Theory of Freedom and Government* (Oxford, Clarendon Press, 1997), intro., p.8

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Charles Taylor and Michael Sandel,³⁰ for whom, in his view, republicanism means, above all else, the positive freedom of the citizens to participate directly in the government of the polity.³¹ Identifying the German political thinker Hannah Arendt as the protagonist-in-chief of this ‘populist’ tale of republicanism,³² Pettit is clear that, as he sees it, democracy, and its institutional manifestations, are (if at all) of but *instrumental* importance to the health of the republic. “Democratic participation may be essential to the republic,” he concedes, “but that is because it is necessary for promoting the enjoyment of freedom as non-domination, not because of its independent attractions: not because freedom, as a positive conception would suggest, is nothing more or less than the right of democratic participation.”³³

The work of Pettit and Skinner is not, however, primarily one which hopes to spark internal republican debate; as far as they are concerned, the (so-called) populists have already lost the argument with their liberal counterparts. Rather, their aim is to demarcate a third sense of liberty³⁴ - a republican one in Pettit’s mind, a neo-Roman one in Skinner’s, though the two are, minor differences aside, more or less interchangeable – which is all at the same time different from, more demanding than and yet preferable to the dominant liberal paradigm of (negative/modern) freedom as non-interference. Thus, in a rebuke of the Hobbesian maxim that “Whether a Common-wealth be Monarchical, or Popular, the Freedome is still the same,”³⁵ which is to say that freedom is non-interference, and *unfreedom* occurs only where one is in actuality interfered with, Skinner and Pettit posit an account in which unfreedom occurs by the mere fact of one’s living at the subjection to the arbitrary will of another.

Skinner’s historical work is not one which places its focus on Rome, as such. Rather, his attention is fixed on a period in English history, the 17th century, spanning the civil war and Glorious Revolution, when much in the way of opposition to a tyrannous king³⁶ was framed by

³⁰ Indeed, Pettit first confronted republicans with his alternative vision in his review of Sandel’s *Democracy’s Discontent: America in Search of a Public Philosophy* (Cambridge, MA, Belknap Press, 1996): Philip Pettit ‘Re-working Sandel’s Republicanism’ (1998) 95(2) *Journal of Philosophy* 73

³¹ Pettit (1997), intro.,p.8

³² Pettit (1997), intro.,p.8

³³ Pettit (1997), intro.,p.8

³⁴ Such was the title of Skinner’s 2001 Isaiah Berlin Lecture at the British Academy: Quentin Skinner ‘A Third Concept of Liberty’ (2002) 117 *Proceedings of the British Academy* 237

³⁵ Thomas Hobbes *Leviathan* (C.B. MacPherson, ed.) (London, Penguin, 1968), p.266

³⁶ See Part II of this thesis for a more detailed account of this period.

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the parliament men and their supporters in the language of “what is perhaps best described as the neo-roman element in early-modern political thought.”³⁷ The claims being made by James Harrington, John Milton, Marchamont Nedham and Algernon Sydney, amongst others,³⁸ were two-fold. First, they said, an individual could not be free unless he lived in a free state. Taking seriously the ancient metaphor of the body politic, a free state was defined by its capacity for self government:

*Just as individual human bodies are free, they argue, if and only if they are able to act or forebear from acting at will, so the bodies of nations and states are likewise free if and only if they are similarly unconstrained from using their powers according to their own wills in pursuit of their desired ends.*³⁹

This could only be said to be the case, so it was put, where the actions of the body politic were determined by the will of its members as a whole.⁴⁰ In order to achieve this, a number of constitutional implications followed: the laws which governed that state must only be made in accordance with the citizens’ consent; each citizen must have equal opportunity to participate in the framing of those laws; the body of that people - ‘too unwieldy to be assembled’ (Harrington), and indeed prone to ‘exorbitant and excessive’ behaviour (Milton) even if they *could* be so assembled – found in an elective assembly “of the more virtuous and considering...chosen by the people to legislate on their behalf.”⁴¹ Second, Skinner considers the further neo-Roman claim that just as the individual who loses his liberty is made a slave, so too a nation or state which loses its freedom must be analysed “entirely in terms of what it means to fall into a condition of enslavement or servitude.”⁴² Here, we reach the crux of the neo-Roman argument, and the means by which it can be distinguished from both the neo-Athenian and the liberal understandings of liberty. Public servitude, said these stalwarts of the *Good Old Cause*, could be brought about by two forces. For one, a state will be rendered unfree where it is forcibly or coercively deprived of its capacity to act at will in pursuit of its own ends.⁴³ Thus, when Charles

³⁷ Skinner (1998), Pt.I, p.11

³⁸ In Part II, I will focus on the arguments of the parliamentarian propagandist, Henry Parker.

³⁹ Skinner (1998), Pt.I, pp.25-26

⁴⁰ Skinner (1998), Pt.I, p.26

⁴¹ Skinner (1998), Pt.I, p.32

⁴² Skinner (1998), Pt.I, pp.36-37

⁴³ Skinner (1998), Pt.I, p.47

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I entered the House of Commons to arrest five of its members, in a bid to prevent that national assembly from deliberating freely about public affairs, he could be said to be forcibly substituting his own will for that of the body politic – reducing England to a state of public servitude, and making himself an enemy to whom opposition was ‘at one irresistible’ (Milton).⁴⁴ More innovative, however, was the claim that a state could be rendered unfree even where, as a matter of fact, that state is *not* governed tyrannically. “Such a state,” said Skinner, “will nevertheless be counted as living in slavery if its capacity for action is in any way dependent upon the will of anyone other than the body of its own citizens.”⁴⁵ Hence the fierce opposition expressed by Milton not to the *exercise* of the King’s ‘negative voice’, his right to veto the legislative proposals put to him by the national assembly, but to the very *existence* of the right, which “takes away the independence of parliament, making it subject to, and dependent on, the will of the king.”⁴⁶ The fullest implication of this is spelled out by Skinner:

*Your rulers may choose not to exercise these powers, or may exercise them only with the tenderest regard for your individual liberties. So you may in practice continue to enjoy the full range of your civil rights. The very fact, however, that your rulers possess such arbitrary powers means that the continued enjoyment of your civil liberties remains at all times dependent on their goodwill.*⁴⁷

In Pettit’s language, adapting and updating the tradition, one can say that where such powers exist, but are not, as a matter of fact, exercised, one may be said to be free from *interference*. One remains in a condition of servitude however by the power holder’s capacity for *domination*.⁴⁸ For Pettit then, and in a clear parallel with Skinner’s work, freedom from domination means freedom from the arbitrary power of another. In turn, this means that “the non-interference you enjoy in the actual world, you enjoy with a certain resilience or security.”⁴⁹ To be free, in this sense, means that one is free not only in the here and now, but in the realm of possible futures – where the goodwill of the power holder may be less forthcoming, less reliable, less secure for any number of (even unforeseeable) reasons. Pettit illustrates this point with the

⁴⁴ Skinner (1998), Pt.I, p.48

⁴⁵ Skinner (1998), Pt.I, p.49

⁴⁶ Skinner (1998), Pt.I, p.52

⁴⁷ Skinner (1998), Pt.I, p.70

⁴⁸ Pettit (1997)

⁴⁹ Pettit (1997), Ch.1, p.25

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classic example of the relationship between master and slave. The slave, he says, may be dominated without actually being interfered with. The freedom of the slave is already compromised, according to Pettit, when the non-interference by his master is secured at the cost of his own conscious act of self-censorship; where the ‘realm of possible futures’ open to the slave is restricted by his second-guessing of that behaviour which will curry favour with his master – be that by flattery or fawning.⁵⁰

It may just happen that my master is of a kindly and non-interfering disposition. Or it may just happen that I am cunning or fawning enough to be able to get away with doing whatever I like. I suffer domination to the extent that I have a master; I enjoy non-interference to the extent that that master fails to interfere.⁵¹

The point, however, is that in the future the master may grow wearisome of such fawning, or wise to such cunning; may abruptly alter his disposition (for reasons internal or external), or may be succeeded by an altogether different character, of a more malevolent nature. Where non-interference is secured only by such contingencies, the precariousness of that condition is clear. Where the fact of non-interference exists because of the absence of domination, however, the individual is protected against any interference that another may, at any time, intend. Securing non-domination, in Pettit’s analysis, requires a double movement: first, protecting against *dominium*, “problems [of domination] which arise in people’s dealings with one another”; and second, against *imperium*, where the state itself becomes an agent of domination; the latter being the task of our constitutions.⁵²

For Pettit, a constitution can secure non-domination only where it provides “systematic possibilities for ordinary people to contest the doings of government.” By making decisions contestable citizens can ensure that authority is exercised for public, rather than for private or sectional, interests.⁵³ Thus this conception of republicanism can be distinguished from liberty as non-interference because, contrary to that school of thought, interference, say in the shape of

⁵⁰ For more on this theme, see Philip Pettit ‘Keeping Republican Freedom Simple: On a Difference with Quentin Skinner’ (2002) 30(3) *Political Theory* 339, esp. p.348 ff.

⁵¹ Pettit (1997), Ch.1, p.23

⁵² Pettit (1997), Ch.6, p.171

⁵³ Pettit (1997), Ch.6, p.183

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legislation, which *is* conducted in an environment of effective contestability cannot be said to induce unfreedom. In other words, just as there can be unfreedom without interference, so too can there be interference without unfreedom. At the same time, by focussing on contestability, Pettit draws the clearest distinction between his republican interpretation, and that (as he sees it) of Arendt et al. Non-domination, he says, and therefore non-arbitrary decision making, depends upon the citizens in some sense “owning” and “identifying” with the decisions being made. Consent, however, provides an unsatisfactory account of ownership in Pettit’s mind. If, on the one hand, explicit individual consent is required for each decision, then non-domination becomes an inaccessible ideal. If, on the other hand, implicit consent is thought to be enough, then non-domination becomes so accessible as to be meaningless: “any decision which fails to drive me to the barricades will count as non-arbitrary.” Instead, then, Pettit suggests that by being able to effectively contest any decision not in my (individual/collective) interest we are able, in this way, to own the decision: to ensure that it does reflect, or can be made to account to, those interests.⁵⁴ Because their conception requires not self-mastery, in active participation, an actively given consent to the law, Pettit and Skinner’s vision of republicanism is presented, like its liberal counterpart, as being one which furthers a *negative* conception of liberty: a freedom *from* domination by others. It is, however, one with a twist of positive liberty, to the extent only that something more than the absence of interference is needed; that something being security against interference through the channels of contestation.⁵⁵ So, it would seem, theirs is not a “third way” at all, at least not in so much as the third way marks a wholly distinct alternative to that which has come before it. Rather, it is simply a way which looks to tie ancient/positive and modern/negative liberty together; and still, as Tully said, in a way which prioritises the latter.

Republican freedom as non-domination, as it has been historicized by Skinner, and theorised by Pettit, has, over the course of the past decade or so, come itself to dominate modern republican discourse.⁵⁶ A newcomer to republicanism who picked up a recent collection such as, say, Besson and Marti’s *Legal Republicanism*, or Maynor and Laborde’s *Republicanism and Political Theory*, could be forgiven for thinking that Pettit and Skinner’s account of republicanism is the

⁵⁴ Pettit (1997), Ch.6, pp.184-185

⁵⁵ Pettit (1997), Ch.2, p.85

⁵⁶ Adam Tomkins ‘On Republican Constitutionalism in the Age of Commerce’, in Samantha Besson and José Luis Marti *Legal Republicanism: National and International Perspectives* (Oxford, Oxford University Press, 2009), Ch.14, pp.317-336, p.318

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only show in town (or city-state). What Tomkins has said of *Legal Republicanism*, I believe, applies more broadly:

*If a collection of essays on legal republicanism and republican law had been assembled in the 1970s or 1980s, rather than now, it is likely that consideration of the implications for law of Hannah Arendt's political theory, and of J.G.A. Pocock's ground-breaking work on the history of political thought would have figured more prominently.*⁵⁷

What I mean to say is that republicanism is itself an ambiguous term – the most unintelligible in the English language, as John Adams has famously said⁵⁸ - which offers a startling variety (and as we have seen, not always compatible) of ideas on citizenship, constitutional form, institutional shape, international relations, trade, cosmopolitanism and much more. The dominant influence of just one such account, important though it may be, should not, therefore, be thought inevitable, a kind of republican ‘end of history’ (to borrow Fukuyama’s phraseology).⁵⁹ Upon what contingency then has this domination been brought about? In my opinion, the answer has been neatly spelled out by Laborde and Maynor in the introduction to their 2008 collection. In order to be taken seriously by the mainstream, they say, republicans must be recognised as taking seriously what they call “the circumstances of liberal modernity – moral individualism, ethical pluralism, and an instrumental view of political life,” and seek to fit (squeeze, even) old republican insights into them.⁶⁰ By emphasising his republican account of freedom as, primarily, a negative one Pettit is able to find a foothold in the liberal mainstream because, unlike others such as Arendt, Pocock, and Rahe,⁶¹ his falls on the ‘right’ side of the ancient/modern

⁵⁷ Tomkins, *On Republicanism*, in Besson and Marti (2009), p.318

⁵⁸ John Adams, in a letter to his confidante and some times adviser, Mercy Otis Warren, dated 8th August, 1807

⁵⁹ See Francis Fukuyama ‘The End of History’ (Summer 1989) *The National Interest*, in which the author claims that the end of the Cold War, and the triumph of the West marked a more significant, and conclusive victory for the liberal democratic ideal:

What we may be witnessing is not just the end of the Cold War, or the passing of a particular period of postwar history, but the end of history as such: that is, the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government.

⁶⁰ Cécile Laborde and John Maynor ‘The Republican Contribution to Contemporary Political Theory’, in Laborde and Maynor (2008), Ch.1, pp.1-28, p.1

⁶¹ See Paul A. Rahe *Republics Ancient and Modern* (vols. I-III) (Chapel Hill and London, The University of North Carolina Press, 1992)

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(Constant), positive/negative (Berlin) dichotomy. I will conclude this chapter with the claim that, in striving to present a republicanism acceptable to “the moderns”, one shorn of the spectre of revolution and terror, Pettit has conceded too much of the republican tradition at the altar of mainstream political theory. It seems to me, however, that the republican revival struggles to escape the question of active consent, and keep hidden from new friends the positive political liberty still at its core. Pettit suggests that, as a last resort for those frustrated by the outcome of their (unsuccessful) contestation, two options remain on the table. First, secession: that the [dominated] group are allowed to secede from the state, establishing a separate territory, or at least a separate jurisdiction.”⁶² Second, accepting that secession is not always viable or desirable, that “there should be room in any republican society for dissenting individuals and groups to claim a special treatment under the law.”⁶³ Whilst Pettit admits that his investigations into what such accommodation might look like embryonic at best,⁶⁴ his chosen examples – such as the separate treatment afforded to indigenous populations in Canada and Australia, or to the Amish community – are, I believe, illuminating in two respects. First because at this point - the point of dissent - it no longer makes sense to think of Pettit’s republic as one based on contestability and not on consent. If the final expression of the citizens’ contestation is dissent, and separation from the original jurisdiction, presumably this must happen on the basis of consent, indeed, active consent, on the part of the dissenters first to form together, and second to constitute a new politico-constitutional entity. Secondly, by advocating dissent as a negatively constituted phenomenon (that is to say, as a freedom to escape from the dominant party) the creative force of conflict, which as we shall see lies at the core of Roman republican theory, is lost. Dissenters do not, in Pettit’s account, confront the dominant rulers head on in a positive act of reconstitution *between* the parties. Rather they withdraw into their own communities, their own identities, whilst the dominant party remains relatively untroubled – each to their own, private interests.

In what follows I will make a pitch for republicanism back at the level of political liberty. By returning to Arendt, I will argue that Pettit’s dismissal of her as something of an archaic populist misses the point. Christoph Möllers has said that (a particular strand of) populism ought to be

⁶² Pettit (1997), Ch.6, p.199

⁶³ Pettit (1997), Ch.6, p.200

⁶⁴ Pettit (1997), Ch.6, p.200

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recovered from pejorative usage; that *constitutional* populism should be held distinct from pure populism. The latter, he said, “[talks] about every form of political movement that may claim democratic means or ends.” The former, however, is a more nuanced expression of a constituent power neither finished with the process of constitution-making, nor...fully incorporated in...established in constitutional procedures.”⁶⁵ Constitutional populism, that is to say, expresses itself towards constitutional institutions and procedures, without ever fully being subsumed by them. I will argue that Arendt’s political thought is not one which favours, as it has been claimed by Wolin or by O’Sullivan (see Part I), a frightening, boundless mass of democratic participation for participation’s sake, retrieved from the ancient past for a time it barely recognises. Rather, Arendt’s concern was expressed toward an age, modernity, which she believed could be characterised by a disavowal of responsibility for the public realm: an age in which the Holocaust could occur not because politics had run amok, but because – persuaded to their private liberties and peaceful enjoyment – atomised individuals were encouraged to think about themselves, and not about their (democratic) relationships with one another, let alone their (collective) relationship with the state. Anything could happen, Arendt was fond of saying - and as we shall see, in the concentration camps anything *did* happen – because no one cared. In Part I then, I consider the nature of Arendt’s *constitutional* thought in light of this basic fear: arguing that Arendt turned to the political (both personally, and later academically) as a means of recovering the ‘lost spirit’ of man’s responsibility for the public realm. This spirit, we shall see, far from boundless was lost because it was never afforded a constitutional space, boundaries to put it another way, in which men (and women) could *assume* responsibility as a working reality expressing themselves (by active consent, or the corollary of dissent) towards, but never fully captured within, the institutions of government who act in their name; and in that tension finding new possibilities, new modes of political organisation *between* plural actors which promises more than the secession and retreat of last resort in Pettit’s account.

In Part III, I will return to where I started: with the claim that rethinking Arendt’s (republican) constitutional thought in this way allows us to make a contribution to ongoing British constitutional debates about the proper conception of liberty, and therefore the surest means to

⁶⁵ Christoph Möllers ‘We are (afraid of) the people’: Constituent Power in German Constitutionalism’, in Loughlin and Walker (eds.) (2007), p.87, pp.87-88

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enshrine, protect and enhance that liberty in constitutional form. Broadly presenting the argument as a tension between two schools of thought: on the one hand the legal constitutionalists, who begin with a picture of the human condition as one the atomised modern individual actor, desiring of nothing more demanding than the minimum (negatively constituted) protection of the law, in the shape of pre-political, fundamental rights guaranteed by a court of law, from the unpredictability, the tumult even, of politics; on the other hand political constitutionalists who believe that the condition of politics is driven by a dynamic of continuing/resolving/continuing disagreement, and that therefore the political *constitution* must be one which accepts and even embraces those conflicts, I will suggest the recent republican turn, which seeks to provide a normative counter to the legal constitutionalist position, does not take its republicanism far enough. By focussing almost exclusively on the constituted, on the institution of Parliament as *the public space par excellence*, it will be argued that the enormous creative potential of the republican conflict between constituent and constituted power (between the people and the institutions, including Parliament, which represent them) is missed; and therefore turn my mind to locating space within the British constitution for an articulation of the people as a working reality.

The missing link is Part II, when I turn my Arendtian analysis to a moment in the 17th century when the British people *did* emerge as a working reality, in the face of a tyrant king, not only to resist, and ultimately to knock down, his claim to divinely ordained authority, but also, by putting that spirit to work, to build up new constitutional paradigms, from which Parliament would (over time) emerge supreme. It will form a key part of my argument, therefore, that Parliament itself was constructed in a (constructive) spirit of resistance; a spirit which it nevertheless sought immediately to dispel, in order to preserve its new found hegemony. So, if we are to rediscover that spirit, it is likely to be found somewhere under the weight of, and waiting to resist against, that sovereign Parliament.

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Part I: Arendt, and the political constitution

Part I(I) *Self-censorship as a moment of action*

Arendt's political turn

Given Arendt's reputation as a theorist of action, it seems appropriate that in *this* section I will focus not on her political thought *per se*, but rather on the experiences, and - in response to those - her own actions, which led to her political awakening; for, as we shall see, it is in these experiences that we find the roots of Arendt's ambivalent relationship with (public) law, her belief in action, and - putting the two together - what she saw as being the constitutive (or at least, the creative) force of action, even *against* constituted law(s).

Considering the breadth and depth of her political thought, it is perhaps a little surprising to learn that a passion for, even an interest in, politics came to Hannah Arendt relatively late in her formative years. Attending university from 1924-1929, "exactly the years of greatest stability for the troubled Weimar Republic,"⁶⁶ Arendt was at this time, and by her own admission, concerned as little by the theoretical underpinnings of the public realm taught to her by Karl Jaspers, as she was inattentive to the general political climate which surrounded her.⁶⁷ It was not until the early 1930s that Arendt took her first steps in the direction of politics. At this time, her biographical work on Rahel Varnhagen coincided with a developing interest in Marx and Trotsky, and a curiosity about the major political questions of the day, in particular those which impacted most upon her identity: the Jewish question, and the (as she saw them, dubious) achievements of the women's rights movement.⁶⁸ What exasperated Arendt more than any other issue, however, was the "darkening political situation" which surrounded her in Nazi Germany, and more than this, the failure of even leading intellectuals to understand the

⁶⁶ Elizabeth Young-Bruehl, *Hannah Arendt, For Love of the World*, (London, Yale University Press, 1982) Ch.2, p.42 [hereafter, *For Love of the World*]

⁶⁷ Young-Bruehl, *For Love of the World*, Ch.2, p.44

⁶⁸ Young-Bruehl, *For Love of the World*, Ch.3, pp.92-97

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gravity of the situation which faced them.⁶⁹ In a revealing interview with the journalist Günter Gaus, Arendt was able to pinpoint the precise moment of her political awakening:

Gaus: Your interest in political theory, in political action and behavior, is at the center of your work today. In this light, what I found in your correspondence with Professor Scholem seems particularly interesting. There you wrote, if I may quote you, that you “were interested in [your] youth neither in politics nor in history.” Miss Arendt, as a Jew you emigrated from Germany in 1933. You were then twenty-six years old. Is your interest in politics – the cessation of your indifference to politics and history – connected to these events?

Arendt: Yes, of course. Indifference was no longer possible in 1933. It was no longer possible even before that...

Gaus: For you as well?

Arendt: Yes, of course. I read the newspapers intently. I had opinions. I did not belong to a party, nor did I have need to. By 1931 I was firmly convinced that the Nazis would take the helm...

...Gaus: Is there a definite event in your memory that dates your turn to the political?

Arendt: I would say February 27, 1933, the burning of the Reichstag, and the illegal arrests that followed during the same night. The so-called protective custody. As you know, people were taken to Gestapo cellars or to concentration camps. What happened then was monstrous, but it has now been overshadowed by things that happened later. This was an immediate shock for me, and from that moment on I felt responsible.⁷⁰

For Arendt, taking up the mantle of responsibility would manifest itself in two ways. For one, she published what remains, for many, the *magnum opus* of her vast body of work: *The Origins of Totalitarianism*. As she said in response to one (particularly stinging) review of the book, “my first problem was how to write historically about something – totalitarianism – which I did

⁶⁹ Young-Bruehl, *For Love of the World*, Ch.3, p.98

⁷⁰ “‘What Remains? The Language Remains’: A Conversation with Günter Gaus’ in Baehr (ed.) (2000), pp.3-22, pp.5-6 [hereafter: ...with Gaus] [my emphasis]

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not want to conserve but, on the contrary, *felt engaged to destroy*.⁷¹ Her solution, she continued, “was to discover the chief elements of totalitarianism and to analyze them in historical terms.” Not a history of totalitarianism as such, “[t]he book...does not really deal with the “origins” of totalitarianism – as its title unfortunately claims – but gives a historical account of the elements which crystallized into totalitarianism,”⁷² with the express hope of eradicating them from the human condition. To these efforts, I will return my focus later in this section.

A second manifestation of Arendt’s taking of responsibility however, one for which she is far less renowned, came in the shape of her own resistance to the Nazi regime, in the spring of 1933. Whilst thinking gravely of her own emigration, ‘acting’, for Arendt, would mean covertly offering her Berlin apartment as a welcome stop to Jews and Communists fleeing Germany, as tensions heightened in the immediate aftermath of the fire. Risky though her participation in this underground railroad undoubtedly was, her action took an altogether more flirtatious relationship with danger when the German Zionist Organization approached her to undertake illegal work on their behalf. As Young-Bruehl tells it:

*They wanted her to collect materials at the Prussian State Library which would show the extent of anti-Semitic action in nongovernment organizations, private circles, business associations, and professional societies. She was to make a collection of the sort of anti-Semitic remarks which would be unlikely to make their way into the German or foreign press.*⁷³

At the point of undertaking this work Arendt had already come to full consciousness of the predicament in which she, and her compatriots, had found themselves. Along the path of the underground railway she had witnessed many arbitrary arrests, particularly of Communists who would be sent to the cellars of the Gestapo or to the concentration camps; recalling them as “monstrous” events only overshadowed by what was still to come. All at the same time, Nazi legislation continued to alienate Germany’s Jewish population, depriving them, amongst other

⁷¹ Hannah Arendt ‘A Reply to Eric Voegelin’ in Baehr (ed.) (2000), pp.157-164, p.158 [hereafter: *Reply to Voegelin*] [my emphasis]

⁷² Arendt, *Reply to Voegelin*, p.158

⁷³ Young-Bruehl, *For Love of the World*, Ch.3, p.104

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things, of key university posts and civil service appointments.⁷⁴ Where ordinary existence was increasingly suffocated *by* the law, and where even a life lived in apathetic legality could no longer guarantee the minimum liberal protection *of* the law, the opportunity to take on such an illicit task was one which Arendt embraced with positive relish. Recalling this climate of indeterminate il/legality as that which ‘marked her [personal] turn to the political,’ when invited to explain the nature of her work for the Zionists she confided in Gaus about the arrest which had preceded her own flight from Germany:

I was found out. I was very lucky. I got out after eight days because I made friends with the official who arrested me. He was a charming fellow! He'd been promoted from the criminal police to a political division. He had no idea what to do. What was he supposed to do? He kept saying to me, "Ordinarily I have someone there in front of me, and I know what's going on. But what shall I do with you?"

...Unfortunately, I had to lie to him. I couldn't let the organization be exposed. I told him tall tales, and he kept saying, "I got you in here. I shall get you out again. Don't get a lawyer! Jews don't have any money now. Save your money!" Meanwhile the organization had gotten me a lawyer. Through members, of course. And I sent this lawyer away. Because this man who arrested me had such an open, decent face. I relied on him and thought there was a much better chance than with some lawyer who himself was afraid.⁷⁵

Whilst Arendt was thankful for that piece of good fortune which had led to her release from custody, she was also astute enough to recognise the limits of such luck. Within days she had joined those exiles who had made their way to Prague, on a journey that would not end until she received American citizenship some 18 years later.

In so far as it relates to the point of this thesis, there are three initial (and related) observations which I would like to make about Arendt's tale of “good” fortune. First, we can say that the climate in Germany, in particular for Jews and Communists, was, in 1933, one of complete

⁷⁴ Young-Bruehl, *For Love of the World*, Ch.3, p.104. Take, for example, Gesetz zur Wiederherstellung des Berufsbeamtentums (The Law for the Restoration of the Professional Civil Service), passed on April 7th 1933, by which “non-Aryan” members of the civil service were removed, or forced to retire, per s.1, “even where there would be no grounds for such action under the prevailing Law.”

⁷⁵ Arendt, ... *with Gaus*, p.7

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uncertainty (such is the condition by which Skinner distinguishes the lives of slaves according to the republican tradition). “Conscientious, thoughtful people,” reflected Young-Bruehl, “were shocked into the realization that legality no longer mattered.”⁷⁶ For the unfortunates this meant not just arrest, but indefinite detention and, often, torture. For those who might, for want of a better term, be thought fortunate, there still remained the immediate and burning appreciation that fortune might just escape them at any time. Second, when we stop to reflect on Arendt’s own arrest, we can appreciate her predicament not only in terms of the state’s actual interference with her, but also as one in which Arendt’s awareness of her relationship with the state, her knowledge that she was dominated, told her that she had to act accordingly in order to ‘play safe’; to avoid, if at all possible, the terrifying consequences brought to bear upon so many of her compatriots. “I *had* to lie to him,” she said, knowing full well that if she did not, not only would the “organization be exposed,” but that her personal well-being would have been gravely endangered. In other words, Arendt could not act freely, could not speak openly about her business with the Zionists, nor of her opinions on the regime for whom her arresting officer worked. She had to censor herself in order to facilitate her own release, and protect those closest to her from the regime’s interference. Arendt was unfree, of that there can be little doubt. In 1933 however, that domination was not yet total. Third then, despite the fact that she understood full well the nature of her condition, despite the fact that the range of actions available to Arendt was restricted when she came face to face with the state, via her arresting officer, it is difficult not to detect, as Arendt recounts the tale, a sense, almost, of perverse excitement. Whilst reading this moment through the lens of Pettit’s self-censoring slave (above, pp.15-16) might lead us to rebuke Arendt’s abasement, rather than cringe at a tale of servility, as Arendt is forced to lie and beg her way from capture, one is left with a sense that, at a micro-level, in *this* encounter, Arendt was the victor. Indeed, it is not impossible to lose sight of the context and feel some pity for the young officer, as the fullness of his naiveté in dealing with her, revealed by his eagerness to “get her out again,” becomes apparent. The point, however, is this: Arendt was undoubtedly fortunate – she could just as easily have been arrested by a cold, charmless, jobsworth, unresponsive to her lies and unimpressed by her character (little wonder then her later fascination with Adolf Eichmann and what she famously described as the banality of (his) evil). Nevertheless, the very fact of there being a face to face encounter, a human encounter, at least permitted the *possibility*

⁷⁶ Young-Bruehl, *For Love of the World*, Ch.3, p.103

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of action, exercised extraordinarily, and capable of breaking the cycle of arbitrary arrest and the monstrous consequences which followed. On this, let me make three further points. First, this was an *extraordinary* encounter. *Normally*, said the police officer, he would know how to dispose of the person in front of him, but Arendt was different. If this was her fortune, her virtue was to grasp the chance, securing her release without betraying her Zionist colleagues. Second, Arendt could only hold this sway over the officer *because* of the extraordinary nature of the encounter. *Normally*, someone in Arendt's position would accept the legal representation paid for by the Zionists and offered to her. Yet Arendt seemed to sense (in the lawyer's "fear") that normal channels would not serve her well. What is more, it seems clear to me reading this account that Arendt saw the lawyer as an obstruction between the officer and herself: as a barrier, in other words, to action. Through a lawyer her encounter would have to have been refracted, she would have been unable to *act* (with all of its performative connotations) with fullest effect on the officer, and thereby would have been less confident of breaking a cycle which might, ultimately, have led her to the concentration camps. Far from debasing her, one might say that here the opportunity for self-censorship vis-à-vis Arendt's arresting officer itself constituted a moment of action. Third, we can begin to understand the form of government which Arendt most feared: bureaucratic administration – what she called "the rule of nobody."⁷⁷

Bureaucracy: The rule of nobody

It is true that one-man, monarchical rule, which the ancients started to be the organizational device of the household, is transformed in society...into a kind of no-man rule. But this nobody, the assumed one interest of society as a whole in economics as well as the assumed one opinion of polite society in the salon, does not cease to rule for having lost its personality. As we know from the most social form of government, that is, from bureaucracy...the rule by nobody is not necessarily no-rule; it may indeed, under certain circumstances, even turn out to be one of its cruelest and most tyrannical versions.⁷⁸

As with many of the terms which Hannah Arendt used to demarcate and define her vision of politics, she used bureaucracy in an idiosyncratic way. Hers was not the bureaucracy of, say,

⁷⁷ Hannah Arendt *The Human Condition* (Chicago, University of Chicago Press, 1958), Ch.2, p.45

⁷⁸ Arendt (1958), Ch.2, p.40

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Gordon Tullock's work: the inefficient, bungling myriad of government organisations, their ever frustrating 'red tape', and (as Tullock saw it) the self-interested, lazy or de-motivated staff at their centre.⁷⁹ Indeed, as we shall see, in Arendt's mind efficiency was at one time the very legitimating force which underpinned that form of governance. Nor did she view bureaucracy as did Weber.⁸⁰ Despite sharing with Arendt the belief that the conditions of modernity were fertile ground from which bureaucracies could most productively emerge, and despite their shared belief that efficiency – and not, as with Tucker,⁸¹ inefficiency – was the calling card of government by such means (for Weber, “[w]hen those subject to bureaucratic control seek to escape the influence of the existing bureaucratic apparatus, this is normally possible only by creating an organization of their own which is equally subject to the process of bureaucratization”⁸²), Arendt was deeply unsettled by the trend towards bureaucracy. Whereas Weber could speak, in its ideal type at least, of bureaucracy in positive terms – in his view, bureaucracy presented the most efficient means of applying the ‘rule of law’ – for Arendt, bureaucracy was blameworthy on (at least) two counts. On the one hand, rule by nobody would mean that law, and government more generally, would be reduced to pure administration, by “a government of experts.”⁸³ The experience of the British Empire, however, had taught Arendt that these experts needed not official authority, neither by the popular consent of the governed,

⁷⁹ For the classic account, see Gordon Tullock *The Politics of Bureaucracy* (Washington, Public Affairs Press, 1965). Explaining bureaucracy's inefficiency, Tullock says:

In most bureaucracies – whether in General Motors, the Department of State, or the Exchequer – is in a position where only to a minor extent is his or her own interest involved. Bureaucrats make many decisions that will have little or no direct effect on themselves and hence can be made with the best interests of General Motors or the American people or the British people at heart. Unfortunately bureaucrats, in general, have only weak motives to consider these problems carefully, but they do have strong motives to improve their status in the bureaucracy, whether by income, power, or simply the ability to take leisure while sitting in plush offices. They are likely to be more concerned with this second set of objectives than the first, although they may not put very much effort into it because not much effort is required.

(Gordon Tullock 'Bureaucracy', in Gordon Tullock, Arthur Seldon, Gordon L. Brady *Government failure: a primer in public choice* (Washington, D.C., Cato Institute, 2002), pp.53-62, p.55)

⁸⁰ It was, says Margaret Canovan, to the great frustration of her mentor, Karl Jaspers, that Arendt never really engaged with Weber, or showed a real interest in his work. Canovan (1992), Ch.5, p.185

⁸¹ As well as others: see, for example, William A. Nasken *Bureaucracy and Representative Government* (Chicago, Aldine-Atherton, 1971)

⁸² See Max Weber 'Religious Rejections of the World and their Directions', in H.H. Gerth and C. Wright Mills (eds.) *From Max Weber: Essays in Sociology* (London and New York, Routledge, 2009), pp.323-362, p.338

⁸³ Arendt, *OT*, Pt.II, Ch.3, p.277

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nor by legal or political treaty, to support their administration. Reflecting on the rule of Lord Cromer over Egypt between 1883-1907, Arendt discovered that from the administrator's perspective, *effectiveness* was the key to legitimacy. Achieving efficacy *might* require the administrator to track the interests of the governed. The determination of those interests, however, remained firmly within the grasp of the tracker, the administrator, so that Cromer could claim, with no hint of irony, that what *he* saw as the "self-interest of the subject races," that was, their interest in being raised to a plane of civilization already attained by their imperial masters, "is the principal basis of the whole Imperial fabric."⁸⁴ On the other hand, Arendt came to loathe such bureaucracy because of its inherent secrecy. Effective governance, Cromer believed, thrived in dark shadows. Any green shoot of democracy (be that sprung from parliament, from Whitehall, or in Egypt itself) and the openness that might bring, was seized upon by Cromer as a threat. Governing "a people by a people – the people of India by the people of England," Cromer told parliament, was impossible.⁸⁵ What is more, given the "inexperienced," uncivilised even, "majority," which Cromer believed he ruled over, the self-rule of the colonial people was (from his perspective) equally impossible. Better, he thought, that he and his staff, unimpassioned, ambitious, highly skilled, and highly trained "remain more or less hidden to pull all the strings...[for,] the less British officials are talked about, the better."⁸⁶

Bureaucratic rule then was rule (almost) literally by nobody, at least, by no-*publicly accountable*-body. "Their greatest passion," said Arendt of the administrators, "would have to be for secrecy...for a role behind the scenes; their greatest contempt would be directed at publicity and people who love it."⁸⁷ Bureaucratic rule, this is to say, excluded precisely the sort of public (at least, we can say face to face) encounter which Arendt had experienced with the Nazi state when she was arrested in its early years. There was, in other words, no *opportunity* for action, no sense or space in which action could take on meaning or relevance. Indeed, she concluded that bureaucracy's faceless 'rule by experts', based on efficiency, operating in secrecy, closed down the opportunities for citizens to come face to face with the state, as Arendt herself had done under arrest, and *act*. It simply did not recognize the very possibility of the extraordinary:

⁸⁴ Lord Cromer, quoted by Arendt in, Arendt (1951), Pt.II, Ch.3, p.275

⁸⁵ Lord Cromer, quoted by Arendt in, Arendt (1951), Pt.II, Ch.3, p.277

⁸⁶ Lord Cromer, quoted by Arendt in, Arendt (1951), Pt.II, Ch.3, p.277

⁸⁷ Arendt (1951), Pt.II, Ch.3, p.277

The justification [of bureaucracy: the ‘rule by experts’] is that deeds and events are rare occurrences in everyday life and in history. Yet the meaningfulness of everyday relationships is disclosed not in everyday life but in rare deeds, just as the significance of a historical period shows itself only in the few events that illuminate it. The application of the law of large numbers and long periods to politics or history signifies nothing less than the willful obliteration of their very subject matter, and it is a hopeless enterprise to search for meaning in politics or significance in history when everything that is not everyday behavior or automatic trends has been ruled out as immaterial.⁸⁸

It is possible then to say that self-censorship, the hook upon which Pettit and Skinner have held the distinctiveness of republican from liberal freedom, at least hints at the *possibility*, however unlikely, however extraordinary, of action – of breaking the cycle of oppression, and fundamentally altering the relationship between the oppressor and the oppressed. Taking Arendt seriously, and it is my belief that Pettit fails to do so in his depiction, indeed his dismissal, of her as a ‘populist’, means locating domination at its worst where that domination is total: where tumult has turned not to self-censorship or servility, but to torpor; where the closure of that space of action (violent or otherwise) by the administration, or the (willful or negligent) dispersal of that space by the people themselves, facilitates their oppression; where, finally, inactivity renders *both* consent *and* contestability meaningless. In the following section, we will see that maintaining such spaces, authentic political sites of resistance *against* constituted power, was a primary concern of the Roman republican tradition; that Machiavelli knew, as did his English admirers, that non-domination could not be thought of as a negatively formulated liberty, but *demand*ed the vigilance of the people, and the freedom (or, perhaps better put, the opportunity) of action.

From tumult to torpor: Machiavelli and non-domination

In his most recent works, Quentin Skinner has sought to step back somewhat from the emphasis placed by Pettit and himself on the self-censoring slave as the example *par excellence* of the dominated subject. “It seems to me,” he has said, “that both of us have perhaps placed too much

⁸⁸ Arendt (1958), Ch.4, pp.42-43

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weight on this argument.”⁸⁹ For Skinner, a focus on self-censorship is of “secondary importance” to the main claim which (neo-Roman) republicans wished to make. Exponents of republican liberty as non-domination, says Skinner, “agree that anyone who reflects on their own servitude will probably come to *feel* unfree to act or forbear from acting in certain ways. But what actually *makes* them unfree is the mere fact of living in subjection to arbitrary power.”⁹⁰ Now, it is true that this ‘return to basics’ by Skinner remains a few steps removed from the claim which I am making – the claim that freedom *demand*s the positive exercise of political liberty, and I will not put these words in his mouth. I can begin by saying, however, that by drawing back from the example of the slave who becomes aware of his situation, to the basic point that subjection to arbitrary power is the primary concern of those who value freedom as non-domination, Skinner reminds us that there are a number of possible scenarios in which domination might occur, including the predicament of one who is dominated without even coming to consciousness of that fact, or who may even be indifferent to his or her status as citizen, subject or slave. With this in mind, a return to Skinner’s *Visions of Politics* (2002) is revealing:

*The Roman historians had entertained one further and yet more tragic thought about the effects of living in servitude. Provided that our loss of liberty is accompanied by a life of ease, they had argued, we may fall into such a state of corruption that we may cease even to wish for the more strenuous life of freedom and greatness.*⁹¹

So, Sallust had reported Catiline’s taunt to the people of Rome, that they “had rather live in subjection, than command with Honour.”⁹² So too, Tacitus told how the French, once “redoubted in warre,” had in time “[given] themselves over to peace and idleness,” such that “cowardice crept in, and shipwreck was made both of manhood and liberty together.”⁹³ The Romans, described by Arendt as “perhaps the most political people we have known,”⁹⁴ fared little better – the nobility betraying their freedom when, upon Augustus’s usurpation of power,

⁸⁹ Skinner (2008), p.93

⁹⁰ Skinner (2008), pp.93-94

⁹¹ Quentin Skinner *Visions of Politics: Volume II: Renaissance Virtues* (Cambridge, Cambridge University Press, 2002), Ch.11, p.306

⁹² Sallust on Catiline, in Skinner (2002), Ch.11, p.306

⁹³ Tacitus, from the *Annals*, in Skinner (2002), Ch.11, p.306

⁹⁴ Arendt (1958), Ch.1, p.7

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they offered no resistance, “so much [were they] more bettered in wealth, and advanced in honors.”⁹⁵ From these ancient authorities, Skinner goes on to note the Englishman John Milton’s late preoccupation with the theme, particularly after the restoration of the monarchy in 1660. “But what more oft in nations grown corrupt; And by their vices brought to servitude; Than to love bondage more than liberty; Bondage with ease than strenuous liberty.”⁹⁶ With this brief, but illuminating discussion, Skinner rests the theme. The point, however, is important and deeply rooted in the republican tradition so close to his (and to Pettit’s) work. Domination may lead to interference, it may even lead to self-censorship; what Skinner calls the “*worst* betrayal of the birthright of freedom,”⁹⁷ however, is the corruption of the people themselves, not as the corruption of the *demos* was so often painted by the ancient authorities, in the form of *hyperactivity*, in the form of licentiousness, avarice and anarchy,⁹⁸ but rather in a deliberate withdrawal from the public realm into private pleasure, and a condition of *inactivity*. Indeed, as we shall see, for Machiavelli, the opportunity for action was the very lifeblood of the Roman constitution.

According to Machiavelli, in every republic there were (generally speaking) two classes: an upper and a lower class, the nobility and the common people, the “haves” and the “have-nots.”⁹⁹ What it was that the upper class “had”, and the lower class “had not”, was power, through the holding of political office. This being the case, Machiavelli posed himself the question: in whose hands, the “haves” or the “have-nots”, is best placed the safeguarding of liberty. In answering the question, he addressed himself to the ambitions of each. Amongst the nobility, he said, there was “a great desire to dominate.”¹⁰⁰ That is to say, there was a desire to acquire more and more power. Amongst the common people, however, was simply “the desire not to be dominated.”¹⁰¹

⁹⁵ Tacitus, from the *Annals*, in Skinner (2002), Ch.11, p.306

⁹⁶ Milton, in Skinner (2008), Ch.11, pp.306-307

⁹⁷ Skinner (2002), Ch.11, p.306 (my emphasis added)

⁹⁸ See for example, the description of degenerate democracy contained within Book VI of Polybius’ *The Rise of the Roman Empire* (Ian Scott-Kilvert, trans.) (London, Penguin Books, 1979), where “the people...unite their forces, and proceed to massacre, banish and despoil their opponents, and finally degenerate into a state of bestiality, after which they once more find a master and a despot.” (p.309)

⁹⁹ Niccolò Machiavelli *The Discourses* (Bernard Crick, ed.; Leslie J. Walker, trans.) (London, Penguin Books, 1970), Bk.I.5, p.115. Walker translates this from “*chi vuole acquistare o chi vuole mantenere*,” that is, ‘those who want to acquire or those who want to keep’ – which he equates with the typical English distinction of ‘haves’ and ‘have nots.’

¹⁰⁰ Machiavelli (1970), Bk.I.5, p.116

¹⁰¹ Machiavelli (1970), Bk.I.5, p.116

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For this reason, Machiavelli advised that it was in the hands of the common people that the safekeeping of liberty should be left:

*...if the populace be made the guardians of liberty, it is reasonable to suppose that they will take more care of it, and...since it is impossible for them to usurp power, they will not permit others to do so.*¹⁰²

Where Machiavelli distinguished himself from his peers, who equated discord with faction, and faction with unfreedom,¹⁰³ was his insistence that the (often violent) clashes between these classes was *constitutive of*, and certainly not the antithesis of, liberty, and thus the very dynamic of the republican constitution. Take, as a case in point, his praise for tumult in the streets of Rome.

*Look how people used to assemble and clamour against the senate, and how the senate decried the people, how men ran helter-skelter about the streets, how the shops were closed and how the plebs en masse would troop out of Rome – events which terrify, to say the least, anyone who read about them.*¹⁰⁴

Unlike others who “read about them,” for Machiavelli these (seemingly anarchic) scenes were the very means by which the common people defended, indeed enhanced, their liberty. He was perfectly willing to accept that “someone may object” to what looked, on the surface, like “extraordinary and almost barbaric” acts.¹⁰⁵ He was, however, unwilling to concede the point. No republic, he said, can be “stigmatized in any way as disordered” in which tumult leads to the creation of good laws.¹⁰⁶ “To me,” he continued, “those who condemn the quarrels between the nobles and the plebs, seem to be caviling at the very things that were the primary cause of Rome’s retaining her freedom.”¹⁰⁷ Chastising those who “pay more attention to the noise and clamour resulting from such commotions than to what resulted from them,” for Machiavelli what *did* result from them was legislation favourable to liberty, his named example the creation of the

¹⁰² Machiavelli (1970), Bk.I.5, p.116

¹⁰³ Quentin Skinner *Machiavelli* (Oxford, Oxford University Press, 1981), Ch.3, p.66

¹⁰⁴ Machiavelli (1970), Bk.I.4, p.114

¹⁰⁵ Machiavelli (1970), Bk.I.4, p.114

¹⁰⁶ Machiavelli (1970), Bk.I.4, p.114

¹⁰⁷ Machiavelli (1970), Bk.I.4, p.113

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tribunes. Charged with mediating between the plebs and the senate, and vested with such prerogatives as necessary to protect the former from arbitrary interference by the latter, the Roman tribunes were born of such tumult:¹⁰⁸

*Hence if tumults led to the creation of the tribunes, tumults deserve the highest praise, since, besides giving the populace a share in the administration, they served as the guardian of Roman liberties.*¹⁰⁹

From Machiavelli's observations, I would like to draw out three of my own. First, that the tradition which looks back to Rome in order to distinguish republican from liberal freedom identified amongst these Roman authorities a concern with non-domination. Indeed, the desire not to be dominated marked, in Machiavelli's view, the limits of the common citizens' ambition.¹¹⁰ Second, however, the exponents of republican freedom as non-domination are not, on my reading of Machiavelli (nor, I suggest on Skinner's reading of Sallust and Tacitus) correct to identify the republican conception of non-domination as being a negatively constituted liberty; a freedom *from* domination. To be sure, Pettit takes great pains to demonstrate that freedom from interference is not a straightforwardly negative one, conceding that there *might* be a role for democratic participation compatible with his republican vision, even if such participation is

¹⁰⁸ Machiavelli (1970), Bk.I.4, pp.113-4

¹⁰⁹ Machiavelli (1970), Bk.I.4, p.115

¹¹⁰ However, as Stephen M. Griffin has said, in times of crisis it is quite possible that the people look to empower the executive power, often to the detriment of their liberty. This, arguably, was as true in Machiavelli's time as it is today: the appointment, in times of crisis of a dictator, or *magister populi* ('Master of the People'), to provide the Roman republic with strong leadership in times of war (see Andrew Linott *The Constitution of the Roman Republic* (Oxford, Clarendon Press, 1999), Ch.7, p.110), somewhat akin to the increase in executive power in the United States in the twentieth century:

In national crises such as the Great Depression and World War II, the American people expected presidential action, sometimes without regard to what the Constitution said. This is significant because the increased power of the presidency is often portrayed as something that presidents have done alone. In part, this reflects a mode of thinking inherited from the eighteenth century – presidents seek to increase their power because that is what ambitious men in office tend to do. But it is at least equally the case that increased power has been something forced on the presidency by an aroused constituency of the people.

(Stephen M. Griffin 'American Constitutionalism', in Martin Loughlin and Neil Walker (eds.) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford, Oxford University Press, 2008), Ch3, p.63)

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instrumental in safeguarding liberty, rather than having any definitional connection to it.¹¹¹ This, I suggest, underplays the relationship between non-domination and action. After all, active resistance, such as was seen in the tumults of Rome, was not, for Machiavelli, *one* way in which non-domination could be achieved. Rather, the Florentine was clear in his assertion that “*all* legislation favourable to liberty is brought about by the clash between [the nobility and the common people].”¹¹² Thus, where there is no such action, where the “have-nots” do not resist the (inevitable, ever creeping) usurpation by those who “have” and wish to acquire still more power, there will be *no* legislation favourable to liberty. Furthermore, in the *Annals* of Tacitus, in Sallust’s *Conspiracy of Catiline*, as well as in Machiavelli’s *Discourses*, those writers upon whose observations the neo-Roman tradition was built had made clear that, in their view, domination itself might lead, finally, to that very loss of virtue, specifically, the loss of a virtue of ‘public mindedness’, which reduces (by the promise of an easy way of life, of wealth, or security) active citizens to passive subjects. If Pettit is correct to say that freedom from domination “is not a positive one,”¹¹³ how are we to account for the claim by Tacitus that such cowardice makes a mockery not only of liberty, but (separately, on its own terms) “manhood”; or the claim by Machiavelli that the tumults ensured not only the safeguarding of liberty, but (separately, on its own terms) the share of the common people in the administration of government? Third, if tumult did ensure the share of the common people in the administration of government, what can we say about the nature of that share? For Machiavelli, it was clear that the creative potential of tumult (the passage of good laws, the creation of the tribunes) testified to its being a share in the administration of the state. It would seem, however, that such share as the common people had was not a share in normal, everyday decision making. It was not, this is to say, a share in the administration of *ordinary* politics. Moreover, in Machiavelli’s view, the common people demanded no such share. They wished *only* not to be dominated. Thus, their share in administration was limited to the *extraordinary* moments when those entrusted with political office, typically the nobility, attempted to take for themselves more (power) than they were due. The resistance of the people then, “either [they] behaved in some such way as we have described or [they] refused to enlist for the wars, so that to placate [them], [they] had to

¹¹¹ Pettit (1997), Ch.2, p.51

¹¹² Machiavelli (1970), Bk.I.4, p.113 [my emphasis added]

¹¹³ Pettit (1997), Ch.1, p.27

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some extent to be satisfied,”¹¹⁴ at least as it was presented in the *Discourses*, occurred somewhere in between the ordinary exercise of everyday political power, and the revolutionary breaking down and building up of a new constitution. Resistance, tumult, marked what Kalyvas has called (though not by reference to Machiavelli) the politics of the extraordinary, when “politics opens up to make room for conscious popular participation and extra-institutional, spontaneous collective intervention.”¹¹⁵ Agreeing with Pettit that freedom from domination, as the Romans expressed it, was neither straightforwardly positive nor negative, I suggest here that Pettit goes too far to say that this conception of freedom is largely negative, with the positive twist that popular participation *may* be instrumental in achieving non-domination. Quite the opposite, it seems to me that courage (to step outside the life of ease, and set aside one’s private interests), and the public minded virtue of *zoon politikon*, was the *conditio sine qua non* of non-domination, demanding with it a public space, a space of appearance into which this confrontation, this moment of action, could assume reality: the tumults, and the consequent creation of the tribunes, evidence to Machiavelli that the “city of Rome was one which provided such ways and means.”¹¹⁶ If there was a negative element to that freedom, then this was a freedom *from* the unwelcome intrusion upon, or closure of, that space of appearance, the space of action, by the nobility. As Constant said in his famous address of 1819:

*[T]he holders of authority are only too anxious to encourage us to [surrender to them our right to share in political power]. They are so ready to spare us all sort of troubles, except those of obeying and paying! They will say to us: what, in the end, is the aim of your efforts, the motive of your labours, the object of all your hopes? Is it not happiness? Well, leave this happiness to us and we shall give it to you.*¹¹⁷

The Frenchman’s response was emphatic and stirring. “No, Sirs,” he said, “we must not leave it to them. No matter how touching such a tender commitment may be, let us ask the authorities to keep within their limits.”¹¹⁸

¹¹⁴ Machiavelli (1970), Bk.I.4, p.114

¹¹⁵ Kalyvas (2008), intro., p.7

¹¹⁶ Machiavelli (1970), Bk.I, p.114

¹¹⁷ Constant (1819), p.326

¹¹⁸ Constant (1819), p.326

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Recovering a right to publicity: the curious case of Benjamin Constant

So far, I have attempted to show that the claim that non-domination is (first and foremost) a positive one is rooted in the Roman tradition itself. Indeed, *this* conception of non-domination has bubbled under the surface of mainstream constitutional theory, troubling its boundaries, wherever Machiavelli's influence has been most keenly felt. I have already pointed to Skinner's belief that Milton became preoccupied with this theme in 17th Century England, as the nation restored the monarchy and opted, in his view, for the easy way. In 18th Century Scotland too, mindful of the prominence of his contemporary, Adam Smith's, division of labour, Adam Ferguson (to name but one) grew concerned at the loss of public minded virtue, the retreat into self-interest, and the exclusion of society which might follow the separation of the citizen from the politician, aiming a broadside at those who "would frequently model their governments, not merely to prevent injustice and error, but to prevent agitation and bustle; and by the barriers they raise against the evil actions of men, would prevent them from acting at all." For Smith, as with Machiavelli and Milton before him, what was at stake here was not simply domination, but the debasing of the human spirit. "If," said Ferguson, "to any people it be the avowed object of policy, in all its internal refinements, to secure the person and the property of the subject, without any regard to his political character, the constitution may indeed be free, but its members may likewise become unworthy of the freedom they possess, and unfit to preserve it."¹¹⁹ So too, as we have seen, for Constant (himself a loyal disciple of Machiavelli,¹²⁰ and student of Ferguson's at Edinburgh University¹²¹) in 19th Century France, where, "absorbed in the enjoyment of our private independence, and in the pursuit of our particular interests," the French had, "surrender[ed their] right to share in political power," at Napoleon's whim, "too easily."¹²²

It is true that *The liberty of the ancients...* failed to pinpoint precisely what would be lost, beyond a general claim for political liberty, whatever that may be, however that may be exercised. For sure, there was made by Constant, the Aristotelian appeal to *zoon politikon*: the claim that even the moderns find self-fulfilment only in the exercise of politics:

¹¹⁹ Adam Ferguson *An essay on the history of civil society* (Fania Oz-Salzberger, ed.) (Cambridge, Cambridge University Press, 1995), p.210

¹²⁰ Holmes (1984), intro., p.15

¹²¹ William W. Holdheim *Benjamin Constant* (London, Bowes & Bowes, 1961), Ch.1, p.13

¹²² Constant (1819), p.326

*Political liberty, by submitting to all the citizens, without exception, the care and assessment of their most sacred interests, enlarges their spirit, enobles their thoughts, and establishes among them a kind of intellectual equality which forms the glory and power of a people.*¹²³

Self-fulfilment however seems an unconvincing explanation for Constant's sudden (re)turn to political liberty. After all, there was little spirit and certainly not much of glory and power in his reflections back upon his own time in political office: "a task, ...a chance to fulfill a duty, which is the only way to lift the burden of doubt, memory, and unrest, the eternal lot of our wretched and transitory nature."¹²⁴ Rather, as we shall see the somewhat banal textual explanation for the seemingly unfathomable contradictions built into Constant's speech betray a more meaningful and altogether more interesting insight at the very point of his republican turn. As Stephen Holmes explains:

*The strikingly democratic conclusion to "Ancient and Modern Liberty" remains puzzling until we understand how the underlying logic of the argument of 1798 was adapted to meet the demands of Restoration politics. The lecture is a palimpsest. It is so complex because it was composed twice, the second version superimposed on the [barely edited] first after an interval of twenty years. By 1819, Constant's original fear of convulsive and compulsory patriotism had partly yielded to his hope that enhanced participation might advance liberal causes while keeping the ultras in check.*¹²⁵

In the midst of this twenty year period, an unmistakable suspicion of politics, and retreat into the safety, security, and pleasures of the private realm, had suddenly been turned on its head: the tyranny of terror answered by no more than the tyranny of the emperor, Napoleon. What marks Constant as a relevant, and even critical thinker to this day is that he was able to locate the rise of that "usurper" in precisely the conditions of modernity which in the first place he had set out to praise. Amid the private happiness of multitudinous individuals in territorially expanded states,

¹²³ Constant (1819), p.327

¹²⁴ Benjamin Constant, in a letter written to Mme. De Nassau, 20 January 1800, quoted in Holmes (1984), Ch.1, pp.44-45

¹²⁵ Holmes (1984), Ch.1, p.43

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the public square had been deserted; the citizen, Constant feared, had lost his zeal for public duty. Only with the rise of Napoleon then did Constant come to realise that what distinguished ancient and modern constitutions was not only their understanding of freedom, but the constitution of a *public* space within which *political* freedom could be exercised. Elsewhere, Constant had written:

*In the large associations of modern times, the freedom of the press, being the only means of publicity, is by this fact, whatever the form of government, the only protection of our rights. In Rome Collatinus could expose on the public square the body of Lucretia and the whole people was instructed of the outrage he had received...But in our days the immensity of empires prevents this kind of protest. Partial injustices remain unknown to almost all the inhabitants of our vast regions...*¹²⁶

As Fontana has said, for Constant, “[p]ublicity, the transparency of actions of public authorities and institutions” was the soul of republican government ancient *and* modern,¹²⁷ the greatest limit to the sovereign power; the most meaningful check on arbitrary rule. Thus, he wrote:

*The coercive force needed to constrain a government to obey the laws is located in the constitution, in the penalties it pronounces against treacherous wielders of authority, in the rights it assures its citizens, and above all in the publicity it consecrates.*¹²⁸

Calling publicity “a sacred right”,¹²⁹ Constant lamented the opportunism with which Napoleon had been able to navigate the obstacles and boundaries of civic privatism to establish his tyranny. Frenchmen could not, or would not, resist this tyrant because, deprived of publicity, they “lived alone, ignorant of each other and in a painful sleep, interrupted by noises to which they contribute nothing. What results is a momentary annihilation of all opinion, all public suffrage.”¹³⁰ Thus when Constant addressed the Athénée Royal with the proposition that political liberty is indispensable, he was warning not only his audience, but the French nation

¹²⁶ Benjamin Constant, translated by Fontana, in Fontana (1991), Ch.6, p.82 (my emphasis added)

¹²⁷ Fontana (1991), Ch.6, p.81

¹²⁸ Benjamin Constant *Commentaire sur Filangieri*, 1:34, quoted in Holmes (1984), epilogue, p.243 [a useful emphasis is supplied by Holmes himself]

¹²⁹ Benjamin Constant in a letter of 13 September 1807, quoted in Holmes (1984), epilogue, p.243 [hereafter *letter, 1807*]

¹³⁰ Constant, *letter, 1807*, quoted in Holmes (1984), epilogue, p.247

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that when they need their civil liberties most they might just awake from their slumber to find them useless. “To renounce [political liberty],” he warned us, ourselves, we: the moderns, “would be a folly like that of a man who, because he only lives on the first floor, does not care if the house itself is built on sand.”¹³¹ It was, I believe, precisely this warning which drove Arendt to pen the *Origins*: first, that modern man had renounced the calamity of public liberty for peaceful enjoyment and private leisure; second, that this renunciation, this indifference to the political climate which surrounded them, had created the conditions from which the horrors of totalitarian government could emerge. That was their irresponsibility. It is, then, to the *Origins* that I now turn my attention.

Part I(2) *The ‘Burden’ of ‘our’ ‘time’*

What’s in a name? The originality of totalitarianism

As Arendt suggested in her reply to Eric Voegelin, the title to *The Origins of Totalitarianism* was, to her mind, something of a misnomer. Indeed, finding a suitable moniker for the book was the cause of some anxiety for its author. As her biographer noted, before the final title had been settled upon, a variety of working titles had come and gone: *The Elements of Shame: Anti-Semitism-Imperialism-Racism*; *The Three Pillars of Hell*; and *A History of Totalitarianism*. She had wanted, but could never find, a title which reflected the methodology of her work. The title used (against her wishes) when the book was released in England, *The Burden of Our Time*,¹³² probably, as Young-Bruehl says, best captures the tone of the book, if not her approach to writing it.¹³³ For sure she had identified “certain fundamental threads” which ran through the anti-semitism (Part 1 of the book) and imperialism (Part 2) of the nineteenth century and still through the totalitarianism of the twentieth (Part 3). Yet it was never her intention to attribute a causal connection between the three. The crucial distinction was this: that the totalitarianism which had scarred the twentieth century may have *emerged* from Jew hatred and designs upon spatial and ideological expansion, but not inevitably so. The totalitarian movements which had emerged in Germany and the USSR in the middle of the twentieth century were worthy of

¹³¹ Constant (1819), p.326

¹³² Hannah Arendt *The Burden of Our Time* (London, Secker & Warburg, 1951)

¹³³ Young-Bruehl, *For Love of the World*, Ch.5, p.200

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Arendt's attention not because of the pre-existing elements which she had found within, but because of what separated them from that which had come before; what was novel about them. Perhaps there is some merit in Samantha Power's observation that the book might better have been titled *The Originality of Totalitarianism*.¹³⁴

Totalitarianism represented for Arendt far more than tyranny writ large. Whilst neither could exist without first destroying the public realm, "without destroying, by isolating men, their political capacities,"¹³⁵ totalitarianism represented an entirely novel form of government because "it is not content with this [public] isolation and destroys private life as well. It bases itself on loneliness, on the experience of not belonging to the world at all, which is among the most radical and desperate experiences of man."¹³⁶ The advent of totalitarian government was then, as Arendt saw it, no less than a violent rupture from that which had come before, a 'new beginning', made possible only by the condition of modern Man himself:

*The tragedy of our time has been that only the emergence of crimes unknown in quality and proportion and not foreseen by the Ten Commandments made us realize what the mob had known since the beginning of the century: that not only this or that form of government has become antiquated or that certain values and traditions need to be reconsidered, but that the whole of nearly three thousand years of Western civilization, as we have known it in a comparatively uninterrupted stream of tradition, has broken down; the whole structure of Western culture with all its implied beliefs, traditions, standards of judgement, has come toppling down over our heads.*¹³⁷

Only "great...calamity,"¹³⁸ she said, had awoken Man from his sleepwalk toward "total domination",¹³⁹ and whilst this ultimate end of totalitarian government would, in all likelihood, never have been achieved,¹⁴⁰ the danger remained that, as with monarchies, republics, tyrannies,

¹³⁴ Samantha Power, intro., in *OT*, p.xii

¹³⁵ Arendt, *OT*, pt.3, ch.4, p.612

¹³⁶ Arendt, *OT*, pt.3, ch.4, p.612

¹³⁷ Arendt, *OT*, appendix, 'Concluding Remarks', p.625

¹³⁸ Arendt, *OT*, appendix, 'Concluding Remarks', p.630

¹³⁹ Arendt, *OT*, appendix, 'Concluding Remarks', p.619

¹⁴⁰ As Arendt explains in the concluding remarks to her first edition:

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dictatorships and despotism, elements of this new form of government would survive temporary defeat and “stay with us from now on.”¹⁴¹ Given the subject of the book then, “the burden” of which she speaks might easily be thought of as an albatross around our necks: a duty ‘never to forget’ the rise of totalitarianism, the conditions which made this possible, the lives lost within and the wars fought out with. After all, Arendt herself had made explicit her intention at the outset to destroy totalitarianism. And yet *The Origins* offers not only a warning but, with it, hope; it does not ‘merely’ seek to destroy, but more than this to renew, to start again, to build:

*But there remains also the truth that every end in history necessarily contains a new beginning; this beginning is the promise, the only “message” which the end can ever produce. Beginning, before it becomes a historical event, is the supreme capacity of man; politically, it is identical with man’s freedom.*¹⁴²

The real “burden” of our time falls on all men to consciously begin anew. Only “a consciously devised new polity,” she argued, “will eventually be able to reintegrate those who in ever-increasing numbers are being expelled from humanity and severed from human condition”; the Rights of Man meaningless, for Arendt, unless and until they become the “prelegal basis of a new legal structure”.¹⁴³

If this is the burden, modernity is explicitly “our time” because of the loss of human experience which defines it as an age of “bureaucratic administration and anonymous labor, rather than

The full aspirations of totalitarian governments could not be achieved even if the earth were divided between several totalitarian governments, for totalitarianism allows for no diversification – not even that of simple plurality, since competition as such could invite doubt and rebellion.....So the chances are that total domination of man will never come about, for it presupposes the existence of one authority, one way of life, one ideology in all countries and among all peoples of the world. Only when no competitor, no country of physical refuge, and no human being whose understanding may offer spiritual refuge, are left can the process of total domination and the change of the nature of man begin in earnest.

(Arendt, *OT*, appendix, ‘Concluding Remarks’, pp.618-619)

¹⁴¹ Arendt, *OT*, Pt.3, ch.4, p.616

¹⁴² Arendt, *OT*, Pt.3, ch.4, p.616

¹⁴³ Arendt, *OT*, appendix, ‘Concluding Remarks’, p.631

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politics and action”.¹⁴⁴ Her message was simple but alarming: we, mankind to our detriment, have made our age by (deliberately) rejecting our responsibility for its challenges. So, when Arendt turned her mind to the conundrum of how such a “small” issue as the Jewish question and anti-Semitism could come to amalgamate a number of factors which would lead, finally, to the terror and total domination of the concentration camps, her attention was drawn to what she saw as an illusory ‘Golden Age of Security’, immediately prior to the outbreak of World War I. At this moment, with despotism in Russia, corruption in Austria, “stupid militarism” in Germany and a “half hearted republic” in France, not one of these governments could claim particularly healthy support, and indeed each bore witness to growing domestic opposition, and yet the capacity for action, characterized here as the courage to initiate *radical* change, was entirely absent: Constant’s lament of the moderns rippling through her diagnosis that

*Europe was much too busy expanding economically for any nation or social stratum to take political questions seriously.*¹⁴⁵

In an age of labour and commerce, where the “aim of the moderns is the enjoyment of security in private,”¹⁴⁶ the public realm was simply traded away. With the space of public appearance deserted, “everything could go on because nobody cared.”¹⁴⁷

The fear which drove Arendt to pen *The Origins* was that man would be *so* far detached from his political liberty, so safe in this private security, and thus so disinclined toward the courage of entering the public realm, that totalitarianism would “ravage the world as we know it...before a new beginning rising from the [inevitable demise of the movement] has had time to assert itself.”¹⁴⁸ The security of the modern age then, the right of the moderns to peaceful enjoyment of their private rights – what Ayn Rand has famously called the ‘virtue of selfishness’¹⁴⁹ - proved, in this analysis, to be little more than a mirage: without political guarantee, such security was subject *always* to the sway of what Machiavelli knew as ‘fortune’.

¹⁴⁴ Maurizio Passerin D’Entreves *The Political Philosophy of Hannah Arendt* (London and New York, Routledge, 1994), ch.1, p.29

¹⁴⁵ Arendt, *OT*, ch.2, p.70

¹⁴⁶ Constant, *Ancients and moderns*, p.317

¹⁴⁷ Arendt, *OT*, ch.2, pp.69-70

¹⁴⁸ Arendt, *OT*, pt.3, ch.4, p.616

¹⁴⁹ Ayn Rand *The Virtue of Selfishness: A new concept of egoism* (New York, New American Library, 1964), see esp. Chs. 12, ‘Man’s rights’, and 14, ‘The Nature of Government’.

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The modern, for whom ‘liberty’ is but negatively understood, in truth trades only the unpredictability of the public realm for the uncertainty of fortune; “the sudden, awful (sic.) and challenging piling up of social factors and contingent political events in an unexpected way,”¹⁵⁰ from which totalitarianism became the 20th century’s great curse.

To be sure, Arendt did not believe and barely feared that totalitarianism could achieve its aims outright. Totalitarianism, in its fullest, most terrifying form of total, global, domination could tolerate not even the simple plurality of two concurrent totalitarian regimes:

*...the chances are that total domination of man will never come about, for it presupposes the existence of one authority, one way of life, one ideology in all countries and among all peoples of the world. Only when no competitor, no country of physical refuge, and no human being whose understanding may offer a spiritual refuge, are left can the process of total domination and the change of the nature of man begin in earnest.*¹⁵¹

In the isolated context of the concentration camps however, albeit for a fleeting moment, and restricted to limited spatial bounds, the totalitarian regime *had* succeeded in rendering men superfluous, in creating what she called ‘living corpses’ whose individuality, whose very humanness, had somehow been stripped from them; so much so that their march to the gas chamber seemed no different, neither from the perspective of the murderer nor the murdered, than the procession of a herd to the slaughterhouse. “There are no parallels to the life of the concentration camps. Its horror can never be fully embraced by the imagination for the very reason that it stands outside of life and death.”¹⁵² Arendt traced the creation of living corpses to three key moments. The first, the killing of man’s ‘juridical person’, was carried out by selecting for the camps inmates who had, in no real demonstrable way, violated what one might understand as a law or penal code. “Criminals,” she explained, “do not properly belong in the concentration camps, if only because it is harder to kill the juridical person in a man who is guilty of some crime than in a totally innocent person.”¹⁵³ The criminal, this was to say, was *already* a ‘legal’ person: his crime was defined by law; his criminal status was determined by the

¹⁵⁰ Crick, *On Machiavelli*, p.58

¹⁵¹ Arendt, *OT*, Appendix, ‘Concluding Remarks’, pp.617-618

¹⁵² Arendt, *OT*, Pt.III, Ch.3, p.572

¹⁵³ Arendt, *OT*, Pt.III, Ch.3, p.577

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legal process; his punishment (should he be found to fall within that category) both contestable (for example, by appeal) and predictable (as prescribed by law). The criminal, therefore, was by definition a rights-bearing individual judged for his unlawful *actions*. What made the status of the ‘innocent’ in the concentration camp so drastic was that his detention was brought about not because of his *actions*, something which he could control, which he could consent to, but because of his *identity*, something out with one’s control and with that, in Arendt’s words, something “outside the normal judicial procedure in which a definite crime entails a predicatable penalty.”¹⁵⁴ Jews could not consent to and therefore could not contest their identity *qua* Jew; the carriers of disease could not consent to their illness and therefore could not contest the reason for their detention. Consent was rendered meaningless, and so, with it, was the very right of those individuals *to have* the (legal) rights and protections afforded to the criminal. Thus, the aim of such arbitrary detention was, she said, to pave the way for the total domination of the whole population by destroying the founding myth of social contract: free consent. “The arbitrary arrest which chooses among innocent people destroys the validity of free consent, just as torture – as distinguished from death – destroys the possibility of opposition.”¹⁵⁵ With the legal personality of man destroyed, with the basis of his legal protection in free consent rendered meaningless, the next step in the preparation of living corpses is to destroy man’s ‘moral person’. “This,” she said, “is done in the main by making martyrdom, for the first time in history, impossible.”¹⁵⁶ By making it impossible to find out whether an inmate was dead or alive, Arendt suggested that death itself was robbed of its significance. After a man has shed his mortal coil, after all, it is only by remembrance that his death takes on his significance, that his (individual) life story can be told. By making death “anonymous”, the SS “took away the individual’s own death, proving that henceforth nothing belonged to him and he belonged to no one. His death merely set a seal on the fact that he had never really existed.”¹⁵⁷ With the destruction of man’s legal and moral person, the final step, the overcoming of man’s individuality, that which makes him human, “is almost always successful.”¹⁵⁸ This can be, and was, achieved by a variety of means, all of which served to transform the victim from human to ‘beast’: pointless torture designed neither to kill nor to extract information; the herding of hundreds of human beings into

¹⁵⁴ Arendt, *OT*, Pt.III, Ch.3, p.577

¹⁵⁵ Arendt, *OT*, Pt.III, Ch.3, p.581

¹⁵⁶ Arendt, *OT*, Pt.III, Ch.3, p.582

¹⁵⁷ Arendt, *OT*, Pt.III, Ch.3, p.583

¹⁵⁸ Arendt, *OT*, Pt.III, Ch.3, p.586

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cramped trains, like cattle, for transportation to the camps; the shaving of the head and the issue of intentionally ill-fitting camp clothing, all served to destroy human dignity and individuality.¹⁵⁹ Indeed, the common experience reported by tour guides at Auschwitz today, that visitors to the camp often find the mug shots of the inmates less harrowing than, say the collection of their glasses, their shoes, or the briefcases which contained their home address and with them traces of identity, perhaps points precisely to the effectiveness of the SS in destroying even the physical individuality of the camps' inmates. As Dana Villa has correctly said, Arendt's focus on the *process* of destroying individuality says nothing of the *instruments* of the process, of the physical changes brought about by starvation, poor sanitation and accommodation, and forced labour.¹⁶⁰

Crises of the republic

If Arendt despaired not that totalitarianism would succeed, ultimately, in achieving total domination, she remained concerned that by asserting itself, and by finding an awful reality in the confines of the concentration camps, totalitarianism had "brought forth an entirely new form of government which is a potentially and an ever-present danger [and which] is only too likely to stay with us from now on, just as other forms of government which came about at different historical moments and rested on different fundamental experiences have stayed with mankind regardless of temporary defeats".¹⁶¹

In her own time Arendt came to warn against the emergence of many such pro-totalitarian elements in that republic which she so cherished above all, the United States. The Vietnam War era, she said, had seen the secret service act almost as a shadow government, whose over-classification of sensitive information had deprived "the people and their representatives [of access to] what they must know to form an opinion and make decisions."¹⁶² Detached from the people and their representatives,¹⁶³ detached even from the intelligence community,¹⁶⁴ the

¹⁵⁹ Arendt, *OT*, Pt.III, Ch.3, p.584

¹⁶⁰ Dana R. Villa *Politics, Philosophy, Terror: Essays on the Thought of Hannah Arendt* (Princeton, New Jersey, Princeton University Press, 1999), Ch.1, p.23

¹⁶¹ Arendt, *OT*, Pt.III, Ch.4, p.616

¹⁶² Hannah Arendt 'Lying in Politics: Reflections on the Pentagon Papers', in Hannah Arendt 'The Crises of the Republic' (San Diego, New York, London, Harcourt Brace & Company, 1972), pp.1-47, p.30

¹⁶³ Arendt *Lying in Politics*, in Arendt (1972), p.21:

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National Security Council operated in a culture of secrecy. Unlike the imperial bureaucracies, however, for whom effectiveness (however perversely defined) superceded democratic legitimacy, the National Security Council was concerned *not even* with this question. Not democracy, not effectiveness, but maintaining the *image* of the US as the leading world superpower became the overwhelming aim of their involvement in the region.¹⁶⁵ Turning her mind to the question of *how* this could come about, Arendt focussed her ire once more on “the evils of bureaucracy,” this time making explicit its cross-fertilization with the concept of representative democracy:¹⁶⁶

The internal world of government, with its bureaucracy on one hand, its social life on the other, made self-deception relatively easy. No ivory tower of the scholars has ever better prepared the mind for ignoring the facts of life than did the various think tanks for the problem-solvers and the reputation of the White House for the President’s advisers... [T]he truth of such decisive matters could be successfully

Even when, under Johnson, foreign governments were thoroughly briefed on our plans for bombing North Vietnam, similar briefing of and consultation with congressional leaders seem never to have taken place.

¹⁶⁴ Arendt *Lying in Politics*, in Arendt (1972), p.22:

The fact-finding branches of the intelligence services were separated from whatever covert operations were still going on in the field, which meant that they at least were responsible only for gathering information, rather than for creating the news themselves. They had no need to show positive results and were under no pressure from Washington to produce good news to feed into the public relations machine... They were relatively independent, and the result was that they told the truth, year in and year out.

¹⁶⁵ One memo to the United States Secretary of Defense, Robert S. McNamara, from his closest advisor, the then United States Assistant Secretary of Defense for International Security Affairs, John McNaughton, leaked to the *New York Times*, famously listed the US aims in Vietnam, in order:

US aims:

*70% --To avoid a humiliating US defeat (to our reputation as a guarantor).
20%--To keep SVN (and then adjacent) territory from Chinese hands.
10%--To permit the people of SVN to enjoy a better, freer way of life.*

*ALSO--To emerge from crisis without unacceptable taint from methods used.
NOT--To "help a friend," although it would be hard to stay in if asked out.*
(The Pentagon Papers, Gravel Edition, Volume 3, pp. 694-702. Available online, in full, at <http://www.mtholyoke.edu/acad/intrel/pentagon/pent1.html>)

¹⁶⁶ Arendt *Lying in Politics*, in Arendt (1972), p.20

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*covered up in these internal circles – but nowhere else – by worries about how to avoid becoming “the first American President to lose a war” and by the always present preoccupation with the next election.*¹⁶⁷

As I have said, however, what Arendt found to be novel about totalitarianism was not (only) its domination of the public realm, but with it, its ravishing of the private realm. This malevolent seed, she warned, was precisely what was to be found in the McCarthy era, when many US citizens, from government officials, to high profile entertainers, to educators, trade unionists and private industry employees, found themselves to be the victims of rigorous investigation, on the basis of often false or exaggerated claims that they were either active Communists, or passive sympathisers. “Informing,” Arendt said, “is a duty in a police state where people have been organized and split into two ever-changing categories: those who have the privilege to be the informers and those who are dominated by the fear of being informed upon.”¹⁶⁸ As she saw it, the adoption of *this* element of totalitarianism was a quite deliberate, but wholly ill-conceived, attempt to defeat the totalitarian spectre of Communism:

It is the old story: one cannot fight a dragon, we are told, without becoming a dragon; we can fight a society of informers only by becoming informers ourselves...

