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A Revolution in Law's Republic: Arendt and Michelman in Dialogue

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ABSTRACT

In the late 1980's and 1990's, the "republican revival" emerged as an influential movement in contemporary American constitutional thought. In this paper, I critically examine the republican approach to constitutionalism by bringing into conversation one of its most influential proponents—Frank Michelman—with another theorist not commonly associated with the republican revival: Hannah Arendt. In the first part of this paper, I examine Frank Michelman's theory, in particular his conception of constitutional legitimacy and "jurisgenerative politics" with regards to questions of intergenerational commitment and social change, and review the critiques to his approach. In the second part of this essay, I reconstruct Arendt's constitutional theory and contend that it offers a powerful corrective to some of the criticisms launched against republican constitutional theories such as Michelman's, and indeed that it provides a more fruitful route for reconceptualizing constitutional theory in more inclusive ways.

I. Introduction

In How Democratic is the American Constitution? (2002) Robert Dahl begins with a question that strikes at the heart of the US constitutional tradition. He writes:

> Why should we feel bound today by a document produced more than two centuries ago by a group of fifty-five mortal men, actually signed by only thirty-nine, a fair number of whom were slaveowners, and adopted in only thirteen states by the votes of fewer than two thousand men, all of whom are long since dead and mainly forgotten?[1]

The answer often given to this question of constitutional beginnings (or questionable beginnings) and its implications for contemporary constitutional legitimacy is a familiar one: that the Constitution offers us as individuals rights that protect the exercise of our political freedom, that it secures order and prosperity, and that it contains the possibility for change, in other words, that the meanings and values expressed in this text can be adapted in progressive ways to adjust to the changing face of American society. A

1 See Robert Dahl. *How Democratic is the American Constitution?* (New Haven, CT: Yale University Press, 2002), p. 2.

reassuring, perhaps comfortable response. Yet for the countless number of groups who have since the Founding been a part of the political community, though not always recognized as equal members—African Americans, Native Americans, and women—to the countless more who in the contemporary political arena continue to be disenfranchised and excluded from the Constitution's promised bounty of rights and freedoms, this question is more troubling and not so readily answered.[2]

Reviewing Founding historiography, one might indeed venture to say that this question of beginnings has been the Janus-face of American constitutional scholarship. Debates not only of textual legal interpretation but also of how we relate to and interpret the values and legacy of the Founding past can be framed as tense faces upon a spectrum. At one end, we find the face of the patriot, emblazoned by 19th century historiographers such George Bancroft in whose work the Founders became Hegelian heroes and demi-gods, the chosen agents of history acting upon a higher-will to create a nation and divine its course for time immemorial.[3] At the other end, we locate the face of the skeptic sketched out by the Progressive Era historian Charles Beard, in whose work the Constitution appeared as the counterrevolutionary junta of the landed class, an undemocratic document staged through a process most characteristic of a coup d'état.[4]

Beginning in the late 1960's, a third face emerged which caused ripple effects in this spectrum: the face of republicanism. Against then dominant Hartzian interpretations of America's ideological rootedness in liberal political and economic thought, scholars such as Bernard Bailyn, Gordon Wood, Quentin Skinner, and J.G.A. Pocock[5] retrieved the civic republican strain present in the political thought of the American Revolutionaries and the Constitution's Framers. The impact of these works has been enormous, redrawing intellectual battle-lines and approaches in a wide range of fields from history to political theory, and beginning in the 1980's, in American constitutional thought. It is this last expansion into the self-proclaimed "republican revival" that is the focus of my analysis and this paper.

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2 In his speech during the commemoration of the Constitution's Bicentennial, Supreme Court Justice Thurgood Marshall was among one of the few dissenting voices suggesting a more critical review of the Constitution's original legitimacy. See "Bicentennial Speech", Annual Seminar of the San Francisco Patent and Trademark Law Association, Maui, Hawaii, May 6, 1987. www.thurgoodmarshall.com

3 See George Bancroft. *History of the Formation of the Constitution of the United States of America.* (New York: D. Appleton, 1885). Though this image is characteristic of the nineteenth century historical school of thought, its one that as Bruce Ackerman notes, has gained renewed appeal in recent years, "to the point where Justice Clarence Thomas could embrace the words and wisdom of the Framers with an enthusiasm unprecedented in modern constitutional law." For a discussion of the "glorification/demonization" cycle in constitutional interpretation see Bruce Ackerman, *We, The People*. *Vol. II: Transformations*. (Cambridge, MA: The Belknap Press of Harvard University Press, 1998), p. 32-33. For an excellent overview of the movements in Founding Historiography see Peter Onuf. "Reflections on the Founding: Constitutional Historiography in Bicentennial Perspective." *The William and Mary Quarterly*. Third Series, Vol. 46, Issue 2 (April 1989): 341-375.

4 See Charles Beard. *An Economic Interpretation of the Constitution of the United States*. (New York: The MacMillan Company, 1913).

5 See Bernard Bailyn. *The Ideological Origins of the American Revolution*. (New York: Belknap Press, 1967); Gordon Wood. *The Creation of the American Republic, 1777-1787*. (Chapel Hill: University of North Carolina Press, 1969); Quentin Skinner. *Liberty before Liberalism.* (Cambridge, UK: Cambridge University Press, 1997); and J.G.A. Pocock. *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*. (Princeton, NJ: Princeton University Press, 1975).

The "republican revival" emerged as one of the dominant new schools in American Constitutional scholarship thanks in large part to the work of Frank Michelman, who in his influential article Law's Republic (1987) inaugurated the revival and provided with this piece one of the foremost statements on the republican approach to normative constitutional theorizing.[6] At the core of this work is the claim that not only is republicanism just as much a part of America's political and constitutional roots as liberalism, but that moreover it can offer us important "visionary resources" to guide contemporary constitutional practice. Among these "resources" he points to republicanism's core ideals of political equality, participation, active citizenship, and deliberative democracy.

Central to the return to republicanism that Michelman advocates is also the attempt to directly address the problem of exclusion and legitimacy through a constitutionalism founded on a practice of public justification that is dependent upon the continued inclusion of previously excluded social groups, that is, of bringing "the margin to the center."[7] In this, it is an approach that is a refreshing departure from the previously dominant paradigm: original intent. The beginning, the Founding moment, is problematized and still salvaged because the problem of exclusion is recognized.

