

The Role of the Supreme Court in Arendt's Political Constitution

MARCO GOLDONI AND CHRIS MCCORKINDALE

IT IS SLIGHTLY curious that despite her clear interest in questions of law and legal process (see, for example, her analysis of Eichmann's trial in Jerusalem, her reflections on the Supreme Court's rulings on racial segregation, her analysis of the 'juridical person' in man, her formulation of the right *to have rights*), lawyers themselves have spent almost as little time on Arendt's work as Arendt scholars have on her legal thought. Then again, perhaps this should *not* be surprising. Arendt, after all, was noted for her neglect of 'normal' politics and a corresponding fascination with the 'extraordinary'.¹ And yet, given that her optimism for mankind in the *Origins of Totalitarianism* was based on the hope of founding new legal structures, given too that her pessimism in *On Revolution* was based on the failure of America's Founding Fathers to *institutionalise* the revolutionary spirit by which that republic was made, it would seem that a comprehensive account of Arendt's political thought is necessarily incomplete absent any dedicated analysis of those institutions within which she believed that the spirit of (political) action could endure.

For its constitutional implications, as well as for the way it captures the ambivalent treatment given by Arendt to law more generally, in this essay we focus on just one such institution—the US Supreme Court—and the ambiguous role attributed to it, and to the function of judicial review in particular, found scattered throughout her writing. We begin to explore this question from chapter five of *On Revolution*, where both the potential and the limits of the Supreme Court as a republican institution emerge. To date, and to our knowledge, only two papers seriously consider Arendt's views on the possibility of politics being played out in the court room; papers which offer polar opposite accounts of her faith in the judicial branch. The first is Jan Klabbers' 2007 piece, 'Possible Islands of

¹ See, eg, G Kateb, 'Political action: its nature and advantages' in D Villa (ed), *The Cambridge Companion to Hannah Arendt* (Cambridge, Cambridge University Press, 2000) 134–35; A Kalyvas, *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt and Hannah Arendt* (Cambridge, Cambridge University Press, 2008).

Predictability: The Legal Thought of Hannah Arendt'.² Here Klabbers says of Arendt:

She would have been ... sympathetic to the idea of judicial review, provided that the idea remain limited to testing whether legislation and administrative action had ... come about in the right manner, and provided there were a clear constitutional mandate. She said kind words about the US Supreme Court, which while powerless, exercised great authority, and did so in a purely legal function.³

Klabbers, then, interprets from Arendt a somewhat narrow role for judicial review, something akin to John Hart Ely's procedural approach.⁴ Taking from her work the warning that 'getting judges to solve political debates or fix political outcomes under the heading of judicial review would run into serious difficulties',⁵ Klabbers proceeds from there to build his own argument against juridification on the international plane.

The second paper is Andrew Arato and Jean Cohen's 2009 article, 'Banishing the Sovereign? Internal and External Sovereignty in Arendt'.⁶ In a marked contrast with Klabbers' interpretation, here the authors see in Arendt's work a far more expansive scope for judicial review. Indeed, they go as far to say that Arendt embraced 'a constitution of judges', putting 'a glowing senatorial aura on Wilson's rather negative depiction of the Court as "a constituent assembly in permanent session"'.⁷ Thus Cohen and Arato find in *On Revolution* a Supreme Court 'capable of usurping sovereignty'.⁸ This interpretation is not entirely implausible, and would place Arendt within a tradition of American legal scholars for whom a republican revival in American constitutional *thought* has meant, above all, placing the US Supreme Court to the front and centre of constitutional *design*.⁹ Indeed, and as we shall see, in *On Revolution* Arendt certainly seemed to look upon the Supreme Court with something of the reverence depicted in Cohen and Arato's analysis. By looking beyond *On Revolution*, however, in particular to two essays, 'Reflections on Little Rock' and 'Civil Disobedience', this essay sets out to offer a more nuanced account of the authority and power of the Supreme

² J Klabbers, 'Possible Islands of Predictability: The Legal Thought of Hannah Arendt' (2007) 20 *Leiden Journal of International Law* 1, 1.

³ *Ibid* 21–22.

⁴ JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass, and London, Harvard University Press, 1980).

⁵ Klabbers, above n 2, 22.

⁶ J Cohen and A Arato, 'Banishing the Sovereign? Internal and External Sovereignty in Arendt' (2009) 16 *Constellations* 307.

⁷ *Ibid*.

⁸ *Ibid*, 317.

⁹ The leading works are Cass Sunstein's 'Beyond the Republican Revival' (1988) 97 *Yale Law Journal* 1539, and Frank Michelman's 'Law's Republic' (1988) 97 *Yale Law Journal* 1493. For a strong counter-point, see K Abrams, 'Law's Republicanism' (1988) 97 *Yale Law Journal* 1591: 'The legal foray into republicanism,' says Abrams, of Sunstein's and Michelman's efforts, 'has been sidetracked by its intellectual premises. Straitened by the distinctive problems and perspectives of liberal legalism, it has produced a muted hybrid, oddly focussed on the role of the courts' (at 1591).

