A study of Constitution and Legitimacy:

Influences of Protestant thinking on perceptions of the legitimacy of constitutional reform as enacted by the 1688 English Bill of Rights

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Abstract

This thesis is a work of constitutional theory focusing on the Bill of Rights [1688]. It posits this document as a simultaneous manifestation of two constitutional projects. First, as a settlement to the constitutional crises and Revolutions of the English seventeenth-century. Second, as a constitutional reform that established the basis of Parliament's authority over the monarchy. It is suggested that this reform enacted the legal transition from a monarchic towards a parliamentarian model of constitutionalism. This is undertaken through arguing that the perception of the legitimacy of the Bill of Rights was influenced by thinking stemming from the Protestant Reformation. The central thesis is that the Protestant Reformation of church structure and 'spiritual' authority opened conceptual space for reimagining the relationship between the people and their governors. It is argued that challenges presented to the hierarchical authority of the Medieval Roman Catholic Church were transferable to the unidirectional experience of constitutional authority inherent in monarchic constitutionalism.

This thesis presents an interdisciplinary examination of the influence of thinking concerning authority stemming from the Protestant Reformation upon constitutional theory. In so doing, this extends study of the interconnection between church and state constitution and organisational thinking from the Medieval into the Early Modern period. This project also challenges the entrenched ideologically opposed Whig and Revisionist historiographies of England's seventeenth-century constitution. As part of this process it critiques the dominant positivist logic of the legitimacy of public law, and the dogma of British constitutional exceptionalism. The aim of this thesis is to introduce a new interdisciplinary perspective on British constitutional development into the existing literature of non-positive constitutional theory. This facilitates a contribution to this field of study that challenges dominant narratives of Early Modern secular Republicanism as the driver of constitutional development. It also contributes a historical account in the emergent style of what in this project is termed the third wave historiography of seventeenth-century English constitutional history.

The main points of discussion in demonstrating the central argument of this thesis are as follows: First, The Bill of Rights can be understood as simultaneously both a constitutional settlement and a constitutional reform. Second, Perception of the legitimacy of the Bill was influenced by Protestant Reformation of church structure and 'spiritual' authority. This argument addressing perception of the legitimacy of the Bill is revealed through analysis of preceding failed constitutional manifestos for reform, and subsequent constitutional reforms. The documents analysed are: the Petition of Right (1628), and the Levellers' An Agreement of the People (1647); and the Triennial Act (1694) and the Act of Settlement (1700). In order for this new perspective to be revealed a non-positivist interdisciplinary framework of theory, concepts and methods is required; one utilising a political jurisprudential approach to constitutional scholarship.

Contents

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Introduction

My thesis argues that the Bill of Rights [1688] enshrined in law a constitutional settlement that can be conceived as having derived some perceptions of its legitimacy from the introduction of a relationship of authority between the people and their government, as opposed to the pre-existing unidirectional, hierarchical experience of absolute authority. This took the form of the transition of constitutional authority away from the monarchy towards a parliamentarian constitutionalism. The Protestant Reformation re-imagined a church structure built upon a relationship between the congregation and their 'spiritual' authorities. The Bill can be perceived as having transferred elements of this idea into the temporal political sphere, through Parliament's claim to be representative of the people as the basis for a parliamentary constitutional model. Foundational to the Protestant Reformation was the attack on the prevailing Papal hierarchy, and hierarchical authoritarian structure of the Medieval Roman Catholic Church. This hierarchical structure was underpinned by the Papal claim to authority based upon being God's individual representative on earth; providing unique access to divine legislative sovereignty. This in turn meant the tiered form of appointed leadership within the Catholic Church was legitimised by the extension of this hierarchical relationship. Office holders were perceived to possess a privileged position due to their association with Papal authority through direct and indirect Papal appointment. This structure of Church constitution created a unidirectional, hierarchical experience of (absolute) authority as power.

Universal among the theological principles of the Protestant reformers was the firm conviction that the authority of the Pope as voice of God, and leader of the church on earth, was a human creation and not a divine appointment. Instead, Protestant theology placed the individual at the heart of the spiritual experience. The individual believer possessed the capacity to engage directly with Scripture and, stemming from this, a right to a personal

relationship with their God. This was as opposed to access filtered through layers of church bureaucracy as required by Medieval Papal doctrine. The role of the Protestant church was not that of a gatekeeper to divine wisdom and knowledge, but as a facilitator of access for the laity to their deity on an individual as well as congregational level. I contend that these basic Protestant tenets can be seen to act within the Bill of Rights in three principal ways. First, through conveying a perception of the legitimacy of the Bill, by connecting the constitutional authority claimed by Parliament to its role as the correct representative of the people. Second, by invoking parliamentary constitutional authority to enable the Bill to function both as a constitutional settlement to the tumultuous English seventeenth-century, and as a reform of constitutional structure and authority. Third, through establishing a legal basis for successful deployment of Parliaments' constitutional authority to undertake subsequent constitutional reform; through enshrining parliamentary authority, and establishing the Bill of Rights itself as a source of legitimacy for constitutional reform.

The notion of the divinely appointed hierarchical supremacy of monarchs, through invocation of the divine right of kings, can be seen to echo Papal claims to authority, and legitimacy. Therefore, Protestant theological reform concerning the individualisation of the relationship with God could be argued to have a readymade transferable capacity into the constitutional arena. The perception of legitimacy conveyed through a relationship between the congregation and their 'spiritual' officers similarly echoes that of a potential relationship between the governed and their governors. I contend the Bill of Rights undercut monarchic hierarchy by promoting Parliament to the position of constitutional supremacy. This in turn allowed the Bill of Rights to be perceived as a legitimate settlement to the so called 'Glorious' Revolution and wider seventeenth-century constitutional crises. Furthermore, it created a perception of the legitimacy of further parliamentary constitutional reform, and the legitimacy of the Bill as a source of legitimacy for further constitutional reform. Aspects of this legitimacy

were conveyed by a change in the perception of the authority of government. Whereas previously absolute authority had been bestowed by privileged association to divinity, it came to be perceived as now requiring a relationship between the people and their representatives in Parliament. This represented a structural reform of constitutional authority that can be viewed as relating closely to Protestant theology. Specifically, the Protestant individualisation of the relationship between the faithful and their God; and the consequent re-imagining of church structure, and the location of 'spiritual' authority, that the Reformation entailed. An aspect of the legitimacy of the Bill of Rights is argued to have been perceived through this theological doctrine, to facilitate its function as a source of legitimate authority for empowering further constitutional reforms. These reforms can be seen in the later seventeenth and early eighteenth centuries, manifested in the Meeting of Parliament Act (1694) and the Act of Settlement (1700). The success of this reform process can be measured against the failure of earlier unsuccessful constitutional reform manifestos such as the Petition of Right (1628) and the Levellers' An Agreement of the People (1647).

LITERATURE REVIEW

The primary orientation of my thesis is toward academic debates surrounding the understanding of constitutionalism. My thesis contributes to the growing literature arguing for a non-positivist understanding of constitutionalism that is sensitive to both legal and political components of constitutional process. In the specific context of the Bill of Rights my intention is to increase focus on the document and its various functions, as opposed to leaving it buried under the wider political ramifications of the 'Glorious' Revolution. In order to develop my argument, and highlight my contribution to this discourse, I make use of external literatures concerning histories of the English seventeenth-century, and the Protestant Reformation, as well as legitimacy theory in the behavioural social sciences of Sociology and social-Psychology.

Historiography of the 'Glorious' Revolution and Reformation

The tercentenary of the Bill of Rights in 1988/9 saw the publication of documents from the Parliamentary archives concerning the 'Glorious' Revolution, a project that shows the clear influence of the Whig constitutional grand narrative.[1] These celebrations stimulated a concentrated Revisionist historical review of the politics of the 'Glorious' Revolution. This project fractured the grand Whig narrative of gradual constitutional evolution, and the smooth rise of eighteenth-century parliamentary democracy, instigated by the correction of monarchic abuse of powers and misinterpretation of the ancient or common law constitution.[2] In place of the inward facing and isolationist Whig narrative Revisionist historians introduced an international context, and military dimension to the event.[3] Around this time a reinterpretation of the period began across the social sciences, early works coming from the history of economics, developed gradually by historical focus on political economy, revealing the revolutions in public finance begun in 1688.[4]

Historians have subsequently revisited the early Revisionist approaches to 1688 and developed what I describe as a third wave school of history, placing the 'Glorious' Revolution centrally in the cycles of constitutional conflict of the English seventeenth-century.[5] This scholarship critiques the Revisionist atomisation of events of the 'Glorious' Revolution as well as the traditional Whig historical interpretation of the event as a bloodless appendage to the central settlements enacted in the wake of the upheavals of the Civil War, Interregnum and

[1] As an example see: David Lewis Jones, *A Parliamentary History of the Glorious Revolution* (HM Stationery Office 1988).
[2] As examples of Whig historiography see: George Barton Adams & H Morse Stephens (eds), *Selected Documents of English Constitutional History* (Macmillan 1914); Lewis Jones, (n1); SR Gardiner, *Constitutional Documents of the Puritan Revolution* (3rd edn, Clarendon Press 1951); Carl Stephen & Fredrick George Marcham (eds), *Sources of English Constitutional History* (Harper & Row 1937).
[3] As examples see: Robert Beddard (ed), *The Revolutions of 1688* (Clarendon Press 1991); Jonathan Israel (ed), *The Anglo-Dutch moment* (CUP 1991); Lois Schwoerer (ed), *The Revolution of 1688-1689* (CUP 1992).
[4] As examples, for economics see: Douglas North and Barry Weingast, 'Constitutions and Commitment' [1989] The Journal of Economic History 803; and for political economy see: David Stasavage, *Public Debt and the Birth of the Democratic State* (CUP 2003).
[5] As examples see: Tim Harris, *Revolution* (Penguin 2007); Steve Pincus, *1688* (Yale University Press 2009); and Edward Vallance, *The Glorious Revolution* (Abacus 2006).

Restoration; a position that long influenced legal and political debate.[6] From a positivist legal perspective this scholarship concerning the ancient or common law constitution aligns with the narrative of the infallibility of the law, and the need for revolutionary settlements to confirm pre-existing legal truths, correcting non-legal, political misapprehensions.[7] The third wave historiography challenging this tradition fits easily into the wider social sciences trend, the developmental trajectory of eighteenth-century British constitutional politics, as well as contemporary critical legal constitutionalist scholarship.

What I classify as the third wave historiography of the 'Glorious' Revolution provides a broader context and richer narrative of the event. As part of this, it challenges the fundamental supposition, common to both Whig and Revisionist historiography, of a largely bloodless occurrence felt only within the politically engaged upper echelons of society. This scholarship also highlights how the Whig grand narrative, of progressive constitutional evolution stemming from the ancient or common law constitution, created not only a historiography of English constitutionalism but also a method of constitutional practice. The producers of the Whig grand narrative were not academic historians as we recognise them today, but rather active participants in the constitutional process. Study of the Bill of Rights serves to draw attention to how Parliament was able to shape its own constitutional narrative within enacted legislation.[8] Additionally, the third wave helps to expose the collapse of the Revisionist historical project

[6] As examples see: JGA Pocock, *The Ancient Constitution and the Feudal Law* (CUP 1957); continued in: Glenn Burgess, *The Politics of the Ancient Constitution* (Macmillan 1992); His, *Absolute Monarchy and the Stuart Constitution* (Yale University Press 1996).

[7] Paul Kahn, *The cultural study of law* (University of Chicago Press 1999), 70-77; this is also a theme explored in Reinhart Koselleck, *Futures Past* (Keith Tribe ed and tr, Columbia University Press 2004), interestingly this work develops a notion of different conceptions of revolution: one in line with traditional legal framing as a slow revolution reversing discontinuity, but also another as the idea of sudden developmental shift as in the concept of technological revolution. This dual conception may have utility in exploring themes around the split character of the Bill of Rights within the Glorious Revolution and how it can be understood to appear legitimate to both conservative and reform movements, both ends of the spectrum able to perceive legitimacy in different conceptions of the revolutionary moment of 1688.

[8] This argument is developed in detail through analysis of the framing of the document in chapter 4. It suffices here simply to point out historical research does not match the portrayal of events within the *Bill* itself. It should also be noted from the Whig histories cited above how the Whig narrative has shaped the presentation of the documents themselves to later audiences.

into a mere anti-Whiggism. Rather than reconsider events of the 'Glorious' Revolution dispassionately, revisionists fell into a trap of the dismantling the Whig grand narrative as their primary goal. This produced works of ideological binary opposition as opposed to nuanced retellings of events. At the heart of third wave scholarship, and shaping its current discourse lies a lack of attention to the legal documents of the 'Glorious' Revolution such as the Bill of Rights, and the reforms it sparked in the Meeting of Parliament Act and the Act of Settlement.[9]

Reformation historians have analysed the works of Protestant reformers such as Luther[10] and Calvin[11] and detailed their claim that medieval Papal doctrine was based upon a corruption of Scripture. The correction of this recognised the capacity for the individual to relate directly to God through personal engagement with Scripture, which was the true source of the Word of God, not Papal interpretation of Scripture. In turn this invalidated not only the papal claim to legitimate 'divine' elevation, but also the whole hierarchical structure of the Medieval Roman Church.[12] These beliefs can be found to be central across the wider Protestant reform movement.[13] Working from these fundamental tenets, Protestant reformers re-imagined

[9] As examples note the focus on the Declaration of Rights as opposed to the legislative Bill of Rights in Harris, (n5); and the absence of the Bill of Rights from the index of Pincus, (n5).
[10] As examples see: Oswald Bayer, 'Martin Luther (1483-1546)' in Carter Lindberg (ed) *The Reformation Theologians* (Blackwell 2002); Scott Hendrix, 'Luther' in David Bagchi & David Steinmetz (eds) *The Cambridge Companion to Reformation Theology* (CUP 2004); and Robert Kolb, 'Confessional Lutheran theology' in David Bagchi & David Steinmetz (eds) *The Cambridge Companion to Reformation Theology* (CUP 2004); Carter Lindberg, 'Luther's struggle with social-ethical issues' in Donald K McKim (ed) *The Cambridge Companion to Martin Luther* (CUP 2006); Fred Meuser, 'Luther as preacher of the Word of God'; and Whitford, 'Luther's political encounters' in Donald K McKim (ed) *The Cambridge Companion to Martin Luther* (CUP 2006).
[11] As examples see: Jeannine Olson, 'Calvin and social-ethical issues' in Donald K McKim, *The Cambridge Companion to John Calvin* (CUP 2004); and William Stevenson, 'Calvin and political issues' in Donald K McKim, *The Cambridge Companion to John Calvin* (CUP 2004); David Steinmetz, 'The theology of John Calvin' in David Bagchi & David Steinmetz (eds), (n10); Randall Zachman, 'John Calvin (1509-1564)' in Carter Lindberg (ed), (n10).
[12] As examples see: Francis Oakley, *Kingship* (Blackwell 2006), 87-131; John Witte Jr, *The Reformation of Rights* (CUP 2007) chapter 1.
[13] For the uniformity on at least the relevant central theological tenets to my study across all developing Protestant theologies see: Peter Newman Brooks, 'Thomas Cranmer (1489-1556)' in Carter Lindberg (ed), (n10); Daniel Epply, 'Richard Hooker (1554-1600)' in Carter Lindberg (ed), (n10); Gregory Miller, 'Huldrych Zwingli (1484-1531)' in Carter Lindberg (ed), (n10); Richard Muller, 'Theodore Beza (1519-1605)' in Carter Lindberg (ed), (n10); and Heinz Scheible, 'Philip Melanchthon (1497-1560)' in Carter Lindberg (ed), (n10); Sachiko Kusukawa, 'Melanchthon' in David Bagchi & David Steinmetz (eds), (n10); Andrew Pettegree, 'The spread of Calvin's thought' in Donald McKim (ed), (n11); and Carl Trueman, 'The theology of the English reformers' in Donald McKim (ed), (n11); Peter Marshall, *The Reformation* (OUP 2009).

the constitution of the church; envisioning an institution with a relationship between the congregation and their spiritual officers. A relationship including the individual, collectively through membership of the congregation, in the selection of those holding offices of 'spiritual' authority. This process conveyed a perception of the legitimacy of official authority distinct from that of 'divine' privilege in the Medieval Papal mode.

Elements of religious thought and religious politics have been subjects within the Revisionist and third wave historiography. There have been studies conducted of the relationship between the Anglican Church and the Crown through analysis of conformist and non-conformist sermons, and the rise and fall of key personages such as Archbishop Laud.[14] However, this has largely concentrated upon the period leading up to the eleven year personal rule of Charles I, the Civil War and the Interregnum. There has also been scholarship addressing the influence of perceptions of Catholic imperialism in the political crises leading up to the 'Glorious' Revolution, and the ideological conceptions of Catholic and Liberal modernisms.[15] Additionally, there has been analysis of the Protestant conceptual reform of church structure and spiritual authority to the constitutional crises of the English seventeenth-century. However, it has not been applied to analysing its influence upon perception of the legitimacy of its settlement in the 'Glorious' Revolution, and subsequent parliamentarian constitutional reform.

Constitutional theory

Current critical scholarship of constitutionalism questions the positivist position of constitutional power emanating purely from law, which in turn prevents legal analysis of the societal processes generating constitutional law. This is exemplified by classical legal positivist

[14] As examples see: Elina Kiryanova, 'Images of Kingship' (2015) 100(339) History 21; David Little, 'God v Caesar' (2016) 16 Ecclesiastical Law Journal 291; Mark Parry, 'William Laud and the Parliamentary Politics of 1628-9' (2017) 36(2) Parliamentary History 137; L Reeve, *Charles I and the road to personal rule* (CUP 1989); Kevin Sharpe, *The Personal Rule of Charles I* (Yale University Press 1992).
[15] As examples see: RD Congleton, *Perfecting Parliament* (CUP 2010); Harris, (n5); North and Weingast, (n3); Pincus, (n5); Stasavage, (n4).

scholarship such as Kelsen's *Pure Theory of Law*.[16] The result of this approach is that the English seventeenth-century constitutional settlement has been accepted, un-critically, as the reversion to an ancient ideal, and isolated from early modernity through categorisation as something prior to, and distinct from, Early Modern rights based constitutional revolutions.[17] This has also created a dominant tendency, throughout positivist and non-positivist constitutional scholarship alike, to distinguish the 'Glorious' Revolution from modern rights based constitutional discourse.[18] There is a general tendency to suggest that political rights based revolutions began with the French and American Revolutions of the late eighteenth-century. Therefore, the 'Glorious' Revolution is side-lined from discussion of modern western revolutionary constitutionalism.[19]

In response to the dominant positivist paradigm within constitutionalist scholarship, Loughlin has examined the interrelation of law and politics in western historical constitutional development. He suggests that sovereignty, and the legitimacy of power, is to be found in the introduction of a relationship between the governed and their governors.[20] This positioning of the legitimacy of power, as not lying purely in the correct enactment of legal constitutions is also shared by Thornhill. Through historical-Sociological analysis he suggests that normative principles site the legitimacy of constitutional power in the political relationship, rather than singly in the formalistic legality of the constitutional document itself.[21] Tomkins, seeking to

[16] Hans Kelsen, *Pure Theory of Law* (Knight tr, 2nd edn, University of California Press 1987).
[17] As examples see: Hauke Brunkhorst, *Critical Theory of Legal Revolutions* (Bloomsbury 2014), 221-230; Dieter Grimm, *Constitutionalism* (OUP 2016) chapter 1.
[18] As examples see: ibid; Martin Loughlin, *Foundations of Public Law* (OUP 2010) chapter 9; Chris Thornhill, *A Sociology of Constitutions* (CUP 2011) 181-182; Elizabeth Zoller, *Introduction to Public Law* (Martinus Nijhoff 2008) 83-130.
[19] An exception to this might be found in the idea behind Adam Tomkins, *Our Republican Constitution* (Hart 2005) chapter 3, which does undertake a republican analysis of the 'Glorious' Revolution's legal documents. However, it does so largely in isolation from wider narratives of constitutional development.
[20] Loughlin, (n18), 183-208; His, *The Idea of Public Law* (OUP 2003) chapter 5; His, 'The concept of constituent power' (2014) 13(2) European Journal of Political Theory 218; His, 'The Constitutional Imagination' (2015) 78(1) Modern Law Review 1. More generally see: Martin Loughlin, *Sword & Scales* (Hart 2000); His, 'Martin Loughlin's Foundations of Public Law' [2016] Jus Politicum 15.
[21] Chris Thornhill, 'Towards a Historical Sociology of Constitutional Legitimacy' (2008) 37(2) Theory and Society 161; Thornhill, (n18) Introduction; as an exposition of this line of thinking in contemporary contexts

illuminate the interrelation of the legal and political aspects of constitutionalism, prioritised the Bill of Rights as the centrepiece of a republican constitutional model.[22] Tomkins' position is in opposition to the traditional narratives of developmental monarchic constitutionalism as the normative principle of English legal history, as espoused by Pocock, Burgess and others.[23] These insightful critiques of positivist legal constitutionalism focus upon power, failing to separately consider authority; especially the legitimacy of authority that may be found in the nature of the relationship between the governed and governors.

Another factor influencing both positivist and non-positivist constitutionalism is the acknowledgement, or not, of religious influence upon constitutional thought. Scholarship addressing the influence of religious thinking and Church structure upon constitutional thought has focused upon the period between the Papal and Protestant Reformations. Once past this transition, constitutional thought from the seventeenth-century onwards has been analysed from a political not theological perspective. The result is that it does not comprehend the influence of the reform of Protestant church structure, and the relationship between congregations and their spiritual officers, upon Early Modern constitutionalism.[24] In order to realise a vision of clean rational legal positivism, stripped of subjectivity and unsullied by questions of divinity and faith, positivist constitutionalism rejected any religious influence upon modern constitutionalist revolutions. Instead, law became about rights and freedoms inherent in all citizens (or free men). This focus upon republican political theory has permeated non-positivist constitutional scholarship. However, this is not to suggest that religious

see: Christopher Thornhill, 'A Sociology of Constituent Power'(2013) 20(2) Indiana Journal of Global Legal Studies 551.

[22] Tomkins, (n19), 67-114; for the genesis of this argument applied in contrast to the monarchic leaning analyses of Walter Bagehot see: His, 'The Republican Monarchy Revisited' [2002] Constitutional Commentary 737.

[23] As examples see: Burgess, *The Politics of the Ancient Constitution* (n6); His, *Absolute Monarchy and the Stuart Constitution* (n6); Pocock, (n6); His, *The Machiavellian Moment* (Princeton University Press 1975).

[24] As examples see Harold Berman, *Law and Revolution* (Harvard University Press 1983); Brian Tierney, *Religion, Law, and the Growth of Constitutional Thought 1150-1650* (CUP 1982); Loughlin, (n18); Thornhill, (n18). Alternatively, religious influences upon the administrative structure of early modern legal regimes has been subjected to analyses, as opposed to the constitutional influences underpinning those administrative regimes, as an example see Harold Berman, *Law and Religion, II* (Belknap Press 2003).

influence upon republican rights discourse has not been studied, it is rather the case that this analysis is often contained within human rights scholarship and has had limited impact upon wider constitutionalist scholarship.[25]

In rejecting religious influence upon modern constitutionalism, scholars are forced to confront the legitimacy of constitutional formation and operation through a framework that rejects faith in divinity, which was the principal source of legitimacy for Medieval constitutionalism.[26] In positivist scholarship this risks becoming a quest for legitimacy located in procedural correctness. Laws are proposed and enacted in the prescribed constitutional fashion, with the constitution legitimised simply by its very existence.[27] For political constitutionalists the focus becomes constituent power and its constitution of constituted power. From a legal perspective, this creates a paradox whereby constituents are required to exercise their power through illegal revolt to authorise the constituted power in the constitution of the legitimate legal regime.[28] In order to find a conception of legitimacy operable within my study there is a need to survey literature external to prevailing constitutionalist discourse.

Weberian legitimacy theory in Sociology and social-Psychology

Central to the issues with current constitutionalist conceptions of legitimacy, especially among legal scholars both positivist and non-positivist, is a conflation of power and authority. In order to accurately comprehend perception of the legitimacy of authority as underlying legitimate exercise of power, a distinction needs to be drawn between separate but related concepts of

[25] As examples see: Micheline Ishay, *The History of Human Rights* (University of California Press 2004); Witte, (n12).
[26] Evidence of the clear break between religious influenced medieval constitutionalism and early modern political constitutional theory can be seen in the sweeping historical studies of numerous scholars, as examples see: Brunkhorst, (n17); Grimm, (n17); Loughlin, (n18); Thornhill, (n18).
[27] As an example see: Joseph Raz, *Between Authority and Interpretation* (OUP 2009), 348.
[28] As examples see: Joel Colon-Rios, 'Five conceptions of constituent power' [2014] Law Quarterly Review 306; Kelly Grotke & Markus Prutsch (eds), *Constitutionalism, Legitimacy, and Power* (OUP 2014); Andreas Kalyvas 'Popular Sovereignty, Democracy, and the Constituent Power' (2005) 12(2) Constellations 223; Hans Lindahl 'Possibility, Actuality, Rupture' (2015) 22(2) Constellations 163; Martin Loughlin & Neil Walker (eds), *The Paradox of Constitutionalism* (OUP 2007); Antoni Negri, *Insurgencies* (University of Minnesota Press 1999); Mark Wenman, *Agonistic Democracy* (CUP 2013).

power and authority. A strong body of existing literature analysing this position, of distinction between power and authority, can be located within Sociological and social-Psychological studies of democratic legitimacy and regime transition.[29] The basis of this contemporary scholarship can be found in Max Weber's study of law and legitimacy. Weber's historical-Sociology identifies three pure types of legitimate authority: 1) Charismatic authority, the inspirational leadership of a single person such as newly 'revealed' prophetic wisdom; 2) Traditional authority, based on the normative legitimacy of immemorial custom, and; 3) Rational/Legal authority, the invoking of normative legal principles and the correct following of their procedure in the constitution of authority and exercising of power.[30] The strengths of Weber's work are that it allows for an analysis of the collective experience of authority by a community – and individual members of that community – simultaneously. This is facilitated by an understanding that the individual will have a perception of the authority, and a perception of the wider community's perception of the authority; and that the perception of legitimacy of the authority will be based on both of these interrelated perceptions. Additionally, Weber's work possesses a strong sensitivity to the influence of religion on societies, and the influence upon perceptions of legitimacy that this can cause.[31]

The issue in applying Weber's historical-Sociological approach to legitimacy, in isolation, to my project is that the starting position once again assumes an existing normative principle whereby the constitution is a source of law. Fortunately, subsequent behavioural analysis scholarship has built its foundations directly upon Weber's work; starting from the

[29] As examples see: Jonathan Boswell, *Community and Economy* (Routledge 1990), 16; Bogdan Denitch, 'Legitimacy and Social Order' in His (ed), *The Legitimation of Regimes* (SAGE 1979); GL Field & John Higley, 'Elites, Insider, and Outsiders' in Bogdan Denitch (ed), *The Legitimation of Regimes* (SAGE 1979); Branko Horvat, 'The Delegitimation of the Old and the Legitimation of New Social Relations in Late Capitalist Societies' in Bogdan Denitch (ed), *The Legitimation of Regimes* (SAGE 1979); Herbert Kelman, 'Reflections on Social and Psychological Process of Legitimization and Delegitimization' in John Jost and Brenda Major (eds), *The Psychology of Legitimacy* (CUP 2001), 54-58.

[30] Max Weber, *Economy and Society* (Guenther Roth and Claus Wittich ed, 2nd edn, University of California Press 1978), 212-311.

[31] Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (12th ed, Unwin University Books 1974).

understanding that the legitimacy of authority is bound up in both individual perceptions of authority and individual perceptions of community perceptions of authority. Therefore, perceptions of the legitimacy of authority will be influenced by both aspects of this relationship to authority.[32] From within this Sociological and social-Psychological research four key aspects of relationships to authority and their impact upon individual and collective perceptions of the legitimacy of authority can be found. These are: 1) the *general* perceptions of individual and community treatment by the authority;[33] 2) the perceptions of the fairness of *specific individual* procedures used by the authority in dealings with individuals and the wider community;[34] 3) perceptions of individual and collective dependence upon the authority, and 4) feelings of justification of the authority that this may breed.[35] All of these factors feed into individual and collective perceptions of the legitimacy of authority. Positive experiences will generate perceptions of legitimacy, while negative experiences will result in perceptions of the authority's illegitimacy.[36] Where an existing authority claims legitimacy from a source that is open to alternative interpretation, such as theological differences between Catholic and Protestant doctrines, the 'competing' alternative claim can destabilise perceptions of the legitimacy of the authority of the existing regime. Once destabilised, a regime can be supplanted if an alternative regime – with a stronger perceived source of legitimate authority –

[32] Morris Zelditch and Henry Walker, 'The Legitimacy of Regimes' [2003] Advances in Group Processes 217; see also the overview and literature review within: Morris Zelditch, 'Theories of Legitimacy' in John Jost and Brenda Major (eds), *The Psychology of Legitimacy* (CUP 2001).
[33] As examples of the source material from which this principle is drawn see: Margaret Levi et al, 'Conceptualizing Legitimacy, Measuring Legitimacy Beliefs' (2009) 53(3) American Behavioural Scientist 354; Cecilia Ridgeway, 'The emergence of Status Beliefs' in John Jost and Brenda Major (eds), *The Psychology of Legitimacy* (CUP 2001).
[34] For sample literature see: Mike Hough et al, 'Procedural Justice, Trust and Institutional Legitimacy' (2010) 4(3) Policing 203; Jonathan Jackson et al, 'Why do people comply with the law?' (2012) 52 British Journal of Criminology 1051; Tom Tyler, 'A Psychological Perspective on the legitimacy of Institutions and Authorities' in John Jost and Brenda Major (eds), *The Psychology of Legitimacy* (CUP 2001).
[35] John Jost, Diana Burgess and Christine Mosso, 'Conflicts of Legitimation among Self, Group, and System' in John Jost and Brenda Major (eds), *The Psychology of Legitimacy* (CUP 2001), 364; Jojanneke van der Toorn et al, 'More than fair' (2011) 47 Journal of Experimental Psychology 127; Jojanneke van der Toorn et al, 'A Sense of Powerlessness Fosters System Justification' (2015) 36(1) Political Psychology 93.
[36] Herbert Kelman, (n29).

presents itself.[37] The addition of this research developing Weber's historical-Sociological foundations can assist in accessing further nuance in Weber's analysis of legitimacy.

CONTRIBUTION TO THE LITERATURE

The influence of religious doctrine upon early state formation and constitutionalism has been widely acknowledged; the Papal Reformation of the Medieval Roman Church has been suggested as the first model of a proto-modern state.[38] Berman has continued in this vein to demonstrate the influence of the Protestant Reformation on the development of the English legal system and institutions of public law;[39] while also suggesting a lack of existing scholarship, calling for further investigation of the wider impact of religion upon the development of the 'Western Legal Tradition'.[40]Answering this call, I will utilise scholarship on the theological developments of Protestant reformers. This will allow an understanding of the influence of Protestant theology concerning the individualisation of the relationship to God as a source legitimacy, and an inspiration, for the authority claimed by Parliament as representatives of the people enacted in the Bill of Rights.

My contribution to the existing literature will be made through enriching the examination of theological influences on constitutional thought to the period in question: the seventeenth-century.[41] This will be done by building upon the distinction between power and authority; a distinction that is hinted at if not fully recognised in Loughlin's separation of the concepts of the office of sovereign, governor and exerciser of power, and sovereignty, the

[37] Robin Stryker, 'Rules, Resources, and Legitimacy Processes' (1994) 99(4) American Journal of Sociology 847.
[38] As examples see: Berman, (n24), 199-224; Larry Siedentop, *Inventing the Individual* (Penguin 2015), 192-224; Tierney, (n24), 85-118.
[39] Berman, *Law and Revolution, II* (n24), 199-371.
[40] ibid, ix, 373.
[41] Scholarship addressing religious influences upon constitutional thought has focused upon the period from the Papal Reformation to the Protestant Reformation itself. Once past this transition constitutional thought from the seventeenth-century onwards has been analysed from a political, not theological perspective. As examples of this see my discussion of works by Harold Berman and Brian Tierney; and Martin Loughlin, Chris Thornhill and Adam Tompkins. Alternatively, religious influences upon the administrative structure of legal regimes has been subjected to analyses, as opposed to the constitutional influences underpinning those administrative regimes, as an example see my discussion of Harold Berman below.

constitutional relationship between the governor and the governed and source of constitutional authority.[42] My focus on the Protestant Reformation of church structure and 'spiritual' authority allows for a deeper complexity of understanding of the cultural character in which the legal and political constitutional development occurred. As discussed above, the literature critiquing legal positivist constitutionalism examines the legitimacy of power exercised under constitutional auspices. I analyse perception of the legitimacy of authority through the relationship of the people to their government; and how this might be linked to the Protestant doctrine of individualism and the refutation of divinely empowered hierarchical authority. In order to find a theoretical basis for such an examination, one needs to step outside the traditional legal and political frames. This is because legal (and political) constitutional scholarship addresses itself to the concept of sovereignty, a concept which is a characteristic of divinity, encompassing both the *authority* and *power* of God. Sovereignty can never be illegitimate, if divine in nature.[43] This concept entered legal discourse with Medieval Papal claims to divinely appointed legislative sovereignty which underpinned the constitutional steps taken during the Papal Reformation of the eleventh and twelfth centuries.[44] The Protestant Reformation assaulted the papal claim head-on, but was of limited impact in challenging the legal concept due to retention of core aspects of the character of legal sovereignty.

In order to facilitate my analysis of seventeenth-century constitutional legislation I will construct a combined framework of method, concepts and theory.[45] The foundation of this framework will be the theory and method of political jurisprudence, in conjunction with a definition of constitution and authority specific to my thesis. My framework also draws

[42] As examples see the conceptual explications in: Loughlin, 'The concept of constituent power' (n20); Loughlin, 'The Constitutional Imagination' (n20).
[43] This theme that runs through and across several essays of Erik Peterson, see: Erik Peterson, 'Monotheism as a Political Problem', 103; 'Christ as *Imperator*', 146-147; 'Witness to the Truth', 162 in His, *Theological Tractates* (Michael Hollerich ed & tr, Stanford University Press 2011).
[44] Siedentop, (n38), 192-224.
[45] This framework is the subject of the first three chapters of my thesis.

primarily upon the literature concerning the Protestant individual. This will be assisted by secondary recourse to Weber's historical-Sociology and subsequent Sociological and social-Psychological literature concerning the legitimacy of authority. This allows for the construction of an analytical framework that is sensitive to how Protestant theology that undercut Papal authority – while centralising the relationship between the individual and God – could also be imagined to question monarchic constitutional authority. This introduced into constitutional thought an idea that there should be a closer and more equal relationship between the governors and the governed. In turn this led to the reform enacted in the Bill of Rights which granted Parliament supremacy over the monarch, as electorally accountable representatives of the people.[46] This was a reform of constitutionalism that enabled further legislation to build upon this foundation, as seen in the Meeting of Parliament Act and the Act of Settlement.

My reading of the Bill of Rights demonstrates the central importance of this document, not only to the constitutional settlement of the 'Glorious' Revolution and wider seventeenth-century constitutional crises, but also to subsequent developments of parliamentarian constitutionalism. It is argued that through purely focusing on the positive legal impact of the Bill its contribution to constitutional processes is missed. By facilitating a political jurisprudential analysis, it can be seen how the Bill allowed a political settlement to be written into law by Parliament on its own terms. A settlement which presented Parliaments' own version of the constitutional transition as the legal precedent. It also highlights how the perception of the legitimacy of this action can be traced to an understanding of constitutional structure and authority influenced by Protestant Reformation re-imagining of church structure and 'spiritual' authority. Furthermore, it is also demonstrated how the Bill of Rights itself acted

[46] Bill of Rights [1688], see the preamble for the authority claimed by Parliament as emanating from the people, and the heads of grievance and central articles for the requirement of free elections to Parliament without monarchic influence or interference.

as a source of legitimacy for subsequent constitutional reforms seen in the Meeting of Parliament Act and the Act of Settlement.

RESEARCH QUESTIONS

1: How can the concept of the Protestant individual and Protestant Reformation of spiritual authority and church structure be seen to have influenced the perception of the legitimacy Bill of Rights [1688]?

2: How might the concept of the Protestant individual and its challenge to the Catholic doctrine of papal hierarchy be understood to have impacted upon perception of the legitimacy of constitutional authority, in relation to:

(A) divine right monarchic government;

(B) Parliament as opposed to the monarch as the supreme constitutional authority?

3: How can the influence of conceptions of church constitution and spiritual authority upon the perception of the legitimacy of manifestos for constitutional reform be understood, with reference to:

(A) the Petition of Right (1628) and the Levellers' An Agreement of the People (1647);

(B) the Bill of Rights [1688]?

4: How might the perceived legitimacy of the Bill of Rights have influenced perceptions of the legitimacy of the Meeting of Parliament Act (1694) and the Act of Settlement (1700) as constitutional reforms?

CHAPTER OUTLINE

My thesis is comprised of an introduction, conclusion and six chapters. Part A is made up of three chapters that contain the framework of method, concepts and theory used to analyse my chosen constitutional manifestos. Part B comprises three chapters of empirical documentary analysis demonstrating my argument. The basic structure and content is as follows:

Part A

The first three chapters of the thesis are concerned with the methodological, conceptual and theoretical components of my research. The first chapter outlines existing constitutional theory in relation to the core concepts of constitutionalism and political jurisprudence. The second chapter discusses how contributions from Sociologically and social-Psychologically informed literature can address legal theory's narrow conceptualisation of legitimacy. The third chapter addresses how the Protestant Reformation of church structure and 'spiritual' authority can be understood as a model for constitutional reform in Early Modern England, and the transition to a constitutional model that perceived Parliament as the legitimate constitutional authority.

1: **Method and Concepts**

Chapter one of my thesis addresses the method of political jurisprudence, and the central constitutionalist concepts of constitution, sovereignty, power and authority; and how they are understood within my research. This is in order to provide the basis for my complex framework of method, concepts and theory. It is demonstrated how political jurisprudence can be operationalised as a method, and how the central concepts of constitution and authority are defined in my work, in relation to the more usually addressed concepts of sovereignty and power.

2: **Legitimacy Theory**

This chapter of my thesis directly addresses legitimacy theory. Specifically, the Weberian historical-Sociology of legitimate authority that underpins the framing of legitimacy utilised within my research. This is in order to provide a theoretical component for my framework of analysis that facilitates an understanding of legitimacy beyond strict adherence to correct legislative form and procedure. The theory of Max Weber, and its Sociological and social-Psychological development, is used to provide an understanding of legitimacy based upon the

perception of the individual, and the individual's perception of the collective community's perception, of the legitimacy of authority.

3: **Protestant theology and individualism, challenging hierarchical authority**

The third chapter of my thesis engages with the theology underpinning the Protestant Reformation, and the impact that this might be understood as having had for the perceptions of the legitimacy of both spiritual (church) and temporal (monarchic) authorities. It argues that the Protestant Reformation of church structure and 'spiritual' authority away from the unidirectional experience of hierarchical authority of the medieval Roman Catholic Church can be used as a model for understanding constitutional reform from monarchic to parliamentarian constitutionalism.

Part B

The second set of three chapters in my thesis comprise the empirical documentary analysis demonstrating my argument. These chapters first focus on the Bill of Rights as the centrepiece of my research. The success of the Bill is then contrasted with analysis of the failed attempts at constitutional reform represented by the Petition of Right and the Levellers' An Agreement of the People. The last chapter further supports my argument by analysing how the Bill can be directly connected to the subsequent constitutional reforms enacted in the Meeting of Parliament Act and the Act of Settlement.

4: **The Bill of Rights [1688]: constitutional settlement and reform**

This chapter directly locates the Bill of Rights, within the wider 'Glorious' Revolution, as a key component of the final, successful settlement to the constitutional crises of the seventeenth-century. The argument is that perceptions of the legitimacy of this process are provided by Parliament presenting itself as representatives of the people, and how this can be connected to the perceptions of the legitimacy of congregational authorities within the Protestant faith. It is

also demonstrated how the Bill can be seen to have acted as the basis for a reform that promoted parliamentary constitutional authority over that of the monarchy.

5: **Failed constitutional reform manifestos of the seventeenth-century: The Petition of Right (1628) and the Levellers' An Agreement of the People (1647)**

This chapter analyses the Petition of Right and Agreement of the People as examples of failed attempts at constitutional reform. This chapter directly contrasts the failures of both reform agendas, one too conservative the other too radical, in order to highlight the 'space' into which the Bill of Rights had to fit in order to be able to be perceived as legitimate by both sides of the constitutional conflict. The role of religious institutional structures and the perception of their legitimacy is assessed in the failure of both reform manifestos.

6: **The Meeting of Parliament Act (1694), the Act of Settlement (1700) and the Bill of Rights as constitutional reform**

This final substantive chapter of my thesis analyses legislative constitutional reforms subsequent to the Bill of Rights. This is in order to demonstrate how perceptions of the legitimacy of these reform processes can be seen to have been drawn from the legitimacy of the Bill. Thus highlighting how the Bill of Rights might have been perceived as a legitimate constitutional settlement and constitutional reform. It also serves to demonstrate how the Bill itself can be understood as a source of legitimacy of these subsequent constitutional reforms which entrenched the constitutional authority of parliament over the monarchy.

CHRONOLOGY AND DATING

As a conclusion to the introduction I offer the reader a note concerning the treatment of dates and documents in my thesis. This is primarily a work of constitutional theory, and as such it is orientated towards constitutionalist discourse and scholarship. While it cannot be ignored that the context of my research is historical, this is not a work of legal history. Furthermore, I am not a historian, legal or otherwise. However, I am a trained Archaeologist. As such, I have an

approach to my research that conceives of the documents analysed as artefacts, rather than as historical documents. A subtle distinction it is true, but one important to address nonetheless.

To this end I feel a need to provide a specific guide to the framing of my positionality as a researcher. The documents selected for analysis are understood as artefacts of material culture, manifestos for constitutional reform; some successful, others unsuccessful. As a result, the primary distinction of legal historians between law and non-law is not centrally acknowledged in my thesis. Equal weighting in importance of subject material is given to the Bill of Rights, the Petition of Right, the Levellers' An Agreement of the People, the Meeting of Parliament Act and the Act of Settlement. The Bill of Rights achieves a position of primacy within my work because it is the central artefact around which my thesis, and research, are arranged. All five texts are considered as equal sources of information concerning the influence of Protestant Reformation of church structure and 'spiritual' authority upon the English seventeenth-century's constitutional crises. They are all material artefacts of the constitutional culture of the period in question. In order to provide as accurate an analysis of the source material as possible a range of reproductions of each text have been consulted and cross-referenced against each other. In each instance a minimum of two, and where appropriate three, different reproductions have been consulted.

With regards to the chronology of texts, and dating in general within my thesis, I offer this final thought. As artefacts of material culture these texts are treated with a minimum of interference. Therefore, if a text presents its own date this is left unaltered. The same approach is taken with secondary sources, all dates presented within these texts are also left unaltered. The result is that the observant reader will quickly notice the appearance of divergent chronologies in the text of my thesis. In the seventeenth-century England used the Julian as opposed to the Gregorian calendar, which was not officially adopted until the entering into

force of the Calendar (New Style) Act 1750.[47] The legal texts, following standard conventions, contain within their titles the year of their passing and are therefore misaligned with contemporary dates. Most secondary sources, again in line with standard conventions, date texts and events in the contemporary Gregorian, as opposed to the historical Julian, calendar. As a simple illustration, the Bill of Rights [1688] is the same document as the Bill of Rights (1689).

[47] Calendar (New Style) Act 1750.

PART A

INTRODUCTION

Part A of my thesis addresses the method, core concepts and theory components of my work. This comprises the first three chapters. The second three, Part B, undertake an empirical testing of my central thesis, informed by Part A, through analysis of the Bill of Rights, the Petition of Right, the Levellers' An Agreement of the People, the Triennial Act, and the Act of Settlement. The content of these first three chapters constructs the framework through which the empirical analysis of Part B is conducted. While abstract and conceptual in nature, the substance of these chapters is essential to understanding the proposition of constitution and authority contained within my work; as well as to understanding the contribution that my research makes to scholarship concerning the development of English constitutionalism. Part B will demonstrate the contribution to existing scholarship of this framework in analysing the influence of Protestant reform of church structure and spiritual authority upon perception of the legitimacy of parliamentary authority to enact constitutional reform in 1688.

Chapter 1

The focus of my thesis is upon constitution and authority relating to the Bill of Rights, and the influence of the Protestant Reformation of church structure and 'spiritual' authority upon this. The method used to undertake my research is that of political jurisprudence. Chapter one outlines and defines my method and core concepts of constitutionalism, which are constitution and authority. This is achieved through an expression of political jurisprudence situated within the wider constitutional methodology to identify the particular strengths of this approach to my project. The concepts of constitution and authority, as central to the study of constitutionalism, are outlined and defined in relation to the more commonly addressed constitutional concepts of sovereignty and power. This provides a specific understanding and application of these

concepts as they are used within my thesis, and also demonstrates the utility of conceptualising and studying these concepts as distinct entities. The focus is on identifying a concept of authority distinct from power and sovereignty, and a broad and culturally sensitive concept of constitution.

Chapter 2

The second chapter addresses legitimacy theory. Positivist legal scholarship provides a very narrow test of legitimacy, the focus is upon ascertaining the correct procedure and form of legal enactment. This is not a useful understanding of legitimacy within the terms of project, and in relation to the method and concepts outlined in chapter one. Chapter two provides an alternative expression of legitimacy theory, found in the work of Max Weber and its subsequent development. Weber posited three pure types of legitimacy: Charismatic, Traditional and Rational/legal. The understanding and application of Weber's theory relies upon an understanding of legitimacy that is able to comprehend a relationship between the individual and collective people(s) governed, and their governors. This chapter outlines this understanding of legitimacy theory, and explains its relevance to my thesis. The key element of Weberian legitimacy theory is the inclusion of perception. As a sociological theory Weber's work and its developments address the challenge of both individual and collective perception of legitimacy, as opposed to an abstract concept of legitimacy in isolation. The perception of the legitimacy of authority is central to my thesis and the analysis undertaken in Part B.

Chapter 3

Having outlined and defined the method, concepts and theory required to undertake my empirical analysis in Part B, chapter three directly engages with the question as to how the Papal and Protestant Reformations might be understood to have influenced constitutionalism. This is undertaken through discussion of two Christian Reformations and the impact upon

Church constitution and spiritual authority. The impact of the Papal Reformation upon the constitution and authority of the Roman Catholic Church, and its influence upon monarchic constitutionalism is addressed first. Second comes discussion of the impact of the Protestant Reformation upon the constitution of churches and 'spiritual' authority, and the influence of this upon anti-monarchic constitutionalism. Together these provide a model of church constitution and spiritual authority to be used in analysing the influence of Protestant Reformation of church structure and 'spiritual' authority upon perception of the legitimacy of the transition from monarchic to parliamentarian constitutionalism seen in the so called Glorious Revolution and Bill of Rights.

CHAPTER 1

Method and concepts

INTRODUCTION

Chapter one provides my research foundations, my method and core concepts. These elements are introduced to provide a functional overview as to how they are understood, and understood to operate within my research. The method of political jurisprudence, and the conceptualisation of constitution and authority in relation to sovereignty and power defined in this chapter are central to the understanding of the two theoretical chapters immediately following in Part A as well as Part B's empirical documentary analysis. As such, this chapter provides a working description of political jurisprudence and how it can be operationalised to allow a different perspective on constitution, and constitutional documentation. Additionally, it provides functional definitions of the core concepts of constitution and authority which are central to my thesis. These concepts are introduced through their relationship with other central concepts of constitutionalism, sovereignty and power.

The chapter first introduces political jurisprudence, before providing insight into its application as a method within my research, and what it facilitates in different understandings of English seventeenth-century constitutionalism. The chapter then addresses the core concepts of my thesis, which are: *constitution* and *authority*; as understood and accessed through their relation to sovereignty and power. As with the method section, these concepts are contextualised through their general understanding and usage, before they are considered specifically regarding their application here. As part of this discussion, the core concepts of constitution and authority are positioned centrally to my research, and I demonstrate how this is achieved in relation to the concepts of sovereignty and power, which are more usually focused upon. Detailed discussion of sovereignty and power is provided alongside that of

constitution and authority in order to highlight the distinct methodological and conceptual application that I have made in my research, and to provide insight as to why, and what is gained from doing so. The conclusion of the chapter reiterates a functional definition of each concept as understood in my research, and how political jurisprudence is operationalised as a method in reading constitutional manifestoes of the English seventeenth-century. This sets the conceptual foundation for the discussion of legitimacy theory in chapter two. The specific focus on authority as a concept is necessary for appreciation of the analytical perspective afforded through Weberian legitimacy theory provided in the following chapter.

METHOD[1]

Due to the unwritten nature of the English Constitution, political constitutionalism has a strong and well developed tradition within English constitutionalism as it maintains that '[e]verything that happens is constitutional'.[2] By which it is meant that the constitution is done rather than written, comprising political practice, convention and positive law. According to this perspective constitutionalism functions on a number of levels. First, the level of *politics*, the practice whereby people collect themselves into a forum for discussion and action. Second, the level of *positive law*, whereby political action is given expression (in some circumstances) as governmental command. This is not to suggest that there is a singular authoritative expression of political constitutionalism;[3] rather the opposite, however, they share a presumption 'that society is endemically in a state of conflict between warring interest groups'.[4] The main distinctions are between those, who like Griffith, see political association as always agonistic,

[1] Throughout this method section, due to the interdisciplinarity of my PhD research, in many instances reference will be made to general and disciplinary specific terminology. Instances of discipline specific usage will be acknowledged through capitalisation: e.g. Sociological referring to the academic discipline; social referring to general understanding of human association.
[2] JAG Griffith, 'The Political Constitution' (1979) 42(1) Modern Law Review 1, 19.
[3] On the tradition of the political constitution see: Michael Foley, *The Politics of the British Constitution* (Manchester University Press 1999); Graham Gee, 'The political constitution of JAG Griffith' (2008) 28(1) Legal Studies 20; Thomas Poole, 'Tilting at Windmills?' (2007) 70(2) Modern Law Review 250.
[4] Griffith, (n2), 19.

and therefore politics as a tool of management; and those who see a reconciliatory potential in political practice which allows positive law to take on a tempered character, unifying disparate actors into a single collective authority.[5] What is shared across the perspectives is that democratic association and political constitutionalism are the best frameworks through which to constitute government, and law, as political officials can more easily be held to account than legal officials.

Political constitutionalism appears well suited to analysis of the English constitution, as an understanding of constitution as a political process also holds the potential for historical study of the development of that process, as scholars such as Tomkins have shown.[6] However, within the method of political constitutionalism lies an expression perhaps especially well suited to the study of public law as political practice; as well as the historical unpacking of the development of that process. This is the Public Law scholarship of Martin Loughlin, which is understood through his political jurisprudence.[7] He presents an understanding of political constitutionalism that is well placed to avoid the pitfall of reducing law merely to the positive command of the sovereign. Loughlin's method of constitutional scholarship differs from wider political constitutionalism by adding a third level of understanding to the political constitutional process. This allows a revival of a non-positivist, interpretive, historicist methodology for understanding the development of the European tradition of Public Law.[8]

[5] As an example of the second approach see: Adam Tomkins, *Our Republican Constitution* (Hart 2005).
[6] ibid.
[7] This approach to Public Law and political jurisprudence has been developed over a number of years, as (non-exhaustive) examples see: Martin Loughlin, *The Idea of Public Law* (OUP 2003) chapter 8; His, *Foundations of Public Law* (OUP 2010); His, *Political Jurisprudence* (OUP 2017).
[8] On this see: Martin Loughlin, *Political Jurisprudence* (OUP 2017) chapter 2 'Public Law as Political Jurisprudence'. For comparative contrast between Loughlin's approach and the dominant positivist jurisprudential paradigm see: Michael Gordon, 'A Basis for Positivist and Political Public Law' (2016) 7(3) Jurisprudence 449.

Loughlin's constitutional jurisprudence has become a body of work 'around which other research will be obliged to position itself'.[9]

At the heart of Loughlin's concept of Public Law lies recognition of, not two, but three levels of constitutional operation. These three, in reverse order, are: *Positive law*, the expression of legislative statute; *politics* as political process, the management of inherent tensions in human association; and (crucially) *the political* – the level most often absent in constitutional law, and the level that is responsible for avoiding the pitfall of positive reductionism.[10] *The political* is the starting point of Loughlin's Public Law. Its operation is understood through political jurisprudence. The political is a representative abstraction: 'The concept of representation lies at the root of public power. It is only through representation that those exercising governmental power are given certain responsibilities; similarly, it is only through representation that the people are transformed into citizens.'[11] It is a realm that represents the world in which we exist, as a space in which people come together in order to undertake the governance of that world through political action and expression of positive law.[12]

> [T]he political is an autonomous way of viewing the world. […] Political jurists, those who seek to cultivate this kind of [political] jurisprudence, are able to explain how law operates to strengthen the integrative forces of the political. […] [T]he authority of its

[9] Chris Thornhill, 'Publication Review: *Foundations of Public Law*' (2011) Public Law 673, 673. On this point see also: Marco Goldoni, 'The Materiality of Political Jurisprudence' (2016) 16 Jus Politicum 49; Gordon, ibid, 449-450; Panu Minkkinen, 'The tragic politics of public law' in Michael Dowdle & Michael Wilkinson (eds), *Questioning the Foundations of Public Law* (Hart 2018).

[10] On the importance of *the political* in Loughlin's conception of Public Law see: Emilios Christodoulidis & Stephen Tierney, 'Public Law and Politics' in Their (eds), *Public Law and Politics* (Ashgate 2008); Emilios Christodoulidis, 'Public Law as Political Jurisprudence' in Emilios Christodoulidis & Stephen Tierney (eds), *Public Law and Politics* (Ashgate 2008); Martin Loughlin, 'Reflection on *The Idea of Public Law*' in Emilios Christodoulidis & Stephen Tierney (eds), *Public Law and Politics* (Ashgate 2008); Stephen Tierney, 'Sovereignty and the Idea of Public Law' in Emilios Christodoulidis & Stephen Tierney (eds), *Public Law and Politics* (Ashgate 2008); Scott Veitch, 'Authority, Exploitation and the Idea of Public Law' in Emilios Christodoulidis & Stephen Tierney (eds), *Public Law and Politics* (Ashgate 2008)

[11] Martin Loughlin, *The Idea of Public Law* (OUP 2003), 70.

[12] On the concept and operation of representation in Public Law see: Martin Loughlin, *Sword & Scales* (Hart 2000) especially Part I; His, 'The constitutional imagination' (2015) 78(1) Modern Law Review 1.

> world view is strengthened through institutionalization. […] The political and the legal operate relationally, without being reduced to each other.[13]

Pursuit of *the political*, as the representative sphere that underpins political action, and the pronouncement of positive law – and political jurisprudence as the method of understanding this sphere – is tied to the transition from Medieval to early modern constitutionalism. This is the historical foundation of Public Law. Medieval constitutionalism understood a distinction between 'civil or positive law – law made by the sovereign',[14] and natural law 'fundamental law, law that makes the sovereign.'[15] With the emergence of the secularised state structures of European modernity the concept of natural law morphed into the constitutive process governing *the political*. The representative abstraction, within the foundations of governmental process, was founded upon the idea of political representation and self-government. The advent of positivism, and the idea of legal science, reduced the role of law and of jurisprudential analysis, to merely concerning positive law – the command of the sovereign.[16] Loughlin's approach seeks to provide a jurisprudential method by which the unified view of Public Law can be recovered, breaking jurisprudence free from the positivist self-limitation of only analysing positive law, at the expense of political association.[17]

Public Law, understood through political jurisprudence, provides a framework for legal analysis of the developmental processes which give rise to the institutions of government. A jurisprudential perspective denied to positivism. It is achieved by centralising the concept of *the political*, as a representation of the world of human association. Loughlin's construct of *the political* provides a meeting place for harmonised legal, and political, theoretical perspectives of constitutionalism – both of which are based upon textual documentation. However, there

[13] Loughlin, (n8), 1.
[14] Martin Loughlin, *Foundations of Public Law* (OUP 2010), 1.
[15] ibid.
[16] See generally ibid chapter 1; Loughlin, (n11).
[17] See generally Loughlin, (n8). For an alternative expression of political jurisprudence see: Michael Wilkinson, 'Political Jurisprudence or Institutional Normativism?' (2014) 43(3) Netherlands Journal of Legal Philosophy 240.

appears no reason that it could not provide a methodological perspective by which cultural influences upon constitution can be added to Loughlin's representative sphere.[18] By expanding this approach, the importance of implicit constitutional influences exerted by cultural factors would be highlighted; influences that are not always explicitly evident in textual source material. This is not to suggest that Loughlin's concept is deficient within its own terms – it is a textual, historicist, interpretive method – therefore, it can be suggested to have more than achieved its stated aims. Rather, I suggest that the framework of Pubic Law can be re-purposed, through adopting a cultural perspective to the influences that are found in the representative sphere of *the political*, to allow access to non-textual inputs in constitutionalism.

Cultural constitution

In critiquing reform centered scholarship Kahn suggests '[w]e must accept the proposition that there is nothing natural about the legal order, that it is a constructed social world that could be constructed differently.'[19] He called for a new orientation in legal scholarship: 'A modern, critical discipline of law needs to draw equally from work in [A]nthropology and [C]ultural [T]heory […] social practices are historically specific and […] must be approached through a process of thick description.'[20] In acknowledging this approach is difficult, but that in turn this can also provide new avenues of creative tension, he suggests:

> Cultural inquiry is itself a social practice that cultivates the practice of simultaneously standing within and without, of articulating beliefs in order to subject them to critical examination […] in this critical interpretative inquiry we do not measure beliefs against a separate truth. Rather we ask how truth is constituted through beliefs.[21]

[18] Loughlin's conception of the political has been critiqued for a perceived deficiency in understanding of agonistic human association, see: Christodoulidis, (n10); Minkkinen, (n9). A materialist deficiency has also been identified by Marco Goldoni, however, he proposes that further expansion of the textual influences within *the political* will rectify this, see: Goldoni, (n9).
[19] Paul Kahn, *The Cultural Study of Law* (University of Chicago Press 1999), 30.
[20] ibid, 35.
[21] ibid, 35-36.

I take up this challenge, allowing a framework for examination of societal influences upon constitutional culture. How might the influence of the Protestant Reformation, and the re-constitution of spiritual society be understood to influence the concept of the correct constitution of political society? What role might this play in perceptions of the legitimacy of constitutional settlement and reform? How can this be understood when legal scholarship focuses so closely on textual evidence, to the exclusion of virtually all other inputs in the study of the past? An expanded conception of *the political*, capable of appreciating cultural influence, seems capable of augmenting the existing depth of textually focused constitutional history. This provides a breadth of understanding of the influences of societal processes and cultural practices, thus going some way to providing a thickness of description.[22]

A cultural constitutionalism allows for potential analysis of non-textual influences upon the development of constitutional processes and practices. This method presents the possibility to build upon the existing strengths of constitutional scholarship. The addition of cultural influences to this existing scholarship presents the opportunity to add further complexity and nuance to this narrative. This is achieved by fleshing out the depth of historical knowledge with a breadth of interpretation of cultural practice: looking not at legal documents as documents, but as manifestations of cultural practices.

Loughlin's broadly understood Public Law is founded upon the idea of *the political* as a representative of the lived experience of the world. However, in this scheme *the political* is constructed through recourse to legal and political theory, and its textual, Historical, evidence. *The political* could be expanded to include societal practices that might influence constitutionalism, elements of societal cultural practice such as religion. This is not without

[22] In his use of the term 'thick description' Kahn is echoing the work of Clifford Geertz, similarly I too am echoing this sense in my suggestion of adding a breadth of cultural understanding to the existing depth of textual knowledge of constitutional process and practice. For the classical example of thick description see: Clifford Geertz, *The Interpretation of Cultures* (Basic Books 1973) chapter 1.

precedent. Medieval constitutionalism widely acknowledged the influence of religious doctrine upon the development of monarchic structures of governance. [23] However, as examination of constitutional thought entered the early modern period, religious influence was jettisoned in favour of political theory. This is because it is the path trodden by the textual evidence. The constitutionalism of modernity explicitly engages with secularised forms of political association.[24] Even Locke's *Treatises*, which clearly express religious content, distance themselves from direct theological influence upon the constitutional process itself.[25] Extrapolating the Lockean example, in an admittedly reductionist way, might the textual evidence shift so dramatically precisely because of the distinction between the Medieval and the modern? Medieval monarchic constitutionalism was heavily underpinned by Roman Catholic Papal doctrine. Proto-democratic models of political association required an alternative basis: political theory. This does not mean that the religion did not implicitly influence constitutionalism once explicit papal doctrine had been excised.

The idea of *the political* as the foundation of constitutional practice already exists. Rather than a concept, based in textual interpretation, bridging political and legal theoretical approaches to constitutionalism in isolation, cultural practices can be added. In place of a bridge of representative understanding, there emerges a representative platform, to which many different cultural influences and disciplinary perspectives can contribute collectively or individually. In the context of my PhD thesis I am seeking to add only the potential understanding of how Protestant Reformation of church structure and 'spiritual' authority

[23] As examples see: Harold Berman, *Law and Revolution* (Harvard University Press 1983); Brian Tierney, *Religion, Law, and the growth of Constitutional Thought 1150-1650* (CUP 1982). This is also discussed in chapter 3.
[24] As examples see: James Harrington, *The Commonwealth of Oceana* (Anodos Books 2017); Thomas Hobbes, *Leviathan* (Wordsworth Editions 2014).
[25] See the distinction in religious emphasis between Locke's *Two Treatise of Government*: The first is a refutation of Filmer's *Patriarcha* which necessitates Locke distance himself from overt theological imperatives in the development of his own constitutional scheme in the second treatise, see: John Locke, *Two Treatise of Government* (Peter Laslett ed, 3rd edn, CUP 2005).

might have influenced perceptions of the Bill of Rights as a legitimate constitutional settlement, and reform.

CONCEPTS

Having discussed the methodological approach of political jurisprudence utilised in the conduct of my research, the chapter now outlines the core concepts as they are understood in my project. This is done through contextualisation of these concepts in relation to their more usual deployment and the balance of attention given to them in the wider constitutionalist literature. The concepts discussed below are: constitution, sovereignty, power and authority. The core concepts to my understanding, and my research are constitution and authority. Discussion of constitution is used to provide an understanding of constitution as a social process, as opposed to a legal document or political and legal convention(s), and how this lies at the foundation of my research project. The section addressing sovereignty relates my work to this central concept of constitutionalism, and also identifies how I find it to be unhelpful in answering my research questions. This theme is further developed through analysis of power and authority, which I suggest can be understood as subdivisions of sovereignty which provide a clearer understanding of constitutional processes. In order to accurately understand the central concept of authority as it is used in my research, it is preceded by an outline of the corresponding concept of power. Through discussion of sovereignty it is revealed why it is a problematic concept, and how it can serve to obscure the related concepts of power, and centrally to my research, authority.

CONSTITUTION

A constitution is the written document that sets out the scope, scale and powers of government. A legal document which is afforded a measure of importance, and protection, beyond that of basic statutes or judicial precedent: the foundation of all subsequent law. This, however, cannot be an uncontested definition. ‘The fact that the British constitution cannot be found in a single

document and that the laws relating to the constitution of government can be repealed or amended by Act of Parliament in exactly the same way as ordinary laws does not mean that the constitution does not exist.'[26] The UK possesses a constitution, but not in the form of a single authoritative document.[27] Therefore, when considering what *a*, *the*, or simply *constitution* in general might be, the starting point must be something other than a single written document. This is particularly pertinent in addressing a historical period of development of the British constitution, the English seventeenth-century, and specifically the Bill of Rights.

An alternative way to think of constitution is to consider the system of government of any given nation-state, or transnational legal entity or regime. The process of constitution creates a legal regime governing the component institutions, and their relationships to each other and those they overarch, whether what is constituted is a national or transnational order. The system of government of the UK includes legislative, executive and judicial branches. The interactions between these branches are subject to regulation; and their interactions, as a collective government, with the people are also subject to regulation. All of this regulation is achieved – at least in part – through legal provisions. Within this framing the UK can clearly be seen to possess a constitution. Constitution would appear to be about more than a single authoritative written document, even in the most basic of legal analysis.

Constitution might be considered, simultaneously, as the legal interaction between the branches of government, and the interaction between the governor(s) and the governed. Thornhill has defined a constitution as a series of legal provisions that reflect normative political principles concerning the institutionalisation of power.

