III. THE WHIG THEORY OF THE CONSTITUTION IN THE REIGN OF CHARLES II

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I

No description of the theory of the constitution which the Whigs professed in the five years of their existence as a political party in Charles II's reign, can be adequately made except in relation to the position in which they found themselves during this period. For though their view of what the constitution ought to be was to a considerable extent built up on ideas inherited from past ages and especially from the previous half-century, as it was formulated between 1678 and 1683 it was designed to justify a particular set of actions, and to advocate a type of government appropriate to the needs of a group of people at a particular moment.

In 1678 the Country party, whose left wing provided a large part of the ideology and personnel of the Whig party of the Exclusion contest, saw itself, as it seemed, permanently excluded from office as a result of the policy pursued by Danby in the four preceding years. Danby, it may be said, whether consciously or unconsciously, had learned a lesson from the fall of Clarendon and the collapse of the Cabal. Since it was impossible for the King to rule without parliament, the only way by which he could avoid the disastrous disputes which had characterized the first thirteen years of his reign, was by managing parliament. On the basis, therefore, of a programme designed to conciliate Cavalier sentiment, and by the extensive use of bribery, Danby attempted to build up a permanent majority in the House of Commons and to bestow all the chief offices of state, as far as was possible, on his supporters.

These proceedings were stigmatized by the opposition as a deliberate attempt to exact vengeance for the Civil War, and as a violation of the Act of Oblivion;[1] and undoubtedly there was a certain amount of truth in such accusations. When, further, it is remembered that the foreign policy which the government pursued between 1673 and 1678, although admittedly it was not of Danby's choosing and although it was by no

[1] Cf. Shaftesbury, *Letter from a Person of Quality to his Friend in the Country*, printed in Cobbett's *Parl[iamentary] Hist[ory]*, IV, xxxix.

https://doi.org/10.1017/S1474691300003449 Published online by Cambridge University Press

means as deliberately in the French interest as it was painted, was obviously ignominious and even more obviously dangerous, it is apparent that those people had a considerable grievance who were not prepared to toe the line at Danby's dictation and sell their opinions for an office at court.

For a variety of reasons, therefore, it seemed essential to the Country party that Danby should be removed from office and his pensioners disbanded. But there was no constitutional machinery by means of which this object could be attained. Whatever interpretations might be placed on the constitution, it could not be denied that ministers were appointed by the crown; further, there was no law against bribery and in the existing parliament it was obvious that none could be passed.[2] Danby's opponents, in consequence, until they were providentially rescued by Titus Oates, saw themselves doomed to a perpetual abiding in the wilderness.[3]

In the current phraseology of the Country party, the court, acting on Danby's inspiration, was perverting the spirit of the constitution and endeavouring to enslave the nation under the forms of law.[4] There is no evidence that so far-reaching an idea had ever, in the seventies, occurred to anyone in authority, and no doubt this accusation was a parody of the truth; in the circumstances, however, it is not surprising that it should have been made. The fact remains that if the abuses of Danby's régime were to be removed, this could not be done without a change in the law, and no such change could be effected as long as Danby remained in office and the power of the crown to appoint ministers, to bribe members and voters, and to control the duration of parliaments and of parliamentary sessions, remained intact. In the circumstances, it seemed to impartial observers such as the French ambassador, Barillon, that the logical outcome of the situation which existed in 1678 must be revolution.[5] It came to be increasingly believed, between 1678 and 1681, that a revolution would in fact take place. During these years the Whigs exploited the potentialities of Oates's plot with an ingenuity and a cynicism worthy of

[2] So many members of the Cavalier Parliament were in receipt of money and pensions from various sources and had come to depend on them for a livelihood [cf. Burnet, *History [of my Own Time]*, ed. Airy (1900), 89; Marvell, *Growth of Popery and Arbitrary Government* (1678); De Beer, *Bulletin of the Institute of Historical Research*, XI, no. 31] that the Country party came to realize that in ordinary circumstances it would be impossible to muster a majority in favour of a dissolution, or to pass any measure against bribery, even though it was universally admitted to be a crying scandal.

[3] Cf. Burnet, *History*, 155.

[4] Cf. *Letter from a person of Quality to his Friend in the Country*. Cobbett, *Parl. Hist.*, IV, liv.

[5] P[ublic] R[ecord] O[ffice], *Baschet Transcripts*. Barillon to Louis XIV, 16 Sept. 1678.

the twentieth century. They achieved a great deal by such means, but not enough for their purposes. They stampeded Danby's pensioners in the Cavalier Parliament into abandoning him; they secured themselves a substantial majority in the Commons in the three succeeding parliaments; on many occasions they forced Charles to give way to their demands. But they remained a minority, though a large one, in the House of Lords; they never held any of the important offices of state, and their attempts to gain control of local government were only partially successful, and such successes as they won in this field were of necessity precarious. Their achievements never went further, in fact, than to create a deadlock analogous to that which had existed in 1642, when, because compromise appeared impossible and neither side could overawe the other by peaceful means, only an appeal to force remained.

The similarities between the two situations were so obvious and so consistently proclaimed that the differences were overlooked. The material grievances which had existed under Charles I had largely disappeared with the abolition of the Courts of Star Chamber and High Commission. Such grievances as there were in the late seventies and afterwards were in the main the result of the bitterness which the Civil War had engendered. It was this bitterness that had led Danby to assume that stable government was impossible without the elimination of those subversive elements which, to the Cavalier way of thinking, had wrecked it once already; it equally led the Court's opponents to deduce from the actions of Danby and his successors those intentions to introduce Popery and arbitrary government which had previously been attributed to Charles I —a suspicion to which Charles II's intrigues with France lent colour.

No doubt there might have been a revolution in 1681 if the memories of 1642 had been less vivid. The lesson of 1642, however, had been very thoroughly learned. Revolution meant social upheaval, insecurity of life and property, and military despotism. The idea of it was anathema to the upper classes in Charles II's reign—to the King's opponents scarcely less than to his supporters—and though to the Whigs it remained defensible as an abstract proposition, they clearly thought it practically inexpedient and even socially unrespectable.

Thus during the Exclusion contest they found themselves in an extremely awkward predicament. If they were to get into power on the only terms on which power seemed to them worth having, then revolution was necessary to them; on the other hand they shrank from the consequences which they were extremely well aware that revolution entailed.

This practical dilemma was reflected in their political theory. The events of the Great Rebellion had strengthened the belief which English political thinking had displayed throughout the first half of the seven-

teenth century until the execution of Charles I had made it manifestly untenable—the belief that the constitution was an expression of fundamental law, itself an expression of the Law of Nature, and in consequence immutable. Hence it was held that any imperfections which might at any given moment be apparent were due to the misinterpretation of the constitution, and not to any inherent defects which it might possess. However they might behave in practice, and whatever the implications of their doctrines, the opposition in the early seventeenth century always professed a profound disbelief in change, and their spiritual descendants in Charles II's reign continued to do the same until the obvious necessities of the situation drove a few more daring and original spirits to admit that argument in terms of law and precedent was largely inappropriate. Such people, however, were a minority during the Exclusion contest. Most politicians, pamphleteers and political thinkers maintained a valiant but increasingly unsuccessful attempt to reconcile two irreconcilables—the historical argument which was conservative, and the argument from 'reason' which, in their hands, was revolutionary.

II

The sources of information on the Whig theory of the constitution between 1678 and 1683 are very considerable, for the issues of the period appeared so momentous that inevitably they were discussed on every level of political thought. According to a contemporary pamphlet; 'there is no coffee house and few private houses but their table talk is of these things.'[6] They were argued out in parliamentary debates, presented in a simplified form by candidates to their constituents at elections,[7] by constituents to their members in the form of letters and addresses,[8] by

[6] *A letter from a Gentleman in the City to one in the Country concerning the Bill for Disabling the Duke of York*... (1680). Bodl[eian] Libr[ary]. Godwyn Pamphlets, 1864 (26).

[7] Not very many speeches in this category appear to have been printed. There is, however, a certain number; see infra, notes 29 and 30.

[8] Before the meeting of the Oxford Parliament the Whig constituencies sent these addresses to their newly-elected members. Those from the counties were usually in the name of the Grand Jury, or the 'Gentlemen and Freeholders', those from the boroughs in the name of the whole borough, or the Mayor, Alderman and Common Council. The addresses generally expressed the constituents' thanks to the members for their services in the last parliament, and then proceeded to outline the programme which it was desired that they should pursue in the coming one. In view of the methods usually adopted on such occasions, there is every reason to suppose that these addresses were not a spontaneous expression of opinion but the work of an organized group of Whigs in the localities concerned. The difference in phraseology, however, and in subject matter, is sufficient to prove that they were not all copies of one model, though some were obviously copied from others. They were printed *in extenso* in the Whig newspapers, and afterwards produced in one volume entitled the *Vox Patriae*, which went into several editions and of which copies exist in most of the collections of pamphlets of this period.

the Petitioners in their petitions for a parliament.[9] Particularly, however, they were debated in the pages of a pamphlet literature so enormous in its extent that it can find no parallel in any previous part of the century except during the period of the Civil War.

