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The Scholastic and Conciliar Roots of Samuel Rutherford's Political Philosophy: The Influence of Jean Gerson, Jacques Almain and John Mair

1. Introduction: The Scottish Context

When Samuel Rutherford wrote his *Lex Rex* in the midst of the civil wars that were tearing apart his country, setting king against people and people against king, he sought to ground his politics on the secure and immutable foundations of Scripture and natural reason. His political theory is therefore rooted in and shaped by both the biblical theology of covenant and the scholastic theory of the natural law.¹ Yet Rutherford was writing at a momentous time in Scottish history in order to justify the existence and character of what his Royalist opponents regarded as a revolutionary government operating outside the framework of the law and constitution and transgressing the rights of the monarchy. Consequently, he was very conscious of the need to root the abstractions of his political theory in the concrete and complex political context of his time.

The immediate circumstance prompting his writing of the *Lex Rex* was the publication in 1644 of John Maxwell's treatise *Sacro-Sancta Regum Majestas*, which sought to set out the 'sacred and royal prerogative of Christian kings'. Maxwell was the deposed bishop of Ross and had been one of the principal architects of the notorious Scottish prayer book. He was thus implacably opposed to the Covenanting regime and his work set out both an elaborate 'divine right' theory of monarchy as well as a frontal attack on his opponents' political convictions. In formulating this Maxwell drew deeply, although without acknowledgement, as Rutherford gleefully pointed out, on such prominent jurists as Marc-Antonio de Dominis, Hugo Grotius and Henning Arnisaeus.² Such a work clearly demanded a response, not least given the volatile and highly uncertain political state of the nation. This Rutherford, spurred on by the Covenanter leaders Robert Baillie and Archibald Johnston of Wariston, wrote in a few short months during his attendance at the Westminster Assembly.³

In responding to Maxwell, whom he minced no words in describing as a 'seditious excommunicated apostate',⁴ and seeking to establish against his absolutisms the 'just prerogative of king and people',⁵ Rutherford drew not only on the Bible but on centuries of Scottish history and legal precedent.⁶ In this he bears just comparison with George Buchanan, who at the start of his celebrated dialogue *De Jure Regni apud Scotos*, announced his intention to 'explain from their very cradle...the mutual rights and powers of kings and their subjects'.⁷ Indeed, in seeking to prove the parliamentary basis of the Scottish monarchy against no less a personage than King James I, Rutherford had recourse not only to Buchanan himself but also to John of Fordun, Hector Boece and John Mair. From these, and especially from Buchanan, he took

¹ John Coffey, *Politics, Religion and the British Revolutions: The Mind of Samuel Rutherford* (Cambridge: Cambridge University Press, 1997), 146-87 draws attention to the intertwined scholastic and biblical elements of Rutherford's political theory.

² Samuel Rutherford, *Lex Rex: The Law and the Prince. A Dispute for the Just Prerogative of King and People* (London, 1644), 118.

³ For the context of the *Lex Rex* see Coffey, *Politics*, 146-51.

⁴ Rutherford, *Lex Rex*, 55.

⁵ This is the subtitle of the *Lex Rex*.

⁶ This is apparent throughout but Rutherford's most celebrated discussion is to be found in Q. XLIII 'Whether the King of Scotland be an absolute Prince, having prerogatives above Parliament and Laws?' (*Lex Rex*, 433-54).

⁷ George Buchanan, *George Buchanan's A Dialogue on the Law of Kingship among the Scots: De Jure Regni apud Scotos Dialogus*, tr. and ed. Martin Smith and Roger Mason (Edinburgh: Saltire Society, 2006), 37.

his understanding of the covenantal-elective framework of the Scottish crown and the integral role of the estates in government and legislation.⁸ However, for Rutherford, of course, the covenant was not a historical fossil but was a living reality in the hearts of the nation. If it was Buchanan who helped provide the vital connection between his political theory and the Scottish historical context, it was surely from ‘Master Knox of blessed memory’ that he took his understanding of Scotland as a covenanted nation under God, whose sacred status was to be upheld even at the point of the sword.⁹

Yet as important as Buchanan and Knox undoubtedly were to Rutherford, they will not be the topic of this chapter. Rather, it looks to a different tradition, which, although not Scottish by origins, undoubtedly became deeply rooted in the intellectual culture of late medieval and Reformation Scotland and is itself often connected to the political theory of Buchanan and Knox. This is the conciliarist tradition of the Catholic Church.¹⁰ Conciliarism developed in the late fourteenth and fifteenth centuries in response to the epoch-making crisis of the Great Schism. It affirmed the superiority of a General Council of the Church over the Pope and especially the right of the Council to depose a lawful Pope in cases of necessity. While it is often thought to have become a spent force after the dissolution of the Council of Basel and the papal victory at the Council of Florence-Ferrara, it continued to live on both as an ecclesiastical and, as the researches of Brian Tierney, Francis Oakley and Quentin Skinner have shown, especially as a political movement.¹¹

In particular, the early sixteenth century saw a revival of conciliarism, with the calling of the renegade Council – or to its detractors ‘*conciliabulum*’ – of Pisa in 1511 at the instigation of King Louis XII of France. For this event sparked not only the calling of the Fifth Lateran Council but a paper war between Tomasso de Vio Cajetan, then Master General of the Dominicans, and the University of Paris. In 1512 Cajetan wrote his *De Comparatione Auctoritatis Papae et Conciliorum* which represented an innovative restatement of high papalist claims against the French conciliarists. Asked to respond to this the University of Paris appointed as their champion Jacques Almain, the brilliant young student of John Mair. Calling on the authority of the ‘most Christian doctor’ Jean Gerson and the ‘blessed Council of Constance’ Almain wrote a devastating attack on Cajetan’s *De Comparatione*, which became celebrated across Europe. Later,

⁸ Rutherford, *Lex Rex*, 448-9.

⁹ Rutherford, *Lex Rex*, 418. An excellent example of this is *Lex Rex*, 209 where Rutherford cites with approval Knox’s comparison between Israel’s sin in allowing Manasseh’s idolatry and the sin of the Scottish estates in allowing the Queen to celebrate ‘her abominable masse’.

¹⁰ J. H. Burns, *Scottish Churchmen at the Council of Basle* (Glasgow: Burns, 1962) and ‘The Conciliarist Tradition in Scotland’, *Scottish Historical Review* 42 (1963), 89-104 were important early works drawing attention to fifteenth-century Scottish conciliarism as an influential intellectual and political movement. Its continuing importance in early modern Scotland is further explored by Burns in *The True Law of Kingship: Concepts of Monarchy in Early-Modern Scotland* (Oxford: Oxford University Press, 1996), 19-92 as well as in an earlier essay by Francis Oakley: ‘On the Road from Constance to 1688: The Political Thought of John Major and George Buchanan’, *Journal of British Studies* 1 (1962), 1-31.