Court which is to be found in Arendt's work; a position which sits somewhere between that of Klabbers and that of Cohen and Arato. In the first place, we shall show that Arendt was much more ambivalent in bestowing authority upon the Supreme Court than the latter suggest, finding in that institution not the dynamism and vitality of the founding moment, but rather (and merely) the conservative interpretation of the written Constitution. *Contra* Arato and Cohen, secondly we trace the steps which led Arendt, finally and explicitly, to *reject* 'a constitution of judges'.

I. THE SUPREME COURT BETWEEN POWER AND AUTHORITY

In her (in)famous reconstruction of that which she believed to have been the most successful among modern revolutions, the American Revolution, Arendt traced the roots of its success to a distinction drawn by the Founding Fathers between the seat of *power* and the source of *law*. The Founding Fathers, she said, 'were never tempted to derive law and power from the same origin. The seat of power to them was the people, but the source of law was to become the Constitution, a written document, an enduring objective thing'.¹⁰ It was 'in-between' these different sources that Arendt discovered the novelty of the Supreme Court, which stood to protect that object from the ebb and flow of power (always moving, always changing, always *subjective*) embodied in the legislative and executive branches. For she, the Court—together with the institution of judicial review—was directly linked to the *preservation* of that object, the Constitution,

which, to be sure, one could approach from many different angles and upon which one could impose many different interpretations, which one could change and amend in accordance with circumstances, but which nevertheless was never a subjective state of mind, like the will.¹¹

It is here, in Arendt's view of the Constitution as a *lasting* object, that one can begin to understand the role which she attributed to the Supreme Court. What she saw as characteristic of this institution was its being the seat of authority, and neither the *locus* of power (the people) nor the source of law (the written Constitution). In order to understand the nature and the scope of the Supreme Court (at least as Arendt saw it), allow us to consider this assumption a little more carefully.

For Arendt, the failure of the French Revolution (beyond the troublesome social question) could be traced precisely to the attempt to derive *both* law and power from the same source, through the deification of the people. There, the contradiction between the principle of political legitimacy (the national will) and the aim of institutions (to create the conditions for political stability) was brought into a sharp focus. Because the will is by definition the most transient among

¹⁰ H Arendt, *On Revolution* (London, Penguin, 1963) 157 (hereafter 'OR').

¹¹ *Ibid.*

the human faculties, and therefore the least able to provide for a solid (and this is to say, permanent) institutional ground, Arendt saw that any conflation of power and law—of the subjective will and the objective constitution—was bound to fail.¹²

For Arendt, a stable and durable political community could only be secured through an institution capable of mediating between these two distinct concepts, the *power* of the new beginning (the founding moment) and the *stability* of the constitution (that which was founded). ‘If,’ she said, stating the paradox which faced the men of the revolution, ‘foundation was the aim and the end of revolution, then the revolutionary spirit,’ which was to say, the spirit of *action*, ‘was not merely the spirit of beginning something new but of starting something permanent and enduring ... From which it unfortunately seems to follow that nothing threatens the very achievements of revolution more dangerously and more acutely than the spirit which has brought them about’.¹³ The Founding Fathers’ ‘novel and unique’¹⁴ solution to this ‘unsolvable’¹⁵ problem was to recover for the modern age the Roman concept of authority.

It was characteristic of Arendt to give idiosyncratic (and at times hotly-contested) meaning to commonplace terms of political theory. In this instance, she distinguished ‘authority’ from ‘violence’ (defined by coercion *over* men) and ‘power’ (defined by persuasion *between* men). The ‘hallmark [of authority],’ as she saw it, ‘is unquestioning recognition by those who are asked to obey; neither coercion nor persuasion is needed’.¹⁶ To be sure, Arendt was never clear as to the nature of this act of faith: that is to say, just why it was that one institution could or should attract the *unquestioning* support of the people. She did begin to make a move in this direction, however, by exploring the etymology of the word, which she traced from *augere*, to augment. Here she left us the clue that the nature of authority derives from the continued augmentation of the republic’s founding principles.¹⁷

In Rome, those who were recognised as having authority (*patres*) constituted the Senate. Their duty was to preserve the founding principles of the city by ensuring, through their deliberation and advice, that present and future laws remained faithful to them.¹⁸ The past, in this sense, became a guide—a banister—to the coming generations; a legacy bestowed upon them by the Senators. Thus, no

¹² On Arendt’s conception of the will, see ‘Willing’, in H Arendt, *The Life of the Mind* (New York, Harcourt & Brace, 1978) 93; on this see S Jacobitti, ‘Hannah Arendt and the Will’ (1988) 16 *Political Theory* 53; J Martel, ‘Amo: Volo ut Sis. Love, Willing and Arendt’s Reluctant Embrace of Sovereignty’ (2008) 34 *Philosophy & Social Criticism* 287. See, also, V Liska, ch 4 of this volume.

