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Interposition: Magistrates as Shields against Tyranny

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ABSTRACT

The conduct of politics proper, through the arts of persuasion, may be contrasted with despotism, which relies upon coercion. Historically, regimes that secure the rule of law, constitutional limitations, civil liberty, and self-government are a remarkable but often short-lived achievement. A crucial part of this history has been played by a form of resistance, or civil disobedience, known as interposition. Indeed, politics and freedom emerge from the often-brutal conflict of powerful stakeholders. Historical sketches, including precedents for interposition by lawful magistrates, lead into an essay on trends that enhance or threaten the well-being of communities as well as the institutions that enable human flourishing.

I FIRST CONSIDERATIONS

The political culture of the West emerged by fits and starts over a long span of time. Civic order arose independently in scattered places at various times as people's liberties and the rule of law periodically waxed and waned. What Francis Lieber referred to as 'civil liberty and self-government' has many ancestors and undergone countless

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trials.¹ An outstanding part of this history has been played by acts of innovation, confrontation, even a form of resistance or civil disobedience known as interposition, by leaders in positions of authority. As Kenneth Minogue has emphasized, politics began as ‘the business of the powerful: citizens, nobles, property-owners, patriarchs—all had power and status.’

It was essential to the idea of the state, in all its forms, that it should be an association of *independent* disposers of their own resources. ... It was precisely because the state was composed of masterful characters that it could not turn into a despotism. Having projects of their own, powerful individuals of this kind had no inclination to become the instruments of someone else’s project. This is the sense in which despotism and politics are precisely opposed, and the state was distinguished by the right of the individual to dispose of his (and in time her) own property.²

II HISTORICAL VIGNETTES

In 930 AD Iceland’s Althing first met at the Law Rock in the fissure zone of a long rift valley where the Eurasian and North American tectonic plates slowly pull the volcanic island apart. In this stark setting the elected Lawspeaker recited the laws to the assembled chieftain-priests (the *godar* or godly ones). There in the year 1000 the Lawspeaker Thorgeir Ljosvetningagodi, a still-pagan chieftain-priest, declared Christianity to be the official religion, although certain pagan practices were retained.³

In that same millennial year in the Carpathian basin, the Grand Prince Stephen, adopting a German Christian custom, was crowned and consecrated as the first Hungarian king and presided over nearly

¹ Francis Lieber, *On Civil Liberty and Self-Government* (J B Lippincott, 3rd rev ed, 1877).

² Kenneth Minogue, *Politics: A Very Short Introduction* (Oxford University Press, 2000) 112.

³ Gwyn Jones, *A History of the Vikings* (Oxford University Press, rev ed, 1984) 282-86.

forty years of relative peace. Nine centuries later the last bearer of the Crown of St Stephen, the young Emperor Charles acceded to the throne of the Dual Monarchy halfway through the First World War and died in exile on Madeira five years later, having tragically failed in his courageous and ultimately self-sacrificial bid to end the war, due in part to a series of betrayals on all sides.⁴ Seen from one standpoint a heroic act of conscientious objection may be regarded as treason from another.

The Christian Middle Ages were the great seedtime of the liberties we enjoy today. In 1033 the humble monks of a Benedictine monastery at Thorn Ey, near King Canute's residence on the Thames, held a contested election that went through several ballots before a new abbot was formally elected. Before long King Edward the Confessor began expanding the monk's church into today's Westminster Abbey and built a palace that 'was eventually transformed into the Houses of Parliament.'⁵

Institutionally divided and limited power is the cornerstone of the western political tradition. The Decrees of León in 1188 made León the first kingdom to accord representation to the common people, along with the king, the clergy, and nobility. Kings John of England and Andrew II of Hungary were soon forced by their nobility to accept restraints on their power through Magna Carta (1215) and the Golden Bull (1222), respectively.⁶ Magna Carta, drafted by Stephen Langton, the Archbishop of Canterbury, and imposed by the barons, was intended to restore 'what the barons claimed had formerly been the relationship between the King and the feudal magnates.'⁷ It was subsequently reconfirmed at least forty times.

⁴ See Gordon Brook-Shepherd, *The Last Habsburg* (New York: Weybright and Talley, 1968); Erik von Kuehnelt-Leddihn, *Leftism: From de Sade and Marx to Hitler and Marcuse* (Arlington House, 1974) 244-47.

⁵ Charles Colson and Harold Fickett, *The Faith* (Zondervan, 2008) 212.

⁶ See Helen Silving, 'The Origins of the Magnae Cartae' (1965) 3 *Harvard Journal of Legislation* 117; Helen Silving, *Sources of Law* (William S Hein and Co, 1968) 237-49.

⁷ Sydney D Bailey, *British Parliamentary Democracy* (Houghton Mifflin, 2nd ed, 1962) 14.

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Another baronial revolt demanded representation in the king's government, which led to the Provisions of Oxford in 1258 and the creation of the Privy Council. Simon de Montfort later called the Great Parliament of 1265 in order to strip King Edward III of his unlimited authority and even ruled for a time in his stead. It was the first representative assembly in England to include merchants as well as the landed nobility.⁸ Limited government is the byproduct of usurpations as well as forcible interpositions – acts of intervention or resistance – by rulers, councils, and magistrates.

In 1628, as a result of disputes over customs duties and forced loans to finance the Thirty Years War, Parliament presented Charles I with the Petition of Right to compel him to consult it on matters of state and the purse. The King granted the petition as an act of grace but refused to be bound by its terms. The following year he dissolved Parliament and – supported by revenue from the Irish gentry – ruled by royal prerogative for eleven years until he needed funds for the Bishops' Wars in Scotland.

The King summoned the Short Parliament in the Spring of 1640, so named because it quickly deadlocked over longstanding grievances and opposition to an invasion of Scotland. He then turned to merchants for loans and raised an army in August, but it was repelled by the Scots within days, leaving the King with a mounting ransom bill and a Scottish army occupying northern England. In November he again summoned Parliament. This time Parliament's ultimate control of the purse strings strengthened its hand, enabling it to finally pass major reforms, which included the Triennial Act, which allowed this so-called Long Parliament to stay in session for many years, and abolition of the Star Chamber. A series of confrontations and protests culminated in the King's fruitless invasion of Parliament early in 1642 to seize five members he accused of treason.⁹

The ensuing Civil War and Interregnum inspired a remarkably

⁸ Ibid 57.

⁹ Conrad Russell, *The Crisis of Parliaments: English History, 1509-1660* (Oxford University Press, 1971) 326-29, 338-39.

fertile period of political and religious thought, including the Westminster Confession's chapter on liberty of conscience.¹⁰ Precedents and models from what John Selden styled the Hebrew Republic were a major inspiration to reformers.¹¹ The lively Putney Debates held within Oliver Cromwell's New Model Army in 1647 gave voice to the grievances and perspectives of ordinary soldiers, whose lives were dominated by the ruling gentry.

Politics and freedom emerge from the often-brutal conflict of powerful interests.¹² They operate best within a relatively free market of persuasion rather than coercion.

III THE THREEFOLD RISE OF CIVIC ORDER

Cater-corner across the continent and two millennia earlier, the citizens of ancient Athens discussed public affairs in the marketplace and gathered forty times a year at the Pnyx as members of the Assembly (*ekklesia*), deciding issues up or down. The political agenda was set by the Council (*boule*) of 500 that served as the full-time government for a year. It was chosen by lot, as were members of its presiding committee (*prytanes*) for a given month.

In 406 BC the board of ten generals (*strategoï*) in charge of military operations intervened to save the Athenian fleet at the Battle of Arginusae but were prevented by a storm from rescuing drowning sailors or retrieving their bodies. So great was the public outrage that the generals were summoned to answer directly to the Assembly. In a courageous act of interposition, only Socrates, who had been appointed president (*epistates*) of the Assembly for that single day, used his office to stand against mob rule and for due process by opposing a mass trial. The following day hotter heads prevailed; the generals

¹⁰ See Gai M Ferdon, *The Political Use of the Bible in Early Modern Britain: Royalists, Republicans, Fifth Monarchists and Levellers* (Jubilee Centre, 2013) <<https://www.jubilee-centre.org/ebooks/political-use-bible-early-modern-britain-dr-gai-ferdon>>.

¹¹ Gertrude Himmelfarb, *The People of the Book: Philosemitism in England, from Cromwell to Churchill* (Encounter, 2013) 26-27.

¹² In *Discourses on Livy*, Book One, chapters four and five, Machiavelli makes a similar observation about how conflicts between the people and the elites fostered liberty.

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were found guilty and took the hemlock, adding a second disaster to the first.

After its final defeat by Sparta two years later, Athens fell under a reign of terror by the Thirty Tyrants, during which time Socrates again stood for the rule of law and refused to arrest an opponent of the Thirty. The general amnesty that followed their overthrow was disregarded by the enemies of Socrates, who pressed spurious charges against him a few years later. Socrates chose death over exile.¹³ His memory was preserved by his students, notably Plato and Xenophon, as an embodiment of the classical *paideia*.

