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ON THE ORIGINS OF LIMITED GOVERNMENT

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ABSTRACT

I consider two theories of the determination of political institutions. One of these theories stresses effects of changes in the balance of military power between the ruler and subjects on the distribution of property rights which the political system enforces. The other theory emphasizes the effect of changing informational constraints which require institutional changes to be made in order to maintain efficiency. I examine how each of these theories would apply to explaining the development of parliamentary government in thirteenth-century England. My general conclusion is that both theories are required to understand fully the process by which liberal political institutions emerge.

1. Introduction

Many people believe that there has been a world-wide movement towards parliamentary government during the past fifteen or twenty years. Dictatorial governments in various countries of southern Europe, Latin America, and Asia have been replaced, mostly by negotiated change rather than by outright revolution, by governments where at least nascent parliamentary institutions exist. In this paper I will consider how such negotiated transformations of the institutions of government might occur. Specifically I will formulate two sorts of theory about how the form of government is determined. My general argument will be that both sorts of theory are required to understand fully the process by which liberal political institutions emerge.

One theory that I will examine, which I shall call the balance-of-power theory, posits that a transition from dictatorship to parliamentary government is tantamount to a seizure by the people (or at least by a class of the people) of property that has previously been held by the dictator. To explain why the occurrence of such a seizure might have occurred at some particular time and place, one should locate particular changes in the technology available to the various political agents in society—particularly including military technology. The other sort of theory posits that government exists in a changing environment, and suggests that changes in government are often responses to environmental changes. Such responses may well be to the mutual advantage of the ruler and the subjects, rather than necessarily helping one at the expense of the other. Some of the environmental changes that prompt such mutually beneficial changes may be subtle ones, and skilful work by historians is needed to discover them. This is particularly true of changes of intangibles such as the distribution of information among political agents. Indeed, the specific theory that I will contrast here to the balance-of-power theory is a theory about the role of private information in determining the form of efficient government institutions. Using history of the development of parliamentary government in England at the time of the Magna Carta as an example, I shall argue that the private-information theory captures significant aspects of the process of institutional change that the balance-of-power theory misses.

After reviewing the facts from English history to which I will subsequently refer, I will present a simple formal model of the balance-of-power theory. I will show that this theory succeeds in explaining analytically an apparent aspect of feudalism—specifically of the type of feudalism that developed in England under Norman rule—to which some historians have attached great significance. Namely these historians suggest that feudal government was based on the coordination of social activity by appeal to a system of customary rights. It is suggested that these rights were more explicitly spelled out and that they evolved more slowly than is typical for the systems of rights that are in force in modern states.

I will continue by arguing that there are two problems with the view that historians have taken of the balance-of-power theory. First, the characterization of feudal government that the balance-of-power theory ostensibly explains is exaggerated or even inaccurate. Historians suggest that such a characterization applies most clearly to England during the century and a half following the Norman invasion. However, the characterization does not accord very well with some of the most

striking facts about the evolution of Norman and Angevin government in England. To the extent that historians' view of feudal government as being a system of firmly entrenched, customary rights is qualified, the support that the example of feudal government provides for the balance-of-power theory as a theory of government in general is weakened.

The second problem with the balance-of-power theory is that it cannot explain the most salient features of parliamentary government. (Parliamentary government is broadly understood to be based on systematic, ongoing consultation with the governed. Throughout this paper I will abstract entirely from the issues of voting equilibrium that would loom large in a theory specifically of legislative government.) The Magna Carta provides a clear illustration of this shortcoming of the theory. A clause of the charter that has figured very prominently in subsequent history is a guarantee by the king to the barons that they will not be taxed without their consent. The balance-of-power theory would suggest that this clause was a roundabout way of limiting the burden of taxation borne by the barons. If to enact such a limitation was the aim of the clause, though, then the clause itself would seem to be a poor instrument with which to achieve its aim.

I will provide an alternative analysis of this clause of the Magna Carta in the context of a theory of efficient institutional structure under informational constraints. I will argue that, despite the obvious limitations of a theory that is as highly schematic as the one which I present, this theory does provide some valuable insight into the general questions that motivate this work.

2. Some historical background

Since I will use medieval England as a case study, let me begin by summarizing the relevant history.[1] The period in question extends from William's conquest of England in 1066 to the end of the reign of Henry III in 1272. This period begins at the point when Norman rule in England had evolved into a set of institutions that historians would consider to be paradigmatically feudal, and it ends at the point when parliament had become a recognized institution with well-defined membership and structure.[2] Particularly after he had completed the suppression of military opposition to his rule, William (1066–1087) initiated a process of fundamental innovation in public finance. This process ultimately built a system of money taxation on a legal foundation of vassals' feudal obligations to perform specific duties for the king, enabled the assessment and collection of taxes at dramatically higher levels than those customary obligations would suggest were warranted, and reduced the level of distortion caused by taxation to levels that made such heavy taxation

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[1] The facts cited here are documented in the work of M. T. Clanchy (1983) and J. C. Holt (1992), among others.