> [C]onstitution has the following features. It is a legal order impacting on the exercise of political power that (a) contains an effectively established presumption of public rule

[26] Martin Loughlin, *The British Constitution* (OUP 2013), 14.
[27] As any good constitutional law text book states, alongside the UK both Israel and New Zealand lack singular codified constitutions. As an example see: Hilaire Barnett, *Constitutional & Administrative Law* (11th edn, Routledge 2016), 1.

> in accordance with principles or conventions, expressed as law, that cannot easily (i.e. without unsettling controversy) be suspended; (b) is designed to constrain or restrict egregiously mandatory use of power in both public and private functions; (c) allocates powers within the state itself, and comprises some form of popular/political representation in respect of questions perceived as possessing importance for all politically relevant sectors of society; and (d) expresses a legal distinction between the form of the state and those persons assuming authority to borrow and enforce the power stored within the state.[28]

Key aspects of this approach are that it does not require a written document, but that it does account for distinct separation between the government and the people as components of the state.[29] This conceptual subdivision of constitution as requiring a recognition of, and accounting for, the separate but linked assemblages of 1) the state, and 2) the office of government, was famously made by Schmitt.[30] This approach can be found to underpin many contemporary and subsequent understandings of constitution.[31] A central factor in the widespread influence of Schmitt's conception might be found in the possibilities for analysis that it facilitates outside of positivist legal conceptions of constitution.

Hans Kelsen's *Pure Theory of Law* provides an archetypal positivist position. 'The Pure Theory of Law is a theory of positive law. […] [I]t only describes the law and attempts to eliminate from the object of this description everything that is not strictly law: Its aim is to free the science of law from alien elements.'[32] The foundation of the hierarchical order is the Grundnorm, as Kelsen explains: 'a presupposition, establishing the objective validity of the norms of a […] legal order, will be called a *basic norm* (*Grundnorm*).'[33] When considering constitution the Grundnorm can be found in the codified constitution. 'The form of government

[28] Chris Thornhill, *A Sociology of Constitutions* (CUP 2011), 10-11.
[29] ibid, 8-12.
[30] Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer ed and tr, Duke University Press 2008) Part I.
[31] As examples see: Olivier Jouanjan 'What is a constitution? What is constitutional history?' in Kelly Grotke & Markus Prutsch (eds), *Constitutionalism, Legitimacy, and Power* (CUP 2014); Loughlin, (n14); Thornhill, (n28). Schmitt's formulation is itself suggested to have been directly influenced by the work of Egon Zweig: Duncan Kelly 'Egon Zweig and the intellectual history of constituent power' in Kelly Grotke & Markus Prutsch (eds), *Constitutionalism, Legitimacy, and Power* (CUP 2014).
[32] Hans Kelsen, *Pure Theory of Law* (2nd edn, Max Knight tr, Lawbook Exchange 2009), 1.
[33] ibid, 8.

is merely the method of creating law at the highest level of legal order, namely at the level of constitution.'[34] As stated above Kelsen's aim was to isolate law from all other considerations, to reduce law to an empirically knowable, understandable and quantifiable science.

> If the identity of state and law is discovered, if it is recognized that the law […] positive law […] *is* this very coercive order as which state appears to a cognition which is not mired in anthropomorphic metaphors but which penetrates through the veil of personification to the man-created norms, then it is simply not possible to justify the state through the law[.][35]

Kelsen sought to identify the constitution itself as the Grundnorm. This prevented jurisprudential consideration of all that lies beyond the constitution. In so doing positivist legal theory seeks to prohibit access to outside influences upon law such as politics. This denies the subjective human nature of law, as a mechanism by which society(s) can be founded, stabilised and collectively regulated.

> An alternative interpretation is provided by Loughlin's conception of *Public Law*:
>
> Whether presented as a model of rules or regime of rights, modern accounts conceptualize law as an autonomous mode of action and as an enterprise to be differentiated from politics. Such claims eclipse the idea of public law, which, far from transcending politics, is an aspect of political practice.[36]

By taking the position that law might be understood as part of 'political practice' legal analysis can be directed towards the processes by which political power is generated, institutionalised, and implemented through law; as well as how these undertakings are legitimised. This non-positivist view of public law, and of constitution as a component of this, can be seen to inform the concept of constitution in many of the works influenced by Schmitt.[37]

[34] ibid, 280.
[35] ibid, 318.
[36] Loughlin, (n11), 132.
[37] As examples see: Hannah Arendt, *On Revolution* (Faber Modern Classics 2016); Andreas Kalyvas 'Popular Sovereignty, Democracy, and the Constituent Power' (2005) 12(2) Constellations 223; Thornhill, (n28).

Constitution as culture

If, following Loughlin, we posit public law – and within this, constitution – as a component of political practice, then we allow for the conception of law as a community expression of societal ordering. Different cultures will constitute in different ways; but common, general, recognisable principles of internal governance structure may be found in all systems. Different legal systems can be easily differentiated and isolated for individual study, especially when focusing on constitution. The 'jurisdiction' of the constitutional system highlights the extent of cultural spread. This clear definition of the bounds of legal cultures is in distinction to more traditional studies of culture which can be subject to very blurred edges of cultural overlap or transference. This can, in turn, lead to susceptibility to bleeding between central cultural complexes and sub-assemblages.[38] Due to the inherent identifiable boundaries of jurisdiction displayed by all legal cultures (and constitutions) law could be quite easily studied as a component of culture, however this is not the norm.[39]

> There is remarkably little study of the culture of the rule of law itself as a distinct way of understanding and perceiving meaning in the events of our political and social life […] such a study requires turning legal scholarship away from the project of reform.
>
> The culture of law's rule needs to be studied in the same way as other cultures. Each has its founding myths, its necessary beliefs, and its reasons that are internal to its own norms.[40]

These same arguments can be applied to thinking about constitution, and how it is experienced and perceived as legitimate by those subject to it. To ask why perceptions of illegitimacy may have been experienced, and how new models of constitution might be experienced as legitimate.

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[38] A prime example of this difficulty is expressed in scholarship seeking to express characteristic ancient 'Roman' identity, as an example see: David Espinosa Espinosa, A. César González-García and Marco V. Garcia Quintela, 'On the Orientation of two Roman towns in the Rhine Area' [2016] Mediterranean Archaeology and Archaeometry 233, 238. More generally, R. Laurence and J. Berry (ed), *Cultural Identity in the Roman Empire* (Routledge 1998); U. Rothe, *Dress and Cultural Identity in the Rhine Region of the Roman Empire* (Archaeopress 2009).

[39] This is highlighted as a central theme in: Kahn, (n19).

[40] ibid, 1.

> [T]he scholar of law's rule should not be asked whether law is the expression of the will of the popular sovereign […] [t]hese are propositions internal to the systems of belief. […] [Instead] [a] scholarly discipline of the cultural form approaches these propositions not from the perspective of their validity, but from the perspective of the meaning they have for the individual within the community belief.[41]

This approach to public legal scholarship, combined with comprehension of community culture, allows for an appreciation of multiple methods of undertaking the same process, or a plurality of constitution(s). 'Not to see the end of social order as the rule of law strikes us as unnatural – the equivalent of imaging a world without gravity. Two hundred years ago, [world-wide] social and political practices were tremendously diverse. Today, respect for that diversity has been suppressed'.[42] Any given culture will possess a specific manifestation of law, and within that a specific manifestation of constitution as a method of social ordering.

Within constitutional cultures that might be branded as legal, focusing on a superior written document, there are clear distinctions in the manifestation of constitutional culture. The US constitution is venerated, privileged with a high degree of superior protection from amendment; representing a single definitive, authoritative, source never to be replaced.[43] In contrast, the French have written numerous constitutions since their 1789 Revolution. When instances of clear structural reform have been encountered (for better or worse) the response has been to start from basics and re-issue a new constitution to reflect changing circumstances.[44] The French manifestation of legal constitutional culture still privileges and protects the written document as the foundation and source of public law, as does the US. However, the actual document itself is not subject to veneration as the origin of the State: the

[41] ibid, 2.
[42] ibid, 4.
[43] As an example of the historic 'worship' see: Dennis Goldford, *The American Constitution and the Debate over Originalism* (CUP 2005).
[44] As an example see: Thornhill, (n28), which charts periodised development of European constitutions.

constitution is the foundation of any given French government, not the foundation of the French. In contrast, the US constitution could be considered as the foundation of America(ns).

Legally successful legislation, and (legally unsuccessful) political manifestos can be comprehended as expressions of constitution; allowing for a much fuller understanding of constitutional development, through adopting a culturally aware political jurisprudence. This in turn facilitates analysis of legal, and political, documents as cultural artefacts, rather than as the textual offshoots of a legal system. These documents become representative of collective social undertakings, rather than the singularly authored expressions of ruling dictates. We might learn as much from 'failed' models of constitution (unsuccessful political manifestos), as from successfully legislated constitution(s). This can be achieved through combining two things. First, Loughlin's understanding that 'the essence of the constitution is not contained in a statute or a norm, but in the fact that the constitution is an existential phenomenon giving shape to […] political unity'.[45] Second, Kahn's cultural approach to the rule of law 'as a way of organizing a society under a set of beliefs that are constitutive of the identity of the community and of its individual members. It is a way of understanding the unity of the community through time and of the self as the bearer of that history.'[46]

SOVEREIGNTY

Sovereignty is perhaps the dominant and most routinely discussed concept in constitutional theory. Within the framework of my research sovereignty is not the central concept. Alongside constitution, authority is a core concept in my work. However, to access the necessary conceptualisation of authority it is important to relate authority to sovereignty, indeed to how sovereignty can serve to conflate power and authority, thus obscuring authority as a concept in constitutional theory. This is a particularly acute issue in theorising legitimacy and its

[45] Loughlin, (n14), 216.
[46] Kahn, (n19), 6.

relationship to the concept of constitutional authority, as such the following discussion serves to set up the discussion of legitimacy theory developed in chapter two.

Political theology allows for a critical perspective upon sovereignty and many of the issues arising from contemporary secularised (positivist and functionalist) framings of the concept. Schmitt famously stated: 'Sovereign is he who decides the exception.'[47] Schmitt elaborated by suggesting that '[w]hat characterizes an exception is principally unlimited authority, which means the suspension of the entire existing order.'[48] This was contextualised through recognising a characteristic of sovereignty: that a true indivisible and sovereign actor comes before the law.

> For a legal order to makes sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists. […] The exception reveals most clearly the essence of the state's authority. The decision parts here from the legal norm, and […] authority proves that to produce law it need not be based on law.[49]

It is also interesting to note the distinction that Schmitt makes between authority (the subject of the above quotes) and power, which he describes as 'prov[ing] nothing in law for the banal reason that Jean-Jacques Rousseau, in agreement with the spirit of his time, formulated as follows: Force is a physical power'.[50] This distinction and its potential utility in realising a concept of sovereignty will be considered in more detail below. Schmitt was able to make this key intervention through the express recognition that: 'All significant concepts of the modern theory of the state are secularized theological concepts'.[51]

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[47] Carl Schmitt, *Political Theology* (2nd edn (1934), Schwab tr, University of Chicago Press 2005), 5; on the importance of this quote to political theological understandings of sovereignty see: Paul Kahn, *Political Theology* (Columbia University Press 2011), 31-32; Juri Lipping, 'Sovereignty beyond the state' in Hent Kalmo & Quentin Skinner (eds), *Sovereignty in Fragments* (CUP 2010), 190-195.
[48] Schmitt, (n47), 12.
[49] ibid, 13.
[50] ibid, 17.
[51] ibid, 36.
Critical scholarship has addressed itself to this notion, see: Giorgio Agamben, *Homo Sacer* (Heller-Roazen tr, Stanford University Press 1998); Wendy Brown, *Walled States* (Zone Books 2010); specifically chapter 2; Kahn, (n47); Eric Santner, *The Royal Remains* (University of Chicago Press 2011).

Recognition of the divine aspect to sovereignty enables a positing of a scholarly critique external to positivist concepts of sovereignty in legal thought.

> A legal system can be viewed abstractly as a system of norms in which every norm is related to all others. […] Every norm gives us access to the entire legal world [through horizontal and vertically connected hierarchical relationships]. […] Standing within such a system, one never gets beyond it.[52]

Theology was complicit in forming this restricted positivist view as '[b]efore there could be any law at all, there had to be the […] sacred source, which could invest in and withdraw from particular finite formations. Existence before justice.'[53] The downfall of the positivist approach in constructing sovereignty and constitutional formation is summed up in the assessment that '[a] constitutions attempt to establish the locus of sovereign power may not successfully identify the actual sovereign in the concrete situation.'[54] Sovereignty, as the decision upon the exception, is further developed in the work of Agamben, who finds the sovereign has to be located before the law. The sovereign in the moment of decision can choose as to whether the law is operative upon the person or not. The sovereign, in deciding, operates both inside and outside the law simultaneously; and outside temporality. '[T]he inclusion of bare life in the political realm constitutes the original […] nucleus of sovereign power.'[55] 'The paradox of sovereignty consists in the fact that the sovereign is, at the same time, outside and inside the juridical order.'[56] This capacity to transcend the temporal and spiritual spheres is characteristic of divinity (see chapter three).

A seminal work in the field tracing sovereignty to spiritual origins, is *The King's Two Bodies*.[57] However, it raises a number of questions as to the nature of sovereignty as understood in pre-modern times. These arise in both legal and political theory in the Medieval and Early

[52] Kahn, (n47), 33.
[53] ibid, 37.
[54] ibid, 40.
[55] Agamben, (n51), 11.
[56] ibid, 17.
[57] Ernst Kantorowicz, *The King's Two Bodies* (Princeton University Press 1957).

Modern periods, concerning the point at which a complete concept of sovereignty can be argued to have developed. It is a commonly held position in legal theory that a concept of sovereignty was unknown to Medieval jurists.[58] The starting point of the development of an Early Modern 'legal' concept of sovereignty is usually attributed to Jean Bodin. Baranger states 'sovereignty was a legal phenomenon: it existed at the level of law, and not empirical reality. […] In the post-feudal state, the unity of the sovereign was identifiable throughout a diversity of customs in written laws'.[59] This principle of the legal concept of sovereignty belonging to Early Modernity – and any Medieval concept being a divided and therefore not true sovereignty in an absolute legal sense – has been presented for over a century.[60] Instead, it is argued that during this period, in a legal sense, '[o]ne could only be relatively, not absolutely, sovereign.'[61] Indeed, in terms of positivist legal theory, sovereign legal powers were shared among numerous claimants and adhered to specific (non-territorial) jurisdictional relationships.[62]

Political theory presents a similar developmental trajectory of sovereignty, a singular unified and absolute concept of political sovereignty is unknown during the Medieval period. Once again it is attributed to Early Modernity, although the question becomes subject to political debate around a century earlier than it does in legal scholarship.[63] Of particular interest in the development of political conceptions was the theory of the divine right of kings, traditionally associated with absolute monarchy as described in the seventeenth-century by Sir Robert Filmer: 'Kings are the Lord's anointed, the vice regents of God on earth, and

[58] As an example see: Dieter Grimm, *Sovereignty* (Belinda Cooper tr, Columbia University Press 2015) Part B chapter 1.
[59] Denis Baranger, 'The apparition of sovereignty' in Hent Kalmo & Quentin Skinner (eds), (n47), 52.
[60] As examples see: JN Figgis, *The Theory of The Divine Right of Kings* (CUP 1896); JW McKenna, 'The myth of parliamentary sovereignty in late-Medieval England' (1979) 94 The English Historical Review 481; Walter Ullmann, 'The Development of the Medieval Idea of Sovereignty' (1949) 64 The English Historical Review 1.
[61] Grimm, (n58), 13.
[62] Shaunnagh Dorsett & Shaun McVeigh, *Jurisdiction* (Routledge 2012) chapter 2. For a specific analysis of the introduction of the central importance of territory to theories of sovereignty as part of the Early Modern development see: Amnon Lev, 'Sovereignty and Federalism' (2017) 17 Jus Politicum 191.
[63] As examples see: Figgis, (n60); McKenna, (n60); Quentin Skinner, 'The sovereign state' in Hent Kalmo & Quentin Skinner (eds), (n47); His, *The Foundations of Modern Political Thought* (2 volumes, CUP 1978).

consequently enjoy supreme and unquestionable power over the […] state.'[64] Burgess has identified a peculiarly English variation that animated Stuart discourse concerning sovereignty and constitutional theory. Rather than claim legal sovereignty, he argues Stuart divine right theory instead claimed political supremacy. Supremacy still located within the common law constitution. The monarch was the source of positive law, but subject to natural or divine law.[65] While undoubtedly interesting this theory still posits a divided sovereignty. The monarch was politically sovereign but creator of supreme, not sovereign, positive law – because still subject to the natural or common law.

Historical analysis of the conceptual development of sovereignty suggests a source in Early Modernity and Reformation influenced works, such as those of Bodin and Hobbes. However, while acknowledging a religious conception of sovereignty, a distinction is drawn between legal and religious uses of sovereignty.[66] However, this denies the analysis of the concept through the rubric of political theology, and any influence that Medieval religious concepts of sovereignty might have had upon legal and political theoretical developments.

Medieval sovereignty as a religious concept

There is nothing demonstrated in the literature that necessitates express declarations that the legal or political conceptions of sovereignty have to be treated as the development of freestanding theories emerging during the transition from Medieval to Early Modern historical periods. Those who seek to follow a documentary historical charting of the development of legal sovereignty will plot a historical progression of accounts of positive law-making power. However, there is nothing that prevents following an alternative thread and seeking to

[64] Skinner, 'The sovereign state' ibid, 29.
[65] This is the argument of: Glenn Burgess, 'The Divine Right of Kings Revisited' (1992) 107 The English Historical Review 837; and generally: His, *Absolute Monarchy and the Stuart Constitution* (Yale University Press 1996).
[66] Grimm, (n58), 13.

understand how secular concepts can be related to theology within state theory. One simply needs to acknowledge that there is more to sovereignty than purely legislative power, and a different story is revealed.

> [T]he task is to describe how this theory of the state gradually assembled out of a mass of theological, legal and philosophical mutations within mediaeval discourse, the result of attempts to settle the interpretative conflict over whom was to be the legitimate heir to the subjectivity of Christ, and therefore, ultimately, to the sovereignty of God.[67]

Different influences upon the concept of sovereignty are seen by opening up study to look beyond the positivist legal understanding of law-making power. 'The [Medieval] source of all authority, whether in terms of the papal *plenitudo potestatis* or lay *imperium, gubernaculum* or *majestas*, was divine; all legitimate power descended from God downwards.'[68] Berman reached related conclusions, stating: 'The Papal Reformation gave birth to the modern Western State'.[69] Berman is not claiming the papacy was itself a recognisably modern state – a coherently constructed territorial entity, constituted upon a legal foundation adhering to the rule of law. He suggests that the process taken by the papacy in pursuit of a position of legitimate authority over the spiritual community of Christendom can be seen as a model for what would follow as temporal monarchs tried to carve out territorial claims throughout the late Medieval period into early modernity.

> The canon law, the first modern Western legal system, was conceived […] as an integrated system of law. […] The church itself was conceived for the first time as a legal structure, a law-state […] From the canon law of corporations is derived the concept that the executive authority may not take certain actions without the "advice and consent" of a consultative body[.][70]

[67] Jens Bartelson, *A Genealogy of Sovereignty* (CUP 2001), 91.
[68] ibid. For discussion of the constitution of the papacy and the legitimate authority of the Pope wielded through recognition of the connection to divinity see chapter three.
[69] Berman, (n23), 113.
[70] ibid, 530.

In the constitution of church as 'law-state' the papal reformation sought to utilise the transcendent sovereignty of God to establish and authorise the papacy as temporal legislative power, combining legislative and executive power over the canon law and its jurisdictions. This was underwritten by recognition that God simultaneously oversaw spiritual and temporal realms, and that the Pope possessed a unique connection to this transcendent sovereignty. The claim encompassed all members of the spiritual community, a universal Christendom; it was never expressly limited to defined territory. The papacy, while claiming authority from direct connection to God's sovereignty, never claimed itself universally sovereign (transcending the temporal and spiritual). Additionally, as individuals within a hierarchical spiritual corporation, Popes were assisted by senior clerical officers.

The Papal Reformation provided another model of constitution legitimising a hierarchical social structure with a strong basis for authoritarian legislative power, authorised by unassailable divine legitimacy; a model monarchs followed.[71] Kantorowicz documents how theoretical principles underpinning the Tudor monarchy and the development of the English concept of sovereignty (Crown in Council in Parliament) can be traced from Medieval theory. This was intended to elevate the monarch to a position of hierarchical authority over their subjects. 'The king is a twinned being, human and divine […] although the king is two-natured and germinate by grace only and within Time, not by nature and within […] Eternity: the terrestrial king *is* not, he *becomes* a twinned personality through his anointment and consecration.'[72] The king is associated with God's sovereignty directly in a manner not accessible to mere mortals, but not universally sovereign. '[H]e could not possibly attribute to the king a divine "nature" after having repeated […] the king was *not* divine by nature, but by grace.'[73] It can be seen that a theological model of sovereignty, as a divine but *absolute* concept,

[71] For discussion of this development during the Medieval period see chapter three.
[72] Kantorowicz, (n57), 49.
[73] ibid, 52.

existed during the Medieval period. It can be argued to have underpinned the legitimacy of the attempt by the papacy to establish a state-like legal corporation with authority over spiritual life in the temporal realm, and to have influenced the attempts of monarchs to claim legitimate authority over their subjects. This model followed two different trajectories in England, and on the European continent. This resulted in divergent manifestations of 'secularised' post-Protestant Reformation public law,[74] giving rise to the idea of English constitutional 'exceptionalism'.[75]

The territorial component of sovereign jurisdiction is implicitly present in Early Modern theorists such as Bodin and Hobbes, but not Medieval theory. God is transcendent, therefore, both legitimate authority and power in the spiritual and temporal realms. However, legal and political theorists such as Jean Bodin attempted to re-constitute the concept in modern constitutional law after the Protestant Reformation had eviscerated Medieval papal authority and power.[76]

[74] Elisabeth Zoller, *Introduction to Public Law* (Martinus Nijhoff 2008), 8-24.
[75] ibid, 28-29.
[76] For more details of this process see chapter three.

Religious sovereignty and early modern theorists

'Sovereignty is linked, like no other principle of politics or law, with the name of one author: Jean Bodin.'[77] Bodin has come to represent what Loughlin describes as 'The Methodological Turn':[78] a jurisprudential switch from only recognising the theoretical purity of the constituted Imperial *Res Publica* of the Holy Roman Empire; to acknowledging the political reality of the numerous autonomous European monarchs.[79] This led in turn to the eventual emergence of the legal recognition of constitution, and state operation, as they existed in reality, which Loughlin designates 'The Normative Power of the Factual'.[80]

Bodin's theory of sovereignty was influenced by the French Wars of Religion of the latter half of the sixteenth-century. Peace could only be achieved if the French commonwealth unified under a singular temporal authority, in line with the theological imperative for temporal authorities to provide secure environments for the faithful.[81] Therefore, for Bodin, '[s]overeignty is the absolute and perpetual power of a commonwealth'.[82] This was a power derived from the people of the commonwealth, not from God; although it is to be used subject to natural or divine law. Bodin's sovereign is an office, not a person. It was a theoretical concept that had never been realised in reality.[83] Bodin sought legal power modelled upon the universal omnipotence of God. 'Since there is nothing greater on earth, after God, than sovereign Princes, and since they have been established by Him as His lieutenants for commanding other men […] Contempt for one's sovereign prince is contempt toward God, of whom he is the earthly

[77] Grimm, (n58), 13. Although he was not the only writer addressing the concept, see generally Skinner, (n63).
[78] See Loughlin, (n14), 51.
[79] French monarchs were particularly influential in the recognition of autonomous sovereigns: Ullmann, (n60).
[80] See Loughlin, (n14), 216.
[81] See chapter three.
[82] Jean Bodin, *On Sovereignty* (Julian Franklin ed, CUP 1992), 1.
[83] See generally, ibid, Book I, Chapter 8.

image.'[84] To acknowledge the superiority of God (and divine law) the power of this sovereign office must by necessity be positive in nature.

Bodin's conceptual development was the sovereign as representative office, as opposed to the person holding the office. This enabled theoretical accounts of numerous constitutional types such as 'a democracy, where sovereignty resides in the assembly of the people.'[85] Famously, for Bodin sovereignty was indivisible and absolute.

> Just as God, the great sovereign, cannot make a God equal to Himself because He is infinite and by logical necessity […] two infinites cannot exist, so we can say that the prince, whom we have taken as the image of God, cannot make a subject equal to himself without annihilation of his power.[86]

As with God, a temporal sovereign possessed all the power they required, and because they were sovereign their power was self-authorising. Among the marks of sovereignty outlined by Bodin, positive legal power was most important. 'This same power of making and repealing law includes all other rights and prerogatives of sovereignty, so that strictly speaking we can say that there is only this one prerogative of sovereignty, inasmuch as all other rights are comprehended in it.[87] Implicitly acknowledged in Bodin's concept was that creating a temporal positivist legal sovereign also created a concomitant necessity for territorial demarcation. This legal sovereignty sought not to emulate the universal sovereignty of God – applying a spiritual jurisdiction, as with the Medieval papacy. It represented an attempt to corral the networks of interrelated temporal legal jurisdictions and prerogatives, largely divorced from geographical concerns, into a single reservoir of supreme legal power; legal power authorised by and adhering to its subjects: the people of the commonwealth, or proto-nation.

[84] ibid, 46.
[85] ibid, 50.
[86] ibid.
[87] Ibid, 58.

Hobbesian sovereignty can be seen to have been influenced by Bodin, and civil war.[88] His sovereign is an office, not an individual. The concept is an abstract principle, or Weberian ideal type.[89] Hobbes sought to create a singular locus of absolute sovereign force, in order to bring peace to the commonwealth. The authority of the sovereign arises from the capacity to provide security.

> The *Office* of the sovereign (be it a monarch or an assembly) consisteth in the end for which he was trusted with the sovereign power, namely the procuration of the safety of the people; to which he is obliged by the law of nature, and to render an account thereof to God, the author of that law, and to none but him.[90]

Hobbes' concept of sovereignty carried hallmarks of religious thought. Throughout Christian doctrine existed an imperative for public peace, in order for the faithful to pursue their belief. This was to be enforced and upheld by temporal authority, which served to provide the legitimacy of that temporal authority (see chapter three).

The legitimacy of Hobbes' sovereign power is provided through the people covenanting to form a commonwealth, in order that a sovereign use their power to provide security. However, as the sovereign is created by the covenant sovereignty can never be used against the commonwealth.

> A commonwealth is said to be instituted when a multitude of men do agree and covenant […] the right to present the person of them all (that is to say their representative) […] [f]rom this institution of a commonwealth are derived all the rights and faculties of him or them, on whom sovereign power is conferred by the consent of the people assembled. [91]

Therefore, 'there can happen no breach of covenant on the part of the sovereign' as 'he which is made sovereign maketh no covenant with his subjects beforehand'.[92] This is justified 'because every subject is by this institution author of the […] sovereign instituted, it follows

[88] The Civil War has even been described as the 'English wars of religion', see: Grimm, (n58), 24.
[89] Harold Berman, *Law and Revolution, II* (Belknap Press 2003), 261.
[90] Thomas Hobbes, (n24), 255.
[91] ibid, 136.
[92] ibid, 137.

that whatsoever he doth, it can be no injury to any of his subjects, […] every particular man is the author of all the sovereign doth'.[93] Hobbes' sovereign so closely followed the omnipotence of divinity that to achieve supremacy in the temporal realm the sovereign is accountable only to God. As Berman suggests 'Hobbes had defined sovereignty as the supreme factual power in the state […] [t]he sovereign may exercise his will through laws, which however, cannot bind him, since otherwise he would lose his supreme power to keep order.'[94] This was because of the constitutional process. For Hobbes, the act of constituting the commonwealth simultaneously co-created the sovereign office. There was no distinction between the formation of political unity and the institution of constitutional government. '[I]f the essential rights of sovereignty […] be taken away, the commonwealth is thereby dissolved, and every man returneth into the condition and calamity of a war with every other man[.]'[95] As with Bodin, Hobbes' theory necessitates delimited territory.[96] Temporal absolutism, unlike divine transcendent sovereignty, can only govern people it subjugates as a geographically unified collective.

'[O]ne generation after Hobbes, John Locke, in his *Two Treatise* […] derived the purpose of the state not from the value of security but from that of individual freedom.'[97] Locke's theory demonstrates influence of a different political climate to that of Hobbes. Whereas Hobbes sought to provide security, through instituting an unquestionable office of the sovereign, the Restoration Monarchy; Locke justified the so called 'Glorious' Revolution. As such Locke created a two stage process of constitution.

> The only way whereby any one divests himself of his Natural liberty, and *puts on the bonds of Civil Society* is by agreeing with other Men to joyn and unite into a Community […] [w]hen any number of Men have so *consented to make one* Community or

[93] ibid, 138-139.
[94] Berman, (n89), 260-261.
[95] Hobbes, (n24), 255.
[96] On the need for implicit recognition of territorial dimension in Hobbes' theory see: Lev, (n62), 201-208.
[97] Grimm, (n58), 25.

> Government, they are thereby presently incorporated, and make *one Body Politick*, wherein the *Majority* have a Right to act and conclude the rest.[98]

Stage one sees the creation of the political unity. Stage two the constitution of government under positive law. '[T]he *first and fundamental positive Law* of all Common-wealths, *is the establishing of the legislative* Power; as the *first and fundamental natural Law*, which is to govern the legislative itself, is the *preservation of the Society*'.[99] The reasoning behind establishing governmental power under law, in the context of the 'Glorious' Revolution, was demonstrated by fear of absolutism. 'Absolute Arbitrary Power, or Governing without *settled standing Laws*, can neither of them consist with the ends of Society and Government'.[100] Therefore Locke concluded, '[f]or all the power the Government has, […] so it ought to be exercised by *established and promulgated Laws*'.[101]

Locke demonstrates an influence of religious thinking distinct from that of Bodin or Hobbes and their re-creation of divinity in the absolute sovereign. First, explicitly, Locke used the language of power and authority not sovereign and sovereignty. This could be attributed to Book I of his *Two Treatises* in which he eviscerated Sir Robert Filmer's *Patriacha*, a defence of monarchic absolutism. This required the demolition of Filmer's use of sovereign. Second, implicitly, Locke's two stage process of constitution displays hallmarks of Calvinist congregationalism. Calvinist thought distinguished between the formation of the congregation as a collective, and the role of the congregation in selection of their spiritual leader which legitimised the 'spiritual' authority.[102] Through utilising a two stage process of constitution Locke may have recognised a distinction between the *authority* of the people of the commonwealth and exercise of positive *power* by the agents of government. By introducing a

[98] Locke, (n25), 330-331.
[99] ibid, 335-336.
[100] ibid, 337.
[101] ibid, 338.
[102] For details on this process see chapter three.

two stage process Locke side-stepped issues of divided sovereignty found in Bodin and Hobbes. Instead, he recognised an implicit distinction between the political authority of the commonwealth and the legal power of government. Working on the basis of Calvinist thought, this could be perceived as inspired by allowing individuals, as autonomous spiritual actors, freedom to pursue their own salvation through direct relation to God. By contrast, Medieval papal doctrine imposed a unidirectional hierarchical experience of God (see chapter three).

The influence of religion upon development of the early modern concept of sovereignty is clear. Bodin and Hobbes sought to provide indisputable central authority, with absolute power, to heal sectarian division. Their temporal sovereign was modelled on the divine transcendent sovereign: God's absolute power and authority. Locke, influenced by Calvinist congregationalist theology, attempted to limit the capacity of centralised government. This was achieved through empowering (some of) the people with authority that underpinned governmental power. Locke's model most influenced modern government, and the sovereignty of Public Law (in Loughlin's sense). This could be ascribed to the 'success' of the Locke influenced (constitutional) American Revolution.

(Medieval) Sovereignty and political jurisprudence

Loughlin visits the same sites of analysis as are found above charting the conceptual development of sovereignty within public law: Bodin, Hobbes and Locke. He finds Bodin's 'rules establish the nature of the undertaking: governing the public realm by means of positive law, with such law-making power vested in an absolute authority.'[103] Bodin recognised the necessary distinction between public and private, state and religion. He also perceived that '[s]overeignty should not be confused with power: restrictions on power can enhance sovereign authority, and absolute authority does not entail omnipotence.'[104] Loughlin identifies

[103] Loughlin, (n14), 69.
[104] ibid, 70.

monarchic absolutism as a development of 'modern' political theory, in its attempts to not only wrestle temporal influence out of the hands of religious leaders, but also in its centralisation of institutionalised state power and authority. Loughlin decides that 'sovereignty has its roots in the figure of the sovereign.'[105] For him this is an idealised ruler, not a Medieval king 'who remained subject to the control of the [Holy Roman] emperor […] therefore not a sovereign ruler.'[106]

Through limiting his engagement with the influence of religious thought upon developmental processes of public law, Loughlin misses the social perception of legitimacy leant by religion to new constitutional structures. He identifies that the emergence of modern state structures (and their institutions) was impossible without rejection of Medieval hierarchical structures underpinned by the constituted hierarchy of the Roman papacy. He even acknowledges the religious rejection of hierarchical authority. 'This distinction between sovereignty and government took on a further twist with the acceptance that sovereign right was not bestowed from above by God, but was conferred from below by the people.'[107] Loughlin does acknowledge religious influence upon early modern 'institutionalization of social discipline.'[108] He also identifies that this was 'promoted from below, through enforced compliance to social norms.'[109] However, he does not engage in analysis of how Reformation thought might be understood to have influenced individual and collective perception of the legitimacy of claimed governmental power and authority beyond identifying a clear link to Calvinism.[110] He specifically misses the re-structuring of the congregation to facilitate and acknowledge the individual, and their capacity for a direct relationship with God. By

[105] ibid, 184.
[106] ibid.
[107] ibid, 185.
[108] ibid, 411.
[109] ibid, 409.
[110] ibid.

addressing the emergence of Public Law as questions of technical construction, there is no account of wider societal perceptions of the legitimacy of constitutional transition.

To re-constitute 'divine' sovereignty in the temporal realm, it was necessary to establish territorial jurisdiction(s). Additionally, an unassailable authority underpinning the basis of supreme power was needed so that exercise of that power was legitimate. If it was to be a temporal power it could not be divinity that provided legitimacy.[111] Early modern public law took the same perceptual basis of legitimacy as the Protestant Reformation in its reconstitution of the church. Authority stemmed from the representative collection of the autonomous individuals of a community – whether it be a spiritual community or a political community. For authorities' exercise of positive legal power to be legitimate they needed to maintain the support of those subject to their rule. By isolating faith as a personal pursuit (facilitated by the church) the Protestant Reformation provided the conceptual leap for the idea of the autonomous political individual to be born. This included an implicit recognition of the authority bestowed upon government by its subjects. Sovereignty ceased to be transcendent. This required it to be conceptualised to allow distinction, within the unified concept, between power and authority. Positivist interpretations fail to account for this. Loughlin's concept can, because in its relationship between people and constituted government it mirrors the internal distinction between authority and power as sovereign and sovereignty.

The problem for legal thought in recognising both this historical influence of religious thought in the development of sovereignty, and in the operation of the principle today, stems largely from positivist interpretation. Positivist theory only seeks the seat of supreme legislative power. It treats the preceding political process as non-legal, automatically rejecting any possibility of assessing the politics of sovereignty. This focus on legal power ignores political

[111] For an alternative critique following the divine aspect of monarchic sovereignty influenced by Kantorowicz's *Two Bodies*, through a progressive transitional assimilation into popular sovereignty see: Santner, (n51).

authority and therefore does not comprehend it. Instead, positivism folds an amorphous and incoherent shell of authority into positivist legal power by merely checking if correct procedural form is followed.

> Sovereignty is a form of authority, and not a kind of power, but sovereignty can easily be construed and interpreted as irresistible or compelling power. […] Power and authority are closely related ideas […] Authority commands, power executes. Authority is a warrant or license – an authorisation – to exercise power[112]

Jackson comes close to conceptualising unified sovereignty, when read from an anti-positivist legal position. However, from a political perspective he is falling into the mirror image of the legal positivist trap: isolating sovereign political authority from legal power. He understands the connection of the two, but sees power as an external (legal) concern, non-comprehensible to political theory.

Sovereignty needs to be understood as unifying authority and power in a coherent concept. This is found in its basis in Medieval religious thought, and transcendental Divinity. A particular methodological approach is required to achieve this, one able to transcend disciplinary division and access both components simultaneously for analysis. This method is political jurisprudence, which is applicable to both historical and contemporary contexts, and allows for a recovery of a concept of sovereignty that can be seen to comprise the subdivisions of both power and authority.

> Political jurisprudence is a discipline that explains the way in which governmental authority is constituted. […] Throughout the Middle Ages, jurists maintained a distinction between positive law, law made by the sovereign, and natural law (sometimes expressed as fundamental law), law that made the sovereign. […] What changed [with modernity] is that most jurists came to believe that the question [as to why sovereign law should be obeyed] lies beyond the bounds of legal cognition. […] This position, commonly associated with the school of legal positivism, is directly challenged by political jurisprudence.[113]

[112] Robert Jackson, *Sovereignty* (Polity Press 2007), 14.
[113] Martin Loughlin, 'Political Jurisprudence' (2016) 16 Jus Politicum 15, 15.

Loughlin addresses the distinction between power and authority as two typologies of power, drawing on Medieval Papal doctrine.[114] This is because he self-limits analysis to the constituted processes of Public Law: 1) The constitution of governmental authority; 2) The constitution of a legal regime both from, and of, the constituted authority. By ignoring the Medieval divine origin of the model of sovereign government, and the influence of Protestant thinking upon its (mis-)translation into modern legal thought, Loughlin misses the opportunity to fully comprehend the preceding moment: the constitution of the political unity itself. If the religious basis of sovereignty is understood then authority needs to be considered as a core component, but distinguished from power. Separation of interrelated but distinct sub-concepts of Power and Authority is undertaken below. This is so that authority, as a central concept within my research, alongside constitution, can be understood; not in opposition to power, but interrelated to it as a complementary component of sovereignty derived from divinity.

POWER

Power is a much studied concept, and within the social sciences the focus is upon political framings. Under this umbrella power can be understood as a relationship, either as power over or power to; the relation between governors and governed, the governors' power over law-making and the requirement of the governed to obey.[115] The variety of applications and colloquial understandings of power can make theorists reticent to offer concrete definition(s).[116] A similar difficulty exists in defining powers' field of operation. My thesis understands public law as a field of study and practice that overarches political and legal disciplines. As such, any concept of power has to apply to the process of law-making. Political theorising of power provides useful insight, as Emmet suggests a sub-categorisation of legal power:

[114] ibid, 24-27.
[115] As examples see: Hans Morgenthau, 'Power as a political concept' in JR Champlin (ed), *Power* (Atherton Press 1971); Stewart Clegg, *Frameworks of Power* (SAGE 1989).
[116] As an example see: Charles McClelland, 'Power and Influence' in Champlin (ed), (n115).

Type V. Legal Power, illustrated by-

(a) The (legal) capacity of an authority, or the agents of an institution to do something […]
(b) The (legal) capacity of a person to take certain kinds of action […]
(c) The powers of, e.g., the police as a right and obligation to protect members of society.[117]

Further elaboration reaches the conclusion that '[p]ower in this sense is thus a socially recognised claim on someone's part to be able to act in a certain way […] [i]t is not force, less still domination'.[118] While this concept of legal power can be read in a positivist light, it does identify an understanding that legal power has to be backed up by something else. Associating power in a legal sense with sovereignty and its conflation of power and authority does not provide full comprehension.

Foucault provides a prime example of the study of power as hierarchical relationship(s), with a focus upon the factual operation of power relations through history. Within this framework he finds sovereignty as merely one among many variations of power relations. Although he does allow that the particular expression of 'pastoral power', presented in religious contexts, is a development uniquely facilitated, and utilised, by the Christian faith.[119] Foucault's work is critiqued for its lack of Sociological perspective, resulting in the elision of the people existing within these relations.[120] Without any concern for a social perspective perceiving the experience of people within any scheme of study will be difficult. Michael Mann's *Sources of Social Power* addresses precisely this concern. His study of power relations as network organization finds, from a historical-Sociological perspective, that power can be understood as the projection of the power to rule over a population. This is divided into four interrelated spheres: Ideology, Economic, Military and Political. His model suggests self-identifying

[117] Dorothy Emmet, 'The Concept of Power', in Champlin (ed) (n115), 89.
[118] ibid, 96.
[119] Michel Foucault, *Security, Territory, Population* (Senellart ed, Palgrave Macmillan 2007), on pastoral power see particularly chapters 5-7.
[120] See: ibid, 2-3; Clegg, (n115), 16.

Medieval polities formed through the territorial limitations of projection of hierarchical power. Monarchs claimed power to rule based upon over how far they could enforce their power to coerce obedience.[121]

Focusing purely on power makes it hard to escape positing the legal regime as a cloak for an expression of pure power, divorced from any consideration of legitimacy. This is a primary critique of legal positivism. In isolating the 'science' of law as the subject of study questions of legitimacy are answered through respect to legal form and procedure. The people's experience of law cannot be comprehended. What if one discards positivism and acknowledges the conceptual basis of sovereignty in religious thinking, and that it is an integral component of state theory that can be understood through political jurisprudence? The result is an expression of sovereignty that simultaneously (but distinctly) encompasses the hierarchical dominance of government, and positive law-making. The concept of constitution can be understood to overarch and regulate both concerns. If we see the constitution as the location of sovereignty then from where does its authority to manifest positive law arise?

Legal Power and political jurisprudence

Loughlin's political jurisprudence identifies the issue of power and authority, and the importance of power over, and power to, as the source and solution. He describes power to as *Potestas*, representing 'authority as a product of the people's capacity to act in common.'[122] Power over becomes *Potentia* 'the power deployed by government', positive law-making power.[123] Potential terminological confusion and conceptual slippage persists because power is still two distinct processes. 1) Power to constitute a political unity, and; 2) The subsequent governmental power. However, if *Potestas* becomes political action authorising the

[121] Michael Mann, *The Sources of Social Power* (3 volumes, 2nd edn, CUP 2012) volume 1.
[122] Loughlin, (n113), 24.
[123] ibid, 25.

constitution of government (of the people and by the people) then there exists a moment of political authorisation of government, or sovereign *Authority*. An action achieved either through a single covenant to create the representative sovereign (as per Bodin or Hobbes), or through a two stage creation of a sovereign political unity and subsequent constitution of government (deployed by Locke). *Potentia*, the positive law-making power of governance, can now be conceived as legal *Power*. The legitimacy of the exercise of legal power can then be assessed correctly, and distinctly, through recourse to checking adherence to prescribed form and procedure.

This facilitates a partial reconciliation with positivist interpretations of public law, with the caveat that only half of the process can be understood. At the same time an operative distinction is achieved between concepts of legal power and political authority. Crucially, both of these sub-categorisations have to be present, appreciated and understood for the study of sovereignty which can no longer be represented as mere power or authority. Political jurisprudence can facilitate an understanding of this achievement, indeed, that is its purpose. Therefore, juridical analysis of 'political' process can be undertaken, as well as analysis of 'legal' form. The conception of authority is assessed below.

It can also be seen how cultural study of the law could be achieved in this way. Foucault's scheme is not appropriate for finding human experience and perception of power relations; whereas, Mann's Sociology does not understand power as a tangible concept. By expressly recovering sovereignty as comprising both authority and power, an alternative perspective arises: Weber's historical-Sociology of the legal and political state.[124] Weber made analytic distinctions between power, domination, authority and legitimacy. Although translation issues have led to conflation of domination and authority, what is crucial to

[124] Max Weber, *Economy and Society* (Gunther Roth & Claus Wittich eds, University of California Press 1978), 901-955.

acknowledge is that Weber understood power as something to be exercised, and authority as something to be possessed.[125] Power is exercised as the actions of government. Authority is legitimate domination of the government over the governed. This is addressed in detail in chapter two.

AUTHORITY

Alongside constitution, authority is a central concept to my research. The preceding discussion of sovereignty and power has served to highlight the place of authority within constitutional theory, but also how discussion dominated by the concept of sovereignty has obscured the role of authority. Focusing on authority allows for the development of a core concept in my research, and how the concept relates to the more usually discussed concepts of sovereignty and power. It also serves to lay the conceptual foundations upon which discussion of legitimacy theory in the next chapter will be built.

The legal concept of authority is shaped by positivism. Raz's work on legal authority represents a positivist moral perspective, he identifies the issue of legal authority as controversial and paradoxical.[126]

> The paradoxes of authority can assume different forms, but all of them concern the alleged incompatibility of authority with reason or autonomy. […] It is of the nature of authority that it requires submission even when one thinks that what is required is against reason. Therefore, submission to authority is irrational. […] Since authority sometimes requires action against one's own judgment, it requires abandoning one's moral autonomy.[127]

As with power, authority is understood as a relationship between parties. The distinction is that authority can compel people to obey against their personal views without recourse to threat or sanction, even when legal frameworks expressly provide these options. Authority is enough to

[125] Stuart Clegg, 'Power, Legitimacy, and Authority' in Gerard Delanty & Stephen Turner (eds), *Routledge International Handbook of Contemporary Social and Political Theory* (Taylor & Francis 2011), 215; ibid.
[126] Joseph Raz, *The Authority of the Law* (OUP 1979), 3.
[127] ibid, 3.

convey sufficient legitimacy to override objection. However, authority presents distinct facets. 'We should distinguish between authority over persons and authority to perform certain actions […] Everyone who is an authority has authority over people, but not everyone who has authority is an authority.'[128] This would suggest that unlike Weber's understanding of authority, Raz's concept of legal authority is not limited to something that is 'possessed'.

This positivist aspect of legal authority is highlighted when considering the concept's operation in private law. Jansen identifies the historical importance of normative practice among legal elites to the enshrinement of hierarchical legal norms, and the privileging of textual form, as *the* legal authority in private law. [129] It is the isolated nature of the legal norm, and its use in the hands of elite practitioners that contributed towards the authority of the individual legal norm, but also the wider body of the legal system. Jansen confirms this perspective when examining public legal practice. Starting from the position of the privileged authority of the written reproduction of the legal norm he suggests that legal authority is maintained because 'jurists […] rarely discuss the abstract constitutional validity of a norm'.[130] He suggests their attention is focused upon 'whether a norm is applicable in the specific case, or whether another norm is to be given priority.'[131] The isolationist nature of positivist legal doctrine, and its limitation of considering legal authority beyond procedural form is later confirmed:

> [T]he abstract authority of a text giving expression to a legal norm consists in the legal profession accepting it as the ultimate source of the law, *without* requiring further legal reasons to do so. Of course there may be political, prudential, moral, or other reasons for recognizing such a text as legal authority. But such reasons are not part of the legal system. Their place is rather 'before', or 'outside', the law. Hence they are usually not part of the legal discourse.[132]

[128] ibid, 19.
[129] Nils Jansen, *The Making of Legal Authority* (OUP 2010), 20-27 especially his focus upon the *Decretum Gratiani* as the highest authority in Canon Law and 'The Saxon Mirror' in secular law in the Medieval period.
[130] ibid, 42.
[131] ibid.
[132] ibid, 43 (emphasis added).

Questions of legal authority became issues of positivist moral legal philosophy concerning the individual as a private actor because the connection between political practice and public law was denied to jurisprudential attention. When addressing the legitimacy of constitutions as legal authority this positioning navigates Raz into a degree of logical absurdity. First he suggests constitutions are legitimate simply because of their authors. However, he is forced to qualify that in further finding:

> Constitutions, at least old ones, do not derive their authority from the authority of their authors. […] They are valid just because they are there, enshrined in the practice of their countries. […] *As long as they remain within the boundaries set by moral principles,* constitutions are self-validating in that their validity derives from nothing more than the fact that they are there.[133]

If jurisprudence can analyse the political aspect of constitutionalism – as a mirror of societal interactions (and morality) – as a collective enterprise, then questions of moral validity are somewhat negated. Additionally, the legitimate authority of a constitution, or convention, can be subject to political jurisprudence. This addresses Raz's concern that '[c]onstitutions are meant to provide a framework for the public life of a country, giving it direction and shape. For this to be achieved, widespread knowledge of the constitution has to be secured.'[134] Political jurisprudential thought negates this as the constitution is recognised as possessing a political component, and being responsive to social practice. Further legal analysis can assess the validity of the constitution in responding to these social norms. This highlights the deficiency in the dominant attitudes to legal authority, but could these be challenged by alternative concepts of authority?

From an anarchist perspective, Wolff suggests '[a]uthority is the right to command […] the right to be obeyed.'[135] Yet he also acknowledges that '[t]he term "authority" is ambiguous,

[133] Joseph Raz, *Between Authority and Interpretation* (OUP 2009), 348.
[134] ibid, 350.
[135] Robert Wolff, *In Defence of Anarchism* (2nd ed, University of California Press 1998), 4.

having both descriptive and normative senses. Even the descriptive sense refers to norms or obligations'.[136] His understanding, like that of Raz, is predicated upon the individual subject of moral obligation; not upon the social aspect of collective perception or action. 'Obedience is not a matter of doing what someone tells you to do. It is a matter of doing what he tells you to do *Because he tells you to do it*. Legitimate, or *de jure*, authority thus concerns the grounds and sources of moral obligation.'[137] Synthesising an overview of the relationship between political obligation and moral authority Simmons suggests the following:

> Political obligations […] are general moral requirements to obey and support the political institutions of our own states or governments. The requirements are *moral* in the sense that their normative force is supposed to derive from independent moral principles, a force beyond any conventional or institutional "force" that might be thought to flow from the simple facts of institutional requirement (according to existing rules) or general social expectations of conduct.[138]

Simmons identifies the peculiarity of authority as distinct from general concepts of either force, or power. However, he persists with the normative positivist perspective, therefore relegates the issue of authority to a position external to legal (and political) analysis. Authority is the concern of individual moral autonomy. There is no account of authority as related to collective social action or perception, and integral to that politico-legal discourse. This critique applies to the wider dominant perspective, even through functional analysis of sovereignty (divested of concerns of individual moral autonomy), political literature finds that '[s]overeignty is a form of authority, and not a kind of power'.[139] This leaves the issue that the source and understanding of the authority of sovereign government is seen to lie outside of positivist perspectives.

> A fundamental question [concerning popular sovereignty] arises at this point: how can the people be answerable and accountable if they are creatures and instruments of the political elites? […] There are no satisfactory answers of which I am aware […]

[136] ibid, 5.
[137] ibid, 9.
[138] A. Simmons, 'Political Obligation and Authority' in Robert Simon (ed), *The Blackwell Companion to Social and Political Philosophy* (Blackwell 2002), 17.
[139] Jackson, (n112), 14.

> [s]overeign authority and power has to be in somebody's hands. It cannot be in the hands of everybody.[140]

There is only the ability to analyse the prescribed system or framework of governance, not the social elements of perception, action and ascription that underpin it.

Arendt's classic study connects the issue of authority to the transformation of transcendent concepts of authorisation through the development of Early Modern political systems. Her position acknowledges potential religious influence upon the concept of sovereignty in the transition from Medieval to Early Modern conceptions. Arendt's starting point is encapsulated in the famous quotation 'Power and Authority are no more the same as power and violence.'[141] However, modern understanding of authority is indistinct because 'we can no longer fall back upon […] experiences common to all' as a result 'the very term [authority] has become clouded by controversy and confusion.'[142] Working through the historical development of (Western) political community Arendt suggests that '[i]f authority is to be defined at all […] it must be in contradistinction to both coercion by force and persuasion through arguments.'[143] The capacity to achieve this, and to understand its necessity, has been lost; as has the true sense of authority. This is because the transcendent concepts of history and religion have dissolved under the advance of modernity: 'Historically, we may say that the loss of authority is merely the final, though decisive, phase of a development which […] undermined primarily religion and tradition.'[144]

'The downfall of political authority was preceded by the loss of tradition and the weakening of institutionalised religious beliefs […] [which] had ruled the secular and spiritual

[140] ibid, 82.
[141] Arendt, (n37), 179.
[142] Hannah Arendt, 'What is Authority?' in *Between Past and Future* (Faber & Faber 1961), 91.
[143] ibid, 93.
[144] ibid, 93.

affairs of men since the beginnings of Roman history'.[145] Religion ceased to be the collective experience of Medieval Catholicism, and instead became an individualised experience. Collective understanding of a 'spiritual' authority was eroded through the reduction of its public importance. Authority stemmed from collective perception, experience and action. Arendt highlights this through analysis of the Roman tradition where 'authority was not vested in laws, and the validity of the laws did not derive from an authority above them. It was incorporated into a political institution, the Roman Senate'.[146] The Senate possessed authority due to both tradition, the connection to the transcendent collective past, and because of its position as the forum of public (collective) discussion among the wider political class. Arendt's conception of authority understands the importance of an experience of collective action as a source of authority. Whether through experience of a religious community, or a collective historical tradition, the principles have been lost to modern legal and political thought. Can this concept of authority be recovered?

Philosophical investigation addressing authority as the object of study highlights the centrality of collective experience, religion and tradition to the nature of the authority relationship.

> The concept of authority thus leads back to the concept of freedom: it is the practical freedom of the individual, his social freedom and its absence, which is at stake. The union of internal autonomy and external heteronomy, the disintegration of freedom in the direction of its opposite is the decisive characteristic of the concept of freedom which has dominated bourgeois theory since the Reformation.[147]

Marcuse traces this process to Lutheran and Calvinist liberation of the individual – and their relationship with God – from the unidirectional experience of hierarchical papal authority of Medieval Catholicism and the Holy Roman Emperor. 'The Protestantism of Luther and Calvin

[145] Arendt, (n37), 114; see also: François Terré 'Introduction to the French Edition' in Kojève, *The Notion of Authority* (Verso 2014), xix.
[146] ibid, 200.
[147] Herbert Marcuse, *A Study on Authority* (Verso 2008), 7.

[…] is bound up with the emergence of a new […] society […] it required deliveration of the territorial sovereign from the authority of an internally centralised church and the central imperial power.'[148] This was achieved by making power a temporal concern. However, initially at least, authority remained a transcendent concept in classical Calvinism. 'All worldly power can only be a "derivative right": authority is a "jurisdiction as it were delegated by God". […] The relationship of God to the world appears essentially as the relationship of an unlimited sovereign to his subjects.'[149] This transcendent aspect of individual religious practice was twisted into an understanding that '"[s]overeignty" originated with society itself: "society, and sovereignty were born together".'[150] Therefore, the state has to fulfil this position and subsume and erase the religious components of eschatological progression. '[S]tate and society must be presented as something exceeding all human power: "Every Constitution […] goes beyond the powers of man."'[151]

Similarly, Kojève identifies four theories of authority, including: '1. The theological […] theory: primary and absolute Authority belongs to God; all other (relative) authorities are derived from it.'[152] Kojève further identifies characteristics of authority shared by all four theories. 'There is Authority only where there is (real, or at least possible) movement, change, and action. Authority is held only over that which can "react" […] Authority belongs to the person who can affect change and not to the one subject to change'.[153] Authority is understood as something possessed as part of a relationship of domination. He further elaborates that authority can be seen as truly distinct from force, due to the involvement, or lack thereof, of coercion.

[148] ibid, 9-10.
[149] ibid, 26.
[150] ibid, 70.
[151] ibid, 71.
[152] Kojève, (n145), 1.
[153] ibid, 7.

> Authority is not only something different from using force (violence), but the two phenomena are mutually *exclusive*. Generally speaking, one needs to *do nothing* in order to exert Authority. The mere fact of being compelled to call on the intervention of force (violence) proves that no Authority is involved here. Conversely, it is not possible – without using force – to make people do what they would not have done spontaneously (of their own accord) without calling upon the intervention of Authority.[154]

Authority and legitimacy are inherently linked to uses of power. Authority is also necessarily a social relation, often perceived to be imbued with legal character.[155] In addressing the origin of authority he concludes: 'All four types of pure Authority are assumed to have a *spontaneous* […] genesis.'[156] In the context of collective action, political authority can be argued to underpin exercises of law-making power.

Marcuse and Kojève relate well to Weber's historical-Sociology of authority which describes the Sociological interrelation of power, dominion, authority and legitimacy.[157] He defined a political community as 'a community whose social action is aimed at subordinating to orderly domination by the participants a "territory" and the conduct of the persons within it'.[158] This can be undertaken through use of power, a social relationship represented in the domination of the governor(s) over the governed. Within this understanding of power and domination, authority is a species of domination that manifests as an ability to secure obedience without obvious coercive violence or threats. Authority compels obedience through Sociological norms that allow its perception as legitimate. Weber described three pure types of legitimate authority: Charismatic; Traditional; and Rational.[159] Similarly to Arendt, Kojève and Marcuse, authority in Weber's work (although normative in character) displays characteristics of transcendence or tradition. The benefit of Weber's approach is its ability to account for both

[154] ibid, 10.
[155] ibid, on the social element see page 8; on the legal and legitimate characteristics see page 10.
[156] ibid, 32.
[157] Weber, (n124).
[158] ibid, 901.
[159] ibid, 954. These pure types are discussed in detail in chapter two.

social perception of legitimate authority, as distinct from positive power, and a transition or convergence between types of legitimate authority. In addition, his ideas align with a concept of sovereignty as law-making power, and collective action as political authority. Weber understood Power as something exercised, and Authority as something possessed.[160] Can these understandings of authority and social action be reconciled to legal theory?

Authority and Political Jurisprudence

Reconciliation between Loughlin's anti-positivist Public Law and normative positivist legal theory might be achieved through recourse to political jurisprudence. Undertaking analysis of authority Lindahl finds '[t]he term "authority" is commonly used in one of two ways in the law, namely when referring to individuals empowered by the legal order – legal authorities – or to the law's objectivity – the authority of the law.'[161] He argues these two interpretations can be unified: 'positing the law yields the key to the act of legal objectification.'[162] This is because any legal norm is either a re-presentation of a norm of social character, or a re-presentation of itself as a pre-existing legal norm; regardless of whether newly 'posited', or used as existing authority in legal discourse.

> For by positing general norms, whether substantive or procedural, every legislative act also claims to carry forward values claimed to be constitutive for the identity of the community […] the act of positing the law involves both the reproduction and the production of values. […] [P]ositing a norm always transforms […] the applied norm. In other words, setting the law is an act at once reproductive and productive, representational and presentational.[163]

Lindahl applies his thesis to constitutionalism through his interpretation of constituent power as Authoritative Collective Action (ACA).[164] Central to this approach is 'understanding

[160] This is most explicit in the grammatical constructions of the original German, and has been subject to varied translation, see: Clegg, (n125), 215.
[161] Hans Lindahl, 'Authority and representation' (2000) 19(2) Law and Philosophy 223, 223.
[162] ibid.
[163] ibid, 242.
[164] Hans Lindahl, 'Constituent Power and the Constitution' in David Dyzenhaus & Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (OUP 2016).

the constitution as a first-person plural concept' as identified by the common opening refrain to constitutional texts of some version of 'We the People'.[165]

> The notion of collective action captures the insight that there is a distinctive first-person plural perspective proper to collective agency, a perspective which is simply the summation of the first-person singular perspectives of the individuals who compose the group. […] This means concretely, that judgments, intentions, actions, and responsibility can meaningfully be ascribed to social groups, which have an existence irreducible to – although not independent of – the individuals which compose them. [166]

Lindahl's scheme struggles with questions of temporality and the relationship between constituent and constituted power. He suggests any action of ACA, such as constitutional formation, must be presented as the action of a pre-existing community. The community itself could not form through the same process of ACA. This paradox is found at the heart of constituent power, when viewed as ACA; but is reflected in any 'revolutionary' moment. How can a new order be legitimate under law? Either the new order creates a legal regime, which was not extant in the moment of constitution; or existing law applies and the constitutional revolution is a coup. The benefit of Lindahl's scheme is that if an exercise of ACA is claimed in a moment of constituent power, and it is socially accepted or perceived as legitimate action, then the unresolved paradox can be bypassed. Social acceptance creates legitimate action, social rejection creates illegitimate action.[167]

For Loughlin the heart of facilitating juristic analysis of both political and legal components of a broadly conceived, autonomous, Public Law lies in recognition of the constitutions' role in addressing both *potestas* (power to), and *potentia* (power over). *Potentia* is reducible to positive law-making power. *Potestas*, as the power of collective action, stems from the recognition of the formation of a political unity and subsequent collective

[165] ibid, 141.
[166] ibid, 141-142.
[167] ibid, 147-152.

representational constitution of government.[168] I have suggested this collective power to constitute government be reconsidered as authority stemming from political action, authority underpinning positive exercise of law-making power. This produces terminological clarity. It also provides a conceptual subdivision – of an overarching concept of sovereignty – that harks back to a clearer Early Modern understanding as expressed in Bodin, Hobbes etc.: Sovereignty as an indivisible concept acting in both legal and political spheres of social interaction. Lindahl's concept ACA allows for a political jurisprudence that can simultaneously comprehend normative positivism, and political actions of constitutional formation; because it allows attribution to social action as legal norm creation or re-presentation.

CONCLUSION

This chapter has provided the characteristics of the concepts in my research. The core concepts are constitution and authority. Authority is best understood in relation to other elements of wider constitutional theory. Discussion of sovereignty and power has been used to distinguish authority and its central role within my project. Within my research sovereignty is a transcendent concept, an aspect of divinity, which Early Modern state theory attempted to reconstitute in the temporal sphere (encompassing legal and political thought). Power is positive law-making power. Authority is possessed by government, and perceived as legitimate due to a government's representation of the collective will of the governed. Therefore, the authority of the people underpins the constituted model of government. Constitution is understood as a process reflecting all aspects of social association that might influence the construction and operation of societal organisation. The Protestant re-constitution of the church on congregational lines influenced the perception of the legitimacy of 'spiritual' authority. This process transformed spiritual authority from a unidirectional experience of Medieval Papal doctrine towards an individual relationship with God; a relationship facilitated through church

[168] Loughlin, (n113), 24-25.

authorities' assistance of individual understanding, and provision of an environment conducive to religious betterment. These authorities having been selected, and therefore legitimised, at least partially by the congregation subject to their governance. I argue a route to perceive a religious aspect to the legitimacy of the constitutional change as enacted by the Bill of Rights might be found through these Reformation practices. Parliament claimed the right to be the supreme legislative power because it was representative of the Nation. Due to similarity to, and association with, Medieval papal doctrine the hierarchical monarchic constitutional order would also have been undermined by Reformation thought. Similarly, the Protestant congregational model of religious association echoed a parliamentary model of constitutional government, potentially lending a perception of legitimacy.

The next two chapters detail the theoretical components of my research. Chapter two addresses legitimacy theory, and chapter three the church as a constitutional model. Part B provides an empirical application of the combined theoretical elements constructed in Part A through analysis of five seventeenth-century manifestos for English constitutional reform. Using political jurisprudence I am able to simultaneously approach the Petition of Right, the Levellers' An Agreement of the People, the Bill of Rights, the Meeting of Parliament Act and the Act of Settlement as documents of equivalent importance in understanding the constitutional transition from monarchic to parliamentarian models. This method also allows a reading of these documents highlighting the influences of Protestant Reformation of church structure and 'spiritual' authority upon this transition; to understand the location of constitutional authority, and potential implicit influence upon perception of the legitimacy of this constitutional re-structuring. The next chapter provides the theoretical understanding of legitimacy utilised in my analysis of the perception of constitutional authority undertaken in Part B. Central to my project is the Weberian theory of legitimacy which appreciates the role of both individual and collective relationships to authority in perception of legitimacy.

CHAPTER 2

Legitimacy Theory: Weberian authority and the people's perception of legitimacy

INTRODUCTION

Working in conjunction with chapter one and chapter three, this chapter provides theoretical components for the construction of my framework of concepts, theory and method with which I analyse the Bill of Rights, Petition of Right, the Levellers' An Agreement of the People, the Triennial Act and the Act of Settlement. Specifically, this chapter provides an introduction to and analysis of the work of Max Weber, and its subsequent development in the behavioural science fields of Sociology and social-Psychology. It is argued that Weber's theory provides a suitable foundation upon which to base analysis of a cultural conceptualisation of constitutionalism, and the transition from monarchic to parliamentarian constitutional models in the English seventeen-century. The suitability of Weber's work, and its subsequent developments, is found to lie in two principal theoretical aspects. First, the historical-Sociological approach developed by Weber. Second, the sensitivity of his work to the experience of authority by both the individual and collective subject(s). Weber's theory, and its developments, are based on recognising that perception of legitimacy is founded upon the individual experience of being subject to authority, but also the individual perception of the collective experience of being subject to authority.