¹¹ The literature on conciliarism and its political influence is vast but see especially John Neville Figgis, *Studies of Political Thought from Gerson to Grotius 1414-1625* (Cambridge: Cambridge University Press, 1907); Quentin Skinner, *The Foundations of Modern Political Thought. Vol. II: The Age of Reformation* (Cambridge: Cambridge University Press, 1978), 114-23; Brian Tierney, *Religion, Law and the Growth of Constitutional Thought 1150-1650* (Cambridge: Cambridge University Press, 1982); Francis Oakley, ‘On the Road from Constance to 1688’; ‘From Constance to 1688 Revisited’, *Journal of the History of Ideas* 27 (1966), 429-32; ‘The Anxieties of Influence: Skinner, Figgis, Conciliarism and Early Modern Constitutionalism’, *Past and Present* 151 (1996), 60-110; and *The Conciliarist Tradition: Constitutionalism in the Catholic Church 1300-1870* (Oxford: Oxford University Press, 2004).

after Almain's death, Mair himself included an important restatement of the conciliar case against Cajetan in his 1518 *In Matthaem*.¹²

As is now being increasingly recognised the 'silver age' conciliarism of Almain and Mair, itself deeply indebted to Gerson, had a profound impact on early modern politics and especially on the development of theories of constitutional, limited monarchy. Thus Annabel Brett and Quentin Skinner have pointed to the important influence of conciliarism on both the Salamancan School and Reformed political thought.¹³ Such connections were also apparent to writers of the seventeenth century and Maxwell himself opened the *Sacro-Sancta* with an attempt to discredit Jesuit and Covenanter political thought by demonstrating its roots in the conciliar movement.¹⁴ Rutherford himself was well aware of the central importance of the conciliarists to constitutional thinking, and his writings testify to a profound familiarity with and appreciation for the Parisian school. While his intellectual debt to the conciliarist tradition has by no means been missed by modern scholarship, with both Coffey and Oakley remarking on it, the nature and depth of its influence on him still remains very much unplumbed.¹⁵ In this chapter I shall focus on just one aspect of this inheritance, largely bracketing out both ecclesiastical questions and resistance theory. This is that of the origins of government and the nature of kingship. In doing so I shall hope to show the way that Rutherford's own entwining of natural law and covenantal thought is foreshadowed in the work of Gerson, Almain and Mair.

2. The Natural Origins of Government

Rutherford's political reflections in *Lex Rex* open with an important discussion of the origins of government. Following the Aristotelian tradition he holds that God has created man as a 'social creature' inclined towards government. The power of government is therefore innate and part of the structure of human nature. As an Augustinian, however, Rutherford was clear that political society did not properly exist before the fall. Instead, he held that the only authority in the state of original nature was paternal in character.¹⁶ Although he described this with Thomas Aquinas in terms of a consequent dominion of the more gifted over the less 'for the utilitie and good of the weaker,'¹⁷ his sharp dichotomy between the paternal and the political is much more redolent of what Brett has called the 'neo-Augustinianism' of Duns Scotus.¹⁸ Against his Royalist opponents Rutherford was therefore adamant that Adam was not a king and that kingship itself could not be traced back to the state of nature. He buttressed this claim with the authority

¹² An excellent discussion of this later Parisian conciliarism is to be found in Francis Oakley, 'Almain and Major: Conciliar Theory on the Eve of Reformation', *The American Historical Review* 70 (1965), 673-90 and 'Figgis, Constance and the Divines of Paris', *The American Historical Review* 75 (1969), 368-86.

¹³ Skinner, *Foundations*, II.113-66, 267-75; Annabel Brett, *Liberty Right and Nature: Individual Rights in Later Scholasticism* (Cambridge: Cambridge University Press, 1997), 118-139 and 'Scholastic Political Thought and the Modern Concept of the State', in Annabel Brett, James Tully and Holly Hamilton-Bleakley (eds.), *Rethinking the Foundations of Modern Political Thought* (Cambridge: Cambridge University Press, 2006), 130-48.

¹⁴ John Maxwell, *Sacro-Sancta Regum Majestas, or, The Sacred and Royal Prerogative of Kings* (London, 1644), 3-4, 25; cf. Rutherford, *Lex Rex*, 418.

¹⁵ Coffey, *Politics*, 74 and Oakley, 'Almain and Major: Conciliar Theory on the Eve of Reformation', 685.

¹⁶ Rutherford, *Lex Rex*, 2-3, 5, 94.

¹⁷ Rutherford, *Lex Rex*, 90; cf. Thomas Aquinas, *Summa Theologiae*, 2a2ae q. 57 art. 3.

¹⁸ Brett, *Liberty, Right and Nature*, 29-31.

of the Salamanca school, but, as Skinner has pointed out, such a claim had deep roots in the conciliarist tradition.¹⁹

While Rutherford held that political society was grounded in nature, he was clear that the existence of any polity beyond the domestic required the consent of the community. Civil society was therefore natural in the root (*in radice*) but voluntary in its ‘manner of coalescing’ (*in modo*).²⁰ In order to explicate this Rutherford drew on the important scholastic distinction between the primary and secondary law of nations as formulated by the Spanish jurist Fernando Vazquez de Menchaca. According to Vazquez the primary law of nations was nothing other than human natural instinct or natural reason. It is therefore intimately bound to the natural law. By contrast he held that the secondary law of nations was not something that ‘came into being simultaneously with the human race’ but rather a law which developed over time and as a matter of expediency. It therefore belongs within the sphere of positive law.²¹ Following Vazquez Rutherford clearly demarcated the power of government – as belonging to the primary law of nations – from the power of government by magistrates – as belonging to the secondary law of nations. While he believed the first to be natural, he insisted, against his Royalist opponents, that the second was merely ‘artificiall and positive’.²²

In order to explain the nature of political government and especially why it depends on consent Rutherford entwined two different narratives – broadly speaking one of natural liberty and one of natural rights. The first he drew again from Vazquez, this time in his distinction between freedom and servitude paralleling the fundamental division between the primary and secondary law of nations. Vazquez held that man was born ‘as free as the beasts’ and that his natural state, as with that of all animals, was one of freedom from subjection. By contrast he believed that government by magistrates was not a natural state and could only occur through a resignation of natural liberty and a voluntary entering into subjection.²³

This view was echoed by Rutherford who argued that when people had originally banded together for the purpose of self-defence in the first political communities they had early recognised the need to appoint magistrates over them and to place themselves under the penal law. In doing so they had therefore sacrificed their original state of liberty for a form of voluntary servitude. Like Vazquez he believed that such subjection, while both necessary and beneficial, was hardly natural in character and required active consent. For while someone by ‘natural conscience’ alone could by an antecedent will agree to place themselves under a magistrate and law, they could only consent ‘consequently, tacitly and conditionally’ to penal laws as penal. This was because assent to anything which may potentially do one harm goes against the principles of the natural law, and an act of will is therefore needed to overcome this natural aversion.²⁴ The foundation of political society is therefore the principle, rooted in human nature, that ‘it is lawful to repel

¹⁹ Skinner, *Foundations*, II.156.

