CONSENT AND POLITICAL OBLIGATION: RICHARD HOOKER TO JOHN LOCKE

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Abstract

The problem that this thesis addresses is what was meant by politics based on consent in seventeenth-century England. It proceeds by examining several of the best-known English political writers, beginning with Richard Hooker and ending with John Locke. It attempts to offer an historical account of the meaning of consent, and its relationship to political obligation.

The method used is both philosophical and historical. It examines the cogency and coherence of doctrines of consent that were articulated, beginning with Hooker, touches on several theories of consent that arose during the period of the English Civil War, and examines the relative importance of consent theories during the Restoration and Glorious Revolution. It considers consent, or contract theory in light of two models: a 'social contract theory' that argues from a state of nature, and 'constitutional contract theory' that understands consent as consent to law. The nature of political obligation is a function of both varieties of consent theory.

The general conclusion is that, despite the arguments of the Levellers for a politics based on 'each man's consent', John Locke does not use this vocabulary of consent. He relies instead on a variant form of English constitutionalism, a variety of consent theory that has affinities with that of Richard Hooker's, that assumes that Parliament consents to law for all. It concludes by arguing that, in spite of recent readings of consent theories that have suggested that political obligation was simply understood as a duty to God, one's consent to particular laws was a necessary component of one's obligation and willingness to obey.
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Frontespiece

Consent of nations is the sovereign call,
The best, the first, the true original.
The great Vox Dei's in the public choice
And always Heaven concurs with general voice.

Daniel Defoe, Jure Divino

Good Heavens! What strange names and opinions, alike ill-shapen and dire, but otherwise monsterously diverse, have these last seven years, fruitful of prodigies, brought forth into the world and nursed and cherished under the pretence of Reformation.

Robert Sanderson, Bishop of Lincoln  De Obligatione Conscientiae

Nor do I know, if men are like Sheep, why they need any government: Or if they are like Wolves, how can they suffer it.

William Temple  An Essay upon the Original and Nature of Government
INTRODUCTION

In the period roughly bounded by Richard Hooker's statement of a consent theory of government at the beginning of the seventeenth century, and John Locke's use of Hooker's theory in his *Two Treatises of Government*, the nature of political obligation in England remained a fiercely contested issue. Political obligation in a Christian commonwealth could be conceived simply as a duty to God, and a consequent duty to follow the dictates of Romans 13:1; "Let every soul be subject unto the higher powers" coupled with the admonition of Romans 13:2; "Whosoever therefore resisteth the power, resisteth the ordinance of God: and they that resist shall receive to themselves damnation." However, there was a restatement in the sixteenth and seventeenth centuries of a tradition that stressed reason and natural law applied to understanding law's command. There was a third equally vital tradition in England, that argued that a King's power was limited by the laws of the realm. From the Christian tradition was derived the notion that only genuine law could oblige the conscience, but also a doctrine of passive obedience to whatever government that God had placed over man. From the natural law tradition was derived the notion that genuine law had to conform with reason, and would elicit one's 'consent,' or rational agreement. From the constitutional tradition were derived two complimentary axioms; genuine laws, including those which bound the King, had come into existence either as custom to which 'tacit consent' had been given or through 'express consent' as legislation passed in parliament, a body which represented the realm. It is in the collision of these three traditions—the religious, the natural
law, and the legal, or constitutional— that theories of political obligation and theories of government based on consent were worked out in in the seventeenth century.

This paper begins with a theoretical and historiographic excursus. Next, it considers Richard Hooker, whose Of The Lawes of Ecclesiastical Polity provides a unique combination of constitutional and philosophical arguments for government based on consent. As the press of events of the English Civil War caused a breakdown in the political nation and a dissolution of government the issues of consent, contract, representation and the grounds of political obligation become much more than theoretical issues. Several versions of consent theory thrown up out of the confusion of the Civil War and Interregnum will be examined in the middle portion of the paper. The final portion considers the importance of doctrines of consent in Locke's theory of government, Locke's use of Hooker's Lawes in the formulation of that theory, and places Locke's articulation of consent theory within the context of the Restoration discussions about political authority and individual obligation.

Methodologically, this paper relies heavily on the work done by Quentin Skinner and others who have outlined a contextualist approach to the reading of works of political theory. Although this paper perhaps is the product of one more student who cannot put pen to paper "without self-conscious elaboration of methodological frameworks," the presuppositions of an inquiry such as this are worth noting. We must keep in mind that "the meanings of concepts such

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1 These works are listed in the bibliography and include writings by Quentin Skinner, J. G. A. Pocock, John Dunn, James Tully, and Mark Goldie.

as the 'state of nature' or 'contract' were embedded in a political struggle.\textsuperscript{3} What we may tend to consider abstract theory gained ideological importance as it shaped, and was shaped by, the political conflicts of the seventeenth century. In turn, the experience of those conflicts influenced the way men thought about politics. Political theory is not, however, just the product of political struggles, a view which tends to reduce all political writing to ideology.\textsuperscript{4} Just as importantly, one needs to consider the philosophical genesis and coherence of political theory as theory. However, one needs to be sensitive to the language employed by the writers under examination without falling into a idealist reading that tends to categorize certain writings as 'pure' political theory, and thereby deny their obfuscatory, confused and often times polemical intentions. In a modest way, then, this study combines an awareness of language and linguistic conventions with 'old-fashioned' history of ideas that concentrated on specific texts understood to be part of a canon of important texts. It also attempts to recognize that both the ideological and philosophical genesis of political theory must be taken into account. Turning to the specific issue under consideration, 'consent', like most terms of the political vocabulary of the period, and like most emotive words in times of political upheaval, has a cluster of meanings in which a newer language overlays the older one. The project for the historian must be a careful 'unpacking' of these meanings. By focussing on consent and by paying careful


\textsuperscript{4}See Ashcraft, ibid, introduction, and his "The Two Treatises and the Exclusion Crisis: The Problem of Lockean Political Theory as Bourgeois Ideology", 28-36, in \textit{John Locke: Papers Read at a Clark Library Seminar 10 December 1977} (Los Angeles: William Andrew Clark Memorial Library, 1980). One ought to be able to accept that part of his view which stresses the importance of the political struggles for the emergence of a particular language of politics without embracing the whole of his Mannheimian view that tends to deny authorial intention.
Introduction

attention to the language used and positions taken by the participants, the terms and conditions of political debate about the issue of consent can perhaps be better understood. As this examination proceeds, it will become clearer that the issue of what consent meant is an ideological problem; but even more than that, it is also a philosophical one.

A particular problem, and one we should make note of at the outset, is that to view the history of the seventeenth century through the refractory categories of Royalist and Parliamentarian, or even worse, Whig and Tory, is to ignore the historically contingent and thus downplay the extent to which these categories themselves are a result of political struggle. Reading these dualisms back into the early seventeenth century ignores the fact that most political writers of the period were engaged in a dialogue using common categories with the desired end of maintaining the political order. However, this is in no way suggests that there was unanimity of outlook, either in categories of thought or modes of practice, except perhaps at the level of vague generalizations. Thus, although most writers of the period claimed to be defending the Ancient Constitution, there clearly was a high level of disagreement over the exact content of that customary and legal outlook. As J.P. Sommerville has written: "In the early seventeenth century, men agreed it would be wrong to change the existing political and constitutional arrangements, but disagreed on what these

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5 Thus, writers as diverse as Henry Parker, for the Parliamentary side, the Constitutional Royalists of the Tew Circle like Henry Hammond and Dudley Digges, or the Levellers like Richard Overton, could all make the claim that in part their positions rested on an understanding of the 'ancient frame of government', allowing for the exigencies of the situation. The phrase is classically defined by J. G. A. Pocock in The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century. A Reissue with a Retrospect (Cambridge: Cambridge University Press, 1987), 36.
It is safe to say that for the period under consideration that most men were 'royalist' to the extent that few could imagine politics without a king. One thing that emerges more or less incidentally to the main focus of this paper is the suggestion that the connection from Royalist to Tory (or from Parliamentarian to Whig), at least at the level of ideas, is by no means obvious.

Ideally, such a study should carefully examine the full set of concerns dealing with the idea of government by consent. Clearly, as an issue in politics it has both a practical and philosophical component. The practical aspect is obvious; the idea of consent changes from an unexamined belief that linked institutions and people in authority with a right to consent for all, to one that—of necessity—had to consider how consent is actually expressed, whether by individual oath or by parliament, representatively or virtually. On a more philosophical level, the right of the individual to judge the command of law, as interpreted by individual reason and conscience, worked to limit any easy acquiescence to existing or proposed laws. I am only too aware of the sketchy nature of the account of theories of consent offered here. It leaves largely unexamined the practical relationship between consent theories and political practice in late Tudor and Stuart England. I can only note that changes in the legal language of contract seem to parallel changes in the political language.

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also leaves unexplored the theoretical ramifications of the differing theories of natural law and natural rights except as they impinge directly on the issues and thinkers under consideration. I can also do little more than acknowledge the existence of an adjunct discussion, often casuistical in nature, about the relationship between genuine law and conscience—what it means to 'be obliged in conscience'—that deserves fuller treatment than I can give it. As a final caveat, what is attempted is a 'tunnel' history of a particular set of related concerns through one of the most studied periods of history, and, since there is an increasingly rich literature on nearly every aspect of seventeenth-century English history, it makes no pretence to offer a balanced account of English political thought in the seventeenth century. Given these provisos, this study describes the theoretical articulations of consent, and their relation to theories of government by law through considering the link between Hooker and Locke.

While highlighting the differing views of consent displayed by Locke and Hooker is to show the mutations of an idea across time, acknowledging their similarities helps to demonstrate Locke's reluctance to embrace the radical view of consent of someone like Hobbes, and to suggest the similarity of the moral axis on which both Hooker and Locke ought to be located. This aim is doubly problematic. First, in what way can we construct an argument for continuity between Hooker and Locke that is not a naive one, that establishes limits to intellectual iconoclasm that stresses discontinuity in the seventeenth century? Second, what role can we assign to theories of consent and contract, both in terms of the debates within this period, and also in terms of the persistence of theories of consent as part of a later 'official' Whig ideology? At a textual level, it

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8Only a small portion of the appropriate secondary literature can be acknowledged (though not discussed extensively) in those places where the arguments touch on areas related to the issue under discussion.
is the specific ideas of the natural equality of men and government by consent that Locke takes from Hooker. Yet the issue has much wider ramifications. Within the overall framework of seventeenth century political debates, the argument for politics based on consent is crucially important to the emergence of a notion of politics as an activity created by men that runs contrary to competing theories stressing its divine origins. It is in opposition to theories of 'divine-right' kingship and its analogue, episcopacy ordained by God, that consent theories become the repository of doctrines of radical and constitutional limitation on earthly institutions.
CHAPTER 1
THE ISSUE OF CONTINUITY

One might well ask 'why begin with Hooker?' In the first place, Hooker's Lawes contains the fullest elaboration of a natural law basis for understanding political authority published in England in the late sixteenth century. Yet its very breadth and power leaves one with an historiographic puzzle. How could one of the greatest English prose works, and what one writer has rightly called the most "systematic and philosophically sophisticated piece of political writing produced in the sixteenth century," be virtually ignored by modern political theorists?¹ Even the best recent textualist account of the sources of modern political thought, that of Quentin Skinner, ignores Hooker, despite the success of his Ecclesiastical Polity and its seventeenth-century reputation.² Brendan Bradshaw finds it puzzling that Skinner "does not consider Hooker in the context of the revival of constitutionalist theory," despite the parallels between


Hooker and the continental writers surveyed by Skinner. While one can recognize Hooker's affinities with the native English and Thomist constitutionalism, it is his particular combination of these elements that makes his work unique.

There seems to be general agreement among most historians of political thought of the critical role that revived theories of natural law played in the development of constitutionalism and theories of natural right in the seventeenth century. However, in one of the few recent examinations of the emergence of theories of natural right, Richard Tuck, like Skinner, ignores Hooker. Tuck argues that a continental pedigree originating with Grotius can be traced for theories of rights in England, even when it is clear that the same natural law basis for theories of rights is present in Hooker. In contrast, an essay by Hugh Trevor-Roper has hinted at the importance of a pan-European context for understanding Hooker, and, in particular, the similarity of his use of natural law theory for discussing the origins of political society to those employed by other European writers.

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natural law theories into seventeenth- and eighteenth-century English political thought is often elucidated by tracing a tradition from Grotius, through Pufendorf and to Locke. A fuller understanding of Hooker should both place him in context with Grotius, and with the writers of the Catholic counter-Reformation like de Soto and Suarez. As Bradshaw notes, "Hooker's treatment of constitutionalism is not purely traditional. It is clear that he is attempting to accommodate the constitutional elements of the new humanist jurisprudence and of Counter-Reformation neo-Thomism to the constitution of late Tudor England."6

A secondary aim of this paper then is to restore in some small way Hooker's place in the 'history of English political thought' and to examine the survival and transmutation of ideas about the nature of political obligation, often described as medieval, in the critical debates of the 1640s, 1660s and 1680s.7 In a general way this issue of the continuity between the late medieval and early modern periods with respect to political philosophy has become almost commonplace in recent years. The understanding that the seventeenth century witnessed the birth of both individualism and the new sciences and a consequent radical disjuncture in the vocabulary of natural law, theology and politics, seems

that existed between Grotius and the Tew Circle, the legitimate heirs of Hooker's views, see the introduction and chap. 4 of his Catholics, Anglicans and Puritans: Seventeenth Century Essays (Chicago: University of Chicago Press, 1988).

6 Bradshaw, ibid.

7 This is the older view which was apparently widely held. See, for example, George H. Sabine, A History of Political Theory, 3rd ed. (New York: Holt, Rinehart and Winston, 1961), 523: "The medieval tradition that Locke tapped through Hooker, was an indispensable part of the revolution of 1688." See also A. P. d'Entrèves, Medieval Contribution to Political Thought: Thomas Aquinas, Marsilius of Padua, Richard Hooker (Oxford: Oxford University Press, 1939; repr., New York: The Humanities Press, 1959), 116: "Hooker is indeed one of the most important links though not the only link between medieval and modern political philosophy in England."
to be on the wane. Moreover, as Eccleshall suggests, we should not view early
modern political thought "as the product of an intellectual dark age that was
squeezed in between the architectonic splendours of the Scholastic era and the
analytically rigourous contract theories of the mid-seventeenth century."
Hooker, in Eccleshall's view, following d'Entrèves, is a case par excellence of the
high point of early modern political thought. Skinner's masterful re-
examination of these 'foundations' has provided much evidence for this
continuity of ideas. D. R. Kelley characterizes the seventeenth century as the
time when

natural law overwhelmed positive law; pure reason replaced erudition and
legal tradition as a means of persuasion and justification. But if the words
changed the music in a sense remained the same; and the familiar themes of
Hobbesian absolutism, Lockean constitutionalism, and (pace Pocock)
Harringtonian republicanism are traced to their earlier and more obscure
formulations in terms especially of scholastic, conciliarist, civic humanist,
and Protestant thought.

As Francis Oakley notes, the English divine-right theorists of the seventeenth
century, like John Maxwell, argued that theories of delegated power from the
people were arguments derived from the conciliarists. Or as Sommerville
recently stated: "Locke's Two Treatises of Government ... owes a heavy debt to
ideas that were current in the early seventeenth century."

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8 Eccleshall, ibid, 2. See also his "Richard Hooker and the Peculiarities of
the English: The Reception of the Ecclesiastical Polity in the Seventeenth and
Eighteenth Centuries," History of Political Thought 3, 1 (Spring 1981), 63-117, and
his "Richard Hooker's Synthesis and the Problem of Allegiance," Journal of the


10 Francis Oakley, The Political Thought of Pierre d'Ailly: The Voluntarist

11 Sommerville, Politics and Ideology 3.

12 Examples of the continuities studied include the importance of covenant
theology and natural law, discussed by Francis Oakley in a series of articles and
Central to our understanding is seeing that the clash over the nature of political authority was not between theories of divine-right monarchy and democracy. While this paper is concerned with exploring the parameters of consent and contract, we must use great care that we do not impose on these ideas a modern vocabulary of politics. It seems to be simply a false antithesis to contrast an order-centered theory of government with a community-centered theory as an explanation of the origins of political power. Not only was there general accord about the necessity of order maintained by the inherited framework of law and institutions, but, since all powers be of God—either "instituting or permitting," as Hooker says—all political power must in some way flow from God, and express itself as part of the order of the universe. Natural law and the Ancient Constitution were the accepted touchstones of contemporary political commentary.

A second problem in understanding consent theories is to get a proper sense of what is meant by 'divine-right' monarchy. Sommerville contrasts what he calls "royal absolutism" with two theories that argued against the King's unlimited power: the king is accountable to the people or the king is accountable to ancient custom. For Sommerville there is a "stark disjunction between these theories and the principles of royal absolutism." As Wootton has noted

books, who examines some of the links between the scholastics and the writers of the seventeenth century. The continuity between medieval and modern political thought and theories of divine right was examined in works by J. N. Figgis and the influence of the French religious wars of the sixteenth century on English political thought by J. M. H. Salmon.


15Sommerville, ibid, 4.
however, kings were called absolute by men of the seventeenth century, meaning that their power was workable and we misinterpret if we think of it as meaning despotic or ruling without regard to law. Divine right, at least before the Civil War, was understood to mean that the King was answerable to no earthly authority, that monarchy was approved by God, that monarchy best embodied the principles of hierarchy and unity, and that primogeniture was divinely ordained. It would be a mistake, however, to see this as incompatible with notions of monarchy restricted by custom and law. In his examination of the genesis of theories of monarchy, Eccleshall argues that the theories of the absolute power of kings, as well as theories of their constitutional limitation should not be falsely contrasted. They both had a "respectable ancestry in medieval theory, though the predominant trend in English political theory from the thirteenth century was towards a theory of limited monarchy." Both "evolved from and were contained comfortably within an established system of assumptions that was to hold sway until the middle of the seventeenth century." The extent of the king's prerogative, or his sphere of absolute power, is certainly one of the troubling issues of the period, but most commentators would agree that what Sommerville calls 'royal absolutism,' often expressed as extreme theories of patriarchal power based on Biblical exegesis that denied the concrete historical English past, was a product of the escalation of claims from


17Eccleshall, Order and Reason, 2, 47.
the mid 1620s. For the purposes of this paper if we contrast theories of consent simply with theories of divine right, it is for convenience only and not meant to deny the complexities of definition.

It is clear, however, that ideas of constitutional limitation were reformulated to counter new theories of undivided sovereignty and a resurgence of imperial ideas about kingship. Sovereignty, as Bodin understood it, was barely acknowledged by Englishmen before the Civil War. One of the most striking aspects of the political theory of the period seems to be the ability of writers to hold claims about political power which seem contradictory or mutually exclusive. Thus there seemed little trouble in holding that the king retained absolute power within his *lex regia*, while arguing for the limitation of his ordinary power by the laws of the land. However, in a classic summary, C. H. McIlwain describes the emergence of constitutional dispute in the late sixteenth century:

In an age in which *majestas* could be defined as *summa in cives ac subditos legibusque soluta potestas*, the question could not remain long in abeyance whether the magistrate wielding such unbridled power derived it from God directly, or from the other members of the commonwealth, or from God through the people; and if from the people, whether the *Lex Regia* by which it was conferred could or could not be revoked by those who had made the law.

While England did not undergo the same extent of political upheaval in the sixteenth century as did France,

_to a degree surprising in view of the trite phrase "Tudor Absolutism,"

questions were mooted touching the source, the nature, and the extent of royal power; questions of election, of contract, of restrictions imposed by the coronation oath; assertions of the right of the people collectively to judge, to

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18 This is the new orthodoxy, promoted especially by Conrad Russell, *Parliaments and English Politics 1621-29* (Oxford: Clarendon Press, 1979), passim. See note 2, chap. 3, for a longer comment on this revisionist view.

19 Eccleshall, ibid, 76-9; Skinner, *Foundations*, vol. 2, 113-84.
depose, and even to kill the king, a right attributed in rare instances to individual subjects.²⁰

However, the idea of electing kings, and their subsequent restriction by coronation oath, the extreme view of the Catholic monarchomachs, played little part in the English debates. The same could be argued for theories of deposition and tyrannicide, which were articulated in the Scottish context, not in England. Yet there is good reason to believe that English writers were well aware of the continental debates and thus already had intellectual ammunition that fell readily to hand with the dissolution of government in the 1640s.²¹

Consent, or contract, theories were the most vital theories available for determining the 'source, nature and extent of royal power' in opposition to theories of unlimited monarchy. Yet it is too easy to think of 'social contract' only as an argument from a 'state of nature.' As Martyn Thompson suggests, there were at least two theories of social contract:

One was a tradition of social contract theory with a distinctive vocabulary of natural rights, natural law, states of nature and social and original contracts. The other was a tradition of . . . "constitutional contract theory." This theory had a distinctive vocabulary of fundamental rights, fundamental law, ancient constitutions and original contracts. The first tradition appealed to the evidence of reason and the moral law. The second tradition appealed to the evidence of history and constitutional law. Both traditions assumed their characteristic early eighteenth century formulations at the time of the 1688 Revolution, with Locke formulating social contract theory. . . . In the period up to the second decade of the eighteenth century, by far the most


²¹J. M. H. Salmon, French Religious Wars in English Political Thought (Oxford: Clarendon Press, 1959), notes the use of the French theories in the English political debates, but seems to suggest that they were not known earlier. Sommerville, Politics and Ideology, has recently argued strongly that James I was aware of the continental theories, and used them in his own writings. As I will argue, Hooker shows knowledge of these debates and books such as the Vindiciæ contra Tyrannos and Bodin's Republic and restates English constitutionalism in spite of it.
For the remainder of the paper, these two versions of 'contract' theory will be used to discuss the issue of consent. The description of these as contract theories, rather than consent theories is somewhat problematic, since until the breakdown of government in the 1640s few people imagined that specific limitations on the king could have been agreed to at the time of some initial agreement. That is, the initial agreement was not understood as contractual in the sense of outlining specific rights and duties. Although contract implies consent, consent need not imply contract.

Given that there are two distinct, but not wholly separate traditions noted by Thompson, we must consider what role consent is understood to play in theories of political obligation. Skinner has suggested consent in sixteenth and seventeenth century political thought is "not used to establish legitimacy of what happens in political society, it is solely used to explain how a legitimate political society is brought into existence." It is thus used to explain "how it is possible for a free individual to become the subject of a legitimate commonwealth." Thus, the juridical validity of government in this period is a question of whether or not the laws which have been enacted are in accord with natural law and not a function of consent. In Skinner's formulation, the idea that consent implies the

\[22\text{Martyn P. Thompson, "Hume's Critique of Locke and the Original Contract," Il Pensiero Politico 10, 2 (1977), 200. Thus, as Thompson's notes, Locke was clearly in the tradition of the first type of contract theory, and Hume's criticism of the historicity of the contract, although ostensibly directed at Locke, really missed the thrust of Locke's argument.}

\[23\text{Skinner, Foundations, vol. 2, 162. See also, Gordon Schochet, Patriarchalism in English Political Thought: The Authoritarian Family and Political Speculation and Attitudes Especially in Seventeenth Century England (Oxford: Basil Blackwell, 1975), 9; Consent explains "how political societies may have arisen, not why men had to obey them."} \]
foundation, but not the legitimacy, of government is based on the belief that there is one moment at which an individual becomes obliged to obey a particular government and its laws and that consent has no further role to play. As Schochet notes: "The reliance on contract was transformed into a derivation of obligation from individual consent . . . Consent theories rely on the actions of the subject himself and not upon his duty to accept the political order agreed to by his ancestors." This is a very Lockean reading of consent that ignores the parallel discussion that assumed consent could be given by individuals to that political order in some manner.

If the sovereignty that is thus created through individual consent is absolute, as some writers of the seventeenth century would argue, then consent as an actuating condition would have little to say about the terms by which such sovereignty is transferred to the prince. The analogy for this type of contract, and an analogy employed by the writers of the seventeenth century, was that of the marriage contract. While the participants in the marriage 'consented' to the agreement, implying no coercion, the legitimacy of the contract was a function of God's law and, in a sense, the alienation of right on the part of the individuals was total. Hooker does consider the agreement that establishes

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24 Schochet, *Patriarchalism*, 8. See also, 62, where consent is defined as an action of individuals. This seems a false antithesis between consent and contract. The context of the paper should make clear my disagreement with Schochet about these two ideas of consent and contract.

25 Mary Shanley, "Marriage Contract and Social Contract in Seventeenth Century English Political Thought," *Western Political Quarterly* 32, 1 (1979), 79-91. The arguments for divorce made by Milton and others were thus the analogue of the arguments for the right to overthrow kings. As Dudley Digges argues, in *The Unlawfullness of Subjects Taking up Armes* (London, 1644), 113; marriage required two parties, "yet after it is once made . . . real discontents cannot dissolve the compact. Consent joined man and wife, King and people, but divine ordinance continues this union."
government as irrevocable; yet he also suggests that the terms of the contract are important. It is not so much that terms are established, as it is the fact that men agree to a system of laws that is coeval with the erection of a king. The king is from his inception bound by the law. In Hooker's words the power that the king possesses must be "limited erre it be graunted" and these limitations must continue to restrict the absolute power of the prince. The problems with the legalism of this formulation are immense, though it is definitely one of the main lines of argument made by the Parliament in disputes with the king.

Within the realm of 'constitutional contract' theory, however, there was the belief that consent continued to have a role in determining the validity of law, and the subject's duty to obey it. Parliament was assumed to be the arena in which subjects 'consented' to the law. As the Elizabethan, Sir Thomas Smith said: "The consent of Parliament is taken to be every man's consent." Such a view was still put forward in the early seventeenth century. As Berkeley was to say in his Hampden case judgement: "No new laws can be put upon them [the subjects], none of their laws can be altered or abrogated, without common consent in Parliament." But when we examine his definition of the power of the King and his restatement of the view that parliament sits at the King's pleasure, this notion of consent seems hard to grasp. Thus, Berkeley argues that each man's consent and parliament's consent are analogous terms in a way that seems consistent within English political discourse, that is, that the terms are used


synonymously, and that this procedure of giving consent to particular actions is a function of parliament. This notion of consent, as expressed in parliament, retains overtones of counsels to the King and a certain unanimity of outlook. In this view, the King's function is to approve and maintain law; he can neither make nor break it. Laws were enacted by the King after they received counsel (concilium) of the magnates or those concerned with the law. As McIlwain notes:

It is misleading to inject the later idea of sovereignty into this "counsel" and think of it as exactly the same "consent" often required under modern constitutions. What was requisite in medieval "counsel" was knowledge rather than authority. In consensus, the emphasis fell on unanimity or agreement of witnesses to the existence of custom, as members of an inquest or jury, not in their legal indispensability in the modern meaning of the term.29

The important thing to emphasize about this possible meaning of consent is its connotation of knowledge, unanimity and agreement.

Therefore it also is possible that the expression 'to give consent' to some particular law or practice is not a political act at all. Rather, it has the connotations of rational agreement, or giving assent or approval. The notion of 'tacit consent' implies precisely this. Such an understanding of consent is given new force by the natural law understanding that stresses the possibility of rational agreement to law. What has come into existence as law has been approved in the sense that there has been tacit acceptance of it. Plamenatz suggests that what was customary implied popular consent, but in fact the issue

29Charles Howard McIlwain, The Growth of Political Thought in the West: From the Greeks to the End of the Middle Ages (New York: Cooper Square Publishers, 1968), 194. He then goes on to quote Bracton, who claims that what has force of law is not "what has pleased the prince" but "whatever shall have been justly defended and approved (definatum et approbatum) with counsel and agreement (consensu) of the magnates."
is more complex than that. Where the boundary blurs between the notion of 'express' consent through legislation and 'tacit' consent, is that, if custom has established an order of proceeding so that consent is implied in the foundation of political authority (in this case Parliament), then consent (at least as agreement) on the part of the population can be assumed to exist. Prescription or tradition function to a large degree to sanction existing political arrangements, and the consent of the particular individual, understood as participating in the political process, might not be at all at issue.

The criticisms of either version of contract theory were legion. First, Sir Robert Filmer, like more recent writers, attacked the theory of 'social contract' at its weakest point; that is, how can men in a pre-political state establish juridical limitations on political power? In the words of John Maxwell, in his Sacro Sancta Regum Majestas of 1644, if the people are only a collection of individuals, how can they agree to confer anything? Yet it is not clear that such criticisms are well-founded. More telling is the question, how can such terms and conditions that may have been established with the initial transfer of power be binding on subsequent generations? This becomes an issue of critical importance with the renewed speculation about the establishment of legitimate authority in the civil war period and the loss of confidence in tradition as an axiom of belief.

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31 One must be sceptical that the theorists like Hooker were not clever enough to see this limitation to their argument. This paper will argue that their reconciliation of this problem, that some form of society existed prior to the creation of government, was attacked both by Royalists and Parliamentarians alike, and attacked using the language of Hobbist 'individualism.'

32 For the argument that Hooker was the last writer for whom all means of knowledge such as tradition were mutually reinforcing and that the seventeenth century saw a decay of a 'Christian humanist synthesis', see Herschel Baker, *The
troubling, and this is connected to the increasing articulation of individual
rights, is the question of how men can give away the power that belongs to them
by nature? This series of critical questions arises when the legitimacy or the limit
to government is argued from conditions established by the consent of the
governed at the time of the initial contract.

Moreover, one of the strong criticisms of theories of government based on
consent is that they in principle interfered with the divinely ordained hierarchy.
As John Maxwell was to argue: "How can it then be conceived that God hath left
it to the simple consent and composition of men, to make and establish a
herauldry of Sub and Supra, of one above another, which neither nature nor
Gospel doth warrant."33 Charles I could say, without ingenuousness one
suspects, that the issue of participation should not make any difference to the
subjects' obedience to the government. In the Answer to the Nineteen
Propositions the writer expresses the paradoxical notion that the "common
people" should not be deceived to "call parity and independence liberty." The
document expresses a genuine fear of the destruction of the ordered and
hierarchical society that will likely result from the intrusion into politics of the
masses. To gain the consent of the people will mean catering to their "wild
humours" through flattery, and once they realize their power, the result will be
that "this splendid and excellently distinguished form of government [will] end
in a dark equal chaos of confusion, and the long line of our many noble ancestors

Wars of Truth: Studies in the Decay of Christian Humanism (Cambridge:
Harvard University Press, 1952), passim.

33John Maxwell, Sacro-Sancta Regum Majestas; or the Sacred and Royall
Prerogative of Christian Kings, (Oxford, 1644), 83. Quoted in Eccleshall, Order and
Reason, 162. It is interesting to note that the phrase 'consent and composition'
 echoes Hooker, Book I.
Issue of Continuity

in a Jack Cade or a Wat Tyler." The idea of the consent of each man seemed to point in the direction of 'dark equal chaos.'

Second, Royalists and radicals were equally critical of 'constitutional contract' theory. They were quick to point out that consent in parliament, conceived of as an individual action in 'giving voice' in elections, or actually participating in parliament really only touched the minority of the population. While the elected parliament claimed to represent the wishes of the people, and is in that sense representative, in the late sixteenth century such representation was not a function of the 'consent' of individuals whose political wills were somehow articulated by their participation in the process of parliamentary selection or perhaps actual participation in parliament itself. While it was clearly recognized that, in theory, consent could be given by individuals, in practice such consent-giving was done by the corporate bodies entrusted with the affairs that affected all. As David Wootton has suggested, "the medieval tradition, continued into the seventeenth century, maintained that the people gave their consent, not as equal individuals but as members of a hierarchical society." As Archbishop Whitgift put it, external order could never exist in the church if it required "every singular man's consent," while, on the other hand, "neither princes nor prelates in this land . . . ruleth 'after their pleasure and lust,' but according to those laws and others that are appointed by the common consent of the whole realm in parliament." Onesuspects that the same understanding

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34 Philip Hunton, A Treatise of Monarchy (1643), cited in Divine Right and Democracy, ed. David Wootton, 175.

35 Wootton, ibid, 49.

existed about the possibility of a politics that required 'every singular man's consent'.

While there were pressures to concede that politics required 'every singular man's consent', it would clearly be a mistake to collapse this into modern view of consent expressed as choice through free elections. Mark Kishlansky argues in a recent study that we misunderstand the electoral process in the early modern world if we use terms which imply competition. For the early modern period, free election, like free consent given by individuals, implied unanimity rather than choice. Again the connotations of consent as rational agreement are clear. Thus an election was 'free' if it was uncontested. A government could be said to be based on 'consent' (or assent) if it proceeded by a ritual affirmation of the existing hierarchy. Parliamentary candidates were 'chosen' in meetings that involved mass participation, often by a quite broadly-based electorate, but usually competition between candidates did not occur unless the selection procedures had broken down. The people's role, as voters, was affirmatory, rather than one which expressed choice. However, Kishlansky argues, in England between 1614 and 1685 the process of parliamentary selection was transformed so that: "A process of social distinction and community assent had given way to one of political power and electoral consent." While I think Kishlansky idealizes the degree of agreement in the early seventeenth century, he is right to point out the problems in trying to understand what was meant by

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37Ibid., 146.

terms like consent and representation. One of the arguments that will be made is that our unreflective modern connection between election and consent gets started in the seventeenth century, and that the practical concerns of electoral politics influenced the theoretical articulations about consent in a fairly direct way. In the seventeenth century, the practical issue becomes how the consent of the governed could be expressed through participation, choice and representation.

The important parallel that I wish to emphasize between Locke and Hooker is that they use both varieties of contract theory: a 'social contract' theory and a 'constitutional contract' theory. Yet unlike Thompson's formulation of 'constitutional contract' as an actual historical event, with precise conditions attached, both Hooker and Locke stress the creation of law, or legislative, as the only important result of the formation of government. Hooker and, as will be argued, Locke, in this regard see 'contract' as almost a minimum condition, a hypothetical-historical as-if; both then limit the contract side of the argument. For Hooker prescription and custom imply what those conditions of the original contract might have been. For Locke, the critique of established political authority is not likely to be conducted in a language of abandoning the terms of contract by the sovereign authority, but by the abuse of trust that is implied in the ruler-ruled relationship. Neither writer however successfully addresses the

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39 For the argument that Kishlansky attacks, see Derek Hirst, Representative of the People? Voters and Voting in England Under the Early Stuarts (Cambridge: Cambridge University Press, 1975), passim.

issues of parliament's claim to be representative in a very satisfying way. Yet both use the combination of 'constitutional contract theory' and 'social contract theory' to construct their arguments about government based on consent. In doing so, it is clear that consent both in the sense of rational agreement to law by individuals, and consent to law as expressed in parliament, play an important continued role in providing reasons for individual obedience to law. Thus, contrary to Skinner's reading of constitutional theory, and contrary to Dunn's reading of Locke's consent theory, the individual obeys the laws of a particular government because he has 'consented' to them. Such 'consent' can be imagined as rational agreement, 'tacit' acceptance, or as 'express' consent by some legislature; however imagined, consent functions to provide a check on the pretensions of unlimited monarchs.

This paper, then, represents to some degree a return to constitutional history. Focussing on the ways in which the 'constitutional contract' argument is combined with the 'social contract' one, will allow us to better assess political possibilities in seventeenth-century England. In a curious way the scholarship of political thought has tended to overemphasize the influence of Bodin and Grotius, and downplay the native English debate about the nature of law and government; it has been excessively 'philosophical'. Hooker is then seen as a peripheral figure, interesting only for his contribution to Anglican theology, and von Leyden suggest that Locke's use of 'trust' was a response to the inherent weakness in the 'contract' theory.

This is in part, as will be argued, a product of Locke's suspicion of and lack of trust in the parliament, since it was on the terms of violation of contract that parliament made its claims in the Civil War. See chap. 4, below.

even criticized for being too naive politically. Indeed, his close friend Hadrian Saravia has been seen to be more clear-headed about the harsh realities of late Tudor politics.\textsuperscript{43} W. D. J. Cargill Thompson, in his assessment of Richard Hooker as a political thinker, cautions against accepting much of the Anglican hagiographical treatment of the 'judicious' Hooker. He is much more sanguine in saying, however, that Of the Lawes of Ecclesiastical Polity:

> is not in any formal sense a treatise on the principles of government. . . nor is it a discourse on the nature of the English constitution. . . . nor is it primarily . . . a work of theology. Essentially it is a work of apologetic, a defence of the constitution and practises of the Anglican church against the attacks of its Puritan critics . . . a \textit{livre de circonstance}, which has its roots in the controversies of the Elizabethan church. As such it is primarily a work of polemic.\textsuperscript{44}

Thompson seems determined to deny the Lawes any importance as a political treatise. By emphasizing Hooker's debts to Aristotle and the scholastics, to protestant theology and to traditional English political thought and to the earlier church reformers (and Whitgift in particular), Thompson limits any claims that might be made regarding Hooker's intellectual or polemical originality.\textsuperscript{45} In striking contrast to the treatment of Hooker by Skinner and Thompson, J. W.