¹³ OR 232.

¹⁴ *Ibid* 228.

¹⁵ *Ibid* 232.

¹⁶ H Arendt, *The Crises of the Republic* (New York, Harcourt & Brace, 1972) 144.

¹⁷ OR 201.

¹⁸ This is not the place to question why Arendt found the Roman conception of authority so persuasive. For some clue, however, see the pages on memory and heritage in H Arendt, *The Human Condition* (Chicago, Ill, The University of Chicago Press, 1958) 160–64 (hereafter ‘HC’).

generation was an island: each generation—past, present and future—was bound by a common world, both spatially and temporally:

The common world is what we enter when we are born and what we leave behind when we die. It transcends our life-span into past and future alike; it was there before we came and will outlast our brief sojourn in it. It is what we have in common not only with those who live with us, but also with those who were here before and with those who will come after us.¹⁹

How Arendt conceived of this temporal dimension is both counter-intuitive and yet at the same time essential to understanding her conception of authority. It is natural to think of growth, and therefore of augmentation, as an activity which is exclusively orientated to the future, distancing us from the past. For Arendt however, the opposite was true. Thus, she said, for the Romans:

Old age, as distinguished from mere adulthood ... contain[ed] the very climax of human life; not so much because of accumulated wisdom and experience as because the old man had grown closer to the ancestors and the past. Contrary to our concept of growth, where one grows into the future, the Romans felt that growth was directed toward the past.²⁰

The Senate, then, derived its authority from the fiction that in it were permanently recreated the founding fathers of Rome themselves:

Through the Roman Senators, the founders of the city of Rome were present, and with them the spirit of foundation was present, the beginning, the *principium* and principle, of those *res gestae* which from then on formed the history of the people of Rome.²¹

It was not the founding moment, but its (mythical) reincarnation in a political institution which tied the changes of the present to the vitality of beginning, to the vibrancy of the constitutive *act* of foundation; which tied, in other words, future generations to their constitutional origins.

In America, however, the seat of authority was *not* a political institution but a legal one. Judicial control of executive and legislative power drew *its* authority not from the political act of foundation, but rather from that which was founded: from the written document of the Constitution. As such, the role of the Court was neither to deliberate nor to advise, but rather to *interpret* that document.²² If the Roman Senate sat as the (fictional) personification and institutionalisation of a *constituent* power, the very embodiment of action, the Court sat as the (fictional) personification of the Constitution itself. Accordingly, for the Romans, the

¹⁹ *Ibid* 58.

²⁰ H Arendt, 'What is Authority?' in H Arendt, *Between Past and Future* (London, Penguin, 2006) 123 (hereafter 'WiA?').

²¹ OR 201.

²² Close to this reading of Arendt's approach to the role of the Supreme Court is Kalyvas, above n 1, 278–80.

uninterrupted continuity of [constitutional] augmentation and its inherent authority could come about only through tradition, that is, through the handing down, through an unbroken line of successors, of the principle established in the beginning. *To stay in this unbroken line of successors meant in Rome to be in authority...*²³

Corresponding to the meaning—if not the practice—of authority, in America to act *according to* the Constitution, to act *intra vires*, was to be in authority, the ongoing interpretation and *re*interpretation of legitimate *vires* being the role—the *only* role—reserved for the Supreme Court.²⁴ If this seems a rather banal position, we shall come to see its significance when, in sections III. and IV., we turn our attention to the criticisms which Arendt levelled at the Court in two specific instances. Before we do so, however, we must delve deeper into the nature of the Court and its authority.

II. POWERLESS BUT LASTING JUDGES

Taking Federalist number 78 as the basis for the claim that power and authority were kept separate by the Founding Fathers,²⁵ Arendt emphasised two features of the Supreme Court which bound it to the latter. ‘Institutionally,’ she said, ‘it is [i] lack of power, combined with [ii] permanence of office, which signals that the true seat of authority in the American Republic is the Supreme Court’.²⁶ Allow us, then, to consider each of these features in turn.

The first—lack of power—speaks to the difficulty of producing in a constitutional court those matters which Arendt saw as being the two conditions of power: a space of appearance, and a common world.²⁷ To constitute a space of appearance, an institution should allow a plurality to appear, to speak, to act and to be preserved *qua* plurality. Typically, a court does not constitute such a space, and this for intrinsic reasons. First, in most actions before the court there stand only two actors, who face each other in an adversarial, zero-sum game with no (or limited) space for resolution *between* the parties. Secondly, in contemporary practice those two parties are, more often than not, constituted by the government on the one side and another (legal or physical) person on the other.²⁸ Thirdly, restrictive rules on standing mean that the latter must (generally) have suffered some harm in order to bring a claim against the former; third party and

²³ OR 201 (emphasis added).

