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Foundation and Revolution

Hannah Arendt and the Problem of Legitimacy and Stability in Constitutional Consolidation

MEL A TOPF

This chapter investigates the relations of revolutionary consolidation to the American constitutional founding. The concepts of consolidation and augmentation have received little attention in relation to the central question of constitutional legitimacy. Hannah Arendt's theory of revolution is paradigmatic in this respect. Notwithstanding her influential discussion of foundation, Arendt gives relatively little attention to the pragmatic role of consolidation in acts of constitutional founding. Further, scholarly analyses of Arendt on revolution rarely offer critiques of her concept of foundation in this respect. I focus on Arendt partly owing to her influential theories regarding founding of bodies politic and partly because I believe that within her political thought on what for her was the uniquely successful consolidation of the American Revolution lies an explanation for that success that she herself does not expressly offer. Further, Arendt's thinking may be a useful launchpad in considering the dynamics of founding moments.

The historical barriers to the successful consolidation of revolutionary acts are a function of negotiating the extraordinarily difficult relation of revolution to legitimacy. Arendt's theory of foundation reflects the vexed relation of founding to legitimacy and to the order of stability. 'Arendt is not considered as a thinker of order but as a thinker of ... revolutionary beginnings.'¹ I will look at the creation of the early US state constitutions (those developed 1776 to 1780) in order to argue that their purported legitimacy as foundational revolutionary acts was grounded in what Arendt calls the modern identification of fabrication with action, with the consequent reliance on what she calls the 'central position of

¹ Christian Volk, 'The Decline of Order: Hannah Arendt and the Paradoxes of the Nation-State' in Seyla Benhabib (ed), *Politics in Dark Times: Encounters with Hannah Arendt* (Cambridge University Press, 2010) 173.

the concept of process.² I will extend Arendt's view of foundational acts to show that the consolidation phase of the American Revolution was widely perceived as guaranteeing the Revolution's legitimacy by fabricating stable spaces for its augmentation, that is, institutions, which in turn are perceived as made through the force of speech acts – written constitutions. The unprecedented reliance on the *ethos* of fabrication was a crucial ground for the perceived legitimacy of the consolidation of the American Revolution. Everywhere the revolutionaries framed their narrative of events in terms of fabrication, a frame, for that era, of great cognitive power.

This was reinforced by the written and printed nature of the early constitutions, which was crucial to both the making and the consolidation of a constituent and stable post-revolutionary body politic. The emergence of a print culture 'reconceptualized the public sphere' (Gordon Wood) through what was in the 1770s the unprecedented making of constituting documents that had the force and effect of consolidation. The perceived stabilising force of the making of written constituting documents was crucial as 'a foundation never more to be shaken', as one of the framers of the first Pennsylvania Constitution put it. While Arendt, like many writers on revolution and founding, does not explicitly develop this important element at length, I will show that it is crucial to her views on the problem of the relation of revolution and founding on the one hand and to legitimacy, stability and consolidation on the other.

I. Hannah Arendt and the Problem of Revolutionary Consolidation

In her influential book *On Revolution*,³ Hannah Arendt largely avoids the question of revolutionary consolidation in her treatment of the American Revolution. Somewhat curiously, she seems to adopt that revolution as a kind of norm, against which later revolutions in France, Russia and elsewhere failed, owing mainly to violence. She celebrates, with little attempt at explaining, the relatively non-violent character of the American Revolution. She simply notes, as she put it elsewhere, that the American revolutionaries 'founded a completely new body politic without violence and with the help of a constitution.'⁴ She separates the act of foundation from development of a constitution, which, as she says, merely helped.

For Arendt, it is the foundation of a body politic, the *polis*, which is crucial. Central to her thought is that human beings gain their humanity, their very identity as human, only to the extent that they are political. She was inspired by the ancient Greeks, for whom 'outside the body politic man's life was not only and

² Hannah Arendt, *The Human Condition*, 2nd edn (University of Chicago Press, 1998) 294–304.

³ Hannah Arendt, *On Revolution* (Viking Press, 1963; revised edn, 1965).

⁴ Hannah Arendt, *Between Past and Future* (Viking Press, 1961) 140.

not even primarily insecure ... it was without meaning and dignity because under no circumstances could it leave any trace behind it.⁵ It is only through action (as opposed to labour and work) that humans can be free, can exercise their unique capacity to initiate, to found, to begin something new. Hence, 'the *raison d'être* of politics is freedom, and its field of experience is action.'⁶ Action is never possible except in the *polis*, in the presence of others in a public space: 'to be isolated is to be deprived of the capacity to act.'⁷ Indeed, 'without a space of appearance and without trusting in action and speech as a mode of being together, neither the reality of one's self, of one's own identity, nor the reality of the surrounding world can be established beyond doubt.'⁸ This space of appearance, of speech and action, where humans may come together has endurance and stability only because of the human capacity for fabrication. Fabrication is for Arendt a kind of second-order category of the *vita active*, for it is by erecting a concrete world of lasting things that action can be protected and be remembered.⁹

Working against action and fabrication, in danger of destroying them, is the endless cycle of nature, which must, as far as possible, be kept out of the *polis* or at least be marginalised to protect action and fabrication. Humans of course never escape nature. They may act and fabricate, but they also must engage in the third element of the human condition – labour – and they must consume the fruits of labour to survive, since we are always subject to the demands of biological necessity. Labouring and consuming are life processes, the most futile of human endeavours because they leave nothing behind. Labour is opposed to freedom, for labour 'despite its futility is born of great urgency and motivated by a more powerful drive than anything else, because life itself depends upon it.'¹⁰ For Arendt, 'the activity corresponding to the status of poverty was laboring.'¹¹ Poverty, then, which 'forces free men to act like a slave',¹² can have no place in the *polis* owing to the threat it poses both to freedom and to the very stability of the public realm.

Arendt attributes the relative success of the American Revolution and 'the failure of the men of the French Revolution' to 'the predicament of poverty [that] was absent from the American scene but present everywhere else in the world.'¹³ The poor, even with some assurance of self-preservation, are bound by the necessity of labouring and consuming, so that even after 'their self-preservation has been assured ... their lives are without consequence, and ... they remain excluded from the light of the public realm.'¹⁴ For Arendt, the French Revolution failed owing to

⁵ *ibid* 71.

⁶ *ibid* 146.