*...[However, if] we became dragons ourselves, it would be of small interest which of the two dragons should eventually survive. The meaning of the fight would be lost.*¹⁶⁹

For Arendt, the answer to these creeping ‘crises of the republic’ was, *contra* Rand, not to be found by retreating to our private pleasures and peaceful enjoyment, to the ‘virtue[s] of selfishness’, but rather, as for Constant over a century before her, a call to arms: a (re)invocation of the very soul of republican government; to find a *virtue* of (for want of a better word) ‘publicness’. After all, to each of the crises which attracted her attention, Arendt had attributed the *absence* of the public: “seven years of an *undeclared* war in Vietnam; the growing influence of *secret* agencies on public affairs; open or *thinly veiled* threats to liberties guaranteed under the First Amendment; attempts to deprive the Senate of its constitutional

¹⁶⁷ Arendt *Lying in Politics*, in Arendt (1972), p.36

¹⁶⁸ Hannah Arendt ‘The Ex-Communists’, in Hannah Arendt *Essays in Understanding 1930-1954* (Jerome Kohn (ed.)) (New York, San Diego, London, Harcourt Brace & Company, 1994), pp.391-400, p.394

¹⁶⁹ Hannah Arendt, *The Ex-Communists*, in Arendt (1994), pp.394-395

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powers, followed by the President's invasion of Cambodia in open disregard for the constitution, which explicitly requires congressional approval for the beginning of a war;"¹⁷⁰ to say nothing of the "quicksand of lying statements of all sorts, deceptions as well as self-deceptions...apt to engulf any reader who wishes to probe" the top secret *Pentagon Papers*. Where the injustices of government lurked in the shadows, remaining illicit, Arendt demanded of citizens that the shining light of publicity be cast upon those acts – the citizens themselves the final limitation on the tyrannical corruption of office. Where that injustice was open, defiant even, Arendt demanded *from* citizens the assumption of responsibility: demanded that they *act*. Concluding Part I of this thesis, I will suggest that Pettit's dismissal of Arendt as a 'populist' misses this intellectual core of her work – the attempt to locate, amid the uncertain conditions of modernity, a space of appearance within which "the extraordinary [could be made] an ordinary occurrence of everyday life."¹⁷¹

The space of appearance

It was, ironically, not long after Arendt's turn to politics that she discovered precisely what it meant to be without it; to be, that was, without a political community. Shortly after her release from police custody in Germany, and conscious of good fortune which had come her way in the shape of her 'charming' arresting officer, Arendt prepared to leave Germany, aware that such luck would be unlikely to fall for her so kindly her a second time. "One evening's pause," Young-Bruehl tells us, "to enjoy the company of her friends and to celebrate her release" (over more than one glass of wine)¹⁷² before Arendt and her mother, Martha, fled Germany.¹⁷³ So

¹⁷⁰ Hannah Arendt 'Civil Disobedience', in Arendt (1972), pp.49-102, pp.74-75

¹⁷¹ Arendt (1958), Ch.5, p.197

¹⁷² ... "the most drunk occasion of our lives," in her own words. Young-Bruehl, *For love of the world*, Ch.3, p.106

¹⁷³

...without travel documents, by way of the thick forest of the Erzgebirge Mountains, known to fleeing Jews and leftists as the "Green Front." They were headed toward Prague, which had become the capital city for exiles from Nazi Germany. The Prague-based leftist exiles had organized a network of border stations to facilitate both the exit of people from Germany and the entrance into Germany of newsletters, information, and couriers. The Arendts went to the station at Karlsbad, for a time the most important in the network and the best known within Germany. They crossed the Czech border at night, avoiding the patrol. Their escape was very simple: a sympathetic German family owned a house with a front door in Germany and a back door in Czechoslovakia; they received their "guests" in the daytime, provided them

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began eighteen years as a “stateless person”, before she was finally naturalized as a citizen of the United States, having arrived there from Prague, through Geneva, and Paris. Unsurprisingly, given this experience, Arendt identified the “first loss which the rightless suffered” as the “loss of their homes...in which they established for themselves a place in the world.”¹⁷⁴ This problem was not, for Arendt, in itself unprecedented: human history (as well as contemporary experience) was littered with the forced migration of peoples for economic or political reasons.¹⁷⁵ “What is unprecedented,” she suggested, “is not the loss of a home but the impossibility of finding a new one. Suddenly, there was no place on earth migrants could go without the severest restrictions.”¹⁷⁶ This Arendt knew only too well. When she spoke of “the new kind of human being created by contemporary history...[the kind that] are put into concentration camps by their foes and into internment camps by their friends”¹⁷⁷ she was reflecting not only on the political position of the stateless, but one her personal experience as a woman who had been interned in France, her place of refuge, at the outbreak of war with Germany. The second loss suffered by the rightless, in her analysis, was the loss of government protection. Whilst this, too, was, of itself, nothing new – the practice of offering asylum to political refugees had operated for those cast out from protection for centuries – the *scale* of the problem had become overwhelming. As Arendt said, “[t]he trouble arose when it appeared that the new categories of persecuted were far too numerous to be handled by an unofficial practice destined for exceptional cases.”¹⁷⁸ The danger was, that as the numbers of those expelled from the political community increased, as the problem of what to do with the mass of human beings now searching, desperately, for a home, for a place in the world, became more and more urgent, it would, in turn, become tempting to *keep* the émigrés on the outside. In so doing, by denying them a space of appearance within an adoptive state, their plight could remain somewhat at a distance, never confronting states, or their citizens, with the *problem* of the stateless, and the responsibility which they shared for its

with dinner, and then ushered them out of the back under the shelter of darkness.

(Young-Bruehl, *For love of the world*, Ch.3, p.107)

¹⁷⁴ Arendt, *OT*, Pt.II, Ch.5, p.372

¹⁷⁵ Arendt, *OT*, Pt.II, Ch.5, p.372

¹⁷⁶ Arendt, *OT*, Pt.II, Ch.5, p.372

¹⁷⁷ Arendt, ‘We Refugees’, quoted in Young-Bruehl, *For Love of the World*, Ch.4, p.152

¹⁷⁸ Arendt, *OT*, Pt.II, Ch.5, p.374

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resolution. They lived what Agamben has called a ‘bare life’,¹⁷⁹ excluded from political and moral life, with nothing but their humanness to define them, so that in the camps

...they were and appeared to be nothing but human beings whose very innocence...was their greatest misfortune. Innocence, in the sense of complete lack of responsibility, was the mark of their rightlessness as it was the seal of their loss of political status.¹⁸⁰

In other words, the condition of the stateless person had disproved the “inalienability” of the Rights of Man, for the loss of a home, and the loss of government protection, at which point the need for inalienable rights becomes most pressing – at that point when rights which are inalienable from human nature ought, *qua* rights, to provide protection of the very last resort – had the exact effect of exposing the stateless person to a naked vulnerability. As Margaret Canovan has said, “[f]or those who fell outside [the category of citizenship], constitutional commitments to supposedly inalienable rights turned out to be meaningless.”¹⁸¹ What Arendt discovered in the plight of statelessness was a peculiar and novel calamity. Not the withdrawal of specific rights as such, the stateless person had been denied the very right to belong to a community in which those rights could be granted, in which claims to those rights could be both articulated and heard. They had suffered not from inequality at the hands of the law, but expulsion from the very categories of legality altogether; their obscurity from the public world confirmed by, in the final place, their superfluity.¹⁸² When they were needed most, by those who needed them most, stateless people had found for themselves that the inalienable Rights of Man were meaningless, and thus utterly useless. In possibly her most famous passage of all, Arendt put to her reader:

[w]e became aware of the existence of a [prior, inalienable] right to have rights (and that means to live in a framework where one is judged by one’s actions and opinions) and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights because of the new global political situation. The trouble is that this calamity arose not from any lack of civilization, backwardness, or

¹⁷⁹ Giorgio Agamben *Homo sacer: Sovereign power and bare life* (Stanford, Calif., Stanford University Press, 1982)

¹⁸⁰ Arendt, *OT*, Pt.II, Ch.5, p.374 [my emphasis]

¹⁸¹ Canovan (1992), Ch.2, p.34

¹⁸² Arendt, *OT*, Pt.II, Ch.5, p.375

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*mere tyranny, but, on the contrary, that it could not be repaired, because there was no longer any “uncivilized” spot on earth, because whether we like it or not we have really started to live in One World. Only with a completely organized humanity could the loss of home and political status become identical with expulsion from humanity altogether.*¹⁸³

The meaning of this famous little phrase, “the right to have rights” is much contested, the debate contained within a vast body of literature. In concluding this section, however, I would like to make two claims of my own for “the right to have rights”.

The first claim I would like to make is that the “right to have rights” can meaningfully be thought of as a right to publicity, of the sort discovered by Constant amid Napoleon’s rise. In a striking passage which precedes and informs the formulation of a “right to have rights”, Arendt says:

*The soldier during the war is deprived of his right to life, the criminal of his right to freedom, all citizens during an emergency of their right to the pursuit of happiness, but nobody would ever claim that in any of these instances a loss of human rights has taken place. These rights, on the other hand, can be granted (though hardly enjoyed) even under conditions of fundamental rightlessness.*¹⁸⁴

Arendt’s suggestion here is that *specific* rights (life, shelter, privacy) may be granted (albeit in minimal terms, perversely applied) even by tyrannical or totalitarian regimes. The point however is that when one or more of these specific rights are taken away, she who exists in a condition of “fundamental rightlessness” is denied a space of appearance into which the reality of that injustice can be made known. It is *as if* the deprivation has no tangible, no *real*, effect. *Anything* can happen, remember, where *nobody cares*. Nobody cares, we can say, when they are not confronted with the reality of that which has happened.

For the sake of clarity I will take an example commonly deployed by Arendt herself. The criminal may be denied his right to freedom. That criminal cannot be said to be rightless however where his deprivation occurs in conditions of publicity. Appearance in the court room,

¹⁸³ Arendt, *OT*, Pt.II, Ch.5, p.376

¹⁸⁴ Arendt, *OT*, Pt.II, Ch.5, p.375 [my emphasis]

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his actions judged against public laws, an open trial, notification of the case being made against him, reasoned judgments, free correspondence with lawyers, the right to meet with journalists, the right to *reappear*, in an appeal court, all serve (amongst other things) to cast publicity on the justice/injustice of the deprivation. When Arendt said that *innocence* was the mark of rightlessness, she can best be understood in this regard. Stateless people were less than criminals because, “[t]hey [the criminals] at least know why they are in a concentration camp and therefore have kept a remnant of their juridical person.”¹⁸⁵

In these circumstances, the rather abstract relationship between the public realm, the space of appearance and reality in *The Human Condition* takes on a chilling and immediate significance for the rightless person of *The Origins*.¹⁸⁶ So, when she says that “[t]he subjectivity of privacy...can never replace the reality rising out of the sum total of aspects presented by one object to a multitude of spectators,” so that “[o]nly where things can be seen by many in a variety of aspects without changing their identity...can worldly reality truly and reliably appear,”¹⁸⁷ we can make sense of this, politically speaking, in her reflections on the testimony of concentration camp survivors. The very term “public”, she said, “means, first that everything that appears in public can be seen and heard by everybody *and has the widest possible publicity*. For us, appearance – something seen and heard by others as well as by ourselves – constitutes reality.”¹⁸⁸ Rightless, condemned to a life without a community, without a space of appearance, Arendt footnotes a quote from one survivor, Bruno Bettelheim,¹⁸⁹ who said:

It seemed as if I had become convinced that these horrible and degrading experiences somehow did not happen to ‘me’ as subject but to ‘me’ as an object. This experience was corroborated by the statements of other prisoners... It was as if I watched things happening in which I only vaguely participated... ‘This cannot be true, such things just do not happen.’... The prisoners had to convince themselves that this was real, was

¹⁸⁵ Arendt, *OT*, Pt.III, Ch.3, pp.577-578 [my emphasis]

¹⁸⁶ Margaret Canovan is entirely correct in her assessment that, in order to understand Arendt’s political thought, “scholars cannot afford to concentrate on *The Human Condition* to the point of ignoring her earlier work, including her unpublished writings.” Canovan (1992), preface, p.vii

¹⁸⁷ Arendt, *HC*, Ch.2, p.57

¹⁸⁸ Arendt, *HC*, Ch.2, p.50 [my emphasis]

¹⁸⁹ Bruno Bettelheim ‘On Dachau and Buchenwald’ (from May, 1938, to April, 1939), *cit.* below.

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*really happening and not just a nightmare. They were never wholly successful.*¹⁹⁰

The second claim I would like to make for the “right to have rights” is one of constituency: on whom does this right and its corresponding duties fall? Arendt’s contemporary, Richard Bernstein has said that “[t]he fundamental deprivation that occurs when one is stripped of the right to have rights is that an individual no longer has the opportunity to act.”¹⁹¹ Arendt herself said:

*The fundamental deprivation of human rights is manifested first and above all in the deprivation of a place in the world which makes opinions significant and actions effective. Something much more fundamental than freedom and justice, which are rights of citizens, is at stake when belonging to the community into which one is born is no longer a matter of course and not belonging no longer a matter of choice, or when one is placed in a situation where, unless he commits a crime, his treatment by others does not depend on what he does or does not do. This extremity, and nothing else, is the situation of people deprived of human rights. They are deprived, not of the right to freedom, but of the right to action; not of the right to think whatever they please, but of the right of opinion.*¹⁹²

Indeed, for all of the debate as to what the “right to have rights” actually means, it is often overlooked that Arendt herself explained what she meant by it: “to live in a framework where one is judged by one’s actions and opinions,” and not by one’s identity. Action and opinion, for Arendt, could *only* be realized in the public realm. *Contra* Schmitt, for whom the political community was defined in the *distinction* between friend and enemy, and the action spurred as a result – “Each participant,” he said, “is in a position to judge whether the adversary intends to negate his opponent's way of life and therefore must be repulsed or fought in order to preserve one's own form of existence”¹⁹³ - standing on the shoulders of such giants as Pericles and Aristotle, Arendt defined the public realm as the very space created by people who come

¹⁹⁰ Bettelheim, quoted in Arendt, *OT*, Pt.III, Ch.3, p.566, fn.128

¹⁹¹ Richard J. Bernstein *Hannah Arendt and the Jewish Question* (Cambridge, Polity Press, 1996), Ch.3, pp.82-83

¹⁹² Arendt, *OT*, Pt.II, Ch.5, p.376

¹⁹³ Carl Schmitt *The Concept of the Political* (George Schwab, trans.) (Chicago, University of Chicago Press, 1996), p.27

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together in this spirit of action, “no matter where they happen to be.”¹⁹⁴ Thus the “right to have rights” can be thought of in two constituent parts. First, it is a right of individuals to have available a space of appearance. As such, it is the right of all, when specific rights are taken from or denied to them, to say to others *this* action is being brought upon me, *this* action is real, *this* action is oppressive, is unjust, is unpolitical. It is their *political* right, in other words, to confront others with *their* duty of judgment. Second, because the public realm exists only wherever people live as a *polis*, with the purpose of acting and speaking together, the “right to have rights” entails the duty on all responsible men actively and aggressively to pursue (by legislation, she said, in democracies; by revolution in tyrannies) the conditions in which acting and speaking take on relevance. All tyrannies, be they the tyranny of the people, parliament, king, or elite, says Arendt, seek:

*...the banishment of the citizens from the public realm and the insistence that they mind their private business while only “the ruler should attend to public affairs.”... It is the obvious short-range advantages of tyranny, the advantages of stability, security, and productivity, that one should beware, if only because they pave the way to an inevitable loss of power, even though the actual disaster may occur in a relatively distant future.*¹⁹⁵

If stateless people discovered their own superfluity at the very moment they needed the inalienable Rights of Man most, it was equally true, in Arendt’s eyes, that those upon whom this duty fell were unwilling to act – distracted by their own (golden age of) security. As Andrew Schaap has said, “[t]otalitarianism is world destroying because it makes individuals superfluous. To resist the legacy of the death camps, Arendt appropriates for modernity the Ancient Greek vision of the world-disclosing potential of politics.”¹⁹⁶ Similarly, Benhabib has argued that what remains important in Arendt’s phenomenology of totalitarianism is the study of the public sphere and of the associations which are its lifeblood.¹⁹⁷ Indeed, Benhabib has attributed to Arendt’s study of totalitarianism a forerunner of modern theories of civil society, “for a multiplicity of

¹⁹⁴ Arendt, *HC*, Ch.5, p.198

¹⁹⁵ Arendt, *HC*, Ch.5, pp.221-222

¹⁹⁶ Andrew Schaap *Political Reconciliation* (London and New Yourk, Routledge, 2005), Ch.5, p.59

¹⁹⁷ Seyla Benhabib *The Reluctant Modernism of Hannah Arendt* (Thousand Oaks, London, New Dehli, Sage Publications, 1996), Ch.3, p.69

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public spaces are,” she said, “the sine qua non of an independent and vigorous civil society as a component of democratic cultures everywhere.”¹⁹⁸

Pettit, in his dismissal of Arendt as a ‘populist’, misses, it seems to me, the fundamentally neo-Roman nature of her political thought; which can best be teased out by reference to her own experience, first on the edges of legality in Germany, and then, cast outside of legality altogether when she fled the Nazi regime. We have seen that the neo-Roman writers who looked back to Tacitus, and to Machiavelli, found that one’s humanness was at stake when one submitted to the domination of another, for reason only of the fear of commotion. So, the first strand of Arendt’s neo-Roman thought is that which confronts modern man with just that proposition: that to surrender the responsibility of action is to surrender something of what makes us human; a warning which manifested itself fully in the spectre of living corpses created and then destroyed in the concentration camps. Concluding Part I, I will turn my attention to the second strand of Arendt’s neo-Romanism, her search for the ways and means, within the American republic, actively to resist the sort of political domination which seeks the closure of this space, and the disavowal of this responsibility.

Part I(3) *Framing the extraordinary*

The social question

Arendt’s political thought is often characterized by those scholars who follow her most closely as being frustratingly incomplete. George Kateb presented a fairly typical critique of her work when he wrote that for Arendt, “politics is all the more authentic when it is eruptive rather than when it is a regular and already institutionalized practice, no matter how much initiative a practice accommodates.”¹⁹⁹ With its centering of action at the heart of her political thought, and the alignment which she draws between action and both miracle and natality, Kateb described Arendt’s conception of politics as “a burst of unfrightened, superabundant energy;”²⁰⁰ her talents, he said, always “best engaged by what is extraordinary, not by the normal. She writes with the

¹⁹⁸ Benhabib (2006), Ch.3, p.75 [my emphasis]

¹⁹⁹ George Kateb ‘Political action: it’s nature and advantages’, in Dana Villa (ed.) *The Cambridge Companion to Hannah Arendt* (Cambridge, Cambridge University Press, 2000), pp.130-148, pp.134-135

²⁰⁰ Kateb (2000), p.135

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fullest power about imperialism, revolution, civil disobedience, and totalitarianism, while less urgent or dramatic phenomena mostly fail to set her mind in motion.”²⁰¹ That Arendt was at her most captivating when engaging with the extraordinary is arguably true, though it must be said that having narrowly evaded detention in Nazi Germany, and having fled as a stateless Jewess to the United States where she witnessed the rise of the Civil Rights movement and the various controversies which surrounded the Vietnam War, there was much of the extraordinary to inspire her, even before Adolf Eichmann was captured and put on trial in Israel for his role in the Final Solution. It must also be said that the definitive statement of Arendt’s political theory, the lessons to be learned from her ventures into the extraordinary, although planned, remain, with her passing, finally unwritten. Some time after the publication of *The Human Condition*, Arendt had submitted a proposal to the Rockefeller Foundation in which she had set out her plans to consider “the various modi of human plurality *and the institutions which correspond to them.*”²⁰² In this project, to be entitled *Introduction into Politics* Arendt, it would seem, intended to deal in greater depth with ‘the normal’: “authority; government; power; law; war; etc.”²⁰³ If, however, the promise to turn her mind to just those questions offered in any way a response to Kateb’s frustrations, that she did *not* see through this plan serves only to support those suspicions – for it was precisely a burst of unfrightened, superabundant energy which distracted Arendt from this project and inspired the shift in focus which led, instead, to the publication of *On Revolution*. As Margaret Canovan has said, the spontaneous outbreak of the Hungarian Revolution in 1956 (as well as its swift defeat by the invading Soviets) quickly caught Arendt’s attention. “As a shining example of free political action, it seemed to vindicate Arendt’s attempts to recover authentic political experiences from the distortions of philosophical tradition and modern society.”²⁰⁴ The extent of her fascination with the Hungarian rebellion was captured in a correspondence with Heinrich Blücher written around the time of the Suez crisis: “*everything* is overshadowed,” she said, “*except my joy about Hungary*, by this crazy Israel-episode.”²⁰⁵ Above all else, two aspects of the Hungarian Revolution (or, at least, her perception of it) had captured Arendt’s

²⁰¹ Kateb (2000), p.135

²⁰² ‘Description of Proposal’, Rockefeller Correspondence 013872, quoted in Canovan (1992), Ch.4, pp.100-101, fn.3 [my emphasis] [hereafter *Rockefeller proposal*]. *Contra* Young-Bruehl, who attributes who suggests 1956 as the probable year that this proposal was made, Canovan suggests the later date of 1959, as the proposal itself refers to work published in 1958.

²⁰³ Arendt, *Rockefeller proposal*, quoted in Canovan (1992), Ch.4, p.100

²⁰⁴ Canovan (1992), Ch.4, p.144

²⁰⁵ Arendt to Blücher, 31 October 1956, quoted in Young Bruehl (1982), Ch.7, p.298

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imagination. First, unique amongst modern revolutions, Arendt believed that the Hungarian uprising sought not social betterment, but rather freedom “and hardly anything else.”²⁰⁶

*No revolution has ever solved the ‘social question’ and liberated men from the predicament of want, but all revolutions, with the exception of the Hungarian Revolution in 1956, have followed the example of the French Revolution and used and misused the mighty forces of misery and destitution in their struggle against tyranny or oppression.*²⁰⁷

Second, the path which the rebels had taken had provided, in her eyes, a sense of vindication both for her analysis of totalitarianism, and the “consciously planned [new] beginning” for which the concluding remarks of the first edition of *The Origins of Totalitarianism* was such a powerful rallying-cry.²⁰⁸

*...nothing indeed contradicts more sharply the old adage of the anarchistic and lawless ‘natural’ inclinations of a people left without the constraint of its government than the emergence of the councils that, wherever they appeared, and most pronouncedly during the Hungarian Revolution, were concerned with the reorganization of the political and economic life of the country and the establishment of a new order.*²⁰⁹

At the theoretical core of *The Human Condition* (a publication in which Arendt sought, as Canovan said, to sketch “a kind of preliminary to political theory proper [by investigating] the human activities that have most bearing upon politics”²¹⁰) sits not only a rethinking of politics properly so called, but a corresponding reevaluation of the *nonpolitical*. As such, Arendt’s early appeals to antiquity (and by the ancients she was greatly inspired) served to mark a dichotomy between realms political and nonpolitical; the familiar, if contested, division between public and private. “According to Greek thought,” she said, “the human capacity for political organization is not only different from but stands in direct opposition to that natural association whose center

²⁰⁶ Arendt, *OT*, subsequently omitted ‘epilogue’, quoted in Canovan (1992), Ch.4, p.144

²⁰⁷ Arendt, *OR*, Ch.2, p.112

²⁰⁸ Arendt, *OT*, ‘concluding remarks’, p.631

²⁰⁹ Arendt, *OT*, Ch.6, p.271

²¹⁰ Canovan (1992), Ch.4, p.100

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is the home (*oikia*) and the family.”²¹¹ With the rise of the ancient city-state citizens had found themselves flitting between two sharply distinct orders of existence. The private realm, given form in the household, was the realm of property, a realm of ownership.²¹² The public realm on the other hand was a realm of community, of the communal, of that which is common.²¹³ Action, “the only activity that goes on directly between men without the intermediary of things or matter”;²¹⁴ action, which “corresponds to the human condition of plurality, to the fact that men, not Man, live on earth and inhabit the world”;²¹⁵ action, which “always establishes relationships and therefore has an inherent tendency to force open all limitations and cut across all boundaries”;²¹⁶ was for Arendt, the very lifeblood of *res publica*. Again appealing to the ancients to guide her distinctions she said:

Aristotle’s definition of man as zōon politikon was not only unrelated and even opposed to the natural association experienced in household life; it can be fully understood only if one adds his second famous definition of man as zōon logon ekhon (“a living being capable of speech”).

Because the public realm was one of the communal, and not one of property, no one citizen, body of citizens, nor even the general will of all, could presume ownership in, or mastery over, the affairs of the *polis*, which demanded a condition of political equality. As Cohen and Arato have said, “[t]he public sphere in Arendt’s view presupposes a plurality of individuals unequal by nature who are, however, “constructed” as politically equal. According to her, the meaning of the *polis* as *isonomia* (literally, equality in relation to law) is that of “no rule,” in the sense of an absence of differentiation into rulers and ruled within the citizen body.”²¹⁷ To force others in the public realm by violence or by command was, for Arendt, to behave contrary to the political way of life: “[t]o be political,” she said, “to live in a *polis*, meant that everything was decided

²¹¹ Arendt, *HC*, Ch.2, p.24

²¹² Arendt, *HC*, Ch.2, p.24 and pp.58-67

²¹³ Arendt, *HC*, Ch.2, p.24 and pp.50-58

²¹⁴ Arendt, *HC*, Ch.1, p.7

²¹⁵ Arendt, *HC*, Ch.1, p.7

²¹⁶ Arendt, *HC*, Ch.5, p.190

²¹⁷ Jean L. Cohen and Andrew Arato *Civil Society and Political Theory* (Cambridge, Massachusetts, and London, England, The MIT Press, 1992), Ch.4, p.179. At fn.12, Cohen/Arato suggest that such an understanding of “no rule” is compatible with the Aristotelian idea that citizens take in turns the duties of rulership.

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through words and persuasion”.²¹⁸ *What* though was to be talked about and acted upon in the public realm? As an exasperated Mary McCarthy put directly to her friend in a frank exchange at the University of Toronto, “speeches can’t be just speeches. They have to be speeches about something.”²¹⁹

Arendt herself was never comfortable answering this question. In *The Human Condition*, and most controversially in the second chapter of *On Revolution*, she leaves us only to define the content of public discourse by elimination: by discounting that which she held to be *unpolitical*, that against which the public realm is set: that which private.

Almost everywhere in Arendt’s work, the content of the public realm was defined by deduction.²²⁰ If the public realm was the realm of freedom, it was so because those welcome to enter had first to master the necessities of (their private) lives.²²¹ If the public realm was one of equality, it was so because in the privacy of the household was established the *inequalities* which facilitated that freedom. The ancients, she believed, found it necessary to possess slaves because the maintenance of life was itself a slavish activity: “[b]ecause men were dominated by the necessities of life, they could win their freedom only through the domination of those whom they subjected to necessity by force.”²²² She continued:

*The institution of slavery in antiquity, though not in later times, was not a device for cheap labor or an instrument of exploitation for profit but rather the attempt to exclude labor from the conditions of man’s life.*²²³

It followed (though not, perhaps, inevitably) that that if the public realm was the realm of ‘no rule’ this was because only by ruling over his household, over his family and his slaves, could

²¹⁸ Arendt, *HC*, Ch.2, p.26

²¹⁹ Mary McCarthy, in exchange with Hannah Arendt at the University of Toronto, quoted in Benhabib (1996), Ch.5, p.155

²²⁰ On this, see Shiraz Dossa *The public real and the public self: The political theory of Hannah Arendt* (Waterloo, Ontario, Canada, Wilfrid Laurier University Press, 1989), esp. Ch4

²²¹ Arendt, *HC*, Ch.2, p.32

²²² Arendt, *HC*, Ch.3, pp.83-84

²²³ Arendt, *HC*, Ch.3, p.84

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man escape the force of that labor;²²⁴ if the public realm was the realm of persuasion, then the *isnomia* which made this possible was achieved at the cost of a justified, pre-political, violence:

*Because all human beings are subject to necessity, they are entitled to violence towards others; violence is the pre-political act of liberating oneself from the necessity of life for the freedom of the world.*²²⁵

By stubbornly defining the public realm in relation to that which she deemed private (and therefore unpolitical), the substance of Arendt's politics proves elusive. As Dossa has said, "the content of [Arendt's] politics is the exercise of freedom in speech and in action";²²⁶ this to the extent that when McCarthy reflected that all that was left was "war and speeches" she was not far from the truth. At some point or another Arendt had excluded legislation, poverty, constitution making, welfare and housing provision, work, procreation, nourishment, family life, and even (strikingly for a republican!) education from the realm of the public, as things social or pre-political in their nature. Indeed, in response to McCarthy's question she offered only the vague reply that there will always be affairs "worthy to be talked about in public": that "[p]ublic debate can deal only with things which...we cannot figure out with certainty".²²⁷

The much derided 'social question', which colours Arendt's analyses of the American and French Revolutions,²²⁸ emerges when, in the course of revolution, not freedom and *isnomia* in the *polis*, but rather the condition of poverty becomes the driving force of rebellion. More than deprivation, poverty for Arendt, is, simply put, the direct expression of the private realm:

*...poverty is abject because it puts men under the absolute dictate of their bodies, that is, under the absolute dictate of necessity as all men know it from their most intimate experience and outside all speculations. It was under the rule of this necessity that the multitude rushed to the assistance of the French Revolution, inspired it, drove it onward, and eventually sent it to its doom...*²²⁹

²²⁴ Arendt, *HC*, Ch.2, p.32

²²⁵ Arendt, *HC*, Ch.2, p.31

²²⁶ Dossa (1989), Ch.4, p.73

²²⁷ Arendt, quoted in Benhabib (1996), Ch.5, p.156

²²⁸ as well as the later Hungarian Revolution...

²²⁹ Arendt, *OR*, Ch.2, p.60

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The collapse (already observed by Constant) of the French Revolution into first Robespierre's terror, and then the construction of Napoleon's tyranny, was traced by Arendt to the failure on the part of French revolutionaries to distinguish the political question of freedom from the social question of poverty (as misery and want). This dichotomy bears little scrutiny however, for the fact is that the very location of the boundary *between* public and private, political and social, is itself contestable: a question 'worthy of public debate';²³⁰ moreover, from the answer to *this* question flows a dangerous arbitrariness of inclusion and exclusion, participation and domination. Those who are excluded from the public realm by their poverty, by their misery and want, must, to follow Arendt's own analysis of the stateless problem, also be cast into darkness, and deprived of the publicity required to register their condition against the dominant voices who simultaneously exclude these naked beings *from* their deliberations, and yet include them, *by* their determinations (for example, in the allocation of scarce resources). As James Bohman has said,

*...powerful groups can make presumptive claims about the "we" that has deliberated publicly or come to an agreement, a "we" that does not pass the test of plurality and publicity contained in conceptions of political equality.*²³¹

The fluidity of the boundary between social and political problems was nowhere more salient than in Arendt's belief that the *success* of the American Revolution was largely due to the "[absence] from the American scene [of] misery and want."²³² Implicitly rejecting the (then) dominant view of the revolution as producing, predominantly, an "economic document drawn with superb skill by men whose property interests were immediately at stake," excluding, from the outset, the property-less masses,²³³ Arendt comes much closer to the (then) emerging revision of that moment, led by Gordon S. Wood and Bernard Bailyn, as one characterized not by self/propertied interests, but with civic virtue and freedom.²³⁴ "[S]ince the laborious in America

²³⁰ ...and this was precisely the reply of Richard Bernstein to Hannah Arendt in the exchange at Toronto, Benhabib (1996), Ch.5, p.156

²³¹ James Bohman "The Moral Costs of Political Pluralism: The Dilemmas of Difference and Equality in Arendt's "Reflections on Little Rock", in Larry May and Jerome Kohn (eds.) *Hannah Arendt: Twenty Years Later* (Cambridge, Massachusetts, and London, England, The MIT Press, 1996), pp.53-80, p.64

²³² Arendt, *OR*, Ch.2, p.68

²³³ Charles A. Beard *An Economic Interpretation of the Constitution of the United States of America* (New York, The Macmillan Company, 1913), Ch.6

²³⁴ So, for Wood:

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were poor *but not* miserable,” she said, “they were not driven by want, and the revolution was not overwhelmed by them.”²³⁵ Yet, as she herself had to admit, the social question was not “absent” from the American revolution at all. The political freedom of the American founders was built upon the social domination of the negro slave. “As it is,” Arendt said, “we are tempted to ask ourselves if the goodness of the poor white man’s country did not depend to a considerable degree upon black labor and black misery – there lived roughly 400,000 Negroes along with approximately 1,850,000 white men in America in the middle of the eighteenth century, and even in the absence of reliable statistical data we may be sure that the percentage of complete destitution and misery was considerably lower in the countries of the Old World. *From this, we can only conclude that the institution of slavery carries an obscurity even blacker than the obscurity of poverty; the slave, not the poor man, was ‘wholly overlooked’.*”²³⁶ That *this* obscurity is a question both social *and* political is demonstrable by the extraordinary actions of men and women which have, over time, began to overcome that exclusion: in war (the American Civil War, 1851-56), in speech (President Lincoln and Martin Luther King only the most prominent of many who by speech sought persuasion over force and violence), in the telling of stories,²³⁷ through individual actions (Rosa Lee Park’s refusal to vacate her seat on a bus just one example), and the actions-in-concert which they inspired (through, for example, the emergence of the Civil Rights movement). If the clear distinction between social and political, upon which Arendt placed so much weight in both *The Human Condition* and in *On Revolution*, is untenable however, what, to repeat McCarthy one last time, does *this* leave us? Echoing the critique of Arendt made by George Kateb, that she was, by and large, unmoved by ‘normal’ politics, Shiraz

*The sacrifice of individual interests to the greater good of the whole formed the essence of republicanism and comprehended for Americans the idealistic goal of their Revolution.*²³⁴

(Gordon S. Wood *The Creation of the American Republic, 1776-1787* (New York and London, Chapel Hill, 1969), Ch.2, p.53)

²³⁵ Arendt, *OR*, Ch.2, p.68 [my emphasis]

²³⁶ Arendt, *OR*, Ch.2, p.71 [my emphasis]

²³⁷ Indeed, it has been suggested that story and song was used by fleeing slaves as a way of ‘coding’ escape messages, means and routes to their fellows. The most commonly cited example is ‘Follow the Drinking Gourd’, which was first published in 1928, by the American folklorist H.B. Park. Park claimed that he had heard the song in various guises across the Southern states in the early twentieth century, having evolved, he claimed, from its introduction to slaves by a touring Underground Railroad operative, Peg Leg Joe, who moved from plantation to plantation bringing the song, and its message to ‘follow the drinking gourd’ (code, said Park, for the Big Dipper star formation) to freedom, to the slave populations there. See, for example, Sculley Bradley (ed.) *The American Tradition in Literature* (4th ed.) (New York, W.W. Norton, 1974)

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Dossa has said that “[h]er lack of interest in institutional problems is on a par with her refusal to see economic issues as part of politics.”²³⁸ She was, he said, “unique among political theorists in demanding from politics so little materially, and so much more humanly.”²³⁹ Certainly Arendt’s appeals to ancient Greece in *The Human Condition*, her sharp division of public and private, and the subsequent exclusion of social questions from the realm of the political lend credence to such a view. This was after all a woman who had described “[a] life without speech and without action” as one “literally dead to the world”.²⁴⁰ In the final analysis however, *On Revolution* turns out not to be a celebration of the success of the American Revolution at all, and rather a lament of its *failure* to *institutionalize* the spirit of action which had driven it.

The failure of post-revolutionary thought to remember the revolutionary spirit and to understand it conceptually was preceded by the failure to provide it with a lasting institution. The revolution, unless it had ended in the disaster of terror, had come to an end with the establishment of a republic which, according to the men of the revolutions, was ‘the only form of government which is not eternally at open or secret war with the rights of mankind’. But in this republic, as it presently turned out, there was no space reserved, no room left for the exercise of precisely those qualities which had been instrumental in building it. And this was clearly no mere oversight...²⁴¹

What the political crises of the 1960s had taught Arendt was that, in that great modern republic, the United States of America, the excluded were no longer the stateless masses, nor the impoverished mob. American citizens had, it seemed, been themselves excluded from public life, from political deliberation, as bureaucratic government (of which the NSC was but one example among many such organisations), and the procedural state, reduced politics to a liberal, rights based ‘end of history.’ Although she never framed it in these terms, it was as though the crises which surrounded her had, where she least expected it (note, for example the sudden change in tone, from optimistic praise, to pessimistic lament which occurs in the final chapter of *On Revolution*, as well as the full blown disenchantment which colours *Crises of the Republic*) awoken Arendt to the realization that Americans were finding themselves cast into the social

²³⁸ Dossa (1989), Ch.4, p.73

²³⁹ Dossa (1989), Ch.4, p.73

²⁴⁰ Arendt, *HC*, Ch.5, p.176

²⁴¹ Arendt, *OR*, Ch.6, p.232

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realm. Subject to the determinations of a political class, a ruling elite, which excluded them, and unable to register in the deliberations which informed those debates, the public space had ben deserted. Once again, hers was a call to arms. Just as, for Machiavelli, the health of the Roman republic, its capacity for liberty, could be measured in the ways and means by which the many who ‘had not’ power could resist, irritate, and ‘govern’ the few who held political power, so Arendt looked to discover what, if any, sites of resistance the founding fathers, who themselves had created a republic from resistance to a tyrant king, had bequeathed to their descendants.

A constitution of judges? The role of the court in Arendt’s constitutionalism

There is little doubt that, despite her fascination with law and legal process (see, for example, her analysis of Eichmann’s trial in Jerusalem, her reflections on the Supreme Court’s rulings on racial segregation, her analysis of the ‘juridical person’ in man, her formulation of the *right to have rights*), lawyers themselves have spent almost as little time on Arendt’s work, as Arendt scholars have on her legal thought. Indeed, in terms of substantive work on her legal thought, by a legal scholar, a recent piece by the international lawyer Jan Klabbers, in the *Leiden Journal of International Law*, with a focus on the international criminal court, seems to be about the sum of it.²⁴² In many respects, this shouldn’t be surprising, given – as we have seen – Arendt’s apparent neglect of ‘normal’ politics. And yet, given that Arendt’s optimism in the *Origins* was based on the hope of founding new legal structures, given too that her pessimism in *On Revolution* was based on the failure to *institutionalize* the revolutionary spirit by which the American republic was made, it would seem that a consideration of Arendt’s political thought is necessarily incomplete without pausing to reflect upon those structures, the institutions within which the spirit of politics endured. Concluding Part I, I will consider four ‘ways and means’ by which (it has been argued that) Arendt sought to guarantee that space for legitimate, constitutional resistance: in the courts, through judicial review; through civil disobedience; in the revolutionary councils; and in the exercise of what she called the fundamental political right, the right to information.

²⁴² Jan Klabbers ‘Possible Islands of Predictability: The Legal Thought of Hannah Arendt’ (2007) 20 *Leiden Journal of International Law* 1. There was also a chapter by Jeremy Waldron, ‘Arendt’s constitutional politics’, in Dana Villa (ed.) *The Cambridge Companion to Hannah Arendt* (Cambridge, Cambridge University Press, 2000), p.201, however, this piece is somewhat light on questions of Arendt’s constitutional *law*.

Arendt's view of the courts is not entirely clear cut. One of the (very) few articles which touch upon the theme is a recently written piece in the journal *Constellations*, by Cohen and Arato: *Banishing the Sovereign? Internal and External Sovereignty in Arendt*.²⁴³ For them, Arendt embraces a "constitution of judges," putting, they say, "a glowing senatorial aura on Wilson's rather negative depiction of the Court as 'constituent assembly in permanent session'."²⁴⁴ This position is not implausible, and indeed would place Arendt within a tradition of American legal scholars for whom the republican revival in American constitutional *thought* meant, above all, placing the US Supreme Court to the front and centre of constitutional *design*.²⁴⁵ In *On Revolution*, Arendt certainly seems to look to the Supreme Court with a reverence for its authority befitting Cohen and Arato's description. Yet, a closer look at *On Revolution* reveals, from Arendt, a much more nuanced position:

*In novelty and uniqueness the institution of the [U.S.] Senate equals the discovery of judicial control as represented in the institution of Supreme Courts. Theoretically, it only remains to note that in these two acquisitions of revolution – a lasting institution for opinion [the Senate] and a lasting institution for judgement [the Supreme Court] – the Founding Fathers transcended their own conceptual framework, which, of course, antedated the Revolution; they thus responded to the enlarged horizon of experiences which the event itself had opened up to them.*²⁴⁶

In chapter 5 of *On Revolution*, Arendt explained that, from the Romans, the Founding Fathers had learned to differentiate power and authority. In Rome the function of authority was political, and was incorporated in a political institution: the Senate (not to be confused with its American namesake). The Senate, the seat of authority in ancient Rome, derived its own authority from the

²⁴³ Jean Cohen and Andrew Arato 'Banishing the Sovereign? Internal and External Sovereignty in Arendt' (2009) 16(2) *Constellations* 307

²⁴⁴ Cohen and Arato (2009), p.317

²⁴⁵ The leading works are Cass Sunstein's 'Beyond the Republican Revival' (1988) 97 *Yale Law Journal* 1539, and Frank Michelman's 'Law's Republic' (1988) 97 *Yale Law Journal* 1493. For a strong counter-point, see Kathryn Abrams' 'Law's Republicanism' (1988) 97 *Yale Law Journal* 1591. "The legal foray into republicanism," says Abrams, of Sunstein and Michelman's efforts, "has been sidetracked by its intellectual premises. Straitened by the distinctive problems and perspectives of liberal legalism, it has produced a muted hybrid, oddly focussed on the role of the courts." (p.1591)

²⁴⁶ Arendt, *OR*, Ch.6, pp.228-229

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fiction that in it were permanently recreated the founding fathers of Rome themselves. “Through the Roman Senators, the founders of the city of Rome were present, and with them the spirit of foundation was present, the beginning, the *principium* and principle, of those *res gestae* which from then on formed the history of the people of Rome.”²⁴⁷ It was not the foundation itself then, but its (mythical) reincarnation in a political institution which tied the changes of the present to the vitality of beginning, the vibrancy of the constitutive *act* of foundation; which tied, in other words, future generations to their constitutional origins.

In America, however, the seat of authority was *not* a political institution but a legal one. Judicial control of executive and legislative power found its own authority not in the political act of foundation, but rather in that which was founded: from the written document of the constitution itself. As such, the role of the court was not to give advice, but rather to interpret. If the Roman Senate sat as the (fictional) personification and institutionalisation of a *constituent* power, the very embodiment of action, the court sat as the (fictional) personification of the constitution itself. Accordingly, for the Romans, the “uninterrupted continuity of [constitutional] augmentation and its inherent authority could come about only through tradition, that is, through the handing down, through an unbroken line of successors, of the principle established in the beginning. *To stay in this unbroken line of successors meant in Rome to be in authority.*”²⁴⁸ Corresponding to the meaning, if not the practice, of authority, in America to act *according to* the constitution, to act *intra vires*, was to be in authority, the ongoing interpretation and reinterpretation of that document being the role reserved for the Supreme Court.²⁴⁹ By locating in the court the role of the interpretation of already constituted laws, Arendt showed herself to be much closer to Ely’s narrow, procedural vision of judicial review,²⁵⁰ than to Michelman’s juris-generative republican citizenship. Indeed, *contra* Michelman, for Arendt it was the court’s *lack* of power to initiate fundamental change which made it fit for authority.²⁵¹ Writing in the era of the Warren Court, and *against* the progressive steps taken by the court to bring an end to racial desegregation in schools, Arendt remained adamant that the court’s authority was at stake where it overstepped the limits of that role, and tried to fundamentally change the nation’s fabric.

²⁴⁷ Arendt, *OR*, Ch.5, p.201

²⁴⁸ Arendt, *OR*, Ch.5, p.201 [my emphasis added]

²⁴⁹ Wilson, quoted in Arendt, *OR*, Ch.5, p.200

²⁵⁰ Ely (1980)

²⁵¹ Arendt, *OR*, Ch.5, p.200

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Citing as evidence for this the results of polls conducted in the state of Virginia, which showed that 79% of those polled denied any obligation to accept the Court's ruling on desegregation as binding,²⁵² Arendt located the limits of law, and therefore the limits of the court's jurisdiction, in creating the conditions within which society could *choose* (perhaps slowly, over time) to change. The contrast with *forcing* desegregation, with burdening "children, black and white, with the working out of a problem which adults for generations have confessed themselves unable to solve," and which – amounting to advice – was, for Arendt, beyond the Court's proper jurisdiction, was with the proper setting aside of anti-miscegenation laws, which would not only have confronted adults with the responsibility for their problems, but also invited those adults to choose themselves whether or not to marry outwith the confines of their own race.²⁵³

If Arendt found "most startling"²⁵⁴ the courts overreach in cases such as *Brown*, however, it was, somewhat paradoxically, their reluctance to exercise their authority which led her, finally, to lose faith in the very institution of judicial review (and, therefore, if she ever had supported it, the constitution of judges). So, when she said that "[t]he establishment of civil disobedience among our political institutions might be the best possible remedy for [the] *ultimate failure* of judicial review," she did so against the back drop of the hugely controversial Vietnam war, and the many and varied attempts by citizens of the United States to challenge the legality of that war in the court room.²⁵⁵ Judicial review, she believed, had 'failed' because, by the court's response to these challenges, "the sovereignty principle and the reason of state doctrine [had been] permitted to filter back, as it were, into a system of government which denies them."²⁵⁶ In other words, she believed that by its *refusal* to ask questions of the legality and constitutionality of the war the judiciary, that separate and independent guardian of the constitution, had, by this omission, failed to preserve the very republican values upon which the American system of government had been (to paraphrase Lincoln) built by, and built for.²⁵⁷ At the heart of her criticism lay what she

²⁵² Hannah Arendt 'Reflections on Little Rock' (1959), in Baehr (ed.) (2000), pp.231-246, p.235 (hereafter *RLRK*)

²⁵³ Arendt, *RLRK*, p.236. For contemporary work which questions the court's ability to drive (rather than respond to already emerging) changes, see, for example, Richard Bellamy 'Republicanism, Democracy, and Constitutionalism', in Laborde and Maynor (eds.) (2008), pp.159-189; Gerald N. Rosenberg *The Hollow Hope: Can Courts Bring About Social Change?* (2nd ed.) (Chicago and London, University of Chicago Press, 2008)

²⁵⁴ *Ibid.*

²⁵⁵ Hannah Arendt 'Civil Disobedience', in Hannah Arendt *Crises of the Republic* (San Diego, London, New York, Harcourt Brace & Company, 1972), pp.49-102, p.101 [my emphasis added]

²⁵⁶ Arendt, *CD*, p.100

²⁵⁷ Arendt, *CD*, pp.100-102

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perceived to be the court's use of 'the political question doctrine' to deny *certiorari* to the Vietnam cases. The very existence of the doctrine is itself contested,²⁵⁸ whilst it has been argued that the trend in contemporary jurisprudence is a shift away from the doctrine²⁵⁹ and towards what Ran Hirschl has called 'juristocracy'.²⁶⁰ At the time of writing however Arendt was in no doubt that this doctrine, "according to which certain acts of the two other branches of government, the legislative and the executive, 'are not reviewable by the courts'",²⁶¹ was a corruption of the American constitution and not, as it has otherwise been defended, a cornerstone of the separation of powers.

In a provocative and influential article which appeared in a 1976 edition of *The Yale Law Journal* Louis Henkin suggested that the 'political question doctrine' can be thought of in two ways. "That there are political questions – issues to be resolved and decisions to be made by the political branches of government and not by the courts – is," he said, "axiomatic in a system of constitutional government built on the separation of powers."²⁶² In one respect, the 'political question doctrine' applied by the courts might take the shape of "the ordinary respect of the courts for the political domain."²⁶³ In other words, if competence for a particular matter has been committed by the constitution to the executive or legislative branch of government, then so long as the subsequent actions of that branch remain *intra vires* the courts should recognise and respect this by refusing itself jurisdiction to review those acts, rather than interfere where it is not (by constitutional prescription) welcome. Such questions, said Henkin, are the normal course of constitutional government, and so stand in no need of particular doctrinal protection. "A more meaningful political question doctrine," in Henkin's view, "implies something more and different: that some issues which *prima facie* and by usual criteria would seem to be for the

²⁵⁸ Louis Henkin 'Is There a "Political Question" Doctrine?', (1976) 85(5) *The Yale Law Journal* 597

²⁵⁹ See, for example, Mark Tushnet 'Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine' (2002) 80 *North Carolina Law Review* 1203. Most notably, in modern times, the doctrine has been challenged by the decision of the Supreme Court in the infamous *Bush v. Gore*. See, for example, Ran Hirschl 'Resituating the Judicialization of Politics: Bush v. Gore as a Global Trend' (2002) 15 *Can. J.L. & Jurisprudence* 191; Erwin Chemerinsky 'Bush v. Gore Was Not Justiciable' (2001) 76 *Notre Dame Law Review* 1093; Jack M. Balkin 'Bush v. Gore and the Boundary Between Law and Politics' (2001) 110 *Yale Law Journal* 1407

²⁶⁰ Ran Hirschl *Towards Juristocracy: The Origins and Consequence of the New Constitutionalism* (Cambridge, Massachusetts, and London, England, Harvard University Press, 2004)

²⁶¹ Arendt, *CD*, p.100

²⁶² Henkin (1976), p.597

²⁶³ Henkin (1976), p.598

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courts, will not be decided by them but, extra-ordinarily, left for political decision”: a doctrine which was, by Henkin’s admission, invoked in his day “to deny judicial review of constitutional issues raised by our national misfortunes associated with Vietnam.”²⁶⁴ When it was argued before the courts that the President had acted *ultra vires* by engaging in a war not declared by Congress, several of the courts²⁶⁵ held that questions of war and peace, fitting into the broad spectrum of international relations, were political questions best answered elsewhere. Thus, when Robert Luftig, a private in the U.S. Army, sought to challenge his pending transfer to Vietnam on the basis of the war’s illegality and unconstitutionality, an appellate court told him:

*It is difficult to think of an area less suited for judicial action than that into which the appellant would have us intrude. The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use of and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive.*²⁶⁶

On the face of it, the court’s reasoning seems (at least) justifiable. As Lon Fuller has said, there are some disputes, some decisions, which by their very nature are not suited to adjudication in the court room.²⁶⁷ One, for example, would not expect a court to decide which player is best to be selected to play as goalkeeper for the American soccer team. Such a decision is one which is clearly best left to the coach of the team, who has the benefit of seeing the players in action, of watching them train, and of engaging with them directly, not to mention the expertise which the coach has to make such decisions and the fact that he will be accountable (for example to a football association) for the results which he achieves based upon those types of decisions. Similarly, by invoking the political question doctrine in the Vietnam cases the court seemed to be saying that both Congress and the Executive were better placed to determine questions of foreign policy. They had greater expertise, they were democratically accountable for such questions of high politics, and they had access to information, such as intelligence reports, which were not available to the judges. This is all well and good, but for the fact that Robert Luftig had not

²⁶⁴ Henkin (1976), p.599

²⁶⁵ The constitutionality of the Vietnam War was challenged in over 70 cases!

²⁶⁶ *Luftig v McNamara* 373 F.2d 664 (D.C. Cir. 1967), pp.665-666. *Certiorari* was subsequently denied by the Supreme Court, 389 U.S. 934 (1967).

²⁶⁷ Lon Fuller ‘The Forms and Limits of Adjudication’ (1978) 92 *Harvard Law Review* 353

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asked the court to oversee the conduct of U.S. foreign policy. Rather, the question he put to the courts was subtly different and, *prima facie*, certainly justiciable:

*Has the Executive Branch of government exceeded its constitutional powers by committing American troops to a war in Vietnam without the requisite declaration of war by Congress?*²⁶⁸

By invoking the ‘political question doctrine’ to escape even this question, a question of *vires*, the courts had not only left individual citizens without a judicial remedy against (the potential) abuse of constituted power by the Executive, but, as Michael Malakoff said, they had made “a binding decision on justiciability which in effect, holds that federal courts will *never* question the President’s authority to wage war.”²⁶⁹ It was then *this* evasion which Arendt found so damning when she penned her essay on civil disobedience. Judicial review had failed, in her mind, because by its use of the ‘political question doctrine’ the judiciary had in essence deferred not only itself, but those individuals who sought to challenge their government, to an extra-ordinary but no less unquestioning obedience to an executive power now bereft of public scrutiny. Civil disobedience, she believed, was the *inevitable* result because the constitution had left nowhere for those citizens to turn. Arendt, in other words, had faced in *Civil Disobedience*, in her analysis of the ‘political question doctrine’, the problem of political exclusion, for this was precisely the effect of decisions such as *Luftig*, and discovered that by that exclusion, those same citizens had been *included* in the ‘deliberative outcomes’ of those (here the executive and judicial branches) who presumed to speak for the ‘we’ (Bohman), be that by the deployment in war of members of the armed services, or by the unquestioning obedience demanded of the citizens as a whole; by the engineering, it would seem, of their tacit consent and the rendering impotent of the power of dissent.

“The only remedies against the misuse of public power by private individuals,” and here we must include the illegal and unconstitutional exercise of executive power, “lie in the public realm itself, in the light which exhibits each deed enacted within its boundaries, in the very visibility to

²⁶⁸ Michael P. Malakoff ‘The Political Question and the Vietnam Conflict’ (1969-70) 31 *University of Pittsburgh Law Review* 504, p.505 [my emphasis]

²⁶⁹ Malakoff (1969-70), p.513

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which it exposes those who enter it.”²⁷⁰ So said Arendt in chapter 6 of *On Revolution* as she struggled not with the ‘success’ of the American Revolution in creating a still enduring constitution, but with its ‘failure’ to preserve within that constitution a space *for* freedom: the space *of* publicity. The courts having proven themselves unwilling to provide such a space (and unwilling rather than unable seems to have been her diagnosis),²⁷¹ Arendt turned her attention to alternative *loci* for the exercise of political freedom and the expression of publicity.

Civil Disobedience

In civil disobedience she found one such site. “Civil disobedience,” she said, “arises when a significant number of citizens have become convinced either that the normal channels of change no longer function, and grievances will not be heard or acted upon, or that, on the contrary, the government is about to embark upon and persists in modes of action whose legality and constitutionality are open to grave doubt.”²⁷² There are, I believe, three aspects of Arendt’s treatment of civil disobedience which, for the way in which they push the boundaries of her analysis of the public realm, are worthy of pause for thought: first, that civil disobedience requires (at least a simple) plurality of actors; second, that following this, civil disobedience is a public act; third, that civil disobedience is aimed against government.

It is the “greatest fallacy”, in Arendt’s view, to presume that talk of civil disobedients is talk about “individuals, who pit themselves subjectively and conscientiously against the laws and customs of the community”.²⁷³ In contrast with the conscientious objector, who acts alone, driven by the

²⁷⁰ Arendt, *OR*, Ch.6, p.253

²⁷¹ Following Alexander Bickel (see, for example, Alexander M. Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd. Ed.) (New Haven and London, Yale University Press, 1986)), she said:

Whatever the theory, the facts of the matter suggest that precisely in crucial issues the Supreme Court has no more power than an international court: both are unable to enforce decisions that would hurt decisively the interests of sovereign states and both know that their authority depends on prudence, that is, in not raising issues or making decisions that cannot be enforced. (Arendt, *CD*, pp.100-101)

²⁷² Arendt, *CD*, p.74

²⁷³ Arendt, *CD*, p.98

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privacy of her own morality, her own soul even²⁷⁴ and therefore remains “unpersuasive of others”²⁷⁵, in the civil disobedience which she witnessed, from the Civil Rights movement to the anti-Vietnam War movement, Arendt saw not individuals but voluntary associations of citizens: organized minorities whose capacity for persuasion was not in doubt. “The fact is that we are dealing with organized minorities, who stand against assumed inarticulate, though hardly “silent,” majorities, and I think it is undeniable that these majorities have changed in mood and opinion to an astounding degree under the pressure of the minorities.”²⁷⁶ Jurists, she said, had, by their nature, failed to understand this aspect of civil disobedience. All the more natural for men of the law to see the civil disobedient as “an individual law breaker, and hence a potential defendant in court.”²⁷⁷ So long as these minorities remained organized, organized by their *consent*, then the spirit American constitutional law,²⁷⁸ and its corresponding “right to *dissent*”²⁷⁹ would continue to have *political* force. Plurality as numbers alone, however, was insufficient in explaining the politico-constitutional face of the civil disobedient. As Arendt admitted, in the form (the crime, even) of “conspiracy”, the law had already recognised that individuals might join together and act as a group.²⁸⁰ There had to be something about the nature of their coming together which separated the civil disobedient not only from the conscientious objector, but also from the criminal conspirator. That ‘something’ was *publicity*.

There is “all the difference in the world,” Arendt said, between the criminal’s violation of the law and the citizens’ right to dissent.²⁸¹ Whilst the former acts in the shadows, seeking cover from his privacy, the civil disobedient was defined by the publicity of his transgression. “This distinction,” she continued, “between an open violation of the law, performed in public, and a clandestine one is so glaringly obvious that it can be neglected only by prejudice or ill will.”²⁸² In *The Human Condition*, Arendt held that publicity was essential in the common world because appearance, which means that something is “seen and heard by others as well as by ourselves”,

²⁷⁴ Arendt, *CD*, p.65-67

²⁷⁵ Arendt, *CD*, p.67

²⁷⁶ Arendt, *CD*, pp.98-99

²⁷⁷ Arendt, *CD*, p.99

²⁷⁸ Arendt here explicitly following Montesquieu, *CD*, p.94

²⁷⁹ Arendt, *CD*, p.94 [my emphasis added]

²⁸⁰ Arendt, *CD*, p.99

²⁸¹ Arendt, *CD*, p.74

²⁸² Arendt, *CD*, p.75

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constitutes reality.²⁸³ “Since our feeling for reality depends utterly upon appearance and therefore upon the existence of a public realm into which things can *appear out of the darkness of sheltered existence*, even the twilight which illuminates our private and intimate lives is ultimately derived from the much harsher light of the public realm.”²⁸⁴ In *Civil Society and Political Theory* Cohen and Arato, giving consideration to the social movements of the industrial working classes, wonder aloud if “that despised terrain of the social could after all become the scene of repoliticization in the context of movements that constitute a new public sphere and thereby mediate between the private and the public”.²⁸⁵ By thinking civil disobedience through the prism of a right to dissent and a corresponding right of publicity - so that disadvantaged minorities might organize themselves around the principle of their dissent; so that through their actions, no longer ‘overlooked’, those dissenters ‘appear out of the darkness of their sheltered existence’, shedding the light of publicity upon the injustice of their exclusion; so that through civil disobedience new spaces of appearance may emerge, troubling the established boundaries of constituted power²⁸⁶ - Arendt’s political thought appears (at least) capable of *admitting* the excluded social to the realm of the political.²⁸⁷

If I am right in this assertion, that Arendt’s analysis of civil disobedience allows us to move with more fluidity between private/public, social/political, exclusion/inclusion, than even Arendt herself was prepared to admit then this is not to say that privacy, as opposed to publicity, no

²⁸³ Arendt, *HC*, Ch.2, p.50

²⁸⁴ Arendt, *HC*, Ch.2, p.51 [my emphasis added]

²⁸⁵ Cohen & Arato (1992), Ch.4, p.199

²⁸⁶ Arendt says:

The space of appearance comes into being wherever men are together in the manner of speech and action, and therefore predates all formal constitution of the public realm... (Arendt, *HC*, Ch.5, p.199)

[T]he civil disobedient shares with the revolutionary the wish to “change the world,” and the changes he wishes to accomplish can be quite radical indeed... (Arendt, *CD*, p.77)

²⁸⁷ In *The Reluctant Modernism of Hannah Arendt*, Seyla Benhabib echoes Cohen and Arato, asking if the normative core of Arendt’s political theory, “the creation of a common world through the capacity to make and keep promises”, can be retained only by maintaining the sharp divisions between public/private, political/social. “Suppose we turned the arrow of influence around and asked ourselves: what if we were to extend this form of human relations, based upon the mutual promise-giving and keeping of individuals, to the economic, the social, and the intimate realms? What,” she asked rhetorically, “would Arendtian politics look like then?” (Benhabib (1996), Ch.5, p.166)

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longer remained key to her political thought. It has long been said that Arendt's reflections draw too heavily from a (supposed) Athenian model of politics as its own end. As Kateb says, "to speak," as Arendt seemed to in much of her work, "of the content of politics as politics, to speak of politics as speech concerned with the creation or perpetuation of the preconditions of such speech, is really to claim that the purpose of politics is politics, that politics (when authentic) exists for its own sake."²⁸⁸ Elsewhere however, Kateb has written that when she moves "[o]ut of the Greek world", (as Cohen/Arato say, to a Roman one), the content of her politics becomes ever more substantial.²⁸⁹ Dominated by accounts of the foundation of constitutions, as well as by their defence against internal corrosion, he says of Arendt's later works, that "[w]hen writing about modern revolutions that culminate in the creation of new constitutions, and about the practice of civil disobedience in America, she finds the appropriate center of her conception of the content of political action."²⁹⁰ In Arendt's journey from Greece to Rome, the metaphorical expression of the transition in her thought from *The Human Condition* to *On Revolution*, it becomes clear that for Arendt the public realm was not only the real power behind the republic, but, as with Machiavelli's *il popolo*, its final limitation. It was Arendt's hope that the crises of the 1960s would "provoke" her compatriots to rediscover, in civil disobedience, what their forefathers had discovered in revolution: action in *dissent*. As we shall see, in their own time, the institutionalization of that spirit came in what, for Arendt, was a genuinely new, authentically political model of government: council democracy.

Council democracy

Given the consistency with which Arendt expressed her admiration for the system of 'council democracy' as a viable alternative to what she saw as the failing, indeed inherently contradictory, model of the nation-state (more on which, in this section), it is surprising that the idea has so often been overlooked by her commentators. Those who *have* paused to reflect on the idea have tended to focus on its elucidation in the closing sections of *On Revolution*, arriving at a negative conclusion: Margaret Canovan's dismissal of the idea as being "utopian in the pejorative

²⁸⁸ Kateb, in Villa (ed.) (2000), p.134

²⁸⁹ George Kateb *Hannah Arendt: Politics, Conscience, Evil* (Totowa, New Jersey, Rowman & Allenheld, 1984), Ch.1, pp.18-22

²⁹⁰ Kateb (1984), Ch.1, p.18

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sense,”²⁹¹ the typical response.²⁹² However, there is a sense in which the charge of utopianism is (perhaps) a little unfair. After all, Arendt’s first published flirtations with the council system came some eighteen years before *On Revolution* was released, and were offered by way of a practical solution to one of the most difficult political questions of our time.

In her 1945 piece, ‘Zionism Reconsidered’, Arendt had expressed staunch opposition to the enforced creation of a Jewish state in Palestine, which she believed would be faced with near insurmountable internal and external problems.²⁹³ Externally, surrounded by (hostile) Arab states, the Jewish state would, she said, be forced to seek protection “from an outside power against their neighbours,” thereby allowing an outside party to alter the balance of power in the region, “or come to a working agreement with their neighbors;” an agreement for which she held out little hope.²⁹⁴ Internally, the absence of any mention of the Arab population *in situ* in those resolutions of the American Zionist Council (AZC) which called for a Jewish state concerned her greatly. If it was the case that a *sovereign* Jewish state was to be established in Palestine, then sovereignty in this sense meant (as the AZC had resolved) establishing “a free and democratic Jewish commonwealth” to “embrace the whole of Palestine, *undivided and undiminished.*” Beginning her essay with this resolution, for Arendt taking this to its logical conclusion would mean confronting an unsettled Arab population with two choices: choose to leave, or choose to remain, as a second class citizen.²⁹⁵ Arendt had no truck with those who called for a Jewish state to be founded on these terms. She had experienced what it meant to be a second class citizen in Germany, and (as we have seen) was all too aware of the horrors to which such an arrangement might lead. Explaining the conundrum, she said:

²⁹¹ Margaret Canovan ‘The Contradictions of Hannah Arendt’s Political Thought’ (1978) 6(1) *Political Theory* 8

²⁹² But, see John F. Sitton ‘Hannah Arendt’s Argument for Council Democracy’ (1987) 20(1) *Polity* 80-100

²⁹³ Hannah Arendt ‘Zionism Reconsidered’, in Hannah Arendt *The Jewish Writings* (Jerome Kohn & Ron H. Feldman (eds.)) (New York, Schocken Books, 2008), p.343 [hereafter, ZR]

²⁹⁴ On the consequences of *failing* to come to such an agreement, Arendt said:

If such an agreement is not brought about, there is the imminent danger that, through their need and willingness to accept any power in the Mediterranean basin which might assure its existence, Jewish interest will clash with those of all other Mediterranean people; so that, instead of one "tragic conflict" we shall face tomorrow as many insoluble conflicts as there are Mediterranean nations. for these nations, bound to demand a mare nostrum shared only by those who have settled territories along its shores, must in the long run oppose any outside--that is, interfering--power creating or holding a sphere of interest.

²⁹⁵ Arendt, ZR, p.343 [my emphasis]

*The Jews are convinced that the world owes them a righting of the wrongs of two thousand years and, more specifically, a compensation for the catastrophe of European Jewry which, in their opinion, was not simply a crime of Nazi Germany but of the whole civilized world. The Arabs, on the other hand, reply that two wrongs do not make a right and that no code of morals can justify the persecution of one people in an attempt to relieve the persecution of the other.*²⁹⁶

For Arendt, the problem was inherent in the very notion of the ‘nation-state’, a form of political organization which she had held, in the *Origins*, to be in ‘decay.’²⁹⁷ The cause of this perceived decay was traced to the tension which she believed to exist in the very juxtaposition of the ‘state’ with the ‘nation’. The state, as a form of political organization (at least, as she understood it), had pre-democratic roots, emerging from “centuries of monarchy and enlightened despotism” (a category in which she included constitutional monarchy), the function of which was to act as the “supreme legal institution” over “all inhabitants in its territory no matter their nationality.”²⁹⁸ As such, community was created by a common bond of obedience to an external symbol: typically, the Crown. The nation, on the other hand, emerged later, when obedience to a sovereign king gave way, and the void was taken up by a sovereign ‘people’. At this moment, Arendt said, (predominantly class) struggles began to emerge *within* the body politic, striving for control of the legal apparatus of the state. The only remaining bond for people in such a condition, she continued, was in the introspective community of common origin, which expressed itself, ultimately, in the form of an insular nationalism.²⁹⁹

It was precisely this combination, a conflictual (defensive, even) nationalism, combined with a control over the machinery of the state (manifest in the function of guaranteeing rights, and therefore the power to include within, or exclude from that guarantee, whomsoever it pleased) which Arendt found so repulsive in the call for a sovereign Jewish state to be established in the

²⁹⁶ Arendt, *ZR*, p.369

²⁹⁷ Arendt, *OT*, Pt.II, Ch.5 ‘The Decline of the Nation State and the End of the Rights of Man’

²⁹⁸ Arendt, *OT*, Pt.II, Ch.4, p.296. On the historically contingent development of the state as the dominant mode of political organisation, see Hendrik Spruyt *The Sovereign State and Its Competitors: An Analysis of Systems Change* (Princeton, Princeton University Press, 1996)

²⁹⁹ Arendt, *OT*, Pt.II, Ch.4, p.297

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Middle East.³⁰⁰ The inter-war period, and the experience of the Minority Treaties, she said, had taught us what to expect when citizenship is structured in such a two-tier fashion. Native citizens (that is, those whose nationality controlled the state machinery) had “frequently looked down upon naturalized citizens, those who had received their citizenship by law and not by birth.”³⁰¹ When the post-World War peace treaties created new sovereign states,³⁰² emerging from the dust of the Austro-Hungarian empire, the state nationals’ disdain for national minorities became something altogether more dangerous: irresponsibility. By passing responsibility for designated minorities within the new states to the League of Nations, it became clear that “only nationals could be citizens, only people of the same national origin could enjoy the full protection of legal institutions.”³⁰³ The effect was that minorities were placed in a permanent state of exception, the only escape from which was their complete (and unlikely) assimilation within the state, and thus their detachment from their own origins, or their leaving the system altogether, and becoming stateless (*ergo*, as we have seen, without rights).³⁰⁴ For Arendt, the idea that the Jews might repeat on Palestinian Arabs that which they had suffered in Europe was appalling. She *did* believe that Palestine was the homeland of the Jews. Her problem, however, was that the model of the sovereign nation-state could only succeed in establishing itself by forcing the Arab population into just such a state of exception.³⁰⁵ There had to be found, in her opinion, a new form of political organization capable of overcoming the problems of the nation-state model. So, in a second piece, ‘To Save the Jewish Homeland: There Is Still Time’,³⁰⁶ Arendt – always herself preoccupied with *novelty*, with *new* forms of government – proposed a novel system of Jewish-Arab co-operation:

Local self-government and mixed Jewish-Arab municipal and rural councils, on a small scale and as numerous as possible, are the

³⁰⁰ Arendt, *ZR*, p.372

³⁰¹ Arendt, *OT*, Pt.II, Ch.4, p.298

³⁰² Sovereignty is here used in the Westphalian sense, used by international lawyers. That is to say, the external sovereignty of individual states free from the interference of other states in their internal affairs. For a comprehensive overview of the development and meaning of sovereignty in this sense, see, Alan James ‘The Practice of Sovereign Statehood in Contemporary International Society,’ (1999) 47(3) *Political Studies* 457–473

³⁰³ Arendt, *OT*, Pt.II, Ch.5, pp.350-351

³⁰⁴ Arendt, *OT*, Pt.II, Ch.5, p.351

³⁰⁵ Arendt, *ZR*, pp.344-345

³⁰⁶ Hannah Arendt ‘To Save the Jewish Homeland: There Is Still Time’ (1948), in Arendt (2008), p.388 [hereafter, *ZH*]

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*only realistic political measures that can eventually lead to the political emancipation of Palestine.*³⁰⁷

Jews and Arabs, this is to say, should co-operate to build a common world; the councils their starting point, the common, public space within which Jews and Arabs could confront one another in a constitutive, rather than destructive, manner. As Seyla Benhabib has said, these proposals, though “historically moot”,³⁰⁸ though tantalizingly underdeveloped, are useful for the insight that they give us into key themes which Arendt would develop throughout her life, most notably, the decline of the nation state, and an alternative in the system of council democracy. It was not until that final chapter of *On Revolution*, however, that she would expand, in any meaningful way, upon the theme.

In many respects, the final chapter to *On Revolution* is a curious book end to all that comes between that work, and the earlier *Origins*. Whereas *Origins* was a book born of despair, and a desire to ‘destroy’ (totalitarianism), only to take a hopeful turn with the promise that new institutions might be built from the rubble, that new legal structures, new forms of political and legal interaction (internal and external)³⁰⁹ might emerge in a renewed spirit of action, almost the opposite is true of *On Revolution*. This book, which reads (almost) throughout as a celebration of the “triumphantly successful” American revolution,³¹⁰ takes a suddenly despairing turn with the final chapter, when, in a remarkable twist, Arendt turns her mind to the “failure of post-revolutionary thought to remember the revolutionary spirit and to understand it conceptually;” one which, we remember, “was preceded by the failure of the revolution to provide it with a lasting institution.”³¹¹

³⁰⁷ Arendt, *ZH*, p.401

³⁰⁸ Benhabib (1996), Ch.2, p.42

³⁰⁹ And, in some respects at least, she had some cause to be hopeful: the development of the United Nations, for example, pointed to a new era of international co-operation, and dealt specifically with the plight of the refugee in the 1951 Convention Relating to the Status of Refugees; the European project took shape, whilst the Universal Declaration of Human Rights, the European Convention on Human Rights evidenced an international effort to ‘take rights seriously.’ Perhaps the latest development which might be thought – following her reflections on genocide in the Eichmann trial (see Hannah Arendt *Eichmann in Jerusalem: a report on the banality of evil* (New York, Penguin Books, 1965)) – as measures which would have pleased her is the development of an international criminal court, capable of trying individuals (such as the Sudanese President, Omar al-Bashir) for their crimes against humanity.

³¹⁰ Arendt, *OR*, Ch.1, p.56

³¹¹ Arendt, *OR*, Ch.6, p.232

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The institutionalisation of that spirit which calls into being a revolutionary moment involves at least two paradoxes which lie as fault lines under the constitutional foundation.³¹² For one, there is a paradox of *authority*. That is to say, who has authority to speak for a (revolutionary) people who are not yet constituted? As Hans Lindahl has said:

*...whoever exercises constituent power must claim to act in the name of the collective, that is, must claim to act as a constituted power: he not only speaks about but also on behalf of [the constituents]...*³¹³

This, Arendt said, was the immediate paradox faced by the French revolutionaries when they cast off the King's yolk: none of the constituent assemblies which emerged from the revolution could command authority across the board: "they lacked the power to constitute by definition; they themselves were unconstitutional."³¹⁴ As such, they were always vulnerable to the challenge of competing claims to speak for the French nation, the 'we'. A second (though related) paradox is a paradox of *power*. If the revolutionary spirit engenders the power of individuals coming together, acting together in concert, in order to create something new, to constitute,³¹⁵ how can this power be preserved within a stable, enduring constitution? This paradox, this is to say, being that, at the very moment of foundation, the spirit of beginning becomes a threat to the stability of that which has been founded.

For Arendt, power was at the heart of the public realm. Indeed, she said in *Human Condition*, "[p]ower is what keeps the public realm, the potential space of appearance between acting and speaking men, in existence."³¹⁶ Sharing with Schmitt the belief that political power is generated by citizens "meeting and interacting in the public realm,"³¹⁷ for better or for worse,³¹⁸ the

³¹² For an exploration of these paradoxes, from a variety of disciplinary perspectives, see Martin Loughlin and Neil Walker (eds.) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford, Oxford University Press, 2008)

³¹³ Hans Lindahl 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood' in Loughlin and Walker (eds.) (2008), Ch.1, pp.18-19. On Arendt's treatment of this paradox, see Jason Frank *Constituent Moments: Enacting the People in Post Revolutionary America* (Durham and London, Duke University Press, 2010), esp. Ch.1

³¹⁴ Arendt, *OR*, Ch.4, p.165

³¹⁵ Arendt, *OR*, Ch.4, p.166

³¹⁶ Arendt, *HC*, Ch.5, p.200

³¹⁷ Kalyvas (2008), Ch.9, p.269

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importance (but not exclusivity) of power as *resistance* - in that Machiavellian sense described by Crick (himself a huge admirer of Arendt)³¹⁹ as being of the people as the ultimate restraining force and final power behind the republic - shines through her constitutional thought. In *Human Condition* it is used to illustrate, in the abstract, the (contested) distinction which Arendt draws between violence and power.³²⁰ Violence, which she says is instrumental in character – that is to say, which is always concerned with an end, by which violent means are justified (the safety of American citizens from terrorism (George W. Bush), or from drug trafficking (George H. W. Bush), are ends cited by U.S. Presidents, which, they said, justified (violent) military intervention in Afghanistan (2003 – present) and Panama (1989) respectively) – is necessarily destructive of, and certainly not to be mistaken for, power. Because violence is directed towards some end, she says, it restricts freedom. When George W. Bush (in)famously warned the international community that “you’re either with us or against us in the fight against terror,”³²¹ to illustrate by way of example, the extent of that restriction upon freedom is made clear. One must either join (willingly, or otherwise) with the forces of violence (be they well intentioned or not), or be subsumed by them. Violence, then, seeks to achieve its stated aims by coercion.³²² Whilst,

³¹⁸ Arendt herself was fully aware that in embracing a politics with action, and new beginnings at its centre, was not without risk. She has been criticised by Sheldon Wolin (in ‘Hannah Arendt: Democracy and the Political’, in Lewis P. Hinchman and Sandra K. Hinchman (eds.) *Hannah Arendt: Critical Essays* (Albany, State University of New York Press, 1994), Ch.11) and N.K. O’Sullivan (in ‘Politics, Totalitarianism and Freedom: The Political Thought of Hannah Arendt’ (1973) 21(2) *Political Studies* 183-198) for formulating a boundless theory of action which might itself lead to totalitarianism or some other form of degenerate form of political organisation. This, I believe, ignores three important points: first, Arendt’s concern with *institutionalising* the revolutionary spirit, thereby admitting spacial boundaries for action; secondly, Arendt’s concern with law – law in the Athenian sense of *nomos* in *Human Condition*, law in the Roman sense of *lex* in *On Revolution* – which creates qualitative boundaries for action; thirdly, the importance of ‘forgiveness’ in Arendt’s work. If we are free to act, then – in order to release that potential – we must also be willing to ‘forgive’ where action goes wrong. On the concept of forgiveness in Arendt’s work, and its utility in the public realm, see Andy Schaap *Political Reconciliation* (London and New York, Routledge, 2005), Ch.7, pp.96-108.

³¹⁹ See Bernard Crick ‘On Reading the *Origins of Totalitarianism*’, in Melvyn A. Hill (ed.) *Hannah Arendt: The Recovery of the Public World* (New York, St. Martin’s Press, 1979), pp.27-47, esp. at p.44:

Rereading her, I am convinced that even yet her stature has been underestimated. There is a view of political and social man just as comprehensive as those of Hobbes, Hegel, Mill and Marx; and, to my mind, one far more flattering to humanity.