²⁴ Woodrow Wilson, as quoted in OR 200.

²⁵ This is the passage quoted by Arendt: ‘[T]he majesty of national authority must be manifested through the medium of the courts of justice’ because the judiciary branch, possessing ‘neither Force or Will but merely judgment ... was beyond comparison the weakest of the three departments of power’ (*ibid*).

²⁶ *Ibid*.

²⁷ HC 58. On the space of appearance, see J van der Walt, ch 3 of this volume.

²⁸ This theme resonates in J Waldron, *Law and Disagreement* (Oxford, Oxford University Press, 1999).

public interest standing, where the plaintiff represents a broader plurality, has actively been discouraged by the court: ‘judicial power,’ as the traditional reading has it, ‘exists only to redress or otherwise to protect against injury to the complaining party’.²⁹ Thus, putting the three together, judicial review is often painted as a forum for the expression of what Berlin has famously called ‘negative freedom’³⁰: the protection of individual, private rights vis-à-vis the weight of the (presumably interfering) federal government.³¹ For Arendt, freedom meant something more than this. Hers was an active and unashamedly demanding freedom: it meant, she said, ‘the “right to be a participator in government”, or it meant nothing’.³²

Because of its powerlessness, political freedom—at least as Arendt saw it here—*could not* be exercised by a constitutional court. Thus, in a brief passage of *What is Authority?*, Arendt flirts with Montesquieu’s definition of judicial power (a definition which clearly influenced the Founding Fathers themselves), approving his dictum that judicial power was ‘somehow nil’ and yet at the same time the highest authority.³³ Montesquieu’s definition of the judiciary was, of course, tied to a specific institutional setting: his interpretation of the English Constitution, which—he said—guaranteed that judges were simply ‘*le bouche de la loi*’. Taking from this famous passage support for her belief that the authority of a constitutional court was to be measured in the respect and reverence held for the institution itself, and not from its ability to command, persuade or coerce, one of Arendt’s key insights into the separation of constitutional powers lies in her distinction between constitutional judgments and their enforcement. Lacking the means to enforce its decisions—and in so doing to open up the possibility of a new beginning (and we shall return to this theme in section IV.)—the Court must restrict itself to decisions which authoritatively guide the other branches of government. In other words, when posed a constitutional question, the range of possible answers available to the Court were narrowed: the Court had a duty to interpret the Constitution, but could go no further.

The second feature of the Court, permanence of office, corresponds to the lifetime appointments of its judges; a feature which reveals the peculiar connection between the Court and ‘constitutional time’. The Founding Fathers were particularly attentive to the importance of periodic constitutional renewal as a bulwark against political corruption; so it is that both the composition of Congress (the legislative branch) and the Presidency (the executive branch) are renewed and refreshed according to staggered political terms. However, this feature does not apply to the Supreme Court, whose judges are appointed for their lifetime. Even if justices are often appointed along political lines, and through a political process,

²⁹ *Warth v Seldin* 422 US 490 (1975) 499. For a recent reaffirmation of the restrictive test, see Justice Scalia’s opinion in *Vermont Agency of Natural Resources v United States ex rel Stevens* 529 US 765 (2000).

³⁰ I Berlin, *Two Concepts of Liberty* (Oxford, Clarendon Press, 1958).

³¹ OR 143.

³² *Ibid* 218.

³³ *WiA?* 122.

lifetime appointments seem to achieve at least two things. First, they place the Court on a different temporal plane from the legislature and the executive. In that respect, and in keeping with Arendt's Roman understanding of authority, it seems that it was the task of the Supreme Court to solve the riddle of action and permanence, of foundation and preservation. Secondly, whilst a judge's appointment is the product of a political process, and therefore possibly exposed to the prevailing political winds at that time, her lifetime appointment transcends the moment of her appointment, elevating her (in theory, at least) to a degree of independence from the constant flux of political opinions. What, then, can we glean from these conceptual (the meaning and implications of the Court being the seat of authority) and institutional (lack of power, lifetime appointments) features, and—in particular—how do they help us explain the awe in which that institution is held?