[2] For a period of twenty years Edward I (1272–1307) convened parliament at fixed times twice a year whenever he was in England. (Harriss, 30) Although this custom lapsed for a period of decades under his successors, parliament became an entrenched political institution in the fourteenth century, and it had acquired a settled membership and had evolved into two houses by the end of that century.

possible without economic collapse.[3] Subsequently under Henry I (1100–1135) the development of fiscal institutions continued with the invention of the Exchequer and the Pipe rolls.

Henry I was succeeded by Stephen (1135–1154) who faced serious military threats throughout his reign. To raise quickly the support needed to defend himself against these threats, he sold offices which thereafter yielded streams of tax revenues to their possessors rather than to the crown. Partly on this account, the annual tax revenue available to his successor Henry II (1154–1189) was substantially less than what Henry I had been able to collect towards the end of his reign. Henry II and subsequently his sons Richard I (1189–1199) and John (1199–1216) expanded the tax base by reassessing land, by instituting taxation of revenues and chattels as well as of land, by introducing a customs system, and so forth.[4]

By the second half of the twelfth century, England had become drawn into European politics to a considerable extent. In 1194 Richard became a vassal of Emperor Henry IV, and in 1213 John became a vassal of Pope Innocent III. English and continental rulers also became closely connected by family links. For example, Henry III (1216–1272) and King Louis IX of France were married to sisters, and Henry III's sister was married to Emperor Frederick II. Both the pope and the French king intervened directly and legitimately in English politics.[5]

William had been the Duke of Normandy when he conquered England, and his successors inherited both Normandy and England as fiefs. An abrupt change in the position of English kings came in 1204 when King Philip Augustus of France captured Normandy. John made a sustained attempt to regain Normandy, but he was defeated decisively at Bouvines in 1214. Louis VIII of France invaded England after John's death in 1216 but was repelled in the following year. Although neither country subsequently invaded the other during the reign of Henry III, France and England continued to pose a direct military threat to one another.

During John's reign, the English barons grew progressively disaffected with the heavy taxes and demands for military service that he made of them. In May, 1215 they seized the city of London to force John to negotiate with them. The outcome of this negotiation was the Magna

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[3] William's most remarkable contribution to this process was the compilation of the Doomsday Book which both documented authoritatively the ownership of property in England and also provided the informational basis for the government to tax that property. William also claimed ownership of forest lands which had not previously been private property, and he derived revenue from licensing various uses of the forest.

[4] However Richard, in particular, returned to the practice of selling offices and thus weakened the fiscal base.

[5] Both John and the barons were vassals of the pope. On the basis of this authority, Innocent III instructed the English barons to pay a disputed tax (the Poitevin scutage) in 1215 and annulled the Magna Carta in 1216. A legate of his successor, Honorius III, gave papal authority to the coronation (of disputed validity) of Henry III and also attached the papal seal to the Magna Carta , thus overriding the earlier annulment. Louis IX accepted an invitation from both sides to mediate a dispute between Henry III and the English barons in 1264, and his ruling which overwhelmingly favored the king set the stage for civil war.

Carta which John agreed in June, 1215 to issue. This charter was reissued several times during the succeeding decade.

Various clauses of the Magna Carta addressed a variety of grievances that had been brought forward by the barons and their allies. Some of those clauses, such as those dealing with navigability of the Thames River and with widows' right to remarry without purchasing permission from the king, are precisely the kind of transfers of property-like rights that the balance-of-power theory is designed to explain. Other clauses fit this description less neatly. A particularly important example consists of clauses 12 and 14 which concretely specify the king's duty to obtain the barons' consent to taxation: "No scutage or aid is to be levied in our realm except by the common counsel of our realm... And to obtain the common counsel of the realm for the assessment of an aid ... or a scutage, we will have archbishops, bishops, abbots, earls, and greater barons summoned by our letters ... for a fixed date, with at least forty days' notice, and at a fixed place[.] ... [The] business shall go forward on the day arranged according to the counsel of those present, even if not all those summoned have come." (Magna Carta, clauses 12, 14, translated in Holt (455).) The striking feature of these clauses is that they do not specify what is to be done (that is, how high the burden of taxation may grow) nor even precisely how that decision is to be reached (that is, how deliberations will be conducted and which criterion such as majority or unanimity will be used to ratify an ultimate decision). Rather clauses 12 and 14 resolve unambiguously the specific issue of who is to be included in whatever decision-making process will evolve.