Practically all the pamphlets which appeared during the Exclusion contest were polemical works written to justify the Whig political programme either as a whole or in relation to specific details. Many of them, even leaving out of account those directly concerned with the Plot, were pure propaganda—vilification of the court and the Tories without attempt at argument, crude portrayals of the fate in store for England if a Catholic should succeed to the throne, and directions to the electorate as to the best means of furthering the Whig cause. If one excepts Sidney's *Discourses Concerning Government* there is hardly one that without considerable qualification can be dignified by the title of political philosophy. On the other hand the extent of the divergence between Whigs and Tories in their views on what the constitution was, and the necessity under which in consequence each side found itself of appealing to first principles in justification of its opinions, tended to make every pamphleteer and every politician something of a philosopher in so far as he wished to argue and not merely to assert. Since there was a large number of political assumptions on which the two sides found it impossible to agree, the purposes for which the state existed and the means most appropriate to their achievement were matters on which discussion was inescapable. In consequence even in parliamentary debates and in pamphlets designed for an ignorant audience, references to the origins and ends of Civil Society are not uncommon and in the best polemical writing they are very frequent.

In general in this period political argument derived its sanction either directly or indirectly from religion. Convention required that any assertions on the nature of government should be defended on three separate lines. To prove one's case one needed to show that the type of government one advocated was consistent with the divine will as revealed in the Bible; that it was in accordance with 'reason', by which was meant a series of propositions presumed to be of universal acceptance (but in fact arbitrarily laid down by the writer);[10] and that it was supported by history

[9] These were also printed in considerable numbers in the Whig newspapers; notably in the *Protestant (Domestic) Intelligence.*

[10] The most illuminating, because the most explicit, exposition of what the Whigs meant by 'reason' is to be found in Sidney's *Discourses* [*Concerning Government*]. Cf. particularly p. 3 (ed. of 1704), where 'reason' is described as '. . . common notion(s) written in the hearts of men, denied by none but such as are degenerated into beasts'. Frequently it is equated with common sense. (Cf. pp. 48, 60, 92.) Thus interpreted

in the sense of having demonstrably existed since the earliest times. But 'reason' was presumed to be equivalent to the law of nature, and therefore an expression of the will of god, and so in a less direct sense was history, which, in so far as it showed any general tendencies (and everyone assumed that it did), was held to be a product of that innate reasonableness which (again it was assumed) was a characteristic of the human race. Thus the people who maintained that hereditary monarchy was ordained by God, felt it also necessary to show that it had originally existed everywhere, and that departure from it was an aberration entailing a just punishment. Equally the opponents of this thesis, who maintained that power originated in the people, felt compelled to assert that since it was by virtue of being reasonable that men had entered into civil society, the principles which had inspired the original act of association must be exemplified in the constitution thus established, and were in point of fact expressed in custom.

In consequence, though all these lines of argument, the biblical, the historical and the argument from 'reason' were explanations of the workings of the divine will, they were not so in an equal degree of immediacy and certainty, and since the point of view expressed in any one of them was liable to be contested, the essence of a convincing thesis was that they should all lead to the same conclusion; in fact no thesis could be accepted where they did not.

The Whigs, however, managed to a considerable extent to escape from the necessity of pursuing the first. To the Tory assertion that hereditary monarchy was ordained by God, they replied that a study of the Bible clearly proved the Tories wrong. It was obvious, they said, that God had not given his sanction to any one form of government. He had decreed that there should be government of some sort, not that this

it is to be distinguished from 'reason' as invoked by the lawyers, who understood by it 'the reason of the Common Law', i.e. 'the trained and enlightened reason, founded upon and directed by that reasoning of ages of judicial decisions, by which the principle to be applied to the particular case is found and when found followed' (H. H. L. Bellot, 'The Rule of Law', *Quart[erly] Rev[iew]* (1926), 394). Thus when Winnington, arguing against the validity of Danby's pardon, said: 'I dare not offer that violence to my reason as to say that this is a good pardon' (Anchitel Grey, *Parliamentary Debates*, VII, 181), it is clear from the rest of his argument that it is of 'reason' in this sense that he is speaking. The law, he maintains, prevents the King from protecting any man from the legal consequences of a crime which involves loss or damage to others. Thus it is 'unreasonable' that Danby, who has brought the whole nation to the verge of ruin, should be pardoned. In this article, when reference is made to the argument from 'reason' as used by the Whigs, 'reason' is understood in the sense in which Sidney used it. In the sense in which Winnington used it 'reason' must be equated with the conclusions assumed to be deducible from law and precedent, as distinct from conclusions which it was usually held that law and precedent supported, but which were deduced from other premises.

government should be of a single type.[11] Thus the Whigs were free to concentrate on the two remaining lines of argument, the historical argument and the argument from 'reason'.[12]

In comparison with anything which had been seen previously the Whigs were an astonishingly well-disciplined party. The discipline it is true was not complete, and on many occasions in the three Exclusion parliaments individual Whigs are to be found speaking on the court side. On all the major issues, however, the Whig majority appeared so overwhelming—to some extent, it must be admitted, because the Tories were afraid to open their mouths—that a division was scarcely ever demanded. This unanimity in practice was reflected in theory. At the outbreak of the Civil War there was a vast amount of divergent political speculation; during the Exclusion contest there were only three main divisions of opinion on political matters—Whig, Tory and Trimmer, and within the Whig ranks disagreement, though it undoubtedly existed, was confined to a few topics and even then appears to have passed unobserved, or at least without comment.

'Reason' to the Whigs spoke with one voice only. It asserted that all government, or at any rate all just government, originated in a contract between the subjects and their ruler;[13] that the purpose of the state was to maintain security of life and property, and to ensure liberty without which neither could endure; and that the people, from whom political power was originally derived, had the right and duty of rebellion when, in their opinion, the government failed to fulfil the ends for which it had been instituted.

Liberty, as defined in the light of the contract theory, was a simple concept. 'I desire', said Sidney, 'that it may not be forgotten that the liberty asserted is not a licentiousness of doing what is pleasing to everyone against the command of God; but an exemption from all human laws

[11] Cf. Sidney, *Discourses* (1704), 262. The same point of view is maintained explicitly or implicitly by all Whig writers who touch on the subject. Notably it appears in the pamphlets on the Exclusion, referred to below.

[12] This is not of course to say that all Whig writers always used both lines of argument. Everyone did whose thesis touched on fundamentals, as was the case, for example, with the writers on the succession question. Other people, who were concerned with minor episodes in the dispute, as, for example, the functions of jurymen or the position of the nonconformists, might well not concern themselves at all with the argument from 'reason' as described below. Even so, however, they could often not escape from assumptions which were based on it, and which implied familiarity with it.

[13] An attempt was sometimes made to prove that the contract had taken place as a matter of historical fact. But it was more usual to admit, as did the author of the *Plato Redivivus*, that: 'it remains undiscovered yet how the first regulation of mankind began: and therefore I will take for granted that which all politicians conclude, which is that necessity made the first government'—necessity involving the contract.

to which they have not given their assent.'[14] This idea was afterwards expressed by Locke in his *Second Essay on Civil Government* in almost the same words, and it would be safe to say that it was unanimously accepted in Whig circles in Charles II's time, though not to the exclusion of other ideas which in reality were incompatible with it.[15]

But by assent the Whigs did not mean the assent of even the majority in any exact sense. They meant the assent of the majority in parliament, and virtually they came to mean the assent of the majority of the House of Commons. For when they spoke, as they invariably did, of parliament as representative of the nation, it is usually apparent from the rest of the argument, if it is not explicitly stated, that what is understood is not parliament as a whole, but merely the Commons.[16] The fiction that the Commons expressed the people's will was a very old one, subscribed to by both sides,[17] until the use which the Whigs made of it induced the Tories to expose its absurdities.[18] By implication the Whigs admitted that it had no basis in fact when they concerned themselves with paper schemes for the reform of the franchise,[19] but possibly force of habit, and certainly its obvious usefulness, induced them to continue to assert it.

The argument from 'reason' was thus in its main outlines unambiguous and the conclusions to which it led were, it might be supposed, clear enough and adequately expressed by that phrase which was always on Whig lips: *salus populi suprema lex*. If government existed in order that the interests of the people might be preserved; if the sole criterion of what these interests were was the people's will, and if the people's will was expressed by the House of Commons, then the House of Commons was the ultimate authority in the nation and the other organs of the constitution must be subordinated to it. Undoubtedly this was the

[14] *Discourses*, 3.

[15] See infra, p. 53.

[16] Cf. 'An impartial account of the nature and tendency of the late addresses' (1681), *State Tracts* (1692), II: 'For if elections of members to serve in parliament be the best standard to judge the disposition of the Kingdom by...'; *A Modest Account of the Present Posture of Affairs in England* (1682), Trin[ity] Coll[ege] Libr[ary], Y. 11. 29: 'Hath your Lordship found out another way to make a distinction between the sense of the nation and that of a dangerous party, than that of the House of Commons?'

[17] For the Tory opinion on this matter, see, particularly, Nalson, *The Common Interests of King and People* (1678).

[18] Cf. *Captain Thorogood, his Opinion of the Point of the Succession* (1679), Brit[ish] Mus[eum], 100* (115), where the writer, after enumerating all the various reasons against holding the Commons to be representative of the nation, concludes: 'that the supposition...is a fiction of law, well devised by the wisdom of our ancestors for quieting and appeasing the minds of all particular men, who could not have a stronger motive of submission, or of not believing themselves injured, than their being accounted parties and privy to all Acts of Parliament.' This thesis is maintained in a large number of Tory writings in the eighties.