The dominance of positivism in contemporary legal theory has resulted in a narrow conception of legal legitimacy. Constitutional theory finds law to be legitimate if it satisfies two basic criteria. First, has the law been developed from the correct source, such as the requisite legislative body? Second, has it been enacted following the correct procedure, such as Parliamentary debate and Royal Assent? Within these criteria it is also required that a law be found to assign duties, responsibilities and powers to suitable bodies and agents, and nominally at least, that it possess the potential for operable functionality. In simple terms law

is legitimate if it follows the accepted form and procedure for producing law.[1] At first glance this seems a suitable conception of legitimacy, but it quickly breaks down in contact with the real world.

Weber's theory of legitimacy, and its subsequent developments, recognise both an individual and a collective dimension to perception of legitimacy. When considering claims to constitutional authority in the English seventeenth-century, the capacity to recognise two elements to the perception of legitimacy holds the potential to facilitate sophisticated analysis of how competing monarchic and parliamentarian claims to constitutional authority may have been perceived. In assessing the suitability of Weberian legitimacy theory to my research this chapter is structured as follows. First is an introduction to Weber's theory of legitimacy and detailed analysis of its core elements, and applicability to my research. Second comes an assessment of the subsequent development of Weber's theory in the development of Sociological and social-Psychological literature on legitimacy theory. Third an assessment of how Weberian legitimacy theory can be used in analysis of perception of legitimacy. The conclusion is that Weber's work makes a solid basis for an understanding of legitimacy that is more nuanced than that of the dominant contemporary legal theory. This is because it is well suited to a cultural understanding of constitution and the legitimacy of the transition of constitutional authority from the monarchy to parliament in the English seventeenth-century. Furthermore, it is found that the literature can yield four indicative criteria which aid analysis of perception(s) of legitimacy of authority by those subject to it, on both individual and collective levels.

[1] As examples see: Hans Kelsen, *Pure Theory of Law* (Knight tr, 2nd edn, University of California Press 1987) part 3; Joseph Raz, *The Authority of the Law* (OUP 1979) chapter 1.

MAX WEBER AND LEGITIMACY THEORY

Weber's work has been subjected to critique, but much of this has been as a result of issues surrounding application to analysis of legitimacy in twentieth and twenty-first century situations. It can conversely be seen that Weber's scholarship is more suited to behavioural analysis on an individual and small-group scale, as has been the case with its development within the study of legitimacy in the disciplines of social-Psychology and Sociology. I suggest that Weber's work is also suitable to be applied to the historical contexts surrounding the Bill of Rights, and the wider English seventeenth-century. As a basis upon which to build my analytical framework, the scholarship of Weber provides a firm foundation as he was a thinker of particular sensitivity to both Protestantism, and to classical conceptions of pre-modern party-political liberalism, and individualism; which are both factors of importance to my research.[2] It is the centrality of belief to Weber's analytical frameworks engaged with the study of legitimacy that make his work so suitable for my research, and simultaneously is the source of the most strident criticism from political scientists. Belief in legitimacy is at the core of Weber's writing on the topic, due to his focus on the experience of the individual. Belief is an important factor for my own research for the same reason as it shares the individual as a starting point; but also because of the prevalence, and all-pervading importance, of religious faith in the historical context of the English seventeenth-century, and particularly the so called 'Glorious' Revolution. In order to back any substantive engagement with the social, legal and political disturbances of the 'Glorious' Revolution an appreciation of the subtleties of the religious environment, as well as an understanding of the role played and the facilitation provided by religion in daily life is essential.

[2] On Protestantism see: Alan Sica, *Weber, Irrationality, and Social Order* (University of California Press 1988), 101. On liberalism see: David Held, *Models of Democracy* (Polity Press 1987), 144-147; Robert Holton and Brian Turner, *Max Weber on Economy and Society* (Routledge 1989), 85-86.

Attending directly to the scholarship of Weber the key text can clearly be seen to be *Economy and Society*, and in particular his considerations of legitimacy within social order, formation and structure. [3] This sizeable compendium constitutes a body of work that can accurately be described as seminal in the field of legitimacy, containing as it does all the key considerations and aspects of Weber's work on the subject. Before going further some attention should be paid to the organisation of the work itself. It begins with a detailed glossary of Sociological terms important to the subsequent text, an approach that seems sensible in this context. With that in mind there are several key concepts that need to be addressed here before commencing a fuller study and analysis of Weber's work; particularly in the context of its contribution to the contemporary social-Psychology research I will subsequently be utilising, and its direct relation to my own research.

The key concepts to be drawn from Weber's work and applied to my own considerations are *Domination, Power* and *Legitimacy*. In remarkably simple terms Weber defines *Power* as 'the probability that one actor in a social relationship will be in a position to carry out his own will despite resistance',[4] in other words power can be described as the ability to bend others successfully to one's will within any given social, legal or political circumstance. Weber defines *Domination* as 'the probability that a command with a given specific content will be obeyed by a specific group of persons.'[5] In this context domination can be seen to be removed from the embodiment of any precise person or group, allowing it to be applied to a wide range of situations, including the description of any successful exercising of power. When considering the nature and application of legitimacy, Weber first describes there being two basic 'Types of Legitimate Order'; the first comprises of 'purely subjective' assessments, that I would categorise as based upon faith or belief:

[3] Max Weber, *Economy and Society* (Guenther Roth and Claus Wittich ed, 2nd edn, University of California Press 1978), 212-301.
[4] ibid, 53.
[5] ibid.

I. The guarantee may be purely subjective, being either

1. affectual: resulting from emotional surrender; or
2. value-rational: determined by the belief in the absolute validity of the order as the expression of ultimate values of an ethical, esthetic or any other type; or
3. religious: determined by the belief that salvation depends upon obedience to the order.[6]

I would characterise these as representing an order based upon faith or belief, and I shall endeavour to use faith as belief as a component of Weber's definition. This is because I understand them to represent a purely personal experience that can, but that does not necessarily need to, occur in complete isolation from the action or suggestions of other members of a social group.

Weber goes on to complete the 'Types of Legitimate Order' thus:

II. The legitimacy of an order may, however, be guaranteed also (or merely) by the expectation of specific external effects, that is, by interest situations.

An order will be called

(a) *convention* so far as its validity is externally guaranteed by the probability that deviation from within a given social group will result in a relatively general and practically significant reaction of disapproval;
(b) *law* if it is externally guaranteed by the probability that physical or psychological coercion will be applied by a *staff* of people in order to bring about compliance or avenge violation.[7]

The importance of the element of individual subjectivity within the initial categorisation now becomes clear. The second category can be seen to require both individual, and collective processes, in order to generate social compliance with the order. Any given individual must perceive that an action is 'wrong', by both their personal and the established group standard. It can be suggested that compliance with both aspects of the second categorisation will be determined by the established normative behaviours of a social group, but that *law* also has the additional requirement of a specified enforcement body.[8] Sanctions against violators from a

[6] ibid, 33.
[7] ibid, 33-34.
[8] ibid, 34.

conventional perspective are of a purely social and un-codified nature and as such are to some extent irrational. Whereas, legal sanctions are explicitly prescribed and predictably enforced by a specified agent(s) and are therefore formal and rational in nature.

When considering directly the nature and perception of legitimacy among those being acted upon Weber states the following:

> The actors may ascribe legitimacy to a social order by virtue of:
>
> (a) *tradition:* valid is that which has always been;
> (b) *affectual,* especially emotional, *faith*: valid is that which is newly revealed or exemplary;
> (c) *value-rational* faith: valid is that which has been deduced as an absolute;
> (d) positive enactment which is believed to be *legal*.
>
> Such legality may be treated as legitimate because:
>
> (a) it derives from a voluntary agreement of the interested parties;
> (b) it is imposed by an authority which is held to be legitimate and therefore meets with compliance.[9]

I share Weber's belief that these categorisations can be further reduced to three basic groups, as they appear under the heading 'Bases of Legitimacy: Tradition, Faith, Enactment**'**.[10] Using these groups I would see (a) as '*tradition*' (b) and (c) as *'faith*', and (d) and its subsections as '*enactment*' or law. These groupings of the 'Bases of Legitimacy' will be subjected to deeper analysis below, and it is indeed worth noting that Weber himself gives significant treatment to them later in his work. It is useful to bear in mind that after a brief terminological discussion he does state that these pure types are not directly, and never were intended to be, representative of manifestations of social orders in reality.[11] In effect, these pure types are analytical abstractions. In contemporary and historical reality social orders are likely to reflect aspects of two or all three of these categorisations.

When embarking upon his considerations of the legitimacy of authority Weber first takes care to point out:

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[9] ibid, 36.
[10] ibid.
[11] ibid, 37-38.

> What is important is the fact that in a given case the particular claim to legitimacy is to a significant degree and according to its type treated as "valid"; that this fact confirms the position of the person claiming authority and that it helps to determine the choice of means of its exercise.[12]

This would clearly suggest that within the three types of authority described there are certain forms and formulas that need to be respected and maintained, in order for the perception of legitimacy to still be seen to exist. In other words, this can be read as indicating that regardless of the system of social order in evidence and the apparent power of its leaders there always has been, is, and will continue to be, the possibility of illegitimacy. At this point I feel it useful to stress that Weber represented his work as being 'pure types',[13] and that these abstractions are not meant to be directly representative of any known social order. This is a subtle point that can at times be missed, and has perhaps led to some of the criticism that Weber's work has received.[14]

The first of Weber's 'Three Pure Types of Authority' is described as:

> Rational grounds – resting on a belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands (legal authority). […] In the case of legal authority, obedience is owed to the legally established impersonal order. It extends to the person exercising the authority of office under it by virtue of the formal legality of their commands and only within the scope of authority of the office.[15]

In order to claim the legitimacy of rational grounds, or law, the social order must be operating within clearly defined boundaries. Furthermore, those exercising power derived from, or on behalf of, the social structure will only be able to do so within these defined parameters. Conversely this also dictates that individual abuses of power will not necessarily cause the system as a whole a loss of legitimacy. Instead, the holder of a particular position, office or power(s), may themselves become illegitimate, while the wider structure is able to maintain

[12] ibid, 214.
[13] ibid, 215.
[14] David Beetham, 'Max Weber and the Legitimacy of the Modern Sate' (1991) 13(1) Analyse and Kritik 34; Robert Grafstein, 'The Failure of Weber's Conception of Legitimacy' (1981) 43 The Journal of Politics 456; Martin Spencer, 'Weber on Legitimate Norms and Authority' (1970) 21(2) The British Journal of Sociology 123.
[15] Weber, (n3), 215-216.

the appearance of legitimacy. At first glance this may seem to be a description most closely suited to the formal structure of modern political states. However, it can be suggested to apply to other political structures and their laws.

The second of Weber's 'Three Pure types of Authority' is defined as follows:

> Traditional grounds – resting on an established belief in the sanctity of immemorial traditions and the legitimacy of those exercising authority under them (traditional authority) […] In the case of traditional authority, obedience is owed to the *person* of the chief who occupies the traditionally sanctioned position of authority and who is (within its sphere) bound by tradition.[16]

This can be articulated as legitimacy deriving from the exercise of power under a system that appears redolent with the wisdom of ages, and that is correct and proper because that is the way things have always been. This could be described as legitimacy that owes its basis to lore rather than law. On the other hand, Weber cautioned against this as he stated 'the obligation of obedience is a matter of personal loyalty within the area of accustomed obligations.'[17] This would suggest Weber viewed the obeying of structures claiming this legitimacy to be a matter primarily of personal choice rather than social coercion.

The third of Weber's 'Three Pure Types of Authority' is stated to be:

> Charismatic grounds – resting upon devotion to the exceptional sanctity, heroism or exemplary character of an individual person, and of the normative patterns or order revealed or ordained by him (charismatic authority). […] In the case of charismatic authority, it is the charismatically qualified leader as such who is obeyed by virtue of personal trust in his revelation, his heroism or his exemplary qualities so far as they fall within the scope of the individual's belief in his charisma.[18]

This may most easily be understood by likening the pure type of *Charismatic authority* to the cult of personality. It can be seen to apply to prophetic figures in religious history, but also to heroic persons of a secular nature. Examples provided by historical and contemporary dictators and populists leaders spring to mind as demonstrations of this concept. This typology of authority could also be seen to have some contribution to ideas of divine right monarchy, as

[16] ibid.
[17] ibid, 216.
[18] ibid, 215-216.

claimed by seventeenth-century Stuart kings of England. When looking at the three types expressed together, one interesting observation to keep in mind when considering these pure typologies is that the first can be seen to be based on a purely rational principle, the third on simple irrationality, and the second somewhere between these two poles.

When addressing Weber's category of rational grounds it seems easiest to consider it as a legitimacy based upon law, as defined by a particular social organisation. If one uses this as a basis for analysing claims to legitimacy within the English seventeenth-century, the most obvious analogy is the claim to authority made by Parliament, as manifested in the Bill of Rights, and the subsequent alterations that it made to the formalisation of the regime structure thereafter. The Bill sets out a rational scheme of legal order based upon the recognition and protection of the rights of the individual people, at least those who are enabled to take active participation in a somewhat representative democratic movement. This is in opposition to the perceived tendency toward arbitrary governance policies of the preceding system, dominated by the individual power of the monarch. This type of claim to legitimate authority could also be used to characterise the claims of the ancient constitutionalist movement, as exemplified by Sir Edward Coke and the Petition of Right.[19] Although this could be diluted by the somewhat conventional nature attributable to the arguments derived from the common law of the time. This is because they might have been perceived to lack the ultimate formalisation of a monarchic or governmental decree. Alternatively, it is also a claim to legitimacy that could have been articulated by the prevailing monarchic structure. Although this would have been open to claims of abuses due to the arbitrary actions of the Stuart monarchs, which as already hinted at above, could have been a source for counter-claims of illegitimacy; especially if the holder of the power had been seen to over-reach the scope of their authority.

[19] Glen Burgess, *The Politics of the Ancient Constitution* (Macmillan 1992) chapter 2; JGA Pocock, *The Ancient Constitution and the Feudal Law* (Cambridge University Press 1957), 37-50.

The second categorisation of traditional authority most clearly lends itself to the support of the monarchic structure of governance and its attendant laws. This is obviously the case when one considers that monarchy had been the known, expected and accepted form of social construction (in one form or another) since the withdrawal of the Roman Empire.[20] With that said, it is of course once again the case that any perceived abuses by the monarch of their powers would have been perceived as illegitimate. A useful illustration was provided by the Baronial Revolt and Magna Carta, and its representation and politicisation in the seventeenth-century constitutional crises.[21] In the hands of the radical Parliamentarians this might have been seen to allow a traditional claim to legitimate authority for the ancient constitutionalist movement. Another interesting point to consider here is the manifestation of the Restoration. In light of the possibility of a dual nature to perceptions of illegitimacy, the Restoration of the Stuart line in 1660 does appear to take on a character of a continued belief in the social order of monarchy. This allowed the potential for a representation of the actions and subsequent beheading of Charles I as a manifestation of discontent with personal abuses of power by him, not a feeling of wider illegitimacy in the system of governance and its laws.

Weber's third category of charismatic legitimate authority might at first glance be suggested to be of questionable application to the English seventeenth-century. This is especially so as it lends itself most readily to analysing the claims to legitimacy of prophetic religious, or cultic characters. However, this would be to miss some of the subtleties of the category definition. Weber suggested that there can be an heroic aspect to charismatic authority,[22] and this would allow one to consider this claim to legitimate authority to have been open to Cromwell as the victorious post-Civil War leader. Certainly this goes some way to

[20] Harold Berman, *Law and Revolution* (Harvard University Press 1983), 11-46; Elisabeth Zoller, *Introduction to Public Law* (Martinus Nijhoff Publishers 2008), 7-15.
[21] Burgess, (n19) chapter 2; His, *Absolute Monarchy and the Stuart Constitution* (Yale University Press 1996); Pocock, (n19) chapter 2.
[22] Weber, (n3), 215-216.

assisting in understanding, alongside the above considerations on the same topic, as to why the Interregnum came to an effective end with the death of Cromwell. This is because there would have appeared at this time no capacity for the transference of his charismatic authority to his successor, therefore, the status quo resumed. The nature of a charismatic claim to authority might have an interesting application to consideration of the claim of Parliament in the 'Glorious' Revolution, and the Bill of Rights itself, to have been basing a system of law upon the recognition and protection of individual rights. This argument could have claimed a source of legitimacy from the Protestant Reformation of church structure and 'spiritual' authority, as well as theology of individualism. This would have been in addition to presenting a claim that appealed to a break in the continuity of social structure, not too dissimilar from a religious leader declaring newly revealed knowledge. Unfortunately, this claim would run afoul of Weber's typology, as he was quite explicit in stating that charismatic authority applies to people, rather than ideas. Due to Weber's disclaimer on the pure types, and their representing abstractions rather than reality, it is a point worth raising nonetheless.[23]

As the brief considerations above suggest, the distinct characteristics of Weber's pure typologies of legitimate authority are not necessarily as distinct as they can first appear. This is a factor that Weber himself alluded to, subsequent to his considerations of charismatic authority.[24] It can be considered possible that from within any of the three types another can subsequently develop and come to dominate. For example, a charismatic leader who is able to manoeuvre a passing on of authority to a successor can give rise to a dynastic line over time. This in turn could develop a situation whereby it might become the case that the processes around succession become established as traditional norms. Subsequently, these norms could

[23] This is especially when considering the emotions that can be evoked by documents such as the US Constitution, and inanimate objects such as the US Flag, it appears that they can become focus points for movements that could allow them to be suggested to possess a charismatic type of 'irrational' leadership, legitimate in the eyes of their 'followers'.
[24] Weber, (n3), 241-271.

continue developing to eventually become perceived as possessing a legal character. Thus a transition from charismatic to legal authority unfolds. The potential of this process is well considered in Kantorwicz's study *The King's Two Bodies*.[25] These considerations, when put alongside the abstract nature of the three typologies as described by Weber, would suggest that by themselves they do not represent a sufficient system of analysis to deal with the claims to legitimacy articulated in the English seventeenth-century. Clearly each of the three pure types can be suggested to apply to both monarchic and parliamentarian models of governance, analysed in more depth in Part B. To provide the necessary sophistication of analysis to address the influence of Protestant Reformation of spiritual authority upon perception of the legitimacy of the Bill of Rights further development is required. In this project, as in the disciplinary research of Sociology and social-Psychology, Weber's pure types form a starting point to be built upon. The developments detailed in the next section allow for sophisticated application of Weberian legitimacy theory to instances of competing claims to governmental authority and models of constitution, as seen with the Bill and wider constitutional crises and conflicts of the English seventeenth-century.

POST WEBERIAN LEGITIMACY THEORY

Weber has had a sizeable direct impact upon legitimacy theory throughout the social sciences. This has been to such an extent that even for those researchers who are not satisfied with his work, he is unavoidable within the field. The work of Weber can also be seen to have both primary and secondary influences upon the research into legitimacy within specific disciplines, namely Sociology and social-Psychology. This is unsurprising when one considers that Weber has been described as one of the fathers of the modern discipline of Sociology.[26] The strong influence of his work within the field of social-Psychological study into legitimacy is far from

[25] Ernst Kantorowicz, *The King's Two Bodies* (Princeton University Press 1957).
[26] Holton and Turner, (n2), 20; Sica, (n2), xii.

unexpected. This could be attributed to Weber's focus upon the experience of the individual in relation to the wider group context, as extrapolating data from the individual for analysis of the collective is one of the primary research methods employed by social-Psychologists.[27]

The breadth and depth of research into legitimacy theory within the field of social-Psychology in particular has grown enormously since the end of the last century.[28] The implications and applications that have been ascribed to legitimacy are wide ranging, and varied, within the disciplinary field. Studies have aimed to analyse the legitimacy of legal regimes through examining how those subject to their governance relate to both decision outcomes, and procedural methods. Others have sought to understand how a sense of belonging or exclusion can be seen to affect perceptions of legitimacy within minority groups, or how social disadvantage can influence perceptions of the legitimacy of a governing regime. Further studies have examined the ways in which outside influences can impact upon legitimacy, or in what ways a pre-established perception of the legitimacy of a regime might be challenged or de-legitimated.[29]

One of the most long lived and influential behavioural analysis studies on legitimacy is *The Bases of Social Power*, the initial results of which were first published in 1959. In this study French and Raven described five bases of social power: '(1) *reward power* […] (2) *coercive power* […] (3) *legitimate power* […] (4) *referent power* […] and (5) *expert power*';[30] these were subsequently bolstered by the addition of a sixth, *informational power* in a 1965

[27] On the individual in Weber see: Leo Strauss, *Natural Right and History* (University of Chicago Press 1953), 37.
[28] John Jost and Brenda Major, 'Introduction' in John Jost and Brenda Major (eds), *The Psychology of Legitimacy* (CUP 2001).
[29] For a general overview of the intersection of social-Psychological and Sociological literature addressing legitimacy theory see: ibid; Tom Tyler, 'Psychological Perspectives on Legitimacy and Legitimation' [2006] Annual Review of Psychology 375.
[30] John French and Bertram Raven, 'The Bases of Social Power', in Dorwin Cartwright (ed), *Studies in Social Power* (University of Michigan Press 1959), 151.

paper developing upon the research programme.[31] In the context of my own research, the most obvious 'base' to be of relevance, would be legitimate power, which is described as:

> [T]hat power which stems from internalized values in [the subject] P which dictate that [the authority] O has a legitimate right to influence P and that P has an obligation to accept this influence. We note that legitimate power is very similar to the notion of legitimacy of authority […] However, legitimate power is not always a role relation: P may accept an induction from O simply because he has previously promised to help O and he values his word too much to break the promise.[32]

French and Raven set about analysing social power within a very loose definition, and many of their conclusions are drawn from examining relationships that were of a character very different to formal governance structures. This is a theme that runs throughout the literature of behavioural analysis. However, this is mitigated by French and Raven's considerations upon psychological factors that may induce behaviours concurrent with authority exercising legitimate power:

> [I]t applies to certain attitudes and beliefs which he may, should, or should not hold. The feeling of "oughtness" may be an internalization from his parents, from his teachers, from his *religion*, or may have been logically developed from some idiosyncratic system of ethics.[33]

I would suggest that while these influencing and developmental factors would definitely regulate social conduct in informal settings, as French and Raven hypothesise. They would also be the factors that shaped internal and external responses in more formal settings, for example relationships with a governing regime or authority. Although I use these factors in a general sense, it should be acknowledged that French and Raven's study has attracted criticism, stemming from the sources of influencing factors as they applied them to their research.[34]

What concepts and theories have been put forward to describe and explain processes that lead to the establishing and development of the legitimacy of a regime or authority figure

[31] Bertram Raven, 'A Power/Interaction Model of Interpersonal Influence' (1992) 7(2) Journal of Social Behaviour and Personality 217, 218.
[32] French and Raven, (n30).
[33] ibid, emphasis added.
[34] Timothy Hinkin and Chester Schriesheim, 'Development and Application of New Scales to Measure the French and Raven (1959) Bases of Social Power' (1989) 74(4) Journal of Applied Psychology 561, 561.

among those subject to its governance? It is widely acknowledged throughout the literature that it is possible to maintain successful rule, and at least a surface veneer of legitimacy, through extensive use of coercion, threat, and use of violence, in the maintenance of order.[35] However, while acknowledged to be a possible and functional method of rule it is also shown to be precarious in nature. This is due to the high likelihood of civil disobedience, or in order to combat this, the high cost of management measures such as intensive surveillance and policing of the populous.[36] It can therefore be suggested that this represents a last resort or short term measure for the maintaining of legal and political control. What methods are more likely to generate genuine legitimacy, which can be seen to act as a self-policing mechanism, ensuring obedience by subjects of a regime?[37] In other words, what makes people buy into a system at both the personal and collective levels?

Extensive empirical research by both Sociologists and social-Psychologists has shown that one of the most effective ways of generating perceptions of legitimacy is to create a system of social order that speaks to the normative values of those who operate within that system.[38] Zelditch and Walker describe the criteria for a successful claim to legitimacy based upon normative values as follows:

> [C]laims to legitimacy will be unsuccessful unless (1) there is general consensus on the norms, values, beliefs, practices, and procedures to which the regime appeals; (2) any beliefs to which the regime appeals are either in the common interest or can be made universal; (3) any beliefs to which the regime appeals are generally treated as objective fact; and (4) the values, norms, beliefs, practices and/or procedures to which the regime appeals are consonant with the nature, conditions, and consequences of the system.[39]

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[35] This sentiment is expressed widely throughout the literature but as examples see M.R. Jackman, 'License to Kill: Violence and Legitimacy in Expropriative Social Relations' in John Jost and Brenda Major (eds), (n28), 437-468; Jojanneke van der Toorn et al, 'More than fair: Outcome dependence: system justification, and the perceived legitimacy of authority figures' (2011) 47 Journal of Experimental Psychology 127; Jojanneke van der Toorn et al, 'A Sense of Powerlessness Fosters System Justification' (2015) 36(1) Political Psychology 93.
[36] ibid, and additionally Tyler, (n29), 376-377.
[37] Tyler, (n29).
[38] Tom Tyler, 'A Psychological Perspective on the Legitimacy of Institutions and Authorities', in John Jost and Brenda Major (eds), (n28), 416-436; Morris Zelditch, 'Processes of Legitimation' (2001) 64(1) Social Psychology Quarterly 4; Morris Zelditch and Henry Walker, 'The Legitimacy of Regimes' [2003] Power and Status 217.
[39] ibid, 221.

The third and fourth criteria appear to be the most influential in my research. This is because these are the criteria that could be seen to be the hardest to break down in terms of challenging the pre-existing concepts of the legitimacy of an extant regime. It is widely acknowledged that social change or revolution is rare, because it is extremely hard to successfully and fully undermine an established system of legitimacy.[40] When considering the scale of upheaval and structural change seen in the English seventeenth-century, a seismic shift would have been required in the conception and perception of legitimacy systems and theories for this change to occur. Perceptions of the legitimacy of existing social structures and authority of governing regimes are difficult to challenge. Opposition to, or disagreement with, a regime or authority figure will only be effective if overt in nature.[41] There can be widespread quiet 'dissensus' among the individuals governed, without any obvious loss of perceived legitimacy among the collective.[42]

Research has demonstrated other mechanisms for the establishment of perceived legitimacy by a regime include creating systems that can produce favourable outcomes for those who live under and participate within a system of governance.[43] The effectiveness of establishing systems, or at least perceptions, of procedural fairness can also be seen to have positive connotations with regards to perceptions of a regimes' legitimacy.[44] This is suggested to supersede the requirement of favourable outcomes for the generation of legitimacy.[45] In addition to these mechanisms, or perhaps in precedence to them, the simple measure of polite and efficient treatment of subjects has been shown to assist in generating perception(s) that a

[40] John Jost, Diana Burgess and Christina Mosso, 'Conflicts of Legitimation among Self, Group, and System' in John Jost and Brenda Major (eds), (n28), 363-389.
[41] Cecilia Ridgeway, 'The emergence of Status Beliefs' in John Jost and Brenda Major (eds), (n28), 257-277.
[42] Zelditch and Walker, (n38), 221.
[43] Christian Crandall and Ryan Beasley, 'A Perceptual Theory of Legitimacy' in John Jost and Brenda Major (eds), (n28), 77-102; Robert Robinson and Laura Kray, 'Status versus Quo: Naïve Realism and the Search for Social Change and Perceived Legitimacy' in John Jost and Brenda Major (eds), (n28), 135-155.
[44] Heather Smith et al, 'The Self-Relevant Implications of the Group-Value Model' (1998) 34 Journal of Experimental Social Psychology 470, 489-491.
[45] Margaret Levi et al, 'Conceptualizing Legitimacy, Measuring Legitimacy Beliefs' (2009) 53(3) American Behavioural Scientist 354, 370-371.

regime or authority figure is legitimate.[46] Furthermore, this would come at very little cost or capital expense to a regime in return for a marked difference in the populous' perception of the regime or figure.

What must be remembered when considering the descriptions and details of this literature, and the conclusions that are reached, is that this research is contemporary in nature. It has been conducted almost exclusively in environments where universal adult suffrage is the norm; the vast majority of the populous are literate; and exchange and dissemination of ideas is easily facilitated by mass communication networks and the media. Under these circumstances universal appeal, which is often cited as a composite factor in the literature, is a genuine requirement. When considering these findings in the context of the English seventeenth-century, however, this is not the case. The majority of the population would have been illiterate and mass communication was to all intents and purposes non-existent.[47] Above all, only a small section of society was legally and politically engaged, and only a small section of society ever had been legally and politically engaged.[48]

The mechanism can be characterised as continuing to foster perceptions of legitimacy, or as serving to further cement existing perceptions of the legitimacy of a pre-existing regime. Additional mechanisms also include: polite, efficient and effective treatment of those who find themselves in direct dealings with the regime or authority figure; the development of systems that produce favourable outcomes for those vested in the interests of the regime, and its continued legitimacy of governance; the creation of procedural fairness in dealings between the subjects and the representatives of authority, which again can be seen to reduce, or even

[46] Crandall and Beasley, (n43), 77-102; Ridgeway, (n41), 257-277; Robinson and Kray, (n43), 135-155.
[47] This is of course true of mass communication being non-existent outside of the structure of the Church, even after the advent of the printing press, indeed really until the increasing of literacy towards universal levels and the advent of public communications the Church maintained an unassailable monopoly on the widespread dissemination of information.
[48] Weber, (n3), 212-298; and see generally Berman, *Law and Revolution II* (Harvard University Press 2003), 358-359.

supplant, the need for favourable outcomes in the further generation of perceptions of legitimacy among a public.[49] Another factor in the further development of regime legitimacy, and one that tackles the difficulty of challenging, or overturning a legitimate structure, has been demonstrated in social-Psychological research. It has been demonstrated by van der Toorn et al that those living under an unfair structure, but that become dependent upon the system, create very strong perceptions of the legitimacy of the system. This perception continues to be deepened in nature as their dependence upon the regime grows.[50] While apparently counter-intuitive, this does provide some explanation for the rarity of social revolution, especially among those groups who would appear to be most in need of it.[51] It also suggests that a successful social revolution has to be external to the interests and system of the existing regime. I would suggest that this characterisation might have fitted the self-presentation of the revolutionaries responsible for the movement towards the Bill of Rights, in their deliberate juxtaposition against James II.

When considering mediums that could serve to challenge the legitimacy of an existing regime or authority figure, there are some immediate potential processes that present themselves. All of the above described mechanisms can be seen to function as factors and procedures that act to establish, and subsequently further build up, perceptions of the legitimacy of a regime or authority figure. If these were to be reversed, could this not foster developing perceptions of the illegitimacy of authority(s)? The behavioural analysis research suggests this is the case. This could be achieved inadvertently, or indeed deliberately, by creating systems and procedures that contravene a collectively recognised basis of societal norms. Through creating systems that flout established norms could a regime not induce own challenges to its

[49] Mike Hough et al, 'Procedural Justice, Trust and Institutional Legitimacy' (2010) 4(3) Policing 203; Jonathan Jackson et al, 'Why do people comply with the law?' (2012) 52 British Journal of Criminology 1051.
[50] van der Toorn et al, (n35); van der Toorn et al, 'A Sense of Powerlessness Fosters System Justification' (2015) 36(1) Political Psychology 93.
[51] This phenomenon is described by both Brenda Major and Toni Schmader, 'Legitimacy and the Construal of Social Disadvantage' in John Jost and Brenda Major (eds), (n28), 176; and van der Toorn et al, (n35).

own legitimacy? This could be achieved through the introduction of impolite, inefficient and ineffective relationships in dealing with subjects. This would produce unfavourable outcomes for those vested in the legitimacy of the regime and could instigate biased and unfair procedures of governance.

This would not seem to be the case, as these actions would create a climate where the perceptions of legitimacy would become perceptions of illegitimacy, and where obvious dissent could become rife. The research of van der Toorn et al and Major and Schmader would suggest that by itself this is not necessarily sufficient.[52] This is because of the deepened perceptions of legitimacy that dependence upon the governing system breeds, and the subsequent rarity of social change. I would argue that illegitimacy of a governing regime or authority needs to be simultaneously accompanied by an alternative claim to legitimate governance, by an external system. The question faced is how can this alternative claim be produced?

When trying to analyse the theoretical processes that might lead to an alternative challenge to pre-existing conceptions and perceptions of the legitimacy of a regime or authority figure, what mechanisms might enable this situation to become established and to further develop? This is a difficult subject matter to categorically pin down. It is also an ephemeral concept to define and assess, yet Sociological research may be used to assist in comprehending a hypothetical process and the mechanisms it would require.[53] Stryker sought to analyse the implications for the perceptions of legitimacy of legal regimes that utilised 'science' and 'scientific methods' to bolster their claims to legitimacy among those people subjected to their governance. One of the most interesting outcomes was the examination of how two spheres of competency, namely legal and scientific expertise, could be seen to interact with each other.

[52] ibid.
[53] Robin Stryker, 'Rules, Resources, and Legitimacy Processes' (1994) 99(4) American Journal of Sociology 847; Tyler, (n29).

The implications for legal regimes in reaching out beyond their own sphere of competence to claim increased legitimacy and efficacy are especially intriguing.

Stryker's research suggests that when legal regimes claim their legitimacy from an external source there is potential for a strengthened perception of the regime's legitimacy among those subject to it.[54] Her paper also demonstrates that by claiming a source of legitimacy outside of legal competence those within the legal sphere, can in effect, lose control of their chosen source of legitimacy.[55] Once an outside competence is introduced, opponents can utilise differing interpretations of the same source to articulate alternative concepts of what may or may not be legitimate.[56] The effect being that instead of further bolstering claims to legitimacy, these competing counter claims serve to undermine the legitimacy of the pre-existing regime. This is in addition to providing a potential for an alternative conceptual authority, to supplant the legitimacy of the previously uncontested legal structure.[57] This can be seen to have potential implications for consideration of the legal and political contests of the English seventeenth-century. This can allow an argument to suggest that the Stuart monarchs in utilising claims of divine right to underpin their absolutist ambitions, sowed the seeds of their own downfall. This is because by making claims to temporal authority, underwritten by Catholic doctrine, central to their conception of legitimacy, they themselves opened their rule up to the challenge of a competing claim to legitimacy. A claim based upon Protestant Reformation of church structure and 'spiritual' authority, which enabled a re-envisioning of constitutional structure concerning the nature, and rights, of the individual, would be an example of this.

Research from the field of social-Psychology can assist in analysing the potential impact of a fully enabled alternative source of legitimacy upon perception of the legitimacy of an existing regime or authority figure; in particular, perception of their claims to the legitimacy

[54] Stryker, (n53), 849-850.
[55] ibid, 851.
[56] ibid, 857-860.
[57] ibid, 859-868.

of their structural model or organisational system. Should a regime be compromised there can be suggested to be strong potential for increases in disobedience against their rule. This is because those operating under the authority of a suspect or potentially illegitimate regime are able to conceive of alternative perceptions of legitimate social structure or governance regime. This is especially the case among those who are subject to the direct actions of the regime, or are in a disadvantaged or exclusionary position in the social relationship.[58] Other studies have shown that once there are concrete grounds upon which the questioning of regime legitimacy can be founded it is not only the socially disadvantaged that question the status quo. Where there is found to be substantive grounds for questioning the legitimacy of the pre-existing regime structure there is also evidence to suggest that those in socially advantageous, or privileged, positions in a social relationship will present new attitudes and actions to those in less favourable situations. This can lead to those privileged within the group to construe their own place, and the system that grants it, as illegitimate. This is enabled through the recognition of a form of social guilt. This guilt arises from the questioning and then acceptance of perceptions of structural inequality, which may be reduced or removed through the imposition of an alternative regime structure or authority figures claim to legitimacy.[59]

As has already been discussed above, while processes and mechanisms can be seen to establish and promote preconceptions of legitimacy, they can also be enacted in reverse to create concepts of the illegitimacy of a prevailing regime or authority figure. This in itself is unlikely to be sufficient to bring about a wholesale social, legal and political revolution; as was seen to unfold through the English seventeenth-century, culminating in the successful constitutional settlement concluded with the enactment of the Bill of Rights. Other factors are required in addition to perceptions of illegitimacy that can be found in these inter-linked

[58] Rebecca Ford and Cathryn Johnson, 'The Perception of Power' (1998) 61(1) Social Psychology Quarterly 16, 30.
[59] Ulrike Weber et al, 'Perceived Legitimacy of intergroup status differences' [2002] European Journal of Social Psychology 449, 450-451, 466.

processes. There also needs to be an alternative claim to legitimacy, and a conception of an alternative social structuring of governance. These need to be perceived as viable so they could be imagined to supplant the legitimacy, and the actual rule, of the pre-existing social and governance system.

ASSESSING PERCPTIONS OF LEGITIMACY

How can these mechanisms and processes of legitimacy, and illegitimacy, be seen to relate to my research project? It can be seen that there are several mechanisms that can be used to establish, and further build a concept of legitimacy. Perhaps the most important is the basis of the claim being founded upon a normative conception of society that is shared by all those subject to the rules of the system.[60] Failing that, at least a claim accepted by all who participate in the system and interact directly with the regime. Another factor to be considered includes creating perceptions of procedural fairness.[61] Following on from which, additional factors such as an environment of favourable outcomes, and polite and efficient interactions with a regime or authority figure are also important.[62] The reversal of these factors will create a situation that can lead to expressed dissatisfaction which can be seen to lead to regime instability, as well as allowing for the development of perceptions of illegitimacy among those subject to a regime.[63] However, this alone is not necessarily sufficient to ferment social revolution, as system dependence can provide a very strong perception of legitimacy.[64] While it can be seen that claims of regime illegitimacy are central, there can also be suggested to be a requirement for both an alternative structure of social order, and an alternative claim to regime legitimacy. It can be argued that these are most effective when they are alternatives that draw upon the same source of legitimacy as the pre-existing regime. This is as long as they are positioned externally

[60] Tyler, (n38), 416-436; Zelditch, (n38); Zelditch and Walker, (n38).
[61] Hough et al, (n49), 204-205; Jackson et al, (n49); Smith et al, (n44), 489-491.
[62] Crandall and Beasley, (n43), 77-102; Robinson and Kray, (n43), 135-155.
[63] Levi et al, (n45), 368-370.
[64] van der Toorn et al, (n35), 137-138.

to the location of the conflict; for example science and scientific method as a source of legitimacy in legal regimes.[65]

When working with behavioural analysis literature on the subject of legitimacy the concept of perception(s) is of great significance, but it is also a multifaceted concept. Of primary importance in understanding the concept of perception as it applies to legitimacy is the dual aspect of individual, and collective, perception.[66] Legitimacy requires an analysis of both the individual *and* the collective perception of the legitimacy of a regime or authority figure. The second aspect of this is as much to do with how individuals perceive the collective group reaction to a regime's claim to legitimacy, as it is, to how the collective can be suggested to perceive the regime or authority figure. It is suggested that because of this consensus in collective perceptions of legitimacy does not have to be, and perhaps never can be, universal within a social group.[67] I would argue that while these subdivisions of perception are necessarily worthy of separate consideration, they can never completely be divided from each other. A perception of legitimacy can never be fully established without both individual and collective perceptual aspects. If only collective perceptions of legitimacy are dominant in a system then while presenting a functional appearance legitimacy will only be a veneer, and any challenge to it can be founded in fertile soil. Correlatively, collective perceptions of legitimacy cannot succeed without a majority basis of individual perceptions of legitimacy acting as a foundation. The concept of perception(s) within the behavioural analysis literature on legitimacy can be seen to act in a similar way to the analysis presented as to how the concept of belief operates in the work of Weber, in his consideration of legitimate authority.[68] In this way I believe the uses of the behavioural analysis literature drawn from the disciplines of

[65] Stryker, (n53), 857-860. When specifically addressing my project this might be manifested as the introduction of 'spiritual' or religious claims of legitimacy into realms of temporal or legal debates about constitutional order and legality.
[66] Zelditch and Walker, (n38), 219, 221, 242.
[67] Zelditch, (n38), 10.
[68] Weber, (n3), 212-299.

social-Psychology and Sociology vindicate the basis of my work being the typologies of Weber, despite the criticism of his work.[69] This is because of the importance of the perceptions of legitimacy on the individual and collective levels, as opposed to purely theoretical analysis of collective actions espoused by political scientists.[70]

As it is used in Part B, the framework of concepts, method and theory constructed across chapters one, two and three facilitates a sophisticated analysis of claims to authority and perception of legitimacy in the seventeenth-century constitutional settlement enacted by the Bill of Rights. Combining a cultural conception of constitution and an understanding of authority as possessed by those in governmental relationships, with a theory of legitimacy that appreciates the distinction between individual and collective perception(s) of legitimacy allows for a sophisticated analysis of competing claims to constitutional authority seen in the seventeenth-century constitutional crises, as demonstrated in Part B. In particular, it allows access for analysing how the Protestant Reformation of spiritual authority, as addressed in chapter three, may be understood to have influenced perception(s) individually and collectively of constitutional authority claimed by both the monarchy and parliament. It can be seen how both individual and collective perception(s) of legitimacy can impact on existing authority(s), especially when presented with an alternative competing authority and claimed legitimacy.

CONCLUSION

This chapter has demonstrated the utility of an interpretative understanding of legitimacy to my research. It has been shown how Weber's historical-Sociological approach to theorising legitimacy allows for an appreciation of the perception of legitimacy, individually and collectively, by those subject to authority. In addition the uses of subsequent works in Sociology and social-Psychology, that developed Weber's theory, have been demonstrated.

[69] Beetham, (n14); His, *The Legitimation of Power* (2nd edn, Palgrave Macmillan 2013), 8; Grafstein, (n14); Spencer, (n14); Strauss, (n27), 42.
[70] Beetham, (n69), 6; Ian Clark, 'Legitimacy in a Global Order' (2003) 29 Review of International Studies 75.

The core aspects of Weber's theory are twofold. First, the three pure types of legitimacy: Charismatic; Traditional and Ration/Legal, and the interrelation between them. Second, how these couple with an interpretive approach that allows for the recognition of the importance of the individual's perception of authority and the individual's perception of the collective perception of an authority to which they are subject. For a true perception of legitimacy both need to be present. Alongside instances where there is no perception of legitimacy, illegitimacy can be perceived where only an individual or a collective perception of legitimacy is found to exist. Furthermore, where perceptions of illegitimacy exist it has been shown how this can influence regime change when an alternative proposition arises as a source of legitimacy for either social order, or for a regime or authority figure.

Drawing on Weberian influenced theory there are four indicative criteria that can be used to assist in assessing perception of legitimacy. These are: 1) Perceptions of individual and community treatment by authority;[71] 2) Perceptions of the fairness of procedures used by authority in dealing with individuals and the wider community;[72] 3) Perceptions of individual and collective dependence upon authority; 4) Feelings of justification of authority that this may breed.[73] All of these factors feed into individual and collective perception(s) of the legitimacy of authority. Positive experiences generate perceptions of legitimacy, whereas negative experiences result in perceptions of the authority's illegitimacy.[74] These criteria will be used as part of my empirical analysis of the Bill of Rights, Petition of Right, the Levellers' An Agreement of the People, Triennial Act and Act of Settlement in Part B of my thesis.

[71] As examples of the source material from which this principle is drawn see: Levi et al, (n45), 370-371; Ridgeway, (n41), 270-277.
[72] For sample literature see: Hough et al, (n49), 203-204; Jackson et al, (n49), 1062-1064; Tyler 'A Psychological Perspective on the legitimacy of Institutions and Authorities' in John Jost and Brenda Major (eds), (n28), 416-436.
[73] Jost, Burgess and Mosso, (n40), 363-390, 364; van der Toorn et al, (n35); van der Toorn et al, (n50), 94-96.
[74] Herbert Kelman, 'Reflections on Social and Psychological Process of Legitimization and Delegitimization' in John Jost and Brenda Major (eds), (n28), 54-75.

The relationship between constitution, authority and legitimacy allows for detailed analysis of perceptions of authority. In Part B this is applied to analysis of the Bill of Rights and the wider constitutional crises and conflicts between competing monarchic and parliamentarian models of constitutional authority. Recognition of the importance of both individual and collective dimensions to perception of authority allows for sophisticated understanding of the perception of the legitimacy of competing claims to constitutional authority. It also allows for appreciation of how factors such as the Protestant Reformation of spiritual authority might have filtered through to influence these perceptions.

The four criteria drawn from the legitimacy theory literature and outlined above can be used as part of my framework of concepts, theory and method to analyse manifestos for constitutional reform. They assist in allowing interpretive understanding as to how perception of legitimacy can be inferred from the texts of the documents analysed, and how the authors of constitutional reform manifestos used their documents to present particular narratives and to stir up specific sentiments. Attention is paid to how religion, especially the Protestant Reformation of church structure and 'spiritual' authority, can be seen to have been implicitly and explicitly invoked within these texts. Chapter two provides a central pillar, legitimacy theory, for the construction of my framework of concepts, theory and method in Part A of my thesis. This is achieved in conjunction with chapter one which provided the core concepts of constitution and authority, and method used in my thesis; and chapter three which outlines the Papal and Protestant Reformations as models for constitutional structure and reform. My framework is deployed in analysis of my chosen constitutional documents in Part B.

CHAPTER 3

Protestant theology and individualism, challenging hierarchical authority

INTRODUCTION

This chapter presents the theological elements forming the basis of my argument that Protestant Reformation thinking acted as an influence upon the perception of the legitimacy of the Bill of Rights. It will begin by briefly describing the prevailing Roman Catholic doctrine and the hierarchical positioning of the Pope prior to the Reformation, addressing how this can be seen to have influenced early constitutional thought and proto-modern state formation. The chapter will then continue to directly engage with key aspects of the reforming of theological doctrine brought about by the Protestant Reformation: the attack on papal supremacy, and hierarchical structure of the Roman Catholic Church; and the positing of the idea of the individual as possessing a capacity for a direct relationship with God. These tenets of Protestantism will be demonstrated to have been fundamental to the spirit of the Reformation and foundational to all differing creeds and expressions of the Reform movement. Particular attention is paid to Luther and Calvin, but these tenets were central to their contemporaries and successors in the Protestant faith. Further subsections of the chapter will then examine how the general precepts of Protestant theology spread through Europe, and how they might have been assimilated into individual and community perceptions of, and relationships to, authority. The final topic to be addressed in this chapter concerns the nature of sovereign and political power in Protestant thought, specifically how this might relate to perceptions of the legitimacy of authority. Building on Chapter one, *authority* is examined as a distinct subject. This is in contrast to the conflated conception of authority and power as sovereignty which legal theory has tendency to collapse in to, as described in Chapter one. It is argued through introducing a conceptual distinction between authority and power as discrete subjects of study divorced from

sovereignty a depth of understanding of the perception of the legitimacy of authority as residing in the relationship between the governed and their governors can be achieved.

Working in conjunction with chapters one and two, chapter three provides the final elements for the construction of my framework of method, concepts and theory utilised in analysing the Bill of Rights, the Petition of Right and the Levellers An Agreement of the People, and the Triennial Act and the Act of Settlement. This is the last chapter of Part A and completes the analytic framework deployed in the documentary analysis of Part B. In providing the theoretical elements of my research project concerning the Protestant autonomous spiritual individual, and the Reformation of church structure and 'spiritual' authority, this chapter engages directly with two of my research questions:

1: How can the concept of the Protestant individual and Protestant Reformation of spiritual authority and church structure be seen to have influenced the perception of the legitimacy Bill of Rights [1688]?

2: How might the concept of the Protestant individual and its challenge to the Catholic doctrine of papal hierarchy be understood to have impacted upon perception of the legitimacy of constitutional authority, in relation to:

(A) divine right monarchic government;

(B) Parliament as opposed to the monarch as the supreme constitutional authority?

Chapter three directly addresses these questions, however, it is through an understanding of theory, concepts and method, assembled throughout Part A that the capacity to address these questions is facilitated. The purpose of this chapter is to provide a theoretical model for the challenging of pre-existing hierarchical authority and the relationship between spiritual and constitutional theories of authority. The Protestant Reformation, especially as discussed here, predated the Bill of Rights by two centuries. However, the so called 'Glorious' Revolution can be understood to echo many similar influences and conflicts, the perception of the legitimacy

of the settlement provided by the Bill can be argued to reflect the influence of the Protestant Reformation of spiritual authority discussed in this chapter.

PAPAL HIERARCHY AND MEDIEVAL STATE CONSTITUTION

The influence of the Roman Catholic theological doctrine of papal supremacy, and attendant hierarchical church structure, on the nature of the relationship between church and state in early constitutionalism is a rich topic and has been examined across a range of academic disciplines. Therefore, I will not be engaging in great depth of study, discussion or analysis as this is not a period of time that is central to my project. Rather, I will briefly set the scene as to the nature of theological doctrine and its influence on legal and political considerations of church and state structure at the time of the rupture in Western Christianity that we now recognise as the Protestant Reformation.

At the core of orthodox Medieval Roman Catholic theological doctrine prior to, and indeed during, the Protestant Reformation lay the idea of the supremacy of the Pope on earth.[1] In simple terms the papal office, and the Pope of the time as holder of that office, were considered to be God's divinely appointed representative on earth, and importantly the *Voice* of God. This endowed the papacy with a high degree of symbolic, and often actual or political, authority. The Pope was believed to be gatekeeper of God's knowledge and the temporal source of divine wisdom, which was directly accessible only to him.[2] This provided justification for both papal authority, and the hierarchical structuring of the Church by appointment to office from the top down (authorised by the Pope), and then successive levels of indirect association

[1] For a discussion of this principle and the antagonism it created from a historical development of Protestant individualism and liberal human rights perspective see: Micheline Ishay, *The History of Human Rights* (University of California Press 2004), 64, 84; John Witte Jr, 'Law, Religion, and Human Rights' (1998) 26(2) The Journal of Religious Ethics 257; His, 'Rights in the Western Tradition' Emory Law School Public Law & Legal Theory Research Paper Series (Research Paper No. 05-21 2005), 6. For discussion from a natural law and natural rights, and constitutional thought perspective see: Brian Tierney, *Religion, law, and the growth of constitutional thought 1150-1650* (CUP 1982), 32-33; His, 'The Idea of Natural Rights-Origins and Persistence' (2004) 2(1) Northwestern Journal of International Human Rights 2, 9.

[2] See Harold Berman, *Law and Revolution* (Harvard University Press 1983), 88-94; Martin Loughlin, *Foundations of Public Law* (OUP 2010), 19-22; Tierney, (n1), 32-33.

to papal authority. The position of the Pope as sole direct conveyor of the Word of God was a theological doctrine that could be interpreted as conveying almost unlimited earthly authority.

Clear expressions of this claimed authority can be seen in the *Dictatus Papae* of Gregory VII in 1090. With regards to the association with divinity it was claimed that 'The Roman pontiff alone can with right be called universal' and 'for him alone it is lawful, according to the needs of the time, to make new laws, to assemble together new congregations […]'. Concerning his relationship with temporal monarchs it was claimed 'of the pope alone shall all princes kiss the feet' and that 'it may be permitted to him to depose emperors.' The Dictate also had implications for theological doctrine and control of religious texts as Gregory stated '[t]hat his name alone shall be spoken in churches' and further 'this is the only name in the world.'[3] In addressing control of texts it was claimed '[t]hat no chapter and no book shall be considered canonical without his authority' and '[t]hat the Roman church has never erred; nor will it err to all eternity, the Scripture bearing witness.'[4] It is suggested that while efforts were made to justify the claims made in the Dictate, Gregory VII can be understood to have largely self-authorised the papal office.[5] Another expression of papal authority can be seen in the *Unam Sanctam*, a 1302 Papal Bull of Boniface VIII. Once again, association to divinity is claimed as authority and legitimacy.

> A spiritual man judges all things, but he himself is judged by no one. This authority, moreover, even though it is given to man and exercised by man, is not human but rather divine, being given by divine lips to Peter and founded on a rock for him and his successors through Christ himself whom he has confessed; the Lord himself saying to Peter: "Whatsoever thou shalt bind." etc. Whoever, therefore, resists this power thus ordained by God, resists the ordination of God[6].

[3] The Dictate of the Pope, in Ernest F. Henderson (ed), *Select Historical Documents of the Middle Ages* (Biblo and Tannen 1965), 366.
[4] Ibid, 377.
[5] Berman, (n2), 95.
[6] Unum Sanctam, Henderson (n3), 437.

Given the self-authorising nature of these claims and the difficulty in challenging divine legitimation of the papal office it is unsurprising that such claims and the theological doctrines underpinning became targets for the Protestant Reformers. However, it should be noted that in challenging the papacy and Roman Catholic doctrine and practices both Luther and Calvin succumbed to similar temptations towards autocratic power as perhaps can be seen here with Popes Gregory and Boniface.

While the theological legitimacy of the authority of the papal office might theoretically be conceived as unassailable, the political situation dictated that this was not always so. Despite the best efforts of successive Popes such as Gregory VII, through the Papal Reformation,[7] to centralise papal authority as the supreme religious, political and therefore legal authority on earth (or at least in Western Europe), this hierarchical supremacy was not to last unchallenged. However, these reforms acted to centralise papal authority and bureaucratise the running of the Roman Church, leaving a legacy as the model for early European state formation.[8] The result of the power struggles between the authority of the papacy and regional monarchs was a convoluted and fractious settlement as to the nature of competing temporal and spiritual jurisdictions. As Oakley suggests, 'the papal office, as it emerged in the high Middle Ages […] was, no less in its inner reality than, in its self-presentation […], an essentially monarchical one.'[9] Papal authority still stretched across Western Europe and beyond, but it was effectively limited to particular concerns, with varying degrees of success, by the regional monarchs and their political power bases.[10]

[7] See Berman, (n2), 88-94.
[8] From a legal historical perspective sensitive to theological considerations see ibid, 205-221; for a historical constitutional theory perspective see Loughlin, (n2), 18-27; Chris Thornhill, *A Sociology of Constitutions* (CUP 2011), 25-39; from the perspective of developing human rights see Ishay, (n1), 64- 84; Tierney, (n1), 61-62; His, 'The Idea of Natural Rights-Origins and Persistence' (2004) 2(1) Northwestern Journal of International Human Rights 2, 5-9; Witte, (n1), 258.
[9] Francis Oakley, *Kingship* (Blackwell 2006), 111.
[10] For details of the competing jurisdictional claims of spiritual and temporal authorities across Western Europe see Berman, (n2), 255-519; Martin Loughlin, *Sword & Scales* (Hart 2000), 125-136; His, *The Idea of Public Law* pages (OUP 2003), 73-75; Loughlin, (n2), 46-49; Thornhill, (n8), 40-76.

From the perspective of constitutional thought, and the constitution of authority itself, an essentially universal model developed out of these conflicts. The positioning of papal authority as derived from divine appointment (spiritually transcendent and universal) proved to be insurmountable. Therefore, regional temporal (human, political) authorities adopted the same strategy; utilising their political earth bound power to extract spiritual legitimacy for their authority from papal legitimacy. To do this they acquired concessions from the papal office to be recognised as spiritually appointed to hierarchical positions of authority within their own territories.[11] As a result, monarchs were able to occupy their positions of authority legitimately as they possessed the divine right of kings. At the same time, the Roman Church maintained a high degree of centralised authority throughout Western Europe as the Pope still controlled access to divine appointment, as the Voice of God. Meanwhile, the highly educated clergy continued to serve as a bureaucratic civil service to enable the functioning of feudal regimes, in a time of very low rates of literacy; as well as simultaneously pursuing their 'spiritual' agendas.[12] The result, was a very close interlinking of what we would today recognise as the separate entities of the Church and State in spiritual and political affairs. In addition to this, the whole system – locally headed up by the supreme political authority of various monarchs, and spiritually lead across the whole of Western Europe by the Pope – was a hierarchical structure of authority legitimised by the theological doctrine of the Pope as the Voice of God.[13]

> [D]uring the period stretching from the late eleventh to the early fourteenth century, the papal claim to a direct power in matters temporal was articulated with ever increasing force. In the thirteenth century high papalist canon lawyers […] were particularly bold in their insistence on the derivation of the imperial power from the papacy.[14]

[11] See Berman, (n2), 113-119; Loughlin, (n2),18-28; Tierney, (n1), 42-43.
[12] See Berman, (n2), 255-270; Ernst Kantorowicz, *The King's Two Bodies* (Princeton University Press 1997), 43-49; Elisabeth Zoller, *Introduction to Public Law* (Martinus Nijhoff 2008), 35, 87.
[13] The authority of Medieval clergy cannot be underestimated, they are suggested to have been the 'legitimators of social structure and political organization', see: Carter Lindberg, *The European Reformations* (Blackwell 1996), 12.
[14] Oakley, (n9), 116.

The reasons for monarchic acceptance of papal authority can be seen clearly. Monarchies relied on the educated clergy to act as skilled administrators (not to mention a reliable pan-European communications network), in addition to which they could receive the benefit of divine appointment from the legitimate authority of the Pope. From the papal perspective the challenge to supreme authority was tolerated on a regional basis again because of theological doctrine. It was held across the Christian spectrum that political (temporal, human) authority was a gift from God to prevent people (as Gods' creations) from further fall into sin after their expulsion from the Garden of Eden.[15] Temporal authorities were provided by God, tasked with applying the law, whether it be naturally existing structural laws of the world, or divine revelatory wisdom available only to spiritually appointed authorities. In either interpretation their function was to save humanity from ourselves on earth. Therefore, collective obedience to their strictures and structures was a theological imperative.[16] The constituted structure of temporal monarchies was perceived as legitimate due to the association of the office of king as representing the closest analogy to the position of God on earth (at least within the political sphere).[17]

THE PROTESTANT REFORMATION AS AN ANTI-HIERARCHICAL INDIVIDUALISATION OF RELIGION

This section of the chapter addresses core principles common throughout the Protestant Reformation that I argue had significance in relation to the perception of the legitimacy of authority as constituted in the Bill of Rights. These tenets were: papal authority as the sole

[15] Tierney, (n1), 39-52; Tierney, (n8), 6; David Whitford, 'Luther's political encounters' in Donald McKim (ed), *The Cambridge Companion to Martin Luther* (CUP 2006), 179-181; Witte, (n1), 260; His, 'Rights in the Western Tradition' Emory Law School Public Law & Legal Theory Research Paper Series (Research Paper No. 05-21 2005), 7-8.

[16] This principle is present in the teachings of Luther and Calvin who both held pacifist views, requiring the people to obey their rulers. It is not until the development of their positions by subsequent theologians such as Beza, in the face of persecution of Protestants after the St Bartholomew's Day Massacre, that any right to resistance is introduced; even then it is limited to junior magistrates, rather than the people collectively, in the first instance, see: John Witte Jr, 'Rights, Resistance, and Revolution in the Western Tradition' (2008) 26 Law and History Review 545.

[17] Tierney, (n1), 39-52; Whitford, (n15), 179-181; Witte, (n1), 260.

Voice of God was heresy; the subsequent challenge to divinely appointed hierarchical structure that this entailed; and the centralisation of the individual in communion with God that this allowed. It is my contention that the assault on papal authority, and Church hierarchical structure, facilitated a re-orientation of religious constitution that placed the individual as the subject of a direct relationship to the divine authority of God. It is argued that this challenged top down hierarchical authority by allowing a bottom up access to divine wisdom and knowledge. This critique of hierarchical 'spiritual' authority can be perceived as having impacted upon temporal political authorities' claims to legitimacy, through the doctrine of the divine right of kings.

At the core of the Protestant Reformation was found a vehement dissatisfaction with Medieval Catholic doctrine that stated papal authority emanated from the claim to be the Voice of God on earth. Protestant theology unceasingly attacked this presumption; [18] thus challenging the legitimacy of the entire hierarchy of the Roman Catholic Church.[19] This was possible because the structure of the Church was legitimised across the bureaucratic layering through association – whether direct or indirect – with the divinely appointed supremacy of the Pope. An extension of the same principle can be conceived as having had similar consequences for the legitimacy of any monarch claiming their authority as having been derived from divine appointment to supremacy, through the invocation of the divine right of kings. The Protestant

[18] As examples of the theological challenge presented by Protestantism see: Andrew Bradstock, 'The Reformation' in Peter Scott & William Cavanaugh (eds), *The Blackwell Companion to Political Theology* (Blackwell 2004), 62; Peter Newman Brooks, 'Thomas Cranmer' in Carter Lindberg (ed), *The Reformation Theologians* (Blackwell 2002),242; Gregory Miller, 'Huldrych Zwingli' in Carter Lindberg (ed), *The Reformation Theologians* (Blackwell 2002), 159-163; Fred Meuser, 'Luther as Preacher of the Word of God' in Donald McKim (ed), *The Cambridge Companion to Martin Luther* (CUP 2006), 136-140; Heinz Scheible, 'Philip Melanchthon' in Carter Lindberg (ed), *The Reformation Theologians* (Blackwell 2002), 68-69, 79; Carl Trueman, 'The theology of the English reformers' in David Bagchi & David Steinmetz (eds), *The Cambridge Companion to Reformation Theology* (CUP 2004), 169; Whitford, (n15), 179-181; Randall Zachman, 'John Calvin' in Carter Lindberg (ed), *The Reformation Theologians* (Blackwell 2002), 185.

[19] As examples of Protestant opposition to hierarchical legitimacy in legal historical and constitutional theory see Harold Berman, *Law and Revolution, II* (Belknap Press 2003), 5-8, 23-28, 39-57; Loughlin, (n2), 61-69; Thornhill, (n8), 88-96. While from the perspective of Protestant theology informing the development human rights see: Ishay, (n1), 64-77; Witte, (n1), 258. For a theological analysis of the same principles see: Lindberg, (n13), 12.

reformers held that the claim of the papal office to allow direct access to the Word of God was heretical; not a divine appointment, rather a political manoeuvre.

A foundation stone of the Protestant Reformation was the theological doctrine that Scripture is the source of the Word of God, not the Pope.[20] If Scripture is the source of the Word of God then all those who preached it were enunciating the Word of God; allowing a more egalitarian access to the wisdom and knowledge of God. No longer were the unidirectional constructs of the Roman Catholic Church, headed up by the Pope, necessary in order for the faithful to access their deity. Any and all who read or heard Scripture had the same level of access to God as previously allowed only to the Pope. The reformers' argument was based on the principle that the papal office had corrupted Scripture: the papacy had manipulated Scripture to allow a claim to hierarchical access to God, rather than the original basis of an individual relationship guided and supervised by ordained clerical officers.[21] Further to this corruption of Scripture, the authority it allowed and power exercised under it, had corrupted the officers of the Roman Church. The reformers contention was that the entire edifice was rotten. Therefore, the whole Church was corrupt. Yet, because their issue was with the papal office and the structure of the church, there was also a belief that salvation could be had via a direct relationship to God's true wisdom through Scripture.[22] As a result, individuals could act to rectify the situation.[23] It can be seen that in general terms the Reformation was a move against the Roman Catholic Church as an entity as much as it was against any particular individual (except the Pope(s)) or the congregations of the Catholic Church.

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[20] As examples of this position in Protestant theology see: Bradstock, (n18), 66; and generally, Meuser, (n18), 136; Jeannine Olson, 'Calvin and social-ethical issues' in Donald McKim (ed), *The Cambridge Companion to John Calvin* (CUP 2006), 153; Scheible, (n18), 68-69.

[21] For specific examples citing Papal corruption of doctrinal truth see: Daniel Epply, 'Richard Hooker' in Carter Lindberg (ed), *The Reformation Theologians* (Blackwell 2002), 266-267; Miller, (n18), 159-163; Scheible, (n18), 68-69; Zachman, (n18),185-191.

[22] See Scheible, (n18), 68-69 as an example of Protestant antagonism against the offices and actions of the Catholic Church as opposed to the individual believers.

[23] Oswald Bayer, 'Martin Luther' in Carter Lindberg (ed), *The Reformation Theologians* (Blackwell 2002), 53-54; Meuser, (n18), 137.