A century earlier, according to Livy's traditional account, the Romans overthrew a now despotic Etruscan monarchy in 509 BC and introduced a republic under the leadership of the tribune Lucius Junius Brutus, who was himself a member of the royal family. Although he was afterward elected consul, several of his in-laws and his two sons later conspired to restore the monarchy. Brutus and his fellow consul had them arrested and executed.¹⁴

Historically, despotism is the default position of worldly rule and may be just as descriptive of a democracy or a republic as of a monarchy.¹⁵ It often takes time and considerable confrontation for freedom to filter down to the lower ranks of society. When the much-oppressed underclass of plebeians seceded from Rome in 494 BC and took sanctuary on the Sacred Mount, the ruling patricians introduced a series of reforms, including creation of Tribunes of the Plebs to protect them. Even so, discrimination persisted.¹⁶

According to tradition, the turbulent son of Lucius Quinctius Cincinnatus, a very able leader who served as consul, killed a plebeian

¹³ Plato, *The Apology*, 32a-e, 42; Xenophon, *Conversations of Socrates*, trans. Hugh Tredennik and Robin Waterfield (Penguin, 1990) 72. See Bettany Hughes, *The Hemlock Cup: Socrates, Athens and the Search for the Good Life* (Alfred A Knopf, 2013) 59ff.

¹⁴ Livy, *The Early History of Rome*, trans. Aubrey de Sélincourt (Penguin, 1960) bk 1, 57-60, bk 2, 4-5.

¹⁵ See Minogue, above n.2, chapter one.

¹⁶ Livy, above n 12, bk 2, 23-25.

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and fled into exile. Cincinnatus was held liable and forced to sell his property to pay the heavy fine, then retired to a humble farm. One day, he was approached by a delegation from Rome while at work. He laid down his plow, put on his toga, and was greeted with the grant of a dictatorship in order to save Rome from an invading army. He accepted this open-ended offer of unlimited power and returned to Rome to raise an army. Fifteen days later he relinquished power and returned to his plow, having defeated the enemy and won their allegiance to Rome.

On another occasion, Cincinnatus was called upon to deal with Spurius Maelius, a wealthy patrician who allegedly sought to buy the people's support. The man who would be king died while resisting arrest.¹⁷

Democratic but often tyrannical Athens and republican but increasingly corrupt Rome soon enough went the way of all flesh. A third civil order was born out of the crumbling remains of the western Roman Empire through the spiritual challenge posed by the Christian faith and, earlier, by Judaism, both of which articulated world-and-life views based on divine revelation that were radically at odds with the imperial order and its classical ideals. To the cardinal virtues of wisdom, courage, temperance, and justice, the Christians added faith, hope, and caritas, translated alternatively as love and charity. A new civilisation began to emerge.¹⁸

IV THE GREAT SOURCEBOOK

As the Apostle Paul noted, all authority is delegated by God (Rom 13:1) for defined but limited purposes. The ideals of limited government – ‘with malice toward none, with charity for all’¹⁹ – are readily derived from the narratives of Scripture: indeed, from the necessary boundaries, divisions, and judgments that restrain, compartmentalize, and redeem errant individuals, institutions, and governing authorities.

¹⁷ Ibid bk 2, 14, 26-30, bk 4, 13-16.

¹⁸ See Minogue above n 2, ch 4.

¹⁹ Abraham Lincoln, Second Inaugural Address, March 4, 1865.

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The giving of God's commandments was accompanied by blessings for obedience and curses for disobedience (Deut 28).²⁰ 'In the Abrahamic Covenant, the covenantal blessing that God will be a God and a Father to us and our seed after us is linked with the covenantal command to "walk before me and be thou perfect."'”²¹ Failure to follow the Great Commandment (Matt 22:35-40) leads repeatedly to suffering, judgment, exile, and, sometimes, repentance.

The Bible remains a great sourcebook of practical political wisdom. Divine warnings and human responses to abuses of power are depicted, for example, in Jotham's parable of the trees (Jud 9:7-21), Samuel's speech to the people (1 Sam 8), the people's intercession on Jonathan's behalf (1 Sam 14:45), Azariah opposing Uzziah's usurpation of power (2 Chron 26:16-20), the people's resistance to an unjust ruler (1 Kings 12:1-14), Jeremiah's rescue by Ebed-Melech (Jer 38:4-13, 39:16-18), Peter's resistance to an unjust command (Acts 5:29), and Paul's appeals to both Roman law and Jewish faith (Acts 22:25-23:10).

In terms of worldview, philosophical insights and practical applications may be drawn from a careful reading of the scattering of nations (Gen 11:6-9), the tithe to Melchizedek (Gen 14:18-20), Jethro's recommendation of a federal division of governance (Ex 18:19-26), the gracious provision of God's Law (eg Ex 20-23, Deut 5-6), restraints on kings (Deut 17:14-20), the cities of refuge (Deut 19, Josh. 20), the revelatory witness of the Prophets (Jer 29:4-8; Hos 3:4-5), Jesus on servant leadership (Mark 9:35) and giving both God and Caesar their due (Matt 22:11), Paul's counsel to 'be subject to the governing authorities' (Rom. 13:1), and his practical definition of the love we owe (Rom 13:7-10). From such judicious examples one might reasonably

²⁰ The 9th century English King Alfred the Great prefaced his Laws with the Ten Commandments and otherwise drew upon the Bible as a source. See Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983) 65.

²¹ Louis DeBoer, 'The Fundamental Biblical Tactic for Resisting Tyranny' Gary North (ed) *Christianity and Civilization, 3: Tactics of Christian Resistance* (Geneva Divinity School, 1983).

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expect the development of a system of separate spheres of authority mediated by checks and balances to help restrain abuses of power.

The Bible dramatically reveals the full scope of human depravity on the historical stage and honestly portrays the way people, driven by envy and ambition, bear false witness, turn colleagues and families against each other, and deflect blame onto rivals. The child sacrifices practiced by apostate kings such as Ahaz (2 Kings 16:3) and Manasseh (2 Kings 21:6) resemble initiation rituals that bind, on pain of death, criminal conspiracies. The singular wickedness of Queen Jezebel, who criminally deprived a landowner of both his property title and his life, has made her name a byword down to the present day. Her treacherous but feckless husband, King Ahab, scorned Elijah as his enemy. Nevertheless, when Elijah confronted him with a crime akin to Cain's, Ahab repented of Naboth's murder and was reprieved (1 Kings 21:20).

V BIBLICAL REALISM

An examination of the evidence should make it evident that a heavy dose of Biblical realism is needed to strengthen wisdom generally and statecraft specifically in the face of social contagions and their consequences. One scholar who has done so, René Girard, characterizes the dynamic, transactional, underlying motive behind scandals and violent conflicts as “mimetic desire,” which draws us into envy and rivalry.²² In *The One By Whom Scandal Comes*, Girard singles out for analysis a familiar passage from the Sermon on the Mount (Matt 5:38-40) about turning the other cheek and handing over one's tunic:

Most people today regard these injunctions as a utopian sort of pacifism, manifestly naïve and even blameworthy because servile, doloristic, perhaps even masochistic. ...

This reading pays only glancing attention to St. Matthew's text, which presents us with two examples: someone who slaps us without provocation; and someone who sues us for

²² René Girard, *I See Satan Fall Like Lightning*, trans James G Williams (Orbis, 2001) 10.

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our tunic, the main article of clothing, often the only one, in Jesus's world. Gratuitously reprehensible conduct of this sort suggests the presence of an ulterior motive. We are dealing with people who wish to infuriate us, to draw us into a cycle of escalating conflict. They do everything they can, in other words, to provoke a response that will justify them in retaliating in turn; to manufacture an excuse for legitimate self-defense. For if we treat them as they treat us, they will be able to disguise their own injustice by means of reprisals that are fully warranted by the violence we have committed. It is therefore necessary to deprive them of the negative collaboration they demand of us.

Violent persons must always be disobeyed, not only because they encourage us to do harm, but because it is only through disobedience that a lethally contagious form of collective behavior can be short-circuited. Only the conduct enjoined by Jesus can keep violence from getting out of hand, by putting a stop to it before it starts.²³

We see this principle illustrated by King Saul's repeated, unanswered provocations against David while David's refusal to harm God's anointed king led him to take refuge in the wilderness for a time (1 Sam 19, 24). Elijah, who stood against Ahab and the priests of Baal, similarly fled into the wilderness to escape the wrath of Jezebel before being sent back on a final errand (1 Kings 18-19). The Suffering Servant of Isaiah 53 is described as silent toward his oppressors. God spoke through Jeremiah to the exiles in Babylon: 'And seek the peace of the city where I have caused you to be carried away captive, and pray to the LORD for it; for in its peace you will have peace' (Jer 29:7). Captives and exiles like Joseph, Daniel and his friends, Mordechai, and Nehemiah suffered much in rendering service but, proving themselves faithful stewards, were elevated to offices of trust by foreign monarchs.

²³ René Girard, *The One by Whom Scandal Comes*, trans. M B DeBevoise (Michigan State University Press, 2014) 19-20.

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Here a question naturally arises: How may we honor those in authority yet hold them accountable when they do not act the part of ‘a minister to us for good’ (Rom 13:4) or deliberately provoke us? For those of us who have been nurtured within representative institutions, what responsibility do we have to hold the governing authorities accountable? And through what procedures?