The analysis of this paper will focus largely on the two clauses that have just been quoted. These clauses described a practice of consultation that was already well known when the Magna Carta was drafted. For example, John had convened councils at Oxford to obtain the barons' assent to taxes that were levied in 1204 and 1207. (Holt 319–322) What was radical in the Magna Carta was the conversion of such consultation from being a discretionary procedure that the king could use when convenient to being a mandatory procedure. This change in status was objectionable to the crown, as is shown by the fact that clauses 12 and 14 were deleted from the Magna Carta on the occasions (beginning in 1216) when it was reissued. These reissues did not settle the matter, though.

Conflict between the king and the barons came to a head again late in Henry III's reign. In 1258 the king was obliged to swear to a set of proposals known as the Provisions of Oxford. These proposals envisioned that a council would meet three times per year on a permanent basis. (The term "parliament" was used to refer to these meetings.) The powers given to this council would have effectively transferred the government of England to an elected committee. Henry III avoided putting the Provisions of Oxford into effect and the Barons' War ensued. Although the barons were defeated, the outcome of the war was a political compromise between the king and the barons. The characterization offered by one historian is that "this [compromise] was an unexpressed but probably not unrecognized triumph of the fundamental political concept of government by counsel and consent. The final outcome was a transformation of the key institution of parliament. This concept and this institution were to lie at the heart of the great effort of political reconstruction undertaken by Edward I." (Wilkinson, 163)

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3. The balance-of-power theory

Implicitly or explicitly, many social scientists and historians take a general view according to which political power is a kind of property that groups of agents (that is, political elites) compete to hold. On this view, dictatorship is just one manifestation of concentration of wealth in the hands of one individual or of a narrow class of individuals. Such concentration is supposed to arise when the technology for defending and for seizing property—prominently including the technology of military force—is a natural monopoly. In contrast, parliamentary government is supposed to flourish when the technology for defending property is accessible to a wide class of individuals.

This economic viewpoint lends itself to the following sort of theory. There are two industries: production (of goods and services) and forcible expropriation. Forcible expropriation is a natural monopoly. (cf. Hobbes, *Leviathan*) After the forcible-expropriation industry has attained its monopoly structure, the monopoly firm is known as the ruler. The ruler and the people who engage in production play a noncooperative game against one another. The strategy of the ruler is to impose and collect taxes. This strategy involves some costly activity by the ruler. Among other factors, the cost of collecting a given revenue depends on the innate ability or coerciveness of the ruler in obtaining high tax payments.

If the power of the ruler really cannot be challenged, then the ruler is a dominant player in the tax-collection game. The ruler maximizes revenue (or a utility function of revenue) subject to a "Laffer-curve" constraint that to expropriate too vigorously will deter production. The game may be further complicated by giving subjects a second strategic variable: revolt. If the subjects revolt, then whether they succeed or fail is a random outcome. Successful revolt has very bad consequences for the ruler, and unsuccessful revolt has very bad consequences for the subjects. The outcome of a successful revolt for subjects is that the incumbent ruler is replaced by a new ruler. Recall that we are treating coerciveness as being an exogenous attribute of the ruler, and that we are assuming that some rulers are more coercive than others. Assume that the coerciveness of the new ruler is drawn from a fixed probability distribution.

Consider how we could model feudal government as a noncooperative game played by a single subject and an infinite sequence of would-be rulers.[6] In the game, subjects should prefer less coercive rulers to more coercive ones. Formally, let coerciveness be parametrized on the interval $[c^-, c^+]$. Let $u(c)$ denote the utility level of subjects when a ruler of coerciveness c solves its Laffer-constrained revenue-maximization problem. We assume, then, that u is strictly decreasing.

The essence of the situation is that the subject has must make a choice between either accepting its incumbent ruler or else revolting and running the risks of failing and of being subject to the ruler's unknown successor in the event of success. As long as the subject continues to revolt and succeeds, the sequence of potential rulers are installed in turn as ruler. When a ruler is installed,

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[6] Here I will only specify the main features of such a game and outline the main elements of its analysis. To fill in the details of this analysis would be a routine exercise in the sort of economic theory surveyed in Tirole (1988).

both the ruler and the subject observe the ruler's type—that is, they observe how coercive the ruler is. However the subject is uncertain about the coerciveness of rulers who have not been installed. This uncertainty will be represented by treating rulers' coerciveness as being an i. i. d. sequence of random variables.