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\textsuperscript{45}Bradshaw, ibid. Gordon Schochet, \textit{Patriachalism}, 51, calls Hooker's examination of the origins of government "an even greater departure from previous writers and a more interesting use of Aristotle" than other English writers, but notes only Hooker's lack of clarity about who is to consent to government, without considering Hooker's argument in its entirety.
Allen and A. P. d'Entreves assert that the Lawes contains the most extended sixteenth-century treatment of natural law by any writer and that it deserves serious attention as a work of political theory. Yet in d'Entreves view, Hooker is essentially backward-looking, and Hooker is envisioned as an irenic thinker. Similarly, Thompson's treatment emphasizes the centrality of Hooker's religious concerns; his political theory is seen to be subordinated to the goal of justifying the Elizabethan settlement. Despite its rather careful exposition of Hooker's work and its historiography, Thompson's essay, especially owing to its use of perjorative terms like 'polemic' and 'propaganda', ends up not treating the Lawes seriously enough. A view that is very difficult to assess is that of Robert Faulkner who, while arguing that Hooker is not just the time-serving defender of the status-quo that Thompson makes him out to be, emphasizes the religious and philosophical at the expense of the political elements in Hooker. The theoretical implications of Hooker's work need to be examined in their own right even if Hooker did begin his work with the limited purpose of defending the Elizabethan settlement. In Hooker's case, the process of abstraction leads him to consider the nature and justification of political obligation in the widest

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47 Faulkner, Hooker and the Politics of a Christian England, passim. As Bradshaw, ibid, 440, notes "this is not the authoritative treatment of Hooker's magnum opus that is required."

48 J. G. A. Pocock, "The History of Political Thought: A Methodological Enquiry", Philosophy, Politics and Society, 2nd series, ed., Peter Laslett and W. G. Runciman, (Oxford: Basil Blackwell, 1972), 186. Pocock discusses the importance of seriously examining a work even if it was written with polemical intent since "no man knows where the process of abstraction may lead" a particular thinker.
possible sense, and this alone makes him worthy of study. It is the fullest statement of a theoretical political position available on the origins and nature of political society for late sixteenth- and early seventeenth-century England.

While Hooker's writing is less political than Grotius's, especially by our standards, this alone has not led to his relative obscurity. One obvious mitigating factor is the text's lack of availability in its completed form until the late seventeenth century, coupled with its late translation into Latin, which meant that Hooker's views were not well known to his contemporaries in England or on the continent. However, this means only that our treatment of Hooker within the intellectual tradition must be different than if the text was widely disseminated, and that his position should still be viewed as open for debate. However, its relative disregard by modern theorists stems from a more obvious source—a problem of context. Despite the recent attempts of historians of ideas to achieve contextual precision, there seems still to be an Enlightenment bias regarding matters of religion. Perhaps the difficulty with the Lawes is not that we find it incoherent, but that we fail to find the idea of religious politics coherent. There are certainly problems in coming to terms with Hooker. In a

49However, concentrating on the 'political' aspects of the Lawes does not mean that we can deny the centrality of its religious intent. Because the modern sense of politics as a distinct sphere of activity was just emerging, and had not achieved that divorce from moral and ethical discourse with which we associate it, that order Hooker describes in the political world gets its coherence from his restatement of divine and natural law theories; for him, prudence was not yet divorced from Christian ethics.

50On the textual history of the Lawes, Chap. 2, note 2 below.

51An interesting discussion of how we ought to deal with documents that are not 'public'—arguing that they can be taken as valuable statements of then-current political thinking—can be found in J. G. A. Pocock, in Virtue, Commerce and History: Essays on Political Thought and History, Chiefly in the Eighteenth Century, (New York: Cambridge University Press, 1985), 25-6.

52A.S. McGrade, "The Public and Religious in Hooker's Polity," Church History 37 (1968), 406. As Faulkner, ibid, 24, notes, Hooker wrote when there was
way analogous to the historical treatment of Thomas Hobbes, in which only the 'modern' portions of *Leviathan* are read because they feed into a recognizable tradition, or, until recently, the failure to see that Locke's writing as 'theocentric', the overall religious nature of the *Lawes* makes it hard to assign it a place in terms of the 'history of political thought'.

What do the scholars say about the specific Hooker-Locke connection as a means for placing Locke historically? Eccleshall, while persuasive in his exegesis of Hooker's synthesis, describes a breakdown of that synthesis, coupled with a somewhat naive reading of *The Two Treatises*, that ends up offering very little to aid us in understanding any possible connection between Hooker and Locke. Thus, Eccleshall's argument seems to be little more convincing than George Bull's original attack on the naive Whig interpretation which, overemphasizing the changes between Locke and Hooker, leaves us with little or no meaningful way to understand the continuity of ideas through the civil war period. While still a chance of a "religious politics" rather than a "politic religion." Faulkner strongly argues that Hooker sought to establish a religious politics, and that atheism and Machiavellianism was his target, a view which seems to go against a straightforward reading of the text.

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53 On Locke, see, for instance, John Dunn, *The Political Thought of John Locke: An Historical Account of the Argument of the Two Treatises of Government* (Cambridge: Cambridge University Press, 1969), and an article by David Gauthier, "Why Ought One Obey God?: Reflections on Hobbes and Locke," *Canadian Journal of Philosophy* 7, 3 (Sept. 1977), 425-46. The revolutionary aspect of Dunn's scholarship is that it almost single-handedly cleaved Locke from that tradition of modern liberal scholarship that saw Locke as a political scientist and arid rationalist, and restored a Locke who was deeply and sincerely religious. Leaving aside for the moment the orthodoxy of these religious beliefs, this revisionist view puts Locke squarely back in the seventeenth century.

54 See for example, George Bull, "What did Locke Borrow from Hooker," *Thought* 7 (1931-33), 122-35, or S. Bethell, *The Cultural Revolution of the Seventeenth Century* (London: Dennis Dobson, 1951), passim, for arguments that Locke changes the meaning of the language he uses from Hooker.
Faulkner argues that Hooker is not just a time-serving defender of the status-quo, he rejects the legitimacy of Locke's use of Hooker. A. P. d'Entreves, in emphasizing the backward-looking nature of Hooker's intellectual view, discounts the connection between Locke and Hooker, as Thompson does.

Turning to the Locke scholars, Peter Laslett suggests that Hooker was very much on Locke's mind while he was doing final revisions on the Two Treatises. Laslett, however, emphasizes the 'openness' of Locke's work, and says:

This marks Locke off very sharply from the other theorists of his generation, indeed from the traditional attitude which dominated political thinking ... The heavy books of Grotius, Pufendorf, Hooker and others ... were all presentations of a single, synthetic system, a view of the world which preceeded from an account of reality to an account of knowledge, and so to an ethic and a politic.

However, Laslett notes that Locke's recognition of both a naturalistic and intellectualist view of why men form political societies is very close to Hooker's.

With the publication of Locke's earlier writings on natural law and government, a more complex portrait of Locke has emerged. In the first instance, not only do his early writings portray a Locke whose writings are "more

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55Faulkner, ibid, 110-11.
56D'Entreves, ibid, 125-32, esp. 127; Locke's reading of Hooker "represents the best illustration of the possibility of interpreting Hooker's doctrine as a striking anticipation of the modern doctrine of social contract and popular consent." It is not clear what in fact this 'modern' doctrine is.
57Laslett, editors introduction, John Locke, The Two Treatises of Government, (New York: Cambridge University Press, 1960; repr., New York: New American Library, 1963), 70. Subsequent references to the Two Treatises are to the first or second treatise, expressed as I or II, followed by a section number and page number referring to this Laslett edition.
58Ibid, 100.
angled toward the problem of authority" than has previously been recognized, but also a Locke who, in his earliest views of the origins and extent of government, is clearly within the orthodoxy of political obligation seen as obedience to God.\textsuperscript{60} Locke's 'radicalism', as Abrams notes in his examination of Locke's earliest political writing (published only in 1967 as the \textit{Two Tracts on Government}), at least with respect to the issue of the judging the magistrate, is restricted to the \textit{Two Treatises}.\textsuperscript{61} It would perhaps be a mistake to call the \textit{Two Tracts} absolutist, yet they do show, as will be argued below, that Locke's initial formulations about the issue of political obligation are indeed much closer to those of Richard Hooker than has previously been recognized.\textsuperscript{62} The problem is then to describe the political situation that led to his radical stance. In the second instance, Locke's argument for religious toleration, usually described as the substance of his liberal views, is a product of a similar intellectual progression. As Ashcraft notes, the fact that "Locke began his writings on the side of Parker and the established church and ended on the side of Owen and the Dissenters

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\textsuperscript{62}The dissenting voice about Locke's intellectual evolution is W. von Leyden, in his \textit{Hobbes and Locke}, 149-50: "It should be emphasised that Locke's views on law, liberty, and authority in his \textit{Second Treatise} do not differ from early ideas on these matters in his \textit{Two Tracts on Government}, the \textit{Essays on the Law of Nature}, or his writings on toleration. Locke always combined a conservative with a liberal outlook in his political theory: he extolled the value of a supreme political power and the rule of law while at the same time upholding the need for individuals to choose freely, to act in their own interest, and check the reliability of government. . . . Without wishing to generalise unduly, I suggest that the variations in Locke's views on these matters from the time he met Lord Shaftesbury to the time of his maturity as a philosopher amount to differences of emphasis or to a further qualification of his ideas, yet never presuppose alterations in kind or principle."
\end{quote}
should make us more, not less sensitive to the political aspects of his development on this issue." In this issue of toleration, as in much else, Ashcraft emphasizes the association between Locke and Anthony Ashley Cooper, the First Earl of Shaftesbury. Ashcraft argues that it was Locke's involvement with Shaftesbury's Whigs that led to this transformation of his views. It is crucial that two aspects of this world of politics be emphasized. First, it is the issue of religious toleration which forms the central platform for the 'First Whigs'. Second, Shaftesbury's role should be seen as twofold; he involved Locke in practical politics but also provided a personal link between the generation that was involved in the Commonwealth and the 'late disturbances' of the civil war period. This particular aspect of Locke's intellectual heritage is crucial to this paper. Locke's restatement of a contract-consent thesis must be seen in the light of his understanding (vis a vis Shaftesbury and others) of the causes of the civil war.

As we have revised our understanding of Locke's political commitments, so too have we greatly revised our understanding of the importance of natural law for Locke's writings. The intellectualist natural law language of the Two Treatises had been dismissed as 'window dressing' to emphasize the disjunction between Locke and the writers of the early seventeenth century. Writers like Leo Strauss argued that Locke was Hobbes, and a dishonest one at that; Locke took advantage of "his partial agreement with Hooker" and used the categories of what Strauss calls 'classic natural right' to present a natural law argument separated from its moral teleogy. Locke's debt to 'nominalist', or 'voluntarist' theories of natural law has been re-examined by J. C. Colman who has concluded

63 Ashcraft, Revolutionary Politics, 88.
64 Leo Strauss, Natural Right in History, 207.
that if Locke is in fact a nominalist, he is at most a theological one. More generally, as Oakley has suggested, to see the traditions of voluntarism or nominalism, and intellectualism, as mutually exclusive is to fall into a false dichotomy. A blend of these traditions is in some way present in Hooker and Robert Sanderson as well as in Locke, as von Leyden suggests. Von Leyden, in his examination of the sources for Locke's *Essays on the Law of Nature*, concentrates on Bishop Sanderson, rather than on Richard Hooker. He does note that a shift seemed to take place while Locke was at work on the *Two Treatises* and using Hooker for his revisions. Locke's understanding of natural law seems to shift from the voluntarist conception of law, borrowed from Robert Sanderson, to a more intellectualist account of natural law, like Hooker's.

In one of the most insightful presentations of Locke's views in recent years, Ashcraft is at least conscious of the irony of the Dissenters appealing to Hooker as a defender of reason as applied to politics, at the same time that Samuel Parker's *Discourse of Ecclesiatical Polity* of 1671, a virulent attack on the Dissenters themselves, cites Hooker as the authoritative word against the dangers of private judgement. Ashcraft does not, however, elaborate on the

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65 J. C. Coleman, *John Locke's Moral Philosophy*, 247: "We can be confident, in so far as he [Locke] is a voluntarist, his voluntarism is theological in character."


67 Editor's introduction, John Locke's *Essays on the Law of Nature* 56-9, 67,71-8. In his most recent work, *Hobbes and Locke*, von Leyden does not mention Hooker at all in his discussion of consent and political obligation. Philip Abrams, editor's introduction, *Two Tracts on Government*, 108, n. 12, disagrees that any substantial shift took place in Locke's understanding of natural law. I agree, however, with von Leyden, because Locke's argument from consent to explain the force of law's command, relies on reasonable understanding–law must be more than the voluntarist command of the superior will, see chap. 4 below.
influence of Hooker on Locke. Ashcraft notes their common use of Aristotle and comments that there is "a need for a more detailed examination of the relationship of Locke's ideas to those of Aristotle, Cicero, Hooker, and other thinkers from whom Locke drew much of his inspiration." He notes that although Locke had good political reasons for using Hooker, there is good reason to think that Locke understood himself to be working in the same tradition as Hooker. Given that we accept an evolutionist view of Locke's understanding of politics, we must try to trace the background from which Locke constructed his theories. If Locke's understanding of consent, contract and the grounds of political obligation are much the same as Hooker's, then why is the connection between them not taken seriously? Maurice Cranston suggests that he:

neither subscribes to Dr. Cox's view that Locke was so close to Hobbes to be virtually a Hobbist nor to Dr. Laslett's view that Locke was scarcely influenced at all by Hobbes. . . . Locke was nearer to Hobbes at one stage, but then moved along to find his own originality in ideological affinity with Richard Hooker.

As Bradshaw notes "the case for Hooker as a genuine forerunner of Locke and social contract theory needs to be looked at afresh."

Examination of this connection must take account of certain polemical claims. There can be no doubt that the Whigs were fond of citing Hooker in the Restoration; there was certainly a tendency for the writers after the Glorious Revolution to use Hooker in an emblematic way. Hooker was cited to prove that

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68 Ashcraft, Revolutionary Politics, 68, 571.


71 Brendan Bradshaw, ibid, 443, n. 2.
individuals are rational, that government is founded on consent, and that the state of nature is a state populated by equal individuals. These references were so common that, as William Atwood was to write in 1690, "so many have cited the judicious Hooker until it is threadbare." Thus the use of Hooker, who was being marshalled as an eminently respectable supporter of the Anglican-Tory establishment, was effective ammunition for the Whigs. As Locke was to say, citing Hooker in defence of his own view: "I thought Hooker alone might be enough to satisfie those men, who by relying on him for their Ecclesiastical Polity, are by strange fate carried to deny the principles upon which he builds it." Although one gets the sense at times that there was a tendency to cite the Lawes without a real understanding, or at least acceptance, of its philosophical underpinnings, for the purposes of this essay it will be assumed that we ought to take Locke's statement about Hooker at face value. In fact, I will argue that Locke's is as close to a fair-minded use of Hooker as that of his opponents, who clearly downplay any arguments in Hooker which contradict their claims about the divine right of kings and its analogue, the divine origins of episcopacy. In fact, Locke should be seen in some serious way a better student of Hooker than his Anglican high church opponents.

Moreover, a reconsideration of this connection is justified by the need to take account of the revisionist historiography of both Locke and Hooker. The

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72 William Atwood, The Fundamental Constitution of the English Government (1690) (repr., Wilmington, Del.: Scholarly Resources, 1973), 4, cited by Ashcraft, Revolutionary Politics, 571, n. 202. As Ashcraft notes, these are important parts of the radicals' program in the 1670s. See also Martyn P. Thompson, "The Reception of Locke's Two Treatises of Government 1690-1705," Political Studies 24, 2 (1976), 185, note; the part of Benjamin Hoadly's The Original and Institution of Civil Government discuss'd (London, 1710) which parallels Locke's Second Treatise "was presented by him as simply a 'Defence of Mr. Hooker's Judgement'."

73 Locke, II. 239, 475.
relative dearth of serious examinations of the Hooker-Locke connection suggests that the accepted wisdom is that Locke's use of Hooker was at best opportunistic. An anti-Whig history of the seventeenth century has emerged that denies that a history of the growth of 'liberalism' naively connecting Hooker with Locke makes sense. This reflects a more general turning away from viewing the seventeenth century solely in terms of constitutional struggles. However, while more recent work on Richard Hooker has tended to emphasize the discontinuity between Hooker and Locke, it is a discontinuity that is in part predicated on the Locke of 'Whig' historiography. Hooker scholarship tends to see only the breakdown of the sixteenth century consensus in the seventeenth century and seems still to embrace a picture of Locke and individualism that is not in touch with the powerful revisionist understanding of Locke's work revealed by the scholarship of the last twenty years. However, the fault for this relative neglect does not wholly lie with those historians whose focus is on the late sixteenth and early seventeenth century. Even the best of the new scholarship about Restoration political thought tends to be somewhat naive about the inheritance during the Civil War period of both classical learning and theological controversy coming from the English Renaissance. Such neglect is also partly a product of an intellectual division of labour whereby historians tend to work on one side or the other of the great divide of the Civil War.

If we cannot argue an explicit connection between Hooker and Locke on the basis of a contractual argument that is somehow part of an older history of liberalism, and if we are to reject the view that would argue for their radical divorce, we must ask why Locke would use an argument based on consent and
contract to discuss the origins of legitimate political authority?\textsuperscript{74} Since, as Pocock notes, \textit{de facto} arguments and not the theories of the Levellers were perhaps the true legacy of the civil war, and these \textit{de facto} arguments were in part the position that Locke proclaimed himself to be against, we must, as John Dunn has expressed in epigram, ask why Locke did not become Hobbes?\textsuperscript{75} It is at this point that the intellectual heritage of Locke becomes clearer. Focussing on the issue of consent with the aim of recovering a sense of the medieval synthesis that Hooker displays, will, I hope, also suggest that the reinterpreted Locke is far closer Hooker than to the Enlightenment thinkers who would view society as a battleground of competing interests.\textsuperscript{76}

Finally, we must consider the general understanding of the issues of consent, contract and political obligation in seventeenth-century England. The place of the social contract in this story was problematic. Within contemporary political idiom, if "consent describes both a theory of political obligation and a theory of how political life is and should be conducted, a normative and descriptive theory of the polity . . . . [and] government by consent is the proper mode of government," it is easy, as Dunn suggests has been done, to make both a philosophical and historical error reading this back into Locke. Locke, in this view, was the paradigmatic liberal, therefore necessarily espousing a theory of

\textsuperscript{74}For the 'history of liberalism', see Henry Hallam, \textit{Constitutional History of England} (1859), I, 2, 159-60, Hooker embraced "the liberal principles of civil government" and in this his theory "absolutely coincides with that of Locke."


government based on consent and contract as a way of ensuring governmental legitimacy.\textsuperscript{77} In a Whig history of social contract, clearly Hooker had said the same thing as Locke, only not so well. Hooker's commendation of government by law and consent "was supposed to show that he was fighting the battle of toleration and popular government in 'advance of his age'. . . [Hooker] is portrayed as a sort of scout for the liberal general John Locke."\textsuperscript{78} If, as recent studies have suggested, Locke is no longer the 'liberal general', where does this leave the 'scouts'? Within the Whig paradigm itself, the place of the social contract is puzzling. On the one hand, it became a Whig shibboleth, while on the other, it was recognized that contracts can be unmade; therefore the association of the Whigs with the right of resistance and potential political instability became one of the Whigs' most troubling inheritances after the Glorious Revolution.\textsuperscript{79} Clearly, the longer history of the association of governmental legitimacy with the notions of contract and consent is outside the province of this essay. There is, however, ample evidence that consent and contract became one of the accepted parts of the political discourse in the seventeenth century. But what part? To get some sense of this, it is necessary to


look at the way in which men of the seventeenth century themselves thought about the issues raised at the outset.

The issue of order is perhaps the dominant concern for much of the political writing of the seventeenth century, but the issue of obligation—how one knows that he is indeed obliged to obey a government, and perhaps more importantly, how then one has good reason to act—is certainly the corollary to this quest for order. The problem, however, of finding explanations for the reason why men were in fact obligated to obey government was a particularly pressing one. A theory of government based on consent becomes perhaps the only alternative to a view that one is obliged to obey because a government's power to command is a bequest from God. When it is no longer obvious that God has given only to the King such power to command, the issue of who one is obliged to obey becomes a critical one. Clearly government based on consent is the corollary of the theories of divine right, though to see these as strictly antithetical is perhaps wrong. It is not just the issue of the form of the government, however. As Allen has noted, it was the "negative" aspect of theories of divine right of a higher power, that no "will or act of men can create obligation . . . therefore assert[ing] that the subject's duty of obedience rationally cannot be founded on consent contact or delegation," that "was the main content of the theory of divine comission alike under James and Charles." Thus, theories of divine right were theories of political obligation. The force of theories of consent: consent imagined in the first instance as a means of

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80David Wooton, Divine Right and Democracy, 27; there was "an almost universally held conviction that order had to be maintained and that order could only be maintained by unity and obedience to the monarchy."

ensuring the neutrality of law; or consent imagined as some means by which agreement or disagreement with particular laws was expressed (through parliament or otherwise), was that political obligation needed to be understood by our reason.

The idea of government based on consent has a history that predates the period here concerned, and it has a particularly modern and democratic version that is perhaps visible in outline only by the end of the seventeenth century. The modern sense of 'I consent' as implying both the foundation of legitimate political authority and the continuation of legitimate political practice is a view of the nature of politics that should not blind us to Locke's use of the word. Consent as the operative condition for the establishment and continuation of government is in many ways a contemporary article of faith. It implies concurrence on the part of individuals to the establishment of a particular government: thus, it implies both choice and legitimacy. Most importantly perhaps, it has at its base a model of man as self-sufficient, reasonable creature capable of determination and choice. It requires, then, both an epistemology and cosmology in which men are seen as the bearers of reason capable of fashioning the world of politics in their own image. When we turn to consider the politics of the seventeenth century, we enter a world in which, partly as a result of the experience of the Civil War, men have come to see themselves this way. The problem for the historian is to provide an adequate account of the medieval heritage and a careful reconstruction of the positions that develop (especially in England during the Civil War) without somehow making this into a story of inevitable progress. This essay will proceed by way of a careful examination of Hooper's formulation of consent and contract, paying particular attention to what he has to say regarding the relation between the King, parliament and the
law. The theoretical parameters of consent and contract for the period between Hooker and Locke will be outlined, especially the understanding of consent as a function of practical reason (Hobbes) and the use of consent as a actual political strategy (the Levellers and the Agreement of the People). Locke's theory of consent and contract will then be examined (as his *Two Treatises* must be) in light of the changing political experiences of his generation. It is against a resurgence of divine-right theories that Locke reiterates the view that governments must be based on consent.
CHAPTER 2
RICHARD HOOKER, NATURAL LAW, AND CONSENT

Archbishop Whitgift, Richard Hooker's patron, encouraged the writing of the Lawes of Ecclesiastical Polity in the 1590s to provide a defence of the practices of the Church of England against the onslaught of reformers, like Walter Travers and Thomas Cartwright, who wished to continue the reformation of the English church along more Calvinistic lines, in particular, to establish presbyterian church governance. At issue was the question of state control of church practices—in effect, the Elizabethan settlement—which had made matters of ecclesiastical organization and government (although officially not the power to administer sacraments and arbitrarily set doctrine) subject to the Queen in Parliament. The controversy between the reformers and Hooker, like that between the Catholics and Henry VIII's Act of Supremacy, involved the extent to which the civil magistrate's authority could extend in religious affairs. Hooker, realizing that the issue would not be served by another laborious polemic that 'confuted' his opponents, sought to build a defence of the current practices of the Church of England by providing a primarily theological, but also philosophical, defence of the existing laws and practices, not just of the church but of law in general. It is this attempt to broaden his inquiry to consider laws in general that has ensured the Lawes a place in English literature, and political theology in particular.¹

¹I have borrowed the term 'political theology' from Sheldon Wolin, Politics and Vision: Continuity and Innovation in Western Political Thought (Boston: Little, Brown and Company, 1960).
Hooker, Natural Law, and Consent

The work itself is overwhelming in its complexity, sophistication and erudition; to extract the thread of an argument without doing violence to the text is difficult indeed. As Hooker planned it, the work was to be eight books long: the first four were to deal with general principles of law and its relation to church polity, while the last four were to treat the specific concerns of the governance of the church. Throughout the Lawes the philosophical underpinnings of law and government explained in greatest detail in Book I are assumed, and are never far from Hooker's mind. For example, his understanding of government's basis in consent, with which this essay is concerned, is treated most fully in Books I and VIII, but is never entirely forgotten in the intervening books. In 1593, Books I-IV were published in one volume, while Book V was published in 1597, shortly before Hooker's death in 1600. The last three books (VI-VIII) however, share a similar history; all were kept from publication by a tangle of events after Hooker's death and, with the exception of Book VII, have descended to us in a less than finished form. Book VIII, in which Hooker deals most fully with the royal supremacy, and thereby the constitutional issues of the authority of King and Parliament has remained problematic for scholars since its authenticity has been called into question because of its unfinished form. Although doubts about the authenticity of the last books began with John Spenser's "To the Reader" in the 1604 edition of Books I-V, in which he argued that the manuscripts of the last three books had

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2Book I contains Hooker's full statement of natural law principles. Books II and III are attacks on certain key principles of the reformers from the perspective of natural law. Book IV is a general summing up of how one ought to discern the true basis of religious ceremonies. Book V examines the liturgical practices of the Church of England. Books VI-VIII leave specific religious practices and concern themselves with questions of church government: whether it ought to be by lay elders (VI), by the episcopacy (VII), or by the monarchy (VIII).
been tampered with by person or persons unknown, and these doubts have been subsequently accepted by most modern scholars, the most recent editor of Books VI-VIII, has affirmed their authenticity. He has concluded that the reasons that these books were not published were doctrinal, not textual:

Hooker's views, expressed especially in Books VII and VIII, that royal and episcopal authority rested rather on consent and their usefulness for the church than on immutable divine right, were not only unfashionable but dangerous in the years of Laudian rule. The Caroline church was unsympathetic to Hooker, and it effectively ignored his work and actively suppressed the contentious last three books for nearly fifty years after his death.3

That these last books were kept from publication, while Hadrian Saravia's more blatant defence of the divine right of kings was published with official approval, suggests also that we ought to dismiss the argument that Hooker was only defending the status quo of the Elizabethan settlement, as defenses of the status quo are not usually considered dangerous or subversive books.4 Thus, at the outset we must view Hooker's work as either consciously or unwittingly controversial, in particular its derivation of political power from the consent of the people; the story of its polemical career will provide a counterpoint for the issues of consent, contract and the grounds of political obligation with which I am concerned.

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4Sommerville, Politics and Ideology, 11-2; "In the De Imperiandi, Saravia put forward a systematic set of alternatives to the resistance theories of the Catholics and Calvinists. He argued that the Queen derived her power not from the people but from God alone, and claimed that she was bound by no human laws. These views contrast strongly with those of Hooker... Saravia's work was reprinted in 1611... while Hooker's eighth book, in which he voiced his political opinions most clearly, remained in manuscript until after the Parliamentarians triumphed over Charles I." See also his "Hooker, Saravia and the Divine Right of Kings."
While his arguments in defence of the existing church drew heavily on the defences made by Whitgift and others, Hooker's field of inquiry was far broader. Consciously, Hooker tried to force the debate past a consideration of the comparatively narrow questions of church discipline and religious observance to an examination of English political order. In answer to the narrow Biblical literalism of his opponents, Hooker had to show that the existing laws of England were congruent with both the law of God and man's reason. While his opponents argued for a greater separation of Church and society, Hooker argued that they were in England one and the same, and that the laws established to control the Church by the royal supremacy were binding on all members of the society for the same reasons as was any other law.

Men are not only to use God's law as revealed in Scriptures to determine if they are bound to obey authority, but:

Those things which the Law of God leave arbitrary and at libertie are all subject unto the positive lawes of men, which lawes for the common benefit abridge particular mens libertie in such things as farre as the rules of equitie will suffer. This wee must either maintaine or els overturne the world and make everie man his owne commaunder.

The law of God as revealed in the Bible could not be considered a complete guide to allowable positive law; neither could it be a complete guide to action given the complexity of political life. By refusing to acknowledge that men could establish laws covering a great range of activities not described in the Bible, the reformers

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5We should read Hooker as part of a continuous project of reform in the late Elizabethan church, as H. C. Porter suggests, see "Hooker, the Tudor Constitution and the Via Media" in W. Speed Hill, ed, Studies in Richard Hooker, 77-116. See also Allen, A History of Political Thought in the Sixteenth Century (London: Methuen and Co. Ltd., 1957), 173. The title 'Of the Lawes' was meant to suggest other capacious works of antiquity like Cicero's; P. G. Stanwood, editor's introduction, Vol III, p. xiii.

6Allen, ibid, 195.

7Lawes, V.71.4 (Vol. II, p.374).
undermined much of what made government possible. Thus, Hooker's opponents were, at best, politically naive men who failed to realize that what seemed to them an eminent project of religious reform actually struck at the heart of the existing political and legal relationships.

At a philosophical level, Hooker, like Suarez, needed to "repudiate . . . the whole vision of political life associated with the evangelical Reformation." Like the writers of the Catholic counter-Reformation, he needed to answer the claims of the 'heretics of the present age' that political society had been ordained by God to remedy man's moral deficiencies. The Lutheran 'heresies', by emphasizing the inscrutable nature of God's will, implied that the individual could not know the good except through knowing both the Word of God and God's law, either through Biblical study or by direct revelation. At the level of action this implied that men could not have confidence in the ability of their reason to determine or make government and law for themselves. Owing to their fallen nature men could not lead just lives, and therefore earthly justice was an impossible ideal. If such laws as were enacted took their character from those in power, the commands of an ungodly prince, interpreted by one's conscience, could not be binding, and this could be justification for resistance to those laws that were not in accord with divine law. Thus, for reformers like Luther, the godliness of a ruler could and did become a condition of their succession and continuance, thereby subjecting political authority to theological scrutiny and censure with explosive consequences. It was against this background that the political theorists of the late sixteenth century reasserted a dignity for politics as an

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8Skinner, Foundations, vol. 2, 138. Skinner sees Suarez as repudiating the Lutheran conception of the church as well. Clearly Hooker is not rejecting out of hand the reformed theology of Luther and Calvin. The phrase 'heretics of the present age' is Skinner's.
activity for men. Hooker, and to a degree, Calvin, replaced the simplistic Lutheran understanding of political authority as alien to man, of rule by divine right because of our irredeemable nature, with an understanding of politics that reduced the distance between church and society by emphasizing the rule of law. Within Calvinism itself this collapsed into theocracy; within Hooker's system the authority to enact all law, even for matters concerning the church, came to be understood as political.

Recognizing the potential political disruptiveness of the claims by the English reformers that there could be no rule for action except from Scriptures, Hooker sought to integrate reformed Christian belief with an epistemology of natural law that took into account human reason and action. Using the tools of scholastic argumentation, and a method that emphasized prescriptive usage drawn in part from his legal training, Hooker countered the religious reformers' claims with counter-claims grounded in both theory and practise. Trying to answer the question of what our religious observances ought to be, he was led logically to the question of not only how we know what we know, but also what gives the force of command to certain beliefs. While the theological and ethical questions were answered by his Christian beliefs, Hooker found that the many other practises and laws of society would seem only to have the force of command because of customary usage or prescription. Logically, if these laws were only customary, literally indifferent, then any laws would seem to suffice. Positive laws, if only based on custom or legislation, could conceivably be an actual discouragement to our Christian purpose, as the reformers argued.

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9On Calvin's politics, see Wolin, ibid, 168-94.

10Interestingly, Hooker recognizes that an a priori belief in God is essentially unproveable, "to use reason to try prove all things is to overthrow reason altogether."(Lawes I.8.5.; Vol. I, p.85), quoting Theophrastus.
Therefore, Hooker resolutely tried to reconcile the moral and coercive aspects of law by equating the command of the sovereign with the 'ought' of moral philosophy. Tying authority and law to custom, to human reason, and to natural law then became the second part of his project. Hooker first outlined the way that man's reason allows him to participate in the law-governed order of the cosmos, to know the good and seek it, then proceeded to show political society as a construct of man. He was able to demonstrate in this way that the existing order of society was rational, good, and potentially righteous; therefore this order could command men as a necessary and perhaps natural part of their Christian existence.

The central understanding giving coherence to the Lawes is that the universe functions according to law. A hierarchy of laws exists beginning with the order which God "hath set down with himself and for himself to do things by." The belief that God had established an eternal order was restated by

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11A.S. Mcgrade, "Introduction I," in Of the Laws of Ecclesiastical Polity (New York: St. Martin's Press, 1975), 22-3: "Hooker hoped to reduce the tension between divine and human law, not by identifying the two, but by relating them to one another as distinct but non-competing elements of a broader normative scheme . . . Instead of standing essentially outside the political order and submitting to its authority only from a sense of duty, the zealous Christian is invited to regard life in the community as an integral part of his religious existence."

12J. W. Gough, The Social Contract: A Critical Study of its Development (2nd ed, Oxford: Clarendon Press, 1957), 72, argues political society is natural, while Faulkner, Richard Hooker and the Politics of a Christian England, 103, argues that it is not natural in the Aristotelian sense, as does d'Entrèves, Medieval Contribution,128, in that it does not perfect men, since Hooker, following Augustine, suggests that political society is necessary because of the Fall.

13Lawes I.2.5, (Vol I, p.63). See Francis Oakley, Omnipotence, Covenant and Order: An Excursion in the History of Ideas From Abelard to Leibnitz, (Ithaca, N.Y.: Cornell University Press, 1984), passim, in which he argues for the long heritage of the debate regarding the power of God to remake the agreement of his involvement in the world. The debate is conducted in the seventeenth century regarding the extent of the King's power to remake the agreement of
Hooker (and by the counter-Reformation theorists) as a 'middle Thomist position' to provide a framework so that natural law (and therefore human law) could be seen as 'genuine' law (a product of God the law-maker's will, but also His reason). This order, then, created the possibility for men to create true justice in political society. This law, which God has agreed to maintain for himself, is what Hooker calls the second law eternal; it informs the rest of the hierarchy of law, which hierarchy consists of a law for angels, a law for beasts and insentiate things, divine law (which God has revealed by Revelation and through Scriptures), and natural law. This last category is also termed the law of reason and is the guarantee of man's uniqueness. Reason is "written in [men's] hearts" so that they may participate in the order of universe. It is this law that "bindeth creatures reasonable in the world and with which by reason they may most plainly perceive themselves bound." Despite our fallen nature we possess a natural thirst for knowledge and desire to seek goodness implanted in us by God as compensation for the Fall. Thus, we have the capacity for reason, will and choice, and may undertake to make law for ourselves to aid us in seeking our perfection, which is to aspire to the greatest conformity with God.

Government under law is a necessity, given our fallen nature, in order to aid men to live lives of virtue. Positive law, then, partakes of divine law or the

society. Hooker, seen in this long debate, is a moderate Thomist, arguing for a fixed order that God may re-establish if he wills it, but not without notice.

14Skinner, Foundations, vol 2, 148-9; This can be seen as a reaction against the voluntarist view that informed Lutheran theology that would argue the inability of men to embody justice in their earthly institutions. God as will only "implies the reduction of all moral laws to the inscrutable manifestations of God's omnipotence." A. P. d' Entrèves, Natural Law: An Introduction to Legal Philosophy (London: Hutchinson and Co. Ltd., 1951), 68; Hooker's position is a "rejection of a nominalist or voluntarist theory of law." See also, Skinner, ibid, vol. 2, 78.

law of nature; but it is discovered by reason and enacted by men for themselves. Genuine positive law "must be compatible with the theorems of justice supplied by the law of nature," or reinforce the duties described by divine law. These laws Hooker describes as "mixedly human," in that they clarify why we ought to obey divine or natural law, or attach specific rewards and punishments for transgressions of these laws within a civil society. But there is, in theory, no reason why we cannot understand these laws from first principles through our reason. Finally, other lesser 'laws' exist that are purely man-made and conventional, those which Hooker terms "meerly human" law, that will create a duty where before none existed, or take away a duty that now exists, where the duty is not described in divine or natural law terms. In other words, these laws are purely conventional.

In assessing this natural law language in the understanding of politics, most writers have noted that it signalled an important change in the understanding of government. It both "restored the status of political society" to something that was necessary for man's existence, and reinvested man "with a political nature." By arguing that man participated in the order of the universe through the natural law or the law of reason, despite his impairment by the Fall, the "dignity and power of man" was restored. More importantly, it allowed for the possibility of 'natural', rational values providing the basis for morality, law and justice. Thus, a positive value could be attributed to the role of the state.

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16 Skinner, ibid, 148; he does not mention the second, but Hooker does.  
18 Wolin, ibid, 181.  
19 A. P. d'Entrèves, Natural Law, 44.
Moreover, natural law not only supplied "the moral foundations of political life," but also a paramount standard by which it could be judged.\textsuperscript{20}

However, one of the troubling inheritances of this view is its potential egalitarianism. If all men can criticize law on the basis of self-evident principles of reason, like the theological understanding which suggests that men may know the saving truths of religion unaided, what is to stop men from claiming as their 'right', exemption from certain laws which transgress the law of reason as they understand it? As Hooker says, there is nothing in the law of nature "but anie man (having naturall perfection of wit and ripeness of judgement) may by labour and travayle find out."\textsuperscript{21} Hooker is very conscious of the potential egalitarianism that his argument implies and gives great emphasis to the difference between public and private reason, which we will return to below. If men are conceived of as reasonable beings, who of necessity ought to be members of political society, how is political society created? How do men enter political society?