[19] Cf. particularly, 'Some observations concerning the regulating of elections for parliament', usually attributed to Shaftesbury, *Somers Tracts*, VIII.

deduction to be drawn from the claims made by the Whig majority in the second Exclusion Parliament.

And yet no such deduction as this was ever in point of fact explicitly drawn, if one excepts the *Discourses Concerning Government* and the *Plato Redivivus*, which express more or less exactly what the Whigs would have said if they had been content to pursue only the argument from 'reason', but bear no very close relation to what they did in fact say. For both the traditions and contemporary conventions of political thinking, and the circumstances in which the Whigs found themselves, forced them to use the historical argument. It always had been used—except during the Great Rebellion, a period to which it was not respectable to refer except in terms of abuse—and it was necessary to use it if one wished to demonstrate, as the Whigs did, that one had no desire to initiate another revolution.

In spite, however, of assumptions to the contrary, it was not to be reconciled with the argument from 'reason'. However liberally precedent might be interpreted (and often this was done to the extent that the past was forced to yield a meaning wholly at variance with the truth) there were limits to what it could be made to sanction. 'Reason' did not necessarily lead to republicanism, and though a few people turned in desperation to the idea of a republic in 1682, the sources under examination yield no traces, either explicit or implicit, of republican thought.[20] On the other hand 'reason' certainly advocated, and circumstances required, a state of affairs in which the King should be a mere figurehead; for if the Whigs were to get into power and maintain themselves there, Charles's views being what they were, it was necessary that he should be reduced to this position. By no stretch of the imagination, however, could precedent be made to countenance such a view of the constitution, and since the Whigs could not emancipate themselves from precedent, they could never explicitly admit that this was what they desired, and it must remain a matter of doubt to what extent most of them consciously desired it.

They therefore found themselves in the position of advocating the 'mixed monarchy'—the form of government capable of imposing the greatest number of restrictions on the royal power which precedent, even when interpreted with the maximum amount of casuistry, could be

[20] It has been asserted (Gough, *The Social Contract*, 21) that Sidney in his *Discourses* takes up a 'definitely republican position', but it is difficult to see how such a thesis can be maintained. Sidney consistently expressed a preference for a 'mixed monarchy' over any other type of government and though he would have allowed the king virtually no power, and held that he should be deposed if he broke the law, this was not republicanism as it was then understood, nor even, it might be added, as it is understood to-day.

induced to support. The 'mixed monarchy' was a cardinal plank in Whig political theory and propaganda, explicitly defended on every possible occasion.

What was meant by it is best expressed in the words of a letter written in 1676 and printed in the *State Tracts* where it is attributed to Lord Holles: 'England', the writer says, 'is a government compounded and mixed of the three principal kinds of Government; a King who is sovereign, qualified and limited prince, and the three Estates, who are the Lords Spiritual and Temporal, compounding the aristocratical part of the government, and the Commons in Parliament, with an absolute delegated power, making the democratical part: the legislative authority is in the King and the three Estates, the power of levying money in the Commons, and the executive power in the King, but to be administered by ministers sworn and qualified, which is the reason of those two grand maxims of the Law of England: first that the King of England is always a minor, and secondly that he can do no wrong.'

In spite of the strength and bitterness of ideological differences, the reign of Charles II was far from devoid of common assumptions and the 'mixed monarchy' was one of them. The Trimmers were the only people who genuinely and consistently upheld it, but the Tories, no less than the Whigs, though they formally repudiated it, for the greater part advocated a form of government, which they called by another name, but which was equally distinguished by a division of powers.[21] The Tories' mixture was compounded in different proportions from that of the Whigs, but it was a mixture all the same, and inevitably so since to anyone who examined the facts there was no escaping from the conclusion that in the English constitution there neither was, nor ever had been, any organ which the law recognized as supreme.[22] Thus to advocate the 'mixed monarchy' was to advocate a division of powers; and to advocate a division of powers was to postulate a fundamental law of the constitution—a condition of the existence of both and a prerequisite of their continuance.

[21] Admittedly the Tories accepted Filmer's *Patriarcha* which advocated absolutism, and there are other Tory works in the same category; but the bulk of Tory polemical writing clearly presupposes that the King is not in a position to override the law, except on certain specified occasions, such as a national emergency. The Tories deny that there is such a thing as a right of rebellion; on the other hand they maintain that the law of the constitution imposes limits on the royal power, and by implication, that the judges, whose duty it is to interpret the law, cannot enforce in the courts the King's decisions unless they are in accordance with the law. For an admirable illustration of this thesis see Sherringham, *The King's Supremacy Asserted*, 2nd ed. (1682), Cambr[idge] Univ[ersity] Libr[ary]. The work was written in 1660, and a copy of the first edition is in the library of Caius College.

[22] For the limitations which were held by lawyers to be placed on the power of the King in Parliament, and which the courts enforced, see Birdsall, 'Non obstante', [*Essays presented to McIlwain*] (1936), and Bellot, *Quart. Rev.* (1926).

For if any such division was to be maintained the relation of the various parts to each other could only be kept stable by means of a law superior to all of them.

To its advocates the 'mixed monarchy' appeared as the only guarantee of the rule of law—the antithesis of arbitrary government, that bugbear of every seventeenth-century Englishman. By its system of checks and balances it prevented the concentration of power in the hands of a single body of men, and this, it was claimed, was its peculiar merit. For persons thus endowed would tend, it was assumed, to become tyrannical, not only or necessarily in the sense that they would not abide by their own laws, but also in the sense that the laws they enacted might abolish existing rights and take no account of legitimate expectations.[23]

It should be added that the rule of law is a phrase capable of more than one meaning, but to any consistent apostle of the 'mixed monarchy' it involved not merely the idea of a law equally applicable to and binding upon all men, and of justice impartially administered, but also the idea that, in a more extended sense, the law was supreme because its essential provisions regarding the constitution were unalterable.[24]

[23] Cf. particularly *The History of Whiggism*... (1682), Trin. Coll. Libr., Y. 11. 29: 'Sovereign power cannot be invested in anything that is not omnipotent.... I know that prerogative is part of the law, but sovereign power is no parliamentary word: In my opinion it weakens Magna Charta and all our statutes: take we heed what we yield unto. Magna Charta is such a fellow that he will have no sovereign...all power and liberties and prerogatives are bounded and limited by the laws, and though they be as great as the sea, yet have their bounds, the law saying: hitherto shalt thou go and no further and here shall thy proud waters be stayed: no prerogative is infinite in England, nor any power omnipotent (except that of God alone). The law limits and binds us all from the greatest to the least...let us hold our privileges according to the law: that power that is above this, it is not fit for the king and people to have it disputed further.'

[24] The sources under consideration, subject to the qualifications discussed below, give much more support to the view of McIlwain than they do to Holdsworth's refutation of it (*History* [*of English Law*], 3rd ed., II, 442). Admittedly, for the reasons which Holdsworth discusses, occasions when the legality of the decisions of the King in Parliament was liable to be questioned were unlikely to occur. But during the seventies and eighties, when first the court and then the Whig party attempted by means of propaganda, bribery and intimidation to force on the other side in parliament an unwilling compliance with its wishes, their occurrence seemed much more likely than in less abnormal times. Whether or not, therefore, there was a fundamental law of the constitution whose provisions could be invoked against the enactments of the King in Parliament became a question of immediate practical importance, and though this was a subject on which there was a great deal of divergence of opinion, the prevailing view was that such a law existed and that its existence was incompatible with an omnicompetent parliament (cf. Burnet, *History*, 214); see infra, p. 67.

Admittedly some Whigs attempted to explain the situation in the way in which it appears to Holdsworth—notably the author of 'Fundamental laws and politic constitution of this realm' (*State Tracts* (1692), II). This writer maintains the thesis that fundamental laws 'are things of the Constitution, treating such a relation' [i.e. the relation of the organs of the constitution to each other]. They are an expression of the law of nature and immutable and eternal. They are not, however, anywhere written down, except 'in the very heart of the Republic', and it appears that only parliament can say in what they consist. Thus it is argued that there are no limits to the power of

How remote all this was from the conclusions dictated by 'reason' is easily apparent. If *salus populi* is *suprema lex* there can be no limit to the extent to which the constitution can be altered. Equally, liberty to the believers in fundamental law is different from the liberty which Sidney describes; it is a state in which certain specific rights are guaranteed for all eternity to certain persons and groups. To the idea of liberty as expressed by Sidney the concept of fundamental law opposed the idea of liberties—the inherited liberties of the English people, hallowed by custom and prized by patriotism, immutable, eternal, incomparable. Whatever the Whigs might say in some of their moods, in others they could no more shut their ears to this appeal than could the Tories.

Only a few extremists on either side were prepared to admit the disadvantages which the 'mixed monarchy' obviously entailed in practice. Since the Restoration it had been proving itself unworkable, as it had done between 1603 and 1642; and during the Exclusion contest the fact that responsibility was fixed in no single place resulted in a state of affairs to which anarchy seemed the next step. In the absence of any impartial arbiter to adjudicate on the rival claims of the various organs of the constitution—and no such arbiter existed—deadlock could only have been avoided if there had been some measure of agreement among King, Lords and Commons as to the public policy to be pursued.