³²⁰ Contesting the political basis of this distinction, see Keith Breen ‘Violence and Power: A Critique of Hannah Arendt on the ‘Political’ (2007) 33(3) *Philosophy and Social Criticism* 343

³²¹ President George W. Bush, speaking at a joint press conference with then French President Jacques Chirac, on November 6th, 2001

³²² Whilst these distinctions are referred to in *Human Condition* (at Ch.5, pp.199-202), the classic account is Arendt’s essay, *On Violence*, originally written for the *New York Review of Books*, but reworked and published in final form in *Crises of the Republic*, *op.cit.*

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however, violent resistance *might* produce, momentarily, a space for power (by, for example, the overthrow of the tyrant), Arendt's fear was that one of two outcomes was more likely. First, that violent resistance would lead to the subsequent reinforcement of rule *by* violence: the substitution by the French Revolution of the supposed tyrant, Louis XVI, with the altogether more frightening *Terreur*, in the name of the people's general will, and the self-purges within the Bolshevik Party following the October Revolution, her chosen examples.³²³ Second, that violent resistance would lead to violent reprisal, in a self-perpetuating vicious circle. "If goals are not achieved rapidly," she said, the result will be not merely defeat but the introduction of violence into the whole body politic."³²⁴ Returning to the conundrum of Israel-Palestine, and the failure to create a council democracy in which the power of Jews and Arabs acting in concert might have created a *new beginning* in the Middle East, the cycle of violence in that region can hardly have been far from her thoughts when she suggested that:

*The practice of violence, like all action, changes the world, but the most probable change is to a more violent world.*³²⁵

A resistance which eschews violence, however, for power – for the peaceful, nevertheless active, nevertheless vigilant,³²⁶ rejection of the *status quo* – is a more productive resistance, in the sense that *is* capable of discovering new modes of political organization in keeping with the human condition of plurality. Moreover, when Arendt turned to the council model as a solution to the problem of the Jewish homeland, and as a model capable of engendering power (as she understood it), she did not pluck this idea from the ether. She did so because she was overwhelmed by the consistency with which this form of organization had appeared in the world in the midst of revolution, even if each of these moments of freedom ultimately had been 'lost'.

In the throes of revolutionary France (but not before) was seen the quite unexpected, spontaneous self-constitution of the *sociétés populaires*, which existed, according to Robespierre, to keep alive the public spirit from which the revolution was sprung, and within

³²³ Arendt, *OR*, Ch.2, p9.99-100

³²⁴ Arendt, *OV*, p.177

³²⁵ Arendt, *OV*, p.177

³²⁶ In her own words, "to call such revolt 'passive resistance' is certainly an ironic idea; it is one of the most active and efficient ways of action ever devised." Arendt, *HC*, Ch.5, p.201

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which would be maintained and passed on the ‘true principles of the constitution.’³²⁷ Warning the National Assembly that interfering with these voluntary clubs and societies would mean attacking freedom itself, Robespierre went so far as to call them the ‘true pillars’ of the constitution.³²⁸ And yet, no sooner had the revolution brought Robespierre to the head of the new (revolutionary) government, than the paradox of preserving this spirit had revealed itself to him. If the great popular Society of whole French people, and the laws that reflected their ‘general will’, were truly one and indivisible, then a plurality of societies, with nuanced, or even divergent views on the shape which that society ought to take, posed an obvious threat.³²⁹ So, when Sant-Just, following Robespierre, first praised the societies as a ‘democracy capable of changing everything’, and then – from a position of government – reversed his view, such as to express the freedom of the people in terms of a freedom *from* politics, *from* government, and not, therefore, in their participation in its affairs, Arendt was moved to find, expressed in this change, the “death sentence for all organs of the people” and, unequivocally, the “end for all hopes of the revolution.”³³⁰ A similar fate, she continued, had befallen the *soviets*, declared by Lenin as being the ‘essence’ of the October Revolution,³³¹ and yet sacrificed by him to a (once again) unifying, omnipotent, indivisible entity, this time the Bolshevik Party. The point, in both examples, was that the people themselves, who had experienced freedom in the *societies*, or in the Soviets, would, by this loss, become detached from their *political* liberty. Be it the ‘general will’, or the Bolshevik Party, it was clear that whichever entity had subsumed the organs of (local) popular participation, it would be too large, too unwieldy to allow for all to share in it. The political realm, in other words, could be experienced only indirectly, through representatives; political liberty, therefore, became the prerogative of the few who represented the citizenry. If, however, the people, in their capacity to act in concert, in their power of resistance, are indeed the final restraint on government, the danger (a danger which may have been borne out in France, and in the USSR, by what happened next) was that the organs of government would, ultimately, be unrestrained, such that, as Benjamin Constant soon came to realize, private citizens could depend upon little more than the state’s good will for the security of even their private, modern liberty.

³²⁷ Robespierre, addressing the National Assembly in 1791, quoted in Arendt, *OR*, Ch.6, p.240

³²⁸ Arendt, *OR*, Ch.6, p.240

³²⁹³²⁹ Arendt, *OR*, Ch.6, pp.240-244

³³⁰ Arendt, *OR*, Ch.6, p.244

³³¹ Arendt, *OR*, Ch.2, p.65

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Arendt herself was fully aware that the council system which she so admired was one that, historically, had been doomed to failure and acknowledged that we must not be ignorant of the reasons for this.³³² Moreover, as she looked to the future, she wondered whether the modern American republic would be capable of supporting such a polity,³³³ offering, slightly playfully the prospect that only after the “next revolution”, if at all, might such a form of constitution take hold.³³⁴ Nevertheless, in *On Revolution* she did turn to the system as a way of thinking beyond both the nation state, and beyond political representation, drawing on Jefferson’s desire, expressed informally to the Englishman, John Cartwright, as the ‘salvation of the republic’, to “divide the counties into wards.”³³⁵

For Arendt, what Jefferson had sought to preserve in the ward system was the revolutionary spirit which had brought the new constitutional order into being. Jefferson proposed a system in which small, local assemblies (such as those which Arendt proposed should be adopted in Palestine) capable of admitting ‘every man in the State’ as ‘an acting member’ of the common government,³³⁶ would feed into the county republics, state republics, and, ultimately, to the republic of the Union, ‘in a gradation of authorities, standing each on the basis of law.’³³⁷ Just as Arendt herself was vague about the content of politics, so too Jefferson about exactly *what* the function of these ‘elementary republics’ might be. He could offer only the hope that if one was constituted, for a specific purpose, it would soon ‘show for what others they [were] the best instruments.’³³⁸ Not deterred by this vagueness, quite the opposite Arendt was enthused by it, evidence as it was, she said, that this was a genuinely *new* (so new, that even Jefferson couldn’t explain how it would operate!) form of government.³³⁹ What gave Arendt hope for the new system, despite the lack of detail in Jefferson’s account, despite, indeed, the repeated failure of similar institutions to survive in France, Russia and Germany, was the very recurrence of the councils, *societies* (France, 1817), *Soviets* (Russia, 1917) and *Räte* (Germany, 1918), across

³³² Canovan (1992), Ch.6, p.236

³³³ Canovan (1992), Ch.6, p.236

³³⁴ Arendt, *TPAR*, p.233

³³⁵ Jefferson, in a letter to John Cartwright, 5 June 1824, quoted in Arendt, *OR*, Ch.6, p.248

³³⁶ Jefferson, quoted in Arendt, *OR*, Ch.6, p.253

³³⁷ Jefferson, quoted in Arendt, *OR*, Ch.6, p.254

³³⁸ Jefferson, quoted in Arendt, *OR*, Ch.6, p.255

³³⁹ Arendt, *OR*, Ch.6, p.255

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years, across borders, “without any theory of popular organization to pass on the message.”³⁴⁰

What gave Arendt *particular* hope for the American incarnation of that system was that in America, the spirit of the revolution had emerged from such institutions, and not, as was the case in France, the institutions from the revolution.

As she saw it, in their townships and colonies Americans had *already* constituted the sorts of public spaces in which participation in common deliberation could flourish, long before their struggle to break free from King George III, and the British Empire. Arendt found great inspiration in the work of the Frenchman Alexis de Tocqueville, whose name she drops on several occasions throughout *On Revolution*; and, when de Tocqueville praised the American townships as being “to liberty what a primary schools are to science; [bringing] it within the people’s reach, [teaching] them how to use it and enjoy it,”³⁴¹ their appeal to Arendt becomes clear. The township provided a meeting point between the heroic, performative politics of *Human Condition*, and the later, Roman turn to constitutive action. Writing about the townships in 1821, Timothy Dwight, the then President of Yale, said:

*In these little schools men commence their apprenticeship to public life; and learn to do the public’s business. Here the young speaker makes his first essays: and here his talents are displayed, marked, and acknowledged. The aged, the discreet, here see with pleasure the promise of usefulness in the young...*³⁴²

Looking *back* on the revolution, the significance of these pockets of deliberation was, in Arendt’s view, profound. First, they provided precisely that space for publicity in which citizens could be brought face to face with the injustices brought upon their fellows, and persuaded to action. If, in other words, in the townships was constituted that space wherein “the voice of the whole people would be fairly, fully, and peaceably expressed, discussed and decided” by one’s peers,³⁴³ then those decisions might ultimately have been decisions to resist. As the historian Pauline Maier has said, “[r]evolutionary tendencies were most fully expressed...in local

³⁴⁰ Canovan (1992), Ch.6, p.235

³⁴¹ Alexis de Tocqueville *Democracy in America* (New York, Harper & Row, 1966), Bk.I, Ch.IV

³⁴² Timothy Dwight *Travels In New England and New York* (1821).

³⁴³ Arendt, *OR*, Ch.6, p.250

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situations;”³⁴⁴ situations which had the town meetings at their heart.³⁴⁵ Secondly, when resistance became revolution, when the King’s authority dissipated, Arendt found America uniquely prepared to fill the vacuum left behind. In these ‘primary schools of public life’, the American people existed not as an abstract fiction, but as a “working reality”³⁴⁶ who had discovered and experienced for themselves the power of acting in concert,³⁴⁷ a power which came to the fore when

*to the great surprise of all the great powers, the colonies, namely the townships and provinces, the counties and cities, their numerous differences amongst themselves notwithstanding, won the war against England.*³⁴⁸

Arendt attributes the *failure* of the Founding Fathers to account for these self-constituted pockets of freedom to two (in some ways contradictory) factors. On the one hand, she says, such was the vibrancy of public life in the townships, “formed and nourished throughout the colonial period” that the revolutionaries “took this spirit for granted.”³⁴⁹ Indeed, as the townships themselves had continued to operate for a period, untouched by the formal outcomes of the constitutional conventions, it was no surprise that the citizens themselves barely noticed their exclusion from the constitution itself, until they were subsumed by the “enormous weight” of a constitution which, in truth, had transferred the public business of the nation as a whole to Washington.³⁵⁰ On the other hand, Arendt suggests that the men of the revolution may not have been quite as ‘forgetful’ as this; that they, more than anyone, knew the threat which a continuing revolutionary spirit would pose to the stability of that which they had created. Far from taking it for granted, that is to say, the revolutionaries knew full well what was at stake with their failure to incorporate the townships within the Constitution. Indeed, nowhere is this paradox more apparent than in Jefferson’s own doubts about this vision. He who Arendt (rightly) says was the

³⁴⁴ Pauline Maier *From Resistance to Revolution: Colonial Radicals and the Development of American Opposition to Britain, 1765-1776* (London, Routledge & Kegan Paul, 1973), Ch.7, p.218

³⁴⁵ Perhaps the most influential account of the value of townships, and one which Arendt herself quotes approvingly in *On Revolution* comes in Lewis Mumford’s *The City In History: Its Origins, Its Transformations, and Its Prospects* (San Diego, New York, London, Harcourt, Inc., 1961)

³⁴⁶ Arendt, *OR*, Ch.4, p.166

³⁴⁷ Arendt, *OR*, Ch.4, pp.175-178

³⁴⁸ Arendt, *OR*, Ch.4, p.176

³⁴⁹ Arendt, *OR*, Ch.6, p.239

³⁵⁰ Arendt, *OR*, Ch.6, p.251

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only one of the men of the revolution to take seriously the “obvious question of how to preserve the revolutionary spirit once the revolution had come to an end,”³⁵¹ was the very same who (and this Arendt misses in her analysis) derided the townships as being no more than a “little selfish minority” which had “overrule[d] the Union”, when they challenged his own legislation.³⁵² Nevertheless, siding with (and directly quoting) Mumford’s analysis, that the failure to incorporate the townships represented a “tragic oversight” in post-revolution politics,³⁵³ Arendt was clear in her belief that whilst the constitution was capable of withstanding tyranny, and protecting citizens in their private capacity, what it could not do was “save the people from lethargy and inattention to public business,” for public business, as we shall see, had become the sole preserve of the people’s representatives.³⁵⁴

Opinion, and the right to (uncorrupted) information

What was at stake then, when Robespierre re-established the French Assembly at the expense of the *sociétés*;³⁵⁵ when the lie of the *soviet* Union was betrayed by the dominance of the Bolshevik Party;³⁵⁶ when the American townships gave way to Washington’s great institutions, was two-fold. Not only, as I have discussed in the preceding section, was the revolutionary spirit (quite intentionally, as Arendt saw it) ‘lost’, but with it, and not unrelated was lost the conditions in which the people could form and share opinions about the nation’s affairs.³⁵⁷

As she understood it, opinions, which “never belong to groups but exclusively to individuals”,³⁵⁸ could be formed *only* in a process of ongoing deliberation *between* those individual citizens in whose possession the faculty rests.³⁵⁹ In this political sense (political, at least, within the Arendtian conception of politics as that which goes on in the public space between plural men),

³⁵¹ Arendt, *OR*, Ch.6, p.239

³⁵² Letter to from Thomas Jefferson to Joseph C. Cabell, February 2, 1816, reproduced in Joyce Appleby and Terence Ball (eds.) *Jefferson: Political Writing* (Cambridge, Cambridge University Press, 1999), p.205. Jefferson here was venting his frustration at the towns’ treatment of his Embargo Act of 1807, which placed an embargo on all ships in U.S. jurisdiction, in order to prevent imports from, and exports to, Great Britain.

³⁵³ Arendt, *OR*, Ch.6, p.235

³⁵⁴ Arendt, *OR*, Ch.6, p.238

³⁵⁵ Arendt, *OR*, Ch.6, p.248

³⁵⁶ Arendt, *OR*, Ch.6, pp.257-258

³⁵⁷ Arendt, *OR*, Ch.6, pp.225

³⁵⁸ Arendt, *OR*, Ch.6, p.227

³⁵⁹ Arendt, *OR*, Ch.6, p.268

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opinion was a specifically *public* thing. It could meaningfully be formed, she said, only where individuals confront one another with their various interests, and are prepared to modify and enlarge their view to incorporate those of others.³⁶⁰ Drawing on Kant's notion of "reflective judgment", according to which a "public sense" can be achieved only by "putting ourselves in the position of everyone else",³⁶¹ for Arendt the exchange of opinion was the means by which individuals could (using Kant's terminology) enlarge their mentality beyond their private interests and towards a concern for the (public) world. As she put it in *Between Past and Future*:

*The more people's standpoints I have present in my mind while I am pondering a given issue, and the better I can imagine how I would feel and think if I were in their place, the stronger will be my capacity for representative thinking and the more valid will be my final conclusions, my opinion.*³⁶²

It was, then, the political moment *par excellence* when one was able, by the strength of argument, "to woo," as she herself put it, "the consent of [another] in the hope of coming to an agreement with him eventually."³⁶³ As such, opinion depended upon at least two external (that is, external to the critical, rational individual) factors. First, it would depend upon the availability of a public space within which this confrontation could take place, secondly, it would depend upon the receipt (and exchange) of uncorrupted information, by which opinions could take shape.

In her first analysis, the constitutional space for the interchange of opinion was held not to be in the councils at all, but in the institution of the U.S. Senate which, she said, rivaled the Supreme Court in its constitutional "novelty and uniqueness."³⁶⁴ Whilst it was true, as she saw it, that opinion was always the preserve of the individual, it was equally the case that in order to have meaning in, and influence upon, government (and so to avoid its reduction to deliberation purely for deliberation's sake) the "endless variety" of opinion would need to be purified and filtered in some way, through some institution, fit for the task. No individual, she said, was up to the task of representing *all* opinions; no man, "neither the wise man of the philosophers nor the divinely

³⁶⁰ Arendt, *OR*, Ch.6, p.268

³⁶¹ Immanuel Kant *Critique of Judgment* (1790), p.151

³⁶² Arendt, *BPF*, p.241

³⁶³ Arendt, *BPF*, p.222

³⁶⁴ Arendt, *OR*, Ch.6, p.228

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informed reason, common to all men, of the Enlightenment,” was capable of sifting through opinions, and coming to find in them a common, or at least public, reason.³⁶⁵ Thus, in the Senate, urged by Madison to proceed “with more coolness, with more system, and with more wisdom, than the popular branch [of government],”³⁶⁶ it was thought that the appointment of Senators for six year terms, as opposed to two years in the House of Representatives, as well as the more heterogeneous constituencies served under the ‘one state, two Senator’ arrangement, as opposed to the smaller constituencies represented in the House, would free the Senators to do just that, and so take a broader view of the public interest than might be possible in the lower-house.³⁶⁷ Indeed, echoing Madison’s call, Arendt described the Senate and its members as being those selected specifically for the purpose of sifting through the multitude of opinions for the discovery of genuinely public views:

*[T]hese men [the Senators], taken by themselves, are not wise, and yet their common purpose is wisdom – wisdom under the conditions of the fallibility and frailty of the human mind.*³⁶⁸

If it was the genius of the revolutionaries to find an institution for the formation of public views within the very fabric of government,³⁶⁹ the fabric itself was quickly stained by the relative ease with which the two-party system – equated, pejoratively so, by Alexander Hamilton and James Madison in the *Federalist Papers* with faction and division - took hold of the American institutions of government, the Senate included.

Whilst it was not the case that the emergence of the two-party system led, as the celebrated revolutionary Patrick Henry believed it must (by virtue of that faction and division), to the destruction of the Union,³⁷⁰ nor, as John Jay warned, did the “more sober part of the people”

³⁶⁵ Arendt, *OR*, Ch.6, p.227

³⁶⁶ Madison, quoted in James Madison, Alexander Hamilton and John Jay *The Federalist Papers* (Isaac Kramnick (ed.)) (London, Penguin Books, 1987), Editor’s introduction, p.43

³⁶⁷ See, however, Mark Tushnet (*The Constitution of the United States of America: A Contextual Analysis* (Oxford and Portland, Oregon, Hart Publishing, 2009), Ch.2, p.44) who observes that the actual rates of re-election in both Houses in fact blur the distinctions between the two.

³⁶⁸ Arendt, *OR*, Ch.6, p.227

³⁶⁹ Arendt, *OR*, Ch.6

³⁷⁰ Daniel Sisson *The American Revolution of 1800* (New York, 1874), Ch. X, p.45

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yearn for a (re)turn towards monarchy,³⁷¹ Arendt nevertheless found in the two party system cause both for celebration, and for lament. On the one hand, she said, the two party system – that by which she categorized the institutional politics of Great Britain and the United States – had managed to secure a tense equilibrium between the party of government and the party of opposition:

*Since the rule of each party is limited in time, the opposition party exerts a control whose efficiency is strengthened by the certainty that it is the ruler of tomorrow.*³⁷²

For this reason, she said, “lofty” questions of ‘Power’ and ‘State’ are taken down from the clouds and placed “within the grasp of the citizens organized in the party,” who know that if they are not the rulers today, they will nevertheless find their turn.³⁷³ By *On Revolution*, however, Arendt’s faith in the two-party system was much more nuanced. Whilst she recognized its “viability and...its capacity to guarantee constitutional liberties”, which, she said, set the two-party system aside from multi-party and one party systems,³⁷⁴ Arendt went on to say that the “best [the system] has achieved” is a “certain control of the rulers by the ruled.” What it had categorically not done was allowed the citizen to *participate* in public affairs, because all that the citizen could hope for was that her views be *represented* in the legislature.³⁷⁵ The crucial move comes next, however, when Arendt says that what is at stake, if this is true, is opinion, which, under these conditions is the sole preserve of the few representatives with whom the opportunity to participate in government rests.³⁷⁶ A representative institution, such as the US Senate, might form an opinion in the process of “open discussion and public debate” held within its four walls; without a public space *outside* those walls, however, in which citizens can meet, discuss and debate, more still, without a space within which *these* opinions can impact upon the deliberations within the Senate, the constitution is reduced to oligarchy: where “public happiness and public

³⁷¹ John Jay, in a letter to Thomas Jefferson, October 27th, 1786, reproduced in Henry P. Johnston (ed.) *The Correspondence and Public Papers of John Jay, in four volumes* (New York and London, G.P. Putnam’s & Sons, 1890-1893), Vol.3, pp.212-213

³⁷² Arendt, *OT*, Pt.II, Ch.4, pp.323-324

³⁷³ Arendt, *OT*, Pt.II, Ch.4, p.324

³⁷⁴ Arendt, *OR*, Ch.6, p.268

³⁷⁵ Arendt, *OR*, Ch.6, p.268

³⁷⁶ Arendt, *OR*, Ch.6, pp.268-269

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freedom [to participate in the affairs of government] are once again the privilege of the few.”³⁷⁷

Read in this light, a return to *Civil Disobedience* makes for a slightly more fruitful reading.

Jason Frank has said, *contra* Jeremy Waldron, that civil disobedience is not a “despairing echo of constitutional politics,”³⁷⁸ but a “concrete instantiation of political freedom,” through which

Arendt seeks to return the political question of the legality of law to the people themselves.³⁷⁹

My view is that in claiming, as she so contentiously does, that institutionalizing civil

disobedience might compensate for the failure of the courts to address that prior question, Arendt

is careful *not* to put its determination in the hands of the civil disobedients. Rather, she says,

civil disobedients should be afforded the same recognition that special-interest groups, that is,

pressure groups and lobbyists, have to *influence* the opinion of the legislature. Now, there are a

host of problems with such an arrangement. As Andreas Kalyvas has said, institutionalizing civil

disobedience may compromise its impact: something of the spontaneity and extraordinary nature

of the action; that which compels people to leave their private realm and join with others in

expressing their dissent, may well be lost.³⁸⁰ Moreover, institutionalizing civil disobedience

would remain open to two further questions. First, for whom does the civil disobedient speak?

Who, in other words, has authority to speak for *which* ‘we’? Secondly, even if the question of

authority can be addressed, a significant danger might be that clever political strategy from

above might be used to co-opt the civil disobedients (now a part of, rather than a force against,

the institutions of government) within contentious policy decision making, garnering for them a

cloak of legitimacy and consent. Nevertheless, and where Frank is quite correct in his

assessment, what seems to have attracted Arendt to civil disobedience was the grab, in some

way, for the actual participation of the citizens in government which had, either by the political

apathy of modern man, or by the conscious neglect of the townships by the Founding Fathers,

been allowed (encouraged, even) to wither:

Representative government itself is in a crisis today, partly because it has lost, in the course of time, all institutions that permitted actual participation, and partly because it is now gravely affected by the disease from which the party system suffers:

³⁷⁷ Arendt, *OR*, Ch.6, p.269

³⁷⁸ Jeremy Waldron ‘Arendt’s Constitutional Politics’, in Villa (ed.) (2000), p.203

³⁷⁹ Frank (2010), Ch.1, p.66

³⁸⁰ Kalyvas (2008), Ch.9, p.287

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*bureaucratization and the two parties' tendency to represent nobody except the party machines.*³⁸¹

In other words, having resigned herself to the futility of making the case for the council system – “the current...despair of the people’s political capacities,” she said, “is based solidly upon the conscious or unconscious determination to ignore the reality of the councils and to take for granted that there is not, and never has been, any alternative to the present system”³⁸² – a system, that is to say, in which the authority of the delegates within the legislature would depend upon the active, *continuing* consent (and therefore be alive to seeds of dissent)³⁸³ from the councils which feed into it,³⁸⁴ it would seem that Arendt saw in the publicity of civil disobedience, in the coming together of those citizens exercising their right of assembly, acting in concert in order to test the constitutionality of enacted laws, something of the spirit, if not the form, of the ‘lost’ townships: consent (and corresponding dissent) for Arendt (following another of her great influence, Montesquieu) both the “inspiring and organizing principles” of those voluntary associations of the eighteenth century,³⁸⁵ and too of the civil disobedients of the twentieth.³⁸⁶ If, however, the first movement in resistance is a democratic one – the act of coming together itself – the second, I have suggested, is an authoritarian one, a resistance *back*: the closure of that space, the dispersal of the *demos*, and the *restrengthening* of the state, lest the stability of the constitution be sacrificed at the altar of action. This was as true for the civil disobedients as it was for the ‘pupils of public life’ in the townships. For, just as the latter were deprived of a public space, when the men of the revolution failed to furnish the revolutionary spirit with an appropriate institutional inlet, so too the civil disobedient was neutered *qua* disobedient when he came before the court. This so, because the *established* niche by which civil disobedience is *already* institutionalized is that which first processed the disobedient as an individual through the court system, and second, which would tolerate his actions only if “the lawbreaker is willing and

³⁸¹ Arendt, *CD*, p.89

³⁸² Arendt, *OR*, Ch.6, p.271

³⁸³ Here, Arendt draws a contrast between her position and what she called, from Benjamin Rush, the “new” and “dangerous” doctrine that although “all power is derived from the people, they possess it only on the days of their elections. After this it is the property of their rulers.” (Arendt, *OR*, Ch.6, p.236)

³⁸⁴ Arendt, *TPAR*, p.232. Although she does not really discuss, in *On Revolution*, what the top of the council system, the tip of the pyramid, should look like – how, for example, it should interact with the legislature - in her interview with Adelbert Reif she very quickly, and with no further development, speaks of a system which “continues upward, and finally leads to a parliament.”

³⁸⁵ Arendt, *CD*, p.94

³⁸⁶ Arendt, *CD*, p.99

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even eager to accept punishment for his act.”³⁸⁷ If the *power* of civil disobedience lies, as Arendt said, in its publicity, then the dispersal of that public, so that individuals appear before the court is already and inescapably disempowering. If, moreover, the defining *character* (for efficacy, I use my own term, here and not Arendt’s) of the civil disobedients was a concern not for themselves, but for the “world where [a] wrong is committed or in the consequences that the wrong will have for the future course of the world,”³⁸⁸ then by confronting the individual, in the courtroom, with a stark choice, ‘guilty’ or ‘not guilty’, accept your punishment and be treated with a degree of tolerance, that character is necessarily altered by the barely escapable introduction of private (and thereby, as Arendt understood them, unpolitical), individual concerns of morality and conscience.³⁸⁹ Finally, if the *spirit* of the disobedient act is one of active consent (expressed through its corollary, dissent), then by *enticing* the individual to plead guilty and accept his punishment, by – in effect – coercing this concession from him, the spirit of the action is lost, the consent thereby registered no longer in a meaningful sense, *active*.³⁹⁰

Confronting this ‘paradox of institutionalism’ in the context of those social movements whose extra-institutional activism demands the institutionalization of human rights, Neil Stammers has identified at its heart the problem of opening democratically constructed channels of communication between institutions and the people they claim to represent.³⁹¹ It seems to me, that this is precisely what Arendt hoped to achieve when she suggested two ways - the councils who would feed the legislature from the bottom up, and the civil disobedients who would be given rights of audience within institutions - in which organs of the people could influence opinion. Even then, however, Arendt herself was somewhat trapped in paradox. The townships, which were never incorporated within the constitution, fell into disuse as *public* business became the prerogative of Washington, and *private* happiness, the concern of the citizen. The civil disobedient, whose acts *are* incorporated in a minimal sense – to the extent that the court will look favourably upon a disobedient who accepts his guilt in breaking the law – lose, in the legal process, much of the political elements of their action. And yet, to free the civil disobedient from the shackles of criminal trial, and to establish a niche, akin to that provided for lobbyists,

³⁸⁷ Arendt, *CD*, pp.51-52

³⁸⁸ Arendt, *CD*, p.60

³⁸⁹ Arendt, *CD*, pp.60-63

³⁹⁰ Arendt, *CD*, p.52

³⁹¹ Neil Stammers *Human Rights and Social Movements* (London, Pluto Press, 2009), Ch.4, esp. pp.128-129

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seems destined to regularize and normalize civil disobedience in a counterproductive way. In Part III, when I speak to contemporary problems within the context of the British constitution, I will attempt to address more directly possible solutions to this foundational problem. Closing Part I, however, I would simply like to make one final substantive point.

If Arendt was engaging in establishing channels of communication between the organs of the people and the organs of government, then we can say that this communication must rely on a flow of information by which opinion can meaningfully be informed and exchanged. As we have seen, for Constant, freedom of the press was the foremost means, in modern times, of publicity, and therefore of protecting our rights. For Arendt, the freedom of the press – indeed, of a wider media³⁹² – was also of the uppermost significance. Reflecting on the leaked *Pentagon Papers*, a comprehensive forty-seven volume history of United States involvement and decision making in Vietnam, between 1945 and 1968, prepared for the U.S. Department of Defense, two things struck Arendt with particular force. First, was what she called the danger of overclassification. On the one hand, the people and their representatives are denied access to the information which they need in order to form opinions and (in the case of the latter) to make decisions; on the other, those decision makers who *have* top level clearance work, she said, under conditions and habits which inhibit them, both in time and in inclination, from “hunting for pertinent facts in mountains of documents, 99½ per cent of which should not be classified and most of which are irrelevant for all political purposes.”³⁹³ Indeed, in support of her point Arendt cited the *Pentagon Papers* – themselves, classified documents which were leaked to the *New York Times* by one of their contributors, Daniel Ellsberg, because, as the editorial of that newspaper would later put it, they “demonstrated, among other things, that the Johnson Administration had systematically lied, not only to the public but also to Congress, about a subject of transcendent national interest and significance”³⁹⁴ – which, even when members of Congress were given the whole study, appear not to have been read by those “most in need of [the] information.”³⁹⁵ Where the people and their representatives lacked information, where they

³⁹² She would commonly remark to students about the potential of television to stir political engagement.

³⁹³ Arendt, *LIP*, p.30

³⁹⁴ R.W. Apple ‘The Pentagon Papers’ *New York Times*, 23rd June 1996

³⁹⁵ Arendt, *LIP*, p.31

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lacked the means to form an opinion, they could easily be lied to –and lied to, as the papers left no doubt, they were.

The second thing which struck Arendt, however, was the extent to which much of what was revealed in the leaks was nothing new “to the average reader of dailies and weeklies;”³⁹⁶ nor had any of the pros and cons surrounding the war escaped debate in the written press, on television, or on radio. Arendt found in this fact a nugget for comfort. It was, she said, evidence of the power of the press to cast the light of publicity into dark corners. In this regard, Arendt was happy to call the media the fourth branch of government – with an important proviso: it must both be free, and uncorrupt. It was the duty of that “branch” to furnish citizens and decision makers with unmanipulated, factual information. It was the right of those citizens, indeed “their most essential political freedom” to receive it.³⁹⁷ What remains unsaid by Arendt, is that if this duty is not fulfilled, if the press becomes corrupt, or, if the people are otherwise disavowed of their right to receive information, for example, by overclassification, or by deceit, this in itself was a cause which called for resistance. Here, however, was a perfect storm through which to summarise Part I of the thesis.

At the executive level, the *Pentagon Papers* had made clear to the people the extent to which Presidents and cabinet politicians had manipulated information and misled even Congress. This information, however, was well known to most who read the daily news, because it had been coming out – through the press – in various, sporadic, leaks from those, such as Ellsberg, concerned about the direction which the war was taking. In other words, those responsible for carrying out a war in the name of American citizens were either guilty of misleading them (the executive), or blissfully ignorant of the realities of the situation and its decision making context (Congress). The only institution to which they could turn, the courts, had, however, declared the conduct of foreign policy – even when the question was one of constitutional interpretation – to be one far outwith their remit. In other words, those opposed to the war were left to wonder where left to turn when it was the very organs of their representation (executive and legislative) and constitutional protection (judicial) which had acted in a spirit which ran counter to their

³⁹⁶ Arendt, *LIP*, p.45

³⁹⁷ Arendt, *LIP*, p.45

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constitutional intuitions. Then, and *only* then, *only* after the established channels of communication had failed, did they turn to civil disobedience; the point being that the civil disobedients did not *want* to disobey. They wanted, in the first place, to resolve their dispute internally, most notably in the courtroom. Their disobedience, then, their resistance, was one which occurred in a spirit of legality, even if it was, ultimately, the legal process which dispersed, individualized and depoliticized them.

In Part III of this thesis, I will use Arendt's conception of politics as a lens through which to look at contemporary problems within the British constitution. Whilst it is true that Arendt herself had little to say about the British constitution, beyond a few scattered paragraphs on parliament and the two-party system, in Part II of the thesis I will argue that the British constitution is one ripe for Arendtian analysis. The rejection of monarchy on these shores, and the emergence of an institution, Parliament, which claimed first to represent and then to be the very embodiment of the people, marked a consciously made new beginning. Furthermore, and running contrary to the prevailing opinion that the people were always, in this period, a useful fiction employed instrumentally by the revolutionary Englishmen, and never a "working reality",³⁹⁸ I will suggest that it was a moment of resistance by the people out of doors, a very real opposition to what they believed to be the King's illegal and unconstitutional imposition of Ship Money – a form of taxation – which opened the space for the Parliament men to reject the monarch's claim to divine right, and to harness the power of the people in creating a constitutional new beginning, with Parliament at its heart. If it was the spirit of that resistance which opened that space, it was its institutionalization which closed it; the revolutionaries, in keeping with Arendt's analysis of the *failure* of even the American Revolution, claiming for Parliament an unquestioning obedience to rival that of the King. In Part III, I will argue that this 'lost spirit' of (an English) revolution can, and ought to be, rediscovered.

³⁹⁸ Cf. Edmund S. Morgan *Inventing the People: The Rise of Popular Sovereignty in England and America*

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Pt.II Stranger than fiction: The making of England's mixed constitution

That Hannah Arendt largely ignored the constitutional conflicts which engulfed England in the seventeenth century can be attributed to two factors. First, whilst she recognised that the word 'revolution' first appeared in our political vocabulary during that turbulent period of English history, it was not at that time used, in her view, to mark a *new beginning*, with a concomitant new form of government, but rather – and truer to its etymological origins – marked a constitutional revolve *back* to a pre-established point: the *restoration* of the previously deposed Stuart monarchy, in 1660.³⁹⁹ Secondly, she was of the belief that England's political struggles in this period had "broken out" from the masses⁴⁰⁰ which, in keeping with her idiosyncratic terminology, had a particular meaning. In contrast to the American Revolution, at least as Arendt saw it, which was consciously made by revolutionary citizens who desired freedom above all else, her comparator of choice, the French Revolution, had "broken out" of a concern not (first) for freedom, but for necessity: it was, she said, "the urgent needs of the people," which was to say the multitude of the poor,⁴⁰¹ which had "unleashed the terror and sent the Revolution to its doom."⁴⁰² To be sure, Arendt wrote at a time when a similar vision, most notably that of the Marxist historian, Christopher Hill, dominated the historical accounts of the English Civil War,⁴⁰³ and as such she might be excused for missing the point; miss the point, however - on both counts - I believe she did. For one thing, to reduce the tumult of seventeenth century England to a cyclical revolve back to monarchy is to miss an extremely fertile period, as the authority of the Stuart monarchy crumbled, in which constitutional experiment and innovation came to the fore. As such I will attempt to show that the very rejection of the King's claim to a divine right to rule, and the emergence of the people as an active, political force, was itself a new constitutional beginning, a rupture which radically altered the *substance* of English government

³⁹⁹ Arendt, *OR*, Ch.1, pp.42-43

⁴⁰⁰ Arendt, *OR*, Ch.1, p.43

⁴⁰¹ Arendt, *OR*, Ch.2, p.60

⁴⁰² Arendt, *OR*, Ch.2, p.60

⁴⁰³ Christopher Hill's work, from *The English Revolution, 1640* (1955), through *Reformation to Industrial Revolution: A Social and Economic History of Britain, 1530-1780* (1967) and *The World Turned Upside Down: Radical Ideas During the English Revolution* (1972) are some of the leading texts published, with no little influence, at precisely the time that Arendt was most seriously engaged in thinking and writing about revolutions.

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even if, after the restoration, the *style* looked depressingly familiar.⁴⁰⁴ For another thing, this new beginning, far from “breaking out” from a needy multitude, who had somehow submerged the public realm and subverted the course of liberty, was one which was consciously made by its protagonists in a spirit of action which lends itself to an Arendtian reading. It was, we will see, a period in which revolutionary Englishmen attempted to prize open the public realm, in the name of liberty. What I will suggest here is twofold. First, that the constitutional changes of the seventeenth century emerged from the people not as a mere fiction, to be harnessed and manipulated, as Edmund Morgan has said, but, at least in its initial stages, as a ‘working reality’ questioning and resisting the authority of the Crown, and seeking new modes of political organisation. Secondly, I will argue in closing Part II, and throughout Part III, that in the almost immediate collapse of the (real, active) people into their fictional (*ergo* mythical, mystical) embodiment in a sovereign Parliament, was ‘lost’ an invaluable element of constitutional health: the ways and means of active resistance *to* the law, *in the name of* legality. Developing this argument in three stages of the peoples’ emergence I will look first at the divine right of kings, in particular as it was theorised by King James VI & I himself, and which held the people to be but a unitary mass of passive, pre-political subjects of the monarch (worthy king or evil tyrant alike). Secondly, we will see how quickly the actions of Charles I called into question his claim to divine origin, and the willingness of his subjects to resist what they saw as his illegal and unconstitutional infringements upon their liberty. Focussing on Charles’ infamous Ship Money levy, we will see a real, active people challenging that tax in the courtroom and then, when that channel failed, in civil disobedience through (sometimes violent) non-payment. Thirdly, as the challenges to the king’s authority took hold, we see propagandists for the Parliamentary cause develop a theory of public law which placed the origins of government in the people. With a particular focus on Parliament’s propagandist-in-chief, Henry Parker, we see the Parliamentary cause first embrace the people’s power, in his reflections on the legal challenge to Ship Money, before channelling (and thereby limiting the force of) that power, in a claim for unquestioning obedience to a sovereign Parliament: those channels of contestation receding almost as quickly

⁴⁰⁴ See, for example, Walter Bagehot’s classic text, *The English Constitution* (1867), in which it is said that in the parliamentary system of cabinet government, a republic had “insinuated itself beneath the folds of a Monarchy.” (Walter Bagehot *The English Constitution* (Forgotten Books, 2008), p.66). For evidence that the revolve back was, to some at least, depressing, see the scorn directed by John Milton at his countrymen as they prepared the return of Charles II, which runs throughout his final political tract, *The Ready and Easy Way to Establish a Free Commonwealth* (1660).

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as they emerged. Rather than shoe-horn Arendt in to a period of history about which she had very little to say *directly*, I will engage here with the historical period on its own terms, leaving for Part III the task of drawing together the specifically Arendtian insights to be gleaned from that period, and put to work in contemporary constitutional discourse.

Pt.II (1) *The Divine Right of Kings*

King: I go from a corruptible, to an incorruptible Crown; where no disturbance can be, no disturbance in the world.

Doctor Juxon: You are changed from a Temporal to an external Crown; a good exchange.

The King then said to the Executioner, is My Hair well: Then the King took off His Cloak and his George, giving His George to Dr. juxon, saying, Remember... (It is thought for to give it to the Prince.) Then the King put off His Dublet and being in His Wastecoat, put His Cloak on again; then looking upon the block, said to the Executioner, You must set it fast.

Ececutioner: It is fast Sir.

King: It might have been set a little higher.

Executioner: It can be no higher Sir.

King: When I put my hands this way (Stretching them out) then...

After saying two or three words (as he stood) to Himself with hands and eyes lift up. Immediately stooping down, laid His Neck on the Block: And then the Executioner again putting his Hair under his Cap, the King said, Stay for the signe. (Thinking he had been going to strike)

Executioner: Yes, I will, and it please Your Majesty.

And after a very little pawse, the King stretching forth his hands, The Executioner at one blow, severed his head from his Body.⁴⁰⁵

⁴⁰⁵ Project Canterbury 'King Charls (sic.): His Speech Made upon the Scaffold At Whitehall-Gate, Immediately before his Execution, On Tuesday the 30 of Ian. 1648: VVith a Relation of the manner of his going to Execution' (London, Peter Cole, 1649) [Hereafter *Charles from the scaffold*]

Of kings...

This account of the final few moments of the reign and life of King Charles I, indeed it could be assumed by those in attendance the final few moments of monarchical government on these shores,⁴⁰⁶ is as striking as it is moving for a number of reasons. For one, we read of a king who just moments before had claimed his Royal crown “a trust committed to me by God,” and yet who appears so suddenly vulnerable and, almost the same, so suddenly human. As Charles sought reassurance from the executioner that his block be properly set, so that his fate be swiftly and painlessly delivered, he seems momentarily distracted from his journey to God (“to whom I must shortly make an account”) by concern only for a temporal moment, his final human experience. He is distracted too from the supra-human role of ‘father of the nation’ by the immediacy of his fate: displaying concern for his natural son, that his robes be delivered to the prince in time. And even in a final grasp for (personal) sovereignty, as Charles sought to bring his destiny within his command, asking that the axe be delivered only upon his signal (“when I put out my hands this way”) and again that the executioner wait for the signal to be given (“[t]hinking that he had been going to strike”), the king is humanised by the inevitability that the axe will fall no matter; the double irony of the Executioner’s final phrase, that this “please Your Majesty”, all the more apparent for it. Finally, we are told that with just one blow⁴⁰⁷ the

⁴⁰⁶ Charles’ execution had been delayed by several hours, in order that the Commons might pass the *Act abolishing the office of the King*, March 17, 1649, which read (at II.):

And whereas it is and hath been found by experience, that the office of a King in this nation and Ireland, and to have the power thereof in any single person, is unnecessary, burdensome, and dangerous to the liberty, safety, and public interest of the people, and that for the most part, use hath been made of the regal power and prerogative to oppress and impoverish and enslave the subject; and that usually and naturally any one person in such power makes it his interest to encroach upon the just freedom and liberty of the people, and to promote the setting up of their own will and power above the laws, that so they might enslave these kingdoms to their own lust; be it therefore enacted and ordained by this present Parliament, and by authority of the same, that the office of a King in this nation shall not henceforth reside in or be exercised by any one single person; and that no one person whatsoever shall or may have, or hold the office, style, dignity, power, or authority of King of the said kingdoms and dominions, or any of them, or of the Prince of Wales, any law, statute, usage, or custom to the contrary thereof in any wise notwithstanding.

⁴⁰⁷ ...and for this fact alone the King could be thankful: Mary, Queen of Scots receiving three blows, and James Scott (at least) five before the executioner’s job was done...

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executioner “severed his head from his body”; a fate which not only ended the human life of Charles I but which struck symbolically at the claim to authority upon which James I and his son had defended their controversial rule: the divine right of kings. A crudely literal twist, then, on the definition of kingship espoused to such effect by his father: that as “[t]he head cares for the body, so doeth the King for his people.”⁴⁰⁸

The use of similitude was commonplace in political thought long before King James put his ideas to paper, whilst the history of the divine right of kings is as old as the scriptures themselves.⁴⁰⁹ What was, indeed what remains, so exceptional about the body of political writing produced by James is to be found not so much its content, but rather its source in the monarch himself. If Englishmen had already heard from the pulpit of the “perilous” consequences of rebellion against the King by his subjects⁴¹⁰ then the same message directly from the King’s pen formed an impressive (and at times persuasive) marriage between the theory of divine right, the institution of the King’s office and the fact of the King’s rule. Thus the demand for the republished *Basilicon Doron* and *The Trew Law* at the time of James’ accession to the English throne was to the satisfaction of more than a mere theoretical curiosity; it was something far more substantial. To take but one example, the House of Commons at the close of their first session under Stuart rule tempered the discontent which they had aimed at the King in *The Form of Apology and Satisfaction*⁴¹¹ with the reminder that “not rumour but your Majesty’s own writings” had assured them of the “happy fruits” to be brought by accepting the King to the throne. The members of the House could barely have been unaware then of James’ self-description of the “free and absolute” monarch: that for James the institution of the King was the head of the body politic

⁴⁰⁸ James VI ‘The Trew Law of Free Monarchies: Or The Reciproock and Mutuall Duetie Betwixt A Free King, And His naturall Subjects’ (1598), in Johann P. Sommerville (ed.) *James VI and I: Political Writings* (Cambridge, Cambridge University Press, 1994) pp.62-84, p.76 [hereafter *TL*]

⁴⁰⁹ *Romans* 13:1-2, for example, reads: “Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God. Whosoever therefore resisteth the power, resisteth the ordinance of God: and they that resist shall receive to themselves damnation.”

⁴¹⁰ See for example the Government issued ‘An Homily Against Disobedience and Wylful Rebellion’ (1570), in David Wootton (ed.) *Divine Right and Democracy: An Anthology of Political Writing in Stuart England* (London, Penguin Books, 1986) pp.94-98. Such homilies issued by the government and delivered from the pulpit held significant influence at a time when large proportions of the population were illiterate and reliant upon the spoken message as a source of information. Even as late as 1642 over two-thirds of the adult male population were believed to have lacked basic literacy skills. [Wootton (ed.) (1986), eds. Intro., p.27]

⁴¹¹ ‘The Form of Apology and Satisfaction, 20 June 1604’, in J.P. Kenyon (ed.) *The Stuart Constitution 1603-1608: Documents and commentary* (2nd) (Cambridge, Cambridge University Press, 1986) pp.29-35, p.30 [hereafter *The Form of Apology*]

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because he alone possessed the God given grace to carry out the task, the art even, of government; of “directing all the members of the body to that use which the judgement in the head thinkes most convenient”;⁴¹² so that the head “may apply sharpe cures, or cut off corrupt members”⁴¹³ to ensure the survival of the whole body. From this, the implication for his subjects was clear: just as no body could survive where “the head, for any infirmitie that can fall to it, be cut off” by the other parts,⁴¹⁴ so too the nation would quickly degenerate into a state of anarchy were it left “in the hands of the headlesse multitude, when they please to weary off subjection, to cast off the yoke of government that God hath laid upon them.”⁴¹⁵

Read in isolation the implications of this analogy might understandably have appeared most threatening to a Commons which had made explicit its fear that “the prerogatives of princes may easily and do daily grow.”⁴¹⁶ What had reassured the House however was more than the *description* of kingship which James had revealed, but rather the values by which, he said that institution was constituted; its ‘happy fruits’:

*...that under your Majesty’s reign religion, peace, justice and all
virtue should renew again and flourish...⁴¹⁷*

As James saw it, the human condition was one of (a necessary) subjection; a condition in which servitude to the king was synonymous with, rather than the very antithesis to, liberty.

Whilst Charles was driven by the urgency of his cause (his impending execution) to proclaim this condition first at trial and then from the scaffold, his father had less immediate reason to make explicit the theological basis of his rule. Indeed, it has been argued that James’ persistence in repeating his theory in fact called into action, or at least accelerated the organisation of, an opposition to this particular conception of kingship which might, under different circumstances,

⁴¹² James I ‘A Speech to the Lords and Commons of the Parliament at White-Hall, on Wednesday the XXI. Of March’, in Sommerville (ed.) (1994) pp.179-203, p.182 [hereafter *1610*]

⁴¹³ James I, *1610*, p.182

⁴¹⁴ James VI, *TL*, p.78

⁴¹⁵ James VI, *TL*, p.81

⁴¹⁶ *The Form of Apology*, p.32

⁴¹⁷ *The Form of Apology*, p.32

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have waited a generation longer to appear.⁴¹⁸ In part, his desire to elaborate a theoretical basis for kingship seems to have been pedagogical; an idiosyncratic urge in James to “teach [his subjects] the right-way,” and to “instruct” them of the true ground upon which his monarchy rested.⁴¹⁹ More than this however, a second common similitude drawn by James - that between the king and the father of the family, he who is “bound to care for the nourishing, education, and vertuous government of his children”⁴²⁰ – reveals, as James saw it, the king’s duty, as the father of his subjects, to instruct them, as his children, of their place in the world. Just as the body is by nature subservient to the head so, he said, the well being of the family is dependent upon its deference to the father. By God the father is given strength to suffer “toile and paine” to ensure the prosperous weale of his family; he is possessed of wisdom and reason so that he might “foresee all inconvenience and dangers that might arise towards his children” and press to prevent them; he is given wrath, tempered with pity, so that his offending children be corrected “as long as there is any hope of amendment in them.” Thus:

*...as the Fathers chiefe joy ought to be in procuring his childrens welfare, rejoicing at their weale, sorrowing and pitying at their evil, to hazard for their safetie, travell for their rest, wake for their sleepe; and in a word, to thinke that his earthly felicitie and life standeth and liveth more in them, nor in himselfe; so ought a good Prince thinke of his people.*⁴²¹

How monstrous (ergo inhuman, unnatural) it would be for James to see his children forgo their subjection to their father, “to rise up against him, to control him at their appetite, and when they thinke good to sley him, or cut him off.”⁴²² Indeed, according to Sir Robert Filmer’s famous variant of the theory, the divine right of the king was not merely akin to that of fatherhood, but *identical* to it:

⁴¹⁸ Godfrey Davies *The Early Stuarts 1603-1660* (2nd) (Oxford, Clarendon Press, 1959), Ch.1, pp.32-33: Davies here quotes Sir Ralph Winwood, an eyewitness who responded to one of the King’s speeches in 1610 by reporting “much discomfort [in parliament], to see our monarchicall power and regal prerogative strained so high, and made so transcendent every way, that if the practise should follow the positions, we are not likely to leave to our successors that freedome we received from our forefathers.”

⁴¹⁹ James VI, *TL*, p.62. Unusual though it may seem, and even unbecoming a monarch, Alan Cromartie has noted that it was “perfectly in character” for James, who “liked to have a theory of his activities”, to have published as he did. Alan Cromartie *The Constitutional Revolution: An Essay on the History of England, 1450-1642* (Cambridge, Cambridge University Press, 2006), Ch.6, p.148

⁴²⁰ James VI, *TL*, p.65

⁴²¹ James VI, *TL*, pp.65-66

⁴²² James VI, *TL*, p.77

The first father was, of course, Adam, who had ruled over the whole world by right of fatherhood. Later kings held power which was, like Adam's, fatherly whether their title to it arose 'by election, donation, succession or by any other means'. Since Adam had been a king the notion of original popular sovereignty stood refuted, and no place was left 'for such imaginary pactions between Kings and their people as many dream of'.⁴²³

Filmer's major work, *Patriarcha*, was first published in 1680, twenty-seven years after his own death, and possibly some fifty years after it was written for the attention of, among others, Charles I.⁴²⁴ His ideas, however, which lent an organic, patriarchal twist to Stuart-era divine right theory, were in circulation long before their persuasive and influential deconstruction by John Locke⁴²⁵ and Algernon Sydney.⁴²⁶ For our purposes, there are two important consequences which flow if, as Filmer believed, monarchy could be traced directly to Adam, and, therefore, to God. First, Filmer said, if God had made Adam the sole proprietor of the world, and everything in it, then it must follow that there had never been a moment of communal ownership: all property must be private property, all the world under the dominion of some king or other. Explicitly writing against Hugo Grotius, who argued for the existence of community, however shortlived, at the moment of creation,⁴²⁷ and John Selden, who said that community (between the father, Noah, and his children) was ushered in with the Flood,⁴²⁸ for Filmer it made no sense to believe that God would sanction a community "which could not continue."⁴²⁹ Rather, all property could be traced first to Adam, any property enjoyed by others thereafter coming at Adam's discretion (through gift or succession). According to this view, this is to say, there was no *public* world such as that in which Arendt believed, but a possession of private property, the

⁴²³ J.P. Sommerville 'Absolutism and royalism', in J.H. Burns and Mark Goldie (eds.) *The Cambridge History of Political Thought 1450-1700* (Cambridge, Cambridge University Press, 1991), pp.347-373, p.358

⁴²⁴ Its political influence however is best traced to its revival in the writings of Locke and Sydney, who spent much time directly refuting Filmer's assumptions in making their cases for a popular, or republican understanding of sovereignty.

⁴²⁵ John Locke *Two Treatises of Government* (1689)

⁴²⁶ Algernon Sydney *Discourses Concerning Government* (1698). Filmer's first published constitutional tract, *The Free-Holder's Grand Inquest Touching Our Sovereign Lord the King and His Parliament: to Which Are Added Observations Upon Forms of Government*, was published in February 1688 (although this was, in many respects, a revision and update of the earlier written, but later published *Patriarcha* – see the editor's introduction *Patriarcha and Other Political Works of Sir Robert Filmer* (Oxford, Blackwell, 1949), by Peter Laslett, pp.1-48, p.7).

⁴²⁷ *De Jure Belli ac Pacis* (1625)

⁴²⁸ *Mare Clausum* (1635)

⁴²⁹ Filmer (1949), VIII, p.65

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liberty for which depended upon the discretion of the ruler, the father: the king;⁴³⁰ the civil law therefore existing first and foremost to protect only that private liberty to peaceful possession. If there was a public world outwith the father's private dominion, then why, Filmer asked rhetorically, would the law "give power and remedy to Fathers to recover...their children that depart."⁴³¹ Without community there existed, therefore, nothing for which men shared a *common* responsibility; it was each to their own, and nothing more. If, however, the argument could then be made that men might share together common a concern for protection of their private liberties, the second consequence of Filmer's argument flatly rejected any notion that human society had emerged from the horizontal relationships between subjects/citizens, and the political liberty to consent, and dissent to the form, method or means of their being governed.

There is an intriguing hint of Arendt's 'Golden Age of Security' in Filmer's repudiation of political community. Where men have responsibility for the preservation of a Commonwealth, he warned, each becomes drawn to the belief that the public business will be looked after by the others, until it is "quite neglected by all."⁴³² Such indeed was the warning given by Arendt to modern men, who she believed *had* shied away from their responsibility in pursuit of private gain or peaceful enjoyment. Whereas for Arendt this retreat from the public realm was a corruption of the human condition, whereas she was both optimistic that this sense of (and for) 'publicness' could be recovered, Filmer was wholly pessimistic of the people's capacity for public life, urging them – as Constant said all rulers might – to passivity; calling their condition one of subjection. Because kingship was, in his view, an extension of patriarchal authority it followed that one's place in society was a matter for nature's arbitrary determination, rather than any collective, conscientious human construction or choice.⁴³³ Hence, for Filmer as for James, the "unnatural" condition of a "multitude [who claim to] choose their governors, or to govern, or to partake in government."⁴³⁴ It was, as we shall see, this strand of theology which the early Stuarts found so favourable in their appeal to divine right: the theorization not only of the peoples' subjection, but of their complete political and constitutional passivity, even in the face of tyranny.

⁴³⁰ Filmer (1949), VIII-X

⁴³¹ Filmer (1949), IX, p.73

⁴³² Filmer (1949), XIX, p.92

⁴³³ Filmer (1949), XIII - XV

⁴³⁴ Filmer (1949), XX, p.93

Thus the analogies made by James between the king, the head (of the body) and the father (of the family) served to educate his subjects: that they might not only have known their King as *their* head (the head of the multitude, they the body) and *their* father (they his children) but that they understood their subjection to him as a natural, a proper, and a beneficial condition. A natural condition because government by the King was the ordinance of God, made discernible by the Law of Nature (and more on this later); a beneficial condition because the divine conception of Kingship was defined as much by the duties of the King as by his right. In this sense the most significant similitude drawn by the King for the education of his subjects was that between monarchic and divine power: “Kings are justly called Gods,” he advised a hostile Parliament in his speech of 1610, “for that they exercise a manner or resemblance of Divine power upon earth.”⁴³⁵

Properly called Gods by the prophet King David, James found in scripture the basis for the office of God’s King:

*...To minister Justice and Augment to the people, as the same David saith: To advance the good, and punish the evill, as he likewise saith: To establish good Lawes to his people, and procure obedience to the same as diverse good Kings of Judah did: To procure the peace of the people, as the same David saith: To decide all controversies that can arise among them, as Salomon did: To be the Minister of God for the weale of them that doe well, and as the minister of God, to take vengeance Von them that doe evill, as S.Paul saith. And finally, As a good Pastour, to goe out and in before his people as is said in the first of Samuel: That through the Princes prosperitie, the peoples peace may be procured, as Jeremie saith.*⁴³⁶

Having drawn from these sources James continued to interpret the Coronation oath of every Christian king not only as a promise to maintain and defend the religion practised within their

⁴³⁵ James I, *1610*, p.181

⁴³⁶ James VI, *TL*, p.64

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kingdom, to maintain and execute the law, and to protect the privileges and liberties of the country from external and internal threat, but beyond that:

*...to procure the weale and flourishing of his people...by all...means possible to for-see and prevent all dangers, that are likely to fall Von them, and to maintaine concord, wealth, and civilitie among them, as a loving Father, and careful watchman, caring for them more then for himselfe, knowing himselfe to be ordained for them and they not for him...*⁴³⁷

Glenn Burgess, in his treatment of the divine right of kings, has spoken of the “mythical battle of ‘constitutionalism’ and ‘absolutism’ that some have discerned in pre-Civil-War England”;⁴³⁸ a battle between the so called ‘constitutionalism’ of parliament in opposition to the ‘royal absolutism’ of the early Stuart royalists which in fact, he says, never took place (at least not drawn along such stark lines). For sure, James seems at first glance to make such a distinction explicit: having staked the claim that the *Trew Law* was that of a “free and absolute” monarch,⁴³⁹ he boasted to Parliament that “[t]he State of Monarchie is the supremest thing on earth”; Kings called Gods even by God Himself.⁴⁴⁰ Nevertheless, Burgess was able to trace the origins of ‘Constitutional royalism’ to precisely this royalist theology. Stripping the perception of James’ absolutism of its Bodinian garb, Burgess suggested that the King himself would have applauded the assertion by the Royalist bishop, Henry Ferne, that absolute power need not mean ‘a power of arbitrary command’ but rather ‘a power not to be resisted or constrained by force of arms raised by subjects.’⁴⁴¹ The implication, posited here by Ferne, was that James’ adoption of divine right theory represented something more than a claim to the *institution* of kingship. The monarch, at this time *the* institution of English government, might be personified either in the form of the king or of the tyrant, the former who “acknowledgeth himselfe ordained for his

⁴³⁷ James VI, *TL*, pp.64-65

⁴³⁸ Glenn Burgess ‘The Divine Right of Kings Reconsidered’ 107 *English Historical Review* 425 (October 1992) pp.837-861, p.845

⁴³⁹ James VI, *TL*, 64

⁴⁴⁰ James I, *1610*, p.181

⁴⁴¹ Burgess (1992), p.858. Burgess here (p.858 fn.5) quotes Henry Ferne *A Reply unto Several Treatises* (Oxford, 1643), p.12. For a fuller treatment of the conflation of meanings attributed to relation of ‘absolute’ to Monarchy in the 17th century, and their political implications, see James Daly ‘The Idea of Absolute Monarchy in Seventeenth-Century England’ 21 *The Historical Journal* 2 (June, 1978) pp.227-250

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people”, the latter “who thinketh his people ordained for him”.⁴⁴² Yet, whilst the objective element of *monarchy*, ‘the rule (over all) by one’, is satisfied by both king and tyrant, subjectively, the two were distinct. It was not simply that the monarch *ought* to rule for the common weale as described by James; but that according to his divine right the King *must* rule in this way because that was what was his constitution (from God) demanded of him. Should a monarch ignore James’ advice, and consider the people no more than “a prey to his passions and inordinate appetites, as the fruits of his magnanimitie”; should he “frame the common-weale [only] to advance his particular: building his suretie upon his people’s miserie”, then the very constitution itself would have degenerated and transformed; the tyrant thereby making “up his owne hand upon the ruines of the Republicke.”⁴⁴³ Both could lay claim to the institutional power of monarchy; only one, however, with any constitutional legitimacy could call himself ‘king’. To equate this particular conception of divine right with royal absolutism, or as justification for the king’s rule by arbitrary command then is to miss the point that *by* divine right the institution of monarchy itself was limited; that *of* the king was demanded by his celestial Creator moral and political virtue to rule for the common weale. Kings were so called by scripture, properly so according to James, not only because they sat upon God’s throne on earth but more than that because ultimately only God himself, and certainly no earthly authority, could enforce this demand; because, in James own words, “[they] have the count of their administration to give unto him,”⁴⁴⁴ that is to say, to God, and to God alone.

It was, I believe, specifically *this* aspect of the *Trew Law*, written by the King of Scotland, published in Scotland, responding to the rebellious overtures of Scots upstarts John Knox and George Buchanan, which, for a time, so successfully carried James’ message across the border, with his accession to the English throne. If Tudor Kings had learned to live with, and act through parliament then such a staunch defence of a seemingly absolute royal authority might easily have been cast off as an irrelevance by this curious new audience. As Judson has said, and as we will come to consider in the chapters which follow:

⁴⁴² James VI ‘Basilicon Doron: Or His Majesties Instructions To His Dearest Sonne, Henry The Prince’ (1599), in Sommerville (ed.) (1994) pp.1-61, p.20 [hereafter *BD*]

⁴⁴³ James VI, *BD*, p.20

⁴⁴⁴ James VI, *TL*, p.64

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James and Charles could never completely ignore established ways of acting. During their reigns the dead weight of administrative procedure still afforded considerable protection to the subject.

So did the long-established procedural principle that parliament was necessary for many of the king's actions. It was necessary for the making of laws. The attempts of James and Charles to legislate in council by proclamation, rather than in parliament by statute, were bitterly contested; and their attempts to bypass the money-granting power of parliament never completely succeeded. In the making of laws and in the securing of direct taxes, parliament still had a voice in seventeenth century England. In these respects the king's authority was very definitely limited.⁴⁴⁵

If the *constituted* powers and *constitutional* practices of the two kingdoms, Scotland and England, remained distinct however, the *constituent* power behind kings, behind *all* kings, was in this view always and only that of God. The people of England, no matter their traditions, could no more legitimately call their king to account than could the people of Scotland or the people of France their own. Thus, when he addressed his parliament in 1610, James was clear that in acting through parliament he was moved not by obligation but by his own free will. "As it is a Christian duety in every man," he said, "*Reddere rationem fidei*,"⁴⁴⁶ and not to be ashamed to give an account of his profession before men, and Angels, as oft as occasion shall require: So did I ever hold it a necessitie of honour in a just and wise King, though not to give an account to his people of his actions, yet clearely to deliver his heart and intention unto them upon every occasion."⁴⁴⁷

Of the King's right...

The relationship between the divine right of kings and the accountability of the monarch has been somewhat underplayed in the orthodox readings of the theory as "on its political side...little more than the popular form of expression for the theory of sovereignty."⁴⁴⁸ This is

⁴⁴⁵ Margaret A. Judson *The Crisis of the Constitution: An Essay in Constitutional and Political Thought, 1603-1645* (New Brunswick and London, Rutgers University Press, 1988), Ch.2, p.50

⁴⁴⁶ 'to give an account of his faith'

⁴⁴⁷ James I, 1610, p.181

⁴⁴⁸ John Neville Figgis *The Divine Right of Kings* (2nd) (Cambridge, Cambridge University Press, 1922), Ch.IX, p.237

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not to say that the theme of accountability has been ignored altogether, but to the extent that it has been considered the focus has largely been a negative one. The recognition by Nicholas Henshall that “[d]ivine right raises the issue of accountability” because it “specifically *denied* that a monarch was accountable to his subjects” is broadly representative of this position.⁴⁴⁹ If the King was to be thought as God’s lieutenant on Earth (1) *because* he sat upon God’s throne *and because* (2) he had the account of his administration to give to God, then the focus of historians has traditionally been very much on the former condition, and less so on the latter.

When John Neville Figgis wrote, with great influence, that divine right was the vehicle by which sovereignty took shape in the minds and practice of the English nation, that his focus was fixed on the administration of ‘God’s throne’ was clear. For Figgis the main claim of the seventeenth-century royalists who adopted so readily the whole package of divine right ideology⁴⁵⁰ was the stamping of a Bodinian sovereignty on the English constitutional mind; more than the need for a law-giver with authority above all positive law, the divine right of kings, for Figgis, paid testimony to the need for (institutional) continuity “and the paramount importance to a state of a law-abiding habit”:

*It is easy to deny the doctrine. But those, who do this, should bear in mind that the singularly orderly character of English constitutional development, its freedom from violent changes, would not have been obtained but for the influence of this doctrine.*⁴⁵¹

The force of this argument is easy enough to trace in the writings of James himself. Troubled by the “Sirene songs”⁴⁵² of resistance composed in the writings Knox and Buchanan, named by the king as the very “archibellouses of rebellion”,⁴⁵³ James’ political work was clear and consistent in affirming the duty of obedience owed by his subjects to the crown. Accordingly, meeting three possible objections to this claim head on, he outlined his own vision of just what that due obedience demanded.

⁴⁴⁹ Nicholas Henshall *The Myth of Absolutism: Change & Continuity in Early Modern European Monarchy* (London and New York, Longmans, 1992), Ch.6, pp.142-143 [my emphasis added]

⁴⁵⁰ Figgis finds in *The Trew Law* the theory of divine right “in every detail” [Figgis (1922), Ch.VII, p.138]

⁴⁵¹ Figgis (1922), Ch.VII, p.146

⁴⁵² James VI, *TL*, p.62

⁴⁵³ James VI, *BD*, p.46

The first objection (supposed by the King) was that good citizens were possessed of a natural zeal for the preservation of their commonwealth; that it was their resulting duty to throw off the “wicked and tyrannous” king, to which he gave two answers. First, that theology had long taught “that evill should not be done, that good may come of it.” The evil of which he spoke was simply the taking of the power of the sword from the magistrate into the hands of the people. The king was ordained by God to judge his people; they could not lawfully judge the king. Secondly, the king reminded his people of the perilous consequence of rebellion: “For a king cannot be imagined to be so unruly and tyrannous, but the common-wealth will be kept in better order, notwithstanding thereof, by him, then it can be by his way-taking.” The results of rebellion, said James, would be a loosening of order, the perils of that being such that men are exposed “to all the insolencies that disordered people can commit by hope of impunitie.” Whilst in a tyranny some particulars might suffer, in rebellion *all*, he warned, would fall victim to anarchy.⁴⁵⁴

Next the King met the objection that disobedience to an unruly monarch would please God Himself, and suit his purpose. To this claim he answered that even a wicked king is sent by God, as a punishment to his people; that not the removal of a king by the people, but patience, prayer to God, and amendment of *their* ways was the only solution which could carry God’s favour.⁴⁵⁵ The final possible objection put by James was grounded in the alleged “mutuall paction and adstipulation...betwixt the King and his people, at the time of his coronation”: that should the king, by his tyranny, break such a pact, his subjects would as a consequence be released from their duty of allegiance. James responded to this ground by accepting that “a king at his coronation, or at the entry to his kingdome, willingly promiseth to his people, to discharge honorably and trewly the office given to him by God”. Notwithstanding the existence of this promise however, “in this contract (I say) betwixt the king and his people, God is doubtless the only Judge, both because to him onely the king must make count of his administration (as is oft said before) as likewise by the oath in the coronation, God is made judge and revenger of the breakers”. For the king, were the people to free themselves of this pact they would offend not only the principle known to all civil lawyers that a party to an agreement could not judge his own

⁴⁵⁴ James VI, *TL*, pp.78-79

⁴⁵⁵ James VI, *TL*, pp.79-80

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case, but also they would offend God Himself, by usurping his position as judge of all oaths, and surrendering that power to the passions and disorders of the headless masses.⁴⁵⁶

Non-resistance to the king then, *at least as the king himself saw it*, supposed that the very institution of monarchy (by King or by Tyrant) existed so that men would be saved from themselves: from the menace of anarchy. Throughout James' repudiation of the grounds of 'legitimate' resistance runs an underlying suspicion of the possibilities of 'action', to such an extent that the tyrant, of whom James writes so scornfully in *Basilicon Doron*,⁴⁵⁷ is considered preferable to the chaos and disorder of popular participation in the public realm; that the evils of tyranny are themselves a curse brought *upon* men as punishment for their sins.⁴⁵⁸ Here, Filmer stood in violent agreement with James, there being, he said, no tyranny comparable to the tyranny of the reckless, licentious multitude.⁴⁵⁹ According to the divine right of kings, it is the people themselves who are to be feared; the monarch to be revered for the maintenance of order over them: the very purpose of the theory, as expressed by J.P. Sommerville, "[t]o challenge resistance theory, and to strengthen royal power as a bastion against anarchy".⁴⁶⁰

For Sommerville, as for Figgis, the central tenet of early Stuart divine right thinking "was that by whatever means a ruler acquired his title, his authority came from God alone."⁴⁶¹ If this was the *aim* of divine right theory, its *effect*, as Sommerville put it, was to make the king sovereign in England.⁴⁶² Thus, when James issued his 'Commission to levy impositions' in 1608 he spoke of the care imposed upon princes to provide for the safety and welfare of their subjects" before stressing the political impotence of all but the king:

It is well known unto all men of judgement and understanding that the care imposed upon princes to provide for the safety and welfare of their subjects is accompanied with so great and heavy a charge as all the circumstances belonging thereunto can hardly

⁴⁵⁶ James VI, *TL*, pp.80-82

⁴⁵⁷ James VI, *BD*, pp.20-21

⁴⁵⁸ James VI, *TL*, p.79.

⁴⁵⁹ Filmer (1949), XIX, pp.90-93

⁴⁶⁰ J.P. Sommerville *Royalists & Patriots: Politics and Ideology in England 1603-1640* (2nd) (London, Longmans, 1999), Ch.1, p.10

⁴⁶¹ Sommerville (1992), Ch.1, p.29

⁴⁶² Sommerville (1999), Ch.1, p.41

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*fall under the conceit of any other than of those who are acquainted with the carriage of public affairs...*⁴⁶³

...which was to say, of course, the prince.⁴⁶⁴ James was well versed in resistance theory, this much is clear.⁴⁶⁵ His childhood tutor was George Buchanan: the same Buchanan who invoked such contempt from the King as an architect of rebellion in *Basilicon Doron*; the same Buchanan, indeed, whose *De Iure Regni apud Scotos Dialogus* (the text which earned the King's disdain), was dedicated to the child James himself:

*If you obey it [the book's instruction], you will gain for yourself and your people tranquility in the present and, in the future, everlasting glory.*⁴⁶⁶

The above dedication (first published in 1579) might have appeared quite prophetic by the middle of the seventeenth century, a period characterised not by 'tranquility' but by regicide, by tumult at home and troubled foreign policy abroad; James' own reputation as "the wisest fool in Christendom" (a phrase coined by his contemporary Henry VI of France in 1604) hardly the stuff of 'everlasting glory'. That the King did not 'obey' Buchanan was because he knew well that the ripples of resistance theory could easily, in the absence of caution, become the crashing waves which would bring down his reign. For Buchanan, not Kings but human communities were the divine thing, and, just as James invoked the image of the human body to make his claim, so too Buchanan, who declared the commonwealth as prone to disease as the human body itself.⁴⁶⁷ For Buchanan however the King was not the head, the seat of reason, but the doctor, with "a double duty: on the one hand, to preserve good health, and on the other, to restore it when it has been undermined by disease", by maintaining, in other words, the "equilibrium" of justice.⁴⁶⁸ The people themselves bestowed authority upon the king not because of his perfection, his proximity

⁴⁶³ 'Commission to levy impositions, 1608', in G.W. Prothero (ed.) *Select Statutes and other Constitutional Documents illustrative of the reigns of Elizabeth and James I* (4th) (Oxford, Clarendon Press, 1913) pp.353-355, p.354

⁴⁶⁴ 'Commission to levy impositions', in Prothero (ed.) (1913), p.354

⁴⁶⁵ Cf. Above at fn. 37

⁴⁶⁶ Roger A. Mason and Martin S. Smith (eds.) *A Dialogue on the Law of Kingship among the Scots: A Critical Edition and Translation of George Buchanan's 'De Iure Regni apud Scotos Dialogus'* (Aldershot, Ashgate Publishing Limited, 2004), Buchanan's intro., p.3 [hereafter *De Iure*]

⁴⁶⁷ George Buchanan, *De Iure*, p.22

⁴⁶⁸ George Buchanan, *De Iure*, p.25

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to the divine, but because he had shown himself to them, by experience and practice, to know and understand the laws by which justice was kept: a check upon the passions of the king and the people alike.⁴⁶⁹ Should the king “burst through all the fetters of the laws and clearly [behave] like a public enemy” he could no longer be considered the king but a tyrant, for it is from the law that he derives the very title of ‘king’. What is more, because the people, in Buchanan’s account, are ‘parent’ or ‘author’ of the laws, more powerful than the laws, *ergo*, more powerful than the king, “when the king is summoned before a court of the people, then, the lesser is summoned to stand trial before the greater.”⁴⁷⁰ As the enemy of the people, indeed, as the enemy of the whole human race, Buchanan thus concludes it to be “the right not only of the people as a whole but also of individuals to kill the king.”⁴⁷¹ The dangers to the king of ‘obeying’ the advice dedicated to him by Buchanan were, we see, rooted in the very idea of a *constituting* power vested in the people to bestow the authority of government upon the king; that ultimately the unlawful ruler, the tyrant, might be actively resisted and called to account by the very same. Thus we come to understand the negative association made by Henshall (above) between the theory of divine right and ‘issues of accountability’. For James, the ‘right’ of the king, claimed with clarity and consistency throughout his political work, was the right of non-resistance. In its ideal form, the divine right was properly called ‘absolutist’ by Sommerville not because the king possessed or claimed an ‘absolute’ right to create all human laws. Rather, the ‘absolute’ tenet of the divine right of kings, the ‘right’ of the king himself, was the absolute right of the king to the obedience of his subjects; the security that his subjects could not resist; could not, that is to say, call their king to account before them.⁴⁷² It was, as J.W. Allen has said, not a claim to make the law, but an absolute right to be tolerated should he break it.⁴⁷³

That the king was not claiming for himself an absolute right to make the law appeared most saliently in his famous address to parliament in 1610. Repeating much of the language used to defend kingship in *The Trew Law*, James moved on from his claim that “the State of Monarchie is the supremest thing upon earth” to distinguish between Kings in their original state and those

⁴⁶⁹ George Buchanan, *De Iure*, pp.29-31

⁴⁷⁰ George Buchanan, *De Iure*, pp.131-137

⁴⁷¹ George Buchanan, *De Iure*, p.153-155

⁴⁷² Sommerville (1999), Ch.1, pp.51-54

⁴⁷³ J.W. Allen *English Political Thought 1603-1660* (vol.1, 1603-1644) (London, Methuen & Co. Ltd., 1938), Ch.1, p.12

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of settled monarchies “that doe at this time governe in civill Kingdomes.”⁴⁷⁴ Whilst in their original state, be it a throne derived from conquest or election, the will of the kings served as law, the kingdom quickly settled:

Yet how soone Kingdomes began to be settled in civilitie and policie, then did Kings set downe their minds by Lawes, which are properly made by the King onely; but at the rogation of the people, the Kings grant being obtained thereunto.

In such a state, the king is subject to a double bind: the first, tacit bind, derives from the fact of his kingship: that he must serve for the good of the people and protect the laws themselves; the second bind, made explicit by his Coronation oath, that his government will be framed in conformity with the fundamental laws of the state.⁴⁷⁵ The consequence of breaking this bind was nothing less than the degeneration of the constitution itself:

*And therefore a King governing in a settled Kingdome, leves to be a King, and degenerates into a Tyrant, as soone as he leaves off to rule according to his Lawes.*⁴⁷⁶

That the right claimed was not one of absolute command, but one of non-resistance became clearer still as he continued that *even* in a settled kingdom, *even* where the King had degenerated into that ‘enemy of the people’, the Tyrant, *still* “no Christian man ought to allow for rebellion of people against their prince”.⁴⁷⁷ What Sommerville perceived as the *effect* of divine right theory, to make the King sovereign in England, was drawn directly from this source. Non-resistance, in Stuart ideology, was not the constitutional safeguard of a ‘Schmittian’ sovereign operating in the realm of ‘the exception’, but was a duty of obedience owed as equally to the well meaning King as to the nefarious Tyrant. The monarch might have existed for justice, or the common *weale*: the common *weale* however was in no sense *res publica*. Whilst the King acting in pursuit of the common interest was, by his office, a “publike person...as it were set...upon a publike stage”⁴⁷⁸, *upon* this stage the King was isolated; the people themselves neither actors, able to participate on

⁴⁷⁴ James I, *1610*, p.183

⁴⁷⁵ James I, *1610*, p.183

⁴⁷⁶ James I, *1610*, p.183

⁴⁷⁷ James I, *1610*, p.183

⁴⁷⁸ James VI, *BD*, p.4; repeated in James I, *1610*, p.184: “As I have already said, Kings Actions (even in the secretest places) are as the actions of those

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the stage of government (James asked even Parliament not to “meddle with the maine points of Government; that is my craft”⁴⁷⁹), nor spectators, able to observe and critique the performance by the King before them (“I wil not be content that my power be disputed vpon”⁴⁸⁰). The relationship between the King and his subjects was, from the King’s own perspective, a non-political one. The common *weale*, this is to say, was revealed not in that Arendtian sense of appearance and debate, action and speech by, for and amongst equals, in a public space. Rather the people were as children; pre-political beings, lacking the capacity of reasoned judgement needed to act in political affairs, hidden in their private lives under the protective care of the father. As the father ‘knows best’ the means by which his child may flourish so, for James, the King alone ‘knew best’ the common *weale*, admitted to the subjects only by his discovery and revelation.

No matter the source, by the King’s monopoly of the political, by the corresponding fact that the determination of the common *weale* was not *res publica* but *res rex* - the line drawn by James between King and tyrant - so reassuring in theory to the House of Commons in 1604, soon became worthless in fact.

The divine right of Kings...