By attacking the supremacy of the Pope (legitimised through embodiment of the Word of God) with the assertion that the true Word of God is to be found in Scripture, and only in Scripture, the Protestant reformers facilitated an entire about face in the constitution of religious authority. No longer did access to God emanate from a single authority figure, filtered through the hierarchical bureaucratic church superstructure. Instead, with Scripture as the source of the Word of God, any and all who engaged with it could experience an individual relationship with God.[24] Every member of a congregation hearing a sermon experienced the Word of God on the level of an individual relationship. All those who read Scripture related directly to God on an individual basis. The role of the church was not to act as dispenser of the Word of God, as accessed by a single individual (the Pope), effectively a corporate monopoly on divine wisdom and salvation. The Protestant reformers held that the church was to assist and facilitate the access of the faithful to an individual relationship with God.[25] Scripture was to be preached to congregations. Reading of the Bible was to be taught and encouraged. The dissemination of Scripture in written form was to be conducted in the easiest fashion for the faithful, in their own language.[26]

This founding principle of the Word of God as having been located in Scripture, and that it should be as widely accessed as possible by true believers, can be seen to up-end the structure of the church. If the individual were to become capable of a direct relationship to God, under the correct tutelage and direction of the church, then the legitimacy of church authority becomes founded on that individual's direct experience of their relationship to the divine authority of God.[27] By launching this attack on the legitimacy of papal authority as a corruption of Scripture, the reformers opened the legitimacy of the authority of divine right monarchs to

[24] Meuser, (n18), 136; Olson, (n20), 153; See Scheible, (n18), 68-69.
[25] Bradstock, (n18), 63-75; Meuser, (n18), 136; Olson, (n20), 153; See Scheible, (n18), 68-69.
[26] For the importance of literacy and access of all the Bible see: Lindberg, (n13), 372.
[27] For theological perspectives see: Bradstock, (n18), 63-75; Epply, (n21), 254; Miller, (n18), 159-163; Meuser, (n18), 138-140; Olson, (n20), 153; Scheible, (n18), 79; Whitford, (n15), 179; Zachman, (n18), 185-190.

questioning and refutation.[28] If the constitution of the church could be re-imagined – as centred on the individual members of the congregation and their possession of a capacity for a direct relationship with God – then could claims of divinely appointed sovereignty of monarchs not be challenged? Therefore, could a political structure that centralised the exercising of power, as law, not also have been built upon the legitimacy conveyed to those in authority by the individual relationship between the people and their ruler(s)? Would this not then have meant that governmental authority would have been perceived to be legitimised, in part, by the direct relationship between the people and their governors? On this topic Oakley suggests that 'the Reformation did indeed […] bolster the dignity and power of kings', however, 'it ended by undercutting indirectly that dignity, status, and power.'[29] Consequently, Parliament, by expressly claiming within the Bill of Rights to be direct representatives of the people can be argued to have been politically occupying the authority of the space found to exist between the people as a congregation and those in authority over them in the spiritual sphere. Parliament claimed supremacy not within a unitary spiritual community but within a political unity, in the political sphere.

Theological developments of Martin Luther and John Calvin

So far I have presented the theological developments of the Protestant Reformation regarding the individualisation of the relationship between the faithful and their God, and the implications that this can be conceived as having had for the legitimacy of the hierarchical church and constitutional structures, at a very general level. This has been in order to suggest that these principles, as they concern my research, were prevalent throughout the reform movement. However, I will now engage with these fundamental Protestant principles as they manifested within the theological teachings of two of the foremost Protestant reformers: Martin Luther and

[28] For developmental human rights perspective see: Ishay, (n1), 70-77; Witte, (n1), 258.
[29] Oakley, (n9), 127.

John Calvin. While they represent undoubtedly the most famous of the Protestant theologians, and indeed have given their names to arguably the two most well-known branches of Protestantism, it would be remiss to not highlight that the labels their names have provided to the respective Protestant traditions are just that. Lutheranism and Calvinism both owe debts to their namesakes, but it would be incorrect to assume that they reflect the exact theological teachings of either reformer.[30]

Both men cast long shadows over the Protestant faith and found themselves, whether by design or otherwise, as figureheads of the reform movement during their lives. Addressing now specific individual theological details, which aspects of their theological teachings could be of most importance to considerations of the individualisation of communing with God; and the influence that this had on perception of the legitimacy of authority in the political sphere, including the constituted form of governmental authority? Attending first to the central tenets of the Protestant faith with which I am concerned in this study: How did Luther and Calvin treat the position of the individual in relation to God, and papal claims of hierarchical authority within the Roman Catholic Church as derived from appointment by God?

Starting with Luther as the widely accepted progenitor of the Protestant Reformation,[31] and certainly the earlier of the two reformers specifically considered here,[32] how can his theological teachings be seen to be relevant to this study? Luther criticised aspects of Roman Catholic practice and papal doctrine. Central to these criticisms and to my research, are his teachings concerning the heresy of divine appointment to the papacy: that the incumbent of

[30] Evidence of the developments of the Reformed Protestant (Calvinist) tradition beyond the teachings of Calvin can be seen in Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (12th ed, Unwin University Books 1974); and critique of this work regarding Calvin and Calvinist traditions of predestination in Leo Strauss, *Natural Right and History* (University of Chicago Press 1953), 60-61 note 22. The interweaving of Lutheran theology into the development of the Calvinist or Reformed Protestant tradition can be found in the theology of Theodore Beza concerning the right to resistance, see: Witte, (n16). For the school of thought that Calvinism in general might be better expressed as a tradition of Reformed Protestantism see: Richard Muller, 'John Calvin and later Calvinism' in David Bagchi & David Steinmetz (eds), *The Cambridge Companion to Reformation Theology* (CUP 2004).

[31] Scott Hendrix, *Martin Luther* (OUP 2010), 2; Peter Marshall, *The Reformation* (OUP 2009), 1-2.

[32] Luther living 1483-1546 and Calvin 1509-1564, see: Bayer, (n23), 51; Zachman, (n18), 184.

that office represented the only direct recipient of revelatory knowledge, through communion with God.[33] This was achieved primarily through a two pronged approach. First, the Catholic Church and its hierarchical structure was attacked as corrupt, and corrupting of the Christian faithful. 'The gospel, Luther argued, repudiates "the wicked idea of the entire kingdom of the pope […] Therefore the papacy is a veritable torture chamber of consciences and the very kingdom of the devil.["]'[34] It is worth noting that, while the Pope was heavily implicated, the issues were largely presented as lying with the bureaucratic entity rather than individual people within it.[35] Second, the claim of the Pope to 'proprietary' divine wisdom was challenged and refuted. This was accomplished by repudiation of the claim that the Word of God could only be accessed by the Pope, through the unique capacity to interpret Scripture. Instead, Luther stated Scripture to be the sole source of the Word of God, and further that all those who had access to Scripture had access to the Word of God.[36]

> Luther's provision of a readable and accurate translation of the Bible was a stimulus toward universal education – everyone should be able to read in order to read God's Word. More immediately, his translation deprived the elite, the priestly class, of their exclusive control over words as well as the Word.[37]

This repositioning of Scripture as the sole source of the Word of God opened the way for the individual to become the centre of the church through the possession of the capacity for a direct relationship to the divine authority of God.

> Luther, like so many of his contemporaries, had heard the gospel as a threat of God's righteous wrath because medieval theology and pastoral care presented the righteousness of God as the standard that sinners had to meet in order to achieve salvation [through good works and moral behaviour]. Luther now came to realize that

[33] Bradstock, (n18), 63; Carter Lindberg, 'Luther's struggle with social-ethical issues' in Donald McKim (ed), *The Cambridge Companion to Martin Luther* (CUP 2006), 168; Scott Hendrix, 'Luther' in David Bagchi & David Steinmetz (eds), *The Cambridge Companion to Reformation Theology* (CUP 2004), 43 (specifically regarding the provocation of the Ninety-five Theses).
[34] Lindberg, (n13), 67, citing: Martin Luther, *Luther's Works* (Jaroslav Pelikan & Helmut Lehmann eds, 55 volumes, Concordia/Fortress 1955-1986) volume 26, 386-387.
[35] Bradstock, (n18), 62; Hendrix, (n33), 43; Whitford, (n15), 179-180.
[36] Meuser, (n18), 136-140; see also Muller, (n30), 143, citing Scripture as the source of the Word of God as a common precept to both the teachings of Luther and the Lutheran tradition, and Calvin and the Reformed Protestant tradition.
[37] Lindberg, (n13), 91.

> we are not to think of the righteousness of God in the active sense (that we must become righteous like God) but rather in a passive sense (that God *gives* us his righteousness). The good news, Luther discovered, is that justification is not what the sinner achieves but what the sinner *receives* [after the expulsion from the Garden of Eden all are by default sinners].[38]

It was because Luther not only recognised the sole authority of Scripture, but also that all who had access to it had access to the Word of God, that the hierarchy of the Roman Church could be attacked in such a fundamental way. Instead of requiring the representatives of the Catholic Church to intercede on their behalf, the faithful could now relate directly to the Word of God and its inherent wisdom and knowledge.[39] Luther held that all preaching represented the Word of God. All those who read Scripture, and that as many as possible should be enabled to do so, related directly to their deity on an individual basis.[40] Stemming from this, the role of the church became to further facilitate the access of the faithful to their God under the correct tutelage of the officers of the church.[41] Rather than act as a filter between God and the wider Christian population as the prevailing papal doctrine of the Medieval period held, the Protestant church was a facilitator.

> [I]t may be argued that "radical" in its fundamental sense of going to the roots (*radix*) equally applies to Luther's [as well as to radical Calvinist's] conviction that Scripture alone is the norm of the Christian faith. This is a sober argument when it is realized that it was medieval [Roman Catholic] clergy who were custodians of the predominant social myth and hence the legitimators of social structure and political organization, not to mention controllers of a good deal of property and wealth.[42]

Calvin followed the same fundamental lines of theological teaching on the heretical basis of papal authority, and Roman Catholic hierarchical church structure:[43] Scripture as the

[38] ibid, 69-70 (*emphasis* added).
[39] Bayer, (n23), 53-54; Bradstock, (n18), 62.
[40] Bayer, (n23), 53-54; Meuser, (n18), 136.
[41] Bradstock, (n18), 62-63; Hendrix, (n33), 43-47; Meuser, (n18), 137.
[42] Lindberg, (n13), 12.
[43] Zachman, (n18), 185.

sole source of the Word of God,[44] and the ability of the individual to become directly relatable to God through the correct use and understanding of Scripture.[45] It is in appreciation of the context within which these beliefs were held, and the affect that they would have had on this context, that the importance and influence of the Protestant Reformation on the development of constitutional thought can be recognised. By contextualising the theological developments made by reformers such as Luther and Calvin the implications for the relationship between people and authority, and the perceptions of the legitimacy of that relationship become understandable. This process additionally highlights the sowing of the seeds for the de-legitimisation of monarchic hierarchical authority; and perceptions of the legitimacy of a parliament which claimed authority, and supremacy, from its direct relationship to the people.

Luther and Calvin existed in a world very different to our own. Their worldview, as constructed through their faith, was divided into three estates. Broadly speaking these can be understood as: the church, encompassing all spiritual concerns; the government, concerning purely earth bound temporal considerations of order and peace; and the household, also recognised as what we would today consider the private economy.[46] Their conception of the church, state and household were very different to our own. While there was much overlap between the three estates, the basic divisions of competence perceived the existence of clear boundaries. The state narrowly related to earth-bound temporal politics, issues of public order, peaceful coexistence and security functions.[47] The church broadly encompassed all theological concerns in public and private life, on both the spiritual and temporal planes. This included many functions that we would consider as relating to those of the public state, such as education

[44] Muller, (n30), 143; David Steinmetz, 'The theology of John Calvin' in David Bagchi & David Steinmetz (eds), *The Cambridge Companion to Reformation Theology* (CUP 2004), 116; Zachman, (n18), 189-191.
[45] Olson, (n20), 153; Steinmetz, (n44), 117.
[46] Regarding Luther on this point see: Bayer, (n23), 56, 61-64; Lindberg, (n33), 167-174. Regarding Calvin see: Olson, (n20),154-155; Steinmetz, (n44), 122-123.
[47] Bayer, (n23), 56; Lindberg, (n33), 167-174; Steinmetz, (n44), 122-123.

and social welfare.[48] It was in their theological teachings on these concerns that Luther, and particularly Calvin, could be found to lay considerable groundwork for the basis of political reform of constituted authority, such as the empowerment of Parliament through the Bill of Rights.

Luther and Calvin made foundational developments in Reformation theology regarding the estate of the church. As a frontrunner within the Protestant reform movement Luther made key interventions in the individualisation of the relationship between the believers and God, as described above. This led to a reconsidering of the basis of authority within the constituted church.[49] Luther's thought lent itself to a more egalitarian church structure, perceiving a direct relationship of authority between the leaders (or at least those actively preaching the Word of God) and the collected individuals of the congregation.[50] Lutheran tradition can be seen to start the process of thinking in terms of 'gathered' churches which came to fruition under the considerably more radical Puritan umbrella of the Reformed Protestant tradition.[51] While Luther made important theoretical leaps concerning church structure within his theology; Calvin can be suggested to have made his most critical contributions to the Protestant movement in his teachings concerning the structure of the church and spiritual estate. It has even been suggested that the relative success of the spread of the Reformed Protestant tradition, compared to that of the Lutheran tradition, can be partially attributed to the concrete and actionable nature of Calvin's teachings on the matter.[52]

[48] Lindberg, (n33), 167-174; Olson, (n20), 157-169.
[49] Bradstock, (n18), 62.
[50] As an example of practical congregational community outreach under the auspices of Lutheran theology see: Lindberg, (n33), 171-172.
[51] In the context of the English seventeenth-century the most radical gathered churches were those of the Independents, each congregation was an enclosed unit responsible for their own theological direction and selection of representative leaders, only loosely bound to the wider Reformed Protestant movement as a whole, as examples of the high degrees of autonomy of action possessed by these congregations see: RA Beddard, 'Vincent Alsop and the Emancipation of Restoration Dissent' (1973) 24(2) Journal of Ecclesiastical History 161, 175-176; Youngkwon Chung, 'Ecclesiology, Piety, and Presbyterian and Independent Polemics During the Early Years of the English Revolution' (2015) 84(2) American Journal of Church History 345.
[52] Marshall, (n31), 28.

Calvin conceived of a broad definition of the church that encompassed four offices, which while possessing overlapping jurisdictions, individually addressed core aspects of the widest possible conception of the spiritual estate.[53] The four offices of Calvin's theology, and their respective competences were as follows. First the Pastor, preacher of the Word of God to the faithful and overseer of the spiritual wellbeing of the congregation.[54] Second the Doctor, responsible for education of the faithful, to enable their fullest access to the Word of God through the reading of written Scripture. With an additional duty concerning safeguarding the future of the faith, by training subsequent generations of pastors, as well as the education of those destined to take up lives outside of the spiritual estate in the civic life of the community.[55] Third the Consistory, groups of elders of the congregation(s) who oversaw the spiritual lives of the community in the day to day context. These groups often sat in judgement over those who were viewed to have strayed in their faith, as reported by their fellow congregational members, or on occasion by the offenders themselves.[56] Fourth the Deacon, responsible for social outreach, overseer of the provisions of social welfare such as charity, alms and hospitals.[57]

Within Calvin's vision of the correct ordering of the church and wider spiritual estate the role of the church and the scope of the spiritual estate, was conceived on a broad basis. The four offices of the church had, to a greater or lesser extent, a direct impact on what we would today recognise as central aspects of the estate of government. It is worth noting that this was not an abstract imaginary framework, this was designed to be eminently actionable; as seen under Calvin's oversight in Geneva, and in other Reformation contexts such as Scottish Presbyterianism.[58] Indeed, Berman has devoted considerable attention to the role of the

[53] Bradstock, (n18), 72.
[54] Olson, (n20),57; Steinmetz, (n44), 122-123.
[55] Olson, (n20), 157-159; Steinmetz, (n44), 122-123.
[56] Olson, (n20),159-163; Steinmetz, (n44), 122-123.
[57] Olson, (n20), 163-167; Steinmetz, (n44), 122-123.
[58] As examples see: Chung, (n51), 359-366; Olson, (n20), 157-167.

Protestant Reformations on the shaping of the 'Western Legal Tradition', and particularly the legal competences of public institutions in the German and English contexts.[59] I would argue that the most important contribution of the theologies of Luther and Calvin, to the nature and form of the church and wider spiritual estate, can be found in their teachings concerning the constitution of these bodies. It is here that I believe the strongest influence of the Protestant reform lies: In the introduction of the capacity of the individuals of the congregation to relate directly to their deity; and stemming from this their capacity to relate directly to those with 'spiritual' authority over the congregation.

I contend that the key aspect of the theologies of Luther and Calvin concerning the structure of the church, can be found in the inclusive decision making of the whole community. This began with Luther and the individualising of the relationship between the faithful and God, encompassing the change that this initiated in the role and authority of the preacher within the congregation. This resulted in the removal of the necessity of the priest to the process of communion with God, as it allowed individuals the capacity to relate directly to God.[60] This can be perceived as a fundamental relocation of authority in the spiritual sphere of life. Individual members of the congregation were no longer directly reliant on the priest to intercede with God on their behalf; therefore, authority divested purely in God through Scripture as the Word of God.[61] This more abstract theological positioning can be seen to fully mature in Calvinist thought regarding the correct constitution of the church. Pastors were still ordained, and therefore distinct from the congregation they oversaw. However, the congregation were now given a direct role in choosing their pastors in Calvinist theology. Along similar lines, the elders of the congregation that made up the officers of the consistory

[59] See Berman, (n19), 156-197, 330-371 for the German (Lutheran) and English (Calvinist) contexts respectively.
[60] Bayer, (n23), 53-54; Bradstock, (n18), 62; Hendrix, (n33), 43.
[61] Fred, (n18), 136-140; Muller, (n30), 143.

were drawn from among the congregation, 'nominated' for office by their fellows. Deacons were selected through a similar process.[62]

The third key tenet of the specific theological teachings of Luther and Calvin addressed here is the doctrine of Two Kingdoms. Both men envisioned the division of the estates outlined above as guiding the roles of authorities in the temporal realm. Additionally, they believed in the overall division of spiritual and temporal realms.[63] The temporal realm was inhabited and overseen by all people, not just those enlightened by their faith. The spiritual realm was overseen by God and only accessible to the true Christians selected for salvation.[64] God remained transcendentally sovereign: the only entity capable of possessing true sovereignty, universally encompassing the temporal and spiritual realms. God ceded (temporal) authority to people for the ordering and safeguarding of the temporal realm.[65] Therefore, temporal governmental authorities were not hierarchically privileged by divine right, or direct selective appointment. However, they did wield power derived from God, and as such, all Christians owed them a duty of obedience.[66] This was because God had 'devolved' authority to temporal governments in order to safeguard the faithful, and to prevent their further fall into sin after expulsion from the Garden of Eden.[67] Temporal authorities did this by providing a settled and peaceful environment in which individual Christians could best achieve their spiritual salvation through the pursuit and development of their individual relationship with their sovereign

[62] Chung, (n51), 359-366; Olson, (n20), 157-167; Steinmetz, (n44), 122-123.
[63] For examples of Luther's thought on the Two Kingdoms see: Bayer, (n23), 62-63; Bradstock, (n18), 64-65; Hendrix, (n33), 49-50; Lindberg, (n33), 174; Whitford, (n15), 180-186.
For examples of Calvin's continuity of thought on the Two Kingdoms see: Bradstock, (n18), 72-74; Steinmetz, (n44), 120-121, 129; Zachman, (n18), 190-191.
[64] See Bradstock, (n18), 64, 72 for Luther's and Calvin's respective thought on the division of responsibility and access.
[65] For Luther's theology on this point see: Bradstock, (n18), 65; Whitford, (n15), 186.
[66] For Calvin's theology on this point see: Bradstock, (n18), 64; for Luther's thought on the division of responsibility and access see, Steinmetz, (n44), 129.
[67] For the safeguarding role of temporal authorities as ordained by God in its fullest expression see the theology of Calvin regarding governmental authority: Steinmetz, (n44),120; Zachman, (n18), 190-191.

deity.[68] This was demonstrated forcefully by Luther in relation to the German Peasants' War 1524 – 1526:

> [Luther] first called upon the ecclesiastical and secular rulers to amend their ways before a rebellion arose that would destroy all Germany. He excoriated the authorities, lay and ecclesiastical […] Luther went on to blame "murder-prophets," […] those like Müntzer who were preaching religious revolution, and to exonerate the gospel and his own teaching from responsibility for the rebellion. […] Furthermore, Luther consistently denied the right of revolt [against temporal authorities] […] The rulers may slay the peasants in good conscience, for the upholding of social order is a *divine* mandate.[69]

The implications of these specific theological developments for the reform of constitutional authority, such as that enacted in the Bill of Rights, are then addressed in the subsequent sections of this chapter.

These fundamental tenets of the Protestant Reformation were found across the entire reform movement;[70] as examples see the theological writings of Melanchthon, generally considered as part of the Lutheran tradition,[71] yet also demonstrably an innovator in his own right.[72] Similar evidence can be found in the teachings of Zwingli, a contemporary of Luther, but more a forerunner of Calvin.[73] These principles were present in theologies developed under the broad umbrella of the Reformed Protestant (Calvinist) traditions. They are found in the

[68] This can best be understood in reference to Luther's fear of chaos, resulting in the belief that governmental tyranny is preferable to the de-stabilisation of revolt, as an example see: Whitford, (n15), 181. Calvin refined this point to an understanding of a cooperative relationship between church and state in order to facilitate peaceful pursuit of spiritual salvation, see: Steinmetz, (n44), 129.
[69] Lindberg, (n13), 165-166 (*emphasis* added). This also demonstrates a clear expression of the violence of Luther's rhetoric and the tendency towards creating a Protestant orthodoxy that both he and Calvin at times tended toward.
[70] See: Leopold Damrosch Jr, 'Hobbes as Reformation Theologian' (1979) 40(3) Journal of the History of Ideas 339, 343-346; Robert Kolb, 'Confessional Lutheran theology' in David Bagchi & David Steinmetz (eds), *The Cambridge Companion to Reformation Theology* (CUP 2004), 68-69, 73-79; Sachiko Kusukawa, 'Melanchthon' in David Bagchi & David Steinmetz (eds), *The Cambridge Companion to Reformation Theology* (CUP 2004), 57; Strauss, (n30), 170-175, 190-191; Witte, (n1), 258-260.
[71] For the theology of Melanchthon concerning these points see: Euan Cameron, 'Philipp Melanchthon' (1997) 48(4) Journal of Ecclesiastical History 705, 709-720; Kolb, (n70), 71-72; Kusukawa, (n70), 59- 67; Scheible, (n18), 68-69, 79.
[72] For particular consideration of the tradition and general theological 'fit' of Melanchthon see: Kusukawa, (n70), 57, 67.
[73] For the theology of Zwingli concerning these issues see: Miller, (n18), 159-163.

writings of Beza[74] (a key figure in Calvinist development and particularly in French Calvinism); in a more specifically English context, Cranmer (Archbishop of Canterbury to Henry VIII and Edward VI),[75] and subsequently Hooker (an influential Elizabethan theologian).[76] They also informed Protestant reformers at the centre of debates within the collective movement, often in antagonism to Luther or Calvin and their continuing traditions, such as Chemnitz, Andreae, Brenz and Flacius among others.[77] While these central tenets were born through spiritual crises they had a strong influence upon political and legal thought. The issues raised and understanding developed by Protestant reformers possessed relevance to long running constitutional tensions. My thesis is predicated upon an argument that the influence of the Protestant Reformation of spiritual authority influenced the perception of the of the legitimacy of the constitutional settlement enacted by the Bill of Rights. This is in part because it settled not only the seventeenth-century constitutional crises of the Stuart's, but tensions in governance that had existed since the reign of Henry VIII and the beginnings of the Protestant Reformation itself.

The Reformed Protestant (Calvinist) Tradition as a basis for correct constitution

This section of the chapter addresses how the Protestant Reformation, specifically the central tenets of spiritual reform, can be perceived as having provided a model for a re-imagining of the form of constituted government. For example, the perception of Parliament's claim to have been the correct representative(s) of the people as legitimising its rise to constitutional supremacy. I will demonstrate the influence of the Protestant Reformation upon constitutional thinking, as regards the correct constitution of social order within a community. This will be

[74] For the theology of Beza see: Richard Muller, 'Theodore Beza' in Carter Lindberg (ed), *The Reformation Theologians* (Blackwell 2002), 213, 217; Richard Tuck, *Natural Rights Theories* (CUP 1979), 42-43; Witte, (n16).
[75] Brooks, (n18), 242; Witte, (n1), 258.
[76] Epply, (n21), 254-257.
[77] For brief discussions of these theological principles as addressed by Chemnitz, Andreae and Brenz see: Kolb, (n70), 71-73; for the theology of Flacius on these topics see: Kusukawa, (n70), 66.

done by drawing upon the central theological developments concerning the refuting of papal authority and inherent hierarchical Catholic Church structure, and the centralisation of the individual at the core of the spiritual relationship with God. The primary focus is on the teachings concerning church structure developed by Calvin and fundamental to the Reformed Protestant or Calvinist tradition. However, it must be noted that these developments were facilitated by the original features of the Protestant Reformation present in the theology of Martin Luther: The individualisation of the relationship between the believer and their God, and the heretical foundations of papal hierarchy; and the impact that these revolutionary principles had upon the authority of the wider Catholic Church structure and the authority of the personage of the Pope and papal office.

The central tenets of the Protestant Reformation were universal throughout subdivisions of the Protestant tradition. However, differences between the various schools of theology existed, most obviously in distinctions between the titular progenitor traditions as laid out by Luther, and Calvin. The earlier beginning to the Lutheran tradition meant it provided the theological wellspring of the Protestant Reformation. Its teaching concerning the relationship of the individual to God being direct and personal; and assault on the papal claims to authority and the hierarchical structure of the Catholic Church, were foundations of the Reformation movement.[78] However, while Lutheranism developed a strong foundation in specific locales (Germany and Scandinavia) it did not generate a strong internal theological doctrine concerning precise church constitution. Nor did it initially succeed in settling key internal theological debates. These factors are considered to have impacted negatively upon expansion beyond its initial conversions.[79] It has been suggested the opposite trajectory of the dispersal of Calvinist thought across Western Europe was assisted by the provision of a strong internal

[78] For an example of Calvin's admiration of Luther on these central tenets, presenting him as a saviour of the church see: Zachman, (n18), 185.
[79] For a contrast of Calvinist success in these concerns see: Muller, (n30), 135; Andrew Pettegree, 'The spread of Calvin's thought' in Donald McKim (ed), *The Cambridge Companion to John Calvin* (CUP 2006), 216.

theology of church constitution, and a settled canon of basic principles. This is because it possessed a tangible and identifiable basis for establishing and developing religious communities in the face of strong political opposition.[80]

The spread of Calvinist thought across Western Europe can be seen in the (Reformed) Protestant traditions developed in areas such as France,[81] the Dutch Republic,[82] and the UK.[83] These all built upon the strong foundation of the tradition in Switzerland and specifically Geneva.[84] The method of transmission of the Reformed Protestant tradition was varied. However, a key aspect of the successful nature of the dispersal can be attributed to domestic state responses to Protestant communities within their borders. Even in countries that were to become majority Protestant strongholds, early reform proved to be controversial, often violent, and saw ebbing and flowing of Protestant and Catholic dominance of popular religion. The history of the Reformation in Tudor England illustrates this. Henry VIII and his Archbishop of Canterbury Thomas Cranmer broke with Roman, papal authority; placing the monarch at the head of the Church of England.[85] This was a relatively minor alteration of the theology underpinning church constitution, and was clearly influenced by Luther's relationship with the Elector of Saxony and his powerbase at Wittenberg.[86] This early Reformation in England was further developed and strengthened under the brief reign of Henry's heir Edward VI; but became subject to wholesale reversal upon his death and the ascension to the throne of his Catholic sister Mary I and her husband Philip II of Spain. A 'second' Protestant Reformation commenced upon the succession of the Protestant Elizabeth I to the throne after Mary.[87] This

[80] Marshall, (n31), 28; Pettegree, (n79), 216-217.
[81] See: Muller, (n30), 135; Pettegree, (n79), 216; Witte, (n15), 8; Witte, (n16), 546.
[82] See: Muller, (n30), 135; Pettegree, (n79), 216; Witte, (n15), 8.
[83] For the influence of Calvinist thought on specifically the English legal system see: Berman, (n19), 263-265. For the spread of Calvinist theology to England specifically, and Britain generally see: Muller, (n30), 135; Pettegree, (n79), 216; Witte, (n15), 8.
[84] See: Muller, (n30), 135; Pettegree, (n79), 217.
[85] Brooks, (n18), 242.
[86] See: Muller, (n30), 137; Trueman, (n18), 163-165.
[87] For an overview see: Lindberg, (n13), 309-334.

subsequent period of reform was more noticeably influenced by Calvinist thought,[88] although of a moderate rather than Puritan style.[89]

It can be argued that the phenomenon of the exile might have explained the changes in the dominant tradition influencing English Protestantism. During turbulent processes of successful or unsuccessful theological reform, devout believers often found themselves in exile, this could be either self-imposed due to fears real and imagined of persecution, or through state pressure.[90] A central gathering point and safe-haven, welcoming and financially supportive to a reasonable degree, was found in Calvinist influenced Geneva.[91] The reception and stable life that Geneva provided, accompanied by the rationalised and coherent theology of church constitution espoused by Calvin and implemented in Geneva, proved an easy transplant, to strengthen and develop nascent Protestant traditions across Western Europe outside of the initial German and Swiss heartland.[92]

The basic principles of Calvinist theology concerning the correct constitution of the church provided another source for the successful spread of the Reformed Protestant tradition. While both the Lutheran and Calvinist theological traditions emphasised the importance of teaching, to allow the widest possible direct access to Scripture, and therefore the Word of God; this found a much more practical outlet in Calvinist thought.[93] One of the four central offices of Calvinist theology concerning the correct constitution of the church estate is that of

[88] See: Christopher Durston, 'Edward Fisher and the Defence of Elizabethan Protestantism during the English Civil War' (2005) 54(4) Journal of Ecclesiastical History 710, 710; John Morrill, 'The Puritan Revolution' in John Coffey & Paul Lim (eds), *The Cambridge Companion to Puritanism* (CUP 2008), 70; Muller, (n30),137.
[89] See the thinking of the influential Elizabethan theologian, and 'moderate Calvinist' Richard Hooker: Epply, (n21), 263.
[90] See: Morrill, (n88), 69-72; Muller, (n30), 136-137; Trueman, (n18), 163.
[91] See: Olson, (n20), 165-166, for an example of charitable funds established within Geneva to support refugees and exiles by emigres; Pettegree, (n79), 208.
[92] As an example of exiles form the reign of Mary returning to influence the Elizabethan Reformation process see: Lindberg, (n13), 328.
[93] For the benefits to the Calvinist tradition of the strong emphasis on education to provide a pool of 'missionary' preachers see: Pettegree, (n79), 212-213. For the importance of teaching to increase access for the faithful to God in Calvin's theology see: Steinmetz, (n44), 114.

Doctor.[94] The holders of the office of Doctor were responsible for the higher level education of the next generation of pastors, and the tutoring of the general community to facilitate their access to Scripture. In addition, there was a responsibility for the indoctrination in Calvinist thought of subsequent generations of temporal government officials.[95]

A further strength of Reformed Protestant (Calvinist) theology that could be understood to aid its spread, was the adaptability that the tradition showed in new settings and emergent situations.[96] Calvin's teaching provided a strong basic foundation and easily understood theology. It included a direct engagement with correct church constitution. These core principles allowed for quick development of a strong Calvinist foundation in new territories. They also facilitated a high degree of responsive flexibility to varied surroundings, circumstances and pressures.

> Together, these principles allowed the church to strike a unique perpetual balance between law and liberty, structure and spirit, order and innovation, dogma and adiaphora […] this ecclesiastical machinery did help to render the pluriform Calvinist churches remarkably resistant over the centuries in numerous countries and cultures.[97]

This is evidenced in the adaptation of Calvinist theology to the French Wars of Religion in the wake of the St Bartholomew's Day Massacre. Under the guidance of Beza, there developed a strong theological basis for the right of Protestants to resist Catholic tyranny; as against the largely pacifist teaching of Calvin.[98] The flexibility was also highlighted by the seizure of the opportunity to establish the Presbyterian Church in Scotland; orchestrated by Genevan influenced contemporaries of Calvin such as John Knox.[99]

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[94] See: Olson, (n20), 157-159; Steinmetz, (n44), 122-123.
[95] See: Lindberg, (n13), 327, education was crucial preparation for the service of the entire community; Olson, (n20), 157-159.
[96] Beyond this adaptation to environment the flexibility of Calvinist thought is perhaps best exemplified in its association to capitalist doctrines as demonstrated by: CB Macpherson, *The Political Theory of Possessive Individualism* (OUP 2011); Weber, (n30); and critique of this attribution of predestination to Calvin in Strauss, (n30), 60-61 note 22.
[97] John Witte Jr, *The Reformation of Rights* (CUP 2007), 80.
[98] See: Muller, (n74), 217; Pettegree, (n79), 210, 215-216; Witte, (n16); Witte, ibid, chapter 3.
[99] Pettegree, (n79), 221.

Which aspects of Reformed Protestant theology on correct church constitution might have been the most influential? In answering this, consideration needs to be paid to potential influences upon perceptions of the legitimacy of constitutional reform of governmental structure. In particular, the legitimising impact of a relationship between the people and their government present in Parliamentary constitutionalism, as opposed to the monarchic hierarchy of the divine right of kings. There are three factors I wish to draw particular attention to within Calvin's theology concerning the correct social ordering of the spiritual estate, and the specific constitution of church congregation(s). 1) The non-hierarchical principles of church structure. By which I mean the removal of singular access to the Word of God by the Pope, and the centralising of the importance of the individually based relationship to 'spiritual' authority between the believers and God. 2) The importance of the involvement of lay members of the congregation; and the centrality of the direct relationships between the congregation/community members and God. This is as opposed to the previous dominance of the ordained clergy in the Catholic Church structure. 3) The ability to exercise and experience their re-imagined relationship with authority. This was afforded to Calvinist congregations, through the requirement of the active participation of the community in the selection of the heads of their congregations and local spiritual communities (pastor and consistory elders). This further extended to involvement in selection of their representatives in the wider regional leadership (synods and presbyteries depending on location) of the church.

The first aspect of Calvinist theology concerning the constitution of the church addresses the wider sense of the correct constitution of the spiritual estate. The spiritual estate, alongside the government and household, was one of the three estates envisioned by Protestant theology as the correct ordering of the temporal realm.[100] Foundational to the understanding of

[100] For the initial Protestant basis for the three estates in the theology of Luther see: Lindberg, (n33), 167-174; Bayer, (n23), 61-64. For Calvin's theology of the three estates see Olson, (n20), 154-155; Steinmetz, (n44), 122-123.

this estate in Reformation theology was the position of the individual. By refuting the authority of the Pope as the one person able to commune directly with God, Protestantism robbed the church of the ability to legitimately ordain its hierarchical structure through exclusive claims to divinity.[101] Individual members of Protestant congregations were able to commune directly with God. This shift from unidirectional hierarchy to a relationship with authority within the church meant the role of the ordained clergy and church leadership changed.[102] They were no longer required in order to gain access to God's wisdom and knowledge. Instead, they fulfilled an advisory position, better facilitating the individual's communion with God. This basic re-orientation of the fundamental role of the church, and of the authority of the clergy within the spiritual estate, automatically created a more publicly focused institution, one more responsive to congregational needs and demands.

Second, the role and involvement of the lay members of the congregation changed. The basic Protestant tenet that the individual had a direct relationship with their God re-imagined the authority of the church and its officers. The role and involvement of the lay members of the congregation accordingly changed. Instead of passive recipients of the divinely empowered hierarchical authority of the Roman Catholic Church, members of Protestant congregations (especially Reformed Protestant) became active participants in their spiritual community, and the wider spiritual estate.[103] Alongside this, the collective individuals of a congregational community could be seen to have a two way relationship between the lay congregational members and their spiritual authorities within the church structure and the wider spiritual

[101] For Calvin's theology concerning the heretical claim of Papal authority, Roman Church hierarchy, and the individual as directly relational to God through the 'truth' of Scripture as the Word of God see: Bradstock, (n18), 71; Muller, (n30), 143; Olson, (n20), 153; Steinmetz, (n44), 114-117, 123-129; Zachman, (n18), 185-191.
[102] For examples of this orientation towards relationship of authority, and alteration of the function of ordained officers of the church across the Protestant spectrum see: Pettegree, (n79), 216-222; Witte, (n1), 159-160.
[103] For the theology of Calvin, and the wider Reformed Protestant tradition concerning relationship of authority between the congregation and their leaders see: Bradstock, (n18), 72; Olson, (n20), 154-167; Steinmetz, (n44), 122-123.

estate.[104] Without the support of the individuals, who were now responsible for their own relationship to God, the ordained clergy and lay leadership of the congregation risked losing their legitimate 'spiritual' authority.

The third implication of Reformed Protestant (Calvinist) theology to be considered is the exercise of lay members' direct relationships to authority within the constitution of the church. The authority they derived from their capacity to relate to God, without the requirement of intercession by the clergy and wider church hierarchy, meant the lay participants in Protestant congregations could employ their relationship with 'spiritual' authority in the constitution of church communities. Collective congregations were able to utilise their individual 'spiritual' authority within a correctly constituted church, through their active involvement in the selection of the officers of their church. Under the theological teachings of Calvin concerning the correct constitution of the church, and the wider spiritual estate,[105] individual lay members of congregations were given the authority to participate in choosing their pastors (ordained officers of congregational leadership); and elders who comprised the consistory (lay leaders of the spiritual community whose jurisdiction encompassed questions of spiritual discipline).[106] Indeed, it is even explicitly found in Calvin's teaching that members of the consistory were to be representative of their whole community.[107] The same chance to exercise their authority was also afforded through the selection of deacons, who oversaw social welfare and community outreach or 'charitable' aspects of the spiritual estate.

A strong case can be made for these theological teachings concerning the correct constitution of the church as having had a revolutionary impact upon the legitimacy of

[104] For examples of the Protestant relationship of congregational authority as an actionable right in Protestant churches and theology see: Pettegree, (n79), 216-222; Witte, (n1), 159-160.
[105] For Calvin's theology concerning congregational participation in the selecting of officers of the church see: Bradstock, (n18), 72; Olson, (n20), 154-167; Steinmetz, (n44), 122-123.
[106] For examples of the relationship to authority within Protestant congregations having been exercised in the appointment of their church officers see: Olson, (n20), 157-164; Pettegree, (n79), 218-219, 222; John Spurr, 'Later Stuart Puritanism' in John Coffey & Paul Lim (eds), *The Cambridge Companion to Puritanism* (CUP 2008), 97-98; Weber, (n30), 35-46; Witte, (n1), 259-261; Witte, (n16), 555.
[107] Elders 'were to be selected from all quarters of [Geneva]' Olson, (n20), 159.

governmental forms. In particular, those based upon the individualisation of the relationship between the faithful and their God. There existed potential for aspects of Protestant theology to exert considerable influence over: 1) individual and community perceptions of the legitimacy of authorities as representatives of the people, and; 2) the role of the people within the constituted form of government. In Part B of my thesis I argue this re-imagination was evident in the constitutional reform enacted in the Bill of Rights. The Protestant Reformation of spiritual authority presented challenges to both spiritual and temporal political authority. It also provided the capacity to reform both spiritual and political authority and to influence the perception of the legitimacy of both spiritual and temporal authorities. The Protestant Reformation exposed constitutional tensions that ran through the Tudor dynasty from Henry VIII and the seventeenth-century Stuart dynasty. It also provided the capacity for reform that ultimately came to influence the perception of the Bill of Rights as a legitimate settlement to the constitutional crises and conflicts of the seventeenth-century.

THE DIVISION OF THE SPIRITUAL AND TEMPORAL REALMS AND THE LEGITIMACY OF AUTHORITY

This section of the chapter addresses the interlinking of constitutional and theological thought regarding perception of the legitimacy of authority in the context of the Protestant Reformation. The focus is upon the separation of understandings of sovereignty in the spiritual realm, and authority and power as distinct concepts in the temporal realm (building upon the discussion of the Two Kingdoms doctrine in the theologies of Luther and Calvin above). Further, I address the implications for perception of the legitimacy of temporal authority. This would have been due to the changing nature of legitimate authority from a hierarchical experience to a relational basis, founded upon the connection between the people and their selected leaders. The section provides a brief overview of how this transition is traditionally conceptualised in legal thought: as a secularisation of law; and how the attendant arguments are constructed. I will then analyse how this might be conceived from a different perspective. An alternative framing focused upon the constitution of governmental *authority*, viewed through the Protestant theology of the correct ordering of the church and spiritual estate. Addressing where the position of authority can be located, and how it might have been experienced in its exercise.

Traditionally legal scholarship of historical constitutional development in Western Europe has addressed this issue in a very specific frame. The standard formula approaches the distinction of the spiritual and temporal realms as an aspect of the growth of the proto-modern state. This is characterised as a secularization of law, through the gradual dominance of the domestic in competition between local monarchic and pan-regional spiritual jurisdictions.[108] This leads to a consideration of what Thornhill has described as the study of the 'abstraction of political power' from the spiritual realm.[109] As a result these studies construct clear and

[108] See Berman, (n19), 349-371; Hauke Brunkhorst, *Critical Theory of Legal Revolutions* (Bloomsbury 2014), 147-233; Dieter Grimm, *Constitutionalism* (OUP 2016) chapter 1; Martin Loughlin, *Sword & Scales* (Hart 2000), 69-75; Loughlin, (n2), 17-26, 61-63.
[109] This is the explicit purpose of his research in: Thornhill, (n8).

coherent legal arguments as to how law-making power was established by the state in the political sphere. The conclusion is that this was achieved through counteraction of spiritual jurisdiction(s), and extraction of temporal powers from the papal office and the Roman Church, and their regional leaders.[110]

I contend that this focuses too closely upon the purely legal construction of the arguments, allowing the narrative to be driven by internal positivist logic. In internally accounting for its history the law seeks to find continuity and infallibility;[111] rejecting any possible influences of revolutionary change as a reversion to an existing legal truth, or counteracting political misapprehension.[112] This standardised position of analysing the division of the spiritual and temporal realms with the secularisation of law being represented as the emergence, or rise to pre-eminence, of 'the political' misses the depth and texture of the process. It fails to fully address how the constituted governmental structure which emerged from this process took form. This is the area that I seek to illuminate by looking not at (generally conflated) power, but (separately and specifically) at *authority*. In precise terms, my focus is upon the role in the perceived legitimacy of this new constitution of governmental authority that is played by Protestant theology. In particular, attention is paid to Reformation theology concerning the individualisation of the relationship to God, and the correct constitution of the institutional church and church estate.

I argue that the neglect of this phenomenon in the study of historical constitutional development is shared by those who seek to account for the historical development of individual, liberal rights. This scholarship also poses the abstraction of the political from the

[110] For a general survey of these styles of legally framed argument see: Berman, (n19), 349-371; Loughlin, (n108), 69-75, 116, 125-136, 161-162; Loughlin, (n10), 45, 74-75; Loughlin, (n2), 1-4, 17-26, 31, 37-46, 61-63, 73-74, 77-78; Adam Tomkins, *Our Republican Constitution* (Hart 2005), 52-56.

[111] For an example of a legal historical analysis of the so called Glorious Revolution from this positioning see: Richard Kay, *The Glorious Revolution and the Continuity of Law* (Catholic Universities of America Press 2014).

[112] For a legal perspective on this phenomenon see: Paul Kahn, *The cultural study of law* (University of Chicago Press 1999), 70-77; and for a conceptual historical analysis Reinhart Koselleck, *Futures Past* (Tribe ed & tr, Columbia University Press 2004).

spiritual as a secularisation of the law. Thus facilitating a new non-hierarchical interpretation and understanding of the individual in a free standing purely temporal political arena, with God removed or side-lined as a source of legal power. This line of thinking focuses on the basis of the individual relationship to power (again not authority) as founded on the possession by individuals of a bundle of rights that derive from or are for use against the collected community of individuals.[113] Once again this analysis seeks to find the basis for the abstraction of individual rights, from a political construct, as a source of power. It does not specifically address the process through which this political entity is constituted. Nor does it directly attend to the authority (and the legitimacy of this authority) that might emanate from this process of constitution, or what the influences for this constituted form might be.

This is not to say that I am disregarding the existing scholarship. The study of the abstraction of political power through a secularisation of legal power, and the emergence of a modern conception of individual liberal legal rights, is clearly a crucial field of study. Not least for understanding the historical nature of our current conception of human rights.[114] The seminal scholarship in sociology,[115] and political economy,[116] that draws upon the historical antecedents of current individual rights, and examines how they might have been extracted from theological doctrine for secular political consumption is of inestimable value. I am suggesting that a subtle niche might exist for the study of the constitution of relationships of

[113] As examples see the individual rights analysis of Medieval and early modern juridical and constitutionalist writers (as well as the easy conflation of the two perspectives) in: Strauss, (n30), 59, 114, 165-167 generally, 182-183, 190-191, 193 specifically on Hobbes, 207-209, 225-228, 231-232, 238-248 on Locke; Tierney, (n1), 99-101; His, 'Historical Roots of Modern Rights' (2005) 3(1) Ave Maria Law Review 23, 28-40; Tuck, (n74), 83-99 on Selden, 125, 126-130, 135-137, 175 on Hobbes, 155, 168, 170-173 on Locke.

[114] For a Protestant focus on this process of emergence see: Ishay, (n1); Witte, (n1); Witte, (n15); Witte, (n16).

[115] As examples examining individual rights in socialised forms emanating from a theological basis see: Weber, (n30); Weber, *Economy and Society* (Guenther Roth and Claus Wittich ed, 2nd edn, University of California Press 1978). See chapter 2 for importance of Weber's scholarship.

[116] As examples see: Macpherson, (n96); Douglas North and Barry Weingast, 'Constitutions and Commitment' [1989] The Journal of Economic History 803. While neither of these works have quite reached the importance of Weber's scholarship they have undoubtedly been influential within political economy, it has been suggested that Macpherson's work in particular, similarly to Weber's, is of sufficient importance to force engagement by its most devout opponents, see: Geoff Kennedy, 'Capitalism, contextualisation and *The Political Theory of Possessive Individualism*' [2012] Journal of Intellectual History and Political Thought 228.

authority; which can be conducted through analysis of the division of the spiritual and temporal realms in theological developments of the Protestant Reformation. Further, that a deeper knowledge of this process might facilitate a fuller understanding of how the reform of governmental constitution may, in some aspects, have been legitimised through these theological developments.

In considering the division of the spiritual and temporal realms, and any implications for the constitution and legitimacy of authority that this might have, I will first address the Protestant theological doctrine of the three estates. Within the specific consideration of the theological teachings of Luther and Calvin, Protestant (and Catholic) theology viewed there to be Two Kingdoms: The spiritual and temporal realms. Further, the temporal realm was perceived to comprise of three estates: the church estate; the governmental estate; and the household estate.[117] Within this understanding of the three estates, the church and the household were broadly defined. They covered many aspects of what would today be thought of as linked to governmental activity such as social welfare, and the demarcation of personal and familial relationships. On the other hand the governmental estate was narrowly understood, primarily concerned with the provision of a 'peaceful' and 'safe' environment, or basic law and order or security, and foreign diplomatic and military functions.[118] As a reflection of these boundaries between the three estates, the church estate oversaw many aspects of modern public services such as education, physical welfare and enforcement of public morality, or spiritual welfare. This manifested as church governance of schools, hospitals, alms relief and charity, and even some 'social order' offences. With these boundaries and roles within the estates reiterated let us now consider their possible implications for constitutional reform of authority relationships. How they may have been perceived through processes of participation, and the

[117] For examples of the doctrine of Two Kingdoms in both Luther and Calvin's theology see: Bayer, (n23), 62-63; Bradstock, (n18), 64-65, 72-74; Hendrix, (n33), 49-50; Steinmetz, (n44),120-121, 129.
[118] For examples of the three estates doctrine in the theology of both Luther and Calvin see: Bayer, (n23), 61-64; Lindberg, (n33), 167-174; Olson, (n20), 154-169; Steinmetz, (n44), 122-123.

division of the spiritual and temporal realms, and the implications for conceptualising sovereignty that these changes in religious understanding may have had.

A central tenet of the Protestant Reformation was the development of a doctrine governing the correct constitution of the institutional church and wider social order in the church estate; as outlined in the specific theological considerations of Luther, and especially Calvin (but found across varying divisions of Protestant theology). This stemmed from the understanding of the individual as capable of directly relating to God. Therefore, the church did not hold a position of hierarchically structured authority over the individuals of the congregation.[119] Instead, the individuals of the congregation collectively had relationships with their church and community leaders, which could be exercised in a direct manner. The result was authority of church officers having been partially legitimised by their relationship with the collective individuals of the congregation(s) they represented.

These theological developments within Protestant perception of the correct constitution of the church congregation, and estate, allowed all individual members to become active participants in the constitution of their church and wider social community. Individuals, as members of congregations, had direct relationships to those in authority. Therefore, they possessed the capacity to participate in the selection of ordained church officials, the pastors. As well as lay representatives in the institutional church and church estate: elders of the consistory; and deacons. This provided some influence upon the authorities in charge of administration of education, the doctors, through the capacity to relate directly to other officers of the church.[120] Not only was this direct relationship to authority experienced by lay members

[119] As examples of the direct relationship between the individual and God in the theology of Luther and Calvin see: Hendrix, (n33), 43- 47, 54-55; Muller, (n30), 143; Zachman, (n18), 185-191.
[120] For examples of the theology of lay involvement in selecting leaders in the congregation and the wider church estate see: Bradstock, (n18), 63-73; Damrosch, (n70), 343-346; Kolb, (n70), 74; Lindberg, (n33), 168; Miller, (n18), 160; Olson, (n20),153-167; William Stevenson, 'Calvin and political issues' in Donald McKim (ed), *The Cambridge Companion to John Calvin* (CUP 2006), 174, 180, 183; Whitford, (n15), 181; Zachman, (n18), 190.

as applying to lay persons and ordained clergy in the local arrangement of the church estate. It also manifested in the wider regional and 'national' levels, through the continued participation of selected lay and ordained persons at all levels of estate structure. This can be seen in the constituted form of the Scottish Presbyterian Church; which featured layers of local and regional consistories and synods to a national level.[121] The implications for this theological position on the correct and legitimate constitution of the church can be plainly seen to have had potential to impact upon perceptions of the legitimacy of constituted political governmental authority. This is especially so when taking into account the separation of the spiritual and temporal realms. At all levels of authority, not only were mixtures of lay persons and ordained officers involved, they were all also in a direct relationship of authority with the individual members of congregations. Indeed, they relied upon this for aspects of the legitimacy of their authority, which could not be directly and exclusively assigned to them via divine appointment.

When considering the separation of the spiritual and temporal realms, and the attendant implications for the basis of authority, the issue of sovereignty cannot be avoided. In the legal conception of historical constitutional development the question of sovereignty and the transfer of sovereignty from the spiritual to temporal (political) bases of power sets the scholarly agenda.[122] All too often in legal thought sovereignty ends up as a conflation of power and authority. The end goal appears to become identification of the basis for power and its association with sovereignty, so the analysis inherently focuses on power at the expense of separate considerations of *authority* as a distinct concept, as discussed in Chapter one. This conflation of power and authority can be teased apart allowing for a separate understanding of processes and factors that might lead to the perception of authority as legitimate, or not. In turn,

[121] Chung, (n51), 350-353.
[122] This can be seen in the driving forces behind such works as: Berman, (n2), 271-294; Loughlin, (n108), 69-75; Loughlin, (n10), 73-77; Loughlin, (n2), 376-384; Thornhill, (n8), 55-61; Tomkins, (n110), 52-56.

this might be understood to have implications for whether the power exercised by that authority might also be perceived as legitimate as discussed in chapter two.

For a consideration of the nature of sovereignty within the context of a political theology, as opposed to a study of theological politics,[123] I would contend that Erik Peterson is an important scholar. Peterson suggests that sovereignty is a truly universal concept: in order for sovereignty to exist it must, by definition, encompass the entirety of both the temporal and spiritual realms. This results in the only true sovereign being a transcendent, universal God.[124] His theological analysis also posits that any claim to sovereignty in a temporal setting must be false, any such claimant must be directly or indirectly under the influence of the antichrist.[125] Peterson further strengthens this position through theological analysis, concluding that the church, and its claim to any temporal sovereignty in the spiritual sphere, is a human, political, action. This understanding is presented through analysis of classical Christian theology and the politicisation of the Roman Church in subsuming political sovereignty within a transcendent divine sovereign monarchy.[126] Classical Roman political theological debates were reignited in the through the Papal Reformation and these themes continued to divide spiritual and political communities through the Protestant Reformation. The implications of this line of thinking for sovereignty and the basis of legitimate authority are potentially wide ranging. Not least of

[123] This is a distinction that is made in the title and introduction to: György Geréby, 'Political Theology versus Theological Politics' (2008) 35(3) New German Critique 7, 7-8.
[124] See primarily: Erik Peterson, *Theological Tractates* (Hollerich ed & tr, Stanford University Press 2011), 47, 72-74, 179-180; in addition see analysis in: Geréby, (n123), 15, 26, 29, 33.
[125] See: Peterson, (n124), 150, 166-168; Bruce Rosenstock, 'Monotheism as a Political Problem' in Randi Rashkover & Martin Kavka (eds), *Judaism, Liberalism, and Political Theology* (Indiana University Press 2014), 329.
[126] See generally Peterson, 'Monotheism as a Political Problem' (n124), 103-105; supported by Geréby, (n123), 13-14, 24-25, 32; Rosenstock, (n125), 325-327. On the absorption of political sovereignty to a transcendent divine sovereign monarchy see Peterson, 92-94. "The polis is polytheistic because nation-statehood is pluralistic. […] By contrast, the Roman Empire connotes peace. […] [under the unified Roman and Christian rule of Augustus formerly divided nations] are blessed with the greatest peace, while pluralistic sovereignty and local kingship no longer exist". On the symbolic subsuming of representations of political sovereignty within the sovereign divine monarchy see Peterson, 'Christ as Imperator' (n124), specifically 146-147.

which is the support that can be found for Luther's assault upon the heretical basis of Medieval papal claims to (divine) sovereignty.

Within the theologies of Luther and Calvin there is found a division between the spiritual and temporal realms. Both men, and the wider Protestant reform movement, held sovereignty to be a purely divine concept attributable only to God. Therefore, that the papal office and its claim to authority on earth through God as having been of a divine character were heretical.[127] This suggests a similar theological position to Peterson's perception of the church as a political entity. Further to this line of thinking, how did this impact upon considerations of governmental constitution and the legitimacy of its authority? In particular, taking into account the division not only of the Two Kingdoms, but also the division of the estates of the temporal realm, and the social functions considered part of the church estate.

First, sovereign status was afforded only to God, and all temporal authority was devolved from God. Therefore, there was a stark division between the spiritual and temporal realms. All temporal authority became political in nature.[128] Protestant theology acknowledged a necessity for temporal government. Alongside this existed an interlinked Christian duty to obey this authority in order to create a settled and peaceful environment in which to pursue salvation and access to the spiritual realm.[129] However, political authority could not itself be sovereign. Second, there was a precedent set for a direct relationship between individuals within a congregational community, and those with authority in the community.[130] The reformed theology concerning the correct constitution of authority in the church estate provided

[127] As examples of the theology of both Luther and Calvin finding the heretical nature of Papal authority claimed through access to God and the facility of the individual to relate directly to God see: Hendrix, (n33), 43-47, 54-55; Muller, (n30), 143; Zachman, (n18), 185-191.
[128] See: Geréby, (n123), 13-14, 24-25, 32; Michael Hollerich, 'Preface' in Peterson, (n124), xix-xxv; Peterson, (n124), 103-105; Rosenstock, (n125), 325-327.
[129] As examples of Luther and Calvin's theology concerning the basis and function of government see: Lindberg, (n33), 174; Steinmetz, (n44), 129.
[130] As examples of lay congregational involvement in the selection of their lay and ordained representative leaders see: Bradstock, (n18), 63-64, 70-73; Damrosch, (n70), 343-346; Kolb, (n70), 74; Lindberg, (n33), 168; Miller, (n18), 160; Olson, (n20),153-167; Stevenson, (n120), 174- 183; Whitford, (n15), 181; Zachman, (n18), 190.

a perception of the legitimacy of authority to be found in a direct relationship between the congregation and their leaders and officers of the church. Third, the perception of the legitimacy of these authorities was partially inherent on their status as representatives of the wider congregational community. If this degree of reform of authority could be found in the church estate, the most closely related to spiritual life and the spiritual realm, then could it not also be transferred into the politics of the governmental estate? If the division of the spiritual and temporal realms was sufficient for the reforming of the constitution of the church estate to be considered legitimate, as it did not impinge upon the sovereign authority of God. Then the claim to sovereign authority, derived from God, exercised within the governmental estate must also have been open to legitimate reform. This would not have been a reform of divine or sovereign authority. As with the reform of the church estate, it was reform of a human, temporal construction. Therefore, a legitimate undertaking for Christian people of Protestant belief.

Protestant Reformation theology of the individual, as possessed of the capacity to directly relate to those in authority, can be seen to have had the potential to impact upon the consideration of the correct constitution of government. This was achieved by influencing perceptions that the legitimacy of government stems, at least in part, from its constitution by representatives of the people it governs. I argue this influence can be seen upon aspects of the legitimacy of the Bill of Rights as a site of constitutional reform, and constitutional settlement, within the context of the seventeenth-century. The Bill refuted the claim to supremacy of the monarch, built on a non-relational hierarchy of divine appointment. In its place it elevated Parliament to supremacy, constituted by representatives of the people that were governed under its legally enshrined authority. The perception of the legitimacy of Parliament in this position was partially built upon the authority that it drew from its direct relationship to the individual people constituting their own government. This could be seen as a principle transferred from the theology of the Protestant Reformation.

As described in Chapter one, sovereignty, as it is understood in legal theory is a conflation of the concepts of *power* and *authority*. This conflation of power and authority within the concept of sovereignty in legal thought can be seen to have been influenced by the transplantation of the theological concept of sovereignty directly into legal theory. This can be attributed to Medieval papal claims to a legitimate legislative supremacy. These claims were built upon a special access to, and capacity to interpret, the divine knowledge and Wisdom of God. A privileged relationship to God's sovereignty, one which included both the authority of divinity and the absolute transcendent power that came with it. From this point onwards legal thought revolved around finding sovereignty as absolute legal authority and power of action, initially as the power of the papacy, then in the power of the monarchs as they challenge papal supremacy. Later the location of sovereignty was sought in the people or the Constitution.[131] This framed arguments about legal sovereignty through a focus on the 'correct' location of sovereignty. Not on how it is experienced and perceived as legitimate authority by those subject to it. This positioning fitted well within standard positivist accounts of constitution(s) as isolated normative sources of law, distinct from other fields of social action such as the political sphere.[132]

If one looks to the structure of the church as distinct from the transcendent divine sovereign, and considers it to be a temporal concern; then it becomes a human construction and, therefore, a political association.[133] This requires a re-considering of the concept of sovereignty, but allows for the individual concepts of *power* and *authority* to be teased apart. Furthermore, it facilitates analysis of how these might be perceived as legitimate (or not) by

[131] For conflict between the papacy and monarchies see Berman, (n2), 88-221; Larry Siedentop, *Inventing the Individual* (Penguin 2015), 192-224. For development of the ideas of 'popular sovereignty' see Loughlin, (n2), 184-208.
[132] For an exemplar of positivist constitutional theory see Hans Kelsen, *Pure Theory of Law* (Knight tr, 2nd edn, Lawbook Exchange 2005). For commentary critiquing this narrow and self-limiting conceptualisation of constitutional law see: Hans Lindahl, 'Authority and Representation' (2000) 19(2) Law and Philosophy 223; Martin Loughlin, 'The concept of constituent power' (2014) 13(2) European Journal of Political Theory 218.
[133] See Peterson, Erik Peterson, 'Monotheism as a Political Problem', 103; 'Christ as *Imperator*', 146-147; 'Witness to the Truth', 162 in His, (n124).

those subject to them. Through this process a study of constitutional authority, and the perceptions of the legitimacy of constitutional authority can be undertaken. In turn this allows appreciation of how powers exercised under the auspices of constitutional authority may or may not be perceived as legitimate by those subject to the powers. Following this approach sovereignty becomes an issue of transcendence, an aspect of the spiritual realm, beyond the proper concern and indeed comprehension of those inhabiting the temporal realm. Therefore, the 'correct' focus of constitutional law (as a temporal, human action) is authority and power as distinct concepts. These are the concepts experienced by those occupying the temporal, political sphere. Here is found the utility of Loughlin's scholarship concerning public law. He posits a broad definition of the concept, not as an isolated source of law (the constitution), but rather as a facet of a wider political discourse.[134] This allows for the perception of the people as subjects, and participants, to be analysed in the legitimacy of constitutional authority. As opposed to arguing over the location of sovereignty, and assuming that wherever it is found it is automatically and unquestioningly legitimate.

CONCLUSION

In this chapter I have attempted to demonstrate the inherent interconnection between perception of the legitimacy of governmental authority, and the constitution of church authority. Medieval proto-states can be seen to have been constituted following a model of hierarchical authority, influenced by prevailing Roman Catholic Church structure and claims to divine authority. The impact of the Protestant Reformation can be seen in the refutation of papal 'divinity', and Roman Church hierarchy. In its place emerged a Protestant doctrine founded upon the individual as an entity with a capacity to relate directly to God. This led to the constitution of a church that acquired a measure of its legitimacy from the relationship between the collective

[134] For full development of this idea see: Loughlin, (n10), 134-142.

members of the congregation and the representative leaders they selected. A church that contained lay people in positions of authority throughout its structure.

Protestant theology also clearly drew a stark distinction between the church and state, and further separated the spiritual and temporal realms. It asserted that the only true universal sovereign is God, and that no human could claim true sovereignty, because they would be bound by the temporal realm. I argue that these represent key ingredients for the creation of a constitutional move away from hierarchical monarchic government towards Parliamentary representative constitutionalism. Additionally, that in the English context an important point of transition, and further legitimacy for ongoing reform, can be found in the Bill of Rights. This document can, at least in part, be suggested to have created perceptions of its legitimacy based upon the promotion to constitutional supremacy of Parliament as representative(s) of the people. It benefitted from the closeness of these principles to the reformed Protestant theology that centralised the individual in religious experience, and granted individuals and collective congregations, authority within the church estate.

Working in conjunction with the method and concepts of chapter one and the legitimacy theory of chapter two, this chapter completes Part A of my thesis through provision of the final components of my analytical framework. Chapter three facilitates the documentary analysis of Part B by providing the necessary theoretical elements concerning the Protestant autonomous spiritual individual, and the Reformation of church structure and 'spiritual' authority. As such this chapter complements the preceding chapters due to the explicit access to understanding of the process required to engage with research questions 1 and 2. First, this chapter allows comprehension of the individual relationship with authority afforded through the Protestant Reformation; and the perception of legitimacy that the autonomous spiritual individual could have been imagined to furnish Parliaments' claimed constitutional authority within the Bill of Rights. Second, it provides insight into the Protestant challenge to the Catholic doctrine of

Medieval papal hierarchical authority. It can be seen how in undermining papal authority the Reformation consequently challenged the legitimacy of monarchic authority and the divine right of kings. Furthermore, through realising the autonomous spiritual individual, and the interlinked re-location of ‘spiritual’ authority within Reformed church structure, conceptual space for a template of an alternative model of constitutional authority and governmental structure was created.

PART A

Part A of my PhD thesis provided the method, key concepts and theory underpinning my PhD project. All of these abstract conceptual elements are required to fully comprehend Part B and the empirical documentary analysis that it contains. This is because Part A provides the framework through which the analysis in the next part is undertaken. This first part has outlined and defined my method of political jurisprudence, the concepts of constitution and authority, legitimacy theory, and the theoretical model for the influence of the Protestant Reformation of church structure and spiritual authority as an influence upon constitutional authority. Part B empirically tests my thesis through analysis of the Bill of Rights, the Petition of Right, the Levellers' An Agreement of the People, the Triennial Act, and the Act of Settlement.

CONCLUSION

Chapter one defined my core constitutional concepts of constitution and authority against the more usually addressed concepts of sovereignty and power. This chapter also outlined my method of political jurisprudence, and the strengths of its application to this project, as a way of understanding the core concepts within my PhD research. Collectively, political jurisprudence and the concepts of constitution and authority provided in chapter one present a way of understanding constitutional documents, political manifestos and legislation, that facilitates appreciation of constitutional processes and influences not available to positivist and doctrinal constitutional study.

Within my research legitimacy is theorised as being more than the positivist legal understanding of correct procedure and form. Chapter two presented legitimacy as an essential relationship between the governed as individual(s) and collectively, and their governors. This understanding of legitimacy as a relationship is located within Weber's historical-Sociology,

within Weberian legitimacy theory perception of authority, and its legitimacy, relies upon belief in the legitimacy of authority. Subsequent literature developed his theory through clarifying that this entails perception of both the personal legitimacy of authority, and of the wider collective legitimacy of authority. This is the relationship between governed and governors that is required for legitimate authority. It is a relationship that is built upon a basis of individual and shared perception of the legitimacy of authority.