VI HARBINGERS OF LIMITED GOVERNMENT

The spread of Christianity and the institutional struggles between church and state – as empires receded and nation-states rose – increasingly brought the individual onto the historical stage. The independent status and Christian character of the English system of common law has had the long-term effect of restraining the powers that be.²⁴ As the cleric and lawyer Henry of Bracton put it at the outset:

The king himself ... ought not to be under man but under God, and under the law, because the law makes the king. ... [F]or there is no king where will, and not law, wields dominion. That as a vicar of god he [the king] ought to be under the law is clearly shown by the example of Jesus Christ.²⁵

The Germanic tradition of elective warrior kings was gradually Romanized and Christianized to the point where increasingly the king was expected to defend the faith without, however, exercising authority over it. Kings emerged as lords over the lords of realms. Government by consent emerged out of the king’s right to counsel from his leading vassals, an ancestor of the ‘advise and consent’ function of the United States Senate.²⁶

The growing recognition that ordinary people are beloved of God gradually transformed cultural norms and encouraged a restructuring of the civil order to ensure the rule of law, both civil and ecclesias-

²⁴ See Augusto Zimmermann, *The Christian Foundations of Common Law*, vol 1: *England* (Connor Court, 2008) ch 8.

²⁵ Herbert W Titus, ‘God’s Revelation: Foundation for the Common Law’ (1994) 4 (Spring) *Regent University Law Review* 1.

²⁶ Henry A Myers, *Medieval Kingship* (Nelson-Hall, 1982) 155.

tical.²⁷ This enabled, first, the barons and bishops of the land to be represented in government (Magna Carta and the rise of Parliament) and, gradually, permitted individuals of all classes to win economic and civil liberty. All this led M Stanton Evans to conclude:

On net balance, it is fair to say, the Catholic Church of the Middle Ages was the institution in Western history that did the most to advance the cause of constitutional statecraft. This resulted from its constant readiness, in the spirit of the Hebrew prophets, to challenge the might of kings and emperors if they transgressed the teachings of religion.²⁸

Yet there is also a reciprocating aspect in which kings and emperors at times play a positive role as defenders of the faith and protectors of reformers while asserting their own prerogatives.²⁹ The Investiture Struggle over the appointment of bishops led to what Eugen Rosenstock-Huussy called the Papal Revolution of the eleventh century, soon followed by the reintroduction of Roman civil law (the Institutes and the Code of Justinian). The protracted contest between emperors and the church hierarchy had a restraining effect on both. It was the first of a series of clerical, then secular, revolutions that shaped the West.³⁰ Similar upheavals inspired the great landmarks of liberty, the rise of representative institutions, even, ironically, the divine right of kings idea developed by Jean Bodin. Each revolution institutionalized changes we now take for granted but whose terms are ever open to renegotiation.

²⁷ Many unbelievers cherish this transformation and acknowledge the West's dependence on Christianity. See Marcello Pera, *Why We Should Call Ourselves Christians: The Religious Roots of Free Should Societies*, trans L B Lappin (Encounter, 2011); Roger Scruton and Mark Dooley, *Conversations with Roger Scruton* (Bloomsbury, 2016) ch 11; Tom Holland, *Dominion: How the Christian Revolution Remade the World* (Basic Books, 2019).

²⁸ M Stanton Evans, *The Theme Is Freedom: Religion, Politics, and the American Tradition* (Regnery, 1994) 152 (italics omitted).

²⁹ See Eugen Rosenstock-Huussy, *Out of Revolution: Autobiography of Western Man* (William Morrow, 1938) 382.

³⁰ Ibid 519-45.

The Truce of God [limiting warfare], the free choice of a profession, the liberty to make a will, the copyright of ideas—these institutions are like letters in the alphabet which we call Western civilization. ... They have emancipated the various elements of our social existence from previous bondage. ... A police force means nothing less than the emancipation of the civilian within myself; for without it, I should be forced to cultivate the rugged virtues of a vigilant man. To free the courts from the whims of changing government exalts my will and testament to a kind of immortality: something will endure when I have passed away. And so each of these institutions was hailed as a deliverance. Not one of them came into existence without the shedding of streams of blood.³¹

Divided power helps check tyranny and favors greater accountability. The great Scholastic philosopher, St Thomas Aquinas, dealt with the issue of sedition while carefully distinguishing it from lawful resistance to tyranny in his *Summa Theologica*. The difference between them turns on the correspondence of law with the common good. ‘The sin of sedition is first and chiefly in its authors ... and secondly it is in those who are led by them to disturb the common good,’ he wrote. Those who resist such seditious parties, however, are not themselves seditious:

A tyrannical government is not just, because it is directed, not to the common good, but to the private good of the ruler. ... Consequently there is no sedition in disturbing a government of this kind. ... [I]t is the tyrant rather that is guilty of sedition, since *he encourages discord and sedition among his subjects, that he may lord over them more securely*; for this is tyranny, since it is ordered to the private good of the ruler and to the injury of the multitude.³²

³¹ Ibid 30-31.

³² *The Summa Theologica of Saint Thomas Aquinas* (Encyclopædia Britannica, 1952) vol 2 584. *Secunda Secundae*, qu 42, art 2. Italics added to illustrate the deliberate provocation.

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In fact, Christian theories of resistance to tyranny and even tyrannicide were already extant in the Middle Ages at least a century before Aquinas. At their heart was a dynamic tension and an admonition to honor the office even when a particular officeholder is found unworthy. Procedures for bringing offenders to account developed within this context. John of Salisbury, who had gone into exile for a time with Thomas à Becket (who was later murdered in the cathedral as Archbishop of Canterbury), was an early contributor to the literature.³³ Examples of such resistance abound: John Wycliffe's and William Tyndale's translations of the Bible, the French Huguenots, the English Pilgrims and Puritans, John Hampden, Algernon Sidney, and many others.

VII INTERPOSITION BY PUBLIC OFFICERS

One of the most sophisticated forms of resistance is the doctrine of interposition in which, usually, lesser magistrates intervene to protect people against the abuse of power by higher authorities. Without the practice of interposition, the Protestant Reformation would have been stillborn. In 1520 Martin Luther addressed his letter *To the Christian Nobility of the German Nation* and called for a general council for the purpose of reforming the church.³⁴ Such councils had been called for the same purpose at earlier times, as in the case of the Councils of Nicaea and Chalcedon. A year later Luther was summoned to appear before the imperial Diet and condemned for heresy, a capital offense. But he was spirited away and kept in hiding at Wartburg Castle for a year by his prince, the Elector of Saxony, Frederick the Wise.³⁵

Almost three decades later the same emperor, Charles V, tried to force the Protestants into submission. While the magistrates of Magdeburg resisted, the pastors of the city drafted the Magdeburg Confession, an appeal to the emperor that stated the principle of defense by magistrates against tyranny. Charles placed Magdeburg under siege for more than a

³³ John of Salisbury, *Policraticus: Of the Frivolities of Courtiers and the Footprints of Philosophers*, Cary J Nederman (tr, ed) (Cambridge University Press, 1990) 201-05.

³⁴ J M Porter (ed), *Luther: Selected Political Writings* (Fortress Press, 1974) 37-49.

³⁵ Rosenstock-Huessy, above n 29, 380-81.

year before withdrawing. Four years later the Peace of Augsburg (1555) brought a truce between the Catholic and Lutheran parts of Germany.³⁶

In the last chapter of the *Institutes*, John Calvin writes: ‘The first duty of subjects towards their rulers, is to entertain the most honourable views of their office, recognising it as a delegated jurisdiction from God, and on that account receiving and reverencing them as the ministers and ambassadors of God.’³⁷ Here he stands on common ground with earlier theologians. Addressing the problem of bad rulers, Calvin notes that they may be God’s means of bringing judgment on the iniquity of the people. He holds that rulers owe mutual duties to those under them, but this does mean ‘that obedience is to be returned to none but just governors.’ It is not for private persons to cure these evils but to implore the help of the Lord, who may raise up avengers from among His servants or, alternatively, use the fury of men who have their own motives.

Let princes hear and be afraid; but let us at the same time guard most carefully against spurning or violating the venerable and majestic authority of rulers. ... Although the Lord takes vengeance on unbridled domination, let us not therefore suppose that that vengeance is committed to us, to whom no command has been given but to obey and suffer.³⁸

Yet it is at this very point that Calvin introduces a subtle shift of emphasis for which he had carefully prepared:

I speak only of private men. For when popular magistrates have been appointed to curb the tyranny of kings (as the Ephori, who were opposed to kings among the Spartans, or Tribunes of the people to consuls among the Romans, or Demarchs to the senate among the Athenians; and perhaps there is something similar to this in the power exercised in each

³⁶ ‘The Magdeburg Confession’ [1550] <<http://magdeburgconfession.com/mag/>>; see also <<http://www.zum.de/whkmla/military/16cen/magdeburg1551.html>>.

³⁷ John Calvin, *Institutes of the Christian Religion*, bk 4, ch 20, [22]. <<https://www.biblestudytools.com/history/calvin-institutes-christianity/book4/chapter-20.html>>.

³⁸ *Ibid* [31].