Specifically, suppose that the game proceeds as follows. The first potential ruler is installed. If this ruler actually possesses coercive power c, it can set the policy that would be revenue-maximizing for a ruler of any type $c' \leq c$. Once this policy is set, the ruler cannot change it. The subject observes the policy of the ruler and decides whether or not to revolt. If the subject decides not to revolt or if the subject revolts unsuccessfully, then the ruler's policy is carried out and that is the end of the game. If the subject revolts successfully, then the second potential ruler is installed. The same order of events occurs as in the case of the first potential ruler. If there is a successful revolt against the second potential ruler, then the third potential ruler is installed, and so forth. An unsuccessful revolt does not affect the payoff of the ruler but it results in the lowest possible payoff for the subject. A successful revolt does not directly affect the payoff of the subject, but it results in the lowest possible payoff for the ruler against whom it occurs.

Let σ be the expected cost to the ruler of a successful revolt. (That is, σ is the probability that a revolt will be successful if it is undertaken times the utility loss that the subjects would impose on the incumbent ruler in that event.) The game can be parametrized so that, for any $\hat{c}$, there exists a unique c^* such that one of the following two conditions holds. The first possibility is that a ruler of any type c would prefer to solve its Laffer-constrained optimization problem and face a revolt, rather than to maximize its revenue subject to subjects enjoying utility level $u(\hat{c})$, if and only if $c^* \leq c$. The second possibility is that $c^* = c^+$ and that no ruler of any type c would prefer to solve its Laffer-constrained optimization problem and face a revolt rather than to maximize its revenue subject to subjects enjoying utility level $u(\hat{c})$. This threshold level c^* of coerciveness is a continuous function of $\hat{c}$.

Define $v(c, \hat{\gamma}, \gamma^*) = u(c)$ if $c \leq \hat{\gamma}$ or $\gamma^* \leq c$, and $v(c, \hat{\gamma}, \gamma^*) = u(\hat{\gamma})$ if $\hat{\gamma} < c < \gamma^*$. Let the probability measure π on $[c^-, c^+]$ represent the distribution of coerciveness in the population of potential rulers, and let $\phi > 0$ denote the expected cost to subjects of revolt. (That is, ϕ is the probability of failure if a revolt is undertaken times the magnitude in utility terms of the punishment that would be inflicted on subjects in that event.) Since u is strictly decreasing, for any c^* there is a unique $\hat{c} \in (c^-, c^+)$ such that

$$u(\hat{c}) = \int_{c^-}^{c^+} v(c, \hat{c}, c^*) \, d\pi(c) - \phi.$$

The threshold level $\hat{c}$ is a continuous function of c^*. (As stated, this result requires that the game should be parametrized in such a way that $u(c^+) - \int_{c^-}^{c^+} u(c) \, d\pi(c) > \phi$. Otherwise the statement has to be modified to allow for the possibility of boundary $\hat{c}$. Such a modification would not affect the analysis in any important way.)

The noncooperative equilibrium of this game will be of a particular form. There exist some $\hat{c}$ and c^* such that $c^* > \hat{c}$ and the following conditions hold. If $c \leq \hat{c}$ or $c \geq c^*$, then the ruler

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solves its Laffer-constrained optimization problem. If $\hat{c} < c < c^*$, then the ruler maximizes revenue subject to the subjects having utility level $u(\hat{c})$. Subjects revolt if and only if $c^* \leq c$.

According to this characterization of equilibrium, ruler will fall into three classes. *Weak* rulers are those whose level of coerciveness is no greater than $\hat{c}$. *Strong* rulers are those whose level of coerciveness is at least c^*. *Typical* rulers whose level of coerciveness is strictly between $\hat{c}$ and c^*. Typical rulers all permit the same utility level to subjects, and it is plausible that the model can be parametrized so that this type of ruler is the norm. In that case, the treatment of subjects can be understood to be governed by custom from which only the occasional weak and strong rulers depart.

Under this interpretation, the balance-of-power theory provides an excellent description of the alleged character of the feudal rule that was imposed on England after the Norman conquest in 1066. The historian F. M. Stenton in particular has argued that services must be exactly defined in order to be feudal and that the "new precision which governed relationships throughout the higher ranks of post-Conquest society is the most obvious illustration of the difference between the Old English social order and the feudalism which replaced it." (Stenton cited by Clanchy, 83–4.) Another historian, J. C. Holt, adds that "Custom and law largely consisted of routine procedure which had been hallowed by long usage. Occasionally it was reinforced by assizes or statutes produced by the king and his counsellors, but as late as 1215 there was still little enough substantive regulation to warrant the name of law." (Holt, 112.) That is, political equilibrium involved a set of rigid expectations regarding the exercise of royal power which all but the most atypical ruler took pains to fulfill.