Hooker's philosophical argument is that government is based on consent. Leaving for a moment the particular English practises, what we will consider below as 'constitutional contract theory,' Hooker makes an extended argument for a 'social contract theory' of the origins of political society. In a manner analagous to Suarez, Hooker clearly restates a 'consent' theory of the basis of government, arguing that the only way we can imagine government emerging, given men's common capacities of reason and conscience, is through consent. This 'contractarianism', based on "natural rights, natural law, states of nature and social and original contracts" appeals to "the evidence of reason and the

\textsuperscript{20}Skinner, ibid, 148.

moral law.”\textsuperscript{22} Certainly it is this tradition that provides the philosophical basis and justification for Hooker's theory of the emergence of government. Consent in this instance becomes a philosophical argument—given that men have in common a certain natural tendency, a certain moral inscription, and the ability to reason, all governments must originate with some act that encapsulates the consent of the governed. Hooker's philosophical justification of political society was intended to show the "necessity [and] not merely the possibility of creating a commonwealth" in terms of human capacity to will it into existence, and thereby to argue the view that government was of 'nature not grace'.\textsuperscript{23}

Hooker's argument for the necessity of political society draws on Aristotle's on the one hand and the traditional medieval religious view on the other. From the former he takes the idea of a natural sociability of man; man is "naturally induced to seeke communion and fellowship" with others.\textsuperscript{24} From the latter he derives the necessity of government for post-lapsarian man, 'the corruption of our nature being presupposed.'\textsuperscript{25} All men in the pre-political state are free, equal and independent.\textsuperscript{26} These comprise a trilogy of medieval commonplaces but, as Skinner has noted, a defence against the argument that political society is only ordained by the will of God must begin with the assumption that men in the nature of things are free, equal, and independent.

\textsuperscript{22}\textsuperscript{Thompson, "Hume's Critique," 200.}
\textsuperscript{23}\textsuperscript{Skinner, ibid, 154; he is quoting Cardinal Bellarmine: "Dominion is of nature, not grace." The strength of the argument is that men make political society as men.}
\textsuperscript{24}\textsuperscript{Lawes, I.10.1.(Vol. 1, p. 96).}
\textsuperscript{25}\textsuperscript{Lawes, I.10.4.(Vol. 1, p.100).}
\textsuperscript{26}A kind of 'state of nature', although Hooker does not use the phrase. As Skinner notes, Suarez also does not use the specific term, but his view implies what later writers mean by the term. The same is true of Hooker.
Then political society must be shown to be a human creation, arising naturally.27 In Hooker's mind, two foundations underlie societies: "The one, a naturall inclination, whereby all men desire sociable life and fellowship, the other an order expresly or secretly agreed upon, touching the manner of their union in living together."28 Society thus arises naturally, given that man is not able by himself to provide what is necessary for a life fit for the dignity of man, including our material needs. The common bonds of language and the delight that we take from the sharing of intellectual understanding also naturally creates community.29 However, if the pre-political state is one of freedom, equality and independence of each, in which each individual acknowledges this, and, if man already is in a natural community, then why does man enter political society at all? To this Hooker gives two answers. The first is that increasing injustice and uncertainty arise when there is no superior power to which all owe obedience. Prudence leads us to the institution of authority for "our most behoof and securitie," or concerns for our welfare.30 The other reason, and the more germane for the structure of the Lawes as a whole, is that only under government does man have the opportunity to be a fully moral being. Government is instituted for the common good, but a common good understood in a particularly Christian way.31 Thus, "humane societies are much more to

29This is common to Suarez as well. The source is Aristotle, Politics, I.2 (Barker, p.5).
31Lawes, VIII.2.18.(Vol. III, p.349): "The end whereunto all government was instituted was bonum publicum, the universal or common good." See Faulkner, Politics of a Christian England, 77-8, where he compares Aristotle's and Hooker's conception of the end of society.
care for that which tendeth properly unto the soules estate then for such
temporall thinges as this life doth stand in need of."32

We need to emphasize that in order for a people to agree to the institution of government, they must already have some identity as a group and will display some characteristics of order. The pre-political state is, by definition, law or rule-governed, since the law of nature is written on men's hearts. That is to say, the same moral characteristics and capacities are possessed by all men in common. Natural laws "do bind men absolutely, even as they are men, although they have never any settled fellowship, never any solemnne agreement amongst themselves what to do, or not to do."33 This claim becomes crucial when we consider the institution of the King's power and the way that sovereignty (in a modern sense) appears to be split between the King and the people in the Lawes. The concept of an organic unity of the people (what Suarez refers to as a single mystical body) having the potential to act with a single unified will, is also present in Hooker, although he does not use this particular expression.34 Thus:

every independent multitude, before any certain form of regiment established, hath, under Gods supreme authoritie, full dominion over it self, even as a man not tied with the bond of subjection as yet unto any other hath over himself the same like power. God creating mankinde did indue it naturally with full power to guide it self in what kindes of societies soever it should choose to live.35

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33Lawes, I.10.1.(Vol. I, p.96). Note the agreement with Locke, that promise-keeping and other laws of nature bind men even before government is erected.
34Skinner, ibid, vol. 2, 166-7, citing Suarez. Hooker's use of the word 'multitude' captures the flavour of this idea.
35Lawes, VIII.2.5.(Vol. III, p.334). See also, Lawes, I.10.4.(Vol.I, p.100): "There being no impossibilitie in nature considered by it selfe, but that man might have lived without any publike regiment", except that the corruption of our nature requires it. The type of regiment we choose is a "thing arbitrarie."
Thus, for both Suarez and Hooker, government is not instituted to remedy the horrific state of lawless individuals, as in Hobbes's state of nature. Government, or 'regiment', is instituted by an 'independent multitude' (a group that already has an identity and coherence) for the purpose of helping men to overcome the infirmities of their fallen nature and achieve the good.

Therefore, as with Suarez (and perhaps Locke) the criticism levelled at 'contract' theory—how atomized individuals in a 'state of nature' could have the political sophistication to formally agree to institute government?—cannot properly be directed at Hooker. Government is instituted by choice and consent, albeit choice moved by necessity. For this reason, Faulkner downplays the role played by consent, arguing that Hooker's doctrine of consent "is basically derivative from the law of reason . . . Men consent to government because they must." However, it is still a doctrine that has a strong moral egalitarianism. Hooker dismisses the Aristotelian argument that some men have the natural right to rule their fellows because all men are equally masters of their estate before they consent to the erection of government: man is born "Lord of himself." Hooker also rejects patriarchalism, or the belief that the authority of

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36See Gough, Social Contract, 70-1, who cites Otto v. Gierke, Natural Law and the Theory of Society, translated by E. Barker, 2 vols., vol. 1, 46. Gierke dismisses the part of Suarez's argument in which he discusses this idea of the single mystical body as a 'jeu d'esprit', which Gough does not agree with. Gough, however, does not note a similar 'organicism' in Hooker. Skinner, ibid, vol. 2, pt. 2, notes that this idea, however unsatisfying it may be philosophically, at least suggests that the criticism directed against Suarez, and by extension, perhaps Locke (in his use of the word 'community' to express a similar notion in the Second Treatise) for not recognizing this problem, is misdirected. Like the notion of the 'mystical body' of the Church, it relies for its coherence on the idea that although men may 'naturally'congregate, the power that infuses the collective is God's, and is therefore both greater than, and qualitatively different from, men's 'natural' powers.

37Faulkner, ibid, 111.

38Lawes, VIII.3.1/2.5.(Vol. III, p.334).
the family writ large is the source of legitimate political dominion. Power to
govern in most cases can only occur through the consent of the governed. Only
in rare instances does God appoint rulers.39

The second branch of consent theory that is very apparent in Hooker is
what Thompson calls 'constitutional contract theory', dovetailing nicely with
what Pocock refers to as the language of the 'Ancient Constitution'.40 Skinner
has argued that 'consent' has little to say about the way in which a government
functions; juridical validity in the seventeenth century is a question of whether
or not laws enacted are in accord with natural law: "Consent is not used to
explain the legitimacy of what happens in political society, but is used to explain
how legitimate political society is brought into existence."41 However, Hooker
joins together the 'social contract' argument with the 'constitutional contract'
argument so that consent has a continued role to play. Laws, made by consent or
agreement of the governed, are coeval with the formation of government. Thus,
governments are based on consent in its manifestation as consent to the rule of
law. Within this native English political discourse, Parliament functions as a
means of expressing man's consent to, and concurrence with, the practises of
government. As the Elizabethan Sir Thomas Smith wrote: "The consent of


40Martyn Thompson, ibid; Pocock, Ancient Constitution. Hooker's work, I
think is more interesting than Suarez because of this practical strain–Suarez
specifically exempts the more mundane aspects of his inquiry since as he says:
"theology . . . considers the civil laws only by way of determining, according to a
higher order of rules, their goodness and rectitude," in De Legibus, in Selections
from Three Works of Francisco Suarez, Vol 2, Trans. Gwladys L. Williams et al.
(Classics of International Law Series, Publications of the Carnegie Endowment

41Skinner, ibid, 162.
Parliament is taken to be every man's consent." Clearly, such a view, however, relies on fictions of representation and an unhistorical understanding of the origins of Parliament, at least by our standards. Yet writers such as Hooker move easily between the 'philosophical' consent that one might imagine as establishing the rule of law and the practical functioning of consent in ensuring the juridical validity of the existing government and practises. Given the etymological difficulties, we then need to tease out the extent to which this discourse is, for Hooker, a language of reciprocal rights and duties that are defined at the time of the original agreement (a contract), rather than an understanding that emphasizes the dispositional aspect of the rule of law. To do this, first we must consider the abstract level of his discussion of 'constitutional contract theory'—the emergence of government under law.

Just as the power to 'make' government inheres in the whole multitude, so does the power to command "whole politque societies of men belongeth so properly to the same intire societies." The criticism made by later writers, that men in a 'state of nature' could not devise law, misses Hooker's understanding that law is a later discovery. The "law of the common weale" is the initial agreement whereby all men enter political society. It is the "very soule of a politque body, the parts whereof are by law animated, held together, and set on worke in such actions as the common good requireth." As we have seen above, however, society is prior to this agreement. Particular laws which a society then makes for itself follow from this initial agreement to create society under law.


44 Lawes, I.10.1.(Vol. I, p.96). Again, the parallel with Locke's insistence that it is the agreement to erect the 'legislative', that allows men to leave the state of nature is striking.
Given our fallen nature, we must rely on laws of government to "direct even nature depraved to a right end." Men must satisfy certain material wants which precede all other concerns. At the same time, men, "growing unto composition and agreement amongst themselves," must institute some form of government to which all subject themselves to end the "mutuall grievances, injuries and wrongs" of living where each man's will is supreme. Men, having discovered that subjection to the will of one man inconvenient—their first attempt at government—then devised government under law. Their misery in living by one man's will "constrained them to come unto lawes, wherein all men might see their duties before hand and know the penalties of transgressing them." They found out that the power of making law "for any Prince or potentate," unless given by God, can only be exercised "by the authoritie derived at first from their consent upon whose persons they impose lawes." Otherwise, it is "no better than meere tyrannye." Because all laws rely on the same divine power for their ability to command, the Christian commonwealth of necessity ought to serve to create the conditions here on earth whereby man's natural, civil and spiritual estates can be enhanced. In all commonwealths "things spirituall ought above temporall to be provided for. And of things spirituall the chiefist is Religion." Thus law, a product of the whole community, serves both a juridical and moral function. A society creates a government that functions

47Lawes, I.10.5.(Vol. I, p.100). This is later read as Hooker's argument for resistance by Calybutte Downing in his Sermon Preached to the renowned company of the Artillery September 1641 (London, 1644), 28(34), cited by Sommerville, "Hooker, Saravia, and Divine Right," 233, n. 13. It seems unlikely, however, that Hooker thought that this was more than a one time change.
under a system of laws; such laws will differ in whether their objects are the church or civil society, but at the same time the distance between church and society has been reduced.

Within a properly functioning government men create, or more properly find out through reason, a system of laws to which all can consent. Initially, legitimate government can only be established by consent or by the "immediat appointment of God"—a rare occurrence. Once established, a properly functioning government continues by consent to the rule of law. Although public 'approbation' is required to make law, such approbation, need not be expressed personally. It can be expressed "by voice, signe or act, but also when others do it in their nams by right originally at the least derived from them, As in parliaments, councls and the like assemblies." Consent can be immediate and apparent or it can be implied by the obvious fact that someone at some time must have consented, thus willing the law into existence. Implied consent is the essence of custom establishing law. Consent, expressed by ourselves directly, or by someone to whom we have delegated our right, or in any way assumed to have taken place in the past, "should stand as our deed, no lesse effectually to binde us then if our selves had done it in person." To give past consent the power to bind us in the present, Hooker argues that political society is an immortal corporation; therefore, what has been consented to in the past has the force of law for the individual in the present. It is this notion of enduring consent which gives law their prescriptive power. Laws can only be modified by "expresse consent whereof positive laws are witnesses," or through "silent

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51 Lawes, I.10.8.(Vol.I, p.103)
allowance famously notified through custome reaching beyonde the memorie of man." This distinction between express consent implying legislation, and 'tacit' consent implying law established by custom, will be important to keep in mind when considering Locke's formulation of consent. A system of law, positive or man-made as compared to natural law, is consented to and imposed by a society on itself. Thus, a civil constitution "peculiar unto each particular common weale" is devised. Laws and practices of a particular society are never only customary, however, since all law stems from a common source, and must be in accord with the law of reason. Still, understanding the particular laws of a society does require an historical sensitivity to the emergence and development of that society's laws.

Law can thus be said to command obedience from men because of its dual nature. We owe obedience to the laws of society since we have 'consented' to their institution; we also owe obedience to the laws of society because the power

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54So far as I can tell Hooker does not use the actual word 'tacit', but this distinction seems to be understood. As Suarez, De Legibus, in Selections, Vol II, 451, defines it, the substance or essence of custom is its acceptance by the common consent of the people, "for where there is already written law, custom calculated to introduce law is not needed; the written law suffices. Indeed, such custom does not seem to be morally possible, since it is the essence of custom that it is to be established not by explicit but by tacit consent." In the original, De Legibus, in Selections, Vol.I, p.777, "...ex consensu tacito, sed expresso." The common source is likely Justinian, Institutes, or Bartolus, Digest, both of which Suarez cites. See Lawes IV.14.5.(Vol. I, p. 340): "For there is not any positive law of men, whether it be generall or particular, received by formall expresse consent, as in councels; or by secret approbation, as in customes it commeth to passe, but that the same may be taken away if occasion serve." Here Hooker is clearly referring to laws for the church.


56While this may sound like an argument for cultural relativism, Hooker also establishes the Thomist category of the law of nations in Book I to explain the commonality of certain practices and customs that have emerged in all nations; Lawes I.10.12.(Vol.I, pp. 107-8).
to make laws that inheres in the community giving law their force of command ultimately comes from God. It is this understanding, that law can be formulated in congruence with the divine order by men through their reason and consent, but that the power that infuses these laws is given to the community by God, which is Hooker's answer to the question that later critics will direct at theories of government based on consent; how can men simply as men create genuine obligations under law? This is also a view of political life that distinguishes Hooker's generation from Luther's, because it substitutes the possibility of man's obedience to government out of understanding, for obedience out of fear of the power of a magistrate who chastises and coerces us because of our fallen nature. Nor is it the case that laws "take their constreining force from the qualitie of such as devise them, but from that power which doth give them the strength of lawes." The godliness of the ruler does not matter, although there is the ever-present inclination in Hooker toward rule with the concurrence of the wise. Even the structure of Hooker's argument is based on the possibility of a reasonable understanding of the force of laws. As he says, it would have been much easier (and one suspects more popular in certain circles) to spend time "extolling the force of lawes, in shewing the great necessitie of them when they are good, and in aggravating their offence by whom publique lawes are injuriously traduced." Rather, Hooker chose "to show in what manner . . . this very gift of good and perfect lawes is derived from the father of lightes; to teach men a reason why just and reasonable lawes are of so great force, of so great use

57Lawes, VIII.6.9.(Vol.III, pp. 398); Hooker begins by quoting Romans 13.1, but then qualifies it: "All Powers are of God. They are of God either instituting or permitting." It is this permissive aspect that gives the arguments from consent their force.

in the world," and to provide a method to reduce law to first causes so that it may better be judged. The way in which this judgement functions in its practical aspect will be considered below. First we must consider the way in which the individual will respond to law.

By emphasizing the rule of law, Hooker presumes that the impartiality of law's authority to command will be understood by men. Men presume the law "doth speake with al indifferencie, that law hath no side respect to their persons, that the law is as it were an oracle proceeding from wisdome and understanding." When a law seems unjust, men must consider whether their objection to that particular law is justified and on what grounds. Because genuine positive law, by definition, must embody the law of nature or reason (and therefore God's law for man), even the court of conscience ought to dictate obedience to positive laws. Hooker cites Peter and Paul to argue that all men are subject, and concludes: "Subjection therefore we owe, and that by the law of God, we are in conscience bound to yield it even unto every of them that hold the seats of authority and power in relation to us" although not to all kinds of power. We are in conscience bound to obey public authority because all power is of God either 'instituting or permitting', but also because we consent to it; that is, governments that survive and flourish owe their continued existence to implied consent, even those established through conquest. In order for their

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61 Lawes, VIII.6.9.(Vol. III, p.397). He follows with a comment that Christ's injunction to obey the Scribes and Pharisies (Matt.23:3) did not mean "if they at any time enjoyne the people to levie an armie or to sell their landes and goodes for the furtherance of so great an enterprise." Generally, we should not obey commands simply because it is commanded, but should consider their "place and power" and its limitations of those commanding. It seems to be a veiled discussion of the Queen's prerogative in passing laws to raise money for the war with Spain.
continuance not to be an injustice there must be some point at which consent can be assumed.62

Positive law, then, should dictate in foro interno, but Hooker is somewhat equivocal as to whether or not breaches of positive law are to be considered sins.63 Obedience to law is owed, not just because of its moral command, but also because we make laws as men which we must obey because they have been created by some law-making body or have been established by custom. To see all questions of obedience as moral questions is simply to miss the fact that whole aspects of human existence function according to rules which men make as men. The mistake made by the reformers, in their claims for Biblical sanction for all law, is to use the wrong standard to judge merely human practice. More importantly, in order to claim 'conscience' as a reason for disobedience to law, what are required are reasons that are "necessary and demonstrative," not just reasons that are merely 'probable'.64 Hooker's discussion of conscience in Book VIII is one of the most interesting parts of the book for the issue of obligation to law. Hooker answers the reformers with Romans 13:1, 'Be ye subject', arguing that such subjection we are "in conscience bound to yield" and then immediately equivocates.65 There is equivocation, in that Hooker argues that positive law cannot command the heart.66 Hooker's reconciliation is to be found in his

62 Lawes, VIII.2.5. (Vol. III, pp.334-5).
63 Lawes, VIII.6.9. (Vol. III, pp.400-01): "Too rigorous it were that every breach of humane lawe should be held a deadly sinne" a discussion not continued as there is a break in the text.
64 Lawes, Preface.6.6. (Vol. I. p.33); clearly Hooker is relying on the belief of Aristotelian logic that after having been shown certain kinds of proof, we are unable to refuse our assent.
66 Lawes, Pref. 6.6. (Vol. I. p.33). Clearly, Lawes V.9.5. (Vol. II, p.44), a 'necessary' reason against a law "dischargeth the conscience." Equity, like the law of nature (Vol. I, p.106)—a principle, can "bind men's conscience in things
conception of things indifferent—only those things which are absolutely essential for our salvation are give force of command by God. Yet this does not answer the reformers' claims, since they claim to know 'in their hearts' the rightness of their cause. Conscience, or 'tender conscience', in religious and civil affairs is still problematic. Hooker's argument against those who argue that the causes that they are absolutely inflexible about are given by divine revelation, is that, if this were true, God would have provided them with evidence sufficient to convince other men that this was in fact the case. 67 This whole discussion shows Hooker at his rhetorical best in trying to leave an opening to argue that certain laws do not bind in conscience because of the limitations on political authority imposed by the rule of law. Hooker, in trying to argue that political power itself is limited, suggests that we do not give power to command in all things and that 'usurpers'—curiously interpreted to be those who do not seize authority by violence, but those who "use more authoritie then they ever did receive in forme and manner before mentioned [by consent]"—cannot "binde any man to obedience." 68 The unresolved issue about what constitutes certainty of inward belief that must in fact be acknowledged as truth, coupled with Hooker's hope that the reformers will also acknowledge as axiomatic his distinction between public and private reason and feel themselves obligated to stop controversy which law cannot reach unto." See VIII.6.5/6.6. (Vol. III, p.390); "it is not in the power of any human law" to command opinions.

when private reason has been overruled, leaves his resolution of the issue of
when obedience can be legitimately commanded seriously flawed.69

Hooker argues that it is possible to know the obligatory force of the law of
time through rational reflection—what one is obliged to do is known by men
even as men. Most men will not find out through reflection what they are
obliged to do, however, for this is difficult. Instead, and for the most part, men
will know what they are obliged to do by acknowledging that they are bound to
obey the laws of a society. As men, our habitual attitude ought to be obedience,
and where our reason has told us otherwise, we must first check our
understanding before listening to private and mere probable reason. As
Faulkner has noted, Hooker depreciates politics in favour of dutiful obedience.70
Although tradition alone is an imperfect yardstick, most men will know what
they are bound to do by acknowledging that the general consent of men has
facilitated the establishment of the laws of a society.71 These laws are an
expression of "the generall perswasion of all men" in seeking goodness, which is
the end for which society is instituted.72 Thus, the laws of society are not only
rational or transparent to reason; since they could only come into existence

69Lawes, I.16.6.(Vol.I, p.140): The reformers "by following the law of
private reason, where the law of publique should take place . . . breed
disturbance." In the Preface, Hooker makes an extended argument about
councils were predicated on the understanding that once judicial and final
decision has been given by the council, discussion ought to stop.

70Faulkner, Richard Hooker, 99. Politics as an important activity for those
called to public life is not depreciated, however.

71Lawes, I.13.2.(Vol. I, p. 123); We should not trust tradition, "as if nothing
were more safely conveyed then that which spreadeth itself by report," since the
truth is in danger of becoming "maimed and deformed". See also I.14.5, (Vol. I,
p. 129).

through the "generall and perpetuall voyce of men," they are also customary. The opponents of Hooker, like all who seek purity through a strategy of 'return', denied the evolutionary nature of society and church, and sought instead to establish de novo the rules of society based on the revealed word of God from the Bible. Hooker's reply to this is that the legitimacy of authority in both church and society must, in part, be described historically. Thus he writes a 'conjectural', rather than just a sacred history to explain the formation of political society, based on biblical and classical arguments.

Hooker's arguments in Book VIII turn away from the more theoretical sketch in Book I to a practical examination of English institutions and practices. Through his assumptions that the jurisprudential tradition of English society is in accord with natural law, and that existing laws were previously established by

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73 Lawes, I.8.3.(Vol. I, p.84).


75 Conjectural in the sense that it need not be shown to have actually occurred but rather that it would not be unreasonable, given mens capacity for reason and his initial endowment of reason and conscience. Pocock, ibid, credits Hooker with emphasizing the church as a traditional community, "transmitting its interpretations of original revelation in ways that invest them deeply with prescriptive and presumptive value". However, Pocock's sketch of the necessary intellectual apparatus for a reasoned defence of the established order: scholastic reason, institutionalised authority, prescriptive usage and a Christian history in which all of these modes of authority and transmission were seen to be working together, are precisely the intellectual underpinnings of the Lawes, which Pocock does not acknowledge.

76 It is this practical orientation that leads me to disagree with A.S. McGrade, "Introduction I," Of The Laws of Ecclesiastical Polity, 20, that Hooker was not so concerned with political legitimacy, but was more concerned with "the nature and quality of political power rather than its localization in particular persons." I think that Hooker needs to address both for his project to make sense.
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consent, he is able to integrate his theoretical and practical concerns. While the type of political regiment that a society might devise is a matter of choice, Hooker restates the classical argument in favour of a monarchy ruled by law. The King holds his power of and under the law according to that Bractonian axiom: Rex non debet esse sub homine sed sub Deo et Lege, the King is under no man but under God and the law. Yet there is a nationalistic pride in Hooker's theory of kingship and constitution. He states:

In this respect I cannot choose but to commend highly their wisdome by whom the foundations of this Commonwealth have been layd, wherein though no manner person or cause be unsubject to the Kings power, yet so is the power of the King overall and in all limited that unto all his proceedings, the law it self is a rule.78

This passage nicely outlines the paradoxical nature of the King's relation to the law. In theory the King's power is unlimited except by prohibitions of divine or natural law, but in practice the "positive lawes of the realme have abridged therein and restrayned the Kings power." Since, however, 'no manner person or cause be unsubject' to the King's authority, the King must retain considerable power, despite the proviso that his practises must be in accord with positive law.

When Hooker considers the relationship between King and Parliament, he does not make an elaborate or extended argument about its origins; there is little attempt, surprisingly, to claim for Parliament an ancient and venerable pedigree. Rather, like many aspects of current practice, the relationship is assumed as another aspect of the necessity of ongoing consent to law. Thus, Parliament is both a council of wise men and an institution by which all who are members of the commonwealth are represented. This question of representation

77Lawes, VIII.2.3.(Vol. III, p.332).
is glossed over: "Lawes they are not therefore which publique approbation hath not made so. But approbation not only they give who personally declare their assent by voice signe or act, but also when others do it in their nams." Men who represent others have a right that was "originally at the least derived from" those they claim to represent.\textsuperscript{80} In a passage where he treats the selection of Bishops, Hooker suggests, in response to the question of whether or not the right of selection can be "translated from them [the people]", that such 'translation' is lawful unless the right is taken by violence, against the law, and without public appointment.\textsuperscript{81} Hooker argues:

\begin{quote}
the people do in effect chuse him [the Bishop] thereunto. For albeit they chuse, not by giving every man personally his particular voyce [but] . . . their ancient and original interest therein, hath been by orderly means derived unto the Patron who choseth for them.\textsuperscript{82}
\end{quote}

While the question of political representation is not strictly analagous, Hooker's insouciance about the fairness of such a transfer of the right of choice shows in this case, as well as in the case of Parliament.

However, leaving aside the issue of the fairness of their representation, law must be agreed to by the people, since "against all equitie it were that a man should suffer detriment at the handes of man for not observing that which he never did by himself or by others mediately or immediately agree unto."\textsuperscript{83} Or more succintly, he says: "laws they are not which publique approbation hath not made so."\textsuperscript{84} Despite the people granting power to the King, law can only have force if it is agreed to by the people through Parliament ('others mediately')

\textsuperscript{80}\textit{Lawes}, I.10.8. (Vol. I, p.103). See also the discussion VII.14.7-14.10., (Vol. III, pp.222-7), about the right to be represented by Bishops.

\textsuperscript{81}\textit{Lawes}, VII.14.7. (Vol. III, p. 222).


\textsuperscript{83}\textit{Lawes}, VIII.6.7-8.(Vol.III, p.393).

\textsuperscript{84}\textit{Lawes}, I.10.8.(Vol.I, p.103).
in that Parliament 'represents' all citizens. It is in Parliament that consent to law is expressed. This is not just an abstract claim, but a claim for greater authority than Parliament had traditionally been allowed. Hooker argues that Parliament has competent authority to treat of any matter including religion and that the king has principally the strength of a negative voice regarding such legislation. This is clearly at odds with Elizabethan practice. What is even more suprising is his assertion that the king's prerogative is given to him "by the common law and parliament." Here Hooker seems on dangerous grounds indeed.

The consent that Hooker assumed is the basis of the transfer of power from the people to the king is the source of his seemingly paradoxical conception of the power of the king and its limitation by Parliament. The transfer of power, "that first originall conveyance when power was derived by the whole" and given to the king, implies that this power is "limited erre it be graunted." No man with reason can think

but that the first institution of Kings is a sufficient consideration wherefore their power should always depende on that from which it did then flow. Originall influence of power from the bodie unto the King is the cause of the Kings dependie in power upon the bodie.

Arguing against those who would view kings as existing prior to law, Hooker argues that the English:

85Bradshaw, "Review," 442-3, notes this reinterpretation of the Elizabethan settlement: "It is hardly possible to miss the novelty and daring implications of Hooker's elaborate apologia on behalf of a Royal Ecclesiastical Supremacy derived from the Christian community of England, held, therefore, by human right, and in subordination to the authority vested in parliament and Convocation and mediated through the law."

86Hooker, Autograph Notes, (Vol. III, p.505), "All prerogatives are given to the prince by the common law and parliament and that in good measure and proportion so that the k. hath no power save only to do good without hurt of others."


88Lawes, loc.cit.
are in no subjection but such as willingly themselves have condescended unto for their own most behoof and securitie. In Kingdomes therefore of this qualitie, the highest Governour hath indeed universall dominion, but with dependence upon that whole entier body over the severall partes whereof he hath dominion so that it standeth for an axiome in this case, The King is major singulis universis minor.

The king's 'dependencie upon the whole entier body' Hooker further defines as "subordination and subjection." While it has been claimed that Hooker's concern for English constitutional questions led him to ignore Bodin's discussion of sovereignty, d'Entreves argues that the opposite is true. We ought to read Hooker's description of monarchy restricted by law as an answer to Bodin and "the whole left wing of sixteenth-century political theory." D'Entreves argument makes sense in that Hooker knew the writings of Hadrian Saravia, whose refutation of limited monarchy was made along the principles of Bodin.

G. R. Elton has rightly suggested that Hooker's famous statement that the king is subject to "not only the law of nature and of God but the very nationall and municipall law," emphasizes the King's subjection to the positive law of England. While Hooker acknowledges that nations can be misled and then

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89 Lawes, VIII.3.2/2.7. (Vol. III, pp.336-7). The phrase 'behoof and securitie' echoes Book I; Lawes, VIII.3.2/2.10. (Vol.III, p.339). 'Subjection' implies to be subject to, not a more modern meaning of 'under the exploitative power of'.

90 D'Entreves, ibid, 134-5. 'Left-wing' is used by d'Entreves to connote the radicalism of Bodin and theories of unlimited sovereignty, but also the arguments of the monarchomachs.

91 D'Entreves, ibid. See also Somerville, "Hooker, Saravia, and Divine Right," passim.

92 Lawes, VIII.3.3/2.12. (Vol. III, p. 341); Elton, The Tudor Constitution: Documents and Commentary, 2nd ed., (Cambridge: Cambridge University Press, 1982), 13-14, "Not only lawyers stressed the position of the Crown under the law; even in Hooker's hands the point refers to the positive law of the realm rather than some nebulous law of nature to which all man-made law must conform. The law of nature was a sixteenth century commonplace and to no one more important than to Hooker, in this context it was more important that that the king was thought of as subject to the common law of England and unable to tamper with it." (emphasis added)
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stray from natural law, in general he would argue that there should be a congruence between natural and positive law that Elton fails to acknowledge. Admittedly one type of law is more practically enforced. The problem in the seventeenth century is that, with the re-emergence of a notion that the King's prerogative extends to making new law, the fixity with which Hooker regards the law is no longer a commonplace.93 To be more accurate, it is not so much that Hooker regards the laws as fixed, but that the established laws, if they are to be changed, require the combined offices of the King, Parliament, and Convocation to consider changes that might be made. Hooker's conception did exclude the possibility that the lawful prerogatives of the Crown included powers which might unilaterally affect the law itself. If the king could remake the law by himself, this would deny the chance for consent to be expressed in Parliament. The subsequent attempts by James I and Charles I to do so, highlights the change that took place in the seventeenth century.

The limitations on the king's power have a two-fold source. There is the limitation of the king by law established by the fact that it is the consent of all that made the institution of the king possible in some initial state. Subsequently, there have been restrictions through established law, "whatsover hath in a free and voluntarie manner been consented to."94 In Hooker's view law is 'discovered', or found out through reason and put into effect to rectify the

93G. R. Elton, "The rule of law in sixteenth century England", reprinted in Studies in Tudor and Stuart Politics and Government (Cambridge: Cambridge University Press, 1974), vol. 1, 270: "As the seventeenth century was to discover there were two weaknesses in this apparently clear-cut and satisfactory position [Bracton's doctrine of the King under law]. It held good without difficulty only so long as the law was somehow regarded as fixed: what was the king's position with reference to the making of new law? And did it not exclude the possibility that the lawful perogatives of the Crown included powers which might affect the law itself?"

94Lawes, VIII.2.2.(Vol.III, p.331).
dangers of man being subjected to the will of one: in a sense it always comes from 'below'. The institution of law is coeval with the erection of the king; the king is from the first instance bound by the rule of law. There can be no ahistorical appeal to deny the power of the king, as some have argued, for the limitations on the King's power are to be determined by historical jurisprudence, not political philosophy.95 Yet the more objective comparisons to natural law and theology are available to judge both the king and the law, even though Hooker is wary of this appeal. The natural law framework of the Lawes precludes a strictly historical or prescriptive justification for the existence of any aspect of law, including the limitation of the power of the king. Therefore, the extent to which Hooker conceives of positive law as "by nature subject to change and capable of progressive transformation" needs to be stressed.96 It is this which ensures that Hooker's argument is conservative, but not static.97 The way in which Hooker has constructed the historical argument, relating natural law with actual English legal practises, is perhaps one of the most elusive aspects of his argument. By grounding the limitations of the King's power in customary law,


96 D'Entreves, ibid, 125.

97Faulkner, ibid, introduction, especially p. 6: "Recent historians have tended to miss ... the extent to which Hooker sought to reshape as well as defend Elizabeth's church, to reduce as well as expand her ecclesiastical power, to redefine as well as assimilate the ancient learning newly reborn—all this as he waged a battle not only against English reformers but also against elements of the Reformation itself." See, H. R. Trevor-Roper, "The Great & Good Works of Richard Hooker; New York Review of Books, Nov. 24, 1977, 8: Hooker acknowledges "the legitimacy of historical change." A similar reading of Hooker as 'conservative not static' has been given by A. B. Ferguson, Clio Unbound: Perceptions of the social and cultural past in Renaissance England (Durham, N.C.: Duke University Press, 1979), 76.
custom in a sense becomes sovereign. However, for the writers who came after Hooker, once the assumed link between the customary law and natural law weakens, the appeal to historical jurisprudence shifts necessarily to questions of historical fact, especially when the assumed cooperation of the King and Parliament no longer seems to hold.

One of the most striking parts of Hooker's argument is his view of the way in which the process of the critique of law and its 'progressive transformation' ought to be a public process carried out by men who have a public voice in Parliament. The determinations of such men follow the law of public determination: "Because except our owne private, and but probable resolutions be by the lawe of publique determinations overruled, we take away all possibilitie of sociable life in the worlde." This role of wise men and councils in the 'sifting and devising' of laws is emphasized throughout the Lawes. Therefore, Hooker expects the impetus for 'devising' laws will come from Convocation for the affairs of the church, and from Parliament for civil affairs. Only such councils of men who understand the delicate historical and customary balance, and can judge law by the proper standard, should engage in reform. That "the most naturall and religious course in making of lawes is that the matter be taken from the judgement of the wise" is a standard refrain for Hooker; and, he implies that men of exact judgement in certain specifics are better at this than are kings themselves. While Hooker shows a predisposition to consider the laws

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100 Lawes, VIII.6.11.(Vol.III, p.403). See also Lawes VIII.3.5.(Vol.III, p.353): Laws should be "publiquly deliberated and resolved upon with exacter judgement in matters divine than Kings for the most part have." This
currently in force as good laws, unless there can be shown sound reasons why change should be considered, there is nothing in the nature of any positive law that prohibits change.101 Clearly the next move is to argue that certain things such as property are guaranteed by natural law and are therefore not a product of positive or conventional law.

Hooker's quarrel with the reformers is twofold. It is not just that they desire change; rather, instead of "proceeding by the slow and tedious help of publique authoritie," they capitalize on "the people's more quick endevor for alteration," thereby undermining the established system of public consideration.102 His second complaint is directed at their use of the wrong standard, the Bible, to criticize existing law. Hooker argues:

Easier a great deale it is for most men to be taught what they ought to doe, then instructed how to judge as they should do of law; the one being a thing which belongeth generally unto all, the other such as none but the wiser and more judicious sort can performe. . . To soundly judge of a law is the weightieast thing which any man can take upon him.103

Hooker is arguing not that judgment ought not to take place—"for men to be tied and led by authority, as it were with a kind of captivity of judgement . . . this

foreshadows the argument made by Sir Edward Coke in his famous dispute with James I over James's right to judge cases in the king's courts.

101Lawes, IV.14.5.(Vol.I, p.340); "For there is nothing in any positive law of men, whether it be generall or particular, received by formall expresse consent, as in counsell; or by secret approbation, as in customes it commeth to passe, but the same may be taken away if accasion serve." This is as close as Hooker comes to definig 'express' and 'tacit' consent as Suarez does.