Chapter three provided a model for appreciation of the influence of religious thinking upon constitutional development. This is established through discussion of the Church as a model of constitution and spiritual authority. It is demonstrated how the Papal Reformation can be understood to have impacted Church constitution and 'spiritual' authority, and influenced the development of monarchic constitutionalism. The Papal Reformation created a hierarchical, unidirectional experience of authority (as power) centred on the papacy. It is also demonstrated how the Protestant Reformation impacted upon Church constitution and 'spiritual' authority. The Protestant Reformation attacked the medieval Roman Catholic Church, and the papacy. This created space for the recognition of an alternative proposition: a relationship between the congregation (people) and their spiritual officers (authority). A relationship that legitimised the 'spiritual' authority independently from 'God's divinity'. It is suggested that the shift in perception of constitutional authority from monarchic to parliamentarian constitutionalism can be seen to have echoed this process. A perceived relationship between governed and governors, people and parliament, can be understood to have conveyed legitimacy upon authority.

Working in conjunction the three chapters of Part A combine to construct the framework of analysis deployed in Part B. They provide the core concepts of constitution and authority, which are then bolstered by a theory of legitimacy based on individual and collective perception of authority established through the relationship between authority and its subjects. Finally, a model for perceiving the influence of religious Reformation on church structure and

‘spiritual’ authority is provided as a template for understanding reform of temporal, monarchic constitutionalism.

PART B

INTRODUCTION

Part B undertakes empirical testing of the framework of method, concepts and theory provided in Part A. This takes the form of direct analysis of five constitutional documents of the English seventeenth-century. The centre piece of my thesis, Part B and the documentary analysis, is the Bill of Rights [1688], which is the subject of chapter four. The study of the Bill is contextualised by analysis of two prior, failed, constitutional reform manifestos in chapter five: the Petition of Right (1628) and the Levellers' An Agreement of the People (1647). The final chapter of Part B strengthens the analysis of the Bill through further study of subsequent constitutional reforms, the Triennial Act (1694) and the Act of Settlement (1700).

The aim of Part B is to outline and develop my core PhD thesis. My argument is that the Protestant Reformation of church structure and 'spiritual' authority can be seen to have influenced perception of the legitimacy of the Bill of Rights as a restorative constitutional settlement and reform. I propose that this suggests the Bill can be understood as a moment of constitutional transition. The constitutional authority of the monarchy can be seen to have begun a relocation, in favour of parliament. The constitutional model transitioned from a monarchic constitutionalism to parliamentarian constitutionalism.

Chapter 4

This chapter undertakes direct analysis of the Bill of Rights, through the framework established in Part A. The Bill is presented as having simultaneously been a constitutional settlement to the so called 'Glorious' Revolution, and a constitutional reform. Aspects of its legitimacy in both presentations are shown to have been influenced by Protestant Reformation of church structure and spiritual authority. In providing a lasting constitutional settlement to the conflicts of the seventeenth-century, the Bill demonstrated a practical legitimacy. The nature of the

settlement provided, and its articulation through the legislative drafting of Parliament created a constitutional reform, which further cemented that perception of legitimacy. The Bill laid the foundations for the development of parliamentary constitutionalism and the proto-democratic state.

Chapter 5

The aim of chapter five is to contextualise the study of the Bill of Rights. This is achieved through analysis of failed seventeenth-century constitutional reform manifestos prior to the 'Glorious' Revolution. Using the framework constructed in Part A, the Petition of Right and the Levellers' An Agreement of the People are examined to determine the influence of Protestant Reformation of church structure and 'spiritual' authority upon the documents, and perceptions of their illegitimacy as constitutional reforms. This serves to further reinforce the success of the Bill, and highlights how this can be understood through contrast with earlier failed reform attempts.

Chapter 6

This final chapter of Part B strengthens the analysis of the Bill of Rights, through empirical analysis of two subsequent constitutional reforms: the Triennial Act and the Act of Settlement. This chapter demonstrates how the legitimate authority of the Bill underpinned and legitimised these constitutional reforms, which further entrenched the constitutional authority of parliament. This chapter also serves to highlight the influence of Protestant Reformation of church structure and 'spiritual' authority upon perception of the legitimacy of the constitutional settlement and reform provided by the Bill, and these subsequent constitutional reforms. This influence is shown to have been both explicit and implicit, through a reading of these documents facilitated by the framework provided in Part A.

CHAPTER 4

The Bill of Rights [1688]: constitutional restoration and reform

INTRODUCTION

'The Bill of Rights is rightly considered as one of the foundations of the British constitution. […][It] is the prime candidate for being […] the basic constitutional document of the United Kingdom'.[1] Despite having been enacted over three hundred years ago, the Bill of Rights remains a centrepiece of the statute books, one of the cornerstones of the modern British Constitution.[2] A quick glance at the document highlights the constitutional principles set down in law. These include restriction of Royal Prerogative in domestic law: 'That the pretended Power of Suspending of Laws or the Execution of Laws by Regal Authority without Consent of Parliament is illegal.'[3] As well as enshrining Parliamentary control over taxation: 'That levying Money for or to the Use of the Crown by pretence of Prerogative without Grant of Parliament for longer time or in other manner than the same is or shall be granted is Illegal.'[4] Further articles also protect free Parliamentary elections, Parliamentary speech and aspects of criminal procedure such as limitations on bail and empanelling juries.[5] The final article of the Bill enshrines the legal requirement for regular meetings of Parliament: 'And that for the Redress of all Grievances and the amending strengthening and preserving of the Laws Parliaments ought to be held frequently.'[6] The role of the Bill of Rights in shaping modern constitutional form, and practice, should not be underestimated. However, it should also be remembered that the British constitution is unwritten, or at least uncodified. Therefore, legal documents provide only half of the picture. The so called 'Glorious' Revolution, at the heart

[1] Geoffrey Lock, 'The 1689 Bill of Rights' (1989) 38 Political Studies 540, 540.
[2] Bill of Rights [1688], it should be noted that the Bill originated as English legislation prior to the formation of the United Kingdom in 1707.
[3] ibid, art 1 Dispensing Power (spelling modernised).
[4] ibid, art 4 Levying Money (spelling modernised).
[5] ibid, articles 8 Freedom of Election, 9 Freedom of Speech, 10 Excessive Bail, 11 Juries.
[6] ibid, art 13 Frequent Parliaments (spelling modernised).

of which lay the Bill, is as much a part of the modern political constitution as any legislative act. Indeed, the 'Glorious' Revolution often overshadows the Bill of Rights in constitutional history.

This chapter will address how the historiography of the 'Glorious' Revolution has presented the event, and within it the Bill of Rights, in the national (constitutional) consciousness. The chapter will demonstrate how differing historical perspectives have accentuated or hidden aspects of the Bill. One facet of the Bill can be considered to present a settlement to the constitutional crises through implementation of a conservative constitutional *restoration*, an alternative presentation of the Bill is of a constitutional *reform*. I argue that in order to fully understand the position and role of the Bill of Rights in both constitutional theory, and practice, both aspects have to be appreciated simultaneously. This chapter will demonstrate how perceptions of the legitimacy of the Bill to achieve both constitutional restorative settlement and constitutional reform – where other seventeenth-century attempts had failed[7] – can be seen to have been at least partially attributable to Protestant Reformation of church structure and 'spiritual' authority. First, the prevailing historiographical narratives will be presented. This will be followed by analysis of the Bill of Rights as constitutional restoration, and the influence of religion on perceptions of its legitimacy. As a contrasting counterpoint, the document is then analysed as constitutional reform, to understand how perceptions of the legitimacy of its reforming character could also have been influenced by religious thinking. This is before concluding that in order to fully understand the Bill, and its place in the 'Glorious' Revolution, and constitutional practice; both the *restoration* and *reform* aspects of this Janus-faced document need to be accounted for.[8]

[7] Two such failed attempts, the Petition of Right and the Levellers' An Agreement of the People are addressed in chapter 5.
[8] For a brief introduction to the Janus like characteristics of the Bill of Rights see: Steve Crawford, 'Janus-headed intaglio' (2017) 68(3) Northern Ireland Legal Quarterly 305, 312-315.

In analysing the Bill of Rights I directly engage with my research questions 1 and 3(B):

1: How can the concept of the Protestant individual and Protestant Reformation of spiritual authority and church structure be seen to have influenced the perception of the legitimacy Bill of Rights [1688]?

3: How can the influence of conceptions of church constitution and spiritual authority upon the perception of the legitimacy of manifestos for constitutional reform be understood, with reference to: (B) the Bill of Rights [1688]?

In answering these questions I will utilise the legitimacy theory outlined in chapter two including Weber's three pure types of legitimacy: Charismatic, Traditional and Rational/Legal.[9] As well as the four criteria I extrapolated from the wider literature governing individual and collective perception(s) of the legitimacy of authority: 1) Perceptions of individual and community treatment by authority;[10] 2) Perceptions of the fairness of procedures used by authority in dealing with individuals and the wider community;[11] 3) Perceptions of individual and collective dependence upon authority; 4) Feelings of justification of authority that this may breed.[12] All of these factors feed into individual and collective perception(s) of the legitimacy of authority. Positive experiences generate perceptions of legitimacy. Negative experiences result in perceptions of the authority's illegitimacy.[13]

[9] As identified and explained in: Max Weber, *Economy and Society* (Guenther Roth and Claus Wittich ed, 2nd edn, University of California Press 1978), 212-301, 311-308.

[10] See: Margaret Levi et al, 'Conceptualizing Legitimacy, Measuring Legitimacy Beliefs' (2009) 53(3) American Behavioural Scientist 354, 370-371; Cecilia Ridgeway, 'The emergence of Status Beliefs: From Structural Inequality to Legitimizing Ideology' in John Jost and Brenda Major (eds), *The Psychology of Legitimacy* (CUP 2001), 270-277.

[11] See: Mike Hough et al, 'Procedural Justice, Trust and Institutional Legitimacy' (2010) 4(3) Policing 203, 203-204; Jonathan Jackson et al, 'Why do people comply with the law?' (2012) 52 British Journal of Criminology 1051, 1062-1064; Tom Tyler, 'A Psychological Perspective on the legitimacy of Institutions and Authorities' in John Jost and Brenda Major (eds), *The Psychology of Legitimacy* (CUP 2001), 416-436.

[12] John Jost, Diana Burgess and Christina Mosso, 'Conflicts of Legitimation among Self, Group, and System' in John Jost and Brenda Major (eds), *The Psychology of Legitimacy* (CUP 2001), 364; Jojanneke van der Toorn et al, 'More than fair: Outcome dependence, system justification, and the perceived legitimacy of authority figures' (2011) 47 Journal of Experimental Psychology 127; Jojanneke van der Toorn et al, 'A Sense of Powerlessness Fosters System Justification' (2015) 36(1) Political Psychology 93, 94-96.

[13] Herbert Kelman, 'Reflections on Social and Psychological Process of Legitimization and Delegitimization' in John Jost and Brenda Major (eds), *The Psychology of Legitimacy* (CUP 2001), 54-75.

This will demonstrate how the Bill of Rights presented, simultaneously, an explicit constitutional restoration; and an implicit constitutional reform. Furthermore, it will be demonstrated how aspects of the legitimacy of the Bill could have been perceived to have been related to thinking stemming from the Protestant Reformation regarding the correct constitution of church and society. Namely, how Parliament asserted its power to settle the constitutional crisis through constitutional restoration and reform by drawing on the authority of its constitutional position as representing the nation. How this authority can be related to the Protestant theology concerning the role of the individual within the congregation, and the authority of spiritual officers having relied on recognition of this.[14] However, in order to understand how the two faces of the Bill of Rights have been variously obscured, a brief overview of the prevailing historiographical trends will first be outlined.

THE HISTORIOGRAPHY OF THE BILL OF RIGHTS

In this section three predominant schools of historical thought concerning the 'Glorious' Revolution, and within it the Bill of Rights, will be addressed. The first is Whig historiography and the second Revisionism; the third classification addressed is one that I shall term the third wave approach. This is characterised by a revisiting of the basic assumptions and approaches of the Revisionist school, and has produced a number of key works concerning the 'Glorious' Revolution in the last decade or so.

Whig history

Whig historiography provided the dominant interpretation of British constitutional history well into the twentieth-century (the only serious school of thought in opposition was Marxist historiography)[15] until the Revisionist school firmly established itself. The Whig constitutional

[14] For an overview of the Protestant Reformation thinking concerning the individual and the constitution of the church and spiritual society see chapter three.
[15] As an example see: Christopher Hill, *The Century of Revolution, 1603-1714* (2nd edn, Routledge 2001).

interpretation was dominant in both theory and practice until comparatively recently.[16] Indeed, it could be suggested that the academic response to the tercentenary marked the point at which Revisionism finally became the dominant historiographical approach.

Whig constitutional tradition was founded upon a grand narrative of constitutional evolution culminating in the contemporary modern democratic constitutional monarchy that exists today. The lineage of this system of government evolved directly from the events of the seventeenth-century. In this narrative the key events are those of the Civil War, Interregnum and Restoration, when parliament established the proper functioning of the Ancient Constitution through enshrining parliamentary supremacy in the constitutional structure. The common law was restored as the source of the monarchic power, and the ancient rights and liberties of the Englishman secured for ever more.[17] Within this narrative tradition the 'Glorious' Revolution tended to be seen as a corrective measure, an event of secondary importance.[18]

As a result of the focus of the narrative of Whig history being dominated by the events of the middle of the seventeenth-century, rather than the later 'Glorious' Revolution, the presentation of the Revolution itself took on a particular character. First, it was very much a domestic event, far removed from any continental strife. Second, it was a bloodless triumph, an event almost characterised by paperwork as much as any political discord or military undertakings. Third, and most importantly, it was an event in keeping with the traditional

[16] This is ably demonstrated by the Parliamentary tercentenary of the 'Glorious' Revolution, see: David Lewis Jones, *A Parliamentary History of the Glorious Revolution* (HM Stationery Office 1988); and the Introduction to Edward Vallance, *The Glorious Revolution* (Abacus 2006).
[17] For classical Whig presentations of seventeenth-century constitutional events see: George Barton Adams & H Morse Stephens (eds), *Selected Documents of English Constitutional History* (Macmillan 1914); SR Gardiner, *Constitutional Documents of the Puritan Revolution* (3rd edn, Clarendon Press 1951); Carl Stephen & Fredrick George Marcham (eds), *Sources of English Constitutional History* (Harper & Row 1937).
[18] For Whig interpretations of the 'Glorious' Revolution see: Lewis Jones, (n16); Lock, (n1); GM Trevelyan, *The English Revolution 1688-1689* (OUP 1968). For a general overview of Whig historiography of the 'Glorious' Revolution see: Lois Schwoerer, 'Introduction' in Her (ed), *The Revolution of 1688-1689* (CUP 1992).

conception of revolution: the turning of a wheel. By which a political revolution was understood as a return to a former state, in this instance the correct re-instating of the ancient constitution. This classical concept of revolution ties very well to legal theory addressing revolutions which also naturally tends towards viewing revolutionary events as corrective of prior political misapprehension or corruption.[19] The Whig grand narrative was able to present the 'Glorious' Revolution as little more than a parliamentary pageant. Where Catholic James II, deemed to have been subverting the ancient constitution through pursuit of arbitrary government by royal prerogative, was found to have vacated the throne and William Prince of Orange (along with his wife, James's daughter Mary) was asked to replace him.

With the 'Glorious' Revolution being portrayed as a secondary event to the Civil War, Interregnum and Restoration, the legal document at its heart, the Bill of Rights was placed centre stage, as evidenced by the opening quotation to this chapter. Furthermore, the 'Glorious' Revolution was portrayed as such a peaceful event that it was 'often called by men of that age the Happy Revolution'.[20] Perhaps because of this portrayal of the 'Glorious' Revolution as such a smooth dynastic transition, the legal document enabling this process, by necessity, became the focus of attention. 'As an affirmation of public law, it cannot be a matter of doubt; the Bill of Rights is the Revolution.'[21] On the one hand, the Whig grand narrative of constitutional history accentuated the political events of the middle of the seventeenth-century, somewhat obscuring the legal documentation. While on the other, Whig history highlighted the legislative aspects of the 'Glorious' Revolution and side-lined the political events. It may (somewhat cynically) be suggested that as a history constructed by the victors this was in-order to portray these actions in the best possible light.

[19] On the historical concept of revolution see: Reinhart Koselleck, *Futures Past* (Tribe tr, Columbia University Press 2004), chapter 3. On legal conceptions of revolution see: Paul Kahn, *The Cultural Study of Law* (University of Chicago Press 1999), 70-77.
[20] Stephen & Marcham (eds), (n17), 598.
[21] ibid.

> English history before and after 1688 could be written in terms of the constitution's persistence in the teeth of Stuart and Cromwellian attempts to overthrow it. The Whig need to distance 1688 from 1649 produced a historiography of the civil wars which vindicated the parliamentary cause while condemning the regicide[22].

Exposing this is what lay at the heart of the aims of the Revisionist movement.

Revisionist history

The Revisionist school of historiography gained prominence during the second half of the twentieth-century as Whig constitutional history gradually came under sustained challenge. Initially the challenge was directed within the framing of Whig historical focus: the middle of the seventeenth-century was addressed first. However, as the movement gained pace and became the dominant approach, the focus was expanded and began to re-assess the importance of the 'Glorious' Revolution. Perhaps the decisive moment came with the tercentennial in 1988. Even as Parliament celebrated a Whig presentation of the event, academic historians embarked upon a renewed campaign to comprehensively re-examine the Revolution in a co-ordinated manner.[23] This process began with a number of Revisionist symposia and conferences, and culminated in a series of overlapping publications. These works completely undercut Whig historiography, highlighting the 'Glorious' Revolution as a complex event worthy of study in its own right.[24]

The primary function of the Revisionist interpretation was to fracture the Whig grand narrative. This was undertaken on the scale of the centuries long evolutionary development of constitutional practice stemming from the so called Ancient Constitution; and on the level of individual events such as the 'Glorious' Revolution. The most immediately obvious result was

[22] JGA Pocock, 'The Significance of 1688' in Robert Beddard (ed), *The Revolutions of 1688* (Clarendon Press 1991), 277.
[23] For the celebration of a bloodless victory of constitutional form see: Lewis Jones, (n16); and the Introduction to Vallance, (n16), noted exceptions came from the Marxist influenced left wing of the Labour party including a junior backbench MP Jeremy Corbyn.
[24] As examples see: Robert Beddard (ed), *The Revolutions of 1688* (Clarendon Press 1991); Jonathan Israel (ed), *The Anglo-Dutch moment* (CUP 1991); Schwoerer (ed), (n18).

an interpretation that saw the domestic Whig understanding of the 'Glorious' Revolution buried under a European and colonially contextualised understanding of the event. No longer could the imperialist policies of Louis XIV's France be ignored, nor could William III's holding of the office of Stadtholder in the Dutch Republic. Finally, it was acknowledged (nearly unequivocally) that William's arrival with tens of thousands of troops had to be understood as an invasion.[25] Furthermore, Revisionists demonstrated that this was not an event limited to legal and political wrangling. The Revolution was shaped by, and in turn shaped many aspects of, civil society (at least in the higher echelons). The Church was one of the key players as '[a]lmost from the beginning of James II's reign, Anglican churchmen and their lay followers engaged in extensive and concerted civil disobedience'.[26] Finally the fiction of bloodlessness and a lack of revolutionary violence was dispelled.

> During the decisive months of late 1688 and early 1689, London was perceived in many ways a city under siege […] progress of William's troops through the south of England and the power vacuum left by James's departure from London […] spurred fears of a bloodied and unbridled reaction from Scotland or from Ireland.[27]

Although in general terms the worst extent of the violence was understood to have been primarily limited to Ireland, leaving the centre (England) largely untroubled by actual bloodshed.

There were perhaps two key interventions of the Revisionist approach to the understanding of the 'Glorious' Revolution. First, the fracturing of the unbroken continuum of the Whig constitution. Whereby the uncertain legal footings of the event were exposed; and the nature of much of the claimed conservative constitutional re-instatement was uncovered as

[25] See: Jonathan Israel, 'The Dutch role in the Glorious Revolution' in His (ed), (n24); Charles-Edouard Levillain, 'London Besieged?' in Jason McElligott (ed), *Fear, Exclusion and Revolution* (Ashgate 2006); Bruce Lenman, 'The poverty of political theory in the Scottish Revolution of 1688-1689' in Schwoerer (ed), (n18).
[26] Mark Goldie, The Political Thought of the Anglican Revolution' in Beddard (ed), (n24), 102.
[27] Levillain, (n25), 91.

radical re-engineering of political practice, clothed in supposed historical antecedence.[28] Second, the exposure of this manipulation as, at root, an aristocratic coup d'état. Parliamentarians came together and concocted a settlement for a constitutional crisis that claimed to adhere to established principles, while actually creating them as they went along.[29] Furthermore, this was supposedly undertaken solely by the Parliamentarians themselves, excluding any wider popular participation. What these two interventions achieved was an acknowledgement of the break in constitutional continuity, and the sea-change in constitutional practice, and state function, that it ushered in. What could not be adequately answered was the degree to which these developments were intended or not. A prime example of this issue is provided by historical scholarship in economics and political economy which identifies 1688 as the key moment in revolutionising state finance; but is unable to concretely ascertain as to what degree this was driven by intention or accident.[30]

For the purposes of this study the most useful intervention of the Revisionist turn in the scholarship addressing the 'Glorious' Revolution was the attention it drew to the role of religion in the process. The Whig narrative acknowledged a religious dimension, but limited it to the rights of Protestants, and the safeguarding of the national Church in legislation. The Revisionist approach highlighted the influence of Huguenot refugees from France;[31] the

[28] This is well articulated by viewing works suggesting a conservative influenced law-abiding or preserving approach such as: Howard Nenner, *By colour of law* (University of Chicago Press 1977); Richard Kay, *The Glorious Revolution and the continuity of Law* (Catholic University of America Press 2014), alongside republican influenced perspectives such as: Edmund Morgan, *Inventing the People* (WW Norton & Co. 1988); Lois Schwoerer, *The Declaration of Rights, 1689* (Johns Hopkins University Press 1981).
[29] Robert Beddard, 'The unexpected Whig Revolution of 1688' in His (ed), (n24); John Morrill, 'The Sensible Revolution' in Jonathan Israel (ed), (n24); WA Speck, 'William – and Mary?' in Lois Schwoerer (ed), (n18); Hugh Trevor-Roper, 'Epilogue' in Jonathan Israel (ed), (n24).
[30] For details of this debate see: Douglas North & Barry Weingast, 'Constitutions and Commitment' (1989) 49 (4) The Journal of Economic History 803; Barry Weingast, 'The Political Foundations of Democracy and the Rule of Law' (1997) 91(2) American Political Science Review 245; David Stasavage, *Public Debt and the Birth of the Democratic State* (CUP 2003); Gary Cox, 'Was the Glorious Revolution a Constitutional Watershed?' (2012) 72(3) The Journal of Economic History 567.
[31] As an example see: Robin Gwynn, 'Roger Morrice and Huguenot Refugees' in Jason McElligott (ed), *Fear, Exclusion and Revolution* (Ashgate 2006).

tensions and violence in Catholic Ireland and the discord in domestic religious policy;[32] the fear of James's Catholic heir, and the propaganda campaigns that this launched.[33] Furthermore, it opened up access to analysis of how the events might have played out on a more public stage, removed from a purely parliamentary arena.

> [T]he long-standing English equation of Popery with arbitrary government bolstered the determination to maintain native freedoms by keeping French and Popish influences at bay. Englishmen feared the political no less than the religious tyranny of the Counter-Reformation.[34]

Revisionism did not directly address itself to how Reformation thinking might have influenced the character of the constitutional settlement as both restoration and reform and reform. However, it did raise questions directly relating to how the Protestant Reformation, and subsequent religious thought, might be implicated in shaping the events of the 'Glorious' Revolution.

Revisiting the revisions: a third wave?

The third school of historiography I wish to address is what I have termed the third wave. Although theoretically within the umbrella of Revisionism, there are two primary aims of this scholarship that I feel require it to be treated as a separate enterprise for the purposes of my research. First, unlike the Revisionist scholarship outlined above, third wave works are typified by attempts to create a unified and coherent narrative structure of the 'Glorious' Revolution. Not a centuries spanning evolutionary narrative such as that of Whig historiography, but rather a deeply contextualised thick description of the 'Glorious' Revolution. One drawing on all available resources together, as opposed to addressing individual component parts. Second, as

[32] JR Jones, 'James II's Revolution' in in Jonathan Israel (ed), (n24); Gary De Krey, "Arbitrary Government" in Jason McElligott (ed), *Fear, Exclusion and Revolution* (Ashgate 2006); JGA Pocock, 'The Fourth English Civil War' in Schwoerer (ed), (n18).
[33] Steven Zwicker, 'Representing the Revolution' in Lois Schwoerer (ed), (n18). See also the Baby in the Warming pan conspiracy concerning James II male (Catholic) heir.
[34] Robert Beddard, 'Introduction' in His (ed), (n24), 6.

part of this thick description, these works are characterised by identification of widespread popular involvement in the 'Glorious' Revolution. This is in stark contrast to the Revisionist default position of presenting the events as an aristocratic coup d'état.[35]

Vallance suggests that both the Whig and Revisionist interpretations of the Bill of Rights err in their presentation of the settlement it affected. Whig historiography 'stressed […] the conditional nature of the English Parliament's offer of the Crown to William and Mary, emphasising the importance of the Declaration of Rights'.[36] The Declaration was drawn up by the Convention Parliament; later becoming the Bill of Rights, once William III was crowned and proper legislative procedure could resume. Whereas, 'Revisionist historians pointed to the vagaries of the Revolution settlement and scotched the idea that either the Declaration of Rights or the Bill of Rights placed conditions upon the acceptance of the Crown.'[37] It might be suggested that rather than mis-representing the settlement constituted by the legislative provision of the Bill, instead, the Whig and Revisionist perspectives offer only an incomplete picture. Yes, the Bill cannot be construed as having been a condition on the Crown being placed on William's head – he was after all at the head of an invading army. Yet, at the same time, the Bill claimed, and is shown to have operated in law, as if it were a condition of coronation: It established a principle that Parliament was supreme in a number of domestic constitutional matters. In order to fully appreciate this one has to be afforded a view of both the constitutional *restoration*, and *reform*, enacted by the Bill within the 'Glorious' Revolution.

Through undertaking research into the socio-political history of Early Modern England Harris has concluded that the top-down presentation of an aristocratic coup is misleading.

[35] As examples of this third wave approach see: Tim Harris, *Revolution* (Penguin 2007); Steve Pincus, *1688* (Yale University Press 2009); Vallance, (n16).
[36] Vallance, (n16), 12.
[37] ibid, 15.

Finding that the number of people involved in administrative government exceeded those in the electoral franchise,[38] he suggests:

> [T]o claim the Revolution came essentially from above and was the result of external factors is seriously misleading […] William was able to conquer England without fighting a major battle. It was not that he shattered James's power […] rather, he found James's power already shattered […] developments within England, from below, played a crucial role in James's fall and the eventual success of a revolution that was never simply dynastic or the result of a foreign invasion.[39]

It is not too hard to imagine that while William represented the de facto power after James fled, he would not have been willing to risk open warfare if it was avoidable. Therefore, Parliament held considerable legal and political power as well. 'The settlement of 1689 involved not only some degree of compromise but also a certain amount of fudging, lending itself to a plurality of readings as a result.'[40] The Revolutions' ability, and the ability of its settlement, the Bill of Rights 'to appear as all things to so many different types of people, of course, goes a considerable way towards explaining its success.'[41]

Pincus follows the threads of the questions raised by the post 1688 transformations of state finance. He seeks to provide an answer that suggests an awareness of the consequences of the settlement constructed by Parliament with regard to control over the public purse.[42] As a result he concludes that 'James's opponents were, by and large, revolutionaries, not reactionaries.'[43] Furthermore, Pincus challenges the traditional conception of revolution as an accurate label for the events of later part of the seventeenth-century. 'Against these traditional views, I suggest the Revolution of 1688-89 does indeed meet the theoretical standard of

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[38] Harris, (n35), 15-17. See also: Mark Goldie, 'The Unacknowledged Republic' in Tim Harris (ed), *The Politics of the Excluded, c. 1550-1850* (Palgrave Macmillan 2001); Joan Kent, 'The Centre and the Localities' (1995) 28 (2) Historical Journal 363; George Southcombe & Grant Tapsell, *Restoration Politics, Religion and Culture* (Palgrave Macmillan 2010).
[39] Harris, (n35), 240.
[40] ibid, 310.
[41] ibid.
[42] See: Steve Pincus, 'Neither Machiavellian Moment nor Possessive Individualism' [1998] American Historical Review 705; His, 'The Making of a Great Power' (2000) 5(4) The European Legacy 531; Pincus, (n35).
[43] Pincus, (n35), 6.

revolution.'[44] Similarly to Harris, examination of social (socio-economic) factors leads him to question the proposition of an aristocratic coup. 'Scholars have significantly underestimated the extent of the English popular involvement in the Revolution. Thousands took up arms in support of William. There were popular risings throughout England – as well as in Scotland and parts of Ireland.'[45] Although it should be noted other parts of Ireland and Scotland rose in support of James.

Pincus further suggests that the 'Glorious' Revolution can, therefore, be considered not merely as an authoritative constitutional settlement to the crisis of the seventeenth-century; but that economic thought of the time demonstrates that subsequent constitutional development was rooted in prior theory. Therefore, the development of the modern constitutional state takes on a pre-planned, as opposed to an accidental, character. The Bill of Rights – at the heart of the 'Glorious' Revolution – must therefore comprise both restoration and reform characteristics.

> Like so many of his contemporaries, James understood European politics in terms of a great struggle between two competing models of the modern state. Most in England believed that Lois XIV had perfected an absolutist and intolerant state focused on territorial empire. The […] [Dutch], by contrast, had come […] to represent a modern popular or mixed state committed to religious toleration and commercial expansion. James was unusual in the 1680s […] for his conclusion that English interests lay in supporting France and eviscerating the Dutch Republic.[46]

The state envisaged by the revolutionaries of Pincus' history was a modern trading nation built on the inherent wealth of labour, not land.

> Since at least the 1650s, English radicals had embraced the possibilities of commercial society […] [they] defended two propositions. First, […] property was primarily a human creation, not a natural endowment. Second, they claimed that a national bank would play a vital and constructive role in promoting national prosperity and […] national security.[47]

[44] ibid, 223.
[45] ibid.
[46] ibid, 323.
[47] ibid, 369.

This suggests that the reforms of state structure and function were built upon existing theoretical foundations. The enshrining of Parliamentary supremacy in the constitutional order had prior precedent. The justificatory writings for the 'Glorious' Revolution of John Locke may not have been re-writing history, as such. Rather they may have been echoing, and more widely circulating, a pre-planned notion of national reform.[48]

Within this third wave historiography it can be seen that a new and coherent narrative of the 'Glorious' Revolution can be found. Furthermore, it demonstrates that popular participation has to be considered. Alongside this, the character of the Bill of Rights also has space for reconsideration. By treating it as a restorative legal document of constitutional settlement, only half the story is told. By treating the 'Glorious' Revolution as a political revolution (reform) again only half a picture is revealed. Through regarding the Bill of Rights as a material artefact of (cultural) political constitution, a more complex picture accounting for both legal form and political practice – restoration and reform – is revealed, and a deeper, richer story can be told. This is what I shall now endeavour to do in the following parts of this chapter.

THE BILL OF RIGHTS, THE 'GLORIOUS' REVOLUTION AND THE CONSTITUTION

The key question to ask at this point, to set the frame of the following analysis, is where does the Bill of Rights sit within the 'Glorious' Revolution and within the constitution? The answer, for Whig scholars, was simple; as the opening quote of the chapter expressed. The Bill of Rights was the 'Glorious' Revolution, and the Revolution was the foundation of the modern constitutional monarchy. This is because the Whig Revolution was a traditional revolution: a rotation of the wheel back to a previous position. James II, in line with family tradition, had

[48] ibid, Pincus' radicals included Marchamont Nedham, Slingsby Bethel, Henry Robinson, Benjamin Worsley and Carew Reynell. The similarities between these suggestions and the social contract theory of John Locke, especially regarding property, are marked, see: John Locke, *Two Treatise of Government* (Peter Laslett ed, 3rd edn, CUP 2005), 285-353.

subverted the ancient constitution and infringed upon the rights and liberties of the people.[49] The Bill had simply corrected this political misapprehension, and re-instated proper legal and constitutional operation. For the Revisionists this was not the case.

Under Revisionists the 'Glorious' Revolution became an event at the heart of political constitutionalism. The presence of William of Orange at the head of an invading army; the 'absence' of James II; and the unconstitutional form of the Convention Parliament (self-assembled, rather than called by the Crown) dictated that politics led proceedings, and law followed in its wake to tidy up.[50] The result was that the Declaration of Rights, as opposed to its later legal form the Bill, took centre stage.[51] This is because the Declaration was the product of the political debate of the Convention, rather than the official stamping represented by the legislative Bill. The Convention was where the political unity, representing the people of the nation, assembled and constituted the settlement to the seventeenth-century crises. Indeed, some scholars draw attention to the Convention's character as that of a constituent assembly.[52] The revolutionary settlement 'reflected the political realities of the occasion […] the Convention, transformed by its own act into a regular Parliament'.[53] It was the political process that addressed questions of reform, which would have to include any conception of revolution recognisable as modern; the turning of the wheel to a new political and legal position (to use the same metaphor). What focus on the Declaration, over the Bill, resulted in was that the difference between the documents, although acknowledged, got lost in the wider picture. The 'Bill of Rights incorporated the Declaration with three major changes'.[54] As Harris states, one of these key changes was 'separating out those clauses that were declarative of old law and

[49] For details of Charles I's (James I's father) constitutional subversion see chapter 5.
[50] On issues of legal form and political practice, and treading the fine line between settlement and reform see: Morrill, (n29), 89-90; Nenner, (n28), 199.
[51] As examples see: Schwoerer, (n28), 9; Morgan, (n28) 107-120; Harris, (n35), 345-346, 353, 483.
[52] See: Morgan, (n28), 93-110, 118; Schwoerer, (n28), 27-28; Chris Thornhill, *A Sociology of Constitutions* (CUP 2011), 146.
[53] Schwoerer, (n28), 3.
[54] ibid, 27.

those that would require fresh legislation' this was in-order to echo the Petition of Right, and settle rather than reform the constitution.[55] 'The Convention's restraint meant that England did not achieve – and never would – the formulation and establishment of its constitution by popular sanction or authority separate from its government.'[56] While the Convention may have appeared as a potential constituent assembly, and the Declaration a formative constitutional document, this never transpired. Indeed, it could never have been the intention as this would be to read later historical developments such as the American and French Revolutions into English history a century earlier. However, in attempting to do this the actual product, the Bill of Rights, was either relegated to merely law, or lost to view.[57] The result was that the constitutional role of the Bill within the wider 'Glorious' Revolution was also obscured.

This legacy granted by historiographical currents can be seen in works of legal and political constitutional theory that address the 'Glorious' Revolution and Bill of Rights. From the legal perspective, following the traditional concept of revolution as a reversion, Berman found that the Bill

> gave four legal justifications for the revolutionary transformation of the absolute divine right monarchy of Tudor-Stuart England into a constitutionally limited monarchy under parliamentary control: first, that it had previously been a constitutionally limited monarchy, which James II had changed into "an arbitrary despotic power"; second, that James II having abdicated, the throne was vacant (the implication being that his Roman Catholic heir could not legally rule a Protestant England); third, that Prince William of Orange had made it possible for a new parliament to be elected and that he had agreed to the terms on which that Parliament had offered him the English throne; and fourth, that the constitutional limitations on the English monarchy, which William accepted, are rooted in ancient rights and liberties of the English people.[58]

Each of these justifications can be seen as concerned with reverting back to a former, correct, and legal antecedent constitution. In a similar vein Kay notes 'no one hoping to exercise

[55] Harris, (n35), 332. The Petition of Right is addressed in chapter 5.
[56] Morgan, (n28), 120.
[57] In Pincus' otherwise commendable *1688* the Bill of Rights does not feature in the Index, and the *Declaration of Rights* only twice (as a specific document).
[58] Harold Berman, *Law and Revolution, II* (Belknap Press 2003), 226.

political power wanted to be seen as an innovator, much less a revolutionary'[59] (presumably in the modern sense). This could be understood, as

> [t]he Revolution had put a great strain on the legal sensibilities of many of the men who made it. They felt it unfair to ask for more […] [t]his conviction, and an unwillingness to make a clean break with the prior constitutional authorities, for reasons, no doubt, of both prudence and principle, were widespread.[60]

This view is constructed through examining the explicit wording of the document, especially when compared to the Declaration. As Harris notes above, the Bill contained only the provisions of the Declaration relying on 'old' law. It does not account for how the Bill of Rights would integrate with constitutional development and practice. Nor does it account for how the Bill might relate to the constitutional, as opposed to purely legal, context of the wider seventeenth-century constitutional crisis.

From a political constitutional perspective, the view is slightly different due to the nature of the British Constitution. According to Loughlin, '[f]rom a constitutional perspective, the revolutionary settlement of 1689 presents itself as a conservative movement.[61] […] Nevertheless, although conservative in form, in impact these changes were radical; this was, indeed, the world's first modern revolution.'[62] The Bill of Rights, as a document, gets lost in the transformation of constitutional principle brought about by the 'Glorious' Revolution. 'Parliament now found itself in possession of the instruments of control. […] The establishment of these institutional checks significantly enhanced the legitimacy of the Crown's policies: restraints on power served the function of generating power.'[63] Following similar threads of political constitutionalism, but from a historical-sociological perspective, Thornhill similarly concludes 'the seventeenth-century constitution greatly expanded the practical power of the

[59] Kay, (n28), 12.
[60] ibid, 157.
[61] Martin Loughlin, *Foundations of Public Law* (OUP 2010), 259.
[62] ibid, 260. He is echoing the subtitle of Pincus, *1688: The first modern revolution*, (n35).
[63] ibid, 261. On this point see also His, *The Idea of Public Law* (OUP 2003), 106-107.

state. […] The growing (yet still incompletely realized) idea of parliamentary sovereignty acted as a principle that greatly simplified the operations of the state'.[64] Once again, the individual legal documents making up this constitutional development are overshadowed by the politics of constitutionalism. One slight exception to this is the work of Tomkins, who suggests:

> [T]he Bill of Rights […] can be seen as constituting the formal resolution of the troubles of the seventeenth-century.[65] […] As we shall see, however, it was quickly supplemented and strengthened in further legislation.[66] […] The Bill of Rights was supplemented by two further pieces of constitutional legislation: the Triennial Act 1694 […] and the Act of Settlement 1701.[67]

However, Tomkins' work is characterised by a very particular argument that shapes his understanding of the political constitutionalism he studies, his work is after all *Our Republican Constitution*. As a result, he reads the 'Glorious' Revolution, and its legal documents, as a part of a direct lineage stemming from the Civil War and Interregnum. The Bill of Rights 'cements the Republican constitutional order that the Long Parliament had started to lay down in the early 1640s[68] […] much of what Parliament had won after 1642 but had then lost after 1660 was now restored'.[69] This interesting and provocative approach fails to properly engage with the full context of the Revolution, and the restorative and reform enacted by the Bill of Rights. Against Tomkins' reading, parliament sought to enshrine a constitutional monarchy, not a republic. However, below I will engage with Tomkins' ideas to some extent. By reading the Bill specifically as a constitutional artefact, rather than simply as a legal document, I will highlight how this can locate the Bill fully within both the traditional *restoration* of the legal 'Glorious' Revolution and the *reform* of the 'Glorious' Revolution's political constitutionalism.

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[64] Thornhill, (n52), 146.
[65] Adam Tomkins, *Our Republican Constitution* (Hart 2005), 103.
[66] ibid, 104.
[67] ibid, 105. These two Acts are subject to analysis in chapter 6.
[68] ibid, 103.
[69] ibid, 104.

The Bill of Rights as constitutional restoration

The enacted structure of the Bill of Rights goes a long way to establishing a presentation of the document as a constitutional restoration. Dividing it into three parts: the first lays out grievances with the regime of James II, and finds that he has abdicated the throne; the second, lays out the rights and liberties of the people; the third addresses the limitations of the Crown, and oaths of allegiance to be taken by governmental officers, and a declaration to be made by those accepting the Crown. When viewing the Bill specifically as a constitutional restoration how might its legitimacy have been perceived in accordance with Weber's typology of legitimacy and the four criteria drawn from chapter two, and outlined above? Starting with the Weberian pure types of legitimacy the presentation of constitutional restoration offered in the Bill of Rights can be seen to appeal to both traditional and rational/legal legitimacy: there existed a proper constitutional procedure to be followed, and there were pre-existing laws that underpinned these procedures.[70] Unlike with previous attempts at constitutional reform such as the Petition of Right, the Bill did not formulate a requested acknowledgement of these pre-existing constitutional conditions.[71] Instead, the Bill of Rights presented them as the foundation upon which the Bill was constructed, but also upon which the Crown was subsequently offered to William and Mary. In the preamble the potential monarchs were crucially presented as 'their majesties, then called and known by the names and style of William and Mary, prince and princess of Orange'[72]. From the outset parliament placed itself in the supreme position of constitutional authority, over that of the *prospective* monarch; and it did so through an appeal to rational/legal legitimacy.

[70] For details of Weber's three pure types of legitimacy, and their interrelation see chapter two, and; Weber, (n9).
[71] The Petition of Right is subject to analysis in the following chapter.
[72] Bill of Rights (1689), (n17), 599.

When addressing the first and second criteria of perceptions of the fairness of treatment by an authority, on both individual and collective levels (as outlined above, and in chapter two), the heads of grievance provide insight into how presentation of discontent drove the construction of the document.

> Whereas the late King James II, by the assistance of divers evil counsellors, judges, and ministers employed by him, did endeavour to subvert and extirpate the Protestant religion and the laws and liberties of this kingdom by assuming and exercising a power dispensing with and suspending of laws and the execution of laws without the consent of parliament […]
>
> [B]y causing several good subjects being Protestants to be disarmed at the same time when papists were both armed and employed contrary to law[73]

It can be seen how arbitrary actions of monarchic governance were presented as contrary to existing law. Additionally, it is demonstrated how representations of differential treatment between Catholics and Protestants were highlighted. Further, how the treatment of Protestants was implicitly associated with having been against the majority population – the Protestant religion is connected directly to 'the laws and liberties of this kingdom'.[74] It can be suggested that this represented a clear attempt to create a feeling of unfair treatment on both collective and individual levels among the majority of the population. It also paints a picture of general practice, as well as highlighting specific monarchic policies, such as the employment of Catholics or the disarming of Protestants. It can be seen that when measured against both the first and second legitimacy criteria, perceptions of the illegitimacy of the monarchic regime were being presented.

With regard to the third and fourth legitimacy criteria: dependence on, and justification of an authority, the Bill of Rights also used claims of Weberian traditional and rational/legal legitimacy, in a sophisticated manner.

[73] ibid, 600.
[74] ibid.

> [B]y levying money for and to the use of the crown by pretence of prerogative for other time and in other manner than the same was granted by parliament […]
> [B]y violating the freedom of election of members to serve in parliament[75]

Here, the claim was that the monarchic regime of James II subverted constitutional procedure and broke the existing law. However, it was also suggested that James interfered with the membership of the proper authority: Parliament. This could be argued to break the connection of dependency upon, and justification of, monarchic governance. Furthermore, it denied any claim to the legitimacy of monarchic government by suggesting the pre-existing primacy of Parliament in the constitutional order.

These claims were further reinforced, as was the supposed strength of the Parliamentary position, during the second and third parts of the Bill of Rights. Parliament presented itself as the proper constitutional authority through connecting itself to the authority stemming from representing the nation, as well as claiming the purpose of parliament was to protect those they represented through the pre-existing and traditional laws. According to the Bill, advice from parliament to William:

> [D]id cause letters to be written to the lords spiritual and temporal being Protestants, and other letters to the several counties, cities, universities, boroughs, and Cinque Ports for the choosing of such persons to represent them as were of right to be sent to parliament to meet and sit at Westminster . . . , in order to [provide] such an establishment as that their religion, laws, and liberties might not again be endanger of being subverted[76] […]
>
> And they do claim, demand, and insist upon all and singular the premises [the claimed rights] as their undoubted rights and liberties[.][77]

This can be seen to call upon not only the proper legal form of parliament within the constitution, and the traditional existence of the rights and liberties of the subject, but to echo something else as well. It is here, in this explicit claim of representation, that I argue lies the

[75] ibid.
[76] ibid, 600-601.
[77] ibid, 601.

key change in constitutional authority found within the Bill of Rights. Furthermore, this change can be seen to have been influenced by thought stemming from the Protestant Reformation; and to inform perceptions of the legitimacy of Parliament to enact the constitutional settlement at the expense of the monarchy.

In the above passage, and in the preamble, Parliament claimed to be the representatives of the nation, and claimed authority for their actions derived directly from this. 'Whereas the lords spiritual and temporal and commons assembled at Westminster, lawfully, fully, and freely representing all the states of the people of this realm'.[78] Parliament claimed to be the representative(s) of the nation, not the monarch. This was a distinction not typical up to this point in the seventeenth-century. As a prime example think of the classic frontispiece of Hobbes' *Leviathan* where the individual people are depicted as making up the body of the sovereign king. Previously the monarch was understood as the embodiment of the nation, not Parliament. Here this was expressly challenged, Parliament claimed to be the true representatives, and the legitimacy of authority to act that came with this claim. The Bill even listed parliaments' component parts to show how all were represented within the body. I argue this shift was enabled through the dissemination of Protestant thinking regarding the proper constitution of the church. As addressed in chapter three, the Protestant Reformation made specific reforms to the constitution of the church structure and 'spiritual' authority. The individual was recognised as possessing the capacity for a direct relationship with God, the role of the spiritual authorities was to assist with this. As a result, the individual was recognised as an autonomous unit, and the aggregation of individuals within a congregation were given a role in the selection of their spiritual authorities. The legitimacy of said authorities was, at least partially, tied to their selection by the congregation. Parliament can be seen to echo this line of thought: Parliament was the legitimate constitutional authority because not only was it the true

[78] ibid, 599.

representative of the nation, not the monarch, but also because the nation had a role in choosing its representatives in Parliament.

In answer to my research questions, Protestant Reformation thought concerning the correct constitution of the church and spiritual society can be seen to potentially provide perceptions of the legitimacy of the Bill of Rights as a restorative constitutional settlement, and perceptions of Parliamentary legitimacy as the governmental authority to provide that settlement. In answer to question 1 the Protestant theological doctrine of individualism can be suggested to have influenced a perception of the claim to legitimacy made by Parliament as the proper representative of the nation. Furthermore, it can be understood to have provided an influence upon the perception of the Bill as a legitimate constitutional settlement as it was a product of Parliament. How the Protestant Reformation thinking concerning correct constitution can be understood to have potentially influenced perceptions of the legitimacy of the Bill of Rights as a constitutional reform, building upon the restorative settlement it provided, will be addressed in the next section.

The Bill of Rights as constitutional reform

When addressing the Bill of Rights as constitutional reform attention needs to be paid to implicit content of the document. As noted above by Harris (and others), before the Declaration of Rights was itself finalised and enacted in law as the Bill, any provisions requiring new legislative recognition were removed. The Bill therefore explicitly presented as a restoration of pre-existing constitutional law, and a reversion to correct constitutional form and practice. However, if the function of the Bill as an element of the constitution is assessed alongside its form as a statute then another story emerges. This is acknowledged by Tomkins in the strengthening of the Bill by subsequent legislation, and by other constitutional scholars as they weave the narrative of eighteenth-century constitutional development. As England lacked at this time, as Britain does to this day, a codified constitution, in-order to assess the character of

constitutional provisions attention must be paid to not only the contents of the document, but also to the function of the document in the constitutional system. The Bill of Rights had a marked impact upon the constitution, and I argue one not simply limited to strict legislative provisions. Furthermore, the legitimacy of the Bill as a constitutional reform, and the legitimacy of Parliament to undertake this reform through enacting the Bill, can be seen to have been influenced by their perceptions as filtered through, among other things, reconstitution of the church and spiritual estate in the wake of the Protestant Reformation.

> The preamble of the Bill of Rights reads as follows:
>
> Whereas the lords spiritual and temporal and commons assembled […] lawfully, fully and freely representing all the estates of the people of this realm […] present unto Their Majesties […] William and Mary[.][79]

As addressed above, much debate has unfolded as to whether William and Mary were required to accept the Bill as a condition of coronation. Certainly this passage suggests that this was the case; however, due to political and military realities it is hard to imagine that this was so.[80] Yet when taking into account the constitutional function of the document this is unimportant. The Bill represents a reality in which it was implicitly claimed that Parliament – as proper representative(s) of the nation – did cause the Bill to be approved by the then 'prince and princess of Orange'.[81] In other words, in a constitutional document Parliament claimed to have the authority to dictate constitutional provisions to (potential) monarchs. Whether at that particular instance this was the case is of little relevance when assessing the function of the constitution at a later date: the precedent was set, and enshrined in law.

Viewed through the framing of Weberian legitimacy theory this can be suggested to be an appeal to ration/legal legitimacy. Parliament claimed the pre-existence of proper

[79] Bill of Rights (1689), in George Barton Adams & H Morse Stephens (eds), *Select Documents of English Constitutional History* (Macmillan 1914), 462-463.
[80] As examples see: Harris, (n35), 240-241; Schwoerer, (n28), 9.
[81] Bill of Rights (1689) (n78), 463.

constitutional form and legal provision, and claimed to be following that procedure in the presentation and enactment of the Bill of Rights. Within this concept there was also an implicit appeal to tradition. This is in keeping with Weber's categorisation of pure types, and his recognition that these abstractions do not exist in isolation from each other in reality.[82] However, it is important to note that, as the following chapter will address in relation to the Petition of Right, Parliament had been making these claims for some time previously (arguably since the conception of Magna Carta and Parliament). Importantly, they had been made unsuccessfully. Monarchs had been the supreme constitutional power at virtually all points prior to this. Charles I had accepted the Petition, before almost immediately disregarding it and embarking on an eleven-year period of personal rule. What was different in the Bill of Rights was in the construction of the document, which created an implicit constitutional reform of parliamentary constitutional function. Rather than require recognition of the proper constitution from a monarch, Parliament claimed the correct constitution in the document *prior* to the recognition of the monarch; and this theme was repeated through the document.

> And whereas the said late king James the Second having abdicated the government and the throne being thereby vacant, His Highness the prince of Orange […] did (by the advice of the lords spiritual and temporal and divers principle persons of the commons) cause letters to be written to the [constituents and electors of parliaments for] […] choosing of such persons to represent them […] And thereupon the said lords spiritual and temporal and commons pursuant to their respective letters and elections being now assembled in a full and free representative of this nation, taking into their most serious consideration the best means for attaining the ends aforesaid [the issues raised in the heads of grievance], do in the first place (as their ancestors in like case have usually done) for the vindicating and asserting their ancient rights and liberties declare [there follows the rights claimed in the Bill][83] […]
>
> Said lords spiritual and temporal and commons assembled at Westminster do resolve, that William and Mary, prince and princess of Orange, be and be declared king and queen[84] […]

[82] See: Weber, (n9), 215-216.
[83] Bill of Rights (1689), (n78), 464.
[84] ibid, 465.

> All which Their Majesties are contented and pleased shall be declared, enacted and established by authority of this present parliament, and shall stand, remain and be the law of this realm[85]

It can be seen that Parliament placed itself centrally in the constitutional structure. Furthermore, Parliament claimed that all subsequent constitutional procedure was founded upon the authority of parliament as the proper representative of the nation.

Parliament did not claim a concession from the monarch to adhere to, or recognise the existence of, the proper constitutional form and practice, as had previously been the approach. Instead, parliament enacted the constitutional reform to reflect the existence of the constitution as they claimed it to have been. While the document presented a restoration, implicitly it enacted reform. Further constitutional practice demonstrated that this had indeed occurred. As Tomkins suggests, as do other scholars such as Loughlin, the Bill of Rights should be viewed in association with subsequent legislation such as the Act of Settlement.[86] This will be done in more detail in chapter six. However, in briefly commenting here, I argue that the subsequent legislative acts do not so much strengthen the constitutional settlement offered by the Bill of Rights, as Tomkins argues; but rather that the Bill is the explicit source and basis of the legitimacy of the substantive constitutional reform actions taken. Prior to the Bill of Rights monarchs had possessed the de facto power to over-ride parliamentary provisions for constitutional government. After the Bill this never again happened. The Act of Settlement not only famously established the freedom of the judiciary; it expressly dictated Parliaments' control of the line of succession. This is control over the very fabric of the monarchy itself. I argue this was only achievable because of the reform implicitly enacted by the Bill to constitutional practice.

[85] ibid ,468-469.
[86] As noted above, see Tomkins, (n65) 103-108. See also Martin Loughlin, *The British Constitution* (OUP 2013), 15-16.

The above analysis of the Bill of Rights as constitutional restoration demonstrates how legitimacy theory can assist in understanding how the document manifested certain perceptions of treatment by the governing authority, particularly in de-legitimising the regime of James II. The issue of the succession highlights how the Bill also used perceptions of the treatment of the populace by governmental authority to create a perception of the legitimacy of Parliament to establish reform of the constitution.

> And whereas it hath been found by experience, that it is inconsistent with the safety and welfare of this Protestant kingdom to be governed by a popish prince or by any king or queen marrying a papist, the said lords spiritual and temporal and commons do further pray, that it may be enacted that all and every person […] shall profess the popish religion, or shall marry a papist, shall be excluded and be forever incapable to inherit, possess or enjoy the crown and government of this realm[87]

Parliament drew on the perceptions of the illegitimacy of James II and his regime as having been directly connected to the Catholic faith in order to create a perception of the legitimacy of Parliament as possessing authority to interfere with monarchic succession. This can be seen to fit within the framing of legitimacy theory criteria three and four: perceptions of dependence (individually and collectively) upon an authority, and; feelings of justification for an authority that dependence may breed. Parliament implicitly created a perception of the legitimacy of its authority to reform the constitution by asserting its presence as an alternative governmental authority to the monarchy. Indeed, by claiming control over the monarchy. All of which was authorised by Parliaments' role as proper representative of the nation, as opposed to the monarch. The constitutional reform implicitly enacted in the Bill of Rights: the placement of Parliament as the supreme constitutional authority, was further strengthened at the end of the document. As part of the final declarations it is stated:

> II. And be it further declared and enacted by the authority aforesaid, that, from and after this present session of parliament, no dispensation by *non obstante* of or to any statute or any part thereof shall be allowed, but that the same shall be held void and of no

[87] Bill of Rights (1689), (n78), 468.

> affect, except in such case as shall be specially provided for by one or more bill or bills to be passed during this present session of parliament.[88]

This further reinforced the position of parliament as the supreme constitutional power in the creation and enactment of the Bill. In addition, it cemented that position in the operation of the constitution by enacting the provision that no changes could be made but those agreed by Parliament. Unlike previous attempts at constitutional reform these provisions held, and have continued to do so since. I argue it was the role of constitutional thinking stemming from the Protestant Reformation that assisted in allowing this to be the case.

Throughout this analysis of the Bill of Rights as constitutional reform it has been shown that parliament claimed authority as the representative of the nation. As is demonstrated in the next chapter, previous manifestos for constitutional reform such as the Levellers' An Agreement of the People had attempted to tap into the concept of the proper locus of constitutional authority as residing in the people. However, this had been perceived as too radical and had not generated sufficient belief in the legitimacy of the proposed reforms to gain popular support. What Parliament achieved with the Bill of Rights was a middle ground. First, an implicit expression of reform alongside an explicit constitutional settlement. Second, a claim to represent the nation, and repeated demonstrations of how parliament comprised elements of the three estates of the realm; the three estates were at the centre of religious understanding of the world as identified in chapter three. Unlike the previous failed reform manifestos, the Bill did not directly empower the people to change the constitution. Rather parliament claimed the authority of the national representative to enact law for the safety of the people. This can be understood as more similarly aligned to the reconstitution of the church under Protestant thinking, and the role of the individual, as part of the congregation, within Reformation

[88] ibid, 469.

structure.[89] The people, as a collective, had a role in selecting members of the Commons within parliament. Parliament then took this authority as representing the nation – beyond the strict limit of pure electoral accountability – and used it to exercise a power of government. As with the spiritual individual of the Protestant church, the political individual had a role to play in seventeenth-century constitutional government, but not the sole role, nor in isolation from the concept of the rest of the nation. This was not republican constitutional theory as deployed in the American and French Revolutions. This was Protestant theology informing cultural concepts of correct constitution, and the position of supremacy in exercising governmental power.

With regards to research question 1 it can be suggested that Protestant thought might have influenced the perception of parliament as the proper representative of the nation, as opposed to the monarch, because parliament possessed a direct connection to the people of the nation through their selection of members of the Commons. Regarding question 3 I argue that perceptions of the legitimacy of the Bill of Rights might have been, at least partially, influenced by the Bill being presented by Parliament to the monarch. This could have been understood, implicitly, as a correct constitutional reform because of the influence of Protestant reconstitution of church structure, and the echoes of this perceived in the role of parliament as representative of the nation and its connection to the people.

[89] As outlined in chapter three, see also for the relationship between the congregation and their spiritual authorities.

CONCLUSION

In conclusion, this chapter has demonstrated that the Bill of Rights can be argued to exist simultaneously as both constitutional *restoration* and constitutional *reform*. Viewed within the wider English constitutional crisis of the seventeenth-century, to achieve constitutional settlement was no mean feat. Part of the perception of the legitimacy of both the restoration, and reform, enacted in the Bill of Rights can be argued to have emanated from Protestant Reformation thinking concerning the correct constituted form of the church and spiritual society. The restorative facet of the document appealed to the legitimacy of the pre-existing law; in line with previous attempts at constitutional clarification and reform such as the Petition of Right. However, in the Bill of Rights the Protestant faith was also used to create an explicit perception of unfair and biased treatment of the people by the regime of James II. Through presenting itself as the proper representative of the nation at the expense of the monarch, Parliament created a perception of illegitimacy of the regime of James II through the taint of Catholicism. According to the four criteria of legitimacy theory derived from the work of Weber and subsequent developments in chapter two, this tallies with the first and second criteria: 1) Perceptions of individual and community treatment by authority;[90] 2) Perceptions of the fairness of procedures used by authority in dealing with individuals and the wider community.[91] The restorative character of the Bill can be understood as an explicit presentation of the illegitimacy of James II's regime to support parliament's finding 'whereas the said late King James the Second haveing Abdicated the Government and the Throne being thereby Vacant'.[92] With the explicit settlement of the constitutional crisis, and the Crown conveniently unoccupied, parliament then embarked upon an ambitious, and implicit, constitutional reform.

[90] As examples of the source material from which this principle is drawn see: Levi et al, (n10); Ridgeway, (n10).
[91] For sample literature see: Hough et al, (n11); Jackson et al, (n11); Tyler, (n11).
[92] Bill of Rights [1688], Recital that the late King James had abdicated the Government.

This capitalised upon a specific set of constitutional circumstances, and made good use of both legal documents and political constitutional practice.

The reform face of the Bill of Rights was subtler than the explicit restoration. However, by viewing the Bill in line with Weber's framing of legitimacy it can be seen that Parliament made an explicit appeal to the concept of rational/legal legitimacy: the existence of correct constitutional form and procedure. At first glance this was presented through a simultaneous appeal to what could be understood as a Weberian pure type of traditional legitimacy, but this would be inaccurate. Previous constitutional reform manifestos such as the Petition of Right (addressed in the next chapter) had been constructed as appeals to the legitimacy of traditional common law. However, constitutional practice demonstrated that merely claiming the pre-existence of the law and proper constitutional form did not make that how the constitution actually operated. Through understanding not only the legal document, but also the context of seventeenth-century constitutional operation, the implicit reform character of the Bill of Rights is revealed. First, Parliament placed itself in the position of constitutional supremacy through the construction of the document: portraying the Bill as a legal enactment of Parliament's having conditionally offered the Crown to William and Mary. This was as opposed to having claimed an acknowledgement of existing constitutional procedure from the monarch. Second, by analysing the construction of the Bill through the third and fourth criteria of legitimacy theory developed in chapter two, the impact of this construction upon potential perceptions of the legitimacy of the Bill itself, but also of Parliament to be able to enact it, are revealed. These criteria are: 3) Perceptions of individual and collective dependence upon authority; 4) Feelings of justification of authority that this may breed.[93] Drawing upon the disparity in treatment between Catholics and Protestants under the regime of James II, Parliament not only de-

[93] Jost, Burgess and Mosso, (n12), 364; van der Toorn et al, (n12) Journal of Experimental Psychology 127; van der Toorn et al, 'A Sense of Powerlessness Fosters System Justification' (n12).

legitimatised that regime but also presented itself as an alternative governmental authority. This was in addition to presenting itself as the correct constitutional legislative authority. The result was that through Parliaments' claim to be 'lawfully and feely representing all the Estates of the People of this Realm',[94] a perception of its legitimacy was created. This was further reinforced by parliamentary claims to have been securing future safe and fair treatment of the Protestant nation, by excluding Catholic association to the throne. Not only did parliament de-legitimise James, and all future claimants from that Stuart line, it created the perception of an alternative governmental authority. This removed any feelings of dependence upon, and justification of, James's regime. Simultaneously it also created a serious constitutional reform, Parliamentary control over the line of succession; under the guise of constitutional restoration.

In addressing my research questions, I have demonstrated how perceptions of the legitimacy of the Bill of Rights, and perceptions of the constitutional legitimacy of Parliament to enact the Bill, may be understood to have been influenced by religious thinking stemming from the Protestant Reformation. In answer to question 1: How might this Protestant doctrine influence perceptions of the legitimacy of constitutional authority through the reform of church structure and spiritual authority? I have argued that Parliament was able to create a perception of its legitimacy as the supreme constitutional authority by echoing elements of the reform of the constitution of the church and spiritual sphere outlined in chapter three. Where the Protestant Reformation recognised the autonomous spiritual individual and reconstituted the church around this concept, Parliament claimed, in the Bill, to be the proper representative of the nation. Included in this was an element of Parliaments' direct connection to the people through elections to the Commons. However, unlike previous radical reform manifestos such as the Levellers' An Agreement of the People, Parliament did not purely claim to directly represent the people, rather all of the estates of the nation. As with Protestant reconstitution of

[94] Bill of Rights [1688], preamble.

'spiritual' authority, the role of the autonomous individual in the authorisation of their representatives was recognised. However, the collective individuals were not presented as the undisputed and isolated sources of constitutional authority, as with Leveller thought and republican constitutional theory deployed a century later in the American and French Revolutions.

As seen in the following chapter, exclusive claims to direct popular representation and constituent power would have appealed to, and been understood and perceived as legitimate by, decentralised Congregationalist Puritans on the societal fringe. However, this same approach would alienate centralised church authorities. Through adopting a claim to represent the estates of the nation, as opposed to purely the people, Parliament could appeal to, and be perceived as a legitimate authority by, Congregationalists and more centrally structured (and socially mainstream) Protestants such as Presbyterians and even Anglicans.[95] As Berman notes:

> [T]he religious settlement matched the political settlement […] As Republican Whigs and divine-right monarchist Tories came together to establish a political system of parliamentary superiority over the Crown, so did puritan nonconformists and orthodox Anglicans come together to establish a religious system in which the Protestant Church of England remained the nation's established church but Presbyterians, Independents, Congregationalists, and other Trinitarian Protestant denominations were "tolerated,"[.][96]

Implicitly echoing this sentiment in its appeal to represent the estates, as opposed to the people, of the nation Parliament allowed for the establishing of a popular perception of its legitimacy. This was achieved by allowing conservative Anglicans to be reassured by the implied presence of a centralised authority: the Church of England as one of the estates. However, more radical republicans, and Puritans, would still be able to perceive a claim to representation of the people

[95] For details on the Protestant conceptions of the three estates society of the world see chapter 3.
[96] Berman, (n58), 228.

through the dominant position occupied by the Commons within the parliamentary construction of the Bill of Rights.