We know then that the King, as drawn by correspondence, was God’s lieutenant on earth; the father of the nation and head of the body politic. We have seen that the right which he claimed was for the obedience of his subjects: a doctrine of non-resistance which sought to strengthen the *institution* of monarchy by stripping from it the *constituting* power of the people claimed, amongst others, by the King’s childhood tutor, George Buchanan. This leaves us with one final question: what work is being done, on behalf of the king’s right, by invoking in its favour a claim to ‘divine’ origin?

One aspect which seems clear from the evidence is that the King does not claim for himself ‘divine’ power, as such. James believed that ‘the age of miracles’ had come to pass. If, for

⁴⁷⁹ James I, *1610*, p.190

⁴⁸⁰ James I, *1610*, p.184

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example, he continued with the practice of ‘touching for the king’s evil’, a practice so called because it was believed that by the king’s touch could be cured certain diseases of the skin (most commonly scrofula(s)),⁴⁸¹ his scepticism toward the (so it was thought, divine) practice was betrayed by the fact that he ceased the acts of making the sign of the cross before the afflicted, and of physically touching the sores himself. Rather, it would seem, he continued the practice not so much through religious conviction but “in part to humour the people, more largely because he would not discontinue a custom which emphasized the divine nature of royalty.”⁴⁸² The answer to the King’s claim to ‘divinity’, I will argue, is a more specifically constitutional one. Some two-hundred years (...a civil war, regicide and a revolution...) after James had put pen to paper on *The Trew Law*, Thomas Paine provided a famous rebuke of the English constitution. “A constitution,” he wrote, “is not the act of a government, but of a people constituting a government; and government without a constitution, is power without right.”⁴⁸³ I believe it is fruitful to read James’ political work with Paine’s blast fresh in the mind. The King, we have said, had felt compelled to express his conception of kingship in response to what he perceived as being the rebellious and ultimately anarchic instructions of authors such as Buchanan who had called the King to account before the people: the lesser to account before the greater. Because Buchanan considered human community, and not the king himself, as that which was originally divine, and the king a human institution constituted by that community for the maintenance of justice, it was clear to the authors of resistance that the king should be held accountable for the exercise of his authority to that original power (with all its generative connotations). It followed from this that even tyrannicide could be justified in their name should the king desert his duties, ride roughshod over the laws, and become an enemy of the people. James’ fascination with and adoption of divine right theory can therefore be read as a direct challenge to these ideas, the forebearers of popular sovereignty. If the Scot had composed a ‘song’ of resistance, if the authority and power of the people went hand in hand with tumult, with rebellion and even regicide, then James’ conception of kingship was the opposite in every way: the king, he said, was the divine thing, hierarchy the state of nature, and order and unity “the

⁴⁸¹ For more detail on The King’s Evil, see Frank Barlow ‘The King’s Evil’ 95 *The English Historical Review* 374 (Jan., 1980) pp.3-27

⁴⁸² David Harris Willson *King James VI and I* (London, Jonathan Cape, 1956), Ch.X, pp.122-123

⁴⁸³ Thomas Paine *Rights of Man* (1790) (London, Penguin Classics, 1985), pt.II, Ch.4, p.185

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perfection of all [these] things.”⁴⁸⁴ By drawing correspondence between the people and the children of the family, or the members of the body, James was clearly demonstrating their political impotence; political *power* vested solely in the office of the king. Thus, when Charles I stood before his accusers, sentenced to death as (and note the similarity to Buchanan’s language) “a tyrant, traitor, murderer and public enemy to the good people of this nation”⁴⁸⁵ the defence of James’ heir was to reaffirm the political monopoly of the monarch. The “true liberty” of his subjects, he replied, “consists not in the power of government, but in living under such laws, such a government, as may give themselves the best assurance of their lives, and property of their goods.”⁴⁸⁶ As an answer to resistance theory, the divine right of the Stuart monarchy depended upon restraining the potential of this popular power by banishing the people from the public realm, and slamming shut the channels of communication between them and the monarch, from ‘the power of [participation in] government.’ There was, according to this account of kingship, liberty (for the people) experienced in the private realm, and beyond this only the right of the monarch; the power of government vested in one man: a clear example, Paine surely would have said, of power without right; government without constitution. Yet Paine was not the first to label the accusation of power without right in the direction of those who claimed to hold constitutional power in England. Charles I himself, declining the jurisdiction of those commissioned to judge him, fired this same shot across the bow of the High Court of Justice:

*...the duty I owe to God in the preservation of the true liberty of my people will not suffer me at this time to be silent: for, how can any free-born subject of England call life or anything he possesseth his own, if power without right [my emphasis] daily make new, and abrogate the old fundamental laws of the land...?*⁴⁸⁷

This is a revealing paragraph, for not only does it emphasise the political impotence of the people (we know that their ‘true liberty’, of which he speaks, is solely a private liberty of security in property and life) and reject the power of the court to try him, lacking right and thus abrogating

⁴⁸⁴ James VI, *TL*, p.63

⁴⁸⁵ ‘The Sentence of the High Court of Justice upon the King’ (January 27, 1648-49), in Gardiner (1906) pp.337-380, p.380

⁴⁸⁶ Charles I ‘The King’s reasons for declining the jurisdiction of the High Court of Justice’ (January 21, 1648-49), in Gardiner (1906) pp.374-376, p.375 [hereafter *The King Declines HCJ*]

⁴⁸⁷ Charles I, *The King Declines HCJ*, p.374

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the fundamental law of the land; it reveals also, in a truly revolutionary moment - the passing of judgement in the name of the people against the king, a moment of action - the source from which the king believed his 'right' had been granted: "the duty I owe to God". To say that the right of the king was divine was to say that the *political* power of the king was sprung from God himself. Charles might have said that 'a constitution is not an act of government, but of [the divine power of God] *constituting* a government; and government without a constitution, is power without right.' It is in this sense that a body of scholarship (not uniform enough in its substance to be described as a school of thought) has described the political work of King James as essentially constitutionalist in nature.⁴⁸⁸

The 'trew law' of which James wrote in 1598, and which he confirmed to the English parliament in various addresses after accepting the English crown, was in divine theory the fundamental laws by which the state was to be governed: the "trew...*ground [my emphasis]* [of] our so long disordered, and distracted Common-wealth";⁴⁸⁹ the true grounds, that is to say, "of the mutuall duetie, and alleageance betwixt a free and absolute *Monarche*, and his people".⁴⁹⁰ The king's instruction therefore was grounded in a language of constitutionalism: saying something of the institution of government, as well as the people over whom that institution is constituted and of the values and goals underpinning and shaping the vision of the constitution set therein. To begin with the latter: the goal of the constitutionalism put forward by James, and defended from the scaffold by Charles, was clearly 'order'. In an exchange just moments before his execution, Charles reassured Doctor Juxon that in death he would exchange a 'corruptible' for an 'incorruptible' Crown. That which he held to be the corrupting influence seems clearly to have been disorder: "I go from a corruptible to an incorruptible Crown; where no disturbance can be, no disturbance in the World." Charles himself was sure of his innocence, at least against the charges of tyranny brought by his earthly judges:

But I think it is my duty to God first and to my country for to clear myself both as an honest man and a good King, and a good

⁴⁸⁸ For example, elements of such thinking can be traced in Burgess (1992); the relevant pages on James I in Allen (1938); James Daly 'Cosmic Harmony and Political Thinking in Early Stuart England' 69 *Transactions of the American Philosophical Society* 7 1976; Francis Oakley *Omnipotence, Covenant, & Order: An Excursion in the History of Ideas from Abelard to Leibniz* (Ithaca and London, Cornell University Press, 1984)...

⁴⁸⁹ James VI, *TL*, p.63

⁴⁹⁰ James VI, *TL*, pp.63-64

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*Christian. I shall begin first with my innocence. In troth I think it not very needful for me to insist long upon this, for all the world knows that I never did begin a War with the two Houses of Parliament.*⁴⁹¹

That the crown was ‘corruptible’ in his view was not, therefore, because of the king’s ills, but rather was external, by “they that began these troubles”⁴⁹², by those, in other words, who had claimed, in the name of the people, the power to overthrow the tyrant. Charles’ answer was twofold. First, he challenged the claim that the High Court of Justice represented the people at all.

*And admitting, but not granting, that the people of England’s commission could grant your pretended power [to try, and to sentence, the king], I see nothing you can show for that; for certainly you never asked the question of the tenth man in the kingdom, and in this way you manifestly wrong even the poorest ploughman, if you demand not his free consent; nor can you pretend any colour for this your pretended commission, without the consent at least of the major part of every man in England of whatsoever quality or condition, which I am sure you never went about to seek, so far are you from having it.*⁴⁹³

Secondly, he projected an image of the people’s ‘happiness’ under the “settlement” of the kingdom which had “flourished” under Elizabeth, James and latterly Charles himself. “What hope is there of settlement,” he asked, “so long as power reigns without rule or law, changing the whole frame of government under which this kingdom hath flourished for many hundred years?”⁴⁹⁴ The people’s happiness, and by this we know he means their (private) liberty, their security in life and property, could not be guaranteed where ‘power without right’ could alter seemingly at will the fundamental laws of the nation. In such a state of flux there could be no order, nor this cherished security: the ‘true’ liberty of the people. James, of course, had given

⁴⁹¹ Charles I, *From the scaffold*

⁴⁹² Charles I, *From the scaffold*

⁴⁹³ Charles I, *The King declines HCJ*, p.375

⁴⁹⁴ Charles I, *The King declines HCJ*, p.376

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Charles' argument a theoretical grounding in *The Trew Law*. "And shall it lie in the hands of the headlesse multitude, when they please to weary off subjection, to cast off the yoake of government that God hath laid Von them, to judge and punish him, whom-by they should be judged and punished...?"⁴⁹⁵ The people without government were to be feared as a passionate and unruly mob, incapable of maintaining order. That the point was constitutional, in a sense broader than the institutional rights and duties of kingship, is shown by the instruction that even the order imposed by the tyrant was to be preferred, tolerated by his subjects, where the alternative was anarchy and the disorder wrought by 'the many'. God had laid the monarch upon the people, and even the tyrant was sent by God as a curse for *their* sins; and so it followed that to resist the monarch (be they King or Tyrant) was not only treason, but blasphemy; to resist God not only blasphemy, but treason. Thus, W.H. Greenleaf has called the divine right theory adopted by the early Stuarts a "political theory of order"⁴⁹⁶ wherein popular rebellion against the tyrant was nothing less blameworthy than the casting of sin upon sin. Greenleaf compared the political claims of the divine right of kings to the 'great chain of being' made famous in an essay by Sir Arthur Lovejoy. According to the great chain of being, all of creation, from God in heaven to the smallest grain of sand on earth, takes its place within a natural (God given) hierarchy. The most important link on this chain, the first link, was God who sought, through creation, to multiply his goodness. The closer one's place on the scale to God, the greater that link's claim to goodness by its relative proximity to perfection. According to this way of thinking, man was the pivotal link in the chain from the heavens and earth, possessing as he did both body and soul. The political implications of this were drawn by correspondence. Not only did God constitute the body politic as *creator* but as *exemplar*: because God was sovereign, and because all that existed was a multiplication of his goodness, sovereignty inhered in that which was created by him, including, crucially, political society.⁴⁹⁷ Monarchy, we remember, was thought by James 'the supremest thing upon earth' because it most closely resembled divinity, by which he meant the perfection of all things: unity. Just as nature gave the body just one head (and called anything with more a monster) so too monarchy was the most natural form of government, best fitting the order of the chain.

⁴⁹⁵ James VI, *TL*, pp.81-82

⁴⁹⁶ W.H. Greenleaf *Order, Empiricism and Politics: Two Traditions of English Political Thought 1500-1700* (London, Oxford University Press, 1964), Ch.2, p.41

⁴⁹⁷ Greenleaf (1964), Ch.2, pp.13-32

The invocation of divinity therefore endowed the right of kings with a teleological constitutional value. If the people were to be thought of as pre-political, as subjects rather than citizens, then the teleology of order made certain demands of them. Most importantly the appeal to (the order of) hierarchy stripped from them the power of community. Buchanan had argued that the ultimate political power lay in the people to appoint, judge and even kill the monarch. Holding the assembly of the people as ‘greater than’ the monarch, and thus the most perfect judge of his actions, he set as his task to describe the citizen properly so called, he who was fit to judge, stressing at all times the value of human society:

*Those who obey the laws and uphold human society, who prefer to face every toil, every danger, for the safety of their fellow countrymen rather than grow old in idleness, enjoying an ease divorced from honour, and who keep always before their eyes, not their immediate pleasures, but the renown in which posterity will hold them.*⁴⁹⁸

How different then the appeal by Charles that the liberty of his subjects lay not in the power of government, an enterprise in which by Charles own admission the people (all the people) must come together lest it be something less than popular, but in their ‘immediate pleasures’, security in life and property? How divorced from honour, toil and danger the isolated subject of the tyrant, for whom not resistance but the solitude of “patience, earnest prayers to God, and amendment of their lives, are the onely lawful meanes to moue God to relieve them of that heavie curse”⁴⁹⁹

Finally, because it was by the divine constituting power that the office of the king was created and defined, it was to that power, to God alone, that the king must give account for the administration of his office. Of this Charles remained sure, even when he had been sentenced to death as an ‘enemy of the people’. Protesting his innocence as both a good Christian and a good King, Charles “call[ed] God to witness, to whom [he] must shortly make an account”⁵⁰⁰ that Parliament, and not the King, had struck the first blow of the civil war. Indeed, in so much as

⁴⁹⁸ Buchanan, *De Iure*, p.141

⁴⁹⁹ James VI, *TL*, pp.79-80

⁵⁰⁰ Charles I, *From the scaffold*

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divine right ‘raises issues of accountability’, the most revealing aspect is less that the king may be called to account by no earthly authority, but rather that the king, according to both James and Charles, *must* give account of his reign to God. To the extent that such a tangible thing as a constitution existed in the political thought of the early Stuart monarchs, it was to be found in the oath made by the acceding monarch upon his coronation. Having explicitly denied the right of his subjects to rebel against their monarch, no matter the character of his rule over them, James I sought to reassure the assembled parliament that should the king exceed the limits of his power set forth by his oath, should his rule degenerate forthwith into tyranny, he would find his punishment, properly, before God:

For in that same Psalme where God saith to Kings, Vos Dij etis, hee immediately thereafter concludes, But ye shall die like men. The higher we are placed, the greater shall our fall be. Ut casus sic dolor: the taller the trees be, the more in danger of the winde; and the tempest beats sorest vpon the highest mountaines. Therefore all Kings that are not tyrants, or perjured, will be glad to bound themsevles within the limits of their Lawes...⁵⁰¹

This positive aspect of the accountability of the monarch (accountability *to...*) runs throughout James’ conception of kingship, all the time related to God *because* of His divine, constituting power. For example, the king concedes that by his coronation oath a promise is made to his people; the terms of that promise, however, to “discharge honourably and trewly *the office given him by God [my emphasis] over them*”.⁵⁰² Thus it falls to God, and not the people, to judge that the promise, and with it the terms of the office given him, have been broken; they themselves without the capacity to determine a breach and cast off their subjection:

...God is doubtless the only Judge...because to him onely the king must make count of his administration (as is oft said before) as likewise by the oath in the coronation...⁵⁰³

By the King’s proximity to God he is the most supreme thing on earth, and yet by the same token his sins are amplified, the greater his obligation to his creator, the punishment due for

⁵⁰¹ James I, *1610*, pp.183-184

⁵⁰² James VI, *TL*, p.81

⁵⁰³ James VI, *TL*, p.81

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transgression far greater for it, so that no king should forget his duty to God, no King therefore forget that he is ordained for his people, for the well-being of the Commonwealth.⁵⁰⁴ James knew well that removing the threat of resistance required the formulation of a habit of obedience from the very source of that resistance, the people themselves. In the divine right of kings therefore, he found a compelling answer to the legitimacy paradox left behind; a grab for *constituent* (or, better put, constituting) power in harmony with the interests of monarchy and suspicious of the boundless unpredictability of action. Declaring the King's accountability (only) to God, James in the same paragraph reminded the reader of *The Trew Law* the reason for doing so: "my onley purpose and intention in this treatise is to perswade...by these sure and infallible grounds, all such good Christian readers...to keepe their hearts and hands free from such monstrous and unnaturall rebellions, whensoever the the wickednesse of a Prince shall procure the same at Gods hands".⁵⁰⁵ We know by the words of the Commons in 1604 that for a time His Majesty's writings, the marriage therein between the fact of the kings rule and theoretical basis, reassured a somewhat restless nation as to the character and intentions of their new king. When the potentially absolutist theory of the father became the tyrannical actions of the son however, the divine right of kings found itself unable to perform a further important constitutional task, the resolution of institutional struggles. It could, at best, resort only to the ideal: that for their patience on earth the king's subjects would be rewarded with a clean conscience at the moment of their judgement, by tolerating the reign of the tyrant in the knowledge that God's punishment would fall upon the monarch in time. This was a burden evidently more bearable when posed in theory than in practice, the conciliatory tone of the Commons in 1604 long forgotten when that same House passed (nominally) an *Act erecting a High Court of Justice for the King's Trial*,⁵⁰⁶ an Act allowing for the trial of Charles I *by the authority of the parliament assembled*, for his "wicked design" to "introduce an arbitrary and tyrannical government", in order to bring about the "enslaving or destroying of the English nation."⁵⁰⁷ In chapters 2 and 3, I will turn to consider the limits of this divine constitution, magnified by struggles both political and legal through which England's political constitution

⁵⁰⁴ James VI, *TL*, p.83

⁵⁰⁵ James VI, *TL*, p.83

⁵⁰⁶ in Gardiner (1906) pp.357-358; I say nominally because the 'Act' had in fact passed through only this House [hereafter *HCA Act*]

⁵⁰⁷ *HCA Act*, p.357

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was first theorised, in opposition to the tyrannical practices of James' heir, Charles I. In the scathing words of Rudyard Kipling:

*He was the author of his line
He wrote that witches should be burnt;
He wrote that monarchs were divine,
And left a son who proved they weren't!*⁵⁰⁸

Pt.II (2) *Re-making the Constituent Power*

A man of courage never needs weapons, but he may need bail.
- Lewis M. Mumford -

An ocean of uncertainty: Ship money under attack...

We left Charles I with the mocking tone of Kipling ringing in his ear. James' heir, said Kipling, had proven by the calamity of his reign that kings, far from divine, were inescapably human. This, of course, would find its final expression in the appearance of the king in judgment before his subjects, 'the good people of his nation.' As we shall see, it was no irony that the origins of Charles' final defeat, in law, before the High Court of Justice which sentenced him to death, can be traced to his own legal *victory*, in the (in)famous case of Ship Money, *Rex v. Hampden*.⁵⁰⁹

Prior to the controversy ignited by the extension of this ancient prerogative, the Crown's right to requisition both ships and men in time of emergency was one with a long and seemingly uncontroversial history. As Holdsworth has said, during the Thirteenth to the Sixteenth Centuries the power was "recognized in the widest manner." He summarizes:

(1) The Crown requisitioned ships and men (a) in territorial waters; and (b) on the high seas, or elsewhere. (2) The width of these powers is accounted for by the fact that they were to a large extent based, not upon the locality of the ship, but upon the theory that ship-owners and their ships owed allegiance to the Crown. (3) As a corollary to and a consequence of these powers the

⁵⁰⁸ Rudyard Kipling, *James I, 1603-25*

⁵⁰⁹ *Rex v. Hampden*, 3 How. St. Tr. 826

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Crown (a) punished those who disobeyed its orders to produce ships; and (b) indemnified those who obeyed its orders. (4) Parliament recognized the legality of these powers.⁵¹⁰

It was, however, “[t]he attempt made by Charles I to use his prerogative over ships and shipping to raise a permanent extra-Parliamentary revenue by means of ship-money” which roused the suspicions of his subjects.⁵¹¹ If Arendt was right, however, if the *only* remedy against the misuse of public power by private individuals is to expose that misdeed to the glare of publicity,⁵¹² then in order for those suspicions to give rise to action, action against the extension of the policy, Englishmen would need to find a public space within which those suspicions could be confirmed (or disproved) and opinion formed, and within which those opinions could influence, if need be in resistance to, their rulers. As we shall see, when the Buckinghamshire landowner, John Hampden, was summoned before the Court of Exchequer for his failure to pay the 20s which had been demanded of him, it became clear that this space would *not* be found in the common law courts.⁵¹³

The context from which the ship money controversy emerged was that of what is now known variously as Charles’ ‘personal rule’ or the ‘eleven years tyranny’. Having dissolved parliament on March 2nd 1629, following a “disorderly scene” in the Commons, when the Speaker, John Finch, had been forcibly held in his chair as Sir John Eliot read a stinging remonstrance against the Crown’s taking of tonnage and poundage without the consent of the Parliament,⁵¹⁴ Charles would wait eleven years before calling another. In the meantime, however, the Crown’s need to

⁵¹⁰ W Holdsworth ‘The Power of the Crown to Requisition British Ships in a National Emergency’ (1919) 35 *Law Quarterly Review* 12, pp.12-13

⁵¹¹ Holdsworth (1919), p.26

⁵¹² Arendt, *OR*, Ch.6, p.253

⁵¹³ This is not an uncontroversial point. For accounts which place the common law courts at the very heart of seventeenth century political reform, see Alan Cromartie *The Constitutionalist Revolution: An Essay on the History of England, 1450-1642* (Cambridge, Cambridge University Press, 2006); Paul Craig ‘Prerogative, Precedent and Power’, in Christopher Forsyth and Ivan Hare (eds.) *The Golden Metwand and the Crooked Cord: Essays on public law in honour of Sir William Wade QC* (Oxford, Clarendon Press, 1998).

⁵¹⁴ F.W. Maitland *The Constitutional History of England* (Cambridge, Cambridge University Press, 1908), Ch.4, p.314. Traditionally, tonnage and poundage (a tax levied on every tun of wine imported, and every pound of merchandise imported or exported) had been granted to the King for life. However, concerned by Charles’ extravagant spending, as well as his desire to involve his kingdom in the Thirty Years War, Parliament, as a matter of strategy, sought to restrict the King to annual grants of the levy, forcing him to make his case on a year by year basis, before eventually refusing the grant altogether. Undeterred, Charles continued to raise the levy without the approval of his Parliament, leading to the chaotic scenes which saw his second Parliament dissolved.

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generate income was undiminished.⁵¹⁵ By 1634 it was thought that only the king's own ships could keep up with their expanding and improving French and Dutch counterparts. Whilst the law would allow Charles to requisition private ships, however, it would not allow him the money to fit his own. As Glenn Burgess observed, "[the law] allowed [the king] to do what he did not need to do, but did not allow him to do what he needed to do."⁵¹⁶ To be sure, ship money of sorts was nothing new. As late as 1619, James I had raised nearly £50,000 from seaport towns in lieu of ships for war against Algiers.⁵¹⁷ In that case however the country was on a war footing, and the danger to the commonwealth was both immediate and visible. When however, in 1634, Charles issued a writ requisitioning ships, or money in lieu thereof, directly from his people there was a widely held suspicion that no such threat was in fact imminent.

The writs of 1634, commonly attributed to the Attorney General Noy, were carefully drafted to conform to old precedents: restricted in application to the maritime counties and seaport towns and asking first for ships and not for money; the perceived threat to the kingdom outlined therein as follows:

*...we are given to understand that certain thieves, pirates, and robbers of the sea, as well as Turks, enemies of the Christian name, as others, being gathered together, wickedly taking by force and spoiling the ships, and goods, and merchandises, not only of our subjects, but also the subjects of our friends in the sea...have carried away, delivering the men in the same into miserable captivity: and forasmuch as we see them daily preparing all manner of shipping farther to molest our merchants, and to grieve the kingdom, unless remedy be not sooner applied...*⁵¹⁸

Gordon records that collection following this writ was relatively successful, 79,589 pounds being collected from assessments totalling 80,609. Still though, having invested some 88,000 pounds

⁵¹⁵ On the contribution of the Crown's "poverty" to the eventual outbreak of civil war see, generally, Glenn Burgess *The Causes of the English Civil War: The Ford Lectures Delivered in the University of Oxford 1987-1988* (Oxford, Clarendon Press, 1990), Ch.7

⁵¹⁶ Burgess (1990), Ch.7, p.183

⁵¹⁷ J.R. Tanner *English Constitutional Conflicts of the Seventeenth Century 1603-1689* (Cambridge, Cambridge University Press, 1928), Ch.5, p.76

⁵¹⁸ 'Specimen of the first Writ of Ship-money', in S.R. Gardiner (ed.) *Documents of the Puritan Revolution 1625-1660* (Oxford, Clarendon Press, 1889), pp.105-108, p.105

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on their fleet, the Crown required yet more income and so, by August 4, 1635, a second levy was charged which not only renewed the previous maritime levy, but which extended the tax inward, to the inland counties.⁵¹⁹ “[T]his burden of defence⁵²⁰ which touches all,” the writ explained, “ought to be borne by all”.⁵²¹ Accordingly the writ was accompanied with an instruction to those sheriffs charged with collection to levy, instead of a ship, a specified sum of money.⁵²² Charles had fully anticipated the unpopularity of the extended policy, and, expecting the difficulties in collection which surely followed, sought to counteract his subjects’ displeasure with the support of his judges. Thus, having already offered his support for the initial writs, the royalist judge, Finch, urged his colleagues of Common Pleas to subscribe to an extra-judicial opinion maintaining the legality of the king’s actions. This they did, to the effect that “(1)...where the benefit of naval defence was more particularly felt by the coastal districts, they alone should contribute to the cost; (2) that the King was sole judge of whether the danger extended to the country as a whole; and (3) that where he judged that it did so, the burden of defence fell on all alike.”⁵²³ To this (unpublished) opinion Hutton did not subscribe, and Croke offered a separate opinion.⁵²⁴ Frustrated by continued problems of collection, the king returned for a further opinion, this time to be made public: “enrolled in all the superior Courts and in the Star Chamber [and to be published by the judges] at the assizes.” Therein the scope for collection was widened still: “explicitly stating that the King could command contributions from his subjects and coerce the refractory.”⁵²⁵ Again Croke and Hutton disagreed. This time, however, it was urged “that the lesser number must submit to the major, although they varied in opinion”, and the opinion did as if it was unanimous, published as the “resolution of ‘all the judges of England’.”⁵²⁶ With the opinion of the judges (seemingly) behind them, the Crown felt confident that the legality of

⁵¹⁹ Gordon ‘The Collection of Ship-Money in the Reign of Charles I’ (1910) 4 *Transactions of the Royal Historical Society* 141, p.143

⁵²⁰ For the record, the danger spelled out in this writ was virtually identical to that of the first.

⁵²¹ Quoted in Richard L. Noble ‘Lions or Jackals? The Independence of the Judges in *Rex v. Hampden*’ (1962) 14 *Stanford Law Review* 711, p.715

⁵²² Tanner (1928), Ch.5, p.77

⁵²³ D.L. Keir ‘The Case of Ship-Money’ (1936) 52 *Law Quarterly Review* 546, p.555

⁵²⁴ Noble (1962), p.716. Given that Hutton and Croke’s opposition to the policy was, therefore, known before *Hampden’s case*, Noble argues that claims that the King there manipulated the bench to suit his ends are overplayed (p.721).

⁵²⁵ Keir (1936), p.555

⁵²⁶ Noble (1962), p.716. It was alleged that in order to procure support for the King from all the judges Finch had used bribes and threats to secure their signatures. (W.J. Jones *Politics and the Bench: The Judges and the Origins of the English Civil War* (London, George Allen & Unwin Ltd., 1971), (Introduction) Ch.5, p.127)

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ship-money could stand up to scrutiny in the courts, and brought proceedings Hampden for his share.

Such a judgement, contrary to all other...

Debating in the Commons, after the fact, Pymme said of Ship Money:

*It is true that it hath the countenance and coullor of a Judgm[en]t for it, but such a Judgm[en]t as is contrary to all other Judgm[en]t of the Lawe; being ag[ains]t all lawe and having noe one book for it...*⁵²⁷

The lawyer George Peard went even further, calling the policy an “abomination” which, having become precedent, no longer attacked just his contemporaries but future generations: “the unborn child,” for whom the precedent had been set.⁵²⁸ Although undoubtedly touching the mood of a nation in which “the financial measures of the Crown gave all classes a common grievance,”⁵²⁹ as a (strict) question of law, the position was not nearly so clear cut.

Whatever their dividing lines, those who judged both for and against the king were agreed that the case before them was one unprecedented in its importance both in the history and in the development of English constitutional law. Whilst warning that the claim might be a little exaggerated, Sir John Finch admitted that each of the judges “have in one thing agreed, that this is the greatest Case that ever came in any of our Memories, or the Memory of any Man.”⁵³⁰ The

⁵²⁷ Mr Pymme to the House of Commons, 17 April 1640, quoted in Esther S. Cope (with Willson M. Coates) *Proceedings of the Short Parliament of 1640* (London, Royal Historical Society, 1977), p.153

⁵²⁸ Mr Peard to the House of Commons, 23 April 1640, quoted in Cope (1977), p.153. At the insistence of a Mr Herbert, pointing to the “gravity of the King” and the “solemnity of the judges”, Peard retracted the “punishable language” he used with an apology. That he remained committed in his opposition to both the policy and the judgment is clear however. Just a week later he restated:

That the Parliament was the only creator of lawes, and the expounder of those lawes. The Parliament was the Phisition to prescribe rememdy to the diseases of the commonwealth, and the Judges were as the Apothecaries (not to putt, or add to any newe ingredient but such onely as the Phisitian, the Parliament had before prescribed)...

(Mr Peard to the House of Commons, 30 April 1640, quoted in Cope (1977), p.153)

⁵²⁹ Tanner (1928), Ch.5, p.73

⁵³⁰ Opinion of Sir John Finch (for the King), 3 How. St. Tr. 826 [p.195]. This was indeed a sentiment expressed on all sides. Sir Robert Berkley, deciding strongly in the King’s favour, would call it “a Question of extraordinary

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reason, unequivocally expressed throughout the various opinions, for such weight being attached to the case was that it asked a court of law to determine:

*Whether the King, by his Right of Sovereignty, may charge the Subject, in Case of Necessity, to contribute with him to the necessary Defence of the Kingdom, without the Subjects Consent in Parliament.*⁵³¹

Simply put the question in law was a fairly narrow yet spectacularly important one: “assuming the realm to be in danger, [to what extent is] the King’s right and duty to provide against the danger...brought to a standstill by the subject’s right in his own property”?⁵³²

Deciding most strongly in the king’s favour were the triumvirate of Berkley, Crawley and Finch. For they, the subject’s private right in his own property was *no* restraint upon the right and duty of the Crown to provide against danger to the realm itself. In the opinion of Berkley, the fundamental laws of England were those of any monarchy, with the consequence that the king possessed all the rights of a free monarch.⁵³³ “The Law,” he said, “is of itself an old and trusty Servant of the King’s; it is his Instrument or means which he useth to govern his People by.” He continued:

*I never read or heard, that Lex was Rex, but it is common and most true, that Rex is Lex, for he is lex loquens, a living, a speaking, an acting Law.*⁵³⁴

In those times when the very existence of the commonwealth was threatened, the rights of the individual were entirely subsumed by the general good of the Kingdom; *salus republicae* the supreme (and, in the event, the only) law, which by necessity “takes away particular

Weight, of infinite Consequence, the greatest that ever came before Judges of ordinary Courts of Justice.” (Opinion of Sir Robert Berkely, 3 How. St. Tr. 826 [p.125]). Sir George Croke, Hampden’s most vociferous supporter agreed, calling it the “greatest Cause that ever came in Question before any Judges.” (Sir George Croke, 3 How. St. Tr. 826 [p.146]). Delivering a more moderate opinion, for the Hampden on a technicality of law, Sir Humphrey Davenport found the case one of “very great Weight” demanding that all Judges turn an “especial Eye unto it.” (Opinion of Sir Humphrey Davenport, 3 How. St. Tr. 826 [p.188]).

⁵³¹ Opinion of Sir Frances Crawley (for the King), 3 How. St. Tr. 826 [p.115]

⁵³² Keir (1936), p.557

⁵³³ Berkley, 3 How. St. Tr. 826 [pp.130-131]

⁵³⁴ Berkley, 3 How. St. Tr. 826 [p.131]

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Interests”.⁵³⁵ Indeed, by invoking *salus reipublicae* it was clear that the private realm, where women dwelled, where prayer was offered, where property was held, was stripped of its defining privacy, and called, wholly and unreservedly, to the service of the Crown:

...every Subject must (even by Rules of Law) bestir himself; must contribute his best Abilities; must set to both his helping hands.

Rich Men must expose their Treasures.

Able Men of Body must put on Arms.

Great Councillors must give their Best Advice.

Women must not be idle.

Old Men and Clergymen (if they have no other Powers) must attend their Prayers.

*And Judges must press and inforce the Laws upon the Subjects, to compel them to contribute.*⁵³⁶

If this was the king’s right and duty, then the question must be asked: *by* whom did the court believe this right was granted; *to* whom did the court believe the duty was owed? Certainly the right was not granted by the people themselves: on this, Berkley was clear. The fundamental laws of England, never democratic, he said, knew of “no such King-yoaking Policy” as the subjection of the king’s prerogative power to parliamentary limitation.⁵³⁷ Finch was no less emphatic: the king, he said – in a clear parallel with divine right theology⁵³⁸ - preceded any parliament, and therefore held the original sovereignty. Indeed, as Maitland has observed, the dependence of parliament upon the king was, certainly at that moment of apparent crisis, an observable fact magnified by the context of personal rule. “It comes when he calls it, it disappears when he bids it go; he makes temporal lords as he pleases, he makes what bishops he pleases, he charters new boroughs to send representatives.”⁵³⁹ Finch’s advice to those who sought to redeem the lost privilege of parliament was no appeal to the virtue and action of the

⁵³⁵ Berkley, 3 How. St. Tr. 826 [p.133]

⁵³⁶ Berkley, 3 How. St. Tr. 826 [p.144]

⁵³⁷ Berkley, 3 How. St. Tr. 826 [p.131]

⁵³⁸ As Filmer saw it:

The people cannot assemble themselves, but the King, by his writs, calls him to what place he pleases, and then again scatters them with his breath in an instant, without any other cause shown them than his will.

(Filmer (1949), Ch.XXX, p.118)

⁵³⁹ Maitland (1908), Ch.4, p.298

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people but rather, it so followed, “Obedience and Dutifulness unto his Majesty’s Command.”⁵⁴⁰ In the opinion of the majority of the court the king was not, indeed *had never been*, accountable to any temporal authority. The institution of parliament depended upon his bidding; the law his ‘trustworthy servant’. Rather, and giving the weight of judicial sanction to divine right, it was by God that the king’s rule was constituted, and so the definition, and re-definition of his powers were held to be beyond the pale of the law, and indeed beyond *any* human authority. Sir William Jones said as much when, delivering his opinion in Charles’ favour, he left “Divines to talk the Pleasure” of the king’s right, the role of the bench, he said, being solely “to judge according to the [already established] fundamental laws and Customs of the Realm.”⁵⁴¹ Finch, unsurprisingly, went even further:

*The King holds this Diadem*⁵⁴² [and with it, all the rights of a free monarch] *of God only, all others hold their hands of him, and he of none but God...none other can share with him in his absolute power.*⁵⁴³

It was, then, from God that the majority found the king’s prerogative right to act in emergency had been constituted, and it was to God and to no other, that the King must give account for the performance of that right. In an emergency sitting following the discovery of the Gunpowder Plot, James I had thanked “GOD, for the great and miraculous Delivery he hath at this time granted to me”: finding in the ‘miraculous’ discovery and failure of the plot the fact of God’s (positive) judgement over his reign which his theory of divine right had (publicly, and regularly) promised.⁵⁴⁴ That Charles’ court in *Rex v. Hampden* “might in the long run have preferred the divine right of Kings to the divine right of property”⁵⁴⁵ can, then, be supported further by the example given by Sir Thomas Trevor, echoing James I, that in the great Plot of Gunpowder neither parliament, nor the law, but God Himself had kept the nation safe.⁵⁴⁶

⁵⁴⁰ Opinion of Sir John Finch (for the King), 3 How. St. Tr. 826 [pp.199-200]

⁵⁴¹ Opinion of Sir William Jones (for the King), 3 How. St. Tr. 826 [p.176]

⁵⁴² His crown

⁵⁴³ Finch, 3 How. St. Tr. 826 [p.199]

⁵⁴⁴ James I ‘A Speech in the Parliament House, As Neere the Very Words As Could Be Gathered at the instant’ (9 November, 1605), in Johann P. Sommerville (ed.) *King James VI and I: Political Writings* (Cambridge, Cambridge University Press, 1994) pp.147-158, p.147

⁵⁴⁵ Keir (1936), p.574

⁵⁴⁶ Opinion of Sir Thomas Trevor (for the King), 3 How. St. Tr. 826 [p.145]

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In finding for the king then, we see the full ambit of divine right theory take hold in the court room. Thus, the court held that, assuming the realm to be in danger, Charles, by his prerogative right and divine duty, may and indeed must exact extraordinary charges upon the people, in spite of any rights held by his subjects in property. In Keir's analysis the key to defending the majority position is that each of the judgements delivered in favour of the king had stressed that this was a right and duty of the king limited to cases of necessity, to those (presumably rare) instances when the very existence of the commonwealth and thus the very basis of *salus republicae* was threatened. Berkley, for example, was "clear" that the King "may not...at all Times, and upon all Occasions, impose Charges upon his Subjects in General, without common consent in Parliament." Subjects, he said, were not slaves; they were freemen, not villeins.⁵⁴⁷ Jones held for the king but on the condition that the charge ceased with the cause,⁵⁴⁸ whilst Finch too agreed that without danger there could be no charge.⁵⁴⁹ These qualifications being made, Keir found much to praise in a judgement founded upon "a conception of public policy, inherited from the preceding age, which placed the general welfare of the realm above private interests".⁵⁵⁰ Such a reading of the case is well and good, but for one thing: the tone of the judgement was betrayed by the unquestioning trust placed in the king's divine right. For Finch the legality of the policy *depended upon* the existence of necessity, which is to say, of danger. How did he know that such a danger existed? "It is sufficient," he said, "that the King knows there is a danger."⁵⁵¹ It was, for Finch, a "scandal" to claim that the king used Ship Money for his own personal gain⁵⁵² (indeed we know now that the Charles made no such dishonest use⁵⁵³), although Finch was alive to the distinct danger that the revenue raised may be used for an *unnecessary* war. Against this possibility, however, stood only the good will of the monarch:

But though (blessed be God) his Majesty is so gracious and loving to his Subjects, and so just, that we need not fear that he will charge them but upon urgent Necessity; yet we know not what succeeding Ages will do.

⁵⁴⁷ Berkley, 3 How. St. Tr. 826 [p.126]

⁵⁴⁸ Jones, 3 How. St. Tr. 826 [p.175]

⁵⁴⁹ Finch, 3 How. St. Tr. 826 [p.198]

⁵⁵⁰ Keir (1936), p.573

⁵⁵¹ Finch, 3 How. St. Tr. 826 [p.198]

⁵⁵² Finch, 3 How. St. Tr. 826 [p.202]

⁵⁵³ Tanner (1928), Ch.5, pp.77-78

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*It is not well to blast succeeding Ages, and if they should hereafter charge unreasonably without Cause, yet this Judgement warrants no such thing. Again, It is no Argument to condemn the true Use of a thing, because it may be abused. And again, The Law reposes as great Trust in the King as this.*⁵⁵⁴

This, in the analysis of J.W. Allen, was the “radical weakness” of the case: that it “stood or fell with the *assumption* that the alleged public danger was real and immediate. That, rather obviously, was not true.”⁵⁵⁵ What has perhaps been overlooked in the literature which surrounds the case, however, is the extent to which the making of this assumption was grounded in divine right thinking. This was made all the more apparent by their unwillingness to question not only the levy itself, but the underlying question of necessity which gave rise to it. After all, the danger, immediate or apprehended, did not ‘loom large’; following this, if the king could not be said to have abused his trust he could certainly be accused of exercising extremely poor judgement. In doing so Charles belied his own claim to perfection, to ‘mortal divinity’, proving it a (constitutional) fiction so far removed from (political and social) reality that his subjects were, in the long run, no longer willing to ‘suspend their disbelief’ and bind themselves unquestioningly to his rule. What is more, the majority opinion of the court, which placed such absolute and inscrutable trust in so implausible a figure as Charles left the political nation starkly, and suddenly, exposed. As Burgess has observed, the decision in *Rex v. Hampden* “seemed to imply that the law was quite worthless as a protection for the rights of the subject”.⁵⁵⁶ *Contra* the claim by Finch that it was an “averment” of the subject’s right to property that *only* in necessity may it legitimately be taken,⁵⁵⁷ by simply accepting that the king was the sole judge of such a state of exception, subject to no human scrutiny, neither by the judges, nor by Hampden or his counsel before them, the Englishman could, with some justification, feel that he possessed no security in that property at all;⁵⁵⁸ that he was therefore laid bare at the will of a king whose judgement, indeed whose divine sanction, he could now doubt.

⁵⁵⁴ Finch, 3 How. St. Tr. 826 [pp.202-203]

⁵⁵⁵ J.W.A. Allen *English Political Thought 1603-1660: vol.1 1603-1644* (London, Methuen & Co. Ltd., 1938), Pt.I, Ch.2, p.21 (my emphasis added)

⁵⁵⁶ Glenn Burgess *The Politics of the Ancient Constitution: An Introduction to English Political Thought, 1603-1642* (Basingstoke and London, The Macmillan Press Ltd., 1992), Ch.7, p.202

⁵⁵⁷ Finch, 3 How. St. Tr. 826 [p.200]

⁵⁵⁸ Indeed, Jones came close to stating as much. For he goods were not owned by subjects but were given them (by grant of the king, by law) upon condition. Should that condition be broken, for example by the outbreak of war, it

On the one hand, of course, it could be argued that the resistance to ship money was nothing more than the opposition of a new capitalist class against the flight of (their) financial capital from the counties to London. As Hill has said, as a result of early industrialisation at home, and the opening of new trade routes abroad, “[t]here [came increasingly to be a] great deal of capital in England which merchants, yeomen and gentlemen were anxious to invest in the freest possible industrial, commercial and agricultural development.”⁵⁵⁹ For those industrialists, merchants and a number of influential landed families, the extra-parliamentary levy of ship money, imposed by the Crown and supported by the Court of Exchequer, was an illegitimate and unlawful impediment to achieving that, and hardened their resolve to assert the rights of Parliament – in which many of them were present, and would thereby be able to exert direct influence over economic policy - against the King. “The bourgeoisie,” said Hill, “thus saw that their economic grievances could only be redressed by political action; the royal economic policies, hitting the capitalist class as a whole, could not be improved by the winning of small privileges for particular members of the class. The demand for a business government, strong ever since the crisis of 1621, grew rapidly. Following Hampden’s example, there was a general refusal to pay taxes in the years 1639-40. The bourgeoisie had gone on strike.”⁵⁶⁰ Indeed, Hampden himself - Oxford educated, a successful lawyer and wealthy land owner, with interests in at least two colonial enterprises overseas, the Massachusetts Bay Company and the Providence Company – seems perfect protagonist for such an interpretation.⁵⁶¹ After all, Hampden’s first instinct following his trial was no longer to resist, and yet no longer to pay. Choosing flight over fight, he resolved to emigrate to the New World where he would be freed from the burdens placed on his capital, and was only prevented from doing so when the King issued an order restraining any ship “setting forth with passengers to America” from leaving London, without special license.⁵⁶² How different our constitutional history might have been but for that order we shall never know, for both Hampden and a young, as yet undistinguished Oliver Cromwell were stood on Thames

could therefore be no breach that the king reclaim those goods, and put them to the preservation of the commonwealth. (Jones, 3 How. St. Tr. 826 [p.176])

⁵⁵⁹ Christopher Hill *The English Revolution 1640, an essay* (London, Lawrence and Wishart, 1955) [I have been using the online resource, at << <http://www.marxists.org/archive/hill-christopher/english-revolution/index.htm>>>

⁵⁶⁰ *ibid.*

⁵⁶¹ The classic biographical account of Hampden’s life is, Lord Nugent *Some Memorials of John Hampden* (London, Henry G. Bohn, 1860)

⁵⁶² Lord Nugent (1860), p.116

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Dock awaiting departure on the day that it was issued. It was a grave tactical error by the King, who could easily have allowed these men to sail in to the sunset. As it was, Lord Nugent has put it best: “in the alternative between flight and resistance,” he said, “the government, as it were, had bound down these men to an opposite condition to that which they had chosen for themselves.”⁵⁶³

There are three points which I would like to make however, in response to taking such an interpretation too far. First, the hypothesis being developed in this Part is not one that is concerned with the anatomy of resistance, as such – the actors and the interests which motivated them – but rather with the complete monopolisation of the public realm by the King and his advisers, and the nature of the openness brought about by the reaction against that closure. To put this more clearly, the King’s domination rested on a claim to divine authority which lifted him above human scrutiny: neither the authority, nor the actions which he took on its basis, were open to contestation by his subjects. Only God reserved the power of judgement over the King. By his refusal to pay the tax, however, Hampden set in motion a chain of events – the minority verdicts delivered in his favour; the publication King’s publication of the judgement for the benefit of his subjects; the *consequent* non-payment of the tax – by which not only the tax itself, but the King’s very (divine) authority were opened for question. Second, when Hampden stood in the dock, he did so only in defence of his own right in property, but also on behalf of fellow Buckinghamshire freeholders, thirty in total,⁵⁶⁴ who were inspired to follow the example of his non-payment, but who lacked the means to test the issue in a court of law. Thus, Hampden’s disobedience ought not to be thought of as an individual act of conscientious objection *outside* of the law; rather, he represented a group of public spirited individuals who had come together to reject what they saw as the *King’s* unlawful, unconstitutional act. Theirs was a claim *for* the re-constitution of Parliament, outwith of which the King had abused his power. Third, this chain of events brought Englishmen to a full realisation of their predicament under Charles’ domination. They saw a King who claimed to be accountable only to God, a Parliament which lay empty as a result of its protracted dissolution, and a Court whose judgement had “given up to the discretion

⁵⁶³ Lord Nugent (1860), p.117

⁵⁶⁴ A roll listing the names and the varying amounts that they were charged, remains at Great Kimble Church, Buckinghamshire, where they met to express and affirm their opposition.

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of the King the whole property of the country.”⁵⁶⁵ Their aim was thereby lifted from one which sought the repeal of a particularly repugnant tax, to something much more radical: the establishment of a public space into which men could enter and participate in public affairs, in a spirit of debate by action and discussion. No matter its motives, Hampden’s resistance, and the collective resistance which it inspired, opened up the (metaphysical) space into which a new principle of English government might emerge: one grounded in the authority of the people. Thus we see that when the matter of Ship Money came to be debated before the Short Parliament in 1640, it was not lost on the parliamentarians that what was being attacked was more than the specific rights of the individual in property. At a more fundamental level, the very right of the subjects *to have* those rights was challenged.

George Peard, in the Commons, described liberty as “the salt that seasoned all”; be this unsettled, he said, it would take “not only our goods, *but our persons also*”.⁵⁶⁶ For Sir Francis Seymour the judges had so “betrayed the King to himself” by “telling him his prerogative is above all Lawes” that they had rendered his subjects “*but slaves* to the destruction of property.”⁵⁶⁷ Nor was the force of the judgement lost on St. John, who had acted as counsel for Hampden before the court:

It’s not that Ship-Money hath been levied upon us, but it’s that Right whereby Ship-Money is claimed, which, if it be true, is such as that makes the Payment of Ship-Money the Gift and earnest Penny of all we have.

It’s not that our Persons have been imprisoned for Payment of Ship-Money, but that our Persons, and (it is conceived) our Lives too, are upon the fame grounds of Law, delivered up to Bare Will and Pleasure.

*It’s that our Birth-right, our Ancestral right, our Condition of continuing free Subjects, is loft, that of late there hath been an Endeavour to reduce us to the state of Villianage, nay to a lower.*⁵⁶⁸

⁵⁶⁵ Lord Nugent (1860), p.115

⁵⁶⁶ Peard, in Cope (1977), p.153 [my emphasis]

⁵⁶⁷ Sir Frances Seymour to the House of Commons, 16 April 1640, quoted in Cope (1977), pp.142-143 [my emphasis added]. Keir (1936) makes a strong defence of the majority judgement. At worst, he says “[t]he law which most of the twelve [judges] contended for was not demonstrably wrong.” (p.574). For a robust defence of the majority decision, see also Noble (1962).

⁵⁶⁸ Mr St John’s speech to the House of Lords (7 January 1640), 3 How. St. Tr. 826 [p.218]

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Let us consider this a little more closely. “It’s not that Ship Money hath been levied upon us,” St. John said: thus our property *might* be used for the common defence of the realm without *necessarily* attacking us *qua* subject. “[I]t’s that Right whereby Ship-Money is claimed”, i.e. the right of an absolute and divine monarch, which leaves us exposed; “delivered up to [the king’s] Bare Will and Pleasure.” Thus we are attacked *qua* subject, *qua* human even, when the very “condition” of our “continuing free Subjects”, our “Birth [*ergo* inseparably human] right” *to have* these rights, is taken from us. It is at *this* point that the binding force of constitutional law no longer makes sense: when (the constitutional) fiction becomes so detached from (the political and social) reality that it is no longer able to command the “willing suspension of disbelief” of the governed.⁵⁶⁹ The divine right of kings was sustainable as a political theory, supporting the rule of one man over all others, only in so much as the monarch’s good will and judgement remained visible to his subjects; which is to say, for as long as the reality of the promise made by James I “to protect aswell the people, as the Lawes of his Kingdome”⁵⁷⁰ sufficiently supported the fiction of his divine right to do so. The historical, prerogative right of the king to requisition ships and men in times of emergency had thrown an island of predictability into quite literally uncertain seas: that in times of crisis the safety of the commonwealth could be preserved by extraordinary means, even by the temporary violation of the subject’s particular property rights. When that faculty was misused, however, when the courts placed mere trust in the king to properly determine both the existence of an emergency and the means required to meet the danger, there were, “in his subjects’ minds,” no longer “barriers” to a future abuse of the prerogative.⁵⁷¹ Not only their rights but their very security before the law, and their identity as subjects of the realm was laid bare before the king’s will. The promise made by his father could no longer be supported by the consent of Charles’ subjects: the people, far from being protected, were left exposed to the pleasure of a monarch whose judgement was demonstrably in question; the law, far from being protected, was said (by the judges themselves, no less) to be no more than the king’s ‘trusty servant’. Stripped of his divine robes, the king’s *new* clothes exposed a naked, human ruler, no less prone to error or slavish to personal interest than any subject. In order to

⁵⁶⁹ c.f. Edmund S. Morgan *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York & London, W.W. Norton & Co., 1988), esp. introduction to Part One, and Chapter 1, ‘The Divine Right of Kings’

⁵⁷⁰ James I ‘A Speech to the Lords and Commons of the Parliament at White-Hall, on Wednesday the XXI. Of March’, in Sommerville (ed.) (1994), pp.179-203, p.183

⁵⁷¹ Burgess (1992), Ch.7, pp.204-205

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command the unquestioning respect of the governed, *salus reipublicae* would require a new fiction, one capable of sustaining the “willing suspension of disbelief” of a disenchanted people. It was the genius of Henry Parker to find precisely that fiction in the institution of parliament.

On subjects and slaves...

The substitution of the king’s judgement for that of parliament had been suggested even before Parker’s influential *The Case of Shipmony Briefly Discoursed*⁵⁷², most notably in the minority opinion of Croke in *Rex v. Hampden*. As with the majority opinion of Jones, for Croke the courtroom was an inappropriate forum for the resolution of such fundamental questions as the constitutional relationship between the monarch and his subjects. However, in stark contrast to Jones, who left “divines” to such determinations, for Croke, “sorry it should come in Question in this Place; *more requisite it was to have had it debated in a publick Assembly of the whole State*”.⁵⁷³ This early attempt to locate a constitutive power, a power, this is to say, to debate and to determine the relationship between government and governed, in (an assembly of) the people met with the monarch’s rebuke, and Croke duly obeyed Charles’ demand to hear the case “in this place”. It was, furthermore, a position upon which Croke stood alone. This is no surprise. As Loughlin has argued, “[d]emocracy is not easily reconciled to law.” This, he says, because:

*[Democracy] is an expression of an expansive or innovative movement that asserts the capacity of the people to decide for themselves the type of ordering under which they might live. As the primary legitimating principle of modern political order, democracy fixes on the present and is orientated to the future. Democracy reflects a principle of openness. Law, by contrast, seeks to control, regulate and divide this expansive force. Although addressing the concerns of the present, law is orientated to the past. Law seeks the closure of that which democracy tries to keep open.*⁵⁷⁴

⁵⁷² Henry Parker *The Case of Shipmony Briefly Discoursed, According to the Grounds of Law, Policy, and Conscience, and Most Humbly presented to the Censure and Correction of the High Court of Parliament* (London, 1640). The paper was released anonymously however was attributed to Parker on the title page of George Thomason’s copy.

⁵⁷³ Croke, 3 How. St. Tr. 826 [p.146] [my emphasis]

⁵⁷⁴ Martin Loughlin *The Idea of Public Law* (Oxford, Oxford University Press, 2003), Ch.6, p.100

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Loughlin of course writes from a modern perspective; from a democratic (even post-democratic?) era. Perhaps in the 17th Century, and in the context of the claim being made by Croke, we might invert the final sentence of the above paragraph to see its relevance: ‘Democracy’, at this time, ‘sought to open that which the law tried to keep closed’. The language of the bench was, quite naturally, that of fundamental laws, of the ancient constitution, of the (monarchic) history and traditions of the English constitution, but by employing this language the law ‘kept closed’ the emergence of subjects as citizens; that is to say as an active rather than a passive political, legal, and constitutional force. Croke was no different in so much as he recognised the limits of the vocabulary available to the court: hence his supposition that it was for the assembled people to debate the relationship between Crown and subject(s). Nevertheless, his opinion, delivered by reason of obedience, was one which remained rooted to an idea of the people (or at least the political ‘people’ in parliament) as the commonwealth’s constituent power and legitimising authority. Having failed to replace the judgement of the court with that of the ‘whole nation’, Croke’s opinion called for the no less revolutionary substitution of parliament for the king as the repository of *salus republicae*. “We have a pious King,” he said, “and he will not [abuse his power, by declaring an emergency where none exists], but the law looketh into the inconvenience.”⁵⁷⁵ The law must not merely trust the king but, quite the opposite, for Croke the law must *assume* at least the possibility that the king (rather, in his caution, some future king) may either abuse his power personally, or use it unnecessarily on the basis of misinformation. Safer, therefore, that “it is in the judgement of Parliament”, and not the king (or his counsel), that the assessment of danger be made. This proposition, rejected explicitly by Finch (deciding for the king)⁵⁷⁶ was doubted even by Croke’s allies in the minority.

Throughout the 1630s, a decade of government without parliament, the public perception of parliaments was something of a mixed bag. To some, and presumably in this we can include Croke, parliament was a council comparable to the Roman Senate, in which the king “could hear advice important to him and to the realm. He could insure that his subjects understood his needs, demonstrate his concern for them by hearing their grievances, and avoid embarking on a course

⁵⁷⁵ Croke, 3 How. St. Tr. 826 [p.146]

⁵⁷⁶ Finch, 3 How. St. Tr. 826 [p.203]

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of action for which he would find it difficult to obtain their support.”⁵⁷⁷ In parliament, in other words, opinions could be exchanged and formed, and, more than that, imparted to the king, influencing his own opinion. It was also variously seen as a supporter in war, a maker of laws and a granter of taxes. Yet, Cope has argued that in its absence “few individuals expressed either regret at the absence of a parliament or desire that one be called.”⁵⁷⁸ Thus it was the view of parliament as “a turbulent assembly where overzealous subjects poured out grievances and aspired to assume authority over matters which they did not understand and which belonged to the royal prerogative”⁵⁷⁹ which found the strongest support amongst the judiciary in *Rex v. Hampden*.⁵⁸⁰ Hutton, even deciding against the king, was sufficiently wary of recent history to warn that “there was seen too much of the ambitious humour of some in the last parliament, that stirred up nothing but confusion and discontentment, as we now feel it to our great prejudice.”⁵⁸¹

In the context of early Stuart England, where (as we have seen, cosmic or divine) order was a settlement revered, the charge of confusion, of *disorder*, made against parliament, initiated by the Crown and reaffirmed by the majority of the judges in *Hampden’s case*, was a damning offensive. In an instant however, Parker turned those very claims back upon the judiciary, waiting no longer than the opening paragraph of *The Case of Shipmony* to wonder at “such strange contradiction” which existed “amongst the pleaders, and dissent amongst the Judges, even in those Lawes which are most fundamentall, that we are left in a more confused uncertainty of our highest privileges, and those customes which are most essentiall to Freedome

⁵⁷⁷ Esther S. Cope ‘Public Images of Parliament during Its Absence (1982) 7 *Legislative Studies Quarterly* 221, p.226

⁵⁷⁸ Cope (1982), p.222

⁵⁷⁹ Cope (1982), p.225

⁵⁸⁰ Interestingly, *contra* the majority view of the court, Cope’s research led her to conclude that it was the image of Parliament as a Council, however interpreted, which dominate sources from the period. This she said had practical political advantages:

It allowed men to suggest to the king how he might benefit from Parliament rather than put themselves in the position of challenging the legality or wisdom of His Majesty’s acts. Moreover the idea of Parliament as council is inclusive. It could appeal to individuals and communities with concerns which would not in themselves warrant a parliament. It thus fit the needs of men who were seeking alternatives, who were aware of precedents and of the importance of adhering to proper procedure, but who were also desirous of action.

⁵⁸¹ Hutton, 3 How. St. Tr. 826

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then we were before."⁵⁸² Parker's prescription was made with what would become a trademark gusto; the publication of *The Case of Shipmony*, timed to coincide with the opening of the Long Parliament, stating with clarity and precision that:

*To remove therefore this uncertainty, which is the mother of all injustice, confusion, and publike dissension, it is most requisite that this grand Councell and Trefhault Court [Parliament] (of which none ought to thinke dishonourably) would take these Arduis Regni, these weighty and dangerous and dangerous difficulties, into ferocious debate, and solemnly end that strife, which no other place of Judicature can so effectually extinguish.*⁵⁸³

As Michael Mendle, arguably the foremost Parker scholar, has said, the “intellectual and political task of *The Case of Shipmony*...was to re-establish order amidst the confusion” which inhered in the judgement.⁵⁸⁴ It was the near unanimous verdict of the judges in *Rex v. Hampden* that the case was the greatest, most significant constitutional dispute to come before an English court of law. And yet, for Parker, the astonishing fact betrayed by their various opinions was that the “greatest Sages of our Law”⁵⁸⁵ had *no* firm idea of the constitutional fundamentals upon which the king's (undisputed) power to compel aid in times of emergency in fact, as well as in theory, was grounded. At times the judges argued upon grounds of natural law. That “since the King is head, and bound to protect, therefore he must have wherewithall to protect.” Some argued from the prerogative, yet Parker was left unsure as to the exact nature of that prerogative: “whether [it be the] Prerogative naturall of all Kings, or the Prerogative legall of the Kings of *England*.” Some argued that “by Law there is naturall allegiance due to the King from the subject”, by which the monarch could not be denied the grant of aid; whilst others argued from the very opposite: that by law man had a right in his property, “and it doth not stand with that property, that the King may demand of them without consent.” Finally, some argued on the basis that the king's prerogative could not be used to create injustice, from the starting assumption “that to levie money without consent is unjust”.⁵⁸⁶ To maintain the king's prerogative upon such

⁵⁸² Parker (1640), pp.1-2

⁵⁸³ Parker (1640), p.2

⁵⁸⁴ Mendle (1995), Ch.2, p.35

⁵⁸⁵ Parker (1640), p.2

⁵⁸⁶ Parker (1640), pp.3-4

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constitutional and legal uncertainty was, for Parker, “[t]o introduce...such a Prerogative...as destroyes all other Law, and is incompatible with popular liberty”.⁵⁸⁷ Echoing the contributions made by Peard, Seymor and St.John in the debates of the Short Parliament, the decision to uphold Charles’ policy on these (shaky) grounds stripped the subject of more than his right in property. “[I]f wee grant Ship-money upon these grounds, with Ship-money we grant all besides.”⁵⁸⁸ That is to say we grant to the king not *only* our property, but also our status as free subjects:

*...we all know that no slave or villaine can be subjected to more miserable bondage than to be left meerly to his Lords absolute discretion...*⁵⁸⁹

Thus where law is no longer made in a co-ordination between prince and people, wherein each is capable of wooing the other to share one’s opinion, or at least to modify one’s own in light of it, but instead where the mere will of the king is law, where *Rex* is indivisibly *lex*, the people are no less miserable in their subjection to the king, as are the slave and villein to their master:⁵⁹⁰ This, Parker observed, was precisely the danger which lurked in the majority’s support for the charge of ship money:

*...as sole judgement is here ascribed to the King, he may affirme dangers to be foreseene when he will, and of what nature he will: If he say onely, Datum est nobis intelligi*⁵⁹¹, *as he does in his Writ, &c. To his sole indisputable judgement it is left to lay charges as often and as great as he pleases. And by this meanes if he regard not his word more than his profit, he may in one yeire draine all the Kingdome of all its treasure, and leave us the most despicable slaves in the whole world.*⁵⁹²

What at once concerned Parker was not merely the use by the king of his prerogative to violate the property rights of his subjects *in this instance*, rather, and more broadly, it was the very existence of that prerogative, which the king might exercise at any indeterminate time, by any

⁵⁸⁷ Parker (1640), p.2

⁵⁸⁸ Parker (1640), p.2

⁵⁸⁹ Parker (1640), p.4

⁵⁹⁰ Parker (1640), p.5

⁵⁹¹ ‘It is given us to be understood’

⁵⁹² Parker (1640), p.11

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indeterminate means, which left his subjects such ‘despicable slaves’ to his will. As Quentin Skinner has so persuasively argued, the claim being made by the Crown’s opponents, who found in Parker their “most lucid and resourceful supporter”,⁵⁹³ was that, drawing on classical sources of Roman law,⁵⁹⁴ where subjects depended for their liberties upon the good will of their ruler alone then “what we have to say is not that these liberties are thereby left in a state of jeopardy. What we have to say is that we do not possess any such liberties, since the very existence of such prerogative powers reduces us to a level below that of free subjects.”⁵⁹⁵ Exposed to such a state, no man can be free because no man can be certain that his liberty today will remain his liberty tomorrow. Left in this state, where an act of virtue on one day might jealously be thought a vice the next, it is the very existence of virtue itself which is lost:

*Those who live at the mercy of such rulers learn to curb the very qualities that need to be given freest rein if civic greatness is to be achieved. The alternative, Tacitus grimly adds, is to learn from experience that under tyranny the possession of outstanding qualities is a ‘capitall crime’. With virtue effectively proscribed, we are condemned to living in a servile society in which flatterers and time-servers flourish unopposed.*⁵⁹⁶

As I have alluded to above, it was into this uncertainty that Parker sought to establish his own island of predictability: the institution of parliament.

Parliament’s privado

The Case of Shipmony was, as Mendle has said, a *tour de force*⁵⁹⁷: an acid analysis of the majority opinion which had decided against John Hampden, and by which Henry Parker would

⁵⁹³ Quentin Skinner *Visions of Politics, Volume II: Renaissance Virtues* (Cambridge, Cambridge University Press, 2002), Ch.11, 293. It is certainly a point worth noting that Parker never quite fit the portrait of the objective ‘observer’ which he liked to paint of himself. *The Case of Shipmony* is an excellent example. Although not made explicit in the text itself, we know that Hampden’s case was the “pet project” of Parker’s uncle, Lord Saye, who at one point looked likely to be the subject of the case itself. Thus, Mendle has suggested it to be more than likely that *The Case of Shipmony* was a factional piece written in Saye’s political interest. (Mendle (1995), cf. Ch.1, pp.18-19; Ch.2, p.41)

⁵⁹⁴ Sallust, Livy, Tacitus and Justinian prominent names amongst them

⁵⁹⁵ Skinner (2002), Ch.11, p.288

⁵⁹⁶ Skinner (2002), Ch.11, p.290

⁵⁹⁷ Mendle (1995), Ch.2, p.48

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lay the key-stone for a full blown account of parliamentary absolutism. For Parker, the divine constitution in which the king had sat, as God's lieutenant on Earth, at the head of the body-politic, had proven itself, *by the king's own actions*, inadequate.

Divines of late have beene much to blame here in preaching one universall forme of government, as necessary to all Nations,⁵⁹⁸ and that not the moderate & equall neither, but such as ascribes all to Sovereignty, nothing at all to popular liberty.⁵⁹⁹

It was, he said, “not sufficient” for Jones to determine it proper in the way of kings to raise money without the consent of his subjects, “unlesse he first prove that such Prerogative be good and profitable for the people”.⁶⁰⁰ It was, moreover, insufficient of the law, indeed it was “ridiculous” of its guardians on the bench, to hold that, in so proving, “it is contrary to presumption of Law to suspect falsity in the King”, as the majority (and here Jones again is the named target) had held.⁶⁰¹ For proof of this Parker offered examples which must have shocked his audience: that even England's “best Kings, King *Charles*, King *James*, Queen *Elizabeth*...have done undue illegal things” having been misinformed by their ministers.⁶⁰² Whilst at this stage Parker was either unwilling or unprepared to make explicit a republican argument by calling monarchs to account before the people for the ‘illegal things’ done unto them, he nevertheless hinted as much in his stated refusal to “condemne any Nation as unjust” who had, for the most part throughout Christendom, displaced the absolute monarch and “given [themselves] to republics or to conditionate and restrained forms of government”.⁶⁰³

...indeed the often and great infections and insurrections which have happened of late, almost all over Europe, may suffice to warn all wise Princes, not to overstraine their Prerogatives too high...⁶⁰⁴

⁵⁹⁸ The divine right of kings...

⁵⁹⁹ Parker (1640), p.8

⁶⁰⁰ Parker (1640), p.6

⁶⁰¹ Parker (1640), p.21

⁶⁰² Parker (1640), p.21

⁶⁰³ Parker (1640), pp.7-8

⁶⁰⁴ Parker (1640), p.9

If it was just, in the last place, for the people to rise up against their king; if some have chosen republics, or other restrained governments where once they had submitted to monarchy, then Parker must at this point in time have understood the further implication that *in* the political community itself was to be found the original (that which *chooses* the shape of government) and the final (that which rises up in the final judgement of insurrection *against* the government) *locus* of political power. If, however, Parker did not quite follow his arguments to the conclusion that monarchy had no place in the English constitution, his claim that by the constitution all kings, good or bad, should act only and always in parliament was no less revolutionary. “That King,” he advised, “which is potent in Parliament, as good as any King may, is as it were so ensconced in the hearts of his subjects, that he is almost beyond the trays or aimes of treason and rebellion at home, nay forraign hostility cannot pierce him, but through the sides of all his people.”⁶⁰⁵ As Mendle has observed, to give Parker’s words their due “is to come close to asserting parliamentary control of executive power.”⁶⁰⁶

That Parker attributed the ‘undue’ and ‘illegal’ acts committed even by good kings to their being ‘misinformed’ by their counsel speaks to two possible lines of criticism, each challenging the appropriateness of the King’s right to act as the sole judge of the common good. On the one hand there is the distinct possibility that Parker himself did not believe Charles to be one of England’s “best Kings”, as he had said, but that, aware of the consequences of making a direct claim for Charles’ incompetence or, worse still, nefarious designs, he found it strategically advantageous to level those claims instead at the king’s trusted advisors.⁶⁰⁷ In addition, however, is the underlying implication that the misinformation given to the king might itself have been born of the suffocation of virtue given effect by the peoples’ subjection to their monarch’s *lex loquens*; that slide to ‘slavish servility’, to “cowardice” and “sloth”, of which those Roman

⁶⁰⁵ Parker (1640), p.38

⁶⁰⁶ Michael Mendle ‘The Ship Money Case, The Case of Shipmony, and the Development of Henry Parker’s Parliamentary Absolutism’ (1989) 32 *The Historical Journal* 513, p.526

⁶⁰⁷ Mendle ((1995), Ch.2, pp.32-33) notes that Parker’s *The Case of Shipmony*, a “pure, freestanding printed political tract...was not a natural mode of expression” at that time. It was unique in that it “took a current issue and discussed it in a way that led to practical prescription...as well as to a broader political vision...” Given that Parker was here, to a significant extent, ‘breaking the mould’ of political publication it is not unreasonable to think that Parker’s potential criticism of Charles as monarch might be tempered in this way. Parliament itself was having to work hard to find popular support, as Cope (cf.fn.?) has demonstrated, and it may well have done more harm than good to draw the line too starkly between the contemporary royalist and parliamentary causes.

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authorities such as Sallust and Tacitus had warned, could easily translate, in the minds of contemporary Englishmen, to those who had so ill-informed Charles throughout his reign.⁶⁰⁸ Discouraged from those heroic virtues of political action by their King, Englishmen could rely only on a small circle of “cowards”, “time servers” and “flatterers” to advise their ruler. No wonder then Parker’s opinion that “nothing...is more universally affented to than...that Kings may be bad; and it is more probable and naturall, that evill may be expected from good Princes, than good from bad.”⁶⁰⁹ Because the state suffers equally whether that ‘evil’ springs forth from the king’s malice or his ministers’ bad (cowardly?) advice, the law must, he said, and contrary to the majority opinion in *Hampden’s case*, allow the king’s actions to be scrutinised. “[I]f we must presume well of our Princes,” he then asked, “to what purpose are Lawes made”?⁶¹⁰ Here Parker drew explicitly from the Roman argument:

*...and if Lawes are frustrate and absurd, where in doe we differ in condition from the most abject of all bond-slaves?*⁶¹¹

Parker did not claim that Charles would falter, although the implication was there. “[I]t is enough,” was his point, “that wee all, and all that wee have are at his discretion” should *any* king, present or future, well or ill disposed, fare bad upon the people, as any might.

If the king had shown by his actions the limits of the divine constitution, Parker was equally clear that the sovereignty of law, personified by the judges and expressed in their judicial opinions, had shown itself to be a wholly incapable alternative. Laws, said Parker, were made. They were as rules, and whilst they existed to limit the discretion of executive power, they could not manifest the sovereignty of law. This was because laws, as rules, were, indeed are, always subject to exception:

God dispences with many of his Lawes, rather than salus populi shall bee endangered; and that iron-law, which we call necessity itselpe, is but subservient to this Law: for rather than a Nation

⁶⁰⁸ Skinner (2002), Ch.11, p.290

⁶⁰⁹ Parker (1640), pp.21-22

⁶¹⁰ Parker (1640), p.22

⁶¹¹ Parker (1640), p.24

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*shall perish, anything shall be held necessary, and legal by necessity...*⁶¹²

The exception was *salus populi*, and the effect of that exception was such as to render *everything* done in the name of *salus populi* legal. How then, if *salus populi* was capable of defining and redefining law in an instant, could law itself be held supreme? It was not only the condition of law however, but also its vessels on the bench, who proved the inadequacy of the legal constitution. If the king was deemed an unsatisfactory judge of so extraordinarily powerful a state of exception, because of his exposure to private interest and bad counsel, the judges, in Parker's view, fared no better – for it was they (amongst others) who provided that counsel. Insurrections, suggested Parker, served to warn kings not to “overstraine their Prerogatives too high”. He continued, however, that they served equally “to warn all wise Princes...not to give earre to such Councillors as some of our Judges are, who affirme the Kings Prerogative to be in all points unalterable, and by consequence not depending upon Law at all”.⁶¹³ For Parker, the decision of the majority to uphold the taking of ship money without the consent of parliament was worthy itself of punishment. Thus, closing his argument, he recommended that “some dishonourable penalty may be imposed upon the Judges which ill advised the King herein, and the argued as Pleaders, not as Judges”.⁶¹⁴ The judges themselves had, in Parker's estimation, acted as a branch of the Crown and not as an impartial and fair arbiter between the king's prerogative and the subject's liberty, by holding, unquestioningly, the prerogative power to sit beyond the purview of the court.

*If it might be tearmed a Royalty, that the King is not questionable, or to be forced to such acts as tend to the obstruction of justice, it might as well be so tearmed in acts tending to the transgression of Law: for in both he is alike free from any coercive or vindictive force.*⁶¹⁵

If the law did not interrogate the king's use of prerogative, Parker was here saying that the king, and more specifically his prerogative power, tended to the *de facto* destruction of *all* laws. “If,” said Parker, “a King should shut up the Courts of ordinary Justice, & prohibit all pleadings and

⁶¹² Parker (1640), p.7

⁶¹³ Parker (1640), p.9

⁶¹⁴ Parker (1640), p.47

⁶¹⁵ Parker (1640), p.13

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proceedings between man and man, and refuse to authorize Judges for the determination of suits, hee would bee held to doe a most unkingly thing,”⁶¹⁶ and yet, the effect of the judges slavish support for the king’s policy (whose “necessity hathe beene answered, and disproved already”⁶¹⁷) was almost the same.

In parliament, on the other hand, the case of necessity would be the subject of free and “ferocious debate”, weighed from all sides. Indeed the ferocity of this debate would itself demand the very virtues of action suffocated by the monarch’s dominance: wisdom, sincerity, and greatness.

Wisdom, said Parker, could not be expected from the king nor from his few advisors, for “all private single persons may deceive and bee deceived”. It was inconceivable however that “an inconsiderable number of Privadoes should see or knowe more then whole Kingdoms,” as, “all cannot deceive one, nor one all.” The king might be deceived by the private interests of his counsel, as his counsel may themselves be deceived; parliament however was a public forum in which the great determinations of common *weale* were openly and freely debated. The scope for deception was no where near so wide. It was then “a just law, that no private man must bee wiser then Law publicly made.”⁶¹⁸ The very assembly, the public assembly, of the “whole kingdom”, as it was put, had endowed the institution of parliament with wisdom; such wisdom as the king, in the privacy of his counsel, could never achieve. The *sincerity* of parliament’s advice is attributed, by Parker, to the presence of God amongst the assembled, and yet remained at the same time inherent in the people. Blessed by God “so their ends cannot bee so sinister”, the “common body can effect nothing but the common good, because nothing else can be commedious for them.”⁶¹⁹ The contrast of course was with the king. Not only, *contra* Jones, *could* the king do wrong, all kings, great and tyrannous alike, *had* done wrong; their ill intentions, or the private interests of their advisors bringing “common calamitie” upon the nation.⁶²⁰ Parliament on the other hand could no wrong to the kingdom because *it was* the kingdom. Any course other than the common good would therefore be against its *only* interest:

⁶¹⁶ Parker (1640), p.13

⁶¹⁷ Parker (1640), p.44

⁶¹⁸ Parker (1640), p.35

⁶¹⁹ Parker (1640), pp.35-36

⁶²⁰ Parker (1640), p.36

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the public interest.⁶²¹ Only by tapping into the wisdom and sincerity of the absent institution of parliament could the king achieve true *greatness*; this because more than wisdom, more than sincerity, is to be found in parliament. With those virtues is found, and found in that institution alone, the “hearts of the people”: hearts which beat with such force for the public welfare that any king “potent in parliament...is almost beyond the trays or aimes of treason and rebellion” which had befallen so many tyrants. Such hearts the king’s few ministers simply do not carry, even if their counsel was both wise and sincere. For sure, it was possible to argue, as do Keir and Noble,⁶²² that the advice given to the Crown regarding the need for and implementation of ship money was legally defensible. In the hearts of the people however this plainly was not the case. Quite the contrary the sharp collapse of the policy immediately following the judgement was evidence itself that the view of Charles as an ‘arbitrary’ and ‘absolute’ monarch, free from the legal and political constraints of parliament, had formed in the minds of his subjects:⁶²³ “no Tyranny more abhorred,” said Parker, “than that which hath a controlling power over all Law, and knowes no bounds but its owne will”.⁶²⁴

Parliament, from this view, was a forum in which virtues were nurtured, and (*per* Sallust) by which the common *weale* would consequently flourish. What is so intriguing about the picture of parliament paint by Parker in his response to *Hampden* is its resemblance to the public space, in which free and equal men appear in a spirit of open discussion and debate, in an exchange of opinion, tuned to the common world for which they are all responsible. What parliament offered the king can be summed up as power in judgement, in the sense that his determination (of, say, the existence of a public emergency) could be made only after the claim had been tested in the exchanges made from the parliament floor.⁶²⁵ What a true environment of “ferocious debate” offered parliament, what the retrieval of seemingly lost virtues offered the parliament men, was

⁶²¹ Robert Zaller ‘Henry Parker and the Regiment of True Government’ (1991) 135 *Proceedings of the American Philosophical Society* 255, p.258

⁶²² cf. Fn.?