Because no such agreement existed, the 'mixed monarchy', whose cardinal merit was supposed to be that it maintained the rule of law, tended in practice to produce precisely the contrary result. It is now a platitude that the judges will not be impartial in any state which is torn by conflicting ideologies, and Charles II's judges were no exception to this rule. They were human beings like other people, subject to the necessity of earning a living and taking sides in a dispute to which no public figure would remain indifferent. They owed their office to the King and therefore to his opinion that they would support his claims, and even if they were good lawyers and honest men, and some of them were neither,[25] they could not look upon Whig and Tory in the same light; they punished the offences of the Whig more severely;[26] thereby

parliament, which cannot be held to be tied by the Petition of Right or any other similar provisions, because 'England in her polity is like Nature in her instincts, who is wont to violate particular principles for public preservation'. This writer, it might be said, like every Whig, attempted to have the best of both worlds—the benefits at one and the same time of conservatism and revolution. But though in this respect his sentiments were the normal ones, the situation had become too urgent for it to be possible persistently to obscure it in this way.

[25] 'Lord Danby', Burnet said (*History*, 210), 'brought in some sad creatures.' For a confirmation of this statement see Holdsworth, *History*, VI, 503 ff.

[26] Many complaints which had no basis in fact were brought against the judges by the Whigs in this period. The most legitimate ones concerned the discrimination which

creating not unjustifiably in the mind of every Whig the belief that in any case involving politics, no justice was to be had for the King's opponents.[27] This disastrous situation was the direct result of a system under which differences of opinion were inevitable, but in which the appointment of the chief officers of the law was vested in one of the parties to the dispute.

Practically no one, however, was prepared to see these facts as they were. Whigs, Tories and Trimmers alike almost invariably assumed that it was not only possible but natural that King, Lords and Commons should be inspired by a single purpose.[28] That manifestly they were not, was attributed by everyone to the intentionally perverse wickedness of their opponents, primarily exemplified in those unhappy aberrations, political parties, by which unity of will in the state was deliberately destroyed. It was never supposed that the system of government itself could be in any way to blame, and thus the 'mixed monarchy', though it was unable to satisfy anyone's needs, continued to be proclaimed as an ideal by all sides.

To cast aspersions on it was as much as the career of any politician was worth and no Whig did so. Two famous Lord Mayors of London, Sir Patience Ward and Sir Robert Clayton, noted for their intransigent championship of the Whig cause, paid tribute to it in the speeches which they made after their election.[29] Another equally noted and violent Whig,

the judges showed between Whigs and Tories in their imposition of punishments and over the question of bail, and the highly improper tirades against Whiggery and non-conformity in which Scroggs indulged on the Bench (cf. Articles of impeachment against Scroggs, *Commons' Journals*, 3 Jan. 1681; [Historical MSS. Commission], *MSS. of the House of Lords* [11th Report, Appendix Part II], 212). Roger North's *Examen* affords an admirable illustration of the partisan attitude taken up by his brother Frank, Lord Chief Justice of the Common Pleas, who notwithstanding his inability to separate law and politics was an able lawyer (cf. Holdsworth, *History*, VI, 531) and certainly had a high conception of the dignity of his profession.

[27] An interesting illustration of this is provided by a number of Whig tracts written in defence of the 'ignoramus' juries (*The Englishman's Right*... (1680), Trin. Coll. Libr., VI. 11. 86; *The Grandjuryman's Oath and Office explained*... (1680), Trin. Coll. Libr., K. 13. 104; *The Security of Englishmen's Lives*... (1682), Trin. Coll. Libr., Y. 7. 22; *The Power and Privileges of Juries Asserted* (1681), Bodl. Libr., Godwyn Pamphlets 1364 (8); *Ignoramus vindicated*... (1681), Bodl. Libr., Godwyn Pamphlets 1126 (8)). The thesis in these writings was that it was the function of the jury to be a judge of law as well as of fact, because no valid opinion on the former subject was to be expected from the Bench.

[28] Cf. Halifax, *Character of a Trimmer*, where he says: 'Our Trimmer thinketh that the King and Kingdom are to be one creature, not to be separated in their political capacity; and when either of them undertake to act apart, it is like the crawling of worms after they are cut in pieces, which cannot be a lasting motion, the whole creature not stirring at a time.' The same idea, as it could be used by the Whigs for polemical purposes, can be seen very well in *A Speech lately Made by a Noble Peer*. (Printed in Cobbett, *Parl. Hist.* IV, cxi–cxiv.)

[29] Speech of Sir Patience Ward, September 1680, *Somers Tracts*, VIII, 140 ff. Speech of Sir Robert Clayton, September 1679, Bodl. Libr., Bartholomew Pamphlets, B. 143 (48).

Henry Booth, proclaimed its defence as his primary object in an electioneering speech delivered at Chester in 1681.[30] The accusation that the Whig demand for the exclusion of the 'catholics in masquerade' from the army and navy was a manœuvre to vest the control of the armed forces in the Commons, was always, in spite of its truth, indignantly denied,[31] as was any other suggestion that the King was to be deprived of his just rights. No men were more profuse than the Whigs in expressions of loyalty to the crown, or in assertions that they wished only to render unto Caesar the things that were Caesar's.

III

In the course of the Exclusion contest the Whig majority in the House of Commons challenged every one of those powers by virtue of which, in Holles's words, the King was the executive power in the state. The process was a gradual one, which reached its highest point in the second Exclusion Parliament, and to some extent it was the natural result of action taken by the government. For the more the Whigs attacked the crown from the House of Commons, the more the King, when he was not too much alarmed by their display of strength, tried to mobilize against them the very considerable forces of which the crown disposed; and the greater the success he achieved by these methods, the greater the necessity, the Whigs conceived, that the crown should be rendered impotent; until the position was reached when, in the words of an outraged Tory, if the King granted the Whig demands: 'he will have nothing more to part with but his life.'[32] It must be admitted that substantially this was not an exaggeration; and yet between 1678 and 1683 the Whigs persistently proclaimed that they were defending the constitution against the machinations of a clique inspired by the desire for its destruction.

How, precisely, it may well be asked, was this feat of intellectual acrobatics achieved? The answer can best be given in terms of the Whig attitude to the royal prerogative. The prerogative by the seventeenth century had come to be understood as all those rights which belonged to the King by virtue of his office.[33] Of these, in the view of Tory lawyers, a number were so inherent in the nature of kingship that no man could properly be held to be a King who did not possess them.[34]

[30] Speech of the Hon. Henry Booth, *State Tracts* (1692), II, 147 ff.

[31] Cf. *The Protestant* (*Domestic Intelligence*, no. 111, 5 April 1681), in which this accusation is referred to as an invention of 'our popish adversaries, [who] will never want a lie to support their rotten cause'.

[32] *An Address to the Freemen and Freeholders of the Nation* (1682), Bodl. Libr., Godwyn Pamphlets, 1126 (14).

[33] Holdsworth, *History*, IX, 5.

[34] Sherringham, *The King's Supremacy Asserted*, p. 29.

They included the right to appoint officials of state, to summon, prorogue and dissolve parliament, to veto bills, to control the armed forces, to determine policy, to pardon criminals and, through the judges, to interpret the law.

With a qualified exception of the last two, the Whigs never, in general terms, denied any of these rights, and acceptance of them was in fact necessary to a belief in the mixed monarchy. On the other hand there was hardly one of them which was not capable of being made to bear a meaning different from what appeared on the surface, and from what was understood by the Tories, whose legal and historical knowledge was a great deal more accurate than that of the Whigs.

The Whigs always admitted that the King had a right to choose his ministers; they never disputed that the initiation of policy rested with the government, but they maintained that the ministers were responsible to the law for what they did, which meant in effect that they were responsible to parliament which, in Whig opinion, was the supreme interpreter of the law. The law, the Whigs said, applied equally to all men, except to the King, who could not be sued. When, therefore, ministers were attacked in the House of Commons because of actions they had performed in their official capacity, and when, yielding to their natural inclinations and obeying the precepts of Tory constitutional theory, they pleaded the royal commands as an excuse, they were told that such statements were merely an aggravation of their crimes.[35] To suggest that the King was at fault, it was asserted, was unconstitutional, because the law had declared that 'the King can do no wrong'. This maxim, therefore, became the basis on which the Whigs erected their theory of ministerial responsibility. As it had first been used, the phrase had been intended to convey, not that the King was incapable of wrongdoing, but that he had no more right to break the law than anyone else.[36] By Charles I's reign, however, the original meaning had been lost,[37] and to the Whigs of Charles II's day, as to Eliot and Pym, what was meant was on the one hand that no evil actions of any sort, and even no evil intentions, could be attributed to the King (for, as a matter of practical

[35] The classic illustration of this is provided by Danby's case. Cf. Anchitel Grey, *Parl[iamentary] Deb[ates]*, vol. VI, debate of 21 Dec. 1679; also *An Examination of the Impartial Case of the Earl of Danby* (1680), Brit. Mus., 94* (9). There are many other similar instances. Cf. particularly Grey, *Parl. Deb.*, VI, 22, where Vaughan is reported as saying: ' As long as persons can sully their King's robes with their own stains, they think all well enough. The king can do no wrong and I would have the blame laid where it ought to be. The Parliament starts not miscarriages on the King, to reflect them there, but on his ministers, where they ought to be.'

[36] Cf. Ehrlich, *Proceedings Against the Crown* (Oxford Social and Legal Studies, VI), 127.

[37] Cf. Holdsworth, *History*, VI, 101.

politics, if the King could be blamed the result might well be revolution), and on the other hand that if there had been evil actions then someone other than the King must be responsible for them and should be punished.