⁷ Arendt (n 2) 167.

⁸ *ibid* 187.

⁹ *ibid* 120.

¹⁰ *ibid* 76.

¹¹ *ibid* 110.

¹² *ibid* 64.

¹³ Arendt (n 3) 62–63.

¹⁴ *ibid* 63.

the intrusion of poverty – of necessity – into the public realm. There the insidious pressures of compassion demanded not only that the people be liberated from tyranny, as in America, but that the poor ‘had to be liberated once more, and compared to this liberation from the yolk of necessity, the original liberation from tyranny must have looked like child’s play’.¹⁵

Arendt’s view of the success of the American Revolution has what one writer calls a curious unreality.¹⁶ Arendt does note the role of institutional frameworks and constitutionalism, that is, what might be considered consolidation of the revolution, but, as another writer puts it, she is ‘not as concrete as one would like’.¹⁷ In *On Revolution*, ‘the American Revolution is rendered in deceptively pure tones ... We are presented with a sharp contrast between the violence of the French revolutionaries and the legal fairness of the Americans’.¹⁸ Arendt fails to connect the events of the American Revolution, and especially the concurrent and unprecedented state constitution-making, with its most surprising outcome, compared to the French and subsequent revolutions: the successful founding of stable and enduring constitutional structures. In short, she fails to account for the consolidation of the American Revolution. She never succeeds in explaining the surprising stability, and equally surprising universal perception of the legitimacy, of the revolutionary-era constitutions. The nature of the early constitutions and of the governments they created seems to be of little interest to Arendt. The ‘ever-recurring phenomenon of government remained to her a matter of so little urgency, if not indeed one of indifference, despite her relevant discussion of the separation of power principle ... the inherent goal of all political action remains oddly obscure. For that goal is decision’.¹⁹

The problem is twofold. First, Arendt’s concept of action foregrounds its unpredictable nature and celebrates the human capacity of beginning, witness and testimony to the human capacity for freedom. ‘It is the very nature of a beginning to carry with itself a measure of complete arbitrariness ... the beginning has, as it were, nothing whatsoever to hold on to.’²⁰ A revolution for Arendt occurs only ‘when change occurs in a sense of a new beginning, where violence is used to constitute an altogether different form of government, to bring about the formation of a new body politic’.²¹ This valorising of new beginnings, of ‘initiatory action with all of its inherent spontaneity, uncontrollability, and unpredictability’,²² effectively prevents Arendt from coming to terms with the

¹⁵ *ibid* 69.

¹⁶ James Miller, ‘The Pathos of Novelty: Hannah Arendt’s Image of Freedom in the Modern World’ in Melvyn A Hill (ed), *Hannah Arendt: The Recovery of the Public World* (St Martin’s Press, 1979) 181.

¹⁷ Jeremy Waldron, ‘Arendt’s Constitutional Politics’ in Dana R Villa (ed), *Politics, Philosophy, and Terror: Essays on the Thought of Hannah Arendt* (Princeton University Press, 1999) 210.

¹⁸ Miller (n 16) 181.

¹⁹ Dolf Sternberger, ‘The Sunken City: Hannah Arendt’s Idea of Politics’ (1977) 44 *Social Research* 145.

²⁰ Arendt (n 3) 207.

²¹ *ibid* 28.

²² Peter Fuss, ‘Hannah Arendt’s Concept of Political Community’ in Hill (n 16) 159.

mundane goals and the mechanics of their actual operation in the public realm. Hence, Arendt is 'not considered a thinker of order but as a thinker of contingency, of revolutionary beginning'.²³ Another writer observes that Arendt 'was far from being a constitutional engineer; she was far more concerned with the spiritual aspects of politics'.²⁴ In other words, her interest is in founding and not in consolidation or augmentation. Other than the purported absence of poverty, Arendt never attempts to get to the basis for the American Revolution's success in consolidating the revolution.

Arendt pays little attention to the question – central to explaining the success of the American Revolution – of how this new beginning was consolidated, and how it developed into a stable and legitimate constitutional system and so avoided the chaos, violence and instability of revolutionary governments in France. She notes in passing, and somewhat inconsistently, that America's success can be attributed to 'the relatively nonviolent character of the American Revolution', though she acknowledges only that the stability of the resulting political structures is 'surprising'.²⁵ The closest she comes, as Jurgen Habermas notes, is to place 'more trust in the venerable figure of the contract than in her own concept of a praxis. She retreats ... into the contract theory of natural law'.²⁶

Arendt, then, is a thinker of contingency, of revolutionary foundings. Consolidation is simply not a central concern either in her thought on revolution, or for that matter in her thinking about human action and speech and their role in creating a political realm. In one sense, she does not differ from many major writers on revolution. The Marxist analysis of revolution, which Arendt did not accept, has in common with her a lack of interest in consolidation, focusing instead on historical inevitability, so that human action and its capacity for founding play no role. In the Marxist view, consolidation warrants little if any attention because, as Jacques Barzun said, it is almost 'automatic': 'The revolution over, Marx's communist society gets itself established by sheer historic necessity. Communism comes without any special plan.' There is 'an as yet unknown and more cheerful message for the proletariat' on the revolution's other side, but that will come about without human agency.²⁷

Marx acknowledges the violence necessary to revolution, speaking of the 'point where war breaks out into open revolution, and where the violent overthrow of the bourgeoisie lays the foundation for the sway of the proletariat'.²⁸ The next step,

²³ Volk (n 1) 173.

²⁴ Dick Howard, 'Keeping the Republic: Reading Arendt's *On Revolution* after the Fall of the Berlin Wall' in Benhabib (n 1) 281.

²⁵ Arendt (n 4) 140.

²⁶ Jurgen Habermas, 'Hannah Arendt's Communications Concept of Power' (1977) 44 *Social Research* 24.

²⁷ Jacques Barzun, *Darwin, Marx, and Wagner*, 2nd edn (Doubleday, 1958) 165. See also at 161: the 'Marxian process is almost, but not quite, automatic'.