⁶²³ Burgess (1992), Ch.7, p.202

⁶²⁴ Parker (1640), p.22

⁶²⁵ Elisabeth Young-Buehl *Why Arendt Matters* (New Haven & London, Yale University Press, 2006), Ch.3, pp.176-177. On this point Parker is explicit:

*Thofe Kings which have beene moft covetous of unconfinde immoderate power,
have beene the weakeft in judgment...*

(Parker (1640), p.44)

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the possibility of action. Stripped of virtue, the plebs of Rome had “learned to tolerate their vile servitude”,⁶²⁶ and in divine right theory the early Stuarts had espoused a doctrine of passive obedience which recommended servility as its own reward. Men of virtue, however, are bound to shake off that yoke and Parker, though he may have taken caution to stop short of explicit republican exposition,⁶²⁷ nevertheless took pause to reflect on those instances when subjects had resisted, and founded new political constitutions. Contrary to their common portrayal, the people, he believed, were incapable of turbulent motion on their own. As we shall see, it has long been a commonplace of political thought that the ‘ill’ which inheres in (government by) the people is just such turbulent motion, manifested in a degeneration to anarchy.⁶²⁸ For Parker however the people themselves are blameless, “rais[ed]...into rage” by the misery poured down on them from “ill disposed” rulers.⁶²⁹ In a later example, one such prince, King Henry III, had, he said, brought civil war upon himself. In parliament he was “there upbrayded, and called *delapidator regni*⁶³⁰”, and though he would not (at least explicitly) “justify” those who rebelled, he could no less “in some part extenuate such misdemeanors; for the blame of those times is not to bee throwne upon the peeres and commons, but upon the King and his out-landish parasites.” Only the frequency of parliaments had, in Parker’s estimation, prevented yet more misery “in those bloody unjust times.”⁶³¹ The implication for his own time was clear. Where parliament is regularly held, where the people themselves assemble, virtue is nurtured and the commonwealth defends with vigour its freedom from the yoke of dominion. From virtue comes action, and from action comes the possibility of new beginning, free, it was to be hoped, of tyranny.⁶³²

I have argued in the previous section that the accountability of the executive power (here, the Crown) stems from the constituent power by which that power is created and legitimised. James

⁶²⁶ Sallust’s *Bellum Iugurthinum*, quoted in Skinner (2002), Ch.11, p.290

⁶²⁷ Zaller (1991), pp.258-259

⁶²⁸ cf., my discussion of *anacyclosis* and the mixed constitution in the following section.

⁶²⁹ Parker (1640), pp.24-25

⁶³⁰ ‘Dismantler of the kingdom’

⁶³¹ Parker (1640), pp.35-36

⁶³² Mendle ((1995), Ch.2, pp.48-49) has argued that “*The Case of Shipmony* was a persuasive to unity, not a justification of conflict or an analysis of the constitutional cause of civil collapse.” I am tempted, however, to think that by offering these examples of state collapse, by attributing blame therein to the King and exonerating (if not explicitly justifying) the people’s tumult, Parker is in fact placing scattered and veiled justifications for those particular instances of conflict which cast off tyranny in the name of the public good, just so openly as to make themselves apparent to his intended audience (the Long Parliament) yet just so incoherent that he may bat off claims of treason against the current incumbent of the throne.

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I in word, and Charles I in deed, had established their accountability to no other authority than God himself by tracing the origins of their temporal office to divine sanction from heaven; the divine right of kings to rule on earth. For Parker to claim that the king must find greatness in parliament,⁶³³ or risk bringing tumult upon his reign, required more than a challenge to the fiction of divine right, but the discovery of a new founding principle upon which the authority of that parliament could rest. In *The Case of Shipmony* a case was tentatively made that it was by the people themselves that political power was conferred upon the king. From Charles' own maxim, that "the peoples liberty strengthens the Kings prerogative, and the Kings prerogative is to maintain the peoples liberty", Parker inferred not only that prerogative and liberty were compatible, but that the former, which exists purely for the sake of the latter, must be subordinate; that by nature "more favour is due to the liberty of the subject, then to the Prerogative of the King, since the one is ordained onely for the prefervation of the other".⁶³⁴ As Zaller has said, this was more than the mere restoration of balance following constitutional rupture; "it was a decisive alteration in the equation";⁶³⁵ which is to say, a new constitutional beginning. For sure James I had advised his heir that the king was ordained for his subjects, and not his subjects for the king. Contrary to the claims of divine right however, the question which followed was not "what liberty the Kings absolutenesse or prorogative may admit" but instead, "our dispute must be, what prerogative the peoples good and profit will beare".⁶³⁶ In parliament, it would seem, Parker had found the forum, a 'working reality', in which the limits of the people's forbearance could be measured. Implicit was the message that the king had been created by the people, the prerogative for their welfare; that therefore the people, or a manifestation thereof best knew the limits of both. If, for Parker, "nature laye[d] upon" the king this duty to protect the commonwealth then this duty could not be changed but *by* the laws of nature, that "eternall superior power".⁶³⁷ What was merely hinted in *The Case of Shipmony* would soon be exclaimed with great force: Parker beginning his *Observations* of July 1642⁶³⁸ with the powerful assertion that

⁶³³ Great Kings he said, did undue illegal things... "but having consulted with the Judges or States in Parliament, they have all retracted and confessed their error." (Parker (1640), p.11)

⁶³⁴ Parker (1640), pp.4-5

⁶³⁵ Zaller (1991), p.257

⁶³⁶ Parker (1640), p.5

⁶³⁷ Parker (1640), p.9

⁶³⁸ Henry Parker *Observations upon some of his Majesties late Answers and Expresses* (London, 1642)

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*Power is originally inherent in the people, and it is nothing else but that might and vigour which such or such a societie of men containes in itselfe, and when by such or such a Law of common consent and agreement it is derived into such and such hands.*⁶³⁹

From the divine sanction of God to the constituent power of the people, the prescription which would become Parker's epitaph was that in parliament's hands was *salus republicae*, that supreme law, safest, because parliament itself *was* the people in whom political power naturally inhered. It is to the task of understanding this fiction that we shall now turn.

Pt.II (3) A new fiction

*The political world of make-believe mingles with the real world in strange ways, for the make-believe may often mold the real one. In order to be viable, in order to serve its purpose, whatever that purpose may be, a fiction must bear some resemblance to fact. If it strays too far from fact, the willing suspension of disbelief collapses. And conversely it may collapse if facts stray too far from the fiction that we want them to resemble. Because fictions are necessary, because we cannot live without them, we often take pains to prevent their collapse by moving the facts to fit the fiction, by making our world conform more closely to what we want it to be. We sometimes call it, quite appropriately, reform or reformation, when the fiction takes command and reshapes reality.*⁶⁴⁰

The militia crisis

It was one thing for Parker to suggest, as he seemed to do in 1640, that the executive power was subject to parliamentary control, and quite another to declare, two years later, that (political) power, inherent only and always in the people, "is nothing else but that might and vigour which such or such a societie of men containes in itselfe" conferred by common consent into the hands of another (here, the king). After all, the theory of the divine right of kings, as it was expressed by James IV & I and practised by Charles I, had always placed stress upon the supposition that the king was appointed by God *for* his people, and not his people for the king. Indeed, as we

⁶³⁹ Parker (1642), p.1

⁶⁴⁰ Morgan (1988), intro., p.14

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have seen, the very definition of the monarch *qua* king (as opposed to the degenerate tyrant) depended upon the fulfilment of this condition. It would have been quite plausible, therefore, to argue that the king's duty to his people could be questioned in parliament, the institutional embodiment of those people, without necessarily severing from the king his claim to divinity. By 1642 however, what had only been hinted at in the controversy over ship money, that the king could and would use his authority to advance his own interest over that of the common *weale*, struck the parliament-men with such immediate force that they feared their very survival would come to depend upon a struggle for sovereignty itself: a fear, and struggle, manifest in an attempt by parliament to wrestle from the king control over the militia.

When Charles explained that “Kingly Power is but a shadow” without command of the militia⁶⁴¹ he displayed an understanding of the nature of his claim to rule which could have come straight from Bodin, whose influence had certainly been felt upon Charles' father, whose *Six livres de la république* had listed control of the militia as one of the indisputable ‘marks’ of sovereignty.⁶⁴² Even as the crisis over the militia unfolded, it was (uncharacteristically) plain to the king what was at stake. Far more than the right to appoint and to confer authority upon such and such a lieutenant for the protection of the country, he found himself embroiled in a dispute in which *his own* authority, and thus the very constitution of executive power in England, was challenged and forever altered.

If this much was evident to the king, Lois G. Schworer, in his analysis of the contemporary political climate, has argued that in the spring of 1642, when the controversy burned most brightly, “Parliament [itself] was really more concerned to get a guard under its own commander to protect it and London” from royalist forces than it was to impose upon their monarch any grand constitutional theory or design.⁶⁴³ The king had demonstrated his threat to the parliament when, on January 4 1642, he took the quite unprecedented⁶⁴⁴ step of entering the House of

⁶⁴¹ Charles I, quoted in Lois G. Schworer “‘The Fittest Subject for a King's Quarrel’”: An Essay on the Militia Controversy 1641-1642”, (1971) 11 *The Journal of British Studies* 45, p.45

⁶⁴² Quentin Skinner, citing Bodin, in Skinner (2002), vol.II, Ch.12, p.335. Skinner argues that this was a point well known to “every good royalist”.

⁶⁴³ Schworer (1971), p.48

⁶⁴⁴ I say ‘quite unprecedented’ because Gardiner makes reference to an ‘indistinct’ presentation of himself before the Commons by Henry VIII. S.R. Gardiner *History of England from the Accession of James I to the Outbreak of the Civil War 1603-1642* vol.X, 1641-1642 (London, Longmans, Green, and Co., 1884), Ch.CIII, p.139, fn.1

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Commons, intending to arrest five members – Pym, Hampden, Holles, Hazlerigg and Strode – each of whom he had believed to be the protagonists of a plot to impeach his Queen, Henrietta Maria, as a conspirator against public liberty. In his immensely rich study of the period, S.R. Gardiner has suggested that this very act, the passing of the monarch through the door to the Commons, was revolutionary in itself. “He had come to the Commons because they would no longer come to him”, and in so doing the King, said Gardiner, had “formally acknowledg[ed] that power had passed into new hands.”⁶⁴⁵ Whether this was true or not, when the House adjourned following the king’s exit the force of his violation was felt by all who had witnessed it. As D’Ewes’ diary has revealed:

As soon as he was gone, and the doors were shut, the Speaker asked us if he should make report of his Majesty’s speech.⁶⁴⁶ But Sir John Hotham said we had all heard it, and there needed no report of it to be made. And others cried to adjourn till tomorrow at one of the clock in the afternoon; upon which the issue we agreed. And so, the Speaker having adjourned the House to that hour, we rose about half an hour after three of the clock in the afternoon: little imagining for the present – at least a greater part of us – the extreme danger we had escaped through God’s wonderful providence.

Picking up the point, the journal entry of Sir Simonds on that most eventful day⁶⁴⁷ spelled out the nature of the danger feared by D’Ewes; a description so vivid that I will quote at length:

For [the King’s design] was to have taken out of our House by force and violence the said five members, if we had refused to have delivered them up peaceably and willingly; which for the preservation of the privileges of our House, we must have refused. And in the taking of them away, they were to have set upon us all, if we had resisted, in a hostile manner. It is very true that the plot

⁶⁴⁵ Gardiner (1884) vol.X, Ch.CIII, p.139

⁶⁴⁶ Charles had addressed the chamber from the Speaker’s chair, and demanded to know “if any of those persons that were accused are here.” They were not. Having been warned of the King’s march to Parliament, Fiennes at once requested the five members to withdraw. “Pym, Hampden, Hazlerigg, and Holles took the course which prudence dictated. Strode, always impetuous, insisted on remaining to face the worst, till Erle seized him by the cloak and dragged him off to the riverside, where boats were to be found. The five were all conveyed in safety to the City.” Gardiner (1884) vol.X, Ch.CIII, pp.138-139

⁶⁴⁷ More than an ‘eventful day’, John Forster, in his study of the King’s attempt on the five members, called that day in January “[o]ne of the most fatal days in the life of Charles the First”, suggesting it was a direct catalyst for the nation’s decline into civil war and the eventual regicide of Charles himself. This chapter will follow that theme. John Forster *Arrest of the Five Members by Charles the First: A Chapter of English History Rewritten* (London, John Murray, 1860), Ch.I, p.1

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*was so contrived as that the King should have withdrawn out of the House, and passed through the lobby or little room next without it, before the massacre should have begun, upon a watchword by him to have been given upon his passing through them. But 'tis most likely that those Ruffians, being about eighty in number, who were gotten into the said lobby, being armed all of them with swords, and some of them with pistols ready charged, were so thirsty after innocent blood as they would scarce have stayed the watchword, if those members had been there; but would have begun their violence as soon as they had understood of our denial, to the hazard of the persons of the King and the Prince Elector, as well as all of us.*⁶⁴⁸

It remains doubtful whether or not Charles would in fact have countenanced such a massacre.

The historian J.W. Allen, for one, found the suggestion “completely incredible.”⁶⁴⁹

Nevertheless, the politics of fear is a politics as much about perception, rationally viewed or otherwise, as it is about fact, and the perception held by parliament of the king’s action is readily discernible from the agitated tone with which these members wrote. If Charles had become aware of shifting constitutional sands as he entered the Commons, or even before, the members themselves were immediately concerned only with their own safety, both as a collective House and, given that D’Ewes immediately set about the drafting of his will,⁶⁵⁰ as individual members. In order to ensure their safety, control of the militia would become a priority.

By the time of the king’s entry into the Commons there had already been made an attempt to attain for parliament a certain degree of control over the militia. Concerned that, at some indeterminate future date, the king might raise and deploy troops against his own country Hazelrigg, on December 7 1641, had introduced a bill which, although it failed to pass a second reading, had sought to take control of the militia out of the hands of the king and into the hands of an unnamed Lord General who, by statute, would hold extensive powers “to raise men, to levy money to pay them, and to execute martial law.”⁶⁵¹ As Gardiner has noted it was not only the royalists, knowing too well the symbolism with which such a move would strike at the sovereignty of the king, who opposed the bill. Those who had struggled most for English

⁶⁴⁸ The journal entries of D’Ewes and Sir Simonds are reproduced at length in Forster (1860), Ch.XXI, pp.196-197

⁶⁴⁹ Allen (1938), Pt.IV, Ch.III, p.384

⁶⁵⁰ Gardiner (1884) vol.X, Ch.CIII, p.139

⁶⁵¹ Gardiner (1884) vol.X, Ch.CII, p.95

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liberties had themselves found repugnant a proposal to establish, by law, a military despotism.⁶⁵² Yet the immediacy of the danger brought to them on January 4 could not be ignored. As Schwoerer said, “[t]he violence implicit in the intended arrest hardened the determination of extremists and moderates and led to a real contest between Crown and parliament to control the militia and to win the allegiance of Englishmen.”⁶⁵³ With all the constituted authorities, from the Commons, to the City of London, to the Lords united by his actions against the King, and with the current of popular opinion running the same way⁶⁵⁴, an increasingly helpless Charles, fearing for the safety of his Queen, set out in exile to Hampton Court, on that very day, January 10, when the five members reclaimed their seats in the House of Commons.⁶⁵⁵

It was from exile that the king dispatched a conciliatory message to Westminster, asking that the Houses place on paper “all that they judged necessary” for the continuation of his authority and its reconciliation with the privileges of Parliament.⁶⁵⁶ The wounds opened by the king’s attempt on the members were still fresh however, and whilst the Lords wished to reply by thanking Charles for his efforts at accommodation, the Commons was defiant, demanding of the king that the fortresses and militias be left in the hands of those in whom parliament could place its trust. The Lords refused to support the Commons in their demands, and not without cause. As Gardiner noted, “[t]hough reason was on the side of the Commons, it was not unnatural that the Lords should take the opposite view. Tradition and precedent were on the King’s side. Many of the peers feared the sweep of the democratic tide.”⁶⁵⁷ Groping in the dark for a constitutional basis upon which their claims could rest, the dynamic of fear and the unfolding of events nevertheless continued to play in the Commons’ favour. On the advice of his newly appointed (and moderate) advisor, Culpeper, as well as upon the confidences of his beloved queen, the king embarked upon a policy of acceding to many of the demands asked of him, most conspicuously giving Royal Assent to the Bishops Exclusion Bill, excluding the bishops from

⁶⁵² Gardiner (1884) vol.X, Ch.CII, p.96

⁶⁵³ Shwoerer (1971), p.61

⁶⁵⁴ Upon their return, Wedgwood describes the five members “stepp[ing] into a barge to the acclamations of the people. The rest of the members embarked behind them, and the Parliament men were accompanied up the Thames to Westminster by a regatta of decorated craft, of cheering citizens and mariners....Returning conquerors,” she concludes, “could have had no more impressive welcome.” C.V. Wedgwood *The King’s War 1641-1647* (London, Collins, 1958), Ch.1, p.62.

⁶⁵⁵ Gardiner (1884) vol.X, Ch.CII, pp.148-151

⁶⁵⁶ Gardiner (1884) vol.X, Ch.CIII, p.159

⁶⁵⁷ Gardiner (1884) vol.X, Ch.CIII, p.161

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Parliament and reducing them to their spiritual functions. This was not a measure which could have sat easily with the king, who had promised upon his coronation to maintain them in their seats. Nevertheless, for making this sacrifice he received the thanks of both Houses. That very day, however, letters sent by Lord Digby, from exile in Holland, to the Queen were intercepted and opened in Parliament. The advice contained therein was clear that the King should take action on his opponents, and on this basis Digby was impeached for levying war upon the nation.⁶⁵⁸ Once again, it was possible for the Parliament men to argue that in the present climate, with the command of the militia in the hands of the King, the danger to the security of the country was imminent. As Wedgwood said, parliament had been reminded of the hollowness of the King's accommodations: "so long as the King retained his control over the armed forces, he would also hold it in his power to reverse, when he was strong, any acts that had been wrung from him when he was weak."⁶⁵⁹ At almost the same time, with the uncertainty and panic taking its toll on London's poorest, the crowds of wretched petitioners and the "unusual sight" of women appearing with their starving children at the Palace Yard finally moved the Lords to join the Commons in their claim for control of the militia.⁶⁶⁰ It is worth stressing again this point: the Lords had not been *persuaded* by Pym *et al.* to join the Commons; precedent and tradition remained with the King. Instead, the Lords had been *moved* to join the Commons by the sudden and incongruous appearance of those worst affected by the trouble on their doorstep, and by the perception that the surest way to a speedy resolution of the crisis lay in taking co-ordinate action with the House of Commons. Thus, when an ordinance for Parliamentary control of the militia, in the name of *both* Houses, was rejected by the King⁶⁶¹ the response by Parliament was to place the country "in a posture of defence"⁶⁶², and "[f]or the safety...of His Majesty's person, the Parliament and kingdom in this time of imminent danger," to declare the ordinance as law even without the Royal Assent.⁶⁶³ In short, the response by Parliament, both the Lords and

⁶⁵⁸ Wedgwood (1958), Ch.2, p.70

⁶⁵⁹ Wedgwood (1958), Ch.2, p.70

⁶⁶⁰ Gardiner (1884), vol.X, Ch.CIII, pp.162-163

⁶⁶¹ The King had intimated that he was ready to appoint the persons nominated by Parliament for control of the militia, however, his insistence that said person's authority should derive from the King and not from Parliament was deemed, by the Houses, tantamount to a denial of their request. Gardiner (1884), vol.X, Ch.CIII, p.171

⁶⁶² Gardiner, quoting from the *Commons and Lords Journal(s)*, in Gardiner (1884), vol.X, Ch.CIII, p.171

⁶⁶³ 'The Militia Ordinance: An Ordinance of the Lords and Commons in Parliament, for the safety and defence of the kingdom of England and dominion of Wales' (March 5, 1642), in S.R. Gardiner (ed.) *The Documents of the Puritan Revolution 1625-1660* (3rd ed.) (Oxford, Clarendon Press, 1906), pp.245-247 (hereafter: *Militia Ordinance*)

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Commons, had brought about what Skinner has called “an instant crisis of legitimacy.”⁶⁶⁴ In the short term that crisis could be answered by an appeal to the emergency itself; to the tangible threat posed to the English nation by royalist aggression. Thus, Parliament would speak directly to the legitimacy of the ordinance with the claim that

*If we have done more than ever our ancestors have done [by declaring their ordinance law without the Royal Assent] we have suffered more than they have ever suffered, and yet, in point of modesty and duty we shall not yield to the best of former times, and we shall put this in issue: Whether the highest and most unwarrantable proceedings of any of his Majesty's predecessors do not fall short of, and much below, what hath been done to us this parliament...*⁶⁶⁵

This was less a claim to constitutional authority, however, than an invocation of political necessity. Indeed, such was the imminence of the threat posed by the King that the Houses admitted they hadn't even the opportunity to consider the sureness of their constitutional footing, continuing in the same remonstrance with the claim that “the great affairs of this kingdom, and the miserable and bleeding condition of the kingdom of Ireland afford us little leisure to spend our time in Declarations, or in Answers and Replies”.⁶⁶⁶ In the long term however such vindication would be unsustainable. For one thing Parliament well knew that the justifying force of ‘emergency’ was limited by the very nature of emergency itself, its inherent transience. This, after all, had been Parliaments own line of attack *against* the Crown in response to the decision in *Rex v. Hampden*. What to do with the militia when the King was detached from the malignant party which surrounded him? What, henceforth, could be said for the King's discretion to grant or refuse the Royal Assent? As yet the Parliament had no clear answer to give to these questions. Furthermore, the House of Commons knew that the support of the Lords owed more to political pragmatism than it did to constitutional principle; a defensible appeal to the constitution would eventually be needed if the Commons was to press its claims beyond the existence of that emergency which had manifested itself so powerfully

⁶⁶⁴ Skinner (2002), Ch.12, p.325

⁶⁶⁵ ‘Remonstrance of both Houses, in answer to the King's Declaration [of 7 May] concerning Hull, 26 May 1642’, in J.P. Kenyon (ed.) *The Stuart Constitution 1603-1688: Documents and commentary* (Cambridge, Cambridge University Press, 1986), Book II, pp.220-222, p.221 (hereafter *Remonstrance re. Hull*)

⁶⁶⁶ *Remonstrance re. Hull*, p.220

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before the Lords in the Palace Yard some months earlier. If Gardiner was correct, if power really had shifted from the King to Parliament in 1642, the problem which then faced Parliament was that, as Morgan describes it, of moving fact to meet fiction: that is to say, of re-interpreting the fact of that shift of power as something *already* legitimate, something constitutional. “How,” asked Quentin Skinner, “could Parliament possibly defend its decision to trample on such a fundamental and hitherto unquestioned flower of the crown?”⁶⁶⁷

This was precisely the question which occupied the mind of the anonymous author of a single page tract entitled *A Question Answered*, printed “for the good of the Commonweale” which appeared in 1642.⁶⁶⁸

Now in our extreme distractions, when foreign forces threaten, and probably are invited, and a malignant and Popish party becomes offended? The Devil hath cast a bone, and rais'd a contestation between the King and Parliament touching the Militia. His Majestie claims the disposing of it to be in Him by right of Law, The Parliament saith rebus sic santibus, ant nolenti Rege, the Ordering of it is in them?

The answer afforded by the short pamphlet was one which attempted to put the Parliamentary case on solid constitutional ground. In ordinary times, so the argument ran, “His Majesty (let it be granted) is intrusted by Law with the Militia”. Implied in this trust, however, was the condition that the law in question would tend to the “good and preservation of the Republique, against Foreign Invasions or domestic rebellions.” Should the King abuse this trust however and, by the *letter* of the law, command the militia to strike against the nation (“the body reall”) or against Parliament (“the body...representative”) he could be said to have acted against the *equity* of that law (“the public good” for which it was created), thus affording “liberty to the Commanded to refuse obedience”. This was the case, the apologist continued, because it “is the execution of Laws according to their equity and reason which...is the spirit that gives life to Authority”. If the King was “intrusted” with the preservation of the republic, the author of *A Question Answered* was clear that he was so furnished by the English nation; and although we read no more of the nature or the moment of this bestowal, it would seem that the *equity* which

⁶⁶⁷ Skinner (2002), Ch.12, p.326

⁶⁶⁸ of *A Question Answered: How Laws Are to Be Understood, and Obedience Yielded?* (1642). Mendle (1995), appendix, p.194, suggests that this pamphlet was “perhaps” by Parker, though the attribution remains both unclear and contested. (Hereafter *A Question Answered*)

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is the life-giving spirit of authority (*ergo* obedience) finds its essence from within and not out with (for example, from God) the commonwealth. Furthermore, if this trust was placed in the King “by Law” then we are told that this law, and thus the *reason* by which authority is given life, had its foundation in Parliament. Once again, the answer penetrates no further the origins of Parliament’s own creation and claim to authority, however, the implication is clear: without authority, the king could make no claim to obedience; and without the equity of the nation and the reason of Parliament no such authority could exist.⁶⁶⁹ In the “contestation between the King and Parliament” then, it was to Parliament and not the King that obedience was owed. The crucial constitutional argument was contained in the final paragraph, which made the claim that to detach the letter of the law from its implied equity and reason was to make of the kingdom “the greatest Tyranny”:

...for if Laws invest the King in an absolute power, and the letter be not controlled by the equity, then whereas other Kings that are absolute Monarchs and rule by will, and not by Law, are Tyrants perforce. Those that rule by Law and not by will, have hereby a Tyranny confer’d upon them legally, and so the very end of Laws, which is to give bounds and limits to the exorbitant wills of Princes, is by themselves disappointed, for they hereby give corroboration (and much more justification) to an arbitrary Tyranny, by making it legall, not assumed...

To sever the power conferred upon the king by law from the equity and reason of that law was not only to admit the rule of the absolute tyrant, but by conferring an arbitrary power upon the king defeated the very purpose of law itself, which existed not to encourage but to restrain and limit the reach of executive power; an “absurdity” which the laws of England surely could not countenance. Where Morgan has said, of this tumultuous period of English constitutional history, that Parliament itself “invented the sovereignty of the people in order to claim it for themselves”, in order, he says, to justify their own resistance, and not that of their constituents, singularly or collectively,⁶⁷⁰ he was, in effect, making the claim that the people’s resistance as a ‘working reality’ was secondary to the grander constituent claims being made by the parliamentarians. However, if we revisit, for a moment, the story of Ship Money, we can see the

⁶⁶⁹ *A Question Answered*

⁶⁷⁰ Morgan (1988), Ch.2, pp.49-50

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emergence, if even for a fleeting moment, of an active, a real people, resisting the king and calling his authority into question. Moreover, it was this initial moment of local resistance which opened the space within which Parliament – most conspicuously through Parker – could re-invent the very nation’s constitutional foundation.

If the extension of Ship Money to the inland counties caused contemporaneous controversy, its value remains contested even to this day. Kevin Sharpe has called Ship Money the “great success story” of personal rule. “It is significant,” he argues, “that when the writ was extended from the maritime counties to the country at large, the point at which the legality [of the policy] might have been questioned, only 2½ per cent of the sum requested failed to come in, and the amount raised, £194,864, was never exceeded.”⁶⁷¹ On the other hand, Lamar Hill implores that we “ascribe failure to the six years of Ship Money collection which ended in 1640.” Despite the *immediate* success of the policy – the *per annum* average of £107,000 (even allowing for the virtual non-collection of the final year) amounted to “the highest peace-time direct tax receipt ever recorded” – for Hill the policy “failed utterly in the long run and was a major divisive element in the build up to civil war.”⁶⁷² Certainly the effect of *Rex v. Hampden* on the success of collection suggested at best a temporary and limited ‘win’ for the Crown. Despite the 7-5 majority decision in the King’s favour, the narrowness of that victory, and the articulation of strong dissenting opinions preyed on the suspicions of the people at large that the charge being asked of them was illegal. As Cromartie said, “[f]rom a practical political perspective, the only thing that mattered was that virtually all England [already] believed that the payments demanded were indefensible.”⁶⁷³ Thus, in the months between the hearing of the arguments and the delivery of the judges’ opinions a not insignificant number withheld payment in lieu of the outcome of the case. If large numbers continued to pay, and this (in the very short term at least) they did, their doing so seemed to be an act of compliance rather than an act in support of the Crown’s authority. How else to explain that not defeat, but a narrow *victory* for the Crown in those proceedings saw “by 1638 a falling off and by 1639 only a fraction” of successful

⁶⁷¹ Kevin Sharpe *Politics and Ideas in Early Stuart England: Essays and Studies* (London & New York, Pinter Publishers, 1989), Ch.3, p.115

⁶⁷² L.M. Hill ‘County Government in Caroline England, 1625-1640’, in Conrad Russell (ed.) *The Origins of the English Civil War* (Basingstoke, Palgrave Macmillan, 1973), pp.66-90, p.83

⁶⁷³ Alan Cromartie *The Constitutionalist Revolution: An Essay on the History of England, 1450-1642* (Cambridge, Cambridge University Press, 2006), Ch.8, p.239

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collection?⁶⁷⁴ The judges, according to no less an authority than the Earl of Clarendon, had acted “upon such grounds and reasons as every stander-by was able to swear was not law”,⁶⁷⁵ and this, coupled with the quick and influential spread of the minority verdicts, soon precipitated the collapse of the entire policy. As early as May 14, 1638 Laud wrote to Wentworth that “[t]he King’s moneys come in a great deal more slowly than they did in former years, and that to a very considerable sum.”⁶⁷⁶ Reporting on the difficulties of collection, Clarendon was clear in his opinion that the spread of the judgements had the paradoxical effect of strengthening the subjects’ resolve in their resistance to collection,⁶⁷⁷ as a ‘considerable’ deficit shortly became “extraordinary public hostility,” and a collection of almost nil; that hostility manifesting itself physically against those Sheriffs charged with collection.⁶⁷⁸ As Cressy concluded, “Ship money became uncollectable, even before Parliament declared it illegal.”⁶⁷⁹ In spite of, indeed following Clarendon it is surer to say *because* of, the Crown’s *victory* in *Rex v. Hampden*, the very prerogative of the Crown to act as it saw fit in the face of a perceived threat to the country seemed to lose its binding force. That this was no petulant strike against authority, but a resistance which took place in that grey area between law’s letter and law’s spirit, a resistance to law in the name of legality, is supported by the fact that the occurrence of disobedience was sporadic and rare, until it had become clear to Englishmen that the legal process had failed them. What is more, in his *History*, Clarendon reported that it was the strength of the dissenting opinions from the bench which had emboldened their resistance, noting that in the counties “the statements of the minority judges had increased the difficulties of collection.”⁶⁸⁰ This moment of resistance, I suggest, is both significant, and largely ignored, in constitutional interpretations of this period, which focus on the Parliament’s invocation of the people in the abstract, the substitute for a king who, before his Fall, had reigned over the *whole* nation. So, Loughlin says that “the conviction that governmental authority was rooted in the opinion of the people” was employed “to strengthen the parliamentary case;” whilst Morgan takes it even further, calling the sovereignty of the people “an instrument by which representatives raised themselves to the

⁶⁷⁴ Jones (1971), Ch.5, p.128

⁶⁷⁵ Clarendon’s *History of the Rebellion*, quoted in Tanner (1928), Ch.5, p.78

⁶⁷⁶ Letter of Laud to Wentworth, quoted in Tanner (1928), Ch.5, p.79

⁶⁷⁷ Jones (1971), Ch.5

⁶⁷⁸ Conrad Russell ‘Parliament and the King’s Finances’, in Russell (ed.) (1973), pp.91-116, p.109

⁶⁷⁹ David Cressy *England On Edge: Crisis and Revolution 1640-1642* (Oxford, Oxford University Press, 2007), Ch.16, p.355

⁶⁸⁰ Jones (1971), Ch.5, p.128

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maximum distance above the particular set of people who chose them,” shedding their specific local connections in doing so.⁶⁸¹ Yet, before those claims could be made, it was in the (as we look back) somewhat obscured realm of local politics that the resistance to the Crown had taken shape. This may have reached its apogee in a national institution, when Hampden’s case was heard by the Court of Exchequer, but it had begun in the counties, where the extension of Ship Money had sharpened even the most introspective localities to the emergence of an urgent threat to their liberties.⁶⁸² Indeed, in the county of Kent, feeling the pinch of the levy more than most,⁶⁸³ leading families had come together in their objection, circulating amongst themselves the preparation of a ‘Book of Arguments’ against the policy, which centred on their perception of its illegality.⁶⁸⁴ Thus, amongst their number, the Historian and (later) M.P. of the Short Parliament, Sir Roger Twysden, having first accepted the necessity of the levy, became, after due study of the precedents, convinced that it could not be defended in law; their concerns filtering down to the townsfolk and farmers who “bitterly complained” of the tax’s iniquity.⁶⁸⁵ So, when Hampden - himself born of one of the leading families in his own home county of Buckinghamshire - was brought before that court for his steadfast refusal to give up that which had been demanded of him, he could be thought of not only as a representative of *a* people threatened by the King’s recklessness, but of *the* people as a working reality in their various counties, sharing, in the exchange of their grievances, something of a unifying cause; Twysden, Hampden, and many others, personifying what was at stake when the author of *A Question Answered* sought to open a space between law’s letter and law’s spirit. In ordinary times, where consent to the law can easily be given, the two might appear one and the same. I have said in Part I that it is in extraordinary times, however, that the health of a constitution can most effectively be measured, for it is in those times that the space between the law(s), and the spirit

⁶⁸¹ Morgan (1971), Ch.2, p.50; Martin Loughlin ‘Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice’, in Martin Loughlin and Neil Walker (eds.) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford, Oxford University Press, 2007), pp.33-35; see also, Burgess (1996)

⁶⁸² Anthony Fletcher, in his history of pre-civil war England, points to the increasing willingness of local leaders in remote counties such as Pembrokeshire and Carmarthenshire to petition their knight with grievances to take with him to London, over the summer of 1640, as evidence of an increasing national political awareness. (Anthony Fletcher *The Outbreak of the English Civil War* (London, Edward Arnold, 1981), p.xxvi)

⁶⁸³ Gordon (1910)

⁶⁸⁴ Alan Everitt *The Community of Kent and the Great Rebellion 1640-60* (Leicester, Leicester University Press, 1966), Ch.3, pp.63-64

⁶⁸⁵ Everitt (1966), Ch.3, p.64. On the significant influence of the gentry in the local politics of the pre-civil war era, see Alan Fletcher *Reform in the Provinces: The Government of Stuart England* (New Haven and London, Yale University Press, 1986)

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of legality might allow for the right of dissent, the right of citizens to exercise a public mindedness *against* constituted laws to be exercised. To create a ‘Book of Arguments’ against the policy, to challenge the legitimacy of the King’s writ in the court room, to withhold payment, to actively resist the sheriffs sent for collection: each of these acts opened and maintained such a public space as gave meaning to the people as an active, political force. More still, this space simply could not co-exist with a conception of monarchy which held the king accountable to no human authority; as such it demanded both the knocking down of government as Stuart Royalists had known (or at least, told) it, and the building up of a new form of government, capable of channelling that power. Parker’s first political tract, that which laid the groundwork for the full blown account of parliamentary sovereignty which would follow (more on which, below), was, after all, a product of, and reflection upon, this very moment of resistance.

Nineteen propositions, and one unfortunate answer

Charles’ response to *A Question Answered* was as firm as it was swift. Within one day of its publication⁶⁸⁶ he had sent a message to the Lords, “that they may use all possible care and diligence for the finding out the Author, and may give directions to His learned Councill, to proceed against Him and the publishers of it...as persons who endeavour to stir up Sedition against His Majesty.”⁶⁸⁷ Unsurprisingly, the reply did not engage directly with the constitutional point. There was no rebuke for the description of England’s ‘legal and mixed monarchy’, nor counter claim for divine rule. By challenging, however, the “Seditious and Treasonable” distinction between law’s letter and law’s equity, which teaches subjects “[t]hat humane Laws do not binde the Conscience”⁶⁸⁸ the king reaffirmed a position which, as we have seen, bubbled under the surface of divine right theory and which continues to inform political theories of sovereignty to this day. That is, that at the moment one believes that laws do not bind absolutely, and to the letter, “the civill Government and Peace of the Kingdom will be quickly dissolved.”⁶⁸⁹ Which is to say that the over-riding public good of *all* laws is order; and that order can *only* be

⁶⁸⁶ Skinner (2002), Ch.12, p.330, fn.136, follows Thomason’s own copy of the tract and suggests April 21, 1642 as the likely date of publication.

⁶⁸⁷ *His Majesties Message to the Hose of Peers, April 22, 1642* (York, Robert Barker, Printer, 1642) (hereafter *Charles’ message to the Lords*)

⁶⁸⁸ *Charles’ message to the Lords*

⁶⁸⁹ *Charles’ message to the Lords*

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achieved by unquestioned obedience to law's letter. According to the royalist perspective then, order, the antithesis of anarchy, rested upon the supposition that law's letter and law's equity were irrevocably bound: manifest in the command of the sovereign king. The dispute was brought to a head by a remarkable exchange between King and Parliament which would fundamentally re-shape England's constitutional landscape.

On June 1 1642, the House of Commons sent to the king their *Nineteen Propositions*,⁶⁹⁰ a series of demands made of the king which Adam Tomkins has, with some justification, called "one of the most important constitutional documents of the period immediately preceding the outbreak of the Civil War".⁶⁹¹ Parliament's vision for the constitution, set forth in that document, would, as Malcolm has said, "have sharply and permanently circumscribed the king's powers".⁶⁹² So, Parliament called for the removal of all but those members of the king's Privy Council approved by both Houses⁶⁹³; that "the great Affairs of the Kingdom" ought to be conducted only by debate, resolution and transaction in Parliament, and not "by the Advise of private men"⁶⁹⁴; that judges and senior ministers be appointed only "with the approbation of both Houses"⁶⁹⁵; that the King accept the Militia Ordinance until such times as it could be settled in the form of a Bill⁶⁹⁶; as well as the demand that "all Privie Councillors and Judges may make an Oath, the form whereof to be agreed on, and settled by Act of Parliament, for the maintaining of the Petition of Right, and of certain Statutes made by this Parliament".⁶⁹⁷ The presumption which lay at the heart of these demands was clear. As Gardiner put it, "[t]hey claimed sovereignty for Parliament in every particular."⁶⁹⁸ Nowhere was this more obvious than in the suggestion that the oath of judges and ministers, so solemn a promise of obedience, should be offered not to the king, but to parliament. The *Nineteen Propositions*, it would seem, were the logical constitutional conclusions which flowed from the case put for parliament in *A Question Answered*; an attempt to lodge sovereignty

⁶⁹⁰ The *Nineteen Propositions* are re-printed alongside Charles' famous *Answer to the Nieten Propositions*, in Malcolm (ed.) (1999), vol.I, pp.145-178 (Hereafter passages extracted from the *Nineteen Propositions* will be cited *19 Props...* Passages cited from Charles' *Answer to the Nineteen Propositions* will be cited *Answer*)

⁶⁹¹ Adam Tomkins *Our Republican Constitution* (Oxford and Portland, Oregon, Hart Publishing, 2005), Ch.3, p.90

⁶⁹² *19 Props.*, p.146 (introduction by the editor)

⁶⁹³ Proposition I, *19 Props.*, p.148

⁶⁹⁴ Proposition II, *19 Props.*, p.149

⁶⁹⁵ Proposition III, *19 Props.*, pp.149-150

⁶⁹⁶ Proposition IX, *19 Props.*, p.151

⁶⁹⁷ Proposition XI, *19 Props.*, p.151

⁶⁹⁸ Gardiner (1884) vol.X, Ch.CV, p.196

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in Parliament, as the corporate body of the nation, “and not in a king on whom no man could depend.”⁶⁹⁹ In short, Parliament demanded no less than a complete re-ordering of the constitution. This was not, however, unproblematic. Not only did precedent and tradition sway on the side of the Crown, but the divine right of kings remained a significant yoke on the potential of the political nation: “[t]oo many people believed that the conduct of our rulers, be they good or evil, must be accepted without question as part of God’s design.”⁷⁰⁰ As Raab has since observed, in this period Monarchy was very much the *sine qua non* of English political life.⁷⁰¹ In order to cement its claim, in order for Parliament to transact and call to account the executive power of the nation, it would first be necessary to challenge the fiction of the divine right of kings, and recreate the constituent power in the image of the political community itself. This was a task which presented the Long Parliament with a number of problems:

Its weakness lay in the fact that this special Parliament did not at this time any longer represent the nation as a whole,⁷⁰² nor did it claim to content itself with representative function alone. Where thought is free and religious and scientific liberty is secured, a representative assembly may well claim to be but the mirror in which the national purpose is reflected. It does not claim to force future generations into a form which it has chosen for them. It leaves the wind of spirit and intelligence to blow whither it listeth, and makes no attempt to crush down the new life of the future into the narrow mould of which alone it approves. It was not so with the Long Parliament in 1642. It was resolved to choose for the nation the Church-forms and the Church-doctrine which it

⁶⁹⁹ Gardiner (1884) vol.X, Ch.CV, p.197

⁷⁰⁰ Skinner (2002), Ch.11, p.295

⁷⁰¹ Felix Raab *The English Face of Machiavelli: A Changing Interpretation 1500-1700* (London, Routledge & Kegan Paul, 1969), Ch.V, p.259

⁷⁰² (my note) cf. Morgan (1998), Ch.3 ‘The Enigma of Representation’:

It does not follow that particular communities were singled out for representation because the people within them had desired it. Representation began as an obligation imposed from above; and over the years, especially in the sixteenth century, the king or queen expanded the obligation by assigning representatives to new boroughs, not because the residents demanded it, but rather because powerfully connected country gentlemen persuaded the monarch to enfranchise boroughs where they could count on controlling the elections. As a result many small communities were given representation while larger ones were overlooked. By the opening of the seventeenth century most of the 462 members of the House of Commons (increased from 296 at the beginning of the sixteenth century), were country gentlemen not actually resident in the boroughs that elected them. (p.42)

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*thought best.*⁷⁰³ *In all matters of the highest moment England was to take its ply from Parliament, and not Parliament from England.*⁷⁰⁴

Somewhat surprisingly, the catalyst for this seismic shift in the constitutional landscape came not from any theoretical innovation by the Parliamentary leadership, but rather from a quite accidental slip of the pen by the King's own counsel.⁷⁰⁵

As with *A Question Answered*, Charles' response to the *Nineteen Propositions* was both swift in publication and defiant in tone. Knowing full well the significance of the measures put to him the king answered, with no hint of irony, "*Nolumus Leges Angliae mutari*".⁷⁰⁶ Perhaps more than any other document in the pre-civil war period however, Charles' *Answer to the Nineteen Propositions* itself contributed to precisely that fundamental change which it had denied. As the historian Glenn Burgess said, "[i]n a real sense it was he [Charles I, through the *Answer*] who taught his subjects how they might justify putting him to death."⁷⁰⁷ The offending text is to be found in the crucial passages in which the king addresses head on the constitutional demands made of him by his opponents; passages which, inadvertently or otherwise, marked a decisive break from the monarch's claim to divine and absolute rule.

Riled by attempts led by the Commons to exclude the King from his legislative and executive functions, Charles' *Answer* was, in those passages which dealt with the constitution at least, nothing less than a forceful defence of the place of the monarch within the English constitution:

There being three kinds of government among men (absolute monarchy, aristocracy, and democracy), and all these having their particular conveniences and inconveniences, the experience

⁷⁰³ (my note) Proposition VII, for example, demanded that "the Votes of Popish Lords in the House of Peers, may be taken away, so long as they continue Papists". (*19 Props.*, p.150), whilst Proposition VIII continued that "your Majestie will be pleased to Consent, That such a Reformation be made of the Church-Government, and Liturgue as both Houses of Parliament shall advise". (*19 Props.*, p.150)

⁷⁰⁴ Gardiner (1884) vol.X, Ch.CV, pp.197-198

⁷⁰⁵ I accept the argument made by Gardiner (1884) and by Tomkins (2005) that the initiative shown by Parliament in presenting the king with these propositions represented an important shift toward the constitution as we may recognize it today. However, I am concerned here not with the nature of the measures proposed as much as I am with the claims to constituent power presupposed by those claims.

⁷⁰⁶ Charles I, *Answer*, p.171: 'we do not wish the Laws of England to be changed.'

⁷⁰⁷ Glenn Burgess *The Politics of the Ancient Constitution: An Introduction to English Political Thought, 1603-1642* (Basingstoke, The Macmillan Press Ltd., 1992), Ch.8, p.230

and wisdom of your ancestors has so moulded this [...ancient, equal, happy, well-poised and never enough commended Constitution of the Government of this Kingdom...] out of a mixture of these as to give to this kingdom (as far as human prudence can provide) the conveniences of all three, without the inconveniences of anyone, as long as the balance hangs even between the three states, and they run jointly in their proper channel (begetting verdure and fertility in the meadows on both sides), and the overflowing of either on either side raise no deluge or inundation.

Arhiro Fukuda has correctly identified in this *Answer* the first ‘Polybian’ interpretation of the English constitution.⁷⁰⁸ Polybius, the second-century BC historian of Rome,⁷⁰⁹ began Book VI of his famous *Histories*⁷¹⁰ by attributing the success or failure of “all political situations” to “the form of a state’s constitution”.⁷¹¹ If, for Polybius, the constitutions of the Greek states lent themselves easily to such analyses, both by historical study and future prediction, the constitution of Rome, owing to the “complicated nature” of its constitution, presented an altogether more vexing question.⁷¹² So, whilst he warned of the difficulty of “explain[ing] the present situation” of Rome, and of “predict[ing its] future”, this was precisely the task which he set for himself.⁷¹³

For Polybius, that which made Rome such a complex subject also made it the “best” possible constitution. “Most of those writers,” he observed, “who have attempted to give an authoritative description of political constitutions have distinguished three kinds, which they call *kingship*, *aristocracy* and *democracy*. We are, I think, entitled to ask them whether they are presenting these three to us as the only types of constitution or as the best, for in either event I believe that they are wrong. It is clear,” he continued, “that we should regard as the *best* constitution one which includes elements of all three species”.⁷¹⁴ The contrast to Rome, that against which Book

⁷⁰⁸ Arhiro Fukuda *Sovereignty and the Sword: Harrington, Hobbes, and Mixed Government in the English Civil Wars* (Oxford, Clarendon Press, 1997)

⁷⁰⁹ Although a historian of Rome, Polybius himself was of Greek origin, born in Magalopilis, which at that time formed a part of the Achaean League.

⁷¹⁰ For this paper I have been working from Polybius *The Rise of the Roman Empire* (Ian Scott-Klivert, trans.) (London, Penguin Books Ltd., 1979), with assistance from F.W. Walbank *A Historical Commentary on Polybius* (Oxford, Clarendon Press, 1957), vol.I

⁷¹¹ Polybius (1979), Bk.VI.2

⁷¹² Polybius (1979), Bk.VI.3

⁷¹³ Polybius (1979), Bk.VI.3

⁷¹⁴ Polybius (1979), Bk.VI.3

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VI sets the ‘best constitution’, is *anacyclosis*: the continuing cycle of change which stalks all ‘simple’ forms of government.

Polybius began his account of *anacyclosis* by contesting the commonplace assumption that there are in essence only three kinds of political constitution: monarchy, aristocracy and democracy.⁷¹⁵ If each could be distinguished from the other numerically, kingship as rule by one, aristocracy as rule by the few, democracy as rule by (the?) many, then within these numerical divisions could be made more nuanced distinctions, based upon the virtues of government.

*We cannot say that every example of one man rule is necessarily a kingship, but only those which are voluntarily accepted by their subjects, and which are governed by an appeal to reason rather than by fear or force. Nor again can we say that every oligarchy is an aristocracy, but only those in which the power is exercised by the justest and wisest men, who have been selected on their merits. In the same way a state in which the mass of citizens is free to do whatever it pleases or takes into its head is not a democracy. But where it is both traditional and customary to reverence to the gods, to care for our parents, to respect our elders, to obey the laws, and in such a community to ensure that the will of the majority prevails – this situation is proper to be described as a democracy.*⁷¹⁶

Accordingly, to the three most commonly identified constitutions Polybius added their respective degenerate ‘twin’: tyranny, the self-interested rule by one through fear and violence; oligarchy, rule by a libertine few; and mob-rule, the triumph of the angry and violent mob. Not only, and crucially, is tyranny to be thought of as a corrupt relation of kingship, oligarchy that of aristocracy and mob-rule as a debased democracy but the Greek contends that any form of ‘simple’ constitution necessarily, inevitably will degenerate into its corrupt form⁷¹⁷, and, furthermore, that each pair (of ‘good’ and ‘corrupt’ constitution) is necessarily and inevitably linked to the rest. This, indeed, is the very meaning of *anacyclosis*:

⁷¹⁵ Polybius (1979), Bk.VI.3. The translator correctly points out here that classic authors such as Herodotus, Plato and Aristotle account for various forms of constitution out with this trilogy, and speculates that the writers to whom Polybius here refers are more likely to have been “authors of the second rank who wrote nearer to his time.” (Polybius (1979), p.303, fn.1)

⁷¹⁶ Polybius (1979), Bk.VI.4

⁷¹⁷ Polybius (1979), Bk.VI.10: “...it is impossible to prevent each of these kinds of government, as I mentioned above, from degenerating into the debased form of itself.”

*The first of these to come into being is one-man rule, and developing from it with the aid of art and through the correction of its defects, comes kingship. This later degenerates into its corrupt but associated form, by which I mean tyranny, and then the abolition of both gives rise to aristocracy. Aristocracy by its very nature degenerates into oligarchy, and when the populace rises in anger to avenge the injustices committed by its rulers, democracy is born; then in due course, out of the licence and lawlessness which are generated by this type of regime, mob rule comes into being and completes the cycle.*⁷¹⁸

In the examples of Sparta and Rome however, (and Rome being his primary subject) Polybius found an escape from this vicious circle. Each had discovered (Sparta by the foresight of its lawgiver, Lycurgus; Rome by experience and evolution) that the chaotic tumultuousness of *anacyclosis* could be countered, *ergo* stability could be achieved, by combining all the virtues and distinctive features of the best governments “so that no one principle should become preponderant, and thus perverted into its kindred vice, but that the power of each element should be counterbalanced by the others, so that no one of them inclines or sinks unduly to either side.”⁷¹⁹ Thus, the mixed constitution was built on principles of reciprocity and counteraction. In Rome, the functions of kingship, or monarchy, were carried out by the consuls and in that office was “exercise[d] supreme authority over all public affairs.” All other constituted authorities⁷²⁰ were subordinate to and bound to obey them, and it was they who controlled the military, they who reported urgent business to the Senate and they who were “entirely responsible” for executing its decisions.⁷²¹ The Senate, the aristocratic ingredient of the constitutional mix, were responsible for the treasury and the regulation of the flow of expenditure, as well as the public investigation of such ‘political’ crimes as treason, conspiracy and assassination. “All these matters,” said Polybius, “are in the hands of the Senate and the people have nothing to do with them.”⁷²² For the people however, (and notwithstanding the consuls’ control of the militia and the Senate’s fiscal authority) a “very important” role remained: for it was they who bestowed honours (by election to public office) and they who

⁷¹⁸ Polybius (1979), Bk.VI.4

⁷¹⁹ Polybius (1979), Bk.VI.10

⁷²⁰ with the exception of the tribunes...

⁷²¹ Polybius (1979), Bk.VI.12

⁷²² Polybius (1979), Bk.VI.13

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dished out punishment (by control of the law courts). Finally, and perhaps most importantly, it was for the people, and the people alone, to ratify treaties, to approve legislation, and “to deliberate and decide questions of peace or war.”⁷²³

Having described the relative functions of kingship, aristocracy and democracy within the mixed constitution (of Rome), Polybius turned his attention to the ways in which those powers could be used by each of the three to work with or against the other. The consul, he observed, could not send out its army, and hope to reach a satisfactory conclusion without the flow of constant supplies approved by the Senate, nor the ratification or rejection of hostilities by “the sovereign people”. Most important of all, for Polybius, when those hostilities draw to a close, it is to the people that the consuls must, as a matter of course, give account for their actions.⁷²⁴ The Senate too, though it wields great fiscal power, “stands in awe of the masses and takes heed of the popular will” for without the people’s (positive act of) ratification “it cannot carry out inquiries into the most serious and far-reaching offences against the state. Indeed, should the people cast their veto upon the Senate, it cannot even sit, let alone deliberate and decide.”⁷²⁵ The people in turn will “think twice” about overreaching their authority by the exercise of these powers over the consul and the Senate. Through the control of public contracts, and by the provision of judges to sit on civil hearings between citizens, the aristocratic branch “can either inflict great hardship [upon] or ease the burden” of a people “uncertain and afraid they might need its help.” By the same token, the knowledge that “they will come both individually and collectively under [the authority of]” the consuls serves to check the ambitions of the people in obstructing without good cause the projects proposed by that body.⁷²⁶

These, then, are the powers which each of the three elements in the system possesses to help or to harm the others; the result is a union which is strong enough to withstand all emergencies, so that it is impossible to find a better constitution than this. For whenever some common external threat compels the three to unite and work together, the strength which the state then develops becomes quite extraordinary...

⁷²³ Polybius (1979), Bk.VI.14

⁷²⁴ Polybius (1979), Bk.VI.15

⁷²⁵ Polybius (1979), Bk.VI.16

⁷²⁶ Polybius (1979), Bk.VI.17

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...[Furthermore, w]henver one of the three elements swells in importance, becomes overambitious and tends to encroach upon the others, it becomes apparent for the reasons given above that none of the three is completely independent, but that the designs of any one can be blocked or impeded by the rest, with the result that none will unduly dominate the others or treat them with contempt.⁷²⁷

No wonder then the extent to which Charles' advisers sought purchase from Polybian ideas. With the claim that the Militia Ordinance was good law, without the king's assent; with the consequence that the king was to be disposed of his control over the militia, Parliament, driven by the Commons, was effectively curtailing the Crown's role as a constitutional actor. Through a Polybian account of England's mixed constitution, the king's advisers could present not only to the people, but also to the Commons and the Lords, a powerful and persuasive defence of the king's traditionally held powers and functions. As Skinner has said, when read in this context the *Answer*, so often portrayed as a concessive and conciliatory document⁷²⁸, "appears as an aggressive reaffirmation of the crown's place in the mixed constitution...one in which the prerogative of the Negative Voice was shown to play a pivotal role that no one had previously called in doubt."⁷²⁹ Thus, the *Answer* read, the House of Commons, "an excellent conserver of liberty", is solely entrusted with the levy of money and the impeachment of those who have committed offence against the state, whilst the Lords, "an excellent screen and bank between the prince and people", possessed alone the judicatory power of the state. These powers, said the king, were more than sufficient to prevent and restrain the power of tyranny". The king however had been entrusted with the executive power of government: with "[p]ower of treaties, of war and peace; of making peers, of choosing officers and counsellors for state, judges for law, commanders for forts and castles; giving commissions for raising men to make war abroad, or to prevent or provide against invasions or insurrections at home; benefit of confiscations, power of pardoning, and some more of the like kind, are placed in the king." One by one, then, the king dismissed the propositions put to him by Parliament, and each he justified within this Polybian account of mixed constitutionalism. The constitution of England, he now declared, was that of a

⁷²⁷ Polybius (1979), Bk.VI.18

⁷²⁸ Fukuda (1997), Ch.2, p.26, argues that first and foremost of a number of reasons, the king's advisers adopted a Polybian analysis because "they needed a theory to justify, from King Charles's point of view, the substantial concessions he had made since the meeting of the Long Parliament in November 1640.

⁷²⁹ Skinner (2002), Ch.12, p.334

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“regulated monarchy” which, with an impotent crown at its head, would be powerless to “hinder the ills of division and faction” (which flow, he said, from an unchecked aristocracy) as well as the “tumults, violence and licentiousness” which follow unbridled democracy.⁷³⁰ Polybius, Fukuda argued, had sought to suppress the people’s energy and explain the extraordinary stability of (Sparta and) Rome by demarcating the *limits* of monarchy, aristocracy and democracy within a mixed constitution.⁷³¹ By adopting Polybian theory, almost in its entirety, it became possible for the king to be all things to all men. From a Royalist perspective, Charles I could forcefully re-insert himself into the constitution with a stinging theoretical and pragmatic rebuke of Parliament’s *Nineteen Propositions*. At the same time however he could, by recognizing the *fact* of Parliament’s increasing power, appeal to the ‘democratic gentlemen’ by moving (constitutional) fiction to meet new (political) realities. As Corrine Comstock Weston has said in her penetrating analysis of the *Answer* and its subsequent effect, in that document Charles I suddenly, sharply and “completely abandoned the theory of the divine right of kings, with which his name is now commonly associated, and declared that the English government was a mixture of monarchy, aristocracy, and democracy, with political power divided among king, lords, and commons.”⁷³²

From subversion to observation

There is every reason to believe that the sudden abandonment of divine right theology for a Polybian definition of ‘regulated monarchy’ was no innovation by Charles himself. In his account of the calamitous circumstances in which the *Answer* was published Sir Edward Hyde, later the Earl of Clarendon, recalled that the task of drafting the king’s reply to the *Nineteen Propositions* had fallen to two of the king’s advisers, Lord Falkland and Colepeper, and that it was specifically the latter who had drafted the consequential passages on the constitution.⁷³³ For sure, the very appointment of Hyde, Falkland and Colepeper to the king’s inner circle could be taken as a conciliatory measure by Charles; a sign of moderation which he had particularly hoped

⁷³⁰ Charles I, *Answer*, pp.167-171

⁷³¹ Fukuda (1997), Ch.1, p.15

⁷³² Corrine Comstock Weston *English Constitutional Theory and the House of Lords 1556-1832* (London, Routledge & Kegan Paul, 1965), intro., p.5

⁷³³ Weston (1965), Ch.1, p.26

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would catch the attention of the Lords. After all, each of this trio of newly appointed advisers to the king had, in the opening year of the Long Parliament, been instrumental in attempts at reining in the ever expanding prerogative of the crown. Indeed, it was no less than Hyde and Falkland together who had initiated the parliament's moves to have ship money formally declared illegal.⁷³⁴ Hyde himself, however, was greatly disturbed by the drafts of the *Answer* presented to him by Colepeper. Troubled by what he perceived to be the erroneous lowering of the king within the three estates, a claim he felt both insulting and injurious to the crown, it was Hyde's view that the answer proposed by his companion had conceded too much. Colepeper, he felt, had been misled by the influence of lawyers and clergymen keen to see parliament exalted above the king⁷³⁵ and the *Answer* was duly withheld from print. Only when Falkland accused Hyde of acting out of jealousy (jealousy that he, and not Clarendon, ought to have been entrusted with drafting the *Answer*) did the latter recant, and release the *Answer* to be published. Further recollections from Hyde however, first that Falkland had been "greatly troubled" when the reasons for Hyde's concern were spelled out to him, and second that Charles himself was "afterwards very sensible" of the decision to print the *Answer*, betray the extent to which the new royalist position had been expounded as much by accident as by design.⁷³⁶ Nowhere was the subversive potential of Colepeper's carelessness more keenly felt than in that passage which seemed to hold the community as the human source of political power and authority. It was, we remember, "the experience and wisdom of your Ancestors," a human source of authority and therefore *not* God by his divine ordinance, who, according to the *Answer*, "hath so moulded" this, such praiseworthy, mix. Little but the very abolition of monarchy itself could have more starkly contradicted the proud declaration by Charles' father, James I, to the Lords and Commons that Kings, called Gods "even by God himself", possessed the "supremest" authority on Earth, because they had been chosen to sit upon His throne.⁷³⁷ Once again, it would seem, Colepeper had conceded too much - more in any case than royalists were willing to tolerate. Thus it was that on August 12, 1642 Charles himself attempted to correct, at least in part, this passage with the declaration that "the frame and [mixed] constitution of this kingdom [had been]

⁷³⁴ Weston (1965), Ch.1, p.26

⁷³⁵ Weston suggests William Lambarde's *Archeion*, or *A Discourse upon the High Courts of Justice in England*, two editions of which had appeared in 1635, as possibly having an influence upon Clarendon. (Weston (1965), Ch.1, p.27, fn.34)

⁷³⁶ Weston (1965), Ch.1, p.27

⁷³⁷ James I, *1610*, p.181

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so admirably founded and continued *by the blessing of God and our ancestors*".⁷³⁸ In one sentence Charles had reminded his subjects that the constitution of England was (at least in part) divine. If the *Answer* was a simple error however, the continued moderation of Charles' language, demonstrated by the expression of conjoined authority in God *and* our ancestors, was little more than strategy, a final appeal to the natural instincts of the Lords for their support on the eve of civil war.⁷³⁹ Charles had never seriously believed his reign to be anything other than that ultimately of a divine and absolute monarch. When all was lost, when he appeared before the High Court of Justice charged with waging a war on his own people "for the advancement and upholding of a personal interest of will, power, and pretended prerogative to himself and his family",⁷⁴⁰ the king's response to the charge was one which belied any claim to authority held over him by the political community:

*Thus, having showed you briefly the reasons why I cannot submit to your pretended authority, without violating the trust which I have from God for the welfare and liberty of my people, I expect from you either clear reasons to convince my judgement, showing me that I am in error (and then truly I will answer) or that you will withdraw your proceedings.*⁷⁴¹

Evidently, then, the strategy failed. By the *Answer*, Charles had vowed to prevent the subversion of the King of England to a mere Duke of Venice; had vowed this was to say, to prevent the Kingdom from becoming a republic.⁷⁴² And yet, by invoking the Polybian ideal, by presenting the constitution of England as that of a mixed government, the king had achieved just that. As Pocock has said, by erroneously describing the king as merely *one of* the three estates, so moulded by our ancestors, "[g]overnment in England [could] no longer [be thought of as] a

⁷³⁸ Corrine Comstock Weston, Janelle Renfrow Greenberg *Subjects and Sovereigns: The Grand Controversy over Legal Sovereignty in Stuart England* (Cambridge, Cambridge University Press, 1981), Ch.3, p.46 (my emphasis is added, and differs from the emphasis placed by Weston/Greenberg)

⁷³⁹ Just ten days later the raising of the king's standard would mark the formal declaration of war...

⁷⁴⁰ 'The Charge against the King' (January 20, 1649), in Gardiner (ed.) (1889), pp.371-374, p.373

⁷⁴¹ Charles I 'The King's reasons for declining the jurisdiction of the High Court of Justice' (January 21, 1649), in Gardiner (ed.) (1889), pp.374-376, p.376 (hereafter *The Charge Against the King*)

⁷⁴² Charles I, *Answer*, p.167:

We are resolved not to quit them, nor to subvert (though in a Parliamentary way) the ancient, equall, happy, well-poised, and never-enough commended Constitution of the Government of this Kingdom, nor to make Ourselves of a King of England a Duke of Venice, and this of a Kingdom a Republique.

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direct emanation of divinely or rationally enjoined authority; it [was, instead] a contrivance of human prudence, blending together three modes of government – the only three that can exist – each of which possesses its characteristic virtues and vices”.⁷⁴³ In short, he continued, “[t]he government of England...without ceasing to manifest the element of monarchy, [was] being presented as a classical republic.”⁷⁴⁴ At one time groping in the dark for a theoretical basis for their claims, this opportunity afforded to his opponents by the King’s own party was immediately and powerfully taken up, finding its most direct and most forceful expression in the anonymously written *Political Catechism*.⁷⁴⁵

That the theoretical claims of the *Political Catechism* were not only made for but supported by the House of Commons is beyond doubt. The inside cover of the text established that its publication was ordered by the Commons, whilst the extended title explained the reason for doing so:

*Publish’d for the more complete settling of Consiences; particularly of those that have made the late Protestation, to maintain the Power and the Privileges of Parliament, when they shall herein see the King’s own Interpretation what the Power and Privileges are.*⁷⁴⁶

The aim of the catechism then was clear enough: to manipulate, by a painstaking, near line-by-line treatment of the original text, the crucial constitutional passages of the *Answer* so as to provide hitherto insufficient theoretical support for the Parliament’s opposition to the crown. Thus when the observer asked what form of government existed in England, he quoted directly from the *Answer*: “regulated monarchy”, adding by way of comment that if “this Government be a mixture of all three [simple forms], then the House of Commons, the Representative Body of

⁷⁴³ J.G.A. Pocock *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, Princeton University Press, 1975), Ch.XI, p.362. Pocock notes here that in the climate of the seventeenth century the king’s own language, of the ‘conveniencies’ and ‘inconveniencies’ of governments was far less ‘low-key’ than is now the case, and in the context can be read synonymously with ‘virtue’ and ‘vice’.

⁷⁴⁴ Pocock (1975), Ch.XI, p.363

⁷⁴⁵ *A Political Catechism: Or, Certain Questions concerning the Government of this Land, Answered in His Majesties own Words: Taken out of His Answer to the 19 Propositions, Pag. 17, 18, 19, 20 of the First Edition: With some Observations thereupon* (London, 1643) (hereafter, *Political Catechism*). This tract has long been attributed to Henry Parker (cf. Weston (1965), Ch.1, p.37), however Mendle has said that the catechism is “clearly at odds with Parker’s sense of parliamentary absolutism”, and so considered this to be a misattribution. (Mendle (1995), appendix, p.195)

⁷⁴⁶ *Political Catechism*, pp.1-2

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the People, must needs be allowed a share in government (some at least) which yet it is denied”.⁷⁴⁷ This much, he said, flowed from the origins of that government’s authority. “By whom,” he asked, “was this Government framed in this sort? Or who is to be accounted the Immediate Efficient of the Constitution thereof?” The answer, once again, was lifted straight from Colepeper’s pen: “[t]he Experience and Wisdom of your Ancestors hath so moulded this”. Here the catechism made explicit the argument for constituent power which would, in the fullness of time, legitimise the trial and execution of Charles before a court of law:

If our ancestors were the moulders of this Government, then the King hath not his Power, solely, or immediately, by Divine Right...

...But the Immediate Original of it was from the People. And, if so, Then –

*In questioned Cases, the King is to produce his Grant (for he hath no more than what was granted) and not the People to show a Reservation: For all is presumed to be Reserved, which cannot be proved to be granted away.*⁷⁴⁸

These words, vicariously those of the Commons themselves, made crystal clear, from the claim that the people were the original, the constituting authority of government, that the power of the people was both active and vigilant. The burden of proof, at all times, fell upon the king to show that his actions, taken in the name of his people, fell within the limits of the power entrusted to him *by* the people. Here was being advanced a republican argument somewhat ahead of its time. Skinner has said that it was not until Milton’s *Eikonoklastes*, produced in 1649, and free from the fear of royalist reprisal, that Englishmen felt comfortable enough “to go at least as far as [the] classical authorities in suggesting that kings may be no different from tyrants in their envy of the qualities that contribute to civic greatness.”⁷⁴⁹ That is to say, that by their envy of the virtues of

⁷⁴⁷ *Political Catechism*, p.4

⁷⁴⁸ *Political Catechism*, p.5. The charge against the King was unequivocal in accepting the people as constituent authority over and above the king:

That the said Charles Stuart, being admitted King of England, and therein trusted with a limited power to govern by and according to the laws of the land and not otherwise...[has acted]...

...against the public interest, common right, liberty, justice, and peace of the people of this nation, by and from whom he was entrusted as aforesaid.

(The Charge Against the King, p.371 and p.374; my emphasis added)

⁷⁴⁹ Skinner (2002), Ch.11, p.304

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free subjects, both tyrants *and kings*, were equally disposed to induce a numbing servility in and reverence from the people. Yet the *Political Catechism*, published under Charles' reign, some six years before the *Eikonoklastes*, saw no necessity in charging Charles with tyranny before making the claim that he be held accountable before the law and by the people. "Hence we discern, that it is possible for Kings," and note what the catechism does *not* say, 'tyrants', "to envy their People's Happiness, because the largeness of the People's Happiness," such a sign of civic greatness, "depends much upon the Restraint of the King's Exorbitant Power."⁷⁵⁰ The very constitution of English government, moulded by the political community, by our ancestors, as a "regulated monarchy", a mixed government, demanded that any monarch, all monarchs, king and tyrant alike, be subject to the judgment of the people, as expressed by Parliament. The *Answer* itself had reassured the people that "the Power Legally placed in both Houses," that is, the power of the Commons to impeach, as well as the judicial power of the Lords, "is more than sufficient to prevent and restrain the power of Tyranny."⁷⁵¹ The author of the *Political Catechism* clearly agreed, and spelled out the constitutional implications. "The Two Houses are by the Law, it seems, to be *Trusted*, when they declare, that Power is made use of for the hurt of the People, and the Name of *Public Necessity* made use of the Gain of *Private Favourites* and *Followers*, and the like."⁷⁵²

If the royalists had hoped that the Polybian ideal would serve to suppress the energy of the people, the manipulation of the *Answer* which took place in the *Political Catechism*, endorsed by the House of Commons, turned that idea on its head. The greatness of England's mix was, according to this renewed Parliamentary line, precisely that it accepted the power of the people as the original and constant source of authority and sought to harness that great power, in the institution of the two Houses. Thus, Bernard Crick has argued that in the classical mixed government of Rome 'popular government' (*il governo poulare*) did not quite imply 'government by the people'. The connotation, he said, is better understood as "our 'the governor' on a lorry or other engine, the ultimate restraining force, the final limitation – but

⁷⁵⁰ *Political Catechism*, p.6

⁷⁵¹ Charles I, *Answer*, p.169. It is worth pausing to note here that Charles' *Answer*, with which the catechism engaged in detailed textual analysis, made the 'tyrant' conceptually and constitutionally distinct from the 'king'. Had the catechism wished to make that distinction, and to spell out distinct constitutional implications for each, one could expect that the distinction would have been made explicit in the text.

⁷⁵² *Political Catechism*, p.12

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also...the real power, both civic and military, behind republics”.⁷⁵³ What was so remarkable about the *Political Catechism* was just how little work it had to do interpret such a radical role for popular government from the royalist *Answer*. By the latter half of the seventeenth century, this classical mix would be called, with no hint of irony, the ‘King’s Constitution’⁷⁵⁴, a fact which by itself betrays the seemingly magical effect of Charles’ (inadvertent) assent. “Since he used the classical theory,” argued Weston, “he stamped it with royal approval; and this was a fact of fundamental importance.”⁷⁵⁵ Such was the grip thusly held by the theory over the national imagination, that, in Weston’s estimation, “[t]he great majority of Englishmen who reflected on the nature of their government during the civil-war period accepted either a theory of mixed government or the closely related mixed monarchy as the fundamental principle of the English constitution.”⁷⁵⁶ The importance of the *Political Catechism*, however, is, for our purposes, twofold. First of all the tract, published in three editions in 1643, and republished in 1679, 1688, 1689, 1692, 1693 and 1710, “was a main channel through which the discourse on the constitution in the *Answer* to the Nineteen Propositions passed into English political thought.”⁷⁵⁷ Secondly, the catechism gave normative substance to that ‘fundamental principle’. By regulating monarchy, the mixed constitution would ensure that no monarch could act outwith the powers entrusted to him by the political community. Furthermore, by that (active, vigilant) act of regulation, the virtues of the people, reduced to slavish obedience under a divine king, would at once flourish: ‘the people’s happiness’, we remember, dependent upon the restraint of the monarch. As with the controversy over ship money, the *locus classicus* of this parliamentary position was to be found in the now famous response by Henry Parker to His Majesty’s *Answer*.

Unlike the *Political Catechism*, Parker’s *Observations upon some of his Majesties late Answers and Expresses*⁷⁵⁸ contained relatively little direct engagement with the *Answer* itself.

Nevertheless, by its insistence that “[p]ower is originally inherent in the people” derived into the

⁷⁵³ Bernard Crick ‘Introduction’, in Niccolò Machiavelli *The Discourses* (London, Penguin Classics, 1970), pp.15-71, pp.27-28 (hereafter *Crick’s introduction*)

⁷⁵⁴ Weston (1965), Ch.1, p.25 (incl. Fn.31)

⁷⁵⁵ Weston (1965), Ch.1, p.26

⁷⁵⁶ Weston (1965), Ch.2, p.44

⁷⁵⁷ Weston (1965), Ch.1, pp.37-38. Note the spate of republished editions around the time of the Great Revolution...

⁷⁵⁸ Henry Parker *Observations upon some of his Majesties late Answers and Expresses* (London, 1642) (hereafter *Observations*)

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hands of government by the “law of common consent and agreement”⁷⁵⁹; and, by the associated claim that “not the Prince which is the most potent *over* his subjects, but that Prince which is most potent *in* his subjects, is indeed most truly potent”⁷⁶⁰, the *Observations* captured the fundamental principle of mixed government as it seemed to flow from the Polybian ideal. Tellingly, in one of the few passages in which Parker did engage directly with the *Answer* he made explicit for his audience the ‘ills’ of absolute (*ergo* ‘unregulated’) monarchy. In rejecting the *Nineteen Propositions* the king had declared an admiration for “the ancient, equal, happy, well poised and never enough commended constitution of this Government, which hath made this Kingdome, so many years both famous and happy, to a great degree of envie, and amongst the rest, our Courts of Parliament: and therein more especially, that power which is legally placed in both Houses, more than sufficient (as he sayes) to prevent and restrain the power of Tyranny”.⁷⁶¹ Such a claim Parker found utterly deceptive:

*But how can this be? If the King may at His pleasure take away the being of Parliament merely by dissent, if they can do nothing but what pleases Him, or some Clandestine Councillors, and if upon any attempt to do anything else, they shall be called Traitors, and without further arraignment, or legall proceeding, be deserted by the Kingdom whose representations they are, what is there remaining to Parliaments? Are they not more servile than other inferior Courts; nay are they not in a worse condition than the meanest Subject out of Parliament? And how shall they restrain tyranny, when they have no subsistance at all themselves; nay or no benefit of Justice, but arbitrary. Surely if these principles hold, they will be made the very Engines and Scaffolds whereby to erect a government more tyrannical than ever was known...*⁷⁶²

If the king had invoked Polybian mixed government to defend his ancient privileges, including that of the negative voice, then, for Parker, he had introduced to the heart of the English constitution a paradox upon which the republic could not rest. How could parliament exercise its legal power to correct tyranny if both its existence and the legitimacy of its acts depended in the first and last upon the completely arbitrary will of the king? How then could the people’s

⁷⁵⁹ Parker, *Observations*, p.1

⁷⁶⁰ Parker, *Observations*, pp.1-2 (my emphasis added)

⁷⁶¹ Parker, *Observations*, p.21

⁷⁶² Parker, *Observations*, pp.21-22

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(political) happiness, dependent itself upon the *restraint* of the king, flourish where the king's own will was his only effective control? As Skinner said, “[w]e cannot imagine a free people ever consenting to such an unbounded contract of government”:⁷⁶³

*The effect of the Negative Voice is to take away the liberty not merely of individual subjects but of the people as a whole. It converts the English from a free people into a nation of slaves.*⁷⁶⁴

For Parker, law, and therefore parliament's 'legal power', was both necessary and insufficient. *Necessary* because by law was set the boundaries of consent across which the monarch could not (with legitimate authority) act: law, said Parker, was “nothing else...but the Pactions and agreements of such and such politique corporations” was “the Instrument” by which “free and voluntary” men conferred power upon their governors.⁷⁶⁵ *Insufficient* because law alone could not restrain the king. “The wisest of our Kings,” said Parker, “following their own private advice, or being conducted by their own wills, have mistaken their best Subjects for their greatest enemies, and their greatest enemies for their best Subjects, and upon such mistakes our justest Kings, have often done things very dangerous”⁷⁶⁶:

*And yet if Princes may be admitted to prefer such weak opinions before Parliamentary motives and petitions, in those things which concern the Lives, Estates, and Liberties of thousands, what vain things are Parliaments, what unlimitable things are Princes, what miserable things are Subjects?*⁷⁶⁷

For Judson, Parker's great contribution to the political thought of the civil-war period was precisely this: the recognition that “legal sanctions against arbitrary monarchs had failed and that only human power, organized into governmental authority, could provide an effective sanction for truly limiting kings.”⁷⁶⁸ It was the *locus* of this convergence, between power and authority, the very heart of the mixed constitution, which Parker found in parliament. “[W]e cannot

⁷⁶³ Skinner (2002), Ch.11, p.297

⁷⁶⁴ Skinner (2002), Ch.12, p.335

⁷⁶⁵ Parker, *Observations*, p.1

⁷⁶⁶ Parker, *Observations*, p.25

⁷⁶⁷ Parker, *Observations*, p.26

⁷⁶⁸ Margaret A. Judson *The Crisis of the Constitution: An Essay in Constitutional and Political Thought in England, 1603-1645* (New Brunswick and London, Rutgers University Press, 1988), Ch.X, p.426. For a contrasting view of Parker's as an essentially legal argument see Cromartie (2006), Ch.8, p.267

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imagine,” he said, “that publique consent should be anywhere more vigorous or more orderly than it is in Parliament.”⁷⁶⁹

Looking back almost a century on from the settling of England’s mixed constitution in 1689, John Millar, in his *Historical View* observed that:

*...the English government seemed, in the executive branch, to possess the advantages both of a monarchy and a republic...*⁷⁷⁰

More than four decades prior to the Glorious Revolution those advantages had already been thoroughly examined in the exchanges which had taken place between Charles I and his parliament. Monarchy, said the king, “unit[ed] a nation under one head to resist invasion from abroad and insurrection at home”.⁷⁷¹ The Commons, as evidenced by its propagandist-in-chief, was willing to concede this much. “[F]or we cannot restraints Princes too far, but we shall disable them from some good, as well as inhibit them from evil, and to be disabled from doing good in some things, may be as mischievous, as to be inabled for all evils at meere discretion.”⁷⁷² The advantage of the republic, the conducting of government in the public interest, and the prevention of tyranny, however, was a role for which Parker found parliament uniquely suited.⁷⁷³ Parliament could prevent tyranny by providing the King with its best advice:

...if the King could be more wisely or faithfully advised by any other Court, or if His single judgement were to be preferred before all advice whatsoever, 'twere not onely vaine, but extreemely inconvenient, that the whole Kingdome should be troubled to make Elections, and that the parties elected should attend the public business; but little need be said, I thinke every mans heart tells him, that in publique Consultations, the many

⁷⁶⁹ Parker, *Observations*, p.13

⁷⁷⁰ John Millar, quoted in Adam Tomkins ‘On Republican Constitutionalism in the Age of Commerce’, in Samantha Besson and José Luis Martí (eds.) *Legal Republicanism: National and International Perspectives* (Oxford, Oxford University Press), Ch.14, pp.331-332

⁷⁷¹ Charles I, *Answer*, p.168

⁷⁷² Parker, *Observations*, p.14

⁷⁷³ Parker, *Observations*, p.5:

Two things especially are to be aymed at in Parliaments, not to be attained to by other means. First, that the interest of the people might be satisfied; secondly that Kings might be better counselled.