For the opposition the maxim that the King can do no wrong was therefore fruitful in possibilities, but it also had its limitations, because the only criterion of wrong was the law, and the only practicable method of punishing ministers was to impeach them on a charge of high treason. Manifestly, however, the ministers whom the Whigs wished to attack had not broken the law. Their only crime was that they had pursued a policy which the Whigs disliked, and though the Whigs claimed that the right of determining what at any given moment did or did not constitute treason rested with parliament, they still had to reckon with the fact that impeachment was an extremely difficult weapon to use. Many people had tried their hand at it, but for one reason or another, and primarily because of obstructionism in the Lords, in the seventeen years of Charles I's reign and the twenty-five of Charles II's, it had only once been successful.[38]

Recourse was therefore had to an alternative method. The Commons took to passing addresses to the King asking him to remove this or that minister on the grounds that 'Common Fame' held him to be unfit to occupy his office. Addresses of this sort had first been passed against Buckingham and Lauderdale at the time of the collapse of the Cabal,[39] and they continued at intervals to be passed against Lauderdale, whom Charles persistently refused to dismiss until 1679. On these occasions no one had questioned their propriety, but in the second Exclusion Parliament they were resorted to on an extended scale,[40] and it was at once apparent that they were assuming a new significance. When it had been asserted against Buckingham that his behaviour was a public scandal, and against Lauderdale that his absolutist views and his control of the Scottish militia were a menace to the nation, such accusations had not only embodied an obvious truth, they had been accepted in a House of Commons where the absence of any clearly demarcated lines of party

[38] In the case of Stafford, who was condemned to death in 1680 for his supposed participation in the plot revealed by Oates. It is significant that none of the disputes between the two Houses which occurred over Danby's impeachment arose on this occasion; and the reason clearly was that Stafford's case was not a party issue. No one wished to create any difficulties on behalf of a Catholic, for the Catholics were impotent to defend themselves and were a useful scapegoat for both sides.

[39] *Commons' Journals*, 13 and 14 January 1674.

[40] See *Commons' Journals*, 17 November 1680 and 7 January 1681. On 17 November the Commons passed a resolution that Charles should be asked to dismiss Halifax from his presence and counsels for ever. On 7 January similar resolutions were passed against Lawrence Hyde, Worcester, Feversham and Edward Seymour, whom the King was also requested to deprive of all the offices they held under the Crown.

division gave some plausibility to the assertion that the Commons were representative at any rate of the electorate. In the second Exclusion Parliament, on the other hand, it was clear in the first place that the ministers attacked were attacked for no other reason than because they had opposed the Exclusion Bill, that is, because they differed on a matter of policy from the Whig majority; and in the second place that the methods of intimidation and propaganda which the Whigs had employed at the elections,[41] and continued to use for the purpose of browbeating the Tories in the House,[42] gave the Commons' addresses no title to represent anyone's opinion except that of the Whigs themselves.

Primarily, however, these addresses must be held significant because of the reasons adduced for Charles's[42] acceding to them. It was impossible to maintain that he was under any legal obligation to put their demands into effect; it was difficult, though the attempt was made, to maintain that the practice of the constitution required him to do this; what was emphatically maintained was that his obligation was a moral one. In a debate on Lauderdale's misdeeds, held on 23 April 1675, Secretary Coventry, speaking for the government, had given his opinion on the function which the constitution assigned to addresses against ministers, and his thesis had been accepted by the Country party. 'We (the Commons) accuse,' said Sir Nicholas Carew, summing up the argument, 'and the King judges. When we accuse, the King may hear him (the accused). We are in the nature of a Grand Jury.'[43] The validity of this pronouncement was not questioned during the second Exclusion Parliament. What happened at that time as at others was that when arguments from law and precedent were absent or doubtful, the argument from

[41] Cf. Mrs George, 'Elections and Electioneering 1679–1681', *E[nglish] H[istorical] R[eview]* (1930).

[42] Ailesbury, in his *Memoirs* (printed for the Roxburghe Club, 1890), 48, has an illuminating story in this connexion. In a debate on the second Exclusion Bill, the Noes, he says, were very weak and the Speaker declared for the Ayes. 'We were not a dozen that durst cry out, and as a young, inexperienced member, out of zeal I insisted that the House should divide... but by Sir William Temple's entreaty I desisted.' Ailesbury estimated that the anti-exclusionists numbered about 100, and that is very likely approximately correct. In the division on the second reading of the first Exclusion Bill (the only occasion in the Commons when a division was taken) they had been 128 to 207. No doubt the fear which the Tories felt of publicly expressing their opinions was due to the habit, adopted during the Exclusion Parliaments, of printing the debates, so that the public could distinguish the sheep from the goats, and of circulating black lists of 'papists in masquerade', who were held up to public execration. A particularly good example of one of these lists is attached to the *Advice to a Courteous Reader* printed in the Cal[endar of] St[ate] Pap[ers] Dom[estic]. The editors have dated it between 10 and 18 January 1681, but this is clearly a mistake. It must have been issued in the autumn of 1679.

[43] Grey, *Parl. Deb.*, III, 24. Sir Thomas Lee, another member of the Country party, denied that an address of this sort even constituted an accusation. It was, he said, 'a pure petition that the King would deliver you from your fears'.

'reason' was advanced to supply the deficiencies. The unpopular ministers, it was asserted in 1681, by opposing the Exclusion 'have given pernicious counsel to His Majesty, and are promoters of Popery, and enemies to the King and Kingdom'.[44] If Charles should refuse to dismiss them, then, as one member put it, 'we must come to blood'.[45] This thesis was set out at length by the most persuasive of the apologists of the Exclusion Parliaments—the author of the *Just and Modest Vindication*[46]—the King (it is implicit in his argument) is not obliged to get rid of his ministers when parliament objects to them, but he is very ill-advised if he does not: 'The representative of the people, the Commons, whose business it is to present all grievances, as they are most likely to observe soonest the folly and treachery of those public servants... so this representation ought to have no little weight with the Prince.... The best of our Princes have with thanks acknowledged the care and duty of their Parliaments in telling them of the corruption and folly of their favourites. Edward I, Hen. II, Hen. IV, Hen. V and Queen Elizabeth never failed to do it, and no names are remembered with greater honour in English annals. Whilst the disorderly, the troublesome and the unfortunate reigns of Hen. III, Ed. II, Rd. II, and Hen. VI ought to serve as landmarks to warn succeeding Kings from preferring secret councils to the wisdom of their Parliaments.' In other words, the Commons represent the nation[47] and the fundamental assumption of the constitution is that the King ought to give effect to their wishes, whatever the position in law and custom. Such assertions, it should be added, were of much more than academic interest. Although the Whigs always disclaimed any revolutionary intentions (it is significant, and it must certainly have been deliberate, that in the catalogue of deposed kings

[44] Resolution of 7 January 1681.

[45] Sir Henry Capel. Grey, *Parl. Deb.*, VIII, 264.

[46] Printed in Cobbett, *Parl. Hist.*, cxxxiv ff.

[47] It is interesting that the Whigs in the last Exclusion Parliament attempted to give additional weight to this contention by asserting that they were commanded by their constituents (in the addresses to M.P.'s referred to above, p. 45) to press for the Exclusion. Cf. the remark of Sir William Pulteney in the debate of 26 March 1681: 'I am afraid that unless we be true to those we serve we shall deserve a just reproach; and by express directions of those I represent I am enjoined to adhere to the Bill of Exclusion.' Cf. also Henry Booth in the same sense (Grey, *Parl. Deb.*, VIII, 316 and 326). The idea that an M.P. was a delegate and not a representative was explicitly defended by Sidney (*Discourses*, 410), but it was strongly repudiated by the Tories and Trimmers. Cf. particularly the speech of Littleton, the most impressive Trimmer speaker in the House, in the debate referred to: 'I would not', he says, 'have that way cherished here ...it is a most unusual thing here and of dangerous consequence.' The Whigs were not prepared to press the point. Winnington, replying to Littleton, showed no desire to take up Sidney's uncompromising position. After the fashion of most Whigs, he clearly wished to avoid committing himself openly to revolutionary conclusions, such as Pulteney's and Booth's assertions, and the movement which produced the addresses, obviously led to.

given by the *Just and Modest Vindication* there is no mention of Charles I), the impression they assiduously conveyed was that a King who ruled in defiance of the nation's will was likely to lose his throne. The revolution, one is led to infer, would break out, so-to-speak, of itself.

The Tories asserted of the addresses against the ministers in the second Exclusion Parliament that they raised a constitutional issue of the first importance.[48] In the words of Dryden: '...at this rate of bare addressing anyone who has a public profitable employment might be removed...and if his Majesty can no sooner reward the services of anyone who is not of their party but they can vote him out of his employment; it must at last follow that a vote of the House of Commons is in effect the government.'[49] It can scarcely be said that Dryden exaggerated. The logical implication of the Whigs' demands was that the King should accept his ministers at the dictation of the majority in the Commons.