This picture of the stability of feudal rule seems exaggerated, though. As it applies to England, the picture should apply most clearly to the century and a half following the Norman invasion. However, the middle third of that period consists of the reign of Henry I (1100–1135) followed by the reign of Stephen (1135–1154). Henry I (Clanchy, 71–82) and Stephen (Holt 38–9) were unquestionably a strong king and a weak king respectively. That is, at least a third of the paradigmatic period of alleged feudal stability consisted of the reigns of 'exceptional' rulers. Moreover, the very institutions of feudal government were undergoing profound change during the twelfth century. The innovations in public finance mentioned earlier exemplify this process.[7]

The fact that feudal government was less static than some historians have suggested does not contradict the balance-of-power theory. That theory can even be parametrized in such a way that 'exceptional' ruler will be the rule rather than the exception. Thus we cannot reject the balance-of-power theory on the basis of the twelfth-century historical record, although we cannot claim that the theory explains very much about twelfth-century government, either. I now turn

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[7] Consider especially how feudal knights' duties to provide specific services (called "scutages") were transformed into obligations to pay money taxes (called "aids") Holt (1992, p. 398) notes that by the thirteenth century, this transformation was so complete that political actors were thoroughly confused about the distinction between scutages and aids. Nevertheless taxes continued to be assessed as either scutages or aids, so it is not surprising that some historians should have overlooked the radical change in public finance that had taken place.

to the constitutional history of England in the thirteenth century, which I will argue is difficult to understand in terms of the balance-of-power theory.

4. The balance-of-power theory meets the Magna Carta

As the passage quoted above from Holt makes clear, feudal kings did occasionally issue proclamations known as *assizes* which were based on consultation with ad hoc groups of advisors. The passage suggests that such proclamations were infrequent, though, and apparently the use of advisors was at the ruler's discretion. Roughly at the beginning of the thirteenth century, a change began to take place which Holt emphasizes was widespread throughout Europe. (Holt, 25–6.) Holt describes this change in terms of the issuance by kings of *charters of liberties* to their subjects. The Magna Carta, which was issued by King John of England in 1215 and was reissued by John and his successors in 1216, 1217 and 1225, is exemplary of these charters. I now want to consider how this development would be explained in the context of the balance-of-power theory, and to examine carefully whether such an explanation is satisfactory.

If a charter of liberties is viewed as a transfer of property rights from the ruler to the subjects then it can be represented in the balance-of-power theory as a change to a new equilibrium in which $\hat{c}$ is lower than before while c^* is higher than before. That is, in the new equilibrium, (a) both weak and strong rulers are less common than before, (b) typical ruler are more common than before, and (c) typical rulers concede a higher level of utility to subjects than before. The distribution of subjects' utility levels induced by the distribution of rulers' coerciveness in the new equilibrium stochastically dominates the distribution of subjects' utility levels in the initial equilibrium.

It is evident that an increase in σ, the cost to a ruler of a successful revolt, will cause the sort of change of equilibrium that the balance-of-power theory associates with the issue of a charter of liberties. The argument is as follows. Suppose that the initial equilibrium is characterized by parameters $\hat{c}_0$ and c_0^*, and that the new equilibrium is characterized by parameters $\hat{c}_1$ and c_1^*. In the initial equilibrium, the ruler of coerciveness c_0^* is indifferent between behaving as a typical ruler and behaving as a strong ruler. When σ increases, this ruler strictly prefers to be typical rather than strong. The reason is that the expected utility of being typical remains the same while the expected utility of being strong decreases, since revolts occur only against strong ruler. Therefore $c_1^* > c_0^*$. Given this change, the expected utility of deciding to revolt rises since the probability of the incumbent ruler being succeeded by a strong ruler decreases. In the initial equilibrium, subjects are indifferent between revolting and not revolting against typical ruler. The increase in the expected utility of revolt entails that typical rulers would face sure revolt if they were to behave as before. Thus they will offer higher utility to subjects in order to forestall revolt. That is, $\hat{c}_1 < \hat{c}_0$.

An increase in σ can result from either an increase in the prospect of success of a revolt or an increase in the magnitude of the utility penalty that a ruler suffers from a successful revolt. Do we have reason to believe that either of these two factors could have operated during the thirteenth

century in general, or with respect to King John around 1215 in particular? Unless affirmative answers can be given to these questions, we will have little reason to think that the balance-of-power theory can succeed in explaining the movement towards granting charters of liberties.