²⁸ Karl Marx and Friedrich Engels, *Communist Manifesto* (New York Labour News Co, 1948 [1848]) 31.

the dictatorship of the proletariat, continues the revolutionary violence: the proletariat, now supreme, will ‘wrest . . . all capital from the bourgeoisie, to centralize all instruments of production in the hands of the state’. The coercion and suppression of liberty are ‘of course’ a requirement: ‘Of course, in the beginning, this cannot be effected except by means of despotic inroads into bourgeois rights.’²⁹ Afterwards, the post-revolutionary state will famously wither away, apparently automatically, leaving what he calls ‘free development for all.’³⁰ Lenin reveals the same pattern. Suppression, he writes, is ‘still necessary’ during the transition from capitalism to communism, after which the new era will simply arrive. With the state’s withering away, the people will somehow ‘become accustomed to the observance of the elementary rules of social life that have been known for centuries’, people observing these rules ‘without force, without compulsion, without subordination, without the *special apparatus* for compulsion which is called the state.’³¹

II. Consolidation and the Problem of Legitimacy

Arendt, in addressing the American Revolution and its successful consolidation, cannot avoid the vexing question of how a revolution, which by its nature was illegitimate, resulted in a political system that was both stable and legitimate. For her, the ‘problem of founding the new body politic was effectively one of legitimacy [deriving] . . . from the perplexities inherent in every beginning, whose “bewildering spontaneity” means that no cause can be found to prove that the founding act of freedom was necessary and therefore justified. Without such authority, a new legal constitution is at permanent risk of being undone, as was the French constitution, which was replaced fourteen times between 1789 and 1875.’³²

There can be no consolidation without legitimacy. Arendt, fascinated by the American founders’ revolutionary break with the past, never quite accounts for the legitimacy of the extraordinarily successful consolidation of the revolution through constitution-making. For her, Dick Howard writes, the ‘need to break with the past in order to found the new means that the new order has itself no proper legitimacy; its only foundation is the violent revolutionary “crime” that destroyed the old order. This was the rock against which the French revolutionary hopes crashed again and again.’³³ The disconnect between revolution and legitimacy ‘is precisely the dilemma of revolutionaries: how to establish a legitimate order when the existing order labels that act of establishment as fundamentally illegitimate.’³⁴

²⁹ *ibid* 44–45.

³⁰ *ibid* 47.

³¹ VI Lenin, *State and Revolution* (International Publishers, 1932 [1917]) 74.

³² Finn Bowring, *Hannah Arendt: A Critical Introduction* (Pluto Press, 2011) 73.

³³ Howard (n 24) 278.

³⁴ John McGowan, ‘Must Politics Be Violent? Arendt’s Utopian Vision’ in Craig Calhoun and John McGowan (eds), *Hannah Arendt and the Meaning of Politics* (University of Minnesota Press, 1997) 277.

To confront this in her study of the American Revolution, Arendt relies not very convincingly on traditional social contract theory and argues for a continuous line of legitimacy from the Mayflower Compact to the US Constitution.³⁵ For her, the Mayflower Compact is a social contract arising from a group of ship's passengers thrown into a state of nature as their ship arrived at a vast wilderness. Arendt here tips into the view, commonly expressed during the revolutionary era, that independence put the colonies into a state of nature where they would remain until they developed constitutions. Arendt notes neither the then-common confusion between forming a society and framing state governments nor the fact that the framers of the state constitutions never asserted this as a ground for the legitimacy of the new constitutions.³⁶

Yet, in revolutionary America, the entirely new and unprecedented constitution-making that began in 1776 was everywhere accepted as the legitimate means of consolidating the revolution. 'By 1776 the idea of a constitution ... had almost achieved the status of self-evident truth. That these new constitutions were formulated in writing evoked neither resistance nor amazement at such a novelty.'³⁷ Arendt appreciates this astonishing constitution-making, but she seems to presume that because the people had a revolutionary (but not yet a legal) right to do so, they had the ability to do so. She does not satisfactorily account, in these terms, for either the success of American constitutions in consolidating the revolution or the failure of the French revolutionary constitutions to do so. The French accepted, as did the Americans, such notions as popular sovereignty, natural law and the social compact, but these failed to give legitimacy to the revolutionary governments in France, constitutional or not, none of which overcame the need for both the rhetoric and the acts of violence.

The unique success of the American Revolution and especially the absence of systemic violence (which so impressed Arendt) 'cannot be fully explained by the theoretical insights' of the founders, who were 'preoccupied by the absence of an absolute authority capable of legitimizing the legal foundations of the new republic.'³⁸ This is where Arendt relies on her concept of foundation, the establishment of a body politic comprising communities of free people. 'It is this initial step which throughout Hannah Arendt's thinking is so preeminent that political authority can, to her, be flatly traced back to past religious sanction and legitimation, back to the political act of founding and to its enduring presence.'³⁹

³⁵ Bowring (n 32) 77. For Arendt on the Mayflower Compact, see Arendt (n 3) 165–73.

³⁶ See generally Gordon Wood, *The Creation of the American Republic* (Norton, 1972) 273–74, 282–91. The Mayflower Compact appears to have had little influence on American revolutionary-era writers.

³⁷ Willi Paul Adams, *The First American Constitutions* (University of North Carolina Press, 1980) 22. At the call of the Continental Congress, all 13 of the new states considered, in legislatures or conventions, the adoption of written constitutions. Eight states adopted constitutions in 1776, two in 1777 and one (Massachusetts) in 1780. Two states, Connecticut and Rhode Island, decided to retain their royal charters with some changes, though not without debate. See *ibid* 66–68.

³⁸ Bowring (n 32) 75.

³⁹ Sternberger (n 19) 139. See Arendt (n 3) 24.

The problem is that Arendt's concepts, at least as applied to the American Revolution, seem, to use James Miller's term, almost 'magical'.⁴⁰ True to her theory of action and foundation, but not true to the history of the American Revolution (Arendt's treatment of which Miller somewhat harshly calls 'shoddy'),⁴¹ Arendt marvels at how the American founders came together to found an enduring, stable and legitimate republic; that is, they uniquely consolidated a revolution. She assertively if vaguely attributes the broad acceptance of the new constitutions by the people to the 'organizational impulses of the people themselves'.⁴² Here she seems to rely on her concept of spontaneous councils that she believed arise during revolutions. However, she pays little attention to any purported role they may have played in the American Revolution, where much of the activity occurred in duly elected and organised legislatures and conventions on the one hand, and in already-established and constituted town meetings on the other, and not in any spontaneously appearing councils.