²⁰ Rutherford, *Lex Rex*, 2.

²¹ Fernando Vazquez, *Controversarium Illustrium Aliarumque Usu Frequentium* (Frankfurt, 1572) l. 1 c. 41 n. 28-9; cf. Brett, *Liberty, Right and Nature*, 181-2.

²² Rutherford, *Lex Rex*, 2-3.

²³ Vazquez, *Controversarium Illustrium*, l. 2 c. 82 n. 6; cf. Rutherford, *Lex Rex*, 3, 80, 82, 91-2. A corollary of this position was Rutherford’s extreme antipathy to slavery.

²⁴ Rutherford, *Lex Rex*, 3-4.

violence with violence'. For it is this secondary law of nations which gives sanction to the coercive power of the magistrate.²⁵

Given his Vazquezian suggestion that politics is an artificial sphere encompassing the dialectic of freedom and subjection, it is unsurprising that Rutherford has often been seen as anticipating the libertarian discourse of Enlightenment politics. On closer inspection, however, it becomes apparent that such similarities are more apparent than real. For, as John Ford and John Coffey rightly point out, Rutherford in fact distances himself markedly from the transactional understanding that a political community is formed through a transfer of rights from the people to the ruler.²⁶ As he explains:

Individuall persons in creating a magistrate, doth not properly surrender their right, which can be called a right; for they do but surrender their power of doing violence to these of their fellows in that same communitie; so as they shall not now have morall power to do injuries without punishment; and this is not right or libertie properly, but servitude: for a power to do violence and injuries, is not liberty, but servitude and bondage.²⁷

Despite his pronounced emphasis on natural liberty Rutherford is therefore clear that there can be no right which exists outside the objective framework of law.²⁸ In this he echoes an older, scholastic, tradition of natural rights, prominent in Gerson and Almain, which sees right as a power, or faculty, conditioned by divine law.²⁹

This brings us to the second narrative, which ultimately proves much the more significant. Drawing on a long scholastic tradition Rutherford held that everyone has a right of self-preservation founded in the natural law. While he believed such a right to be objectively rooted he clearly construed it subjectively, as a licit power belonging to individual agents. In this his views were redolent of Almain, who, as Annabel Brett has suggested, sought to fuse the objective right of the Thomist tradition with the discourse of subjective rights which he found in Ockham and Gerson.³⁰ Such a stance certainly underpinned the close analogy that Almain wished to draw between the individual and communal right of self-preservation.³¹ In Rutherford we find a similar concern to integrate the rights of the individual with the rights of the community. He held that a political society is formed when the people decide to confer on a magistrate the power of the sword for the well-being of the whole, something which obviously requires consent. In doing so, however, he

²⁵ Rutherford, *Lex Rex*, 4, 92. Brett, *Liberty, Right and Nature*, 181-2 points out that for Vazquez this secondary right belongs not to natural but to positive law.

²⁶ John Ford, 'Lex Rex iusto posita: Samuel Rutherford on the Origins of Government', in Roger Mason (ed.), *Scots and Britons: Scottish Political Thought and the Union of 1603* (Cambridge: Cambridge University Press, 1994), 275-6; Coffey, *Politics*, 161.

²⁷ Rutherford, *Lex Rex*, 44.

²⁸ Rutherford, *Lex Rex*, 397-8. Here he follows the Roman Law definition of dominion as 'a faculty to use a thing as you please except you be hindered by force, or by law'. In the same work on pp 410-11 he makes clear the close connection between dominion and personal right.

²⁹ Jean Gerson, *De Vita Spirituali Animae*, in Palémon Glorieux (ed.), *Jean Gerson: Oeuvres Complètes* (Paris: Desclée, 1961-), III.141; Jacques Almain, 'Questio in Vesperis Habita', in *Aurea Clarissimi et Acutissimi Doctoris Theologi Magistri Iacobi Almain* (Paris, 1518), fo. 72. Brett, *Liberty, Right and Nature*, 81-7, 120-22 identifies Gerson and Almain as both belonging to the tradition of treating right as a faculty conditioned by natural law and right reason.

³⁰ Brett, *Liberty, Right and Nature*, 117-22. Rutherford, *Lex Rex*, 411 affirms from Gerson the doctrine of the believers' 'spiritual right' to their own possessions.

³¹ Rutherford, *Lex Rex*, 331; cf. Jacques Almain, 'A Book Concerning the Authority of the Church', in J. H. Burns and Thomas Izbicki (eds.), *Conciliarism and Papalism*, 135-8.

was insistent that the people do not cede their own right of self-preservation, which is indeed inalienable.³² The prince therefore does not rule absolutely over his people but only conditionally.

In his account of the origins of government Rutherford is clearly attempting to fuse two quite different understandings of right: an individualistic notion of natural liberty derived from Vazquez and a communitarian notion of natural right founded on conciliar principles. Despite their differences – which Brett describes as no less than the gulf between a scholastic concept of rights and an early modern notion of liberty³³ – these both share an understanding that political society is founded on conditional consent. The note of conditionality is important for it points even beyond the consensual to the covenantal basis of all political society. This distinction must be emphasised, for it was perfectly possible for political absolutists, or those tending towards absolutism, to hold to a consensual theory of the origins of government. Indeed, at least as Rutherford interpreted him, such a theory was held by his opponent William Barclay.³⁴ What was not possible, however, for a strict absolutist, was to hold to a covenant between ruler and ruled with its entailed structure of mutual obligations and especially mutual recriminations. Instead, Royalist theorists like Arnisaeus and Barclay insisted that the king was obliged by covenant to God alone and not to his subjects.³⁵ A similar view was upheld by the Salamancan school, who by and large affirmed a consensual, but not a conciliar, model of government.³⁶ What we see by contrast in Rutherford's theory of conditional consent is the germ of a covenantal conception of politics in which the ruler is bound to his people as much as the people to the ruler. In this, as we shall see, he followed a definite conciliarist trajectory.