Among American constitutional lawyers, Paul Kahn has proposed a political-theological explanation of just why it is that Supreme Court decisions are obeyed, both by the people and by the other political branches, even in controversial cases such as *Bush v Gore*.³⁴ Kahn's 'constitutional theology' transfers the body of the sovereign to the institutional body of the Supreme Court. This is plausible, he says, because the Supreme Court testifies with its activity to the sacredness of the act of foundation. In other words, the Supreme Court is the second of the 'two bodies of the king',³⁵ the other one being the mystic body of the revolutionary people. In this model, the Supreme Court gives voice to the sovereign people because the source of its *charisma* comes from the revolutionary past. Grounded in the idea of the citizen's revolutionary willingness to sacrifice herself for the polity, Kahn's explanation is one which justifies the authority of the Supreme Court in terms of the citizens' faith.³⁶ In other words, according to Kahn's theological reading, the authority of the Court does not rely on a rational conception of judgment and interpretation, but on the sacredness that surrounds the highest judicial body. In this sense, 'the voice of the Court is the voice of the People'.³⁷ Arendt's conception of authority is not an act of faith, however. She does not demand the sacrifice of the citizens' judgment even to perverse decisions from the Court. For Arendt—*contra* the implications of Cohen and Arato's interpretation that Arendt's is a 'constitution of judges'—the authority of the Court is not a given. Quite the opposite, it is an 'authority [that] implies an obedience in which men retain their freedom'.³⁸ Thus, in the next sections of this essay we shall see that for Arendt

³⁴ 531 US 98 (2000). On this contested decision see, among several publications, B Ackerman (ed), *Bush v Gore. The Question of Legitimacy* (New Haven, Yale University Press, 2002); R Dworkin (ed), *A Badly Flawed Election* (New York, New Press, 2002).

³⁵ The quotation is from E Kantorowicz, *The King's Two Bodies* (Princeton, NJ, Princeton University Press, 1957).

³⁶ P Kahn, *Putting Liberalism in Its Place* (Princeton, NJ, Princeton University Press, 2005).

³⁷ P Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (New York, Columbia University Press, 2011) 85.

³⁸ WiA? 93.

it has been possible for the Court to *lose* its authority, both by going beyond interpretation and attempting to engineer social change ('III. Reflections on Little Rock'), and, in another instance, by forgoing its duty of interpretation altogether ('IV. Towards Civil Disobedience').

III. REFLECTIONS ON LITTLE ROCK

For its rebuke of the Supreme Court's seemingly progressive judgments in the school desegregation cases *Brown v Board of Education*³⁹ and *Cooper v Aaron*,⁴⁰ 'Reflections on Little Rock' counts amongst Arendt's more controversial pieces. Indeed, so stinging was the criticism of the essay that she felt compelled to publish a defence of her position: a direct response to two critics in particular—David Spitz and Melvin Tummin—in which she claimed that her original article 'was not understood in the terms [that she] wrote it'.⁴¹ The liberal line of attack was clear: here was Arendt—purveyor of the infamous 'social question'⁴²—effectively denying the authority of federal intervention where it was aimed at enforcing racial integration. Yet, as we shall see, it was not—for Arendt—the Supreme Court's jurisdiction which was the problem here: she was clear that there *was* a constitutional question to be asked, and capable of being given a judicial answer. What Arendt found so troubling was, rather, the overreach of the Court in going *beyond* that question, '[f]or the crucial point to remember'—and this, she believed, the Supreme Court had not—'is that it is not the social custom of segregation that is unconstitutional, but its *legal enforcement*'.⁴³ In order to understand this, and in so doing to understand 'Reflections on Little Rock' in the terms that she wrote it, let us begin with an example used by Arendt herself.

For Arendt, 'the right to marry whoever one wishes is an elementary human right': more so, even, than the right to sit where one pleases on a bus, or—at issue in *Brown* and *Cooper*—to attend an integrated school. Had Southern anti-miscegenation laws, those most striking violations of the principles of equality and citizenship, been brought to the attention of the Supreme Court, Arendt felt sure of two things: first, that the Court would (and ought to) hold those laws to be unconstitutional; secondly, that the Court would not (and ought not to) *enforce* mixed marriages. To do so, she believed, would go far beyond the Court's authority to *interpret* the Constitution, and would in effect amount to an exercise in social engineering requiring persuasion or, more likely, coercion.⁴⁴ Allow us, then, to extend this to the issues at stake in *Brown* and *Cooper*.

³⁹ 347 US 483 (1954).

⁴⁰ 358 US 1 (1958).

⁴¹ H Arendt, 'Reflections on Little Rock' in P Baehr (ed), *The Portable Hannah Arendt* (London/New York, Penguin, 2000) 243 (hereafter 'RLR').

⁴² Cf E Christodoulidis and A Schaap, ch 5 of this volume.

⁴³ RLR 236.