In fact, both questions do seem to have affirmative answers. Regarding the general situation, William McNeil has identified the manufacture of crossbows, which reached significant scale in the thirteenth century, as having been a profound change in technology that decreased the concentration of military power. He has characterized this development as having brought an end to the period of centuries during which a small company of armored knights based in a fortified castle could exercise control over a broad countryside. Such a change would plausibly increase the prospects for revolts to succeed. (McNeil, *The Pursuit of Power*, 67.) Regarding the specific case of King John, in 1204 John lost possession of Normandy and in 1214 he "weakened his position throughout all his lands" when he lost the Battle of Bouvines which "is generally considered one of the few decisive battles in medieval European history." (Clanchy, 190.) Most twelfth-century kings did not even spend the greater portion of their time in England (cf. Clanchy), and they might well have considered England to be just one possession that could be recaptured in the long run if it had to be abandoned temporarily because of revolt. John could not have afforded to take so detached a view.

The balance-of-power theory explains why something might have happened in England in the early thirteenth century, then, and it explains why something might have happened generally throughout Europe during that century. I will now argue that the theory fails to explain the character of what happened, though. This failure particularly applies to the emergence of the idea that taxes should not be levied without subjects' consent.

5. The problem of counsel

Holt (94–5) suggests that the Magna Carta was not a radical departure from views about consent that had been gaining currency for a decade or so, but it certainly made a great advance in specifying a clear, operationally defined procedure that the king pledged himself to follow whenever taxation was to be imposed: "No scutage or aid is to be levied in our realm except by the common counsel of our realm... And to obtain the common counsel of the realm for the assessment of an aid ... or a scutage, we will have archbishops, bishops, abbots, earls, and greater barons summoned by our letters ... for a fixed date, with at least forty days' notice, and at a fixed place[.] ... [The] business shall go forward on the day arranged according to the counsel of those present, even if not all those summoned have come." (Magna Carta, clauses 12, 14, translated in Holt (455).)

On their face, these words do not promise a transfer of property or a property-like right from the ruler to the subjects. That is, this part of the Magna Carta does not explicitly describe the sort of change that would be predicted to occur because of an increase in the parameter σ in the balance-of-power theory. In order to subsume the adoption of the clauses just quoted to such an analysis, it would have to be argued that the institutional change was intended to shift the

equilibrium level of taxation to a lower level than before. Holt seems to make that assumption, but he takes the position that the clauses failed miserably to achieve their intended purpose. Writing from the perspective of the balance-of-power theory, he states that "In general cap. 12 was one of the least satisfactory or adequate in the whole Charter. It dragged in the novel demand for consent to scutage ... only to ignore the crucial developments in taxation of the last two reigns. It had nothing to say of the now forms of taxation: of the attempts to assess taxation on land accurately, or of the far more vigorous and successful efforts to tax revenues and chattels. These all fell within the category of aids. Thus [the tax levied in 1207 which was by far the most severe of John's reign, indeed of the whole century,] would have come within its terms. ... Yet [this tax] had been conceded 'by common counsel and the assent of our council at Oxford'. It had been lawful; and such taxation remained lawful after 1215. The Charter made no provision to limit the assessment or to distinguish revenues from chattels or to determine methods of assessments or to restrict penalties for evasion." (Holt, 321–2.)

In the passage just quoted which seems implicitly to rely on the balance-of-power theory as an analytical framework, Holt judges that the English barons in 1215 made a serious strategic error in their negotiation with the king over taxation. In view of subsequent history, this attempt to reconcile the clauses of the Magna Carta regarding counsel in taxation with the balance-of-power theory by positing a strategic mistake is unconvincing. If the barons had made a glaring mistake, then we would expect them to have changed their tack in subsequent years to address the root problems that Holt identifies. To the contrary, when another constitutional crisis occurred in England almost half a century later, the barons continued along the same course. The Provisions of Oxford (1258) specified that a parliament would automatically meet three times a year to deal with questions of taxation. (Clanchy, 272.)

Rather than disregarding Holt's argument, though, let us look more closely at what lies behind it. Holt makes two specific arguments. His first argument is that, on the basis of their experience in 1207, the barons should have seen clearly that the novel procedural arrangement on which they were insisting would be ineffective. His second argument is that the barons could have insisted, but did not insist, on substantive limitations of the king's authority to tax them.