3. The Divine Ordination of Government

Complementing his naturalistic understanding of the origins of government is Rutherford's account of its divine institution. It must never be forgotten that for him the natural law was also the divine law and was therefore rooted in the will of God. Deriving from the natural law, the structures of government must themselves therefore be understood as dependent on the divine will. Without seeing any contradiction Rutherford can therefore affirm, with Durandus, that 'civil power according to its institution is of God, but according to its acquisition and way of use is of man'.³⁷ The view that government was of divine institution was of course commonplace. In developing it, however, Rutherford sought to avoid two equal and opposite tendencies. The first, which he ascribed to Bellarmine and the Jesuits, affirmed this of political power in general but held specific forms of government, including monarchy, to be of 'humane invention'.³⁸ The second, the view of his absolutist and 'divine right' opponents, affirmed the divine institution of specific

³² Rutherford, *Lex Rex*, 226-7, 363, 417. Against his Royalist opponents Rutherford draws on the classical position '*salus populi suprema lex*' saying that 'the safetie of the people is the supreme and cardinall law to which all lawes are to stoop' (p 218). This principle also motivates much of his discussion of the right of resistance.

³³ Brett, *Liberty, Right and Nature*, 7-8, 166-7.

³⁴ Rutherford, *Lex Rex*, 5; cf. William Barclay, *De Regno et Regali Potestate* (Paris, 1600, l. 3 c. 2.

³⁵ Henning Arnisaeus, *De Jure Majestatis Libri Tres* (Strasbourg, 1674), c. 6 n. 1-6 (pp 82-8); cf. Rutherford, *Lex Rex*, 257-8, 400-8. Rutherford does not draw from Barclay directly but from the development of his views by John Buckeridge, the Bishop of Rochester, in *De Potestate Papae in Rebus Temporalibus* (London, 1614), l. 2 c. 20. Indeed, while Rutherford is critical of Barclay he is sensitive to the way that he and Grotius sought to establish a constitutionally limited monarchy (*Lex Rex*, 403).

³⁶ See Skinner, *Foundations*, II.148-66.

³⁷ Rutherford, *Lex Rex*, 9.

³⁸ Rutherford, *Lex Rex*, 5-6.

forms of government, but in practice, if not in theory, elevated monarchy to such a degree that it came to seem the only truly divine pattern of government.³⁹

Countering these two positions Rutherford affirmed that all of the three Aristotelian forms of polity should be considered as of divine institution. Not only monarchy but also aristocracy and even democracy were therefore legitimate forms of government. While his opponents sought to prove these to differ by nature, and thence to uphold the superiority of monarchy, Rutherford's position, redolent of Almain, was that they only differed 'politically and positively'.⁴⁰ What this meant was that these three forms of government must actually be seen on a continuum. In these terms aristocracy is simply to be understood as 'diffused monarchy' and monarchy 'contracted aristocracy'. Extending the analogy, democracy must be considered as simply the most diffused form of monarchy possible.⁴¹

To leave it simply at this, however, is to miss the real force of Rutherford's argument. For in relativising the distinction between the different forms of polity, he is making a deeper point about the nature of true monarchy: that it is by nature inseparable from aristocracy and democracy. According to him the Royalists wanted to make the king a 'God on earth' and many of their arguments for the superiority of monarchy were therefore grounded on its divine claims to authority.⁴² Like the conciliarists before him, however, Rutherford eschewed such direct analogies between God and the king.⁴³ For him the kind of absolute monarch that the Royalists desired was nothing less than a tyrant. By contrast, as we shall see in greater depth below, the truly divine pattern of monarchy, tracing its roots to God's constitution of the Israelite kingdom in Deuteronomy 17, was that of covenantally-limited kingship. Going beyond later conciliarists like Mair, and arguably back to the earlier conciliarism of Gerson, Rutherford therefore held that the best constitution was a mixed one in which each form of government tempers the other. For otherwise, 'absolute monarchy is tyranny, unmixed democracy is confusion, [and] untempered aristocracy is factious dominion'.⁴⁴ Such an ideal he held provocatively to be represented by the Doge of the Venetian Republic, or, more pertinently, but perhaps no less provocatively, to the ancient, now threatened, pattern of parliamentary monarchy in England and Scotland. For, as he put it, parliament with the king has glory, order and unity from the monarch, safety of counsel from the government of the wisest and liberty and obedience from the influence of the commons.⁴⁵

If the divine institution of monarchy was under little doubt, the question of its constitution was a matter of considerable and heated debate. Maxwell held that kings were constituted immediately from God and not from the people. The only role he gave the people, and in this he closely resembles the high papalists of the late Middle Ages, was that of designating the person of the monarch.⁴⁶ By contrast Rutherford followed Almain, the Parisian doctors and the Spanish jurists in holding that political power is 'immediately from

³⁹ Rutherford, *Lex Rex*, 384-9, 454; cf. Maxwell, *Sacro-Sancta*, 26-7.

⁴⁰ Rutherford, *Lex Rex*, 7-9; cf. Almain, 'Authority of the Church', in *Conciliarism and Papalism*, 138.

⁴¹ Rutherford, *Lex Rex*, 7.

⁴² Rutherford, *Lex Rex*, 386.

⁴³ Rutherford, *Lex Rex*, 192. Here and elsewhere Rutherford repudiates direct analogies made between God and the King. Burns, *True Law of Kingship*, 53 notes Mair's similar reluctance and caution in applying analogies between God and the King.

⁴⁴ Rutherford, *Lex Rex*, 112. Mair's conservatism on this point is noted by Burns in *True Law*, 44-5, 55-60.

⁴⁵ Rutherford, *Lex Rex*, 387. For his extensive discussion of the parliamentary basis of Scottish monarchy see pp 433-54.

⁴⁶ Maxwell, *Sacro-Sancta*, 19-23; cf. Ford, '*Lex, rex iusto posita*', 264-5.