The closest the Americans came to any such revolutionary councils were the committees of correspondence that the colonies established in 1773, originally proposed by John Adams for Massachusetts but adopted everywhere. The committees were the colonies' first form of governance that functioned independently of royal authority. The last royal governor of Massachusetts, Thomas Hutchinson, later lamented that independence began with the creation of these committees, calling them 'a most glaring attempt to alter the constitution of the colonies ... It was an act which ought to have been considered as an avowal of independency'.⁴³ It is surprising, then, that Arendt nowhere mentions the committees of correspondence.

Arendt inadequately addresses the difficult question of the consolidation of the revolution in America and does not account for the legitimation that consolidation inevitably required in that, or in any, revolution. We must look at this question of legitimation. Yet, the concept of legitimacy has not been addressed with much success, being neither clearly defined nor related convincingly to political activity, nor much studied empirically. Some 40 years ago, two students of the subject said that 'the nature and underpinnings of legitimacy are among the most neglected aspects of the dynamics of society',⁴⁴ and this has changed little since. Whatever the nature of legitimacy, it includes centrally the related elements of consent and perception. An act by those in power must be seen as having arisen from already-established and consented-to communal norms.⁴⁵

⁴⁰ Miller (n 16) 183, 181.

⁴¹ *ibid* 181.

⁴² Arendt (n 3) 280.

⁴³ Thomas Hutchinson, *The History of the Province of Massachusetts Bay from the Year 1750 until June 1774* (first published 1828), quoted in Adams (n 37) 38.

⁴⁴ Craig A McEwen and Richard J Maiman, 'In Search of Legitimacy: Toward an Empirical Analysis' (1980) 8 *Law and Policy* 257. But see Mlada Burkovansky, *Legitimacy and Power: The American and French Revolutions in International Political Culture* (Princeton University Press, 2002) 2, 70 (on legitimacy as 'a necessary component of authority and thus of power').

⁴⁵ R. Francesconi, 'The Implications of Habermas' Theory of Legitimation for Rhetorical Criticism' (1986) 53 *Communication Monographs* 20; A Hyde, 'The Concept of Legitimation in the Sociology of Law' [1983] *Wisconsin Law Review* 379.

It was the early constitution-making of 1776 to 1780, all observers including Arendt agree, that effectively consolidated the revolution and provided its legitimacy and stability. But what was it about what Arendt calls ‘this spontaneous outbreak of constitution-making in all thirteen colonies ... so that there existed no gap, no hiatus, hardly a breathing spell between the war of liberation ... and the constitution of the new states’⁴⁶ that made these early written state constitutions so immediately and broadly perceived as legitimate? While the unprecedented constitution-writing was spontaneous, the documents were framed on the authority of the Continental Congress by formally elected representatives who, with the rejection of the monarchy, saw themselves as sovereign. Popular sovereignty was a necessary but by no means sufficient element of legitimacy, partly, as Gordon Wood and others have shown, because there was widespread disagreement in the revolutionary era as to what this meant in practice, ranging from mob rule to duly elected legislatures and conventions.⁴⁷

For Arendt, ‘the legitimacy of rule in general, and the authority of secular law and power in particular had [before the modern era] always been justified by relating them to an absolute source not of this world’. She acknowledges that ‘since it was the task of the revolutionaries to establish a new authority, unaided by custom and precedent and the halo of immemorial time, they could not but throw into relief with unparalleled sharpness the old problem ... of the source of law which would bestow legality upon positive, posited laws, and the origin of power which would bestow legitimacy upon the powers that be.’⁴⁸ But if the ‘chief perplexity’ of the revolutionaries ‘was where to find an absolute from which to derive authority for law and power’,⁴⁹ Arendt does not succeed, as I have tried to show, in demonstrating what ‘absolute’ the Americans found that would successfully consolidate their revolution through written constitutions.

While Arendt does not directly offer sufficient explanation, I believe that elsewhere in her thought, she does provide the basis for elucidating the successful consolidation of the American Revolution.

III. Legitimacy and Fabrication

In 1776, the American revolutionaries were amazed by the opportunity independence offered to engage in what Gordon Wood describes as the provocative challenge that was somehow providentially directed at them.⁵⁰ They were everywhere ‘thrilled at the prospect of forming their own government ... Few doubted the extraordinary, almost millennial, character of it all’.⁵¹ Their astonishingly firm

⁴⁶ Arendt (n 3) 139–40. Actually, Connecticut and Rhode Island retained their royal charters.

⁴⁷ Wood (n 36) 329–30, 362–63, 371–72.

⁴⁸ Arendt (n 3) 159.

⁴⁹ *ibid* 160.

⁵⁰ Wood (n 36) 127.

⁵¹ Marc W Kruman, *Between Authority and Liberty* (University of North Carolina Press, 1997) 17, 18.

confidence that they could, for the first time, legitimately frame new governments *de novo* – and thereby consolidate the revolution – through written constitutions is itself remarkable. Some observers remarked that the Continental Congress had trouble completing business because so many members went home to participate in framing new state governments. ‘*Constitutions employ every pen*’, wrote Francis Lightfoot Lee in November 1776.⁵² That this was the best way, if not the only way, to consolidate the revolution was with equal confidence taken virtually for granted.⁵³ As soon as the possibility of independence began to be debated, writers seemed to accept with little or no contradiction that Americans could ‘erect more eligible systems of government on the ruins of the colonies’ monarchical constitutions.⁵⁴ William Gordon of Massachusetts, using the language of fabrication employed everywhere, declared: ‘Let Americans mold their governments.’⁵⁵ John Adams exulted at ‘how few of the human race have ever enjoyed an opportunity of making an election of government, more than of air, soil, or climate for themselves or their children!’⁵⁶ James Burgh noted that all previous forms of government were the results of chance or force, but Americans were ‘the first people whom heaven has favoured with an opportunity of ... choosing the form of government under which they shall live.’⁵⁷

It is these very frequent references to framing, forming, moulding, erecting and such that bring us back to Hannah Arendt. The earlier colonial charters and compacts were not perceived as ‘framing’ completely new structures of government on, so to speak, their own volition and self-referenced authority. While Arendt is much taken with the Mayflower Compact, her view of it as an instance where ‘a group of people could create a valid government for themselves by means of a covenant, compact, or constitution’⁵⁸ is not accurate. It sets aside a distinct, in fact unique, characteristic of the revolutionary era’s constitution-making: the revolutionaries in America saw themselves as actually, quite literally, fabricating new governments. Their self-awareness in engaging in such a constitutional founding moment was itself unprecedented. In the Mayflower Compact, the group aboard ship vows to ‘combine our selues together into a ciuill body politick.’⁵⁹ But while the Compact states the intention to frame a government, it does not itself do so, and at any rate acknowledges that any such framing derives from the authority of God and the king.