In addressing question 3 (B) How can the influence of the concept of the Protestant individual and the Protestant Reformation of church structure and spiritual authority be understood to have influenced the perception of the Bill of Rights [1688] as a legitimate constitutional settlement to the 'Glorious' Revolution, and independently, as a successful reform of constitutional authority? With regards to the restorative presentation as a constitutional settlement, it has been shown how Parliament explicitly called upon the treatment of Protestants at the hands of James II to de-legitimise his regime. Furthermore, linking this to James's 'endeavour to subvert and extirpate the Protestant Religion and the Laws and liberties of this Kingdom'[97], this was then utilised in the parliamentary claim that it possessed the authority to interfere in the line of succession. This authority was claimed through Parliaments' position not only as the supreme constitutional authority, but also as the representative of the nation. 'And whereas it hath been found by Experience that it is inconsistent with the Safety and Welfare of this Protestant Kingdom to be governed by a Popish Prince . . . the said Lords Spiritual and Temporal and Commons do further pray that it may be enacted'.[98] Through the explicit claim of the pre-existence of Parliamentary constitutional supremacy, Parliament implicitly enacted constitutional reform whereby that body could supersede the monarchic wishes and alter the line of succession; authorised by their position as the constitutional representative of the nation. Similar principles can be seen at play when considering the Bill independently as a constitutional reform. The recognition of the autonomous individual, and their association to parliamentary authority through a capacity for an individual relationship to government (selection of commons members), authorised

[97] Bill of Rights [1688], Heads of Declaration.
[98] ibid, Declaration upon acceptance of the Crown.

Parliament, as the nation's representative, to enact a constitutional settlement to safeguard the Protestant faith. The Protestant faith which was represented as an intrinsic aspect of national character and identity. At the same time, this settlement implicitly enacted constitutional reform whereby Parliament claimed the position of supreme governmental power under the constitution, in-order to further safeguard the people.

As this chapter has demonstrated, for a full understanding of the Bill of Rights and its place both in the constitutional law and political practice of the seventeenth-century, a broad approach to the study of constitution is required. Through appreciating a cultural aspect to constitution – including the influence of Protestant Reformation of church structure and 'spiritual' authority – a deeper and more complex texture to constitutional practice is revealed. A focus purely on the legal documentation only allows a limited appreciation of the nature, not only of the documents themselves, but also of the 'Glorious' Revolution, and the wider seventeenth-century constitutional crisis. This was the primary shortfall of Whig historiography; if one filters out the self-aggrandising Parliamentary propaganda. On the other hand, if focus is directed solely upon the political manoeuvring of the so called 'Glorious' Revolution, then the finesse of the constitutional role of the Bill of Rights is occluded. The revolution becomes separated from subsequent eighteenth-century constitutional development, which is reduced to a mere accident of history. In a reductively simplified reading this was the pitfall of the Revisionist approach. However, if one takes a position influenced by public law, as understood through a method of political jurisprudence, then both the legal documents and the political practice of the constitution are simultaneously revealed.[99] It can then be seen how previous failed manifestos for constitutional reform informed the Bill. Furthermore, how subsequent legislative developments were directly related to, and authorised by, the Bill as a

[99] On Public Law and political jurisprudence see: Martin Loughlin, *The Idea of Public Law* (OUP 2003), 134-140; His, *Foundations of Public Law* (OUP 2010), 216-222; His, *Political Jurisprudence* (OUP 2017).

successful and legitimate constitutional *restoration* and *reform*.[100] Indeed, this is what is undertaken in the next two chapters: chapter five addresses failed reform manifestos the Petition of Right and the Levellers' An Agreement of the People; chapter six addresses subsequent legislative reforms the Meeting of Parliament (Triennial) Act and the Act of Settlement, and their direct connection to the Bill of Rights.

[100] Through understanding constitutional reform manifestos (both failed, and successful) as artefacts of constitutional culture one can also draw upon a wider array of materials for the consideration of constitutional form than are available in the scholars of a narrow constitutional construction of constitutional legislation. This is expressly visible in chapter 5, and implicit throughout my thesis.

CHAPTER 5

Failed constitutional reform manifestos of the seventeenth-century: The Petition of Right (1628) and the Levellers' An Agreement of the People (1647)

INTRODUCTION

Following the analysis of the Bill of Rights in the previous chapter, a negative proof of concept will be provided through analysis of the Petition of Right and the Levellers' An Agreement of the People. Both of these documents will be located within the context of the constitutional tensions and Civil War that came to dominate the first half of the English seventeenth-century. It is my argument that both of these documents can be considered as failed constitutional reform manifestos; and that aspects of this failure can be attributed to a perceived lack of legitimacy for the constitutional reforms attempted. Furthermore, I argue that a reason for the perceived lack of legitimacy can be attributed to the influence of religious thinking stemming from the Protestant Reformation of church structure and 'spiritual' authority. The dominant focus within historical analysis of both the Petition and the Agreement revolves around power, the power of financial supply and the power of the army leadership. My intention is to supplement this analysis by addressing the topic of legitimacy. This is not to ignore the questions of power, but to add depth and texture to the narrative and historical understanding.

The Petition of Right was presented to Charles I by Parliament in June 1627/8. The stated aim of the document was to obtain a declaration from the king 'that your Majesty would be so graciously pleased, for the safety of your people, to declare your royal will and pleasure, that in the things aforesaid all your officers and ministers shall serve you, according to the laws and statutes of this realm'.[1] The laws that the Petition charged the king to recognise, and compel his governmental officers to obey, were presented in the preceding ten articles. They

[1] Petition of Right (1628) as reproduced in George Barton Adams & H. Morse Stephens (eds), *Select Documents of English Constitutional History* (Macmillan 1914), 342.

concerned, primarily, the correct levying of finance, through parliamentary procedure (articles 1,2,10); the right to personal freedom, and the enjoyment of personal property (articles 3,4,5,8); imposition of martial law and the billeting of military personnel in private dwellings (articles 6,7); and abuses of power under the royal prerogative (article 9). As the above quote suggests the tone of the document was deferential, and Parliament claimed to be seeking confirmation of pre-existing law. However, the reason for the Petition being presented was that Charles had been ruling according to his interpretation of the constitution which held that the Crown was the supreme constitutional authority, and above the common law espoused in the Petition. Charles did consent to the Petition of Right, however, shortly after he prorogued parliament and ruled through prerogative powers for next eleven years. When unrest broke out in Scotland, Charles recalled Parliament shortly before the outbreak of Civil War in the early 1640s.

The Levellers' An Agreement of the People was presented at the Putney Debates in the aftermath of the Civil War as the New Model Army considered the nature of the post war settlement; shortly thereafter Charles I was to be beheaded, and Cromwell declared a Commonwealth. The document contained a clear enunciation of a formula for the total re-constitution of government. Most surprisingly, it derived its authority for such an endeavour from the very people of the nation:

> And because we are confident that in judgement and conscience you hazarded your lives for the settlement of such a just and equal government that you and your posterities and all the freeborn people of this nation might enjoy justice and freedom […] do proceed from the want of the establishment both of such certain rules of just government and foundations of peace as are the price of blood and the expected fruits of all the people's cost; therefore in this 'Agreement' we have inserted the certain rules of equal government under which the nation may enjoy all its rights and freedoms securely.[2]

[2] An Agreement of the People (1647) as reproduced in The Levellers, *The Putney Debates* (Philip Baker ed, Verso 2007), 58.

The Levellers' vision for the future governance of the nation subject to the will of the people was to be founded on four basic principles that the re-constitution of the English government would be grounded in. These were proportional representation in Parliament (article 1); the dissolution of the Rump Parliament, which was the remains of the last Parliament called by Charles I prior to the Civil War (article 2); that Parliament should be elected every two years (article 3); and that at all times the constituted power of parliament would be inherently subject to the power of the people as its constituents (article 4). All governmental authority in this constitutional vision was to rest with Parliament: the monarchy (and the House of Lords) were to be dissolved. This total re-ordering of constitutional government proved too radical for the time, and was defeated by the Army leadership at Putney. Elements of this reform manifesto can be seen to have been echoed in the supremacy of parliament established in the Bill of Rights. However, the truly radical nature of the proposals can be measured against the Restoration of the monarchy under Charles II in 1660, and the retention of the monarchy in 1688.

In order to fully appreciate the nature of these reform manifestos this chapter will proceed under the following structure. The first section of the chapter outlines the general historiographical trends in the study of the seventeenth-century constitutional crisis. This will demonstrate how the prevailing approaches have shaped attention to, and understanding of, the Petition of Right and the Levellers and their An Agreement of the People. Furthermore, it will show how focus only on specific aspects of constitutional history prevents the full picture of constitutional law and political practice being assembled into a coherent overarching perspective of constitutional culture. This is to emphasise analysis of the failure of both manifestos that can be associated with their perceived lack of legitimacy; and the aspects of this that can be attributed to the influence of religion. This facilitates an enrichment of the narrative through appreciation of legitimacy, alongside the existing analysis of power.

The second section of the chapter directly addresses both the Petition of Right and An Agreement of the People through documentary analysis. This is undertaken with recourse to the legitimacy theory outlined in chapter two, which comprises Weber's three pure types of legitimacy: Charismatic, Traditional and Rational/Legal.[3] As well as the four criteria I extrapolated from the wider literature governing individual and collective perception(s) of the legitimacy of authority: 1) Perceptions of individual and community treatment by authority;[4] 2) Perceptions of the fairness of procedures used by authority in dealing with individuals and the wider community;[5] 3) Perceptions of individual and collective dependence upon authority; 4) Feelings of justification of authority that this may breed.[6] All of these factors feed into individual and collective perception(s) of the legitimacy of authority. Positive experiences generate perceptions of legitimacy. Negative experiences result in perceptions of the authority's illegitimacy.[7]

Analysis of the Petition of Right, and An Agreement of the People directly answers aspects of two of my research questions. This is achieved by addressing how the framing of the documents may have influenced perceptions of their legitimacy, and the legitimacy of the two sides of the constitutional conflict of the 1620s and 1640s. The relevant research questions are:

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[3] As identified and explained in: Max Weber, *Economy and Society* (Guenther Roth and Claus Wittich ed, 2nd edn, University of California Press 1978), 212-311.

[4] See: Margaret Levi et al, 'Conceptualizing Legitimacy, Measuring Legitimacy Beliefs' (2009) 53(3) American Behavioural Scientist 354, 370-371; Cecilia Ridgeway, 'The emergence of Status Beliefs: From Structural Inequality to Legitimizing Ideology' in John Jost and Brenda Major (eds), *The Psychology of Legitimacy* (CUP 2001), 270-277.

[5] See: Mike Hough et al, 'Procedural Justice, Trust and Institutional Legitimacy' (2010) 4(3) Policing 203, 203-204; Jonathan Jackson et al, 'Why do people comply with the law?' (2012) 52 British Journal of Criminology 1051, 1062-1064; Tom Tyler, 'A Psychological Perspective on the legitimacy of Institutions and Authorities' in John Jost and Brenda Major (eds), *The Psychology of Legitimacy* (CUP 2001), 416-436.

[6] John Jost, Diana Burgess and Christina Mosso, 'Conflicts of Legitimation among Self, Group, and System' in John Jost and Brenda Major (eds), *The Psychology of Legitimacy* (CUP 2001), 364; Jojanneke van der Toorn et al, 'More than fair: Outcome dependence, system justification, and the perceived legitimacy of authority figures' (2011) 47 Journal of Experimental Psychology 127; Jojanneke van der Toorn et al, 'A Sense of Powerlessness Fosters System Justification' (2015) 36(1) Political Psychology 93, 94-96.

[7] Herbert Kelman, 'Reflections on Social and Psychological Process of Legitimization and Delegitimization' in John Jost and Brenda Major (eds), *The Psychology of Legitimacy* (CUP 2001), 54-75.

2: How might the concept of the Protestant individual and its challenge to the Catholic doctrine of papal hierarchy be understood to have impacted upon perception of the legitimacy of constitutional authority, in relation to: (A) divine right monarchic government?

3: How can the influence of conceptions of church constitution and spiritual authority upon the perception of the legitimacy of manifestos for constitutional reform be understood, with reference to: (A) the Petition of Right (1628) and the Levellers' An Agreement of the People (1647)?

The results of this analysis will be used to understand how and why both the Petition and the Agreement can be considered to be failed constitutional reform manifestos. Furthermore, how influences of religious thought contributed both to their failures as constitutional reform manifestos; and perceptions of the illegitimacy of Parliament to enact reform in the Petition, and the Levellers in their Agreement.

The final conclusions presented are that the Petition of Right failed due to perception of it as a conservative re-statement of an existing legal regime in which de facto power was held by the monarch, not by parliament, as the Petition implied. Furthermore, that the conservative framing of the Petition by Parliament played into the hands of religious influence upon perceptions of the legitimacy of divine right monarchy. Whereas, the Levellers' An Agreement of the People was too radical in the total re-constitution of government that it proposed. As a result, the Levellers failed to generate sufficient belief in the legitimacy of either their movement, or the specific reforms of the Agreement. This is, somewhat paradoxically, because of their association to radical Puritanism, and their belief (expressed in the Agreement) in secular government.

HISTORIOGRAPHY

As seen in the previous chapter addressing the Bill of Rights, prevailing historiographical trends exert strong influences over how events and documents are understood. In this section an overview of the dominant schools of historical thought concerning the first half of the English seventeenth-century, and their treatment of the Petition of Right and the Levellers' An Agreement of the People will be provided. The first historiographical tradition is that of Whig history, familiar from the previous chapter. However, the Levellers were largely excluded from this narrative so the classical history of the Levellers will be provided. Following this the Revisionist approach to the historiography of the 1620s and 1630s, and the Levellers, will be presented. This will demonstrate how the Civil War came to dominate the Revisionist focus, and how the study of the Petition and the Agreement has been shaped by this reorientation.

Whig historiography: the classical parliamentary tradition

The designation Whig derives from one of the original English political parties. The Whigs (proto-Liberals) were the dominant political force from the late 1680s throughout much of the eighteenth-century. 'In the Whig view of history […] Parliament played a heroic role in the "struggle for the constitution".'[8] This was the traditional historical account of the constitutional developments of the seventeenth-century, evolving into full-blown parliamentary democracy in the eighteenth century. In this narrative the seventeenth-century saw the unfolding of a grand quest where Parliament defended the rights of the individuals against monarchic absolutism. This included the coordination of a great march towards peaceful rule and prosperity from the assent to the throne of James I until the closing (and wholly peaceful) act of the so called 'Glorious' Revolution. This was to remain the official story well into the twentieth-century.[9] It suggested that through a campaign of gradual resistance and corrective direction, governmental

[8] Norah Carlin, *The Causes of the English Civil War* (Blackwell 1999), 85.
[9] For overviews of the Whig perspective and the eventual rise of Revisionist historical perspectives see generally: ibid; Ann Hughes, *The Causes of the English Civil War* (Macmillan 1991), 80-81.

ministerial subversion of the ancient constitution was halted and legally prevented. The result was the gradual realignment of governmental power, and constitutional focus, away from a monarchic dominance towards a model that centralised Parliament, subsuming within it the Crown-in-Council.

Hulme, representing this perspective, writes in a parliamentary focused tone of common sense resolution and constitutional development. '[The Commons] must have something more substantial than a royal promise to guard against illegal actions of his majesty's ministers in the future.'[10] The blame is placed on ministers, not on the monarch. However, legal structures must be put in place as a logical guarantee against further subversion of the law on the part of said ministers. 'The commons […] were willing to trust their king, but they wanted Magna Carta and the old laws not only confirmed […] but also explained, so that posterity would be protected as they had not been on numerous occasions.'[11] The Whig narrative, focusing on the parliamentary perspective – and particularly the Commons – necessarily engaged primarily with domestic issues. Therefore, the focus became the political subversion of the law. The Commons was portrayed as defending the common law constitutional model, under which the common law was supreme, and the Crown (and its prerogative powers of governance) subject to the common law.

Within this historiography the Commons acted as a unified body against the evil ministerial councillors of Stuart monarchs. Despite their best efforts Civil War became necessary to break the Crown's political will, and subsume all powers of governance under the common law. This view proved unsustainable under rigorous academic scrutiny.[12] However, the narrative style which presented Parliament as a voice of reason against arbitrary monarchic

[10] Harold Hulme, 'Opinion in the House of Commons on the Proposal for a Petition of Right, 6 May, 1628' (1935) 50(198) The English Historical Review 302, 302.
[11] ibid, 302-303.
[12] See: Carlin, (n8), 85-89; Hughes, (n9), 80-81.

governance, and the idea of an evolutionary trajectory, remained a strong presence in historical analysis. Even in rejecting a strictly Whig perspective, to open up causative analysis, Harrison finds the parliamentary perspective to be central; the lure of the evolutionary perspective too strong. However, his historical view does include the expansion of governmental operation, and within it the increasing role of Parliament seen under the Tudors. He also acknowledges a need for a tighter framing of the argument. Positing the source of the constitutional tensions of the 1620s as having been parliamentary procedure, and where ultimate control of parliamentary protocol and process might have been found.[13] What is still noticeable is rejection of a full Revisionist perspective. While the details of the argument are precise and technical in nature, they are still part of a wider story of the emergence of Parliament (particularly the Commons) as a full player in constitutional government. The result of this is the assertion of the supremacy of the common law over the political power of the monarch: ancient constitution over royal prerogative.

In analysing the central tenets of the Whig historical view, and the key foundation blocks that it was built upon, critique has addressed the Whig reliance on the parliamentary (Commons) understanding of history in the seventeenth-century. The dominant Commons narrative was of the immemorial nature of the common law, its timeless foundation as the supreme law of England. As Hughes suggests, 'commentators have taken seventeenth century appeals to tradition too much at face value. History was used as 'a normative past' whose values justified much practical resistance to present-day authority.'[14] History was a political tool, a political battleground for constitutional control. The seventeenth-century saw a series of constitutional conflicts, and acute crises, which resulted in the emergence of a dominant

[13] G Harrison, 'Abuses of Power and Power Itself' (1988) 7(1) Parliamentary History 1.
[14] Hughes, n 9, 80; for further discussion of the role of a developing concept of historical antecedence in Stuart constitutional debate see: Glenn Burgess, *The politics of the Ancient Constitution* (Macmillan 1992); His, *Absolute Monarchy and the Stuart Constitution* (Yale University Press 1996); JGA Pocock, *The Ancient Constitution and the Feudal Law* (CUP 1957).

doctrine. It was not a re-statement of the existing supremacy of the ancient common law constitution, a position which would see the Petition of Right as re-statement of pre-existing law. From a struggle for dominance between a political theory of royal supremacy and monarchic divine right, and legal theory and the supremacy of the common law, arose constitutional principles in which law became the central foundation. However, they could never be divorced from political practice. Revisionist historiography allowed this to be seen. Highlighting that the Petition was not part of an interlinked evolutionary process, but an individual site of contestation, that later became a way-marker in a larger conflict.[15]

Classical Leveller historiography

The Levellers have been subject to numerous distinct historical treatments. It should be noted that the Levellers were never integrated into Whig history. Their platform was considerably more radical and democratic than the Whigs, therefore, could be argued to show them in a bad light. Furthermore, they never presented a serious entry into Parliamentary and legal discourse; apart from at the Putney Debates, a distinctly un-Parliamentary forum. As a result, the Levellers were largely swept under the rug until the twentieth-century, before they finally became the centre of their own distinct historical scholarship in the early twenty-first century.[16]

The Levellers re-entry into twentieth-century historical scholarship was driven by theological histories of the radical Puritan communities (predominantly of the American colonies). As Vallance states:

> American liberal historiography of the 1930s and 1940s saw the example of church covenants as central to the development of the Leveller political ideas […] [i]n this

[15] For further critique of the Whig history of the 'English Revolution', and the use of a religious influence in this critique see generally: Harold Berman, *Law and Revolution, II* (Belknap Press 2003), 199-220.
[16] As examples see: Geoff Kennedy, *Diggers, Levellers and Agrarian Capitalism* (Lexington Books 2008); Philip Baker & Vernon Elliot (eds), *The Agreement of the People, the Levellers and the Constitutional Crisis of the English Revolution* (Palgrave Macmillan 2012); Rachel Foxley, *The Levellers* (Manchester University Press 2013); John Rees, *The Leveller Revolution* (Verso 2016).

> symbiotic relationship […] church covenants that bound congregations together were seen as offering the blueprint for […] Levellers Agreements.[17]

These works focused on the role of spiritual belief and discipline in the founding of radical Puritan communities. In this narrative the depravity and sin of seventeenth-century life – and monarchic and Parliamentary despotism and persecution of Puritans – led to these communities isolating themselves politically. Their purpose was to establish Godly communities founded upon rigorously enforced spiritual discipline for the salvation of the faithful. Through entanglement in this narrative, the Levellers were side-lined from political history. Instead they became a curiosity, at best a potential template for these religious communities to be writ large on a quasi-national scale, but never a serious presence in seventeenth-century English constitutional reform. The Godly Puritans were a vociferous, but minority group.[18] It was not until the rise of the Revisionist movement that the Levellers found their place in political history. However, this was still marginal, once again wrapped up with the wider platforms of Godly Puritan radicals.

Revisionist historiography: the new orthodoxy?

The Revisionists began to turn their attention to the seventeenth-century English constitutional narrative in the latter half of the twentieth-century. Subsequently becoming the dominant paradigm.[19] It is incorrect to suggest a single Revisionist perspective. At the heart of the Revisionist movement lies the recognition of the futility of providing a single over-arching historical narrative. Instead, focus needs to be addressed to specific points and themes. Each

[17] Edward Vallance, 'Oaths, Covenants, Associations and the Origins Of the *Agreement of the People*' in Philip Baker & Vernon Elliot (eds), *The Agreement of the People, the Levellers and the Constitutional Crisis of the English Revolution* (Palgrave Macmillan 2012), 33.
[18] On this general historiographical trend and the Levellers place within it see: Diane Parkin-Speer, 'John Lilburne' (1982) 37 Books at Iowa 54; and generally, Ian Gentles, 'London Levellers in the English Revolution' (1978) 29(3) Journal of Ecclesiastical History 281; Vallance, (n17); Elliot Vernon & Philip Baker, 'Introduction' in Philip Baker & Vernon Elliot (eds), *The Agreement of the People, the Levellers and the Constitutional Crisis of the English Revolution* (Palgrave Macmillan 2012).
[19] For analysis of the trajectory in historiography specifically addressing the Civil War see: Carlin, (n8), 3-6; Hughes, (n9), 1-9.

particular focus provides its own narrative highlighting individual components of a much larger story, but not adding up to a clean central narrative as was the case with the Whig ideology. Examples of these projects can be seen in sub-movements such as social history,[20] economic history,[21] state history,[22] and intellectual legal history.[23] A series of these schools are addressed below to examine how they illuminate the Petition of Right as an object of central focus. These are Civil War; Monarchic; and Parliamentary histories. Following this the role of the Revisionist school in changing the study of the Levellers, and their An Agreement of the People will be assessed. I will additionally address how implicit aspects of these approaches might be utilised in constructing a political-theological history of constitutional conflict centred on the Petition, and the constitutional thought of the Levellers, as presented in their Agreement. This will demonstrate how surveying a number of distinct areas of Revisionist history can allow for the creation of a sense of a larger cultural practice of constitutionalism to be observed.

Civil War revisionism

Conrad Russell's *The Causes of the English Civil War* has become the seminal Revisionist study of the event. Its central argument is that the Civil War cannot be viewed as directly connected to political conflicts between the Crown and Parliament in the 1620s.[24] The foundation of this argument is that Parliament possessed no coherent theory of resistance prior to the Civil War. Therefore, the contest was a political struggle over interpretation of the constitutional principle of the rule of law. 'The two sides in 1642 were apparently arguing between rival interpretations of the doctrine of the rule of law whose roots were largely common to both sides'.[25] The question was as to the source of the law: the immemorial (and

[20] As an example see: Tim Harris, *Rebellion* (OUP 2014).
[21] As an example see: Steve Pincus, *1688* (Yale University Press 2009).
[22] As an example see: Michael Braddick, *State Formation in Early Modern England c. 1550-1700* (CUP 2000).
[23] As an example see: Berman, (n15).
[24] Conrad Russell, *The Causes of the English Civil War* (Clarendon Press 1990), 131-136.
[25] ibid, 136.

divine) common law; or the law-making power of the divinely anointed monarch. If the Civil War was influenced by the 1620s, and specifically the Petition of Right, it was more generally; through undermining perceptions of the legitimacy of the political argument for the legal supremacy of the monarch.

> How then did the belief in the rule of law contribute to the causes of the Civil War? It seems to have done so most significantly by weakening and impoverishing the monarchy […] [t]hroughout the period, the view that the Crown could do nothing but what it was entitled to do by law enjoyed popularity which was frequently embarrassing.[26]

The supposed popularity of the Parliamentarian argument, enshrined in the Petition, meant that to pursue a political course independent of the Commons, the Crown resorted to arbitrary government. This acted to further question the legitimacy of divine right theory, and the supremacy of the monarchy in the constitutional order.[27] The specific nature of the constitutional theories of the two sides, and the implication that they held for wider perceptions of their legitimacy, are considered below. However, it can be seen how Civil War history forced the fragmentation of the Whig narrative. Therefore, it necessitated considering individual sites of interest through a range of historical focuses, such as monarchic and parliamentary histories.

Monarchic revisionism

Monarchic histories of the 1620s highlight factors that are obscured by both the Whig grand narrative, and by only considering parliamentary accounts of the issues surrounding the Petition of Right. It has been suggested that during the Parliamentary sessions of 1627/8 (source of the Petition) and 1628/9 (the last before the personal rule) despite the differing opinions between the Commons and the Crown it was expected that an accommodation would be found, and that

[26] ibid, 153.
[27] In addition to Russell see also: Carlin, (n8), 85-89; Hughes, (n9), 80-81, for how the Revisionist argument undermines the narrative of Whig historiography.

governance of the country would proceed as usual.[28] Monarchic histories also show the Crown's focus on international (European) events. While the Commons was focused on issues of financial supply and domestic Crown conduct (discussed below), Charles was personally engaged in the interconnected continental events of the Thirty Years War. Expenses related to war necessitated his funding demands, and also made them time sensitive. This influenced his compulsion to raise money to his schedule, rather than going through drawn out processes of negotiation with Parliament.[29]

The monarchic perspective also highlights that the king may not necessarily have believed he existed entirely above the law. This was the argument levelled at his practices of arbitrary government by Parliament, and specifically the Commons. Instead, Sharpe suggests:

> There is no reason to doubt Charles's belief in his duty to govern in accordance with the common law. […] But Charles's respect for the law went hand in hand, as did everyone else's, with an interpretation of the law. […] Charles believed that the law respected the needs of government, that it had been evolved to support not impede a dutiful king's capacity to govern. […] While remaining strictly within the bounds of the law then, Charles was not averse to applying some pressure to see that the law did not disfavour the government.[30]

The issues were not as cut and dried as they were presented in Parliamentary argument. What was unfolding was not a monarch subverting the law. It was a political contest as to who (or what) was the supreme source of the law. This included contestation over where the ultimate law-making power lay in constitutional practice. In this context the interlinking of legal and political theory cannot be ignored; nor can the influence upon both of religion, which will be discussed in detail below. However, monarchic history does highlight some issues that are not immediately apparent in a Parliamentary narrative. One such point is the influence of the

[28] As examples of Monarchic histories, and of this line of thought see: L Reeve, *Charles I and the road to personal rule* (CUP 1989), 58-63; Kevin Sharpe, *The Personal Rule of Charles I* (Yale University Press 1992), 40-41.
[29] See: Reeve, (n28), 9-14.
[30] Sharpe, (n28), 659.

Arminian faction of the Church of England and Bishop Laud; later Archbishop of Canterbury, and scourge of radical and moderate Parliamentarians alike. Traditional historiography found his rise during the personal rule of the 1630s. However, his influence during the 1620s as a Crown councillor (and proponent of divine right theory) should not be discounted.[31]

Parliamentary and legal revisionism

My designation of *parliamentary* history includes works specifically addressing the Petition of Right and the constitutional tensions of the 1620s, and works that might be termed legal histories. The reasoning is two-fold: 1) Parliamentary histories focus on technical details of legality and legislative process. This reflected how the common law became the central component of the Commons' attempts to counter perceived arbitrary government, and abuse of the royal prerogative. 2) The House of Commons counted within its ranks many common lawyers. Therefore, legal theory would have been a shared constitutional perspective. This would have further added to the utility of the ancient, or common law, constitution as the centre piece of parliament's political conflict with the Crown. Raffield suggests that legal influence in Parliament steadily increased under Elizabeth I, and that by 1640 half of MPs were members of the Inns of Court. He suggests that during the 1620s numbers varied due to the frequent calling of new Parliaments, but it could be assumed that at least one third of members were drawn from the legal community.[32] As the ancient constitution came to define the parliamentary position in the political struggle for constitutional supremacy, Parliaments' political position became inextricable from the common law. This resulted in the common law *as* the mode of Parliamentary resistance.

Parliamentary historiography concerning the Petition highlights its place within a larger conflict between Crown, and particularly, Commons that ran throughout the 1620s. However,

[31] Mark Parry, 'William Laud and the Parliamentary Politics of 1628-9' (2017) 36(2) Parliamentary History 137.
[32] Paul Raffield, *Images and Cultures of Law in Early Modern England* (CUP 2004), 200.

individual issues that came to comprise this wider conflict had been boiling up since the accession of the Stuart line in 1603. From the Parliamentary perspective the facts were as follows. Charles I wanted finances that Parliament were willing to give; but only under certain conditions, and for certain uses (such as war with Spain, not France). As one condition, in-line with the ancient constitution, Parliament asserted any financial levy had to be conducted in line with Parliamentary procedure. Therefore, because the Crown resorted to forced loans to raise money, this was an illegal abuse of the royal prerogative. This abuse was further compounded by the imprisonment of those who refused to pay, and subsequent refusal to grant those prisoners bail.[33] In response to these actions of arbitrary governance by the Crown, Parliament led by the House of Commons, sought clarification. Parliament clearly blamed the Crown's evil councillors, as opposed to Charles personally. The result was the Petition of Right. The aim of which was (ostensibly) confirmation of the pre-existing laws, and a declaration by the Crown that they were to be acknowledged and followed.[34] The Parliamentary position missed the time sensitive context of Charles's financial needs which were necessitated by his entanglement in the continental conflicts now known collectively as the Thirty Years War.[35]

Another aspect of the nature of the Petition as it was framed, as a re-statement, that is worth highlighting is the issue of interpretation. As already mentioned above, the 1620s saw the unfolding of what can now be recognise as a political contest for control of the constitutional position of legal supremacy. Both parties, Crown and Parliament, were deploying law in pursuit of their political objective. By framing the Petition as *re-statement*, rather than new law, the Commons left space for divergent interpretations. The construction and presentation of the Parliamentary position, and its central legal arguments, have been

[33] These events are described in rich detail as the Forced Loan and the *Five Knights Case*, see: Sarah Willms, 'The Five Knights' Case and Debates in the Parliament of 1628' (2006) 7(1) Constructing the Past 92.
[34] For an overview of the Parliamentary perspective see: Alan Cromartie, *The Constitutionalist Revolution* (CUP 2006), 179-233; Adam Tomkins, *Our Republican Constitution* (Hart 2005), 67-86.
[35] For the monarchic perspective see: Reeve, (n28), chapter 2; Sharpe, (n28), 3-62.

subject to great debate. It has been suggested that the use of the form of a petition represented a declarative act, more similar to judicial pronouncement. Therefore, Parliament's intention could never have been the creation of new law.[36] It has also been suggested that the Petition represents a political compromise due to the inability of the Commons to get the full weight of Parliament behind a comprehensive legislative process. Furthermore, that the common law contingent within the Commons were fully aware of this and deployed a range of rhetorical arguments to suggest, perhaps disingenuously, that the Petition was a legislative document merely in a different form.[37] Guy suggests that royal interference can be seen in the legal process of the *Five Knights Case* through Crown manipulation of the court record by the Attorney-General. This was an action that further aided the common lawyers rhetoric against arbitrary government.[38] However, this has been refuted through arguments based upon quirks of King's Bench procedure and record keeping, although the use of this confusion in the Commons rhetoric is still clearly acknowledged.[39] Finally, parliamentary histories have analysed the nuances of technical procedure and concluded that although the form chosen, that of petition, initially suggests a declarative judgment, the passage of the document through Parliament (including Royal Assent) rendered the Petition of Right a legislative document.[40] The Petition could be described as having been created through a process we would now designate codification. The result is that while the form is presented as a *re-statement*, the process was legislative. Therefore, the intention of the common law proponents could be argued to have been implicit *reform* of constitutional procedure, through explicit re-statement. The common law proposed as a political tool in constitutional conflict, and simultaneously, an

[36] Elizabeth Read Foster, 'Petitions and the Petition of Right' (1974) 14(1) Journal of British Studies 21, 24-27.
[37] See: J Guy, 'The origins of the Petition of Right reconsidered' (1982) 25(2) The Historical Journal 289, for the centrality of Sir Edward Coke in this process, and; Michael Young, 'The origins of the Petition of Right reconsidered further' (1984) 27(2) The Historical Journal 449, for analysis of the common lawyers' argument stretching further than the central personage of Coke.
[38] Guy, (n37), 299-304, 311-312.
[39] Mark Kishlansky, 'Tyranny denied' (1999) 42(1) The Historical Journal 53.
[40] L Reeve, 'The legal status of the Petition of Right' (1986) 29(2) The Historical Journal 257.

attempt to use it to gain legal supremacy over political theory in that same constitutional conflict.

Legal constitutional historiography follows the themes of the Parliamentary histories: the continued instances of conflict between Crown and Parliament through the 1620s. As a result, the constitutional/legal (public law) focused histories also find the centre of the disturbance to be governmental finance and taxation procedure; and stemming from these, issues of arbitrary governance. However, public law historiography frames the issue slightly differently. The core focus becomes the seminal judgements, and critical legal events, such as *Bate's Case*, and the *Five Knights Case*; and how they can, and should, be related directly to the Petition of Right. These are assessed in light of the constitutional and legal changes that took place not only under the Stuart reign but also the preceding Tudor dynasty, a period of massive governmental expansion. Consideration of monarchic concerns of international commitments, and also political theory and legal interpretation, are side-lined.[41]

Both implicitly, and explicitly, public law historiography recognises that the legal position was part of a wider conflict for constitutional supremacy. The Crown's argument held that the King was sovereign. Parliament, or at least the Commons, held that the common law embodied constitutional supremacy. The law was a tool in a political fight over dominant theoretical positions. However, the legal focus of these histories demonstrate the existence of tension between royal prerogative actions of the Crown, and the operation of the legal profession and legal procedure. Tension that lent itself to portrayals of arbitrary governance and monarchic absolutism: A judiciary open to removal for obstruction of the Crown's will; disregard for correct Parliamentary and legislative procedure (the proroguing of disagreeable Parliaments); Crown manipulation of the narrow framing of legal judgments to continually

[41] As examples of Constitutionally focused histories see: Cromartie, (n34); Tomkins, (n34), 67-86. For more specifically legally framed histories see: Berman, (n15), 199-372; Raffield, (n32).

operate against the spirit of law. What must be recognised is the Crown's possession of factual supremacy. Charles was able to 'abuse' the royal prerogative to achieve his aims. This was because the common law (and Parliament) were an insufficient constitutional opposition. What the Commons perceived as abuse of the Royal Prerogative, Charles understood as proper constitutional form. It would require Civil War to factually demonstrate the strength of the Parliamentarians constitutional position. However, this does not necessarily mean that Russell is correct in asserting that a coherent theory of opposition did not exist prior to the Civil War.[42]

The public legal histories demonstrate a coherent theory of resistance to divine right theory and absolute monarchy did exist: the common law itself. What is not necessarily apparent, and what is not made explicit in Russell's position, is that the law of the 1620s was not the law of today. The common law was a political tool in the constitutional conflict; not a supposed freestanding system of objective legal truth, as contemporary positivism conceives law. The common law existed alongside the royal prerogative, in direct tension with it. As Kay suggests, in a general sense, '[v]arious formulations of the proper constitutional assignments of king and King-in-Parliament were offered over the relevant period.'[43] Whereas specifically in relation to the Petition of Right, Raffield highlights that '[t]he Commons opted to believe that Charles had simply accepted their demands', meanwhile the King's intention was 'to "confirm all your liberties, knowing (according to your own protestations) that you neither mean nor can harm my prerogative"'.[44] Due to the emergence of modern legal systems, and thinking, it is easy to miss the point that the supremacy of the law was an argument in the constitutional conflict. Legal heroes such as Coke and Selden were radical politicians using the common law to make their case: firm and absolute limits existed upon the exercise of the royal

[42] Russell, (n24), 131-136.
[43] Richard Kay, *The Glorious Revolution and the Continuity of Law* (Catholic University of America Press 2014), 23.
[44] Raffield, (n32), 231.

prerogative, and even the monarch was subject to the common law. It takes legal historiography to demonstrate the novel, radical, nature of the ancient common law constitution argument. Especially the recovery, and deployment, of Magna Carta as an absolute and binding legal fact, an example of the 'extremist attitudes' held by diehard common lawyers such as Sir Edward Coke.[45]

Revisionist historiography and the Levellers

The general trend within the Revisionist movement regarding the Levellers and radical Protestants was to argue minimal religious influence, focusing instead upon classical republican thought within seventeenth-century constitutional reform. As part of this process the Levellers were gradually moved out of the shadow of the wider Protestant fringe and analysed as a stand-alone political entity. However, while the republican inflection in their literature was highlighted they were still placed on the margins of political discourse.[46] Their marginalisation in historical analysis of republican thought in seventeenth-century England can, at least partially, be attributed to the flawed analysis of their agenda in Macpherson's famous *Possessive Individualism* thesis and the historiographical reaction to this work.[47] As Vernon and Baker suggest 'Aylmer's call for a more contextual […] approach, together with Keith Thomas's and J.C. Davis's refutations of the Macpherson thesis […] struck a chord with […] historians'.[48]

Another aspect to Leveller marginalisation in early Revisionist historiography of seventeenth-century constitutional reform agendas can be attributed to their classical portrayal as part of, or loose alignment to, the radical Puritan movement. 'The congregations […] became

[45] Cromartie, (n34), 227.
[46] As examples see: Samuel Glover, 'The Putney Debates' (1999) 164 Past & Present 47 'Leveller rhetoric of the 1640s certainly suggests a strong familiarity with republicanism'; Monicka Patterson-Tutschka, 'Leveller John Lilburne and the Liberal—Republican Tradition' (2014) 43(4) Perspectives on Political Science 213.
[47] CB Macpherson, *The Political Theory of Possessive Individualism* (OUP 2011), 106-138.
[48] Vernon & Baker, (n18), 17.

for the sectarians the paradigm of good order. Nowhere is this more apparent than in the writings of the Levellers'.[49] As focus shifted towards addressing classical republican thought in the Revolution, the religious fringes were marginalised and discredited as serious influences upon constitutional reform agenda(s).[50] However, later Revisionism saw the Levellers gradually analysed as a stand-alone entity. This began with focus upon republican thought in constitutional discourse. Eventually their reform agenda became subject to historical attention in its own right.[51] It also began to catch the attention of constitutional theorists, embarking upon a historical turn within their own disciplines.[52] The result was the uncovering of a remarkable (brief) flowering of English democratic thought, as discussed below.

Revisionist historiography: finding the Petition of Right and An Agreement of the People

Through a combination of social histories and monarchic and parliamentarian histories of the 1620s constitutional conflicts, a narrative addressing the theological politics of the period, and specifically the opposing Crown and Parliamentary camps, can be constructed. According to Harris, the preaching of sermons was a central public relations tool for the Crown throughout the 1620s and 1630s: '[during 1627] a series of sermons […] subsequently published by Royal approval […] emphasised that monarchs ruled by divine right'.[53] Religious influence was used

[49] Harro Höpfl & Martin Thompson, 'The History of Contract as a Motif in Political Thought' (1979) 84(4) The American Historical Review 919, 939.
[50] As examples see: Gentles, (n18), for an account of the declining influence of Puritan factions; and, JC Davis, 'Religion and the struggle for freedom in the English Revolution' (1992) 35(3) The Historical Journal 507 for a discrediting of Puritan spiritual disciplinarians as a force in the constitutional settlement.
[51] As examples see: Kennedy, (n16); Philip Baker & Vernon Elliot (eds), *The Agreement of the People, the Levellers and the Constitutional Crisis of the English Revolution* (Palgrave Macmillan 2012); Foxley, (n16); Rees, (n16).
[52] As examples see: Denis Galligan, 'The Levellers, the People, and the Constitution' in His (ed), *Constitutions and the Classics* (OUP 2014), even the Levellers inclusion under such a title demonstrates the remarkable shift in presentation of their writings; Martin Loughlin, *Political Jurisprudence* (OUP 2017) chapter 3, this is the latest iteration of research programme stemming across several publications; see also: His, 'The Constitutional Thought of the Levellers' (2007) 60(1) Current Legal Problems 1; His, 'Constituent Power Subverted' in Loughlin & Walker (eds), *The Paradox of Constitutionalism* (OUP 2008).
[53] Harris, (n20), 255.

to bolster the Crown's position among the populous. It also directly reinforced Charles's pre-existing belief in divine right.

> Charles had been flirting with the idea of ruling without Parliament […] since 1626. It was the frustrations of the 1629 [session] […] that finally persuaded him that he could more readily fulfil his divinely ordained responsibility of ruling for the public good if he avoided calling parliaments.[54]

The Crown's deployment of sermons preaching divine right theory could be argued to work hand-in-glove to further build fear of arbitrary rule among the Commons' common lawyers. Reeve suggests that by 1628 perceptions of Crown subversion of the common law, including arbitrary interference in judicial procedure, had led to

> fear for the survival of Parliaments in England if the next did not fulfil the function of financing the war. […] The other great concern of the Parliament was the threat (which it perceived to exist) to English liberties [this was aligned with] […] the fear that Charles's government had abandoned its commitment to the rule of law[55].

The result was that '[t]he parliamentary session [of 1628] was actually the scene of conflict between […] a kind of absolutism and […] the traditional rule of law. […] The Petition of Right was the Parliament's attempt to resolve this question.'[56] How did religion become so firmly entrenched in a political conflict over the interpretation of the constitution?

As discussed in chapter three the English Reformation began with Henry VIII. This was, however, a break with the papacy rather than a wholesale *Protestant* reform. Not until Elizabeth I did the Reformation take on a defined Protestant character, a *mildly* Calvinist character. As a result, while the Church of England (headed by the monarch) attempted to maintain a central doctrine, varieties of Protestantism existed within Britain. At one end of the spectrum where the Arminians, known to radical Calvinists as Protestant Jesuits, whose doctrine espoused strong, centralised, church authority. They were natural exponents of divine

[54] ibid, 283.
[55] See specifically: Reeve, (n28), 19, and generally chapter 2.
[56] ibid, 20.

right monarchy. At the other end of the spectrum were the radical Puritans and their gathered congregations, proponents of decentralised religion. As a unified, potentially political entity, the practical opposing end of the spectrum to the Arminians were the Presbyterians. Presbyterianism was a church constituted along congregational lines; a church well established under Knox in Scotland, and gathering English adherents and organised congregations. [57]

From the Elizabethan period differing Protestant doctrines vied for Crown influence. 'Winners' used their influence to gain ideological preachers in key posts, where their sermons could be used to shape opinion of key populations.[58] Under Charles I the Arminian faction came to dominate the Church of England hierarchy, most prominently with Laud's appointment as Archbishop of Canterbury in the early 1630s and his direct influence upon the personal rule. However, the seeds of this dominance were sown in the 1620s. Parry suggests that Laud must be taken seriously as a Crown adviser, and divine right theorist, from the mid-1620s onwards. This period saw him appointed Bishop of London; gaining direct control over the licencing of the capital's printing presses. Laud's theory of divine right went as far as to suggest the Crown could over-ride any common law provision, and that Magna Carta – the (recovered) centrepiece of the common law constitution – was a document of usurpation, built upon rebellion.[59] Arminian dominance of the Crown's religious counsel extended to the pulpit. Through the occupation of key Church of England appointments, Arminian clergy were able to provide strong voices espousing pro-monarchic divine right theory to strengthen the Crown's position in the political conflict over the location of constitutional supremacy with Parliament. Historical study has demonstrated how key sermons deploying express divine right arguments

[57] For an over view of Calvinist reform of church constitution, and specific Presbyterian manifestations, see chapter 3.
[58] As an example see: David Little, 'God v Caesar' (2016) 18 Ecclesiastic Law Journal 291, which examines the influence of Authoritarian Anglian and congregation Puritan preaching on Sir Edward Coke during his time at Inner Temple.
[59] Parry, (n31), 146-147.

were printed and widely circulated.[60] The influence Arminianism could exert from the pulpit over popular perception of the legitimacy of a monarchic constitutional structure could have been central for maintenance of factual power by Charles through the 1620s and 1630s.

The Levellers and the State of Nature

'Natural law is one of the oldest concepts in Western philosophy'; however, '[u]ntil the Enlightenment […] the theory of natural law remained irrelevant and unknown to common folk.'[61] Many classical civic philosophers, influenced by revolutionary and proto-democratic ideas and events, engaged with the concept of the state of nature: writers from Hobbes to Locke produced a range of visions of this natural state of man.[62] What these theorists obscured was that '[i]n the midst of the English Civil War, the concept appeared in the welter of disputes and conflicting plans […] invoked by ordinary men', among whom where the 'middling sort' of the Levellers.[63]

The Levellers, as part of the thrust and counterthrust of constitutional argument through the 1640s, seized on the language of natural law, natural rights and the state of nature. This framing allowed them to communicate within classical philosophical traditions, parliamentary rhetoric and theological debate. Furthermore, they made concerted efforts to communicate their ideas (within this framing) to the common man.

> Although the Levellers justified their demands by referencing both historical and legal arguments these were necessarily cumbersome and unsuited to popular polemic. They gave way increasingly in their literature to arguments based on natural right which had a clarity of appeal lacking to arguments based on evidence and precedents.[64] […] The

[60] As an example see: Elena Kiryanova, 'Images of Kingship' (2015) 100 (339) History 21, which also charts how the tone of these sermons shifted, taking on a more radical Calvinist flavour, as Parliament gained the upper hand through the Civil War.
[61] Richard Gleissner, 'The Levellers and Natural Law' (1980) 20(1) Journal of British Studies 74, 74.
[62] As examples see: Sir Robert Filmer, *Patriarcha and Other Writings* (Sommerville ed, CUP 1991); James Harrington, *The Commonwealth of Oceana* (Anodos Books 2017); Thomas Hobbes, *Leviathan* (Wordsworth Editions 2014); John Locke, *Two Treatise of Government* (Laslett ed, 3rd edn, CUP 2005); Jean-Jacques Rousseau, *The Social Contract and other later political writings* (Gourevitch ed, CUP 2004).
[63] Gleissner, (n61), 74.
[64] Iain Hampsher-Monk, 'The political theory of the Levellers' (1976) 24(4) Political Studies 397, 412.

> Levellers claimed the Law of Reason, the Law of Nature and the Law of God, were one. It was thus possible to argue in a theological or a secular mode.[65]

'The original creation of political society, for the Levellers, is certainly by a process requiring the consent of the bearers of natural rights […] [they] fall within the bounds of contract theory', the philosophical tradition of Hobbes and Locke et al.[66] By taking this position, not only were the Levellers able to register across the theoretical spectrum, and be understood in common parlance, they were also able to insist 'that norms of equal authority were rooted in the law of nature'.[67] This was a useful and potentially populist stance across republican and religious perspectives, as it centralised a claim that 'the Levellers' purpose was to protect the individual's right to live a more fully human existence without hindrance.'[68] Beyond framing a platform that could be understood in contemporary political discourse, what other benefits did the Levellers gain by articulating themselves in this mode of nature and social contract?

Put simply, they were able to argue for a complete reboot of political society. Analysing the Levellers through a lens of modern constitutional theory has been shown to demonstrate the truly radical nature of their democratic platform: a true parliamentary democracy.[69] They were able to articulate this position because of their use of the state of nature, and the concept of the social contract. Deploying these philosophical motifs across the spectrum of political, religious and popular discourse, they argued the Civil War represented the reversion of English society to a state of nature.[70] Furthermore, they could make this point in a way relatable (and

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[65] ibid, 413.
[66] Rachel Foxley, 'Problems of Sovereignty in Leveller writings' (2007) 28(4) History of Political Thought 642, 648-649.
[67] Gleissner, (n61), 80.
[68] ibid, 85.
[69] As an example see the work of Loughlin: Martin Loughlin, The Constitutional Thought of the Levellers' (2007) 60(1) Current Legal Problems 1; His, *Political Jurisprudence* (OUP 2017), chapter 3 'Leveller legacies'.
[70] On this point see: Philip Baker, 'The Levellers, Decentralisation and the *Agreements of the People*' in Philip Baker & Vernon Elliot (eds), *The Agreement of the People, the Levellers and the Constitutional Crisis of the English Revolution* (Palgrave Macmillan 2012); Foxley, (n66); Gleissner, (n61); Hampsher-Monk, (n64); Loughlin, (n52), chapter 3; Sarah Mortimer, 'What was at stake in the Putney Debates' (2015) 65(1) History Today 50; RB Seaberg, 'The Norman Conquest and the Common Law' (1981) 24(4) The Historical Journal 791.

theoretically sound) to constitutional arguments, religious sermons and popular debate. The power of the monarch, and the conceptual underpinnings of the monarchic constitution, had been exposed and undermined by Royalist defeat in the Civil War. There was fertile ground for new seeds of constitutional thought, seeds of popular sovereignty and democracy.

Leveller Sovereignty, popular and parliamentary

Constitutional scholars suggest An Agreement of the People represents the first concrete, potentially actionable, expression of constituent power; one of the cornerstones of democratic constitutional theory.[71] Under the rubric of the social contract, a concept recognisable as constituent power had been considered in the abstract. The Levellers gave it practical form, one that could be have been deployed in the formation of a democratic constitution. At the heart of the Levellers' constitutional idea lay radical re-interpretation of the concept of sovereignty, the seat of supreme legal authority and power.

As discussed with regard to the Petition of Right, Charles I believed himself to be sovereign, whereas, Parliamentarian lawyers argued for the supremacy of the common law. The Levellers added a third proposition: the people were sovereign, source of the authority and power of the constitution. The Levellers argued that '[t]he power held by the Commons is identical with the power originally held by the people'.[72] Superficially, this idea was not radically divergent from the position held by the Rump Parliament: Parliament was the supreme power in England because it included the sovereignty of the people. However, there existed differing opinion as to what that sovereignty actually represented, and its exercise entailed. This became the core issue at the Putney Debates, ultimately sealing the fate of the Leveller agenda.

[71] As examples see: Galligan, (n52), 125-126; Martin Loughlin, 'Constituent Power subverted' in Martin Loughlin & Neil Walker (eds), *The Paradox of Constitutionalism* (OUP 2008), 35-39.
[72] Foxley, (n66), 650.

Parliament held the people of England were sovereign, but that they transferred (surrendered) their sovereignty, in its entirety, to Parliament to govern in their best interest.[73] The Levellers believed that the sovereignty of the people could not be so lightly set aside. The power of Parliament rested upon the authority of the people, as directly exercised through their electing of representatives to Parliament. The conduit for power, from people to Parliament, was the Agreement. Before government could be constituted through the election of a Parliament, the People must come together, uniting to authorise government. When parliamentary sessions ended (bi-annually) '[l]egitimate political power [was] not dissolved: it simply flow[ed] back to the people where it originated.'[74] The Levellers' articulation of this position can be understood as stating that each individual (man), subject to some disqualification criteria, possessed a direct relationship to their constituted government. A relationship exercised through their right of election.[75] In order to protect themselves from abuse of power by government (*expected,* not feared) a new Agreement, constitution and elections would be required in order to form every government.[76] The Levellers' autonomous political individual, a person with a direct relationship to their government, appears very similar to the Protestant Reformations' spiritual individual: a person who has the capacity for a direct relationship with God, as outlined in chapter three.

[73] On Leveller and Parliamentary positions concerning sovereignty see: ibid; Höpfl & Thompson, (n49); Kennedy, (n16) chapter 5; Mark Kishlansky, 'Consensus Politics and the Structure of Debate at Putney (1981) 20(2) Journal of British Studies 50; Jason Peacey, 'The People of the *Agreements*' in Philip Baker & Vernon Elliot (eds), *The Agreement of the People, the Levellers and the Constitutional Crisis of the English Revolution* (Palgrave Macmillan 2012).
[74] Foxley, (n66), 654.
[75] As examples see: Galligan, (n52), 125-126; Loughlin, (n71), 35-39.
[76] On the Leveller expectation of the corruption of all holders of governmental authority see: Kennedy, (n16), 155.

Reconsidering religious influence upon the Levellers

As discussed above, the traditional Leveller narrative had associated them with radical Puritan societies in their attempts to found Godly communities upon religious covenants. The Revisionist trend side-lined the study of religious influence upon the Levellers in favour of addressing the influence of classical republicanism in their writings. There were, however, exceptions to these trends. As one example literary scholars analysed the Leveller texts highlighting evidence of linguistic features demonstrating influences from both political and theological tracts simultaneously. Often these works address particular individuals such Lilburne, Overton or Walwyn, concluding that each individual author showed a tendency to draw more heavily on particular political, philosophical or theological influences.[77]

Recent revisiting of revisionist analysis of religious influences upon Revolutionary thought and writings, has re-assessed religious influences upon the Levellers. The rise of revisionist social historiography has begun to unpack some of the complexity of religious influence at this time. In a cornerstone of the re-appraisal, Coffey demonstrated the variations among the Protestant voices in the Revolutionary fringes. He highlights the Presbyterians as a formidable block seeking a concrete spiritual settlement and centralised Presbyterian Church, and their dominance of the Rump Parliament. He also, however, highlights the diversity of voices among the radical Puritans: those who sought the dissolution of all centralised churches in favour of gathered congregations; and those who campaigned for complete toleration, and true personal spiritual freedom. Even among the most devout on the Puritan fringes there were strident campaigners for the removal of any religious considerations in the post-Civil War constitutional settlement. Among them were the General Baptists, including Leveller leaders

[77] As examples see specifically: Thomas Corns, "I have Writ, I Have Acted, I Have Peace" (2014) 36(1) Prose Studies 43; and generally, Laura Lunger Knoppers (ed), *The Oxford Handbook of Literature and the English Revolution* (OUP 2012).

such as Lilburne. Some of whom had powerful voices (if not influence) among the New Model Army, a serious power in the settlement process.[78]

Following this lead, several authors have revisited Leveller works to appraise them in a new light. The linguistic influences of both political theory and theology are clear.[79] However, the Levellers espoused a tolerationist doctrine, clearly evident in documents such as the Agreement. So much so that Loughlin has identified personal religious freedom as one of the Levellers' core constitutional principles.[80] This historiographical shift shows, among other things, the longstanding interweaving of associations and influences between the individuals who would become Levellers, and the radical Puritan and gathered churches throughout London; sometimes as far back as the early to mid-1630s.[81] This could be suggested to have influenced the Levellers' express necessitating of religious toleration, and the secularisation of any constitutional settlement.[82] It could also be suggested to have influenced the nature of the democratic constitutional settlement the Levellers favoured, and proposed in the Agreement of the People. The model of the autonomous political individual can clearly be seen to closely align to the model of the Protestant spiritually autonomous individual. Furthermore, the equality of the collective individuals in their exercising of franchise rights also shows a strong influence of the gathered congregational formations of radical Puritans. A similar, if somewhat authoritarian, approach and structure lay at the basis of the centralised form of the Presbyterian

[78] See John Coffey, 'Puritanism and Liberty revised' (1998) 41(4) The Historical Journal 961.
[79] As examples see: Rachel Foxley, 'The Levellers' in Laura Lunger Knoppers (ed), *The Oxford Handbook of Literature and the English Revolution* (OUP 2012); Ian Gentles, 'The New Model Army and the Constitutional Crisis of the Late 1640s' in Philip Baker & Vernon Elliot (eds), *The Agreement of the People, the Levellers and the Constitutional Crisis of the English Revolution* (Palgrave Macmillan 2012); Rees, (n16); Vallance, (n17); Elliot Vernon & Philip Baker, 'What was the first *Agreement of the People* (2010) 53(1) The Historical Journal 39; Elliot Vernon, 'A Firme and Present Peace' in Philip Baker & Vernon Elliot (eds), *The Agreement of the People, the Levellers and the Constitutional Crisis of the English Revolution* (Palgrave Macmillan 2012).
[80] Loughlin, (n69), 23-24; His, *Political Jurisprudence*, (n69), 50-51.
[81] As an example see: Rees, (n16), chapter 3.
[82] On this point see: Rachel Foxley, 'Freedom of Conscience and the *Agreements of the People*' in Philip Baker & Vernon Elliot (eds), *The Agreement of the People, the Levellers and the Constitutional Crisis of the English Revolution* (Palgrave Macmillan 2012); Foxley, (n79); Vallance, (n17); Vernon & Baker, (n79); Vernon, (n79).

Church.[83] The influence of Protestant religious thinking, and the perceptions of legitimacy that it might have conveyed, can be seen to emerge throughout Leveller organisational thinking and constitutional theorising. This is alongside the generally documented influence of Protestant voices in the post-Civil War constitutional settlement debates.

DOCUMENTARY ANALYSIS

This section of the chapter engages in direct documentary analysis of the Petition of Right and An Agreement of the People. As presented in the introduction, the documents will be analysed through recourse to Weber's typologies of legitimacy. This is in conjunction with the four criteria for perception of the legitimacy of regime authority extrapolated from the literature developing Weber's thesis. This is in order to answer research questions 2(A) and 3(A). The analysis of each document is followed by a discussion of the influence of religion upon the perceptions of the legitimacy of each document within the historical literature.

The Petition of Right and Legitimacy Theory

This section undertakes documentary analysis of the Petition of Right.[84] The document is understood as an artefact of constitutional culture(s); entailing understanding the influence of both the political practice of constitutionalism, and the legal foundation of constitutional form. This is as opposed to a strictly limited legislative reading within the framing of documentary legal history. The Petition is addressed with reference to: 1) How its framing as legal re-statement, not constitutional reform, impacted upon the perception of its legitimacy. 2) How its presentation as re-statement impacted upon its failure as a constitutional reform.

[83] As outlined in chapter 3.

[84] For the primary source analysed see: Carl Stephen & Frederick Marcham, *Sources of English Constitutional History* (Harper & Row 1937), 450-454. This reproduction has been cross referenced against the document presented in: George Adams & H. Stephens, *Select Documents of English Constitutional History* (Macmillan 1914), 339-342. The former source is preferred due to its deeper contextualisation through additional reproductions of Royal Assent(s) and commentary upon the Petition, as well as the corresponding Resolutions of the Commons (1629).

According to Weberian legitimacy the Petition demonstrates an appeal to tradition. Repeated mentions are made of the history and traditional process of English legal practice 'whereas it is declared and enacted by a statute made in the time of the reign of King Edward the First'.[85] This calls upon the strength of traditional practice. It is bolstered by further recourse to history, both specific 'by authority of parliament holden in the five-and-twentieth year of the reign of King Edward III,' and general 'by which the statutes before mentioned, and other good laws and statutes of this realm, your subjects have inherited'.[86] This also implicitly invokes the idea that there existed not only traditional procedures, but additionally that these procedures were *laws*. This aligns with Weber's rational/legal legitimacy. The framing of the Petition explicitly presented a re-statement of pre-existing law. These pre-existing laws were treated neutrally in the text, beyond being described generically as 'good'. However, actions that were portrayed as not aligning with the pre-existing law, the actions of arbitrary government, were not treated neutrally. There are claims people were 'molested and disquieted' and 'against their wills […] compelled […] to suffer […] great grievance and vexation'.[87] This language clearly plays against criteria 1 and 2 for the perception of legitimacy: Perception of mistreatment by authority, and the unfairness of processes utilised in dealing with those subject to authority.

The language of the Petition framed a re-statement of the law and claimed the law was 'declared and enacted by authority of parliament'[88] and the correctness of the laws so passed 'against the tenor of the said statutes and other good laws',[89] a clear attempt to invoke the legitimacy of both historical tradition and the legitimacy of observing law-making procedure.

[85] Petition of Right (1628) as reproduced in Carl Stephen & Frederick Marcham, *Sources of English Constitutional History* (Harper & Row 1937), 450.
[86] ibid.
[87] ibid, 451.
[88] ibid.
[89] ibid.

Interestingly, whereas the actions claimed to have been illegal were subjected to emotively negative language, the Royal person of Charles, was not held directly responsible. Blame was laid on 'lord lieutenants, deputy lieutenants, commissioners for musters, justices of peace and others, by command or direction from your majesty or your privy council, against the laws and free customs of the realm […] divers commissioners under your majesty's great seal'.[90] The actions were not directly attributed to the King. Responsibility was ambiguously attributed to officers acting on behalf of the Crown, and under the wider auspices of the royal prerogative, although this was not centrally stated. The document was unequivocal in stating these 'commissions and all other of like nature are wholly and directly contrary to the said laws and statutes of this your realm.'[91] Pre-existing law was repeatedly referenced alongside its immemorial standing; actions cited as illegal were lambasted.

> [S]undry grievous offenders […] have escaped punishments […] by reason that divers of your officers and ministers of justice have unjustly refused […] to proceed against such offenders according to the same laws and statutes [by which they have executed people], upon the pretence that the said offenders were punishable only by martial law […] wholly and directly contrary to the said laws and statutes of this your realm.[92]

Both of these steps fit well within legitimacy theory as steps to present strong appeals to perceptions of legitimacy. Yet, whereas the general Crown (and explicitly the Privy Council) was attacked, the monarch was not.

The absence of explicit attack on Charles fits the wider framing of the document as re-statement: the correction, or correct enforcement, of the existing system. The implication was the constitutional supremacy of the common law, and the illegal (and therefore political) acts of Crown agents operating outside the law. However, no explicit attempt was made to undermine the personal authority of King Charles, why? This can be viewed, through recourse

[90] ibid.
[91] ibid, 452.
[92] ibid.

to legitimacy theory, as being due to two factors. 1) The factual power of the monarch, Charles was repeatedly able to act directly against the wishes of Parliament (specifically the Commons). Indeed, the Petition expressly documents those actions. 2) The monarch was the top office within the constitutional structure that was in place. Parliament was not attempting to supplant the position of the monarch in the constitutional order. They were attempting to state that the entire structure existed as part of the common law. As suggested above, the conflict was over interpretation. Parliament interpreted the common law as constitutionally supreme; the Crown viewed the King as above the law. It can be suggested that by framing the Petition as re-statement, not reform, Parliament robbed itself of the potential to expressly discredit the argument of the monarch. As with the constitutional situation, they left the Petition itself open to interpretation. This can be read as an implicit acknowledgement that no alternative structure existed. Whether above the common law or empowered by it, the King was the supreme constitutional agent, not Parliament. There was no perception of the legitimacy of Parliament (even among its own members) to claim to be equal, or superior, to the monarch within the constitutional order. However, by establishing an argument for the interpretation of the constitution as holding the monarch subject to the common law, Parliament began a process of de-legitimising the actions of the Crown.

Religious influence upon perceptions of legitimacy of the Petition of Right

At the outset of the critical Parliamentary sessions of both 1627/8 and 1628/9 it is suggested there existed a majority expectation upon both sides that compromise and reconciliation between Crown and Commons was both possible and probable. The moderate middle on both sides would ultimately triumph, as had been the case throughout the Elizabethan and Stuart periods.[93] '[A] significant number of leading politicians close to the centre of power were yearning for a "new deal" based on keeping the war going and continuing to hold regular

[93] See generally: Little, (n58); Parry, (n31); Reeve, (n28), chapter 2.

parliaments.'[94] These provisions should have been sufficient to appease both sides. 'The key players […] were Charles's moderate councillors […] [who] recognized the importance of persuading the people that the king's ministers could be trusted to observe […] the rule of law and also of convincing Charles parliament was a reliable and risk-free means of raising revenue.'[95] How did the fringe positions of both sides come to take centre stage, and further entrench their opposition?