⁴⁴ *Ibid.*

For Arendt, it would have been perfectly within the authority of the Court to determine that the laws which entrenched racial segregation within the public school system amounted to unlawful violations of the 14th Amendment. What she found so objectionable in these cases, however, was that by *enforcing* integration the Court had forgotten ‘principle[s] ... uppermost in the minds of the founders of the Republic’. First, she said, the decisions read too much into the principle of equality, taking it from its proper place, the political realm, and transposing it into the social realm, where discrimination was justifiable (if not always justified).⁴⁵ The dangers of doing so were clear to see in the iconic images of the time: black children being transported to newly-integrated schools amid ‘jeering and grimacing’ mobs.⁴⁶ It would seem that for Arendt (and perhaps in the reaction of the Southerners we can see some evidence of this), to remove the *legal enforcement* of segregation was to remove the barriers to a voluntary (and therefore deeper?) social integration; on the other hand, to *enforce desegregation* seemed to erect obstacles to that end by bringing to the surface the anger and frustrations of those touched by the decision. Secondly, Arendt was concerned by the underlying conflict between the Federal Government and the Southern states. Decisions such as *Brown* and *Cooper*, in her view, evidenced something of a bias in favour of the Federal Government which went beyond the text of the Constitution itself. Because, for Arendt, power generates more power when it is dispersed, it followed that the states’ rights had to be at least preserved. Thus, by exercising a centripetal role, the Supreme Court, as she saw it at least, was no longer *interpreting* the Constitution but (in the sphere of education) *changing* the Constitution: appropriating for the Federal Government new powers over education, whilst with the same move disregarding the principle (captured by the first four articles of the Constitution) that the American political system is ‘strengthened by the division of power’.⁴⁷

The consequence of the Court’s overreach—its going beyond the bounds of interpretation—was no less than the loss of its defining characteristic: authority. The authority of the Court, we recall, meant for Arendt an ‘unquestioning respect’ for its decisions. This she distinguished from power and action, which depended upon *persuasion*, and from violence, which depended upon *coercion*. That the authority of the Court had been lost could be seen, then, in two moments. First, Arendt herself pointed to the fact that the grounds for respecting the Court’s decision clearly *were* questioned. Thus she took as support for her argument the results of public opinion polls which showed not only that 92 per cent of Virginians were opposed to integration, not only that 65 per cent were willing to forgo public education in light of integration, but, and this is the point, that 79 per cent denied *any obligation* to accept the Supreme Court decisions as

⁴⁵ M Canovan, *Hannah Arendt: A Reinterpretation of Her Political Thought* (Cambridge, Cambridge University Press, 1992) 243.

⁴⁶ RLR 236.

⁴⁷ *Ibid* 243.

binding.⁴⁸ Secondly, if Arendt's conception of authority was one distinguished from violence, then we must add that the *need* of the Federal Government to resort to coercion—by deploying the military to secure the ends of integration—was itself evidence of the Court's *loss* of authority. It was the very fact that respect for those decisions had been questioned—that integration would not happen *as result of the decision itself*—which required the Eisenhower Administration to act with such force.

IV. TOWARDS CIVIL DISOBEDIENCE

If Arendt found 'most startling'⁴⁹ the Court's over-reach in cases such as *Cooper* and *Brown*, it was (less paradoxically than it may seem) the *reluctance* of the judicial branch to exercise its authority which led Arendt, finally, to lose faith in the very institution of judicial review (and, therefore—if she ever had supported it—the constitution of judges). So, when she said that '[t]he establishment of civil disobedience among our political institutions might be the best possible remedy for [the] *ultimate failure* of judicial review,' she did so against the backdrop of the hugely controversial Vietnam war, and the many and varied attempts by citizens of the United States to challenge the legality of that war in the court room.⁵⁰ Judicial review, she believed, had 'failed' because, by the Court's response to these challenges, 'the sovereignty principle and the reason of state doctrine [had been] permitted to filter back, as it were, into a system of government which denies them'.⁵¹ In other words, she believed that by its *refusal* to ask questions of the legality and constitutionality of the war, the judiciary—that separate and independent guardian of the Constitution—had failed to exercise its constitutional role, that is, authoritatively to interpret the Constitution.⁵² Let us explain: at the heart of Arendt's criticism lies what she perceived to be the Court's use of 'the political question doctrine' to deny *certiorari* to the Vietnam cases. The very existence of the doctrine is itself contested,⁵³ whilst it has been argued that the trend in contemporary jurisprudence is a shift away from the doctrine⁵⁴ and

⁴⁸ *Ibid* 235.

⁴⁹ *Ibid*.

⁵⁰ H Arendt, 'Civil Disobedience', in H Arendt, *Crises of the Republic* (New York, Harcourt Brace, 1972) 101 (hereafter CD).

⁵¹ *Ibid* 100.

⁵² *Ibid* 100–02. On the difference between civil disobedience and judicial review, see W Smith, ch 7 of this volume.

⁵³ L Henkin, 'Is There a "Political Question" Doctrine?' (1976) 85 *The Yale Law Journal* 597.

⁵⁴ See, eg, M Tushnet, 'Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine' (2002) 80 *North Carolina Law Review* 1203. Most notably, in modern times, the doctrine has been challenged by the decision of the Supreme Court in the infamous case of *Bush v Gore*. See, eg, R Hirschl, 'Resituating the Judicialization of Politics: Bush v. Gore as a Global Trend' (2002) 15 *Canadian Journal of Law & Jurisprudence* 191.

towards what Ran Hirschl has called ‘juristocracy’.⁵⁵ At the time of writing, however, Arendt was in no doubt that this doctrine, according to which certain acts of the two other branches of government, the legislative and the executive, ‘are not reviewable by the courts’,⁵⁶ was a corruption of the American Constitution and not, as it has otherwise been defended, a cornerstone of the separation of powers.