But even if he had agreed to this, the concession would have been of little value unless it had rested with the Whigs to have a parliament when they wished and to determine the length of parliamentary sessions,[50] and in this connexion the historical argument was by no means easy to manipulate. Precedent had to some extent supported the Whig claims to control the King's ministers, even though it had not been sufficient for the purpose, and where it had been used had been made to countenance a situation which had never previously existed; it was by no means so accommodating when it came to the question of the King's right to summon and dissolve parliament—a right which in the past two hundred years he had clearly exercised without qualification until the Long Parliament, and after the Restoration subject only to the provisions of the Triennial Act. The Whigs could not in general terms dispute so obvious a fact, but there were means of getting round it. They claimed that there must be a parliament at least once a year, and that no parlia-

[48] It is significant that in his Declaration of 8 April 1681 (printed in Bryant, *Letters of King Charles II*, 319), Charles stigmatized these addresses as illegal, presumably because no other convincing enough objection to them could be thought of. The Tories took their cue from the Declaration, but Charles's assertion was certainly untrue. The addresses were not illegal and not even without precedent. The real constitutional objection to them was, however, too complicated to be presented in a manifesto for popular consumption, and it is in any case doubtful how far the Tories were clearly aware of it.

[49] *His Majesty's Declaration Defended* (1681), Cambr. Univ. Libr.

[50] Equally, of course, it was necessary for them to eliminate the possibility of the king's exercising his veto. As Charles, however, only vetoed one bill of major importance in the course of his reign, this was not a subject which was usually discussed. Notwithstanding, the author of a pamphlet considered important enough to be included in the *State Tracts*—'Of fundamental laws'—managed, by the kind of reasoning usually employed, to deny, in effect, that the king had this power. See supra, n. 24.

ment should be prorogued or dissolved until all grievances had been redressed. 'Diverse statutes', they asserted, demanded this, and though the bulk of writers were conveniently silent as to the authority for such a statement, the more conscientious explained that annual parliaments were required by a statute of Edward III and no dissolution before redress of grievances by a statute of Richard II. The statute of Edward III admittedly bore the meaning which the Whigs ascribed to it,[51] but as for the statute of Richard II, by which it was essential that it should be supplemented, the author of the *Plato Redivivus* ingenuously admitted that: 'I do not find this law in any of our printed statute-books, but that which first gave me knowledge of it, was what was said about three years ago in the House of Commons by a worthy and learned gentleman, who undertook to produce the record in the reign of Richard II; and since, I have questioned many learned counsellors about it, who tell me there is such a one....'[52] Clearly this was not a very convincing statement and the writer did not find it so himself, for he went on to say: 'If there were nothing at all of this, nor any record extant concerning it, yet I must believe that it is so by the fundamental law of this government, which must be very lame and imperfect without it.' This was the line usually taken.[53] 'Reason' was again invoked to supply the omissions of which it was suggested, though never with one or two rare exceptions explicitly stated, that history had been guilty.

By an inevitable sequence one demand led on to another. The circumstances which had made the Whigs wish to deprive the King of his power over his ministers and his parliaments, made them also wish to remove from him his right to appoint the judges, and the other legal and administrative officials of the state. In the interval between the first and the second Exclusion Parliaments the Whigs had suffered something in the nature of a persecution, small in comparison with what they were to experience after 1683, but more than severe enough to be exasperating and alarming. During the ministry of the Chits, when for the first time

[51] Cf. Christie, *Life of Shaftesbury* (1871), II, 230.

[52] P. 111.

[53] Cf. *The Just and Modest Vindication* in which almost the same words are used: 'The constitution had been equally imperfect and destructive of itself had it been left to the will and choice of the Prince whether he would ever summon a parliament or put into his power to dismiss them arbitrarily at his pleasure.' Also *Dialogue at Oxford between a Tutor and a Gentleman formerly his Pupil* (1681), Trin. Coll. Libr., Y. 9. 26: 'These are wise and learned men (and who upon a good occasion may be spoke with) that do conceive there is a statute made in the time of Richard II and now in being, though not in print, which provides that no parliament shall be dismissed till all petitions are answered.' Like the author of the *Plato Redivivus*, this writer also asserts that if there is no such statute then the matter must be referred to 'a fixed and standing rule which (in matters of government where positive laws are silent) can be no other than the fundamental architecture and original frame of the Constitution'.

since the outbreak of the crisis the government bestirred itself to action, the Whigs were turned off the commissions of the peace in very considerable numbers and dismissed from their posts in the militia; their nonconformist supporters were rigorously prosecuted under the recusancy laws, and the printers and publishers who conveyed their literature to the public were condemned for seditious libel in the Court of King's Bench presided over by the notorious Scroggs.[54] By way of revenge on their oppressors and as a protection for the future, the Whigs, when the second Exclusion Parliament met, began to clamour that the 'papists in masquerade' should be turned out of all offices—in local government, the services, or elsewhere—which was merely another way of saying that these offices should be filled only by their supporters.[55] Equally they accused the judges, at whose hands they had suffered, of illegal conduct, and they started impeachment proceedings against a number of them. They had no wish, they asserted, to remove from the King his right to appoint the officers of the Army and the Navy, or the holders of any other office hitherto at the crown's disposal; and as for the judges—they never denied that the King both appointed and dismissed them. It was merely claimed that, as in various periods in the past, they ought to hold their offices *quam diu se bene gesserint* and not *durante bene placito*.[56]

The result of so moderate a demand would, it must be admitted, have been negligible if it had been granted, for the criterion of good behaviour would still have been the King's opinion. Here, as elsewhere, the Whigs were unable to say explicitly what they meant. Obviously they wished that justice should be administered by Whig judges, in the Whig interest. But since it was impossible to admit this, all that could be asserted was that in the Commons' opinion the existing judges had shown themselves incompetent to interpret the law. The implication of this, however, and it was on occasions openly stated,[57] was that the judges were responsible to parliament in the same way as were the ministers.

In the articles of impeachment against Scroggs he was accused, *inter alia*, of high treason because 'he hath traitorously and wickedly endeavoured to subvert the fundamental laws and the established religion and government of the Kingdom of England',[58] and when a Tory

[54] Cf. *MSS. of the House of Lords*, 172 ff. and *Cal. St. Pap. Dom.*, passim, in which there is a great deal of information about the government's campaign against the Whigs between October 1679 and November 1680.

[55] Notably the Protestant Association Bill was designed to have this effect. See *MSS. of the House of Lords*, 210.

[56] See *Commons' Journals*, 17 December 1680.

[57] Cf. Grey, *Parl. Deb.*, VIII, Debate of 5 January 1681.

[58] Grey, *Parl. Deb.*, VIII, 237.

member[59] attempted to point out that though Scroggs was certainly guilty of improper conduct, this conduct could not in law be held to be treasonable, it was replied that the determination of what was or was not treason rested with parliament. A number of precedents was advanced to support this contention, but none of them was valid or even plausible.[60] Essentially the Whig case rested on the argument from 'reason'. 'Take that power away of declaring treason in Parliament,' said Colonel Birch, 'and you may all have your throats cut.'[61]

In this wholly unwarranted but revealing statement the Whig position was summed up. In the debate on Scroggs no one attempted to deny the Tory contention that if the Whig view were to prevail, a man might be accused and convicted of treason for an act which the law had not held to be treasonable at the time when he had committed it. *Salus populi*, said the Whigs, *suprema lex*; that is, the only criterion of justice is the needs of the Whig party.

By means of arguments such as these, which, as applied to every item of the prerogative, it would be tedious to recapitulate, the Whigs managed so to qualify each of the rights with which they admitted in general terms that the crown was endowed, that by the time the qualifications were completed, there was nothing left of the original assumptions. The 'mixed monarchy' for which they proclaimed that they were fighting turned out to be a hollow sham. The King, it was clear, was to be virtually eliminated, and the same fate seemed likely to overtake the Lords, for manifestly it would not long remain possible to defend the Lords' functions in the customary terms, as used for example by Holles, nor to reconcile them with the claims of the sovereign people, when the upper house blocked or threw out the most important Whig measures, as it consistently had done between 1679 and 1681.

And if the 'mixed monarchy' disappeared, so equally, it was clear, would the rights which it was supposed to guarantee. As the Tories were fond of pointing out, liberty to the Whigs had become synonymous with the power of their own party to impose its will on other people, and the idea of the rule of law had, as they interpreted it, acquired the same meaning. The Whigs in fact had made no single assertion about the type of constitution they wished to see enforced, or about the purposes it should fulfil, which did not turn out, in the light of the qualifications they attached to it, to be a contradiction in terms.

[59] Daniel Finch. Grey, *Parl. Deb.*, VIII, 242 and 250.
[60] Holdsworth, *History*, I, 378.
[61] Grey, *Parl. Deb.*, VIII, 239.

IV

They had thus committed themselves to a series of inconsistencies so glaring that it is doubtful if any party could long have been kept together on such a basis, at least in circumstances in which protest was possible. In terms of law and precedent they defended the mixed monarchy, but they used the argument from 'reason' to undermine it as far as they could; by one set of arguments they asserted the legitimacy of rebellion; by another they extolled the virtue of loyalty to the King, and, while pursuing a course of action that made civil war all but inevitable, declared themselves insulted if anyone drew a parallel between their actions and those of the Parliamentarians of 1642.[62] In the name of law and precedent they demanded impartial justice and the classic freedoms which, from the beginning of the century, had been claimed by the opposition, and, in theory at least, conceded by the crown—free speech, free elections and freedom from arbitrary arrest. In the name of 'reason', like many revolutionaries after them, they justified behaviour calculated to destroy both. By packing the juries in London and in the provincial boroughs where they had sufficient power, they reduced justice to a farce; by the various illegitimate devices they employed to secure the return of their candidates, they made a mockery of their assertions that the Whig members were freely elected;[63] by exploiting parliamentary privilege they imprisoned as many of the Abhorrers as they could lay their hands on, including those in the House itself, and kept Danby, and the five Catholic peers accused by Oates, for three years in the Tower without trial.[64] And yet their inconsistencies were vital to them, and however

[62] In the autumn of 1675 Shaftesbury brought an action for slander against Lord Digby who had accused him of being 'against the King and for seditious factions'. He won it and was awarded £1000 damages. Cf. also Hist. MSS. Comm., *Ormonde MSS.*, New Series, v, 95, A— B— to Ormonde, 13 May 1679: 'In the debate (on the Exclusion Bill) Sir William Coventry very dexterously interposed: "Before any man can speak clearly it is necessary to know whether you intend after the decease of the King... to drive the Government to a Commonwealth or merely to change the line?" The cry was universal: "No Commonwealth, no Commonwealth, we abhor the thought of it."'