102Preface, p. 25.

were brutish"—but that judgment ought to be given by those selected by the consent of society for the task.104

A second important part of Hooker's argument, and here he is strikingly close to Marsilius of Padua, is that the power to give law its power of command (sovereignty), is centered in the king in Parliament.105 This applies particularly to laws by which all men must be governed, both religious and civil. For Parliament represents the wishes of the people 'mediately'. While the king has 'dominion', that power granted by the people with the first institution of kingship, the people, since they are a corporate body independent of and existing prior to any government whatsoever, have to express their consent to all laws. In effect, Hooker argues that this right to express consent has historically been given to Parliament. The king's dominion is necessary, and for laws that "all must be ordered by" the king shall have the principal role, but this role is limited to assenting with little control of the content of that law. This 'dominion' granted to the king is not granted from God directly. The king engages in the 'act' of power—"all supremacie of externall power be in Christian Kingdomes graunted unto the Kings thereof for the preservation of quietnes, unitie, order and peace"—but this power is transferred from the people. However, if some

104Lawes, I.16.2.(Vol.I, p.165). Peter Munz, Place of Hooker in the History of Political Thought (London: Routledge & Kegan Paul, 1952), 99, argues that "though happily some one part may have a greater sway in that action then the rest" (Lawes, VIII.6.2/6.6.(Vol.III, p.390)) echoes Marsiglio's well known argument that law making, although belonging to the whole body ought to be conducted by vel valentior pars.

105See W. D. J. Cargill Thompson, "The Source of Hooker's Knowledge of Marsilius of Padua," Journal of Ecclesiastical History, 35 (1974), 75-81, in which he discusses Hooker's first hand knowledge of Marsilius of Padua. See also, d'Entreves, Medieval Contribution, chaps 4-6. Munz, ibid, Ch. 4, argues that Hooker starts with Aquinas but ends with Marsilius, and that this causes a basic incoherence in the Lawes. His assumption,(p.101) that Hooker is arguing for a divorce between the 'natural' political state, and the Church is incorrect.
accident were to befall the sovereign, there can be no doubt that power, as 'habit', resides with the people. Prerogative then can be seen to be given both by common law and by Parliament because of the consent that makes the institution of a king possible.

In this way, Hooker is close to the other reform-minded men of his age in his view of the importance of Parliament. At the same time however, he acknowledges that the king's role is no less important, for it is both the ceremonial role of the king and the acknowledgement of all who live under the law that the king has the principal voice, that makes general laws possible. Hooker's insistence on defining a major role for parliament in the process of law-making, and on emphasising the historical and consensual derivation of common and statute law, is strikingly opposed to the royal understanding of government. While the rhetoric of the Queen's address to each session is that parliament sits by her grace, Hooker echoes the other parliament men like Peter Wentworth in his insisting that royal power is originally derived from the people. But to then take the further step, and argue that the prerogative is given to the sovereign 'by common law and Parliament' was a dangerous position indeed. Implying that the prerogative could be defined at all was an anathema to the Tudor rulers.

Too, like those members of Neale's 'choir', Hooker argues that Parliament has competent authority to deal with matters of religion—parliament is "a Court

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106Lawes, VIII.3.5/3.1.(Vol. III, p.352). 'Act' and 'habit' are scholastic categories. See also Lawes, VIII.3.2/2.10.(Vol. III, p.339): The king has prerogatives that are historically given, but "comparing the bodie with the head as touching power, it seemeth always to reside in both fundamentally or radically in the one, in the other derivatively, in the one the habit, in the other the act of power."

not so meerly temporall as if it might meddle with nothing but only leather and wool."\textsuperscript{108} His argument for this authority is strikingly similar to that used by the parliament men about the Marian settlement. To the question, "Had they [Parliament] the power to repeale lawes made, and none to make laws concerning the regiment of the Church?", Hooker answers:

Whereof to define and determine even of the Churches affaires by way of assent and approbation as lawes are defined of in that right of power which doth give them the force of lawes, this to define our own Churches regiment, the Parliament of England hath competent authoritie. Touching the supremacie of power which our Kings have in this case of making lawes it resteth principally in the strength of a negative voyce.\textsuperscript{109}

This view, that all authority to make laws having the power to command the external form of the church rests with the king in parliament, is Hooker's completely radical break with the arguments of those reformers who argue that the Church holds a separate power of command.\textsuperscript{110} For Hooker, ecclesiastical

\textsuperscript{108}Neale, ibid, passim. His 'choir' is a group of Puritan reformers who consistently oppose the Queen. Recently, G. R. Elton, The Parliament of England, 1559-1581 (Cambridge: Cambridge University Press, 1986), has suggested that Neale's characterization of this period is faulty, in that it is hard to establish that any group in Parliament consistently opposed the Queen; Lawes, VIII.6.11.(Vol.III, pp.401-2). On Hooker's reinterpretation of the Elizabethan settlement, see notes 85 and 98 above.

\textsuperscript{109}Lawes, VIII.6.11.(Vol.III, p.404). I think it is fair to say that Hooker's insistence on the King's negative voyce 'in this case of making lawes' seems to indicate that the faction or interest that Hooker represented hoped also to use Parliament as a means to reform the Church. This claim for Parliaments power over the church is also made by Sir Thomas Smith, De Republica Anglorum, 49; "The Parliament . . . establisheth forms of religion."

\textsuperscript{110}There is no conception in Hooker of anything other than a functional separation of church and state: both have as their end the proper purpose of mankind. Lawes, VIII.1.2.(Vol. III, pp.317-8); every man is both a member of the church and commonwealth which represent only different 'accidents' for the same 'multitude' or body of people. Laws regarding specific actions will be administered through different mechanisms, but the individual, or subject of the law, and the end for which all laws are instituted will be the same.
laws of and by themselves, without the consent of all and least of all without the
King's assent, are "but Counsels of Physitions to the sick."\textsuperscript{111}

Within Hooker's system, the independence of the Church is maintained
regarding strictly spiritual questions\textsuperscript{112}, and the independence of Parliament is
also maintained, in that the king has a final, negative voice about any law
proposed though not having 'jurisdiction', or the control of the contents of civil
or ecclesiastical law. The king therefore has supreme authority in the outward
affairs of the church, since laws regarding these are of wise men's devising and
must have the backing of the king in Parliament to make them law for all.
While the power of jurisdiction and order rests with the whole body of the
church, as in civil society, a constitution has emerged in which some are felt to
represent the wishes of all.\textsuperscript{113} Furthermore, positive church law and institutions
like church courts have historically limited the right of the king to act
unilaterally in religious affairs.\textsuperscript{114} Convocation, in a manner analagous to the
way in which Parliament represents the people mediately, has a role in devising
ecclesiastical law since it represents the people in their spiritual affairs.
However, religious law (which by definition was law that concerned all) ought to
be devised by Convocation, debated by Parliament (wherein the people as a
corporate body are represented), and passed into positive law by the King in
Parliament. Despite the seeming limitation on the king's power that the claim

\textsuperscript{111}Lawes, VIII.6.11. (Vol. III, p.403).
\textsuperscript{112}To elaborate this division fully would require a lengthy digression.
Those questions of internal church organization, prayers and ceremonies, ought
to be dealt with by the Church within itself. However, as has been argued there
is clearly a tension here because the Prayer Book, and many other issues that
ought to be dealt with by the Church, were subject to Parliament and statute.
\textsuperscript{113}See Lawes, VII.14.7-14-12. (Vol.III, pp.222-28), where Hooker makes an
extended argument about the selection of Bishops.
\textsuperscript{114}Lawes, VIII.3.3/2.16. (Vol.III, p.346).
of a 'negative voice' implies, Hooker scathingly condemns the desire to claim separate jurisdictional powers for the church, thereby encroaching on the royal power.\textsuperscript{115} In a denunciation that is directed at the more radical religious reformers in Parliament, Hooker says, "their opinions in very truth be against that authoritie which by their speeches they seeme mightely to uphold."\textsuperscript{116}

Given that there are the two strands in Hooker, which for convenience have been termed 'social contract' and 'constitutional contract' theory, we are left to wonder: is he a contract theorist? Hooker clearly does not have a fully developed a theory of contract expressed as terms and conditions established in the first instance of creating government. As W. D. J. Cargill Thompson has argued:

Hooker held a theory of compact or consent rather than a theory of contract. Whereas the keynote of social contract theory, in whatever form the doctrine was expressed was its emphasis on the contractual nature of political authority and the reciprocal rights and obligations of rulers and subjects, the basis of Hooker's theory was not the idea of contract but the idea of consent... Although he talks of men "growing unto composition and agreement amongst themselves"(I.x.4) he does not suggest that such agreements constitute contracts in the legal meaning of the term, nor does he claim that the fact that government originates in consent creates any kind of contractual relationship between ruler and ruled.\textsuperscript{117}

\textsuperscript{115}Faulkner, ibid, chap. 11, clearly overstates his case that Hooker, through the structure of his arguments in Book VIII, has decided that King could be subject to ecclesiastical censure; Hooker seems clear that the King cannot be excommunicated. See Faulkner, ibid, chap. 8. See also Lawes, VIII.3.3/2.14. (Vol.III, pp. 343-4): "Kinges may have supreme power not only in civill but also in Ecclesiastical affayres and consequently that they may withstand what Bishop or Pope soever shall under the pretended claime of higher spirituall authoritie oppose himself against their proceedings." Regarding the use of veto in the Elizabethan Parliaments, Elton, The Parliament of England, 1559-1581, argues that such proceedings did not imply, as Neale has suggested, a Queen set against Parliament, so much as a method whereby the Queen forced factions to come to agreement.

\textsuperscript{116}Lawes, VIII.3.3/2.15.(Vol.III, p.345).

\textsuperscript{117}W. D. J. Cargill Thompson, "Philosopher of the Politic Society," 41-42.
This is, I think, the substance of Hooker's argument. However, I disagree with Thompson, and J. W. Allen also, who calls Hooker's theory one of recognition rather than consent, since they assume that this absence of 'contract' implies that the current juridical practices of the government function without reference to consent.\[118\] The move that Hooker makes to ensure that consent is not just a matter of moving from a 'state of nature' begins with his argument that creating government under law requires consent by the society as a group. Next, there exists a reciprocity between ruler and ruled that has been established at some level; it is in reference to the ongoing consent to law. As we have seen, Hooker carefully argues that the limitation of the sovereign by law is established in the first instance because this is the way we can imagine consent working in its initial stages. Consent continues to function in the present through Parliament, since the power to make law is never really alienated by the people, and the King's role is to provide a final say that forces closure on what could easily become endless contentions if all men had equal say. Similarly, Gough misses the crucial shift in Hooker's argument from the consent that establishes government to the consent that establishes the rule of law, and thus argues that Hooker is "more in accord with the medieval understanding of the contractual basis of all constitutional authority."\[119\] To call this relationship under law contractual is to conflate the argument that Hooker took great pains to make, that this ongoing process of consent to the rule of law was based on mutual recognition, understanding and trust.

\[118\]J. W. Allen, Political Thought, 190. See also Faulkner, ibid, 112, who cites Allen approvingly. The same criticism can be extended to the argument about consent in Skinner, Foundations, vol. 2, chap. 4, and by extension, Dunn, "Consent in Locke," who, by focussing on the natural law arguments, ignores what we have called 'constitutional contract theory'. See chap. 4 below.

\[119\]Gough, Social Contract, 74.
Gough goes on to argue that Hooker "does not tackle the problem of Suarez... how the mere association of individuals at the beginning could create a genuine corporate body with eternal power to coerce people who did not freely join it, but had simply be born into it." Yet, as I have argued, Hooker is at great pains to describe how, through consent, we decide to erect government. Then, as we come to understand the necessity of impartial rule, we establish the rule of law. The most important feature about the notion that the power realized by men 'growing unto composition and agreement' (in both Hooker and Suarez) was not that it required every single man's agreement, but that it was qualitatively different than men's natural power, since it flowed from God. If Hooker did not envisage the consent of individuals to government in the present, it was not because he was 'medieval' but because he relied on a received view of the relationship between Parliament and the concrete individual. It was a 'legal fiction' perhaps, but one scarcely avoidable in an age which had not yet considered the possibility, except philosophically, that every man's consent was required for the functioning of day-to-day politics. An individual's acceptance in the Renaissance present of the existing laws and practises 'tacitly' (i.e., by accepting the benefits conferred by the existing society) was the essence of the

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120 Gough, ibid.

121 Elton, "Rule of Law," 280, argues: "The sixteenth century did not practise democracy or manhood suffrage. The universal consent, which all Tudor writers on the subject agree was represented in Parliament, concerned the members of the realm (shires, cities and boroughs), not of individuals, who were, however, deemed to be present because their community was represented. In practice, it is fair to say that consent was a reality even for individuals... provided they belonged to what we have learned to call the political nation, Sir Thomas Smith's 'them that beare office'—and let us remember that Smith included among them not only noblemen and gentlemen but also citizens, burgesses, and yeoman."
understanding of custom and its power to bind men, a bond which required express consent by an individual through his representative in Parliament.

Hooker's attempt to establish the impartiality of the rule of law, without specifying it in the precise terms of contract, or even the looser terms of pact, should lead to the charges levelled against the lack of realism in his discussion of the 'right of resistance'. As Thompson notes, Hooker is interested more in how society came into existence, than in rights of resistance. At some level this should be obvious—in a book arguing against those who would overturn existing social arrangements, resistance is likely to be a topic that gets short shrift. At a deeper level, however, Hooker is aware of the practical dangers of applying the language of contract to the institution of government. For Hooker, despite the fact that the political 'body' consents to the institution of the king, this 'body' does not have the right to withdraw or reassign its allegiance unless there are no heirs. Investiture is ceremonial, not an actual re-assignment of power. Thus Hooker answers those religious reformers who felt that the king was to be resisted if the rule or ruler was seen to be ungodly. All Hooker suggests is that if the king is ruling without respect for the law, and if the subjects bring it to the king's notice, the king "will not be stiff" in the enforcement of unjust laws. There is, however, a hint that he meant to treat "eschete" more fully in Book VIII, but one suspects that the situations under which it might arise defy

122W.D.J. Cargill Thompson, ibid, 40.
123See Salmon, French Civil Wars in English Political Thought, passim.
124Lawes, VIII.3.2/2.9.(Vol. III, p.339). Here Hooker reiterates what becomes a touchstone English belief that repudiates the radical French claim of elective monarchy. As Laslett suggests, Locke's code name for the Two Treatises, De Morbido Gallico, implied the disease of revolution. As Sommerville has suggested, "Hooker, Saravia, and Divine Right," 235, it was this claim of elective monarchy that was the substance of Hooker's disagreement with the Vindiciæ.
categorization.\textsuperscript{125} Therefore, Hooker's lack of realism with regards to the right of resistance is perhaps more one of appearances. As has been said, "a political theory that makes a fetish of the right of resistance is like a theory of matrimony which makes a general rule of divorce."\textsuperscript{126} 'Divorce' between ruler and ruled may be necessary, but it cannot be an object of general principles if we are to maintain social order. Hooker comes down squarely on the side of order, but not because of a lack of intellectual capacity, or a lack of consideration of the alternatives.

One can find in the Lawes the grounds for consideration of the issue of resistance, however. Despite the circumspection with which Hooker treats the derivation of the power from the people, he sometimes leaves openings that raise the very spectres that he is trying to defeat. For example, in his argument for the establishment of government, he suggests that we can remake government "by like universal agreement."\textsuperscript{127} His argument that power reverts to the people at times of eschete (one suspects by people he is speaking of their representatives) becomes a problem at the time of the Glorious Revolution and the abandonment of the throne by James II, as it does in the Civil War. By occasionally using words like compact, although he says the articles of compact have 'clean wore out of mind' and that we should look at present practises, not at a mythic past, one can imagine the historical search arising for these original

\textsuperscript{125}Hooker, \textit{Autograph Notes}, (Vol. III, pp.497-8): "Wether a societie having given supreme power over it self unto any and finding it afterwards incovenience therin may revoke the same. Surely no. But when supremacie of power doth return unto it then <it> may help itself. How many ways the said power may return as it were by eschete unto the body from whence it came." Book VIII.3.2/2.10, p.339; eschete is just stated as the time when power returns to the body.

\textsuperscript{126}D. Forbes, \textit{Hume's Philosophical Politics} (Cambridge: Cambridge University Press, 1975), 323.

\textsuperscript{127}Lawes, I.1.5.(Vol I, p. 103).
terms. And, as has been suggested above, Hooker's ambivalence in dealing with conscience suggests that he is delicately trying to promote certain reformist aims himself.

By the time we reach the culmination of Hooker's arguments in Book VIII, he has made limitations of the royal authority seem reasonable and consistent—so much so, as has been argued, that this would probably have been sufficient cause for suppression of the later books. There is political significance in Hooker's answer as to how we find out the dictates of right reason. If they are what all men have accounted them to be, if councils of wise men are to determine law, if the perogative exists by the assent of Parliament, and if the King's role rests mainly in a negative voice, then we are not so far from the positions taken up in the debates about government in the 1620s. By making truth a matter for debate and discovery, and by making reason the way to achieve it, Hooker, though ostensibly conservative, is certainly a transitional figure in reason and natural law applied to government becoming a radical claim.

Undoubtedly, Thompson's assertion that Hooker, especially in Book VIII, is only a defender of the status quo of the Royal Supremacy, doesn't hold up. Hooker is in some measure, then, a defender of the status quo, but also engaged in a criticism of what is. Certainly there is no absence of the 'ought', backed by the force of moral command, to change some of the existing political arrangements. Hooker's appeal to natural law to critique existing law, despite his argument for a certain carefulness in its application, is only slightly less dangerous than an

128W. D. J. Cargill Thompson, "Philosopher of the Politic Society," passim. Claire Cross, The Royal Supremacy in the Elizabethan Church (London: George Unwin Ltd., 1969), 35-6 argues somewhat more convincingly argues that Hooker defended the status-quo of 1559 but, by the time the work was finished, was out of step with political realities. See also, P.G. Stanwood, p. xvii, Introduction, Lawes, Vol. III and notes 85 and 95 above.
appeal to God's law as revealed in Scripture, in that there is a presumptive claim in favour of the application of reason to politics. It is a short journey from, 'not in accord with reason, or the law of nature' to 'unreasonable'. Hooker's argument of 'whatever is, is right' in terms of historic jurisprudence, easily disintegrates into a debate about an historic rather than a mythic past. Consent and its expression in Parliament raises questions about when and how such a right for each to consent to law could be imagined to have been given up, or 'translated, from some people, especially if it can be argued that we have such a right 'by nature'.

What gives coherence to Hooker's view of the process of government is that the public scrutiny and debate by which the laws will be brought into accord with natural law, and therefore enhance our Christian existence, will be public, orderly, and most importantly carried out by men who are learned, experienced, and chosen by society to have a certain public role. His predisposition to favour the existing law and practice, "sith equitie and reason, the law of nature, God and man do all favour that which is in being until orderlie judgement of decision be give against it," leaves him with little to say to the "bold spirited" men who are unwilling to acknowledge that the critique from first principles of existing laws for the Church and society should take place in this fashion.\textsuperscript{129} While Hooker reasserted the complexity of politics and government and the virtue of sharpness of wit, experience and depth of judgement against those he sarcastically refers to as men of "high principle" who were unwilling to move past their "unlimited generalities", the times nevertheless were carried by these men of "grosse and popular capacities."\textsuperscript{130} One can hear the despair in Hooker's voice as he pleads

\textsuperscript{129}Lawes, Preface 6.5. (Vol I, p.33)
\textsuperscript{130}Lawes, V.9.2. (Vol. II, p.43)
and cajoles to shore up his understanding that public life is in jeopardy if men of "high principles" are given free reign and allowed to undermine the existing order. His very first words betray this unease and fear about the future that is upon him: "Though for no other cause, yet for this; that posteritie may know we have not loosely through silence permitted thinges to passe away as in a dreame."131

Hooker, then, makes an extended argument about government based on consent, imagined as a combination of 'social contract' and 'constitutional contract' theory. What I wish to emphasize is that what terms we use to describe this understanding are less important than acknowledging that the continued juridical validity of government is a function of 'consent'. Gough suggests, in response to those who have argued that the appearance of the word "contract" signals an important change in our understanding of the relationship between ruler and ruled, that to concern ourselves with the precise definitions of words is to concern ourselves with the analogy, rather than to seek to understand how our duty to obey government to depends in some way on consent.132 My argument, however, that government can be reasonably understood to have originated in some act of consent, as a philosophical argument, is unimpeachable and not open to the criticisms levelled at 'contract theory', first by Filmer, later by Hume against Locke. In this discourse, rulers hold power, as Locke argues, in trust, because of this initial consent. Hooker, because of his confidence in the collective wisdom for shaping man's destiny, argues that our best guide to understanding wherein our duty lies is to accept as a given that the relationship between ruler and ruled has implied the consent of all, tacitly or expressly. In

131Lawes, Preface I.1. (Vol. I, p. 1)
132Gough, ibid, 5-6.
contrast, the notion of 'contract' in its strictest sense, which seems to emerge in the seventeenth century, posits an initial agreement that defines terms under which rulers hold power, implies mutual obligations (enforceable at law) that arise with the initial agreement, and deserves the criticisms levelled at it by Filmer and Hume for being both historically and philosophically naive. If we look to Hooker for a social contract, I think we are unlikely to find it. We will find, however, one of the most extensive arguments for the necessity of consent, in a particularly English manifestation, as a necessary part of the proper functioning of government.

The language of natural law, states of nature and the erection of government by man's consent was one of the lasting contributions of the late sixteenth century to debates about the nature of political obligation. The corresponding use in England of such theories of consent to justify a greater role for Parliament, apparent even in Hooker, suggests that this was meant to be far more than a philosophical argument that only outlined how legitimate governments could be brought into existence. Yet there is a tension between the two views, the 'natural law' and the 'constitutional'. The fiction of representation in parliament must break down if we begin to consider that all men have equally the right to be represented by government and give their consent to it. It is to the issues of consent, representation and governmental legitimacy which we now must turn.
CHAPTER 3
THE BREAKDOWN OF CONSENT THEORY

To discuss adequately the ebb and flow of the issues of consent and contract during the period between the publication of Hooker's Lawes in 1604 and the virtual explosion of theorising from the Long Parliament to the Restoration would be a far larger project than is possible here. I can only raise some of the transitional points that will aid in illuminating Locke's own understanding of the problem of the institution of government, and point out, in some degree, the sources for the emergence of contract theory in association with the 'vulgar Whiggism' later criticised by David Hume. Accordingly, I will highlight the articulation of five important theories of consent that resulted from the breakdown of existing authority in England after 1642. Ideally, while one ought to trace in detail the slow movement and growth of such ideas, to do so would require much more detailed research than can be undertaken here.

The initial theorist I will consider is Henry Parker, who was perhaps the first significant theorist writing after the collapse of government in the 1640s, and who dealt with the problem of authority by reiterating a traditional, recognizably Hookerian argument about the nature of consent. The second group of theorists, if they can be so called, are the Levellers, whose arguments attempt to solve questions of consent to law and representation by including a greater portion of the electorate. The third major theorist is Thomas Hobbes, who radically transformed the meaning of consent within the context of English political debates. Fourth, I will outline the views of Robert Sanderson, Bishop of
Lincoln. Finally, I will deal with Sir Robert Filmer's criticism of consent and contract as a description of the nature of political obligation. Before proceeding to these thinkers, however, some background is necessary.

What needs to be emphasized is the degree to which the synthesis put forward by Hooker was increasingly challenged by a royalist understanding of the nature of the state that stressed divine origins of royal power. In an earlier Whig history, the early seventeenth century was seen as a chapter in the inevitable rise of parliament that was part and parcel of the story of the progress of liberalism. Wicked King James, with mistaken and foreign notions of divine right, confronted the true representatives of the English heritage in Parliament. The political controversies in this view were necessarily between the King, as representative of absolutism, and Parliament, as representative of true English liberties: put crudely, between divine right and democracy. In this view, the Civil War was a detour, notable perhaps for its contributions to liberty, but once government was set right in 1688, the ancient constitution was restored and the inexorable progress of the English polity towards constitutional monarchy was assured. Increasingly, Parliament self-consciously embraced the history of its ancient origins and coexistence of liberties with its claims to the sharing of power with the the King. The overlay of the language of the eighteenth century, of equating absolute monarchy with despotism, more or less assured that the seventeenth century would be seen as the period when such monstrous pretensions on the part of the monarchy had been constrained by reasonable men for reasonable purposes in England, guaranteeing rights under law for all.

Although he is less well-known, both his contemporary reputation and his connections to James Tyrrell (and by extension, John Locke) make him interesting within the context of this paper. He deserves to be better known for the unusually clear form in which he summarises the range of meanings that consent had acquired within English political debates.
and representation for all by a few. While one would no longer want to write a history of the early seventeenth dominated by "Whiggish ideas of a momentous conflict between prerogative and ancient constitution," arguably there were conflicting premises about the nature and source of the King's prerogative and its effect on law.²

If we assume that the synthesis that Hooker articulated was a partisan exercise in favour of, or in support of, a position that involved a substantial enhancement of the role of Parliament vis a vis the crown, then such claims continued to be made, and made increasingly stridently, as James I and later Charles I tried to enlarge the reach of royal jurisdiction. Claims, like Hooker's, for a prescriptive understanding of the English state continued to be made with a dogged stubbornness that has led historians to the conclusion that political theory in the early seventeenth century was conspicuous by its absence. Historians have been forced to piece together a political world view from a wide variety of

²Derek Hirst, "Court, Country and Politics before 1629," 124, in Faction in Parliament, edited Kevin Sharpe, (Oxford, Clarendon Press, 1978). The older Whig story is classically presented by S.R. Gardiner, History of England from the Accession of James I to the Outbreak of the Civil War 1603-42 (London, 1897-1904). There is an immense revisionist literature that attacks the older Whig view; see for example, Conrad Russell, Parliaments and English Politics 1621-29, in which 'opposition' to James is limited to the period after 1625. My disagreement with the extreme revisionist position is that it tends to limit politics to what took place in parliament; it has tended to accept a view of the sixteenth century put forward by G. R. Elton that overemphasizes the degree of autonomy achieved by parliament by the early seventeenth century, and it has tended to overlook the means by which the English gentry acquired the necessary intellectual outlook and practical political experience that enabled them to successfully challenge royal authority in the 1640s. For a helpful survey of the Civil War, see R. C. Richardson, The Debate on The English Revolution (London: Methuen and Co. Ltd., 1977), and, more recently, Robert Zaller, "What Does the English Revolution Mean? Recent Historiographical Interpretations of Mid-Seventeenth Century England," Albion 18, 4 (Winter, 1986), 617-635.
sources. It was a period whose politics was conducted in terms of law, in large part: a language of politics whose articulations necessarily masked change by calling it restoration. Historians have emphasized the dominance of the 'Ancient Constitution' in political debate and attributed such a view to intellectual narrowness. This view has, however, shown "too little favor toward the common law mind's capacity for change" and have downplayed the degree to which the continued defence of the verities of the Ancient Constitution was based on an imaginary history argued for polemical reasons. By emphasizing the common law defences of political rights, historians have also tended to downplay the vitality of the constitutional and natural law traditions as modes of argument that were mutually reinforcing to the common law tradition.


5David Resnick, "Locke and the Rejection of the Ancient Constitution," Political Theory 12, 1 (February, 1984), 100-101, notes that "the attack and defense of English liberty in the seventeenth century was conducted on at least two levels: God and reason on the one hand, and English constitutional history on the other."
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upheavals of mid-century mark the return of extended theoretical writings, much of which still tended to see political issues in terms of law. When this no longer seemed to suffice, there was the rapid assimilation into the English debates of theoretical writings, especially those borrowed from the French context.

Two thinkers that arguably introduce something new into the discussions about politics in England are Jean Bodin and Hugo Grotius. Bodin's work, although relying on similar natural law assumptions to Hooker's, displays a different, more absolutist political tradition. His theory of undivided sovereignty, drawing on Roman Law precepts, made the English touchstone of the mixed constitution seem philosophically less viable. However, as argued above, Hooker, in contrast to Hadrian Saravia, had already constructed the strongest argument possible against Bodin by reiterating the English touchstone of a mixed constitution under law. The insularity of the English view of Bodin is captured by Sir Edward Coke's remark in the debates about the Petition of Right in 1628, "sovereign power is no parliament word." Later Anglican theory has been characterised as "Bodin plus the Bible" and this as much as anything else highlights its distance from Hooker. However, given that a stalemate between the king and parliament arose after the Long Parliament in particular,

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6 On the French influence, see Salmon, The French Religious Wars. What Sommerville, Politics and Ideology, shows, however, is that this literature was known and understood, earlier than the 1640s and to some degree was used, for instance by James I. This tends to support the view that the continued defence of the verities of the 'Ancient Constitution' was less because of intellectual narrowness and more because it was politically useful.

7 Parliamentary Debates 1628, iii, 425.

arguments using Bodinian solution of undivided sovereignty flourished among Royalist writers like Sir Robert Filmer.

What also emerged in the Civil War period were theories of monarchy that were contractual in nature. Thus, the origins of monarchy were assumed to be contractually bound by specific rights and duties. By the 1640s John Selden could say (but not write), "to know what obedience is due to the prince, you must look to the contract between him and his people; as you would know what rent is due from the tenant to the landlord you must look to the terms of the lease." If increasingly the language of consent in politics became a language of contract proper, with overtones of bargain, futurity, and reciprocity of rights and duties, it is worth noting that this changing language of agreement between parties was paralleled in the changes that were taking place within legal discourse. Thus there was a profusion of theories about the contractual nature of the agreement between king and people, that relied on arguments of rights prior to the emergence of government—the rights of Englishmen.

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*Selden, s.v. War, John Selden and his Table Talk, ed. Robert Waters, p. 206. This may be less 'modern' than it sounds, however. Michael Lessnoff, Social Contract. (Atlantic Highlands, N.J.: Humanities Press International, Inc., 1986), 12, cites Manegold of Lautenbach, in 1080, who made a comparison between the contract with the king and the hiring of a swineherd.*

*Law, too was undergoing the 'birth of the contract', where contractual relations were replacing personal ones. Commercial transactions were increasingly brought under the rubric of contract and breach in its modern sense, rather than promise, breach of promise, and trespass pursued as a personal action as a remedy against the person with whom business relations had gone awry, as it might have been in an earlier time. See Delloyd Guth, "The Age of Debt, Reformation and the English Law," in D. J. Guth and J. W. McKenna eds, Tudor Rule and Revolution: Essays for G. R. Elton from his American Friends (Cambridge: Cambridge University Press, 1982). See also Atiyah, Rise and Fall of the Freedom of Contract, pt. 1. Unfortunately to explore this properly is outside of the limits of this paper. The comments made about the connections between the nature of the changes in contract law and the 'social contract' by Atiyah are immensely suggestive.*
A second major theorist whom recent political theorists have tended to concentrate on is Hugo Grotius. By arguing from a natural law background and coupling it with practical arguments drawn from Roman civil law, his work became one of the sources for a shift away from natural law to a language of natural rights. Richard Tuck has gone so far as to characterize the conservative and radical interpretations of Grotius's understanding of rights as a determinant of the major division in the English Civil War.\textsuperscript{11} Clearly, arguments about rights and property in the seventeenth century tended to be conducted in Grotian terms by many English writers.\textsuperscript{12} To adequately assess the influence of the issues of rights, property and consent and the effects that they had would far outstrip the bounds of this essay, but it is worth noting that the attack on security of property through arbitrary taxation by the king, as in the case of Ship Money, led to increasing disaffection under Charles I and forms a background to Locke's later concerns about representation, consent and taxation.

By overstressing the contrast between natural right and natural law theories of government, I think that we unfairly contrast the two theories. There is good reason for seeing Grotius and Hooker as philosophically close-conservative thinkers, who wished, as Clarendon noted, "to live under the same government they were born." As Hugh Trevor-Roper has suggested, Grotius was closest intellectually to the Great Tew circle, composed of Clarendon, Falkland and others, whose moderate constitutionalism and desire for reform, like their moderate religious beliefs, admiration for Hooker and desire for peace, like their moderate religious beliefs, admiration for Hooker and desire for peace,

\textsuperscript{11}Richard Tuck, \textit{Natural Right in History}, 81.

\textsuperscript{12}See for instance, Tuck, ibid, in particular, ch. 3, and James Tully, \textit{A Discourse of Property}, and his subsequent article, "Current thinking about Seventeenth Century Poltical Theory," in which he contrasts Tuck with Quentin Skinner.
he shared. It has been too easy for historians to read Grotius's famous statement that natural law would maintain human society "though we should even grant . . . there there is no God" as a statement of thorough-going rationalism, yet as Trevor-Roper convincingly demonstrates, it was a rationalism combined with a devout Christian faith that was shared by the members of the Tew circle. Tuck suggests that Grotius "made its his rights theory's untheistic character obvious," but to argue this is to falsely contrast religious belief and reason in our understanding of natural right and natural law. Sommerville states that the real question in so far as rights are concerned is whether or not the power of government to command is constituted by each man giving up rights that he possesses by nature, yet as I think is clear from the introduction that the issue of consent and command is not so clear. For a working hypothesis, we will assume that there were a number of philosophical shifts involved in this dialectic relationship between law and right. More importantly, what I wish to stress is the constitutionalist understanding of English government. In this, it has been argued, "the true bridge between the non-resistance of the epoch of the

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13Henry Hyde, Lord Clarendon, History of the Rebellion, iii, 39, cited in Hugh Trevor-Roper, "The Great Tew Circle," in Catholics, Anglicans and Puritans, Seventeenth Century Essays, 198. The intellectual tradition which Trevor-Roper traces is from Erasmus, through Acontius, Castellio, Hooker and Grotius. It was politically conservative, sought peace, tried to define 'matters indifferent' (adiaphora) in religious matters, was Socininian (or Arminian) in a broad, rather than narrow sense, and was sceptical and rationalistic.


15Tuck, ibid, 76. In this Tuck is following a venerable tradition, for instance A.P. D'Entrèves, Natural Law, 55, who sees in Grotius, rationalist, hence secular natural law.

16Sommerville, ibid, 447, n. 63.
While it is beyond the scope of this essay to elaborate on this view, I would argue that the continuity of belief in natural law, constitutionalism, and Erastian views of religion, shared by most members of the Tew circle, is the heritage of moderate men during and after the Civil War, as Trevor-Roper suggests.

Clearly, the early seventeenth century was not a period of political quiessence despite the absence of extended theorizing. That is not to say that conflict between king and parliament was inevitable, but to suggest that parliament's concern with its own 'ancient liberties', like the articulation of 'grievances of the commonwealth' was restated with increasing vehemence when it was felt that such liberties were under attack and that such grievances were increasing. What had seemed to Hooker to be obvious political verities were increasingly called into question. The consensus that he imaginatively constructed was an idealization of the way politics could or ought to work, given moderation in the claims of both Crown and parliament. However, as Philip Hunton was to write in 1643, if the recognized partners in sovereignty could no longer agree, the question of where final sovereignty was within the English constitution would of necessity have to be decided. Reluctance to do so did not involve a myopia about political possibilities as much as it reflected self-congratulatory national pride and a reliance on tradition and prescription that limited abstract speculation about the English polity.

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18Philip Hunton, Treatise of Monarchie (1643), as quoted in Margaret Judson, Crisis of the Constitution, 8.
The philosophical issues raised and left unanswered or incomplete about the issue of consent itself within the Fortescue-Smith-Hooker tradition were likely to become topics on the agenda as political debate increasingly concerned itself with questions of legitimacy and hence governmental origins. The nature of the act of consent, the issue of who consents and their manner of consenting, and the nature of obedience and the command of law over conscience, had to be reconsidered once the understanding of politics was challenged by the events of the Civil War. These issues of consent were more than theoretical, they easily included practical issues of representation. Already by the 1620s, principled arguments were being made for the expansion of the franchise to limit electoral corruption by the court, and these arguments were being made in the language of the right of freeborn Englishmen to consent to the laws under which they lived. Contrary to what has been supposed, the desire to make parliament more representative did not begin with the Levellers, nor did it end with the Restoration. However, while the reconsideration of the issues of consent naturally pushed in the direction of each man's consent to government as a way of ensuring legitimacy, the social ramifications of this proved more difficult to accept. As Richard Tuck has written about the Tew Circle theorists, "they wished

19Derek Hirst, Representative of the People?, 11. Among those involved were Sir Edward Coke, Edwin Sandys and Sir Simonds D'Ewes among others. Hirst's book follows J. H. Plumb, "The Growth of the Electorate in England from 1600 to 1715," Past and Present 45 (1969), 90-116, in its psephological argument about the growth of the electorate. Hirst concedes that we cannot make a simple connection between this electoral growth and interest in politics. Yet Hirst argues that the increase of contested elections suggest that the nature of politics was undergoing change, a view challenged by Mark Kishlansky, Parliamentary Selection.

20Hirst, ibid, 269, notes 23 and 39. He suggests that he differs in his interpretation from both E. Sirluck, Complete Prose Works of Milton, intro., ii, and Judson, Crisis, 305, who argues that the Levellers alone were concerned with these issues.
to combine a stress on the need for consent with a reluctance to construe
magisterial power as constituted by individuals promising not to exercise their
natural rights." Bishop Overall's Canons of 1606 already signalled a
willingness by the ecclesiastical establishment to deny Hooker's 'social contract'
argument. If "any man," he said,

shall affirm that men at the first, without all good education and civility, ran
up and down in woods and fields, as wild creatures, resting themselves in
caves and dens, and acknowledging no superiority one over another, until
they were taught by experience the necessity of government; and that
thereupon they chose some among themselves to rule and order the rest,
giving them power and authority to do so; and that consequently all civil
power, jurisdiction and authority was first derived from the people, a
disordered multitude; or either is still in them, or else is deduced by their
consents naturally from them, and is not God's ordinance originally
descended from him and depending upon him; he doth greatly err.