In a provocative and influential article which appeared in a 1976 edition of *The Yale Law Journal*, Louis Henkin suggested that the ‘political question doctrine’ could be thought of in two ways. ‘That there are political questions—issues to be resolved and decisions to be made by the political branches of government and not by the courts—is,’ he said, ‘axiomatic in a system of constitutional government built on the separation of powers’.⁵⁷ In one respect, the ‘political question doctrine’ applied by the courts might take the shape of ‘the ordinary respect of the courts for the political domain’.⁵⁸ In other words, if competence for a particular matter has been committed by the Constitution to the executive or legislative branch of government then, so long as the subsequent actions of that branch remain *intra vires*, the courts should recognise and respect that fact by refusing itself the jurisdiction to review those acts. Such questions, said Henkin, are the normal course of constitutional government, and so stand in no need of particular doctrinal protection. However, ‘[a] more meaningful political question doctrine,’ in Henkin’s view, ‘implies something more and different: that some issues which prima facie and by usual criteria would seem to be for the courts, will not be decided by them but, extra-ordinarily, left for political decision.’ It was *this* doctrine that was, by Henkin’s own admission, invoked in his day ‘to deny judicial review of constitutional issues raised by our national misfortunes associated with Vietnam’.⁵⁹ When it was argued before the courts that the President had acted *ultra vires* by engaging in a war not declared by Congress, several⁶⁰ held that questions of war and peace, fitting into the broad spectrum of international relations, were political questions best answered elsewhere. Thus, when Robert Luftig, a private in the US Army, sought to challenge his pending transfer to Vietnam on the basis of the war’s illegality and unconstitutionality, an appellate court told him:

It is difficult to think of an area less suited for judicial action than that into which the appellant would have us intrude. The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign

⁵⁵ R Hirschl, *Towards Juristocracy: The Origins and Consequence of the New Constitutionalism* (Cambridge, Mass, and London, England, Harvard University Press, 2004).

⁵⁶ CD 100.

⁵⁷ Henkin, above n 53, 597.

⁵⁸ *Ibid* 598.

⁵⁹ *Ibid* 599.

⁶⁰ The constitutionality of the Vietnam War was challenged in over 70 cases.

policy or the use of and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive.⁶¹

On the face of it, the court's reasoning seems (at least) justifiable. As Lon Fuller has said, there are some disputes, some decisions, which by their very nature are not suited to adjudication in the court room.⁶² By invoking the political question doctrine in the Vietnam cases, the courts seemed to be saying that both Congress and the Executive were better placed to determine questions of foreign policy. They had greater expertise, they were democratically accountable for those questions of high politics, and they had access to information, such as intelligence reports, which were not available to the judges. This is all well and good, but for the fact that Robert Luftig had not *asked* the courts to oversee the conduct of US foreign policy. Rather, the question which he had put to the courts was subtly different and, *prima facie*, certainly justiciable: '[H]as the Executive branch of government exceeded its constitutional powers by committing American troops to a war in Vietnam without the requisite declaration of war by Congress?'⁶³

By invoking the 'political question doctrine' to escape even this question, a question of interpretation—that is to say, the interpretation of constitutional *vires*—the courts had not only left individual citizens without a judicial remedy against (the potential) abuse of power by the executive, but, as Michael Malakoff has said, they had also made 'a binding decision on justiciability which in effect holds that federal courts will *never* question the President's authority to wage war'.⁶⁴ It was then *this* evasion which Arendt found so damning when she penned her essay on civil disobedience. Judicial review had failed, in her mind, because the Court had consciously neglected to interpret the Constitution. The Court, she seemed to believe, feared the loss of authority—its defining characteristic—should it have declared the conflict unconstitutional, only for war be waged regardless:

Whatever the theory, the facts of the matter suggest that precisely in crucial issues the Supreme Court has no more power than an international court: both are unable to enforce decisions that would hurt decisively the interests of sovereign states and both know that their authority depends on prudence, that is, in not raising issues or making decisions that cannot be enforced.⁶⁵

Arendt's observation, however, was that the Court nevertheless suffered an even more striking loss of authority. If the authority of the Supreme Court lay in its duty of interpretation—if this was how the Court ensured that 'the beginning ... is

⁶¹ *Luftig v McNamara* 373 F 2d 664 (DC Cir 1967), 665–66. *Certiorari* was subsequently denied by the Supreme Court, 389 US 934 (1967).

⁶² L Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353.

⁶³ M Malakoff, 'The Political Question and the Vietnam Conflict' (1969-70) 31 *University of Pittsburgh Law Review* 505.