God but first from the community'.⁴⁷ More precisely he held that 'power of government is immediately from God, and this or this definite power is mediately from God, proceeding from God by the mediation of the consent of a communitie, which resigneth their power to one or more rulers'.⁴⁸ For Rutherford the people not only had Maxwell's *potestas designativa* – the mere power of choosing or designating the monarch – but also his *potestas collativa* – the power of constituting him in office which they shared with God.⁴⁹

The coordination and coincidence of the divine and human power of constituting government lies at the heart of Rutherford's political theory. For out of it, as we shall see, flows his covenantal understanding of the relationship between God, king and people. While the general features of Rutherford's understanding have been covered by both Ford and Coffey, its nuances have arguably been somewhat glossed over. As a result, its intimate, if implicit, connection with his late medieval metaphysics and theory of concurrence has been missed.

For Rutherford it was axiomatic that 'the people under God make the king'. In support of this he could draw not only on Reformed witnesses like Calvin and Vermigli but also on a host of Catholic thinkers going back as far as medieval exegetes like Nicholas of Lyra and Hugh of Saint Cher.⁵⁰ In order to explain how this was possible he drew on the scholastic theory of instrumental causation. According to this the principal cause of conferring royal dignity on the king is God himself, whereas the people are simply instruments which God uses in order to achieve his purpose. Simply put, 'God giveth royall power by moving the peoples hearts to confer royall power'.⁵¹

In treating the people as divine instruments Rutherford was insistent that he was compromising neither their dignity nor, more importantly, their freedom. For him, to be an instrument is to be a 'sort of vicarious cause in Gods room' and thus to act with divine sanction and authority.⁵² Moreover, he is explicit that to be moved by God does not take away the people's free consent:

God is the first agent in all acts of the creature, where a people maketh choise of a man to be their king, the states doe no other thing under God but create this man, rather then another; and we cannot here find two actions, one of God, another of the people; but in one, and the same action, God by the peoples free suffrages & voices createth such a man king, passing by many thousands, and the people are not patients in the action, because by the authoritative choise of the states, the man is made of a private man, and no king, a publick person, and a crowned king.

⁴⁷ Rutherford, *Lex Rex*, 5, 50. For this he cites Almain, *De Potestate Ecclesiastica et Laica Contra Ockam*, q. 2 c. 3, 5, in *Aurea*, fo. 29-34. It is worth noting that here Almain differs from his teacher Mair who held that political power, unlike ecclesiastical power, is not immediately from God (John Mair, 'Disputation concerning the Authority of the Council', in J. H. Burns and Thomas Izbicki (eds.), *Conciliarism and Papalism*, 290-5). This difference may help explain Rutherford's general preference for Almain.

⁴⁸ Rutherford, *Lex Rex*, 5. Here he cites Suarez and Soto but he could have equally cited the conciliarists. It is important to note the distinction between power of government – which refers to the constitution of the monarch – and power of governing – which refers to their actual governing.

⁴⁹ Rutherford, *Lex Rex*, 10. Rutherford only uses the term *collative* once.

⁵⁰ Rutherford, *Lex Rex*, 13.

⁵¹ Rutherford, *Lex Rex*, 18, 127. Discussions of instrumental causation abound in scholastic theology but a particularly important one, especially given his desire to rebut Maxwell's sacramental analogies of kingship, is Aquinas' treatment of the sacraments in *Summa Theologiae*, 3a q. 62-3.

⁵² Rutherford, *Lex Rex*, 127.

The people are not therefore simply passive instruments but retain their own freedom in all that they do. To make a king is thus ‘a real action of the people’.⁵³ In order to illustrate his own theory Maxwell had used the sacramental example of baptism, arguing that just as regeneration is conferred ‘not by water but immediately by God’ so royal power is conferred immediately by God and only ‘materially’ by the people.⁵⁴ In riposte Rutherford denied the parallel, holding that the conferral of kingship ‘as an eminent and singular act of Gods special providence’ was much better compared with the working of supernatural grace to enable faith and love of Christ. For in this intellect and will are active and not merely passive, and make a real contribution to faith as they are moved by God. In the same way the people, moved by God, establish the king in royal dignity.⁵⁵ The people are real and free agents in this act and so Rutherford could uphold the principle, pregnant with political implications, that the title to kingship resides only in the ‘suffrages of the people’.⁵⁶

Rutherford probes no further the metaphysical foundations of kingship, but his language of instrumental causation and grace suggests a definite link with the sophisticated theory of concurrence that he was developing in his theological works around this time. In these, following the fourteenth-century Augustinian Thomas Bradwardine, he integrates a Scotist metaphysics of freedom with a ‘premotionist’ theory of the relation between divine and creaturely causation. This allowed him to claim that while God both moves and determines the human will he does not compel it to do anything other than what itself wills, but rather by a ‘connatural leading’ moves the will to that which the will acts and determines for itself.⁵⁷ In these terms he came to the striking conclusion that the decree of God moves the will to elicit that same act which it would elicit if *per impossibile* there were no divine decree.⁵⁸

According to Rutherford’s compatibilist viewpoint there could therefore be no contradiction between freedom and determination. This gets at the root of what has been seen as a latent contradiction in the covenanting worldview. Posed by David Mullan this is the question of how to reconcile a strict predestinarian theology with any form of moral or political activism.⁵⁹ In political terms it comes down to the pointed question, exploited by Maxwell to the full, of how the Covenanters could possibly claim to

⁵³ Rutherford, *Lex Rex*, 11.

⁵⁴ Maxwell, *Sacro-Sancta*, 20-1; cf. Rutherford, *Lex Rex*, 18.

⁵⁵ Rutherford, *Lex Rex*, 57.

⁵⁶ Rutherford, *Lex Rex*, 14.

⁵⁷ Samuel Rutherford, *Disputatio Scholastica de Divina Providentia* (Edinburgh, 1649), 42. Rutherford’s profound debt to Bradwardine is manifest throughout the *Disputatio Scholastica*. The precise metaphysical issue here hinges on Scotus’ celebrated formulation of divine and human freedom in terms of ‘synchronic contingency’. According to this freedom consists of a power towards opposites which obtains even in the temporal moment of the will’s determination. As Michael Sylwanowicz, *Contingent Causality and the Foundations of Duns Scotus’ Metaphysics* (Leiden: Brill, 1996), 210-20 notes, Bradwardine was the first to integrate Scotus’ synchronic contingency with a compatibilist doctrine of divine concurrence. There has been a great deal of controversy about the place of Scotus’ synchronic contingency in Reformed thought. However, Rutherford’s own Bradwardinian adaptation of the notion is clear from *Disputatio Scholastica*, 44, 118, 124 and especially *Exercitationes Apologeticae pro Divina Gratia* (Franeker, 1651), ex. 1 c. 4 112-15, where he makes explicit use of Scotus’ terminology.