Clearly the claim that power was derived from the people by their consents was
unpalatable. There was an unwillingness to accept any version of a delegation
theory to describe the power of the monarch, since by implication that would
suggest continued conditions under which the monarch exercised power.

It has been suggested that instead of concerning ourselves with emerging
liberty, we should give more attention to issues of the legitimacy of authority,
Recent work has tended to concentrate on the emergence of de facto theories in
the civil war period, suggesting that theories of politics based on consent
appealed only to a small minority of Independents and Presbyterians, and that
such theories proved unsatisfying to the Commonwealth. As Pocock has
suggested:

21 Tuck, Natural Right, 144.
22 Kenyon, Stuart Constitution, 11-2. James I declined to licence these
canons, as Kenyon notes, because of article xxviii, which argued that obedience
was owed to settled regimes despite the fact they may have originated in
conquest.
we have been obliged to set beside this [idea of liberty] the perception that seventeenth century men were still pre-modern creatures for whom authority and magistracy were part of the natural and cosmic order, and the starting point of much of their most radical thinking was the unimaginable fact that, between 1642 and 1649, authority in England had simply collapsed. In this reading the central polemic of the English Revolution is not the Putney Debates, but the Engagement controversy.  

Pocock goes on to say that the "radical need to construct authority" is the connecting element of much of the political thought, and I would argue that this too is at the heart of, for example, Leveller theory as well. By arguing that the Engagement controversy is more important than the Putney Debates, we tend to overlook what most disturbed men of principle about the purged Parliament: that it had substituted the rule of the sword for the rule of law, and that, in a serious way it no longer functioned with the consent of the people, real or imagined. What I have described as 'consent theory' in its variant forms continued to be articulated in the effort to bridge the gap between the coercive command of the state and the moral law.

A detailed argument could be made for the continued articulation of what we have termed constitutional contract theory. While it could be argued that natural law doctrines and the derivation of government from some state of pre-political equality was a commonplace of early seventeenth-century political thought, borrowing from a variety of classical sources, English arguments still tended to be conducted in more prosaic terms. The most obvious place that this may be seen is in the judicial decisions and proceedings in Parliament that were the backbone of 'Whig' constitutional histories. One needs to make the proviso that the conflict between King and Parliament should not be seen, as I do not think it was by contemporaries, as a 'crisis of the constitution' except by those in Parliament. Nor do I think that anyone glimpsed that this complex struggle

between King and Parliament would possibly result in the King's destruction and the establishment of a commonwealth. Parliament's claim to represent the people remained a traditional one right up until the actual outbreak of hostilities, and when Parliament finally and reluctantly began to operate as the effective sovereign, it did so in the language of traditionalism. Parliament claimed to represent the people; that it was protecting the ancient constitution; and was protecting the King's true regality against the person of Charles who had attempted to rule by his will, thereby denying Parliament's (and therefore the peoples') right to consent to law.

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The closest thing to a reiteration of Hooker's coupling of the two notions of consent, the philosophical and the constitutional, is in Henry Parker's Observations Upon Some of His Majesties Late Answers and Expresses. Parker, a pen for hire, became parliament's most effective polemicist in its controversy with the king. He flatly states that kings "have no power but to do what is lawful and fit to be done." The true nature of parliamentary power is "publike consent" and "consent as well as counsell is requisite and due in Parliament." This consent, "being the proper foundation of all power (for omnis potestas as fundataest in voluntate) we cannot imagine that publique consent should be any

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24 Traditional in the sense that it represented a growing self-consciousness that extended back into early Elizabethan period.

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where more vigourous or more orderly than it is in Parliament."26 Here we have the linking of consent and counsel in a very traditional way, with the assumption that such consent and counsel should be expressed in parliament.

Parker then proceed to make an 'historical' argument that follows both classical forms and Hooker's argument, although it assumes an initial unsociable nature. Man after the Fall was unsociable and mischievous; therefore, society could not be possible without magistrates. Accordingly:

Without society men could not live, and without lawes men could not be sociable, and without authority somewhere invested, to judge according to Law and to execute according to judgement, Law was a vain and void thing. It was soon therefore provided that lawes agreeable to the dictates of reason should be ratified by common consent, and that the execution of and interpretation of those laws should be intrusted to some magistrate . . . but when it after appeared that man was yet subject to unnaturall destruction, by the Tyranny of the intrusted magistrates . . . a wholesome remedy therefore was not so easy to be invented.

Despite his differing initial premises, in a manner much like Hooker, Parker fixes on law, a human invention, as the means to ensure social stability. Unlike Hooker, however, who argued that men created law to remedy being subject to the unrestrained will of a king, it is the perversion of law by the 'tyranny of the entrusted magistrates' that needs to be remedied. Encapsulated in this phrase is the substance of the opposition to the violation of the neutrality of law that was at the heart of the parliamentary claims against Charles I.

Parker proceeds to give a history of the origins of representative institutions through which the limitation of the sovereign power by law can best be accomplished. The 'wholesome remedy' against the 'tyranny of the entrusted magistrate is "an art and peacable order for Publique Assemblies whereby the

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people may assume its own power to do itself right without disturbance to it selfe, or injury to Princes." Princes are limited by law, not in any private sense, but rather

the whole community in its underived majesty shall convene to do justice, and this convention may not be without intelligence, certaine-times and places and formes shall be appointed for its regiment, and that the vastness of of its owne bulke may not breed confusion: by virtue of election and representation, a few shall act for many, the wise shal consent for the simple, the vertue of all shall redound to some, and the prudence of some shall redound to all.27

A prince "is very unjust that will oppose this Art and order." This tract is a high point of the Parliamentarian ideological battle, for it is not only directed at what is seen at the 'tyrannical' tendencies of Charles I, but is also directed to those who deny the Parliamentary claim to represent the people. Parliament expresses the will of the 'whole community in its underived majesty.' However, for some "a severance has been made betwixt the chosen and the parties choosing ... the people upon causeless defamation and unproved accusations have beene so prone to withdraw themselves from their representatives" which has been the cause of the "late distempers and obstructions in Parliament."28

While there is evidence that the claims of parliament were being made with increased vehemence, much of what Parker wrote was, as Eccleshall notes, very much in the tradition of Fortescue and Hooker. Parker "elaborated a theory of consent with the intention of illustrating how a community might make political provision for itself. ... It was for him as it had been for Hooker, a device by which to explain how the individual will of the monarch could be restricted

27[Henry Parker], Observations, 13-15, reprinted Haller, ibid, 179-81.
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to good effect."  
There is no trace of individualism, in the sense of individuals as constituting government by their own consent. Like Hooker, Parker reiterates the belief that the king's unaided judgement was inferior to the collective wisdom, or counsel, expressed in parliament. It is clear for Parker that parliament expresses consent by the 'few acting for the many' through 'election and representation.' Even the distribution of the right to elect is not seriously questioned.

The point of fracture in the Parliamentarian polemic was the veracity of their claims that they represented the people and functioned to give its consent to law. With an increasing reliance on the army and an increasing distance between ruler and ruled, this fiction was challenged by the Levellers, first and foremost, but later by such an unlikely person as Charles I himself. As he stated at his trial:

And admitting, but not granting, that the people of England's commission could grant your pretended power, I see nothing that you can show for that; for certainly you never asked the question of the tenth man in the kingdom, and in this way you manifestly wrong even the poorest ploughman, if you demand not his free consent; nor can you pretend any colour for this your pretended commission, without the consent of at least the major part of every man in England of whatsoever quality or condition, which I am sure you never went about to seek, so far are you from having it.

That is not to say that the Royalists themselves had any intention of consulting the people, but rather that they challenged parliament's claim that its power was based on consent.

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29 Eccleshall, ibid, 160-1.

In contrast to the traditional nature of Parker's claims, the Levellers took the two arguments for consent—the philosophic argument for consent as the actuating condition for the establishment of political authority and the necessity of continued consent to the rule of law—and translated them into practical terms. If the constitution were to be remade, the Agreement of the People would provide the means by which the philosopher's construct of an initial agreement of all parties to the institution of government would become a reality. Second, they demanded "that the consent of the people, without which no law of the state was valid, should not be assumed without their participation." Both of these views pushed in the direction of including a greater number of people in the political nation. An Agreement subscribed to by all adult males who met certain property requirements, combined with Parliament as the representative institution through which consent to law was expressed, would have to include a wider political nation and electoral procedures changed.

The Leveller political movement was a product of the disintegration of government in the 1640s and has been termed the 'first authentic voice of English liberty.' Their controversial writings have descended to us more or less


32Hirst, Representative of the People?, argues that this demand had already been foreshadowed, see n. 19 above. There has been a dispute notably between Keith Thomas, "The Levellers and the Franchise," in G. E. Alymer ed., The Interregnum: A Quest for Settlement 1646-1660 (London: Archon Books, Macmillan Press, 1976), 57-78 and Christopher Hill, "Parliament and People in Seventeenth-Century England," Past and Present 92 (Aug. 1981), 100-24, arguing against C. B. Macpherson, The Political Theory of Possessive Individualism: Hobbes to Locke (Oxford: Oxford University Press, 1962), about exactly how 'democratic' such claims were. Hirst argues that perhaps 40% of the adult male population was already voting (105), and argues that the "Leveller demands for a representative and responsive assembly could be seen in some ways as a systematization of existing practice."
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intact, are still one of the puzzling inheritances of the Civil War. The Leveller programme included religious liberty, the reform of government in the direction of liberty and certain economic freedoms. The first of these, the personal religious beliefs of the various Levellers themselves, ranged from the mild skepticism of William Walwyn, to the (eventual) quietism of John Lilburne's Quaker beliefs. For Lilburne, the claim of personal liberty conflicted with the civil powers claimed by the bishops and ecclesiastical courts—a classic stand of anti-clericalism in the English context. Generally, the close ties between the Independent churches and the Levellers were in the direction of religious toleration, articulated in particular against the attempts by the Presbyterians to re-establish ecclesiastical conformity in their own terms, substituting 'the strictures of the presbyters for the strictures of bishops'.

With regard to the question of political liberty, what did it mean for the Levellers to argue for consentual foundations of politics? This, in turn, raises

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33 The Leveller movement defies easy categorization and description. Since the term was used derogatively by their contemporaries, nearly any public disturbance, especially within the Army, was deemed to be Leveller-inspired. Contributing to this problem of classification is the relationship between the Levellers' program (however defined) and these kinds of disturbances—the common thread of the complaints are cliches about the nature of the current governmental practises; it presents less evidence of a program. For the purposes of convenience, it will be the pamphlets produced by John Lilburne, Richard Overton, and others, along with the now-published record of the Army debates at Putney, that will define that program.

34 The Leveller concern with economic liberties will not be dealt with, although their attack on monopolies, one of the most strongly argued 'grievances of the Commonwealth' in the early seventeenth century, centered on the capture of such monopoly privileges by members of the Parliament, who simply replaced courtiers in the abuse of them.

35 The close ties between the Independent Churches and the Leveller political programmes have been well documented by Murrey Tolmie in The Triumph of the Saints: The Separate Churches of London 1616-1649 (Cambridge: Cambridge University Press, 1977), passim.
questions with respect to their understanding of history and the 'Ancient Constitution.' Earlier writers have made much of the Levellers rejection of history, in particular the rejection of the "historic constitution," arguing that they should be seen as the first spokespersons of 'political rationalism' who "could not appeal to Law", but appealed "to natural right and reason."

Skinner argues that the Leveller acceptance of the 'fatal breach' in the common law due to William's conquest implies that the Levellers needed to move away from the arguments from history to arguments based on natural rights for the basis of their political platform. Christopher Hill, in his seminal essay on the Norman Yoke, also emphasizes this progression in Leveller political thought—as he describes it, a movement from "historical mythology to political philosophy."

In contrast, Seaberg argues quite convincingly that viewing the Leveller critique of law as a straightforward denial of past experience and tradition is perhaps mistaken. Many of the criticisms of the 'Norman Yoke' are directed at procedural forms adopted after the Conquest, not at ancient fundamental law itself. After careful analysis of the deficiencies of the Pocock-Skinner-Hill thesis, Seaberg concludes "it is tradition, misconstruction notwithstanding, that the Levellers proclaimed."

The evidence that Seaberg cites from the writings of Overton and Lilburne in particular, are indeed statements of continuity of ancient rights and liberties that need to be reclaimed or protected from tyrannical

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36 Pocock, Ancient Constitution, 127.


usurpation. Yet Seaberg does not take a long enough view of what these claims in fact were. If he is correct in asserting that the Levellers' understanding was based on Marginal Prynne's *Sovereign Power of Parliaments*, it is likely that what were being claimed as historic rights was perhaps quite controversial in and of itself, since Prynne himself was claiming greater powers for parliament than it had been traditionally understood to have. What Seaberg manifestly fails to do is determine which of those elements in the Leveller's programme are clearly new.

What needs to be examined is whether consent and written agreement, claimed by the Levellers as a way to reconstruct government, were indeed departures from past experience. In contrast to the Levellers who wished to make government anew, the parliamentary leaders continued to use arguments like those expressed by Henry Parker. In doing so, it meant that they had to assert that "the Parliament—the nation united in the only form in which it could take political action—had represented the nation in the work of justice upon the king." This, however, left them with the difficulty of explaining Pride's Purge, which had made the Common's claim of 'representing' the people even more tenuous. The unpopularity of the execution of the King, the novel form of the trial itself, and the increased dependency on the army also provided ammunition for the criticisms directed at the legitimacy of Cromwell's and the purged parliament's

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*Marginal Prynne, The Soveraigne Power, in his The Treachery and Disloyalty of Papists (1643), 33, "The High Court of Parliament and the whole kingdom it represents, may in divers respects be truly and properly said, to be the Highest soveraigne power of all others, and above the King himself," cited in Charles Beard's foreward to Don Wolfe, ed., *Leveller Manifestoes of the Puritan Revolution* (New York: Thomas Nelson and Sons, 1944), 4. Prynne also seems to use the language of the people electing, with the power to change any government as they choose, see Allen, *English Political Thought*, 444. His views represent a high point of claims for parliament and the people.*
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rule.41 This discreditation of Parliament's claims to be representative, led the Levellers to argue that perhaps the reconstitution of government through the actual consent of the people was the only way out of the dilemma of legitimacy. What was tentatively argued in 1647, in the Putney debates, and hesitatingly embraced in the first Agreement of the People, became one of the only logical solutions to the theoretical impasse of how to actually construct a government that had some claim to legitimacy. While the Levellers claimed to be protecting ancient liberties by doing so, it seems clear, based on the Parliamentary arguments of the 1640s, that they were in the process of articulating a new political theory. They were willing to take account of what Henry Parker had disparagingly called "the peoples moliminous body" to set up what one critic called "an Utopian Anarchie of the promiscuous multitude."42 The issues of consent, representation, and governmental legitimacy have become more than academic issues. Arguments for government by consent have clearly shifted from theoretical articulations like Hooker's and Parker's to an argument for government based on each man's consent.

The evidence of this shift can be seen in two statements by John Wildman, separated by only a few months. In his The Case of the Armie Truly Stated, he reiterates a quite conventional view:

Whereas all power is originally and essentially in the whole body of the people of this Nation, and whereas their free choice or consent by their

41T. C. Pease, The Leveller Movement: A Study in the History and Political Theory of the English Great Civil War, (Washington: The American Historical Association, 1916; reprint, Gloucester, Mass.: Peter Smith, 1965), 305. As Pease notes, the abolition of the House of Lords also had never before been "part of the day's work" for the Commons.

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Representors is the only originall or foundation of all just government; and the reason and end of the choice of all just Governors whatsoever is their apprehension of safety and good by them, that it be insisted upon positively: That the supreme power of the peoples representors or Commons assembled in Parliament, be forthwith clearly declared as their power to make lawes, or repeale lawes, (which are not, or ought not to be unalterable) as also their power to call to an account all officers in this Nation whatsoever, for their neglect or treacheries in their trust for the peoples good.43

While sovereignty is clearly being claimed for parliament as both a trust in the name of the people's good and as the supreme law-making body, Wildman conflates the issue of how parliament ended up in such a position in the phrase, "free choice or consent by their Representors."

The elision between these two views is later tackled by Wildman himself. He argues dramatically in the Putney debates:

We are now engaged for our freedom. That's the end of Parliaments: not to constitute what is already [established but to act] according to the just rules of government. Every person in England hath as clear a right to elect his representative as the greatest person in England. I conceive that's the undeniable maxim of government: that all government is in the free consent of the people. If [so], then upon that account there is no person that is under a just government, or hath justly his own, unless he by his own free consent be put under that government. This he cannot be unless he be consenting to it, and therefore, according to this maxim, there is never a person in England [but ought to have a voice in elections]. If [this], as that gentleman says, be true, there are no laws that in this strictness and rigour of justice [any man is bound to] that are not made by those who[m] he doth consent to.44

Here Wildman makes two, not very well-separated, arguments. Governments in the first instance must be imagined to have originated in consent. In addition,


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consent continues to ensure governmental legitimacy because the individuals' consent is expressed in elections. In the famous words of the Leveller, Colonel Rainsborough:

I think the poorest he that is in England hath a life to live as the greatest he: and therefore truly, Sir, I think it's clear that every man that is to live under a government ought first by his own consent to put himself under that government: and I do think that the poorest man in England is not at all bound in a strict sense to that government that he had not a voice to put himself under.45

However, Cromwell and the Council of State continued to rule without responding to the Levellers' request for a new Parliament based on more equitable representation. Increasingly, the need to recreate the original process of consent led the Levellers to the idea of an Agreement of the People.

By 1649, Lilburne could turn the arguments of Parker and Prynne about the representative nature of parliament against Cromwell. Although they still called themselves a parliament "intrusted and authorised by the consent of all the people thereof, whose Representatives by election," they cannot show that "all the people of England, or [any] part of them authorised Thomas Pride, with his Regiment of Souldiers, to chuse them a Parliament." This 'mock Parliament' of "Col Pride's and his associates" although they have "beheaded the King for a Tyrant . . . walk in his oppressingest steps, if not worse and higher."46

It is clear when we examine the Agreements themselves that this concern for consent led directly to arguments in favour of electoral reform, one made within what we have termed constitutional contract theory. However, as Hirst has

45Cited, Divine Right and Democracy, 286. Note the language here...'put himself under that government', 'had not a voice' both seem to suggest consent as part of 'constitutional contract theory'.

suggested, although this was the solution in theory, the Levellers actually lacked a full understanding of the factual dimension of political practice.\textsuperscript{47}

The two aspects of the Levellers' theory that seem most striking are that they conceive of man as a bearer of rights and subject to natural law, accessible to each man's reason. Government exists to protect the rights of individuals; government is created by the rational consent of man. The social contract, or to use their term, the covenant, is created by men, framed in the language of ancient fundamental liberties and obedience to law. Rather than the two-stage argument of Hooker in which men consented to government and then "made a grudging dole of power to a monarchy," the covenant was only between men and exists to protect those rights that belonged to them as men.\textsuperscript{48} Society could thus be imagined as originating in

a voluntary covenant, based on, and expressive of, the fundamental law of nature. Custom had thwarted its intention and obscured its meaning. The Agreement would restore them. It would reserve to the individual his unalienable rights; it would give effect to the principle of government by the consent of the governed, and provide, through universal suffrage, for the renewal of consent as each succeeding Parliament was elected.\textsuperscript{49}

However, there could not help but be a certain ambivalence about the degree to which such a newly-constituted Parliament would be bound by previous law and statute, and I think that this ambivalence is well-captured by Seaberg.\textsuperscript{50}

Leaving aside the problems in constructing a politics from 'each man's consent', the Levellers faced another more serious problem. The vituperative

\textsuperscript{47}Hirst, Representative of the People?, 23; The Levellers themselves "were unaware of some of the factual dimensions of the political context . . . therefore . . . the Agreement and the Instrument were full of flaws."

\textsuperscript{48}Pease, ibid, 142.

\textsuperscript{49}Ibid.

\textsuperscript{50}Seaberg, "Norman Conquest," passim.
term 'Leveller' had been coined because of problems that resulted from claims of natural equality as applied to politics. The claim of such political rights as rights of all men implied a clear threat to existing social arrangements. This was not just an attack by their Royalist or Parliamentarian opponents; Henry Ireton, at the Putney Debates was quick to point out that claims of formal political equality based on 'rights of men' could easily be extended to criticize existing social arrangements based on property. As Ireton suggests, by arguing from each man's right to consent, "I think that you must fly for refuge to an absolute natural right, and you must deny all civil right"; that is, deny the existing distribution of wealth and position within society.51 He further adds, if "by the right of nature, we are free, we are equal, one man must have as much voice as another. . . I would fain have any man show me their bounds where you will end."52

It is these radical social and economic implications of the Leveller position that becomes the most formidable argument against political equality, and provides a troubling inheritance for the later generation of political thinkers, including Locke. As a theoretical construct however, the social contract had become a somewhat more, or somewhat less, viable alternative (depending on one's reading of the situation from 1647 to 1649) that in the last instance was to be based on the right of each man to consent to the government under which he lived. The restraining influence of tradition to justify what was in existence, or the hope that the 'judgement of the wise' would limit the potential moral egalitarianism of the natural law critique of political authority, had fallen victim to the demands for political change.

51Henry Ireton, Putney Debates, cited in Wooton, Divine Right, 286.

52Ireton, Putney Debates, Clarke Papers, I, 308, cited by Ashcraft, Revolutionary Politics, 161.
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While the Leveller's solution to the impasse of legitimacy pushed in the direction of 'democracy', Thomas Hobbes's *Leviathan*, this "late, wild hypothesis concerning the original of government" as one seventeenth-century writer termed it, presents one of the more troubling answers to the question of how men might make political society.\(^{53}\) It, too was a theory born of crisis, that argued that individuals could reconstitute political authority by combining their natural powers. However, although Hobbes wrote in response to the disorder he witnessed resulting from the Civil War, it has been argued that the consistency of his intellectual position suggests that his understanding of what troubled the English polity were developed to some degree before the irrevocable split between King and Parliament.\(^{54}\) For Hobbes, a good deal of the blame for the Civil War could be directed at those constitutional moderates like Clarendon, whose traditional understanding of a King bound by law, law created by consent, and law which did not coerce the conscience, were dangerous checks on the necessary absolute power of the sovereign. Indeed, "much of Hobbes's work can be best understood as a criticism of Great Tew by someone using their own values in order to condemn them."\(^{55}\) The bargain, according to Hobbes, was that

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\(^{54}\) In his *Elements of Law*, in manuscript in 1640, but not published until 1650, he argues much the same way. His state of nature as a war of all against all was suggested as early as in his translation from Thucydides in 1628; society before government 'was but an anarchy of thieves.' See Salmon, *French Wars*, 111, n.23.

individuals gave up the right of absolute liberty in the state of nature in return for the possibility of any civil rights whatsoever, by submitting their wills completely to the sovereign power which they agreed to erect. Within the context of our discussion of the problem of consent, Hobbes argues that man 'consents' to government for fear of worse alternatives, and, once having done so 'consents' to whatever laws may be enacted because of the terms of his submission. The forcefulness and impatience with which Hobbes presented these conclusions was guaranteed to give him a reputation for notoriety. In distancing himself from the other Royalists, and in particular the constitutional moderates, Hobbes argues for absolutism—hence his impatience with mixed monarchy and constitutional nicety. Absolutism was "the extreme remedy for man's extreme need." As Macpherson summarises, Hobbes's doctrines did not please anyone. They denied "the royalists the exclusive support of both the divine right and customary right doctrines." They also, however "denied the parliamentarians the support both of customary right and of doctrines of limited or revocable contractual sovereignty. It could not have pleased either of them, and Hobbes must have known it would not."

We also should reconsider Hobbes's position with respect to those of his contemporaries. While the older historiography stressed Hobbes's isolated position in political debates, recent work by Quentin Skinner has placed Hobbes's thought within the context of the political upheavals of the 1640s and has shown that Hobbes's writings influenced such people as Marchamont Nedham and

56 Coltman, ibid, 176.

Anthony Ascham.\(^{58}\) Skinner, and more recently Pocock, have suggested that Hobbes ought to be understood as a significant contributor to the debates about de facto theories of political obligation that arose in the Engagement controversy.\(^{59}\) Or, to put it another way, Hobbist arguments about the necessity of obedience to de facto powers were important for men in understanding why they were obligated to obey Cromwell’s government. Even though Hobbes provided strong arguments for the need to obey de facto powers, it is his argument that politics could be created anew without regard to experience and history, that provided the deeper reasons for the animosity directed toward him by his contemporaries. One could argue that de facto theories are not really theories of politics at all, resting as they do on prudence and practical reason—to make them properly theories of politics, most writers argue for some notion of tacit consent and prescription that will eventually justify the present government.\(^{60}\) This is the


understanding that Conal Condren sees in George Lawson, although, as he notes, "it is little more than de factoism with a chronological dimension."61 The quarrel with Hobbes is not over de facto theories per se, since all sincere observers wanted to restore order, but with the means proposed by Hobbes to do so. There seems to be a world of difference between a providentialist resignation to whomever God places over us, and the kind of hypothetical construct that Hobbes argues we must create and obey.

In terms of 'constitutional contract theory' and 'social contract theory', Hobbes denies the first and changes the meaning of the second. He "empties the language of natural law of its traditional meanings," and thus his argument from the state of nature is radically removed from any contemporary's.62 The latter argument Clarendon refers to as an attempt to make an "unnatural and impossible Contract and Covenant." With respect to Hobbes's philosophical argument we must examine why.63 In part, it is because Hobbes suggests coerced agreement can be understood as consent, thereby denying its status as a morally free act. Such 'consent', through which men agree to the rule of Leviathan, creates an indivisible sovereignty in the person of the King or assembly, that

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62 Perez Zagorin, A History of Political Thought in The English Revolution, (London: Routledge and Kegan Paul Ltd., 1954), 175. See also J.W. Gough, Social Contract, 105. For tentative suggestions why we might consider Hobbes as working within some version of a natural law argument, see Stephen State, ibid, passim. This is an argument that seems to go against contemporary commentary by writers such as Cumberland, Tyrell and Clarendon, who all saw Hobbes as outside a conventional natural-law understanding.

then functions with little regard for the wishes of the subjects. Thus, ongoing consent, or consent to law, a necessary adjunct to any de facto theory that moves past conquest or mere power, is denied. It is also because the impossibility of promise-keeping in the state of nature, except for some prudential calculation, makes it difficult to understand why men would agree to abandon their own position first to actually erect government.

To deal with the 'impossible contract' first. The outline of the Hobbesian story as to the way in which men "without a common power to leave them in awe . . . are in that condition called Warre; and such a warre as is of every man against ever man" is too well known to describe in any detail. This natural condition leaves man "in continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish and short." Men in this state know nothing of justice or injustice, for these are qualities "that relate to men in Society, not in Solitude"; these notions require "some coercive power" to be enforced. However,

the passions that encline men to Peace, are Feare of Death; Desire of such things as are necessary to commodius living; and a Hope by their Industry to obtain them. And Reason suggesteth convenient Articles of Peace, upon which men may be drawn to agreement.

The only solution to a life of uncertainty and war is to erect such a common power by conferring "all their power and strength upon one Man, or upon one

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64 There is clearly a utilitarian argument in Leviathan that government exists and continues so long as it is able to offer protection, peace and well-being to the subject.

65 Hobbes, Leviathan, 185.

66 Ibid, 180.


68 Ibid, 188.
Assembly of men, that may reduce all their Wills, by plurality of voice, unto one Will. Given that all are willing to give up their right of self-government, "the Multitude so united in one Person, is called a COMMON-WEALTH. . . . This is the Generation of that great LEVIATHAN, or rather (to speake more reverently) of that Mortall God, to which wee owe under the Immortall God, our peace and defence." Hobbes suggests that this is something more than simple consent—there are echoes of organicism in this union. As he states, "this is more than Consent, or Concord; it is a reall Unitie of them all, in one and the same Person, made by Covenant of every man with every man" and the representative 'bears the persons' of those consenting. As with Hooker and Suarez, there is a sense in which this union creates something qualitatively different than just an amalgamation of private judgments and wills.

It would be a mistake to see this Leviathan as ruling through terror. For Hobbes, there is the possibility of law, and, in particular, law that would correspond to the law of nature arising out of the interaction of men. Although law alone does not create obligation, it would also be a mistake to think that it is only fear and utility that create political obligations. In fact, consent (at least in Hobbes's meaning of the term) is essential to create genuine political obligation. To quote von Leyden, "for Hobbes, self-preservation and self-interest are neither the basis nor the meaning of being obliged . . . . the nature of obligation for him

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69Ibid, 227.

70Hobbes, ibid, 227. Here Hobbes seems to be using consent in its less active form as meaning 'agreement' or 'concord,' and contrasting it with the amalgamation of wills that he imagines is possible.

71Gough, ibid, 104, for instance, argues that it is only through fear that the Leviathan rules.
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lies in the absence of right." Given his model of man, a state created by institution requires the voluntary consent of individuals to transfer of all rights to the single sovereign. The very formality of the language of contract used by Hobbes suggests that he is writing for an audience that already understands the benefit of civil society, not describing a 'state of nature' in a far-distant past. Hobbes is also emphatic that in the case of conquest, it is not the power of the conqueror which creates right, but the consent and submission of the conquered which creates genuine obligation. Within our understanding of consent, how can the 'consent' that Hobbes describes be considered voluntary?

In Book I of the *Leviathan*, Hobbes describes the nature of voluntary actions. They are

not only actions that have their beginning from Covetousness, Ambition, Lust or other appetites to the thing propounded; but also those that have their beginning from Aversion, or Fear of the consequences that follow the omission, are voluntary actions.

Thus, the consent that is given beginning either in appetite or fear is voluntary and Hobbes can state that authority originating in conquest differs from that originating in original agreement

only in this, That men who choose their Sovereign, do it for fear of one another, and not of him whom they Institute: But in this case [conquest], they subject themselves, to him they are afraid of. In both cases they do it for fear: which is to be noted by them, that hold all such Covenants, as proceed

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72 Von Leyden, *Consent and Obligation*, 65.

73 On Hobbes's language of contract, see Charles D. Tarlton, "The Creation and Maintenance of Government: A Neglected Dimension of Hobbes's *Leviathan*," *Political Studies* 26, 3 (Sept. 1978), 307-27. For a careful account of Hobbes's contract generally, and particularly the requirement that men in the 'state of nature' must already be able to imagine the benefits of civil society to be willing to give up their natural right to all things, see Carole Pateman, *The Problem of Political Obligation*, chap. 3.

74 Ibid, 128.
Once the Commonwealth is instituted, and once consent has been given, then men are genuinely obliged to obey whatever laws are formulated—such laws are, by definition, just. One can imagine, however, that Hobbes could be easily misread as having argued that it was self-interest and self-preservation that continued the obligation to be bound by law. Hobbes himself provides the ammunition for such a view by arguing that the right to obey a government ends when that government is no longer able to provide protection to its subjects. However, since it is not self-interest that creates genuine obligation under law, but fear of the alternative, which is anarchy and Civil War, Hobbes, I think, cannot be faulted for providing this out. One could argue, and I think in terms that Hobbes would understand, that, if protection could no longer be provided, then the covenant would have failed anyway.\footnote{Ibid, 252. Hobbes goes on to acknowledge that promises under fear of death are not binding within society, but not because such exactions were based on fear, but because "he that promiseth hath no right in the thing promised."}

One can say, however, that Hobbes's description of men's agreement in the first institution of government or as 'voluntary' after conquest represents a radical shift in the understanding of consent as a free act. Consent to institute government, and especially consent to the rule of law, was understood to be the way in which the discrepancy between the coercive legal obligation and the moral obligation for the individual to obey was bridged. Given that men had free will, to obey law was potentially an act of virtue. For Hobbes, this is not necessarily the case. Since he saw the practical limits of divine law as a controller of men, the 'convenient articles of peace' will apply to believer and unbeliever\footnote{As Macpherson, introduction, 62, notes.}
alike; they will be products of human reason that men will obey for prudential reasons. Hobbes's willingness to argue that 'consent' arising out of fear after conquest was legitimate was simply beyond the pale. As was argued against the king at his trial, "conquest makes title among wolves and bears but not amongst men." The usual way to gloss over the difficulties inherent in conquest theories was to argue, as Hooker had, that time and custom eventually implied 'tacit' consent, yet Hobbes will have none of this.

Hobbes's philosophical argument for consent, then, represented a very real departure from inherited political discourse, in that the contract so described depended on an individual's understanding, acknowledgement and action in agreeing to submit to a sovereign power without any religious sanctions for so doing. It also represented a clear step beyond the earlier view of consent to government and power in the people—one could no longer speak in Hobbes's language of a power from God, transferred by way of the people to the king, but only of a sovereign erected whose power comprised the agglomeration of the power of each individual. One could also speak of a state organized for secular ends. George Lawson began his attack on *Leviathan* with both these points in mind: "To think that the sole or principle Cause of the Constitution of a civil State is the consent of men, or that it aims at no further end than peace and plenty, is for too mean a conceit of so noble an effort. And this in particular I cannot excuse Mr. Hobbs." For Hobbes's contemporaries it was not just the

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77 'Cooks Speech Against the King', cited in Muddiman, *Trial of Charles*, 145. The speech in question was Sir Edward Coke's. The Royalists' willingness to use conquest theories to justify Charles I's position led to this outburst at the trial. For this use of conquest theories by Royalists, see Tuck, *Natural Rights*, 105.

philosophical impossibility of the contract, but its denial of the historic and
prescriptive limitations on sovereignty, that made it so unpalatable. As Zagorin
notes, Leviathan "altogether transcended anything historically extant."79
Therefore, for the purposes of this paper, I want to stress the implications of
Hobbes's insouciance in the face of the received views of the English
constitution.80 While Hooker's argument for consent in the initial stages
included consent by the monarch to a rule of law, there is no such reciprocity in
Hobbes. The sovereign is neither reciprocally pledged to the people, nor do the
people have the right to "scrutinize the activities of their ruler nor condemn
him for his iniquities."81 The consequences of Hobbes's insistence on individual
sovereignty were as far-ranging as they were controversial: customary law,
Parliamentary rights, and what we have considered as 'constitutional contract
theory' have simply vanished.82

This understanding of Hobbes as someone who consciously worked
outside the discourse of the 'Ancient Constitution' was contemporaneous with
Hobbes's first appearance in print. As Bowie has noted: "The challenge of
Hobbes indeed was met by a restatement of a constitutionalism already rooted in
English life and taken for granted—going back through Hooker, Fortescue,


80Both the practical problems of the agreement, and the problem of how
men in a state of nature would overcome their passions long enough to
covenant. See, Clarendon, Brief view and Survey, 29.

81Von Leyden, ibid, 132.

82See Hobbes, A Dialogue Between a Philosopher and a Student of The
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Bracton and John of Salisbury.\textsuperscript{83} For Hobbes, the idea of sovereignty divided between king and parliament led inevitably to the conflict of the Civil War.\textsuperscript{84} In Hobbes's understanding of the nature of the properly functioning English polity was that the King would have the sole voice, with parliament functioning only as counsellor and advisor.\textsuperscript{85} The king controls the content of laws, ruled by considerations of equity and reason. While the king does indeed have a natural and politic capacity, for the purposes of Hobbes's argument in \textit{Leviathan}, despite the possibility of the king being as Hobbesian as the rest, a monarch's decisions will not likely conflict between these two capacities. Even if they do, as Hobbes says, if the sovereign, or assembly

\begin{center}
\begin{quote}
ordain the doing of many things in pursuit of their Passions, contrary to their own consciences, which is a breach of trust, and of the Law of Nature; but this is not enough to authorise any subject, either to make warre upon, or so much as to accuse of Injustice, or any way to speak evill of their Soveraign; because they have authorised all his actions, and in bestowing the Soveraign Power, made them their own.\textsuperscript{86}
\end{quote}
\end{center}

There can be no recourse to claims of individual rights because of the absolute nature of the sovereign. Later, after having witnessed the greater stability of the Restoration Parliament, Hobbes seemed willing to argue that Parliament could play a role as counsel in making up for the King's tendency to seek private rather

\begin{itemize}
\item \textsuperscript{83}Bowle, \textit{Hobbes and his Critics}, 14.
\item \textsuperscript{84}See, for example, \textit{Leviathan}, 237, 316; or Hobbes, \textit{Behemoth: The History of the Causes of the Civil Wars of England}, ed. William Molesworth, (New York: Burt Franklin, 1963), 144.
\item \textsuperscript{86}Hobbes, \textit{Leviathan}, 297.
\end{itemize}
than public interest, but it is counsel only. Perhaps his last comment is that a King of England is "so far bound to their [Lord's and Commons'] Assents, as he shall Judge conducing to the Good and Safety of his people." Law can still be the product of the King's arbitrary will, not questioned by Parliament or checked by history.