This operation of returning to "republican beginnings" for the sake of its contemporary application, however, has been a source of some of the greatest criticism launched against the revival. For critics such as Derrick Bell and Preeta Bansal, reviving republicanism is something to be viewed by minorities with skepticism. They write:

> For centuries in this country…blacks have served as the group whose experiences and private needs have been suppressed in order to promote the "common good" of whites. Indeed, the "shared values" in which the anti-federalists laid faith included a historically constant and (for whites) a unifying belief in the inferior and subordinated position of black Americans.[8]

Thus, as a doctrine that extols "the common good", presupposes "shared values", and lauds the active citizen above all other human roles, republican constitutionalism today, they argue, cannot escape its less than rosy history of exclusion and moral solidarism.

The debates arising in the wake of the republican revival return us to the question of beginnings and its implications to constitutional legitimacy posed by Professor Dahl. Beginnings are problematic, contingent, and violent. They are also presumably integral to constructing the collective narrative fund from which political communities derive their identity and cohesion. Between the convulsive and violent fact of beginning and the Constitution's function as a tool for stability, certainty, and cohesiveness, is a field of tension littered by questions: since not all groups were figuratively "part of the original contract", what then makes the Constitution and the governmental framework it shields legitimate? What makes a "beginning" legitimate and how do the ways by which we

6 See Frank Michelman. "Law's Republic." *Yale Law Journal*. Vol. 97, no. 8 (1988): 1493-1537 For an extensive discussion of the "republican revival" see Scott D. Gerber. "The Republican Revival in American Constitutional Theory." *Political Research Quarterly* Vol. 47, no. 4 (December 1994): 985-997.

7 This is phrase is borrowed by Michelman from bell hooks. See bell hooks. *Feminist Theory: From Margin to Center*. (Boston: South End Press, 1984).

8 See Derrick Bell and Preetha Bansal. "The Republican Revival and Racial Politics." *Yale Law Journal*. Vol. 97: 1609-1621.

explain this beginning impact contemporary constitutional legitimacy? What, in other words, ties the "Founder" to the "Citizen"—past, present, and future?

My analysis of Michelman's republican revival will be guided by these foundational questions. My interest in examining the revival through this lens is prompted by a broader critique of normative constitutional thinking: theorists have generally tended to shy away from the problem of beginnings, following either the route of Constitution worship or atemporal, presentist conceptions of constitutional legitimacy. The republican revival, and Michelman's approach in particular, is unique in following neither. Yet the synthesis it attempts remains questionable.

In order to fully articulate the tension inherent in his theory, this paper will examine Michelman's approach by placing it in conversation with another theorist for whom the problem of beginnings is central yet has at this point not been connected with the republican revival: Hannah Arendt. Arendt for too long has been ignored as an important constitutional thinker. It is the hope of this paper to begin to rectify this problem. By bringing Arendt's constitutionalism to the fore, I seek to not only provide a critical conversational partner to Michelman's own constitutionalist approach but also, and more importantly, to offer what I shall argue is an important alternative vision.

The paper will thus proceed as follows: in the first part, I will examine the outlines of Michelman's approach to constitutional law, investigating in particular his notion of constitutional legitimacy as "jurisgenerative politics;" in the second part, I shall attend to his critics; in the third part, I will examine Arendt's constitutional theory with the aim of stirring once again the waters of the republican revival and providing a counterpoint for further stimulating contemporary political thought on these central questions of founding exclusions and the problem of democratic legitimation.

II. Michelman's Republican Constitutionalism

Frank Michelman's Law's Republic (1986) begins in direct response to the controversial Bowers v. Hardwick (1986) case. To understand Michelman's approach it is therefore necessary to briefly rehearse the facts of this case. In August of 1982, Michael Hardwick was charged with violating Georgia sodomy laws by consensually engaging in sexual relations with another adult male in the privacy of his home. He subsequently brought suit in federal court to challenge the constitutionality of the Georgia statute on the basis of the privacy rights established by Griswold, Eisendstat, Stanley, and Roe. In one of the most morally and politically charged cases since Roe, the United States Supreme Court ruled five to four against Hardwick and an extension of privacy rights to homosexuals.[9]

To most liberals, the Supreme Court's ruling came as a shock. By declaring in its judgment that "none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy…(for) No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated,"[10] Bowers represented a regressive measure

9 *Bowers v. Hardwick (1986),* http://caselaw.lp.findlaw.com. The *Bowers* case was overturned in 2003 by *Lawrence v. Texas* (2003).

10 Ibid.

bent on curtailing the nascent and growing privacy rights wave ushered in by Griswold and Roe under an undisguised heterocentric rationale.

Michelman offers a different response to Bowers. In Michelman's reading, what is most alarming about this case is not merely the moralistic tinge of the Court's decision, but "[r]ather, it is the decision's embodiment of an excessively detached and passive judicial stance toward constitutional law".[11] This jurisprudence of detachment is evident in the Court's final deference to the Georgia legislature and the twenty-five other state legislatures that criminalized homosexual sodomy. Thus, rather than "impos[e] the Justices' own choice of values on the States and Federal Government,"[12] the Court deferred to the presumed judgment of "we, the people" acting through their state legislatures as the preferred neutral ground on this issue of morality.

For Michelman, this defense of judicial restraint under the mantle of democracy is objectionable on several counts. Firstly, through this stance the adjudicative act becomes an unreflexive, uncritical one. As he explains,

> The devastating effect in Bowers of a judicial posture of deference to external authority appears in the majority's assumption, plain if not quite explicit in its opinion, that public values meriting enforcement as law are to be uncritically equated with either the formally enacted preferences of a recent legislative or past constitutional majority, or with the received teachings of a historically dominant, supposedly civic, orthodoxy.[13]

This unquestioning attitude by the Court, particularly in rejecting Hardwick's counterargument that there was an inadequate rational basis to support the establishment of the Georgia sodomy laws, leads to an exclusionary practice that is not only non-responsive to the claims for political freedom of one individual but also demeans the community as a whole by preventing the possibility for self-transformation. Thus secondly, this stance is objectionable because it presumes a static conception of citizenship and membership in the political community. In Michelman's words, it "debases the community by slighting its self-transformative capacity…through lapse of commitment to extension of membership to persons, who, at many historical moments could not count themselves to traditions whose meanings did at those times involve the exclusion or subordination of just those persons."[14] Finally, according to Michelman, the retrenchment of rights evidenced in Bowers is objectionable in that it produces an authoritarian conception of legitimacy since what is determined to be legitimate is what is dictated by a prior authority that is itself uncritically subsumed.