In the Crown camp, as discussed above, the Arminian faction within the Church of England have to be taken more seriously as advisors to the monarch, and public propagandists of divine right theory, during the 1620s and 1630s. 'The cornerstone of the royal image under Charles I was the theory of the divine right of kings.'[96] Every act of parliamentary resistance, and claim of the constitutional supremacy of the common law, triggered Arminian preaching; and with 'the establishing of the Church of England […] sermons [became] in general one of the most valuable media for the exaltation of the monarch'.[97] Not only would Charles's belief in divine right be entrenched, but also the most effective communication network in the country would serve to reinforce public perception of the legitimacy of the monarch's divine right, and the constitutional supremacy of the king. While a minority overall, the Arminian faction held the important Bishoprics and the King's ear; their collective voice was disproportionate to their individual numbers.[98]

If the radical wing of the Crown faction were able to win the wider publicity war, through control of preaching and sermon publications, the radical common lawyers of the Parliamentary side stoked up fear of arbitrary government at every turn. The idea of the total

[94] Richard Cust, 'Was There an Alternative to the Personal Rule?' (2005) 90(299) History 330, 333.
[95] ibid.
[96] Kiryanova, (n60), 23.
[97] ibid.
[98] See generally: ibid; Parry, (n31); Reeve, (n28), chapter 2.

supremacy of the common law constitution would have been considered a fringe legalist position among the majority of MPs. However, the argument was well served by the actions of the monarch throughout the 1620s. With every forced loan and subsequent arbitrary imprisonment, the factual power of the Crown was demonstrated. While this served to strengthen the Crown's claim to legitimate supremacy among the wider populous in the short-term – in a variation of what Loughlin has described as 'The Normative Power of the Factual',[99] control of the facts on the ground – it reinforced perceptions of the inadequacy of the judiciary to stand up for the law. Disproving the effectiveness of legal mechanisms to prevent a slide towards absolute monarchy as practiced on the continent. A prime example was the controversy around the Attorney-General and the *Five Knights Case*.[100] This episode saw Attorney-General Heath, supposedly at Charles's behest, accused in the House of Commons by Selden (and the radical common lawyers) of manipulating the King's Bench record to prevent a precedent being set against the claimed royal prerogative for indefinite detention. Whether the accusations were true is irrelevant. They fed directly into a climate of fear that the common law could not restrain the Crown from arbitrary governance. The episode served to harden MPs resolve and unify the House in actions leading to monarchic opposition and the Petition of Right.[101] This is evidenced by the final declaration 'and that your majesty would be also graciously pleased, for the further comfort and safety of your people, to declare your royal will and pleasure in the things aforesaid all your officers and ministers shall serve you according to the laws and statutes of this realm'.[102]

Crown actions served to strengthen and unify the resolve of the House of Commons, and led them to unite behind the common law as a tool of resistance to monarchic absolutism,

[99] See: Martin Loughlin, *Foundations of Public Law* (OUP 2010), 216-220.
[100] For an accusation of improper conduct by the Attorney-General see: Guy, (n37). For an exoneration of the Attorney-General see: Kishlansky, (n39).
[101] See generally: Raffield, (n32); Reeve, (n28); Young, (n37).
[102] Petition of Right (1628), (n85), 452.

articulated through a claimed constitutional supremacy of the common law. They also drove MPs to seek allies in wider society. The natural opposition to the Arminian divine right sermons was to be found among the radical Calvinists of the gathered churches, and the Presbyterians; who became ever more vocal opponents of the Crown through the 1630s and into the Civil War.[103] It also served to strengthen Parliamentary belief in the frankly novel, and radical, claims of the immemorial power of the common law and Magna Carta:

> It was not until the 17th century that [Magna Carta] returned to prominence in England. This is only so because the parliamentary forces that opposed King Charles started searching for any historical precedent through which they could state their case against his arbitrary rule. It is in this historical context that Magna Carta became the perfect example of legal resistance against the king. Under the Early Stuarts, 'the great charter designed to restrain the Plantagenets was reborn. It was taken cheerfully out of its historical context and held up as an "original" constitution – proof that Charles was betraying not only his own people but English history at large.'[104]

Parliament failed to successfully oppose Charles I's interpretation and use of the constitution, through the Petition of Right, on several levels: 1) To prevent arbitrary monarchic exercise of the royal prerogative. 2) To enshrine the constitutional supremacy of the common law, through legal re-statement. 3) To be interpreted as a constitutional reform. Many of these failures are associated with short-term successes of the Crown in continuing to act as the constitutional sovereign, as well as the support it gained from the Arminian faction within the Church of England. The Petition did, however, succeed in laying foundations for a coherent opposition, and the expression of the law as a vehicle for a coherent theory of resistance to arbitrary governance. It also succeeded in linking the opposition movements of the Parliamentary common lawyers and the radical Calvinist churches. This union, an accident of history, was to bear fruit during the Civil War.

[103] As an example of the marriage of necessity between common lawyers and Puritans / Presbyterians see: Little, (n58), 298-299.
[104] Augusto Zimmermann, 'Sir Edward Coke and the Sovereignty of the Law' (2017) Macquarie Law Journal 128, 138, citing Dan Jones, *Magna Carta* (Head of Zeus 2015), 108.

The Levellers' An Agreement of the People and Legitimacy Theory

Similar to the treatment of the Petition of Right above, this section undertakes documentary analysis of An Agreement of the People.[105] The understanding of the document is as an artefact of constitutional culture(s), therefore, moving beyond the strict limitation of reading the Agreement as a non-legal historical curiosity. Reference will be made to: 1) The documents framing, as re-constitution, not constitutional reform or re-statement. 2) How this could have impacted upon the perception of its legitimacy. 3) How this presentation as re-constitution impacted upon its failure as a reform.

Analysing the Agreement through a Weberian framing immediately identifies differences to the framing of the Petition of Right. The Agreement did not reference the tradition of pre-existing common law or constitutional form. From the outset it acknowledged the break in continuity presented by the Civil War stating 'God having so far owned our cause, as to deliver the Enemies thereof into our hands'.[106] Perceptions of the legitimacy of the Agreement would have been based on what would be classified as a Weberian typology of rational/legal, as opposed to traditional, legitimacy. The title of the document called for a recognition of the fundamental equality of all (men); seeking re-constitution founded 'Upon grounds of Common-Right', the political levelling of their manifestos made real.[107] Allusions to tradition were framed as the failure of the previous constitutional structure to protect this common right. Reference was made to 'our former oppressions, and scarce yet ended troubles'.[108] Troubles which would henceforth be prevented, because 'hereafter our

[105] For the primary source analysed see: Don Wolfe (ed), *Leveller Manifestos of the Puritan Revolution* (Thomas Nelson and Sons 1944), 225-234. This reproduction has been cross referenced against the document presented in: The Levellers, (n2), 52-60. The former source is preferred due to its preservation of the original spellings of the Leveller documents.
[106] An Agreement of the People (3 November 1647) as reproduced in Don Wolfe (ed), *Leveller Manifestos of the Puritan Revolution* (Thomas Nelson and Sons 1944), 226.
[107] ibid.
[108] ibid.

Representatives be neither left to an uncertainty for the time, nor made useless to the ends for which they are intended'.[109]

Evoking rational/legal legitimacy, as opposed to traditional or charismatic, was necessary because of the total re-constitution of society called for. As discussed above, the Levellers' presented the Civil War as a reversion to the state of nature, which required a complete re-constitution of society upon a new social contract. Monarchic tradition was to be jettisoned from the constitution, and the authority of the collective people was to be the foundation of their representatives' supreme legislative power. This was presented in Article IV: 'the power of this, and all future Representatives of this Nation, is inferior only to theirs who chuse them'.[110] Any appeal to traditional legitimacy, entwined with religious influence because so closely aligned to arguments of divine right monarchy, was excised from their re-constitution of society. Personal freedom of religious choice was presented as a constitutional necessity for a peaceful constitutional order. Article IV (1) states '[t]hat matters of Religion, and the wayes of Gods Worship, are not at all intrusted by us to any humane power'.[111]

Freed from the traditional influences of religion and monarchy, the Agreement's re-constitution was to be founded upon the rationally self-evident equality of the people. The people who were directly connected to their representatives in the constitutionally supreme Parliament (Commons) through bi-annual elections. As stated in Article III 'the People do of course chuse themselves a Parliament once in two years'[112] this was so that the necessary criteria of legal equality laid out in Article IV (5) could be fully met '[t]hat as Lawes ought be equall, so they must be good, and not evidently destructive to the safety and well-being of the

[109] ibid.
[110] ibid, 227.
[111] ibid.
[112] ibid.

people.'[113] Only the representatives of the people were trusted to make laws equally applicable to all. The Agreement proposed a radical re-constitution, but why go to such extreme lengths as to jettison the monarchy, and any religious influence?

Through recourse to the Legitimacy Theory criteria presented in chapter two understanding might be gained. The Levellers' extreme position was mandated by their experiences at the hands of both monarchic and parliamentary authority. The express requirement for bi-annual elections to Parliament in Article II of the Agreement was further bolstered by the superiority of Parliament over all other offices of governance. '[T]he power of this, and all future Representatives of this Nation […] doth extend […] to erecting and abolishing Offices and Courts; to the appointing, removing, and calling to account Magistrates and Officers of all degrees' (Article IV).[114] Furthermore, any member of a current Parliament would be automatically disbarred from the next. The Levellers were not fearful of the corrupting influence of power, they expected it. Their actions were 'compelled thereunto […] by the examples of our Ancestors, whose bloud was often spent in vain for the recovery of their Freedomes'.[115]

According to the first and second Legitimacy Theory criteria, outlined above, perceptions of the legitimacy of authority will be influenced by both general perceptions of treatment by an authority (1); and individual perceptions of treatment, and individual perceptions of collective perceptions of treatment by authority (2). The re-constitution presented in the Agreement founded itself on the presentation of the perception that the previous constitutional system failed on both counts. It went to great lengths to break the link to past traditions. According to criterion three, individual and collective dependence upon

[113] ibid, 228.
[114] ibid, 227.
[115] ibid, 228.

authority can breed perceptions of the legitimacy of that authority. Through an express rejection of the monarchic constitution, and emphasis of the supreme power of Parliament (as authorised by the electorate) the Levellers deliberately presented a new constitutional model. The Agreement implicitly stated: we are not dependent upon the monarchy, and our social 'superiors'. We are all equal under law. Through this process they could also be suggested to address criteria four. They removed any justification for the old system by making religion a matter of personal conscience, placing it outside the purview of the state. Instead, the Agreement presented the common rights of the people, and their proper safeguarding, as the justification for the re-constitution.

Through positioning their approach as re-constitution as opposed to re-statement or reform, the Levellers created two problems. 1) with the perception of legitimacy of the Agreements' constitutional reforms; ,2) with the perception of their legitimacy as the movement to undertake them. First, they prevented any reliance on the various arguments of the re-statement, or re-founding of an ancient constitution. The Agreement referenced learning the lessons of the past in order to safeguard equality and rights in the future. However, the Levellers called for total dissolution of the monarchy, which did not align with mainstream interpretation of any ancient constitutional model.[116] Second, the foundation of the Agreements' re-constitution was the explicit recognition of the equality of individuals: a political and legal levelling in public law. The model of the individual as possessing a personal and direct connection to government, through the election of representatives to the legislatively (and constitutionally) supreme Parliament, could be seen to closely align to the model of the autonomous spiritual individual at the core of the Protestant Reformation.[117] This would have

[116] On this point of alienation from the ancient constitution narrative see: Alan Orr, 'Constitutionalism' in Philip Baker & Vernon Elliot (eds), *The Agreement of the People, the Levellers and the Constitutional Crisis of the English Revolution* (Palgrave Macmillan 2012); Patterson-Tutschka, (n46); Seaberg, (n70); Vernon, (n79).
[117] This placement of the individual in Protestant theology, as against medieval papal theology is the subject of chapter 3.

been a model of constitutional association that could have found purchase in the minds of seventeenth-century Protestants of many denominations. However, the Agreement disassociated itself, as did the Levellers more widely, from any appeal to religious legitimacy through expressly mandated freedom of religious conscience.[118] It could be suggested that, in recognition of the destructive capacity of religion to undermine constitutional foundations, the Agreement sacrificed any short-term benefits that perceptions of religious legitimacy could provide for the project of re-constitution. Instead, the Levellers seemed to favour long-term stability through the removal of direct religious influence upon the sphere of public law. Hindsight tells us that seventeenth-century England was not ready for this.

Religious influence upon perceptions of the legitimacy of An Agreement of the People

Constitutional scholarship has highlighted that the central operative presumption of the Leveller platform was a political levelling: the recognition of individual equality in relations between government and the people, through the removal of political privilege.[119] How was this levelling liable to be perceived by those influenced by Protestant Reformation thinking; particularly in light of the fact that the name 'Levellers' was ascribed to the movement by their opponents?[120] The concept of political levelling and a constitutional settlement built upon electoral equality, can be seen to closely align with the re-constitution of radical Puritan gathered churches. In these congregations (discussed in chapter three) the community of believers came together and selected their spiritual authorities as required. It is unsurprising that the Levellers would arrive at a model of constitutionalised equality bearing such similar hallmarks given the close ties and long-standing interconnection of their senior leadership to

[118] On this point of articulating the autonomous political individual see: Foxley, (n82), 122; Galligan, (n52), 125-126; Loughlin, (n69), 23-24; Loughlin, (n71), 35-39; His, *Political Jurisprudence*, (n69), 50-51.
[119] On this point see: Galligan, (n52), 136-151; Loughlin, (n69); Loughlin, (n71), 35-38; His, *Political Jurisprudence*, (n69) chapter 3; Orr, (n116), 76-77.
[120] As examples on the naming the Levellers see: Glover, (n46), 47-51; Kishlansky, (n73), 52-53; Mortimer, (n70).

the gathered Puritan congregations of London. These similarities even extended to the mandated bi-annual re-election of representatives to Parliament. However, it should not be forgotten that these Puritan communities existed on the fringes of English society, often seeking deliberate isolation from wider social interaction. Even at the height of their persecution under Laud in the 1630s, these radical sects did not enjoy widespread support beyond their opposition to the Arminian dominated Church of England.[121]

Among the more centralised and numerous Presbyterians, dominant in 1640s Parliament, the Agreement struggled to achieve collective perception of its legitimacy. The Presbyterian church was founded upon a Calvinist organisational structure as discussed in chapter three. The members of the congregation had a voice in selecting their spiritual authorities, and the collective voice of the congregation held a role in legitimising those holders of spiritual office. However, the Presbyterians of the 1640s sought the institutionalisation of a Presbyterian Church of England as part of any post-Civil War constitutional settlement. Therefore, they would have perceived the Agreements' requirement of personal religious freedom as illegitimate. Considerable circumstantial evidence suggests Presbyterian organisational doctrine would not have accommodated a true political levelling, making them natural opponents of bi-annual Parliamentary elections. Additionally, a strong Presbyterian faction in the Rump Parliament sought to settle with Charles I, and maintain the Monarchy.[122]

The core issue for the Levellers in communicating their concept of a political settlement, especially to their opponents in instances such as the Putney Debates, was confusion as to the exact nature of the levelling proposed. This is partially attributable to the decentralised Leveller structure. They were a political movement in the loosest sense. Certainly they should

[121] On this general theme see: Baker, (n70), 109-110; Alastair Bellany, 'Libels in Action' in Tim Harris (ed), *The Politics of the Excluded* (Palgrave 2001).
[122] See: Barry Coward, *The Stuart Age* (3rd edn, Longman 2003), 215-257; Kishlansky, (n73); Vernon, (n79).

not be considered as a political party, even if they are occasionally described as such. The concept of political levelling may have gained sufficient perceptions of legitimacy among receptive Protestant believers (primarily Puritans). However, the call for personal religious freedom as a necessary foundation for constitutional settlement would have taken them beyond the pale of all but the most fringe congregations. Furthermore, there is widespread documentation that the concept of levelling was turned against the movement.[123] The arguments put forward were that the Levellers sought a total levelling of all social privilege, akin to a pure theory of Communism. There is no evidence that this was a Leveller cause, this was closer to the Diggers' (self-identified true levellers) platform. However, association of the movement with this idea would have undermined most perceptions of any legitimacy to be granted to their agenda by Protestant thinking. This was because the modest accumulation of personal wealth was seen by mainstream Calvinists as signifying personal grace.[124] This situation is highly indicative of the wider fate of the Leveller platform. Put simply, their democratic constitutionalist proposals were too radical for the time. The dominant social forces both opposed to, and supportive of, monarchy were simply not prepared to countenance such a radical social reform. This tainted the perception of the legitimacy of the constitutional reforms expressed in An Agreement of the People.

[123] As examples of the perceptions of levelling propositions within the Levellers see: Foxley, (n82); Kennedy, (n16); Mortimer, (n70); Michael Norris, 'Edward Sexby, John Reynolds and Edmund Chillenden' (2003) 76(191) Historical Research 30; Peacey, (n73); Vernon & Baker, (n79). For an overview of wider English social structure outside of London under the Stuarts see: Steve Hindle, 'The Political Culture of the Middling Sort in English Rural Communities, c. 1550-1700 in Tim Harris (ed), *The Politics of the Excluded* (Palgrave 2001); Kennedy, (n16) specifically chapter 4 for Leveller perception in rural communities.
[124] On this point see: Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (Parsons tr, 2nd edn, Routledge 2001), 53-80.

FAILED REFORM MANIFESTOS

In light of the analysis undertaken above, this section addresses each document in turn to present an understanding of how both can be understood as failed manifestos for constitutional reform. The Petition of Right and An Agreement of the People are presented as failed reform manifestos; furthermore, analysis is made as to how each manifesto can be understood to have failed within the terms that it set for its own purpose.

The Petition of Right as failed constitutional reform manifesto

In order to analyse potential influences of religious thinking upon perceptions of the legitimacy of the Petition, first the case must be made for it to be viewed as a constitutional *reform* manifesto. Constitutional theory (spanning legal and political disciplines) posits the Petition of Right as a legal document, and assesses its merits and failures strictly within these terms.[125] As the Petition was framed as re-statement of pre-existing law it must be assessed as such if one holds to this line of thinking. Under these terms it was clearly a failure. The wider view of the constitutional conflict demonstrates that the 1620s saw the exposition of two oppositional interpretations of the location of constitutional supremacy: either the common law was supreme, or the Crown. Charles's personal rule demonstrated irrefutably the constitutional supremacy of the monarch. As Loughlin suggests:

> [Parliament's] objection was to the methods through which government was being conducted […] from 1629, Charles returned to the Tudor model of conciliar government. […] [T]he methods used by Charles and his ministers had clear precedents in Tudor government. The route of the quarrel was political and religious, rather than constitutional.[126]

This highlights the issue from the perspective of public law. It was a conflict of legal interpretation, not of alternative models of constitutional structure, because of the framing as

[125] As examples see: Berman, (n15), 207-215; Cromartie, (n34), 226-233; Kay, (n43), 23-28; Martin Loughlin, *The Idea of Public Law* (OUP 2003), 118-120, 190; Loughlin, (n99), 255-259; Raffield, (n32), 78-79, 199-207; Chris Thornhill, *A Sociology of Constitutions* (CUP 2011), 131-148; Tomkins, (n34), 77-87.
[126] Loughlin, (n99), 257.

re-statement. At no point did Parliament make an explicit claim to the constitutional supremacy of any office, or institution, other than the monarch.

The closest any work of constitutional theory comes to suggesting the Petition of Right might have been something other than a re-statement is Thornhill's historical-sociology. In this view the Petition becomes the first concrete manifestation of a gradual construction of legal norms; one that eventually resulted in the constitutional principle of the rights of the individual (as articulated by Parliament) being superior to the will of the monarch. In this can be seen the basic principles of the allocation of constitutional powers. Protection of these rights would become the purview of the *independent* courts; their *expression*, the role of Parliament. 'As early as 1628 […] members of parliament were forced to choose whether to show support for either the common law or the king, and most elected to endorse […] a common-law construction of the constitution'.[127] This approach opened the door to the *possibility* of an alternative constitutional structure to that of a supreme monarch, however, it still operated under the framing of pre-existing law. It succeeded in founding the potential for a constitutional principle, but failed to achieve a supremacy of the common law within the operative constitutional system of the 1620s. Crucial to the dominance of the monarchic centred constitutional model was the perception of the legitimacy of the King's divine right, afforded to the Crown by the Arminian preachers dominating the key positions of the Church of England. This was implicitly acknowledged in the Resolutions of the Commons (1629), when in article I it was stated 'Whosoever shall […] seek to extend or introduce popery or Arminianism […] shall be reputed a capital enemy'.[128] MPs were well aware of the threat, but unable to take decisive action as the Crown held the factual power at the time.

[127] Thornhill, (n125), 141.
[128] Rushworth, Historical Collections vol 1, 660, as reproduced in (n85), 454.

If one takes an alternative perspective on the Petition of Right, viewing it not as it was framed: internally within the strict limitations of a legal system; but instead examines it as an artefact of constitutional culture, an alternative narrative emerges. From this perspective the Petition can be understood as a reform manifesto. It can be constructed as an attack upon a system of constitutional interpretation that saw the royal prerogative and the Crown as superior to the common law. There is evidence to suggest that Charles saw it as such. On 26 June 1628, as part of a wider move to prorogue what had, in his view, become an uncooperative Parliament, Charles addressed Parliament stating: 'I see that even the house of commons begins already to make false constructions of what I grant in your petition […] [the intention] was by no ways to entrench upon my prerogative […] I grant no new, but only confirmed the ancient, liberties of my subjects.'[129] This presented as re-statement of the pre-existing superiority of the royal prerogative, and the Crown, over Parliament (and the common law) in the constitutional structure. The Petition of Right expressly stated no specific interpretation. Charles read the continued supremacy of his prerogative, as bolstered by Arminian theology concerning hierarchical structure and divine right. At this point in the conflict the common law constitution was a radical legalist position. It lacked widespread popular understanding and support, it lacked an explicit religious perspective. However, this episode encouraged a marriage of opponents to church and crown, between the radical common lawyers and the radical Protestants.[130]

In summation, the Petition of Right can be understood as a failed re-statement of pre-existing law, with an acknowledgement that this represented a political position in the conflict over constitutional interpretation. Furthermore, the Petition can be understood as part of a wider

[129] Proceedings on the Petition of Right [26 June 1628], Journal of the House of Lords vol III, ibid.
[130] On the radical nature of the common law constitution and its deployment of Magna Carta see: Zimmermann, (n104), 138-140; on the forced alignment of the radical Protestant and the Parliamentary radicals of the 1620s see: Little, (n58), 298-299.

intention for reform of constitutional culture. When analysed from the perspective of legitimacy theory, the role of religious influence in bolstering the perception of the legitimacy of the Crown can be seen. Additionally, the absence of a popularly supported, and understood, alternative constitutional model is also highlighted. However, when viewed as part of a wider movement for constitutional reform the Petition can be seen to have laid foundations for future success.

Vande Zande has demonstrated, using legitimacy theory, how the court of Star Chamber (an emanation of the Privy Council governed by royal prerogative, not common law) served to provide short-term expressions of coercive power to maintain collective obedience during the personal rule of the 1630s. Also demonstrating how, over the long-term, this acted to de-legitimise the authority of the court. By making use of arbitrary power Star Chamber itself eroded perceptions of its legitimacy.[131] Expanding this framing of analysis, and taking a cultural perspective to the concept of constitution, my work highlights how the nature of the 1620s political conflicts, combined with imposition of the personal rule through the 1630s, served to de-legitimise the Crown's interpretation of constitutional structure.[132] Russell may have been correct in asserting that prior to the Civil War Parliament lacked a coherent theory of resistance, if one views a coherent theory of resistance as a factual method for constraining a monarch to the point of removing them. However, this is not a coherent theory of resistance. This is a coherent alternative theory of constitutional structure, something that was not present or expressly viable in the Petition of Right, but was in An Agreement of the People.

[131] Daniel Vande Zande, 'Coercive Power and the Demise of Star Chamber' (2008) 50(3) American Journal of Legal History 326, 342-346.
[132] As an example of the problems of centralised governance and the experiences of those subject to the agents of the Crown through the 1630s see: Henrik Langeluddecke, 'Law and Order in Seventeenth-Century England (1997) 15(1) Law and History Revue 50.

An Agreement of the People as failed constitutional reform manifesto

Despite the tone of An Agreement of the People, which presented itself as a complete re-constitution of governance structure, the document was a constitutional reform manifesto. The expression of re-constitution, as opposed to reform, can be suggested to be the selected framing of the Agreement for several reasons. First, in wider Leveller literature, as described above, their argument was that the Civil War had acted to re-instate a state of nature. Therefore, it was not a case of providing reform, or re-statement, of existing correct practice. From a theoretical and philosophical perspective there was a requirement for a completely clean state. Second, the Levellers deliberately positioned themselves as a voice of the People, one emanating from outside of the pre-existing constitutional structure. Taking a tone of re-constitution, as opposed to reform or re-statement, could be understood to have assisted in distinguishing the Agreement from the defeated monarchists, and a Rump Parliament increasingly distant from its supposed electorate. This position would also have provided an appeal to the New Model Army rank and file, who could have been the decisive power in the post-Civil War settlement at the Putney Debates. The potential political power of the Army at that point, and the opportunities present in winning its support, cannot be underestimated. As Woolrych suggests 'the king and the Parliament already lay very much at the army's mercy, the outcome of the contest [at Putney] was of incalculable importance for the whole kingdom.'[133] The Putney Debates presented an unparalleled opportunity for a fringe democratic reform campaign to gain the support of *the* potential national powerbroker in the constitutional settlement.

Ultimately, this did not come to pass. It is true the New Model Army may have had the potential to be the deciding force in the settlement. The Levellers made their pitch specifically targeting the soldiery, not the officers who they disparagingly labelled as grandees. Perhaps

[133] Austin Woolrych, 'The Debates from the Perspective of the Army' in Michael Mendle (ed), *The Putney Debates of 1647* (CUP 2001) 53.

forgetting as they did so that the New Model Army was precisely that: a military force. Yes, it was unlike any Army previously seen in England, but it was still a military force with all the internal ties of loyalty and obedience that that entails. While the Agreement may not have been expressly critical of the Army leadership, other Leveller pamphlets most certainly were.[134]

In summation, the Levellers could be simply suggested as having proposed too radical a constitutional reform.[135] Their platform of equality among individuals was perhaps to ill-defined. Even their platform limited to a true political and legal levelling with regards to public law, was too radical for the seventeenth-century. The monarchic forces in the Civil War may have been militarily defeated, but belief in traditional practice and divine right kingship did not dissipate overnight. Holders of these beliefs would never have been natural supporters of democratic constitution. On the other hand, potential natural allies of the Levellers, the radical and politically active Protestants (Presbyterians and Puritans) were themselves, at times, radically out of step with social norms. Furthermore, most of those religious movements would have sought the imposition of a national church favouring their particular flavour of Protestantism (often to the exclusion of all other faiths). The Agreements' recognition that for a true peace religion had to become a purely personal (private, not state affiliated) matter put it radically out of step with all but a very small number of fringe Protestant sects. The autonomous political individual may have been a constitutional component Protestantism could have rallied behind, due to its similarity to the autonomous spiritual individual at the heart of their Reformation. However, the Levellers next step: to make state and church distinct entities, robbed them of any possible perception of religious influence upon the legitimacy of their

[134] For the Leveller writings, and their portrayal of the Army Grandees, see: Wolfe (ed), (n105); The Levellers, (n2).
[135] For an overview of social organisation and local politics of the seventeenth-century see: Coward, (n122); Harris, (n20); His (ed), *The Politics of the Excluded* (Palgrave 2001). On the point of too radical constitutionally see: Baker, (n70); Foxley, (n66); Hindle, (n123). On the point of too radical theologically see: Bellany, (n121); Foxley, (n66); Foxley, (n82).

reform. Therefore, the Agreement had to stand on the appeal of democratic equality alone. Powerful vested interests, including the Church's maintenance of influence upon state politics, never settled for this position.

CONCLUSION

This chapter has analysed two failed reform manifestos preceding the Bill of Rights. This has highlighted aspects of the constitutional settlement and reform affected through the Bill that might have drawn perceptions of legitimacy from religious thinking stemming from the Protestant Reformation. The Petition of Right has been analysed to suggest how too conservative an attempted reform, one presenting itself as re-statement, failed to generate sufficient belief in its own legitimacy. It was a legalistic entry into a political argument over constitutional supremacy; a constitutional conflict won by the Crown. On the other hand, An Agreement of the People was framed as radical re-constitution, rather than reform. This accentuated its presentation as outside of the old constitutional system, and how it called for radical re-positioning of constitutional power structures and authorisation. The document failed to generate sufficient perceptions of its own legitimacy to become a driving force in the post-Civil War constitutional settlement of the late 1640s. However, both of these reform manifestos demonstrated precursors to arguments that, amended, were re-deployed within the Bill of Rights to generate perceptions of its legitimacy. Elements that related to Protestant religious thinking; and how this could influence popular perceptions of the legitimacy of the constitutional settlement, and the role of Parliament in undertaking it.

The Petition of Right was shown to claim a Weberian traditional legitimacy: the immemorial common law of England. As well as aspects of rational/legal legitimacy: the argument there were rules to follow which required express re-statement. On the other hand, An Agreement of the People rejected any legitimacy of tradition. This was because it called for a complete break with the pre-existing constitutional structure: the dissolution of monarchy,

state Church and the House of Lords. The new system would be grounded upon a constitutionally supreme Parliament (Commons). To be achieved by making the legal and political equality of all (men) the fulcrum of constitutionalism. Therefore, the Agreement called upon the rejection of the old, and the foundational importance of the new; public law, founded on the rational legal legitimacy of the sovereignty of the people. The people as authorisers of governmental power, through their collective expression of their equal relationships to government, which they exercised through their authorisation of Parliament by electing its members to represent their collective self.

The Bill of Rights took up aspects of arguments deployed in both failed manifestos. The authority of Parliament as based on its representative connection to all parts of the nation, the three estates, echoes An Agreement of the People. The legalistic circumvention of the line of succession (finding a vacant throne) bore similarities to how the Petition aimed to undermine the theory of divine right, without specifically targeting the office of the monarchy within the constitutional structure. The combined importance of tradition, and the correct application of practice and law, still exists within English constitutionalism.

Analysis of both documents, utilising the four legitimacy theory criteria, shows how each document undertook certain tasks through its framing; and how religious thinking might be understood to have impacted on perceptions of its legitimacy. The Petition of Right expressly engaged with how treatment under the monarchic regime (specifically the various officers empowered under the Royal Prerogative) could be used to de-legitimise the argument of monarchic supremacy under the constitutional structure, as identified in the first and second criteria. However, the conservative framing of re-statement spoke to reliance upon the pre-existing constitutional model: dependence upon the monarchic constitution – as per the third criteria. The inability of the Petition to directly, and *expressly*, target Charles I suggested the lack of an alternative constitutional proposition; and the fringe position of the radical common

lawyers within Parliament's political argument. This necessitated reliance upon (and justification of) the theoretical role of the monarch within the existing constitutional structure. An Agreement of the People took the opposite tone, from a starting point similar to the Petition of Right: the ill-treatment of the people under the previous constitutional structure. The Agreement engaged with the first two criteria generating perceptions of the illegitimacy of traditional monarchic constitutionalism. However, unlike the Petition, the Agreement positioned itself externally, as a radical alternative. This allowed it to disassociate the newly proposed constitutional model from any connection to, or dependence upon, monarchic or ancient constitutionalism (criteria three). There was no possible justification for the unequal treatment, and arbitrary abuse of power, that occurred under the old system. There was no rational justification for the old system under criteria four.

With regards to question 2 (A), both the Petition of Right and An Agreement of the People suggest how ideas of divine right monarchy and its association with the Catholic Church could be deployed to undermine perceptions of pre-constitutional legitimacy. Parliamentary arguments surrounding the Petition of Right made use of criticism of the powerful Arminian faction in the Church of England, and their positive expression of divine right theory. Parliament painted them as exponents and defenders of arbitrary government. The very phenomenon the Petition was itself supposed to tackle, through re-stating proper constitutional operation. An Agreement of the People tapped into the legitimate Reformation re-constitution of Protestant church(s), especially the centralisation of the autonomous spiritual individual. This proposition became the centrepiece of the Levellers re-constitution of the nation: the autonomous political individual; and their equality under law, and in authorising their representatives in government. However, with regard to question 3 (A), it is suggested that both documents failed as constitutional reform manifestos. This, at least in-part, can be attributed to the failure of both documents to have sufficiently generated perceptions of their legitimacy

through association to religious thinking. The Petition of Right took too legalistic a position over constitutional principles. It failed to sufficiently interlink popular perceptions of Arminianism and arbitrary rule. Parliament ‘legally’ objected to Arminian influence in the Church of England, but it did not expressly connect this to a reform of constitutional structure. Nor did it directly engage with perceptions of the illegitimacy of arbitrary rule, and the constitutional supremacy of the office of the King. Instead, the Royal Prerogative, and its authorising of individual officers, was legalistically attacked. Conversely, An Agreement of the People took a potential perception of legitimacy for its cause, the alignment of the spiritual and political individual(s), and then expressly denied recourse to popular perceptions of legitimacy influenced by religious thought. This was achieved through mandatory disassociation of religion and public law: dissolution of the Church of England.

CHAPTER 6

The Meeting of Parliament (Triennial) Act (1694), the Act of Settlement (1700) and the Bill of Rights as constitutional reform

INTRODUCTION

This chapter analyses two legislative reforms subsequent to the Bill of Rights that I argue are direct continuations of the constitutional reform enacted in the Bill as the legal manifestation of the so called 'Glorious' Revolution. Further, I argue that these statutes were able to legitimately enact reform because of the Bill of Rights. The documents addressed in this chapter are the Meeting of Parliament Act, also known as the Triennial Act, and the Act of Settlement. Taken together, these represent more than mere legislative acts, they are foundations of constitutional conventions that substantively changed the English constitution, and cemented Parliament as the supreme constitutional authority at the expense of the monarch. The radical nature of the content of the individual Acts has been overlooked due to the differences between their content and their legal function. They have also been obscured within the narratives of English constitutional history, which promoted a historic stability as opposed to radical intervention and revolution.

Following in the wake of the Bill of Rights, and the express constitutional settlement it enacted, the Triennial Act was the third such Act attempting to govern the conventions for summoning and the duration of parliaments during the seventeenth-century. Unlike previous attempts the 1694 Act was passed, and observed, by monarchs. Even when replaced in the early years of the eighteenth-century its repeal, and the enactment of its successor the Septennial Act 1715,[1] were conducted through correct legislative procedure in line with the constitutional process established in the 'Glorious' Revolution. The long title of the Act declares itself to be

[1] Septennial Act 1715, this statute has only recently been repealed following the passing of the Fixed-term Parliaments Act 2011.

'[a]n act for the frequent meeting and calling of parliaments', this was then explicitly stated through the requirement that 'henceforth a parliament shall be holden once in three years at the least.'[2] The Act further established that this regularised schedule of parliamentary elections and sessions was to expressly operate in perpetuity, stating that 'so from time to time forever hereafter within three years at the farthest from and after the determination of every other parliament, legal writs [shall be issued] for assembling and holding another parliament.'[3] While a legislative act, and therefore technically subject to the convention that no parliament can bind another, the Triennial Act can be understood to represent something greater than mere legislation. It represents the legal enshrinement of a constitutional convention: A requirement for frequent sittings of Parliament, and that Parliament must be regularly renewed through fresh elections. The significance of this Act has been occluded in subsequent narratives of the English and British Constitution, as I shall demonstrate in this chapter.

The second document to be analysed in this chapter is the Act of Settlement. The long title of which is an '[a]ct for the further limitation of the crown and better securing the rights and liberties of the subject.'[4] Here can be seen an explicit echo of the long title of the Bill of Rights, which declared itself to be 'An Act declareing the Rights and Liberties of the Subject and Setleing the Succession of the Crowne.'[5] As this long title of the Act suggests, the Act of Settlement did more than address the line of succession. It excluded Catholics from the line of succession and those married to them (articles 1 and 2). The Act also required the monarch to be a member of the Church of England, and that any monarch not from the British Isles must seek parliamentary approval for use of domestic military force related to any foreign territorial possessions, and that all monarchs must conduct governance through the Privy Council (article

[2] Triennial Act (1694), as reproduced in Carl Stephen & Frederick Marcham (eds), *Sources of English Constitutional History* (Harper & Row 1937), 608.
[3] ibid, 608-609.
[4] Act of Settlement (1701), (n2), 610.
[5] Bill of Rights [1688].

3). The Act additionally enacted further limitations on monarchic prerogative powers: It made judicial appointment subject to good behaviour, not monarchic whim; and established eligibility requirements for holding public office and parliamentary membership to reduce monarchic patronage (article 3).[6]

The Act of Settlement, unlike the Triennial Act, retains a prominent place in the constitutional awareness. The prohibitions enacted against the potential of not only a Catholic inheriting the throne, but also of direct Catholic influence upon a potential inheritor of the throne, continue to alter the line of succession in the present.[7] Among lawyers the Act continues to be celebrated as the source of judicial independence. However, the location and contextualisation of the Act of Settlement within the 'Glorious' Revolution and the developments of constitutionalism in its aftermath have become obscured.[8] The Triennial Act, on the other hand, has been all but forgotten in both popular and legal consciousness. My aim in this chapter is to present these two documents as manifestations of the development of parliamentary constitutionalism, not as individual legislative documents, but as part of a process of reconstitution. A process that began with the Bill of Rights and recognition of Parliament's constitutional authority as superior to that of the monarchy.

This chapter directly addresses research question 4 (and indirectly question 3(B)):

4: How might the perceived legitimacy of the Bill of Rights have influenced perceptions of the legitimacy of the Meeting of Parliament Act (1694) and the Act of Settlement (1700) as constitutional reforms?

In analysing the Meeting of Parliament Act and the Act of Settlement, the chapter will adhere to the following structure. The next section will address the historiographical narratives of the

[6] Act of Settlement (1701), (n2), 610-612.
[7] Vernon Bogdanor, *The Monarchy and the Constitution* (OUP 1997), 54-55.
[8] As an example see: Martin Loughlin, *The British Constitution* (OUP 2013), 15-18.

post 1688 constitutional development; assessing how this was written in the Whig, revisionist and third wave narratives. In addition, briefly assessing how these narratives have shaped our inheritance of these documents in contemporary understanding of the British Constitution.[9] The third section concerns the implication of the Triennial Act and the Act of Settlement for Parliament's authority over its own existence, through elections and duration of sessions. The fourth section examines the influence of the two Acts upon Parliament's authority over the monarchy. The fifth section measures the Triennial Act and the Act of Settlement against the legitimacy theory criteria extrapolated in chapter two. The conclusion of the chapter links these considerations back to the Bill of Rights and my argument that collectively these documents represent a manifestation of constitutional reform.

THE HISTORIOGRAPHY OF THE 'GLORIOUS' REVOLUTION AND PARLIAMENTARY CONSTITUTIONALSIM

This section of the chapter provides an overview of the prevailing historiographical schools that have dominated the narrative of seventeenth-century and early eighteenth-century constitutional history. Alongside this is an assessment of how these trends have influenced the shaping of contemporary understandings of the two documents at the centre of this chapter. Finally, this chapter provides an introduction to developments in historical research of other disciplines that have revealed a constitutional narrative ill-fitting with the prevailing understanding of legal constitutional history. This is the historical literature of economics and political economy as it has developed since 1989.

The prevailing historiographical trends concerning the post-'Glorious' Revolution constitutional development directly connect to the literature addressing the 'Glorious' Revolution, and the Bill of Rights, outlined in chapter four. For the purposes of my thesis these

[9] For an overview of third wave historiography and the definition of this approach see chapter 4.

are categorised as the Whig, revisionist and third wave. The Whig grand narrative tells a tale of Parliamentary resistance to monarchic absolutism, and the successful defence of the ancient or common law constitution in the face of the Stuart tyranny. Therefore, once the issue was conclusively settled (primarily in the Civil War, but finally and bloodlessly in the 'Glorious' Revolution) in 1688 there were no substantive developments until the next great wave of constitutional reform with the rise of liberal democratic ideals a century later.[10] The revisionist movement rightly challenged this understanding of constitutional history. It exposed the Whigs not as defenders of ancient traditions and correct legal procedure, but as an aristocratic cabal intent upon their own agenda; undertaking a coup d'état. However the 'Glorious' Revolution, in this narrative, remained a largely bloodless affair and certainly a minority enterprise with an impact limited to the upper echelons of society. What the revisionists did draw attention to was the pan-European context of the Revolution.[11] The third wave of historiography of the 'Glorious' Revolution (although perhaps more accurately ascribed to a re-revisionism) rejects both narratives. The Whig conservationism and adherence to ancient constitutional ideals is once again exposed as cloaking radicalism and reformist agendas. However, revisionist insistence on a relatively bloodless event, focused on political as opposed to physical violence, is rejected. The revisionist narrative, and its emphasis on the unplanned nature of the Whig revolution required a distinguishing of 1688 from the subsequent constitutional developments of the late seventeenth and early eighteenth-centuries. In further expanding the international contextualisation of the 'Glorious' Revolution the third wave scholars demonstrate that widespread conflict occurred in the British Isles and further afield. However, in examining the social context of the event they also expose evidence of domestic civil unrest. Furthermore,

[10] As examples of Whig historiography see: George Barton Adams & H. Morse Stephens (eds), *Select Documents of English Constitutional History* (Macmillan 1914); David Lewis Jones, *A Parliamentary History of the Glorious* Revolution (HM Stationery Office 1988); Stephen & Marcham (eds), (n2).
[11] As examples of revisionist historiography see: Robert Beddard (ed), *The Revolutions of 1688* (OUP 1991); Jonathan Israel (ed), *The Anglo-Dutch moment* (CUP 1991); Lois Schwoerer (ed), *The Revolution of 1688-1689* (CUP 1992).

they present a convincing narrative of a more inclusive event – one that featured actors from all layers of civil society. As part of the expanding of the international and social contexts of the 'Glorious' Revolution the third wave narrative allows for the identification of a radical Whig agenda at the centre of the revolutionary ideology. This in turn allows for connections to be drawn between the events of 1688 and the subsequent constitutional developments of the 1690s and early 1700s, a perspective denied to revisionism.[12]

Trends in historical scholarship, and the political ideologies spawning them, have gone a long way to shaping how the Triennial Act and the Act of Settlement are understood in constitutional discourse. Within the Whig narrative, the Triennial Act became one among many parliamentary declarations over its own procedures, and potentially the least recognised of the three seventeenth-century Acts. The Whig narrative does ascribe some importance to the Act of Settlement. After all, the exclusion from the line of succession of Catholics (and those married to Catholics) was powerful Parliamentary interference in a 'hereditary' line; and the final, statutory, independence of the judiciary was a major parliamentary victory. However, these events must by necessity be down played as reversions to pre-existing constitutional convention under the logic of Whig historiography.[13] The revisionist assault upon the Whig narrative highlighted the radical intervention of the Act of Settlement, but once again skipped lightly over the Triennial Act as one among many. However, the revisionist school did force a distinction between 1688 and subsequent constitutional development. This conclusively fractured the Whig grand narrative of constitutional evolution, and divorced the Act of Settlement (and what little concern is paid to the Triennial Act) from the 'Glorious' Revolution.

[12] As examples of third wave historiography see: Tim Harris, *Revolution* (Penguin 2007); Steve Pincus, *1688* (Yale University Press 2009); Edward Vallance, *The Glorious Revolution* (Abacus 2006).
[13] As an example of this, and of the development of the Whig historical narrative itself, see: John Campbell, 'Appendix 3: *Essay on the Act of Settlement* [c.1758]' (2013) 32(1) Parliamentary History 330. The development of this Whig narrative can also be seen reflected in the political overview found in: Bogdanor, (n7) chapter 1.

They became unintended and unplanned, individualised legislative enterprises, free standing Acts of Parliament not constitutional developments.[14] While the third wave scholarship highlights the lost connections between the Bill of Rights and subsequent Act of Settlement, the Triennial Act again sits in the shadows of constitutional history. However, it does at least call for analysis of the 'Glorious' Revolution and later seventeenth and early eighteenth-century constitutionalism to be realigned. Although not unquestioningly re-connected.[15] The full impact of this developing historiographical trend is in the process of playing itself out.

These competing historical narratives have influenced the contemporary inheritance of the Meeting of Parliament Act (Triennial Act) and the Act of Settlement. They have informed understandings of constitutional development in the transition between the seventeenth and eighteenth centuries: between the constitutional conflicts and Civil War of the Stuart monarchy culminating in 1688, and the rise of parliamentary democracy, liberalism and the Industrial Revolution. The Whig narrative bequeathed an ideology of British exceptionalism in constitutional and political development, and revisionism sundered any link between the constitutionalism(s) of the two centuries. As a result, attention is often paid to the institutions and to the actors. William and Mary and Parliament, respectively, as opposed to a unified overview of the interactions between the individuals, the institutions and domestic and international civil society, and the mechanisms, such as law, that negotiated these interactions. Therefore, we see credit given to the political instincts (and temperament of collective reconciliation) of William in negotiating a functional settlement and constitutional procedure.

[14] As examples see: Eveline Cruikshanks, *The Glorious Revolution* (Macmillan 2011); GC Gibbs, 'The Revolution in Foreign Policy' in Geoffrey Holmes (ed), *Britain after the Glorious Revolution 1689-1714* (Macmillan 1969); Geoffrey Holmes, 'Introduction' in His (ed), *Britain after the Glorious Revolution 1689-1714* (Macmillan 1969); Angus McInnes, 'The Revolution and the People' in Geoffrey Holmes (ed), *Britain after the Glorious Revolution 1689-1714* (Macmillan 1969); John Miller, *The Glorious Revolution* (2nd edn, Longman 1997).

[15] As an early example of this project, and the depth of insight it allows into the nature of the 'Glorious' Revolution's impact distinctly in Scotland and England, see: Tim Harris, 'The People, the Law, and the Constitution in Scotland and England' (1999) 38(1) Journal of British Studies 28.

In addition to which there is a highlighting of the ways in which the constitutional narrative itself became politicised within historiography by the Whigs as the authors of the victorious history, and the revisionists in their wholesale dismantling of the Whig position.[16] Alongside this shaping of the scholarly traditions and the nature of the academic debate, legal constitutional horizons viewing these two documents have narrowed. The Act of Settlement is celebrated as the source of judicial independence, and perhaps for the alteration of the line of succession (although this is as likely to be written off now as a non-legal and barely even political constitutional issue), and the Triennial Act is basically forgotten. The importance of these documents as individual statutes is unseen, and their contribution to the constitutional development of the late seventeenth and early eighteenth centuries is under-appreciated. Their contribution and place in the contemporary constitution is barely entertained as a possibility.[17] There is however one academic debate that places the space between 1688 and the eighteenth-century as the centre of its attention, and tells a remarkably different narrative. This is the historical analysis in economics and political economy which examines the financial revolution and the rise of the concept of public debt.[18]

[16] As an example of the focus on the personal character of William being central to the constitution see: Roger Congleton, *Perfecting Parliament* (CUP 2010) chapter 12. As an example of the politicisation of the settlement itself, see: Stephen Conway, *Britain, Ireland, & Continental Europe in the Eighteenth Century* (OUP 2011) chapter 1; on this point it has subsequently been suggested that: 'Paradoxically […] the instinctive conservatism of the British towards the constitution was in fact capable of being harnessed to radical constitutional reform in the pursuit of a lost stability.' Michael Foley, *The politics of the British constitution* (Manchester University Press 1999), 118. While made in reference to Thatcherism, the origins of this ideological position can be seen to stem from Whig constitutional historiography and ancient/common law constitutionalism of the seventeenth-century.

[17] For a brief engagement with the dearth of attention paid in legal scholarship to these documents, but also an outline of a potential for an alternative narrative see: Loughlin, (n8), 88-89; Chris Thornhill, *A Sociology of Constitutions* (CUP 2011), 146-152; Adam Tomkins, *Our Republican Constitution* (Hart 2005) chapter 3.

[18] For an overview of recent developments in this field see: John Beckett, 'The Glorious Revolution, Parliament, and the Making of the First Industrial Nation' (2014) 33(1) Parliamentary History 36; Gary Cox, 'War, Moral Hazard, and Ministerial Responsibility' (2011) 71(1) The Journal of Economic History 133; Kara Dimitruk, '"Intend Therefore to Prorogue"' (2018) 22 European Review of Economic History 261; Geoffrey Hodgson, '1688 and all that' (2017) 13(1) Journal of Institutional Economics 79. For related overviews of historical developments in political economy see: Pincus, (n12); David Stasavage, *Public Debt and the Birth of the Democratic State* (CUP 2003).

1688 and the history of economics and political economy

In 1989 North and Weingast's *Constitutions and Commitment* was published, it is a seminal work debated to this day.[19] While the British parliament celebrated the last enunciation of the Whiggish bloodless constitutional defence of ancient rights and liberties, a new direction of historical research into the revolutionary nature, and implications, of the events of 1688 began. North and Weingast argued that '[f]or economic growth to occur the sovereign or government must not merely establish the relevant set of rights, but must make credible commitment to them.'[20] The rights in question were property rights, and their thesis was that 1688 marked the turning point for security of property rights in the face of arbitrary monarchic actions. Once secured, these rights became the basis for sound economic interactions, and the flowering of the financial and then industrial revolutions. This position has been challenged, however, it has been accepted that the 'Glorious' Revolution – encapsulated in the concept of 1688 – marked the start of something new in political economy and economics, and that from this point on the inexorable march of commercial capital developed.

In drawing their conclusion, that 1688 marked the foundation of a state infrastructure capable of supporting credible commitment to financial obligations, and capable of harnessing capital market growth, North and Weingast state: 'In comparison with the previous century or with absolutist governments of the continent, England's institutional commitment to secure rights was far stronger. Evidence from capital markets provides a striking indication of this.'[21] Their argument is based on the idea that whereas monarchs commitment to financial obligations was prone to whimsy (and relied on conquest as the source of income to settle war debt) Parliament took a more measured and predictable view of its debts, and also abstained from arbitrary property confiscation to satisfy them. This view of 1688, and the beginning of

[19] Douglas North & Barry Weingast, 'Constitutions and Commitment' [1989] Journal of Economic History 803.
[20] ibid, 803.
[21] ibid, 830.

secure property rights backed by parliamentary predictability and moderated action, has been supported by Dimitruk, who suggests that 'political barriers to changing property rights were removed' through 'parliament's passage of legislation that reorganized property rights'. This was 'a legislative service to its land and property-holding constituents so they could reallocate their rights and use resources in new ways.'[22] It is the changing characteristics of property rights that are identified as having been the catalyst for change, and once again 1688 was the defining moment.

In critiquing North and Weingast a number of different positions and developments have been advanced. Cox argues 'enhancing the Crown's credibility would not have facilitated financial trade [following North and Weingast], except in the presence of an underlying moral hazard problem entailed in warfare.'[23] Instead, the final piece of the puzzle lay in the development of ministerial responsibility 'the key innovation that allowed parliamentary interests not simply to block royal initiatives but also to share control of the nation's ministers, who directly exercised executive powers.'[24] This focus on the modernisation of warfare, and the early foundation of the modern military industrial complex, as key drivers of the development of the modern state (as well as England, and shortly thereafter Britain's leadership in this field) fits with the prevailing historiography of eighteenth-century constitutional development.[25] In a similar vein, but from a slightly different track, another critique of North and Weingast's thesis suggests that property rights in England had been relatively secure (from an economic perspective) since the thirteenth-century. However, '1688 meant a major shift in foreign alliances and prompted a number of major wars […] [f]acitilitated by the enhanced *de*

[22] Dimitruk, (n18), 261.
[23] Cox, (n18), 133.
[24] ibid, 158.
[25] For an overview see Congleton, (n16), chapter 13; Martin Loughlin, *Foundations of Public Law* (OUP 2010) chapter 9.

facto role of Parliament, international conflict forced reform upon the British state.'[26] As a result of the changing orientation of foreign policy from James II's alignment with France to William III's Dutch allegiance, and the prohibitive cost of modern wars, it is found that '[t]he Financial and Administrative Revolutions of the early 18th century were the most immediate outcomes of 1688.'[27] Implicitly buried within these revolutions was the capacity and willingness to reform property rights, not increase their security. There is one aspect implicitly shared across all of these perspectives, but that is indirectly overlooked by all of them perhaps because of the difficulty of economic quantification. That is the result of the post-1688 shift in the balance of constitutional power, and the rise of parliament to constitutional supremacy.

'Before 1688, the monarch was head of state and head of government, with the right to call and dismiss parliament.'[28] This was the *de facto* constitutional position, regardless of any *de jure* claims made in opposition by Parliament; no matter the form of those claims, such as the two Triennial Acts prior to 1694 subject to discussion in the next session. 'During the 17th century, long periods went by when parliament was less than effective. […] They were subject to sudden adjournments and prorogations which interrupted business.' As a result, 'there was little, or no, opportunity for developing any programme of domestic improvement',[29] in other words a coherent legislative agenda. What is common across the historical analysis in these disciplines is the recognition that not only did 1688 mark the ascent of parliament to unquestionable constitutional supremacy, but also that it marked the beginning of effective parliamentary legislative programmes.[30]

[26] Hodgson, (n18), 100.
[27] ibid, 100.
[28] Beckett, (n18), 37.
[29] ibid, 37.
[30] As examples see: ibid; Cox, (n18); Dimitruk, (n18); Hodgson, (n18); North & Weingast, (n19); Pincus, (n12); Stasavage, (n18).

Once the monarch was no longer able to interfere with parliamentary sessions by arbitrarily ending them, Parliament became an effective and productive legislative chamber. Legislation became the chief domestic tool of governance. Unlike previous attempts at instituting regularised and stable parliamentary sessions (a project that dated back to Magna Carta), the 'Glorious' Revolution, centred on the Bill of Rights, established the constitutional convention of regular and predictable parliamentary sessions. This was further demonstrated, and strengthened, by the express constitutional developments of the Meeting of Parliament Act and the Act of Settlement. The Triennial Act demonstrated capacity of Parliament to secure its existence and facilitate its own renewal through periodic elections. Importantly, without the scope for the scale of arbitrary prorogation and abuse of process seen previously such as the Personal Rule of Charles I and excessive durations of the Rump and Cavalier Parliaments. This also contained opposition positions *within* parliament, as opposed to external exclusion, so both Whigs and Tories had reason to continue to operate within Parliament.[31] The Act of Settlement demonstrated an extension of this constitutional principle of Parliamentary supremacy to cover the existence of the monarchy. Parliament legislated for the precise line of succession of its own choosing, and enacted safeguards to prevent inheritance by future undesirables. As is demonstrated in the following sections of this chapter, elements of the legitimacy of these documents can be ascribed to the Bill of Rights and the successful settlement and reform it enacted.

[31] It is traditionally suggested the rise of the party-political system occurred during the eighteenth-century, with the instituting of Prime Minister Robert Walpole given as evidence of this. However, analysis of the economic and political disturbances of the 1690s demonstrates an internalisation of opposing political positions within a parliamentary party system, as opposed to previous dissatisfaction being expressed as acts of divine retribution. See: Brodie Waddell, 'The politics of Economic Distress in the Aftermath of the Glorious Revolution, 1689-1792' (2015) 130(543) English Historical Review 318.

PARLIAMENTARY AUTHORITY AND THE PARLIAMENTARY PROCESS

This section addresses the Meeting of Parliament Act and the Act of Settlement from the perspective of the constitutional development of Parliament's authority over itself.[32] By this I mean the rise to supremacy of parliament within the constitutional power relationship, and its assumption of the *de facto* and *de jure* positions of constitutional power; as well as the interrelated capacity of parliament to prevent arbitrary interference in both parliamentary sessions and elections. As opposed to the pre-1688 situation, whereby the monarch was the *de facto* seat of constitutional power. As discussed in the preceding section, historical analysis in economics and political economy has identified a key change in governmental practice post-1688: increased predictability in the parliamentary lifecycle. This can be seen in the increased capacity and efficiency of legislative procedure, but how could it be understood in the constitutional developments of the period?

Each of the major waypoints in the seventeenth-century saga of constitutional conflict was accompanied by a Triennial Act concerning the frequency and duration of parliamentary sessions, what I describe as the parliamentary lifecycle.[33] In the midst of the Personal Rule of Charles I and the Civil War is found the Triennial Act of 1641, aimed at the dual goals of parliament meeting every three years (at least) and not being dissolved without its own consent. Passed by the Long Parliament, this was the most ambitious of the three Acts as it provided for a measure of legislative control over prorogation of parliament against the royal prerogative. Largely due to this, it was not to survive the Restoration. In 1664 a second Triennial Act was passed, again with the ambition of securing regularised meetings of parliament. While it might be considered that the Restoration of the monarchy was accompanied by the removal of the

[32] The balance of the documentary analysis in this section will be in favour of the Meeting of Parliament Act, however, there is also supporting evidence to be found in the Act of Settlement. The section following this one concerning Parliamentary authority over the monarchy inverts the focus of documentary analysis.
[33] Richard Kay, *The Glorious Revolution and the continuity of law* (Catholic University of America Press 2014), 30, 39, 65, 140-141.

1641 Act's fetter on the royal prerogative, this does not explain why it was felt necessary to enact a further Triennial Act in 1694. However, when one considers that during the final four years of Charles II's reign, and after the first year of James II's reign parliament was not called at all, desire for a new Triennial Act in 1694 makes sense.[34] This situation acts as a perfect illustration of the location of factual constitutional power before 1688. Despite legislative constitutional requirements for frequent sessions of parliament the monarchs possessed the implicit constitutional authority to override statute. As the previous chapter demonstrated regarding the Petition of Right, even when parliament was in session the monarchs felt no constitutional restriction against proroguing it arbitrarily if it failed to meet their expectations. Indeed prorogation of troublesome parliaments, and the explicit threat to do so to force compliance, became tantamount to policy under Charles I.[35]

By the time of the passing of the Meeting of Parliament Act (1694) the three year model had become an established norm. However, unlike the previous two Acts, this one was never subject to arbitrary monarchic contravention. Even when it was repealed, as described above, it was in favour of a replacement procedure for observing the constitutional convention provided by the correctly enacted Septennial Act. 'Throughout the revolutionary period, in short, parliament came to be considered as an institution that could not be dissolved or prorogued at the royal behest'.[36] While Thornhill's analysis sees this simply as the proposition and gradual entrenchment of a constitutional norm, this does not provide sufficient detail for substantive micro scale analysis within the context of the seventeenth-century. Nor does it fully appreciate the central importance of the Bill of Rights in this constitutional development. As Thornhill's scholarship accounts for a century's long overview of normative constitutional development it is unable to address the question *Was the Glorious Revolution a Constitutional*

[34] On the convoluted history of Triennial Acts in the 1600s see: ibid, 65; Tomkins, (n17), 67, 88, 96.
[35] See chapter 5.
[36] Thornhill, (n17), 146.

Watershed?[37] To do this one must be able to conceptually address not just normative development of positive constitutional law, but also a sea-change in parliamentary practice, and legislative capacity and efficiency post-1688. This requires a more detailed view of the changes in constitution (as broadly conceived societal process) beyond the strict expression of positive law.

The Meeting of Parliament (Triennial) Act

The long title of the Triennial Act identified itself as: 'An act for the frequent meeting and calling of parliaments.'[38] This is unsurprising given the colloquial title of Triennial Act suggested how frequent these meetings should be. However, the document continued, stating 'by the ancient laws and statutes of this kingdom frequent parliaments ought to be held, and whereas frequent parliaments tend very much to the happy union and good agreement of the king and people'.[39] This passage is surprising, as it reflects an implicit acknowledgement of the failed nature of previous legislative attempts to enshrine the frequency of the meetings of parliament. It also alludes to the fractious nature of the relationship between parliament (as the representative of the people) and the monarchy that the contest over the parliamentary lifecycle had represented. This was highlighted in article I, which states:

> [I]t is hereby declared and enacted by the king and queen's most excellent Majesties, by and with the advice and consent of the lords spiritual and temporal and commons in this present parliament assembled and by the authority of the same, that from henceforth a parliament shall be holden once in three years at least.[40]

A marked change in tone. Here parliament declared the law, and did so through the monarchic voice. All the while demonstrating that parliament was the driving force, and in possession of

[37] This question is asked by Gary Cox, who also answers in the positive, as evidenced by the increase in legislative activity post 1688, see: Gary Cox, 'Was the Glorious Revolution a Constitutional Watershed?' (2012) 72(3) The Journal of Economic History 567; and additionally, Cox, (n18).
[38] Triennial Act (1694), (n2), 608.
[39] Triennial Act (1694), as reproduced in George Adams & H Morse Stephens (eds), *Select Documents of English Constitutional History* (Macmillan 1914), 471.
[40] ibid.

the *de facto* constitutional power. Furthermore, that this expression of constitutional power, and the power to bind the monarchy into the establishing of this constitutional convention (requiring their continued involvement in the lifecycle of parliament), was done so through Parliament's own constitutional authority.

The emphasis upon the authority of Parliament to control its own destiny was further reinforced in article II which required a new parliament to be assembled 'from time to time forever hereafter […] within three years at the farthest from and after the determination of every parliament'.[41] In other words it is not enough that parliament meet frequently, there must be periodic renewal of the membership (regular elections). Article III then cemented this core constitutional convention through the declaration that 'no parliament whatsoever […] shall have any continuance longer than for three years […] from the day on which by the writs of summons the said parliament shall be appointed to meet.'[42] Articles I, II and III all operate in perpetuity, to ensure that parliament will meet at least every three years at a minimum, and that no individual parliament will last longer than three years. While the principle that no parliament may bind any other was demonstrated to have been operable by the passing of the Septennial Act, the express requirement of these provisions created a binding convention that has been adhered to ever since. Their express inclusion in the document required that all subsequent legislative amendment must make some provision for following the principle not just of regular meeting, but also regular electoral renewal. It is worth remembering that not only did Charles II fail to call any parliament for the final years of his reign, but that prior to that his Cavalier Parliament spanned two decades between 1661 and 1679. Additionally, it is worth considering the issues raised by the Long Parliament of the Civil War and its degeneration into the Rump

[41] ibid.
[42] ibid.

Parliament and the governmental crisis precipitated at the end of the Interregnum.[43] Firm constitutional principles governing the lifecycle of parliament could be appreciated by both parties.

What might not be immediately obvious regarding the content and tone of the Triennial Act is: 1) the claimed location of constitutional authority, and 2) the entrenchment of the correct constitutional procedure for governance of the parliamentary lifecycle. First, the location of constitutional authority (once legislatively enshrined) acted as a continuation, for the first time, of both *de facto* and *de jure* power being vested in Parliament, as against the monarch. Article I established that the actions of the monarchs were taken 'with the advice and consent of the lords spiritual and temporal and commons […] and by the authority of the same'. This was reinforced in article II which underwrote this provision as 'enacted by the authority aforesaid', a sentiment echoed in article III and article IV (which provided for the dissolution of the 1694 Parliament, in accordance with its own legislation).[44] At each stage of the establishment of the procedure it was entrenched that parliament possessed the constitutional authority to govern its own procedures. This was expressly reiterated in reference to frequent meeting, the strict limitation upon duration, and the requirement for electoral renewal. The authority of parliament (in the Crown-in-council-in-parliament formation) was not only established in the preamble, it was stamped at the beginning of each subsequent article. This left no doubt that parliament possessed constitutional authority, and was acting as both *de jure* and *de facto* constitutional power.

The Triennial Act established a second principle: the procedure through which the parliamentary lifecycle would be governed. Unlike the Long Parliament in 1641, the 1694 Act

[43] On the varying characters and inordinate lengths of seventeenth-century Parliaments see: Tomkins, (n17), chapter 3. Although the title of the book should give some sense that the author's sensibilities were perhaps less offended by the Long Parliament than by the Cavalier Parliament.
[44] Triennial Act (1694), (n39), 471.

made no provision for alternative assembly in the face of a non-compliant monarch.[45] Instead, the monarch was expressly bound into the process for calling (and dissolving) parliament, as they are to this day. Article II stated 'legal writs under the great seal shall be issued by directions of Your Majesties, your heirs and successors, for calling, assembling and holding another new parliament.'[46] Not only did this provision compel monarchic engagement with the parliamentary process, as opposed to providing a self-enacted procedure of a republican character; it foreclosed on the potential for a competing 'monarchic parliament' to be assembled. James II was still alive and had assembled an Irish army, furthermore, his son was recognised by Louis XIV as heir. James had even 'disposed' of his great seal in the Thames in the hope of stymying governmental process in his absence.[47] However, what this might represent most was the supreme confidence of parliament in the constitutional structure, and their position within it. 1688 settled the constitutional conflict of the seventeenth-century, and created a constitutional monarchy. The Triennial Act represented an expression of Parliamentary confidence (as a Whig political project, and a unified governmental entity) that the monarchy had been brought to heal and subsumed within the constitution; under parliamentary supervision once and for all. The constitutional history of Britain since has proved them correct.

[45] As an example of this point concerning the Long Parliament's 1641 Act see: Kay, (n33), 65.
[46] Triennial Act (1694), (n39) 471.
[47] Kay, (n33), 73, 285.

The Act of Settlement

The Act of Settlement is most famous in the general consciousness for settling the line of succession and giving rise to the Hanoverian line. It still governs the relationship between Catholicism and the Crown to this day.[48] Whereas, in legal consciousness the Act is mostly remembered as the document that enshrined judicial independence from the monarch. These positions miss much of what the Act of Settlement represents constitutionally.[49] As identified in the introduction, the Act of Settlement contains more than provisions concerning the line of succession and the appointment of judges. Although most of the content concerns what might be thought of as issues around parliamentary authority over the monarchy, and as such is subject to analysis in the following section, there is one article that has contents addressing parliaments' authority over itself. Namely article III and provision that it made for membership of parliament.