⁵² Quoted in Wood (n 36) 128.

⁵³ *ibid* 129.

⁵⁴ Wood (n 36) 129.

⁵⁵ William Gordon, *The Republican* (30 January 1776), quoted in Wood (n 36) 128.

⁵⁶ John Adams, *Thoughts on Government* (1775), in *The Revolutionary Writings of John Adams* (Liberty Fund, 2000).

⁵⁷ James Burgh, *Political Disquisitions*, quoted in Wood (n 36) 127. On the widespread excitement of the American Revolutionaries, see Kruman (n 51) 17–19; and Wood (n 36) 127–32.

⁵⁸ Arendt (n 3) 309.

⁵⁹ Mayflower Compact (1620); see the Mayflower webpage, mayflowerhistory.com/mayflower-compact.

Similarly, the colonial charters provided for structures of government, but they invariably and quite emphatically asserted royal authority for doing so. It was the king who did the framing ‘by our royal will and pleasure’, the charter simply documenting and certifying it, and specifically delegating authority to the colonial leaders to carry it out.⁶⁰ Rhode Island’s Royal Charter of 1663 is entirely typical in this respect, declaring that King Charles II, who ‘by our will and pleasure ... and our especial grace, certain knowledge, and mere motion ... have ordained, constituted and declared’ that the petitioners ‘shall be ... a body corporate and politic.’⁶¹ The charter creates the offices of governor and others, a judicial system and a legislative body, each with duties specified, but these are created by ‘mere motion’, by the grace and sheer will of the sovereign.⁶² It is a rhetoric of will, not of fabrication.

The early American constitutions in contrast did not designate the frame of government as handed down from a higher authority. How was it that this notion of framing governments simply by the language of a written document was so widely and enthusiastically accepted as an objectively legitimate means of consolidating the revolution? It was in part owing to writing and printing. By the eighteenth century, printing was widely perceived as affirming a document’s credibility, to some extent because the text could be relied upon as stable and enduring, and because of the relative ease and cheapness of promulgation.⁶³ This helped to confirm the central and overriding purpose of constitutions: ‘written documents as barriers to encroaching power.’⁶⁴ James Cannon of Pennsylvania anxiously asserted that in order to prevent constitutional rights from being ‘lost forever’, they must be ‘written down in immutable documents.’⁶⁵ This was a flashpoint in the debates between federalists and anti-federalists over whether the rights and principles of constitutions ‘actually have to be specified and written down in order to be in force’, reflecting, Gordon Wood notes, ‘a basic ambiguity in the American mind about the nature of law that was carried into the Revolution.’⁶⁶ But constitutions in their capacity as frames of government were everywhere understood as necessarily written, since they were meant to withstand anticipated challenges to the people’s liberties, when the documents would be invoked during inevitable disputes over interpretation and application.

⁶⁰ The quote is from Rhode Island’s Royal Charter of 1663, in *State of Rhode Island Constitution and Royal Charter* (1986) 30.

⁶¹ *ibid* 31–32.

⁶² The colonial charters are collected in Yale Law School’s Avalon Project. See the Avalon website: avalon.law.yale.edu.

⁶³ See Ian Williams, ‘“He Credited More the Printed Bookes”: Common Lawyers’ Receptivity to Print, c. 1550–1640’ (2010) 25 *Law and History Review* 39.

⁶⁴ Wood (n 36) 268. Closely correlated with this was the unprecedented development of a ‘reading public that produced and consumed the numerous pamphlets, newsletter, and books’ flooding Europe and America in the eighteenth century. See Carolina Armenteros, ‘Epilogue: The Forced Inhabitant of History’ in Carolina Armenteros and Richard Lebrun (eds), *The New Infant de Siècle: Joseph de Maistre as a Writer* (University of St Andrews, 2010) 99.

⁶⁵ Wood (n 36) 293.

⁶⁶ *ibid* 292–93.

That the early American constitutions were written and printed does not, of course, itself account for the extraordinary confidence the revolutionary era had in the legitimacy of, as it were, constructing governments on paper. That it was extraordinary, that there was nothing inherently automatic about written constitutions as effective consolidators of revolutions, is evidenced by the revolution in France and that country's repeated (and mostly failed) creation of constitutions – some 14 in the 85 years after 1789.

The question remains: why were the early written constitutions so widely and enthusiastically accepted as the legitimate instruments to consolidate the American Revolution? While Hannah Arendt largely failed, as we have seen, to account for the consolidation phase of the American Revolution, I believe she does offer an explanation elsewhere in her work on the human condition, but not addressed in *On Revolution* or her other discussions of revolution. We may find it in Arendt's concept of fabrication and its unique role in the public life of a secular polity.⁶⁷ She argues that the powerful, unprecedented forces of secularisation degraded the public realm to the point where we live in a condition of 'worldlessness'. We no longer have or believe in an enduring *polis* that is a place for action and for the talking about and remembering actions.⁶⁸ We no longer accept that there are great words and deeds that stand out as singular events and disrupt the endless, futile cycles of daily life, words and deeds that make a world. In this worldless view of modern, mass society, all events are seen as merely parts of processes. 'The modern concept of process ... separates the modern age from the past more profoundly than any other single idea. To our modern way of thinking nothing is meaningful in and by itself.'⁶⁹

Because in the modern era nature is the standard by which humans observe themselves, the study of nature – natural science – has become the foundation for all thought. It renders intellectual legitimacy to other systems of thought, and systems that do not pay allegiance to it are on the defensive and at risk of being marginalised. The power of modern science lies in its rejection of anything human. The trouble is, for Arendt, that without a public realm, humans can have no conception of an external reality: 'The reality of the world is guaranteed by the presence of others.'⁷⁰ The weird consequence of this is that modern science accounts not for the external world, general opinion notwithstanding, but for a private one whose existence no one can be sure of. Such apparent discoveries as the motion of the earth, the law of inertia, the structure of the atom or the behaviour of matter at velocities approaching the speed of light, the great advances of modern science – none of which can be revealed directly to the senses – all presume a loss of faith in the truth-revealing capacity of the senses. Descartes'

⁶⁷ See generally Arendt (n 2) pt V.