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*eyes of so many choyce Gentlemen out of all parts, see more then fewer, and the great interest the Parliament has in common justice and tranquility, and the few private ends they can have to deprave them, must needs render their Counsell more faithful, impartiall, and religious, then any other...*⁷⁷⁴

That parliament could act only in the public interest was, thought Parker, quite natural. The whole kingdom, he said, was not the author of parliament but its very “essence”.⁷⁷⁵ As Mendle has said, “parliaments were not,” according to Parker’s observation, “mere agents or ministers of the people, but rather the same thing in a different mode. Cause and effect were the same.”⁷⁷⁶ By the creation of *this* fiction Parker had laid much of the theoretical groundwork for that constitution which emerged in 1689. Preceding Locke and Sydney’s deconstruction of Filmer’s arguments, the self-styled ‘Observor’ had challenged the theological, patriarchal assumptions which had supported the *divine* constitution; whilst his observations on *Hampden’s Case*, and his acid denial of the king’s negative voice had demonstrated that “[h]uman beings need more than law”, more that is to say, than a *legal* constitution, in which to frame *res publica*.⁷⁷⁷ Rather, seizing upon the opportunity afforded by the *Answer to the Nineteen Propositions*, Parker manipulated the power of the people into the shape of the Lords and Commons, the composition of which, he observed, “takes away all jealousies [self-interest], for it is so equally, and geometrically proportionable, and all the States doe so orderly contribute their due parts therein, that no one can be of any extreame predominance,”⁷⁷⁸ and placed parliament at the heart of a *political* constitution, in which politics itself could be expressed in the institutional tensions of the mix; that which occurs *in between* the various constituted powers.

The latent warning in the midst of Millar’s observation that, by the settlement of 1689, England possessed the advantages of a monarchy and a republic reveals itself in the inverse of that truth; that by the same token England must, by need, be doubly vigilant: as vigilant against the ills, the vices, of monarchy (tyranny) as of the republic (apathy). What I hope to have shown in this chapter, however, is that quite some time before that settlement was achieved, in the conflicts

⁷⁷⁴ Parker, *Observations*, p.11

⁷⁷⁵ Parker, *Observations*, p.5

⁷⁷⁶ Mendle (1995), Ch.5, p.85

⁷⁷⁷ Judson (1988), Ch.X, p.412

⁷⁷⁸ Parker, *Observations*, p.23

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between royalists and parliamentarians in the 1640s, that warning was already, and explicitly, being made. As the rights of his subjects were trodden upon by Charles I, with the collusion of the judiciary, and under the cloak of divine right, the willingness on the part of the people to suspend their disbelief, and accept the King as God's agent, was shaken; the readiness with which Charles' misplaced *Answer* was seized upon, evidence enough of the scramble for a new constitutional hypothesis. I concluded Part I by noting that Hannah Arendt had nothing productive to say about this period, despite her flirtation with English history, and fascination with revolution. Revolution in England, she said, had "broken out" (she does not specify from what), by which she meant it was concerned not with liberty, nor with the conscious construction of a new constitutional order to house that freedom. Indeed, it had (in accordance with the original meaning of 'revolution') revolved back to monarchy, with the restoration.⁷⁷⁹ A revision of this period by historians such as Glenn Burgess, J.P. Sommerville and Michael Mendle, political theorists such as Alan Cromartie, lawyers such as Adam Tomkins and Jeff Goldsworthy, to say nothing of the alliance between Skinner and Pettit, however, tells us something different. For one thing, we see divine right tested, and ultimately found wanting, in a moment of resistance: the people themselves, by their actions, rendering ship money uncollectable, its judicial sanction irrelevant, and parliament's proscription a formality, in a direct confrontation with the state, in the shape of the king's judges, and the levy's collectors. For another, we see the spirit of that moment of resistance captured by the parliament men's foremost propagandist, Henry Parker, in a series of pamphlets which set forth that new hypothesis; Parliament front and centre because the plurality of its composition, the ferocious debate therein, as well as its concern with public and not private interest, which ensured its virtues: 'tranquility', 'justice' and 'impartiality'.

Now, let us be clear, from our perspective, in 2010, in a climate dominated by a perceived popular distrust of traditional politics, and the institution, parliament, at its heart,⁷⁸⁰ the picture

⁷⁷⁹ Arendt (1963), Ch.1, p.43

⁷⁸⁰ As David Marquand has so vividly illustrated:

In 1999, a MORI poll showed that only a fraction more than 20 per cent trusted a government of any party to put the national interest above its party interest. By 2002 just around a third of those polled trusted the government to tell the truth about climate change, radioactive waste and GM food. In 2005, a MORI report found that public confidence in government information had fallen too...

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painted by Parker barely seems relevant. Allow me to close Part II, however, with something of a lament. For no sooner had the people emerged as a real, and active force against ship money, than Parker had praised their resistance, and used it for Parliament's ends: seeking to fold the people back within its four walls. Offering Parliament as the King's best counsel, Parker *immediately* sought to immunise parliament from the very same resistance which he had praised, when directed against the king. As Morgan has said, "by endowing the people with supreme authority...Parliament intended only to endow itself."⁷⁸¹ So, having espoused the people as the efficient and final cause of power in his *Observations*, Parker made clear that, no matter, it was not the power exercised by the king, arbitrary and absolute, that was in dispute, but simply the king's, and not parliament's, wielding of that power. That there is an arbitrary power somewhere in the state, said Parker, is not only "true" but, more than that, "necessary":

*...every man has an absolute power over himself; but because no man can hate himself, this power is not dangerous, nor need to be restrained. So every state has an arbitrary power over itself, and there is no danger in it for the same reason. If the state entrusts this to one man, or few, there may be danger in it; but the Parliament is neither one nor few, it is indeed the State itself...*⁷⁸²

For Parker, to rebel against the tyrant was the people's duty; the equivalent of cutting off an infected limb. To rebel against the Parliament however, was to rebel against the people themselves; the equivalent, this is to say, of suicide. So, when Arendt, in closing *On Revolution*, reflected on the irony that it was under the impact of the revolution itself, that the revolutionary spirit withered away, that it was the new constitution itself, "this greatest achievement of the American people," which had "cheated them of their proudest possession,"⁷⁸³ she might as well have been talking of the English resistance in 1640, and of the mixed constitution which emerged there from. For the real, active people, out of doors, who won such approval from Parker in his *Case Against Shipmony* for their resistance to the Crown, were nowhere to be seen when, in the

Party membership slumped. In 1964 the Conservative Party had more than 2 million members, and the Labour Party had 830,000. By 2006 the Conservatives had fewer than 300,000 and Labour fewer than 200,000.

(David Marquand *Britain Since 1918: The Strange Career of British Democracy* (London, Pheonix, 2009), Ch.12, p.400)

⁷⁸¹ Morgan (1988), Ch.3, p.65

⁷⁸² Parker (1642), p.34

⁷⁸³ Arendt, *OR*, Ch.6, p.239

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exchange around the *Answer*, the people, from which political power was sprung, were located in 'our ancestors', at some (unspecified) foundation as mythical and mystical as the King's divine ordinance, and Parliament itself, as the actual embodiment of that people in action. Looking back on this period then, allow me to stress two key moments in the revolution: first, the opening of a public space, here in the shape of resistance/disobedience, in which the recognition of a positive liberty, a political right *to have* those private rights which were duly threatened, manifested itself finally in the exercise of a right to dissent to the tyrant Charles; secondly, the paradoxical closure of that public space by the men of the revolution themselves, in their search for an abstract source of authority capable of filling the void left by the king's divine right. Make no mistake, this was no mere oversight: the people's capacity to resist, the enormous, transformative potential of that power, had not been forgotten as authority passed from one sovereign (the divine king) to another (the people). Had this been the case, Parker would barely have felt the need to remind those people of their relationship to parliament, of the obedience demanded of them by that body of men, and of the destructive nature of resistance to its sanction. As quickly as it had appeared, the revolutionary spirit, that which opened the space for new constitutive actions, had been lost; Parker's greatest trick to convince his countrymen that they were both always present *in*, and yet never responsible *for*, their government.

Part III: Reclaiming the Public

Part III(1) The virtue of ‘public-ness’

The link between Arendt’s political and constitutional thought, and the constitutional experience of the United Kingdom is not an immediately obvious one, after all she had but few and scattered things to say about the British constitution. However, what she did say was revealing and, I will argue, important and illuminating. Furthermore, those little gems, as they appear, make a coherent fit with the trains of (her) thought which I have tried to put to use in this thesis. Before developing this line, I will first retrace the steps taken in Parts I and II which bring this in to focus. Those parts have been about *domination*, and what is lost when domination is most severe: the public realm. Allow me, then, to define these terms a little more closely.

Domination

In **Part I**, I have said that for Arendt the totalitarianism of Nazi Germany was orientated towards the *total domination* of the human condition. That is to say that totalitarianism would have succeeded in achieving total domination only were it able to replace the creative and constitutive (occasionally resistant) possibilities of human *plurality* with the submissiveness of human *superfluity*. Human plurality, for Arendt, was the very essence of the human condition: “because we are all the same, that is, human, in such a way that nobody is ever the same as anyone else who ever lived, lives, or will live,”⁷⁸⁴ the reality of the world that we share as humans is only truly revealed *in between* the many and diverse human perspectives which are brought to bear upon it. To put it another way, because we must all live in common (as members of a common species), and yet because we are all different, and capable of manifesting those differences in reason and in speech (because we are, as Aristotle put it, *political* animals), we live in a condition of (what Jeremy Waldron, himself a self-confessed Arendtian,⁷⁸⁵ has called) ‘reasonable disagreement.’ According to the late, and indeed great J.A.G. Griffith ‘reasonable disagreement’ could be understood as follows:

⁷⁸⁴ Arendt, *HC*, Ch.1, p.8

⁷⁸⁵ See Jeremy Waldron ‘Arendt’s Constitutional Politics’, in Villa (ed.) (2000), p.201

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*All I can see in the community in which I live is a considerable disagreement about the controversial issues of the day and this is not surprising as those issues would not be controversial if there was agreement. I know what my own view is about racial minorities, immigration, the power of trade unions, official secrets, abortion and so on and so on. And I know that many people disagree with my views.*⁷⁸⁶

For Arendt, freedom meant having the capacity, the ways and the means, to enter into and engage with those debates with others (that is to say, in public). Civil liberties (the stuff of negative (Berlin)/modern (Constant) liberty), in Arendt's view, were no more than *private* freedoms, "the preliminaries of civilised government," but by no means its substance; *public* freedom, she said, meant being a participator in political affairs – in the free exchange of opinions, in the face of inevitable and reasonable disagreement - or it meant nothing.⁷⁸⁷ James Tully has said that citizenship is "an identity that members acquire through exchanging reasons in public dialogues and negotiations over how and by whom political power is exercised."⁷⁸⁸ For Arendt, this was undoubtedly the case: men, she said, reveal and indeed discover "who" they are (as opposed to "what" they are) in the process of action and speech amongst others:

*In acting and in speaking, men show who they are, reveal actively their unique identities and thus make their appearance in the human world, while their physical identities appear without any activity of their own in the unique shape of the body and sound of the voice.*⁷⁸⁹

Understood in this way, for Arendt (as, later, with Pettit and Skinner) it was possible that domination might occur, even where one's civil liberties are in fact respected. Turning her mind to the American revolutionaries, it was she said *more* than the pursuit of Americans' *private* happiness that had inspired the break from British rule: had the protection from interference in one's civil liberties been their aim, "reforms and not revolution, the exchange of a bad ruler for a

⁷⁸⁶ Griffith, *Political Constitution*, p.118

⁷⁸⁷ Arendt, *OR*, Ch.6, p.218

⁷⁸⁸ James Tully 'The Challenge of Reimagining Citizenship and Belonging in Multicultural and Multinational Societies', in Catriona McKinnon and Iain Hampsher-Monk (eds.) *Demands of Citizenship* (London, Continuum, 2000), Ch.10, p.212, p.215

⁷⁸⁹ Arendt, *HC*, Ch.5, p.179

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better one” would have sufficed. What it was that so inspired their break with the past, with British rule, was *public* happiness, through participation in (self)government.⁷⁹⁰

Domination, as Arendt understood it, therefore occurred where citizens were denied the very opportunity to enter in to the public realm, to reveal their uniqueness (that element of “who” they are), and to bring that perspective to bear upon the always on-going debates, negotiations and dialogues which keep open, and keep contestable, the principles which underpin the allocation and exercise of political power within their community. A matter of degree, Arendt saw in the concentration camps the only (nearly) successful attainment of *total* domination: the reduction of *men* in their diversity and plurality, to *Man*, a species in which one member is interchangeable with the next, in which all are superfluous. Yet there was domination too in more banal (or, at least, less radically evil) forms. The principle of sovereignty, she said – be that the sovereign king or the sovereign people – could not sit with the plurality of political power as action-in-concert: the King who claimed public affairs to be his sole and absolute preserve, who accordingly imposed his will upon his people, was no less tyrannical, no less abrogative of public freedom than was self-determination by a ‘general will’ imposed collectively upon all, and under which plurality and difference were stifled by terror.⁷⁹¹ The surest weapon against domination was, then, to keep open the public realm, to maintain a space within which the principles of domination could be contested and challenged: in the exercise, to put it one other way, of *public* freedom.

The virtues of public-ness

The virtues of public-ness thus understood were threefold. First, they disclosed the identity of the individual *qua* individual, but also *qua* the distinct, idiosyncratic member of a community. This, as we have seen, ultimately was what was deprived of those who found themselves in the concentration camps, not because of “who” they were (disclosed, say, by criminal actions) but because of “what” they unchangeably were (Jews, disabled, mentally retarded and so on).⁷⁹² Secondly, by casting the light of publicity it was possible to expose the abuse of public power by

⁷⁹⁰ Arendt, *OR*, Ch.5, pp.133-134

⁷⁹¹ Arendt, *OR*, Ch.2, pp.76-77

⁷⁹² Arendt, *OT*, Pt.III, Ch.3, p.577

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private interests. Just as Constant saw in publicity the means of holding political power to account, so too Arendt saw publicity as the *only* remedy for the misuse of public power by private interests.⁷⁹³ So it was that the leaking of the *Pentagon Papers* exposed an administration which had intentionally misled the American public over its intentions in Vietnam. Thus, whilst Lyndon Johnson and his Secretary of Defence, Robert McNamara, said publicly that the war aimed to secure an “independent, non-Communist South Vietnam,” the leaks revealed quite different intentions: “70 percent - To avoid a humiliating US defeat (to our reputation as a guarantor). 20 percent—To keep SVN (and the adjacent) territory from Chinese hands,” and – contrary to the publicly stated aims, only “10 percent—To permit the people of SVN to enjoy a better, freer way of life.”⁷⁹⁴ Third, the (self) constitution of a public space within which public affairs were debated and negotiated, within which the organisation of political power was always open to contestation from new perspectives, allowed the people to re-invoke, when necessary, the constituent power which they held in reserve against the forces of domination. Let us explore this latter point a little further still as it leads us back to our analysis of *British* constitutional experience, by considering it from two directions.

First, what is clear is that civil liberties, negative liberties, the freedom of the moderns were wholly insufficient tools against domination. On the one hand, it was (somewhat ironically) Constant himself who provided one of the strongest rebuttals against the reduction of freedom to its negative/modern meaning:

Could we be made happy by benefits [private rights] if these weren't somehow guaranteed? And where would we find guarantees if we gave up political liberty? Giving it up would be a folly like that of a man who doesn't care if the house is built on sand because he lives only on the first floor.

One might enjoy the benefit of this and that right at any given moment; yet, as we have seen in Part I, Arendt's concern was not with particular instances of interference or particular grants of right, but by the very right *to have* rights in the first place: a right with which she equated the right to belong to a political community – a public space – in which one was judged for one's

⁷⁹³ Arendt, *OR*, Ch.6, p.253

⁷⁹⁴ Cf. Above, fn. 165

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actions and deeds.⁷⁹⁵ Particular rights might always be subject to exception, or suspended entirely in the name of emergency/security. However, only through publicity and scrutiny in the public realm can the appropriate weight of the right vis-à-vis the exception properly be scrutinized; only in the shining light of the public realm – and the resistance to Ship Money, itself an interference with property rights made in reaction to an exaggerated or false emergency is an excellent example – can the ‘reality’ of the emergency be tested, and where necessary the domination be resisted. On the other hand, the turn to rights (indeed, Loughlin has called ours an ‘Age of Rights’ characterized by the triumph of law over politics)⁷⁹⁶ might itself be thought of as a form of domination. After all, if the condition of politics is indeed one of reasonable disagreement about public affairs, whereby each individual brings their own unique perspective to an ongoing and always open debate in the public realm, then the promise of (so-called) fundamental rights, that certain aspects of that debate are closed, uncontestable and guaranteed *outwith and above* the circumstances of politics, is itself one which preserves for the decision maker (be that in the hands of a legislature, an executive, a constitutional court or elsewhere) an extraordinarily wide discretion to apply or not to apply rights, in ways which may or may not be satisfactory, and yet which somehow evades serious scrutiny. To return to Griffith, the best we can say for rights is that they present political questions misleadingly as their resolution.⁷⁹⁷ The turn to rights, to put this all more concisely, is one which atomises and individualises us in our ‘private happiness’,⁷⁹⁸ each in our *individual* relationships with the state, whilst at the same time depriving us of the virtues by which the right *to have* rights might be defended, and domination be resisted. Before we make an explicit argument for the British constitution, allow me to explore this from a second angle.

Arendt held out little hope for a constitution which surrendered public for private happiness, political freedom for civil liberty, but she was just as pessimistic for a constitution in which that political freedom – the freedom to participate in the affairs of government – was left to the peoples’ representatives. She well knew that the “room[s of congress or parliament] will not

⁷⁹⁵ Arendt, *OT*, Pt.II, Ch.5, p.376

⁷⁹⁶ See Martin Loughlin *Sword and Scales: An examination of the relationship between Law and Politics* (Oxford, Hart Publishing, 2000), Ch.13

⁷⁹⁷ JAG Griffith ‘The Political Constitution’, in JAG Griffith *Public Rights and Private Interests* (Trivandrum, Academy of Legal Publications, 1981) p.103, p.121 [hereafter Griffith *Political Constitution*]

⁷⁹⁸ Arendt, Ch.5, p.133

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hold all,”⁷⁹⁹ that sheer numbers prevented all of the people deciding all political questions all of the time. Yet, she was weary all the same of replacing the participation of the people with the participation of a political elite. As we have seen, Arendt’s reading of the American revolution was one in which a constitution was made from the ground up, from a multitude of small, localized, public spaces – the townships and the wards – within which the people of those communities could gather in the shared experience of political liberty. Within these ‘schools of public life’, as Timmothy Dwight described them,⁸⁰⁰ on the one hand ‘partial injustices could be made known’⁸⁰¹ such that the legitimacy of impositions by the British Parliament could be debated and (then) resisted, whilst on the other – in the midst of revolution – the people themselves could negotiate, compromise and co-operate in establishing the form of government that would replace British sovereignty. The tragedy of the American revolution however was that the constitution thereby created ‘forgot’ both the spirit of revolution which brought it in to being, and the institution (the town meetings) through which that spirit was productively channeled in a constituent act. “The failure,” as Arendt put it, “of post-revolutionary thought to remember the revolutionary spirit and to understand it conceptually was preceded by the failure of the revolution to provide it with a lasting institution.”⁸⁰² As we have seen, however, this ‘failure’ was quite intentional: the men of the revolution were well aware that nothing threatened the stability of their creation more than the tumultuous spirit which had in the first place inspired it. By creating a constitution in which the peoples’ political freedom was exercisable only on the day of the election, it was the peoples’ representatives “in parliament and in congress, where he moves amongst his peers,” who retained the privileges of political freedom: of debate, speech, action and participation in public affairs.⁸⁰³ Arendt saw in this arrangement an inherent conservatism: if political freedom exists only *within* institutions, then those who exercise that freedom are unlikely to strongly contest and question the principles underpinning that freedom. Left outside of those institutions looking in, Arendt could see only two options for the people themselves: either “they must sink into lethargy,” and thus precipitate the “death of public liberty,” or they could “preserve the spirit of resistance to whatever government they have

⁷⁹⁹ Cf. Above, fn.16

⁸⁰⁰ Cf. Above, p.86

⁸⁰¹ Cf. Constant, above, p.39

⁸⁰² Arendt, *OR*, Ch.6, p.232

⁸⁰³ Arendt, *OR*, Ch.6, p.276

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elected, since the only power they retain is the reserve power of revolution.”⁸⁰⁴ In Part I, by looking at civil disobedience, council democracy and freedom of information, I have tried to show that for Arendt the second option was not only preferable, but realizable: that in extraordinary moments the people had shown themselves willing to (re)invoke their reserve power of resistance in order not to break down government or the constitution, but to provide a vehicle of last resort for the expression of an *alternative* constitutional voice, once again contesting and negotiating with constituted powers the limits of their domination. If this thesis is to succeed in transposing Arendtian arguments onto an analysis of the British constitution, I must show (1) that there was, once, a constitutive spirit of resistance by which the constitution was created, (2) that the British constitution has, under the domination of constituted powers, likewise ‘failed’ to remember (theoretically and institutionally) that spirit, (3) that, under the surface of that domination, echoes of this spirit remain, held in reserve, and – in extraordinary moments – have been (re)invoked as a constituent voice renegotiating or reinterpreting the limits of constituted power. What is at stake, in doing so, can simply be put as this: that where the public is absent, there tyranny and domination thrive. In Part I, I have said that the various crises of the American republic against which Arendt wrote could be ascribed to loss of public-ness: undeclared war, classified secrets, veiled threats to individual liberties. Tracing this back further still, I have said that Constant discovered the precisely the same: that at the very moment he had so strongly denounced public freedom, Napoleon’s rise taught him to cherish it. Taken further still, and contrary to the dominant view of republican freedom as non-domination, I have said that Pettit misunderstood Arendt in his dismissal of her as an arch-populist; that her assertion of a *constitutional* public which existed outside of *institutional* walls was one wholly consistent with the neo-Roman strand of non-domination: Machiavelli’s discovery that in the tumults of ancient Rome, in the commotion between the government (and its institutions) and the people themselves, was to be found not a threat to liberty, but its very essence. For this reason, “every [constitution],” the Florentine said in the *Discourses*, “should find the ways and the means whereby the ambitions of the populace may find an outlet.”⁸⁰⁵ Let us consider, then, the ‘ways and means’ by which the people might register that voice at the level of British constitution, first by revisiting the argument developed in Part II in order to tease out the

⁸⁰⁴ Arendt, *OR*, Ch.6, pp.237-238

⁸⁰⁵ Machiavelli (1970), Bk.I.4, p.114

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Arendtian thread which, I suggest, runs through those seventeenth century conflicts when the people did emerge, if only in the blink of an eye, radically to reshape the English constitution.

My first proposition: that there was, once, a constitutive spirit of resistance by which the constitution was created

Domination

I have said in opening Part II that Arendt - who was positively enthralled by revolutions wherever they occurred, so much so that events in Hungary led her to abandon what would have been the systematic of her political thought, *Introduction into Politics*, in order to pen *On Revolution* – was nevertheless barely moved by the revolution in political thought which took place in 17th century England, understanding them to have “broken out” of *necessity* and not to have been “made” by plural men engaged in a shared exercise of political *freedom*. It is my view however that Arendt’s ignorance here – possibly attributable to the dominant historical accounts of the revolution at the time, which focused on religious and economic motives to the near exclusion of political and constitutional ones – does not mean that Arendt’s work has nothing to say *to* those events, even if she said very little *about* them herself. Allow me to explain, by revisiting Part II, through an Arendtian lens. In particular, I will say something about domination, and about the virtues of publicness. Finally, I will explain what it is that I believe such a reading adds to our understanding of *contemporary* constitutional discourse: the stuff of Part III.

We have seen that for Arendt, the domination of a sovereign entity (God, king, parliament or people) entailed the suppression of the human condition. “Sovereignty,” she said, “is possible only in imagination, paid for by the price of reality.”⁸⁰⁶ The reality which was obscured by sovereignty was that of human plurality: that not one man (the sovereign), but men, inhabit the earth and live in the world. “[I]f,” she warned, “this attempt to overcome the consequences of human plurality were successful, the result would be...arbitrary domination of all others [or, put another way] the exchange of the real world for an imaginary one where these others would

⁸⁰⁶ Arendt, *HC*, Ch.5, p.235

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simply not exist.”⁸⁰⁷ Political freedom then, the freedom to *appear* in the world in action and speech amongst others is therefore the very antithesis of sovereignty: for the more opportunities that exist for others to appear, the harder it becomes to maintain the fiction that the sovereign is the sole master of public affairs. In order to mask that fiction, then, it becomes incumbent upon the sovereign to close down the public realm, by violence or by persuasion. Just as Constant warned that the sovereign is only too anxious to spare us the troubles of public liberty - “[t]hey will say to us,” he said, “what in the end is the aim of your efforts, the motive of your labours, the object of all your hopes? Is it not happiness? Well, leave this happiness to us and we shall give it to you”⁸⁰⁸ – so too Arendt saw in domination the necessary corollary that others abstain from the whole real of human affairs, and retreat indoors to the security of their private lives.⁸⁰⁹ *This* is the closure against which the resistance the people acting-in-concert is directed: furthermore, if we accept from Arendt that sovereignty over men obscures the *reality* of human plurality, then we can see – with Arendt – the inevitability that somewhere, somehow that reality will resurface and, in so doing, belie the fiction in which the sovereign’s authority is cloaked. Whether that is within or outwith the institutions of government does not matter: “the *polis* properly speaking, is not the city-state in its physical location; it is the organization of the people [wherever] it arises out of acting and speaking together.”⁸¹⁰

Looking again at the resistance against Charles, we can see that *his* domination – the closure that was resisted *against* - was dressed in just such terms. The divine right of kings was itself a work of fiction. As Morgan has said, the early-Stuart monarchy required close ties with divinity in order to stress the king’s immortality, his infallibility and, just as importantly, his inscrutability: “[t]he rules of the game,” as he put it, “were simple: the first was that God’s lieutenant could do no wrong; the second was that everyone else (including Parliament), was a mere subject.”⁸¹¹ Underlying the peoples’ (at least initial) willing suspension of disbelief that this was so was the *reality* that the king sat as but one man exercising an absolute rule over many; and the former’s knowledge that “force,” that is to say, the power to reverse that condition, “is always on the side

⁸⁰⁷ Arendt, *HC*, Ch.5, p.234

⁸⁰⁸ Constant (1819), p.326

⁸⁰⁹ Arendt, *HC*, Ch.5, p.234

⁸¹⁰ Arendt, *HC*, Ch.5, p.198

⁸¹¹ Morgan (1988), Ch.1, p.21

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of the governed,” if ever they were to come together in reaction against him.⁸¹² In order to preserve their authority, then, the early-Stuarts, by their exposition of divine right, set about closing off the possible channels of contestation through which the reality of the peoples’ power might appear. Thus, James asked the people *indoors*, embodied in Parliament, to refrain from meddling in political matters, because government was his “craft”;⁸¹³ to the people out of doors he recommended non-action: for anarchy – a war of all against all – would inevitably follow were the body politic to cut off its head and leave to “the hands of the headlesse multitude, when they please to weary off subjection, to cast off the yoke of government that God hath laid upon them.”⁸¹⁴ In exchange, their domination was bought with the promise that he would attend to the peoples’ (private) happiness in concord, wealth, security and flourishing.⁸¹⁵ Over the reality of their plurality and power, this is to say, the domination of the king was secured by persuading the people of a quite different condition: their absolute and necessary subjection. By reducing the public realm to the relationship between the monarch and the divine Creator, the king could treat others as if they simply did not exist: nowhere more conspicuous than when Charles’ dissolved Parliament and resolved to act on his own without the interference of that body. The first lesson that we can take from Arendt here is, then, threefold. One, that in order to support their claim to absolute rule the monarch was required to persuade the people to surrender their political freedom, their freedom to act with others in action and deed in the public realm. Two, that in so doing he asked his people to exchange the real world for an imaginary one: to exchange the fact that men live together in a condition of plurality, and that the truly political arises *in between* their many unique perspectives, with the fiction that they are but mere subjects of the king, to whom the ‘craft’ of politics is solely reserved and revealed to him by God. Three, that if the credibility of that fiction *depended* upon the suppression of the public realm; if, furthermore the public realm emerges (inside or outwith institutions) wherever men gather for the purpose of speaking and acting together; if, finally, this coming together reveals the *reality* of the world which they share, then the surest way to counter that domination, to challenge that fiction, is *to* gather in just such a spirit, to exercise ones political freedom to act in the presence of others, and thereby to confront fiction with reality. It is precisely this that I believe both Arendt and

⁸¹² David Hume ‘Of the First Principles of Government’ (1758)

⁸¹³ James I, *1610*, p.190

⁸¹⁴ James VI, *TL*, p.81

⁸¹⁵ James VI, *TL*, pp.64-65

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seventeenth century historians have missed: that the king's domination ultimately did fall when it was exposed to the public realm and its manifestation in action-in-concert against him.

The virtues of publicness

I have said that what is at stake here, where the public is absent, is the fomenting of conditions within which domination can deepen, and tyranny thrive. In Part I, we saw that this was Machiavelli's warning in the *Discourses*: that those who 'have' power will be possessed both of a "great desire" to want more still, "to dominate,"⁸¹⁶ and at the same time a fear that "they cannot hold securely what they have possess unless they get more at others' expense."⁸¹⁷ If we take from Arendt the understanding that political liberty means "to live in a framework where one is judged by one's actions and opinions,"⁸¹⁸ what Arendt called 'the right to have rights', then we can understand the anxious desire of sovereigns – those who 'have' power - to persuade subjects to surrender that liberty to them. If (they believe that) their security depends upon appropriating rights at the expense of others', then the right of the latter to have those rights must itself be seen as a threat to the sovereign's authority. Tyranny, which Arendt defined as "[a]rbitrary power, unrestricted by law, wielded in the interest of the ruler and hostile to the interest of the governed,"⁸¹⁹ seems (albeit as a matter of degree) almost to be the *inevitable* result of domination. It was certainly so during Charles I's doomed reign. His extra-parliamentary collection of tonnage and poundage,⁸²⁰ the extra-parliamentary collection of a 'forced loan' from his subjects, the billeting of troops (expensive to keep, rowdy but unaccountable, at least to civilian authorities) in his subjects' homes (and the imprisonment of those who refused),⁸²¹ the infamous imprisonment without charge of the 'five knights' who refused to pay his extra-parliamentary levies, and – of course – the imposition of Ship Money were all examples of Charles' exercise of arbitrary power either to acquire rights (to badly needed funds) and the powers to acquire them (outside of parliament) at the expense of others' (rights to property or right to liberty), or to maintain security in his position by closing off the opportunities to oppose

⁸¹⁶ Machiavelli (1970), Bk.I.5, p.116

⁸¹⁷ Machiavelli (1970), Bk.I.5, p.118

⁸¹⁸ Arendt, *OT*, Pt.II, Ch.5, p.376

⁸¹⁹ Arendt, *OT*, Pt.III, Ch.4, p.594

⁸²⁰ Cf. Above fn.514

⁸²¹ Ronald A. Banaszak, Sr. (ed.) *Fair Trial Rights of the Accused: A Documentary History* (Westport, Greenwood Press, 2002), intro., p.xiii

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and challenge his actions (by dissolving a noncompliant parliament, by arresting dissenters, by deliberately *not* charging them in order to avoid legal challenge). Thus we see, in the absence of the public – Parliament dissolved, the courts avoided, the people themselves subdued by arbitrary arrests or the imposition of troops into their homes – that Charles’ domination was indeed deepened: that tyranny did indeed reign. What, I believe, Arendt has missed in her ignorance of the English civil war as a truly revolutionary moment, when new principles of government were consciously made by men of action, was the extent to which the reaction against these tyrannous acts conformed with her reading of ‘successful’ revolutions: that the domination and tyranny of the king was opposed in the name of political liberty and the right (of Charles’ subjects) to have rights. The English civil war, this is to say, was one fought in terms that Arendt would have found most praiseworthy. To put this more concisely: if Charles’ tyranny thrived where the public was absent, the opposition to that tyranny can best be understood as a reassertion *of* and *by* the public in confrontation to the king.

Publicity

Take the first meaning given by Arendt to the term ‘public’: publicity. For Arendt, publicity meant that “everything that appears in public can be seen and heard by everybody.” Only where the conditions of publicity exist can the reality of human affairs be revealed between political actors. “The presence of others,” she said, “who see what we see and hear what we hear assures us of the reality of the world and of ourselves.”⁸²² In Part II, I have presented the collection of and resistance to ship money as the catalyst for profound constitutional change, a new beginning, in the seventeenth century. Let us revisit that moment, with this insight in mind. As I have said, the collection of ship money was not one which, at the outset anyway, promised radical constitutional upheaval. Whilst controversy undoubtedly surrounded the extra-parliamentary methods by which the tax was levied, against which a brave few men were resistant from the start, the records show that on the whole the collection was, initially at least, extremely successful: 79,589 pounds having been collected from assessments totaling 80,609 pounds in the first year, before the writ was extended inwards to the inland counties.⁸²³ What it was that seems

⁸²² Arendt, *HC*, Ch.2, p.50

⁸²³ Gordon (1910), p.143

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to have motivated the sudden, wide-scaled, collective non-payment of the charge was the publicity to which it was exposed. Even in 1635, the year in which the already controversial tax was extended inland, the success of collection was remarkable: the unprecedented sum of £194,864 which was collected meant that non-payment stood at just 2.5%.⁸²⁴ Yet by 1638, Charles' most trusted adviser, William Laud, was forced to concede that "[t]he King's moneys come in a great deal more slowly than they did in former years,"⁸²⁵ to the extent that, just one year later total *payment* stood at just 20%.⁸²⁶ What had happened in the intervening period to effect such a dramatic shift in fortunes was, we recall, the trial of John Hampden and, this is the point, the order by the king that the court's narrow majority judgement in favour of the tax be published far and wide in order to discourage non-payment. As the Earl of Clarendon so succinctly put it, the quality of the judgement was such that Charles' subjects were able to swear that it was not law; that, furthermore, in those inland counties the strength of the minority judgements was such that wide publication had the opposite effect to that which had been desired: markedly "increase[ing] the difficulties of collection."⁸²⁷ Put back into Arendtian terms, the presence of others who read directly and spoke about the judgement reassured skeptical individuals of the reality of their predicament: put negatively, that the reasoning of the majority had "given up to the discretion of the King the whole property of the country;"⁸²⁸ put positively, that those others would join them in a powerful action-in-concert *against* the tax. With Parliament inactive and the courts complicit, the people themselves emerged not as a unifying fiction, but as a working reality whose very appearance troubled the credibility of the king's claim to divine rule. Put another way, the real world, inhabited by plural men acting together in speech and in deed, had momentarily revealed itself, such that the imaginary one in which the king acts alone could not much longer survive.

Whilst Arendt did not speak *about* this moment, what I believe her work says *to* it is that this resistance was at the same time extra-institutional (for the reasons that I have mentioned) and yet also *constitutional*. The claim being made by those who resisted was that it was the king and his

⁸²⁴ Kevin Sharpe *Politics and Ideas in Early Stuart England: Essays and Studies* (London & New York, Pinter Publishers, 1989), Ch.3, p.115

⁸²⁵ Letter of Laud to Wentworth, quoted in Tanner (1928), Ch.5, p.79

⁸²⁶ David Gross (ed.) *We Won't Pay: A Tax Resistance Reader* (2008), Ch.2, p.16

⁸²⁷ Jones (1971), Ch.5, p.128

⁸²⁸ Lord Nugent (1860), p.115

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judges, not they, who had abused the constitution: as the parliamentarian Sir Francis Seymour put it: the judgement in *Rex v. Hampden* had “betrayed the King to himself” by “telling him [that] his prerogative is above all Lawes.”⁸²⁹ With no institutional outlet through which they could state that claim, the people instead self-constituted a public space, where they could no less legitimately register their dissent. For, as Arendt said, the polis is not limited by physical or institutional boundaries, but emerges *wherever* men come together in a spirit of action.

The Public Realm

Developing this still further, take the second meaning given by Arendt to the term ‘public’: the public realm, or common world, that “gathers us together and yet prevents our falling over each other.”⁸³⁰ What so captured Arendt’s imagination as events unfolded in Hungary, and what inspired her to write (for five of six chapters, at least) so positively about the American revolution was that she saw in these events action which aimed at establishing new spaces of freedom, and little else. Whilst I could certainly not say the same of the English civil war - any full account of which would involve a theological, religious, social, economic, political and historical study well beyond the remit of this thesis, indeed beyond my own capabilities - what is apparent is that the clearing of a new space for freedom was at the heart of the *constitutional* piece of the puzzle. It was not enough for Charles to retreat, nor for him to be replaced by a more benign ruler: for, as St. John told the assembled House of Lords, it was not that ship money had been levied, nor that individuals had been imprisoned for non-payment, that drove the opposition. Rather, it was the “*right* whereby Ship-Money is claimed” that caused such concern; it was that *all* property, and *all* liberty had been “delivered up to [the king’s] Bare Will and Pleasure.”⁸³¹ It was, in other words, the very right to *have* rights that had been betrayed here. If the first two sections of Part II were about domination and action-in-concert respectively, the final section was about Parker, and the claims which he made for and on behalf of Parliament: that it was by the strength of that institution that the non-domination of the people could be secured against the king. Those arguments have been well rehearsed there, however allow me to tease out two ‘Arendtian’ threads which run through them.

⁸²⁹ Peard, in Cope (1977), p.153

⁸³⁰ Arendt, *HC*, Ch.2, p.

⁸³¹ Cf. above, fn. 568

The first is that, for Parker, what I have called here (rather clumsily) the virtues of public-ness were present in Parliament: that if Charles' had acted within Parliament, and not against it he would have been possessed of those virtues. Acting through Parliament, said Parker, the King could not have (knowingly or unknowingly) misled his subjects because *in* that institution political affairs, including and indeed above all *salus populi*, would be the subject of "ferocious debate" between wise, sincere and great men. To be clear, wisdom, sincerity and greatness, as Parker defined them, were not (as we might expect) the individual traits of the parliamentarians. Rather, and here Parker reveals a quite Arendtian quirk, they were the virtues which emerged *in between* those men, duly gathered, in the course of that debate. They were, to put it another way, political virtues. Furthermore, they were political virtues which by (that) definition, the king simply could not possess alone. Private men could not possess wisdom, because all private men are susceptible to private interests or the malevolent advice of others. When the "whole kingdom" brings its perspectives to bear upon political affairs wisdom emerges in something like representative thinking, as private interests are either put aside so that one might take cognizance of the position of others, to see affairs as others see them, or are exposed by the publicity to which they are subject within the debate. Hence, for Parker it was "a just law, that no private man must be wiser then Law publicly made."⁸³² Likewise, sincerity pertained not to the honesty or integrity of the individual, but to the *reality* of what was revealed by in the formation of opinion produced by action and speech in the debate chamber: the common good. "The common body," said Parker, "can effect nothing but the common good," precisely because it is the common interests of the country, and not the private interests of factions or individuals, that appear between them.⁸³³ Finally, by greatness was meant not the heroism of individuals within the chamber – though in those time individual heroism may have been a prerequisite of speaking openly and honestly against the king⁸³⁴ - but rather what Arendt understood as power; the productive force of action created by the fact of men's acting *together*, in the presence of others.

⁸³² Parker (1640), p.35

⁸³³ Parker (1640), p.36

⁸³⁴ So it was for Sir John Eliot, who died in the Tower of London for his part in the forcible reading of the remonstrance against tonnage and poundage. Cf. Above, p.130

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“No advice,” Parker said, “could be so fit, so forcible, so effectual for the public welfare, as that which is given in Parliament... the people do not go along with any other, as with that.”⁸³⁵

If the first Arendtian thread is the idiosyncratic use of language to describe particularly public virtues, the second is that Parker sought to ground these virtues in an active, always open consent of the people. “We cannot imagine,” Parker said, “that public consent should be anywhere more vigorous...than it is in Parliament.”⁸³⁶ But what did Parker mean by this? Once more, he seems to predict one of Arendt’s most unique contributions to constitutional thought. For Arendt, as we have seen, sovereignty was a most *unpolitical* thing: imposing the rule of a fictional unifying entity over the plurality of the human condition. Rather, she proposed that we think about constitutional law as a series of promises: promises, specifically, to keep open the public space even in the face of adversity. As she explained in a revealing end note to her essay, *On Violence*:

*The common dilemma – either the law is absolutely valid and therefore needs for its legitimacy an immortal, divine legislator, or the law is simply a command with nothing behind it but the state’s monopoly of violence – is a delusion. All laws are “directives” [which] direct human intercourse as the rules direct the game. And the ultimate guarantee of their validity is contained in the old Roman maxim Pacta sunt servanda.*⁸³⁷

Thinking about (constitutional) law in this way, I believe, allows us productively to see in those self-constituted public spaces which spring up in opposition to domination *already* lawful, *already* constitutional moments. If we can divorce their legitimacy from divinity or from command (from the sources of domination), and ground it instead always and only in the consent of those gathered in a spirit of action and speech, then the possibility of contesting *constituted* domination in *constitutional* terms remains, for so long as the human condition of plurality – and the concordant will to action - endures. They can, in other words, co-opt the language of constitutionalism in order to present the actions of the dominant other (the king, the government, the courts, even parliament) as being *unconstitutional*. By framing their opposition in this way, the final interpretation of the constitution is removed from constituted channels and returned

⁸³⁵ Parker (1640), p.38

⁸³⁶ Parker (1642), p.13

⁸³⁷ Arendt, *OV*, pp.193-194, n.62

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temporarily to the people themselves: the ‘successful’ interpretation being that which is best able to curry their opinion and to hold their consent when they return ‘indoors’. This, after all, was precisely the argument presented by St. John on behalf of John Hampden: that it was the king, acting outwith Parliament to impose Ship Money, who had behaved unconstitutionally; and, accordingly, that Hampden’s evasion, not an individual act but one sprung from that voluntary association which had gathered in Great Kimble collectively to *promise* their non-payment, had behind it the spirit (if not the letter) of the law. The sudden and sharp decline in payment across the country, which followed the courts’ judgement *in favour* of the king, is evidence enough of which interpretation commanded the support of the English people.

Parker’s rejection of the king’s divine right was expressed in just these terms. “Law is not to be understood as any ordinance sent from heaven,” as Charles had it, but instead “can be nothing else...but the mutual pactions and agreements of such and such political corporations.” That this was an *on going* consent, whereby the principles of government were always open to debate, contestation and, in the last resort, revocation - and not the imagined prior act of a mythical unifying ‘people’ or ancient ancestors thereby incapable of revoking those agreements - follows from his assertion that power, “inherent in the people,” is nothing more than “that might and vigour by which such and such a society of men contains in itself, and when by such and such a law of common consent and agreement it is derived into such and such hands.”⁸³⁸ It was Parker’s contention that the Englishmen ought presently to revoke the agreement by which power was vested in the king. By seeing law not as the king’s command, but as the pactions of the people inherent in themselves (plural), however, the radical claim being made by Parker was that severing the king’s command man would not throw men back upon a quarrelsome state of nature, but rather would already be constitutional. This was the spirit by which the divine right of kings was dispelled, the constituent power of the people proclaimed, and the justification by which Parliament’s supremacy took shape: a spirit of action in concert made possible only when the people themselves *had in fact* reclaimed that power, had reacted against the king *in the name of the constitution*, creating the rupture from which established assumptions – the *fiction* that the king ruled over all - could be challenged, and new beginnings emerge from the *reality* that power is always, as Hume said, on the side of the governed.

⁸³⁸ Parker (1642), p.1

These, then, are the analytical tools with which I will approach the remainder of this thesis: first, that domination requires a leap of imagination, inviting the people willingly to suspend the reality of the human condition of plurality and the power of action-in-concert; secondly, that this reality is *merely* suspended; that where constituted power tends to domination the people might gather in a spirit of action and speech in order to re-establish that reality and re-order their principles of government; thirdly, that it is in these moments when political freedom is exercised that the virtues of public-ness, publicity and the power of the public realm, reveal themselves. In turning my mind to the relevance of this for our contemporary constitutional experience, allow me to trace one more Arendtian thread – much less optimistic in tone - through the seventeenth century.

My second proposition: that the British constitution has, under the domination of constituted powers, 'failed' to remember that spirit

A people displaced

Looking back on an extraordinary period of constitutional tumult and innovation, Martin Loughlin has said that the doctrine of parliamentary sovereignty which emerged in the seventeenth century did so *at the expense of* the republican ideals which brought it in to being. Contrary to the view of Adam Tomkins, for whom “the republicanism of our constitution is to be found...in Parliament,”⁸³⁹ to Loughlin’s mind, “[w]hile the people retained unquestioned allegiance to the parliamentary system and the unwritten constitution – as they did right through to the latter half of the twentieth century – scholars could continue to write accounts of the British constitution that managed to avoid analyzing any of its basic characteristics,” including the underlying question of constituent power, “too closely.”⁸⁴⁰ It is my view that Loughlin is correct here, in two respects. First, that the sovereignty of Parliament *has* dominated those accounts, even if that domination is now under attack. Secondly, that this domination has entailed a certain subversion of the constituent power of the people in any meaningful, active sense. As we shall see, this was no historical accident. Moreover, with the Arendtian account of

⁸³⁹ Tomkins (2005), Ch.4, p.124

⁸⁴⁰ Loughlin, in Loughlin and Walker (eds.) (2008), Ch.2, p.48

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domination fresh in our minds, we can perhaps say that it couldn't have been otherwise: that domination requires the suppression of the human condition from which the peoples' active constituent power arises. Let me explain.

It was not until he was freed from his obligations to Parliament that Parker followed the logic of the claim that power inhered in the people to his most radical (and barely noticed) conclusion: that – once again predicting Arendt – sovereignty *itself*, and not merely the divine variety, was unpolitical. In one of his final, but largely ignored political tracts, (the anonymously published) *Jus Populi*, Parker set out to dispel the royalist claim that political power was at all hierarchical in nature. Finding agreement with his opponents that domination inheres in private relationships - that the father properly is possessed of a natural authority over his son,⁸⁴¹ that the husband is naturally possessed of a contractual authority over his wife⁸⁴² - the boldness of *Jus Populi* lay in detaching political power and public interests from any analogy with private power and personal interests. For one, whilst the son, wife and household stood to benefit from their submission (and I will leave for elsewhere a critique of domination in private relationships),⁸⁴³ the condition of “servitude” created by “absolute, arbitrary” government “professes no justice in itself.”⁸⁴⁴ Indeed he said, to the contrary, that such rule encourages injustice: “arbitrary government does not only rob slaves of that natural interest which they have in themselves, and states of their public interests...but it is often a very strong incentive to cause an abuse of that usurped interest.”⁸⁴⁵ For another, government itself (arbitrary or otherwise; monarchic or democratic) was created in the exercise of (what then must be a political) freedom, and neither by nature (father/son) nor necessity (husband/wife). Thus, he said: “I conceive that freedom being in itself good, and acceptable to Nature, was preferred before government, which was also good,” with the consequence that prior to any government was the freedom to create that government. If government was not to ‘abuse the usurped interests’ of its citizens, it was important for Parker that under the weight of government “man be left free and not abridged of his own consent [and note the positive/political connotation of freedom as consent here, surely more demanding than,

⁸⁴¹ Parker (1644), pp.33-34

⁸⁴² Parker (1644), pp.35-36

⁸⁴³ Note, however, that for Parker the powers of father over son, husband over wife, whilst ordered hierarchically did not amount to “jurisdiction” or “coercive” control: disputes therein were properly to be settled not by the father/husband’s will but by “an impartial judicator” or other “public authority” (Parker (1644), p32).

⁸⁴⁴ Parker (1644), p.36

⁸⁴⁵ Parker (1644), p.38

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say, (negative/private) liberty] or forced by any Law of God to depart from his freedom.”⁸⁴⁶ To couch this back in the Arendtian terms of this discussion: we can say that for Parker arbitrary/absolute/sovereign government obscured the reality that political power inhered in the community of men. Following this, when Parker declared “horrid, unnatural, and altogether...damnable” those who denounced resistance, “for hereby it is plainly averred that either government was erected for subversive ends, or else that general subversion may conduce malevolent ends,”⁸⁴⁷ it would seem that, for he, the reassertion of that reality in an act of *dissent* against constituted power was the surest way rein in domination.

Here, however, is the rub: and the trick which has remained with us since. What Parker said in *Jus Populi* was undoubtedly radical, particularly given that this powerful assertion of the political power and authority of the people was one which well preceded Locke’s and Sydney’s more renowned interventions on the matter. Yet the full power of the argument was lost with the immediate proviso that “Parliament is...nothing else, but the very people itself;” that the two (parliament and people) ought not, “in honour, in majesty, in commission...to be divided, or accounted different.”⁸⁴⁸ To put it another way, having proclaimed that government must not abridge the peoples’ consent, lest it be encouraged to nefarious ends, Parker immediately ‘exchanged the real world for an imaginary one’: with the fiction that Parliament *was* the people, that the consent of Parliament *was* the consent of the people. The importance of this is not to be underestimated. If the people consent to government, they can legitimately confront it with acts of dissent. If the people *created* Parliament in an act of consent, then the people might legitimately *dissent* where Parliament abuses its power. However, where to say that Parliament *was* the people was to deny any prior constitutive act, and therefore any right to revoke or re-order that act. That there was no public realm outwith Parliament’s walls, no space of appearance in which opinions could be exchanged and formed – let alone the sort of resistance encouraged and praised when directed against the king - was firmly put in one anonymously authored pamphlet: “[Parliament’s] judgement is our judgement, and they that oppose the judgement of Parliament oppose their own judgement.”⁸⁴⁹ Thus, for Parker, there was nothing

⁸⁴⁶ Parker (1644), pp.5-6

⁸⁴⁷ Parker (1644), p.56

⁸⁴⁸ Parker (1644), p.18

⁸⁴⁹ Anon. *Plain Dealing With England* (London, 1643), p.2

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“horrid, unnatural, and altogether...damnable” about advocating non-resistance to Parliament: indeed, he said, “there can be nothing...which can be more perfidious and more pernicious in the people,” than resisting the acts of that institution.⁸⁵⁰ Another of Parliament’s most prominent spokesmen, Charles Herle, was even more clear:

*A..question begged [by the Royalist, Henry Ferne] is that in case the king and Parliament should neither discharge their trusts, the people might rise and make resistance to them both, a position which no man I know maintains. The Parliament is the people’s own consent, which once passed they cannot revoke...the people have reserved no right in themselves from themselves in Parliament.*⁸⁵¹

When Arendt spoke then of a constitution in which it was “the delegates of the people, rather than the people themselves who constituted the public realm, whereas those who delegated them...remained forever outside its doors,”⁸⁵² she could just as well have been talking about this constitution, in which an absolute, sovereign Parliament dominated, indeed constituted, the public realm. Having set out in *Jus Populi* to demonstrate that there was “no sufficient rule, precedent, or authority, for arbitrary power,” indeed, having brilliantly done so, Parker immediately lay the foundations for the most arbitrary power of all, imagining a world in which ‘others would simply not exist’ (*HC*: 234): Parliament *was* the people; there *were* no others. When Parliament began adopting the language of the royalists: their doctrine of non-resistance; the “ungrateful and unworthy disrespect of” those who questioned its judgement and the “lash” by which its questioners might “learn better”; until finally it was pronounced that Parliament “can do no wrong,”⁸⁵³ one can’t help but think of those people out of doors as those animals who peered through the windows of the farm house at the close of *Animal Farm*, only to see “from pig to man, and from man to pig, and from pig to man again [that] it was impossible to say which was which.”⁸⁵⁴ Having persuaded the people that Parliament *could not* dominate them, it is little wonder that the very victory of Parliament – fought in terms of non-domination – produced conditions within which the very notion of freedom as non-domination could wither: for there

⁸⁵⁰ Parker (1642), p.16

⁸⁵¹ Charles Herle *A Fuller Answer to a Treatise Written by Dr Ferne* (London, 1642)

⁸⁵² Arendt, *OR*, Ch.6, p.251

⁸⁵³ John Marsh *An Argument or Debate in Law* (London, 1642), p.15

⁸⁵⁴ George Orwell *Animal Farm*, Ch.10

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came to be “within a surprisingly short space of time,” under the influence of Bentham, but leapt upon by Parliament’s most famous exponent, A.V. Dicey, a sharp discrediting of that vision.⁸⁵⁵

The Triumph of Freedom as Non-interference

Even as he became increasingly progressive – realising, for example, that “there was a sense in which a sovereign might enhance the value of subjects’ liberties by his acts of regulation”⁸⁵⁶ – Bentham remained convinced that “all coercive laws,” even those constitutive of civil liberties, “are, as far as they go, abrogative of liberty.” How else, he asked, could the sovereign vest a right of property in one individual, but by taking away the liberty of others to interfere with that property?⁸⁵⁷ In a stark contrast with the neo-Roman understanding of liberty, by which laws made in a non-arbitrary way might *enhance* the freedom of those who suffer interference, for Bentham liberty meant always and only the (modern/negative) absence of restraint, with no “positive” (*ergo* collective, participatory) strand.⁸⁵⁸ So too for Paley, for whom *all* laws – even those needed to safeguard liberty - were “an evil”, the justification for which depended upon there being “some [overbearing] public advantage,” proven as such by the legislature.⁸⁵⁹ Thus, the best that government could do to secure the happiness of the greatest number was - according to the utilitarian creed – to do as little as possible. For Paley, as for Bentham, the neo-Roman conception of freedom as non-domination was simply too demanding. “[T]hose definitions of liberty ought to be rejected,” he said, with a beady eye cast upon the republican tradition, “which [make] essential to civil freedom [that] which is unattainable in experience.”⁸⁶⁰ So, women, slaves and children could only be delivered from domination by a raft of (as they saw it, unwelcome) interventionist legislation. Such was the enormous influence of Bentham and Paley’s work that by the end of the nineteenth century their fellow Henry Sidgwick was able to advance a (modern/negative) theory of liberty as non-interference on the unchallenged assumption that the errors of the fading case for neo-Roman liberty was beyond dispute.⁸⁶¹

⁸⁵⁵ Skinner (1998), Ch.2, p.96

⁸⁵⁶ Douglas Long *Bentham on Liberty* (Toronto, University of Toronto Press, 1977), Ch.2, p.47

⁸⁵⁷ Jeremy Bentham ‘Anarchical Fallacies’, in Jeremy Bentham (Sir John Bowring, ed.) *The Works of Jeremy Bentham*, vol.2 (Edinburgh, William Tate, 1843), p.489, p.503

⁸⁵⁸ Pettit (1997), Ch.1, p.44

⁸⁵⁹ William Paley *The Principles of Moral and Political Philosophy* (London, C. and J. Rivington, 1825), p.355

⁸⁶⁰ Paley (1825), p.359

⁸⁶¹ Skinner (1997), Ch.3, p.98

The relevance of all of this, for our purpose, lies in the impact which Benthamite jurisprudence had on the political thought of A.V. Dicey, whose hugely influential restatement of Parliamentary sovereignty at the turn of the twentieth century remains deeply embedded in the British constitutional mind to this very day.⁸⁶² For Dicey, Bentham was the arch-individualist: a man for whom “laissez-faire was practically the most vital part of [his] legislative doctrine.”⁸⁶³ Following his reading of Bentham to its logical conclusion, Dicey saw in those laissez-faire principles the most effective weapons which the moderns possessed against “every restriction, not justifiable by some definite and assignable reason of utility”:⁸⁶⁴ taxation, to take one example was, in his view, a “gigantic evil” unjustifiable where – and he had in mind the redistribution of wealth – it was collected for anything more than meeting the state’s basic and minimum duties.⁸⁶⁵ No wonder then that he rejected any notion of that legal sovereignty resided in any way in the people themselves; Dicey’s staunchly Benthamite philosophy could have no truck with extra-institutional action-in-concert, particularly where that action might strive towards socialist ideals. Indeed, it was precisely this fear which led him to label collectivism the “gravest threat to the country.”⁸⁶⁶

Accepting that by necessity there must, in some institution or other, be located “a supreme legislative authority or sovereign power,” and yet certain that the collective power of the people was a grave danger that must be restrained *by* that power, Dicey located sovereignty in the

⁸⁶² Neil MacCormick *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford, Oxford University Press, 1999), Ch.5, esp. pp.66-75

⁸⁶³ A.V. Dicey *Lectures on the Relation Between Law and Public Opinion in England during the Nineteenth Century* (London, Macmillan, 1905), p.147. Whether Dicey’s reading of Bentham was fair and accurate is another matter. As Parris has said,

Dicey’s erroneous beliefs about Benthamism and its influence on legislation have helped to perpetuate a myth about nineteenth-century government—the myth that between 1830 and 1870 or thereabouts, central administration in Great Britain was stationary, if not actually diminishing, and that this state of affairs ended when a new current of opinion, collectivism, superseded individualism.

(Henry Parris *Constitutional Bureaucracy: The Development of British Central Administration since the Eighteenth Century* (London, George Allen & Unwin Ltd., 1969), p.266

⁸⁶⁴ Dicey (1905), p.107

⁸⁶⁵ Dicey (1905), p.292

⁸⁶⁶ Dicey (1905)

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Queen-in-Parliament:⁸⁶⁷ famously formulated as “the right to make or unmake any law whatsoever,” with the corollary that “no person or body is recognised by the law of England as having the right to override or set aside the legislation of Parliament.”⁸⁶⁸ If there seems, on the face of it, to be an inconsistency here – that on the one hand Dicey decries the collective action of the people, yet in the same move endows their representatives with a formidable share of sovereign power - then let me address this with two points. First, the anti-collectivism which motivated that move can be seen in Dicey’s firmly expressed opposition to Irish home rule. Federalism, he warned – returning power to local, collective bodies politic, such as Arendt favoured in *On Revolution* – could only serve to weaken the “true source” of Britain’s constitution: “the absolute omnipotence” of Parliament.⁸⁶⁹ Secondly, and following this, we see that for Dicey the sovereignty of Parliament *inhered* in that institution: Parliament was the source of its own authority. With no little trace of the Parliamentarianism of Herle and Parker, for Dicey the people out of doors ‘reserved no right to themselves’ because, in the first place, the people had conferred no rights upon Parliament: it knew nothing of their consent nor, it followed, of their dissent. The *only* political right held by the people was the right to elect representatives to the House of Commons: thereafter, the will of the people was nothing more and nothing less than the “will expressed by an Act of Parliament.”⁸⁷⁰ Once more, parliament could do no wrong.

Parliament can do no wrong

The normative proposition that Parliament can do no wrong is one that has had a remarkably profound effect in constitutional practice, for it is no exaggeration to say that *institutionally* the channels through which the people might directly express their ‘reasonable disagreement’ with parliament’s will (at least as that will is expressed by enacted primary legislation), whereby they might contend that Parliament has ‘done wrong’, are extremely limited in scope. Thus, Dicey has said of the courts that “[t]he judges know nothing about any will of the people...and would never suffer the validity of a statute to be questioned on the ground of its having been passed or

⁸⁶⁷ A.V. Dicey *An Introduction to the Study of the Law of the Constitution* (1885) (London, Macmillan, 1915), p.59

⁸⁶⁸ Dicey (1915), pp.37-38

⁸⁶⁹ A.V. Dicey *England’s Case against Home Rule* (London, John Murray, 1886), p.161

⁸⁷⁰ Dicey (1885), p.59

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being kept alive in opposition to the wishes of the electors.”⁸⁷¹ Confirming Dicey’s view, in an oft quoted passage from *British Railways Board v Pkin*,⁸⁷² Lord Reid said that “since the supremacy of Parliament was finally demonstrated” in the constitutional conflicts of the seventeenth century, any idea that the courts might disregard an Act of Parliament “has become obsolete.”⁸⁷³ The presumption made by the court is that the consent of Parliament is conclusive and irrefutable evidence of the peoples’ consent a given law: that the latter has no independent means of (or right to) asserting itself *against* the former. As it was put by Willes J: “[i]f an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it: but so long as it exists as law, the Courts,” and therefore those challenging that Act in the courts, “are bound to obey it.”⁸⁷⁴ Similarly, Lord Bingham has said that the “democratic process is likely to be subverted if, on a question of moral and political judgement, opponents of [legislation] achieve through the courts what they could not achieve in Parliament.”⁸⁷⁵ These restatements of the proper role of the judiciary vis-a-vis might seem unremarkable, yet there are three observations which flow from them that go to the heart of the thesis being developed here. First, that Dicey was correct: the courts know of no such yoke on sovereignty as the dissent of the people: their consent is always and only that expressed by their representatives.⁸⁷⁶ Secondly, that this is the case *even* where Parliament acts in a way which is politically, socially, morally or economically repugnant *to* the people. The courts, in other words, agree that Parliament can do no wrong. Thus, Lord Reid has said:

*It is often said that it would be unconstitutional for Parliament to do certain things, meaning that the moral, political and other reasons against it are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts would not hold the Act of Parliament to be invalid.*⁸⁷⁷

⁸⁷¹ Dicey (1885), p.59

⁸⁷² [1974] AC 765

⁸⁷³ Per Lord Reid, p.782

⁸⁷⁴ *Lee v Bude and Torrington Junction Railway Co.* (1871) LR 6 CP 576, per Willes J, p.578

⁸⁷⁵ *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, per Lord Bingham, p.45

⁸⁷⁶ In Part III(3), I will discuss the (possibly) different approach taken to this question by the Scottish courts.

⁸⁷⁷ *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, per Lord Reid, p.723

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Thirdly, if the courts are willing to say to Parliament that “whatever you enact, regardless of its political or moral flavour; regardless of the peoples’ overwhelming dissent; regardless of the way in which it has been enacted, is nonetheless *constitutional*” then we can begin to appreciate the precariousness of our predicament as one of domination. Domination, we have said, occurs where one party has the capacity (whether in fact exercised or not) to interfere with one’s freedom on an arbitrary basis, with impunity. No one could plausibly argue that parliament doesn’t have the capacity to interfere in our lives. It can, after all, make any law whatsoever: from legislation restricting the breed of dog that we might lawfully own as pets,⁸⁷⁸ to laws which permit virtual house arrest on the basis of secret evidence.⁸⁷⁹ If we take Pettit seriously and say that arbitrary power is exercised where the decision maker need not (though it *might*) track the interests of those who suffer the interference, Lord Reid’s dicta is clear there is nothing as a matter of constitutional law which *requires* Parliament to track the interests of its citizens: indeed, it is perfectly entitled – as a point of constitutional principle - to act in ways wholly repugnant to them. Take, for example, the Poll Tax: an interference with individuals’ property rights, imposed in Scotland by a Conservative government whose comfortable majority in the House of Commons belied a minority of MPs and negligible popular support in that country. That tax, opposed by a huge majority of Scots (polls showed that as many as 80% of Scots were opposed to the tax), and imposed with little regard for the interests of those suffering the interference, was nonetheless beyond reproach as a matter of law, having been brought into existence by a validly enacted piece of primary legislation.⁸⁸⁰ The underlying assumption which runs through the opinions of Lord Reid, Lord Bingham and Willes J (above) is that the *political* question of the law’s legitimacy is an entirely separate one from the question of its legal validity, that it is for Parliament to decide upon the former, and that it is here – through political channels of communication and contestation – that the people might thereby participate in, influence and shape, public affairs. As we shall see however, when looked at through an Arendtian lens, those political channels appear no less defunct as a means of securing non-domination.

Last at the party

⁸⁷⁸ Dangerous Dogs Act 1991

⁸⁷⁹ Prevention of Terrorism Act 2005

⁸⁸⁰ For more detail, see below at Part III(3)

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Arendt was ambivalent with regard to the merits of the British Parliamentary system. In *Origins*, she was effusive in her praise of that system which, she believed, kept political power “within the grasp of the citizens” and thereby out of the grasp of “metaphysical entities independent of the will and action of the citizens.”⁸⁸¹ What it was, precisely, that kept power within the grasp of the citizens was its organisation in a two-party system. Contrary to the traditionally held view that the stability of the British constitution is attested to by the office of the Crown as opposed to the “factional strife of parties,”⁸⁸² for Arendt the ‘efficient secret’ (to misappropriate a Bagehot’s phrase) of the constitution’s remarkable endurance since the Glorious Revolution was that whilst “one party always represents the government and actually rules the country....the opposition party exerts a control whose efficiency is strengthened by the certainty that it is the ruler of tomorrow.”⁸⁸³ The English needed no transcendental entity, no ‘fictional’ embodiment of the people, no divine sanction over and above the law and conferring power upon them, because in that constant confrontation between government and opposition power was always within the grasp of those citizens organised within the parties. Just as the Americans had experienced what it meant to act-in-concert in the townships and districts; just as they had selected from within those local democracies those best suited to represent them at the drafting of the state, and then (from there) the federal constitutions; just as this elite had emerged from the people themselves, answerable to them, limited by the authority conferred upon them, so too Arendt saw in the party structure the means by which an elite sprung from within the parties could be elevated to the position of government, answerable to and limited by them.⁸⁸⁴

The contemporary relevance of this view might be questioned from two perspectives (setting aside, for the moment, the addition possibility that the Liberal Democrats have emerged as a credible *third* party, altering the dynamic). First, it depends upon the political parties themselves genuinely being driven from the ground up, from the members in local community halls, all the way *up* to the party leaders and their cabinet teams. In an era marked by strict party discipline,

⁸⁸¹ Arendt (1951), Pt.II, Ch.4, p.324

⁸⁸² Arendt (1951), Pt.II, Ch.4, p.323

⁸⁸³ Arendt (1951), Pt.II, Ch.4, p.323

⁸⁸⁴ Arendt (1951), Pt.II, Ch.4, p.324

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and intensive media management,⁸⁸⁵ it might be argued that parties (if they ever were) are no longer sites of ground up pockets of political power, but rather the stuff of top down imposition and management. Secondly, and more importantly for our purposes, Arendt was explicit that she saw power held only in the hands of those citizens *organised in the parties*. This was well and good at a time when party membership was on the increase: by the 1960s the Conservatives had some three million members, and Labour one million. The picture has changed dramatically since then, however, such that by 2005 (when the Tories could boast just 250,000 members, and Labour 166,000) only 1.3% of the electorate were registered members of any of the three main political parties.⁸⁸⁶ This apparent turn away from formal participation in politics is supported by the decline in voter turnout at general elections. Despite an increase from a nadir of 59.4% (of registered voters) in 2001 to 61.4% in 2005 (perhaps attributable to heightened stakes, given the background of the 2003 Iraq war, and the huge protests which followed), and again to 65.1% in 2010 (perhaps attributable to the perceived knife edge on which the result was balanced), those figures pale compared to the peak of 83.9% in 1950, and the general turnout of between 70% and 80% between the Conservative win in 1951 and the Labour landslide of 1997.⁸⁸⁷ The question might be, then, what hope for an Arendtian analysis when the pressures of party management from the top, and the desertion at the bottom by the citizen as party member, seemingly squeeze the public realm out of existence altogether. There are two answers that I would like to set out here.

First, it was not until some time later that Arendt returned to the theme, and then only in a fleeting passage of *On Revolution*. What was noticeable on that occasion was that, once again, she honed in on the stability of the two-party system. This time, however, she was much more pessimistic about the capacity of political freedom to flourish within that system. “[W]hile it may be true,” she said, “that, as a device of government, only the two-party system has proved its viability and...its capacity to guarantee constitutional liberties, it is no less true that the best that it has achieved is a certain control of the rulers by those who are ruled, but that it has by no

⁸⁸⁵ On the ways in which the New Labour leadership controlled each, see Anthony Seldon and Dennis Kavanagh (eds.) *The Blair Effect 2001-2005* (Cambridge, Cambridge University Press, 2005), esp. Raymond Kuhn ‘Media Management’, Ch.5, and Philip Cowley and Mark Stuart ‘Parliament’, Ch.2

⁸⁸⁶ For an overview of the trends in party membership, see John Marshall ‘Membership of UK Political Parties’ (House of Commons Library Paper, SN/SG/5125, 17th August 2009)

⁸⁸⁷ Figures taken from <http://www.ukpolitical.info/Turnout45.htm>

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means enabled the citizen to become a ‘participator’ in public affairs.’⁸⁸⁸ A little over a decade after she located the political power in the organisation of the two-party system, and in the perpetual rotation between parties of government and parties of opposition (between the rulers and the ruled), it struck Arendt that the trick of representation had been to *deprive* the people of a public realm in to which they themselves could enter and form opinions, in an on going process of debate and dialogue, action and speech. Secondly, we can see an element of truth in Arendt’s pessimistic turn when we consider the reasons *why* party membership and voter turnout has taken such a sharp decline. What we will see is that whilst the constitution may have ‘forgotten’ the spirit which created it, leaving no public space into which the citizen could exercise political freedom, the people – despite the decrease in party membership and voting turn out noted above – have not sunk in to lethargy: rather, and perhaps surprisingly, it would seem that they have ‘preserved a spirit of resistance’ somewhere outside of the ordinary (and by this I mean institutional) channels of legal and political contestation.

The myth of apathy

Somewhat paradoxically, alongside the decline in formal methods of political participation has been a rise in (so called) “unorthodox” modes of political activity. So, whilst 20% of respondents to the British Election Study in 1979 indicated that they would be willing to join a protest demonstration of some kind, that figure had risen to 33% by the time of the citizen audit survey of 2000.⁸⁸⁹ The perception of such a trend is supported further still by the one and a half million people estimated to have taken to the streets in 2003 in protest at the government’s position on Iraq, the 400,000 people who took to the streets of London in September 2002, in a march organized by the Countryside Alliance aimed at raising awareness of issues of rural concern (the ban on fox hunting prominent among them), not to mention the 150,000 people who attended the Live 8 event in 2005. These are just three highly publicized examples of mass protest in the United Kingdom reaching new levels of involvement. Along similar lines, extensive research carried out by the ‘Power Inquiry’⁸⁹⁰ in 2006 exposed what it called a “myth of apathy” that has obscured, in some sense, a continuing and indeed increasing involvement of

⁸⁸⁸ Arendt, *OR*, Ch.6, p.268

⁸⁸⁹ Paul Whiteley ‘The State of Participation in Britain’ (2003) 56 *Parliamentary Affairs* 610, p.611

⁸⁹⁰ The Power Inquiry *Power to the People: An independent inquiry into Britain’s democratic system* (London, Rowntree Trust, 2006)

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British citizens in political pressure groups, consumer boycotts, and in charity and voluntary organizations. Interestingly, it found that among those supposedly most apathetic, non-voters, some 37% of that group were “members of, or active in, a charity, community group, public body, or campaigning organization.”⁸⁹¹ For the Power Inquiry then, the question became not ‘why are British citizens politically disengaged’, but rather:

*...why is a population that is active in so many political and non-political areas increasingly unwilling to participate in the institutions and processes of formal democracy?*⁸⁹²

Downplaying as ‘red-herrings’ factors such as lack of competition (pointing, amongst other things to the near identical turnout in marginal and ‘safe’ seats), the low calibre of politicians, or media negativity,⁸⁹³ the primary cause of disengagement from *formal* political channels was the feeling that those channels were deficient. Throughout their research, they found that there was

*...[a] very widespread sense that citizens feel their views and interests are not taken sufficiently into account by the processes of political decision making.*⁸⁹⁴

I began this discussion with the proposition that the British constitution had ‘forgotten’ the public spirit, the action-in-concert of the people themselves, by which the supremacy of Parliament was brought out in to the open. This quite deliberate move was one which saw the constituent power of the people invoked, their political liberty exercised in an extraordinary show of resistance to the King, only immediately to be closed off in order to preserve political power *within* the institution of Parliament. As Edwin Morgan has said, “[i]n endowing the people with supreme authority...Parliament intended only to endow itself.”⁸⁹⁵ In what has been discussed above I have attempted to highlight the ‘success’ of that closure: both at the *normative* level, where Parliament claimed for itself a self-constituting power and where liberty was reframed: no longer thought in terms of non-domination and the active exercise of political liberty by which that is secured, the influence of Bentham and Paley brought to prominence a

⁸⁹¹ Power Inquiry (2006), Ch.1: ‘The Myth of Apathy’

⁸⁹² Power Inquiry (2006), Ch.1, p.49

⁸⁹³ Power Inquiry (2006), Ch.2: “Red-Herrings”

⁸⁹⁴ Power Inquiry (2006), Ch.3: “Reality” (quote at p.43)

⁸⁹⁵ Morgan (1988), Ch.3, p.65

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less demanding, less public, right to non-interference - a freedom *from* government; and at the institutional level where the channels of contestation between the branches of government have become so defunct that the people have willingly abandoned the exercise of political liberty through formal politics (almost) altogether. Of course it is possible to say, with Arendt, that such a position is fine where the political ambitions of the people end with their private happiness; and yet, we have seen that the retreat from formal politics ought not to be interpreted as an abandonment of political freedom *per se*. Rather, the people have given up on the ordinary ways and means of participation only to relocate, out of doors, in new “unorthodox” channels of communication with constituted power. This is an important observation for three related reasons. First, as we have seen, the republican line that I have traced from Machiavelli to Arendt is one in which non-domination is secured *precisely* in these contests *between* constituted and constituent power: in the tumults of ancient Rome between the ‘haves’ and the ‘have nots’, in the collective resistance to Ship Money in seventeenth century England, in the civil unrest of 1960s America. Secondly, I will aim to show, in what follows, that the contemporary constitutional experience is one in which these conflicts have continued to shape the way in which, and the principles *by* which, political power is distributed in the United Kingdom. Thirdly, in the decade or so since freedom as non-domination has re-entered the vocabulary of mainstream political and legal thought, the concern has been to put it to work *within* institutional settings. It is my view that so doing fails to realize the constitutive potential of those conflicts. As Jason Frank has said, “constituent moments invent a new political space...[the power of which] transcends the state’s legal organization.”⁸⁹⁶ Closing off the possibility that such new spaces might spontaneously emerge in a spirit of action, the revival of non-domination has contained and restrained its potential *within* the trappings of already existing constitutional practice. Before I return to the spirit of resistance which subsists underneath the weight of the constitution it created, I will develop this third point just a little further.

Non-domination constrained

⁸⁹⁶ Frank (2010), intro., p.8

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For Pettit, decisions cease to be arbitrary (and therefore dominating) when the decision maker is forced to “track the interests and ideas of those citizens whom it effects.”⁸⁹⁷ Thus, he says, arbitrariness might come from *within* ordinary electoral politics organized along majoritarian lines: “[c]ertain decisions and policies,” he reminds us, “may attract majority support whilst representing the most arbitrary interference in the lives of various minorities” whose interests are subsumed by the general will of the majority.⁸⁹⁸ It is then, although without elaborating a great deal on the detail,⁸⁹⁹ by entrusting to the judiciary, through channels of constitutional review, the determination of the public’s “shared interests”⁹⁰⁰ – in other words, their pre-political ‘rights’ - that Pettit sees freedom as non-domination being achieved. On the other hand, Richard Bellamy expressly rejects the rights based conclusions of Pettit whilst putting his favoured conception of liberty, non-domination, to work in defending the political constitution and already existing democratic practices.