As we can see from these objections, Michelman's critique is broader than the adjudicative context of Bowers. Rather, this context serves as an opportunity to rethink what we mean by constitutionalism and its relation to democracy, in particular how we reconcile the ideals of law-rule and self-rule inherent in American constitutionalism. The balancing act attempted by the Bowers court does injustice to both these ideals. On the

11 Michelman, *Law's Republic*, p. 1496.
12 *Bowers v. Hardwick (1986).*
13 Ibid.
14 Ibid.

one hand, it suggests a passive and apolitical understanding (perhaps purposively) of the former; the Court is seen as "the servant, not the author, of a prescriptive text…an organ of law, and therefore not of politics."[15] On the other hand, it presumes an equally passive and uncritical understanding of the later. "Democracy thus conveniently answers to the need for authority…the social determination of disputed questions of value is imaginable only as a battle of preferences or as the exertion of an arbitrary, dominant will."[16] In other words, it fails to sufficiently answer by what right can others control Michael Hardwick's liberty claims and by what right can the Court rule that these others have spoken for "we, the people". To this end, Michelman proposes a republican-inspired constitutionalism as a better account of the relation between constitutionalism and democracy, law and politics.

Michelman's republican constitutionalism is founded on two interrelated claims about the nature of American constitutionalism in particular and the law in general: first, that the principles of self-rule and law-rule can be reconciled by the possibility of a jurisgenerative politics[17]; and second, that the law is not merely a system of rules but a world of narrative and meaning, a fund of public normative references that organizes the political world, informs the individual and collective identity of its participants, and sustains their continued commitment to that community. I shall expand on each point below.

Michelman's central concept of jurisgenerative politics is adopted from the work of Robert Cover. As Cover describes it, "the jurisgenerative principle (is) the legal DNA."[18] Michelman takes this conception one step further and asserts that it is a particularly republican legal DNA embedded in the twin premises of American constitutionalism: self-rule (a government by the people for the people) and law-rule (a government of the people by the laws). The first is inscribed in the principle of popular sovereignty and mediated by the system of representation and the second by the idea of the rule of law as that which provides for stability, certainty, and protection to individuals against arbitrary power.

While these two principles might appear contradictory—and indeed are problematic—their reconciliation is the system's irresistible jurisgenerative impulse. As Michelman depicts it, it is the process by which the law gains a "sense of validity as 'our' law."[19] The process by which the law's authority is legitimated, however, can take various normative venues. Why then is the republican route better?

Michelman makes the case for the republican approach by contrasting it with a competing account: pluralist-inspired constitutionalism. He groups the theories of Richard Epstein, Buchanan and Tullock, John Ely, and John Rawls in this camp. According to Michelman, "such accounts have at their core a line of argumentation designed to show something like the following: Given the various, partly complementary but partly conflicting, pre-political aims and interests of the individuals concerned, and

15 Ibid, 1497.
16 Ibid, 1499.
17 This term is adopted from Robert Cover. See "Nomos and Narrative." In *Narrative, Violence, and the Law:the essays of Robert Cover*. Edited by Martha Minow, Michael Ryan and Austin Sarat. (Ann Arbor, MI: University of Michigan Press, 1992).
18 Ibid, p. 146.
19 Michelman, *Laws Republic*, p. 1502.

given also the inevitably competitive and strategic motivational realities of social (including political and economic) interaction, it is rational for everyone concerned to prefer the constitution in question to the next best practically attainable alternative."[20]

According to Michelman, two fault-lines are present in this approach. First, it presumes rationally motivated self-contractors as the heuristic agents for an account of the law's validation. Second, it is transcendental in character in that this argument rationalizes the law according to a conception of the right removed from actual, political history. "Taking its scientific and philosophical premises as given, the argument's gist then is that each person, whether she knows it or not, ought to accept the law in question as comformable to some assertedly objective notion of reason, nature, fairness, utility, or other criterion of rightness."[21] For Michelman, transcendental justifications of the law are not enough. "Whatever kind of authority a law may possess by force of transcendental justifiability, it is not the authority of self-government."[22]

Against pluralist conceptions of higher law, republican constitutionalism is political, historically sensitive, and immanently grounded. Normatively, it takes as its point of departure the concepts of communicative rationality and discursive validation of norms developed in the work of Jurgen Habermas and Seyla Benhabib.[23] Its central contention is that "justificatory argument must at least begin to explain how that law might have been actually regarded by the people subject to it, in all their actual social and experiential situations, as deserving acceptance by them."[24] Discursive validation, the give-and-take of reasoned argumentation by situated agents each coming towards agreement on the validity of the law from their own perspectives as free and equal participants, thus provides the procedural means by which the law may attain a sense of self-givenness. The republican quality of Michelman's approach should be apparent. It is inspired by the ideals of political equality, active citizenship, and deliberative democracy. Yet it is important to note that this approach is not strictly procedural. The discursive process is itself dependent on the context in which it takes place. Participants are involved, as he states, in not just "one debate, but in a more encompassing common life, bearing the imprint of a common past, within and from which the arguments and claims arise and draw their meaning."[25]

Michelman describes this common world as a fund of normative references. He depicts these as a set of narratives through which the political community and its individuals imagine themselves as "a people". Jurisgenerative political debate takes place as a contested "re-collection" of this fund.[26] That is, this fund is not merely passively

20 Ibid, p. 1510. Italics added by author.

21 Ibid, p. 1511. Italics added by author.

22 Ibid.

23 See Jurgen Habermas. *Theory of Communicative Action, Vol. I & II.* (Boston: Beacon Press, 1985); Moral *Consciousness and Communicative Action*. (Cambridge: MIT Press, 1990); and *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. (Cambridge: MIT Press, 1998). Seyla Benhabib. *Critique, Norm, and Utopia.* (New York: Columbia University Press, 1985).

24 Michelman, *Law's Republic,* p. 1511.

25 Ibid, p. 1513.

26 Michelman adopts this term from Drucilla Cornell's work. See Drucilla Cornell. "Institutionalization of Meaning, Recollective Imagination, and the Potential for Transformative Legal Interpretation." *University of Pennsylvania Law Review,* Vol. 136: 1135-1172.

"collected" by subsequent generations but rather actively reshaped by them so that they may continually re-create and re-imagine themselves as a people.