Even those moderates like Clarendon, who had led the attack on the King's use of prerogative in pursuit of 'private interest', were shocked by Hobbes's blatant denial of the substance of the Long Parliament's claims against Charles I. Regarding *Leviathan*, Clarendon boldly states: "I never read any book that contains within it so much Sedition, Treason and Impiety and therefore that is very unfit to be read, taught, or sold as dissolving all the ligaments of Government, and undermining all principles of Religion." For someone like Clarendon, whose belief in the necessity of kings was no less strong than Hobbes's, any argument defining the king's power must be made from both history and tradition. The English constitution, "that Scheme of Government, which men reasonably believe was instituted, and the progress and alterations which were afterwards made, and all those Covenants, Promises and Conditions which were annexed to it, and by the observation of which it hath always acquired strength and lustre," relied for its coherence on an understanding of

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88The fascinating subtext here is the issue of property rights, taxation and arbitrary law, the substance of the disputes over Ships Money. Hobbes's *Leviathan* makes all claims to property conventional, therefore consent to taxation need not take place in Parliament. Clarendon, *Brief view and Survey*, 56, argues that Hobbes makes "the precious terms Property and Liberty absurd and insignificant, to be blown away by the least breath of his monstrous sovereign."

89Clarendon, ibid, 39.
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those historical and prescriptive limitations.\textsuperscript{90} However, the problem of how one could combine a natural law understanding of law with arguments from consent, was particularly troubling. The potential egalitarianism of 'each man's consent' worked against an acceptance of traditional claims of consent as expressed in Parliament, and tended to cause a fracture in what had been, until the Civil War, two aspects of the same argument: consent of individuals establishing government under law through some hypothetical original agreement, and an institutional expression of ongoing consent to law as expressed in Parliament that putatively expressed the consent of the people. Despite arguments for the king's absolute supremacy that were made by the extreme theorists of divine right, the more moderate arguments of Hooker and Clarendon about government based on consent were still made, while attempting at the same time to reject the radical implications of the doctrine of the 'consent of each'. Robert Sanderson, who was a formative influence on the young John Locke, was an unoriginal thinker in many respects.\textsuperscript{91} But his attempt to salvage the 'constitutional contract' argument, while distancing his theory from the 'social contract' argument's potential egalitarianism, and, at the same time, rejecting outright any greater claim for Parliament's authority, makes him a pivotal figure in understanding the now-apparent problems with consent theory.

Sanderson is perhaps best known as a contributor to the debate on the obligation we owe to \textit{de facto} powers. However, he was much better known as England's outstanding casuistical theologian in the seventeenth century, given

\textsuperscript{90}Ibid, 66.

\textsuperscript{91}See above, Chap. 1, p. 33 and notes 66 and 67 for some comments on Sanderson and Locke's doctrine of natural law.
hagiographical treatment after the Restoration by Izaak Walton. Walton's famous *bon mot,* that Charles I 'took his ears to other preachers but his conscience to Mr. Sanderson,' captured the importance of Sanderson's working out of the problems of oaths, conscience, and political obligation for a generation caught in the unprecedented situation of having to choose to subscribe to the Solemn League and Covenant of the Presbyterian Parliament, the 'Negative Oath' by which subjects were expected to pledge not to assist the King, and later, having to decide whether or not to take the Engagement acknowledging Cromwell's ascendancy. Sanderson was dismissed from his position of Regius Professor of Divinity at Oxford before the execution of Charles, and, after suffering both sequestering and imprisonment at the hands of the Parliamentarians, was allowed to return to Boothby Pagnell until the Restoration. He was among the faithful followers of the English church rewarded at the Restoration; he was made Bishop of Lincoln, but died shortly thereafter in 1662.

It seemed clear that the logic of Romans 13:1 led to the inescapable conclusion that obedience was owed to whomever God has set over us. This particular view of non-resistance or passive obedience had the official sanction of Anglican theory; it was Sanderson's misfortune that the circumstances to which he hesitatingly applied it were radically different. An individual "not only permitted to obey the laws and commands of him who rules *de facto* (if they are not impious and unjust), but the nature of things may be . . . that if he does not, he may be thought deficient in his duty . . . a subject may be obliged to that which is provided by the law, and yet not be obliged to the law itself, but to

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92See Novaar, *The Making of Walton's Lives* chap. 11, for Walton's *Life of Sanderson.* The *Life* was written, as Walton argues, 366: "to preserve the re-establishment, and maintain the status-quo" of the Restoration church.
himself and to his country.\textsuperscript{93} Despite this prudential view, Sanderson wrote against Ascham over the Engagement, taking particular issue with what he took to be Ascham's first two principles, that oaths bind us only so far as we intend to be bound at the time of taking them and that self-preservation is our first obligation in the world.\textsuperscript{94} Yet, although he was unwilling to take the Oath himself, it was clear that Sanderson was willing to obey \textit{de facto} powers, while acknowledging at the same time that their ordinances were not properly speaking law since they did not oblige the conscience.\textsuperscript{95}

In his longer work, Sanderson attempts to walk between the Scylla of restating a traditional understanding of the English constitution, while avoiding the Charybdis of countenancing the doctrine that the necessity of consent of the people implies that the "power of the prince is immediately derived from the

\textsuperscript{93}Robert Sanderson, \textit{De Obligatione Conscientiae} (1647). They were originally given as lectures in 1647, and not published until 1678. I have used a translation, Bishop Sanderson's Lectures on Conscience and Human Law, Delivered in The Divinity School at Oxford. Edited, translated, and with a preface by C. H. R. Wordsworth, Bishop of Lincoln, (London: Rivingtons, 1877).

\textsuperscript{94}Cited John M. Wallace, "The Engagement Controversy," 394. The work in question is called \textit{A resolution of conscience . . . in answer to a letter sent with Mr. Ascham's book} (1649). His more well-known "Of the Engagement", although written in 1650, at his request, was not published until later as the seventh chapter in his \textit{Eight Cases of Conscience} (1674).

\textsuperscript{95}He subsequently was cited as an authority by William Sherlock in the debates in 1688-9 over the Oath of Allegiance in 1688, see Mark Goldie, "The Revolution of 1689 and the Structure of Political Argument: An Essay and an Annotated Bibliography of Pamphlets on the Allegiance Controversy", \textit{Bulletin of Research in the Humanities}, 83, 4 (1980), 557.
people," a power that can be resumed by the people if the prince abuses it. However, Sanderson argues that historical practise in England suggests that "the consent of the people, and the supreme power of the prince, can consist together without opposition . . . . Kings of England . . . did never exercise their legislative power in such a way as to impose laws upon their subjects without their consent." He then argues, citing Aristotle, that at least some consent of the people must be imagined in the making of law, and proceeds to outline, in unusually clear form, the possible ways of understanding consent.

The lowest level of consent is tacit consent, before the delivering of a law. This is imaginable when "subjects have so delivered themselves to a conqueror, or by continued custom of obedience have submitted so absolutely to the will of a prince that whatever he lays upon them obtains the force of a law." By describing it as tacit, Sanderson seems to be stressing that it is not an active consent, a move that avoids the conceptual confusion of Hobbes. The second type of consent seems quite traditional, the tacit consent of the people after the promulgation of the law. This formulation, stressing silence, and more importantly, "actual obedience," is very close to Suarez's version of custom

96 Sanderson, ibid, Prælection 7, 209. Thus he quotes Ulpian, in the manner of Hooker: "Quod principi placuit, legis habet vigorem", and immediately quotes Bracton's gloss, (De Legibus Angliae, I.i.) that this in no way implies the 'Princes will inconsiderately resolved upon in the heat of passion, but what is determined by his council.' One could go on at lengths to describe his stance as traditional; he rejects the doctrine that the King's power is coordinate (206), that paternal power grew by degrees to become political power (213), that even in the case of election the right to rescind the power given remains with the electors (217-8), a defence of the Elizabethan settlement against Erastians and 'Puritanical' Reformers (224-6).

97 Ibid, 220. He continues by arguing against the Presbyterians, that the right of election of pastors, if it it had ever been the people, is now vested in the Patrons of Benefices, and confirmed by parliament, "the common and full consent of the whole people", the same argument that Hooker had used.
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implying consent. Third, there is express consent of the people to a law, after it is proposed to them by a prince. In this formulation, consent seems to be very much like a plebescite, and indeed the example given is Roman. The highest form, and "the true liberty of the people," is their express consent before the enacting of the law. Rejecting any doctrine of the election of kings, or the revocability of the their power, Sanderson then argues that the "consent of the people, and the supreme power of the prince, can consist together." The people, glossed as "freemen and freeholders," have a right of electing by common sufferage knights and burgesses in the several counties and corporations of England, and to send them to Parliament as their representatives, entrusted with a fiduciary power to manage the public affairs of the kingdom; but after the election they have no right at all to abrogate the power they deputed. The parallels with Locke's description of both the manner of voting and the description of the power of Parliament as 'fiduciary' is striking. Sanderson describes the law making process that results. When the form of a law,

upon a mature deliberation of Lords and Commons about the matter and words of it, is approved by their joint sufferage and consent, and then offered to the Kings Majesty to whom belongs the supreme power of enacting law.

As we might expect, as Sanderson argues, if such practice had not been turned away from, English society would still be flourishing. Such an understanding is recognizably Hookerian in its form. Sovereignty is split, as in Hooker; the king either confirms or rejects a proposed law. Such a system functions to "moderate

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98 Suarez, cited chap. 2, note 54 above. Sanderson cites Distinct. 4. Sect. in istis; Digest. I. tit. iii. 1.32., suggesting a common Roman law source.

99 Sanderson, ibid, 217-8.

100 See below, chap 4. The description of the electors is similar to Sir Thomas Smith's; see Elton, "Rule of Law," cited chap. 2, note 121 above.
the power of princes on the one hand, and to check and restrain the licence of the people on the other."\textsuperscript{101} 

The last section of Sanderson's lectures turns to a consideration of the phrase \textit{salus populi, suprema lex}, which he interprets, following Cicero, as meaning that the people must include those in positions of power. It is clear that Sanderson is adamantly opposed to any reinterpretation of consent that pushes in the direction of each man's consent. As he writes:

Within these last few years, a class of men have used their leisure in a luckless way, to invent and import a new scheme of \textit{politics} into the State...and as in the present miserable confusion of the times they have exerted themselves vehemently, not only to enervate the force, but to root up the very foundation, and destroy the whole fabric, of ecclesiastical government under the pretence of \textit{Christian liberty}, or of \textit{liberty of Conscience}; so they carry on the same designs with regard to the \textit{political} administration, under the pretence of civil liberty or liberty of the subject; and at these times they are enforcing their attempts with incredible fury, and with the terrors of the sword.\textsuperscript{102}

The list of charges include tyranny over their fellow subjects by "breaking through all fences of right and property," and enforcing equality in church and state through "cancelling all distinctions of birth, honour, and fortune." They have preferred their own aims over all "laws, rulers, customs, and establishments" in the pursuit of \textit{salus populi, suprema lex}.\textsuperscript{103} Without the express or tacit consent of the \textit{ruler}, any action against the established laws and rights, in pursuit of the public good is a violation of the rights and dignity of the ruler. With this last argument, that the consent of the ruler is needed, Sanderson has begun to derogate from the force of the argument that stresses

\textsuperscript{101}Ibid, 222-3.
\textsuperscript{102}Ibid, 273-4.
\textsuperscript{103}Ibid, 274.
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consent to law is expressed in Parliament, although he clearly retains much of an earlier Hookerian language.

There can be little doubt that Sanderson, like most other moderate Royalists, "denied absolutely that the will or act of men can create obligation, . . . therefore assert[ing] that the subject's duty of obedience cannot rationally be founded on consent, contract or delegation. Yet their willingness to continue to argue the consentual derivation of parliamentary authority seems to be at odds with this understanding of the nature of why men are in fact obliged to obey Parliament's law, or why Parliament needs to be involved in law-making at all. Sir Robert Filmer, although he too could be classed to some degree as a moderate Royalist, attacked this residual notion of consent at its weakest point. He showed the same disdain for the doctrine of mixed monarchy and divided sovereignty as Hobbes had, and argued that it was not necessary to even include this residual notion of consent in his theory of government.

Filmer is perhaps best known as the person against whom John Locke and Algernon Sidney directed their attacks. It has been suggested recently that Filmer's targets were the Levellers, in particular their attack on the social hierarchy, but it seems that, like Hobbes, Filmer's understanding of the problems with the English government date at least from the time of the Petition of

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104 Allen, 114.

Right. It is not necessary to deal with Filmer's positive theory—the patriarchal origins of political power from God's bequest to Adam, except to note that it represented a fully worked-out alternative to theories of politics based on consent. Like Hobbes, Filmer's theory was written to justify absolutism in the King. However, he himself was critical of Hobbes's theory of contract. As he wrote:

With no small content I read Mr. Hobbes's book De Cive, and his Leviathan, about the rights of sovereignty, which no man, that I know, hath so amply and judiciously handled: I consent with him about the rights of exercising government, but I cannot agree to his means of acquiring it. It may seems strange I should praise his building, and yet dislike his foundation; but so it is, his Jus Naturae, and his Regnum Institutivum, will not down with me: they appear full of contradictions and impossibilities.

Throughout his writing, Filmer shows scorn for his contemporaries who argue for government based on consent. In both of the forms we have considered—the philosophical origins by consent, or the maintenance of government through consent to law—Filmer provides us with the shrewdest critique of the looseness with which these concepts have been used.

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106 The connection of Filmer with the Levellers has been argued by John Wallace, "The Date of Sir Robert Filmer's Patriarcha," Historical Journal, 23, 1 (1980), 155-65. A subsequent article by Richard Tuck, "Communication: A New Date For Filmer's Patriarcha," Historical Journal, 29, 1 (1986), 183-6, disagrees, and argues that the substantive positions of Patriarcha were probably written between 1628 and 1631. As Tuck notes, an even earlier date is possible; the issues dealt with were current before 1614, which would, as he notes, could make Filmer the co-inventor of patriarchalism, along with Hadrian Saravia and John Buckeridge—see J. P. Sommerville, "Richard Hooker, Hadrian Saravia, and the Advent of the Divine Right of Kings" for Buckeridge and Saravia.

107 James Daly, Sir Robert Filmer and English Political Thought, (Toronto: University of Toronto Press, 1979), 61. See also Schochet, Patriachalism in Political Thought.

108 Sir Robert Filmer, Observations Concerning the Originall of Government (1652), 239.
Filmer begins by arguing, like Hume's later critique, that to imagine that men in a state of nature could have consented to government is patently ridiculous. Secondly, for law to be based on consent is to misunderstand the nature of the King's power. It is believed by many, that at the very first assembling of the people, it was unanimously agreed in the first place, that the consent of the major part should bind the whole; and that though this first agreement cannot possibly be proved, either how, or by whom it could be made; yet it must necessarily be believed or supposed, because otherwise there could be no lawful government at all.

If we reject the notion of such a foundation, if government is not "beholden" to such consent, then there is no reason to "ask the leave of the multitude" about current government. Filmer decries the sloppiness with which doctrines of consent have been used:

But the truth is, that amongst all them that plead the necessity of the consent of the people, none of them hath ever touched upon these so necessary doctrines; it is a task it seems too difficult, otherwise surely it would not have been neglected, considering how necessary it is to resolve the conscience, touching the manner of the peoples passing their consent; and what is sufficient, and what not, to make, or derive a right, or title from the people.

Filmer both provides a taxonomy of the ways in which consent may be interpreted, and launches a devastating attack on the problems inherent in such theories.

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110 Filmer, Originall of Government: The varieties of consent that he feels that have not been sufficiently distinguished are "distinctions, touching the manner of the peoples passing their consent, nor determine which of them is sufficient, and which not to make the right or title; whether it must be antecendent to possession, or may be consequent: express, or tacite: collective, or representative: absolute, or conditionated: free, or enforced: revocable, or irrevocable."
Filmer begins by asking: If men are born free with a natural right to self-preservation, and is in this sense self-governing, how can he put himself under any government? Filmer then raises the issue of how one can bind posterity through any kind of imagined consent; if the fathers promise, "yet for their children they cannot, who have always the same right to set themselves at liberty, which their Fathers had to enslave themselves." Filmer's next attack is on the often unquestioned assumption (what Locke will argue is a law of nature) about a majority consenting for a minority, or that the "silent consent of any part" may be interpreted as binding a whole people. Filmer concludes that neither argument makes sense, for "it is against all reason for men to bind others, where it is against nature for men to bind themselves... Men that boast so much of natural freedom, are not willing to consider how contradictory and destructive the power of a major part is to the natural liberty of the whole people." He then raises the issue of the relation of political right to that of property rights. The two "grand favourites of the subjects, liberty and property (for which most men pretend to strive) are as contrary as fire to water, and cannot stand together." Like Ireton's attack on Wildman, Filmer argues that granting some initial condition of liberty and equality to justify equal political right leads to the overthrow of existing conventional relationships like property.

Filmer then turns to the issue of representation. As we have seen, an important, unexamined assumption of consent theories was the assumption that representation itself is unproblematic. In an attack that seems to be directed at the logical extension of the idea of representation by the Levellers, Filmer writes:

Besides, if it were possible for the whole people to choose their representers, then either every, each one of these representers ought to be particularly chosen by the whole people, and not one representor by one part, and

111Ibid, 225.
another representer by another part of the people, or else it is necessary, that continually the entire number of the representers be present, because otherwise the whole people is never represented.\textsuperscript{112}

This was a conclusion that had been reached earlier by an anonymous pamphleteer, who had seen that the radical implications of representation led to a form of government that was plebiscitary in form.\textsuperscript{113} Even the notion of the 'whole people's consent' was given a radical twist. Since the whole people as a group was continually changing, their 'consent' would be too. Thus consent theories "first to affirm a necessity of having the peoples' consent, then . . . confess an impossibility of having it." Citing the manifest difficulties in actually determining what consent means, Filmer raises a Rousseauist spectre: "If but once that liberty, which is esteemed so sacred, be broken, or taken away but from one of the meanest or basest of all the people; a wide gap is thereby opened for any multitude whatsoever, that is able to call themselves, or whomsoever they please, the people."\textsuperscript{114} Clearly this last could be as easily directed at the purged parliament of Cromwell as any imagined Agreement of the People.

Filmer's positive argument, that political authority existed as God's bequest to Adam, like Hobbes's, resolved the issue of political obedience by denying the cogency of consent theories. Yet what was lost by doing this was as important as what was gained. What was gained was an answer to issues of 'tender conscience' and certainty of inward belief, in that the sovereign was absolute and thought to be no longer obliged to take cognizance of the beliefs of the subject. What was clearly lost, however, was the possibility of obedience to

\textsuperscript{112}Ibid, 226.

\textsuperscript{113}Hirst, Representative of the People?, 269, n.23. The pamphlet in question was Plain Fault in Plain English. And the Same in Dr. Ferne (1642).

\textsuperscript{114}Filmer, Observations Upon Aristotles Politiques Touching the Forms of Government (1652), 225-226.
law, understood rationally as a duty, a law to which the subject gave willing obedience. What was also lost was the conception of the potential neutrality of law, established by some first consent, and the possibility that a particular law, which had come into existence 'tacitly' or 'expressly', could elicit an individual's obedience in some measure because of his consent.

While the period of the English Revolution proved to be the most fertile period in English political theorizing, the first responses to the collapse of authority were reconsiderations of time-honoured formulae about the Ancient Constitution. It seems somewhat ironic that even Henry Ireton at the Putney Debates marshalls it as evidence for his position. Only as these formulae no longer seemed to provide a sufficient framework for understanding were they hesitantly abandoned or emptied of their traditional content as they were applied to radically new circumstances. The first stage was the claim that Parliament was protecting the 'ancient frame of government' against the unjust and tyrannical usurpations of Charles. The claims made by Parliament, although veiled in the language of tradition, were radical claims that, if granted, would leave the King of England with little more power than the doge of Venice. Even the Answer to the XIX Propositions, most often taken to be a statement of moderateness on the part of the King ought to be read as a very carefully argued rejection of the Parliament's position, full of self-understanding on the part of its framers, that the terms of the debate had irrevocably shifted. Between the Bishop's War and the second outbreak of hostilities there was still optimism that a settlement could be found. The resumption of hostilities and the eventual victory of the

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115See Michael Mendle, Dangerous Positions and Mixed Government, the Prelates of the Realm, and the Answer to the "XIX Propositions" (Alabama: University of Alabama Press, 1985), a rather overstated examination of the emergence of the doctrine of coordinate powers.
Parliament, coupled with the disintegration of the sense of unified purpose led to the abandonment of claims of 'ancient forms' and led stumblingly to the birth of the new.

However, the killing of Charles, rather than becoming a emblem of the dawning of a new age, removed the only symbol of unified rule and left a theoretical vacuum that could not adequately be filled. His trial and execution was not the result of a new and compelling understanding (either theological but especially secular) about the way in which politics ought to be conducted—the saints had become republicans, but religious and emotional, rather than practical ones.\footnote{Tolmie, \textit{Triumph of the Saints}, 190; I find myself somewhat sympathetic to the argument of Walzer, introduction, \textit{Regicide and Revolution: Speeches at the Trial of Louis XVI}, trans. Marian Rothstein, (Cambridge: Cambridge University Press, 1974), in which he argues that the execution of Charles marked a significant turning point in the way in which men viewed kingship. However, as Lilburne argues, the execution of the King by the Court of High Commission, rather than a properly constituted court, limited the popular acceptance of the regicide.}

Parliament, too, lost legitimacy—Cromwell and Ireton were against the election of a new, more representative Parliament. The Commonwealth limped along, relying on the army and the General Council to maintain order, while the Protectorate substituted the rule of Cromwell for the rule of the King and failed to outlive its maker. This period of political turmoil was the spawning ground for an explosion of political theorising, helped along by the breakdown of censorship laws in the 1640s and their fitful application under the Commonwealth.

The collapse of inherited myth and symbol suggested that the reconstruction of authority and the balance between it and liberty ought to be addressed by a new myth. Filmer, by locating the King's authority in a Biblical past, denied secular history and constructed a theory of divine right by God's
grant and Biblical injunction. Like the claims of Parliamentary sovereignty, the 'divine right' of kings in this form was a product of the 'late disturbances' of the civil war.\textsuperscript{117} Hobbes's response was to construct a geometry of politics, argued from the principle of undivided sovereignty that grounded the absolute right of the sovereign on the 'consent' of all subjects to give absolute power to the sovereign, leaving little for the subject except rights of resistance that to be obtained required further disorder. The Levellers were perhaps the first authentically democratic voice, but they too constructed a mythology to justify their ahistoric claim—a myth of the Norman Yoke and the 'rights of free-born Englishmen'.

While one is reluctant to impose a taxonomy, especially in such a fertile period of theorizing, the positions that had emerged and needed to be taken account of by anyone who was to write an adequate theory of the consentual foundations of politics were four-fold. First, the emergence of arguments for the king's undivided sovereignty, argued either as the result of conquest, or as God's bequest to Adam, or simply as an axiomatic deduction of the dangers of divided sovereignty, suggests that any attempt to restate the 'old way' of making government by consent must answer the charge that, in doing so, it was reopening claims for greater powers for Parliament, or limiting the powers of the king and thereby endangering the terms of the Restoration. As we have seen in Henry Parker's writing, the transition from claims that Parliament was truly representative of the people, to claims that it was therefore justified to act as effective sovereign were all too easily made. Second, to rejoin the two arguments found in Hooker, the 'constitutional contract' and the 'social contract' arguments, would not only have to again take into account charges of

\textsuperscript{117}J. W. Allen, \textit{English Political Thought}, 401.
inflating the claims of Parliament vis a vis the king, but more importantly would have to answer charges made against it of 'levelling' tendencies. The difficulty of combining traditional arguments for mixed monarchy with older ideas about representation and consent, without accepting some measure of the social egalitarianism implied in the idea of fair or just representation on the basis of some notion of individual political right, are seen in Sanderson's argument. Put crudely, if the command of law is not a function of consent, why should Parliament's involvement in legislation matter? And if Parliament's role mattered, then how could it be that the fairness of representation was not at issue? Fourth, such concerns with individual political right had a practical dimension. In order to present a fully worked out consent theory, the treacherous issues raised by Filmer of how such consent can indeed be determined must be answered. Finally, and more generally, although the claims made by the Levellers and Hobbes as embracing political rationalism are somewhat overstated, their abandonment of tradition as a justification for differential political rights, or to put it positively, arguments that all individuals have political rights 'by nature', coupled with the actual disruption of government, made any arguments based on custom or tradition immediately suspect. For Locke's generation, it was not just the need to reconstruct authority, but to do so in a manner that was politically viable, yet allowed for a politics that took into account the possibility of obedience understood through reason.

The theoretical responses considered in this chapter are all partial solutions—none of them proved sufficiently compelling to engage the hearts and minds of the majority of the political actors. From the quietism of Selden ("men in times like these are safest doing nothing") to the despair and anger expressed by Anthony Ascham that God had left men in such a predicament of choosing
which government to obey, to the withdrawal from political activity by the
sectaries in the 1650s with the collapse of the Leveller movement, it seemed that
there was no easy solution to the impasse. As Lilburne was to argue against
Cromwell, by failing to embrace the new, they would ensure the reinstitution of
the old, and the old would be brought in with the approbation of the people.
What is important for our subsequent discussion is that the old reflexive
connection between consent, representation, and Parliament had undergone a
radical transformation, and this is the vocabulary of consent that Locke, Tyrell
and Sydney inherited.
CHAPTER 4

LOCKE AND THE 'OLD WAY' OF GOVERNMENT

Despite the almost unanimous relief that greeted the restoration of Charles II, and the promise of a broad-based tolerant regime, Restoration politics was marred by disputes similar to those that had plagued the pre-civil war polity. Even with the Act of Oblivion, exempting all but the regicides from prosecution, and the inclusiveness of General Monck's welcome to the restored Charles II, as J.R. Jones notes, "the events of the 1640s and 1650s had not been decisive or conclusive, major constitutional and political issues were still open and undecided."¹ Universal approval had soon faded, and the reign was marked by a succession of crises, brought on by the presumption of the Cavalier-Royalist and Anglican High Church establishment that ruled as if 1642 or 1649 had not occurred.² The restored monarchy, welcomed with almost universal relief in 1660, was threatened with collapse only twenty-eight short years later.

²As Mark Goldie has noted, "Review: Richard Ashcraft, Revolutionary Politics," English Historical Review, 53, (1988), 126, there is at present no narrative account which seems to capture the complexity of Restoration politics. I am in general agreement with Goldie's own work, see "The Roots of True Whiggism", History of Political Thought 1, 2 (1980), 195-236, and "John Locke and Anglican Royalism, Political Studies 31 (1983), 61-85, despite its tendency to view 'Whig' and 'Tory' as distinct entities and bodies of thought. I am inclined to view Restoration disputes in constitutionalist and religious terms, which place moderates together, as well as in terms of Court and Country. As with the period before the civil war, it would be a mistake to see these as strictly antagonistic relationships, but they should be viewed instead in terms of shifting alliances.
The two great issues of restoration politics, individually and in combination, were religious toleration and "Encroaching Prerogative." The 1670s saw a concerted attack on religious dissent launched by the Anglican Church with the passage of the so-called Clarendon Codes excluding non-conformists and moderate presbyterians from the Anglican church, despite Charles II's desire for a more moderate settlement. While a welcome corrective to previous neglect of religion is to suggest that the "central facts of Restoration politics were the reestablishment of the church and the institutionalization of dissent," this view tends to downplay the equally important, though by no means wholly separate, issue of maintaining political positions that resulted from the Civil War.

3Anthony Ashley Cooper, First Earl of Shaftesbury, "A Letter from a Parliament-Man to his Friend..." (1675), reprinted in William Cobbett et al, The Parliamentary History of England, iv, Appendix vi, p.lxix; Prerogative is the greatest enemy that "English law and liberty, always had, still hath, ever must have" whose "greatest creatures" are the Prelates. Liberty to dissenting protestants would "keep up the ballance against boundless prerogative."

4Hugh Trevor-Roper, "The Good & Great Works of Richard Hooker," New York Review of Books, 24 (Nov. 24, 1977), 48-55, notes the irony that the moderate Erastian Tew circle group—Morley, Sheldon, Hammond, Earle (all who became Bishops under the new regime)—had become much more like Archbishop Laud than their former 'liberal' selves, possibly because of the hardening of opinions due to the excesses of the civil war. For the critical role of the Tew circle group in ensuring the reconstitution of the national church as an episcopacy at the Restoration, see the Introduction and chap. 4, "The Great Tew Circle" in his Catholics, Anglicans and Puritans. On the terms of the settlement, see I. M. Green, The Re-Establishment of the Church of England 1660-3, Oxford History Monographs, Oxford: Oxford University Press, 1978, 200, who contrasts the "zeal" of the gentry for an episcopal church in contrast to Charles's desire for, first, comprehension, or second, royal indulgence for tender consciences.

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However, toleration for either Catholics or Dissenters was at the heart of many of the bewilderingly unstable alliances between crown, court and parliamentary faction leading to the bizarre political configuration of Whigs and Dissenters supporting the crown against an Anglican-Tory opposition in Parliament. Later, the Whigs, in their attempt to exclude James, Duke of York from the throne because of his declared Catholic beliefs, abandoned this alliance with the court. The Whigs still sought toleration for Dissenters, leading to charges of political opportunists. While Whigs might have been willing to accept toleration for Catholics as the price of prerogative toleration for Dissenters, a Catholic monarch was too high a price. If a Catholic monarch came to the throne, it was argued, the English would face both foreign entanglements and loss of security under law, since monarchs like Louis XIV were absolutist and their subjects slaves. Much of the hysteria over Charles II's and James II's reigns can only be understood against this background of international Catholic intrigue, real or imagined.

The Exclusion crisis of 1679-81, in which Shaftesbury and his Whigs tried to exclude James from inheriting the throne, allied Dissenters with ex-Commonwealthmen and others under Shaftesbury's Whig banner. Despite the support for exclusion legislation, Charles II dissolved three parliaments in quick

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6 Goldie, "Review," 126, has suggested a "central paradox of Restoration politics is that a popular and gentry Anglicanism, ferociously intolerant, was sometimes challenged by absolute power in alliance with radical forces."

7 Captured vividly in Dryden's Absalom and Achitophel, who wrote as a Court poet; for a more sympathetic characterization of the Whigs, and Shaftesbury in particular, see K. H. D. Haley, The First Earl of Shaftesbury.

8 Richard Ashcraft, Revolutionary Politics and Locke's 'Two Treatises of Government', is particularly good in providing the background to anti-Catholicism and fears of conspiracy.
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succession. After the last of these, the ill-fated Oxford Parliament of 1681, Shaftesbury and his associates, including Locke, having failed to gain their goals by constitutional means, were willing to consider armed insurrection to achieve them.\(^9\) Joined with the issue of Exclusion were concerns about the general political situation: manipulation of the electoral system, the nineteen year 'management' of the Cavalier parliament, and the spectre of personal rule by Charles after the dissolution of the Oxford parliament. Such concerns were not allayed under James II, who continued electoral manipulation, suspension of borough franchises, and interference with the Commissions of the Peace. For some, all that was sought was a free parliament in both senses of the word--free of management of the electoral system by the court and free to consider and promulgate needed legislation.\(^10\) However, Exclusion was not successful and a willingness to take steps to engage in rebellion split radical from moderate Whigs.\(^11\) It is in this general context that the composition of the Two Treatises is to be understood--as an 'appeal to heaven' to settle a constitutional impasse.\(^12\)

\(^9\)That is not to suggest that Parliament had the right to bestow the succession on who they pleased; precedent pointed away from such a claim.

\(^10\)The call for a 'free parliament' was one of the strongest rallying cries, used alike by the Duke of Monmouth and later by William of Orange. See, The Declaration of James, Duke of Monmouth (1685), and Declaration of His Highness, William Henry, Prince of Orange (1688), in State Tracts, Being a farther Collection of Treatises relating to the Government (London, 1692).


\(^12\)This point is put most forcefully by Richard Ashcraft, "The Two Treatises and the Exclusion Crisis: The Problem of Lockean Political Theory as Bourgeois Ideology", in Pocock and Ashcraft, eds., John Locke (1980); "Revolutionary Politics and Locke's Two Treatises of Government: Radicalism and Lockean Political Theory", Political Theory 8, 4 (1980), 429-86; Revolutionary Politics, c. 7; and finally, in his Locke's Two Treatises of Government (London: Allen & Unwin, 1987).
While a call for revolution might possibly be dismissed as political opportunism, it seems most striking that members of a generation who had witnessed the havoc of the Civil War felt strongly enough about their political position to chance a repeat of that political turmoil.

Following the discovery of the Rye House Plot in 1683, most of these Whig radicals fled to Holland; Shaftesbury died in exile, while Locke and others remained. The next attempt against the Stuarts was Monmouth's Rebellion in 1685, financed and organised with the support of the expatriate radicals, including Locke, which failed. What William needed to manage his entrance to England in 1688 to make a success of the Glorious Revolution, however, was the broader base of support which materialised as James II alienated greater numbers of Whig moderates and Trimmers who had refused to countenance popular uprisings to support Exclusion and who had supported or participated in the prosecutions following the Rye House Plot and Monmouth's Rebellion. Locke returned to England after William had been offered the crown. Later, during the controversy over the Oath of Allegiance to the William and Mary's new regime, Locke's *Two Treatises* was finally published.

It is generally accepted that Locke's *Two Treatises* must be understood against this background of political and religious struggles. First, the major shift in his understanding about the duties of the state, from his early to his mature

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13 On Monmouth's rebellion and Locke's intimate involvement in the purchase of arms, and the obtaining of money, see Ashcraft, *Revolutionary Politics*, chap. 9.

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writings, was that the state could not arbitrate in the realm of ultimate ends. Religious toleration was necessary because of the uncertain epistemological status of religious practices. Second, as it is generally acknowledged, Locke's religious concerns are the central interpretative axiom for understanding his overall intellectual endeavour. What is at issue is not, however, just a matter of Locke's own religious beliefs or his political connections with Dissenters, but the right of the state to enforce particular beliefs using the sanctions of the law. It also was the manipulation of the authority to proclaim doctrine for gains in power and prestige by the clergy themselves with which Locke took particular issue. Locke, whatever his own religious beliefs, saw himself as writing against an ideological campaign carried out by the High Church clergy, one that stressed the divine origins of political power to serve its own ends. As Goldie trenchantly summarises, "it was not Restoration Kingship, but the Restoration

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15There now seems to be general agreement among Locke interpreters about the dramatic shift from his earlier Two Tracts on Government to his Two Treatises and the Letter Concerning Toleration (1689). The dissenting voice is W. von Leyden, Hobbes and Locke: Essays on Freedom and Obligation, 149-50. Subsequent references to the Letter Concerning Toleration will be Letter followed by a page number referring to the Hackett Publishing Edition, 1983, ed. by James H. Tully.

16Tully, editor's introduction, Letter, 7, "Toleration is justified epistemologically . . . because . . . there are no known indubitable objective criteria for determining which beliefs are true beyond a narrow core of speculative and practical beliefs."

17The recovery of the religious dimension of Locke's thought began with the exploration of previously unexamined papers in the Lovelace Collection, first by Peter Laslett and Wolfgang von Leyden; later, most importantly, by John Dunn, in his The Political Thought of John Locke. David Gauthier, "Why One Ought to Obey God: Reflections on Hobbes and Locke," Canadian Journal Of Philosophy 7, 3 (1977), 425-46, has concluded that Locke's thought should be viewed as 'theocentric.'
Church which Locke and his fellow radicals convicted of the most consistent and
dogmatic repressiveness.”

Despite the current agreement about Locke’s religious concerns, placing
Locke politically is more problematic. The composition of the Two Treatises, as is
now generally agreed, was triggered by the Exclusion Crisis. Locke argues for an
‘appeal to heaven’ for a revolution to be made, rather than as an *ex post facto*
justification of the Glorious Revolution. However, it would be a mistake to
reduce Locke’s *Two Treatises* simply to a party document for the Whigs, as it
would be a mistake to concentrate exclusively on its relevance as high theory,
thereby severing it from the contemporaneous pamphlet literature. The
problem of interpretation, then, involves striking a balance between 'Locke the
philosopher' and 'Locke the party polemicist.' By concentrating on the
combination of constitutional doctrine and natural law argument taken up in
the *Two Treatises*, I will argue that Locke should be read as espousing a variant
form of English constitutionalism—one that received its most elegant
formulation in Hooker's *Lawes*—that relied for its coherence on doctrines of

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19First argued most persuasively by Peter Laslett in his introduction, John
Locke, *The Two Treatises of Government*, rev. ed., ed. , Peter Laslett. All
subsequent references will use I.xx, or II.xx to refer to the first or second treatise
and section number, followed by a page number referring to the Laslett edition.

20The iconoclastic voice in interpreting Locke is Charles Tarlton, "The
Exclusion Controversy, Pamphleteering, And Locke's *Two Treatises*," *Historical
Journal* 24, 1 (1981), 61, who stresses that rhetorical conventions, strategic aims
and audience chosen by the author can be coupled with a desire to outline (not
just within the conventions of a particular party ideology) "limits on the scope of
practicable and expedient political action." That is to say that the identification of
text and political movements is more problematic than reducing the text to
ideology. A writer can be irenic to some degree, even while pursuing a 'party
line.' It is this view of political theory to which I am most sympathetic.
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government by consent. As such, it has roots in a native English tradition that cannot be easily subsumed under particular party ideologies.