⁶⁴ *Ibid* 513.

⁶⁵ CD 100–01.

remembered whenever constitutional questions come into play⁶⁶—then a loss of authority was the inevitable result where it elected to *forgo* that duty. Nowhere was this loss of authority more clear than in the eruption of civil disobedience which followed. Civil disobedience, Arendt believed, was a predictable result because the Constitution—as (not) interpreted by the Court—had left nowhere (no space of appearance) for those citizens to turn. Arendt, in other words, had faced in ‘Civil Disobedience’, and in her analysis of the ‘political question doctrine’, the problem of political exclusion—for this was precisely the effect of decisions such as *Lufwig*—and discovered that by that exclusion, those same citizens had been *included* in the ‘deliberative outcomes’ of those (here the executive and judicial branches) who presumed to speak for the American people,⁶⁷ be that by the deployment in war of members of the armed services, or by the unquestioning obedience demanded of the citizens as a whole; by the engineering, it would seem, of their tacit consent and the rendering impotent of the power of dissent.

In our reading of Arendt’s views on the role of the Supreme Court, there is then (despite, perhaps, first appearances) in fact a line of continuity which connects chapter five of *On Revolution*, through her ‘Reflections on Little Rock’ and finally to ‘Civil Disobedience’. The normative aspect in each of these three works remains constant: that the role of the Court is a narrow, albeit important one, to interpret the Constitution; and that the discharge of this function was the very source of its authority. Thus, when the Court exceeded that role (Little Rock), or neglected it (*Lufwig*), Arendt could not help but see in this a resulting *loss* of authority.

V. CONCLUDING REMARKS

In one sense, the aim of this essay has been limited in scope and ambition: to disprove the thesis put by Arato and Cohen that in chapter five of *On Revolution* Arendt subscribes to a ‘constitution of judges’. By looking beyond that text to her particular reflections on the Court’s over-reach in *Cooper*, as well as to its under-reach in those cases such as *Lufwig*, we can see that for Arendt the proper place of the Supreme Court was a much more nuanced one: narrower in the sense that Court’s role was restricted to one of constitutional interpretation, yet no less significant for that. As we see in ‘Reflections on Little Rock’, the Court could *only* interpret: it could not go further and engineer (even progressive) social change, lest it surrender its defining and legitimating characteristic—authority—in so doing. On the other hand, when we turn to ‘Civil Disobedience’, and the use of

⁶⁶ J Frank, *Constituent Moments: Enacting the People in Postrevolutionary America* (Durham, NC, Duke University Press, 2010) 56.

⁶⁷ On this theme, see J Bohman, ‘The Moral Costs of Political Pluralism: The Dilemmas of Difference and Equality in Arendt’s “Reflections on Little Rock”’ in L May and J Kohn (eds), *Hannah Arendt: Twenty Years Later* (Cambridge, Mass, and London, England, The MIT Press, 1996) 53, 64.

the political question doctrine to *evade* its duty of interpretation, we see that whilst the Court may *only* interpret, it *must* interpret—even where interpretation brings before the judiciary questions of war and peace.

Thus, whereas *prima facie* there might appear to be something of a disconnect between the ‘magisterial aura’ bestowed upon the Supreme Court in *On Revolution* and the sharp criticisms which she reserved for that institution in ‘Reflections on Little Rock’ and ‘Civil Disobedience’, it is our view that reading Arendt’s take on the Supreme Court in this way—to take from her the interconnectedness of the Court’s authority with the *performance* of its duty of interpretation—one can see that, in fact, there is a consistent thread which runs through those three texts. What was considered ‘magisterial’ in *On Revolution* was not the institution of the Supreme Court itself, but the founding moment in which the American republic was given birth. The unquestioning recognition which was given to the Court (the very hallmark of Arendt’s conception of authority) was unquestioned *only in so far as* that branch could be seen to interpret that moment anew. Indeed, the consistency with which she held that view shines through an oft-neglected passage of ‘Civil Disobedience’ which we shall quote at length, first, because it reinforces what has been the thrust of our argument, but, secondly, because it reveals, in our view, an insight of considerable relevance to contemporary constitutional discourse: the *limits* of juridification:

Because of the unprecedented rate of change in our time and because of the challenge that change poses to the legal order—from the side of the government ... as well as from the side of disobedient citizens—it is now widely held that changes can be effected by law, as distinguished from the earlier notion that ‘legal action [that is Supreme Court decisions] can influence ways of living’. Both opinions seem to me to be based on an error about what the law can achieve and what it cannot. The law can indeed stabilize and legalize change once it has occurred, but the change itself is always the result of extra-legal action.⁶⁸

In the remainder of this Part of this volume, we shall leave it to William Smith and Kari Palonen to explore the possible sites in which such action might take place.

⁶⁸ CD 80.