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kingdom by the three orders, when they hold their primary diets), so far am I from forbidding these officials to check the undue license of kings, that if they connive at [ignore or fail to act against] kings when they tyrannize and insult over the humbler of the people, I affirm that their dissimulation is not free from nefarious perfidy, because they fraudulently betray the liberty of the people, while knowing that, by the ordinance of God, they are its appointed guardians.

xxxii. But in that obedience which we hold to be due to the commands of rulers, we must always make the exception, nay, must be particularly careful that it is not incompatible with obedience to Him to whose will the wishes of all kings should be subject, to whose decrees their commands must yield, to whose majesty their scepters must bow. And, indeed, how preposterous were it, in pleasing men, to incur the offence of Him for whose sake you obey men! The Lord, therefore, is King of kings. When he opens his sacred mouth, he alone is to be heard, instead of all and above all. We are subject to the men who rule over us, but subject only in the Lord. If they command anything against him let us not pay the least regard to it, nor be moved by all the dignity which they possess as magistrates—a dignity to which no injury is done when it is subordinated to the special and truly supreme power of God.³⁹

Beginning with this opening wedge, the doctrine of interposition emerged by stages. John Knox, the founder of the Presbyterian Church of Scotland, appealed to the Scottish nobility over his condemnation by the bishops and clergy. His *Appellation* (1558) systematically advanced the doctrine of interposition as a principle of resistance by lesser magistrates.⁴⁰ The legal historian Harold J Berman wrote that, despite a positivism that ‘finds the ultimate sanction of law in political coercion,’ the Reformation built on the earlier Christianising of the

³⁹ Ibid [31]-[32].

⁴⁰ John Knox, ‘The Appellation from the Sentence Pronounced by the Bishops and Clergy: Addressed to the Nobility and Estates of Scotland’ (1558) <<http://www.swrb.com/newslett/actualNLs/appellat.htm>>.

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law and assumed ‘the existence of a Christian conscience among the people and a state governed by Christian rulers.’⁴¹ He added that we owe ‘to Calvinist congregationalism the religious basis of our concepts of social contract and government by consent of the governed.’⁴²

Interposition was further developed a few years after Calvin’s death in 1564 through various Huguenot tracts, such as *François Hotman’s Franco-Gallia*, Theodore Beza’s *Right of Magistrates*, and the anonymous *Vindiciae contra Tyrannos*.⁴³ Its articulation at that time reflects the Protestant experience with both royal and ecclesiastical persecution during the protracted religious warfare in France that only abated in 1598 with the Edict of Nantes. Specifically, the doctrine holds that when a ruler violates his oath of office – the ‘covenants and contracts passed between him and the people’⁴⁴ – he is in a state of rebellion and forfeits his lawful authority. Other (perhaps lesser) magistrates may then raise their standard against him to restore constitutional rule.⁴⁵

Drawing on Aquinas’s discussion of tyranny, the anonymous Huguenot writer Junius Brutus, who is generally believed to be Philippe de Mornay, made a succinct case for interposition by officeholders in the *Vindiciae* (1579):

[I]n this their action, we must not esteem them as private men and subjects, but as the representative body of the people, yea, and as the sovereignty itself, which demands of his minister an account of his administration. Neither can we in any good reason account the officers of the kingdom disloyal, who in this matter acquit themselves of their charge.

There is ever, and in all places, a mutual and reciprocal obligation between the people and the prince; the one promises

41 Harold J Berman, *The Interaction of Law and Religion* (Abington Press, 1974) 67.

42 Ibid 68. See also 161 fn 16.

43 Julian H Franklin (tr, ed), *Constitutionalism and Resistance in the Sixteenth Century: Three Treatises by Hotman, Beza, & Mornay* (Pegasus, 1968).

44 Junius Brutus, *A Defence of Liberty Against Tyrants: or, Of the lawful power of the Prince over the People and of the People over the Prince* (Still Waters Revival, 1989) 147.

45 Franklin, above n 43, 86-87, 110-13, 196-97.

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to be a good and wise prince, the other to obey faithfully, provided he govern justly. The people therefore are obligated to the prince under condition, the prince to the people simply and purely. Therefore, if the prince fail in his promise, the people are exempt from their obedience, the contract is made void, the right of obligation of no force. . . .

It is therefore permitted the officers of a kingdom, either all, or some good number of them, to suppress a tyrant; and it is not only lawful for them to do it, but their duty expressly requires it; and, if they do it not, they can by no excuse colour their baseness.⁴⁶

Two kinds of officers are held eligible to interpose their authority to protect the people: general officers of the realm, which in America include Congress and the Supreme Court, and those who govern any province, city, or other governing unit, such as governors, mayors, and sheriffs. ‘Private subjects, however, may not draw the sword against a tyrant by conduct [a lawfully installed ruler turned tyrant] since he was created not by all severally but by all together.’⁴⁷

Early during the English Civil War, which Rosenstock-Huessy regarded as the true English Revolution, the Rev Samuel Rutherford, a Scottish Presbyterian pastor, left room for legitimate popular resistance and held that all rightful authority lies in law.⁴⁸

Royalists say, a private man against his prince hath no way to defend himself but by flight; therefore, a community hath no other way to defend themselves but by flight. 1. The antecedent is false. Dr. Ferne alloweth to a private man supplications, and denying of subsidies and tribute to the prince, when he employeth tribute to the destruction of the commonwealth; which, by the way, is a clear resistance, and an active resistance made against the king (Rom. xiii. 6, 7) and against a commandment of God, except royalists grant tyrannous powers may be re-

⁴⁶ Brutus, above n 44, 134.

⁴⁷ Franklin, above n 43 (emphasis added).

⁴⁸ J F Maclear, ‘Samuel Rutherford: The Law and the King’ in George L Hunt (ed) *Calvinism and the Political Order* (Westminster Press, 1965) 77.

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sisted. 2. The consequence is naught, for a private man may defend himself against unjust violence, but not any way he pleaseth: the first way is by supplications and apologies,--he may not presently use violence to the king's servants before he supplicate, nor may he use reoffending [attacking, retaliating], if flight may save. David used all three in order.⁴⁹

In short, the procedural order – even for civilians – is petition, flight, and, as a last resort, fight.

Following these events and those of England's Glorious Revolution of 1688, the idea of interposition entered the common political parlance in part due to the Revocation of the Edict of Nantes in 1685, causing the entrepreneurial Huguenots to flee all over the Protestant world. One reason for their flight was the quartering of soldiers in private homes as a tool of provocation, a practice that continues today in Xinjiang. When Parliament passed a Quartering Act as one of several "Intolerable Acts" of 1774 directed at Massachusetts due to its resistance to parliamentary taxes, the colonists feared it could be used to billet soldiers in their own homes. These Coercive Acts, as Parliament itself called them, marked the point of no return. By the time of the Declaration of Independence, Benjamin Franklin proposed using the phrase 'Rebellion to tyrants is obedience to God' on the Great Seal of the republic, along with a scene of Pharaoh and his forces perishing as they pursued Moses and the freed Israelites.⁵⁰

VIII ALBION'S SEED

Such avenues of resistance, self-governance, and exercising liberty of conscience⁵¹ have resonated throughout American history, beginning

⁴⁹ Samuel Rutherford, *Lex, Rex, or the Law and the Prince* (Sprinkle Publications, 1982) 160; see also Daniel L Dreisbach, *Reading the Bible with the Founding Fathers* (Oxford, 2017) 123-35.

⁵⁰ Steve Straub, 'Rebellion to Tyrants is Obedience to God, Benjamin Franklin', 30 November 2012 <<https://thefederalistpapers.org/founders/franklin/rebellion-to-tyrants-is-obedience-to-god-benjamin-franklin>>.

⁵¹ See L John Van Til, *Liberty of Conscience: The History of a Puritan Idea* (The Craig Press, 1972).

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humbly with secret congregational meetings by religious separatists in England in defiance of the church establishment. Subsequent emigration by religious dissenters, defeated royalists, and a variety of other outcasts was organized through agreements and covenants for colonial self-government and, in some cases, royal charters.

Beginning in the 1620s, the significance of the Pilgrims and Puritans of New England for the self-understanding of later generations of Americans is difficult to overstate but easy to misrepresent. Colonial New England became a lively experiment: indeed, a laboratory of political innovation, including formal agreements and covenants, Bible-based law codes, citizenship oaths, a long tradition of election sermons, bicameral legislatures, and written constitutions with a separation of powers and federalism as organising principles.⁵² To a long tradition of Anglican liberty, as Francis Lieber called it, self-governing, self-taxing colonists contributed imaginative blends of a uniquely American liberty and the basic political symbols that define the American experiment.⁵³

Many of the great themes and issues of American history have been described or defined in language drawn from the Bible, such as ‘city upon a hill,’ ‘garden’ and ‘wilderness,’ ‘covenant,’ the ‘house divided,’ the ‘grapes of wrath,’ and the ‘chosen people.’ The sense of divine superintendence cherished by these early colonists remains powerful in some quarters. The spiritual aspirations of the Puritans and dissenters have colored the American mind more than is generally acknowledged.⁵⁴

⁵² On federalism, see Daniel J Elazar, ‘Religious Diversity and Federalism’ International Conference on Federalism, October 1999 <<http://www.forumfed.org/library/religious-diversity-and-federalism/>>.