Holt's first argument misses an important difference between the status of the council that John called at Oxford in 1207 and the status that a council convened on the basis of the Magna Carta would possess. This difference becomes apparent if we contemplate what would happen if the king and the council of barons were not to reach agreement. Under the status quo procedural arrangement, the king would assess the disputed tax and would rely on the authority of a feudal superior common to himself and the barons for its enforcement. That is what happened in the case of the Poitevin scutage in 1214–5. (Holt, 228–231.) The feudal superior in this position might attempt to reach a negotiated settlement, but if the parties refused to compromise than ultimately he would have to judge the legitimacy of the tax on the basis of the covenants that existed between the king and the barons. The fact that the king had called an ad hoc council to advise him and then had rejected its advice would not impair this legitimacy, as the judgment of Innocent III that the barons must render the service required by the Poitevin scutage illustrated very clearly. In contrast, the Magna Carta was among the covenants that determined the legitimacy of taxation.

If the Magna Carta stipulated that not only must a council be called, but also its active consent must be obtained, in order for taxation to be legitimate, then the king would be unable to count on the pope or on any other feudal superior for enforcement of compliance with a tax from which such consent had been withheld.

In contrast, Holt's second argument does succeed in showing why the treatment of taxation in the Magna Carta is an awkward case for the balance-of-power theory to explain. As was mentioned earlier, Richard I and John had considerably expanded the traditional tax base by reassessing land, by instituting taxation of revenues and chattels as well as of land, by introducing a customs system, and so forth. Rather than relying primarily on a novel procedural remedy to limit their liability to taxation, the barons might have insisted that John should accept substantive restrictions regarding both what could be taxed and also how heavily it could be taxed. Such a substantive solution to the problem of excessive tax liability would seem to have two advantages over the procedural solution that was adopted. First, the effect of a substantive limit on taxation would have been more reliable than the effect of a solution relying on the equilibrium performance of a deliberative political institution with incompletely specified rules. Second, by insisting on the abandonment of novel forms of taxation rather than on the institution of novel forms of control over taxation, the barons would have portrayed John as having overstepped the king's traditional authority rather than having been themselves in the position of usurping the king's authority. Recall that Innocent III annulled the Magna Carta as it was issued in 1215 but that his successor Honorius III endorsed the reissue of the charter in 1216 from which clauses 12 and 14 were deleted (along with some other clauses which do not seem very consequential). It seem reasonable to suppose that the popes viewed the level of taxation in England to be a matter about which the king and the barons could appropriately negotiate, but that they viewed clauses 12 and 14 of the Magna Carta as tending to undermine a foundation of the feudal political order, and that therefore the choice of a procedural means rather than a substantive means to limit the burden of taxation had the strategic cost of alienating the popes' support for the barons.

To summarize, the balance-of-power theory can explain why the demand for consent to taxation would have been included in the Magna Carta if the barons had lacked any way to define and legitimate substantive limits to their tax liability, but in fact to include such substantive limits in the charter would have been an easy matter. The balance-of-power theory fails to provide an adequate explanation of why some particular substantive limits on taxation (such as limits on the taxation of chattels or on customs duties) were not incorporated in the Magna Carta, either instead of or in addition to the procedurally oriented clauses 12 and 14. We must look for another theory to account for the strong emphasis that the thirteenth-century barons placed on the procedural issue of consent.

6. The private-information theory

The fact that parliamentary government was repeatedly proposed and ultimately came to be accepted, not exclusively in England but also to some degree in other parts of Europe (Holt,

25–27), suggests that in the course of the thirteenth century it had come to be recognized as an efficient political arrangement. Why was this arrangement increasingly seen to be efficient in the thirteenth century, but not during the twelfth century? We have seen that the balance-of-power theory cannot explain this transition. An alternative explanation is that the private information possessed by both the ruler and the most powerful subjects began acquire a strategic importance by the beginning of the thirteenth century that it had previously lacked. In this section I will examine the possible role of increasing informational complexity in explaining the Magna Carta and the subsequent thirteenth-century evolution of parliamentary rule in England. I do not suggest this theory as a general theory of constitutional change. Rather I offer it as one example of a type of theory that can explain features of the evolution of political institutions for which the balance-of-power theory fails to account.

King John lost control of Normandy in 1204. Afterwards, for the first time in a century, England had to reckon with the serious possibility of invasion. By the 1250s, there was a complex strategic and diplomatic relationship between Henry III of England and Philip IX of France who controlled Normandy (Clanchy, 239, 277–8). The fact that Henry and Philip were married to sisters (Clanchy, 297) is one indication of the potential for Henry to possess information which the barons could not verify. It is easy to imagine that the barons' willingness to submit to a high tax in order to raise an army would have depended on an assessment which only Henry could accurately make of the need to deter an invasion.