This process of re-collection is itself dependent upon the active inclusion of previously excluded narratives and voices. In Michelman's words, it "depends on 'our' constant reach for inclusion of the other, of the hitherto excluded—which in practice means bringing into legal-doctrinal practice the hitherto absent voices of emergent self-conscious social groups."[27] It is ultimately through this process which I would like to term re-collection as inclusive translation that the alienated authority of the Founding past is reconstituted and translated into the contemporary authority of present and future generations of citizens.

From this analysis, the component features of Michelman's republican constitutionalism may be summarizes as follows: first, the problem of beginnings is dealt with through a process of self-critical, transformative, and revisable dialogic validation of the law; second, this process presumes an existing normative fund of references, that is, a starting point of narratives that participants draw upon for collective identification across the intergenerational horizon; finally, this fund is itself readjusted, amended, and reshaped by a constant outreach to previously excluded social groups. Through this process of jurisgenerative politics the Constitution's legitimacy is thus presumably attained and intergenerational commitment sustained.

The republican constitutionalist approach developed by Michelman in this article has been highly influential and highly controversial. While his approach has come under attack from various theoretical fronts, in the section that follows I want to examine the critique developed by critical race theorists Derrick Bell and Preetha Bansal as a means of opening up the features of Michelman's theory further to the problem of beginnings and exclusion, as well as the impact of these twin problems on contemporary constitutional legitimacy and the possibility for social change.

III. Michelman and the Problem of Exclusion

In their article "The Republican Revival and Racial Politics", Derrick Bell and Preeta Bansal begin their critique with a cautionary parable set in 1930's Harlem:

> During a quiet moment on a too-crowded block, an old, black man sat on his stoop observing familiar activities of the community he served as respected sage…He listened now to the earnest young street worker, an exile from the upper class, extolling the marvels of the Marxist millennium…When the young proselytizer finished, the black man said he had only one question. "Ask me anything, Pop," the young radical urged. "I have the answers to all your people's problems." "Well," asked the old man, "when you revolutionaries take power and change all the world over—will you still be white?" [28]

27 Michelman, *Law's Republic,* p. 1529.

28 Derrick Bell and Preeta Bansal. "The Republican Revival and Racial Politics." *Yale Law Journal: Symposium on the Republican Revival.* Vol. 97 (1997): 1609-1621.

This may seem like a peculiar parable by which to introduce their critique but the kernel of the old man's response in this parable remains the same with regards to black Americans' response to the radical promises of Michelman's republican revival: skepticism. This skepticism is primarily directed at the core claim of Michelman's argument: that a resurrected republicanism can best inform contemporary constitutional theory and practice.

For Bell and Bansal, the main problem is a historical one: can and should a political theory historically associated with a solidaristic moral doctrine based on the development of a "common good" and predicated upon a set of "shared values" be applicable in today's context? Or to put it more succinctly, can a theoretical tradition break with its "tainted past"? The Framers, as they remind us echoing Robert Dahl, expounded ideals of political equality and liberty, that all "men are created equal," yet proceeded to qualify and restrict these ideals to befit their economic, social, and racial prejudices.

Historical contentions aside, a second, and as I will suggest, more forceful element of their critique aims at the core features of Michelman's republican-inspired dialogic constitutionalism. This notion of dialogic constitutionalism, they write, "assumes at base that a social consensus will emerge from 'reasoned' deliberation by individuals who think 'rationally' and who are capable of abstracting from their private experiences."[29] The fault line with this process, they suggest, is the insensitivity to the contexts of power and domination that results from a belief in a "common good". The problem here is who defines this common good: the dominant class. The "common good" consequently serves as a smoke screen by which to disguise particularistic interests, suppress injustices, and subjugate the interests of the marginalized. Moreover, "reasoned" deliberation accompanies this smoke screen to likewise suppress the claims of justice based on the "private" experiences of the subordinated group.

Finally, a third critique related to the above concern pertains directly to what I have termed Michelman's conception of re-collection as inclusive translation. For Michelman, the jurisgenerative process is dependent upon this capacity of "bringing the margin to the center" as a means of fully re-collecting the normative fund of narratives and translating them into a present context that existing and subsequent generations can call "their own". For Bell and Bansal, the key question for this process is: how are those voices to be included? In their view, Michelman gives no clear answer. At best, he seems to suggest that this capacity depends upon the judiciary's ability to recognize and integrate these voices. This dependence upon the judiciary for them ultimately undercuts Michelman's radical promises for an inclusionary constitutionalism, capable of attending to the needs of excluded groups and keep up with "the constantly political and revisionary activities of 'we, the people'."[30] The whims of the judiciary are not enough. As they state, "the oppressed will not triumph over these barriers through faith alone."[31]

On this latter count I agree with Bell and Bansal's assessment. Michelman's view, while attempting to redirect constitutional theory in more inclusionary ways, in the final analysis appears less than radical in its redirection in that it places too much faith and power in the judiciary's capacity as an inclusionary tool. Indeed, Michelman admits to

29 Ibid, 1610.
30 Ibid, p. 1616.
31 Ibid, p. 1620.

this much and sheepishly attempts to justify it. He writes, "judges perhaps enjoy a situational advantage over the people at large in listening for voices from the margins." This statement, however, seems all the more surprising given that his article was prompted by a critique of the Supreme Court's failure to fully give voice to Hardwick's claims.

To agree with this critique is not to say that Michelman's whole approach should be dismissed so readily. While classical republicanism's belief in a "common good" and "shared values" has, and in this Bell and Bansal are correct, served as mechanisms by which to suppress the claims of subjugated groups, the political values which Michelman seeks to extract from it—deliberation, active citizenship, and political equality—can and have indeed served to aid in the emancipatory struggle of social groups. It is by upholding such ideals and fighting for their redefinition towards more inclusionary ways that groups such as women and blacks have expanded that foundational dictum of "all men are created equal."

What Michelman calls for is not a wholesale adoption of classical republicanism or a deeply substantive and coercive search for a "common good." The republican theory in which he seeks to ground his approach requires in his words a "normative re-thinkering" of this tradition. Republicanism, as theorists such as Bailyn, Wood, Skinner, and for that matter the writings of The Federalists Papers remind us, has been part of the American constitutional tradition and indeed informs its normative self-understanding. The aspiration, as Michelman and his republican revivalists compatriots see it, is not to abandon republicanism but to embrace it and reshape it so that the promises made at the Founding will ring true to the countless groups previously excluded from the Constitution's original contract. It is not by abandoning a belief in active citizenship, political equality, and possibility of a "government by reasoned common deliberation", as opposed to a government guided by imagined market contractors or disengaged citizens, that the twin promises of "government for the people by the people" and a "government by the laws" might be reconciled.