⁶⁸ Discussion of Arendt's thought on fabrication is based on Arendt (n 2) pts IV and VI; and Arendt (n 4) ch 2. Parts of my discussion are adapted from Mel A Topf, 'Hannah Arendt: Literature and the Public Realm' (1978) 48 *College English* 353, 359–62.

⁶⁹ Arendt (n 4) 63.

⁷⁰ Arendt (n 2) 178.

doubt-based philosophy so wholly relied on Galileo's work, especially regarding the heliocentric structure of the universe, that he feared that he would have to retract his system of thought if Galileo acknowledged (before the Inquisition) that he was wrong. If 'the movement of the earth is false, all the foundations of my philosophy are also false'.⁷¹

Sensible reality itself is, Arendt argues, dissolved into the incoherent data of sense perception, so that humans are 'ultimately imprisoned in a non-world of meaningless sensations that no reality and no truth can penetrate'.⁷² This worldlessness of the subjective, the darkness of the private, 'the playing of the mind with itself',⁷³ is for Arendt the primary datum of the modern era. 'Man, whenever he tries to learn about things which neither are himself nor owe their existence to him, will ultimately encounter nothing but himself, his own constructions, and the patterns of his own actions'.⁷⁴ Science itself appears to yield certainty where other knowledge seems so contingent only because 'the sheer cognitive concern of consciousness with its own content ... must yield certainty, because here nothing is involved except what the mind has produced itself'.⁷⁵

An important consequence is that our own minds can construct whatever world we wish and accept it as reality. 'We can take almost any hypothesis and *act* upon it, with a sequence of results in reality which not only make sense but *work*. This means quite literally that everything is possible not only in the realm of ideas but in the field of reality itself'.⁷⁶ Thomas Hobbes (who like Descartes acknowledged his dependence on Galileo and Kepler) knew that understanding *is* knowing how something is made: 'Where is no generation ... there no philosophy is perceived'.⁷⁷ For Hobbes, Ernst Cassirer writes, we 'understand only what we can cause to develop under our observation ... If one wants to "know" something, he must constitute it himself'.⁷⁸ Locke's designation of knowing as an action, which he said was an original contribution to philosophy,⁷⁹ was grounded in the new conception of understanding as a positive process of 'joining together'.⁸⁰

⁷¹ Descartes' letter to Mersenne, November 1633, quoted in Arendt (n 2) 273. Galileo's trial before the Inquisition, at which he testified to recanting the heliocentric theory, took place in June 1633.

⁷² Arendt (n 4) 56.

⁷³ Arendt (n 2) 258.

⁷⁴ Arendt (n 4) 86.

⁷⁵ Arendt (n 2) 255.

⁷⁶ Arendt (n 4) 87.

⁷⁷ Thomas Hobbes, *De Corpore* (1655), quoted in Ernest Cassirer, *Philosophy of the Enlightenment* (Beacon Press, 1955) 254. Hobbes, like Descartes, saw the significance of the new science's rejection of sensible reality. Very early on in his *Leviathan*, setting out the foundations of his political philosophy, he cites Newton's law of inertia, noting that its assertion that 'when a thing is in motion, it will eternally be in motion, unless somewhat else stay it' is something that 'is not so easily assented to'. Thomas Hobbes, *Leviathan* (Dent, 1914 [1651]) 4.

⁷⁸ Cassirer (n 77) 254.

⁷⁹ In the second letter to Stillingfleet, quoted in AC Fraser's introduction to John Locke, *Essay Concerning Human Understanding* (Dover Publications, 1959 [1690]) liv ('If I have done anything new [in the *Essay*], it has been to describe to others, more particularly than has been done before, what it is their minds do when they perform the action that they call knowing').

⁸⁰ Locke (n 79) II, xii, 2.

For Arendt, then, in a world where the decline of the *polis* raises barriers to true action, we are left with fabrication, so that we ‘substitute making for action in order to bestow on the realm of human affairs the solidity inherent in work and fabrication.’⁸¹ There is, Arendt notes, a line of thought extending back to Plato expressing uneasiness about the unpredictable and fragile nature of action as the central value of the political realm, so that the Western understanding of political communities has always been menaced by the suspicion of action and by an accompanying desire to substitute fabrication for action.⁸² Arendt argues that fabrication rose to become a predominant value in the modern era, evidenced by the crisis of secularisation and the scientific revolution it engendered. Arendt saw that the consequence, that ‘everything is possible’, engendered the disasters of the twentieth century. These included the totalitarian regimes, the embodiment of the ‘abyss of the possible’, with the regimes’ total domination and limitless capacity for mass crimes, feasible in good part owing to normal people who simply do not believe the monstrosities of totalitarian systems, since they ‘don’t know that everything is possible.’⁸³

However, Arendt does not take into account the prominent place of this new ethos of making in the Enlightenment’s striking self-assurance that it could, through sheer ‘rational reliance on the efficacy of energetic action’, remake their world and diminish its many evils through the application of scientific method and its discoveries. This was ‘a genuine and far-reaching novelty in human affairs’. Now, ‘for the first time in history, confidence was the companion of realism rather than a symptom of the Utopian imagination.’⁸⁴ The widely perceived, rarely opposed, legitimacy of the early American constitutions meshed with the equally widespread belief that new governments can be made from scratch, so to speak, without posing any challenge to the legitimacy of these governments. The language of fabrication functioned as a legitimating rhetoric because fabrication was the primary frame, the cognitive model by which founding a new body politic was understood as both possible and legitimate. To paraphrase Hobbes, where there is no generation, there no legitimacy is perceived. For the people of revolutionary America, a written constitution meant ‘the active making of a new order, as opposed to its gradual emergence in the course of a continual historical development’. This pointed directly to ‘the theoretical foundations of modernity which presume that the structure and values of the political order are neither innate nor revealed by God, but rationally fabricated by men.’⁸⁵ To the extent that

⁸¹ Arendt (n 2) 225.

⁸² *ibid* 225–26. See Bowring (n 32) 35–36; and Hill (n 16) 170 (on Arendt’s view of Plato as the ‘first philosopher ... to introduce the categories of fabrication and making into the political realm’).

⁸³ Hannah Arendt, *Origins of Totalitarianism* (Harcourt Brace, 1951) 413, quoting David Rousset, *The Other Kingdom* (1947).