Locke was inspired to write in the context of a polemical campaign conducted by the High Church establishment. His response to Filmer, as he notes in his preface to the Two Treatises, would not have been undertaken "had not the Pulpit, of late Years, publickly owned his doctrine, and made it the currant Divinity of the Times." However, it would be as great a mistake to think Locke's target was only Filmer, as it was to assume that Locke's target could only be Hobbes. Following Goldie, I will assume that it is a general attitude that Locke wishes to address—a 'generation of men' that included Samuel Parker and Archbishop Sheldon. Such men worked the machinery of state for their

21The argument that we should interpret Locke as a constitutionalist has been made by Caroline Robbins, The Eighteenth Century Commonwealthmen, 63-5; Locke borrowed "much from the English constitutional tradition and much from the 'judicious' Hooker." In his emphasis on property and the economic motive in society, "as in his insistence on the rule of law, he is in direct descent himself from a long English legalist tradition upheld by Fortescue, Hooker, Hampden, Coke." As Goldie, "Anglican Royalism", 69, notes, the new "clerical Royalism" amounted to "Bodin plus the Bible," and ignored this legalist tradition.

22Locke, preface, Two Treatises, 172.

23Ashcraft, Revolutionary Politics, 186-90, suggests that to concentrate on Hobbes or Filmer as the only targets is to ignore the range of debates about politics in the Restoration. Previous criticisms of Filmer as Locke's possible target were made by modern interpreters on the basis of his unrepresentative nature of divine right thought. James Daly, Sir Robert Filmer and English Political Thought, argues for Filmer's relative isolation in divine-right thought; however, his work seems marred by a tendency to characterise as 'royalist', all those who supported a monarchy bounded by law. In contrast, Gordon Schochet, Patriarchalism in Political Thought, 193; argues that the "Filmerian position very nearly became the official state ideology."

24Goldie, "Anglican Royalism," 65; great philosophers do not respond only to leviathans, but also to the "shoals of smaller, but no less dangerous fish." Ashcraft, Revolutionary Politics, 23; points to the importance of Parker's Discourse of Ecclesiastical Polity (1669) as part of "a general ideological campaign
own ends, provided arguments for the divine origins of episcopacy and kingship, as well as arguments for the exclusion of Dissenters from public life. What is for Locke 'probable belief' is represented as divinely sanctioned and done so for political ends. In his Letter on Toleration, Locke writes that

> these Good Men are indeed more Ministers of the Government than Ministers of the Gospel; and that by flattering the Ambition, and favouring the Dominion of Princes and men in Authority they endeavour with all their might to promote that tyranny in the Commonwealth which otherwise they should not be able to establish in the church.\(^{25}\)

More succinctly, in A Letter From a Person of Quality, he claims that the clerics have "contributed so much" to put absolute power into the hands of the prince so that "priest and prince, may like Castor and Pollux, be worshipped together as divine, in the same temple, by us poor lay subjects: and that sense and reason, law, properties, rights and liberties, shall be understood as the oracles of those deities."\(^{26}\)

Within the Two Treatises Locke tries to locate the origins of the doctrine of divine right of kings in the breakdown of government in the 1620s: "By whom this Doctrine came at first to be broach'd, and brought in fashion amongst us, and what sad Effects it gave rise to, I leave it to Historians to relate, or to the directed against the Dissenters, launched by Sheldon" in the debates on toleration that formed the background for Locke's writings.

\(^{25}\)Locke, Letter, 55.

\(^{26}\)Letter From a Person of Quality to his Friend in the Country (1675), reprinted in William Cobbett et al, The Parliamentary History of England, v, Appendix vi, p.lxiv. There is some dispute over the authorship of this, Ashcraft suggests that if Locke did not personally write it, he contributed significantly to Shaftesbury's authorship. Haley, The First Earl Of Shaftesbury, 391-3, and Cranston, John Locke: A Biography, 158, agree that Locke either wrote or contributed significantly to it.
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Memory of those who were Contemporaries with Sibthorp and Manwering to recollect."27 Sibthorpe's and Manwaring's arguments in favour of the king's ability to tax without consent and their attack on the 'ancient constitution' notion of a king bounded by law earned them notoriety. After the burning of their sermons by the public hangman and their imprisonment in the Tower by parliament, they were later pardoned by Charles I. These issues of consent, taxation, security of property and the relationship of prerogative to law provide an important link between the concerns of Locke's generation and earlier concerns of parliament-men before the civil war.28 As Locke concludes, mankind "had never dreamed of a monarchy being Jure Divino . . . till it was revealed to us by the Divinity of this last Age, nor ever allowed Paternal Power to have a right to Dominion, or be the Foundation of all Government."29 While religious toleration is a goal for Locke, and conformity to some religion established by law a violation of 'natural Rights', there is the further issue that the arguments from divine right lead to claims that property is merely held at

27Locke, I. 5, p.177. See Laslett's note, loc. cit. They were Royalist divines who preached that all property was held at the pleasure of the king so that taxation, in particular Ship's Money, could be collected without consent. Goldie, "Anglican Royalism," 67, dismisses this citation of Sibthorpe and Manwaring as a "Whig cliche", but provides a more extensive list from Sydney's Discourses who had argued similar things—Sibthorpe, Manwaring, Laud, Hobbes, Filmer and Peter Heylyn.

28For a brief account of Sibthorpe's and Manwaring's sermons, see Judson, Crisis of the Constitution, 205, 208-9, 215-217, in a chapter entitled, 'Royalist Clergy Exalt the Divine Right of the King.' Interestingly, Clarendon, certainly no Whig radical, in his Brief Review and Survey, 55, condemns Sibthorpe and Manwaring for writing against the "liberty and propriety of the subject", almost the identical criticism that Locke makes.

29Locke, II.112, p.388. Locke is agreement with modern historians in seeing 'divine right' theories as a product of the civil war. Too, Hooker explicitly rejected the notion that paternal power was the same as political power.
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the will of the king, precisely the argument used by Manwaring and Sibthorpe to justify Charles I's right to collect taxation without consent.\(^{30}\) As Locke notes, to argue "Dominion is founded in Grace" is also "an Assertion by which those that maintain it do plainly lay claim to the possession of all things."\(^{31}\)

It is in this context that Locke's use of Richard Hooker's *Lawes* begins to make more sense. While the *Lawes* was not intentionally a part of the ideological campaign of the High Church party, the story of its publishing history intersects with it. In 1662, John Gauden, seeking to curry favour with the Restoration church, published the most complete edition of Hooker to date. Books I through VIII, including the previously lost manuscript of Book VII, appeared in the most complete form yet, with a 'Life' of Hooker by Gauden included.\(^{32}\) This edition "proved embarrassing to the Restoration episcopate" because it was in the final books that Hooker explicitly argued that bishops and kings were a matter of convenience only, established by consent.\(^{33}\) The response of Archbishop Sheldon's church establishment was quite direct. A new edition appeared in 1666, prefaced by a 'Life' by Izaak Walton, deliberately written to discredit the later books of the *Lawes*.\(^{34}\) In a brilliant rhetorical move, Walton

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\(^{30}\)Locke, *Letter*, 53. For a further claim that religious freedom is a natural right, see *A Third Letter on Toleration*, in *The Works of John Locke*, vol. 6, 212.


\(^{32}\)Books VI through VIII did not appear in complete form in this edition.


\(^{34}\)See David Novarr, *The Making of Walton's Lives*, (Ithaca, N. Y.: Cornell University Press, 1958), 197-300, for a discussion of Walton's close ties to the Restoration Church hierarchy and the reasons for his willingness to engage in hagiography of Hooker, championing him as a supporter of High Church doctrines. Ibid, 366; the *Life of Hooker* is an "agressive attack on the citadel" of Dissent. This edition of Hooker's *Lawes* was reprinted in 1676 and 1682. Either
constructed a portrait of an irenic Hooker, and then, in an extended postscript, called into question the authenticity of the last three books, the very books in which Hooker had been most specific about church governance and English constitutional practices. Hooker's *Life*, like that of Sanderson, was written as "an integral part of Walton's attempt to aid the re-establishment of the High Church at the Restoration." As Trevor-Roper quips, "the great doctor of the Anglican Church had at last, it seemed, been canonized" after fifty years of active suppression of the last books of the *Lawes* by the church that had claimed him as its father. However, "canonization is a ticklish process" that sometimes requires "some judicious tampering with the evidence." In particular,

the last three books, it was now said, were not the works of the saint, but apocryphal works posthumously fathered upon him by Puritan schemers. How else could the great doctor of Anglican episcopacy have been made to utter those "poisonous assertions" about the origin of bishops and kings?  

The 'poisonous assertions' were of course that bishops were a matter of convenience only, not divinely ordained, and neither were kings. Kings were bounded by law and had been created through consent for quietness' sake.  

It is fair to say, however, that Hooker to some degree became a Whig by accident. Clearly the Whigs were as capable of misreading or misconstruing Hooker as the High Church party. Algernon Sydney, in his *Discourses*, argued that Hooker would have agreed with his own doctrine that kings might be

the 1666 or 1676 edition was the one used by Locke while adding the Hooker quotations to the *Two Treatises*, see Laslett, intro., 70.


disciplined by a sovereign people and thought that it was Filmer "who had added
the description of the authors of the *Vindiciae* as 'seedsmen of rebellion' to the
passage quoted in *Patriarcha*" from Book VIII of Hooker's *Lawes*.37 As Ashcraft
notes, Hooker "was not the exclusive refuge of respectability of the radicals; he
was frequently cited as a "judicious" authority on behalf of more moderate, but
non-Hobbesian versions of contract theory."38 The problem of understanding
Hooker was just as acute for Royalists who thought that Book VIII had been
tampered with by Parliamentarians before its publication in 1648.39 Hooker's
express agreement with the maxim, *rex singulis major, universis minor*, which
had become the cry of resistance theory in the civil war, confused as astute an
observer as William Dugdale in his *A Short View of the Late Troubles in
England*.40 Samuel Parker, either disingenuously or sincerely, borrowed the title
of his tract from Hooker, and felt that he was continuing the same Anglican
tradition, although, as Ashcraft suggests, it was Parker who became the target for


38 Ashcraft, *Revolutionary Politics*, 571.

39 This edition had been published by James Ussher, Bishop of Armagh. It included parts of Book VI and VIII of the *Lawes*. Previously, Armagh had published selections from Hooker in his *Power Communicated by God to the Prince* (1661), arguing that subjects were bound to obey the king.

40 Salmon, ibid, note, comments on Dugdale's confusion in his *A Short View of the Late Troubles in England*, 39, and the general connection of *rex singulis* with resistance theory. *A Short View* was first published anonymously in 1644. In 1673, Elias Ashmole, Dugdale's son-in-law wrote to Thomas Barlow, keeper of the manuscripts at the Bodleian on Dugdale's behalf, asking "whether that MS: which he supposed to be the 8 Bookes of Mr. Hooker's Eccles: Policy, were really Mr: Hookers, & not corrupted" suggesting a continued interest in Hooker. See Elias Ashmole (1617-1692), ed. C. H. Joslen, 4 vols., (Oxford, Clarendon Press, 1966), iv, 1344.
the tolerationists, by enunciating doctrines that would have been abhorrent to Hooker. While it is clear that Hooker had not countenanced resistance theory, contrary to Sidney's wishful thinking, it is just as clear that he had argued that governments originated in consent and that kings were limited by positive law; to say the least, these arguments had become troublesome for Restoration politics.

It is worth restating those doctrines in the *Two Treatises* that are not found in Hooker. Strikingly, Locke claims a right of resistance against a ruler who has forfeited his trust, a doctrine Hooker consciously rejected. Second, as the Tory writers were quick to point out, Hooker had clearly limited the application of private reason to political problems and had stressed instead 'public reason' as an privileged expression of those who held positions of political responsibility in society. Finally, Locke's own personal sympathy with the plight of the Dissenters and his arguments for toleration clearly put him in a different religious universe, although an argument could be made that a broad-based Erastian church on the lines suggested by Hooker would have been more palatable to Locke and the more moderate Dissenters than the intolerant narrow church reconstituted at the Restoration. Most strikingly, for Locke,

41 Ashcraft, *Revolutionary Politics*, 41ff.
42 I strongly disagree with the recent argument by J. C. D. Clark, *English Society 1688-1832*, 47, note, and chap. 5, that we should look to "Locke's theological heterodoxy as the theoretical basis of his radicalism." My argument rests on the assumption that this understanding of the *Two Treatises* was simply not available to Locke's contemporaries, given the anonymity of both it and the *Letter on Toleration* at the time of their publication. Given the nonchalance with which Locke uses a very traditional natural law language, whatever quarrels contemporaries might have had with it would likely be political. That is not to suggest that subsequently the *Two Treatises* and the *Essay on Human Understanding* were not connected, and accusations of religious heterodoxy used to discount Locke's arguments. Clark's arguments assume that the attack on the
government exists only for the preservation of property, understood as "Life, Liberty and Estate," rather than for Hooker's Christian-Aristotelian bonum publicum that requires a realm of ultimate religious ends enforced by the state.43 There is also a clear overlay of the experiences of the civil war in Locke's theory. However, even with these provisos, Locke is far closer to Hooker than his High-Church opponents in his understanding of the derivation of political power, the force of natural and positive law, and the role of reason in determining how one is to know when one is bound to obey government.

Filmer, although claiming to resolve issues of political obligation, ended up providing an inadequate guide for the identification of legitimate governments. His understanding of the source of political power and the reason for obedience is ultimately providentialist, because of the impossibility of determining Adam's heir.44 Thus, Filmer's theory easily collapses into a variant of de facto arguments for obedience to whatever monarch currently holds the throne. It offered little improvement on alternative theories of divine-right that preached passive obedience to whomever God had placed over us.

Church was doctrinal in content, and does not consider that it may have been motivated by simple anti-clericalism.

43Locke, II. 87, 367. See also, Letter, 26; the Commonwealth is "a society of men constituted only for the procuring, preserving, and advancing their own Civil Interests. . . . Life Liberty, Health, and Indolency of Body; and the possession of outward things"; compare with Lawes VIII. 2. 18. (Vol. III, p.349).

44The argument that this inability of Filmer's theory to provide an adequate guide to the current holder of legitimate political power, as the reason for Locke's selection of Filmer as his target, is made forcefully by Tarlton, "A Rope of Sand: Interpreting Locke's First Treatise of Government," The Historical Journal 21, 1 (1978), 43-73.
On July 21, 1683, in the aftermath of the Rye House Plot, the Convocation of the University of Oxford passed a judgement and decree against "certain pernicious books and their damnable doctrines." The first three propositions in their list of charges were: (1) All civil authority is derived from the people; (2) There is a mutual compact, tacit or express, between a prince and his subject, and that if he perform not his duty they are discharged from theirs; (3) That if lawful governors become tyrants, or govern otherwise than by the laws of God and men they ought to do, they forfeit the right they had unto their government. Doctrines of contract and the derivation of civil authority from the people clearly had a problematic status in late seventeenth-century England. The connection that such doctrines had with theories of resistance and overthrow of constituted authority in the minds of the members of Convocation is obvious. Their obsession with order and the grounds of political obligation, and their concern to support theories of political obligation whose coherence was given by obligation conceived as a duty to God, is paramount. Theories of government based on consent or contract led to sedition fomented by Catholic or Jesuitical influence. Any arguments for the nature of government that were developed from a 'state of nature'-were read as implying a Hobbist state of war, and hence immorality. Arguments about consent, then, as well as those based on the natural equality of

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45 For a full citation of the decree, see David Wooton, ed., Divine Right and Democracy, 120-6. For an accessible contemporary citation, see State Tracts: Being a Farther Collection (1693), available as a Scholarly Resources Reprint, 1971.

46 Ashcraft, Revolutionary Politics, 570. The use of Hobbes as a stick to beat the radicals with has been noted also by J. P. Kenyon, Revolution Principles, 16-17. As Ashcraft notes, the advantage of using Hooker to butress arguments that government originated in some natural state, and relied on consent, was that he could not be accused of being a 'Hobbist'.
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men, as actuating conditions for the origins of government had become dangerous.

The list of books to be burned by Convocation included, for example, works by Cardinal Bellarmine and John Milton, a pairing that evokes the standard polemical attack by the Tories against the Whigs—that their doctrines about the origins of government were Jesuitical in inspiration and anti-monarchical in intent. In the context of the books burned, the problem that Hooker presented for the church can be illustrated anecdotally. The list of works was not exhaustive—as Richard Baxter was cynically to remark, they left Hooker's Lawes off the list of books that were condemned for arguing that government originated in consent and compact. Baxter's own Holy Commonwealth, that great unwieldy mass of learning, was burned, however, for arguing just that. In his reply to the charges of the Convocation, Baxter claimed that he had only argued for government based on consent in his Holy Commonwealth because he did not know what else to base it on, although he was now willing to confess his youthful error. Other writers also retreated from their earlier positions that government was based on consent because of the radicalism that it now implied. Clarendon agreed that "there are many things don by and with the consent of the People," but was careful to couple together "consent and submission." He

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Schlatter, Richard Baxter and Puritan Politics, (New Brunswick, New Jersey: Rutgers University Press, 1957), 148-9, "A Sheet in Reference to the Judgement...of the University of Oxford" (n.d.). Ashcraft, Revolutionary Politics, 571, note, cites Roger Morrice, who noted that Hooker "who went far beyond Baxter in placing the original of power in the populace" but was not burned by Convocation. Baxter, in his Reliquiae Baxteriane (1696), Part 1, p. 41, couples Henry Parker and Richard Hooker together, and criticizes their doctrine that Parliament is the people, and the people can have any part of the legislative power since it leads to anarchy. He further argues that the King must be both universis major as well as singulis. Cited Julian Franklin, John Locke and the Theory of Sovereignty, 88.
strongly rejected all arguments that government arose from some condition of natural equality and that the king's power was granted by the people. Robert Sanderson, who we have seen adopted a very typical understanding of consent to law as expressed in parliament, argued during the Restoration that the king was "limited and bounded...by such laws and customs as the Supreme Governours themselves have consented to and allowed" and was just as clear that government could not arise from an agreement of men. One could multiply almost indefinitely examples of the problems associated with arguments about government based on consent, however imagined. The important thing to keep in mind is that even Hooker could not stand up to close scrutiny because of his arguments that all governments were based on the consent of the people.

The problem then is to determine the degree that Locke's argument can be considered a restatement of an 'old way' of understanding the origins of government, exemplified by Hooker, whose polemical force should be conceived as a response to arguments that have stressed the divine origins of political power. As Locke argues against Filmer, if men are born free, that is, if hierarchies and power to command are not divinely ordained, "all his Fabric falls" and governments "must be left to the old way of being made by the contrivance, and consent of Men . . . making use of their reason to unite together

48Clarendon, A Brief view and Survey (London, 1676), 45, 71. He equally rejects Hobbes's position that a 'contract' between king and people could exist without reciprocity and that liberty and property is nothing more than what our "our Governor thinks to indulge us" (47-9), and seems to conclude that the historical accretions of limitations on the King's power through "Covenants, Promises and Conditions" that the king has agreed to should be observed, since the the peace and happiness of the people is the end of government. (66)

49Robert Sanderson, introduction, James Ussher, Power Communicated by God to the Prince (London, 1661), no pagination, sig. xii.
in society."  

Hooker is the best exemplar available to Locke of an English writer who made extended arguments about the origins and functioning of government by the consent of the governed. Locke is also clearly aware of the problems presented by Hooker for the High Church party. As he writes: "I thought Hooker alone might be enough to satisfie those men, who by relying on him for their Ecclesiastical Polity, are by strange fate carried to deny the principles upon which he builds it." There is no doubt, as has been suggested, that Hooker added a veneer of respectability to Locke's work. But what of the 'principles' upon which Hooker constructed his polity? It is the principle of government by consent, I think, which becomes the connection that unites these two thinkers in an "ideological affinity."

There is perhaps no part of Locke's Two Treatises that has proved more elusive than his discussions of consent. All problems associated with Locke's theory of consent are not easily resolvable. Yet, if we recognize the parallels

50Locke, I. 6, p. 178. I agree with Charles Tarlton that the first treatise sets up the discussion for the second; see his "A Rope of Sand: Interpreting Locke's First Treatise of Government". For this reason, I am inclined also to agree with Richard Ashcraft's argument (against Laslett and others) that Locke wrote serially; see Ashcraft, Locke's Two Treatises, Appendix, pp. 286-97.

51To be consistent, my reading of Hobbes suggests that it is his indifference to some version of ongoing consent, expressed in some manner by parliament, that makes him an unlikely model for Locke.

52Locke, II. 239, p. 475. The argument does not depend on assuming that Locke was aware that the denial of the Lawes's authenticity was part of a conscious design of the High Church establishment, only that Locke had come to see an inconsistency on their part between an unwillingness to accept any part of Hooker's political argument while at the same time venerating him as a great doctor of the Anglican church.

53Maurice Cranston, pref., John Locke: A Biography, v. Ideological is precisely the right word because it is their political aims and arguments that I am concerned with, not making a more extended argument comparing their respective philosophical positions.
between Locke's discussion and Hooker's use of both a philosophic argument from a state of nature, and its necessary adjunct, an argument that consent is both embodied in and expressed through some institutional arrangements, we find even more problems than previous commentators have noted. Natural law or constitutional arguments were by no means antithetical; one was perhaps chosen for strategic reasons, and the same writer might switch easily from one to the other. What has not been sufficiently emphasized is that an adequate discussion of government originating in consent must include both. Locke had an example of such a combination of constitutional and philosophical consent theory in Hooker's Lawes. Hooker had argued from a combination of constitutional, customary, and philosophical premises that governments originate in some act of consent, and continue to function through consent as expressed in Parliament. What this comparison serves to highlight is the problems that Locke created for himself in trying both to answer Filmer's criticism of the notion of the binding nature of past consent, and reflexively accepting the continuity of institutions and laws that in fact embodied such 'past consent.' Hooker had argued that government had been 'consented' to, either tacitly, through acceptance, or expressly, through positive laws approved by the legislative, and these were binding on the individual in the present. The absence of this type of argument in Locke's Two Treatises leaves open the question of how the government comes to be organized in a particular way.

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54 Ashcraft, Revolutionary Politics, 208-9 argues that arguments from "fundamental rights" (natural law) were often joined with arguments on behalf of rights of "free Englishmen" (ancient constitution). English liberties were a specification of a more general claim known from natural law. This parallel structure of natural law and constitutional argument was first brought to my attention by Martyn Thompson, "Hume's Critique."
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In setting up the problem in this way, I follow Planematz in thinking Locke provided an inadequate discussion of the institutional arrangements through which consent is expressed, and disagree with Dunn that Locke's theory of consent "is not in any sense whatsoever a theory of how a government should be organized."\(^{55}\) There must be some relationship between the expression of consent, legitimate institutional arrangements of the "legislative" and neutrality of law that presumes 'ongoing consent'. For this reason, the Hobbesian argument—a single act of consent erecting a sovereign that could then rule without consent expressed in parliament, or at a lower level with only the prudential check of fear of revolt to check excess, was not compatible with Locke's assumptions about the neutrality of law and security of property.\(^{56}\)

Recent Locke scholarship has pushed the interpretation of Locke in the direction of a Leveller-like conception of the role of consent in the Two Treatises.\(^{57}\)

However, I want to tease out the connections and elisions in the Two Treatises between the formation of government through consent, the right of revolution (clearly a radical claim), and the representation and consent that functions to

\(^{55}\)Planematz, Man and Society, i, 209; John Dunn, "Consent in the Political Theory of John Locke," 30, in Political Obligation.

\(^{56}\)These are also the grounds of Clarendon's attack on Hobbes; he "makes the precious terms Property and Liberty absurd and insignificant, to be blown away by the least breath of his monstrous Soveraign." (Brief View, 56) I am in agreement with the general Locke scholarship that rejects the claims of Leo Strauss, Natural Right in History that Locke was a 'Hobbist', and stresses instead the importance of the language of natural law for the Two Treatises's coherence. See above, chap. 1.

\(^{57}\)Ashcraft, Revolutionary Politics, 145-76 makes the most extended argument, connecting Locke with the radical tradition of the Levellers, concerning issues like the nature of the franchise. Unfortunately, Ashcraft's subsequent discussion of the Two Treatises does not look carefully at Locke's language of consent and its implications for the issues of voting and representation.
ensure the continued legitimacy of government and the consequent obedience of individuals to it.

What has been underemphasized by Locke's commentators in general is the degree to which Locke, like Hooker, must deal with both 'constitutional contract theory' and 'philosophical contract theory'. That is, Locke needs to connect a philosophical argument about how men in the abstract first agree to government with an argument about how men in late seventeenth-century England can determine if in fact their government is or is not continuing to function legitimately in accordance with their consent. Although John Dunn, J. G. A. Pocock, Peter Laslett and Quentin Skinner have all noted Locke's relative indifference to the language of the 'Ancient Constitution', the Two Treatises does indeed deal with specific English constitutional practices, albeit in a discussion pitched in the language of political philosophy.58 Dunn argues that, for Locke, most men were obliged to obey political authority because of their

58John Dunn, The Political Thought of John Locke, 188, Locke is exceptional "in omitting any discussion of English legal or constitutional history"; J.G.A. Pocock The Ancient Constitution and the Feudal Law, 235-8; Laslett, intro, Two Treatises, 89-91; Quentin Skinner, Foundations of Modern Political Thought, I. xiv, Locke "was rejecting and ignoring one of the widely available and prestigious forms of political reasoning available to him...we can scarcely be said to have understood Locke's meaning until we have considered his intentions at this point." To be fair Dunn, Locke (Oxford, 1984), 28, suggests that Locke's theories of consent, trust, and property should be "considered in the context of English politics of the time and of English constitutional doctrine." Pocock also reconsiders his position in his 'Afterword' to Ancient Constitution (1987) and "Varieties of Whiggism." In the first he decries Ashcraft's equation of philosophic arguments with radicalism and historical arguments with 'genteel Burkean conservatism' but accepts Locke as 'philosophic'; that is, unconcerned with current constitutional practices; in the second he argues, against Ashcraft, that Locke's stand on annual parliaments makes it difficult to associate Locke with the 'Radical Whig' tradition. Ashcraft, Revolutionary Politics, 189ff., suggests that Locke was not unusual in his use of natural law language relative to the Exclusion Crisis literature.
fallen nature and as a duty to God, not because they had 'consented.' The occasion of incurring political obligation is some moment of consent for the individual, but the grounds of continued obligation rest upon a general duty to God, an argument more explicit in Locke's other writings besides the *Two Treatises*. Thus consent plays little role in ensuring the juridical validity of government. The parallels between this reading of Locke and Skinner's reading of earlier natural law theorists is striking.\(^5^9\)

There are two problems with this argument, one philosophical, one historical. First, it is not the duty to God that is at issue but the obedience owed to a particular political society's government which, providing a "known and indifferent Judge, with Authority to determine all differences according to the established Law" and "Power to back the Sentence when right, and give it due Execution," that solves the problem of man's natural bias in their own cause or possible ignorance of the natural law.\(^6^0\) It is the possibility of this indifferent judge that separates the state of nature from political society. Our obligation to obey particular positive laws is a function of our consent to those laws in terms of rational assent and agreement to the means by which they are established. Since Locke is equally aware that each individual cannot, if anarchy is to be avoided, choose to obey or disobey each law, some more general means for the linking of consent to positive law must exist.\(^6^1\) Valid positive laws can only arise through the workings of a "legislative" that expresses consent in some manner. What Dunn fails to take into account is a long-standing English usage

\(^{59}\)See above, Chapter 1.

\(^{60}\)Locke, II. 124-6, 396.

\(^{61}\)Locke, II. 97;376; II. 88, 368.
of 'consent to law' as passed in Parliament that is interwoven in the text of the Treatises. The liberty of man in society is to be under "no other Legislative Power but established, by consent, in the Common-wealth, nor under the Dominion of any Will, or Restraint of any Law, but what the Legislative shall enact, according to the Trust put in it." In his reliance on the legislative, Locke "had to explain much of the ordinary operation of government in terms of consent (assuming that representative government, majoritarianism, and tacit consent actually constitute consent)." Consent then functions to distinguish legitimate governments from illegitimate ones, at first institution and in the present. As Dunn suggests, it is not just consent that creates the duty to obey; a more general duty arises from natural law. However, contrary to Dunn's account, consent does allow one to distinguish which person or government to obey and thus has an important continued role.

If Ashcraft's suggestion about the dating of the composition of the Two Treatises is correct, it is worth speculating that Locke's strategy of composition had to be different than a simple assertion of the historic origins of parliament's right to consent to law. In the debate over the historic origins of such rights, William Atwood and William Petyt had run into the historical absurdities first

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62Locke, II. 22, 324; Patrick Riley, "On Finding An Equilibrium Between Consent And Natural Law In Locke's Political Philosophy," Political Studies, 22, 4 (1974), 448. I disagree about tacit consent; it is qualitatively different; an individual who tacitly consents does not become a full citizen.

63Laslett, Intro., 90, notes the absence of a discussion of the historic origins of Parliament by Locke, despite Filmer's claims that it was established by the King.
suggested by William Dugdale about ancient rights of parliament. Historical arguments were undermined even further by the Tory, Robert Brady, in his *Full and Clear Answer to William Petit* of 1681, published with the aid of Archbishop Sancroft. Brady argued for a reinterpretation of England's feudal past that denied the immemoriality of law, custom, and parliament. It was the strongest historical argument yet for what Goldie has described as the "doctrine of condescending power"; that is, law, land and rights exist as historical grants of the king. If history had indeed become a battleground in which the best positions had already captured by one's opponents, the decision to push the *Two Treatises* in the direction of universalistic claims should not seem surprising.

What, however, is not available to Locke in the form it was available to Hooker, is an argument based on continued consent and custom, one that reduces the historical specificity of the original agreement, and focuses instead on the then-accepted modes of political behaviour. However, like Hooker, Locke rejects the historicity of a contract that can be imagined to provide justification for

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64 Pocock, *Ancient Constitution*, 182ff. notes that Atwood and Petyt provided the first response to the republication of Filmer, and, in particular, *The Freeholder's Inquest*. In omitting the historical discussion, Locke is unusual; William Petyt, William Atwood, James Tyrell, and Algernon Sidney felt it necessary to do so. Clearly, Petyt, Atwood and Sidney could be classed as radical Whigs. Pocock suggests that the big failing of Petyt and Atwood was in not arguing from immemorial custom, as Matthew Hale had in replying to Hobbes.

65 The full title is *A Full and Clear Answer to a book written by William Petit, Esq.* (1681); it included an appendix attacking William Atwood as well. Brady was rewarded with a position of Court Physician.

66 Mark Goldie, "John Locke and Anglican Royalism," 70.

67 To argue custom is also to privilege that which is in existence, as Hooker did. Locke's general distrust of the epistemological status of custom is best seen in his fifth essay, "Can the Law of Nature Be Known From The General Consent of Men?", *Essays on the Law of Nature*, ed. von Leyden, 160-179; Locke concludes in the negative.
limitations on the King's prerogative in specific ways, which provides substance to Pocock's claim that he was not a Leveller-style radical. What Locke chooses to do instead is to focus on trust as a description of a generalizable relationship that of necessity exists in any legitimate political society, and then proceeds from that philosophical claim to criticize the behaviour of James II.

An interpretation of consent in Locke must try to understand the balance that Locke imagines between consent, natural law and political obligation. This tends to break into three parts that, although joined at the level of Locke's general philosophical assumptions, are best considered separately for analytic purposes. The first of these is consent imagined in the first instance of government and deals with the passage from the state of nature to political society. As such it has both a conjectural and an historical aspect. However, a fuller explanation of consent involves two further components. It also must provide an explanation of how consent is expressed over time. Clearly this

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68 On Hooker, see above, chap. 2; on Locke's rejection of the historicity of contract, and the subsequent misinterpretation of his position, see Thompson, "Hume's Critique." Pocock, "Varieties of Whiggism," 227, refers to Locke's unwillingness to argue that the king ought to be contractually obliged to hold parliaments at specific intervals, and more strikingly, his willingness to allow prerogative to reign unchecked in cases where salus populi, suprema lex requires that the king act outside established law, both of which were an anathema to the radical tradition.

69 On the advantages of the openness of 'trust' as opposed to attempting to define contractual duties, see Dunn, "Trust' in the Politics of John Locke", reprinted as chap. 2 in Rethinking Modern Political Theory, and W. von Leyden, Hobbes and Locke: The Politics of Freedom and Obligation, 131-2.

70 This expression, and some of the following formulations rely heavily on Riley, "On Finding An Equilibrium."

71 On the state of nature and consent that stresses the historical dimension, see Richard Ashcraft, "Locke's State of Nature: Historical Fact or Moral Fiction," American Political Science Review 52, 3 (1968), 898-915, and his more recent elaborations in Locke's Two Treatises, chaps. 5-7.
involves some consideration of the institutional expression of consent, or what we have called constitutional contract theory. It is in respect to this aspect that Filmer's criticism of the looseness with which consent has been used is most devastating. Third, given that Locke does have some sense of the evolution of government, and that he has taken to heart Filmer's argument that no man can consent in the past and thereby bind posterity, Locke needs to examine how individuals in the present 'consent' to government. Such consent in effect includes the component of individual choice but also the acceptance of the apparatus of institutional consent within society. To understand this aspect of Locke's consent theory implies a careful examination of the 'consent implying' actions that individuals can undertake, while bearing in mind the other aspects of his theory.

Locke's theory of consent should, ideally, also provide answers to the problems that resulted when trying to accommodate radical social egalitarianism and then-existing constitutional practice. Much of the commentary on Locke has concentrated only on the consent-implying actions of the individual, or on the passage from the state of nature to civil society, and have been unconcerned with the relationship between each individual's consent, and the proper functioning of government. In contrast, more radical interpretations of Locke's theory of consent have assumed that it translates easily into a language of wider representation, franchise reform and elections that has distinctly modern overtones. This needs to be carefully examined. Just as importantly, we need to examine the individual determination of when acts of resistance can be justified. Finally, the issue of what the Convention Parliament was expected to do as a body when faced with the dissolution of government will help us to assess the radicalism of Locke's theory of consent.
Any discussion of the role of consent in Locke's *Two Treatises* must begin with a consideration of the state of nature. This is the consent imagined in the first instance of creating government. The general outline of this story is so familiar that my discussion will be as brief as possible. Clearly, the state of nature in Locke's *Two Treatises* serves an analogous function to the similar argument in Hooker's *Lawes*. The argument is simple and direct—any government can only be imagined to have arisen through consent or the direct appointment of God. But there is no divinely ordained hierarchy, no natural right to rule, or particular form of government that men must choose. Man

has a *Natural Freedom* . . . since all that share in the same common Nature, Faculties and Powers, are in Nature equal, and ought to participate in the same common Rights and Privileges, till the manifest appointment of God . . . or a man's own consent subjects him to a superior.\(^72\)

The initial condition that mankind is in is one of natural liberty and equality, with a capacity for reason and hence an understanding of natural law.\(^73\) This implies for Locke, like Hooker, that God would not leave his workmanship, man, *naturally* in a state of war. The natural state is potentially one of peace.\(^74\) Men are naturally sociable, united by language. However, because "Obligations

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\(^72\)Locke, I. 67, 226.

\(^73\)The doubts that Locke expressed about access and understanding of the law of nature, in his *Essays on the Law of Nature*, and *Human Understanding* are not considered in the *Two Treatises*.

\(^74\)The rejection of the Hobbesian state of war in terms of God's purposes for man is a common theme of natural law theorists, see Tully, *A Discourse on Property*, chap. 2; Dunn, *Political Thought of John Locke*, 69ff. The rejection of Hobbes on this basis can be found also in Clarendon, *Brief view*, 31: "Nor can anything be said more contrary to the Honour and Dignity of God Almighty, than he should leave his master workmanship, Man, in a condition of War of every man against every man." James Tyrell, *A Brief Disquisition of the Law of Nature*, (1692), pref., xiv, also rejects "Mr. Hobbes's extravagant Opinion, that all Men by Nature are in a state of War."
Locke and the 'Old Way' of Government

of Necessity, Convenience and Inclination," men eventually choose to erect government.\textsuperscript{75} Locke's argument why they do so is both philosophical and historical. He argues that men move from a comparatively primitive condition of a rough equality of possession, to one of increasing inequality. As society undergoes such a transformation, the occasions for disputes increase as well.\textsuperscript{76} Uncertainty of possession leads to controversy, and the "want of a common judge" leads to the institution of political society through consent. Each man has the right to punish, or "executive power," in the state of nature for any injury or affront. Civil government "is the proper Remedy for the Inconveniencies of the State of Nature, which certainly must be great, where men may be judges in their own Case."\textsuperscript{77} Any civil government that is legitimate can be imagined to originate in "humane prudence, or consent."\textsuperscript{78}

Viewing the state of nature as both logically and historically prior to political society allows one to consider the historical argument more closely. Locke's argument is, however, sketchy and somewhat contradictory. It is fair to say that his use of biblical examples are 'real' history for him, so that Dunn's

\textsuperscript{75}Locke, II. 77, 362.

\textsuperscript{76}Ashcraft, "State of Nature," ibid; Locke's Two Treatises, chapt. 6, Revolutionary Politics, 219ff.; see also C.B. Macpherson, The Political Theory of Possessive Individualism: Hobbes to Locke, 210-11. Dunn, "Consent," 32, disagrees, suggesting that the argument from the state of nature is "not specified at all in terms of social simplicity or complexity," it is "theological, not sociological."

\textsuperscript{77}Locke, II. 13, 316.