Bell and Bansal's critique of Michelman's inattentiveness to power and his approach's lack of a more radical transformation to aid in the inclusionary process, however, cannot be ignored. While I ultimately seek to defend Michelman's approach to normative constitutional theorizing, to do so however requires working through the weakness and tensions of this approach. To this end, I would like to suggest that the constitutional theory developed by Hannah Arendt might provide several correctives. In the section that follows, I will reconstruct Arendt's theory and bring it into conversation with the problems faced by Michelman's theory. In particular, I will argue that her understanding of constitutional authority provides for a more contestable framework that is more attentive to the new transformative political actors than Michelman's judiciary-tipped view.

IV. Hannah Arendt's Republican Constitutionalism

To speak of a constitutional theory in Arendt's political thought may seem peculiar at first glance. For Arendt scholars such as Dana Villa, it may be out of place to think of Arendt as

a systematic thinker. As he writes, "she never wrote a systematic political philosophy in the mode of Thomas Hobbes or John Rawls."[32] Reviewing Arendt's rich ouvre one might be inclined to agree with this statement. In The Human Condition, for instance, narrative threads weave in and out from the contemporary marvels of man-made satellites and the destructive potentiality of nuclear power, to the wonder of the Greek polis and finally into a critique of consumerist society and a lost public realm.

Her most constitutionalist work and the site for this paper's excavation—On Revolution (1963)—also seems to be no exception to this anti-systematicity rule. In this work, Arendt traverses a vast canvas of modern political and intellectual history, from contemporary problems of war to mythical beginnings to the American, French, and Soviet Revolutions, just to name a few of the narrative trajectories covered. So vast is the breadth of her analysis that the aim of this work has often appeared to be less than clear. Indeed, the scant secondary literature on this work has primarily focused on the shock and surprises of Arendt's narrative, thus contributing to the perception that this work is a strange and disjointed conceptual amalgam.[33]

I dispute this tendency to read Arendt as a less than systematic thinker. I would like to suggest that the narrative disjointedness attributed to this work derives from a central misunderstanding: this work has been read as an application of the concepts developed in previous works to historical material. On this interpretation, her interest in constitution-making moments, in particular the American and French cases, is accredited to her interest in finding new archetypes of political action in modernity.[34] As such, Arendt is seen as an apologist for the American Revolution and Founding, celebrating it as an example of those "great deeds and actions" that she uplifts in The Human Condition.[35]

Rather, I want to assert that we can and should think of Arendt as an important constitutionalist thinker, one whose insights may in fact prove illuminating for contemporary debates in normative constitutional theory. But how is Arendt a constitutionalist? What is an Arendtian republican constitutionalism? And how does her theory prove an important corrective to Michelman's?

To answer these questions and place her theory in conversation with Michelman's, I want to begin by recalling the strengths and weaknesses of his theory as discussed earlier. First, one important feature of Michelman's theory is his conception of a self-critical, transformative, and revisable dialogic constitutionalism as the means by which the law gains the validity as "our law". This feature is encapsulated by the concept of a jurisgenerative politics. Second, and related to the notion of jurisgenesis, is the companion feature of re-collection as inclusive translation, that is, the imperative within this jurisgenerative process of bringing previously excluded voices into the constitutional

32 See Dana Villa. "Introduction: the development of Arendt's political thought." In *The Cambridge Companion to Hannah Arendt*. Edited by Dana Villa. (Cambridge, UK: Cambridge University Press, 2000).

33 See for instance James Miller. "The Pathos of Novelty: Hannah Arendt's Image of Freedom in the Modern World." In *Hannah Arendt: The Recovery of the Public World*. Edited by Melvin A. Hill. (New York: St. Martin's Press, 1979).

34 For this interpretation see Jeremy Waldron. "Arendt's Constitutional Politics." In *The Cambridge Companion to Hannah Arendt*. Edited by Dana Villa. (Cambridge, UK: Cambridge University Press, 2000).

35 Indeed, in recent works such as Antonio Negri's *Insurgencies (1999)*, a work undoubtedly greatly influenced by the Arendt of *On Revolution*, this view of Arendt as an American conservative prevails. See Antonio Negri. *Insurgencies: Constituent Power and the Modern State*. (University of Minnesota Press, 1998).

dialogue. I argued previously that these two features are attractive from the perspective of a more temporal understanding of the problem of exclusion and its impact on contemporary constitutional legitimacy. Finally, siding with Bell and Bansal, I suggested that these two strengths are ultimately undermined because of his inattentiveness to questions of power (who's doing the recognition within the legal-doctrinal domain) resulting from the theory's over-dependence on judiciary recognition of socially emergent groups and their claims of justice. As such, though Michelman seeks to articulate a non-authoritarian conception of constitutional legitimacy, this promise subsequently falls flat.

The corrective Arendt offers to Michelman's less than radical republican constitutionalism can be found in the story of revolution and political freedom that unfolds in On Revolution. This story, however, is no mere nostalgic trip across the layers of historical time. On the contrary, it is a story that pries open what constitutional theory has traditionally disavowed: the aporia of law and time.

This aporia is an inherent aspect of all founding, the moment whence the origin of the higher law for a particular political community is derived. Yet it is not merely present or dissoluble at this origin. Rather, it remains within the law's own temporal trajectory, that is, in the impulse to generate and legitimate the law for subsequent generations, what we have come to term the problem of intergenerational commitment. While other theorists, most notably Jacques Derrida[36] in his later writings, have richly elaborated on this aporia, I would like to make the case that Arendt's analysis is not simply a deconstruction of the foundations of authority and law, but instead, provides a more constructive, promising project. Ultimately, as Bonnie Honig has suggested, Arendt's interest in this work is to find new, non-foundational bases for political authority in modernity[37] by exposing as she writes these "age-old-thought customs of Western men."[38] To this end, her conceptions of political freedom and constituent power, and her distinction between power and authority provide, as I will argue, the important correctives to Michelman's approach and point the way towards a more richly elaborated and defensible republican constitutionalism. I will elaborate more fully on these points in the paragraphs below.

V. Law and Time: On the problem of authority and the possibility of freedom

In the beginning there was violence. That Cain slew Abel, and Romulus slew Remus, the violence of beginnings has framed the Western imagination. "Whatever brotherhood human beings may be capable of has grown out of fratricide, whatever political organization men may have achieved has its origins in crime," so these tales have suggested.