⁵³ Donald Lutz (ed) *Colonial Origins of the American Constitution* (Liberty Fund, 1998) xv-xix; Lieber above n 1, chs 5-23; Francis Lieber, ‘Anglican and Gallican Liberty’ *Miscellaneous Writings, vol 2: Contributions to Political Science, Including Lectures on the Constitution of the United States and Other Papers* (J B Lippincott, 1880) 371-88.

⁵⁴ See Erik von Kuehnelt-Leddihn, ‘The Western Dilemma: Calvin or Rousseau?’ in George A Panichas (ed), *Modern Age: The First Twenty-Five Years: A Selection* (Liberty Press, 1988) 520-31.

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The historian Perry Miller, who was impressed by the Puritans' realism about human nature, wrote eloquently of the faith that could produce so firm a character:

Puritanism would make every man an expert psychologist, to detect all makeshift "rationalizations," to shatter without pity the sweet dreams of selfenhancement in which the ego takes refuge from reality. A large quantity of Puritan sermons were devoted to ... exposing not merely the conscious duplicity of evil men, but the abysmal tricks which the subconscious can play upon the best of men. The duty of the Puritan in this world was to know himself—without sparing himself one bit, without flattering himself in the slightest, without concealing from himself a single unpleasant fact about himself.

In the course of this sustained and unmitigated meditation, he perpetually measured himself by the highest imaginable excellency. The Puritan was taught to approve to approve of no act because it was good enough for the circumstances, to rest content with no performance because it was the best that be done in this or that situation. He knew indeed that life is imperfect, that the purest saints do not ever entirely disentangle themselves from the meshes of corruption, but though perfection was unattainable—even more because it was so—he bent every nerve and sinew to attempting the attainment.⁵⁵

Other colonies were likewise practical expressions of a reforming – and often – religious purpose. George Calvert was granted a proprietary charter for Maryland to pursue his vision of Catholics and Protestants living in harmony. Quakers and Anabaptists found a haven in Pennsylvania, a proprietary colony begun by William Penn and assisted by George Fox. The Lords Proprietors of Carolina employed Lord Ashley's secretary, John Locke, to help draft a constitution. The last was Georgia, which like Rhode Island, became a refuge for outcasts, including Huguenots, Scottish Covenanters, and defaulting debtors who were offered a second chance. Such was

⁵⁵ Perry Miller and Thomas H Johnson (eds) *The Puritans: A Sourcebook of Their Writings* (Harper Torchbooks, 1963) vol 1, 284.

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the diversity from which a common resistance against British colonial policies and practices was forged. David Hackett Fischer has identified four major British folkways, drawn from different parts of the United Kingdom, that shaped the American cultural landscape.⁵⁶ Daniel Elazar and Wilbur Zelinsky noted comparable political and geographical patterns.⁵⁷

Taken together, these were the cultural and political seeds that germinated, over the first century and a half, into town meetings and colonial legislatures; the New England Confederation; unchartered New Haven's aid to two regicides and eventual annexation by Connecticut, which had been granted a charter; and the forced consolidation of several colonies into the short-lived Dominion of New England and resistance to Gov Edmund Andros as symbolized by the story of Connecticut's charter oak. The Glorious Revolution of 1688 restored the colonies but the Puritan experiment came to an end.

After a long period of "salutary neglect," the colonies' relationship to the Crown changed during the long reign of King George III that began in 1760. Some of the characteristic developments of this period include the Benjamin Franklin's proposed Plan of Union at the Albany Congress (1754) near the start of the French and Indian War; postwar boycotts against the Sugar Act, Stamp Act, and other protests against mercantilist restrictions and taxes; Samuel Adams's committees of correspondence between towns, counties, and provinces to exchange information; two continental congresses to knit a common response, including declarations of rights and a trade boycott; the Declaration of Independence; the Articles of Confederation; and the Constitutional Convention of 1787.

⁵⁶ See David Hackett Fischer, *Albion's Seed: Four British Folkways in America* (Oxford University Press, 1989) 783-898.

⁵⁷ Daniel J Elazar, *American Federalism: A View from the States* (Thomas Y Crowell, 1966) 85-140; Wilbur Zelinsky, *The Cultural Geography of the United States* (Prentice-Hall, rev ed, 1992) 117-28.

IX THE DISSIDENCE OF DISSENT IN THE AMERICAN COLONIES

Echoing John Adams,⁵⁸ Francis Grund, a nineteenth century Austrian émigré, believed that the character associated with ‘the domestic virtue of the Americans’ provided the key to understanding why the experiment with constitutional self-government succeeded as it had at the time he wrote (1837):

The American Constitution is remarkable for its simplicity; but it can only suffice a people habitually correct in their actions, and would be utterly inadequate to the wants of a different nation. Change the domestic habits of the Americans, their religious devotion, and their high respect for morality, and it will not be necessary to change a single letter in the Constitution in order to vary the whole form of their government.⁵⁹

In the eighteenth century, the patriot-pastors of the American colonies further developed a Bible-based literature of resistance even before the issue of taxation without representation became a central public question following the French and Indian War of 1754-1763. Earlier controversies over religious reform and revivalism helped set the stage for a deepening debate over and commitment to the principles of constitutional government, as Alice Baldwin illustrated in her pathbreaking study, *The New England Clergy and the American Revolution* (1928).

The years from 1743 to 1763 were prolific in sermons, pamphlets, and petitions in which constitutional rights, civil and religious liberty, the right to resistance, etc., were more clearly defined and more positively asserted than ever before. Laymen as well as clergy, poor and unlearned as well as those of higher estate expressed their conviction in no uncertain terms, and again the Bible, natural law, the rights of Eng-

⁵⁸ John Adams, ‘Letter to Massachusetts Militia, 11 October 1798 <<https://founders.archives.gov/documents/Adams/99-02-02-3102>>.

⁵⁹ Francis J Grund, *The Americans in Their Moral, Social, and Political Relations* (Longman, Rees, Orme, Brown, Green, & Longman, 1837) vol 1, 307.

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lishmen, covenants, charters, and statutes were drawn upon for arguments. ... The phrase “unalienable right” grew more common and the references to Locke, Sydney, and other radical theorists more frequent.⁶⁰

The seeds of independence may be found scattered through the history of the colonies. But some of the key issues – such as taxation without representation, abuse of power, political and ecclesiastical tyranny – came to the fore during and immediately after the French and Indian War and led to acts of interposition by legislative assemblies, counties, and judicial bodies. Virginia, Massachusetts, Pennsylvania, and New York emerged as the major players in the struggle that led to independence.

The pulpit and the independent press were the most effective instruments for spreading republican political ideas during this period. While the relative influence of the American Puritan tradition of preaching in comparison with Whig political journalism is still a debated point among historians, Mark Noll acknowledges the seminal role played by Puritanism:

[W]ithout the fertile soil of the American religious tradition, without particularly Puritan preoccupations with original sin, the ongoing battle against Satan, and the “liberty wherewith Christ hath made us free,” Whig ideology would not have exerted such a powerful sway in leading the thought and guiding the actions of the Patriots. Similarities between the view of life in the world developed by American Christianity and Real Whig conceptions of political reality imported from England were responsible for the sense of cosmic importance and the fervent religiosity that permeated the Whig expressions of many Christians.⁶¹

⁶⁰ Alice M Baldwin, *The New England Clergy and the American Revolution* (Frederick Ungar, 1958) 65. Other good sources on the role of the clergy in the development of the American constitutional tradition include Gai M Ferdon, *A Republic If You Can Keep It* (Foundation for American Christian Education, 2008); Franklin P Cole, *They Preached Liberty* (Liberty Press, 1977); and Ellis Sandoz (ed), *Political Sermons of the American Founding Era, 1730-1805* (Liberty Press, 1991).

⁶¹ Mark A Noll, *Christians in the American Revolution* (Christian University Press, 1977) 150.

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Edmund Burke was perhaps the most insightful member of Parliament on this score. In his “Speech on Conciliation with the Colonies” (March 22, 1775), given before the first battles of the War for Independence, Burke spoke out against the use of force, which could only damage both sides and render them vulnerable to outside meddling. He extolled the colonists’ devotion to ‘Liberty according to English ideas, and on English principles,’ noting that the ‘great contests for freedom in this country were from the earliest times chiefly upon the question of Taxing.’ The colonists were well versed in this history: ‘The Colonies draw from you, as with their life-blood, these ideas and principles. Their love of Liberty, as with you, fixed and attached on this specific point of taxing.’⁶²

Burke addressed his fellow parliamentarians in the name of these common principles, which had earlier been cited by Americans as in, for example, the Fairfax County Resolves of July 18, 1774 and other complaints.

[The] share of the people in their ordinary governments never fails to inspire them with lofty sentiments, and a strong aversion from whatever tends to deprive them of their chief importance. If anything were wanting to this necessary operation of the form of government, religion would have given it complete effect. Religion, always a principle of energy, in this new people is no way worn out or impaired; and their mode of professing it is also one main cause of this free spirit. The people are protestants; and of that kind which is the most averse to all submission of mind and opinion. This is a persuasion not only favourable to liberty, but built upon it. ... The dissenting interests have sprung up indirect opposition to all the ordinary powers of the world; and could justify that opposition only on a strong claim to natural liberty. Their very existence depended on the powerful and unremitted assertion of that claim. All protestantism, even the most cold and passive, is a sort of dissent. But the religion most prevalent in our Northern Colonies is a refinement on the principle

⁶² Edmund Burke, *Select Works* (Liberty Fund, 1999) vol 1, 238.