⁵⁸ Rutherford, *Disputatio*, 588. Notably, the celebrated Dutch Reformed theologian Gisbertus Voetius in ‘The Will as Master of its Own Act: A Disputation Rediscovered of Gisbertus Voetius (1589-1676) on Freedom of the Will’, in Willem van Asselt, J. Martin Bac and Roelf te Velde (eds.), *Reformed Thought on Freedom: The Concept of Free Choice in Early Modern Reformed Theology* (Grand Rapids, MI: Baker Academic, 2010), 150-1 cites Rutherford for a similar conclusion.

⁵⁹ David Mullan, *Scottish Puritanism, 1590-1638* (Oxford: Oxford University Press, 2000), 241-3. Even Coffey in *Politics*, 126-7 speaks loosely of Rutherford’s determinism and necessitarianism.

uphold both the divine constitution of kings and popular sovereignty. By invoking his late medieval account of concurrence in response Rutherford was able both to secure the trilateral relationship of God, king and people, thus deflecting Maxwell's criticisms, and to integrate his political theory into an overarching theological framework.

4. The Covenantal Shape of Kingship

Central to Rutherford's covenantal understanding of the relation between God, king and people were two interconnected concepts. The first was the scholastic distinction between formal and virtual causation. As Ford has perceptively pointed out Rutherford made use of the concept of virtual causation, or virtual power, in the *Lex Rex* in two different ways.⁶⁰ He used it firstly to characterise the relation between God and the people. Thus the royal power is said to be formally from God but virtually in the people.⁶¹ Similarly the kingly office is said to be from God and to flow from the people only by 'virtuall emanation'.⁶² He used it secondly to characterise the relation between the king and the people. In this sense royalty is said to be formally in the king and 'originally and virtually only' in the people.⁶³ While Ford treats these two different applications separately, a closer analysis of Rutherford's understanding of virtual causation suggests that the two are intimately connected to each other and grounded in his theory of concurrence.

Rutherford's understanding of virtual causation must be pieced together from his writings. In his *Peaceable and Temperate Plea* he makes clear that 'a virtuall cause is not formally the cause of the effect; as fire is the cause of fire, and doth not formally performe acts of the formall cause'. He puts forward two examples to explain this: flint is the virtual cause of fire and food is the virtual cause of motion in the body.⁶⁴ In his *Lex Rex* he further clarifies this, pointing out that a virtual cause 'cannot be actuated by that same subject that it is in, for then it should not be a vertuall, but a formall power'. Illustrating this he offers the common philosophical example of a herb which can virtually, but not formally, heat something up. Drawing things together it seems that for Rutherford a virtual cause is to be understood as being in potency to an effect but unable to realise it by itself. Thus flint can potentially cause fire but it requires someone to strike it in order to do so.

According to Rutherford 'God giveth royal power by moving the peoples hearts to confer royall power, and this is virtually in the people, formally from God'. We have already seen above the way in which he understands the divine and human act of conferring kingship to be entirely one. Now he seeks to explain precisely how the people are able to confer this power. In his *Sacro-Sancta* Maxwell had argued that sovereignty is a 'ray of divine glory and majestie' and therefore cannot be found in the people.⁶⁵ In response to this objection Rutherford argued that while formally the 'people cannot produce so noble an effect as royalty' they can do so virtually since 'beames of authoritative majesty' have been bequeathed to 'a society of reasonable men'. The source of this authority, he makes clear, is the remnant of the image of God which still remains in all people after the fall.⁶⁶ It is important to emphasise that this virtual power is not a mere

⁶⁰ Ford, 'Lex Rex iusto posita', 279-80.

⁶¹ Rutherford, *Lex Rex*, 18-19.

⁶² Rutherford, *Lex Rex*, 9.

⁶³ Rutherford, *Lex Rex*, 101

⁶⁴ Rutherford, *A Peaceable and Temperate Plea for Pauls Presbyterie in Scotland* (London, 16420, 60-1.

⁶⁵ Maxwell, *Sacro-Sancta*, 48; cf. Rutherford, *Lex Rex*, 41-2.

⁶⁶ Rutherford, *Lex Rex*, 18-19, 42-3.

‘passive capacity’ but is rather an ‘active power’.⁶⁷ Nevertheless, it is axiomatic for Rutherford that a virtual cause ‘cannot be actuated by the same subject that it is in’ – in this case the people themselves.⁶⁸ It therefore must be actuated by God who through the people confers formal sovereignty on the king himself. Rutherford confirms this is his understanding by recourse to one of his paradigm examples of kingship, the accession of David to the throne of Israel. Here he says that the people’s election of David virtually contains ‘royall dignitie’ but the ‘principall agent’ in its conferral is God himself.⁶⁹

Constituted by God and the people the king receives the formal power of kingship. He is clear that the people cannot have this formal power, for then they would have to be said to be both above and below themselves, which is nonsensical.⁷⁰ Nevertheless, the distinction between formal and virtual power continues to structure the relationship between the king and his people. For the people retain not only a virtual power of government – that is of constituting magistrates - but also of governing themselves. As Ford explains such a power is said to be virtual not formal, for they cannot directly govern themselves but can only do so through their appointed representatives the king and the estates.⁷¹ Significantly, as Rutherford goes on to explain, this dynamic relationship between formal and virtual causation structures a covenantal relationship of mutual obligation between ruler and ruled:

The people, because they create the man king, they are so above the king, and have a virtuall power to compel him to doe his duty: and the king, as king, hath an authoritative power above the people, because royaltie is formally in him, and originally and virtually only in the people; therefore may he compel them to their duty...⁷²

Such a pattern may indeed be traced right back to the initial covenant which gave rise to the political community. For government occurs, Rutherford says, when the power of life and death which is ‘eminently and virtually’ in the people is formally conferred to the magistrate whom they have appointed over them.⁷³

The second concept that Rutherford deploys in his discussion of the relation between king and people is that of fountain, or fontal, power. In basic form this concept appears intimately connected to that of virtual causation, for he uses it to underscore the notion of the people’s virtual power as a reservoir or wellspring of sovereignty. Thus he says that ‘the people have vertyually all royal power in them, as in a sort of immortal and eternal fountain, and may create to themselves many kings’.⁷⁴ Elsewhere, however, Rutherford extends the analogy to indicate the way in which the people function not only as the ultimate source of sovereignty but also how they continue to regulate the ‘flow’ of royal power into the person of the king and his successors. Thus he says this fountain power is ‘unlimited in the people but bounded and limited in the king’. It is the people who choose both the measure and mode according to which it is given to the king. It is also the people who choose on whom this power will next be bestowed. Thus ‘the most eminent and fontaine-power of royaltie remaineth in the people, as in an immortal spring, which they communicate by

⁶⁷ Rutherford, *Lex Rex*, 18-19, 50-1.