⁸⁴ Peter Gay, *The Enlightenment: An Interpretation. Volume II: The Science of Freedom* (Knopf, 1969) 3–4.

⁸⁵ Ulrich K Preuss, ‘Constitutional Powermaking for the New Polity: Some Deliberation on the Relations between Constituent Power and the Constitution’ (1993) 14 *Cardozo Law Review* 639. Preuss comments that ‘the relationship between revolution and constitution is extremely ambivalent’ (at 640).

violence, through the Revolutionary War, played a role, this is consistent with the nature of fabrication, which begins with acts of violence – cutting down a tree, say, to make a chair – though the violence is a means to that end, a means to consolidate order. For Arendt, the revolution in America was the exception, not showing ‘the same combination of the old Roman enthusiasm for the foundation of a new body politic with the glorification of violence as the only means of “making” it.’⁸⁶

The American Revolution’s relative absence of violence and the contribution of that absence to the Revolution’s consolidation, which so impressed Arendt, have been accounted for by historians pointing to what they believe was the evolutionary nature of events in America. John Phillip Reid, for example, writes that America’s constitutional arguments against Britain were consistently based on principles already established and ‘familiar’ because American constitutional claims were all derived from former and current British constitutions, or the British imperial constitution.⁸⁷ Others have similarly seen the early revolutionary constitutions as actually a re-forming, out of already-constituted town governments in already-constituted colonies.⁸⁸

But this sudden ‘obsession with constitution making at the inception of the American Revolution’⁸⁹ cannot be adequately explained by seeking continuities with the past. Such continuities fail to account for the consolidation of the revolution, that is, for the role of the early constitutions in affirming the newly framed governments’ legitimacy and, owing to their legitimacy, their stability. It was the acts of fabricating that were crucial in this respect. Although Arendt does not make the explicit connection, for her, as Jeremy Waldron puts it, ‘that politics need *housing*, and that building such housing can be equated with the framing of a *constitution* – this is an image that recurs throughout Arendt’s writings. Whatever images she uses – furniture, fences and boundary walls, bricks and mortar – ‘always the emphasis is on artificial structures ... which exist as features of a world that men have made for themselves.’⁹⁰

Arendt is not consistent in terms of whether she sees constitution-making as fabricating or as acting.⁹¹ But fabricating is more central to her political thought than observers often note, with their greater interest in her concept of action itself, of her (literally) dramatic ‘agonistic conception of politics – politics as a stage for action and distinction’, as well as in her yearning for the ancient *polis*.⁹² This is owing largely to her neglect, already discussed here, in failing to explain just how the early constitution-making succeeded in consolidating the

⁸⁶ Bowring (n 32) 37. On violence as an element of fabrication, see Arendt (n 2) 139–40.

⁸⁷ John Phillip Reid, *Constitutional History of the American Revolution: The Authority to Tax* (University of Wisconsin Press, 1987) 17.

⁸⁸ eg, Robert Nisbet, ‘Hannah Arendt and the American Revolution’ (1977) 44 *Social Research* 69.

⁸⁹ Kruman (n 51) 168.

⁹⁰ Waldron (n 17) 203.

⁹¹ *ibid.*

⁹² *ibid.*

American Revolution, in framing stable governments with enduring institutions whose legitimacy was not subject to challenge, while many later revolutions – for Arendt all of them – were complete, often disastrous, failures in just this consolidation. One element of the early constitutions to which she pays little attention is that the frames of government in these constitutions all comprised specifically and carefully defined institutions. Habermas makes the connection: ‘Owing to its innovative potential, the domain of praxis is highly unstable and in need of protection. In societies organized around a state, this is looked after by political institutions.’⁹³ Yet, Arendt acknowledges that rights could be protected only by such institutions and also acknowledges that these institutions were designed so that their powers could be checked and balanced, chiefly through the separation of powers.⁹⁴

Institutions are the crucial element in the consolidation of a revolution, and they, not assertions of rights, are what are unprecedented in early American constitution-making. The futility of declaring rights in ‘theatrical proclamations’ (Waldron’s phrase) was the basis of Arendt’s criticism of the inefficacy of the French Declaration of the Rights of Man and the Citizen and later such proclamations. But ‘the moment human beings ... had to fall back on their minimum right, no authority was left to protect them and no institution was willing to guarantee them.’⁹⁵ Rights ‘need to be built into the civic structures.’⁹⁶ Rights themselves were widely understood, and argued, as having always existed, whether or not enumerated in a constitution. Constitutions emphatically were not seen as in and by themselves creating rights *ex nihilo*. Revolutionary-era Americans understood their constitutions framing institutions that protected these rights and, perhaps more important for Arendt, creating an enduring civic realm without which rights would be meaningless abstractions. Indeed, the early constitutions were what Preuss calls institutionalist: ‘Institutionalist constitutions ... institutionalize the capacity of the people to form and enforce their will in post-revolutionary times.’⁹⁷ Once again, Arendt remains above dealing with the nuts and bolts of constitutionally established institutions and their role in revolutionary consolidation, her world of abstractions, as one critic put it, ‘largely uncontaminated by mundane things’. Nonetheless, she is engaged, if indirectly, ‘with quite familiar issues about institutions, and ... how important structure is, even in her most abstract characterizations of human freedom.’⁹⁸

The constitution-making and its institution-building, the acts of foundation that so interested Arendt, could not have contributed so centrally to consolidating

⁹³ Habermas (n 26) 8.

⁹⁴ Arendt (n 3) 149–50, 303–09.

⁹⁵ Arendt (n 83) 288; see also at 287–98 (on the relation of rightlessness to the loss of a polity ‘willing and able to guarantee’ any rights (at 294)).

⁹⁶ Waldron (n 17) 207.

⁹⁷ Preuss (n 85) 643.