\textsuperscript{78}Locke, I. 126, 272. Dunn, "Consent," 33, "The sole source of legitimate political authority (though . . . not the sole basis of political duty) is, then, the rational consent of individuals."
A characterization of Locke's argument as conjectural history is not quite apt. A similar sense of historical progress based on Biblical history is a common element in Hooker. However, Locke goes further in speculating that the state of nature is an actual state from which governments are continuing to emerge; "in the beginning," he says "all the world was America." Whether or not one is born under a particular government, "there are no examples so frequent in History, both sacred and profane, as those men withdrawing themselves...and setting up new Governments in other places." Locke's concession to patriarchalism is also an historical argument, that kings began as fathers and are the logical choice for primitive societies, both in the European past and in America in the present. Rather than originating in tyranny and usurpation, governments originated in the "Election and Consent of Fathers of Families which would differ very little from the consent of the people." This slippage between the equality of men, individual consent and the consent of some

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79 Ashcraft, *Locke's Two Treatises*, 147-8, citing to Dunn, *Political Thought*, 103. Ashcraft cites more approvingly Gough's characterization of Locke's argument as "quasi-historical." It is hard to tell if is only the use of Biblical examples to illustrate a more philosophical or conjectural 'history'.

80 Locke, II. 49, 343.

81 Locke, II. 115, 389.

82 Locke, II. 107, 386. The argument about the first kings as fathers is found in Aristotle, and more directly in Hooker, *Lawes* I. 10. 4, (Vol. I, p. 99-100), quoting Aristotle.

83 Locke, I. 148, 290.
standing for all is a general problem which plagues Locke's whole discussion of consent, as I hope to illustrate.84

Despite Locke's greater realism as opposed to Hooker about the state of nature, his discussion of how consent was expressed historically seems to work against his more individualistic use of consent. For Hooker, as we have seen, the laws which are in existence must be based on consent, express or tacit. Custom also provides evidence of consent in its less strong sense of universal agreement. Locke closes off the option of custom or tacit consent by arguing that "an argument from what has been, to what should of right be, has no great force"; and that individuals must actively consent to ensure continuation of government.85 However, he seems willing to speak of a "scarce avoidable consent" in the passage from an earlier family-based regime to monarchy; the family "by degrees grew up into a monarchy" that detracts from consent in its active reading.86 Where his story seems to be more consistent, following Hooker, is the claim that the first kings were chosen on the basis of their "Honesty and Prudence", but when it was found that such monarchies failed to

84On Locke's patriarchalism, see Schochet, Patriarchalism, 200, 259, who I think fails to appreciate Locke's historical argument that, although acknowledging that government began with the family, it could not work for modern societies. A second, more perceptive comment on Locke's 'patriarchalism' is Iain Hampsher-Monk, "Tacit Concept Of Consent In Locke's Two Treatise Of Government: A Note On Citizens, Travellers and Patriarchalism," which argues that Locke, in rejecting Filmer's argument that birth alone placed "absolute and indefeasible obligations" on the individual, failed to account for the issue of how the child of English parents becomes obliged to obey that government, and lapsed into patriarchal assumptions that the locus (but not the range) of obligations were determined by birth. This seems false; Locke, I think, does argue that it is an individual act of consent by which both the range and locus of such obligations are assumed.

85Locke, II. 103, 380.

86Locke, II. 74, 360; II. 110. 386.
provide the security of property for which government was instituted, men
found other alternatives. Locke cannot, if he is to be consistent, gloss over the
issue of how consent has been expressed in the past. Yet this is precisely what he
seems to do.

Consent in its second major aspect should explain the relationship
between individual consent and the existing institutional structure. It is when
Locke discusses the institutional expression of consent that his discussion shifts
to a recognizably English framework. In the passage in which Locke comes
closest to describing the origins of parliament, he says:

Men could never be safe nor at rest, nor think themselves in Civil
Society, until the Legislature was placed in collective Bodies of Men,
call them Senate, Parliament, or what you please. By which means
every single person became subject, equally with other the meanest
Men, to those Laws, which he himself, as part of the Legislative had
established: nor could any one, by his own Authority, avoid the force
of the law, when once made, nor by the pretence of superiority, plead
exemption . . . No Man in Civil Society can be exempted from the
Laws of it.87

It is in this passage that Locke most clearly expresses his debt to a 'constitutional
contract theory' of English government. The question of the juridical validity of
laws now seems to have shifted to a recognizably English understanding that
ought to include a discussion of how each individual becomes a part of the
'Legislative', or how it represents each individual and expresses consent to law.

Yet it is not clear how such institutional arrangements emerge and
function to ensure the consent of each individual in "well-order'd

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87Locke, II. 94, 373. This is one of the crucial passages in which Hooker is
cited, first to argue the necessary transformation from simple kingship and
secondly, that no one, and clearly Locke is directing this at the King, is exempted
from the laws passed by the legislative, a sentiment found couched in less
strident terms in Hooker.
Commonwealths" in the historical past. Locke takes it for granted that such assemblies as Parliament are "impower'd by positive laws" in "constituted and ancient polities that have established Laws and set forms of governments." Here it seems that the sketchiness of the historical explanation is most damaging. How can we imagine that individuals agree to a system of representation that detracts from the political right of each, or in Locke's language, if each person is, in the beginning, part of the legislative, how do we then arrive at a legislative that effectively acts for, or represents the rest? Locke's partial response to Filmer's attack on precisely this point, of who represents whom, seems focused on the erection of government, not on its continuance. In response to Filmer's objection that the notion of consent would founder because of the difficulty in determining the consent of a constantly changing multitude, Locke reasserts a majority principle as a law of nature, despite Filmer's criticism that it could not be such a thing. Thus, "that which begins and actually constitutes any Political Society, is nothing but the consent of any number of Freeman capable of a majority to unite and incorporate into such a society." In so far as this deals with the issue of how consent may be determined in the process of setting up government, Locke has at least answered one part of Filmer's argument against consent theory.

However, it seems that Locke avoids Filmer's equally pointed criticism of how such a constantly changing multitude can be said to be represented, and

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88 Locke, II. 143, 410.
89 Locke, II. 97, 396; II. 116, 390.
90 Laslett, note, II. 98, 377, Locke's defence "must be pronounced unsatisfactory."
91 Locke, II. 99, 377.
hence, how men may consent to government in the present. The phrase 'actually constitutes' and the preceding sentence, "enter into, or make up a Commonwealth" suggests an extension of the majority principle to the ongoing government, although this seems not to be spelled out.\textsuperscript{92} Locke appears completely willing to collapse "the community, or those authorised by them for the purpose," and "the power of the society, or the legislative constituted by them", without explaining how we got from one to the other. Thus, Locke restates the notion of consent, in addition to its active and individualist reading, in the terms that we have associated with 'constitutional contract theory': consent to law as expressed in Parliament. Locke seems unaware of the difficulties glossed over by phrases like "consent of the people, given by themselves or their deputies," unless we imagine some combination of plebicite and legislature for which there seems little historical precedent.\textsuperscript{93} What is missing is an argument that translates the political right of each to consent to government into an argument for widespread representation and hence enfranchisement, or else an explanation of how some voters can be said to consent for the majority.

The third major aspect of Locke's consent theory is how an individual in the present 'consents' to government. When such individual consent is argued as the way in which societies were constituted in the past, it is relatively unproblematic. In this case it becomes a foundational myth, unimportant in its details, but of critical importance for the description of law and agreement as prior to the erection of a king. This is the role that it plays in Hooker's

\textsuperscript{92}Ibid.

\textsuperscript{93}Locke, II. 142, 409.
argument. What is clearly different in Locke, when he answers Filmer, is his argument that such consent is an active right for each individual in the present as this person comes of age. For Locke, the only reason the role played by such consent does not seem obvious to observers is because of its scattered nature. The choices for an individual at this 'moment of truth' are between an "express consent," a "tacit consent" or leaving the commonwealth. Locke's argument, then, seems to be that this one individual moment of choosing to put ourselves under a particular government through express consent implies a total acceptance of existing political arrangements. Through this express act an individual becomes a perfect member of society, a membership that continues indefinitely "unless by any Calamity, the Government he is under, comes to be dissolved: or else some publick Act cuts him off from being any longer a member of it." Those that 'tacitly consent' do not become full members of political society, nor do those who merely enjoy a society's laws and other benefits.

What seems to have confused commentators on Locke's doctrine of consent is the relation of individual consent to a government's juridical validity.

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94Locke, II. 117, 391.

95Locke, II. 121, 394. One wonders if the 'public act' Locke was referring to the laws passed against Dissenters and as an answer to those who argued that the Dissenters had no right to leave England. Hooker was clearer; "A man disenfranchised may notwithstanding enjoy as a subject the common benefit of protection under the laws and magistrates." (VIII. 1. 6)

96Locke, II. 122, 394; II. 119, 292. The confusion about the exact meaning of express and tacit consent has been amplified by the property example that Locke uses. It seems to me that Locke denies that the inheritance of property can simply be read off as implying consent, rather, under ordinary conditions, the inheritance of property will require the express consent of an individual. (Locke, II. 116, 390)
One source of confusion is that there has been little attempt to separate Locke's arguments about how, through some initial act of consent, the individual 'puts himself under a government', and how an individual knows that he is still consenting or feels himself obligated to continue to obey. If it is true that there is no clear relation between an individual's consent, legitimacy of government, and the individual's obligation to obey, John Dunn's argument retains its force—consent in the Two Treatises explains only how individuals create a legitimate government. For Dunn, individual consent is the occasion, but not the grounds of political obligation, in that our reasons for obedience are in the last instance because of a duty to God and have little to do with acts of consent. To argue this, however, is to fail to appreciate the balance that Locke, and the intellectualist tradition of writers like Hooker, imagined as existing between individual reason, consent and obligation. The argument with divine-right theories of government is not over the necessity of obedience conceived of as a duty to God, but about the role that reason is to play in understanding, agreeing and justifying individual consent. While Hooker had limited the claim of this right of individual reason to criticize the laws in existence, by opposing public

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97 Dunn, "Consent in Locke," 33.

98 See Riley "On Finding An Equilibrium", for a good formulation of the balance that exists between natural law, positive law and reason in Locke's Two Treatises. It is worth speculating that Locke's shift from a strict voluntarist position regarding natural law was provoked by the political problems raised by it. If law is only the command of a superior will, clearly the command of the king has as much force of law as that which is enacted through the consent of Parliament. On Locke's shift from the more strictly voluntarist notion of natural law derived from Sanderson, see W. von Leyden, Essays on the Law of Nature, in chap 1 above. This shift in natural law understanding took place while Locke was at work on the Two Treatises and adding the Hooker quotations, and may have been sparked by his rereading of Hooker. Abrams, Two Tracts, 69, suggests that Locke uses Hooker's definition of law, without renouncing his own voluntarist position used in his early writing.
reason of the learned and the wise to 'mere private reason', and was confident that the individual's right to consent to law was properly expressed by parliament, for Locke, the individual can be said to consent to government only if he agrees to it. For Locke this is both a description of how individuals in the past agreed to government, but equally, and more radically, it is an argument whose force is also maintained in the present. Since a child is born "subject of no country or government" the individual's duty to obey government depends on each individual "consenting" upon reaching the age of majority. Taking seriously Filmer's criticism that past consent cannot bind the present generation, Locke argues that children "choose what society they will join themselves to, what commonwealth they will put themselves under."99

The problem with Locke's theory of consent is to try to reconcile this radical individual act at the age of majority, with what seems to be a non-negotiable acceptance of the institutional arrangements by which consent to law is expressed. Locke, unlike Hobbes, was not willing to imagine that a government could function without continued reference to the consent of the people and that an individual's role was restricted to a single act of consenting to the Leviathan. However, Locke simply assumes that a government with a functioning legislative expresses consent to law, through a certain constitutional arrangement and form of government, without fully spelling out what the continued role of the individual was to be. That is, there is an argument about ongoing consent, but its relationship to each individual is unclear; Locke seems as unconcerned as Hooker about potential problems with the notion that an individual's consent could be 'represented' by the legislative. What is clear,

99Locke, II. 73, 358.
however, is that ongoing consent, used in a less active sense as consent to law (as part of what we have termed constitutional contract theory) does function to ensure the legitimacy of government. In contrast to what Dunn has argued, individual consent, in the sense of express agreement, in addition to some rather unspecific continued political role, does create the grounds for an individual's obedience to a particular government.

The unexamined part of Locke's assumptions is particulary damaging to his consent theory, however. What seems very difficult to imagine is that some individual, having reached the age of majority, would expressly agree to continue under a government, if the particular rights accepted by such an individual did not include enfranchisement or the right to continue to participate politically. What Locke could be arguing, in his discussion of the inheritance of property as a consent-implying action, is that the individual accepts it on the terms that it was held by the father, and possibly by extension we might imagine that if one's father had political rights that these would be included in the conditions of inheritance. Yet there is good reason for imagining

100 However, Locke, I. 43, 206, suggests that the beggar can 'consent' to become a subject of a lord, in preference to starving. However, II. 23-4, 325-6, suggests that an individual cannot consent to slavery. Locke, in arguing that the right to 'consent' to government in the first instance, as a corrollary of our fundamental natural equality ensures that this political right is not a function of our relative wealth or social position. However, as the beggar may 'consent' for fear of worse alternatives, Locke's unconcern with continued political right suggests that one may 'consent' to be represented, or perhaps even 'consent' to give up one's political right except the final right to judge when one's liberties have been invaded. In II. 99, 377, he suggests that it is "any number of Free-men" comprising a majority that sets up political society. Ashcraft, Two Treatises, 166, argues that this cannot mean any social differentiation, for Locke there is only the contrast between freemen and slaves, and that property rights or ownership has nothing to do with (potential) political rights. Judging by the debates shown above, the connection between social position and political right was one of the most confusing aspects os any consent theory.
that Locke wanted to separate property and political right and maintain that the right to consent in the initial settling of government was a natural right of each. Although government was instituted for the preservation of property, it was property conceived of in the widest possible way as 'life, liberty and estate', implying that it was each man's consent in the beginning that created government.

Before trying to reconcile these two aspects of consent, there is a final reading which needs to be considered, for Locke's discussion of individual consent extends in another, more radical direction. There can be little doubt that Locke's egalitarianism extended to a judgement made by the individual in determining whether or not the government in question continued to function effectively. There "remains still in the people a Supream power to remove or alter the Legislative" when it acts contrary to the trust reposed in it. This right to make an 'appeal to heaven' is ultimately a right retained by individuals: "Every man is to Judge for Himself whether another hath put himself in the state of war with him," that is, if the liberties of the subject have been invaded. The liberties of the subject can be invaded either by the prince or the legislative, a clear recognition of the possibility that Parliament could be as destructive of

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101 On the relation between property, political right and consent, see Ashcraft, Two Treatises, Chapts. 6 and 7.

102 Locke, II. 149, 413.

103 Locke, II. 242, 476. The radicalism of this stance in the Two Treatises, is suggested by Philip Abrams, Two Tracts of Government, 91 who notes that this right of resistance is only broached in the Two Treatises and not anywhere else in Locke's writings. One can make an argument that its inclusion was for strategic reasons having to do with the Exclusion controversy and the popular movement mobilised by Shaftesbury, yet Locke had opportunities to change his mind and did not, although as Abrams notes, he equivocated on just this issue.
those liberties as a king, an object lesson from the Civil War and the claims for parliamentary supremacy made by Parker and others.\textsuperscript{104} As it stands, this right of judgement needs only to be generalizable to become a political right. That is, the right being claimed by Locke to judge of a government's actions, and to express consent or disagreement, is a fundamental right of rational judgement about whether a government is continuing to function as it should. It only becomes political if it is generalized into a movement to overthrow the government in power. This argument for individual judgement to determine the validity of a government relies on an older notion of consent, translated into a right of resistance. One of the etymological possibilities of what it means to consent to a government included a view that one could 'consent' to a government, in the sense of agreeing with its actions, and that this did not necessarily have anything to do with political participation at all.\textsuperscript{105} The reassurance that Locke offers is that such challenges to the existing government will be infrequent: it will be a "long train of Abuses, Prevarications, and Artifices" that will lead to the conclusion that the legislative needs to be challenged.\textsuperscript{106}

\textsuperscript{104}Franklin, \textit{John Locke and the Theory of Sovereignty} attributes this attack on Henry Parker and theories of parliamentary supremacy and its inclusion in Locke's theory as derived from Locke's reading of George Lawson. Against Franklin I would argue that the notion that power devolves to the people on dissolution of government, rather than parliament (as representative of the people), is older than the civil war controversies; it is in Hooker, for instance.

\textsuperscript{105}Locke seems to use consent in just this sense of agreement, where William's title is said to be made good in the consent of the people; Locke, Pref., 171.

\textsuperscript{106}Locke, II. 225, 463; see also II. 223, 402; II. 230, 466.
Locke's theory of consent is thus only a partial answer to the problems raised by the Levellers and Filmer. He has taken Filmer's criticism that foundationalist consent theories would require universal consent to the existing distribution of property to heart, and has taken care to separate property from political right. As Ashcraft notes, those who have argued that men acquire their political rights from property have simply got the story the wrong way round.\textsuperscript{107} Property arises naturally, prior to the emergence of government, without the necessity of any express agreement. Men, whose acquisition of property in the state of nature has been tacitly consented to, then enter into political society to guarantee their continued rights. Not only does this answer Filmer, but it answers Ireton's criticisms of the Levellers—that by admitting an equality of political right, all existing social and property relations would be challenged.

What is unclear however, despite Ashcraft's arguments, is that Locke has adressed the Leveller's concerns for a wider franchise and more equal representation. While Locke mentions the king's manipulation of the electorate, and expresses reformist urges about rotten boroughs in the \textit{Two Treatises}, it is not clear that these points go beyond the kind of statements made in the 1620s for example, aimed at reducing Court manipulation of the franchise.\textsuperscript{108} It is not clear, moreover, that Locke's radicalism extended beyond his stance on the right of resistance and, despite having the arguments available in favour of a wider franchise, he either ducked the question or failed to

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\textsuperscript{107}Ashcraft, \textit{Locke's Two Treatises}, Chaps 6 and 7. See above, notes 104, 105.

\textsuperscript{108}Locke, II. 216, 457; II. 222, 461. On the urge for franchise reform in the earlier generation, see Hirst, \textit{Representative of the People}, 11.
complete his arguments. Goldie has argued that it is "by no means clear that the Whigs were generally in favour of a wider franchise. Nor could they be sure of a popular vote after 1681." However, both Goldie and Ashcraft seem to leave unexamined the connections between consent, representation and franchise. As Ashcraft himself notes, Locke seems to reproduce at least some of the theoretical confusion of the Levellers on precisely these issues. We might well ask why Locke did not make explicit the connection between ongoing consent and representation, either historically or philosophically. A simple answer is his lack of interest in making an extended argument for the existence of institutions that he takes for granted and this seems consistent with his more general uninterest in constitutional and legal history. A second possible answer is that his Two Treatises did at one time contain a more extended discussion of the 'Ancient Constitution' that made up the middle portion of the book.

What I would argue is that the lacuna in Locke's theory of consent points to a very real issue in our understanding of the whole complex of ideas associated with consent, representation and voting. The absence of an extended discussion in the Two Treatises suggests that Locke simply did not make use of

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109 Ashcraft is convinced that the Whigs had a consistent policy regarding the issue of enfranchisement which he connects with more general egalitarian social concerns; that is, that Locke's radicalism was both social and political.

110 Goldie, "Review," 126; he also attacks Ashcraft's presentation of the class aspect of the split between the Whigs and Tories as "not grounded in any research."

111 Ashcraft, Revolutionary Politics, 145-76.

112 As suggested by Franklin, Sovereignty, Laslett, intro, 90.
vocabulary that translated each man's consent into a right to vote.\footnote{While Locke may well have known of the Levellers's arguments, the level of theoretical confusion displayed by them about the practical terms of how such representation might function could have lead to his rejection of them} When John Dunn wrote against collapsing Locke's theory of consent into a modern democratic one, he was right in spirit, if a little off the mark. As I have illustrated, there was a continuous thread of English political discourse that spoke in terms of consent to law, that assumed that whatever the terms of representation were, Parliament functioned to express such consent. While there were principled arguments made for the right to 'give voice' to express such consent in elections on the part of the individual as a natural right as early as the 1620s, and while such claims were again made by the Levellers, these arguments are not made by Locke. While Locke argues that an individual chooses, on reaching majority, whether or not to consent to government, this acts as a formal acknowledgement of citizenship. This seems unconnected to his more traditional arguments about consent to law as expressed by the legislative. One might argue that such consent on reaching majority could be given by oath, without any continued political role for the individual.

Locke's lack of precision about the issues of consent, representation, and political right suggests that, although he was concerned to argue for the individual right by which one bound one's self to government and the retention of an individual right to judge when one's liberties had been invaded, it is not clear that he saw continued political participation through giving voice as a right that demanded an equal defence. To say this is to make more explicit the grounds of recent criticisms of attempts to model seventeenth-century electoral competitions after our own, or to then have to explain where the competition
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went in the eighteenth century. It may in fact be the case that Locke's indifference on this issue was simply the reflection of a more general indifference about the issues of election and competition. To argue simply, as Locke does, that everyone is a part of the legislative, or that some mysterious majority principle is in effect, without making the terms of such representation explicit, is to fail to address the cogent criticisms directed at precisely this issue in the Civil War. In one of his few direct comments on the process of elections, he seems to suggest that it is only full members of society who participate by giving voice, who afterwards return to their ordinary status as subjects. That is not to say that there was not electoral competition at all, or that there was not a willingness to include a greater number of people in the franchise in the seventeenth century, but only that enfranchisement did not present itself as the obvious answer to the issue of how an individual expressed his willingness to submit to a particular government. In this, Locke's use of consent, if we bracket off the right of private judgement in determining the point of resistance and the right of the individual to choose whether or not to consent upon reaching the age of majority, really does offer a version of the 'old way' of making government.

114 For the seventeenth century, the attack on both J. H. Plumb's approach and following him, Derek Hirst, has been Kishlansky's Parliamentary Selection, a book marred by its uncharitable attack on Hirst. For the attack on Plumb and others going forward into the eighteenth century, see J. C. D. Clark, English Society 1688-1832, 15-41.

115 Locke, II. 154, 416.

116 Both Clark, ibid and Kishlansky, ibid, seem resistant to the idea that concerns about wider enfranchisement or electoral competition were at all issues.
Taking this argument a step further, as we have seen above, W. D. J. Cargill Thompson took great pains to separate Hooker's theory from theories that argued for 'social contract'. The same can be argued for Locke.\textsuperscript{117} As Martyn Thompson has made abundantly clear, the criticisms of a contract theory of government that argues for the capacity for individuals in a 'state of nature' to arrive at terms and conditions on the rule of the king, are misdirected when applied to Locke.\textsuperscript{118} Locke's failing is that he does not provide a more explicit argument as to how governments that originate in consent, 'grow by degrees' into the government that he takes for granted. In fact, the stages that make Hooker's arguments about government into a 'consent theory,' rather than a 'social contract theory,' are present in Locke in a less clear form. We have an initial consent to create government, a second attempt that establishes the 'legislative', or rule of law, that restrains both king and people, and the emergence of some representative body through which ongoing consent is expressed to ensure the juridical validity of government. Locke has added that each individual chooses whether or not to be under a government, and also judges when that government is no longer fulfilling its role.

This latter formulation of the relation of ruler and ruled is not 'legalistic' in the sense of there being corresponding rights and duties established at the time of the contract, but, as Locke argues, "Fiduciary", or based on trust and the principles of the protection of property and the safety of the people.\textsuperscript{119} At least to

\textsuperscript{117}In the sense that Locke did not embrace the 'contractualist' view that specific rights and duties of ruler and ruled could be determined beforehand, in the state of nature. Both thinkers rely on dispositional guides for the king and the establishment of a legislative that works out subsequent issues.

\textsuperscript{118}Thompson, "Hume's Critique."

\textsuperscript{119}Locke, II. 149, 413. On trust, see note 71 above.
some degree, Locke's willingness to leave questions about the abuse of this trust as a matter for each individual's judgement is due to the fact that it functions in the realm of the laws of opinion, rather than in the realm where absolute knowledge can be imagined to exist. Locke's willingness to agree to a prerogative power in the executive that of necessity must be unrestrained is really his answer to those contractualists who thought that the moral hazard in erecting kings could be limited in any meaningful way through express terms and conditions. Like Hooker, it is the sustained apparent neutrality of the legislative and law, from which the king himself is not exempt, coupled with the willingness of the king not to follow the "way of beasts" as judged by salus populi, suprema lex, that ensures the continuation of government. However, for Locke, unlike Hooker, the ultimate prudential check is the 'consent' of the governed, judging if the government has broken its trust. Since these formulations make Locke seem less radical than has been suggested recently, it may be useful to offer some comments about Locke's relation to the Glorious Revolution and his possible reasons for the publication of the Two Treatises.

The Convention Parliament was called after William's successful entrance into England and James's abandonment of the throne. There were clearly differences of opinion about what the Convention Parliament was to do. The more radical view was there had been a ceasura in government. In the words of Lady Mordaunt, writing to Locke:

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120 On the law of opinion, see An Essay on the Human Understanding, (1690), abridged and edited from the fifth edition with an introduction by A. D. Woozley (Glasgow: Fontana Library, William Collins Sons and Co., Ltd., 1964; reprint, Glasgow: Fount Paperbacks, William Collins Sons and Co., Ltd., 1977), chap 28 7-10, 223-4. Thus, ther are three sources of law; divine law, law of nature, and law of opinion.
This oft-quoted letter has been used by those who have argued that Locke could be connected to the radical Whig tradition, particularly by Ashcraft and Franklin. They have coupled this with a second, much-quoted letter written by Locke himself at the time of his departure from Holland. This letter is worth quoting in its entirety, because the edited versions have left out something vital for determining Locke's radicalism. Locke wrote to Edward Clarke:

I have seen the Prince's letter to the convention, which carries weight and wisdom in it. But men very much wonder here to hear of Committees of Priviledges of Greivances etc. as if this were a formall Parliament and were not of some other nature and had not businesse to doe of greater moment and consequence...People are astonished here to see them medle with any small matters and When the settlement of the nation upon sure grounds of peace and security is put into their hands, which can noe way soe well be don as by restoreing our ancient government, the best possibly that ever was if taken and put togeater all of a peice in its originall constitution. If this has not been invaded men have don very ill to complain. and if it has, men must certainly be soe wise by feeling as to know where the frame has been put out of order or is amissee and for that know they have an opportunity offerd to find remedys and set up a constitution that may be lasting. For the security of civill rights and the liberty and property of all the subjects of the nation. These are thoughts worthy of such a convention as this, which (if men suspect here) they think them selves of mending some faults peice meale or any thing lesse then the

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great frame of government, they will let slip an opportunity which cannot even from things within last long.\textsuperscript{122}

While Locke did see the Convention as a special assembly, it is by no means clear that he expected radical constitutional revision; his letter seems to express precisely the opposite. While Locke was willing to entertain the idea that a new government could in fact be created, he in fact thought the existing government, 'the best possibly that ever was,' would likely be restored.\textsuperscript{123} There was a general unwillingness on the part of the members of the Convention Parliament to view themselves as a sovereign body, whose offer of the crown was conditional on the acceptance by William of the Declaration of Right. The implications of this clearly would suggest an elective monarchy, a view endorsed only by a few radicals, of whom Locke was not one.\textsuperscript{124} We equally can question Locke's disappointment with the Revolution Settlement, bearing in mind that

\textsuperscript{122}Locke, \textit{Correspondence}, ibid. Italics added to show the portion omitted by Ashcraft, \textit{Revolutionary Politics}, 592 and Franklin, \textit{John Locke}, 121. A recent review of Ashcraft's \textit{Revolutionary Politics} by John Dunn ("Review" \textit{Journal of Modern History} 60, 2 (1988), 366-8) cites this same portion of the letter omitted by Ashcraft and asks "is it really appropriate to associate Locke's views on the proper role of the Convention with a project of constitutional innovation" that assumed that the state had dissolved into a state of nature, to which Dunn expresses his scepticism.

\textsuperscript{123}Locke, Chapt 19, 'On Dissolution', 454-77.

\textsuperscript{124}The alternative view was that it was a parliament much like any other, whose claim to represent the people was much like any other, although they were clearly uneasy about their exact constitutional status. See \textit{The late honourable Convention, proved a legal Parliament, or The present Convention, a Parliament}, reprinted in \textit{State Tracts being a farther Collection} (London, 1692), pp.457-60. I have used a Scholarly Resources reprint, 1971.
he showed himself willing to participate in that government at an enormous outlay of time and energy.\textsuperscript{125}

The so-called Allegiance Controversy provided the occasion of the publication of the \textit{Two Treatises}. The specific issue concerned the non-juring clergy, or those clergy who, for conscience sake, refused the new oath of allegiance to William's regime appended to the Declaration of Rights. All who were formerly required to take the Oath of Supremacy and the Oath of Allegiance were required to take new oaths. Approximately 400 beneficed clergy refused the oath (despite the omission of the words "rightful and lawful" to describe William and Mary), including Arch-Bishop Sancroft, five of the 'Seven Bishops' who had been imprisoned under James II, and an unknown number of laymen. While it is clear that this group represented a small minority of office holders, the significance of their reluctance to take the oaths is the pamphlet war that resulted in trying to justify the terms of the settlement.\textsuperscript{126} What seems most striking about the Allegiance Controversy was the willingness on the part of clergy, who were later rewarded with preferments, to argue that William and Mary's legitimacy could be justified on the basis of conquest or other doctrines of \textit{de facto} possession. This was a clear reversal of the stand which the Oxford Convocation had taken in 1683 with respect to doctrines of obedience to \textit{de facto}

\textsuperscript{125}Ashcraft \textit{Revolutionary Politics} argues that it was the failure of the revolution to carry through a more radical restructuring of government that led to the publication of the \textit{Two Treatises}.

\textsuperscript{126}For an analysis of the pamphlets generally, see Mark Goldie, "The Allegiance Controversy." For comments about its debts to the Engagement Controversy, see John Wallace, "The Engagement Controversy" and Quentin Skinner, "History and Ideology."
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authority. Clearly, some of this propaganda was official, published with William's knowledge and concurrence.127

The publication of the Two Treatises, then, can be read as continuing the attack against the High Church position on the origins of government. The targets were the same as they had been in the context of the Exclusion Crisis. As well, it can be seen as providing a message of warning and edification to William himself of the dangers of divine-right theories.128 The answer to Laslett's puzzle about why Locke included a large section refuting conquest theory, is that it can be read as an answer to those clerical apologists who were in the process of reinterpreting William's right to rule as originating in a 'just war.'129 The continued connection of 'divine right' theories with the clerical establishment continued well into the eighteenth century, and the connection of the Whigs with arguments against such a view were readily apparent as late as


128 On the role of the Two Treatises as a 'Mirror of Princes', see Charles Tarlton, "'The Rulers Now on Earth': Locke's Two Treatises and the Revolution of 1688," and "A Rope of Sand: Interpreting Locke's First Treatise of Government."

129 Laslett, 90; note, 432-3; on 'just war' theories in the Allegiance Controversy see Goldie, "Edmund Bohun" and "Allegiance Controversy." Hooker, Lawes, VIII. 2. 5, (Vol. III, pp. 334-5), also admits the possibility of origination in conquest through just war, or conquest that slides into consent, Lawes VIII. 2. 11, (Vol. III, pp.340-1), Locke is rules both of these out, although his historical argument seems contradictory. Locke, like his contemporaries is also concerned that 'Hobbist' conquest theories are being mounted to justify William's regime.
Sacheverell's trial. Thus, despite the radical heritage of the Two Treatises, it is quite easy to imagine that it is the doctrine of government by consent, that 'old way of making government, that was most topical in the immediate context of its publication.

If Locke did imagine that the role of the Convention was to restore the ancient frame of government, this fits with the understanding of consent in its less active form as agreement. As Locke writes in his dedication, he hopes that the Two Treatises will be

sufficient to establish the Throne of our Great Restorer, Our present King William; and to make good his Title, in the Consent of the People, which being the only one of all lawful governments, he has more fully and clearly than any Prince in Christendom.131

While in theory, the people have the right to erect whatever form of government they choose, the reassurance that Locke offers in the Two Treatises is that people are slow to change, and that the 'old way' of government worked very well. If, as has been suggested, Locke wished to restore a government that relied on "a notion of strictly mutual and reciprocal balance between king and parliament" that distanced itself form the legal conceptions of Petyt and Atwood, and suggested that the "burden was on the king to recognise and respect limits," since the principal threat of tyranny was "in the temptation for kings to run away with their power and succumb to the temptation of personal rule," perhaps the

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130If 1688 was a final phase of divine right, it was remarkably long-lived, contra Straka. See, for different perspectives on the persistence of divine-right theories, J. A. W. Gunn, "The Spectre at the Feast: The Persistence of High Tory Ideas" printed in his collection Beyond Liberty and Property: The Process of Self-Recognition in Eighteenth Century Political Thought (Kingston, Ont.: MacGill-Queens Press, 1987), and in a more celebratory vein, J. C. D. Clark, English Society.

131Locke, II. Pref., 171.
role of consent can be better understood as a restatement of a way that such ambition can be checked.\textsuperscript{132}

Concentrating on Locke's apparent agreement with English constitutionalism is not meant to diminish his radicalism in claiming the right of individuals to call into question the abuses of a government in power. However, as Locke's dispute with Molyneux shortly after the publication of the \textit{Two Treatises} indicates, the essentially prudential check that Locke took for granted in the context of English constitutionalism might for other places be less in evidence.\textsuperscript{133} It was not contract, nor even the arguments from consent that provided the instability, but the right of private judgement leading to revolution that was the radical heritage of Locke. It was however a radical heritage that was less in evidence at the time of publication. William Atwood, one of the few Whig commentators on the \textit{Two Treatises} at the time it was published, misread Locke's discussion of the dissolution of government, and argued that no such dissolution had in fact taken place with James's abdication. For those who want to overstress the radical nature of Locke's arguments, they also must explain the relative lack of interest in their radical component.\textsuperscript{134} While it is true that radicals were disillusioned with the recapture of Court positions by the same ministers who were the object of virulent attack under James, this by itself does

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\textsuperscript{132}Charles D. Tarlton, "The Rulers Now on Earth," passim.
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\textsuperscript{133}On Locke's dispute with Molyneux about the Irish right to rebel using the doctrines of the \textit{Two Treatises}, see Laslett, intro., 26. Locke considered changing his doctrines about the right to rebel, see Dunn, \textit{Political Thought}, chap. 1, notes, 6-7.
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\textsuperscript{134}On the reception of the \textit{Two Treatises} see articles in Sources Consulted by Martyn Thompson, Mark Goldie, Richard Ashcraft, Ashcraft and Goldsmith and Charles Tarlton.
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not lead to the desire to overthrow the government. The most radical position after 1688 was Jacobitism, embraced not only by those radical Whigs disappointed by the terms of the Revolution Settlement, but also by those Tory 'ultras' who were unwilling to reconcile themselves to the Whig ascendancy under William. Locke does not fit easily into either camp.

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The main conclusion of this study is negative. Locke did not provide a fully worked out alternative to government based on a very traditional understanding of a monarchy bounded by laws that were promulgated by a legislative. He was unable to embrace the radical program of the Levellers in which the claim that each man should only be under those laws to which he had given consent, translated into a right for each man to give voice in elections. Just as clearly, however, he rejected the notion that each man's initial consent in a state of nature established a Leviathan that continued to function without reference to the wishes of the people and more specifically, to the sustained neutrality of law as produced by the legislative. It would be a mistake to see Locke as simply another constitutionalist, however. The radicalism of the claims of each man determining when he felt the invasion of his liberties that, generalised, became a threat of revolution was a new, disturbing element in English political thought, one which despite Locke's best efforts to blunt, became one of the lasting heritages of his thought. It is this acknowledgement that individual judgement can over-ride tradition or custom that provides the fully worked out conclusion of the natural law critique of government.

Clearly, it would be a mistake to see 1688 as the triumph of Lockean liberalism as it would be to see it as the 'final phase of divine right theory.' What I have attempted to draw out, through the consideration of the arguments
about government by consent, is the imbeddedness of any concept within an overall political language. Too, consent theories can only be understood in relation to the larger world of political practice. Arguments which seem reasonable to the historian, like the Levellers's position on the franchise, are not always taken up, even by great theorists like Locke.

Just as clearly, it would be a mistake to overstress the continuity between Hooker and Locke. While they share to a certain degree a natural law language and an English understanding about the conduct of politics, there can be no denying that the direct experiences of the Civil War, in combination with more empiricist epistemologies and ways of viewing the world, fractured what Baker has called the 'Christian-Humanist' synthesis.135 No longer could tradition and custom, reason, and religious belief be seen as mutually reinforcing ways of truth as they were for Hooker. But it would be a mistake to view Hooker as inhabiting a traditionalist static society, in which unquestioned obedience to what was in existence was requisite for all. The gulf that separates Hooker and Locke is a how generalizable the criticism of laws and practices in existence, through the use of reason and natural law doctrines, could be. It is not a gulf dividing corporatism from individualism, nor is there a sudden discovery of reason. We should be wary of seeing a sudden post-Lockean world as well. That such individual capacity for judgements and rights is not fully developed with Locke, judging by modern standards, should go without saying. However, as Skinner has suggested, the force of the Counter-Reformation criticisms of the Bibliolatry of

the Puritan opposition was to reassert the importance of politics as a realm of nature, not grace. In this, Hooker and Locke are arguing on the same side, and, to a degree, the same way.
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