[63] The Whigs maintained that whereas Danby's creatures had won their seats by bribery spent on making the electors drunk, in Whig constituencies it was the electorate which treated the candidates. This assertion was regularly made in the Whig newspapers, notably in the *Domestic Intelligence*. As far as I am aware, the Tories, curiously enough, never attempted to refute it, though they brought a large number of damaging indictments against the Whigs' electioneering methods.

[64] Some of the people who were imprisoned by order either of the House of Lords or of the House of Commons attempted to sue out Habeas Corpuses but were refused them (*MSS. of the House of Lords*, 270–1), according to Burnet, because the Judges were too much 'afraid of the House' to grant them (*History*, 264). An exception occurred in the case of Sheridan, 'a bold, forward man... a native from Ireland', who was imprisoned by the Commons for breach of privilege but who was granted a Habeas

obvious it might seem to their opponents that they had failed to reconcile the two lines of argument on which their interpretation of the constitution was based, they could not bring themselves to abandon either of them.

As the Exclusion contest progressed, however, it is clear that, with many doubts and misgivings, they were proceeding towards the abandonment of the historical argument. An idea which appears to have been fairly widely accepted at the time was peculiarly destructive of conservative thinking. It was to the effect that political power depended on the ownership of land, and that the landed property of England was no longer in the hands of those people who had possessed it when the constitution originated. Then it had belonged to the King and the nobility; now it had passed to the Commons, and thus the law and the facts no longer coincided. Sir William Temple[65] was impressed by this thesis and so was Sir William Petty;[66] it is stated in the letter attributed to Holles, which has already been referred to, and it formed the basis of a part of the argument in Sidney's *Discourses* and to some extent in the *Plato Redivivus*. The obvious deductions were drawn from it in the last two works, whose authors explicitly appealed from the law of the constitution as they admitted that it existed when they wrote, to the spirit by which they presumed that the constitution had originally been inspired. If this spirit were to be preserved, they asserted, the forms of the constitution must be changed to meet the new conditions.

There is no place in Sidney's argument for the idea of fundamental law as it was generally understood. Though implicitly he accepted it in the sense it had for Locke, to whom it meant exclusively the rules laid down by 'reason', he emphatically did not believe that custom and 'reason' must teach the same conclusions. To him history was a process of gradual change. 'It might as well be inferred', he says, 'that it is unlawful for us to build, clothe, arm, defend or nourish ourselves otherwise than as our first parents did...as to take from us the liberty of instituting governments that were not known to them.'[67] 'The authority of custom as well as of law...consists only in its rectitude....We are not so much to enquire after that which is ancient as that which is best,

Corpus by Baron Weston (Burnet, *History*). This occasioned several debates in the Commons where the Whig lawyers, after some shilly-shallying, unanimously came to the conclusion that the Habeas Corpus Act did not apply to people committed by either House (Grey, *Parl. Deb.*, VIII, 220–2 and 229–31), a verdict subsequently endorsed by the Lords during the Oxford Parliament in the case of Colonel Piers Lacey (*Lords' Journals*, XIII, 270).

[65] *Works*, II, 508, quoted. Turner, 'The Privy Council of 1679', *E.H.R.* (1915), 263, n. 78.

[66] 'A dialogue about the parliament of England' (1687), printed in the *Petty Papers*, ed. the Marquis of Lansdowne (1927), I.

[67] *Discourses*, 82.

and most conducing to the good ends to which it was directed.'[68] Thus in the *Discourses* it is explicitly stated that in a discussion on the form which the constitution should assume the requirements of law and precedent are largely an irrelevancy: and the same, though with qualifications, for the argument is much less consistent, must be said of the *Plato Redivivus*.

By the boldness of their conclusions the authors of these two works are distinguished from the vast majority of politicians and pamphleteers who for some time had virtually been thinking along the same lines, but had always refused to admit it. Even with them, however, by 1681, conservatism was beginning to wear perceptibly thinner. Notably this is apparent in the attitude adopted by a number of Whig pamphleteers towards the question of fundamental law. It was the problem of the Exclusion which first brought this matter to the fore by raising the point: could one justify setting aside the lawful heir to the throne without undermining the foundations of the constitution? The answer is that by a line of argument no more disingenuous than those usually employed, and more legitimate than many, one could. If one overlooked the precedents of the last two hundred years—and to do that was, after all, a common practice—there were plenty of precedents in which the principle of hereditary succession had not been observed. With a wearisome enumeration of kings deposed, and the eldest sons of kings murdered or otherwise disposed of, many people proved this. What is remarkable, however, is that others found such arguments insufficient. In a series of pamphlets, in which history was almost wholly neglected in favour of 'reason', the thesis was maintained that the King in parliament was omnicompetent,[69] with the implication, of course, that both King and Lords should follow the lead of the Commons.

If one were to listen to Burnet[70] one would be led to believe that this

[68] *Discourses*, 332.

[69] Cf. 'A word without doors concerning the Bill for the Succession', *State Tracts* (1692), II: 'The same human authority (residing in King, Lords and Commons...) which gave being to those laws for the good of the Community is superintendent above them, and both may and ought to make any addition to or alteration of them, when the public good or welfare of the Nation shall require it.' *A Brief History of the Succession*, Trin. Coll. Libr., Y. 11. 27: 'There must be a supreme, uncontrollable power lodged somewhere. And the men who talk at this rate, can hardly find where it is lodged in England, if not in King, Lords and Commons.' *A Letter to a Friend in the Country, being a Vindication of the Parliament's proceedings in this last Session*, Bodl. Libr., Bartholomew Pamphlets, 13149 (41): 'That it is contrary to the law of Nature or Reason to suppose that the King and Parliament together cannot alter the succession is evident, since the heir apparent may sometimes happen to be a fool, a madman, a Turk or a heretic, or one deprived of his senses, from whom nothing but public ruin could be expected should the government be put into his hands.' The same thesis is also maintained in *The Case of Succession to the Crown of England stated*, Trin. Coll. Libr., K. 15. 49.

[70] *History*, 214.

was the prevailing view in Whig circles, but it is permissible to doubt if Burnet is right. In the first place no lawyer would accept it. The galaxy of legal talent in the House of Commons used fundamental law as an argument for Exclusion and against the 'Expedients' which the court was sponsoring as an alternative.[71]

There is no single speech recorded by Anchitel Grey in which the omnicompetence of parliament is asserted, and by far the greater part of the pamphlet literature of the period expresses the contrary belief, incompatible though it may be with other parts of the writers' argument. Even where this is not the case, it may be doubted how far the champions of an omnicompetent parliament were prepared to accept all the consequences of their premise. Shaftesbury, in his *Letter from a Person of Quality to his Friend in the Country*, which was written in 1675, had made assertions about parliament's power to change the law which are somewhat ambiguous but which might be construed to support the thesis that the power of the King in parliament is unlimited. Further on, however, he speaks of the Peers' right to sit and vote in parliament as 'so inherent in them and inseparable from them that nothing can take it away'. If any Whig had been asked whether, for example, it was within parliament's power to abolish the jury system or the House of Lords, he would almost certainly have answered in the negative.

V

To the question: which argument did the Whigs find the more convincing—the argument from law and precedent or the argument from 'reason'?—there can be no answer except in terms of how the Whigs behaved. But if it is permissible to judge of people's opinions by their actions, then the answer is clear enough. The Whigs had a greater regard for custom than they had for 'reason'. At the time of the Oxford Parliament they were forced to choose between the two. The problem which faced them then was: should they rebel on behalf of the Exclusion and its corollaries, thereby jeopardizing the existence of the monarchy and all those rights and liberties which once before already they had seen engulfed by revolution; or should they submit, not in the hopes of

[71] Cf. Grey, *Parl. Deb.*, VIII, debate of 26 March 1681. Sir William Jones, arguing against the regency scheme suggested by the government: 'If you take away the descent of the Crown upon the Duke, and the Duke has a title to be King, then without doubt all capacities fail... if this can be made effectual I am as willing to exclude the Duke's power as name, but lawyers will tell you it cannot be done.' Cf. also Sir Francis Winnington in the same sense, p. 325. No doubt the lawyers in the Commons spoke in the capacity of advocates, and would not necessarily have upheld the same opinions in a case over which they had had to preside from the Bench, but in this instance it seems that their interpretation of the situation was correct (cf. Birdsall, *Non obstante*).

a better future, for by their own showing the future, with James on the throne, was likely to be worse, but in the name of that loyalty to the crown which they had always professed, although it conflicted with their doctrine of the sovereignty of the people? They chose submission, and it was not a choice which was forced on them, but one which, at least as far as the members of parliament went, and the upper classes generally, they freely made.[72]

No doubt this decision was largely inspired by material considerations —fear of losing their property and of social upheaval—but material considerations are justified in terms of ideas, and there is a considerable amount of evidence that a number of Whigs had been genuinely shocked by the way in which things had been proceeding in the last two parliaments.[73] When Burnet spoke of the 'excesses' of which the Commons in these parliaments had been guilty, there is reason to believe that he was expressing what a large number of Whigs felt.