36 See Jacques Derrida. "Force of Law: The 'mystical foundation of authority'." In Drucilla Cornell, Michael Rosenfeld, and David Gray Carlson (eds) *Deconstruction and the Possibility of Justice*, trans. Mary Quaintance. (London: Routledge, 1992); and "Declarations d'independence". In Jacques Derrida. *Otobiographies: L'enseignement de Nietzche et la politique du nom proper*. (Paris: Galilee, 1984).

37 My interpretation has been heavily influenced and inspired by Bonnie Honig's brilliant article "Declarations of Independence: Arendt and Derrida on the Problem of Founding a Republic," *The American Political Science Review*, Vol. 85, no. 1 (March 1991): p. 97-113.

38 Hannah Arendt. *On Revolution*. (New York: The Viking Press, 1963), p. 207.

According to Arendt, the course of the twentieth-century appears to confirm this association of beginnings with violence in its equation of revolution with war. Writes Arendt, "in our century there has arisen…an altogether different type of event in which it as though even the fury of war was merely the prelude, a preparatory stage to the violence unleashed by revolution…or where, on the contrary, a world war appears like the consequence of revolution."[39] Thus, the end of war has become revolution and violence their "common denominator".

The revolutions that have marked the "physiognomy" of the twentieth century have for Arendt distorted the true meaning of revolution. This distortion is two fold: first, revolution is seen as a beginning with no-end in the form of a "permanent revolution" kept in motion by professional revolutionaries; second, revolution is seen as inherently violent. Revolution is indeed a beginning, among the greatest of examples of humanity's capacity for political action, yet it is a beginning with a specific end: the constitution of freedom.

Arendt's central enterprise in this text is to retrieve this now lost meaning of revolution by returning to the site from whence this concept first emerges on the political and historical stage: the American and French Revolutions. By returning to these two events Arendt seeks to critically examine how these two modern revolutions dealt with the problem of establishing new political communities and, from their failures and successes at this task, to understand and expose how the distortions in this concept were set on course.

Before examining more closely her examination of these two events, it is important to first clarify what Arendt means by this notion of revolution as the constitution of freedom. Arendt's concept of freedom rejects the Kantian and Rousseauian formulations of freedom as the individual freewill that is sovereign and pre-existing in man. For her, the equation of freedom with the free will internalizes the experience of freedom so that freedom is conceived as "the intercourse with one's self (and)…no longer experienced in acting and in associating with others." Freedom then is at its essence best expressed in the political realm as political freedom.[40] It is thus not a transcendental ideal but as a world tangible reality, tied to our capacity as beginners to create spontaneous, new beginnings in the world, that is, to our capacity as creatures of action. For Arendt, to be free and to act are the same. Because freedom is dependent upon being put into action by coming together in the public realm with others, it is incessantly threatened with loss and therefore needs a guaranteed public space to safeguard its appearance and continuance. Thus, freedom must be constituted, that is, there must be a "home for politics" in the Arendtian construct.[41]

In On Revolution, Arendt tells us that it was this thirst for freedom, and in the American case in particular the "public happiness" elicited by the experience of freedom, that itself brought about revolution. She writes, "That there existed men in the Old World to dream of public freedom, that there were men in the New World who had tasted public

39 Hannah Arendt. *On Revolution*. (New York: The Viking Press, 1963), p. 8.

40 Hannah Arendt. "What is Freedom?". In *Between Past and Future*. (New York: Penguin Books, 1961), 163.

41 For this felicitous phrase see Jeremy Waldron. "Arendt's Constitutional Politics." In *The Cambridge Companion to Hannah Arendt*. Edited by Dana Villa. (Cambridge, UK: Cambridge University Press, 2000), p. 203.

happiness—these were ultimately the facts which caused the movement for restoration, for recovery of the old rights and liberties, to develop into revolution on either side of the Atlantic."[42] Yet, while the thirst for freedom was the "plot" moving and motivating the actors to revolution, it was a plot that was understood to be most fully actualized by the act of founding a new political community to ensure that this experience of freedom was preserved. The context of modern revolutions, however, radicalizes the act of founding by bringing it face to face with the problem of beginnings in ways previously unimagined by human beings.

To be sure, the problem of beginnings inherent in foundings has itself always been radical. As she explains,

It is in the very nature of a beginning to carry with itself a measure of complete arbitrariness. Not only is it not bound into a reliable chain of cause and effect, a chain in which each effect immediately turns into the cause for future developments, the beginning has, as it were, nothing whatsoever to hold on to; it is as though it came out of nowhere in either time and space. For a moment, the moment of beginning, it is as though the beginner had abolished the sequence of temporality itself, or as though the actors were thrown out of the temporal order and its continuity.[43]

The task of founding as the beginning of a new political community thus encounters two theoretical perplexities: first, this new beginning is a violation of the old order; second, bringing this radical disruption of an old order by reconstituting it in a new one involves establishing and justifying a new authority. In other words, to use Sièyes' illuminating distinction, the pouvoir constituant and the pouvoir constitué come into conflict.

As Arendt depicts it, for the pre-moderns this conflict is non-existent: the problem of beginnings is solved by the appearance of the Judeo-Christian God. The figure of God acts as a salve to tame the radical character of beginning. It curtails the arbitrary aspect of beginning by situating it in the hands of an "absolute beginner" whose "own beginnings are no longer subject to question" so that the event is "no longer arbitrary but rooted in something which…possesses a reason, a rationale of its own."[44] The problem of beginning thus appears unproblematic, at least not in the human sense; rather it was a divine problem for which there is no answer to the question "why?" only a "who" from which the beginning "springs and by which it is 'explained'."[45]

Modernity problematizes this resolution by bringing to the fore the question of legitimacy. The issue of legitimacy emerges first, as a result of the rise of a purely secular realm, and second, by the very character of modern founding. With the rise of the secular, the Roman trinity of authority-religion-tradition is dismantled. For Arendt, this is something to be cautiously celebrated. Arendt appears to suggest that without the loosening of the bonds of tradition and authority exacted by the rise of the secular, the American and French revolutionaries would not dared to dream that a new authority could be declared apart from the English monarch or the ancien régime. The rise of the secular thus unleashed the full potentiality of human action. Yet this emancipation came

42 Arendt, *On Revolution*, p. 139.
43 Arendt, *On Revolution*, p. 207.
44 Ibid, 207.
45 Ibid.

at a price: it posed new difficulties for these men as they sought to legitimate their authority to constitute a new political realm.