Article III of the Act of Settlement opens with a clause concerning the relationship between the monarch and the Church of England, which is not at issue in this section; and closes with the famous clause creating judicial independence from the monarch. However, in between are two clauses in which parliament stated restrictions upon who might be eligible for membership. '[N]o person born out of the kingdom of England, Scotland or Ireland or the dominions thereunto belonging […] shall be capable to be of the privy council, or a member of either house of parliament'.[50] Buried within a legislative action that settled the succession on the Electresses and Electors of Hanover, this clauses seems to suggest a learning process from having had William III, Stadtholder of the Dutch Republic, as king between 1688-1702 (a very different experience to the shared Scottish and English Crowns of the Stuart line).[51]

[48] Bogdanor, (n7).
[49] On this point see: Loughlin, (n8), 50-53, 88-89.
[50] The Act of Settlement, (n39), 478.
[51] On this point see: Harold Berman, *Law and Revolution, II* (Belknap Press 2003) chapter 7; Congleton, (n16), chapters 12 & 13; Loughlin, (n25), chapter 9; Thornhill, (n7), 139-160; Tomkins, (n17), chapter 3.

However, article III continued with additional restrictions upon parliamentary membership, stating '[t]hat no person who has an office or place of profit under the king or receives a pension from the crown shall be capable of serving as a member of the house of commons.'[52]

These two provisions suggest not simply protection of a domestic parliament from foreign interests, which might not be shared with a 'foreign' monarch; but an explicit statement of self-determination by parliament to prevent its corruption from within, through the practice of placemen subverting parliamentary process. Parliament explicitly demonstrated the capacity afforded to it as the supreme constitutional authority to take measures to ensure its own independence from monarchic interference. Commentators rightly point out that provisions targeting placemen in the Commons were never enforced and were repealed; and further, that this provision may have actually acted as a barrier to smooth governmental process.[53] However, what this perspective misses is that parliament expressly legislated to limit the interference of non-domestic monarchic interests in domestic parliamentary business. Furthermore, parliament foresaw (and learned from experience) the dangers of placemen to their new found constitutional authority, and successfully legislated a preventative measure. Although un-enforced, it was part of the Act of Settlement, and received royal ascent. The precedent was established, if required. Finally, it must be remembered that after the settlement and reform of the Bill of Rights, and the continued reform of the Triennial Act and the wider Act of Settlement parliament had firmly established its position of constitutional authority, replacing the monarch as both the *de facto* and *de jure* constitutional power. If parliament wanted to set criteria for its own membership it had the authority, and now the legislative capacity necessary.

[52] The Act of Settlement, (n39), 478-479.
[53] Jenifer Carter, 'The Revolution and the Constitution' in Geoffrey Holmes (ed), *Britain after the Glorious Revolution 1689-1714* (Macmillan 1969); Congleton, (n16), chapter 12; Cruikshanks, (n14); Harris, (n12); Loughlin, (n25), chapter 9; Miller, (n14); Pincus, (n12); Thornhill, (n17), 139-160; Tomkins, (n17), chapter 3.

PARLIAMENTARY AUTHORITY AND THE MONARCHY

In counterpoint to the previous section this part of the chapter considers the Meeting of Parliament Act and the Act of Settlement from the perspective of Parliament exercising constitutional authority over the monarchy.[54] My thesis argues the 'Glorious' Revolution, and specifically the Bill of Rights, represented not simply a settlement to the constitutional crisis of the seventeenth-century but also a constitutional reform. Evidence of this can be seen through subsequent legislative reform (the subject of this chapter) and failed forerunners as manifestos for constitutional reform (addressed in the previous chapter): when these are addressed not purely as documents of either civic philosophy or law, but instead as artefacts of constitutional history. Furthermore, I contend that aspects of the perception of the legitimacy of this process – as enacted in the Bill of Rights –stemmed from Protestant Reformation of church structure and 'spiritual' authority. In this context, the truly radical elements of the Triennial Act and the Act of Settlement appear. Post-1688, Parliament was able to definitively take possession, free from superseding monarchic power, of its own lifecycle; and indeed included the monarchy within this cycle on its own terms. In the context of the preceding constitutional history from Magna Carta onwards this represented a definitive moment of constitutional reform. Parliamentary claims to constitutional authority had a long antecedence, and had even existed *de jure*, but had never successfully been articulated and exercised *de facto* prior to 1688 in any meaningful and lasting form.

This achievement (nonetheless momentous for what is about to follow) has paled into insignificance in the glare of what has become recognised (by those who have deemed it worthy of attention, and not simply taken it for granted) as the Crowning achievement of the 'Glorious' Revolution: The binding of the monarch to the constitutional supremacy of parliament, through

[54] The focus of documentary analysis will also be reversed. The primary focus of this section falls upon the Act of Settlement as opposed to the Triennial Act, although the latter document is the subject of brief discussion.

the successful entrenchment of the Crown-in-council-in-Parliament constitutional structure. While this model of governance had previously been the nominal constitutional form, it had always been possible for the Crown (according to Parliament at the behest of the council) to break free from the system and indulge in acts of arbitrary government.[55] After 1688, and the Bill of Rights, this no longer existed as potential practice under any constitutional interpretation. Whatever the monarch may have wished to be the case, all constitutional authority had to be exercised through the correct form. Parliament held the balance of constitutional power, due to its claimed position of supreme constitutional authority to ensure this was so. Some scholars find this as a development of the late seventeenth-century, many have treated it as an unrelated component of the eighteenth-century development of liberal parliamentary democracy.[56] Furthermore, very few have noted the truly radical nature of the content of the Act of Settlement, possibly because its operation has not been nearly so radical. Whig historiography occluded the sea-change of the reform to the independence of the judiciary (and declaration of the line of succession in perpetuity) through recourse to the supposedly antecedent ancient constitution.[57] The established focus of this period identifies parliament winning conclusive control of the purse strings post-1688 as the key feature.[58] The importance of Parliament gaining control over the power of financial supply is undeniable. However, there is a somewhat obscured narrative depth that can be added to our understanding

[55] As an example see the discussion around the Petition of Right in the previous chapter.
[56] As examples see: Congleton, (n16) chapters 12 & 13; Thornhill, (n17), 327-240; Tomkins, (n17) chapter 3. As examples of the re-orientation of the historical narrative see: Harris, (n12); Pincus, (n12).
[57] On this point see: Loughlin, (n25), 263-264, who perhaps recognises this most explicitly. Other scholars end up skirting the issue somewhat, as examples see: Thornhill, (n17), where do to the method utilised loses the precise definition of the of the content of the Act of Settlement, in favour of its place in a roll call of developing normative principles identified through its effects, and; Tomkins, (n17), who like Loughlin does appreciate the content, but fails to take its consideration far enough, again partly because of its lack of direct effect, and partly because of a methodological focus on republican political theory which forces the focus of analysis to rest on the Parliamentary actions of the 1640s and the Civil War as much as on those of the 1680s and 1690s and the 'Glorious' Revolution.
[58] On this point see the historical debates in economics and political economy outlined in the historiographic section of this chapter, and additionally the commentary in: Congleton, (n16) chapter 13; Harris, (n12), 352-353; Loughlin, (n25), 259-268; Pincus, (n12), 366-399; Thornhill, (n17), 237-240; Tomkins, (n17), chapter 3.

through focussing attention on the framing of the claimed authority by which Parliament achieved this, and that is the aim of my thesis.

The Meeting of Parliament (Triennial) Act

Due to the subject of the Triennial Act, space in the analysis of this section of the chapter is limited. A document expressing the constitutional procedures for the calling, sitting and dissolving of parliament sees little exercise of parliamentary constitutional authority directly over the monarchy. However, there are some passages of relevance to my aim here, and the document serves as a useful illustration of the new found (post-1688) constitutional authority of parliament: this Triennial Act, as discussed already, is notable compared to its predecessors due to its singular lasting success.

The Triennial Act legislated constitutional conventions governing the lifecycle of parliament. Not only this, it expressly bound the monarchy into constitutional procedure through the article II requirement that 'legal writs under the great seal shall be issued by directions of Your Majesties, your heirs and successors, for calling, assembling and holding another new parliament.'[59] Rather than follow the example of the ultimately unworkable (in the context of the Restoration) Triennial Act of 1641, and provide for an alternative 'non-monarchic' procedure of parliamentary assembly, the 1694 Act deliberately bound the monarchy into the process.[60] It is notable, given the history of the Triennial Acts, of arbitrary prorogations of parliament, of the Cavalier and Long Parliaments, that the Triennial Act still opted for monarchic involvement. However, for the first time this was legislated by parliament from the position of constitutional authority, and in possession of both *de jure* and *de facto* constitutional power.

[59] Triennial Act (1694), (n39), 471.
[60] On the 1641 Act see: Kay, (n33), 30, 39; Tomkins, (n17) chapter 3.

> [I]t is hereby declared and enacted by the king and queen's most excellent Majesties, by and with the advice and consent of the lords spiritual and temporal and commons in this present parliament assembled and by the authority of the same […] II. And be it further enacted by the authority aforesaid […] III. And be it further enacted by the authority aforesaid […] IV. And be it further enacted by the authority aforesaid.[61]

In each case, the authority of parliament expressly bound the monarchy to its will, and vision of constitutional reform, even if that vision might have been presented in the guise of reinstating an imagined ancient or common law constitution.

The Act of Settlement

When looking for post-Bill of Rights expression of parliamentary constitutional authority over the monarchy, the Act of Settlement has to take centre stage from a legislative perspective.

> The implications of the revolutionary settlement for government-parliament relations became evident in the Act of Settlement [… which] took the radical step of prescribing in law a constitutional framework underpinned by the principle of the separation of legislative, executive, and judicial power, and based on the requirement of a formal, official process for executive decision-making to ensure governmental accountability to Parliament[.][62]

The Act of Settlement is known in contemporary constitutionalism as the source of judicial independence, and for establishing conventions governing the line of succession. It is not recognised as the radical basis for the modern constitution, or as the herald of modern constitutional conventions such as the separation of powers.[63] Yet these appear to be found in the document, how can this be so?

The content and the function of the Act of Settlement need to be distinguished. The content has been marginalised and largely forgotten. The function has been to establish judicial

[61] Triennial Act (1694), (n39), 471.
[62] Loughlin, (n25), 263. In a similar vein see: Tomkins, (n17), 105-106: 'The Act of Settlement sought to secure greater separation (or independence) from the Crown for two institutions: the common law courts and the House of Commons […]'; Thornhill, (n17), 150: 'Through these constitutional arrangements, the state was able reliably (although not conclusively) to divide its legislative, judicial and executive functions […]'.
[63] Given the content of the document, if not its eventual function, it may have informed Montesquieu's often citied misreading of the existence of the separation of powers in the English/British constitution.

independence from the monarch, and to establish strict conventions for controlling the line of succession (both inspirational feats in the context of the seventeenth-century), but falling some way short of the potential impact imagined within the content of the Act. So what was actually in the document, and in what way did it manifest parliamentary constitutional authority over the monarchy?

First and foremost it contained an express link back to the Bill of Rights in the resonant echoes between the long titles. The Act of Settlement evocatively identified itself as: 'An act for the further limitation of the crown and better securing the rights and liberties of the subject.'[64] This interconnection and continuation was then further developed through the preamble:

> Whereas in the first year of the reign of Your Majesty and of our late most gracious sovereign lady queen Mary (of blessed memory) an act of parliament was made, entitled, An Act for decalring the Rights and Liberties of the Subject and for settling the Succession of the Crown[.][65]

This introduced a further development; not a new enterprise. As discussed in chapter four, there is some debate as to whether the offer of the Crown to William and Mary was conditional upon acceptance of the Declaration of Rights (later becoming the Bill of Rights) or not. What this passage demonstrated was – a least from a constitutional perspective – the limited relevance of that debate. The Bill of Rights declared (in legislation, rather than reality) that it was the will of Parliament to offer the Crown to William and Mary (implicitly) on their acceding to the contents of the Declaration. Once again here we see the echo of that act. Parliament settled the Crown on their chosen head in 1688, and it continued to do so now. Not just in the case of immediate heir, but in perpetuity. Parliament, in writing the legal history authored their own constitutional victory.

[64] Act of Settlement (1701), (n2), 610.
[65] The Act of Settlement, (n39), 475.

Article I re-stated the Crown settlement of 1688, thus re-affirming the logic and necessity of parliamentary subversion of the hereditary principle. This was in service of the action at the culmination of article I:

> be it enacted and declared by the king's most excellent Majesty by and with the advice and consent of the lords spiritual and temporal and commons […] and by the authority of the same, that the most excellent princess Sophia, electress and duchess dowager of Hanover […] is hereby declared to be the next in succession in the Protestant line to the imperial crown[.][66]

The article continued in this vein, and established Sophia, 'and the heirs of her body' as the heir presumptive. The heir apparent was princess Anne of Denmark (James II's second daughter, sister to the deceased Queen Mary), who ascended to the throne shortly after the passage of the Act. The reasoning was that it 'pleased Almighty God to take away our said sovereign lady [Mary], and also the most hopeful prince William, duke of Gloucester [Anne's last surviving child]',[67] and that Sophia had impeccable Protestant credentials. This was important to Parliament as:

> Your Majesty's said subjects having daily experience of your royal care and concern for the present and future welfare of these kingdoms, and particularly recomending from your throne a further provision to be made for the succession of the crown in the Protestant line, for the happiness of the nation and the security of our religion; and it being absolutely necessary for the safety, peace and quiet of this realm, to obviate all doubts and contentions in the same, by reason of any pretended title to the crown and to maintain a certainty in the succession thereof[.][68]

This relatively minor point, in the context of the length of article I, was of central importance from legal (and constitutional) perspectives. James II was still alive (for another two months) in addition to his son. Whereas, selection of Sophia as heir presumptive skipped over forty people in the hereditary succession.

[66] ibid, 477.
[67] ibid, 476.
[68] ibid.

While it is the settling of the line of succession that occupies half of the document, and the colloquial recollection of the document, what other actions exist in other articles? Article II continues the exercise of parliamentary authority over the monarchy. Not satisfied with violent destruction of the hereditary line of succession in favour of a procedure of parliamentary selection of named heirs, the importance of Protestantism in the monarchy was further entrenched:

> Provided always, and it is hereby enacted, that all and every person and persons, who shall or may take or inherit the said crown, by virtue of the limitation of the present act, and is, are or shall be reconciled to or shall hold communion with the See or Church of Rome, or shall profess the popish religion, or shall marry a papist, shall be subject to such incapacities, as in such case or cases are by the said recited act provided enacted and established[.][69]

This provision served to explicitly exclude Catholics, and those married to Catholics, from the line of succession at the passage of the Act, and as a constitutional convention going forward.[70] If nothing else this demonstrated the central influence of questions of religion on the constitutional politics of the 'Glorious' Revolution. James II's Catholicism was just about tolerated as his daughters (and their husbands) were Protestant. That was until he produced a son, and the possibility of a line of Catholic succession over a predominantly Protestant country loomed large. The legitimacy of the Act of Settlement would have been secured simply on its guarantee of a Protestant monarchy if that was the sole aim of the Act.

> Article III contains further protection of the Protestant inheritance:
>
> And whereas it is requisite and necessary that some further provision be made for securing our religion, laws and liberties […] be it enacted by the king's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal and commons in parliament assembled, and with the authority of the same: That whosoever shall hereafter come to the possession of this crown shall join in communion with the Church of England as by law established.[71]

[69] ibid, 477.
[70] On this continued relevance see: Bogdanor, (n7), 43-45.
[71] The Act of Settlement, (n39), 478.

Parliament's perpetual exercise of constitutional authority over the monarch is explicitly enabled through a claim to the position of supreme constitutional authority as the representative of the nation. Alongside the above provision to ensure a Protestant monarch, article II also marks the point of departure from the titular aim in the Act. In the next clause of article III, parliament imposed a direct duty of parliamentary consultation on any monarch 'this nation be not obliged to engage in any war for the defence of any dominions or territories which do not belong to the crown of England, without consent of parliament.' The following clause imposed a specific fetter on monarchic freedom: 'That no person who shall hereafter come to the possession of this crown shall go out of the dominions of England, Scotland or Ireland, without consent of parliament.'[72] In conjunction with the first clause of article III, and the preceding two articles, these collectively served to make the person of the monarch beholden to parliament and to parliaments' constitutional authority, binding the individual wearer of the Crown under the law.

It is from this point, article III clause four, the Act of Settlement became truly radical. Not satisfied with simply establishing constitutional oversight of the royal personage, parliament used its constitutional authority to legislate constitutional conventions, and the separation of powers. The fourth clause provided,

> all matters and things relating to the well governing of this kingdom, which are properly cognizable in the privy council by the laws and customs of this realm, shall be transacted there; and all resolutions taken thereupon shall be signed by such of the privy council as shall advise and consent to the same.[73]

This established a basis for cabinet government (as we would recognise it today) and ministerial responsibility. Both of which were anchored in the accountability of government to parliament, as authorised by parliament directly over monarchic governmental actions. The

[72] ibid.
[73] ibid.

next two clauses concern the eligibility of membership to the House of Commons, to provide a bulwark against monarchic subversion through placemen (as discussed in the preceding section). In addition, impacting upon potential members of the privy council by excluding non-nationals or their direct offspring. Again this directly overrode monarchic authority in governmental practice. Parliament once again established that it possessed both *de jure* and *de facto* constitutional power, because it occupied the position of supreme constitutional authority as representative of the nation: the Crown-in-council-in-Parliament formula.

The penultimate clause of article III established the independence of the judiciary from the monarch through providing for parliamentary oversight of judicial salaries, and dismissal; and making their tenure bound by good behaviour '*quam diu se bene gesserint*'.[74] The final clause removed the royal prerogative power to pardon anyone impeached by parliament. This backed up parliamentary oversight of the privy councillors, and the principle that would become ministerial accountability, as the monarch could not protect those who displeased parliament. This amended a situation which had greatly limited parliaments' effective oversight of government in the 1620s, influencing the Petition of Right in 1627/8. In content, the Act of Settlement all but established the conventions of the modern parliamentary state we have inherited today. It did so through explicit reference to the Bill of Rights as the source of the constitutional reform it sought to legislate. Contemporary constitutional scholarship overlooks this, why?

> It was the radical character of the Act that led to its undoing [key clauses of article III …] were repealed by the Regency Act of 1706. […] The repeal of these statutory controls was possible because Parliament had discovered a more informal means [a constitutional convention] of ensuring ministerial responsibility […]: the king's

[74] ibid, 479.

> ministers could remain in office only so long as they maintained the confidence of Parliament.[75]

There are two key points to make with regards to the distinction between the content and the function of the Act of Settlement. First, it was, and is, an active expression of constitutional legislation through the alteration of the line of succession, and the creation of judicial independence. The counter balance to this was that the other components of the document could not simply be ignored, they had to be *repealed* through proper constitutional procedure. Second, Parliament was both *willing* and *able* to directly and expressly legislate wholesale limitations on the office of the monarch, and the royal prerogative. In so doing it clearly demonstrated that whereas the monarch had held the *de facto* supreme constitutional power, the position was now held by parliament. Furthermore, it was authorised to act by its constitutional authority as the proper representative of the nation, which had been indisputably acquired through enactment of the constitutional settlement and reform found in the Bill of Rights. It should be noted that the principle of ministerial responsibility, that led to the repeal of the oversight clauses of article III, itself stemmed from article III of the Act of Settlement as discussed above. While not quite the radical constitutional document it had the potential to be, the Act of Settlement still had considerable constitutional impact. Operating in conjunction with the Bill of Rights it deserves more attention, as a manifestation of our modern constitutional culture, than it receives.

[75] Loughlin, (n25), 264. In a similar vein see: Tomkins, (n17), 109: 'The Crown and its government had become fully accountable to Parliament.'; Thornhill, (n17), 155: 'parliamentary/constitutional state […] clearly asserted that it held both a monopoly on societal rights and the monopoly on societal power'.

THE MEETING OF PARLIAMENT ACT, THE ACT OF SETTLEMENT AND LEGITIMACY THEORY

This section assesses the Meeting of Parliament Act and the Act of Settlement against the legitimacy theory set out in chapter two. This being Weber's three pure types of legitimate authority: charismatic; traditional, and; rational authority.[76] This analysis is further developed through recourse to the four criteria of perceived legitimacy as extrapolated from the subsequent behavioural science literature building upon Weber's foundation. These are: 1) the *general* perceptions of individual and community treatment by the authority;[77] 2) the perceptions of the fairness of *specific individual* procedures used by the authority in dealings with individuals and the wider community;[78] 3) perceptions of individual and collective dependence upon the authority, and 4) feelings of justification of the authority that this may breed.[79] All of these factors will feed into individual and collective perceptions of the legitimacy of authority. Positive experiences will generate perceptions of legitimacy, while negative experiences will result in perceptions of the authority's illegitimacy.[80]

[76] Max Weber, *Economy and Society* (Guenther Roth and Claus Wittich ed, 2nd edn, University of California Press 1978), 212-311.
[77] See: Margaret Levi et al, 'Conceptualizing Legitimacy, Measuring Legitimacy Beliefs' (2009) 53(3) American Behavioural Scientist 354, 370-371; Cecilia Ridgeway, 'The emergence of Status Beliefs' in John Jost and Brenda Major (eds), *The Psychology of Legitimacy* (CUP 2001), 270-277.
[78] See: Mike Hough et al, 'Procedural Justice, Trust and Institutional Legitimacy' (2010) 4(3) Policing 203, 203-204; Jonathan Jackson et al, 'Why do people comply with the law?' (2012) 52 British Journal of Criminology 1051, 1062-1064; Tom Tyler, 'A Psychological Perspective on the legitimacy of Institutions and Authorities' in John Jost and Brenda Major (eds), (n77), 416-436.
[79] John Jost, Diana Burgess and Christina Mosso, 'Conflicts of Legitimation among Self, Group, and System' in John Jost and Brenda Major (eds), (n77), 363-390, 364; Jojanneke van der Toorn et al, 'More than fair' (2011) 47 Journal of Experimental Psychology 127; Jojanneke van der Toorn et al, 'A Sense of Powerlessness Fosters System Justification' (2015) 36(1) Political Psychology 93, 94-96.
[80] Herbert Kelman, 'Reflections on Social and Psychological Process of Legitimization and Delegitimization' in John Jost and Brenda Major (eds), (n77), 54-75.

Legitimacy theory and the Meeting of Parliament (Triennial) Act

Starting with the Triennial Act, what does analysis through legitimacy theory reveal? With reference to the Weberian typologies it can be suggested that the opening passage of the document: 'Whereas by the ancient laws and statutes of this kingdom frequent parliaments ought to be held', makes reference to traditional legitimacy.[81] However, this passage also portrayed a subtle inference that this tradition had not been properly observed. This sentiment was reinforced by the character and purpose of the document, which as the culmination of article I tells us was that 'henceforth a parliament shall be holden once in every three years at the least.'[82] As the Act continued in subsequent articles to provide for specific procedures to ensure the primary goal, this can best be understood as an appeal to rational legitimacy. As the preamble explained 'frequent and new parliaments tend very much to the happy union and good agreement of the king and people' the aim of the Act was justified through establishing stable cooperative governance. [83] What the Triennial Act did was establish the positive law to ensure this aim. While simultaneously making an appeal to a newly emergent sense of rational legal legitimacy, as it created the very positive law that underpinned such a claim to legitimate authority.

From the perspective of the four criteria, a similar picture emerges. With regards to criteria 1 and 2, general perceptions of treatment, and the perceptions of individual instances of treatment by an authority, the preamble can be seen to suggest a sense of unfair treatment by authority generally, with specific reference to the frequency of parliamentary sessions. Again this was evidenced by the allusion to subversion of the traditional laws requiring frequent meetings of parliament. When looking at the Triennial Act from the perspective of criteria 3 and 4, the understanding yielded through the Weberian pure types is supported. The

[81] Triennial Act (1694), (n39), 471.
[82] ibid.
[83] ibid.

aim of the Act was to establish a positive legal framework for the constitutional operation of parliament, and this was to be done through the authority of parliament not the monarch. This suggests a move away from the previous traditional constitutional centre of power, found in the monarchy, and a shift in constitutional authority and power to parliament. Under criteria 3 this was suggestive of a move away from dependence on the monarchy as the supreme arm of constitutional government, alongside a simultaneous establishing and entrenchment of parliament's position as the replacement supreme constitutional authority. In line with criteria 4, regarding system justification, the formulation of the correct legislative process as 'enacted by the king and queen's most excellent Majesties, by and with the advice and consent of the lords spiritual and temporal and commons in this present parliament assembled and by the authority of the same' demonstrated the justification of, and dependence upon, this correct constitutional structure. Crown-in-council-in-Parliament was the proper constitutional form as it was the correct representative of the nation, and Parliament inhabited the position of supreme constitutional authority. Furthermore no true law could be enacted unless this form was in place; including any law altering the procedure for electing and assembling Parliament.

Legitimacy theory and the Act of Settlement

When looking at the Act of Settlement from the perspective of Weber's pure types of legitimate authority there appears one very clear appeal. The long title of the Act is 'An act for the further limitation of the crown and better securing the rights and liberties of the subject.'[84] 'Whereas in the first year of the reign of Your Majesty […] an act of parliament was made, entitled, An Act for declaring the Rights and Liberties of the Subject and for settling the Succession of the Crown' is the opening line of the preamble.[85] The Act finished in article IV with the declaration:

> [T]he lords spiritual and temporal and commons do therefore further humbly pray, that all the laws and statutes of this realm for securing the established religion and the rights

[84] Act of Settlement (1701), (n2), 610.
[85] The Act of Settlement, (n39), 475.

> and liberties of the people thereof, and all the laws and statutes of the same now in force, may be ratified and confirmed, and the same are by His Majesty, by and with the advice and consent of the said lords spiritual and temporal and commons, and by the authority of the same, ratified and confirmed accordingly.[86]

In application of Weber's pure types the appeal is singular and clear, but articulated in two complementary forms. First, the explicit echo of the Bill of Rights in the long title and the preamble. This was the foundation of the constitutional settlement of the 'Glorious' Revolution and the establishment of parliament as the supreme constitutional authority. In the singular instance of the Act of Settlement the continuation of that project to secure the line of succession legitimately authorised parliament to utilise its own rational authority to make the required legislative alteration to the line of succession. Second, the closing passage demonstrated the correct constitutional formation for exercising legislative authority, and the position of Parliament at the heart of that process. This too was a legislative result of the Bill of Rights, in which was contained the language by which Parliament was able to present the Crown to William and Mary, and which necessitated implicit recognition of Parliament as the supreme constitutional authority (as the proper representative of the nation).[87]

According to the four additional criteria, the perception of the location of legitimate authority is reinforced. In line with criteria 1 and 2 there are repeated references to the fairness of procedures laid down in the Act; these are explicit and implicit, and concern reform of both the line of succession and constitutional conventions. The line of succession needed securing to protect the people (from the arbitrary absolute monarchic actions of Catholics), and the limitations on parliamentary membership and curbing of royal prerogative actions served to achieve the same goal regardless of faith. The implicit understanding was that these measures would entrench a constitutional system that prevented the arbitrary governmental excesses of

[86] ibid, 479.
[87] On this point see chapter 4.

the Stuart monarchs, especially Charles I and James II (as described in chapters four and five). The evoking of unfair treatment experienced at the hands of monarchic authority served to reinforce the de-legitimisation of monarchic constitutional authority, and simultaneously legitimise the supreme constitutional authority of parliament as the proper representative of the nation and protector of the people. This process speaks directly to criteria 3 and 4. As the previous monarchic constitutional structure was de-legitimised the perception of dependence upon it was broken, and as the vehicle by which this escape was affected the replacement correct constitutional authority of parliament was highlighted as the legitimate location of constitutional authority, and source of legal power.

The Meeting of Parliament (Triennial) Act, the Act of Settlement and the Bill of Rights – a perception of the legitimacy of constitutional settlement and reform in the 'Glorious' Revolution

As addressed in chapter four, the Bill of Rights represented a legislative manifestation of both constitutional settlement to the crises of the seventeenth-century and constitutional reform. It has been demonstrated in chapter five that parliamentary claims to be the correct constitutional authority were never factual in nature. Prior to 1688 the monarch(s) had possessed the capacity to exercise force to achieve their aims; although as also discussed in chapter five, under the monarchic interpretation of the constitution this was not force but correct constitutional authority. The Triennial Acts of 1641 and 1664 demonstrated the situation well, both were enacted statutes and both were ignored or subverted by first Charles II and then James II. The Levellers' An Agreement of the People articulated a constitutional vision in which the people were the supreme constitutional authority and through electoral processes gave rise to a constituted government in which Parliament (the House of Commons) was the proper constitutional authority. Yet this was found to lack a wide enough perception of legitimacy as a correct constitutional form by a sufficient number of people to become the constitution of the post-Civil War Commonwealth.

The ‘Glorious’ Revolution, 1688, and the Bill of Rights marked a departure upon a new constitutional path. No longer were parliamentary claims to constitutional supremacy legal interpretations: They became both *de jure* and *de facto* legitimate. The Bill of Rights was the constitutional building block upon which the Triennial Act and the Act of Settlement were founded; and it was the source of their legitimacy. The constitutional reforms legislated in these two documents have been seen to be truly radical in the context of the seventeenth-century, and to represent the basis of current constitutional practice. Yet it has also been argued that both are under appreciated, and a strictly legal viewing of legislative documents fails to comprehend the radical nature of their achievements. It is also often overlooked how both documents manifested as continuations of the constitutional project begun in the Bill of Rights, a project of settlement and reform.

The long title of the Bill of Rights presented itself as ‘An Act declareing the Rights and Liberties of the Subject and Setleing the Succession of the Crowne.’ Two of the stated ancient rights and liberties of the English were that ‘That Election of Members of Parlyament ought to be free’, and ‘that for Redresse of all Grievances and for the amending strengthening and preserveing of the Lawes Parlyaments ought to be held frequently.’[88] Both the Triennial Act and the Act of Settlement presented as an explicit continuation of the constitutional reform announced in the Bill of Rights. The Triennial Act picked up the stated right for frequent parliamentary sessions and gave concrete legislative form and function to it. In addition it simultaneously entrenched the principle that Parliament possessed the supreme authority to provide for its own selection processes, form and frequency when legislating through the Crown-in-council-in Parliament constitutional structure (in which Parliament held the balance of both constitutional authority and power). The Act of Settlement explicitly invoked the Bill

[88] Bill of Rights [1688].

of Rights with its long title 'An act for the further limitation of the crown and better securing the rights and liberties of the subject',[89] and in its preamble: 'Whereas in the first year of Your Majesty […] an act of parliament was made, entitled, An Act for declaring the Rights and Liberties of the Subject and for settling the Succession of the Crown'.[90] There are two aspects to this relationship to be highlighted. First, the radical constitutional content and operation of these documents – their supplanting of previous monarchic constitutional authority with that of Parliament – benefitted from association with the legitimate constitutional settlement enacted in the Bill of Rights. A perception of legitimacy fostered through association, and continuation of the rational legal constitutional process, and further protecting of the rights of the subject, ensuring a fair relationship between the governors and the governed. Second, the development of these express constitutional reforms upon the foundations laid in the Bill of Rights further enshrined the legitimacy of that document itself. No longer did the (potentially) empty claims contained in the Bill, that it represented the legality of the process whereby the Crown was accepted subject to Parliamentary conditions, exist in free-floating isolation. The Bill of Rights, and the contentious and ambiguous constitutional situation in which it existed, successfully underpinned subsequent constitutional reform and the development of correct constitutional practice.[91]

Furthermore, all three documents described a particular legislative foundation, and expressly announced the authority of Parliament within that structure. Whereas previous legal expressions of constitutional procedure, such as the Petition of Right, had taken the form of Parliament seeking monarchic acknowledgement, the Bill of Rights did something entirely

[89] Act of Settlement (1701), (n2), 610.
[90] The Act of Settlement, (n39), 475.
[91] On the intricacies of the Bill of Rights and the establishing of government in 1688 see chapter 4. In addition, see the debate over the content of the Declaration of Rights (which initially contained many of these subsequent constitutional provisions) and the streamlining process that led to the eventual Bill of Rights in: Harris, (n12), 315-348; Lois Schwoerer, *The Declaration of Rights, 1689* (Johns Hopkins University Press 1981), 27-28.

different. It made the legislative process revolve around Parliamentary constitutional authority, as the correct representative of the people and nation. After the statement of the rights to be protected, the Bill of Rights concluded with a long passage describing a new oath, and establishing the legal foundation of the reign of William and Mary, within which was contained the declaration:

> Now in pursuance of the Premisses the said Lords Spirituall and Temporall and Commons in Parlyament assembled for the ratifying confirming and establishing the said Declaration and the Articles Clauses Matters and Things therein contained by the Force of a Law made in due Forme by Authority of Parlyament doe pray that it may be declared and enacted That all and singular the Rights and Liberties asserted and claimed in the said Declaration are the true auntient and indubitable Rights and Liberties of the People of this Kingdome[.][92]

This constitutional practice and the authority of Parliament in the legislative process was echoed in each of the subsequent documents. The Triennial Act stated that 'it is hereby declared and enacted by the king and queen's most excellent Majesties, by and with the advice and consent of the lords spiritual and temporal and commons in this present parliament assembled and by the authority of the same'.[93] While the Act of Settlement followed the same form, stating 'be it enacted and declared by the king's most excellent Majesty by and with the advice and consent of the lords spiritual and temporal and commons in this present parliament assembled, and by the authority of the same'.[94] The links to the Bill of Rights, and the constitutional settlement and reform it enacted were both express and specific to each document, but also implicit and reflected in constitutional authority and legislative procedure. In each circumstance the legitimacy of the subsequent reform relied upon the Bill of Rights, and with each subsequent reform the legitimacy of the Bill of Rights became more entrenched. The relationship of legitimacy ran in both directions.

[92] Bill of Rights [1688].
[93] Triennial Act (1694), (n39), 471.
[94] The Act of Settlement, (n39), 477.

CONCLUSION

In concluding this chapter with reference to my research questions, as per question 4, the Bill of Rights has been demonstrated to echo in parliamentary constitutional authority, expressly arising in both the Triennial Act and the Act of Settlement. This took the form of momentum driving the legislative process to define and control Parliament's own lifecycle in the Triennial Act. Whereas, the Act of Settlement can be seen to have been expressly evoked it in legitimatisation of the re-ordering of the line of succession, and the establishment that parliament possessed the authority to do so. It has also been seen how the Bill of Rights, and the constitutional format it enacted was linked to the Triennial Act and the Act of Settlement; and the constitutional practice they enshrined. In answer to question 3 (B) a clear link between Protestantism and the constitutional settlement and reform of the Bill of Rights and subsequent legislation can be understood. The Bill explicitly connected the ascension of William and Mary as the Protestant saviours to its own enactment. The Act of Settlement expressly evoked the Bill of Rights declaring the continued necessity of a Protestant monarchy to protect against Catholic arbitrary governance. The interconnection and relationship between Protestantism and the constitutional settlement and reform of the 'Glorious' Revolution was complex and multi-faceted. However, obvious connections were expressed within the documents themselves, and the interplay between the Bill of Rights and the Triennial Act and Act of Settlement show how the Bill served to legitimise the subsequent concrete constitutional reforms, as these reforms were (re-)presented as the continuation of that revolutionary project.

This project can be understood as revolutionary through analysis of the content of the Triennial Act and the Act of Settlement. Whereas the narratives of English constitutional history presented a process of stability and correction reverting to the antecedent ancient law constitution, with a gradual and stately progression into modernity and the assumption of democratic parliamentary process, these legislative acts contain a different story. A story that

was obscured through not only the wider historical narratives but also through focus only on the function of these Acts; rather than their content, and through treatment as individual, isolated, legislative Acts. When analysed for their content as opposed to their function, and appreciated collectively, the radical nature of these Acts comes to the fore. While it is true that their legal function was 'less' than their content, the difficult part of a politicised legislative agenda and constitutional reform is getting a Bill transformed into an Act. Parliament succeeded in doing this with the radical content of each document intact. The Triennial Act and the Act of Settlement may not have had such lasting impact as law, but their contribution as the source of constitutional conventions, is central to the development of the modern constitution.

The Triennial Act dictated that parliament must meet regularly and predictably, and that the membership must be subject to frequent renewal through periodic elections. The frequency of these events has changed through time, but the constitutional convention is unchanged. The Act of Settlement remains hugely influential upon the line of succession, regulating the religious affiliation of future monarchs and their spouses. It is also celebrated as the source of judicial independence from the monarchy. However, in content it was even more radical than this. While the clauses concerning parliamentary regulation of government ministers may never have been enforced, the constitutional convention that parliament be able to hold government ministers directly to account for their actions is still central to constitutional practice to this day. The form laid down in the Act of Settlement is not the one used, but the convention remains as strong as ever even if implemented through different mechanisms.

As artefacts of constitutional settlement and reform the impact of the Triennial Act and the Act of Settlement is clear to see, and considerably more pronounced than their individual legal effects. When viewed together, their continuation of the constitutional reform launched through the Bill of Rights is undeniable. When constitution is understood as a wider cultural

process, beyond the strict limitations of legal documentation then the radical nature of the reform established in the ‘Glorious’ Revolution is revealed. Through an appreciation of both the political practice and the legislative acts that make up the constitutional conventions of this country, then the influences of cultural revolutions, such as the Protestant Reformation, upon constitution as a process can be analysed.

PART B

The purpose of Part B is to demonstrate my thesis through analysis of the Bill of Rights contextualised by two prior failed constitutional reform manifestos, and supported by analysis of two subsequent constitutional reforms. The analysis of the Bill; the Petition of Right, the Levellers' An Agreement of the People; the Triennial Act, and the Act of Settlement is facilitated through use of the framework of method, concepts and theory constructed in Part A. Through this analysis the success of the Bill as both constitutional settlement and reform is established, as is the influence of Protestant Reformation of church structure and 'spiritual' authority upon perception of its legitimacy.

Through my analysis, utilising the framework constructed in Part A, an understanding of the so called 'Glorious' Revolution as a moment of constitutional transition is presented. Within this the central role of the Bill can also be comprehended as both constitutional settlement and reform. The influence of Protestant Reformation of church structure and 'spiritual' authority upon perception of parliamentary authority and the legitimacy of the Bill, within this process can also be appreciated.

CONCLUSION

Chapter four established the argument for the Bill of Rights being understood as a moment of constitutional transition. Through analysis of how the Bill presented itself, it can be seen to have undertaken, simultaneously, to settle constitutional conflict, and to establish the foundation of constitutional reform. It is argued that these aims were achieved through the written framing of the document by parliament. The Bill can therefore be understood as an example of Parliament having authored their victory in the 'Glorious' Revolution. Subsequent constitutional developments and practice have entrenched this position.

The influence of religion, and particularly the Protestant Reformation of church structure and 'spiritual' authority upon the Bill is shown to have been both explicit and implicit. The obvious influences can be seen in the expression of anti-Catholic sentiment within the document. There is also found to have been implicit influence of Protestant Reformation of church structure and spiritual authority through analysis using legitimacy theory. This demonstrated the influence of Protestant reform of church structure and 'spiritual' authority in establishing a necessity for a relationship between governed and governors for the perception of legitimacy in claiming and exercising constitutional authority. This is highlighted by the opposition, contained within the document, to the Medieval Roman Catholic experience of power (as authority), whereby the Pope was the conduit for a unidirectional experience of hierarchical authority. The perception of the legitimacy of the Bill was influenced by the claimed relationship between Parliament and the people of the nation, which echoed the Protestant Reformation of church structure and 'spiritual' authority.

This understanding of the Bill is facilitated through comprehension of both the legal and political aspects of constitutionalism. This is achieved through a combined appreciation of the content and effect of the legal document with the political practice of constitution. This enables an understanding of the Bill not as an isolated law, but as a constitutional transition and part of a programme of wider reform. The capacity to comprehend this aspect of the Bill demonstrated the utility and suitability of the method to the project. It is shown how the core constitutional concepts of constitution and authority combined with my method of political jurisprudence, legitimacy theory, and the model for the influence of religious thinking upon constitutionalism outlined in Part A, to construct a framework providing a new understanding of the Bill of Rights.

Chapter five strengthened my analysis of the Bill of Rights through study of two prior, failed, constitutional reform manifestos: the Petition of Right and the Levellers' An Agreement

of the People. These documents can be understood as manifestos for constitutional reform through appreciation of the way in which the wording of the documents presented their content. The authority of parliament to undertake constitutional reform can be found in the transition from the Medieval, hierarchical, unidirectional experience of power as authority towards the recognition of an alternative proposition. That being, the capacity for parliamentary authority to have been perceived in its relationship to the people; but not through a complete rejection of monarchy. This can be seen to have echoed Protestant Reformation thinking of the structure of the church, and the location, and perception of the legitimacy, of 'spiritual' authority. This is especially evident in comparison to the authority and position of God within understandings of spiritual authority, and the constitutional authority of the monarchy.

The final chapter of Part B confirmed the analysis of the Bill of Rights through contextual study of two subsequent constitutional reforms: the Triennial Act and the Act of Settlement. The legitimate authority of parliament to undertake constitutional reform claimed in the Bill is seen to have operated in both the Triennial Act and the Act of Settlement, implicitly and explicitly, at the expense of monarchic authority. It can be seen that parliamentary authority was perceived in the established claim to a relationship between the people and parliament, governed and governors. This was as opposed to the claimed monarchic authority associated with the divinity of God. Comprehension of these factors and influences is afforded through a broad understanding of constitution and my method of political jurisprudence. The influence of the Protestant Reformation can be comprehended through recognition of the similarities between the reform of church structure and location of 'spiritual' authority, and the legitimacy perceived in parliament to undertake constitutional change.

Conclusion

THESIS

My research has demonstrated influences of Protestant Reformation thinking upon perception of the legitimacy of constitutional transition in English legal history. Analysis, conducted in Part B, of the Bill of Rights has shown how this document acted as the centrepiece of constitutional settlement to the so called 'Glorious' Revolution.[1] It has also shown how the Bill served as the fulcrum within a programme of constitutional reform. The Bill can be seen to sit at the heart of the transition from monarchic to parliamentarian models of constitutionalism. This has been further supported and strengthened through analysis of subsequent constitutional reforms, the Triennial Act and the Act of Settlement.[2] These documents have been shown to have implicitly and explicitly echoed the Bill in the reforms that they enacted to further strengthen Parliamentary constitutional authority. The influence of Protestantism can be seen to have acted overtly in the inclusion of rabidly anti-Catholic sentiment as justification for much of the content of the Bill and the Act of Settlement. It can also be seen to have covertly influenced the styling and presentation of Parliament's claimed legitimate constitutional authority, within all three documents. The location of parliamentary authority, as having been found in its connection to the people, can be seen to have reflected the Protestant Reformation's restructuring of spiritual and church authority. Analysis of two failed reform manifestos, the Petition of Right and the Levellers' An Agreement of the People, prior to the Bill of Rights, strengthens this argument.[3] Through this analysis it can be seen how the nature and presentation of opposing claims to constitutional authority to that of monarchic claims to divine right shifted through the course of the seventeenth-century. In addition it can also be seen how this was driven by monarchic actions such as the eleven year personal rule of Charles I, the Civil War,

[1] This is the subject of Part B as a whole, and specifically chapter 4.
[2] See chapter 6.
[3] See chapter 5.

Interregnum and Restoration, which culminated in the 'Glorious' Revolution. This process saw (non-monarchic) opposition claims move away from deferential seeking of recognition of legal procedure, to encompass a revolutionary character and the institution of an openly political constitutionalism, founded upon the collective authorisation of proto-democratic parliamentary officers by those subject to them. The Bill of Rights, within the 'Glorious' Revolution, can be understood as a maturation of this process. With the subsequent reforms having been seen to claim a lineage to the constitutional authority of parliament expressed in the Bill, in order to further the reform campaign and usher in the eighteenth-century parliamentary constitution.

In order for the detailed documentary analysis of Part B to be undertaken an interdisciplinary methodological, conceptual and theoretical framework had to be constructed. Part A provides this structure to support the analytical content of Part B.[4] The concept of political jurisprudence, operationalised as method, is identified as suitable for application to this research due to its capacity to broaden juridical horizons beyond the strict legal limits of positivist jurisprudence. This facilitated an understanding of political constitutionalism that is sensitive to legal and political thought, and the influences upon them including religion. In turn, this allowed a concept of constitution as a societal process to be outlined, one representative of wider social and cultural influences upon the establishment and development of a complex political society. This is an understanding of constitution that is capable of comprehending religious influences upon constitutional practices. Furthermore, as part of this discussion, I also identified the central concepts of my constitutionalism as those of constitution and authority, which are identified and distinguished through discussion of and relation to the more usually focused upon concepts of sovereignty and power.[5]

[4] The three chapters of Part A combine to construct the framework of method, concepts and theory upon which Part B is founded.
[5] See chapter 1.

A key component of the theoretical aspect of my project has been an understanding of legitimacy fit for my purposes.[6] Legal positivism has conceptualised legitimacy in a way that prioritises correct form and process. Law must emanate from the prescribed body or office, and must follow the required enactment and enforcement procedures. Through stepping outside the strict limitations of legitimacy afforded to legal positivism, a theory of legitimacy that is centred on the relationship of the governed and their governors can be found. This theory is based on the work of Max Weber, and has been developed through Sociological and social-Psychological enquiry over the last century. The key component is recognition that people, as individuals and as a collective, must perceive authority to be legitimate in order for legitimacy to exist. Positivist understanding of legal legitimacy, as correct form and procedure, can be an element of this; but it cannot be legitimate without perception as such by those subject to the legal system. The additional theoretical element of the framework constructed in Part A is provided through discussion of Church structure and spiritual authority as models of constitutionalism.[7] It is demonstrated how the structural upheavals of the Papal and Protestant Reformations impacted upon models of constitution within the church, and specifically the perception of the location of 'spiritual' authority. It is also demonstrated how the Papal Reformation and the Protestant Reformation can be understood to have influenced the rise of first monarchic and then proto-democratic (parliamentarian) constitutional models. Working in combination the methodological, conceptual and theoretical elements of my research have allowed construction of an interdisciplinary framework to support analysis of the Bill of Rights, and associated documents. This has facilitated a deeper and more nuanced understanding of the constitutional transition from monarchy to parliamentarian constitutional models in English legal history. Specifically, I have enabled an understanding of how Protestant Reformation of

[6] See chapter 2.
[7] See chapter 3.

church structure and 'spiritual' authority can be perceived to have acted as an influence upon this process, and the perception of its legitimacy.

CONTRIBUTION TO THE LITERATURE

My PhD research has made a number of contributions to the existing literature in the field. These contributions range from identifying deficiencies in prior scholarship, to challenging accepted narratives and approaches to study of the Early Modern period in constitutionalist research. My project has been founded upon an ambitious programme of interdisciplinary study demonstrating how this can enrich scholarship, opening up new horizons through the use of external concepts to provide a richer texture to understandings of events and processes. This approach has provided a detailed case study of how emerging methods and interdisciplinary practice might be used to provide insight into (the study of) historical events by providing additional breadth and texture in pursuit of complex understanding.

In concluding his seminal 1983 study, *Law and Revolution*, Berman wrote: 'Tradition is more than historical continuity. […] Law is usually associated with the visible side, with works; but a study of the history of Western law, and especially its origins, reveals its rootedness in the deepest beliefs and emotions of a people.'[8] When revisiting this scholarly pursuit in 2003, and providing a comparative study of the impact of religious thinking upon the shaping of state development and function, through law, Berman concluded:

> Contemporary scholars in all the relevant fields – historians, theologians, philosophers, social scientists, lawyers – have with few exceptions paid little attention to the enormous impact of sixteenth- and seventeenth-century Protestantism on the development of Western legal institutions, Indeed, they have largely neglected to consider the impact of belief systems generally on law[.][9]

In part, my PhD project is a response to this challenge laid down by a leading figure in the study of law and religion. I do not believe that Berman would necessarily have envisaged the

[8] Harold Berman, *Law and Revolution* (Harvard University Press 1983), 558.
[9] Harold Berman, *Law and Revolution, II* (Belknap Press 2003), 373.

method used in my study, but I do think he would have appreciated the endeavour and the interest motivating my work. I begin from the same basic proposition that religion (and many other factors) influences the development of legal systems and traditions, and that this is worthy of more attention. In some small, and focused, way my PhD project contributes to furthering this field of study.

In constructing my thesis, I have deliberately engaged in interdisciplinary study. Most obviously in my use of legitimacy theory drawn from the work of Weber, and its Sociological and social-Psychological developments. This has allowed an understanding of legitimacy that breaks free from the straightjacket imposed by the dominant legal positivist paradigm within disciplinary scholarship. In addition, I have made use of differing historiographies to enrich my understanding of the narratives surrounding the Bill of Rights and the 'Glorious' Revolution. Less obviously, I have endeavoured to blend social scientific and law and humanities approaches to legal scholarship to provide a rich and textured study. In this attempt I have been inspired by critical approaches to legal history, but also by the historiographic trend that I have termed as the third wave, and its attempt to move beyond the ideological blinkers of the Whig and Revisionist historiographic camps. Works of Harris, Pincus and Vallance have been frequently cited and discussed alongside the legal constitutionalist scholarship of Loughlin, Thornhill and Tomkins.[10] This has been in order to further integrate the two fields of study, and to deepen and complexify the understanding of the moment of constitutional transition seen in the later English seventeenth-century.[11] Too often interdisciplinarity (or similar terminology) appears as a buzzword, or sop to the discontent at the rise of hyper-

[10] As examples see: Tim Harris, *Revolution* (Penguin 2007); Steve Pincus, *1688* (Yale University Press 2009); Edward Vallance, *The Glorious Revolution* (Abacus 2007); Martin Loughlin, *Foundations of Public Law* (OUP 2010); Chris Thornhill, *A Sociology of Constitutions* (CUP 2011); Adam Tomkins, *Our Republican Constitution* (Hart 2005).

[11] Existing influences of the former upon the later can be seen in Tomkins use of Harris, and Loughlin's admiration of Pincus.

specialism in academia.[12] In undertaking my PhD I have deliberately rejected this, wholeheartedly committing to the complexity and intricacy of interdisciplinary research. The result has been a depth and breadth of constitutional study of unusual focus and narrative texture.

I have sought to identify influence(s) of Protestant Reformation thinking upon the legitimacy of constitutional settlement and reform in the 'Glorious' Revolution. As an aspect of this endeavour I have been able to address a curious division in the existing literature, and to challenge the prevailing assumptions that, at least partially, facilitate the continuance of this division. Constitutionalist scholarship addressing religious influence has long recognised the intertwining of Church and proto-state power throughout the Medieval period. In this arena religious influence is central to understanding the constitutional developments of Medieval monarchies.[13] However, when focusing upon the Early Modern period in constitutional thought the attention shifts from religion to political theory. The result is that a stark divide has opened up between the intertwining of Papal and Protestant Reformations within Medieval constitutionalism, and the secular republicanism of the Early Modern French and American Revolutions.[14] A challenge to the secularist republican narrative has been mounted in the field of human rights scholarship, but this does not directly engage with constitutionalism as a subject, only tangentially in analysis of human rights as a pillar of the development of the modern state and international legal orders.[15] My research engages directly with this division in scholarly approach, and allows comprehension of the influence of Protestant Reformation of church structure and 'spiritual' authority upon an Early Modern constitutionalist event.

[12] On this point see Simon Critchley, *Continental Philosophy* (OUP 2001), 52.
[13] As examples see: Berman, (n8), 404-519; Hauke Brunkhorst, *Critical Theory of Legal Revolutions* (Bloomsbury 2014), 90-146; Loughlin, (n10); Brian Tierney, *Religion, law, and the growth of Constitutional thought 115-1650* (CUP 1982); Thornhill, (n10), 20-55.
[14] As examples see: Brunkhorst, (n13); Loughlin, (n10); Thornhill, (n10).
[15] As examples see: Micheline Ishay, *The History of Human Rights* (University of California Press 2004); John Witte Jr, *The Reformation of Rights* (CUP 2007).

Furthermore, it directly problematises the exceptionalism of modern and Early Modern British constitutionalism, and the requirement for rational scientific principles to be the foundation of positivist understandings of Early Modern legal revolutions.[16] The break in scholarly approaches, and the abandonment of religious influence in favour of political theory, can be seen to assist in the acceptance of the positivist paradigm of modern constitutional thought, and the tendency towards exceptional classification of the 'Glorious' Revolution as neither Medieval nor Early Modern. Instead, I have provided a complexity of narrative, and a method by which subjective experiences can be understood to have influenced the constitutional transition of the Early Modern 'Glorious' Revolution. This questions the logic of setting aside the English seventeenth-century as exceptional, and in ignoring the influence of religious thought upon the development of Early Modern constitutionalism.

Traditionally constitutional scholarship has focused on using historical research to illuminate the present.[17] This has either been through analysis of singular jurisdictions or regions, or through a chronological conceptual study.[18] Recently a minority pursuit of analysis of individual movements or moments of constitutional reform (or failed reform) conducted in isolation as case studies has emerged.[19] My PhD thesis makes a distinct contribution to these existing patterns within the literature. First, my research provides a detailed case study of a particular moment in English constitutional development, the 'Glorious' Revolution, which had often been overshadowed in constitutional scholarship by the Civil War, Interregnum, and associated protest movements such as the Levellers. In addition, I have presented an historical case study that possesses utility in addressing contemporary questions concerning

[16] As examples see: Dieter Grimm, *Constitutionalism* (OUP 2016), 11-12, Elizabeth Zoller, *Introduction to Public Law* (Martinus Nijhoff 2008), 95-112.
[17] As examples see: Grimm, (n16); Tomkins, (n10).
[18] As examples see: Berman, (n9); Brunkhorst, (n13); Dieter Grimm, *Sovereignty* (Belinda Cooper ed, Columbia University Press 2015); Martin Loughlin, *The idea of Public Law* (OUP 2003); Loughlin, (n10); Thornhill, (n10).
[19] This has been particularly evident with scholarship concerning the Levellers, as examples see: Dennis Galligan, 'The Levellers, the People, and the Constitution' in His (ed), *Constitutions and the Classics* (OUP 2014); Martin Loughlin, 'The Constitutional Thought of the Levellers' (2007) 60(1) Current Legal Problems 1.

constitutional practice and parliamentary sovereignty. However, it is not and has not been my intention to provide substantive answers, rather to illuminate the nuances of the historical event in terms relatable to contemporary constitutional theory. Second, within the field of theoretical analysis of historical constitutional development the scope of the enterprise often results in sweeping scales of time and geography, as in the works of Loughlin and Thornhill. My research has taken an alternative approach (afforded by the PhD thesis format) and delved into a single historical moment to analyse the processes at play to a breadth and depth not seen in larger scale work.[20] This has allowed me to address individual societal influence upon the legitimacy of constitutional transition, and the role played by Protestant Reformation thinking within it. Third, and in a similar vein, my project has allowed me to undertake a case study of the application of Loughlin's *Political Jurisprudence* to a specific event within English constitutional history.[21] Through conceptualising his theory as a method of analysis I have been able to explore its potential and limitations as a methodological approach. Unlike in his own *Foundations*, I have applied this method to analysis of a single event, but one that is within the developmental trajectory of English constitutionalism, as opposed to outside of it.[22] My research has demonstrated how political jurisprudence possesses the capacity to allow access for juridical analysis of constitutional influences, such as religion, in the form of a case study of a single site. It also suggests that it may further possess the capacity to allow juridical analysis of not only singular influences, but constellations of such societal influences, upon constitutional formation and development.[23]

[20] This comment is also applicable to the historical analysis of the English seventeenth-century constitutional development undertaken by Tomkins, which was driven by the development and elaboration of a particular issue in the contemporary theoretical setting.
[21] Martin Loughlin, *Political Jurisprudence* (OUP 2017).
[22] Within his own work Loughlin has used political jurisprudence to assess Leveller constitutionalism, as an example see: ibid, chapter 3.
[23] In this vein it has been my ambition to at least partially realise some of the potential displayed, but not delivered, in the concept of the cultural study of law, see: Paul Kahn, *The Cultural Study of Law* (University of Chicago Press 1999) chapter 1.

LIMITATIONS OF THE PROJECT

As with any research project, even at the end of my PhD, there are still many things left unsaid and undone. With that in mind, there are a series of specific limitations to my research project and thesis as it is presented. Some are due to the nature and character of my project, some derive from specific decisions taken in designing, planning and conducting my research and writing. The first, and most obvious, limitation stems from the very conception of the project itself. The complexity and scale of the methodological, conceptual and theoretical framework I have constructed, in order to undertake my documentary analysis, creates a degree of limitation within a thesis word length. Furthermore, the complexity of this element of the project, and its experimental nature, are an inherent limitation of the project itself. This is not a barrier to my research as I have been able to undertake the analysis of my chosen documents. However, it has required a tight focus on a specific set of documents, a set of documents that have been thoroughly justified, but this has meant restricting the scope of the project to constitutional manifestos and legislative proposals of a particular strain. Similarly, the range of historical literature surveyed has also created limitations through scale and complexity of design and material content. Again, this has not limited analysis of my chosen documents, but has rather required a strict focus and specific justifying criteria as to which documents would be selected. With regards to both the historical survey and the framework of method, concepts and theory, the limitations of the density, complexity and length of the material pays off in the breadth and texture of the reading of my chosen documents that it has facilitated. As a result, I have been able to provide a narrative of constitutional change that would be unavailable to internally focused disciplinary research.

Due to my deliberate choice to design, plan and undertake an interdisciplinary project I have needed to reject the internal and isolationist perspective of legal positivism. In addition to this, through choosing to frame my research perspective within a broadly interpretive

tradition I have also undertaken a conscious rejection of many aspects of scientific positivism in my methodological approach more generally. The results are twofold. First, the character of my thesis is interpretive. This means that I am not claiming causative relationships, and the discovery of historical Truth, quite the opposite. I am suggesting a new reading of documents, one sensitive to implicit societal influence and the relationships through which this might be understood to have occurred. Second, the character and tone of my research goes against the dominant research paradigm of legal scholarship. As such my work is likely to primarily appeal to interdisciplinary and critical audiences within the wider field of legal scholarship. On both counts I am justified in my decision-making, as it would quite simply be impossible to undertake my research project within the restrictions of legal and scientific positivism. The value, originality and impact of my research stems from its very non-conformity. The findings contained within my thesis would not be accessible from a positivist perspective.

Similarly, the choice to undertake interpretive research has dictated that I have not been engaged in identifying and answering specific questions stemming from legal practice. The nature of the outcomes of my research project lie in a different form. I have provided an enrichment of understanding, and an additional complexity of narratives surrounding the 'Glorious' Revolution, and the constitutional transition from monarchy to parliamentarian governance. This has not been done in pursuit of concrete details and clear unambiguous answers. It has been undertaken in a spirit of academic enquiry to open up possibilities, to provide nuance and increased richness and texture of narratives to increase the depth of constitutional thought, theory and understanding. I have achieved this goal, from the perspective of academic enquiry. My research has useful and important contributions to make to contemporary issues of constitutional practice. However, it must be remembered that these contributions lie in breadth and depth of understanding, not in provision of definitive answers. My research can provide a richer understanding of current issues surrounding the nature of

parliamentary sovereignty in a post-Brexit constitutional environment, and the validity of The Speaker's use of ancient constitutional conventions, but these issues will not be resolved and nor is it my intention so to do.[24] On the other hand, I would argue that a fuller understanding of the context and influences of constitutional development can only aid in finding solutions to such contentious issues. My thesis is of an interpretive as opposed to positivist character, the breadth and depth of nuanced narrative is afforded through rejection of any claim to concrete certainty and singular authoritative answers.

FUTURE DEVELOPMENTS AND CONTRIBUTIONS

While my PhD thesis may have reached its conclusion, the project represents what I intend to be the beginning of a scholarly career developing the framework and practice demonstrated here. In the immediate future it is my intention to seek publication of the methodological, conceptual and theoretical aspects of my doctoral research as a monograph critically addressing core elements of constitutional theory and scholarship. In conjunction with this, I aim to abstract the methodological elements and further develop my approach to provide an alternative method for cultural study of constitutionalism, which I envisage as the Constitutional Assemblage.[25] This methods project would consolidate and expand my use of political jurisprudence to facilitate juridical comprehension of a constellation of social and cultural influences upon constitutional foundation and development. Rather than acting as a bridge between political and legal constitutional theory, I envision the Assemblage as being a representative platform. The influences exerted by the complexities of social life upon the

[24] As examples see: Editorial, 'The Guardian view on Speaker Bercow: on parliament's side' *The Guardian* (London, 18 March 2019) <https://www.theguardian.com/commentisfree/2019/mar/18/the-guardian-view-on-speaker-bercow-on-parliaments-side> [accessed 28 April 2020]; John Rentoul, 'John Bercow's Brexit ruling is mistaken, but Theresa May's deal is doomed anyway' *The Independent* (London, 18 March 2019) <https://www.independent.co.uk/voices/john-bercow-brexit-ruling-vote-meaningful-deal-eu-a8828636.html> [accessed 28 April 2020].

[25] This idea, and terminology, is influenced by my background in Archaeology and by Assemblage Theory, as an example see: Manuel DeLanda, *Assemblage Theory* (Edinburgh University Press 2016).

assemblage of this representative platform, and constitution, could then be analysed both individually and collectively.

Having isolated my methodological concept from my PhD research, and fully realised it as a standalone approach, I would then seek to test it. Initial options would be to return to the 'Glorious' Revolution and seek to analyse other social and cultural drivers of constitutional development in the moment of transition, such as political-economic analysis similar to that offered by Pincus.[26] This would primarily focus on study of two cases: *East India Company v Sandys* and *Nightingale v Bridges*, and what these cases can be understood to show regarding influences of political economy upon constitutional theory and the role of the state in regulation of trade and monopolies. Another option would be to continue with the influence of religious thinking, and to study an alternative site such as the Counter Reformation and its influence upon French constitutionalism. This could provide a case study of processes of centralisation of monarchic power as opposed to the corresponding dissipation seen in England.[27] Beyond these more immediate sites of temporal and spatial analysis I am intrigued by the deployment of my method in the study of Islamic constitutionalism. The potential for comprehension of the complex social and cultural factors at play in the development of constitutionalist tradition(s) within the less centralised and dispersed Islamic tradition holds great utility. In this arena, my work would have the capacity to make an intervention within the newly emergent discussion of the study of the origins versus the beginnings of Islamic law, and the impact that positivist and interpretive scholarship has in this field.[28]

Aside from the further development of my research project, and discrete aspects of it such as the method of the Constitutional Assemblage, it has been suggested that my work holds

[26] See: Pincus, (n10).
[27] This would be to elaborate on existing comparative and conceptual works, as examples see: Grimm, (n16); Zoller, (n16).
[28] Origins are seen as synonymous with definitive positivist historical Truth, Beginnings are understood as less concrete and open to multiple interpretations and complexity of understanding. As an example see: Lena Salaymeh, *The Beginnings of Islamic Law* (CUP 2016), 21-42.

the potential to contribute to other academic debates. Through the study of the influence of Protestant Reformation of church structure and spiritual authority upon constitutionalism, and particularly how this might be re-conceived as an influential factor in the Early Modern period, my doctoral research has the potential to contribute to the secularisation debate within the fields of constitutional scholarship and rights theory. In both fields there exists an implicit tendency to claim an underpinning secular universalism. Challenges to this dominant narrative have been launched, particularly in the field of rights theory.[29] There is a clear potential for my work to contribute to the growing challenge to the secularisation thesis within rights theory, through highlighting the Christian influence on the concept of the autonomous individual as a political entity; especially how this can be seen to contribute to Early Modern parliamentarian governance.[30] In the field of constitutional scholarship the critique of Early Modern and modern secularisation and universalism is less well established; however, there is an emerging scholarly trend that my work could contribute to.[31] This would appear to be a field of study where a critical intervention questioning the secular basis of core concepts of constitutionalism could bear scholarly fruit.

[29] As examples recognition of Christian influence in universal rights theory see: Ishay, (n15); Witte, (n15). On the other hand, constitutional theory has largely failed to recognise religious influence in the Early Modern discourse of state development, as examples see: Brunkhorst, (n13); Grimm, (n18); Loughlin, (n18); Loughlin, (n10); Thornhill, (n10).

[30] This would be to potentially extend the chronological reach of religious influence upon individualism beyond the Medieval period, where it is well established. As an example see: Larry Siedentop, *Inventing the Individual* (Penguin 2015).

[31] As examples see: Marinos Diamantides & Anton Shütz, *Political Theology* (Edinburgh University Press 2017); Susanna Mancini & Michel Rosenfeld (eds), *Constitutional Secularism in an Age of Religious Revival* (OUP 2014).

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