⁶⁸ Rutherford, *Lex Rex*, 9.

⁶⁹ Rutherford, *Lex Rex*, 18-19.

⁷⁰ Rutherford, *Lex Rex*, 10.

⁷¹ Rutherford, *Lex Rex*, 18-19, 50; Ford, ‘*Lex Rex iusto posita*’, 279-80.

⁷² Rutherford, *Lex Rex*, 101

⁷³ Rutherford, *Lex Rex*, 156-7.

⁷⁴ Rutherford, *Lex Rex*, 125.

succession to this or that mortall man, in the manner and measure that they thinke good'.⁷⁵ This fountain power is naturally in the people and therefore can no more be ceded than can their right of self-preservation.⁷⁶

The channel in which this fountain power runs is that of the parliamentary estates. This Rutherford makes clear towards the end of *Lex Rex* in a revealing discussion of the relation between king and parliament:

If we consider the fountaine-power, the king is subordinate to the parliament, and not coordinate; for the constituent is above that which is constituted. If we regard the derived and executive power in parliamentarie acts, they make but a total and compleat soveraigne power, yet so as the soveraigne power of the parliament being habitually and underived, a prime and fountaine power, (for I doe not here separate people and parliament) is perfect without the king, for all parliamentarie acts, as is clear, in that the parliament make kings, make laws, raise armies when either the king is minor, captive, tyrannous, or dead, but royall power parliamentarie without the parliament is null, because it is essentially but a part of the parliament, and can work nothing separated from the parliament, no more then a hand cut off from the body, can write; and so here we see two supremes coordinate. Amongst infinite things there cannot be two, because it involveth a contradiction, that an infinite thing can be creatd, for then it should be finite; but a royall power is essentially a derived and created power and supreme *secundum quid*, onely in relation to single men, but not in relation to the communitie; it is always a creature of the communitie with leave of the royalist.⁷⁷

This passage goes right to the heart of Rutherford's political principles. For him a king without parliament is clearly inconceivable, but not so a parliament without a king. The estates are therefore integral to government, and if the king can be said by analogy to be the head of his realm then the estates are its temples.⁷⁸ While the Royalists protested that a headless body was impossible, Rutherford invoked the conciliarist argument that the precept of having a pope is affirmative and not always binding on the Church, in order to argue that no nation is tied to monarchy.⁷⁹ Indeed, ultimately, it is in the parliamentary estates and not the king that the fountain power of royalty truly resides.

The fountain language that Rutherford employs here, with its Neo-Platonic overtones, may certainly be traced back to medieval political discourse. However, as Anthony Black points out, in the fourteenth and fifteenth centuries this understanding was generally associated with the high papalist opponents of conciliarism and community sovereignty.⁸⁰ It is also prominent in the early modern upholders of absolutism, many of whose arguments resonate with those employed by the papalists. Thus in the Scottish context we find Ninian Winzet, a sixteenth-century opponent of Buchanan with whose works Rutherford was thoroughly familiar, arguing that 'all power in matters political flows from the king as its source'.⁸¹ Likewise, Maxwell himself frequently uses the image of the king as a fountain from whom royal dignity

⁷⁵ Rutherford, *Lex Rex*, 148-9.

⁷⁶ Rutherford, *Lex Rex*, 148, 152.

⁷⁷ Rutherford, *Lex Rex*, 377.

⁷⁸ Rutherford, *Lex Rex*, 172.

⁷⁹ Rutherford, *Lex Rex*, 78.

⁸⁰ Anthony Black, *Monarchy and Community: Political Ideas in the Later Conciliar Controversy, 1430-1450* (London: Cambridge University Press, 1970), 57-67.

⁸¹ Cited from J. H. Burns, 'Buchanan and the Anti-Monarchomachs' in Mason, *Scots and Britons*, 143. Rutherford cites Winzet in *Lex Rex*, 236, 258, 268, 272, 415.

flows.⁸² Responding to these claims, Rutherford simply inverts the direction of flow, making the people, rather than the king, the fount of royal authority. He was not the first to do this. An important late medieval example, although probably not known to Rutherford, is provided by Sir John Fortescue, who described the king's power to protect the law as 'flowing out from the people'.⁸³ Another more relevant example, which also complicates simplistic accounts of absolutism, can be found in Winzet himself, who spoke of the king's power returning to the people 'from whom it originally flowed'.⁸⁴

However, the most important example I have discovered, which bears striking affinities to Rutherford's own account, is that found in John Mair's *In Matthaeum*. Here, in a section discussing the relative power of pope and council, he faces the difficulty of explaining how power can reside in both. In resolving this Mair offers an example from the political sphere, arguing that in the kingdoms of the French and the Scots supreme power is said to reside in both the kingdoms and the kings themselves. Yet, not equally so, for the power of the kingdom is said to be both superior and less limited than the power of the king. For, as Mair puts it, the 'supreme inabrogable fontal power is in the free people'.⁸⁵ In this concise phrase we find an adequate expression of Rutherford's own political *credo*. For, as we have seen, he too believes the people's power to be supreme, fontal and inabrogable. Whether or not Mair was Rutherford's direct source for this concept requires more investigation, but Burns does take note of its distinctiveness. According to him Mair is groping here towards an understanding of the people as the constituent cause of the king, a formulation which significantly becomes explicit in Rutherford.⁸⁶ For Rutherford *potestas fontalis* implied the ability both to regulate or even redirect its own flow. Such an understanding is also prominent in Mair who held that in particular, admittedly extreme, circumstances the people could both change their monarch and even change the nature of the polity they lived under.⁸⁷

Fascinatingly, Rutherford's own language of habitual and virtual causation can also be found prominently in Mair, who employs it both in ecclesiastical and political contexts. He held that while the pope ordinarily is superior to the whole Church over which he rules as head, the Church is 'habitually and virtually' superior to him. For otherwise the General Council, which receives its authority from the Church as a whole, could not exercise authority over him. In the same way he held that the people are superior to the king both virtually and in particular cases when the estates are summoned in order to resolve a crisis.⁸⁸ For Mair the virtual power of the people is therefore a kind of reservoir which can be called on in an emergency. Using a distinction going back at least as far as Ockham he summed up his views by saying that ordinarily (*regulariter*) supreme power resides in the king while extraordinarily (*casualiter*) it can revert to the community.⁸⁹

In Rutherford we find a similar understanding. Certainly, he was well aware of the connection between virtual and extraordinary power. In his *Due Right* he thus points explicitly to the distinction between a

⁸² Maxwell, *Sacro-Sancta*, 33, 149, 195, 282.