These difficulties can be situated in what for Arendt are the two interrelated elements of modern founding: constitutio libertatis and novus ordo saeclorum. The first, defined as the constitution of freedom, relates to the circle of legitimacy of constituent power and constituted power. The second, defined as the objective institutional order, relates more specifically to the concept of authority. The distinction drawn here by Arendt between power and authority is as we shall see later on crucial to an understanding of her theory of constitutionalism.

For Arendt, the grounds for constituent legitimacy are paved by the constituent assemblies and subsidiary authorities from which the modern Founder must derive their power to constitute. In this regard, the American revolutionaries were more successful than their French counterparts: the Founders coming together in Philadelphia "repeated only on a national scale what had been done by the colonies themselves when they constituted their state governments" thus secured their authority to constitute in the established constitution-making practices of the states.[46] The French revolutionaries, on the other hand, suffered "the great and fateful misfortune…that none of the constituent assemblies could command enough authority to lay down the law of the land…they themselves were unconstitutional."[47] For Arendt, then, the lesson to be drawn from the American case is that the legitimacy of the constituent power is derived from its capacity to give play to existing constituent practices. By doing so, the foundation and establishment of authority via the Constitution was successfully attained.

While the American revolutionaries were apparently successful in initially harmonizing the constituent power-constituted power circle, ultimately this was a qualified success. She writes,

The point to remember is that the American Revolution succeeded, and still did not usher in the novus ordo saeclorum, that the Constitution could be established "in fact," as "a real existence … in a visible form," and still did not become "to Liberty what grammar is to language."[48]

The problem for Arendt comes with the failure to fully institute spaces of public freedom by which the constituent activities of the founding generation could be more fully sustained for generations to come. In Arendt's words, "there was no space reserved, no room left for the exercise of precisely those qualities which had been instrumental in building it."[49]

Though Arendt describes this problem as a failure to create "spaces for public freedom", I would like to suggest that this problem should also be understood as interconnected with that of finding new absolutes in which to situate the authority of higher law. For Arendt, as noted earlier, modern founding exposes not only the legitimacy of the powers that constitute, but moreover, the power that is constituted and thus established as "higher law" not only for the founding generation but also for all generations to come. As Arendt describes it, both the American and French revolutionaries saw their task as that

46 Ibid, p. 164.
47 Ibid.
48 Ibid, p. 62.
49 Ibid, p. 234.

of finding "a new absolute to replace the absolute of divine power."[50] In the case of the French Revolution, that new absolute became the nation, the "sovereign people". She writes, "[L]ike the absolute prince, the nation in terms of public law could no wrong because it was the new vicar of God on earth."[51] The American Revolutionaries fared no better. We find traces of their problematic solution to this problem of absolutes in the Declaration of Independence, the document from which the Constitution, according to Arendt, derives its higher law-making authority. As she explains,

> Jefferson's famous words, "We hold these truths to be self-evident," combine in a historically unique manner the basis of agreement between those who have embarked upon revolution, an agreement necessarily relative because related to those who enter it, with an absolute, namely with a truth that needs no agreement since, because of its self-evidence, it compels without argumentative demonstration or political persuasion. By virtue of being self-evident, these truths are pre-rational—they inform reason but are not its product—and since their self-evidence puts them beyond discourse and argument, they are in a sense no less compelling than "despotic power" and no less absolute than the revealed truths of religion or the axiomatic verities of mathematics.[52]

The "revolutionary spirit" that had set the revolution in motion, while necessary, was itself threatening to the Founders. Their interest was not only in starting something new, but rather, as Arendt depicts it, "of starting something permanent and enduring."[53] The need for something enduring through a Constitution entrenched in absolutes, however, overcame this spirit. As a result, writes Arendt, "freedom, in its most exalted sense as freedom to act…(was) the price to be paid for foundation."[54] The irresistible impulse of constituent power was thus in the end suppressed by the unquestionable and mystic cloak of the absolute.

From this analysis we can see that for Arendt the nature of constitutional legitimacy does not derive in the absolute. On what foundations then can constitutional authority be established? And how can the legitimacy of this authority be sustained across the intergenerational horizon? I would like to suggest that what Arendt ultimately proposes—indeed the kernel of Arendt's constitutional theory—is a constitutionalism of resistance. To best articulate the radical nature of Arendt's constitutionalism of resistance, allow me to bring back into the conversation Michelman's notion of re-collection as inclusive translation.

Recall that for Michelman, the Bowers Court's dismissal of Michael Hardwick's liberty claims reveals an authoritarian conception of legitimacy since what is determined to be legitimate is what is dictated by a prior authority that is itself uncritically subsumed by the adjudicative act. Michelman rejects this conception and attempts to elaborate a conception of legitimacy that is more in-tune with the continually revisable activities of

50 Ibid.
51 Ibid, p. 191.
52 Ibid, p. 193. Italics added by author.
53 Ibid, p. 235.
54 Ibid.

"we, the people" through his concept of a jurisgenerative politics that works to include the voices from the margins through a process of re-collection as inclusive translation. This re-collection works as a continued and contested debate among participants in a political community, where participants see themselves as involved in not just "one debate, but in a more encompassing common life, bearing the imprint of a common past, within and from which the arguments and claims arise and draw their meaning."[55] Michelman describes this common world as a fund of normative narratives through which a political community and its individuals imagine and re-create themselves as "a people". As such, one imagines the intergenerational dialogical constitutionalism described by Michelman as a process akin to looking at a family album: we look back the pictures and re-call the memories which these pictures (values, norms) elicit, we may even add new pictures into this narrative, but at the end we do so to imagine ourselves as one happy family. The original fund is an unquestionable snap-shot in time. The violence generated by the unrecognized, missing faces (colored, gendered) left out from the original snap-shot (fund) is never fully acknowledged. Rather, these new, previously excluded faces must "re-collect" themselves into this fund. This much is egregiously revealed, as Bell and Bansal previously pointed out, because recognition of these excluded voices is ultimately dependent upon the "faith" of the judiciary to include them in the constitutional dialogue. Thus, in the final analysis, Michelman's concept of jurisgenesis occurs in a less than democratic, vertical direction.