⁹⁸ Waldron (n 17) 214.

the American Revolution unless they were perceived as legitimate. Their legitimacy rose from the perception of them as fabricated and so not handed down by some external, higher and transmundane authority, whether divine or royal or tradition. It was in this sense that the revolutionaries so often thought of themselves as being in a state of nature. The people of Massachusetts, for example, during the development of their first constitution, 'imagined themselves creating government for the first time, as if revolution had cast them back into a state of nature wherein they would reestablish government.'⁹⁹ Arendt does not explain this in terms of her concept of fabrication since she falls back on 'the venerable figure of the contract' and the contract theory of natural law.¹⁰⁰ Jürgen Habermas, in criticising her for this approach, argues that Arendt is deficient in failing to test her concepts of speech and action (what he insightfully calls her 'anthropology of communicative action').¹⁰¹ This is, perhaps, because she is not quite willing to proffer a relation between action and fabrication, which, on the one hand, she sees as fundamentally exclusive principles of the human condition and, on the other, argues that making can substitute for action 'in order to bestow upon the realm of human affairs the solidity inherent in work and fabrication.'¹⁰² Mainly, though, Arendt sticks to the sharp distinction between action and fabrication, probably in order to avoid diluting her dramatic, agonistic and character-revealing notion of action by having to acknowledge that action can be a mere means to an end, leading to 'something', and so be conducive to fabrication.

My argument here is that the American revolutionaries, in the face of a potential crisis of legitimacy inherent in any attempt to consolidate a revolution, adopted an unprecedented mode of action that was indeed an act of fabrication. By this act, they could legitimately found a constitutional order, a body politic whose institutions would in turn be perceived, acknowledged and accepted as legitimate, and thereby stable and enduring, and so comprise a consolidation of their revolution. More specifically, the outcomes of the legislatures and conventions that developed the early constitutions were speech acts, and what those speech acts fabricated were constitutional orders. 'What is crucial in their [the founders'] act of founding is linguistic. In J.L. Austin's terms, they used language that might appear denotative ... but is actually performative.'¹⁰³ What allowed the founders' 'performative language' to succeed? 'How can we explain its being taken up by the populace as constituting an adequate foundation for a new body politic?'¹⁰⁴ Arendt explains only that the American revolutionaries, in what she believed is the only successful attempt at doing so, 'founded a completely new body politic without violence

⁹⁹ Kruman (n 51) 31.

¹⁰⁰ Habermas (n 26) 24. On this often-cited social contract view of the early constitutions, see, eg, Kruman (n51) ch 2; and Wood (n 36) 282–91.

¹⁰¹ Habermas (n 26) 7.

¹⁰² Arendt (n 2) 225.

¹⁰³ McGowan (n 34) 276.

¹⁰⁴ *ibid.*

and with the help of a constitution.¹⁰⁵ She seems to view a constitution as somewhat marginal, a mere device, which provided 'help'. In fact, constitutions were, and remained, the core of the body politic and of the legitimacy of the American Revolution's consolidation. It is this that needs explanation.

The legitimacy of the constitution-making arose in great part out of the role that fabrication played in modern secular thinking. However, we need to look at how this legitimacy, which is always a function of appearances, was communicated, applying what Habermas calls Arendt's 'communicative praxis'. The problem is that a revolution, which by its nature is illegitimate, is burdened with communicating the legitimacy of any attempted consolidation. Surprisingly little attention has been given to the communication of legitimacy. Studies of legitimacy tend pretty consistently towards exposing social and economic forces that lie behind claims to legitimacy, especially to show that legal and political institutions 'adopt rules which serve the dominant interest groups in society'.¹⁰⁶ This view downgrades legitimacy to window-dressing to cover up the exercise of 'real' power.

Speech acts and fabrication, that is, a message and its context, affect each other dynamically and actually help create each other. The basic principle of linguistic pragmatics, that a sign has meaning only within context, is of course true. But equally true is that context – the world 'out there' – has meaning only in relation to the sign. This rejects the older positivist notion that words and sentences somehow contain meaning, what Gerald Graff calls 'the fallacy of semantic immanence'.¹⁰⁷ The constructivist view of the dynamics of language rightly asserts that 'to speak, to interact with others verbally, is thus to construct the world, to constitute it, not merely to mirror it in words'.

If communication were simply some objective event within an objective world of context, then communication could be observed against a static background of world/context. However, there exists no Newtonian fixed point in an absolute space of context from which a message may be observed and studied as it moves through contextual space. Moreover, the context, the space through which the message takes effect, is relative to the message. There is no communication without perception of the context, but there is no perceiving context without communication. Neither the message alone nor the context alone has reality; only the message-context continuum does. In other words, there exists no objective message or objective context, but there exists an objective relation between the two. This is communication. A message cannot exist outside its context. There is no outside for it to exist in.

This throws some light on the operation of Arendt's communicative praxis and its place in the consolidation of the American Revolution. That we have some

¹⁰⁵ Arendt (n 4) 140.

¹⁰⁶ William Nelson, 'William Nelson Replies to Robert Gordon' (1988) 6 *Law & History Review* 161. Nelson is critical of this view.

¹⁰⁷ Gerald Graff, "'Keep off the Grass", "Drop Dead", and Other Indeterminacies: A Response to Sanford Levinson' (1982) 60 *Texas Law Review* 406.

confidence that our utterances can be communicated is wholly owing to our common presence in a space of shared values and ends. It is the essence of space, as Merleau-Ponty said, to be already constituted,¹⁰⁸ and we communicate with others in terms of our and their place within the already-constituted spaces of institutions. In other words, the spaces in which we share our presence with others are pre-eminently institutional. Conversely, the institutional contexts are reified by speech. Communication supports the 'selective maintenance of relatively stable strictures of images and associations that stem from institutional structures and policies'.¹⁰⁹ 'Our capacity for communication depends on mutual acceptance of a complex of conventions whose visibility and continuity are guaranteed institutionally. Utterances become speech acts only when they are put forth in the presence of others.'¹¹⁰ We communicate with others in terms of our and their places within the space of institutions.

Action, then, and specifically speech acts (for this is what the constitutional conventions put forth) did fabricate the legitimate institutions that consolidated the American Revolution. The self-assurance with which the Americans of the revolutionary era enthusiastically engaged in constitution-making was grounded in the modern ethos of making not only as a means of understanding reality, but as a means of acting to consciously make a new reality both legitimate and stable by virtue of speech acts – the constitution-making itself – and without the need for reference to divine or royal or traditional authority to secure legitimacy. It never happened before.

¹⁰⁸ WJ Fromm, *Merleau-Ponty Language and the Act of Speech* (Bucknell University Press, 1982) 217.

¹⁰⁹ George Gerbner, 'Communication and Social Environment' (1972) 227 *Scientific American* 159.

¹¹⁰ J Searle, *Speech Acts* (Cambridge University Press, 1970) 237.