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of resistance; it is the dissidence of dissent, and the protestantism of the protestant religion.⁶³

This is nowhere more evident than in the systematic but measured resistance of the colonists to taxes and regulations imposed by a Parliament that never consulted them. A year after Burke's appeal to Parliament and a few months after George III insisted upon passage of the American Prohibitory Act, which declared the American people to be outside the king's protection, Chief Justice William Drayton, who had been trained at the Inns of Court, echoed the indictment against James II nearly a century earlier in his charge to a South Carolina grand jury declaring formal independence from the Crown.⁶⁴ In July Congress passed its own Declaration of Independence.

In the *Oxford History of the American People*, Samuel Eliot Morison relates one soldier's account of the reasons for the separation:

What made the farmers fight in 1775? Judge Mellen Chamberlain in 1842, when he was twentyone, interviewed Captain Preston, a ninetyoneyearold veteran of the Concord fight: 'Did you take up arms against intolerable oppressions?' he asked.

'Oppressions?' replied the old man. 'I didn't feel them.'

'What, were you not oppressed by the Stamp Act?'

'I never saw one of those stamps. I certainly never paid a penny for one of them.'

'Well, what then about the tea tax?'

'I never drank a drop of the stuff; the boys threw it all overboard.'

'Then I suppose you had been reading Harrington or Sidney and Locke about the eternal principles of liberty?'

'Never heard of 'em. We read only the Bible, the Catechism, Watt's Psalms and Hymns, and the Almanac.'

'Well, then, what was the matter? And what did you mean in going to fight?'

⁶³ Ibid 239-40.

⁶⁴ Evans, above n 28, 243-44.

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‘Young man, what we meant in going for those redcoats was this: we always had governed ourselves, and we always meant to. They didn’t mean we should.’⁶⁵

X ‘THE MISCHIEFS OF FOREIGN INTRIGUE’

The Constitution of 1787 was the product of a special convention of delegates from all but one of the future states. It was subsequently ratified by each of the states that composed the new union. Suggested amendments were soon ratified together as the Bill of Rights, which, among other things, reserved to the states and the people those powers that had not been delegated to the central government. The resulting decentralized federal system depended on a practical consensus – a deliberate sense of the community, as the Federalist Papers put it, rather than any temporary majority vote. This resolve was soon tested by the French Revolution and the war it launched against the monarchies of Europe in 1792.

President Washington issued a Neutrality Proclamation in May of 1793, shortly after the arrival of Edmond Charles Genêt, the new ambassador of the French Republic. Citizen Genêt, as he was known, sought to raise a private navy to attack British and Spanish territories from American bases. Breaking a promise to Jefferson, he openly defied the Administration by appealing to the people for support. But before he could be recalled, the Committee of Public Safety came to power in France and instituted the infamous Terror. The now-regnant Jacobin faction sent a new ambassador with orders to arrest Genêt, who sought and was granted refuge.⁶⁶

Agitation by Jacobin supporters and the spread of their ‘revolutionary faith’⁶⁷ drove an ideological wedge into American politics. Cit-

⁶⁵ Samuel Eliot Morison, *The Oxford History of the American People* (New American Library, 1972) vol 1, 284.

⁶⁶ Richard B Morris (ed), *Encyclopedia of American History* (Harper & Brothers, 1950) 125-26.

⁶⁷ See James H Billington, *Fire in the Minds of Men: Origins of the Revolutionary Faith* (Basic Books, 1980).

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ing ‘the mischiefs of foreign intrigue,’ George Washington’s Farewell Address counseled against taking sides in international ‘quarrels and wars.’⁶⁸ A second French incident, known as the XYZ Affair, might have led to war except for the opposition of President John Adams, who had to fight a radical faction within the Federalist Party.⁶⁹

A more serious controversy grew out of the Adams’s support of the Alien and Sedition Acts of 1798. Sponsored by a group of High Federalists from Massachusetts, the laws seemed to have little other purpose than to stifle political dissent. Jefferson and Madison regarded them as unconstitutional. Each drafted a set of resolutions introduced into the Kentucky and Virginia legislatures, respectively. Jefferson’s Kentucky Resolutions set forth a theory of nullification, by which the states could overrule unconstitutional actions. James Madison’s less far-reaching Virginia Resolutions merely stated a theory of interposition by which a state could intercede on behalf of its citizens to block an unconstitutional action by a higher authority. Both states also declared their loyalty to the Union and both deliberately avoided taking any action either to nullify or to obstruct enforcement of the Alien and Sedition Acts.⁷⁰

The United States were more of a coalition of rival geographical and cultural regions than a full union of states. Even today, a fear of conspiracy remains one of the consistent features not only of wartime politics but often of domestic politics, as well.

XI INTERPOSITION IN NEW ENGLAND

Interposition and nullification continued to exacerbate sectional divisions in the years leading to the Civil War. The next confrontation began nearly a decade after the Alien and Sedition Acts when the Jefferson and Madison Administrations introduced economic sanctions to keep the country from being drawn into the war between Britain and Napoleonic France. The greatest public outcry was directed against

⁶⁸ https://avalon.law.yale.edu/18th_century/washing.asp.

⁶⁹ Morris, above n 65, 128-29.

⁷⁰ Ibid 130.

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Britain because the royal navy, which needed help to man a naval blockade against France, pressed able-bodied seamen into its service, claiming they were deserters.⁷¹

In a series of Non-Importation, Embargo, and Non-Intercourse Acts, Congress restricted overseas commerce, penalising New England merchants while profiting smugglers. It would not be the last time that a moralistic foreign policy would be cynically manipulated and defeated.⁷² New England towns and legislatures sent resolutions challenging the constitutionality of these laws. Gov Jonathan Trumbull of Connecticut declared that state legislatures were dutybound ‘to interpose their protecting shield between the rights and liberties of the people and the assumed power of the general government.’⁷³

Urged by Southern and Western War Hawks, President Madison pushed for a declaration of war against Britain in June 1812. The Federalist governor of Massachusetts declared a public fast and, along with the governor of Connecticut, refused to supply militia forces. In New Hampshire, Daniel Webster condemned the war in the Rockingham Memorial, suggesting that if the Union were ever to dissolve it might occur ‘on some occasion when one portion of the country undertakes to control, to regulate, and to sacrifice the interest of another.’⁷⁴

After President Madison called for conscription, a convention was called to meet at Hartford late in 1814 to consider a joint course of action.⁷⁵ Several resolutions were passed, including limits on trade restrictions, requiring a supermajority for declarations of war and the admission of new states, and ending the three-fifths representation advantage of the Southern states. By the time the delegation it sent

⁷¹ Ibid 134-36.

⁷² See Colin Dueck, *Reluctant Crusaders: Power, Culture, and Change in American Grand Strategy* (Princeton University Press, 2006) 2-5; Angelo M Codevilla, *To Make and Keep Peace Among Ourselves and with All Nations* (Hoover Institution Press, 2014) 67-69.

⁷³ Morris, above n 65, 136-37.

⁷⁴ Ibid 145-46.

⁷⁵ Tom Rose, ‘On Reconstruction and the American Republic’ (1978) 5(1) *Journal of Christian Reconstruction* 25.

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arrived in Washington, DC, however, news of the Treaty of Ghent that ended the war and Gen Andrew Jackson's victory at the Battle of New Orleans dashed any opportunity it might have had to succeed.⁷⁶ It was the last hurrah of the Federalist Party.

XII THE TARIFF OF ABOMINATIONS

As the election of 1828 approached, candidate Jackson's supporters on the House Committee on Manufactures decided to embarrass the Administration by reporting out a tariff on raw materials so high that all sections of the country would oppose it on the floor. President John Quincy Adams could then be blamed for its defeat, thus alienating his protectionist supporters in the middle states. The plot backfired when New England supported the bill and it passed. John Randolph of Roanoke grumbled that the law 'referred to manufactures of no sort or kind, but to the manufacture of a President of the United States.'⁷⁷

The exacerbation of regional disagreements and political rivalries led to decades of recriminations. The impasse over the tariff persisted for four years. During his reelection campaign in 1832, Jackson supported a new tariff that did not appreciably change the situation. South Carolina Gov James Hamilton called for an extraordinary session of the legislature following state elections, leading to a special convention, which adopted an ordinance nullifying the two tariffs, prohibiting the collection of duties within the state, imposing a test oath on state executive officials, forbidding appeal to the US Supreme Court of any case arising under the law, and threatening secession if force were used against the state. Jackson replied by placing the forts in Charleston harbor on alert. Jackson issued his Proclamation to the People of South Carolina on December 10, which called nullification an 'impractical absurdity' and held that 'disunion by armed force is treason.'⁷⁸

⁷⁶ Morris, above n 65, 153.

⁷⁷ Ibid 166.

⁷⁸ Ibid 172; see Rose, above n 75, 28-29.