Let us make the five idealized assumptions regarding this change of situation.

(1) Neither in the twelfth century nor in the thirteenth century did subjects ordinarily possess private information that was relevant to the ruler's decisions.

(2) In the twelfth century, the ruler did not ordinarily possess private information that was relevant to subjects' decisions.

(3) In the thirteenth century, rulers regularly acquired such information.

(4) Any decision of the ruler would have the same affect on all of the subjects, so that the subjects would always form a unanimous coalition. (This assumption, which is made in the interest of theoretical simplicity, is clearly false. For example, barons in the north of England seem to have been the most rebellious against both John and Henry III. I believe that a model in which subjects' preferences are unidimensional and single peaked would have very similar implications to the one below.)

(5) The tenure of a thirteenth-century ruler was sufficiently uncertain, and the degree of trust between such a ruler and the subjects was sufficiently low, that subjects' promises of future rewards to a ruler for straightforwardness would not have been taken seriously.

By assumption (1), the balance-of-power theory is a good description of efficient and incentive-compatible twelfth-century government. By assumptions (2)–(5), efficiency in the thirteenth-century political environment cannot be achieved without communication, but can be achieved by a "revelation mechanism."[8] Such a mechanism would involve the subjects presenting the ruler

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[8] One of the standard references on this topic is Myerson (1979).

with a menu of acceptable agreements, one of which would be chosen by the ruler. Each agreement would permit some level of taxation and would require the ruler to raise an army of a certain size. This institution would be equivalent to a "direct mechanism" in which the ruler would report to the subjects how serious was the risk of invasion, and the subjects would reply with permission of some level of taxation tied to a requirement to raise some size of army. The gross level of taxation would be increasing in the reported level of risk, but the ruler's income net of the cost of raising an army would be decreasing in the reported risk level.

The Magna Carta and the Provisions of Oxford both required the ruler to consult regularly with subjects, but neither document spelled out exactly the form that consultation was to take. The efficient, incentive-compatible arrangements just described seem to capture well the rough idea that the authors and negotiators of these documents seem to have had in mind. In short, the private-information theory provides a notably more successful framework within which to understand the thirteenth-century transformation of government in Europe and especially in England than the balance-of-power theory alone is able to provide.

7. Conclusion

In this paper I have tried both to broaden the concept of what aspects of government an economic theory of rights should encompass, and also to take seriously the positive implications of such a theory. The idea that persons should be consulted about taxation and other government decisions that affect them is part of the complex of ideas that are widely understood to constitute the intuitive theory of rights. This idea cannot easily be accommodated within the formal theory of rights as a kind of property, the distribution of which is ultimately determined by a balance of power among political agents. A good test of whether such a balance-of-power theory can satisfactorily incorporate the idea of parliamentary government within a theory of rights is to try to use the theory in order to explain historical episodes of transition to parliamentary government. In the case of a canonical episode of this sort, the transformation of government in thirteenth-century England, the balance-of-power theory fails this test.

For this particular case, a more successful theory is based on the role of private information in the political process. This theory implies that an increase in the salience of private information ought to lead towards a movement towards parliamentary government. Such an increase in salience can credibly be attributed to private information in thirteenth-century England. The private information possessed by rulers of England increased with the rise of a system of international alliances in Europe cemented by rulers' family interrelationships. This information became relevant to subjects because, after the loss of Normandy, an invasion of England could potentially occur with little warning.

I have suggested that, in the case of thirteenth-century England, the increasing role of private information held by the ruler may account for aspects of constitutional history that the balance-of-power theory fails to explain. This is only one of a group of related theories, based on economic

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theory of information and incentives, that have implications regarding the form of social and political institutions. My general argument here is that theories of this sort are required, in addition to theories that concentrate on explaining the distribution of wealth in a society, to understand fully the process by which liberal political institutions emerge.

Whether the private-information theory can also illuminate the apparent contemporary movement towards parliamentary government is an open question. The attempted cartelization of the world petroleum market, the transformation of the world monetary system to floating exchange rates, the progressive weakening of the GATT rules as a reliable regulatory framework for international trade, and the changing nature of rivalry between "superpowers" that have enlisted or coerced many of the world's governments to be client states, are all developments that conceivably may have increased the saliency of private information in various spheres. To enquire seriously about whether the movement towards parliamentary government during the past two decades has been real or only apparent, and if real to try seriously to relate it to the sort of world-wide developments that I have just mentioned, would be an ambitious project but one that I believe would enrich the discipline of social choice and the study of rights in particular.

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