In *Political Constitutionalism*, Richard Bellamy turns to republicanism, and the language of non-domination, not only to celebrate ‘the political’, but to *defend* it from a very particular threat. “This book,” he concludes, “has defended democracy against judicial review”,⁹⁰¹ and this it has done with a welcome, not to mention valuable, intervention in one of (if not,) the most pressing constitutional questions of the day. Rejecting the “increasingly dominant view...that constitutions enshrine and secure the rights central to a democratic society”⁹⁰² the book simultaneously deconstructs the core claims made by those who promise (through law) the ‘end’ of politics and puts in their place the ‘norms’ and ‘forms’ which he believes should guide our conceptual *reconstruction* of constitutionalism. In each of these movements, *towards* the political constitution, *away* from the legal constitution, Bellamy’s *republican* defence, his explicit belief that the constitution is a political and a *public* thing, speaks (in its most ideal

⁸⁹⁷ Pettit (1997), Ch.6, p.184

⁸⁹⁸ Pettit (1997), Ch.6, p.184

⁸⁹⁹ “I have not said anything,” he has since said, “on whether there should be a written as distinct from an unwritten constitution; on what the exact scope of a constitution should be or on whether there should be room for judicial review on the American model, for the sort of review associated with European constitutional courts, or for some other mode of policing the government’s conformity to the constitution.” Philip Pettit ‘Two Dimensional Democracy and the International Domain’, conference delivered at NYU Law School (October, 2002) – available online, at <<http://www.iilj.org/courses/documents/HC2004.Pettit.pdf>>

⁹⁰⁰ Pettit (1997), Ch.2, p.56

⁹⁰¹ Bellamy (2008), conclusion, p.260

⁹⁰² Bellamy (2008), introduction, p.1

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formulation) to what van Roermund calls ‘political reflexivity’: “the whole people rules over itself as a whole.”⁹⁰³ As Bellamy himself says, “we must see the law as in some sense ours - a feeling that flows in large part from the law being a public good, depending upon and making possible mutually beneficial cooperation.”⁹⁰⁴ As such, *Political Constitutionalism* is not an especially innovative book. Kramer, Waldron and Tushnet have all sought to ‘take the constitution away from the courts’, whilst Pettit’s theories of freedom and government are well cited by those, such as Lindahl, who seek out the space of reflexivity and those, such as Tomkins, who defend the political constitution from the Trojan horse of rights-based judicial review.⁹⁰⁵ More than that, much of the empirical work is done elsewhere, as in the examples of Dahl on democracy,⁹⁰⁶ or Tomkins on politically motivated judicial activism.⁹⁰⁷ None of this however is to say that *Political Constitutionalism* amounts to little more than timely synthesis. The critique of legal constitutionalism contained in part I of the book sees Bellamy engage in theoretical groundwork to an extent unmatched by his peers, and provides the dominant liberal schools with a genuine case to answer; whilst the elaboration of political constitutionalism in part II pushes the intra-republican debate beyond the norms of political constitutionalism and toward the forms by which nondomination *must* be secured. “Non-domination,” he writes, “not only provides republicanism’s basic case for establishing a system of self-rule, but also dictates how this system should operate and be organised.”⁹⁰⁸

The organising principle in Bellamy’s analysis is the republican (or, for Skinner, the neo-Roman) view that *unfreedom* means more than suffering “such forms of direct or indirect interference as exploitation and violence or marginalisation”, but rather is manifest wherever “an individual or body possess[es] the power wilfully to exercise such interference over others, or in other ways to ignore or override their opinions and interests.”⁹⁰⁹ This is to say that by denying the very space of ‘the political’, that wherein the reflexive moment of the polity takes place, for example in constitution making, or in legislation, domination and servitude go hand in hand. As Skinner has

⁹⁰³ Bert van Roermund ‘First Person Plural Legislature: Political Reflexivity and Representation’ (2006) 6

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⁹⁰⁴ Bellamy (2008), ch.2, pp.65-66

⁹⁰⁵ Tomkins (2005)

⁹⁰⁶ Bellamy (2008), ch.3, p.95

⁹⁰⁷ Bellamy (2008), ch.6, p.251

⁹⁰⁸ Bellamy (2008), ch.5, p.176

⁹⁰⁹ Bellamy (2008), ch.4, p.151

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said, “if you live under any form of government that allows for the exercise of prerogative or discretionary powers outside the law, you will already be living as a slave. Your rulers may choose not to exercise these powers, or may exercise them only with the tenderest regard for your individual liberties...The very fact, however, that your rulers possess such arbitrary powers means that the continued enjoyment of your civil liberty remains at all times dependent on their goodwill.”⁹¹⁰ Not, then, the denial of civil liberties as such but the denial of the very right to *have* rights draws the boundary between freedom and *unfreedom*. So, Bellamy says, “[a]n enlightened despot might strive to avoid oppressing his or her subjects but would still dominate them”. In other words, where not the ‘whole people’ but the ‘few...rule the whole people’, there, says Bellamy, injustice reigns. “Distinguishing domination from oppression,” he continues, “highlights that being dominated constitutes a form of injustice in its own right.”⁹¹¹ Thus, Bellamy is able to attack legal constitutionalism not only as *unrepublican* and *unpolitical* (an accusation which legal constitutionalists would surely take as a compliment!) but with more bite, he is able to make and substantiate the claim that legal constitutionalism *per se* creates that of which it is most suspicious: *unfreedom*. By promising an ‘end’ to politics, manifest in the entrenchment of fundamental, constitutional rights, legal constitutionalists stand in danger *both* of dominating and of (even an inadvertent, silent) oppression. “The danger of oppression is increased not only because domination renders it easier to inflict and harder to rectify, but also, and most importantly, because in such circumstances oppression may go unacknowledged as such. If the dominant group define what counts as oppression, then they will be able to delegitimise all attempts to question prevailing definitions – especially [and here Bellamy cites the plight of women in the family and workers in private enterprises] if these have been taken outside the realm of politics.”⁹¹² Employing republicanism as the core of his defence of the political, Bellamy is able to construct a coherent and sustained attack on the ‘age of rights’ and thus on the supreme arbiters of the protections enshrined therein: the judiciary.

Motivated by the twin claims that human rights, as fundamental law, flow from “a rational consensus on the substantive outcomes that a society committed to the democratic ideals of equality of concern and respect should achieve”, and, following this, “that the judicial process is

⁹¹⁰ Skinner (1998), p.70

⁹¹¹ Bellamy (2008), ch.4, p.152

⁹¹² Bellamy (2008), ch.4, p.152

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more reliable than the democratic process at identifying these outcomes”, this book contends that the trend towards *legal* constitutionalism, in theory and in fact, *undermines* democracy by resting on the impossible promise of the end of politics.⁹¹³ Thus, the defence presented here by the author is not only the restatement of constitutional rights within the ‘circumstances of politics’ (that of reasonable disagreement) but a celebration of the very *disensus* which *defines* our democratic relationships. “Though people may agree that the circumstances of justice render rights necessary, they disagree about which rights these are, their nature, bearings and relations. Does the right to life rule out abortion; how far does the right to property restrict transfer payments for welfare; when, if ever, should freedom of speech give way to privacy?”⁹¹⁴ By enshrining the right to life, by establishing as fundamental the right to property, by the reification of free speech, Bellamy convincingly argues that far from achieving consensus, and with it the end of politics, politics and its defining disagreements are rather placed beyond the people themselves, beyond in some instances their elected representatives, and put hands of this tiny (judicial) minority.

Where Bellamy pushes the boundaries of the wider debate, however, comes next. Taking the strikingly different positions of Hayek (law as a system of general rules guaranteeing the maximum possible freedom to the individual without impinging on the freedom of others) and Dworkin (constitutional rights as law’s underpinning principles, to be applied by judges in ‘hard cases’) he persuasively demonstrates that each fails to shake off the self-constructed “bogey figure” of the Hobbesian sovereign. “By inviting judges to offer a view of ‘good’ law rather than law *per se*, Dworkin turns judges from third party arbiters into participants in many of the disagreements that it is politics’ rather than the law’s role to resolve...Far from promoting fidelity to law, the very ambition of Dworkin’s approach risks undermining it by making law appear to be little more than the contentious opinion of a particular person.”⁹¹⁵ Hayek’s conception of the rule of law based upon clear and general rules too fails to meet what the author calls ‘the Hobbes challenge’: “Once we admit that there can be occasions when a rule like ‘nobody can drive faster than thirty miles per hour in a built up area’ might admit of exceptions – as when an ambulance, or possibly a private car, is rushing an emergency patient to hospital, then it becomes hard not to

⁹¹³ Bellamy (2008), intro., p.3

⁹¹⁴ Bellamy (2008), ch.1, p.20

⁹¹⁵ Bellamy (2008), ch.1, p.20

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assess the rule in the light of its justification. If that occurs, the rule loses its rule-like character and becomes a piece of advice or a weighty consideration that has to be judged in terms of its relevance for the individuals in the case at hand and the likely effect of making a precedent of the exception or given reading of the rule.”⁹¹⁶ Thus, the radicalism of Bellamy’s argument lies not in empirical innovation, or in strikingly original thought, but rather in adding to the debate between legal and political constitutionalism the theoretical groundwork by which political constitutionalists can coherently challenge the core claims made by their legalist counterparts. This, in and of itself, is a significant advance; one drawn on explicitly republican terms.

If the spirit of part I can best be captured with that old adage, ‘the best form of defence is attack’, then in part II of the book, when Bellamy turns his attention to constitutional prescription, we can perhaps reverse the position, and summarise that ‘the best form of attack is defence’, for what Bellamy presents is not a radical reconstruction of democracy, far less a call to arms for the revolutionary republic, but the rather more subtle defence of “the democratic arrangements [already] found in the world’s established working democracies”, albeit in need of “improvement”.⁹¹⁷ It is then precisely the ‘improvement’ of those arrangements which Bellamy seeks to draw from republicanism and its fundamental principle, nondomination. “Non-domination,” he says, “not only provides republicanism’s basic case for establishing a system of self-rule, but also dictates how this system should operate and be organised”:⁹¹⁸ that is, according to the classic principle *audi alterem partem* (the duty to ‘hear the other side’); and the balance of power.

For Bellamy, a republican account of *audi alterem partem* is one which rejects all substantive notions of the principle. “The principal rationale for a genuinely public form of reasoning – that is, one involving the public in such a way that ‘all sides are heard’ – stems from [the circumstances] of political disagreement.”⁹¹⁹ In established, working democracies, Bellamy identifies equal votes and, from those votes, majority rule as the best way to ensure the ‘input’ of public reasoning to the constitutional process. “Giving each and every citizen one (and only one)

⁹¹⁶ Bellamy (2008), ch.2, p.71

⁹¹⁷ Bellamy (2008), conclusion, p.260

⁹¹⁸ Bellamy (2008), ch.5, p.176

⁹¹⁹ Bellamy (2008), ch.5, p.178

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vote in a general election,” he says, “offers a rough and ready and easy to verify form of ensuring all citizens’ views carry the same weight in collective decision-making.”⁹²⁰ Such formal equality (one citizen, one vote) may be a prerequisite of equal voting, it is, however, in itself insufficient. Practices such as gerrymandering, or restrictive polling times/locations, can be used to turn formal equality into practical inequality. For Bellamy even the protection of these seemingly procedural requirements ought not to be placed in the hands of the judiciary. Relying heavily on the empirical work of Tushnet and Dahl, Bellamy suggests that “[c]ampaigns by disenfranchised and disadvantaged groups to acquire the vote and render its employment more effective have been far more effective in extending and reforming democracy than judicial action.”⁹²¹

If not judicial overview, then for Bellamy the “crucial mechanism” for ensuring nondomination and *audi alterem partem* is the balance of power. The analysis begins (and rightly so) with the claim that the balance of power should not, as so often is the case, be thought of as a synonym of that most reified of constitutional principles: the *separation* of powers. Whilst both identify a common enemy, arbitrary rule, the republican balance of power is more demanding still.

“[W]hile republicans acknowledge that constraining the power of any single actor plays a part in avoiding ‘arbitrary rule’, they also stress the positive role of dividing power in ensuring decision makers ‘hear the other side’ – most particularly of their principals, the citizens.”⁹²² Drawing from Polybius (as well as Aristotle and Machiavelli) the republican theory that power should be divided not functionally between the branches executive, legislative and judicial, but rather as a horizontal division amongst rival and competing powers (the social classes represented in monarchy, aristocracy and democracy)⁹²³ Bellamy finds the complexity of modern power divided and balanced amongst political parties who compete both for the support of the electorate, and with that support, for the right to form the executive power of the state. “An appropriate, public reason inducing, balance of power,” he says, “is achieved through parties competing across certain pivotal ideological cleavages that capture the main political divisions within contemporary societies.”⁹²⁴ By asking voters to refract their particular interests through the lens of the party, Bellamy suggests as its consequence, the formation of “a comprehensive set of

⁹²⁰ Bellamy (2008), ch.6, p.222

⁹²¹ Bellamy (2008), ch.6, p.225

⁹²² Bellamy (2008), ch.5, pp.195-196

⁹²³ Bellamy (2008), ch.5, pp.196-197

⁹²⁴ Bellamy (2008), ch.6, p.233

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policies for the people as a whole” – citizens forced to ‘hear’ and adjust to the competing claims of other citizens; government obliged to ‘hear’ and adjust to the will of the electorate.⁹²⁵

There is no doubt that *Political Constitutionalism* is primarily a defensive piece, which is stronger in its attack on legal constitutionalism than it is in constitutional prescription. As Bellamy says in his conclusion “[s]aying precisely *how* to [reinvigorate the democratic constitution] lies outside this book.”⁹²⁶ Whilst it is reasonable to argue that in times *ordinary* the political constitution is best channelled through a system of equal votes for all citizens, majority rule, and robust competition amongst political parties, (Ch.6), by denying any conceptual distinction between ordinary/normal politics and extra-ordinary moments of *constitutional* politics, Bellamy seems to *deny* the people themselves any moment of self-rule, bar that one day in every four or five years when they exercise their right to vote. Indeed, he has said that the rejection of any such distinction is, in his view, *the* original contribution that he makes to the republican debate.⁹²⁷ “A people,” he said, “continuously reconstitute themselves and democracy through *normal* politics.”⁹²⁸ I hope to show, in what follows, that to discount such moments as properly constitutional is to impoverish our understanding of how domination is able to assert itself at the moment when normal constitutional channels – be they electoral, parliamentary or judicial – fail. Whilst acknowledging that the *institutionalisation* of such extra-ordinary moments of disavowal and challenge present seemingly insurmountable problems of definition and potential misuse, it is, I believe, precisely by re-thinking the *constitutionality* of such moments that we can best meet realise the ideal of freedom as non-domination. After all, and as I began this thesis (p.7), the real challenge for constitutional theorists is to understand “which conceptions of [constitutionalism] we should propose as defining a favoured ideal of liberty in the community.”⁹²⁹

My third proposition: that, under the surface of that domination, echoes of this spirit remain, held in reserve, and – in extraordinary moments – have been (re)invoked as a constituent voice renegotiating or reinterpreting the limits of constituted power.

⁹²⁵ Bellamy (2008), ch.6, p.232

⁹²⁶ Bellamy (2008), conclusion, p.263 [my emphasis]

⁹²⁷ This gleaned from my personal correspondence with the author

⁹²⁸ Bellamy (2008), Ch.3, p.136 [my emphasis]

⁹²⁹ MacCormick, in Edwards (ed.) (1989), p.99

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To repeat: where the public is absent, there tyranny and domination thrive. This is what is at stake when the extraordinary is marginalized and ordinary political and judicial elites are left to monopolize political liberty. If, as Machiavelli put it, constitutions favourable to liberty emerge in the always open spaces of contestation between those who have, and desire yet more power, and those who emerge in the public realm *to* contest, renegotiate and even resist the limits of constituted power, then the thesis to be tested here is two-fold. First, I will look to show through a number of examples just how far governments (both Labour and Conservative) might go when the public is, in some sense, absent. So, I will consider the New Labour government's waging of an illegal war in Iraq (2003), in which the *authority* to wage war rested with the Prime Minister, by virtue of the Royal Prerogative (that echo of royal absolutism), and the Prime Minister alone. I will then turn to the imposition of 'taxation without representation' upon Scotland, when a Conservative government (1988) implemented the hated Poll Tax on a country *in which* it could command but a small share of the vote, and win only a handful of MPs, and yet *over which* it yielded an unlimited sovereignty by virtue of its strong majority in the House of Commons; and I will discuss the attempts made by a Conservative government (1982) to hide behind official secrets legislation in order to evade public scrutiny of both its controversial sinking of the Argentine warship, *General Belgrano* and its efforts to mislead parliament after the fact. Secondly, I will show in each example that a people with no outlet for its 'ambitions' (not to be dominated) held in reserve a power of (self constituted) resistance, invoked extraordinarily to express publicly its opposition to the Iraq war, in demonstrations and in acts of civil disobedience; to resist the Poll Tax and then to challenge the very foundations of Parliamentary sovereignty by which it was levied; to rein in the scope of Official Secrets legislation in the public interest. In each case, the constitution was reopened and indeed reshaped by the counter-claims and contestations of a constituent power which acted as a hinge between constituted power and extra-institutional action (and I expressly do *not* call this action unconstitutional, for these claims are characterized by a certain fidelity to the constitution, and the claim that it is government which has acted unconstitutionally). If, with Arendt, the tragedy of these moments has been their failure *radically* and definitively to restate the source of constitutional power *in the people*, and at best this power remains only (but not meekly) in reserve, what is clear is that there are extraordinary moments, when the ordinary channels of communication between rulers and ruled breaks down, when as a result "politics opens up to make room for conscious popular

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participation and extra-institutional, spontaneous collective intervention,”⁹³⁰ and that (following Arendt) the way in which we can more conspicuously register the extraordinary at the constitutional level is to understand those moments in these terms.

Part III(2) Crises of the republic: Iraq and the constitution

Justice seen (not) to be done

There are two points by way of introduction that I would like to make, in furnishing some background to this sub-section. The first concerns the decision making process leading up to the war, and the (both domestic and international) grey area of law in which it was made. The second concerns the nature of popular opposition to the war, and its failure to impact in any decisive way upon the leading institutional actors - the executive, the legislature, and the courts – each of whom had their own part to play as events unfolded.

In November 2002, the United Nations Security Council unanimously adopted its Resolution 1441. This resolution had offered to Saddam Hussein, “a final opportunity to comply with its disarmament obligations,” by allowing weapons inspectors to carry out their work unimpeded, and threatening “serious consequences” should the resolution fall into breach. The legal status of resolution 1441 has since its inception been something of a flash point in international law: the core of the debate being the proper interpretation to be given to this phrase, ‘serious consequences.’ On the one hand, it was argued by the governments of the United Kingdom and the United States that the use of force against Iraq was already authorized by the resolution – that *this* was the aforementioned serious consequence – and that there was no need to return to the Security Council for a ‘second’ resolution, explicitly authorizing war?⁹³¹ On the other hand, it was argued (most vociferously by the governments of France and Russia) that the omission of the phrase “all necessary means” from the resolution, the ‘magic formula’ by which force was

⁹³⁰ Kalyvas (2008), intro., p.7

⁹³¹ This was the view expressed in the ‘official’ advice delivered to the (then) Prime Minister, Tony Blair, by the (then) Attorney General, Lord Goldsmith. The full text of Lord Goldsmith’s advice is available accessible online, at http://www.ico.gov.uk/upload/documents/library/freedom_of_information/notices/annex_a_-_attorney_general%27s_advice_070303.pdf>>

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authorized by the Security Council against Iraq in 1990,⁹³² was indicative of a different intention: that failure by the Iraqi government to comply with resolution 1441 might lead to a second resolution, one in which the Council expressly authorized member states to use ‘all necessary means’ to restore international peace and security in the region. Despite the eight weeks of intense negotiation which preceded its adoption, the ambiguity at the heart of resolution 1441 was no mistake. Indeed, as Richard Bilder and Martti Koskenniemi have said, ambiguity – which must have at least been recognized by the drafters of 1441, if not intended – is a common and necessary feature of international law-making. The need for agreement, they say, often comes at the expense of specificity; the adoption of broad texts, which defer the real problem for later resolution, being the inevitable result.⁹³³ This appears to have been the case with 1441, where “serious consequences”, and the promise that the Security Council would “convene” (but not necessarily in order to *authorize* force) upon the instance of a breach by the Iraqi government, seems to have been something of a middle ground between earlier drafts of the resolution in which, on the one hand, the US/UK had gone so far as to include the phrase ‘all necessary means’, whilst, on the other, France and Russia had made explicit their intention that the Security Council should follow a two step procedure in which the need for a second, authorizing resolution would have been built into the text of 1441 itself.⁹³⁴ The precise meaning and nature of “serious consequences”, it would seem, had been left for determination on another day, in the name of initial agreement.⁹³⁵ This proposition is supported by the request made from the French Ambassador in Washington, Jean-David Levitte, to the U.S. deputy national security adviser, Stephen Hadley, that the U.S. drop efforts to achieve a second resolution. This because, in France’s view,⁹³⁶ to go to war having clearly failed to win a resolution would leave no doubt

⁹³² United Nations Security Council Resolution 678 (November, 1990)

⁹³³ See Martti Koskenniemi ‘The Politics of International Law’ (1990) 1(1) *European Journal of International Law* 4; Richard Bilder ‘The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs’ (1962) 56 *American Journal of International Law* 654

⁹³⁴ See the House of Commons research paper (02/64, of 21st November, 2002) ‘Iraq and UN Security Council Resolution 1441’, esp. pp. 11-13. The paper is available online, at <<<http://www.parliament.uk/documents/commons/lib/research/rp2002/rp02-064.pdf>>>

⁹³⁵ For more on this theme, see Michael Byers ‘Agreeing to Disagree: Security Council Resolution 1441 and Intentional Ambiguity’ (2004) 10 *Global Governance* 165

⁹³⁶ It was reported by the *Financial Times* that Levitte was acting at the instruction of the French President, Jacques Chirac. For more details, see ‘The Divided West’, a series of articles by the *Financial Times* between May 28th-May 31st, 2003.

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as to the war's illegality; whereas the question of legality would be (at best) 'hazy' if waged on the basis of 1441 alone.⁹³⁷

If the Security Council's permanent members were (intentionally) ambiguous in their respective positions as to the war's legitimacy, the same could not be said for the British public, who had clearly, strongly and consistently opposed their government taking military action in the absence of a 'second' Security Council resolution. On September 26th 2002, just days after the publication by the British Government of the so-called 'September Dossier', which contained the infamous '45-minute claim',⁹³⁸ an Ipsos-MORI poll commissioned by ITV showed that 70% of those polled would be *opposed* to military action being taken against Iraq, without such a resolution. This figure can usefully be contrasted with the 71% of those polled who stated that they *would* support military action against Iraq should a second resolution, authorizing the use of force, be adopted.⁹³⁹ On March 5th 2003, just fifteen days before the war began, another Ipsos-MORI poll, this time commissioned by the Social Research Institute, found that 67% would oppose war with Iraq where UN weapons inspectors found no evidence of weapons of mass destruction (WMD) in Iraq, and no further resolution was passed, compared to 75% who would support the war if evidence of WMD was to be found and the UN did give its express authorisation.⁹⁴⁰ Finally, on March 17th 2003, just three days before the war began, a further Ipsos-MORI poll, commissioned by The Sun newspaper, found that 74% of those polled would support the war should there exist both evidence of WMD and a second Resolution, compared to 63% who would oppose military action in the absence of each of these variables.⁹⁴¹ Given that at any one time along the road to war it would appear, from this evidence, that approximately 70% of the population would have opposed military action *without* a second UN resolution, whilst almost exactly the same proportion would have supported the same action *with* a second

⁹³⁷ Byers (2004), p.173. 'Alone' here being a relative term, given that the 1441 argument invoked a series of resolutions dating back to the first Gulf War, in 1990-91, with the U.S. and U.K. arguing that the breach of Resolution 687 (1991), which brought that war to an end, revived the authority to go to war given in Resolution 687 (1990).

⁹³⁸ *Iraq's Weapons of Mass Destruction: The Assessment of the British Government* (London, The Stationery Office Limited, 2002)

⁹³⁹ 'War With Iraq – Public View' *Ipsos-MORI* (26th September, 2002), questions 5 and 6, <http://www.ipsos-mori.com/polls/2002/itv-iraq.shtml>

⁹⁴⁰ 'War With Iraq' (5th March, 2003), *Ipsos-MORI*, <http://www.ipsos-mori.com/polls/2003/iraq2.shtml>

⁹⁴¹ 'War With Iraq – The Ides of March Poll' *Ipsos-MORI* (17th March, 2003), <http://www.ipsos-mori.com/polls/2003/iraq3.shtml>

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resolution, an interesting picture of public opinion appears: one which found a strong majority opposed to the possibility of war not on the basis of an inherent pacifism, general discontent with a decreasingly popular government or any ordinarily termed ‘political’ matter. Rather the opposition of the public to the war seemed predominantly to be founded upon on the question of its legitimacy, specifically the legitimacy of military action under international law. The significance of this swing, that public support for war was conditioned on its legal legitimacy, should neither be underplayed nor taken for granted. Indeed, Sir Robert Worcester, chairman of Ipsos-MORI emphasized the extraordinariness of what was happening, calling it “one of the most remarkable switches of public opinion that MORI has ever measured.”⁹⁴² This evidence would support the view that the opposition to war without a second resolution was opposition expressed *in the name of* legality, and specifically in terms which an administrative lawyer might recognize as being something like procedural fairness: that the British public would cast favourable judgment upon the government’s decision to go to war, just so long as the decision was reached by way of the proper (legal) procedures.⁹⁴³ The ‘remarkable’ claim being made here then was that the government itself which was acting contrary to law: that the proper interpretation of the war’s legality, and thereby the government’s fidelity to the constitution itself, was contrary to the position taken by Blair and his (closest) cabinet colleagues. As we shall see, however, there was no institution into which that opinion could meaningfully register, no formal public space in to which they might act, in speech and in deed. All that was left to them was the street.

Absolutism reincarnated: the war making prerogative

Take, first of all, the *locus* of the power to take the country to war. Forgetting (though only for the moment) that Parliament was allowed to vote on the matter, the discretion as to whether or not war would be waged with Iraq was one which inhered in the Crown, by virtue of the Royal Prerogative. The precise nature of the Crown’s prerogative powers have somewhat evaded firm definition through the years. For Blackstone, reflecting the view which shone through the

⁹⁴² Sir Robert Worcester *We’ll Support the War in Iraq, If...*, analysis, *Ipsos-Mori* (18th October 2002) <http://www.ipsos-mori.com/mrr/2002/c021018.shtml>

⁹⁴³ This, of course, is to say nothing of the morality of the war. Is it really possible to say that military action in Iraq would have had any less devastating impact upon that country – where civilian deaths as a result of the war are estimated to close to or above the 100,000 mark (see

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majority opinion of the court in *Hampden's Case*, it referred to that 'exceptional' area of monarchic discretion which existed over and above the law;⁹⁴⁴ whilst for Lord Haldane, the prerogative was but a synonym of the common law.⁹⁴⁵ The view which seems to hold most currency, however, is that of A.V. Dicey, for whom the prerogative meant "every act which the executive government can lawfully do without the authority of an Act of Parliament."⁹⁴⁶ This is to say that, in those areas of personal (exercised by the monarch herself) or governmental (exercised by her ministers, and including the power to make war abroad) prerogative, the Crown may (lawfully) act without the consent of parliament, or indeed of any other body.⁹⁴⁷ If, for Arendt, the political moment *par excellence* was that moment – following free exchange and rigorous debate - when one was able to woo the consent of another, then this is to say that in exercising the Crown's prerogative power to make war, the Prime Minister, needing no such consent, was not required to expose his decision to the shining light of publicity; neither by wooing the consent of his cabinet, parliament, the courts nor the people out-of-doors. As the economist Christopher Foster has said, "[t]hough there seemed many things the prime minister could not achieve in practice, on matters of peace and war it would seem as if he could act on his own authority alone."⁹⁴⁸

In one review of the war, it was said by the House of Lords constitution committee that:

[Whilst i]t is commonly accepted that the prerogative's deployment power is actually vested in the Prime Minister, who has personal discretion in its exercise and is not statutorily bound to consult others...it is inconceivable that he would not do so in practice.⁹⁴⁹

The evidence would suggest, however, that whilst the Prime Minister certainly did not take the decision to go to war with Iraq alone - he surely did consult with others - the breadth and depth

⁹⁴⁴ Sir William Blackstone *Commentaries on the Law of England* (New York, E.Duyckink, G. Long, Collins & Hannay, Collins & Co., 1827), Bk.1, p.180

⁹⁴⁵ *Theodore v. Duncan* [1919] A.C. 696

⁹⁴⁶ Dicey (1915), p.425

⁹⁴⁷ This being the view which has run through leading cases, notably *Attorney-General v De Keyser's Royal Hotel* [1920] A.C. 508, and *Chandler v D.P.P.* [1962] 3 All E.R. 142

⁹⁴⁸ Sir Christopher Foster 'Cabinet Government in the Twentieth Century' (2004) 67(5) *Modern Law Review* 753, p.771

⁹⁴⁹ House of Lords Select Committee on the Constitution, 15th Report of Session 2005-06, *Waging war: Parliament's role and responsibility* (vol.I) (London, Stationery Office, 2006) [hereafter, *Waging War*]

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of that consultation is another matter. Foster, for example, has recalled that cabinet – described by Bagehot as that “board of control chosen by the legislature, out of persons whom it trusts and knows, to rule the nation”⁹⁵⁰ – exerted little control, not even having met in the period between 25th July 2002 and 19th September 2002: a vitally important period in which intelligence dossiers on Iraq’s WMD⁹⁵¹ capabilities were pieced together and published at home, and thoughts turned to securing a UN Security Council resolution abroad.⁹⁵² Those recollections are supported by others from within the government. In his evidence to the Chilcot Inquiry – established by Gordon Brown’s government to consider, as we shall see below, the build up to, events during, and the aftermath of, the war with Iraq - the (then) Deputy Prime Minister, John Prescott, said of Blair that his “might be seen as a more presidential style” of government, and that Prescott himself had “tried actively” to involve an almost neglected cabinet more closely in the discussions and decision making processes which surrounded the war.⁹⁵³ Clare Short too, looking back at this period in her book *An Honourable Deception?*, spoke of the difference between:

*...Cabinet being updated each week on the events they are reading about in the press and any serious discussion of the risks and political, diplomatic and military options, and the hammering out of an agreed strategy...*⁹⁵⁴

Indeed, Alastair Campbell’s evidence at the Inquiry revealed an inner sanctum of senior ranking members of the government – not all of them, as Bagehot understood Cabinet, chosen by and from (and therefore theoretically within the control of) the legislature⁹⁵⁵ - which consisted of the Prime Minister, Campbell himself, Geoff Hoon (the Secretary of State for Defence), Jack Straw (at the time Foreign Secretary), and occasionally Prescott, who would meet, furnished with full briefing papers, prior to any full meeting of the Cabinet. Giving credence to Short’s view that

⁹⁵⁰ Bagehot (2001), p.40

⁹⁵¹ That is to say, weapons of mass destruction, be they nuclear, chemical or biological.

⁹⁵² Foster (2004), p.768. fn.111

⁹⁵³ John Prescott, oral evidence to the Chilcot Inquiry, Friday 30th July 2010; available online at <http://www.iraqinquiry.org.uk/>

⁹⁵⁴ Clare Short *An Honourable Deception?: New Labour, Iraq and the Misuse of Power* (London, The Free Press Ltd., 2004)

⁹⁵⁵ Campbell, (then) P.M. Blair’s Director of Communications and Strategy, the foremost example.

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Cabinet was being ‘updated’ rather than actively engaged in the process, Campbell admitted that very often those full briefing papers would not be made available to the Cabinet.⁹⁵⁶

In *Lying In Politics*, Arendt saw in the leaked *Pentagon Papers* evidence enough that, in so far as the Vietnam conflict was concerned, both publicity and reality (the twin meaning of public given by Arendt in *Human Condition*) were absent. On the one hand, the leak was evidence that those who most needed information to make decisions and form opinions on the war were being denied those very tools. On the other hand, the National Security Council was able effectively to insulate itself from scrutiny and reality: purposely ignoring factually accurate intelligence reports emanating from the region.⁹⁵⁷ Arendt’s analysis has some bite when we think about it in the context of Iraq. First, because what has been discussed above revealed a cabinet – those in most need of information in order to form opinions and impact upon executive decisions – who were intentionally being deprived of that information. There was, in cabinet (and we shall come to Parliament in a moment) no publicity to which the strength of the government’s case for war could be exposed and tested. Cabinet were as spectators, watching decisions being made and acted upon, and not as participators. At the same time, when Eliza Manningham-Buller, Director General of MI5 at the time of the war, gave testimony to the Chilcot Inquiry to the effect that she had refused requests from Campbell to include (in MI5’s view) unreliable intelligence information in the government’s dossier, we see the extent to which that lack of publicity allowed the (real) decision makers the space in which to create their own reality. Just as the accurate American intelligence reports were routinely and deliberately excluded from consideration, Manningham-Buller recalled that her reluctance to include inaccurate information led to her being cut out of the decision making process altogether. In particular, when making the point that war in Iraq would not, as the government had said, make Britain safer, but on the contrary (and in *reality*), would dangerously inflame Islamic extremism in this country, no one cared to listen. Indeed, and somehow reaffirming his sense of an insulated pseudo ‘reality’, in his own evidence to the Chilcot Inquiry, Blair remained committed to the view that the war had served to make Britain safer.⁹⁵⁸ Rebutting that ‘reality’, however, Baroness Manningham-Buller told the inquiry team:

⁹⁵⁶ Alastair Campbell, oral evidence to the Chilcot Inquiry, Tuesday 12th January 2010 (afternoon session).

⁹⁵⁷ Arendt, *LIP*, pp.22-23

⁹⁵⁸ Tony Blair, oral evidence to the Chilcot Inquiry, Friday 29th January 2010 (afternoon session)

Our involvement in Iraq radicalised a generation of young people who saw our involvement in Iraq and Afghanistan as an attack on Islam. We [MI5] were pretty well swamped... with intelligence on a broad scale that was pretty well more than we could cope with in terms of plots, leads to plots and things that we needed to pursue.

We gave Osama bin Laden his Iraqi jihad so that he was able to move into Iraq in a way that he was not before.⁹⁵⁹

The space within which Blair was able to wage an illegal war was then one in which (at the institutional level) the public was wholly absent, present neither in the form of publicity: information being retained by only a handful of trusted colleagues, and intentionally deprived from the wider cabinet, parliament and public; nor in the form of a public world in which the reality of different perspectives could be brought to bear upon, influence and shape the decision making process: those, such as Manningham-Buller who offered a (reasoned, but) different opinion were cut out of the decision making process as the government created its own reality (no where more clear than in the exaggerated accounts given to Parliament of Iraq's W.M.D. capabilities. Blair's war making prerogative was a throw back to the absolute power of the divinely ordained monarch, accountable neither to Parliament, nor to the people, but only to a power not of this world.⁹⁶⁰

Parliament as the public space

If the public barely registered at the level of executive power which, in questions of war and peace at least, seemed to retain something of an absolute right, what of that institution, Parliament, which once upon a time was *constituted* as the public space *par excellence* by which even kings could be held to account?

Despite the extent to which Blair's inner-sanctum was able to maneuver around the Cabinet - that link between the executive and legislative power - there should be little doubt that

⁹⁵⁹ Baroness Manningham-Buller, oral evidence to the Chilcot Inquiry, Tuesday 20th July (morning session)

⁹⁶⁰ An observation with some force given Blair's admission to the chat show host, Michael Parkinson, that through prayer he had sought guidance from God on the question of whether or not to wage war: 'Blair 'prayed to God' over Iraq, *BBC News* (3rd March, 2006)

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Parliament remains a formidable institution. Even if the various expenses scandals exposed and drip fed to the public over a period of months by the *Daily Telegraph* in 2009 exacerbated the sense of detachment felt by the people from Parliament, bringing down the Speaker of the House of Commons, and many of that place's incumbents (some of whom jumped before they were, by the electorate, pushed),⁹⁶¹ even if the experience of New Labour's healthy majorities in three successive general elections (1997, 2001 and 2005) showed, with some notable (even comical) exceptions,⁹⁶² the extent to which the executive might exert a troubling dominance over the legislature; Parliament has, on albeit rare occasion, throughout the Iraq controversy, and the wider 'war on terror', been able – if only fleetingly – to rediscover its potency.

When Arendt taught her students of action, of great deeds and heroic deeds worthy of remembrance in the realm of human affairs, she would cite as her exemplar Hans Morgenthau, whose *Politics Among Nations* - giving birth to the political realist school of international relations thought - was hardly a work sympathetic to Arendt's own, and yet a man whose resignation from the National Security Council, in protest at the Johnson administration's policy in Vietnam,⁹⁶³ was, in her view, "an exemplary action, a light in dark times."⁹⁶⁴ Where Morgenthau turned to the pen however, becoming an academic critic of the war in Vietnam, when another man of action (one who Arendt would surely have celebrated), Robin Cook, resigned as Leader of the House of Commons in March 2003, in protest at the British government's policy in Iraq, it was to Parliament that he explained in, as the journalist Andrew Marr put it, "one of the most effective, brilliant resignation speeches in modern British

⁹⁶¹ On which, see Matthew Flinders 'Bagehot Smiling: Gordon Brown's 'New Constitution' and the Revolution that Did Not Happen' (2010) 81(1) *Political Quarterly* 57, esp. pp.59-64. For an account of the background to the affair – which I will discuss in more detail in Pt.III.4 – see Alexandra Kelso 'Parliament on its Knees: MPs' Expenses and the Crisis of Transparency at Westminster' (2009) 80(3) *Political Quarterly* 329.

⁹⁶² When the New Labour government were defeated on Lords' amendments to the Racial and Religious Hatred Bill, a bill which faced opposition from all sides of the House of Commons as well as from Lords, for the way in which it sought to expand the types of expression which might be considered unlawful incitement to hatred, they lost by just a single vote: the Prime Minister, Tony Blair, himself was absent from the vote, however, as he had been reassured by his Chief Whip, Hilary Armstrong, that there was no need for him to stay, as an earlier measure on the same bill had been lost by a majority of 10.

⁹⁶³ Morgenthau was the only member of Johnson's administration to resign over the war.

⁹⁶⁴ On this see Young-Bruehl (2006), Ch.1, p.34: Young-Bruehl herself having been persuaded to take Morgenthau's classes at the New School for Social Science Research by Arendt, with this endorsement ringing in her ears

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politics,”⁹⁶⁵ the reasons why he could not support the government in a war which lacked both “international agreement and domestic support.” Mary McCarthy was undoubtedly right when she said that politics can’t just be about war and speeches, but in this speech, which demolished the legal, moral and political case for war in an exquisite, line by line display of what Cowley and Stuart have called his “talent for controlled contempt,”⁹⁶⁶ the political impact of Cook’s intervention was evidenced by the unprecedented standing ovation afforded to it from all sides of the House.⁹⁶⁷ However, whilst his resignation, along with his appeal to international law and domestic support may well have (indeed, one imagines, must have) given strength to at least *some* of the 139 Labour MPs who voted against the government and therefore against the war the very next day,⁹⁶⁸ neither his inspiration nor his intervention were decisive.

Opening the Parliamentary debate on 18th March 2003, the Prime Minister, Tony Blair, began outlining his case for war with the observation that “[t]he parliament and the country reflect each other” in their divisions over the issue.⁹⁶⁹ As the debate and the vote unfolded, however, it became clear that the two – the country, and its representative institution, the House of Commons – were not so alike at all. Whilst measures of public opinion showed a clear and consistent 70% of the public opposed to the war without a ‘second’ United Nations resolution, in the House of Commons, despite Cook’s intervention, despite those 139 Labour rebels, despite the lack of international agreement and domestic support, the government was able to do just enough to win the vote; with the first military strikes taking place just hours later. Now, it is worth repeating here that this thesis is not an appeal for the people to have the decisive voice in the ordinary affairs of government, and as such, there are very good political reasons why members of the Commons might in the end have felt (and voted) differently from their

⁹⁶⁵ Andrew Marr, quoted in the BBC News article, ‘Cook Wins Commons Ovation’ 17th March 2003, available online at <http://news.bbc.co.uk/1/hi/uk_politics/2858957.stm>

⁹⁶⁶ Cowley and Stuart, quoted by Cole Moreton and Francis Elliot’s tribute to Cook: ‘A man of high principle – both prickly and brilliant’, *The Independent* 7th August 2005

⁹⁶⁷ There is, therefore, perhaps a touch of irony in the fact that the second such standing ovation delivered by the Commons was for Tony Blair himself, as he addressed the House for the final time as Prime Minister. Whilst Cook’s applause was a spontaneous reaction, from all sides of the house, in recognition of what Cook had so powerfully said, Blair’s was an altogether more awkward affair: not joined in by the SNP, and only including the Conservatives (many of whom stood, but did not clap) only when the Conservative leader, David Cameron, himself rose to join the applause, and encouraged his party to do likewise.

⁹⁶⁸ On this, see Philip Cowley and Mark Stuart ‘Parliament: More Bleak House than Great Expectations’ (2004) 57 *Parliamentary Affairs* 301, esp. pp. 304-308

⁹⁶⁹ The full text of Blair’s speech is available online, via the *Guardian*, at <<http://www.guardian.co.uk/politics/2003/mar/18/foreignpolicy.iraq1>>

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constituents. When, for example, President Jacques Chirac announced live on French television that he would be prepared to veto any ‘second’ resolution brought to the Security Council by the U.S. and U.K., “whatever the circumstances”,⁹⁷⁰ a number of MPs were persuaded there and then that any possible route through the United Nations had been blocked.⁹⁷¹ Similarly, it is to be assumed that a number of MPs took at face value the intelligence dossiers which had been published, and which seemed to show the (what we now know to have been an exaggerated)⁹⁷² extent of Saddam Hussein’s breaches of already standing Security Council resolutions. However, there were also a significant number of votes won by the government in much less satisfactory fashion.

In February 2003 the Labour MP, Chris Smith, put down an amendment to a government motion, proposing that the government’s case for military action in Iraq had not been sufficiently proven. Labour whips, expecting around 145 of their own MPs to rebel, managed to dissuade around 20 from doing so. Whilst the motion was defeated by 393 to 199 votes, the 121 Labour MPs who *did* rebel accounted for what was then the largest backbench revolt in modern British party political history.⁹⁷³ Even that number, however, dwarfed in comparison to the rebellion expected should the government press ahead with a vote for war in the absence of a ‘second’ resolution: with one leading rebel, Douglas Henderson, predicting that upwards of 150 Labour MPs would vote against the government in those circumstances.⁹⁷⁴ When a motion finally was tabled, one which called for [and note, the use of Security Council language, in the absence of a ‘second’ resolution] “all necessary means” to be used to disarm Saddam Hussein’s regime, Labour was on tricky ground. Despite having around twenty or so rebels of their own, Blair knew that, counting on the support of the Conservative Party, he was unlikely to lose the vote. What remained a very real concern, however, was the prospect of a government with a majority of 160 relying on opposition support to win a key vote. It is here that the detachment between public opinion and the Commons vote is most striking, and manifested itself in two ways. First, as the New Labour

⁹⁷⁰ Gerard Baker et al. ‘Blair’s Mission Impossible: the Doomed Effort to Win a Second UN Resolution’, *Financial Times*, 29th May 2003

⁹⁷¹ Cowley and Stuart (2004), estimate that around 20 MPs were dissuaded to vote against the government by what now appears – bearing in mind Jean-David Levitte’s intervention in Washington – to have been a show of bravado by the French President.

⁹⁷² See Lord Butler’s report, the conclusion of the Butler Inquiry into pre-war intelligence, *Review of Intelligence on Weapons of Mass Destruction* (London, Stationery Office, 2004), esp. paras. 308-342

⁹⁷³ Cowley and Stuart (2004), pp.304-308

⁹⁷⁴ Cowley and Stuart (2004), p.306

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party machine kicked in to gear, potential backbench rebels were suddenly offered an audience with the Prime Minister, or with the Foreign Secretary, some for the first time, and some of whom admitted publicly to have been swayed by the encounter. Offers would be made to channel more effort into their constituencies, or to boost their prospects on the Labour Party career ladder, in exchange for a vote for the government, or (at worst) an abstention. As one rebel put it, “there was a lot of tea and jobs on offer.”⁹⁷⁵ Secondly, and a card which Blair played to some effect in the build up to tough votes, the Prime Minister was able to turn the vote in many ways into a referendum on his leadership; in those one to one meetings, as well as through other channels, letting it be known that a government defeat would lead to his resignation. One anonymous backbencher, describing his meeting with Blair, told how, in the final hours leading up to the vote, the mood was changing to one broadly supportive of Blair. As one MP put it, loyalty was an important factor: “[t]here [was] a sense now that people should be rallying around the Prime Minister.”⁹⁷⁶ If the ideal vision of the House of Commons is one in which the government of the day owes its continued existence to commanding the confidence of that House, a House which in turn owes its continued composition to ‘we the people’; if that, to paraphrase Tomkins, is how we, through our MPs, are able to ‘throw the scoundrels out’,⁹⁷⁷ then Blair seemed capable, for a period at least, of turning that ideal on its head. Having delivered the Labour Party to government on successive large majorities, following a period of thirteen years out of office, there was a very real sense in which the majority of parliament believed that it owed its position, its being on the side of government, to the Prime Minister – and not (as the correct constitutional interpretation would have it) the other way around. As it relates to this thesis, the point is that whilst some MPs surely voted on the strength of the argument put to them, not only was that argument inherently flawed (the strength of the evidence at best exaggerated, at worst misleading), so that those MPs did not have access to the information needed to make an informed opinion, but some MPs voted for entirely different reasons, reasons of self interest (such as promotions) or self preservation (be that by an increased investment in their constituencies, or the preservation of a leader who – even in 2005, in the shadow of Iraq – could deliver the Labour Party into government). On those bases was the government able to

⁹⁷⁵ Cowley and Stuart (2004), p.307

⁹⁷⁶ Toby Helm and Andrew Sparrow ‘Buttered up in the tearroom and caning in the head’s study’, *Daily Telegraph* 19th March 2003

⁹⁷⁷ Tomkins (2005), Ch.1, p.1

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secure enough votes within its own party not to have to rely on the opposition to carry the motion, and to secure enough support from across the House to win the vote somewhat resoundingly, by 412 to 149.

If the royal prerogative meant that the Prime Minister needed not to woo the consent of the people, if the people's representatives were nevertheless wooed by misinformation, and by dubious threats and promises of a party-political nature, then we can see already that the channels of communication between the institutions of government and the governed were (where they existed at all) in some sense defective. If, however, the public failed adequately to register in the political space that was parliament, the legal space of the court room fared little better.

Flights of fancy: expressions of public interest in the court room

When the Campaign for Nuclear Disarmament (CND), a non-governmental organisation which seeks to “change government policies to bring about the elimination of British nuclear weapons as a major contribution to global abolition” by stimulating public debate on the issue and “empower[ing] people to engage actively in the political process,”⁹⁷⁸ sought, from the High Court, a declaratory judgment on the legal status of resolution 1441, submitting that the government would be acting contrary to international *and to domestic* law by waging war without seeking a, they purported to stand before the court in the public interest.

For CND, there were at least two strands to the ‘public-ness’ of their claim. The first strand – which relates to the first definition of ‘public’ given by Arendt in *Human Condition*: publicity – sought to lift the veil of secrecy which surrounds the exercise of the Crown’s prerogative powers, by extending those precedents which had, bit by bit, brought the exercise of prerogative power *within* the scope of judicial review, to the Crown’s prerogative right to make war (and peace) abroad. Relying on dicta from Laws in *Marchiori -v- The Environment Agency & Others*,⁹⁷⁹ where he said that, “[n]o matter how grave the policy issues involved, the courts will be alert to

⁹⁷⁸ self-description can be found on the CND home page, <http://www.cnduk.org>

⁹⁷⁹ [2002] EWCA Civ. 03

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see that no use of power exceeds its proper constitutional bounds;” and added that “[t]here is no conflict between this and the fact that upon questions of national defence, the courts will recognise that they are in no position to set limits upon the lawful exercise of discretionary power in the name of reasonableness,”⁹⁸⁰ counsel for the CND submitted that

*no longer are there any forbidden areas of executive action into which the courts simply cannot look; there are only aspects of decision making which the court must necessarily accept lie properly and solely with the executive.*⁹⁸¹

In other words CND, following Laws, suggested that the Crown’s prerogative power to make war could not be declared unlawful on the basis that it was (in any judicial sense) *unreasonable*,⁹⁸² but that the same could not be said where that power was exercised *illegally*. Where that happens, it was counsel for the CND’s belief that the decision of the government could be subject to challenge by its citizens, and to scrutiny by the judiciary: open, this is to say, to vigorous public examination. It was CND’s opinion that, were the government to go to war on the basis of resolution 1441 alone, without further authority in the shape of a ‘second’ Security Council resolution, it would be acting contrary to *both* international, and to domestic law. Contrary to international law, they said, because customary international law allows for only two exceptions to the prohibition on the use of force: authorization by the Security Council under Chapter VII of the UN Charter, and self-defence against an imminent attack. With no attack against the UK imminent,⁹⁸³ and resolution 1441 intentionally omitting the crucial ‘all necessary means’ clause, the argument ran that the default position, that the use of force would be unlawful, must apply.⁹⁸⁴ This, they said, was contrary to domestic law because peremptory norms of international law, such as the prohibition on the use of force, are automatically incorporated into domestic common law.⁹⁸⁵ As such, counsel for the CND suggested that they

⁹⁸⁰ Laws LJ, para.40

⁹⁸¹ Simon Brown LJ, para.22

⁹⁸² For an excellent survey of the various tests for reasonableness which are used in the British courts, see Michael Taggart ‘Proportionality, Deference, *Wednesbury*’ [2008] *New Zealand Law Review* 423

⁹⁸³ This despite reports to the contrary in British tabloids: The Sun headline on 25th of September 2002 reading “Brits 45 mins from doom”, whilst the Daily Star led that day with “Mad Saddam ready to attack: 45 minutes from a chemical war”.

⁹⁸⁴ Simon Brown LJ, paras.17-23

⁹⁸⁵ A feature of the common law affirmed by Lord Chancellor Talbot in *Barbuit's Case* 1735 25 ER 777, and reaffirmed by Lord Denning in *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529. This has

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were not interfering with policy, but rather that “they [sought] a ruling on a pure point of [domestic] law,”⁹⁸⁶ thus bringing the question within the jurisdiction of the English courts, and within the scope of judicial review.

The second (and linked) strand of the CND’s claim – which relates to the second definition which Arendt gives to ‘public’: the public world, for which we share responsibility – was that there was, in their view, “*a great public interest* in ensuring that the government is adequately informed” of its legal position, before the decision to take (or indeed to hold back from) military action against Iraq had been made.⁹⁸⁷ In other words, CND had sought to elevate itself from the position of a single applicant, challenging the (anticipated) decision to engage in a war offensive to its own interests, to its own pacifist ideology,⁹⁸⁸ and into that of a representative voice for the broader British public, for whom, they said there was a common interest in ensuring that the government of the day acted within in its constitutional and legal *vires*. The government, after all, had given numerous and public assurances that in reaching its decision, it would “always act in accordance with international law.”⁹⁸⁹ Setting aside, for the moment, any debate about the *authority* of CND to speak for a section of the British public in the courtroom, their claim – that not the war itself, but its legal basis was the core of their challenge – bore striking resemblance to the measures of public opinion already discussed.

The court, however, refused even to engage with the question. The CND had brought the claim, by the court’s own admission, “to guard against the United Kingdom going to war under a mistake of law.”⁹⁹⁰ For Richards J, however, the question being asked by CND was one that was “wholly inappropriate” for a court to answer,⁹⁹¹ whilst for Maurice Kay J, the case brought, “formulated and presented with coherence and intelligence,” was nevertheless one which fell

not necessarily, however, been the consistently held view: see J.G. Collier ‘Is International Law Really Part of the Law of England?’ (1989) 38(4) *International and Comparative Law Quarterly* 924

⁹⁸⁶ Simon Brown LJ, para.22

⁹⁸⁷ Simon Brown LJ, quoting Mr Rabinder Singh QC, for the appellants, para.5 [my emphasis added]

⁹⁸⁸ See, for example, Kate Hudson *CND: Now More Than Ever: The Story of a Peace Movement* (London, Vision Paperbacks, 2005); H.J. Steck ‘The Re-Emergence of Ideological Politics in Great Britain: The Campaign for Nuclear Disarmament’ (1965) 18(1) *Western Political Quarterly* 87

⁹⁸⁹ Simon Brown LJ quoting the Prime Minister, Tony Blair, in the House of Commons, on 24th September 2002, para.4

⁹⁹⁰ Simon Brown LJ, para.44

⁹⁹¹ Richards J, para.51

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well outwith the court's remit.⁹⁹² Most telling, however, were the comments made by Simon Brown LJ, whose (Berkely like) faith in the executive was revealed not only by his view that it was "no more than fanciful" to think that the government *might* act contrary to international law,⁹⁹³ but that he did not even "understand the applicants to question it."⁹⁹⁴ As Arendt had said of the failed Vietnam cases – not only had the case been decided against the individual applicant, in this case the CND, but by confirming the matter as non-justiciable the court was making a declaration that no potential applicant could challenge the legality of the war in the court room.

It seemed therefore that there was no reliable register by which public opinion could manifest as a constitutional voice and impact upon the decision making process: the executive exercising, in the prerogative to wage war, a remnant of royal absolutism,⁹⁹⁵ the legislature swayed by a combination of misinformation and self/party interest, the courts failing even to understand that an applicant might question the government's fidelity to the law. With no institutional inlet, it was then – as Arendt said of American opposition to Vietnam, where too the ordinary channels of communication and contestation had broken down – in the street that public opinion was felt with greatest force, either peaceably, such as those protests which police recorded as being by far the largest of its kind in modern British history, or more forcefully, in acts of civil disobedience directed against the state. As such, it is to that extra-institutional site of constitutionalism, and in particular to the question of civil disobedience that I now turn my attention.

Part III(3) Civil disobedience

In order to appreciate the novelty of Arendt's claims for civil disobedience, let us first consider the dominant accounts in legal and political theory, and their observable influence on legal actors in the UK.

The term 'civil disobedience' is thought to have been coined by the American author, poet and philosopher, Henry David Thoreau. In July 1864, Thoreau had refused a request from Sam Staples, a local constable and tax collector, to make good on a backlog of unpaid poll tax

⁹⁹² Maurice Kay J, para.49

⁹⁹³ Simon Brown LJ, para.44

⁹⁹⁴ Simon Brown LJ, para.5

⁹⁹⁵ Foster (2004), p.771

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extending several years. His refusal, he said, was made by way of a protest against his government's intervention in Mexico (the U.S.-Mexican War 1846-48), the annexation of Texas at its root and the consequent growing up of slavery in the newly acquired territory, as well as the effects of soaring taxation, and increasing 'militarization' in the country at large. So strong was Thoreau in this conviction that he called for Staples' resignation when the collector offered to pay on his behalf. As a result Thoreau spent the night in prison, only to be released the next morning when, to his frustration, his aunt dropped the due sum to Staples through the night.⁹⁹⁶ It was this experience which led Thoreau to pen the essay *Resistance to Civil Government*, now more commonly known as *Civil Disobedience*, as it was renamed after his death. Whilst he began the essay striving towards an apparent anarchism in keeping with the so-called 'no-government men' who were his contemporaries, men such as the lawyer Lysander Spooner,⁹⁹⁷ Thoreau distinguished himself from that school of thought with the recognition that government had, in its ideal form, a positive role to play in political life. "I ask," he said, "not at once [for] no government, but *at once* for a *better* government."⁹⁹⁸ For Thoreau, civil disobedience was one means by which citizens could push their government to be better. Left to its own devices, obeyed without question by its subjects, government, the means by which "the people have chosen to execute their will" was "liable to be abused and perverted before the people can act through it."⁹⁹⁹ the Mexican war, which he believed would not have been consented to by the American people, his chosen example.¹⁰⁰⁰ For Thoreau, through that conflict, and through the continuing institution of slavery, the American government had proven itself unjust, and so, not worthy of obedience.¹⁰⁰¹ It was, therefore, for the individual to choose whether or not to obey. Obedience might be given because it is thought that though the government is unjust, it is but a necessary evil;¹⁰⁰² or because disobedience will bring hardship upon the disobedient, his family

⁹⁹⁶ Steven P. Olson *Henry David Thoreau: American Naturalist, Writer, Thinker, and Transcendentalist* (New York, The Rosen Publishing Group, 2006), Ch.4, pp.66-68

⁹⁹⁷ Henry David Thoreau *Civil Disobedience* (1849) (Raleigh, Hayes Barton Press, 2005) [hereafter, Thoreau (1849)], p.2:

I believe, [t]hat government is best which governs not at all'; and when men are prepared for it, that will be the kind of government which they will have.

⁹⁹⁸ Thoreau (1849), p.3

⁹⁹⁹ Thoreau (1849), p.2

¹⁰⁰⁰ Thoreau (1849), p.2

¹⁰⁰¹ Thoreau (1849), p.6

¹⁰⁰² Thoreau (1849), p.9

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and his property;¹⁰⁰³ yet in those, such as he, who had no property to call his own, nor children to depend upon him, or for those with the courage to set aside those concerns, those in other words who could *disobey*, he saw the surest limitation of unjust government: those individuals' friction against their rulers as necessary to the proper operation of government, as is friction to operation of machinery.¹⁰⁰⁴ In withdrawing his support for the state however, Thoreau suggested that the civil disobedient ought to accept the consequences of his actions: suggesting that the peaceful acceptance of his fate communicates strongly enough the belief that the state itself is unjust, or that it has acted unjustly. In other words, the disobedience ends at the moment of punishment. "Under a government which prisons unjustly," he explained, "the true place for a just man is also prison":¹⁰⁰⁵ the cost of contributing to the injustice (for example, by paying taxes used to support an illegal/immoral/unpopular war) far greater, in Thoreau's calculation, than the cost of accepting the penalty.¹⁰⁰⁶

For her own part Arendt, despite her belief in finding a constitutional niche for civil disobedience, was unimpressed by Thoreau's claim to having acted *qua* civil disobedient. His refusal to pay the tax collector, in her view, was unpolitical in so much as it was not an act which sought to inspire radical change to the unjust world which surrounded him, but was in fact an individual disavowal of responsibility *for* those injustices, which nonetheless would continue:

*Here, as elsewhere, conscience is unpolitical. It is not primarily interested in the world where the wrong is committed or in the consequences that the wrong will have for the future course of the world. It does not say, with Jefferson, "I tremble for my country when I reflect that God is just; that His injustice cannot sleep forever," because it trembles for the individual self and its integrity.*¹⁰⁰⁷

Thus, when Thoreau said that it is less costly to suffer the penalty than to support the injustice, he meant that it was less costly *to him*: the world itself had changed not one jot when he emerged (just the very next morning) from prison.¹⁰⁰⁸ Indeed, Thoreau's own account would seem to

¹⁰⁰³ Thoreau (1849), p.12

¹⁰⁰⁴ Thoreau (1849), p.9

¹⁰⁰⁵ Thoreau (1849), p.10

¹⁰⁰⁶ Thoreau (1849), p.12

¹⁰⁰⁷ Arendt, *CD*, pp.60-61

¹⁰⁰⁸ Arendt, *CD*, p.62

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support Arendt's analysis. His reaction upon his release was not to spark action. It was not one, as the original title of his paper might suggest, of active resistance to the government. Rather, his reaction was to withdraw from the unjust world, to wash his hands of it, and its ongoing injustices, and to return to a simple life on the outskirts of town; an experiment in simple living on the fringes of society, barely more than a hermit in his social habits, which he documented in the part-fiction book, *Walden*.¹⁰⁰⁹ Now, there could, it is admitted, be room to level a charge of hypocrisy at Arendt here. After all, and as we have seen in Part I, Arendt reacted to her own release from detention in Germany by fleeing. There is an important difference however, by which the charge is defeated. Whilst Arendt had sought to change the world around her, by engaging with her Zionist colleagues actively to expose the regime under which they were increasingly suffocated, Thoreau had acted alone and silently in his opposition. He had, by his own admission, failed to pay his taxes for a period of six years or so,¹⁰¹⁰ before his chance encounter with Staples led him to pronounce, to communicate to that agent of the state, the nature, quality and motives of his protest. Thus the communicative aspect of civil disobedience, so crucial to its claim to being a political act, was only minimally (and almost accidentally) present in Thoreau's case. In the intervening period, before that chance encounter, for all the state knew he might as well have been evading tax for personal gain. Against the institution of slavery and the social, legal and economic practices which protected it; against the complexities of the case for intervention in Mexico, and the political, military and economic considerations which fell in its favour, it seems too easy of Thoreau simply to retreat to a life of solitude at Walden Pond, and silently withhold his taxes.

If the act itself was something which fell short, both politically and communicatively, of what Arendt demanded of actors engaged in the public realm, the same was true of its consequences. As I have said in Part I, Arendt flatly rejected Thoreau's supposition, so influential since, that the civil disobedient should accept the punishment meted out to her by the state: that disobedience ends in the court room.¹⁰¹¹ The legal system saw only an individual, the defendant, and, she said,

¹⁰⁰⁹ Henry David Thoreau (J. Lyndon Shanley, ed.) *Walden* (Boston, Mass., Houghton Mifflin, 1971)

¹⁰¹⁰ Thoreau (1849), p.13

¹⁰¹¹ Perhaps the clearest examples of Thoreau's influence, come from Ghandi, and from Martin Luther King Jr., who each praised the American for the example which he set in resisting government, and in accepting the punishment of the law. See M.K. Ghandi 'Duty of Disobeying Laws', *Indian Opinion* 7th September, 1907, in which Ghandi interprets and translates Thoreau's *Civil Disobedience* for his Indian audience. In Clayborn Carson

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disaggregated that individual from the publicness of her civilly disobedient act.¹⁰¹² Moreover, one might question *for whom* the civil disobedient's plea of 'guilty' was *better*? It would seem to be better for the individual, who knows that she will be treated less harshly in punishment.¹⁰¹³ It would seem, plausibly, to be better too for the state itself: the guilty plea after all reaffirms the disobedient's acceptance of already existing political structures. In this respect, the dominant modern accounts of civil disobedience, those offered by Ronald Dworkin, and perhaps more conspicuously by John Rawls, restrict the relevance of civil disobedience as a political act to those which occur in what the latter calls the "nearly just" society.¹⁰¹⁴ In this account individuals or minority groups address themselves to the majority: they believe in the overarching governing structures, but are compelled to act on the fringes of that structure to have defeated some injustice or another that has been brought upon them *qua* individual, or *qua* minority group. Such a "near just" society, Rawls somewhat vaguely says, is "one in which the basic structure of society is nearly just, making due allowance for what it is reasonable to expect in the circumstances." What is 'reasonable' in 'the circumstances' can, and again more than a little vaguely put, be measured "in proportion to the strength of the arguments that can be given for adopting it."¹⁰¹⁵ What it does suppose, for Rawls, are fair procedures and democratic institutions. Yet, this idea that the civil disobedient acts within "nearly just" conditions is, it seems to me, a deeply troubling one. For one thing, at what point does a state fall below the threshold of the "nearly just"? Rawls would certainly describe the United Kingdom as one such "nearly just" society, however this leaves open a number of reflexively searching questions. In *Freedom Under Law*, Denning said that the people of the United Kingdom "would not tolerate" the use of torture by agents of their government.¹⁰¹⁶ How 'near' were we to being a 'just'

(ed.) *The Autobiography of Martin Luther King Junior* (New York, Warner Books, 2001), Ch.2, p.54, King describes being introduced, as a student, to the idea of non-violent resistance through a reading Thoreau's *Civil Disobedience*.

¹⁰¹² Arendt, *CD*, p.52

¹⁰¹³ As Senator Philip A. Hart said:

Any tolerance that I might feel toward the civil disobeyer is dependent upon his willingness to accept whatever punishment the law might impose.

(In *To Establish Justice, To Insure Domestic Tranquility*, Final Report of the National Commission on the Causes and the Prevention of Violence, December 1969, p.108; quoted by Arendt: *CD*, p.52)

¹⁰¹⁴ Rawls (1999), Ch.VI, p.319

¹⁰¹⁵ Rawls (1999), Ch.VI, pp.309-310

¹⁰¹⁶ Denning (1949), Ch.2, p.39

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society, then, when agents of the British state beat and killed Baha Mousa, an Iraqi civilian killed whilst in British custody in Basra, Iraq?¹⁰¹⁷ If not our government *exercising* torture, to what extent was the ‘justness’ of our society lessened when agents of our security services “facilitated” the torture of an individual, Binyan Mohamed, suspected of involvement in terrorist activity, and being held in extraordinary detention by the United States?¹⁰¹⁸ Are we any less just by the fact that these violations seem barely to have registered on the national consciousness? Has the government’s willingness to join the United States in waging war against Iraq made us any less just? If so, why: because the war was illegal? Would it have been *more* just, had it received U.N. authorization? As Scott Veitch has argued, the British government continued to impose (U.N. authorized) sanctions against Iraq between the two Gulf Wars, despite knowing full well the scale of their “disastrous human effects” on civilian Iraqis far removed from the regime which they were intended to harm.¹⁰¹⁹ Did these sanctions lessen to any extent the ‘justness’ of our society? Was justice salvaged by the weight of Security Council resolutions by which the sanctions regime was authorized? Is our society just when the poorest in its midst pay a proportionately heavier burden in taxation than the wealthiest, or when a crisis of private capital is answered by scything through the public sector? Indeed, is the capitalist system itself just, given the exploitation which accompanies it? Do we therefore begin from an unjust position, as if tied to an original sin? By calling the society in which the civil disobedient acts “near just”, it seems to me that the opportunity to initiate radical change is already being denied to the civil disobedient. Rawls’s belief, here expressly following Thoreau’s lead, that the disobedient’s “fidelity to the law” is expressed by the public nature of the law-breaking act, as well as by the willingness of the disobedient to accept her punishment,¹⁰²⁰ reduces the guilty plea to a withering acceptance of the status quo, to the authority of the state within which, and by whom, the injustice was permitted to occur. For Raz, the acceptance of punishment might serve to demonstrate the selfless purity of the disobedient’s motives, or be used to harness a broader support.¹⁰²¹ However, if civil disobedience is to be a politically communicative act, if it is to serve as a channel of communication between the ruler and the ruled, so that the civil disobedient

¹⁰¹⁷ For more information on the public inquiry into Mousa’s death, see The Baha Mousa Inquiry <http://www.bahamousainquiry.org/index.htm>

¹⁰¹⁸ R (on the application of Mohamed) v, Secretary of State for Foreign and Commonwealth Affairs

¹⁰¹⁹ Veitch (2007), Ch.1, p.13

¹⁰²⁰ Rawls (1999), Ch.VI, p.322

¹⁰²¹ Joseph Raz *The Authority of Law: Essays on Law and Morality* (Oxford, Oxford University Press, 1979), Ch.14, p.266

might project alternative political choices onto the constituted powers of government, then it makes no sense for the disobedience to end in the court room, at the moment of punishment, for surely this is *precisely* the moment at which the confrontation between the disobedient and the state is at its most direct, the projection of the alternative at its most radical. Rather than accept her punishment, as Thoreau and Rawls state that she must; or shy away from the moment of confrontation altogether, as is implied by Ronald Dworkin's suggestion that civil disobedience be recognized through the exercise of discretion on the part of the arresting officer (deciding against arrest) or the prosecutor (refusing to bring the case to court), because they "act out of better motives than those who break the law out of greed or a desire to subvert the government,"¹⁰²² there is some merit in asking what Arendt's conception of civil disobedience might have looked like, had she thought it through. There are at least two possibilities, which are worth mentioning here. The first is that in the court room, when asked for a plea, the civil disobedient should confront the state with a plea of 'not guilty'. If the Rawlsian response would say that, in doing so, the civil disobedient refutes her fidelity to the law, then I hold Arendt's (hypothetical) answer to be both persuasive and demonstrable. For Arendt, were the civil disobedient to plead 'not guilty', and thereby force there to be a debate, an argument (in the court room, in the media, in society – wherever), between disobedient and state then not only would the communication be at its most productive, but what is lost in a fidelity to the laws of the state, and its supporting institutions, to law as *nomos*, would be gained in a fidelity to the *spirit* of the laws, to consent: the very basis of law as a relational bind between the citizens themselves, to law as *lex*. In other words, the health of the constitution, and the quality of *consent* is best measured where the channels for *dissent* remain open. This is demonstrable, I believe, in two parts. First, looking back to Part II we saw that it was precisely John Hampden's refusal to accept the illegality of his non-payment of ship money, indeed his conviction that the King's tax had been levied unconstitutionally, which led to the narrow victory for the King in the Court of Exchequer. By pleading not guilty, and thereby confronting the court with an alternative perspective, Hampden in no small part facilitated the formulation of the strong dissenting opinions which so dissuaded his countrymen from continuing to consent to the charge, and ultimately to the King's very authority. Remembering the Earl of Clarendon's report that the decision in the King's favour was such that his subjects 'could swear it was not law', Hampden's

¹⁰²² Ronald Dworkin 'On Not Prosecuting Civil Disobedience' (1968) 10 *New York Review of Books*

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fidelity to the *spirit* of legality was clear, and contributed itself to the more significant constitutional changes which soon followed.

In some senses this confrontational, resistant spirit, personified by Hampden, has been lost in modern appearances of the civil disobedient in British courtrooms. Nowhere has the Rawlsian belief that the disobedient must (meekly?) accept her punishment been expressed with more clarity than in Lord Hoffman's opinion in the case *R. v Jones*, where a number of criminal charges were brought against a handful of British citizens who had caused damage to an RAF base at Fairford, Gloucestershire and a military port in Hampshire, in order, they said, to prevent a crime under international law, the crime of aggression, by the United Kingdom, against Iraq. Addressing himself to the issue of civil disobedience, Lord Hoffman called it the "mark of a civilized community that it can accommodate protests and demonstrations of this kind." Nevertheless, he continued:

*But there are conventions which are generally accepted by the law-breakers on the one side and the law-enforcer on the other. The protestors behave with a sense of proportion and do not cause excessive damage or inconvenience. And they vouch for the sincerity of their beliefs by accepting the penalties imposed by the law. The police and prosecutors, on the other hand, behave with restraint and the magistrates impose sentences which take the conscientious motives of the protestors into account.*¹⁰²³

If there might be a communicative aspect in this opinion (between the law breaker on one side, and the police/prosecutor/magistrate on the other), that the acceptance of guilt served only to preserve rather than to challenge the status quo, and therefore the *conditions* of the (alleged) injustice was apparent in His Lordship's utterance that "the state in this case was the defendant's own state, the state which protected and sustained her *and to which she owed allegiance*. And the legal system which had to judge the reasonableness of her actions was that of the United Kingdom itself."¹⁰²⁴ In other words, the spirit of legality, the spirit of consent, was barely present in Lord Hoffmann's mind, for the vertical relationship between Margaret Jones (defendant) and the state was one in which the former *owed* allegiance to the latter, in exchange

¹⁰²³ *R. v. Jones (Appellant) (and associated appeals)* [2006] UKHL 16, Lord Hoffmann, para.89 [my emphasis]

¹⁰²⁴ *R. v. Jones*, Lord Hoffmann, para.75

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for protection and sustenance. There was no opportunity for the defendant to persuade the court of an alternative normative vantage point. If the liberal interpretation of the human condition is correct, then Hoffmann's judgment poses no problem, and we would be inclined to think that a jury of the defendant's peers would think the same. However, something more interesting has been going on since *Jones* which brings Arendt's counter-claim for the human condition, and for the spirit of legality, into sharp relief. In 2008, a group of environmental activists were charged with causing criminal damage when they caused £35,000 worth of damage to a coal-fired power station at Kingsnorth by painting the name of the (then) Prime Minister, Gordon Brown, on the plant's giant chimney. The protest aimed to disrupt the energy company and government's plan to build a successor to the plant which, the activists said, would have had a hugely damaging environmental impact. The disobedients in this case argued that they had "lawful excuse", under the Criminal Damage Act 1971, for their actions. That is to say that they had acted to prevent even greater damage from being caused, in this case environmental harm to properties worldwide. Traditionally, "lawful excuse" had been thought to have restricted to situations such as that where an individual breaks damages the door of a building in order to tackle a house fire. However, having heard evidence to about the effects of environmental damage from leading figures such as NASA's Professor James Hansen, and Zac Goldsmith (now Conservative MP) the then editor of the *Ecologist* magazine, the jury at Maidstone Crown Court surprised government ministers and energy companies alike by agreeing with, and acquitting the activists.¹⁰²⁵ A similar conclusion was reached in Hove Crown Court in 2010 when a group of five activists caused £180,000 worth of damage to an arms factory in Brighton, with the "lawful excuse", they said, that the damage would slow down or prevent the factory owners, EDO MBM, from unlawfully supplying military equipment to Israel which they believed would be used in the commission of war crimes against Palestinians in Gaza. Supporting the view expressed by Arendt that civil disobedience will emerge only extraordinarily, when the ordinary channels of communication between the rulers and the ruled have failed, Judge George Bathurst-Norman, in directing the jury, reminded them of a statement by the Green MP for Brighton Pavilion, Caroline Lucas, that "all democratic paths had been exhausted" before the activists resorted to

¹⁰²⁵ See Michael McCarthy 'Cleared: Jury decides that threat of global warming justifies breaking the law', *The Independent* 11th September, 2008

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direct action.¹⁰²⁶ In both cases the decision by the jury caused something of a stir. Nevertheless, in defending the role of the jury in the criminal trial, Lord Devlin has argued that the return of surprising verdicts is, from time to time, the sign of a healthy constitution.¹⁰²⁷ As Neil MacCormick has explained, such ‘perverse verdicts’ are politically and communicatively very powerful:

*When such a thing occurs, as most notoriously in the old death penalty cases, in which jurors refused to convict of thefts that were capital offences, it brings political pressure to bear on governments and parliamentarians. The political pressure is either to have the law changed or to bring to heel those members of the executive or those prosecuting authorities who are using the law in an oppressive manner.*¹⁰²⁸

The point however is that in these cases that impact could only be felt by the disobedient’s *refusal* to plead her guilt and accept punishment. By pleading not guilty, the civil disobedient invited the jury to put itself in her shoes, to think of the matter from the perspective of the defendant, in an exercise of (what Arendt would have called) representative thinking. This became a *constitutional* dialogue because what, as a result, appeared *in between* the actors in the court room was a space within which the very limits of a piece of primary legislation could be contested. Had the defendants followed Thoreau or Rawls and pled guilty to the charge, such a dialogue simply could not have taken place. The civil disobedient would have been brought back within the fold of the constitution, yet her act would have remained unconstitutional. As it was, the not-guilty plea and the resulting exchange brought *both* the disobedient *and* the act within the fold of the constitution: a message which the government could not ignore.

Whilst she did not explicitly construct a vision of civil disobedience along these lines, there is reason to suspect that Arendt’s train of thought *might* have led her in this direction. As Margaret Canovan has said, Arendt - who had so enthusiastically shared her own joy in taking part in jury service with Jaspers, impressing upon him the impressive conduct of her fellow jurors - saw in the jury a group who were concerned not with their own private interests, but with the public

¹⁰²⁶ Bibi van der Zee and Rob Evans ‘Jury clears activists who broke into Brighton arms factory’, *The Guardian*, 30th June, 2010

¹⁰²⁷ Lord Devlin *Trial By Jury* (London, Stevens & Sons Ltd., 1966)

¹⁰²⁸ MacCormick (1999), Ch.3, pp.30-31

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interest and impartial justice, in a spirit of deliberation.¹⁰²⁹ It is possible then that had she followed through her thoughts on civil disobedience, engaging the jury with the disobedient's plea of not guilty might have been a fruitful and logical conclusion. As it was, she left us with a quite different prospect, one which took the civil disobedient out of the courtroom altogether: council democracy.

Part III(4) *There will be a Scottish Parliament*

A word on beginnings

Before I make the case for reading the creation of the Scottish Parliament through the lens of Arendtian 'new beginnings', allow me to say a few important words on the choices that I have made here.

It has been a central concern of this thesis to identify Arendt's fascination with those extraordinary political moments when something entirely new – some novel form of political organisation – springs from the action-in-concert of plural men, irrevocably changing the world, be that for better (as, we remember, she saw in the experience of the American Revolution) or for worse (it was, after all, understanding the novelty of totalitarianism which compelled her to pen the *Origins*). For Arendt, these new beginnings which occur from time to time should not themselves be thought of as historical accidents, though the rupture and upheaval which calls their constitutive action-in-concert in to being might be. Thus, fortune might have created the conditions within which the American revolution was made possible, as individual citizens resisted the imposition of taxes made by a foreign Parliament in which they were not represented;¹⁰³⁰ what was truly extraordinary however, what so enthralled Arendt here, was the

¹⁰²⁹ Canovan (1992), Ch.6, p.225

¹⁰³⁰ The claim by George Grenville that Americans were "virtually represented" in Parliament in much the same way as non-electors in Great Britain received short shrift on both sides of the Atlantic. As William Pitt put to Grenville, distinguishing the American condition:

Many [British non-electors] are represented on other capacities, as owners of land, or as freemen of boroughs. It is a misfortune that more are not actually represented. But they are all inhabitants, and as such, are virtually represented. They have connections with those that elect, and they have influence over them.

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virtù of those who elevated their particular resistance to a particular tax in to a universal claim about the very form of government under which they (and the plural is intentional) lived. The new beginning came, in other words, when an argument about a specific instance of interference, interference with their property through the means of (as they saw it, unlawful) taxation, became one about domination: if Americans were not represented in the Parliament which legislated for them, if they could not influence directly the shape of that legislation, their liberty would depend at all times on the good will of others.

When Arendt said that the American revolution aimed at constituting freedom above all else, it was both a freedom from this domination by the British Parliament, and at the same time, in order to achieve this, a freedom actively and collectively to share in the determination of their political fate.¹⁰³¹ The nature of their action was two-fold, and goes to the heart of the claim which I will make here for the devolution in the context of the UK. First, Arendt saw in the council system which emerged in the wards of the American republic, indeed which had appeared spontaneously in every major revolution since (in France and Russia, Germany and Austria, and finally, in Arendt's lifetime at least, in Hungary),¹⁰³² the expression of a constituent voice, "which begins from below, continues upward, and finally leads to a parliament."¹⁰³³ The "new principle of organisation"¹⁰³⁴ which Arendt found in such an arrangement was government held together by true, active (rather than an implied or virtual) consent. Council democracy, this was to say, offered a novel form of government which eschewed the command of a sovereign will - be that the sovereign king, or as she saw in France, the sovereign nation, imposed arbitrarily (and, often, violently) upon *subjects* - in favour of co-operation by *citizens*.¹⁰³⁵ In a revealing passage (and one to which I shall shortly return), she explained:

*The councils say: We want to participate, we want to debate, we want to make our voices heard in public, and we want to have a possibility to determine the political course of our country.*¹⁰³⁶

(John Phillip Reid *The Concept of Representation in the Age of the American Revolution* (Chicago, University of Chicago Press, 1989), Ch.4, p.53)

¹⁰³¹ Arendt, *TOPAR*, p.232

¹⁰³² Arendt, *TOPAR*, p.231

¹⁰³³ Arendt, *TOPAR*, p.232

¹⁰³⁴ Arendt, *TOPAR*, p.232

¹⁰³⁵ Arendt, *OR*, Ch.5, p.156

¹⁰³⁶ Arendt, *TOPAR*, p.232

If there was a sting in the tail (and there certainly was) it was that wherever the council system had sprung in to existence it had, before long, been suffocated: be it as in France by an overbearing general will or, as was the case in the United States, by the weight of the federal constitution that it had helped to create. Yet, it was Arendt's hope (and, she accepted that it might be no more than that: "[w]hether this system is a pure utopia...I cannot say")¹⁰³⁷ that a latent spirit of action remained, 'held in reserve', underneath, if only it could be isolated and teased out in to the open. That was to say that action was – and here we return to the central tenet of Arendt's political thought – a product of the human condition itself; that so long as plural men and not man lived on earth and inhabit the world, the impulse to form government from the ground up would itself survive. Thus, she saw as evidence for such a proposition the repeated emergence of (something like) the council system all the way from America in the eighteenth century to Hungary in the twentieth, each recurrence a seemingly spontaneous and self-contained act with no hint of a connection to those revolutions and those councils which had come before them. "Hence," she said, "the council system seems to correspond to and to spring from the very experience of political action," and not from revolutionary tradition.¹⁰³⁸ If the first characteristic of the council system was its 'bottom-up' generation of political power, the second was that the councils themselves seemed to be concerned only with freedom, and the task of constituting the space in which freedom could be experienced.