In contradistinction, Arendt's theory presents what I will term (following Deleuze and Guattari) a rhizomatic model of constitutional legitimacy: a non-hierarchical, non-centered network structure of democratic constitutional legitimation.[56] This model is presented via three conceptual moves: first, the rejection of the absolute as a foundation for constitutional authority; second, her conceptualization of and distinction between authority and power and the implications of this distinction for intergenerational constitutional legitimacy; and third, the need to create and secure spaces for the exercise of political freedom, wherein the constituent power can gain full traction as a constitutional principle. I shall elaborate on these three points below.

First, Arendt's rejection of the absolute (e.g. divine power, the sovereign "people") challenges us to rethink the means by which law may gain validity in non-transcendental, historically situated ways. The implication of this move is radical: the deconstruction of a key ontological category of popular American mythology—"The People". This move is liberating: it calls for re-situating the legitimacy of higher law making within the conditions of possibility of existing and emergent political groups, rather than in the domain of a unitary, mythic agent. The jurisgenerative process by which constitutional legitimacy is attained, then, is transformed from the representation of authority and consent to the mediation and reproduction of power.

Second, Arendt's conception of constitutional legitimacy is premised upon her distinctive conception of and distinction between authority and power. Both are

55 Michelman, *Law's Republic*, p. 1513.

56 See Gilles Deleuze and Felix Guattari. *A Thousand Plateaus*. Trans. Brian Massumi. (Minneapolis: University of Minnesota Press, 1987), pp. 3-25. For an excellent discussion and application of Deleuze and Guattari's rhizomatic democratic model, see Antonio Negri and Michael Hardt. *Empire*. (Cambridge, MA: Harvard University Press, 2000).

embedded within her understanding of foundation. For Arendt, the original act of foundation is important not simply because it establishes a framework for government or a litany of rights, but because it exemplifies what must continue to occur for the political realm to be constituted beyond the Founding generation: the principle of constituent power. The principle of constituent power, as noted earlier, consists of the qualities exercised in the act of foundation: the coming together of individuals for the purpose of determining together through common deliberation, rather than force, to create a new political realm and jointly govern themselves.

According to Arendt, this power then, is the power of common political action and it is a power that is, moreover, held together by our capacity for making and keeping promises. Indeed, the promise is what permits the intergenerational horizon of commitment. She writes,

Just as promises and agreements deal with the future and provide stability in the ocean of future uncertainty where the unpredictable may break in from all sides, so the constituting, founding, and world-building capacities of man concern always not so much ourselves and our own time on earth as our "successor," and "posterities". The grammar of action: that action is the only human faculty that demands plurality of men; and the syntax of power: that power is the only human attribute which applies solely to the wordly in-between space by which men are mutually related, combine in the act of foundation by virtue of the making and the keeping of promises, which, in the realm of politics, may well be the highest human faculty.[57]

Authority, then as Arendt sees it, emerges from this practice of political action as promise making and keeping. To clarify this point, recall again Arendt's discussion of the American Declaration of Independence as the source of authority for the subsequent Constitution. As Bonnie Honig's notes, for Arendt it was the "We hold", as opposed to appeals to absolute "self-evident truths", that empowered that specific political community by virtue of the fact that it both "constitutes a free coming together and gives public expression of a shared agreement to abide by certain rules in the community's subsequent being together." This "We hold" was both "a promise and a declaration" signaling "the existence of a singularly human capacity: that of world-building."[58] Accordingly, then, Arendt sees this as the only viable conception of authority in modernity. Rather than appeals to an absolute, authority can best be based on a common practice of promising, a constitutional practice that is sustained not merely by the promises of the past but by new and emerging actors continually coming together to build upon these promises, make new ones, and thus re-authorize the binds that tie them as a political community. As such, by resisting a deification of the founding as the sole source of authority and legitimacy, the beginning is pried open temporally, one promise in a horizon of future ones.

Finally, this circle of legitimacy of authority and power is grounded by the imperative for creating and guaranteeing spaces for the continued exercise of political freedom within the polity. Recall that for Arendt the shortcoming of the American example was that "there was no space reserved, no room left for the exercise of precisely those qualities

57 Arendt, *On Revolution*, p. 175.
58 See Honig, "Declarations of Independence," p. 101. Also see Arendt, *On Revolution,* p. 175.

which had been instrumental in building it." Thus, the activity of founding through common deliberation, action, and promise keeping that had been so crucial for the Founders remained something of a distant past. In Arendt's view, this shortcoming resulted from the Founder's fear of this very revolutionary spirit, of the unleashing of constituent power. This fear was not unfounded, but rather exposes the tension between this force of beginning and its desired outcome of creating something permanent and enduring:

If foundation was the aim and the end of revolution…embodying this spirit and encouraging it to new achievements, would be self-defeating…nothing threatens the very achievements of revolution more dangerously and acutely than the spirit which has brought them about.[59]

This threat is unavoidable. She lauds Jefferson for being one of the few men of the Founding generation to be more keenly aware of and preoccupied with this problem. Arendt, however, finds his scheme of recurring revolutions a less than palatable option. "Even in their least extreme form, recommended as the remedy against 'the endless circle of oppression, rebellion, reformation' they would either have thrown the whole body politic out of gear periodically or, more likely, have debased the act of foundation to a mere routine performance."[60] Against this proposal, she finds Jefferson's call for developing concrete organs that can "each man a participant in governance", and ideal developed in his concept of "elementary republics" where "the voice of the whole people would be fairly, fully, and peaceably expressed, discussed, and decided by the common reason" of all citizens,[61] one important and forgotten proposal. She likewise sites the example of the 1848 Paris Commune as an ideal type.

But how do these organs of "normal" every day governance suggests new and more radical spaces for political transformation? I believe properly understanding Arendt's call for creating spaces that give play to the spirit of revolutionary beginnings entails making more porous the distinction between the normal and the "exceptional." Spaces of governance can become spaces for transformation, spaces which allow for the emergence of new voices and discourses, for organizing new challenges against an existing authority, and ultimately prompting radical change and "new beginnings." If there is a final lesson we can glean here is that new beginnings are continually possible wherever spaces are created that give play to our capacity for making and remaking our political world.

Much remains to be rediscovered in Arendt's work and to be explored in her constitutional thought. It has been the hope of this paper to begin this work and to suggest the ways in which Arendt's radical understanding of constitutional authority and democracy can stir the waters of complacency of contemporary constitutional thought and pave the path for a truly self-critical constitutionalism. The Arendtian challenge however remains and awaits us.

59 Arendt, *On Revolution*, p. 235.
60 Ibid, 237.
61 Ibid, p. 253.