⁸³ See Jean Dunbabin, 'Government', in J. H. Burns (ed.), *Cambridge History of Medieval Political Thought c. 350 – c. 1450* (Cambridge: Cambridge University Press, 1988), 516.

⁸⁴ Cited from Burns, 'Buchanan and the Anti-Monarchomachs', 143.

⁸⁵ John Mair, *In Matthaeum ad Literam Expositio* (Paris, 1518), 71^{r-v}. This is the same text as Mair, 'Disputation', in *Conciliarism and Papalism*, 306.

⁸⁶ Burns, *True Law*, 59; cf. Rutherford, *Lex Rex*, 144.

⁸⁷ Mair, 'Disputation' in *Conciliarism and Papalism*, 300.

⁸⁸ Mair, 'Disputation', in *Conciliarism and Papalism*, 300.

⁸⁹ Mair, 'Disputation', in *Conciliarism and Papalism*, 303; cf. Oakley, 'On the Road from Constance to 1688', 14, 16.

‘formal ordinary’ and ‘virtual extraordinary’ power in ecclesiastical affairs. He believed such extraordinary power to apply only in cases of necessity, and he cited Gerson as well as other ‘schoolmen and casuists’ in support of this position.⁹⁰ Moreover, Rutherford was also conscious that he was writing the *Lex Rex* in order to justify the actions of the covenanters in extraordinary circumstances. For, like Mair, he believed that it was only under extreme provocation that the people and estates could act in defiance of their king.⁹¹ Finally, while both men recognised the power of the people to act in extraordinary circumstances they were insistent that such action must be carefully regulated and only enacted through the estates.⁹² Now it is important not to gloss over important differences between the two men. In making the estates integral to the normal processes of government, especially legislation, Rutherford is clearly taking Mair’s conciliar logic beyond where he himself was willing to go. In this he is undoubtedly indebted to Buchanan, as well as to the dramatic constitutional changes which separated his own time from that of Mair.⁹³ Nevertheless, whether directly or indirectly, Mair’s conciliarism surely represents an important source for Rutherford’s own constitutionalism and aristocratic principle of government

For Rutherford this covenantal relationship between the king and the people was sealed at the king’s coronation by the oath he made to the three estates before God. By this he held that the king was not only directly obliged to God but also to his people by ‘reciprocation of bands’ laying ‘mutuall civill obligation upon the king to the people, and the people to the king’. The king bound himself in covenant to govern his people justly and to uphold the cause of true religion, while the people in turn bound themselves in covenant in all due obedience to their sovereign. Following the conventional understanding of a covenant Rutherford held that it both placed each party under an obligation and gave them a right (*ius*) over the other in case of their defaulting.⁹⁴ Such an understanding clearly underpinned his famous resistance theory, justifying the defensive wars of the Covenanters. However, it also had other important implications, structuring the ordinary as much as the extraordinary structure of political life. Citing the modern jurists, but drawing on a definite conciliar tradition, Rutherford held that the covenant obliged the king to act for the safety and well-being of his people and not for his own private ends. The king’s power was therefore ministerial in character and he was properly to be regarded as both the steward of his kingdom and the servant of the people.⁹⁵

For Rutherford this meant that the king could not properly exercise *dominium* over either his people or their property. Following an important late medieval tradition, well represented by Gerson, Almain and Mair,

⁹⁰ Samuel Rutherford, *The Due Right of Presbyteries, or, A Peaceable Plea for the Government of the Church of Scotland* (London, 1644) 7-8. Significantly, Rutherford’s language here seems to have connotations of absolute and ordained power.

⁹¹ Rutherford, *Lex Rex*, 153, 173.

⁹² Burns, *True Law*, 69-70. Noteworthy here is Rutherford’s distinction in *Peaceable and Temperate Plea*, 46 between ‘plebs’ and ‘populus’ which explicitly draws on Arnisaeus. Developing this Rutherford argues that ‘the multitude excluding the states, or the base of the people can hardly have an other law against a tyrant, then the law of nature, but the common-wealth including the estates of a free kingdome, hath an authoritative’.

⁹³ Burns, *True Law*, 55-60 indicates Mair’s conviction that the king exercises legislative authority. This is also seen in Mair, ‘Disputation’, in *Conciliarism and Papalism*, 303 where he clearly expresses his view that in the process of government the king is regularly above his entire kingdom, which only exercises its innate authority over him on extraordinary occasions. Rutherford’s contrary conviction that the ‘legislative power is more in the estates’ than the king himself draws on Buchanan’s *De Jure Regni apud Scotos* as well as others like Calvin, Vermigli and Hotoman (*Lex Rex*, 178-9).

⁹⁴ Rutherford, *Lex Rex*, 96-103.

⁹⁵ Rutherford, *Lex Rex*, 124-30, 156.

Rutherford held that the right to property was rooted in necessity and so ultimately derived from the law of nature, even though the ownership of property itself was to be regarded as a consequence of the Fall. Since this right precedes the existence of kings, both in order of nature and of time, Rutherford was insistent that they could not overturn it. For as he put it ‘neither civility nor grace destroys but perfects nature’.⁹⁶ This meant that the king could have no strict dominion, but rather a ‘meere fiduciary and dispensatory power’ to regulate property for the ‘good of the publique’ – a position identical to that of Mair and Gerson.⁹⁷

Like all rights he was insistent that this right of dominion was bound by the natural and divine law in which it was grounded – confirming again the intimate link between Rutherford’s political theory and the natural rights discourse of Gerson and Almain. In this, as we have seen, there is an intimate and indissoluble link between the rights of the individual and the rights of the community. Governing the relation and interaction of king and people and their overlapping spheres of right and dominion is the higher law of a higher king – that of God himself. For Rutherford, as for Mair before him, all dominion is therefore founded on covenant.⁹⁸

⁹⁶ Rutherford, *Lex Rex*, 116-23.

⁹⁷ Rutherford, *Lex Rex*, 398; cf. Burns, *True Law*, 67; Skinner, *Foundations*, II.117.

⁹⁸ Rutherford, *Lex Rex*, 397-8; cf. John Mair, *In Quartum Sententiarium Quaestiones* (Paris, 1519), 4 d. 15 q. 10.