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In January, Jackson asked Congress for extraordinary powers to enforce the tariff by military force if necessary. Webster and former Vice President Calhoun, who had resigned to take a seat in the Senate, debated the issue in the Senate. Meanwhile, Henry Clay led a compromise tariff through to passage. South Carolina rescinded its ordinance.⁷⁹

The lines of discord were thus already deeply drawn nearly three decades before the War between the States erupted. The centralisation that followed the war left the Early Republic far behind. Opportunistic political empire-builders have never looked back.⁸⁰

XIII THE ADMINISTRATIVE STATE

In America, the post-Civil War Reconstruction led to Progressivism, New Deal liberalism led to the Great Society's entitlements revolution,⁸¹ civil service reform and federal regulatory agencies led to a centralized administrative state, the Constitution of Rights yielded to the Constitution of Powers.⁸² In *Cooper v Aaron*, 1958, the Supreme Court rejected nullification and interposition by states against federal laws. Yet some aspects of the older practice are reasserted when, for example, county commissions pass Second Amendment Sanctuary resolutions,⁸³ sheriffs refuse to enforce facemask regulations,⁸⁴ or judges enjoin onerous COVID-19 lockdown restrictions on business or religious activity.⁸⁵

⁷⁹ Ibid 172-73.

⁸⁰ See Felix Morley, *The Power in the People* (Nash, 1972) 120-28.

⁸¹ Christopher Caldwell, *The Age of Entitlement* (Simon & Schuster, 2020).

⁸² Edward S Corwin, *Total War and the Constitution* (Alfred A Knopf, 1947) 170-72.

⁸³ See 'Updated Map of American Pro Second Amendment/2A Sanctuary Counties', 3 April 2020 <<https://sanctuarycounties.com/2020/03/04/updated-map-of-american-second-amendment-sanctuary-counties-3-4-2020/>>.

⁸⁴ See Amanda Prestigiaco, 'Sheriff Slams Democrat Governor in Viral Post, Says He Won't Enforce Lockdown: "I Can No Longer Stay Silent"', *Daily Wire*, 22 April 2020 <<https://www.dailywire.com/news/sheriff-slams-democrat-governor-in-viral-post-says-he-wont-enforce-lockdown-i-can-no-longer-stay-silent>>.

⁸⁵ Andrew Mark Miller, 'Judge Rules in Favor of Michigan Judge, Allowing Him to Stay Open Despite Lockdown Order' *Washington Examiner*, 21 May 2020, <<https://>

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As the modern administrative state extends its operations into all areas of social life, it breaches the constitutional safeguards that have traditionally kept society and its various institutions free from intrusive regulation by civil authorities.⁸⁶ The essence of the original decentralized federal system is constitutionally divided and limited power, as expressed philosophically by Abraham Kuyper's 'sphere sovereignty' and Pope Leo XIII's 'subsidiarity.'⁸⁷ Constitutional discipline is the hard-won reward of the Puritan experiment – a moderator of the historical drama of clashing interests and passionate convictions.

In *The City of God*, St Augustine asks: 'Justice being taken away, then, what are kingdoms but great robberies?'⁸⁸ He punctuates his point with Cicero's tale of a lowly pirate who was seized by Alexander the Great.

When asked by the king what he thought he was doing by infesting the sea, he replied with noble insolence, "What do you think you are doing by infesting the whole earth? Because I do it with one puny boat, I am called a pirate; because you do it with a great fleet, you are called an emperor."⁸⁹

The story illustrates Frederic Bastiat's observations on the corrupting character of the lust for power (Augustine's *libido dominandi*). What Bastiat called 'legal plunder'⁹⁰ – the abuse of power or office for personal gain – is akin to what Gordon Tullock identified and

www.washingtonexaminer.com/news/judge-rules-in-favor-of-michigan-barber-allowing-him-to-stay-open-despite-lockdown-order>.

⁸⁶ See John Marini, *Unmasking the Administrative State: The Crisis of American Politics in the Twenty-First Century* (Encounter, 2019), especially ch 9.

⁸⁷ See J Budziszewski, *The Revenge of Conscience: Politics and the Fall of Man* (Spence, 1999) 118-19.

⁸⁸ St Augustine, *The City of God*, bk 4, ch 4. St Augustine, *Political Writings*, tr Michael W Tkacz and Douglas Kries (Hackett, 1994) 30-31.

⁸⁹ See Cicero, *The Republic and The Laws*, tr Niall Rudd (Oxford University Press, 1998) 66, 74.

⁹⁰ Frederic Bastiat, *Selected Essays on Political Economy*, tr Seymour Cain, George B. de Huszar (ed) (Foundation for Economic Education, 1964) 64. <http://bastiat.org/en/the_law.html>.

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Anne Krueger designated as ‘rent-seeking.’⁹¹ The law is backed by force. We should carefully consider where the use of force is both appropriate and accountable – and where it is not. Prerogative power, entitlement, and privilege often degenerate into power- or plunder-enhancing turnstile operations, a form of rent-seeking. Like the Prussian model of public education,⁹² the introduction of administrative law in the 19th century German tradition superimposed a foreign body onto the constitutional system for which adequate antibodies to resist insidious abuses of power and influence have yet to develop.⁹³ The delegation of the law- and rule-making power to administrative agencies – where it is not accountable to the whole body politic – threatens basic civil liberties, such as procedural rights, by introducing an element of continental absolutism into the system. The Declaration of Independence contains complaints of comparable practices.⁹⁴

Today, resistance to the COVID-19 lockdowns by sheriffs, mayors, judges, and citizens merge with the struggle between divergent visions of the American future.⁹⁵ Sheriffs refuse to enforce gun control laws and the closure of public recreation areas; judges overrule the closure of businesses and overly broad or inconsistent lockdown orders. Many states reacted to the spread of the disease by closing churches and stopping “elective surgeries” while keeping abortion facilities open as “essential” services.⁹⁶ Many of the institutions, groups, business-

⁹¹ See David R Henderson, ‘Rent Seeking’, *The Library of Economics and Liberty* <<https://www.econlib.org/library/Enc/RentSeeking.html>>.

⁹² See Paolo Lionni and Lance J Klass, *The Leipzig Connection: The Systematic Destruction of American Education* (Heron Books, 1980); Lawrence A Cremin, *The Transformation of the School: Progressivism in American Education, 1876-1957* (Alfred A. Knopf, 1961) ch 1.

⁹³ See Philip Hamburger, *Is Administrative Law Unlawful?* (University of Chicago Press, 2014) ch 24.

⁹⁴ See Philip Hamburger, *The Administrative Threat* (Encounter, 2017) 4-7, 42-47, 50-52.

⁹⁵ Thomas Sowell, *A Conflict of Visions: Ideological Origins of Political Struggles* (William Morrow, 1987) ch 2; *The Vision of the Anointed: Self-Congratulation as the Basis for Social Policy* (Basic Books, 1995) ch 5.

⁹⁶ Rabbi Michael Barclay, ‘Now Is the Time for All People of Faith to Come Together and Support Rob McCoy’, *PJ Media*, 8 August 2020 <<https://pjmedia.com/culture/>

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es, and practices targeted in such an authoritarian manner were often already under pressure, even censure or reprisal. Churches had long been targeted by various regulatory agencies. Similarly, universities that were once at the epicenter of free speech and antiwar protests are now being hamstrung by byzantine speech codes and administrative procedures.⁹⁷

XIV FINAL CONSIDERATIONS – LOOKING AHEAD

Since late May, the pace of change has accelerated from sporadic crises into a more settled state of endemic political antagonism.⁹⁸ It is a pattern we have seen, a refrain we have heard, down through history. In 1838, following the murder of an abolitionist newspaper publisher and other instances of mob violence, a young Illinois legislator described a similar ‘increasing disregard for law which pervades the country; the growing disposition to substitute the wild and furious passions, in lieu of the sober judgment of Courts; and the worse than savage mobs, for the executive ministers of justice.’ When a gaslighting media and political class characterizes months of looting and burning as peaceful protests, reality itself is brought into question.⁹⁹ As with the Great Fear that followed the storming of the Bastille on July 14, 1789, people

rabbi-michael-barclay/2020/08/08/now-is-the-time-for-all-people-of-faith-to-come-together-n766828>.

⁹⁷ Joshua T Katz, ‘A Declaration of Independence by a Princeton Professor’, *Quillette*, 8 July 2020 <<https://quillette.com/2020/07/08/a-declaration-of-independence-by-a-princeton-professor/>>; see also David French, ‘A Eulogy for a Friend, a Lament for Our Nations’, *The Dispatch*, 26 July 2020. <https://frenchpress.thedispatch.com/p/a-eulogy-for-a-friend-a-lament-for?utm_campaign=post&utm_medium=web&utm_source=facebook&fbclid=IwAR121ZzCz1dQqKGdPb81aQ33ZeSqDBNWyGgoOIIlpa5qZSW7wWPPqWeKZxc>.

⁹⁸ See Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* (Oxford University Press, 1987); Guillaume Groen van Prinsterer, *Unbelief and Revolution*, Harry van Dyke (tr, ed) (Lexham Press, 2018).