Throughout *On Revolution* reads a lament to the spirit of freedom engendered at the outset of the French revolution, yet (bloodily) surrendered in the name of (material and biological) necessity. For Arendt, subjection to dire property was much the same as subjection to the will of another,¹⁰³⁹ and both had to be overcome before freedom in the sense of participation in public affairs could be achieved. Whilst the French revolution itself became subject to necessity – "[i]t was necessity, the urgent needs of the people, that unleashed the Terror and sent the Revolution to its doom"¹⁰⁴⁰ - the success of the American Revolution (at least as Arendt saw it) could be ascribed to the absence of questions of poverty and want from the American scene. This is not

¹⁰³⁷ Arendt, *TOPAR*, p.231

¹⁰³⁸ Arendt, *TOPAR*, pp.231-232

¹⁰³⁹ See, for example, Arendt, *OR*, Ch.5, p.205

¹⁰⁴⁰ Arendt, *OR*, Ch.2, p.60

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the place to take Arendt to task for her reading of American history. The point is that for Arendt action-in-concert, and the possibility therein of constituting entirely new spaces for the enjoyment of a peculiarly public experience of freedom – those *new beginnings* which were the very stuff of political action – could not be created by necessity, but only after necessity itself had been mastered. Necessity, which by its nature demands certain ends, by whatever means possible (and the experience of *La Terreur* proved just how troubling that might be), could not resonate with a depiction of politics as, ultimately, an unpredictable and spontaneous enterprise.

Now, what do these reflections on (Arendt's reading of) the American and French revolutions of the eighteenth century have to do with this section which is, after all, a chapter about an experience found in twentieth century Scotland? Allow me to explain. The new beginning which I have identified in Part II as being at the heart of this thesis has been that which was called in to being by the (predominantly) English political conflicts of the seventeenth century. Yet, when one thinks of Scotland, and in particular its relationship within the United Kingdom, one might reasonably expect the appropriate object of study to be a quite different new beginning: that which was brought about in 1707 by the Acts of Union. There are, however, three steps by which I suggest that an Arendtian reading of the experience of devolution can be traced to that which was begun by Parker and his fellows in the 1640s. In setting out let me say that this is not to downplay the hugely significant constitutional questions which continue to flow from those Acts to this day. Dicey's famously held view that the Acts of Union have no greater constitutional significance than the Dentists Act 1878, or indeed any other 'ordinary' piece of primary legislation,¹⁰⁴¹ retains a certain (perhaps even dominant) currency today, particularly in light of their partial alteration by ordinary acts of Parliament.¹⁰⁴² Nevertheless, the status of those Acts can hardly be said to have been settled with Dicey. As recently as 2003, Laws LJ has held that the Acts of Union fall within a class of statute (including the devolution acts, the Human Rights Act, the Reform Acts, Magna Carter and the Bill of Rights) which, by their nature, ought to be recognised by the courts as being not at all like 'ordinary statutes', but which are to be thought of as something loftier; as 'constitutional' statutes, requiring a purposive rather

¹⁰⁴¹ Dicey (1915), p.141

¹⁰⁴² The requirement within the Acts that Scottish Professors accept the Presbyterian faith, for example, was expressly repealed by the Universities (Scotland) Act 1853

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than literal interpretation, and which – by virtue of their being classed as such – cannot be *impliedly* repealed by a subsequent act of Parliament.¹⁰⁴³

That this debate can be traced to beginnings is nowhere more clear than in the account given by J.D.B. Mitchell, who argued – with reference to the specific protections within those Acts for the Scottish legal system generally and the Court of Session specifically “forever” and “in all time” – that the British parliament was “born unfree”;¹⁰⁴⁴ that it could not ‘make or unmake any law whatsoever’ because it was restricted by those protections. *This* beginning, though it is undoubtedly a constitutionally significant one, is not one that fits an Arendtian understanding. First, because it was a Union made of necessity. From the Scottish perspective the Union was driven by economic imperatives. Robert Burns, of course, famously said that Scotland was ‘bought and sold for English gold’¹⁰⁴⁵ and there is certainly merit in the claim. As Scotland’s stark economic decline in the 1690s - brought about both by misfortune (a succession of harvest failures, King William’s so-called ‘Ill Years, stretched domestic resources as well as the potential for trade) and miscalculation (the failure of the Darien Scheme: a costly and hugely (over) ambitious scheme which sought to establish a Scots trading post in South America impacted on both the public purse, as well as the private finance of benefactors who financed the doomed enterprise), Union with England – and the opportunities for trade that that would open up as a result – came by many increasingly to be seen as the only viable path back to relative economic prosperity.¹⁰⁴⁶ From the English perspective, the motivating necessity was of a different nature: engaged in the War of Spanish Succession the English Parliament, which had previously rejected the idea in 1607 and 1670, came to see the Union as a way of shoring up man power (drained on three fronts: conflict abroad and industrialization at home, alongside the expansion of her empire), whilst at the same time closing off, at Hadrian’s Wall, the potential

¹⁰⁴³ *Thoburn v Sunderland City Council* [2003] QB 151, per Laws LJ, p.186. For dicta in both the House of Lords and the (Outer House of the) Court of Session expressing support for this distinction, see the opinion of Lordingham in *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, and the opinion of Lord Bracadale in *Imperial Tobacco, Petitioner* 2010 S.L.T. 1203. Note, however, that at the time of writing, the decision in *Imperial Tobacco* has been reclaimed to the Inner House.

¹⁰⁴⁴ J.D.B. Mitchell *Constitutional Law* (Edinburgh, W.Green & Son, 1968), pp.69-74 [my emphasis]

¹⁰⁴⁵ Robert Burns ‘A Parcel of Rogues in a Nation’ (1791)

¹⁰⁴⁶ For more, see Christopher A. Whately *The Scots and the Union* (Edinburgh, Edinburgh University Press, 2006); Leith Davis *Acts of Union: Scotland and the Literary Negotiation of the British Nation 1707-1830* (Stanford, Stanford University Press, 1998); Christopher A. Whately *Scottish Society, 1707-1830: Beyond Jacobism, towards industrialisation* (Manchester and New York, Manchester University Press, 2000), esp. Ch.1, pp. 36-47

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‘back door’ to a French invasion.¹⁰⁴⁷ This beginning, then, was not a spontaneous and unpredictable occurrence, but the intended and calculated means to specific ends. A second, but not unrelated, limit to reading Arendt in to this beginning is its source. The Union of 1707 was not brought about from the ground up by the action-in-concert of the people themselves, actively consenting to the creation of a new Parliament and indeed a new country. Rather, it was an act which was imposed upon a resistant Scottish people, sometimes violently so:¹⁰⁴⁸ commanded by a monarch, Queen Anne, who feared for the continuance of the Hanoverian line in Scotland after her death;¹⁰⁴⁹ executed by a number of commissioners drawn by her from each of the independent Scottish and English parliaments, for whom bribery rather than persuasion (for Arendt, we recall, the means of action) tipped the balance in favour of incorporation.¹⁰⁵⁰

1707, then, was a moment of huge constitutional significance; yet if we are to follow Arendt and seek to recover the spirit of a purely political action-in-concert it is, for these reasons, the wrong place to look. Rather, and as I have tried to show in Part II, the truly extraordinary constitutional moment, the new beginning as Arendt would have understood the term, was that which occurred in the English conflicts between royalists and parliamentarians in the 1640s.

When John Hampden came before the Court of Exchequer he was an unlikely revolutionary. His had been a refusal to pay one form of taxation, against which he was more likely to flee (to America, had the law allowed it) than to revolt. What was played out in that court was a standard debate about the proper and ordinary role of parliament in the creation of new or wider forms of taxation. The initial step was not a revolutionary one then, but an attempt to resolve a particular dispute about a particular right through ordinary channels of contestation. The extraordinary moment, the spontaneous and unpredictable action-in-concert, from the ground up,

¹⁰⁴⁷ See, for example, Allan I. Macinnes *Union and Empire: The Making of the United Kingdom in 1707* (Cambridge, Cambridge University Press, 2007); Jim Smyth *The Making of the United Kingdom 1600-1800* (Harlow, Longman, 2001)

¹⁰⁴⁸ Troops had to be brought in to quell rioting in the streets of Glasgow, Stirling and Edinburgh by ordinary Scots who opposed, amongst other things, the loss of political self-determination caused by the incorporation of their representatives within the London based Parliament. See, Elizabeth Hallam and Andrew Prescott (eds.) *The British Inheritance: A Treasury of Historic Documents* (Berkeley and Los Angeles, University of California Press, 1999), Ch.2, pp.60-61

¹⁰⁴⁹ The Scottish Parliament’s Act of Security in 1704 reserved to the Scottish parliament the right to appoint a monarch of their choosing after Queen Anne’s death, unless the English granted the Scots free trade across their shared border.

¹⁰⁵⁰ Hallam and Prescott (eds.) (1992), Ch.2, p.60

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came after. It was not until Hampden had lost his case before the court, not until the reasons for the decision in the King's favour were published far and wide, that a people who had initially complied with the charge almost immediately expressed their dissent by an instant, widespread, collective refusal to pay. The conflict turned, to couch it in Arendtian terms, from a dispute about (private) rights to one about domination (by Charles I) and the very right to have those rights, as Englishmen realised that the judgment - as Hampden's counsel St John later put it to Parliament - "delivered [them to the king's] Bare Will and Pleasure" (Pt.II: 138). Whilst this in itself did not mark a new beginning, the rupture created a certain constitutional openness: a space within which Parker could contest the basis of divine right theology and persuade his countrymen that the source of political power on Earth was not God, but the people themselves; and, more than this, that it was in Parliament that the people could experience (albeit indirectly) self-determination.¹⁰⁵¹ It was in this way that the people emerged as a political reality in the 17th Century, and by their action-in-concert set English constitutional history on a new and unexpected course. In so far as it relates to this sub-section, there are two important points worth recapping here. First, the case for Parliament was one strikingly similar to that which Arendt made for the council system: the "true nature" of Parliament was, for Parker, "public consent."¹⁰⁵² Splitting this in to its constituent parts, Parliament was a public thing because in that place (ideally, at least) private men put aside their private concerns in order rigorously, and from all sides, to debate the common good that existed between them. It carried the peoples' consent, he said, because Parliament was nothing less than "the people artificially congregated, or reduced by an orderly election, or representation."¹⁰⁵³ Secondly, however, having invoked the peoples' resistance against ship money in order to prise open a space within which Charles' claim to divine right could be challenged and displaced by Parliament, Parker's next trick was immediately to close that space, to usher the people back indoors, by equating the people-in-parliament with the people themselves; and with it, by equating resistance against parliament with suicide. In Parliament was created a power no less "capable of interfering with others on

¹⁰⁵¹ See also, Loughlin, in Loughlin and Walker (eds.) (2008), Ch.2, pp.32-33:

...it was becoming clear that the parliamentary claims could not easily be sustained within the framework of the old ideology. A break was necessary, and this breach was filled by the argument that governmental authority...had its ultimate source in the will of the people.

¹⁰⁵² Parker (1642), p.13

¹⁰⁵³ Parker (1644), p.18

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the basis of [its] own arbitrium or will”¹⁰⁵⁴ than was the king. It is, then, to this new beginning that I look for the tools by which to assess the coming in to being of the Scottish Parliament, because it was precisely an extraordinary reaction *against* the domination of Parliament that, once again – and with echoes of the reaction against Ship Money – opened the space for the expression a resistant, active, public voice.

The Case Against Poll Tax

Despite what I have said the Acts of Union are not silent in this story. The incorporation of the Scottish Parliament within the English Parliament by those Acts meant that what was created in 1707 was not “a federal state under which governmental responsibilities would be formally divided between London and Edinburgh, but...instead the conditions under which London-based institutions could govern across an expanded territory.”¹⁰⁵⁵ Whilst I have alluded to the argument made from time to time that the Acts of Union amount to the constitutional settlement of an entirely new parliament therefore bound by the terms of 1707, and freed from the shackles of that which came before (specifically, the 17th century legacy of an unlimited sovereign Parliament), the famous dicta of Lord President Cooper that “the principle of unlimited sovereignty of Parliament is a distinctively English principle and has no counterpart in Scottish constitutional law,”¹⁰⁵⁶ has never so persuaded a Scottish court to set aside any act of the Westminster Parliament; not one in the 304 years since the Acts of Union were passed. Indeed, and despite the fact that the Lord President’s obiter dicta retains a certain iconic status - not having been explicitly rejected by the Scottish courts when they have had the opportunity to do so¹⁰⁵⁷ - to all intents and purposes it would appear that the legislative supremacy of the English parliament has (for the time being) been handed down to Scotland indirectly by incorporation. Recalling Lord Reid’s opinion that Parliament had the power to do even that which the public found morally or politically improper, this had a particular significance when the Westminster Parliament passed the Abolition of Domestic Rates etc (Scotland) Act 1987, and imposed by

¹⁰⁵⁴ Quentin Skinner ‘A Third Concept of Liberty’, in Robert E. Goodin *Contemporary Political Philosophy: An anthology* (Oxford, Blackwell Publishing, 2006), Ch.24, p.369, p.411 (fn.53)

¹⁰⁵⁵ C.M.G. Himsworth and C.M. O’Neill *Scotland’s Constitution: Law and Practice* (Edinburgh, Tottel Publishing, 2006), Ch.3, p.56

¹⁰⁵⁶ *MacCormick v Lord Advocate* 1953 SC 396, per Lord Cooper, p.411

¹⁰⁵⁷ See, for example, further support in *obiter* from Lord Keith in *Gibson v Lord Advocate* 1975 SLT 134 (Court of Session)

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primary legislation a tax – the infamous Poll Tax - upon the Scottish people which surely they felt was neither morally nor politically legitimate.

Scottish resistance to Poll Tax was immediate and fierce. The Community Charge (to give it its proper title) - designed and introduced by the Thatcher government to Scotland in 1989, and to England in 1990¹⁰⁵⁸ - effectively reformed the system of domestic rates such that each elector would pay a flat-rate, rather than a rate based on wealth. In many respects this was the final straw for a Scottish working class who, already devastated by the government's reluctance to aid the struggling steel and coal industries, would now be asked to pay the same rate of tax as their wealthiest neighbours. In terms of sheer numbers, the scale of the poll tax resistance was truly impressive: opinion polls revealed that as many as three quarters of Scots were opposed to the charge,¹⁰⁵⁹ and the STUC was able to mobilise a march of 30,000 people upon Edinburgh on April 1st 1989, the date of its implementation.¹⁰⁶⁰ Anti-tax graffiti became a feature of town-centres, whilst an array of protest groups and campaigns were formed as a result. Some, such as the Labour Party/STUC organised and orchestrated 'Stop It' campaign, had little effect. Whilst this campaign had pledged to 'Stop' the tax by encouraging spoiled returns of administrative papers, thus clogging up the administrative machinery of the tax, the campaign was troubled by an internal contradiction: the Labour Party's desire to appear as a responsible, respectable, law abiding and electable party of opposition meant that at the regional level, Labour led councils were already taking the measures needed to ensure smooth implementation and collection of the tax.¹⁰⁶¹ Other campaigns – and arguably the most effective campaigns – were sprung at a local level, from the ground up. Though it didn't last long, the Maryhill and Somerston Anti Poll Tax Union was created by local residents opposed to the tax who met in impromptu locations (bus

¹⁰⁵⁸ This staggered introduction was itself something of a cause for consternation, as Scots came increasingly to feel that the Tories saw Scotland as something of a guinea pig upon which to test unpopular reforms before extending them to England, where (electorally speaking) they had more to lose. See, for example, David Denver et al. *Scotland Decides: The Devolution Issue and the Scottish Referendum* (London, Frank Cass Publishers, 2000), Ch.2, p.30; James Mitchell 'Scotland in the Union, 1945-95: The Changing Nature of the Union State', in T.M. Devine and R.J. Finlay (eds.) *Scotland in the Twentieth Century* (Edinburgh, Edinburgh University Press, 1996), Ch.5, p.85, p.99

¹⁰⁵⁹ See Lynn G. Bennie *Understanding political participation: Green Party membership in Scotland* (Aldershot, Ashgate, 2004), Ch.2, p.22

¹⁰⁶⁰ Danny Burns *Poll Tax Rebellion* (Stirling, AK Press, 1992), Ch.2, p.47

¹⁰⁶¹ For more on this, see Michael Lavalette and Gerry Mooney 'No Poll Tax Here!': The Tories, social policy, and the great poll tax rebellion', in Michael Lavalette and Gerry Mooney (eds.) *Class Struggle and Social Welfare* (London, Routledge, 2000), Ch.11, p.199, p.212

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tops, shops, even traffic islands)¹⁰⁶² and aimed - by bringing local people together, by engaging them in a dialogue with one another, by providing them with information, by organising collective non-payment – to challenge what was seen as an unlawful tax imposed upon them by the British parliament (and the Tory government which controlled it). There are three things which are worth noting, before we consider the constitutional claim being made here more fully. First, here, in Scotland, in resistance to a perceived domination by the British parliament unresponsive to particularly Scottish needs, seems to have been something of the spontaneously created local democracy of which Arendt would surely have approved. It was concerned with engaging those affected by the Poll Tax in a dialogue about (or, better put, what could be done about) it, and did so through the exchange of opinion and information in a self-constituted public space. Second, whilst the initial Maryhill/Somerset APTU was a short lived affair, its very coming in to being inspired the creation of similar associations across the country. Many of those Unions lasted the course,¹⁰⁶³ and were able to organise an effective campaign of non-payment which saw estimates¹⁰⁶⁴ of 12 percent non-payment in 1989/90 rise to 23 percent in 1990/91 and 77 percent by 1991/92.¹⁰⁶⁵ In the end, some 1.5m people were estimated to have withheld payment, with 700,000 summary warrants issued as a result.¹⁰⁶⁶ This was not, in other words, the actions of an unlawful few isolated and determined individuals out to protect their capital; rather, this was action-in-concert - spontaneous at first, but growing from there in to something sustainable - by a people opposed to the very legitimacy of that tax, the power of which (in the fullest Arendtian sense of the word) would drastically alter the very shape of the British constitution. Third, what was made possible by bringing individuals together in that way was the capacity to make sense of the two-fold domination at play here: the domination of a Parliament capable of making laws morally or politically repugnant to the people; but also the domination of the government within and controlling the parliament. Arendt was fond of saying that the coming together of plural men in shared experience and discourse had a world-disclosive effect. “For us,” she said, “appearance – something that is being seen and heard by others as

¹⁰⁶² See the account of this coming together given by Tommy Sheridan, chair of the Pollock Anti Poll Tax Union and later MSP, in Lavalette and Mooney (2000), p.218

¹⁰⁶³ Burns (1992), Ch.2, p.30

¹⁰⁶⁴ Estimates were just that, estimates, given that huge numbers fell off the electoral register in order to avoid detection for non-payment

¹⁰⁶⁵ Hugh Parker Atkinson and Stuart Wilks-Heeg *Local Government from Thatcher to Blair: the politics of creative autonomy* (Cambridge, Polity Press, 2000), Ch.3, p.71

¹⁰⁶⁶ ‘The Poll Tax in Scotland: 20 years on’, *BBC News* (1st April, 2009)

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well as by ourselves – constitutes reality;” and this she called publicity.¹⁰⁶⁷ Isolated, atomised, the individual might have been left to rue an instance of interference with her property; yet brought together with others in the same boat, the reality of the situation came to be seen: that it was not the poll tax which rendered Scots unfree, but the very governing arrangements by which the tax was imposed upon them all. As James Mitchell has said:

*Opposition to the poll tax became aligned with the case for a [Scottish] parliament. The perception grew in Scotland that the Conservative government, with limited support north of the border, was imposing policies on Scotland - and the poll tax symbolised that better than anything else.*¹⁰⁶⁸

If the well-to-do men and women who gathered in Holyrood Palace in March 1989 as the Scottish Constitutional Convention seemed unlikely revolutionaries, what one must bear in mind is that it was the resistance of the Scottish people themselves to what they saw as an illegitimate tax which, more than any statement made in *obiter* from the Court of Session, opened the space in which the question of Parliament’s legislative dominance could be contested. It was the virtue of the SCC to take that opportunity.

Towards devolution

Scotland’s constitutional position in this period was precarious, to say the least. The 1987 general election had brought about the so-called and dreaded ‘Doomsday’ scenario whereby Conservative victory across Britain stood in stark contrast to the party’s showing in Scotland. With just 24% of the share of Scottish votes (as compared to 42.3% nation-wide), the Conservatives were down 11 seats on their previous outing (1983), winning only 10 seats, compared to Labour who won 50 (with 42.4% of the share of votes), the SDP-Liberal Alliance who won 9 (19.2%), and the SNP who won 3 (14%).¹⁰⁶⁹ These results reflected a broader trend in Scottish politics, one which Mitchell has summed up as an outright rejection of

¹⁰⁶⁷ Arendt, *HC*, Ch.2, p.50

¹⁰⁶⁸ ‘The Poll Tax in Scotland: 20 years on’, *BBC News* (1st April, 2009)

¹⁰⁶⁹ For more detailed information, see the House of Commons Public Information Fact Sheet, no.47 ‘General Election Results, 11 June 1987’, available online at <http://www.parliament.uk/documents/commons-information-office/m11.pdf>

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‘Thatcherism.’¹⁰⁷⁰ Given the Conservative Party’s minority in terms of Scottish seats in the Commons, and their falling vote share amongst the Scots more generally, the Labour M.P. John Maxton was able confidently to pronounce the poll tax to have been “imposed on Scotland by a government with no mandate to do so;”¹⁰⁷¹ and whilst in the end it was not opposition in Scotland but violent protest and negative polling in England which did it for the policy,¹⁰⁷² as Andrew Marr has said:

*...at least in England it was a bad tax brought in by the party with the most seats and the most support. In Scotland it was a bad tax brought in by a minority party with minimal support beyond its own ranks.*¹⁰⁷³

The Constitutional Convention - launched in 1989, and encompassing the Labour Party, the Liberal Democrats, Greens, trade unions, local authorities, churches and a number of other ‘civic’ bodies¹⁰⁷⁴ - can be seen as a direct and extra-parliamentary response to this constitutional conundrum: the Conservative constitutional dominance of a polity which, to all intents and purposes, had roundly rejected it. As one group of observers has (collectively) put it:

*As Scots in general increasingly came to believe that Thatcherism was being imposed on Scotland, a growing number of Labour politicians came to conclude that a Scottish Assembly...would have had responsibility for policies in areas in which Conservatives were passing legislation to which they were deeply opposed.*¹⁰⁷⁵

¹⁰⁷⁰ James Mitchell ‘From National Identity to Nationalism, 1945-99’, in H.T. Dickinson and Michael Lynch (eds.) *The Challenge to Westminster: Sovereignty, Devolution and Independence* (East Linton, Tuckwell Press, 2000), p.154, p.160. Thus a nation which had a large public sector on the one hand, and which needed state intervention to maintain the competitiveness of its heavy industries found itself threatened by a government which sought the contraction of the public sector, which refused to prop up struggling industries and which – by virtue of its majority in the House of Commons – had the absolute legislative power to act contrary to the Scotland’s specific interests notwithstanding the strong anti-Tory sentiment in that country.

¹⁰⁷¹ James Mitchell *Strategies for Self-Government: The Campaigns for a Scottish Parliament* (Edinburgh, Polygon, 1996), p.273

¹⁰⁷² This culminated in the so-called Battle of Trafalgar, when a protest march in London by around 200,000 people resulted in over 400 arrests, 200 injuries (including 45 police officers), and some £40,000 of damage to property, as it descended into violence. See Danny Burns *Poll Tax Rebellion* (Stirling, AK Press, 1992), Ch.4, esp. pp.87-104

¹⁰⁷³ Andrew Marr *The Battle for Scotland* (London, Penguin Books, 1992), Ch.5, p.180

¹⁰⁷⁴ The Conservatives, understandably, sat out, and lobbied Scottish business interests to do the same. The SNP, early supporters of a convention, sat out too, fearing that Labour domination of the agenda could be used counterproductively to attack the SNP’s policy of ‘independence within Europe.’ (See David Denver, James Mitchell, Charles Pattie and Hugh Bochel *Scotland Decides: The Devolution Issue and the Scottish Referendum* (London and Portland, Or., Frank Cass, 2000), Ch.2, pp.32-33) [hereafter, Denver et.al.]

¹⁰⁷⁵ Denver et.al. (2000), Ch.2, p.30

As Thatcherism tore apart the institutions of Scottish civil society – institutions, such as trade unions, universities, local government, of great value in a nation without a (representative) national government, one might add¹⁰⁷⁶ – Scots were increasingly unwilling to suspend their disbelief, to uphold the Diceyan orthodoxy, and to revere the authority of the legislation implementing these policies. Rather, as Michael Keating has put it, such legislation “was seen as an abuse of parliamentary sovereignty and therefore a violation of the unwritten norms of the constitution.”¹⁰⁷⁷ Thus, if Lord President Cooper hinted at a different understanding of sovereignty in Scotland, the SCC were making an explicit claim for the sovereignty of the Scottish people; a claim with roots both in Scotland’s constitutional past - whilst Filmer had warned Englishmen passively to obey the tyrant and accept him as a punishment from God, the Scots had as early as 1320 warned their monarchs that their continued obedience was tied to his preservation of their freedom;¹⁰⁷⁸ whilst the English Bill of Right in 1689 had allowed for the abdication of the English throne by King James VII, the Scots’ Claim of Right Act drew on the popular sovereignty of Buchanan and asserted their right to remove him - and present, building on the proposals of a quite remarkable document, Scotland’s *Claim of Right 1988*.¹⁰⁷⁹

Launched in July 1988 by what became known as the constitutional steering committee – a group representative of the Scottish political parties and civil society, which would set out the framework (and, for the most part, participate in) the Convention – this document set out the case for a new constitutional settlement in both negative and positive terms. In the negative sense, it “described a situation in which [the constitutional status quo was] no longer being honoured; in which the wishes of the massive majority of the Scottish electorate are being disregarded.” With a nod to anti-poll tax sentiment and action, the *Claim* went so far as to hint at a justified resistance: “In such a situation,” it continued, “one would expect to see signs of a breakdown of respect for law. They are beginning to appear.”¹⁰⁸⁰ In the positive sense, making explicit their

¹⁰⁷⁶ On which, see Ewen A. Cameron ‘Civil Society, Protest and Parliament: Housing and Land in Modern Scotland’, in Dickinson and Lynch (eds.) (2000), p.123

¹⁰⁷⁷ Michael Keating ‘Managing the Multinational State: Constitutional Settlement in the United Kingdom’, in Trevor C. Salmon and Michael Keating (eds.) *The Dynamics of Decentralization: Canadian Federalism and British Devolution* (Montreal, London, Ithaca, McGill University Press, 2001), p.21 [my emphasis]

¹⁰⁷⁸ Declaration of Arbroath 1320

¹⁰⁷⁹ Owen Dudley Edwards (ed.) *A Claim of Right for Scotland* (Edinburgh, Polygon, 1989)

¹⁰⁸⁰ Edwards (1989), pp.9-53

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rejection of the Diceyan orthodoxy, the *Claim* reaffirmed Scotland's right to self-determination: the right "to articulate its own demands and grievances, rather than have them articulated for it by a Government utterly unrepresentative of the Scots."¹⁰⁸¹ In that respect, it concluded with the call for a Convention to draw up the framework for a Scottish Assembly, and to mobilize Scottish public opinion behind that scheme. Duly convened, the Constitutional Convention opened proceedings by re-emphasising the voice of the constituent *against* constituted power: the convention chair, Canon Kenyon Wright, in a moment of great rhetorical flourish telling the assembled body, and more pointedly the watching public, that, should the Conservative government say to the Conventions proposals, "No, and we are the state," the response should be "Well, we say Yes, and we are the Scottish people."¹⁰⁸²

In a flurry of activity, in particular between 1989 and the general election of 1992, the Convention set to work on drawing up the blueprint for a devolved Scottish assembly, operating within the framework of the (albeit, a reconstituted) United Kingdom. In spite of the various interests present, the group was able to achieve substantial consensus in the face of disagreement: on the policy areas which should be devolved; on the tax raising powers which the parliament should enjoy (powers to implement a small increase in income tax (3p in the £1; no power to control corporation tax); on the parliament's relationship with the European Union, and with the European Convention on Human Rights; on gender equality; on the models of openness and consultation to be adopted; on the number of seats in the chamber; and, on the issue where there was most disagreement to be overcome, on the electoral system to be used to elect MSPs. Here, the Liberal Democrats favoured a system known as single transferable vote (creating large, multi-member constituencies with a share of seats proportionate to the share of votes won at the election). The Labour Party feared that the system was too complex, and that it lacked a sufficiently robust link between the elected MP and the constituency, and so proposed a variant on a party list system. In the end, something of a compromise was struck: the system agreed upon being part first-past-the-post (seventy-three members would be elected in this way), and

¹⁰⁸¹ Edwards (1989), pp.9-53

¹⁰⁸² Quoted in Harvie and Jones (2000), Ch.8, p.154

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part drawn from a list (fifty-six members elected on a regional basis in this way).¹⁰⁸³ Beyond the impressive framework set out by the Convention, there are three points that I would like to note in concluding the discussion, which take us back to the heart of this thesis.

First, what was being expressed by the Convention was a constituent voice. Rather than make any grand separatist claims which stood *outside* the constitution (hence, the non-participation of the SNP), the Convention represented a “paradoxical linkage” between on the one hand, “a commitment to constitutional form,” and on the other, “a claim that the sub-state national society is *constitutionally* entitled to revive the pluralized version of constituent power with which it and other national societies entered the union.”¹⁰⁸⁴ Indeed, it would seem that the Convention was the final, self-constituted expression of a voice which had no other agent to carry it. In Parliament, the overwhelming Tory majority ensured that Scottish M.P.s could have little or no impact on legislation as it passed through the House from the government to the Royal Assent. In Parliament House meanwhile, litigants had found the Court of Session unsympathetic to their attempts to challenge the validity¹⁰⁸⁵ and damaging effects¹⁰⁸⁶ of primary legislation. And yet, rather than sink in to lethargy and accept their lot, the Scottish people called invoked the only *power* they retained, the ‘spirit of resistance.’ Both in the well attended gatherings of the Anti Poll Tax Unions,¹⁰⁸⁷ and in the more formal setting of the Scottish Constitutional Convention, Scottish people were saying, indeed took the initiative themselves to say ‘*we want to participate, we want to debate, we want to make our voices heard in public, and we want to have a possibility to determine the political course of our country.*’

¹⁰⁸³ On the negotiating framework of the Convention, see Brian Taylor *The Scottish Parliament* (Edinburgh, Polygon, 1999), esp. Ch.4. The final report of the convention, containing the details of the agreed framework, was published in 1995: *Scotland’s Claim, Scotland’s Right* (Edinburgh, Scottish Constitutional Convention, 1995).

¹⁰⁸⁴ Tierney (2007), pp.242-243

¹⁰⁸⁵ *Murray v Rogers* 1992 SLT 221

¹⁰⁸⁶ *Pringle, Petitioner* 1991 SLT 229. For more on these cases, see Denis J. Edwards ‘The Treaty of Union: more hints of constitutionalism’ (1992) 12 *Legal Studies* 34; Chris Himsworth and Neil Walker ‘The Poll Tax and Fundamental Law’ (1991) *Juridical Review* 45

¹⁰⁸⁷ As Lavalette and Mooney report it ((2000), p.218):

[The local ATPU organisers] were nearly always taken aback by the response. In apparently ‘demoralised’ working-class communities which had suffered from unemployment, poverty and deprivation, and within which the struggle for daily survival was immense, there were mass meetings of between 200 and 500 people, all of whom were bitterly opposed to the poll tax and determined to fight it.

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The second important point is the remarkable sense in which the power of that voice endured even after the Convention's own dispersal. The Conservative Party's (not altogether unsurprising) general election win in 1992 knocked the stuffing out of the Convention as a continually productive force. Public attention drifted away, and little of great value was added to the (substantial) meat of the proposals agreed upon before the election, with politicians on all sides believing that the Convention had run its course.¹⁰⁸⁸ And yet, when the devolution agenda was again, and decisively, kick-started by New Labour's landslide general election victory in 1997, and their manifesto commitment to deliver to Scotland (as well as to Wales and to Northern Ireland) devolved power, the will of the Scottish people *expressed by the long defunct Convention* seemed to place a restraint on what Parliament was willing to do: a number of legislative amendments suggested by members of the House of Commons being rejected on the basis that they ran counter to the settled will of the Scottish people set out in the Constitutional Convention.¹⁰⁸⁹ As a matter of law, Parliament may have retained the right to 'make or unmake' any law it so pleased; yet the *power* of that action-in-concert had created a political limit on the exercise of that (sovereign) right.

The third point, however, is a more pessimistic one. If the resistance to the poll tax created the openness in which the Scottish people could contest and ultimately restate their constitutional relationship with the United Kingdom, the devolution legislation itself at best fudged the sovereignty question,¹⁰⁹⁰ and at worst closed it off altogether: section 28(7) of the Scotland Act 1998 seemingly reaffirming the classic doctrine of parliamentary sovereignty with the assertion that the existence of a Scottish parliament, with extensive legislative power over a vast policy base, "does not affect the power of the Parliament of the United Kingdom to make laws for Scotland." Notwithstanding the achievement of devolution then, it would appear that the constituent power of the (Scottish) people remains (only) in reserve. Obscured but not subverted however, the lesson of this episode is that even from under the weight of Parliamentary sovereignty, and contrary to the myth of an apathetic citizenry, the action of the people in concert is capable of being re-called, and registering at the level of a reconstructive constitutional

¹⁰⁸⁸ Mitchell (1996), pp.287-290

¹⁰⁸⁹ See Norman (2002), Ch.4, p.87; Bognador (2009), Ch.4, p.117; Brigid Hadfield 'The United Kingdom as a Territorial State', in Vernon Bognador (ed.) *The British Constitution in the Twentieth Century* (Oxford, Oxford University Press, 2004), p.623.

¹⁰⁹⁰ Loughlin, in Loughlin and Walker (eds.) (2008), Ch.2, p.48

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dialogue between constituent and constituted power. Rather than downplay the significance or even the existence of extraordinary politics then, it seems to me that the challenge for republican political theory is to bring these moments out in to the open, and to understand them as legitimate expressions of an otherwise unheard constitutional voice.

Part III(4) Freedom of Information

On opinion and information

I have said that for Arendt, the right to “unmanipulated factual information” was nothing less than the “most essential” of political freedoms. This, she said, because without it “opinion becomes a cruel hoax.”¹⁰⁹¹ In Part I, I have stressed that in reading Arendt one must see opinion as something of a term of art. It is not, as it might normally be understood, the preserve of the individual: the preconceived, perhaps ideologically or internally formed view through which one might begin to approach particular political questions. Rather, opinion was something to be formed in the public space: by debate, by discussion and by exchange amongst, as Richard Bernstein put it, “a political community of equals.”¹⁰⁹² This is *vital* to an Arendtian reading of political action for two reasons. First, thus understood as ‘representative thought’ – “I form an opinion,” we remember, “by considering a given issue from different viewpoints”¹⁰⁹³ – the formation of valid opinions demanded both the willingness to receive information and the courage to transmit it. It is through such exchange that the individual becomes more than a private actor, more than a spectator, but a *participator* in public affairs. Second, it was as a result of that exchange, what Arendt called publicity, that the reality of public affairs could be disclosed to its participants. Each of these propositions struck Arendt with great force when the full extent of the leaked *Pentagon Papers* was revealed. On the one hand, it became clear to her that the (over)classification of those documents had deprived the people and their representatives in Congress of the information that they needed to hold the Johnson administration to account for the execution of war in the Indochina Peninsula. If it was Arendt’s concern that the result of the

¹⁰⁹¹ Arendt, *LIP*, p.45

¹⁰⁹² Richard Bernstein ‘Judging – the Actor and the Spectator’, in Richard Bernstein *Philosophical Profiles* (Philadelphia, Philadelphia University Press, 1986), p.231

¹⁰⁹³ Arendt, *BPF*, p.241

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folding back of the public space within the four walls of the legislature was to once more leave the business of government in the hands of the few (the representatives),¹⁰⁹⁴ then the tendency of the administration to secrecy and the over-classification of information deprived even *that* few of the ability meaningfully to participate: “those in most need of the information,” she observed, “have [never] read it [n]or ever will.”¹⁰⁹⁵ Even the peoples’ representatives, in other words, were no more than mere *spectators* of public affairs going on without them. On the other hand, if the people and their representatives had not gone far enough in *demanding* information, the administration had lacked either the courage or the will to expose its information to the rigours of public scrutiny where its validity could be tested. What is more, in the absence publicity, the National Security Council was capable of creating its own reality. How else to explain the intended ignorance shown by that clique towards the factually accurate information supplied to it by the intelligence services in the region?¹⁰⁹⁶ Although she did not reference the case herself, Arendt’s disdain for the over-classification of information here mirrored the concurring opinion of Justice Potter Stewart, when the issue of the *Pentagon Papers* leak was tested before the Supreme Court in *New York Times v United States*.¹⁰⁹⁷ “In the absence of governmental checks and balances,” he said, “the only effective restraint upon executive policy and power might lie in an informed and a critical public opinion.”¹⁰⁹⁸ Linking this thought to Part II, and the resistance to ship money, one might recall that it was (although not as it was intended!) a rare instance of free information which turned Englishmen away from compliance and towards resistance, first against the tax itself and then against the monarch who had imposed it. After all, we can recall that compliance was relatively steady until the King demanded that the Hampden judgement, decided in his favour, be published far and wide for his subjects’ perusal. The information that they received, of course, was such that they could swear was not valid law and thus a monarch who called himself absolute - without checks and balances, to couch it in Justice Stewart’s terms - was restrained and ultimately overthrown by the action of an informed and critical public.

¹⁰⁹⁴ Arendt, *OR*, Ch.6, p.237

¹⁰⁹⁵ Arendt, *LIP*, pp.30-31

¹⁰⁹⁶ Arendt, *LIP*, pp.22-23

¹⁰⁹⁷ 403 U.S. 713 (1971), where the U.S. government failed to win an injunction against that newspaper printing further news stories that emerged as a result of the leak

¹⁰⁹⁸ See Justice Potter Stewart, at 727-730

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Seen in this light, freedom of information has a quite radical potential: for a legitimately *critical* public can only emerge from an *informed* public. As Constant warned, in modern conditions ‘partial injustices remain unknown to almost all the inhabitants of our vast regions.’ The right to information, as it was in the aftermath of *Hampden’s case*, is one way in which the dots of partial injustices can be joined to reveal the true picture of domination: where individuals can learn that it is not simply *their* individual rights that are at stake, but the very rights of the polity as a whole to *have* rights. The *problem* of information is particularly acute in Britain where, as Harlow and Rawlings have said, the culture of secrecy is (and I use the present tense intentionally here) one deeply embedded into British political culture:

For nearly a century, government [has] been regulated by official secrets legislation, which put government firmly in control of what official information was released into the public arena.¹⁰⁹⁹

How then, are we to ensure a citizenry that is both critical and informed when information is the preserve of government; preserved, furthermore, by the legislative acts of a sovereign parliament? The answer, it seems to me, lies once more in the extraordinary, and the possibilities of action.

In 1985, Clive Ponting, a senior civil servant serving in the Ministry of Defence, was prosecuted under section 2 of the Official Secrets Act 1911 when, contrary to that section, he passed sensitive information to the (then) Labour M.P. Tam Dayell. The information therein pertained to the sinking, during the Falklands War, of the Argentine warship *General Belgrano*, which occurred on 2nd May 1982. The sinking of the *Belgrano* was a hugely controversial moment during the Falklands crisis. Explaining the events which led to the sinking in an Official Report to Parliament made just two days later, the (then) Conservative Secretary of State for Defence, John Nott, said that the ship had been attacked almost as soon as it had been detected, at around 2000 GMT. Furthermore, he added (1) that at the time of its sinking the ship was headed *towards* a total exclusion zone surrounding the islands, (2) that it had thereby come within the line of a British task force in the area, and (3) that the commander of one submarine, HMS *Conqueror* - in full accordance with the rules of engagement - had taken the decision to strike.

¹⁰⁹⁹ Harlow and Rawlings (2009), Ch.10, p.470

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This account was directly contradicted, however, by the *Conqueror's* commanding officer, Christopher Wreford-Brown, who suggested that the *Belgrano* was in fact spotted the day *before* it was attacked, and that the decision to strike had come from London, where the rules of engagement had been altered to allow for attacks beyond the exclusion zone, rather than from Wreford-Brown himself. As a result, Dalyell (amongst others) began vigorously to pursue the matter in Parliament. Under political pressure at home and abroad Nott's successor, Michael Heseltine, ordered Ponting and his colleagues immediately to begin the work of compiling an internal report in to the matter, which came to be known informally as the *Crown Jewels*: a top secret account of the events leading up to and including the sinking of the *Belgrano*.¹¹⁰⁰

In the course of compiling that information, Mr Ponting came to the opinion that the official record given to Parliament was incorrect, that the true series of events had therefore been withheld from M.P.s, and that there were no reasonable grounds of national security which precluded him from setting the record straight. When the House of Commons' Foreign Affairs Committee, chaired by Sir Anthony Kershaw, began to ask questions of the affair, in particular when they began to question whether or not the sinking of the *Belgrano* was in fact an attempt to scupper a Peruvian-led ceasefire initiative,¹¹⁰¹ Ponting recommended to Heseltine that the committee should be given as open and as frank an account as possible. Heseltine, however, took contrary advice from others, including the Armed Forces Minister, John Stanley, who warned him that to do so would be to expose the extent of the initial cover up, such as would cause the government serious political embarrassment. Thus, Heseltine offered only opaque answers designed to "stonewall" the Committee's inquiry.¹¹⁰² Concerned that both the people and their representatives in parliament were being misled, Ponting subsequently leaked two documents to Dalyell, one of which - the infamous 'Legge memorandum' - detailed for Heseltine the 'hows' and 'whys' of withholding information from the committee.

¹¹⁰⁰ See Clive Ponting 'R v. Ponting' (1987) 14(3) *Journal of Law and Society* 366; Rosamund M. Thomas 'The British Official Secrets Act 1911-1939 and the Ponting Case' (1986) *Criminal Law Review* 491, p.492

¹¹⁰¹ This claim has since been rebutted by Lawrence Freedman in his *Official History of the Falklands Campaign* (2 vols.) (London, Routledge, Taylor & Francis, 2005),

¹¹⁰² Clive Ponting *Right to Know: The Inside Story of the Belgrano Affair* (London, Shepherd Books, 1985), p.149

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It was for this leak that Ponting was charged under section 2 of the 1911 Act: a “catch all” provision remarkably wide in scope,¹¹⁰³ which made it an offence for any person holding political office to communicate official information to any other person, other than to one with whom he is authorized to communicate, or to one “to whom it is, in the interest of the State, his duty to communicate it.”¹¹⁰⁴ It was agreed on both sides that Dalyell was not authorized to receive the information. Thus, the success of Ponting’s defence would depend upon being able to paint Dalyell as someone to whom the information was passed in the wider interests of the State.

What happened next came as a great surprise. By raising this defence, the trial judge, McCowan J., was faced with determining what sorts of information and what classes of recipient appropriately fell within the definition of the act. From the prosecution, it was argued that a ‘duty in the interest of the state’ could only mean an official duty, and that the interests of the state were synonymous with the interests of the government of the day. In order to succeed, Ponting’s legal team would need to persuasively argue the opposite: that both the duty and the ‘interests of the state’ should be given as wide a reading as possible. As Ponting himself recalled, McCowan J. gave them no encouragement:

*The judge said he was not impressed by our arguments and that if he accepted the prosecution arguments then there would be no scope for an acquittal, since I could not have been acting in the interests of the government (that is, Michael Heseltine) and that he would, therefore, have to direct the jury to convict me.*¹¹⁰⁵

Drawing on the authority of *Chandler v DPP*¹¹⁰⁶ - where the term “state” under the 1911 Act had been interpreted to mean “the realm”, “the organized community”, or the “organs of government of a national community”, and where, according to Lord Devlin, the “interests of state” meant no more than those interests determined by the Crown, as decided by her Ministers¹¹⁰⁷ - the trial judge directed the jury to the effect that the prosecution needed only to show that Ponting had not acted in the interests of his (and, he reminded the them, *their*) government, whether they

¹¹⁰³ On which, see J.A.G. Griffith ‘Official Secrets and Open Government’, in Griffith (1981), p.63, esp. p.65

¹¹⁰⁴ Official Secrets Act 1911, s.2(1)(a)

¹¹⁰⁵ Ponting (1987), p.370

¹¹⁰⁶ [1964] AC 763

¹¹⁰⁷ *per* Lord Devlin, 806-812

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agreed with its policies or not,¹¹⁰⁸ in order to secure a conviction.¹¹⁰⁹ It was, therefore, not for Ponting, not for Dalyell, nor indeed for anyone outside of government for that matter, to determine what was in the public interest, and what was required to be done to meet it. On such a narrow reading of the act, Ponting was clearly guilty. The jury, however, had other ideas and, ignoring the government's counsel, ignoring too the direction of the judge, saw fit to acquit the accused.

In his reflections on the case, Neil MacCormick has offered two powerful readings of the jury's surprising decision. One way of reading it was through the lens of the 'Perverse Verdict': that the jury saw itself as the "plain person's censor of the law," and that where the law itself, or the use to which that law is put by agents of the executive, presents an affront to morality, the jury will fly in the face of the law, and acquit. Applying this reading, MacCormick found favour with Lord Devlin's opinion in *Chandler*, calling it a "highly arguable" view that (as was the case) interference with the disposition of the armed forces ran contrary to the "interests of the state" (and therefore to the act); that it was a fundamental democratic principle, one which we could expect the law to enshrine and protect, that the armed forces act at the command of the civilian executive, who are in turn themselves accountable to Parliament. By extension, he said, one might think it equally in the interests of the state, in the interests indeed of a working democratic state, that the civil service answers to the executive, and not vice-versa. In that sense, MacCormick said, the jury's findings might not only be 'perverse' in the legal sense, but might also run contrary to moral and democratic values.¹¹¹⁰

A second reading of the case, this time drawn along explicitly Dworkinian lines, was one which MacCormick labeled the "Unsound Interpretation Theory." Applying this reading, the jury had not erred as to the law at all but, to the contrary, it was McCowan J. himself who had erred in reading section 2 so narrowly. Seen from this perspective, the trial judge had wrongly equated the interests of state with the interests of government, and in doing so had invited the jury to convict on the basis of a misconception. Accordingly, far from 'perverting' the law, it was the jury – through their decision to acquit – who had *restored sense* to the law. There was, in other

¹¹⁰⁸ Thomas (1986), p.497

¹¹⁰⁹ Ponting (1987), p.371

¹¹¹⁰ MacCormick (1999), Ch.3, pp.33-38

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words, a correct legal answer to be found: in this case, however, it was the jury, and not the judge, who found it.¹¹¹¹

For my own part, I would suggest a reading which sits somewhere between the two. The second reading is one which supposes an active and informed jury, sharp to the technicalities of the law and its application. Yet this was not how Ponting recalled it. In his view, the jury had appeared “intensely bored” by the arcane piles of civil servant reports put before them.¹¹¹² Where Ponting believed his team had struck a chord with the jury, however, was their success in opening up the public interest argument. The trial had, due to the concerted efforts of his legal team, achieved huge publicity; to the extent that highlights of each day’s events in court were being shown on national television. Thus, despite warning the jury that the question of public interest was irrelevant, in a remarkable summary which went so far as to justify the sinking of the *Belgrano* itself,¹¹¹³ it proved impossible for McCowan J. to incubate the jury from the question of public interest. Had the jury been exposed simply to the evidence before it, and the judge’s summary of that evidence, Ponting was certain that he would have lost the case; that the jury, in other words, would not have detected an ‘unsound’ reading in McCowan J.’s conclusions and would have returned a guilty verdict.¹¹¹⁴ Yet by exposing the jury not only to the arguments being made *inside* the court, but to the wider public interest arguments being made *outside*, it became impossible for those serving on the jury to close their minds to the alternative: to returning a ‘not guilty’ verdict.

Bringing this back to Arendt, allow me to make two final observations. Away from the glare of publicity the sins of the government were two-fold. On the one hand, there was the sinking of the *Belgrano* itself; an unnecessary act of aggression which had resulted in approximately 300 people losing their lives.¹¹¹⁵ On the other hand, there was a deliberately orchestrated attempt to mislead both parliament and the wider public as to the true nature of the events which had taken place that day; the latter a deliberate attempt to deprive parliament and people of the information that they needed adequately to hold the government to account for the former. On both counts,

¹¹¹¹ MacCormick (1999), Ch.3, pp.38-40

¹¹¹² Ponting (1987), p.371

¹¹¹³ Ponting (1987), pp.369-370

¹¹¹⁴ Ponting (1987),p.370

¹¹¹⁵ Estimates put the total dead at anywhere between 275-368

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the government was protected by legislation (the Official Secrets Act) and by prevailing constitutional norms (the prevailing culture of secrecy in which British government operated at that time).¹¹¹⁶ What is more, by jealously guarding the information, the government was able to ‘create’ its own reality, its own account of what happened. It was, therefore the shining of publicity which here exposed the abuse of public power by private interests; what is more, it was the creation of a public space between Ponting, the government, the bench and the jury by which the public interest argument and, therefore, the limits of the Official Secrets Act itself, could be (re)interpreted by the jury. As with the civil disobedients discussed above, both Ponting *and* his action had been brought within the fold of the constitution by the acceptance of his not guilty plea: in the name of the public’s *right to know*.

Secondly, just as the constituent power of the American people was closed off by the constitution it created; just as the courts seek to close off the communicative act of civil disobedience by demanding a ‘guilty’ plea which reaffirms the status quo *ante*; just as the sovereignty of the Scottish people was rejected by the very Scotland Act which it had inspired; just as Machiavelli warned that those who ‘have’ power will inevitably tend towards domination, towards yet more power; so too the highest achievement of the campaign for free information, the Freedom of Information Act 2000, in the end, fudged the constitutional principle – the public’s right to know - by which Ponting was acquitted: for the fact is that, under that act, the government retains the right, as *Yes, Minister*’s meddling civil servant Sir Humphrey Appleby put it, to “mak[e] public only that information which is already known or can easily be found out some other way.”¹¹¹⁷

Whilst New Labour came to power with a manifesto commitment to introduce wide ranging freedom of information reform, and indeed produced a much heralded white paper, *Your Right to Know*, to that effect,¹¹¹⁸ the Bill which was eventually put before parliament was so unimpressive in scope that the House of Lords Select Committee called it “a statement of good intentions, but...not a Freedom of Information Act as that term is internationally understood.”¹¹¹⁹ Persistent

¹¹¹⁶ On which, see David Vincent *The Culture of Secrecy: Britain 1832-1998* (Oxford, Oxford University Press, 1998)

¹¹¹⁷ Sir Anthony Jay and Jonathan Lynn, ‘Notes to the Principal Private Secretary: Transparency’ www.yesprimeminister.co.uk (7th September 2010)

¹¹¹⁸ *Your Right to Know: The Government’s Proposals for a Freedom of Information Act*, Cm.3818 (1997)

¹¹¹⁹ Report from the Select Committee Appointed to Consider the Draft Freedom of Information Bill.

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freedom of information campaigners, Carol Harlow and Richard Rawlings called the resulting Act “one of the world’s more restrictive pieces of information legislation;”¹¹²⁰ whilst for Rodney Austin, the Act was no better than “a fraud on democratic accountability.”¹¹²¹ What has attracted the ire of these critics is manifold, but two examples will suffice here. Section 1 of the Act sets out the general rule that anyone making a request from a public authority for information is entitled both to be informed whether or not the authority holds that information, and if so, to have that communication communicated to her: so far, so open. The particular provision which attracted the House of Lords Select Committee’s attention, however, was that which reserved for the government a wide ranging veto power. Section 53 of the Act allows an ‘accountable person’ - meaning, for the most part, a Cabinet Minister or the Attorney-General - to veto a notice from the Information Commissioner, where he “gives the Commissioner a certificate signed by him stating that he has on reasonable grounds formed the opinion that, in respect of the request or requests concerned, there was no failure falling within subsection.” In other words, Ministers have extraordinary scope to decide, contrary to the opinion of the Information Commissioner, that information should not be put in the public domain. ‘Your Right to Know’, therefore becomes Your Right to Know What the Government Is Willing to Tell You’. What is more, there is no duty on the minister to give the commissioner reasons for his coming to the opinion against disclosure. Thus far, the veto has been used twice: on each occasion, it was said, to prevent the minutes of cabinet meetings from being made public in the name of cabinet’s collective responsibility.¹¹²² On the first occasion, those minutes concerned cabinet discussions over the Iraq war. The *use* of the veto in such a situation is barely a surprise: the matter being one lodged firmly in an area in which government has (almost) always operated beyond serious scrutiny and accountability; nor on this occasion was the *use* of the veto itself especially troubling. Debates about Iraq have been heard and reheard for a number of years, played out in minute detail in the media, and – more importantly – have been subject to a number of inquiries (including the Hutton, Butler, and Chilcot inquiries) at which the decision making process, and its failings, have been laid bare. Indeed, if the surprising thing for Arendt in reading the

Session 1998-1999, HL 97, paragraph 21

¹¹²⁰ Harlow and Rawlings (2009), Ch.10, p.474

¹¹²¹ Rodney Austin ‘The Freedom of Information Act 200 – A Sheep in Woolf’s Clothing?’, in Jeffrey Jowell and Dawn Oliver (eds.) *The Changing Constitution* (Oxford, Oxford University Press, 2000), p.401, p.415

¹¹²² Thus far, the veto has been used twice: both times to prevent the minutes of cabinet meetings from being made public (over Iraq, and over devolution), in the name of cabinet’s collective responsibility. See ‘Minutes of cabinet meeting to ‘stay secret’ *BBC News* 10th December 2009

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Pentagon Papers was how little of it was actually *new*, that most of it would have been ‘old hat’ to those who read the daily newspapers, it seems that much of what has been heard at these Iraq inquiries has conformed closely to what we already knew. Nevertheless, the *existence* of the veto is itself a source of domination, and one against which we must be vigilant, lest the scope and use of the veto expand into areas where the stakes are less high: the second use of the veto showing signs that this is already beginning to happen. Here, a request for the release of the minutes of cabinet discussion over devolution, some 17 years after the fact, was vetoed by Jack Straw, despite the Information Commissioner’s determination that “the minutes themselves do not offer much insight into the nature of the debate or the contributions of individual ministers which would, as suggested by the Cabinet Office, undermine the convention [of collective responsibility].” It was, therefore, the Commissioner’s expressed concern that “the government may routinely use the veto whenever he orders the disclosure of the minutes of Cabinet proceedings, irrespective of the subject matter or age of the information.”¹¹²³

The second bone of contention lies with the 23 exemptions which apply to the act. The range of exemptions is (even comparatively speaking) extraordinary: extending to information already accessible to the public; information that will in future be published; information likely to affect relations between the devolved administrations; information likely to prejudice the economic interests of the UK, or of any devolved administration; information likely to prejudice the efficient functioning of cabinet government; information which would infringe upon the privileges of either House of Parliament; information relating to the Queen, the Royal Family, or the conferment of honours by the Crown; information relating to public audit functions; and more still. Indeed, it has been said that as a result of breadth of exemptions to the Freedom of Information Act the citizen will actually be entitled to less information than she was under the previous (non-statutory regime).¹¹²⁴ As one would expect, politicians know how to play the rules with aplomb. Thus, when (then) Northern Ireland Secretary Peter Mandelson was under investigation for his role in the Hinduja passport affair, the authorization of an internal inquiry by the retired former Treasury Solicitor provided cover against the release information relating to the affair, on the basis that the internal inquiry report would, in future, be published.¹¹²⁵ The

¹¹²³ *Op.cit.* fn.1113

¹¹²⁴ Austin (2000), p.413

¹¹²⁵ On which, see Birkinshaw (2001), Ch.6, pp.307-308

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point, however, is this: contrary to the grand claims which they made in coming to office, the provisions of the Freedom of Information Act have, in effect, “enshrined,” for the government, “a discretionary power to choose what information to disclose.”¹¹²⁶

Taking this back to Ponting, it seems clear that the information which he leaked, touching upon a sensitive matter of national security, would remain out of the public domain even *after* the coming in to force of the Freedom of Information Act. Where the right to know remains at its most radical, then, is not in the exercise of the rather tame access to information allowed by the Act, but rather in the rupture that is to be created when information is exposed in the public realm *in the face of* the Act. Harlow and Rawlings have strongly criticized Britain for erecting a “wall of silence which blocks public access to information.”¹¹²⁷ Highlighting the extent to which the active exercise of freedom of information might itself bring citizens into conflict with the authorities, the pair point to the reluctance of courts to support the public’s “right to know”. “British courts,” they said, and we have seen one clear example from McCowan J in Ponting, “are distinctly hostile to moles, whistleblowers, and hoarders of leaked information;”¹¹²⁸ who were likely to be prosecuted under the Official Secrets Act, or were likely to find themselves the object of an injunction. That so, they warned, campaigns for obtaining or using information *in* the court were likely to bring campaigners into conflict *against* the court.¹¹²⁹ The lesson of Clive Ponting, however, is that these are conflicts that can be won: by inviting the jury to put themselves in his shoes, to engage in representative thinking with him in the court room about the limits of the law, Ponting was able to create *in* the courtroom, *against* the direction of the presiding judge, *between* the actors in the court room, the space in which the government’s inherent secrecy, and its attempts thereby to evade accountability could be opened up and, quite extraordinarily, rebutted. To remind us, once more, what is at stake here, let us recall Arendt: that without information, opinion – the very lifeblood of the public realm – is nothing but a cruel joke.

¹¹²⁶ Austin (2000), p.415

¹¹²⁷ Harlow and Rawlings (1992), Ch.4, p.172

¹¹²⁸ Harlow and Rawlings (1992), Ch.4, p.173

¹¹²⁹ Harlow and Rawlings (1992), Ch.4, p.173

Conclusion

My stress, here has been to reclaim for freedom as non-domination the positive, political liberty at its heart: that in the absence of a vibrant public realm, those who dominate will be encouraged to tyranny, to injustice, even – as Arendt feared – to proto-totalitarian means of government. There is little doubt, in my view, that we in Britain are dominated by a sovereign Parliament which can ‘make or unmake any law whatsoever’ and against whose acts no other body has the power lawfully, constitutionally, to resist. Now, this might appear – on the face of it – an odd time to restate the urgency of Parliament’s domination. After all, it would appear that we are, as it stands, in a moment of great constitutional fluidity where the fundamental principles at the heart of the constitution – and none more so than the absolute sovereignty of Parliament – are up for grabs. The most striking evidence of this ‘openness’ came in the much discussed House of Lords decision, *Jackson v Attorney General*.¹¹³⁰ The facts of this case have been well rehearsed elsewhere and are in no need of elaboration here.¹¹³¹ What is relevant for our purposes, however, are the various statements made by their Lordships in *obiter* about the continuing relevance of Parliamentary sovereignty. On the one hand, we heard Lord Bingham restate in no uncertain terms his view that the orthodox Diceyan reading of Parliamentary sovereignty remains the “bed-rock of the constitution.” It followed that Parliament may “make or unmake any law [whatsoever]. Statutes,” he said, “formally enacted as Acts of Parliament, properly interpreted, [enjoy] the highest legal authority.”¹¹³² This is so, in Lord Bingham’s view, even where those Acts clearly and unambiguously breach Britain’s obligations under international treaties or remove fundamental human rights.¹¹³³ If Lord Bingham is correct then we must say that to the extent that we in Britain enjoy (fundamental/constitutional/human) rights we do so only in the knowledge that at any time those rights, by an Act of Parliament, might arbitrarily (and I will say more on this in a moment) be taken away: we have no (political) right to *have* those rights. What

¹¹³⁰ [2005] UKHL 56

¹¹³¹ See, for example, Tom Mullen ‘Reflections on Jackson v Attorney General’ (2007) 27(1) *Legal Studies* 1; Alison Young ‘Hunting sovereignty: *Jackson v Her Majesty’s Attorney General*’ [2006] *Public Law* 187; Jeffrey Jowell ‘Parliamentary sovereignty under the new constitutional hypothesis’ [2006] *Public Law* 562

¹¹³² Per Lord Bingham, para.9

¹¹³³ Tom Bingham *The Rule of Law* (London, Penguin Books, 2011), Ch.12, p.162

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is at stake in these efforts to reassert political liberty has already been set out by Conor Gearty and Keith Ewing: “the British approach of refusing to assert positive rights gives freedom no weapons to defend itself.”¹¹³⁴

Contradicting Lord Bingham were the triumvirate of Lord Hope, Baroness Hale and, most conspicuously, Lord Steyn. For Hope, whilst “our constitution is *dominated* by the sovereignty of Parliament...parliamentary sovereignty is no longer, if it ever was, absolute.” In his Lordship’s view, “[s]tep by step, gradually [that] principle...is being qualified.” This was to say that the ‘bedrock’ of the constitution, as Lord Hope saw it, was certainly *not* the sovereignty of Parliament; rather “the rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based.”¹¹³⁵ As it was put by Baroness Hale, the consequence of taking such a view is that there are certain actions (such as any attempt to circumvent the rule of law by curtailing access to judicial review) which “the courts will treat with particular suspicion (and might even reject).”¹¹³⁶ Lord Steyn continued the theme. For he, “[t]he classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom.,” and whilst he accepted that the sovereignty of Parliament remained the “general principle” of the constitution he pointed to several examples – common law constitutional rights, the devolution acts, the European Convention on Human Rights and the Human Rights Act, the European Communities Act – by which that principle had been corroded.¹¹³⁷

As it relates to this thesis, there are three points to make here. The first is the quite alarming proposition that – as it appears, anyway - the senior-most judges, in the highest court of the land simply *do not know* what the fundamental principle(s) of the British constitution (in fact and in theory) are. As Tom Mullen has said, “the most obvious reading of the case is that certain judges are staking out their positions for *future* battles;” that:

¹¹³⁴ Ewing and Gearty (1990), intro., p.9

¹¹³⁵ Per Lord Hope, para.104 [my emphasis]

¹¹³⁶ Per Baroness Hale, para.159 [parenthesis in the original]

¹¹³⁷ Lord Hope also suggested that the Treaty of Union imposes limits upon Parliament’s sovereignty (para.106). As I have said in Pt.III(3), however, those limitations seem to be more apparent than real: there has yet - in over over 300 years – to be a single case in which the courts have been willing to strike down a legislative act on the basis of its contradiction with the Acts of 1707, despite the iconic *obiter* delivered by Lord President Cooper; whilst elements of those Acts have since been repealed by ordinary Acts of Parliament.

*...[the judiciary] do fear that Parliament and governments cannot be trusted in all circumstances to refrain from passing legislation inconsistent with fundamental rights, the rule of law or democracy. When a case involving such ‘unconstitutional legislation’ arises they want to be in a position to strike it down without appearing to invent new doctrine on the spot. They want to be able to say that they are applying established constitutional doctrine.*¹¹³⁸

The second point is that, notwithstanding this apparent openness, this apparent fluidity, the enduring *strength* of Parliamentary sovereignty shines through the cracks of Hale’s, Hope’s and Steyn’s logic. Take the examples offered by Lord Steyn: devolution, human rights and European union. Each of these so-called limitations on Parliament’s right to ‘make or unmake any law whatsoever’ were themselves created by Acts of Parliament, in the ordinary way, and over which (theoretically at least) one must presume Parliament retains the right to ‘unmake’ by repeal: theory which might soon be tested should the Conservative Party’s stated intention of repealing the Human Rights Act with an indigenous bill of rights garner broader support.¹¹³⁹ What is more, the fact that these fundamental constitutional changes were, ultimately, enacted through legislation by Parliament, and not in adjudication by the courts, would seem to strike against the claim that it is the latter upon whom the constitution ultimately rests. The judges, fearful of trusting parliament with so absolute a power may *want* to be in a position to strike unconstitutional legislation down: yet even those who express that view most forcefully struggle to explain away the supremacy of that institution.

The third point is that which brings me back to Arendt. If parliamentary sovereignty endures, then so too does the fiction upon which it has been built: that political power does not spring forth from the people, but *inheres* in Parliament itself. As Martin Loughlin has said, “[o]ne dubious legacy of the modern settlement,” that is to say the ‘unquestioned allegiance to the parliamentary system’, “is that the question of constituent power has become buried so deeply that scarcely any of the recent self-styled radical reformers have managed to find their way back to [its] basic precepts...and, even as an exercise in constitutional imagination, to conceive the

¹¹³⁸ Mullen (2007), p.15 [my emphasis]

¹¹³⁹ At the time of writing the Ministry of Justice has established a commission made of “human rights experts” to look in to the possibility of replacing the Human Rights Act (and therefore the Convention rights) with a British Bill of Rights.

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exercise afresh.”¹¹⁴⁰ The ‘real’ world of human plurality remains obscured by the ‘imaginary’ supposition that Parliament *is* the people, that the will and consent of the people is already bound up in its legislative acts, and that therefore there are no channels through which the people might legitimately, lawfully, *constitutionally*, express their dissent to those acts.

Why Arendt matters then, what she is able to bring to British constitutional discourse, is the three-fold insight first, that the mere capacity to interfere arbitrarily in the affairs of others itself induces the dominator to injustice; second that it is in a public realm constituted by the people themselves, and not amongst political or judicial elites, that the will to dominate can most surely be checked; third, that the action-in-concert by the people outwith *institutions* remains nonetheless *constitutional*: the clandestine nature of the criminal act conducted outside of the law here contrasted with the public nature of dissent in the name and the spirit of the law. Let me conclude this thesis by developing this proposition which I will put as follows: that Arendt matters precisely because she puts the human condition of plurality at the heart of her constitutional thought.

So, in Part III I have chosen three examples whereby domination and the absence of the public have fomented the conditions within which injustice could occur. When Parliament was misled (by exaggerated – ‘sexed up’ - intelligence) and cajoled by government (through threats and promises of a party/private nature) into supporting the unlawful invasion of Iraq in 2003, contrary to the observable strength of public opinion *against* such action, the people found an executive endowed with the war making powers of an absolute sovereign, a Parliament in which opposition to the war was overcome in deeply troubling ways, and a judiciary unwilling even to ‘understand’ the claim that government might (as it did) act contrary to international law. When the Conservative government passed the Abolition of Domestic Rates Etc. (Scotland) Act 1987, imposing the Poll Tax on a country – Scotland – in which they held only a handful of seats and yet over which, pre-devolution and by virtue of a strong majority in the House of Commons, they wielded the absolute power of Parliamentary sovereignty, the Scottish people found themselves

¹¹⁴⁰ Loughlin, in Loughlin and Walker (eds.) (2008), Ch.2, p.48. Whilst Loughlin sees the ‘basic precepts of constituent power emerging with the Levellers, in Part II I have attempted to trace the argument back further still, to the earlier half of the 1640s when the peoples’ active resistance to Ship Money demonstrated the power of their action-in-concert and paved they way for the likes of Parker to ground political legitimacy in that community.

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unable to influence a Parliament in which they were barely represented and unable to move a court unwilling to look behind that institution's properly enacted primary legislation. When the Conservative government authorised the sinking of the Argentine warship General Belgrano, they attempted deliberately to use Parliamentary legislation, the Official Secrets Act to deprive both the people and their representatives of information that would have shown them both to have acted in haste in sinking the ship, and to have knowingly misled Parliament about the circumstances surrounding the incident; a deprivation which, when tested in court, the trial judge defended vigorously. What is so striking in each of these examples, however, is not only that the public was shut off from any 'ordinary' institutional channel whereby the basis of those acts could be contested – and let us not downplay their gravity: illegal war; taxation without representation; an attempt to evade accountability for the needless death of 300 people – but that, contrary to the “basis of democracy in Britain which is still predicated upon the passivity of the majority,”¹¹⁴¹ on each occasion the public chose not to ‘slip into lethargy’ and rather to ‘invoke the spirit of resistance’: a right to *dissent* held in reserve as the corollary of their latent *consent*. So, the emergence of one million people on the street protesting against the impending Iraq war created a public space outside of those (defunct) institutional channels so powerful that the Prime Minister – despite wielding an absolute power over questions of war and peace - was compelled to allow Parliament an unprecedented vote on the matter.¹¹⁴² The locally and nationally organised non-payment of the poll tax, which began with impromptu gatherings in bus shelters and on traffic islands created the rupture, the resistance *against* Parliament's exercise of its sovereignty, within which the Scottish Constitutional Convention could, outside of formal institutional channels, assemble and – in a spirit of debate and action – lay the foundations for devolution and the fragmentation of legislative power. The heroic action of Clive Ponting, by leaking sensitive information about the government's underhandedness around the *Belgrano*, and the willingness of the jury to understand engage with the public interest arguments for that leak, to think of them from the perspective of the defendant and to come to a conclusion contrary to

¹¹⁴¹ Vernon Bogdanor *The New British Constitution* (Oxford, Hart Publishing, 2009), Ch.12, p.300

¹¹⁴² If the vote itself was flawed by misinformation and personal/party interest, this was Parliament's failure in an instance; the lasting power of those protests however might be seen in the concession made by that the series of debates leading up to Iraq “established a clear precedent for the future from which I do not believe there will be, or could ever be, a departure” (Jack Straw M.P. House of Commons Hansard, 15th May 2007, col.497. That this might now be established as convention remains to be seen, however Parliament's vote on Britain's involvement in U.N. approved air raid on Libya (which the government won overwhelmingly on 21st March 2011) suggests that the Prime Minister's war making powers may have, as a result of the political climate created by popular opposition to Iraq, been curtailed.

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the prevailing norm of government secrecy, created a powerful public space within the courtroom *against* the directions of the trial judge. What is more, finally, in each of these moments the actors understood themselves to be acting *in the name of* the constitution, *in the face of* its abuse: to already be acting within the constitution. So, we have seen how the public opinion against the war in Iraq turned on the question of its illegality. We have seen that for the Scots', the poll tax amounted to an abuse of Parliamentary sovereignty, driven by a government with little (electorally speaking) to lose in that country; their resistance an exercise in constitutional renewal that would eventually see both the *Claim of Right* and the SCC assert that people's constitutional right to determine its own political destiny. And, we have seen that the (hugely surprising) decision to acquit Ponting was precipitated by his plea of *not guilty* to a violation of the Official Secrets Act. In each case, action in concert – be it in huge numbers, by one million people on the streets of London asserting the illegality of war, by 80% of Scots rejecting the legitimacy of poll tax; or, on a much smaller scale, in the more intimate communication between defendant and jury – created a moment of openness in which new ways of thinking about the law were expressed, “projecting alternative norms, values, identities and ways of living and being into the wider societal milieu, both in terms of seeking acknowledgment and recognition and in terms of proposing alternative ways of living and being.”¹¹⁴³

In Part II, where I turned my mind to the tyranny, tumult and tracts of 17th Century England I sought to present an alternative to two orthodox readings of that period. The first orthodox reading goes that, to the extent that the (political) people were present in the ideological battles between Royalists and Parliamentarians, they were so only on the one hand as a working fiction propping up the republican claims being made on behalf of parliament; or, on the other hand, that they were the pre-political subjects of the King's divine rule. Because research of that period has tended to focus on the exchanges between crown and parliament, between the patriarchal Stuart monarchy, and the paternalistic order of the sovereign parliament, each of whom made their own claims to a fictional authority over the *whole* nation (that the king was appointed by God *for* the people; that the Parliament was the very embodiment *of* the people), I believe that a moment of huge (and yet fleeting) significance, has largely been missed: that moment, marked by the collective refusal to pay ship money, in which the people faced up to their domination by the

¹¹⁴³ Stammers (2009), Ch.6, p.165

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King and confronted the fiction of his divine right with the reality of their action-in-concert. In this moment of collective, active, resistance the people proved – as Hume said – that force is always on the side of the governed. When Charles I ordered the collection of Ship Money, the people quickly discovered that there were no institutional outlets through which they could express their discontent: the king was accountable, he said, only to God; Parliament had been dissolved; the courts, in the case of *Rex v Hampden*, passed so fawning a judgement in the King's favour that the people 'could swear it was not law.' Once more, however, the point is that the people did not slip in to lethargy, but came together – first in small meetings such as that at Great Kimble Church, but which became a national non-payment of the tax – in an act of *dissent* which re-opened for public scrutiny, debate, and negotiation, the very principles upon which their government was made. The second orthodox reading of the period, then, one held by Arendt herself, is that revolution in 17th century England was not a clean break from the past, a new constitutional beginning, but rather, and closer to its etymology, marked a revolve *back* to a pre-existing understanding of the constitution broken by the tyrannous acts of Charles I (and later, James II). This may have been true on a rhetorical level, however, the emergence of the people in resistance to the Crown, and to the judgement of the Crown's courts marked a radical shift in the constitutional landscape within which could emerge the first clear articulation of the constituent power of the people: that the power of the people could productively be put to creative as well as destructive ends. The force of this discovery was certainly felt by the Parliamentarians themselves. It was no coincidence that Parker's first Parliamentary tract, invoking republican language in the name of the people leapt on the illegality of ship money in making the proposition that parliament was the institution which could best guarantee their liberty. Nor was it a coincidence, however, that as the Parliamentary arguments were being won, Parker's propaganda began subtly to discourage that spirit, to convince the people that they were already present in Parliament. Parliament 'could do no wrong', it was said, because Parliament *was* the people; Parliament could not be resisted, it was said, because Parliament *was* the people; the consent of the people was already bound up in Parliament's acts, because Parliament *was* the people. In Part III, then, I have argued that the consequences of this myth – that Parliament is the people, that it embodies their consent, that it can 'do no wrong' (for what else is it to say that Parliament can make or unmake *any* law *whatsoever*?) – have obscured but *not* subverted the people: that when Parliament *has* done wrong (the imposition of Poll Tax over Scotland); when

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acts of Parliament have been used to further private over public interest (the attempt of the Conservatives to use the Official Secrets Act to evade democratic accountability); the people have shown themselves willing and able to reinvoke that spirit.

I have chosen these examples because, in my view, they support the theoretical (sub)hypothesis that I put in Part I: that the republican tradition, *contra* Pettit, is one in which non-domination is not negatively constituted, is not one in which participation is but instrumental to the attainment of freedom as non-domination, but one in which the active, vigilant, resistant spirit of the people is the *only* guarantee against domination; one in which the retreat to an “easier” way – to privacy – breeds not human flourishing but a servile, a slavish, human irresponsibility for the public realm. In Part I, I have said that Arendt discovered the danger of such a condition for herself when she realized that by her own political apathy, and the shared ignorance of those around her to the gathering storm in Nazi Germany, she could not escape responsibility for the unfolding crisis, brought home to her by the Reichstag fire. The dispersal of the public realm had left the space in which the Nazi regime was able first to take hold, and to creep to dominance. Thus my aim in Part I has been two fold. First, an internally Arendtian one which looks to Arendt’s own experiences – from the moment of her awakening, through her work for the Zionists and arrest, as well as her subsequent flee from Germany into statelessness – to trace the roots of her ambivalent feelings for law and legal process, and the extent to which responsibility for the public realm might mean extraordinary resistance to constituted power. The second contribution, however, is to move away from the perception of Arendt – the one held by Pettit – as a thinker who fetishises the past with nothing to say to modern constitutional thought, and rather to draw from her a more nuanced, and relevant, sense of constitutionalism: one in which the people as a working reality emerge, in extraordinary moments, to re-open and re-negotiate the proper distribution of political power in their community. Believing that the revolutionary spirit was ‘lost’ in America by the failure of the founding fathers to find for it a public space, within the constitution I considered three hinges between constituent power and constituted power by which Arendt believed that that spirit might be recovered: in civil disobedience, in council democracy, and in the exercise of a fundamental right to information. Underpinning this is Arendt’s famous formulation of ‘the right to have rights’, which I say is more than a right to belong to a community, but to belong to community in which the public is attentive enough to the

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(individual or collective) rights *of others*, to react as a public - by legislation where possible, by resistance or even by revolution where not - when injustice is brought upon them. If tyranny and domination reign where the public is absent, in other words, the theoretical work in Part I, the historical work in Part II and the contemporary constitutional analysis of Part III has attempted at each stage to reclaim an extra-institutional space for the public, and to think about that space in terms of a dialogue that is *already* constitutional. It seems somehow fitting, having spent so much of my young adult life at Glasgow University, to close my thesis with a quote given by Jimmy Reid to the students of this institution which outlined perfectly what is at stake where that constituent voice fails to register at the constitutional level; where it is left exposed out of its doors:

Everything that is proposed from the establishment seems almost calculated to minimize the role of the people, to miniaturise man. I can understand how attractive this prospect must be to those at the top. Those of us who refuse to be pawns in their power game can be picked up by their bureaucratic tweezers and dropped in a filing cabinet under "M" for malcontent or maladjusted.¹¹⁴⁴

¹¹⁴⁴ James Reid *Alienation* (Glasgow, University of Glasgow Publications 1972), p.10

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