If it is asked how the members of the Whig party could at one and the same time have supported a course of action which it was obvious was likely to lead to civil war, and yet have realized and condemned what they were doing, the answer can only be given in terms of motives too diverse and complicated to allow of exact analysis. Two factors, however,

[72] An extremely illuminating picture of the Whigs' attitude towards rebellion is provided by the confession of Lord Grey of Warke (*The Secret History of the Rye House Plot and Monmouth's Rebellion* (1754), Cambr. Univ. Libr.), which he wrote after Monmouth's defeat, and by the MS. of Robert Ferguson (printed in *Robert Ferguson the Plotter*, by James Ferguson, 1887). Neither of these two writers is much value as evidence when his statements are unsupported by other sources, but to a large extent in their accounts of the events of 1681–3 they bear each other out. They show very clearly the extreme disinclination of the bulk of the Whig gentry to fight. Lord Grey gives a particularly significant account of what happened at the end of the Oxford Parliament, which, though it is not confirmed by any other writer, is likely to be true because, apart from its plausibility, no purpose could have been served by its invention. He says that under the leadership of Shaftesbury, he, Monmouth, Essex and various others, including 'very many members' in the Commons, decided that they would refuse to go home if Charles were to dissolve the parliament before Fitzharris had been impeached. The next morning, however, 'the dissolution surprised us all', but 'persuant to our resolution we got several Lords to stay in the House', and sent 'several messengers ...to our friends in the House of Commons to let them know we...expected performance of their words; but most of them could not be found, and those that were answered us only with shaking their heads, and soon after we heard the Commons' House was empty, and so we went away'.

[73] Cf. particularly a letter printed in the *Cal. St. Pap. Dom.*, 28 November 1680, and written by an anonymous correspondent to an M.P., probably John Speke, one of the most active of the Somersetshire Whigs. The writer refers to the hostility created in Whig circles in his county by the addresses against Halifax, the refusal to provide money for Tangier and various other of the Whig decisions. In the margin is written in another hand: 'To press no further on the King than you can be sure he will bear, always considering that if you should be dissolved, Popery will recover and this great monarchy will be in danger of utter ruin.' The same point of view is expressed in several Whig pamphlets, notably in *Reasons for His Majesty's Passing the Bill of Exclusion*, Trin. Coll. Libr., Y. 11. 1.

appear to have played a large part in creating this situation. One was the fear that the constitution was on the point of being destroyed by a Catholic *coup d'état* supported by a clique at court. In the first instance this fear had been fostered and exploited by people, some of whom, at any rate, knew that it had no immediate justification,[74] for the purpose of ousting Danby from power. The reality of the danger, however, was so often insisted on, that even level-headed men of affairs, who had at first been sceptical, came to believe in it.[75] The second factor was the Whig party organization, which derived its strength from this belief; of which Shaftesbury was the inspiring genius, and which disposed of a variety of means for coercing not only its enemies but its own wavering supporters.

But the more effective this organization became as an instrument for attacking James and the government, the greater loomed the menace of a possible revenge, and the more essential it appeared to forestall this possibility by proceeding to even more extreme measures. Thus finally the Whigs found themselves caught in a situation in which there seemed no alternatives except revolt or surrender, and if one may judge by the confession of Lord Grey of Warke and by the justification of his behaviour which William Russell wrote before his execution,[76] and the explanation they suggest in this connexion is a plausible one, a number of Whigs tried to save themselves by embarking on a gigantic game of bluff. Their assumption was that if the Whig strength could be made to appear imposing enough, the government would yield to the Whig demands; and thus no Whig would be forced to sully his hands by rebellion, or even offend his conscience by admitting—and certainly William Russell never did—that rebellion was what he contemplated.

The Whig party in the reign of Charles II was thus an aberration. It owed its strength and solidarity to an artificially stimulated panic, which itself had seemed necessary as a means of escape from the domination of Danby. But this solidarity, which greatly surpassed anything

[74] Barillon wrote categorically on 10 October 1678 that 'Les gens opposés à la Cour se moquent de toute cette [i.e. Oates's] accusation' (P.R.O., *Baschet Transcripts*).

[75] E.g. the Secretary of State, Sir Henry Coventry. On 1 October 1678, he wrote to Ormonde in some uncertainty (Hist. MSS. Comm., *Ormonde MSS.*, IV, 207): 'It is a stupendous thing', he said, 'to think what vast concerns are like to depend on the evidence of one young man who hath twice changed his religion—if he be now a protestant.' But by 14 January 1679 his doubts had vanished. Writing again to Ormonde he asserted that 'I must confess I am entirely convinced there was a most desperate design'. The letters of Sir Robert Southwell, Clerk to the Privy Council, also printed in vol. IV of the *Ormonde MSS.*, tell much the same sort of story, as, equally, does Roger North's description of the state of mind of his brother Dudley (*Lives of the Norths*, II, 179).

[76] *Speech and Behaviour of William, late Lord Russell, together with the Paper delivered by him to the Sheriffs*, 1683, Cambr. Univ. Libr. (Acton, f. 25. 393).

that had hitherto existed, was a factor for which neither the theory nor the practice of the constitution at the time had any place.

The future in Charles II's reign, it is sometimes said, lay with the Whigs, but this statement is clearly not true if it is intended to mean that the political ideas which the Whigs professed between 1678 and 1683 found expression in the constitution after 1688. *All* the Whig ideas could not possibly have found expression in any constitution, for they were compounded of two contradictory elements one of which was bound to triumph over the other, since both could not, as the events showed, be satisfactorily combined. In them are the germs both of Liberalism, which seeks to safeguard the freedom of the individual by securing to him certain specific rights, and of Jacobinism, which primarily understands by freedom the expression of the will of the people. In the period under discussion the first point of view was primarily represented by the Trimmers, the second by Sidney, and it was not at first apparent to which of the two the Whigs would give their allegiance.

But by refusing to fight in 1681 the majority of the Whigs repudiated their connexion with Sidney, both in the flesh and the spirit. Their collapse after the Oxford Parliament heralded the evolution of the Whig into the Trimmer, or it might perhaps be more accurate to say the return of the Whigs to those constitutional principles which, though inchoately formulated, they, in common with the men who later became Trimmers, had held when both together had been in opposition under Danby. If, therefore, the future belonged to any of the political groups which emerged during the Exclusion contest, it belonged to the Trimmers.

The Trimmer's idea of the constitution was expressed to a smaller degree in terms of first principles than that of either of the other parties to the dispute.[77] Trimmer writings insisted on the necessity of compromise and reasonableness; they were concerned neither with the ultimate purpose of the state nor with its origins; instead they emphasized the value, assumed rather than explained, of certain specific institutions and conditions of political life. In them appears primarily a deep attachment to the religion of the Church of England, to the distinguishing features of English government, and to the ideas of liberty and the rule of law, neither of which they defined at all precisely, but which, in Halifax's words, they saw enshrined 'in our blessed constitution if rightly understood and properly preserved'.

[77] For other Trimmer writings besides the *Character of a Trimmer* see particularly Anglesey, 'State of Government and Kingdom', *Somers Tracts*, VIII, and *A few Words among many about the touchy Points of the Succession*, Bodl. Libr., Godwyn Pamphlets 1125 (22).

To Halifax the English constitution was superior to all others, handed down to us from our ancestors, an expression of the law of nature, embodying all that was of value in the opposites of Monarchy and Commonwealth, preventing the King on the one hand from an exercise of absolute power, and the subjects on the other from a complete freedom of political action which must logically have resulted in an upsetting of the balance which existed between the parts.

The Whigs themselves had consistently made assertions of this sort, though they had also made others which contradicted them. In the bulk of their writings and political speeches they had defended the 'mixed monarchy' in terms to which the Trimmers would have subscribed. Their Whiggism appeared only in the glosses which they made on their own doctrines. To the extent, therefore, that they believed in the 'mixed monarchy' they were Trimmers at heart, if by a Trimmer one understands, as Halifax undoubtedly did, not so much a person who believes in all circumstances in the virtue of compromise as such, as a person who advocates a form of government which, as Halifax himself put it, is a mean between two extremes. The essential difference between the Whigs and Trimmers in Charles II's reign might, perhaps, be said to lie in the fact that the Trimmers realized while the Whigs did not that a form of government which is itself a compromise can only be made to work by people who are prepared to compromise. Circumstances, however, in the course of time, convinced the Whigs of their mistake.

At first sight, admittedly, the *Character of a Trimmer* does not seem to provide a theory particularly applicable to the conditions of the time. Because it postulates a harmony between King and People which was conspicuously absent at the date when it was written, it seems open to the objections which have often been brought against works based on similar assumptions. But to believe in the impossible is sometimes to achieve it, and the 'mixed monarchy' survived the shocks of 1681 and 1688 because, in spite of the many reasons for abandoning it, all parties, the Whigs included, maintained an unshakeable devotion to it.