⁹⁹ See Stephanie A Sarkis, ‘11 Warning Signs of Gaslighting’ *Psychology Today*, 22 January 2017 <<https://www.psychologytoday.com/us/blog/here-there-and-everywhere/201701/11-warning-signs-gaslighting>>; for a political application, see Larry Alex Taunton, ‘Understand What Is Happening in America: A Christian Response’ <<https://larryalextaunton.com/2020/07/understanding-what-is-happening-in-america-a-christian-response/>>.

are unsettled by doubt, even despair. Power abhors a vacuum. When elected and appointed officials fail to govern, a new constabulary – perhaps akin to Mao’s Red Guard¹⁰⁰ – will simply install itself.¹⁰¹ We would do well to heed Abraham Lincoln’s warning:

[T]he innocent, those who have ever set their faces against violations of law in every shape, alike with the guilty, fall victims to the ravages of mob law; and thus it goes on, step by step, till all the walls erected for the defense of the persons and property of individuals, are trodden down, and disregarded. But all this even, is not the full extent of the evil. – By such examples, by instances of the perpetrators of such acts going unpunished, the lawless in spirit, are encouraged to become lawless in practice; and having been used to no restraint, but dread of punishment, they thus become, absolutely unrestrained.—Having ever regarded Government as their deadliest bane, they make a jubilee of the suspension of its operations; and pray for nothing so much, as its total annihilation. While, on the other hand, good men, men who love tranquility, who desire to abide by the laws, and enjoy their benefits, who would gladly spill their blood in the defense of their country; seeing their property destroyed; their families insulted, and their lives endangered; their persons injured; and seeing nothing in prospect that forebodes a change for the better; become tired of, and disgusted with, a Government that offers them no protection; and are not much averse to a change in which they imagine they have nothing to lose. Thus, then, by the operation of this mobocratic spirit, which all must admit, is now abroad in the land, the strongest bul-

¹⁰⁰ See Jeff Sanders, ‘Five Common Threads Between China’s Red Guard and Antifa’ *PJ Media*, 14 September 2017 <<https://pjmedia.com/culture/jeff-sanders/2017/09/14/five-common-threads-chinas-red-guard-antifa-n168889>>.

¹⁰¹ A confrontation by Antifa provocateurs degenerated into a Maoist struggle session in which an elderly woman was doused with paint, wrapped with crime scene tape, and denounced as a non-person. See Victoria Taft, “Day 70: Portland Woman Attacked as She Stands up to Antifa Trying to Set Precinct on Fire,” *PJ Media*, August 7, 2020. <https://pjmedia.com/news-and-politics/victoria-taft/2020/08/07/day-70-portland-woman-attacked-as-she-stands-up-to-antifa-trying-to-set-precinct-on-fire-n763960>

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wark of any Government, and particularly of those constituted like ours, may effectually be broken down and destroyed – I mean the *attachment* of the People.¹⁰²

Interposition as a doctrine is the product of an explicitly Christian civilisation and is not simply a political tactic. While the foundations of that civilisation remain in place, this is less evident to the eye.¹⁰³ We borrow from the accumulated capital of a thousand years of Christendom while we increasingly plunder it, root and branch. Even though elements of interposition may be found at other times and places, the practice really belongs to an Age of Faith, a time of resolute convictions and not mere preferences. Today, instead, we struggle to navigate the treacherous crosscurrents of a politics of fear and rage that is now spinning wildly into a frenzy of vandalism. The cancel culture¹⁰⁴ associated with our social media is being redirected to cancel the West. The duplicitous guardians of our citadels of learning long ago began abandoning their calling as trustees of our intellectual treasury in order to settle ideological scores and earn political points.¹⁰⁵ The upstart Silicon Valley tech empires of the last three decades are now the ar-

¹⁰² Abraham Lincoln, Lyceum Address, January 27, 1838 <<http://www.abrahamlincolnonline.org/lincoln/speeches/lyceum.htm>>; see Daniel McCarthy, ‘The Mock Revolution of the Elites’, *Spectator USA*, 28 July 2020 <https://spectator.us/mock-revolution-elites-protests-amazon/?fbclid=IwAR0ydSAzfp9deBrdBVMAoVJSiX_3ENLqEu8fHcSnysH9LCx__a2-9745dhw>.

¹⁰³ The pervasiveness of Christian presuppositions in the West is often most readily discerned by nonbelievers. See Tom Holland, *Dominion: How the Christian Revolution Remade the World* (Basic Books, 2019); Evan Osnos, Interview with Zhao Xiao (Television Interview, 2011) <http://www.pbs.org/frontlineworld/stories/china_705/interview/xiao.html>.

¹⁰⁴ Brooke Kato, ‘What Is Cancel Culture? Everything to Know About the Toxic Culture Trend’, *New York Post*, 10 July 2020 <<https://nypost.com/article/what-is-cancel-culture-breaking-down-the-toxic-online-trend/>>; see also David T Katz, ‘I Survived Cancellation at Princeton’, *Peckford42*, 27 July 2020. <<https://peckford42.wordpress.com/2020/07/27/i-survived-cancellation-at-princeton/>>.

¹⁰⁵ See David Gelernter, *America-Lite: How Imperial Academia Dismantled Our Culture (and Ushered in the Obamacrats)* (Encounter, 2012); Kenneth Minogue, ‘How Civilizations Fall’ (2001) 19(8) *The New Criterion* <<http://www.ejfi.org/Civilization/Civilization-18.htm?fbclid=IwAR0JChzdgdMgdzLNAoH7VIMWPyaRZEzIPmVgnk3oDyx93mVsKsn5zb3SRrs#fall>>.

biters of politically-correct sentiments and permissible expression.¹⁰⁶ Increasingly, all that remains evident of the great fountainhead of our common culture is a lingering ‘whiff of the empty bottle.’¹⁰⁷

James Chowning Davies’s J-curve theory offers some insight as to what triggers political violence: ‘Revolutions are most likely to occur when a prolonged period of objective economic and social development is followed by a short period of sharp reversal.’¹⁰⁸ Following the long period of rising expectations, a sudden reversal of fortunes during the economic lockdown may have created a sense of ‘relative deprivation.’¹⁰⁹ So it should not be surprising under these circumstances that counterfeit forms of resistance to tyranny should also arise. Following the death of George Floyd in Minneapolis while in police custody, widespread protests quickly devolved into revolutionary violence. A subversive postmodern nihilism has long sought to dismantle the institutions that undergird the increasingly post-Christian West.¹¹⁰

Just as the French Revolution underwent a pell-mell of institutional upheavals, and the 1960s spawned a hedonistic counterculture, so today we see a network of well-organized shock troops and saboteurs that seek to overturn the constitutional system through the conversion of its own liberties and defences into weapons.¹¹¹ Amidst a climate of

¹⁰⁶ Anjana Susarla, ‘Algorithms Are Making Cancel Culture Even Worse’, *Fast Company*, 3 February 2020 <<https://www.fastcompany.com/90458174/hate-outrage-and-cancel-culture-are-snowballing-thanks-to-this>>.

¹⁰⁷ See Francis Stuart Campbell (pseud Erik von Kuehnelt-Leddihn), ‘The Whiff from the Empty Bottle’ (1945) 62 *Catholic World* 20.

¹⁰⁸ James C Davies, ‘Toward a Theory of Revolution’ (1962) 6(1) *American Sociological Review* 5.

¹⁰⁹ Ted Robert Gurr, *Why Men Rebel* (Princeton University Press, 1970) 23.

¹¹⁰ See Steven Alan Samson, ‘A Strategy of Subversion’ (2020) 25 *The Market for Ideas* <<http://www.themarketforideas.com/a-strategy-of-subversion-a541/>>; Andrew C McCarthy, ‘In Congressional Testimony, Barr Calls for Unified Response to Violent Assault on U.S. Government’, *National Review*, 28 July 2020 <<https://www.national-review.com/2020/07/in-congressional-testimony-barr-calls-for-unified-response-to-violent-assault-on-u-s-government/>>.

¹¹¹ See Victoria Taft, ‘10 Big Fat Lies You’re Being Told About the Portland Riots’, *PJ Media*, 26 July 2020 <<https://pjmedia.com/columns/victoria-taft/2020/07/26/10-big-fat-lies-youre-being-told-about-the-portland-riots-n675861>>; Andy Ngo, ‘Portland

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fear associated with both the pandemic and the faux-politics of the endlessly litigated 2016 election, we see governors using emergency powers to order people to shelter-in-place while also giving free rein to violent protestors, mayors and police chiefs ordering the police to stand down, city councils defunding their police departments, state and local officials defying the president's efforts to protect federal property, and attempts by radicals to set up autonomous zones that put businesses and residents at the mercy of criminals who may never be held legally accountable.¹¹²

The larger question then is which will prevail: *politics* – the art of persuasion and consensus-building – or *despotism* – the coercion of surrender and acquiescence?¹¹³ Days of Reckoning are upon us.

¹¹² See, for example, Jeff Reynolds, 'Black Portlander Changes His Mind About the Nightly Protests After He Attends One', *PJ Media*, 24 July 2020 <<https://pjmedia.com/news-and-politics/jeff-reynolds/2020/07/24/black-portlander-changes-his-mind-about-the-nightly-protests-after-he-attends-one-n697027>>.

¹¹³ See Minogue, above n.2, ch 13.